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

PUEBLO OF POJOAQUE; and
BUFFALO THUNDER, INC.,

Plaintiffs,

v.

Case No. 1:20-cv-00166-JB-GBW

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

Defendants.

HONORABLE BRYAN BIEDSCHEID'S
RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Judge Biedscheid correctly determined that, based on the allegations in the complaint before him, he had jurisdiction over Rudy Pena's action against the Pueblo of Pojoaque and Buffalo Thunder. The Pueblo of Pojoaque consented in its Gaming Compact with New Mexico to state court jurisdiction over claims for bodily injury proximately caused by the conduct of the Pueblo's gaming enterprise. Although the Tenth Circuit's ruling in *Navajo Nation v. Dalley*, 896 F.3d 1196 (2018), held that this consent to state court jurisdiction was an impermissible subject for a gaming compact when it extended to tort claims not arising out of gaming activity, Pena's complaint alleges that he was injured while engaged in gaming activity. As a result, the Pueblo's agreement to state court jurisdiction

over claims including Pena's alleged claims was a valid subject of a gaming compact under the Indian Gaming Regulatory Act (IGRA). Plaintiffs are not entitled to a declaratory judgment to the contrary and their motion for summary judgment should be denied.

RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Judge Biedscheid has no independent knowledge of Plaintiffs' Undisputed Material Fact ("Fact") No. 1 but stipulates to the fact for the purpose of this action.

2. Judge Biedscheid has no independent knowledge of Fact No. 2 but stipulates to the fact for the purpose of this action.

3. Judge Biedscheid has no independent knowledge of Fact No. 3 but stipulates to the fact for the purpose of this action.

4. Judge Biedscheid admits that the facts alleged in Fact No. 4 are alleged in Pena's state court complaint. The state court complaint speaks for itself and should be interpreted in its entirety. Judge Biedscheid has no independent knowledge of the truth or validity of the allegations in the state court complaint, which are at issue in the action before him.

5. Judge Biedscheid admits Fact No. 5.

6. Fact No. 6 is not a material fact but a question of law. The cited opinion of *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013), speaks for itself. Judge Biedscheid disputes Plaintiffs' interpretation of IGRA and related case law, as discussed below.

7. Fact No. 7 is not a material fact but a question of law. The cited opinion of *Navajo Nation v. Dalley* speaks for itself. Judge Biedscheid disputes Plaintiffs' interpretation of IGRA and related case law, as discussed below.

8. Fact No. 8 is not a material fact but a question of law. The cited opinion of *Navajo Nation v. Dalley* speaks for itself. Judge Biedscheid disputes Plaintiffs' interpretation of IGRA and related case law, as discussed below.

9. Fact No. 9 is not a material fact but a question of law. The cited opinion of *Williams v. Lee*, 358 U.S. 217 (1959) speaks for itself. Judge Biedscheid disputes that *Williams* governs this action, as—based on the facts alleged in Pena's complaint—the Pueblo of Pojoaque consented to state court jurisdiction over the state court action, as permitted by IGRA.

ADDITIONAL STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In his state court complaint, Pena alleged as follows:

> On or about February 1, 2015 Plaintiff Rudy Pena was sitting at a machine when employees or agents of Defendants and/or John or Jane Does 4-10, that may have been a "change box crew," ordered Plaintiff to "move aside." Plaintiff told them he could not, that he had "MS" (muscular dystrophy). Plaintiff had a cane and scooter with him. One of the employees, John or Jane Doe 4 said he had to move, now. Plaintiff hurried, in an effort to do as he was ordered, falling backward and suffering injuries.

(Pls.' Mot. Summ. J., Ex. A (ECF No. 36-2) (the "State Court Complaint"), ¶ 24.)

2. Pena also alleged in his State Court Complaint that one or more of the Defendants (Jane or John Doe 1-3) were "employees/agent[s]/contractors … that are charged with, among other things, maintaining machines, interacting with, instructing, directing and taking care of customers and maintaining and directing customer, machine

and premises safety on the floor of the casino." (*Id.*, ¶ 10; *see also* ¶ 13 (describing supervisors of such employees).)

