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Iris Martinez

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	CR 06-0565 SI
)	
Plaintiff,)	DEFENDANT MARTINEZ'S REPLY TO
)	OPPOSITION TO MOTION TO DISMISS
vs.)	
)	
PRISCILLA HUNTER, Inc., <i>et al.</i> ,)	Date: November 9, 2007
)	Time: 11:00 a.m.
Defendants.)	Judge: The Honorable Susan Illston

I. Introduction

Defendant Iris Martinez files this reply brief in support of the defendant's Motion to Dismiss Counts Two Through Twelve, and Counts Fourteen through Seventeen of the superseding indictment. The government has filed a brief in opposition that fails to adequately address the significant due process issues raised by Martinez's Motion to Dismiss. The defendant again asks this Court to dismiss Counts Two through Twelve and Counts Fourteen through Seventeen of the Indictment for their failure to meet the due process requirements of the Fourteenth Amendment.

II. Discussion

A. Federal Law Does Not Prohibit Casino Funds From Being Used to Purchase First Class Airfare

The government's Opposition provides no insight into the serious issues presented by Martinez's Motion to Dismiss. The government merely parrots the language contained in its indictment and reiterates that flying first class contravenes the Tribe's fiscal policies and procedures and federal travel regulations. This does not answer the serious due process questions at hand. It fails to address (1) which federal travel regulations state that members of a tribal council traveling on tribal business must purchase coach or economy fares or that the purchasing of first class air fare is a crime (there are none); (2) how contravening tribal policy/procedure is a federal crime, and (3) whether and how tribal council members are required to adhere to federal travel regulations.

Indeed, neither the Federal Travel Regulations nor federal law states that members of an Indian Tribe's tribal council may not fly first class. Nor does the government point to law stating that failure of a tribal council member to adhere to tribal "policy" and "procedure" amounts to a federal crime against the United States. The government simply does not address the heart of Ms. Martinez's argument, that flying first class is not prohibited by any federal law stated in the Indictment.

Ms. Martinez flew first class thirteen times in cross-country business trips for a legitimate business purpose in her role as the Vice Chairman of the Tribal Council. As stated in Ms. Martinez's Motion to Dismiss, this does not contravene the mandates contained in any federal law cited by the government in its Indictment. Accordingly, the indictment must be dismissed on due process grounds for failing to state a crime.

B. Martinez Was Not Given Sufficient Advance Warning that Flying First Class Subjected Her to Criminal Sanctions

The government states that the defendants were on notice that they were required to book all air travel at coach or economy government rates because tribal fiscal policies and procedures and federal regulations stated so. This, however, does not equate to notice that failure to do so could result in *criminal* sanctions. To allow the indictment to go forward would amount to a judicial decree that failure

1 of a member of a tribal government to adhere to tribal policy is a criminal act against the United States.

2 The legislature has passed no such law.

3 Moreover, if flying first class in contravention to tribal policy amounts to sufficient notice that
4 one is committing a federal crime, then it appears that the government is engaging in selective
5 prosecution. The Federal Travel Regulations (“FTR”) include specific guidelines meant to restrict
6 business and first class travel (“premium class travel”) by federal government employees and agencies.
7 The Government Accountability Office (“GAO”) recently issued a report concluding that unauthorized
8 or unjustified premium class travel was occurring in many federal government agencies in contravention
9 to the FTR. GAO, *Premium Class Travel: Internal Control Weakness Governmentwide Led to Improper*
10 *and Abusive Use of Premium Class Travel*, GAO-07-1268 (Washington, D.C.: September 28, 2007)
11 (hereinafter “GAO Report”). Defense counsel, however, can find no instance where a federal employee
12 has been subjected to prosecution for contravening the FTR’s restrictions on airfare travel when traveling
13 for a legitimate business purpose. Given, they would not be prosecuted for a violation of 18 U.S.C. §
14 1167(b); however, if the government’s theory in this case is correct then such a government employee
15 could be prosecuted under, for example, 18 U.S.C. § 641, which largely mimics the language of § 1167
16 but instead of criminalizing the embezzlement or conversion of casino money, criminalizes the
17 embezzlement or conversion of the United States’ money or property. Ms. Martinez could not have been
18 on notice that it was a federal crime to use casino money to fly first class on legitimate business,
19 especially when there have been no prosecutions of government employees flying first class using
20 taxpayer money in direct contravention to the FTR.

21 It is axiomatic that government officials may not enforce criminal statutes in a discriminatory or
22 selective fashion. The basic principle was stated long ago in *Yick Wo v. Hopkins*, 118 U.S. 156, 373-74
23 (1886): “Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and
24 administered by public authority with an evil eye and an unequal hand, so as practically to make unjust
25 and illegal discriminations between person in similar circumstances, material to their rights, the denial
26 of equal justice is still within the prohibition of the Constitution.” It appears here that Ms. Martinez and
27 Ms. Hunter are being singled out for prosecution for flying at premium rates in contravention to certain
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1 policies and regulations because they are members of an Indian tribe. Why otherwise would they be
2 prosecuted and not those federal employees who accounted for approximately \$167 million in improper
3 premium class travel? *See* GAO Report at p. 4. Unfortunately, it appears that the U.S. Attorneys Office
4 is prosecuting tribal leaders while turning a blind eye when misapplication of funds involves non-Indians.

5 In sum, Ms. Martinez simply had no fair warning that her actions subjected her to criminal
6 prosecution. Tribal policy requiring flights be booked at coach or economy rates does not amount to
7 notice that failure to do so could result in federal criminal sanctions. Neither United States Code, the
8 Code of Federal Regulations, or the Gaming Ordinance criminalizes the booking of first class flights by
9 tribal council members, nor do they state that a failure to abide by policies written and created by the
10 tribe itself could lead to criminal sanctions. Where there is no proof that Ms. Martinez could have known
11 that booking a first class flight amounted to a crime, she cannot be convicted consistently with due
12 process. The government here is trying to equate tribal policy and procedure with federal law. Nowhere,
13 however, is it apparent to the average person that contravening tribal policy and procedure is a federal
14 crime.

15 **III. Conclusion**

16 For the foregoing reasons, the Court should dismiss the thirteen counts in the indictment charging
17 Iris Martinez of misapplication of funds in a first class airfare scheme.

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20 DATED: November 5, 2007

21 Respectfully Submitted,

22 GARRICK S. LEW
23 LAURA K. MCKIBBIN

24 By: /s/
LAURA K. MCKIBBIN

25 Attorneys for Defendant IRIS MARTINEZ
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