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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Rahne Pistor, George Abel and Jacob
Whitherspoon,

Plaintiffs,

vs.

Carlos Garcia, et al.,

Defendants.

No. CV 12-00786-FJM

**DEFENDANT McDANIEL'S
RESPONSE TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND CROSS MOTION
FOR SUMMARY JUDGMENT ON
BEHALF OF DEFENDANTS
McDANIEL, PHILLIPS, NEJO AND
LOOMIS**

Defendant Tony McDaniel respectfully submits his response to Plaintiffs' Motion for Partial Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure. In addition, Defendants McDaniel, Phillips, Nejo and Loomis submit their Cross Motion for Summary Judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

This response and cross motion is supported by the Separate Controverting and Separate Statement of Facts filed contemporaneously with this response. Plaintiffs' Motion should be denied and Defendants' cross motion should be granted because: (1) There was probable cause for the detention and questioning of Plaintiffs according to Police Chief Garcia of the Tonto Apache Tribal Police; (2) Defendants McDaniel, Phillips, Nejo and Loomis had probable cause for their detention and questioning of Plaintiffs based upon the "collective knowledge" doctrine, and (3) Defendants' actions were performed under color of tribal law, not state law.

1 **I. FACTUAL BACKGROUND.**

2 As acknowledged by Plaintiff Abel, he and the other Plaintiffs were involved in
3 advantage gambling. Abel had been a professional gambler for several years and, with
4 respect to this case, he had been gambling frequently from April to October 5, 2011 at
5 the Mazatal Casino in Payson, Arizona. (SOF ¶ 1).

6 Based upon the Declaration of Tonto Apache Police Department Chief Carlos
7 Garcia, he had probable cause to believe that Abel, Pistor and Witherspoon were
8 committing criminal acts with respect to their frequent gaming at the Mazatal Casino.
9 Chief Garcia noted that he observed the suspects appear to be able to manipulate and
10 over-ride the casino's machines to increase their ability to bet larger amounts and win
11 more. Additionally, he observed other suspicious conduct between the Plaintiffs as they
12 continued to gamble, and win at an alarming rate, at the Mazatzal Casino. (SOF ¶ 5).

13 After Chief Garcia concluded there was sufficient probable cause to believe the
14 Plaintiffs were committing a crime, he decided to detain the Plaintiffs for questioning.
15 (SOF ¶ 6.) He contacted the Gila County Sheriff's Office to assist. (SOF ¶ 5).

16 In connection with the Tribe's request for assistance, Detective Tony McDaniel's
17 partner, Terry Phillips, was contacted by Gila County Sheriff's Sgt. Travis Baxley and
18 was told that the Tonto Apache Tribal police needed their assistance with a matter at the
19 casino the following day, on October 25, 2011. (SOF ¶¶ 5-6).

20 McDaniel and Phillips understood they would be assisting the Tribe in a Tribal
21 investigation. At no point leading up to and during the detention of Plaintiff George
22 Abel were Defendants acting in any manner except to assist the Tribal police with their
23 own investigation of Plaintiffs Abel, Pistor and Witherspoon. (SOF ¶ 3).

24 At all times on October 25, 2011, Defendants believed that there was probable
25 cause to detain Mr. Abel in connection with possible criminal activity at the casino and,
26 at a minimum, based upon what they were told, Defendants believed there was a
27 reasonable suspicion that Mr. Abel and the other Plaintiffs were actively engaged in the
28 commission of a crime on October 25, 2011. (SOF ¶ 4). Significantly, Defendants

1 McDaniel and Phillips had no contact whatsoever with Plaintiffs Pistor or Witherspoon.
2 Their only contact was with Plaintiff George Abel. (CSOF ¶ 6).