ARGUMENT

I. Judge Biedscheid Correctly Determined That He Had Jurisdiction Over the State Court Action.

A. The State Court Action and Gaming Compact.

The Pueblo of Pojoaque and Buffalo Thunder, Inc. challenge Judge Biedscheid's jurisdiction to hear Rudy Pena's personal injury action against them. Judge Biedscheid, in denying Pojoaque and Buffalo Thunder's motion to dismiss, ruled that based on the allegations in Pena's complaint, he had jurisdiction over the action. Specifically, Judge Biedscheid found:

> "The Court finds that the Gaming Compact entered into between the State of New Mexico and Defendant Buffalo Thunder waives sovereign immunity as to claims for personal injury occurring on its premises in circumstances where it is alleged that the activities of a casino employee caused or contributed to an alleged accident or injury, and the Plaintiff was actively engaged in a gaming activity at the time of his alleged injury."

(Am. Order on Def's Mot. Dismiss at 2, State Court Action, attached to Pls.' Mot. Summ. J., as Ex. D (ECF No. 36-5).)

The Gaming Compact referenced by the state court in its order denying the motion to dismiss is the agreement between the State of New Mexico and the Pueblo of Pojoaque that permits Pojoaque to operate "Class III" gaming facilities on the Pueblo's land. (Excerpts of Indian Gaming Compact between New Mexico & Pueblo of Pojoaque (the "Gaming

Compact"[1]), attached to Pls.' Mot. Summ. J. as Ex. G (ECF No. 36-8)); *see also* 25 U.S.C. § 2710(d)(1)(C) (1988) (Class III gaming[2] may only be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" meeting the requirements of 25 U.S.C. § 2710(d)(3)). Section 8 of the Gaming Compact is titled "Protection of Visitors" and includes provisions waiving the Pueblo's sovereign immunity and permitting visitors to gaming facilities to bring claims in state court. The Compact states that "[t]he safety and protection of visitors to a Gaming Facility is a priority of the Tribe, and it is the purpose of this Section to assure that any such persons who suffer bodily injury or property damage proximately caused by the conduct of the Gaming Enterprise have an effective remedy for obtaining fair and just compensation." Gaming Compact, § 8(A). "To that end," the Pueblo "agrees to a limited waiver of its immunity from suit, and agrees to proceed either in binding arbitration proceedings or in Tribal, State, or other court of competent jurisdiction, at the visitor's election…." *Id.* Finally, the Gaming Compact conditions the availability of a state court forum on such an agreement being permissible under IGRA: "[A]ny such claim may be brought in state district court … unless it is finally determined by a state or federal court that the IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." *Id.*

[1] A full copy of the Gaming Compact attached as Exhibit G to the Motion for Summary Judgment is available at: https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/pdf/508%20Compliant%202017.10.26%20Pojoaque%20Compact.pdf

[2] Class III gaming is "the most closely regulated" form of gaming under IGRA, and "includes casino games, slot machines, and horse racing." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014).

IGRA lists the provisions that may be included in a compact for Class III gaming:

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions related to—
>
> (i) the application of the criminal and civil laws and regulations 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;
>
> ...
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C). As discussed more fully below, the Tenth Circuit in *Navajo Nation v. Dalley* held that under this section of IGRA, a gaming compact could not include an agreement to permit a state court forum for the tort claim at issue there, a slip and fall in a casino restroom, because the plaintiff was not "participating in Class III gaming activities on Indian land … when [he was] allegedly harmed by a tortfeasor." 896 F.3d at 1207–08. Tort claims not occurring during gaming activities, the court reasoned, could not "be 'directly related to, and necessary for, the licensing and regulation' of Class III gaming activities." *Id.* at 1208 (quoting 25 U.S.C. 2710(d)(3)(C)(i)).

B. IGRA, as Interpreted in *Dalley*, Permits the Gaming Compact's Agreement to Allow Visitors to Bring Tort Claims in State Court Occurring When the Visitor is Participating in Gaming Activities.

