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FILED
MADERA SUPERIOR COURT

2015 APR -7 AM 10:48

CLERK OF THE COURT

DEPUTY

ATTORNEYS FOR DEFENDANTS,

BRIAN AUCHENBACH et al.

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF MADERA
MAIN COURTHOUSE**

Case No.: MCR050201A, B, C, E

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiffs,

v.

DAVID DIXON, SHAWN FERNANDEZ,
ERIC SUNIGA, and TIMOTHY TOFAUTE,

Defendants.

**NOTICE OF REPLY; DEFENDANTS'
REPLY TO THE PEOPLE'S
OPPOSITION**

**[EVIDENTIARY HEARING
REQUESTED]**

DATE: April 10, 2015

TIME: 8:30 A.M.

DEPT: 2

JUDGE: Hon. Dale J. Blea

TO: THE HONORABLE DALE J. BLEA, JUDGE OF THE ABOVE-REFERENCED
COURT; AND TO DAVID LINN, DISTRICT ATTORNEY FOR THE COUNTY OF
MADERA, BY AND THROUGH HIS DEPUTY, NICHOLAS FOGG:

PLEASE TAKE NOTICE, Defendants, BRIAN AUCHENBACH, JOHN CAYANNE,
DAVID DIXON, SHAWN FERNANDEZ, JIM GLASSCOCK, RONALD JONES,
BENJAMIN RHODES, ERIC SUNIGA and TIMOTHY TOFAUTE, provide this reply to the
People's opposition to Defendants' Statutory and Non-Statutory Motions to Dismiss. This reply
is based upon the moving papers, the opposition papers, the records, files, and pleadings in this

1 matter, and upon such oral and documentary evidence that may be presented at the time of the
2 April 10, 2015 hearing on the Motion to Dismiss.

3 DATED: April 6, 2015

Respectfully submitted,

4 NUTTALL & COLEMAN

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7 MARK W. COLEMAN
8 Attorneys for Defendants,
9 BRIAN AUCHENBACH et al.

10 * * * * *

11 **INTRODUCTION**

12 First, the actions of these Defendants need to be put into the proper context. In
13 December of 2013, the "McDonald faction" held an election and the Tribal Council was elected.
14 This Council was running the hotel and the casino, as well as several other administrative
15 function of the Tribal government. In September of 2014, the "Lewis faction," or self-anointed
16 "Unification Council," in the dead of night, took control of the hotel and casino operations and
17 held it with Security Training Concepts (STC) guards who were armed.

18 The McDonald Council sought help from local, State and Federal law enforcement. All
19 of the agencies refused. Since they had no outside law enforcement to turn to and facing
20 imminent shutdown of the casino, they proceeded to form their own police force and passed
21 resolutions and ordinances authorizing the operation at issue in this case.
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1 Whose actions do the People believe that the Court need deter in the name of public
2 policy? The men who entered the *hotel entrance* (not the Casino as the People misstate) for the
3 singular purpose to gain access to the Gaming Offices to obtain the necessary audit
4 documentation so that the Casino would not be closed? Or the men who kept a cache of
5 weapons and K-9s at the front entrance of the hotel, and who brandished Tasers at individuals
6 who were not putting forth any force, and who actually pointed a Taser at a Tribal police
7 officer's head from less than three (3) feet away and deployed that Taser, ultimately striking
8 that police officer's hand?
9

10 The person who actually caused the hotel to be evacuated by ordering the fire alarm to
11 be pulled was Ted Atkins, Director of Casino security for the "Unification Council."
12 Coincidentally, there have yet to be charges levied against Mr. Atkins for violation of Penal
13 Code section 148.4, despite him telling Madera County Sheriff's that he did indeed order the
14 fire alarm to be pulled and that there was no actual fire. (*MSO Reports*, p.93, ¶5.)

15 There was no "casino takeover" or any chaos during this operation. It was over in six
16 (6) minutes. The footage confirms that within the hotel and the Gaming offices it was business
17 as usual, before, during and after the Tribal police's entrance. The only chaos ensued after Ted
18 Atkins ordered the casino fire alarm to be pulled resulting in immediate evacuation of the entire
19 hotel after the Sheriff failed to remove the trespassing STC personnel from the Casino and they
20 reentered into the basement. (*MSO Reports*, p.93, ¶5.) It was public knowledge that the Gaming
21 Commission had been threatening to shut the casino down based upon a failure to provide the
22 audit documentation by the Lewis faction. Defendants contend that but for the detainees not
23 being removed from the premises, and Ted Atkins ordering the fire alarm pulled, the resort and
24 casino would still be open today, thousands of Madera County residents would still be
25 employed, and the Tribe would be thriving.
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1 The People state that dismissal of the charges against Defendants based upon their status
2 as Tribal police officers would create an absurd result, and that such an outcome would
3 encourage a flurry of criminal activity with people claiming to be Tribal police officers.
4 (*People's Opposition*, p. 20:3-7.) The People fail to acknowledge all the documents previously
5 provided, showing the extensive measures these officers and this Council took to comply with
6 the law. Gaining access to the Gaming offices to obtain documents to ensure that the Tribe and
7 Madera County's lifeblood, the Chukchansi Gold Resort and Casino, was not shut down as the
8 Gaming Commission had threatened to do, hardly constitutes the onset of a "flurry of criminal
9 activity."

