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MICHAEL HUNTER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL HUNTER, Defendant.	CR NO. CR-06-0565 SI MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE PENDING INDICTMENT Date: October 19, 2007 Time: 11:00 a.m. Hon. Susan Illston

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I. INTRODUCTION

The defendant, Michael Hunter, through his counsel, John J. Jordan, files this memorandum of points and authorities in support of the defendant's Fed. R. Crim. P. 12 motion to dismiss the four counts in the indictment against the defendant.

First, the defendant asks this Court to dismiss counts eighteen, twenty, and twenty-three of the indictment, which charge Hunter in a conspiracy count and two substantive counts

with signing checks regarding political contributions, for the simple reason that such conduct was not illegal. Accordingly, counts eighteen, twenty and twenty-three fail to state a crime and the counts should be dismissed. Fed. R. Crim. P. 12(b)(3).

In addition, Hunter asks this court to dismiss count one, which charges him and three other defendants with conspiracy to steal and misapply casino funds. Accepting as true all the allegations in the indictment, count one describes individual actions by separate co-defendants and fails to allege an agreement among the co-defendants to commit the criminal acts. The count thus fails to properly allege a conspiracy. See *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir.), *cert. denied*, 531 U.S. 969 (2000), citing 18 U.S.C. § 371.

II. PROCEDURAL AND FACTUAL BACKGROUND

On August 15, 2006, the defendant, Michael Hunter and six other members of the Coyote Valley Band of the Pomo Indians were indicted by the government, in a 39-count indictment. Hunter was named in four of the counts. He is described in the indictment as the Historian for the Tribe.

On October 17, 2006, the government filed a superseding indictment, charging the identical allegations against Michael Hunter, but adding a new co-defendant to the obstruction charge.

Michael Hunter was again named in only four of the counts of the superseding indictment, dealing with the alleged misuse of a bank card and co-signing checks for political contributions.

In count one, Hunter and three other tribe members are charged with conspiracy to steal and misapply tribal and casino funds, in violation of 18 U.S.C. § 371, by theft and misapplication of funds in excess of $1000 from an Indian tribal organization, in violation of 18 U.S.C. § 1163, and theft and misapplication of funds in excess of $1000 belonging to a gaming establishment on Indian lands, in violation of 18 U.S.C. § 1167(b).

The indictment charged in overt act "m" that Michael Hunter, on or about April 10, 2003, misapplied Tribal funds by making personal expenditures totaling approximately $308 at the Phoenician Hotel in Scottsdale, Arizona, using a Wells Fargo debit card funded by the Tribe.

In count eighteen, Hunter was charged, along with seven other members of the Tribe, with another conspiracy to misapply Casino funds, in violation of 18 U.S.C. § 371, by willful misapplication of funds in excess of $1000 belonging to a gaming establishment on Indian lands, in violation of 18 U.S.C. § 1167(b). The indictment alleged that Hunter and the others conspired to misapply and take funds from the Casino on Tribal

lands to make contributions to several federal and California politicians and political organizations.

Count eighteen lists two overt acts allegedly committed by Hunter in furtherance of the conspiracy. Superseding Ind. at p. 10. The indictment charged in overt act "c" that Michael Hunter and Allan Crabtree, on or about June 20, 2002, signed a $1000 check drawn on the Casino's general account and made payable to "Friends of [Congresswoman B]." The indictment charged in overt act "e" that Michael Hunter and Allan Crabtree, on or about September 19, 2002, signed a $5000 check drawn on the Casino's general account and made payable to "[State Politician A] comm."

In counts twenty and twenty-three, Hunter was charged with two substantive counts of Willful Misapplication of Casino Funds, in violation of 18 U.S.C. § 1167(b), charging as separate substantive counts the two check signings described in overt acts "c" and "e" of the conspiracy. Count twenty charged that Michael Hunter and Allan Crabtree, on or about June 20, 2002, signed a $1000 check drawn on the Casino's general account and made payable to "Friends of [Congresswoman B]." Count twenty-three charged that Michael Hunter and Allan Crabtree, on or about September 19, 2002, signed a $5000 check drawn on the Casino's general account and made payable to "[State Politician A] comm."

III. ARGUMENT

A. THE CONSPIRACY CHARGE IN COUNTS EIGHTEEN AND THE MIRROR SUBSTANTIVE CHARGES IN COUNTS TWENTY AND TWENTY-THREE SHOULD BE DISMISSED

1. Introduction

This Court should dismiss counts eighteen, twenty, and twenty-three of the indictment, which charge Mr. Hunter in a conspiracy count and two substantive counts with signing checks regarding political contributions, for the simple reason that such conduct is not illegal.

