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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN P. ANDERSON, in his official capacity as the Sheriff of Madera County, and individually, Plaintiff, v. JACK DURAN, JR., in his purported official capacity as Judge of the Picayune Rancheria of the Chukchansi Indians Tribal Court; DONNA HOWARD, in her purported official capacity as Clerk of the Picayune Rancheria of the Chukchansi Indians Tribal Court; THE PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian Tribe; CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, a wholly owned unincorporated entity of the Picayune Rancheria of the Chukchansi Indians; and CHUKCHANSI INDIAN HOUSING AUTHORITY, a wholly owned unincorporated entity of the Picayune Rancheria of the Chukchansi Indians, Defendants.	CASE NO. 3:13-cv-04825-RS [Action filed: 10-17-13 Case Assigned to: Hon. Richard Seeborg Courtroom 3] **PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT** **[Oral Argument Requested]** Hearing Date: July 11, 2014 Time: 1:30 p.m. Courtroom: 3 Judge: Hon. Richard Seeborg

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REGGIE LEWIS, in his purported official capacities as chairman of the Picayune Rancheria of the Chukchansi Indians; a representative of the Chukchansi Economic Development Authority; and a representative of the Chukchansi Indian Housing Authority;
CHANCE ALBERTA, in his purported official capacities as vice chairman of the Picayune Rancheria of the Chukchansi Indians; a representative of the Chukchansi Economic Development Authority; and a representative of the Chukchansi Indian Housing Authority;
CARL BUSHMAN, in his purported official capacities as a council member of the Picayune Rancheria of the Chukchansi Indians; a representative of the Chukchansi Economic Development Authority; and a representative of the Chukchansi Indian Housing Authority;
IRENE WALTZ, in her purported official capacities as a council member of the Picayune Rancheria of the Chukchansi Indians; a representative of the Chukchansi Economic Development Authority; and a representative of the Chukchansi Indian Housing Authority;
LYNN CHENOT, in her purported official capacities as a council member of the Picayune Rancheria of the Chukchansi Indians; a representative of the Chukchansi Economic Development Authority; and a representative of the Chukchansi Indian Housing Authority;
DAVID CASTILLO, in his purported official capacities as a council member of the Picayune Rancheria of the Chukchansi Indians; a representative of the Chukchansi Economic Development Authority; and a representative of the Chukchansi Indian Housing Authority; and
MELVIN ESPE, in his purported official capacities as a council member of the Picayune Rancheria of the Chukchansi Indians, a representative of the Chukchansi Economic Development Authority; and a representative of the Chukchansi Indian Housing Authority.

Defendants.

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I. INTRODUCTION

This action was filed by the Sheriff under extreme and dire circumstances. Sheriff Anderson was attempting to keep the peace between two heavily armed factions that were engaged in relentless hostilities in their efforts to gain control of the Tribe and its assets. The TRO issued by Judge Duran against the Sheriff, seeking to preempt the Sheriff's jurisdiction, mandated that the Sheriff "investigate" the Lewis Faction's political opponents and report his findings to Defendant Lewis and his supporters. The TRO prohibited the Sheriff from communicating with members of the competing faction, which communication was necessary to prevent further violence. The TRO also unlawfully interfered with the Sheriff's law enforcement discretion and activities by prohibiting the Sheriff from threatening to arrest employees of the Lewis Faction's armed security force, irrespective of whether those armed individuals have or are about to engage in criminal activity. Judge Duran issued the TRO against the Sheriff without notice, or the opportunity to be heard. By issuance of the temporary restraining order and preliminary injunction by this Court, the Sheriff has been able to reassert his jurisdiction and authority on the Rancheria. These orders of the Court have assisted the Sheriff in keeping the peace.

This litigation has been extremely costly and burdensome to Sheriff Anderson and the County. But the need for law, order and peace on the Rancheria is paramount. The Sheriff is not requesting that this Court determine who makes up the tribal council or the tribal court. The Sheriff is seeking what he has sought since the inception of this case: (1) a declaratory judgment that the Tribe, CEDA, CIHA, tribal court, and the individual Defendants have no jurisdiction over him and (2) a permanent injunction providing that Defendants are enjoined from conducting any further tribal court hearings against the Plaintiff, his employees, officers and officials, in addition to the relief listed in Section VI below.