In *Navajo Nation v. Dalley*, the Tenth Circuit held that jurisdictional agreements in gaming compacts must be "'necessary for the enforcement of the laws and regulations,' § 2710(d)(3)(C)(ii), that are 'directly related to, and necessary for, the licensing and regulation of' the playing of Class III games, § 2710(d)(3)(C)(i)…." 896 F.3d at 1210. This does not

include, the court explained, "the enforcement of laws and regulations pertaining to such tangential matters as the safety of walking surfaces in Class III casino restrooms." *Id.* The "gaming activity" that is a permissible subject of gaming compacts is that "actually involved in the *playing* of the game, and not activities occurring in proximity to, but not inextricably intertwined with, the betting of chips, the folding of a hand, or suchlike." *Id.* at 1207 (italics in original); *see also Bay Mills*, 572 U.S. at 792 ("'class III gaming activity' is what goes on in a casino—each roll of the dice and spin of the wheel").

Although not deciding the issue, the *Dalley* court acknowledged that when an alleged injury arises out of gaming activity itself, tort claims may constitute the regulation of gaming activity and be the proper subject of a jurisdictional agreement in a gaming compact. It noted that "the district court correctly observed" that "tort law is a form of 'regulation' of 'the operation of gaming activities'…." *Dalley*, 896 F.3d at 1207; *see also id.* at 1209 ("we are comfortable assuming that tort, and more specifically personal-injury lawsuits, constitute a type of regulation"). However, the court concluded that "actions arising in tort in circumstances similar to this one are not 'directly related to, and necessary for, the licensing and regulation of such activity'" where "individuals are not participating in Class III gaming activities … when they are allegedly harmed…." *Id.* at 1207–08.

By contrast, injuries occurring during gaming activities may be properly covered by a gaming compact's jurisdictional agreement. *Dalley* contains a lengthy footnote suggesting this possibility:

> "[W]e do not intend by this holding to categorically negate the possibility that certain classes of tort or personal-injury claims stemming from conduct on Indian land might conceivably satisfy the statutory conditions for tribal

> allocation of jurisdiction to the states under our plain reading of clauses (i) and (ii) of IGRA. Consider, for example, a casino patron at a roulette table: during the course of the game, an errant ball flies and hits the patron in the eye, causing damage to the patron. Or, in a different situation, a patron is playing on a dysfunctional slot machine that electrocutes the patron, again resulting in some harm. In both of those instances, it is at least arguable that the patron's injuries resulted directly from gaming activity, within the meaning of *Bay Mills*, i.e., 'what goes on in a casino—each roll of the dice and spin of a wheel.' 134 S.Ct. at 2032. Assuming *arguendo* this is so, the harmed plaintiffs could argue—at least colorably—that the tort laws they plan to invoke in their claims are 'civil laws and regulations ... directly related to, and necessary for, the licensing and regulation, of' the gaming activities that caused them harm, and that the allocation of jurisdiction was 'necessary for the enforcement' of those tort laws. § 2710(d)(3)(C)(i), (ii). In short, the hypothetical plaintiffs could argue (at least colorably) that the tribe running the casino at issue would have been authorized under IGRA's plain terms to allocate jurisdiction to the state over their tort claims."

Id. at 2710 n.7 (ellipsis in original).

IGRA is best interpreted as permitting jurisdictional agreements regarding tort claims arising out of gaming activity, as a means of regulating dangers arising during those activities. The statutory language and legislative history of IGRA demonstrate an intent to permit provisions in gaming compacts to protect public health and safety as part of the regulation of gaming activities. Although Plaintiffs argue that "[n]othing about the business of gaming distinguishes it ... from any other commercial activity" with respect to tort claims, Pls.' Mem. in Support of Mot. Summ. J. ("MSJ") at 9 (ECF No. 36-1), IGRA specifically permits the regulation of gaming activity. If gaming activities are operated in a dangerous fashion—to use the example from *Dalley*, if slot machines with faulty wiring are used, electrocuting patrons—resulting tort claims constitute the regulation of that gaming activity and may be the subject of jurisdictional agreements in gaming compacts.