3 McDaniel's partner, Terry Phillips, was told by Sgt. Baxley that he and McDaniel
4 were to handcuff Mr. Abel, lead him off the casino floor and into a conference room so
5 that they could be questioned. McDaniel and Phillips identified themselves as police
6 officers, showed a badge and informed Mr. Abel that he was being detained for gaming
7 violations. Mr. Abel was then handcuffed only while he was lead into a conference
8 room at which point the contents of his pockets were placed on a table in front of him
9 and his handcuffs were removed within probably less than two minutes. (SOF ¶ 8).

10 Defendants McDaniel and Phillips removed the items from Mr. Abel's pockets
11 because he was told that Mr. Abel's criminal activity might involve some type of device
12 he was using to manipulate the casino's machines. McDaniel and Phillips were
13 attempting to ensure that such device or other evidence was not discarded by Mr. Abel.
14 (SOF ¶ 6).

15 After the items were removed from Mr. Abel's pockets and placed on the table in
16 front of him, McDaniel and Phillips had no further contact with the items and, McDaniel
17 and Phillips' entire involvement with the matter ended approximately 5 to 8 minutes
18 later when they left the room. (SOF ¶ 8).

19 At all times during their contact with Mr. Abel on October 25, 2011, State
20 Defendants believed there was probable cause and at a minimum, reasonable suspicion
21 that Mr. Abel was in the act of committing a crime based upon representations made to
22 him by Sgt. Baxley and/or the Tribal police. Defendants limited their behavior with
23 respect to his contact with Mr. Abel to what they believed to be reasonable under the
24 circumstances. (SOF ¶¶ 4-5).

25 At all times during the detention of Plaintiff Abel, Defendant Phillips acted just as
26 had Detective McDaniel. Plaintiffs do not even allege that Phillips engaged in any
27 conduct different in substance from the conduct they allege was engaged in by Detective
28 McDaniel. (Complaint.) Defendant Nejo's entire involvement consisted of two

1 approximately 15-20 minute meetings with Plaintiffs Abel and Witherspoon during
2 which these Plaintiffs were simply questioned. Also, Nejo met with Plaintiff Pistor who
3 refused to answer questions. Defendant Loomis simply observed Nejo's questioning.
4 (SOF ¶ 11-12).

5 **I. LEGAL ARGUMENT.**

6 A. Probable Cause Existed for the Detention and Questioning of Plaintiffs.

7 As a matter of law, probable cause exists if, under the totality of circumstances
8 known to the officers, a prudent person would have concluded that there was a fair
9 probability that the individual had committed a crime. *United States v. Hernandez*, 314
10 F.3d 430, 434 (9th Cir. 2002). Probable cause exists when officers have knowledge or
11 reasonably trustworthy information sufficient to lead a person of reasonable caution to
12 believe an offense has been or is being committed by the person being arrested. *John v.*
13 *City of El Monte*, 515 F.3d 936, 940 (9th Cir. 2008). Probable cause merely requires that
14 the facts and circumstances within the officers' knowledge and of which they had
15 reasonably trustworthy information were sufficient to warn a prudent man believing that
16 the plaintiff had committed or was committing an offense . . . Police must only show that
17 under the totality of circumstances . . . a prudent person would have concluded there was
18 a fair probability that the suspect had committed a crime. *Hart v. Parks*, 450 F.3d 1059,
19 1065-66 (9th Cir. 2006). Probable cause may exist even though there is some room for
20 doubt. *Lorenson v. Superior Court*, 35 Cal.2d 49, 57 (1950).

21 That Chief Garcia had probable cause to direct the detention and questioning of
22 Plaintiffs is established clearly by his Declaration. The numerous suspicious acts
23 observed by Chief Garcia are recited within the Declaration. Whether or not Chief
24 Garcia's suspicions proved to uncover a crime is not the pivotal question. As set forth
25 above, the pivotal question only concerns whether a reasonable person would believe,
26 based on Chief Garcia's observations, that he had probable cause to suspect the
27 commission of a crime, and he most certainly did.