11 A peace officer who is making a detention may use reasonable force to make the
12 detention to overcome resistance. (Cal. Jury Instr.--Crim. 9.26.) There is no concern that any
13 ordinary defendant in "any kidnapping or assault case could defeat the Court's jurisdiction by
14 claiming to be a [T]ribal police officer." (*People's Opposition*, p.20:3-7.) Here, the police
15 officers have made no claims or assertions about their status as police officers. They have
16 presented facts, duly supported by enacted ordinances and resolutions.

17 The only absurd result that could be reached here would be if the Court were to allow
18 charges to be imposed against these police officers, who were acting in the course and scope of
19 their duties and in the public and Madera County's best interest.

21 **II. THE BURDEN IS WITH THE PEOPLE, ONCE DEFENDANTS HAVE
22 RAISED AN AFFIRMATIVE DEFENSE.**

23 The party claiming that a person is guilty of crime or wrongdoing has the burden of
24 proof on that issue. (Evid. Code § 520; Pen. Code § 1096.) The prosecution must prove every
25 fact and element essential to a conviction, including whether the acts were lawful or unlawful.
26 (*People v. Borchers* (1958) 50 Cal.2d 321, 328.) The jury instructions for the prosecution of an
27 unlawful arrest are instructive as to who has to prove what:

1 In a prosecution for violation of Penal Code section ____ , the People have the
2 burden of proving beyond a reasonable doubt that the peace officer was engaged
in the performance of, [his] [her] duties.

3 A peace officer is not engaged in the performance of [his] [her] duties if [he] [she]
4 [makes or attempts to make an unlawful [arrest] [detention]] [or] [uses
unreasonable or excessive force in making or attempting to make the [arrest]
[detention]]. (Cal. Jury Instr.--Crim. 9.29.)

5 Regardless of where the burden lies, the instant Defendants have made a significant
6 showing that this Court is without jurisdiction to maintain this prosecution. Because this Court
7 or any other court is without the jurisdiction to decide who the lawful Tribal Council is or was
8 at the time of the events, this Court may not decide whether the officers and their police
9 department were lawfully appointed. The People concede this. (*People's Opposition*, p.15:3-5.)
10 Following along with this concession, the Court may not decide that the police officers were not
11 acting upon reasonable beliefs that they were lawfully appointed by the controlling Tribal
12 Council. These facts were made very clear in the motions to dismiss that the People opposed.

13
14 As it has been set forth *ad nauseam*, the Tribal police force had one objective that
15 evening, and that was to obtain the Gaming Commission documents for the impending audit so
16 that the resort would not be shut down. The firsthand video footage speaks for itself. No Tribal
17 police officer stepped foot in or near the Casino, and no Tribal police officer exerted any force
18 that was not justified. The actions of every one of the instant Defendants was reasonable.

19 With the burden upon the People to prove that the police officers were not acting
20 lawfully or that they were not lawfully appointed, the motion to dismiss must be granted to
21 ensure that this absurd prosecution is not sustained any longer.

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CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court GRANT their motion to dismiss in the above-referenced matter.

DATED: April 6, 2015

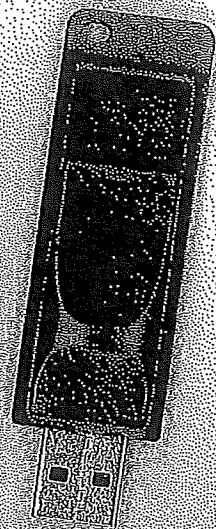
Respectfully submitted,

NUTTALL & COLEMAN



MARK W. COLEMAN
Attorneys for Defendants,
BRIAN AUCHENBACH et al.

EXHIBIT “A”



PROOF OF SERVICE

STATE OF CALIFORNIA,
COUNTY OF FRESNO.

I am employed in the County of Fresno, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2333 Merced Street, Fresno, California 93721.

On **April 7, 2015**, I served the foregoing document described as: **NOTICE OF REPLY; DEFENDANTS' REPLY TO THE PEOPLE'S OPPOSITION; EXHIBIT "A"**; on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

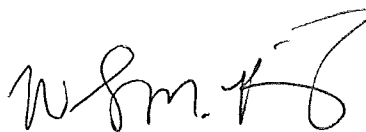
Nicholas Fogg, Esq.
Deputy District Attorney
Madera County District Attorney's Office
209 W. Yosemite Ave
Madera, CA 93637

[X] BY PERSONAL SERVICE

I personally delivered the above-referenced documents on the above-referenced parties.

I declare under penalty of perjury under the law of the State of California that the above is true and correct.

EXECUTED on **April 7, 2015**, at Fresno, California.



WENDY RAMIREZ