In such circumstances, tort laws applied to alleged injuries arising out of gaming activity are regulations "directly related to, and necessary for, the licensing and regulation, of" gaming activities and jurisdiction may be allocated to state courts in gaming compacts where necessary to enforce them. 25 U.S.C. § 2710(d)(3)(C)(i), (ii). The civil enforcement of tort laws to promote and protect public safety constitutes a regulation of gaming activities. As a federal district court recognized, in deciding a similar question of law:

> "Civil tort laws fall well within the realm of public safety, policy, and order. Personal injury laws serve to expose safety hazards and protect the public, as well as to provide an incentive for preventing injuries and allow for compensation of injured parties. Congress was well aware that many casino patrons would be non-Indian state citizens or tourists, and the personal safety of these visitors to Indian lands would be a logical concern of both states and tribes. Given this backdrop, the Court is unconvinced that Congress intended to preclude negotiations concerning such important matters as which sovereign's civil laws and courts would be responsible for the welfare of participants in gaming activities. Congress, as well as compacting parties, could reasonably view the regulation of tortious conduct occurring in the course of commercial gaming and casino operations as directly related to and necessary for the regulation of gaming activities. For these reasons, the Court is unwilling to read into IGRA a barrier to negotiations that is not compelled by the language of the statute."

Muhammad v. Comanche Nation Casino, No. CIV-09-968-D, 2010 WL 4365568, at *5 (W.D. Okla. Oct. 27, 2010). The New Mexico Supreme Court likewise recognized that tort law constitutes a regulation of activity, by deterring harmful behavior. *See Doe v. Santa Clara Pueblo*, 2007-NMSC-008, ¶ 39, 154 P.3d 644. Any distinction between tort regulation, enforced by civil action, and direct regulation by the state, enforced by police power, is artificial and unsupported by IGRA's statutory language.

That gaming compacts may include provisions to regulate health and safety—including through jurisdictional agreements over tort claims arising out of gaming

activity—is also supported by the statutory context of IGRA. *See Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1227 (10th Cir. 2007) (in statutory construction, "we read the words of the statute in their context and with a view to their place in the overall statutory scheme" (internal quotation marks omitted)). In describing what constitutes "good faith" in a State's compact negotiations, IGRA provides: "In determining … whether a State has negotiated in good faith, the court … may take into account the public interest, public safety, criminality, financial integrity, and adverse economic interests on existing gaming activities…." 25 U.S.C. § 2710(d)(7)(B)(iii). Among other things, "public safety" is a proper subject for a State and tribe to consider in drafting a gaming compact.

IGRA's legislative history also suggests that gaming compacts may include provisions to regulate health and safety. *See In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002) ("If a statute is ambiguous, a court may seek guidance from Congress's intent, a task aided by reviewing the legislative history."). The Congressional record reflects that tribes and states were intended to be able to engage in flexible negotiations over gaming activity. These negotiations were intended to balance tribal and state interests, rather than solely to protect tribal interests. As the Tenth Circuit noted, "We do not agree that Congress expressed little concern for state interests when it enacted IGRA. Indeed, the legislative history of the Act is replete with references to the need to accommodate tribal and state interests." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554 (10th Cir. 1997). "[R]espect for state interests relating to class III gaming was … of great concern." *Id.* Likewise, the Ninth Circuit has described Congress's intent in IGRA as creating "cooperative federalism" that "seeks to balance the competing sovereign interests…." *Artichoke Joe's Cal. Grand Casino v.*

Norton, 353 F.3d 712, 715 (9th Cir. 2003) (quoting *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)).