First, the defendant did nothing illegal by co-signing two checks for a political contribution. As the indictment itself specified, 25 U.S.C. § 2710 and 25 C.F.R. § 522.4 both provide that net revenues from Indian gaming can be used to provide for the general welfare of the Indian tribe and its members and to promote tribal economic development. Contributions to federal and State politicians fall under both categories.

Second, the indictment confuses charitable gifts with political contributions, and charges the defendant with violating some perceived restrictions on charitable gifts by co-signing checks for political contributions. Charitable gifts and political contributions are different concepts, treated differently under federal law. In addition, even if the two were considered the same, 25 U.S.C. § 2710 and 25

C.F.R. § 522.4, as the indictment notes, both provide that net revenues from Indian gaming can be used to donate to charitable organizations.

Third, the indictment claims that the Gaming Ordinance issued to the Tribe by the National Indian Gaming Commission (NIGC) and a subsequent settlement agreement prohibited the making of gifts. However, even if the gaming ordinance or settlement agreement somehow restricted or attempted to prevent charitable gifts, and even if charitable gifts included political contributions, violation of either the Gaming Ordinance or the settlement agreement is no federal crime. The NIGC cannot create a new federal crime. Any violation of the settlement agreement or the Gaming Ordinance is a civil matter, not a federal criminal matter.

Accordingly, counts eighteen, twenty and twenty three, which attempt to criminalize the making of political contributions by a Native-American tribe, fail to state a crime and should be dismissed. See Fed. R. Crim. P. 12(b)(3).

2. The Defendant May Move Pre-Trial To Dismiss the Indictment

"An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, *if valid on its face*, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."

United States v. Vitillo, 490 F.3d 314, 320 (3rd Cir. 2007), quoting *Costello v. United States*, 350 U.S. 359, 363, (1956) (footnote omitted and emphasis added). If the indictment is invalid on its face for failing to state an offense, it is subject to dismissal. *Id.* The *Vitillo* court noted that "for purposes of Rule 12(b)(2) [later superseded by Rule 12(b)(3)(B)], a charging document fails to state an offense if the specific facts alleged *in the charging document* fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation." *Id.*, at 320 (emphasis in original), citing *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir.), *cert. denied*, 537 U.S. 819 (2002) and *United States v. Taylor*, 154 F.3d 675, 681 (7th Cir.), *cert. denied*, 525 U.S. 1060 (1998).

The defendant may bring this motion pre-trial. The Ninth Circuit has held that the failure of an indictment to state sufficiently the crimes charged is a fundamental defect which can be raised at any time, and such a challenge must be made at the earliest possible moment. *United States v. Pheaster*, 544 F.2d 353, 360-611 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977) ("Failure of an indictment to state an offense is, of course, a fundamental defect which can be raised at any time."); see also *Echavarria-Olarte v. Reno* 35 F.3d 395, 397 (9th Cir. 1994), *cert. denied*, 514 U.S. 1090 (1995); *United States v. Caperell*, 938 F.2d

975, 977 (9th Cir. 1991) (claim that the indictment fails to state an offense is jurisdictional not waived by a guilty plea.)

Other circuit courts have also noted that a defendant may move to dismiss an indictment pre-trial for failure to charge a federal offense. See, e.g., *United States v. Combs*, 369 F.3d 925, 934 (6th Cir. 2004)(dismissing count in indictment for failure to charge a federal offense). *United States v. Dauray*, 215 F.3d 257 (2nd Cir. 2000); *United States v. Marcello*, 876 F.2d 1147, 1192 (5th Cir. 1989). More recently, in *United States v. Vitillo*, 490 F.3d at 320, the Third Circuit noted that Fed. R. Crim. P. 12(b)(3)(B) states that, "at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense."