1 The probable cause established by Chief Garcia extends to the State Defendants,
2 McDaniel, Phillips, Nejo and Loomis. The “collective knowledge” doctrine illustrates
3 this proposition. This doctrine holds that probable cause can be established by the
4 “collective knowledge” of other officers. In other words, the officer making a stop, or
5 Detectives McDaniel and Phillips in this situation, need not personally know all the
6 precise information relied upon by the other officers, or in this instance, the tribal police.
7 *See, United States v. Sandoval-Venegas*, 292 F.3d 1101 (9th Cir. 2002); *United States v.*
8 *Butler*, 74 F.3d 916, 921 (9th Cir. 1996); *People v. Ramirez*, 59 Cal. App. 4th, 1548
9 (1997). Where law enforcement authorities are cooperating in an investigation the
10 knowledge of one is presumed shared by all. *Illinois v. Andreas*, 463 U.S. 765, 722 fn. 5
11 (1983). A law enforcement dispatcher’s knowledge of specific facts not passed onto the
12 officers in the field may also be considered as part of the “collective knowledge” needed
13 to substantiate a finding of “reasonable suspicion” justifying a stop. *United States v.*
14 *Fernandez-Castillo*, 324 F.3d 1114, 1124 (9th Cir. 2003).

15 The instant situation is a paradigm example of how the collective knowledge
16 doctrine applies. It is a fact of modern law enforcement that the use of multi-agency task
17 forces are extremely common. Here, the State Defendants were simply assisting a tribal
18 investigation and, as part of that investigation, Chief Garcia communicated, through Sgt.
19 Baxley, to the State Defendants, that he had probable cause to believe that a crime was
20 being committed. Therefore, the individual State Defendants, McDaniel, Phillips, Nejo
21 and Loomis, did not need to personally be aware of all of the specific information relied
22 upon by Garcia in determining that there was probable cause. Moreover, as set forth in
23 Chief Garcia’s Declaration, ultimately, he obtained a search warrant from the Tonto
24 Apache Tribal Court. Thus, the Tribal Court was satisfied that there was probable cause
25 to detain and search the Plaintiffs. (SOF ¶ 5). Having said that, it is a matter of fact that
26 none of the State Defendants did anything with any of the Plaintiffs’ property except for
27 placing Plaintiff Abel’s pocket contents on a table in front of him. (SOF ¶ 8).

1 B. The State Defendants' Actions were Performed Under Color of Tribal Law
 2 and not State Law.

3 At no point in Plaintiffs' motion do they even allege that Defendant McDaniel
 4 was acting under color of State law. Plaintiffs simply move directly unto a discussion of
 5 Fourth Amendment law without even establishing the fundamental requirement of 42
 6 USC § 1983, namely, that the Defendants' conduct was undertaken under the color of
 7 State law. Here, the Declaration of Carlos Garcia establishes that the entire investigation
 8 was undertaken by the Tribal police, including obtaining a search warrant from the
 9 Tribal Court. "No action under 42 USC § 1983 can be maintained in federal court for
 10 persons alleging deprivation of constitutional rights under color of tribal law." *R.J.*
 11 *Williams Co. v. Ft. Belknap Housing Authority*, 719 F.2d 979, 982 (9th Cir. 1983)
 12 (emphasis added).

13 In this case, there is no evidence that the State Defendants had any knowledge of
 14 the details of Chief Garcia's investigation nor did they participate in that investigation.
 15 Their only purpose was to detain Mr. Abel and for Lt. Nejo to question the three
 16 Plaintiffs. This was all directed by and requested by Chief Garcia. (SOF ¶ 5.)¹

17 As is clear from Detective McDaniel's Affidavit, at no time did any of the State
 18 Defendants either state or do anything to suggest that they were trying to enforce a State
 19 law. To the contrary, everything that was done and said to the Plaintiffs conveyed that
 20 the State Defendants were merely assisting an ongoing tribal investigation. As set forth
 21 above, this ultimately lead to the Tribal Court issuing a warrant. Therefore, this, by
 22 itself, supports summary judgment for the State Defendants on the federal claims.