Defendants' Opposition to Plaintiff's Motion for Summary Judgment ("Plaintiff's MSJ" or "Plaintiff's Motion") is essentially a reformatted and shorter version of their Motion for Judgment on the Pleadings ("MJP"). Defendants' Opposition to Plaintiff's MSJ ("Defendants' MSJ Opposition") fails, both factually and legally, for many of the same reasons already extensively addressed in Plaintiff's Opposition to the MJP ("Plaintiff's MJP Opposition"). However, the

consequence of those failures now demonstrates that Plaintiff is entitled to the injunctive and declaratory relief that he requests.

In addressing Defendants' MSJ Opposition, Plaintiff will confirm that:

1. Summary Judgment is appropriate because there is no genuine issue of any material fact precluding Plaintiff's requested relief;

2. Sheriff Anderson's Declaration in Support of Plaintiff's Motion ("Sheriff's MSJ Declaration") is admissible, supported by Defendants' admissions, and not rebutted by contrary evidence submitted by Defendants in their Opposition;

3. By reasons of their own admissions, Defendants are estopped from denying this Court's jurisdiction and the need for Plaintiff's requested rulings;

4. This Court has jurisdiction to issue the rulings Plaintiff requests because it is not necessary to adjudicate an intra-tribal dispute;

5. Defendants have waived their sovereign immunity under the 2007 MOU; and

6. This case is not moot.

II. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF PLAINTIFF AS THERE IS NO GENUINE ISSUE OF MATERIAL FACT AND PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Defendants have failed to identify a material issue precluding Plaintiff's requested relief. Summary judgment is appropriate where the Court is satisfied that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed.R.Civ.Pro. 56(a).) Although the moving party bears the initial burden of showing that summary judgment is appropriate, once such showing is made, the burden shifts to the party opposing the motion to produce evidentiary materials that demonstrate the existence of a genuine issue. (Fed.R.Civ.Pro. 56(c); *See Celotex*, *supra*, 277 U.S. at 324.) The means that the party opposing the motion "may not rest upon the mere allegations or denial of his pleading, but…must set forth **specific facts** showing that there is a genuine issue for trial." (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (internal quotations omitted) (emphasis added).) "By its very terms, this standard provides that the mere existence of *some* alleged factual

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dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." (*Id.* at 247-48 (emphasis in the original).) Defendants have not met this burden.

In Defendants' MSJ Opposition, Defendants present **no specific facts** to overcome Plaintiff's Motion. Instead, Defendants rely on conclusory statements that the facts presented in Plaintiff's Motion are disputed. Specifically, Defendants claim that "there are several disputed facts that would affect the *Montana* analysis. These facts include the extent to which the intergovernmental agreement may constitute a consensual relationship between the County and the Tribe sufficient to satisfy the first *Montana* exception." (Defendants' MSJ Opp., 6:8-10.) Next, Defendants allege that "[i]n addition, several disputed facts concern the extent to which the Sheriff's alleged conduct threatened or directly affected the political integrity and welfare of the tribe, particularly given that the competing factions disagree over whether the Lewis Faction was in fact the Tribe's governing body." (Defendants' MSJ Opp., 6:13-16.) Finally, Defendants contend "subject-matter jurisdiction is not established, and is disputed by Defendants." (Defendants' MSJ Opp., 11:1-2.) Nowhere in their Opposition however, do Defendants present any **specific facts** supporting these propositions. Instead, Defendants rely on blanket assertions that the facts are disputed. Without more, Defendants have not raised a "genuine issue" necessary to overcome Plaintiff's Motion.