The Senate Committee report for the bill that would become IGRA articulated the tribal and state interests that were to be balanced in compact negotiations: "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." S. Rep. 100-446, at *13, reprinted at 1988 U.S.C.C.A.N. 3071, 3083 (emphasis added). Public safety was articulated by the committee as an interest of both tribes and states to be considered in negotiating compacts. Therefore, as the Connecticut Supreme Court has recognized, a state "has a genuine interest in providing a judicial forum to victims of torts [and] the gaming act provided the state with a mechanism to negotiate with the tribe, to establish the manner in which to redress torts occurring in connection with casino operations on the tribe's land. *Kizis v. Morse Diesel, Intl., Inc.*, 260 Conn. 46, 58, 794 A.2d 498, 505 (2002); *see also Santa Clara Pueblo*, 2007-NMSC-008, ¶ 36 ("The inclusion of broad state interests such as 'safety,' 'law,' and 'public policy,'—references that could easily encompass the future of personal injury suits against tribal casinos—in the discussion of regulatory authority over gaming, suggests that the

Senate Committee did not intend to confine the scope of compact negotiations on jurisdiction shifting to the prevention of organized crime."). Plaintiffs' contention that the purpose of IGRA is to prevent organized crime and that the resolution of tort claims "bears no relationship whatsoever to IGRA's overarching goal," MSJ at 10, is not supported by this legislative record.

To be sure, *Dalley* held that jurisdictional agreements in gaming compacts could not reach tort claims only tangentially related to gaming activity. 896 F.3d at 1207. And the Senate Committee considering IGRA did "not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands." S. Rep. 100-446, at *14, reprinted at 1988 U.S.C.C.A.N. 3071, 3084. But Congress's concerns with the imposition of state jurisdiction were as to issues "unrelated to gaming." *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1111 (9th Cir. 2003); *see also* Statement by Rep. Coelho, 134 Cong. Rec. H8146-01, 1988 WL 176045 (Sep. 26, 1988); Statement by Sen. Inouye, 134 Cong. Rec. S12643-01, 1988 WL 185742 (Sep. 15, 1988) (impermissible subjects for compacts included issues like water rights, land use, environmental regulation, and taxation). By contrast, where safety hazards arise in gaming activities themselves, they are properly regulated in gaming compacts, including through jurisdictional agreements over tort claims regarding such hazards.

Lastly, Plaintiffs argue that IGRA does not permit tribes to waive sovereign immunity for monetary claims at all. (MSJ at 4, 12–13) The quotation in *Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254, 1266 (D.N.M. 2013), that Plaintiffs rely upon for this argument does not support the contention that gaming compacts may not contain any sovereign immunity waivers for monetary claims. The quotation in *Nash* itself quotes *Mescalero*

Apache Tribe v. New Mexico, 131 F.3d 1379, 1385–86 (10th Cir. 1997), which is discussing IGRA's abrogation of tribes' sovereign immunity from suits by a *state* to enforce IGRA. It is not discussing agreements to waive sovereign immunity for third-party tort suits. *See Mescalero Apache Tribe*, 131 F.3d at 1385 (describing the issue as "whether Congress in IGRA validly abrogated tribal sovereign immunity").[3] And the *Nash* court recognized that tribes may waive sovereign immunity but that in a gaming compact "there can be no clear tribal waiver of immunity for matters outside the scope of the IGRA." 972 F. Supp. 2d at 1266 n.11. In fact, Plaintiffs' argument that all waivers of sovereign immunity for monetary claims are invalid presumably would even extend to tribal court, contradicting their argument that "legal process and financial protections are both in place" for personal injury victims. (MSJ at 12)

C. Judge Biedscheid Correctly Determined That Pena's Injury, as Alleged in His Complaint, Arose out of Gaming Activity.

In denying Plaintiffs' motion to dismiss the State Court Action, Judge Biedscheid properly relied on the facts as alleged in Pena's complaint, viewed in the light most favorable to Pena, the non-moving party. *See Mendoza v. Tamaya Enters., Inc.*, 2010-NMCA-074, ¶ 5, 238 P.3d 903, *aff'd*, 2011-NMSC-030, 258 P.3d 1050 (quoting authorities). Those

[3] Although segments of this language in *Mescalero Apache Tribe* discuss the *waiver* of sovereign immunity rather than its abrogation, that language is discussing the implied waiver of sovereign immunity by entry into a gaming compact, not express agreements to waive immunity. *See* 131 F.3d at 1385 ("The district court … held that the Tribe had waived its sovereign immunity by engaging in gambling pursuant to a compact entered into under IGRA.").

facts, viewed in their most favorable light, allege that Pena was injured while engaged in gaming activity.