Indeed, the defendant would be penalized if this motion was not brought until after trial started. *United States v. Pheaster*, 544 F.2d at 361 ("When an indictment is not challenged before the verdict, it is to be upheld on appeal if the necessary facts appear in any form or by fair construction can be found within the terms of the indictment." (internal quotations and citations omitted)). The Ninth Circuit recently reaffirmed the need to bring such a motion challenging the sufficiency of an indictment pre-trial, stating "we have recognized that a late

challenge "suggests a purely tactical motivation" and is needlessly wasteful because pleading defects can usually be readily cured through a superseding indictment before trial. *United States v. Chung*, 231 F.3d 471, 481 (9th Cir. 2000), citing *United States v. Pheaster*, 544 F.2d at 360. Additionally, "the fact of the delay tends to negate the possibility of prejudice in the preparation of the defense," because one can expect that the challenge would have come earlier were there any real confusion about the elements of the crime charged. *United States v. Chung*, 231 F.3d at 481, quoting *United States v. Pheaster*, 544 F.2d at 360, 363. For these reasons, "indictments which are tardily challenged are liberally construed in favor of validity." *United States v. Chung*, 231 F.3d at 481, citing *Echavarria-Olarte v. Reno*, 35 F.3d 395, 397 (9th Cir. 1994) (quoting *United States v. Rodriguez-Ramirez*, 777 F.2d 454, 459 (9th Cir. 1985)).

In addressing a motion pursuant to Rule 12(b)(3)(B), the indictment "is to be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994); accord *United States v. Caicedo*, 47 F.3d 370, 371 (9th Cir. 1995); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1082 (5th Cir. 1978).

An indictment may track the language of the statute, as long

as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117 (1974). However, "an indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the charges against him ... is defective, although it may follow the language of the statute.'" *Russell v. United States*, 369 U.S. 749, 765 (1962), quoting *United States v. Simmons*, 96 U.S. 360, 362 (1877).

3. The Co-Signing of Checks for Political Contributions Was Lawful

The defendant did not violate either 25 U.S.C. § 2710 or 25 C.F.R. § 522.4 by co-signing two checks for a political contribution. This is not a case where the defendant and co-defendants are charged with bribing public officials or being involved with kick-backs. Instead, the indictment attempts to criminalize ordinary political contributions made to officials thought to be sympathetic to issues of importance to the Pomo Indian Tribe.

But, both 25 U.S.C. § 2710 and 25 C.F.R. § 522.4 provide that net revenues from Indian gaming can be used to provide for the general welfare of the Indian tribe and its members and to

promote tribal economic development. Contributions to federal and State politicians fall under both categories.

Initially, there is nothing intrinsically improper in making a political contribution. In *McCormick v. United States*, 500 U.S. 257 (1991), the Supreme Court explicitly recognized that "Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done." *Id.* at 272. The Supreme Court rejected the notion that political contributions were inherently illegal. "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* at 272.

Nor is there any valid legal reason to exclude Native Americans from this political process, and indict them for making political contributions to politicians who may share similar views on Indian gaming and other issues important to the Tribe. The Ninth Circuit certainly has noted the involvement of Native

Americans in the California political process. In *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003), the Ninth Circuit pointed out that "California's high stakes form of direct democracy is not cheap. Interest groups pour millions of dollars into campaigns to pass or defeat ballot measures. Nearly $200 million was spent to influence voter decisions on the 12 propositions on the 1998 ballot. Of that total, $92 million was spent on one gaming initiative." *Id.* at 1105. The court stated that in that one gaming initiative, "California Indian tribes spent more than $66 million to win the right to place casinos on their reservations; rival Nevada interests spent close to $26 million to protect their gaming monopoly." *Id.* at 1105, n. 22. Certainly some of the $66 million came from casino funds.

Here, the defendant did nothing wrong by co-signing the two checks specified in the indictment. The indictment claims that the contributions were in violation of 25 U.S.C. § 2710 and 25 C.F.R. § 522.4. A review of both sections shows that political contributions are not outlawed by either section. Of course, this is hardly surprising, as Indian tribes around the country contribute to politicians without being indicted.

25 U.S.C. § 2710(B) provides that net revenues from any tribal gaming are not to be used for purposes other than—

(I) to fund tribal government operations or programs;
(ii) to provide for the general welfare of the Indian tribe and its members;
(iii) to promote tribal economic development;
(iv) to donate to charitable organizations; or
(v) to help fund operations of local government agencies.

Similarly, 25 C.F.R. § 522.4(b)(2) provides that "A tribe shall use net revenues from any tribal gaming or from any individually owned games only for one or more of the following purposes:

(I) To fund tribal government operations or programs;
(ii) To provide for the general welfare of the tribe and its members (if a tribe elects to make per capita distributions, the plan must be approved by the Secretary of the Interior under 25 U.S.C. 2710(b)(3));
(iii) To promote tribal economic development;
(iv) To donate to charitable organizations; or
(v) To help fund operations of local government agencies.