To the extent Defendants attempt to use the Declaration of James Qaqundah[1] in Support of Defendants' Opposition to the Motion for Summary Judgment ("Qaqundah Decl."), such efforts are unhelpful. In the Opposition, Defendants intentionally mislead the Court regarding the content of the letter from the Honorable Tom Wheeler, a member of the Board of Supervisors of Madera County, to the Interior Board of Indian Appeals ("IBIA"), dated March 6, 2014. Defendants write:

[1] Attached to the Declaration are the following two exhibits: (1) March 6, 2014 letter from Hon. Tom Wheeler to the Interior Board of Indian Appeals ("Wheeler Letter"), and (2) March 26, 2014 IBIA Order ("IBIA Order") to which the Wheeler Letter was attached. Because Defendants do not address the IBIA in Defendants' Opposition, Plaintiff similarly will not address the IBIA Order herein.

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> At the same time, however, the County of Madera has taken steps to delay a decision that would address the public exigency caused by the intra-Tribal dispute in the very forum with jurisdiction over the matter, the Interior Board of Indian Appeals ("IBIA"), communicating to the IBIA that the circumstances surrounding the intra-Tribal dispute do not require an immediate decision by the Department of the Interior.[1] *See See* (sic) Letter, dated March 6, 2014, from Madera County Supervisor Tom Wheeler to the Interior Board of Indian Appeals, Declaration of James Qaqundah in support of Defendants' Opposition to the MSJ ("Qaqundah Declaration"), Exhibit A. (Opposition 2:7-14.)

A plain reading of the letter reveals that Supervisor Wheeler made no request to delay the decision by the Department of the Interior. Supervisor Wheeler merely provided the IBIA with his opinion regarding violence, or lack thereof, on the Rancheria. Supervisor Wheeler stated that at present, there has been no violence on the Rancheria. Supervisor Wheeler is not apprised of all of the information the Sheriff has regarding threats of violence or potential violence at the Rancheria, the government buildings and the Casino. (Declaration of John Anderson in Support of Plaintiff's Reply to Defendants' Opposition to the Motion for Summary Judgment ("Sheriff's Reply Decl."), ¶7.) Investigative and security records created for law enforcement purposes by the Sheriff's Department are confidential and exempt from disclosure under the California Public Records Act. (Id.) Indeed, Plaintiff seeks relief to KEEP the peace. Nowhere through evidence, nor argument, do Defendants rebut any of Plaintiff's positions, much less overcome their own admissions as to the level of tension on the Rancheria. Defendants present no facts to rebut the well supported conclusions that there is great need for this Court's rulings now requested and the positive effect on keeping the peace that will result therefrom. Defendants' ignoring their own statements and the other evidence submitted by Plaintiff does not create a disputed fact. Because Defendants have failed to present any specific facts to overcome Plaintiff's Motion, the Motion should be granted in favor of Plaintiff.

III. SHERIFF ANDERSON'S MSJ DECLARATION IS ADMISSIBLE EVIDENCE SUPPORTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants fail to contradict any of Plaintiff's evidence. Instead, Defendants object to the "majority of the Declaration of Madera County Sheriff John P. Anderson in Support of Plaintiff's Motion for Summary Judgment (Dkt No. 162)" as constituting inadmissible evidence to support

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Plaintiff's Motion. (Defendants' MSJ Opp., 4:17-19.) Specifically, Defendants claim that the facts alleged in his declaration are: (1) irrelevant; (2) based on speculation or otherwise not based on personal knowledge; (3) based on hearsay; or (4) legal arguments or conclusions. Such objections are unfounded.

Pursuant to Federal Rule of Civil Procedure 56(c)(4), a "declaration used to support…a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the…declarant is competent to testify on the matters stated." Sheriff Anderson has met this burden. Sheriff Anderson is, and has been for over fifteen (15) years, the Sheriff of Madera County. (Declaration of Madera County Sheriff John P. Anderson In Support of Plaintiff's Motion for Summary Judgment ("Sheriff's MSJ Decl."), ¶¶ 1, 21.) Sheriff has been in law enforcement for over fifty (50) years. (Sheriff's Reply Decl., ¶ 3.) As Sheriff, Sheriff Anderson has the duty and responsibility to provide law enforcement services both on and off the Rancheria pursuant to Public Law 280 ("PL 280") and as such has been operating pursuant to, and is familiar with PL 280 and the duties arising thereunder. (Sheriff's MSJ Decl., ¶ 3.) Sheriff Anderson is therefore more than competent to testify to, and has personal knowledge of, his responsibilities under PL 280 and how the current controversy affects those duties.