23 C. The State Defendants are Protected by Qualified Immunity.

24 As recognized in the pertinent case law, officers are protected by qualified
 25 immunity, which allows that officers might make mistakes and if they were held liable
 26 for reasonable mistakes, their ability to enforce the law would be paralyzed. *Mueller v.*
 27 *Auker*, 576 F.3d 979, 993 (9th Cir. 2009). As discussed above, with respect to the

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¹ Neither Officer McDaniel nor Officer Phillips was even wearing a DPS uniform at the time which is also critical to the Court's analysis. See *Huffman v. Cnty of Los Angeles*, 147 F.3d 1054, 1058 (9th Cir. 1998).

1 probable cause line of cases, the relevant question is simply whether a reasonable officer
2 would understand in light of all of the circumstances whether or not Plaintiffs'
3 constitutional rights were being violated. *See, Anderson v. Creighton*, 483 U.S. 635, 640
4 (1987).

5 Based upon the collective knowledge doctrine and the case law, this qualified
6 immunity applies not just to officers, like Chief Garcia, who make the initial
7 determination of probable cause, but also to other officers who reasonably, but even
8 mistakenly, conclude that probable cause exists. *See, Hunter v. Bryant*, 502 U.S. 224,
9 227 (1997). Again, this is yet another argument that, in itself, protects the State
10 Defendants from liability on the federal claims.

11 D. The State Law Claims.

12 Under Arizona law, specifically *Landeros v. City of Tucson*, 171 Ariz. 174, 831
13 P.2d 850 (App. 1992), the State Defendants are immune from mere negligence. Also,
14 pursuant to *Marlowe v. Pinal County*, 2008 W.L. 4264724 (D. Ariz., September 15,
15 2008) Arizona courts do not recognize a claim of "negligent detention or arrest."
16 Therefore, without gross negligence, the State Defendants cannot be liable for the
17 negligence, false imprisonment and battery claims.

18 Here, Plaintiffs have presented absolutely no evidence to demonstrate anything
19 approaching gross negligence. To the contrary, all of the evidence suggests that Officers
20 McDaniel and Phillips, and Gaming Officers Nejo and Loomis, acted reasonably and that
21 they reasonably relied upon information imparted either directly by Chief Garcia or by
22 Sgt. Baxley, who first received his information from Chief Garcia.

23 With respect to the conversion and trespass to chattels claims, the State
24 Defendants cannot be said to have "illegally assumed ownership" of any of the
25 Plaintiffs' property. *See, Autoville Inc. v. Friedman*, 20 Ariz. App. 89, 91, 510 P.2d 400,
26 402 (1973). Further, in this case, the only Plaintiff who the State Defendants had any
27 contact with physically or whose property the State Defendants actually touched, was
28 Plaintiff Abel. By simply putting the contents of Mr. Abel's pockets on a table in front

1 of him and then no longer having anything to do with that property, the State Defendants
2 cannot be said to have illegally assumed ownership of Mr. Abel's property. Simply put,
3 there is no evidence to support claims for conversion and/or a trespass to chattels with
4 respect to the State Defendants.

5 Finally, Plaintiffs have a defamation claim which also has been unsupported by
6 anything in the record. There has been no showing that any of the State Defendants
7 made a "false and defamatory statement" concerning one of the Plaintiffs. This is
8 required by *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 636 P.2d 1257 (App.
9 1981). It has not even been pled in Plaintiffs' Complaint or Amended Complaint that
10 any of the State Defendants made a false and defamatory statement about the Plaintiffs.

11 CONCLUSION.

12 For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment
13 should be denied and instead, summary judgment should be granted on behalf of each of
14 the State Defendants, McDaniel, Phillips, Nejo and Loomis, on all of the Plaintiffs'
15 claims, both federal and state, because there is no genuine issue of material fact and the
16 State Defendants are entitled to Judgment as a matter of law.

17 DATED this 5th day of July, 2013.

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