Under both sections, the making of political contributions is lawful. Political contributions appear to absolutely qualify as expenditures done to provide for the general welfare of the tribe and to promote tribal economic development. The gaming establishment provides significant revenue to the Tribe. The continued operation of the casino is no doubt of prime importance to the Tribe, so that support of politicians sympathetic or supportive of Indian gaming operations certainly helps provide for the general welfare of the tribe and promotes tribal economic

development. Counsel for Hunter can find no case that holds that the provisions of either 25 U.S.C. § 2710 or 25 C.F.R. § 522.4 forbid the use of tribal gaming revenues to make political contributions.

In addition, any such restrictions on the making of political contributions would raise significant First Amendment issues. "Expenditures on political advocacy "constitute expression '"at the core of our electoral process and of the First Amendment freedoms."'" *Federal Election Comm'n v. Survival Educ. Fund*, 65 F.3d 285, 290 (2nd. Cir. 1995), quoting *Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) (quoting *Buckley v. Valeo*, 424 U.S. 1, 30 (1975) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

It cannot be lawful to exclude the defendants from the political process. Again, this indictment seeks to criminalize the making of all political contributions made with Tribal revenue generated by Indian casinos. This would be an intolerable intrusion on the defendant's First Amendment rights.

Thus, counts eighteen, twenty, and twenty-three should be dismissed as to defendant Michael Hunter.

4. The Indictment Confuses Charitable Gifts with Political Contributions

The indictment also fatally confuses charitable gifts with political contributions, and charges the defendant with violating some perceived restrictions on charitable gifts by co-signing checks for political contributions. Charitable gifts and political contributions have long been recognized as different concepts, so that even if the defendants were somehow forbidden from making charitable contributions with casino funds, such prohibition would not include political contributions. Thus, the indictment again fails to state a criminal offense.

As cited above, in addressing a motion pursuant to Rule 12(b)(3)(B), the indictment "is to be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." *United States v. Hall*, 20 F.3d at 1087.

Here, the indictment charged that a prior settlement agreement between the Tribe and the NIGC "prohibited charitable or other gifts from being made from Casino funds" and that if the "Tribe wished to make charitable gifts, it may do so as a government in conformance with the approved uses of net gaming revenues, after such revenues have moved from the gaming operation to the Tribe." Superseding Ind. pp. 9-10. The indictment then charged the making of various political

contributions as gifts.

Charitable gifts and political contributions, however, are distinct concepts.

A political contribution is a contribution made to a politician or a political party for a political purpose. For example, the statutory definition in the Federal Tax Code of a "political contribution" includes "any gift subscription, loan advance or deposit of money or anything of value, made for any political purpose." *McEntee v. MSPB*, 404 F.3d 1320, 1327 (Fed. Cir.), *cert. denied,* 546 U.S. 873 (2005), citing 5 U.S.C. § 7322(3)(A).

Title 5, United States Code, § 7322(3) states: "a "political contribution"

> (A) means any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose;
>
> (B) includes any contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for any political purpose;
>
> © includes any payment by any person, other than a candidate or a political party or affiliated organization, of compensation for the personal services of another person which are rendered to any candidate or political party or affiliated organization without charge for any political purpose; and
>
> (D) includes the provision of personal services for any political purpose.

In addition, the Code of Federal Regulations defines a "political purpose" as "an objective of promoting or opposing a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101 (2004).

A gift, on the other hand, has long been understood to proceed from a 'detached and disinterested generosity,' made 'out of affection, respect, admiration, charity or like impulses.' *De Jong v. Commissioner*, 309 F.2d 373, 378 (9th Cir. 1962), citing *Commissioner v. LoBue*, 351 U.S. 243, 246 (1956) and *Robertson v. United States*, 343 U.S. 711, 714 (1956).

In fact, the current Federal tax code specifically provides, in the code section dealing with gifts, that gifts do not include political contributions. 26 U.S.C. § 2501 provides, in the relevant sections:

> (a) Taxable transfers.
>
> (1) General rule. A tax, computed as provided in section 2502 [26 USCS § 2502], is hereby imposed for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.
> ...
>
> (4) Transfers to political organizations. Paragraph (1) shall not apply to the transfer of money or other property to a political organization (within the meaning of section 527(e)(1) [26 USCS § 527(e)(1)]) for the use of such organization.