In addition, notwithstanding his experience as a law enforcement officer, Sheriff Anderson was also present in the courtroom on November 22, 2013 when Defendants failed to accept Plaintiff's open court offer to dismiss this lawsuit without prejudice, if, *inter alia*, the Lewis Faction dismisses its tribal court action with prejudice. (Sheriff's MSJ Decl., ¶ 15.) Defendants' refusal of this offer made clear to Sheriff Anderson that the Lewis/Reid Faction Tribunal maintains that it has jurisdiction over Sheriff Anderson and as such must work with the fear and expectation of again being illegally hauled into tribal court for exercising his lawful duties. (Sheriff's MSJ Decl., ¶¶ 15, 16.) These opinions are not based on mere speculation or conjecture, but Defendants' own assertions to Sheriff Anderson and his counsel. As such, Plaintiff has the right and obligation to express his opinion and concern over the growing escalation of violence on the Rancheria as his law enforcement duties with regard to such violence will be directly impacted by this Court's ruling. Any objections based on lack of personal knowledge should therefore be overruled.

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Moreover, as previously mentioned, the hostility between the tribal court factions directly implicates Sheriff Anderson's law enforcement duties under PL 280 and the 2007 MOU, the subject matter of this lawsuit. Therefore, to the extent Sheriff Anderson's opinion describes the ongoing and escalating violence on the Rancheria, such opinions are certainly relevant to the current dispute. Defendants' mere conclusion that such facts implicate an intra-tribal dispute does not render Sheriff Anderson's declaration irrelevant, but in fact supports his contention that a formal ruling by this Court is necessary. (*See* Defendants' MSJ Opp., 4:22-26.) Any objection based on irrelevance as related to this discussion should therefore be overruled.

Finally, Sheriff Anderson has reviewed all evidence on which he bases his declaration and the facts asserted therein. (Sheriff's MSJ Decl., ¶23.) To the extent any out of court statement is addressed, it is not being used for the truth of the matter asserted, but merely to provide a background for Sheriff Anderson's opinions. (*Id*.) Such opinions however, are his own, and based on his personal knowledge and experience. Additionally, there is no doubt that Sheriff Anderson qualifies as an expert witness under Fed. R. Evid. § 702.[2] As such, he is entitled to both give his opinion and rely upon hearsay evidence when doing so. (Fed. R. Evid. § 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted").) Therefore, any hearsay objection should also be overruled.[3]

[2] A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. (Fed. R. Evid. § 702.)

[3] Insofar as the Anderson MSJ Declaration contains any legal arguments or conclusions, such does not detract from the overall admissibility of his testimony. To the extent the Court feels these sentences should be stricken, the rest of his Declaration remains based on his personal knowledge and experience, and the evidence presented therein is therefore admissible.

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IV. DEFENDANTS ARE ESTOPPED FROM MAKING ASSERTIONS CONTRARY TO THOSE THEY HAVE MADE THROUGHOUT THE LITIGATION IN THEIR PLEADINGS, TO THIS COURT, TO THE PUBLIC, AND TO THE TRIBE

The courts have routinely held that "[f]actual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them." (*American Tile Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (citations omitted).) Furthermore,

> [U]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court. Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well." *Ferguson v. Neighborhood Housing Services.*, 780 F.2d 549, 551 (6th Cir.1986) (citations omitted). "Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *In re Fordson Engineering Corp.*, 25 B.R. 506, 509 (Bankr.E.D.Mich.1982). (Id.)

Courts today still rely upon the opinion of the United States Supreme Court rendered in 1880 regarding judicial admissions. "We must treat [judicial admissions] as the "clearest proof." *Trinidad y. Garcia v. Thomas*, 683 F.3d 952, 982 (9th Cir. 2012), citing *Oscanyan v. Arms Company* 103 U.S. 261, 263 (1880).)