Pena alleges that he was sitting at a gaming machine at the time of his injury. Judge Biedscheid's Statement of Undisputed Material Fact ("Biedscheid Facts") No. 1. Pena alleges that employees, who "may have been a 'change box crew'"—that is, employees taking money to or from the gaming machine—ordered him to move, causing his injury. Pena further alleges that the employees responsible for his injury included those "charged with … maintaining machines … and machine and premises safety on the floor of the casino." Biedscheid Fact No. 2.

These alleged facts fall within the scope of the waiver of sovereign immunity in the Gaming Compact. *See* Gaming Compact, §8(A) ("the Tribe … agrees to a limited waiver of its immunity from suit … with respect to claims for bodily injury … proximately caused by the Gaming Enterprise.") Further, because the alleged injury occurred while Pena was engaged in gaming activity and as a result of the maintenance of the gaming machines, the Gaming Compact's agreement to provide state court jurisdiction over tort claims including Pena's claim was permissible under IGRA. This interpretation of IGRA, is not, as Plaintiffs' contend, MSJ at 6, that casino employees being the alleged proximate cause of Pena's injury, is sufficient to fall within the scope of a proper jurisdictional agreement. Rather, the Gaming Compact properly agrees to jurisdiction over this claim, as alleged, because the injury arose out of gaming activity, unlike in *Dalley* and *Nash*.

Plaintiffs also argue that the Court should disregard Judge Biedscheid's amended order denying their motion to dismiss, and only consider his original order. [MSJ at 8–9]

They argue that there is no allegation that Pena was "actively" engaged in gaming activity when injured. (MSJ at 8) Although it is unclear what the difference is between the active and inactive engagement in gaming activity, the allegations in the complaint viewed in the light most favorable to Pena support that he was engaged in gaming activity when injured. Biedscheid Fact Nos. 1 & 2. In denying Plaintiffs' motion to dismiss, Judge Biedscheid did not make any "*sua sponte* insertion … of an additional fact not in evidence." (MSJ at 8) The Court should consider the operative, amended order denying Plaintiffs' motion to dismiss, which properly determined that the state court had jurisdiction over Pena's action.

II. Plaintiffs' Request for Injunctive Relief Is Improper and Should Be Denied as a Matter of Law.

As a final matter, the Court should deny Plaintiffs' request for injunctive relief, regardless of how the Court rules on Plaintiffs' request for declaratory judgment. As Plaintiffs acknowledge, "injunctive relief would be available only if Judge Biedscheid were to violate a declaratory decree of this court." (MSJ at 15, n.8); *see also Pueblo of Santa Ana v. Nash*, 854 F. Supp. 2d 1128, 1143–44 (D.N.M. 2012) (Anti-Injunction Act precludes injunctions against state court judges with limited exceptions). Moreover, the Court should not assume, prematurely, that the state court will not follow any judgment declaring that it lacks jurisdiction. *Cf. Doran v. Salem Inn*, 422 U.S. 922, 931 (1975) ("At the conclusion of a successful federal challenge to a state statute or local ordinance, a district court can

generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary.”).[4]

Therefore, Judge Biedscheid respectfully requests that Plaintiffs’ Motion for Summary Judgment be denied.

Respectfully Submitted:

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[4] Plaintiffs’ requested declaration that “unintentional torts of whatever kind and character, occurring in Indian Country at Indian gaming facilities operating under the auspices of IGRA, shall be in the tribal courts,” MSJ at 19, also is beyond the scope of a proper judgment under the Declaratory Judgment Act, which is limited to actual controversies. *See* 28 U.S.C. § 2201(a) (2020) (court may “declare the rights and other legal relations” in “a case of actual controversy within its jurisdiction”); *see also Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1240 (10th Cir. 2008) (setting forth requirements for declaratory judgment action).

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2021, I filed the foregoing document electronically via the CM/ECF electronic filing system, which caused service to all counsel of record.

/s/ Nicholas M. Sydow