Even before the current tax code was adopted specifically excluding political contributions from the statutory definition of a gift, Federal courts had already noted the obvious distinction. In *Carson v. Commissioner,* 71 T.C. 252, 262 (1978), the United States Tax Court held that the statutory definition of "gift" in the Internal Revenue Code as "any transfer for less than an adequate and full consideration in money or money's worth" does not include political contributions. The court noted that "campaign contributions, like those before us, when considered in light of the history and purpose of the gift tax, are simply not "gifts' within the meaning of the gift tax law." 71 T.C. at 263-264.

The Tenth Circuit then upheld the Tax Court decision in *Carson v. Commissioner,* 641 F.2d 864 (10th Cir. 1981). The court stated that in "the Tax Court the Commissioner argued that the taxpayer transferred funds for the benefit of political candidates, and received no consideration reducible to money or money's worth, and that such transfers were taxable as a gift. The taxpayer contended, inter alia, that the history of the gift tax compelled the conclusion that it was never intended to and does not encompass the type of political contributions made by the taxpayer. As indicated, the Tax Court agreed with the taxpayer's position, as do we." *Id.* at 865.

The Tax Court decision in *Carson* was again cited with approval in *Abdalla v. Commissioner,* 647 F.2d 487, 498 (Fed. Cir. 1981) ("statutory definition of "gift" as "any transfer for less than an adequate and full consideration in money or money's worth" does not include political contributions.")

There is no basis for the government to charge that the making of political contributions was illegal because the settlement agreement may have limited the making of gifts.

Moreover, even if one assumes that a political contribution was a gift, 25 U.S.C. § 2710 and 25 C.F.R. § 522.4, as the indictment notes, both provide that net revenues from Indian gaming can be used to donate to charitable organizations. As argued below, even if the settlement agreement somehow restricted this ability of the Tribe to make charitable gifts, any such restriction did not create a criminal offense for failure to abide by that restriction.

Thus, the indictment fails to state a criminal offense.

5. Violation of Either the Settlement Agreement or the Gaming Ordinance is a Civil, Not a Criminal Matter.

The Indictment also wrongly elevates a potential civil violation into a criminal case.

The indictment claims that a prior settlement agreement reached between the Tribe and the NIGC, and the original gaming

ordinance approved by the NIGC, both prohibited the making of gifts. Even if the agreement or the ordinance somehow restricted or attempted to prevent charitable gifts, and even if charitable gifts included political contributions, violation of the settlement agreement or the gaming ordinance is no federal crime. The NIGC cannot create a new federal crime. Any violation of the gaming ordinance promulgated by the commission is a civil matter, not a federal criminal manner. See *Sac & Fox Tribe of the Miss. in Iowa v. United States*, 264 F.Supp.2d 830 (N.D. Iowa 2003).

"Congress enacted the Indian Gaming Regulatory Act in the wake of the Supreme Court's decision that state gaming laws could not be enforced on Indian reservations within states otherwise permitting gaming, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Act established the Commission as an agency within the Department of the Interior." *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 373 U.S. App. D.C. 288, 466 F.3d 134, 135 (D.C. Cir. 2006), citing 25 U.S.C. § 2704(a) (IGRA). "The Commission has the authority to investigate and audit certain types of Indian gaming, to enforce the collection of civil fines, and to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions" of the Act." *Id.*, citing 25 U.S.C. § 2706 and *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 304 U.S.

App. D.C. 335, 14 F.3d 633, 634 (D.C. Cir.) *cert. denied*, 512 U.S. 1221 (1994); see *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 716, n. 6 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004).

"The IGRA includes a comprehensive enforcement and administrative review scheme. The enforcement procedure is set forth in 25 U.S.C. § 2713. Under section 2713(a), when the NIGC determines that the tribal operator of gaming is engaged in gaming in violation of the statute, any regulations or any tribal ordinance, regulation or resolution approved by the NIGC, the Chairman of the NIGC is authorized to levy and collect civil fines in an amount not to exceed $ 25,000 per violation." *Sac & Fox Tribe of the Miss. in Iowa v. United States*, 264 F.Supp.2d at 836, citing 25 U.S.C. § 2713(a)(1). "The most severe enforcement measure made available to the NIGC under the IGRA is an order of temporary closure of Indian gaming for substantial violations of the provisions of the IGRA, the regulations promulgated thereunder or tribal regulations, ordinances or resolutions approved by the NIGC." *Id.* at 836, citing 25 U.S.C. § 2713(b)(1).