As set forth in the Declaration of Lena D. Wade in Support of Plaintiff's Opposition to Defendants' MJP ("Wade's Opposition Declaration"), Defendants are now making statements in their Opposition and MJP that are contrary to statements already admitted and/or made by Defendants in the litigation pending before this Court. As discussed by Plaintiff in exhaustive detail in Plaintiff's Opposition to the MJP (pgs. 9-11), by their earlier admissions, Defendants are estopped from denying jurisdiction and otherwise objecting to Plaintiff's requested rulings of this Court by now claiming that: (1) Defendants are NOT the Tribal Entities; (2) Defendants are NOT the tribal council; (3) the Lewis Faction tribal court is NOT the Tribe's tribal court; (4) Defendants Duran and Howard, respectively, are NOT the judge and clerk of the tribal court; (5) there is NOT an ongoing threat of violence at the present time; (6) the 2007 MOU/Settlement Agreement are NOT applicable to this dispute; and (7) that this Court does NOT have jurisdiction.

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V. THIS COURT HAS JURISDICTION OVER DEFENDANTS

A. This Court Has Jurisdiction Under *National Farmers* Because the Court's Decision Does Not Require a Preliminary Determination Regarding the Legitimacy of the Lewis Faction Tribunal, and Because Plaintiff Has Exhausted His Tribal Court Remedies

In *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985), the Supreme Court of the United States unequivocally established "that a federal court may determine under [28 U.S.C.] §1331 whether a tribal court has exceeded the lawful limits of its jurisdiction." Defendants attempt to escape this jurisdictional grant through the vigorous repetition of a flawed argument. They assert that this Court lacks jurisdiction "because it cannot determine that the Lewis Faction Tribunal was a Tribal court or other Tribal entity during the times relevant to this Complaint." (Defendants' MSJ Opp., 11:14-16.) And as if by saying it they could make it so, they immediately then reassert that "[t]his Court lacks jurisdiction to determine whether the Lewis Faction Tribunal is a legitimate Tribal entity because such a determination would require the Court to adjudicate an internal Tribal leadership dispute." (Defendants' MSJ Opp., 11:23-25.)

Defendants' argument misses the mark. First, as stated above, *National Farmers* established a federal court's authority to decide the outer limits of a tribal court's jurisdiction over non-Indians. (*National Farmers*, *supra*, 471 U.S. at 853.) This is precisely what Plaintiff is asking this Court to decide – that the outer limits of a tribal court cannot reach the activities of the Sheriff of Madera County. Second, this determination does not hinge on the adjudication of an intra-tribal dispute. Plaintiff is not seeking a decision that the Lewis Faction Tribunal is legitimate. Rather, Plaintiff is seeking, as even Defendants understand,[4] an order that **no** tribal court has jurisdiction over him – such an order does not depend upon a preliminary decision as to the legitimacy of the Lewis Faction Tribunal.

[4] See Defendants' MSJ Opposition, 12:2-7.

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Like their arguments, the case law Defendants cite also misses the mark. In their MJP,[5] which Defendants repeatedly refer to in their Opposition, they rely on *Picayune Rancheria of Chukchansi Indians v. Henriquez*, 2013 WL 6903750. That case is inapposite here.

In *Henriquez*, the court enumerated the three requirements of standing: injury-in-fact, a causal connection between that injury and the defendant's conduct, and redressability. (*Henriquez, supra*, at 3.) In that case, the United States Department of Housing and Urban Development (HUD), after being contacted by each of the three fighting factions of the Rancheria, each claiming legitimacy, denied access to Line of Credit Control System (LOCCS) to all current users because "[t]he BIA advised HUD that the intra-tribal dispute was currently the subject of an appeal and that…there was no final BIA determination regarding the appropriate tribal government." (*Id*., at 2.) As such, the court concluded that "Plaintiffs have suffered injury from HUD's action, and their injury will be redressed by the Court's order, only if Plaintiffs are the rightful representatives of the tribe." (*Id.*, at 3.) Consequently, the very existence of an injury in *Henriquez* was contingent on Plaintiffs' right to rule, and thereby on the resolution of an intra-tribal dispute. (*Ibid.*) That is not the case here. In this instance the Court need not decide **which** faction can assert jurisdiction over Plaintiff, but that **no** faction can do so. That **no** faction can assert jurisdiction over Plaintiff is a determination that is independent of the adjudication of which tribal faction has the right to govern. Therefore, the concerns that animated the court's decision in *Henriquez* are absent here.

Defendants also point out that *National Farmers* requires the exhaustion of tribal court remedies before proceeding to the federal courts. (See *National Farmers, supra,* 471 U.S. at 857.) However, in this instance, there were no additional tribal court remedies available to Plaintiff, and

[5] Defendants also cite to *Ransom v. Babbitt*, 69 F.Supp.2d 141 (D.D.C. 1999) and *Alturas Indian Rancheria v. Salazar*, 2011 WL 587588, at *2n.1 (E.D. Cal. Feb. 9, 2011) in the Opposition. These cases' only relevance here is in their brief acknowledgement of the undisputed proposition that a federal court cannot decide an intra-tribal dispute. Otherwise, these cases are simply inapplicable here. In *Babbitt*, Indian tribal leaders sued the United States under Administrative Procedures Act, alleging wrongful refusal to recognize leaders as tribe's legitimate government. The court granted plaintiffs' motion for summary judgment because defendants' actions were arbitrary, capricious and contrary to law. In *Alturas*, A federally recognized Indian tribe filed an action against the United States relating to a contract renewal request submitted by plaintiff pursuant to the Indian Self–Determination and Education Assistance Act. The court was considering a motion to intervene filed by another faction of the Alturas Indian Rancheria.

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proceeding to the federal courts was therefore proper.[6] Moreover, although Plaintiff did exhaust available tribal remedies, *Nevada v. Hicks*, 533 U.S. 353, 369 (2001) makes clear that he was not required to do so. In *Nevada v. Hicks*, the U.S. Supreme Court held that because tribal courts clearly lack jurisdiction over state officials for causes of action relating to performance of their official duties, adherence to the tribal exhaustion requirement would serve no purpose other than delay and was therefore unnecessary. (*Ibid*.)

B. Defendants Have Waived Their Sovereign Immunity Under the 2007 MOU

Defendants argue that this action does not arise under the 2007 MOU or Settlement Agreement. As stated in the Declaration of Lena D. Wade filed in support of the Reply to Defendants' Opposition to Plaintiff's MSJ ("Wade's Reply Declaration"), Plaintiff has exhaustively briefed the issue of the 2007 MOU and Settlement Agreement. (¶9.) As Plaintiff has argued, the 2007 MOU, the Settlement Agreement and the limited sovereign immunity waiver therein are applicable in this case. Defendants argue that "the 2007 MOU did not provide the Sheriff with any authority or responsibility to provide law enforcement to the Tribe's Rancheria." (Defendants' MSJ Opp., 13:1-2.) That clearly is not what the 2007 MOU states.

Paragraph 2.1 of the 2007 MOU states that the "Tribe...acknowledges that assistance from the Madera County Sheriff's Department ("MSO") may be required from time to time with respect to the apprehension and arrest of persons engaged in suspected criminal activity." Paragraph 2.1 of the 2007 MOU is a broadly written provision that contemplates that the Tribe generally will require assistance from the Sheriff.

Moreover, the Lewis Faction's Lawsuit specifically includes allegations arising out of law enforcement services the Sheriff provided at the casino. The Lewis Faction's verified tribal court complaint, which is the basis for this litigation, makes it clear the 2007 MOU is applicable in this case. (See Exhibit 48 attached to Decl. of Sheriff Anderson In Support of Motion for Summary Judgment.) As identified in Plaintiff's earlier filings, the Lewis Faction's verified tribal court complaint is replete with allegations regarding the failure of the Sheriff to

[6] The Tribe's rules do not provide for any appellate process. Plaintiff filed a motion contesting the court's jurisdiction, which Defendant Duran denied as to Sheriff Anderson. Given that Sheriff Anderson had no appellate remedy, he exhausted all available tribal remedies.