Thus, any violations of the gaming ordinance or the settlement agreement amount, at most, to a civil violation. The indictment here cites no authority for the proposition that a

violation of any of the rules and regulations of the NIGC is a violation of criminal law. There is no authority cited for the proposition that the violation of any of the terms of the gaming ordinance or the settlement agreement constitutes a violation of federal criminal law. An indictment such as this one, which purports to charge that the violation of a gaming ordinance or a settlement agreement with the NIGC is a violation of federal law fails to state an offense. Moreover, if the grand jury was so instructed, then it was instructed incorrectly.

On this basis, counts eighteen, twenty and twenty-three should be dismissed as to Hunter.

B. COUNT ONE SHOULD BE DISMISSED FOR FAILURE TO ADEQUATELY CHARGE A CONSPIRACY

Mr. Hunter also moves for this court to dismiss count one, which charges him and three other defendants with a conspiracy, in violation of 18 U.S.C. § 371, to steal and misapply Tribal and casino funds, in violation of 18 U.S.C. § 1167(b). Accepting as true all the allegations in the indictment, count one describes only individual actions and not joint actions, thus failing to allege an agreement among the co-defendants to commit the criminal acts. Accordingly, the count fails to properly allege a conspiracy.

The law of federal conspiracy under 18 U.S.C. § 371 is well-

settled. "To establish conspiracy, the government must show: (1) an agreement (2) to engage in criminal activity and (3) one or more overt acts in furtherance of the conspiracy. *United States v. Wright*, 215 F.3d 1020, 1028 (9th Cir.), *cert. denied*, 531 U.S. 969 (2000), citing 18 U.S.C. § 371.

Again, looking just at the four corners of the indictment, *United States v. Hall*, 20 F.3d at 1087, count one charges that the defendant Michael Hunter and three other co-defendants used credit cards and debit cards issued to them to purchase personal items for their own benefit. Ind. at p. 5. The indictment then lists 13 different individual purchases by the various defendants as overt acts in furtherance of the conspiracy. Overt act "m" charges that Michael Hunter, on or about April 10, 2003, misapplied Tribal funds by making personal expenditures totaling approximately $308 at the Phoenician Hotel in Scottsdale, Arizona, using a Wells Fargo debit card funded by the Tribe.

Even if the allegations in the overt acts are true, there is no establishment of an agreement among the co-defendants to commit the acts described in the overt acts. None of the overt acts list more than one defendant acting. Nowhere in the indictment is there any allegation that the defendants acted together. Accepting all the facts alleged in count one as true, the indictment charges only that the five co-defendants misused

their own American Express card or Wells Fargo debit card to make individual purchases. There are no facts that establish any kind of joint agreement among the co-defendants to do so.

The charge wrongly seeks to bundle into a conspiracy charge separate acts by four individuals. Under the government's theory, it could indict everyone who works for a large corporation and misuses their own company credit card with conspiracy. It is obvious that the government charged Hunter in a conspiracy because the amount of money is so small for his individual allegation. The amount charged for Hunter is only $308, not even over the $1000 threshold required to constitute a substantive violation of 18 U.S.C. § 1167(b). But, this is not a valid reason for lumping individual actions, even if true, into a conspiracy charge.

Accordingly, count one of the indictment fails to properly allege a conspiracy and should be dismissed.

CONCLUSION

The Court should dismiss the indictment.

September 6, 2007.

Respectfully submitted,

/s/

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MICHAEL HUNTER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL HUNTER, Defendant.	No. CR-06-0565 SI **DECLARATION IN SUPPORT OF DEFENDANT HUNTER'S MOTION AND MOTION TO DISMISS INDICTMENT** Date: October 19, 2007 Time: 11:00 a.m. Hon. Susan Illston

DECLARATION OF COUNSEL IN SUPPORT OF MOTION:

I, JOHN J. JORDAN, am an attorney licensed to practice in the State of California and do hereby declare under the penalty of perjury as follows:

1. I am an attorney-at-law duly authorized to practice before the Courts of the State of California, and the attorney of record for Defendant Michael Hunter.

2. I have reviewed the attached Motion to Dismiss the Indictment, and I believe the factual statements made therein are

true and correct to the best of my information and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: September 6, 2007

Respectfully submitted,

/s/
JOHN J. JORDAN
Attorney for Defendant
MICHAEL HUNTER