"appropriately" render law enforcement services at the casino and elsewhere. Defendants' argument that the 2007 MOU applies only to the Sheriff's actions at the casino does not defeat Plaintiff's argument that the 2007 MOU is applicable in this action. The 2007 MOU is applicable under both the Sheriff's broader interpretation and Defendants' more narrow interpretation of the 2007 MOU and Settlement Agreement.

VI. THIS CASE IS NOT MOOT BECAUSE PLAINTIFF HAS NOT RECEIVED ALL THE RELIEF REQUESTED AND BECAUSE DEFENDANTS CANNOT MEET THE HEAVY BURDEN OF PERSUASION THAT THE CHALLENGED CONDUCT THEY HAVE VOLUNTARILY CEASED CANNOT RECUR

Although their mootness argument is long-winded, the crux of it is this: Plaintiff cannot seek relief in this Court because he has already received all the relief he has asked for.[7] But in the same breath, Defendants state that "Plaintiff seeks a permanent injunction enjoining Defendants from taking any action to re-file or prosecute the Lewis Faction Lawsuit in a tribal court."[8] Thus, just one paragraph after arguing that Plaintiff has received all the relief he has asked for, Defendants contradict the crux of their mootness argument by pointing out relief that Plaintiff has asked for which he has not yet received. In fact, Sheriff Anderson actually requested the following relief in the Complaint he filed with this Court:

(a) Declaratory judgment that the Tribe, CEDA, CIHA, the tribal court, and the individual Defendants have no jurisdiction over Plaintiff in any tribal court of the Tribe with respect to the claims and matters as alleged in the Lewis Faction Lawsuit;

(b) Declaratory judgment that all orders of Defendant Duran issued in the Lewis Faction Lawsuit are without force or effect and otherwise issued without jurisdiction and are void;

(c) Such other and further declaratory judgments consistent with the contentions and allegations of Plaintiff as set forth in his Complaint and as are otherwise necessary and consistent therewith;

(d) For a temporary restraining order and preliminary and ultimately a permanent injunction providing that Defendants, their officers, agents, servants, employees, and attorneys,

[7] See Defendants' MSJ Opposition, 14:7, 15:1-2; 16:6-7; 17:10-12.
[8] See Defendants' MSJ Opposition, 14:9-11.

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and all persons acting by, through, under, or in concert with Defendants are enjoined from proceeding with the Lewis Faction Lawsuit against Sheriff Anderson. Furthermore, Defendants shall not conduct any further tribal court hearings against the Plaintiff herein in which the County, the Sheriff or their employees, officers, officials, elected or appointed board members, agents or attorneys are named in any manner as Defendants or real parties in interest. Defendants shall not entertain, order, issue, enforce or attempt to enforce any order, judgment ruling or decree of any kind against Plaintiff or his employees, officers, officials, elected or appointed board members, agents or attorneys;

(e) The TRO issued against Plaintiff Anderson by Defendant Duran on or about August 6, 2013, is void and of no effect;

(f) Defendants are to immediately vacate the TRO issued against Plaintiff;

(g) Within five business days from the date of this order, Defendants Duran and Howard shall serve and file a declaration verifying that they have complied with this order; and

(h) For such other and further relief as the Court deems just and proper.

Sheriff Anderson has not yet been granted the declaratory relief he seeks.

Defendants cite to *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (2007) and summarily conclude that "[t]he Lewis Faction Lawsuit was the only action filed against the Sheriff by the Lewis Faction, in tribal court or otherwise. Accordingly, the 'extreme remedy' of a pre-filing order is inappropriate here."[9] But, as explained above, Plaintiff does not seek such an order. Moreover, assuming that was the case, Defendants focus solely on the number of actions at issue, without even touching upon the Ninth Circuit's four factor test for pre-filing orders.[10] Consequently, Defendants first contradict the crux of their mootness argument by pointing out relief that Plaintiff has not received while ignoring all the relief Plaintiff actually seeks and has not yet received, and then summarily conclude such relief is inapplicable without even the slightest effort to evaluate the necessary four factors to support that conclusion.

[9] See Defendants' MSJ Opposition, 14:18-20.

[10] See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (2007).

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Such failures are in addition to ignoring the law cited to by Plaintiff in his Opening Brief. Defendants' failure to address the authorities cited in Plaintiff's Motion should be treated as concessions or admissions of the points made by Plaintiff in relying on such authorities. (Please see Wade's Opposition Declaration, ¶ 12, for a list of points and authorities addressed in Plaintiff's Motion which Defendants have simply ignored in their Opposition.)

Additionally, the most important part of Defendants' mootness argument is not what it says, but rather what it fails to say. As Plaintiff has already stated in Plaintiff's MSJ, "[v]oluntary cessation of challenged conduct moots a case, however, only if it is '*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." (*Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (emphasis in the original), citing *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968).) "And the 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." (*Adarand, supra*, 528 U.S. at 222 (emphasis in the original), citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000).)

In this instance, Defendant's dismissal of the Lewis Faction Lawsuit and the TRO issued by Judge Duran on August 6, 2013 constitutes voluntary cessation of their assertion of jurisdiction over Plaintiff. This voluntary cessation would only moot this case if Defendants met their heavy burden of persuasion by demonstrating that the challenged conduct cannot start up again. Defendants cannot meet this heavy burden; in fact, the dismissal without prejudice tends to point to the contrary.[11] Equally telling is the Lewis Faction's refusal to dismiss with prejudice despite the Plaintiff's open court offer to waive attorney's fees.

The present case is far from moot. This is supported not only by the Defendants' failure to meet the heavy burden of persuasion that their challenged conduct cannot recur, but also by

[11] Defendants assert that the dismissal without prejudice was prompted by a desire to reserve the right to bring possible actions against Plaintiff in the federal courts. See Defendants MJS Opposition 15:2-9. Without addressing the truthfulness or lack thereof of this assertion, this assertion alone cannot meet the heavy burden of persuasion standard imposed by the Supreme Court of the United States in *Adarand, supra.*

Defendants' own statements and actions as cited to by Plaintiff, and Defendants' failure to rebut through any evidence submitted, the state of affairs now existing in Madera County.

VII. CONCLUSION

In bad faith and under the direction and assistance of well-experienced Indian Law counsel, Defendants commenced this legal battle with the filing of their verified complaint in a tribal court, alleging Plaintiff was subject to and had violated the Constitution, laws, ordinances and customs of the Tribe, seeking both $5 million in damages and injunctive relief. Having earlier armed themselves and engaged in violence quelled by Plaintiff, Defendants obtained, without notice or an opportunity to be heard, a temporary restraining order thereby seeking to intimidate, limit, control and direct a California Sheriff in his law enforcement duties, in violation of laws of the United States and the State of California. In so doing, Defendants took action contrary to well established law set forth by the United States Supreme Court, the Ninth Circuit and contrary to this Court's jurisdiction and earlier Order issued by the Honorable Judge Jeremy Fogel. Since that time, both in these proceedings and out, their unrestrained conduct and positions demonstrate that Defendants effectively assert they are above the law.[12]

The matters before this Court are not hypothetical; nor are they moot. Real lives are at stake. The potential for violence created by Defendants' behavior is now beyond even Defendants' ability to control. Defendants have placed themselves, their security personnel, sheriff's deputies and the public at risk for further violence. The tinder box has been meticulously and deliberately created by Defendants and it will only take a spark to set it off. Volatile instability can quickly escalate into actual violence and even death, as recently demonstrated by tragic events on other California reservations.

[12] Defendants' internal leadership dispute is far from over as evidenced by the recent March 24, 2014 filing of yet another lawsuit involving the tribe and its factions. This continuing internal dispute and the behavior of the competing factions (and some of the legal counsel involved) persists in creating an environment of hostility, tension and potential violence. (See *Morgan Stanley Smith Barney LLC v. The Picayune Rancheria of Chukchansi Indians, et al.* lawsuit attached as an exhibit to the Klinedinst PC's Motion to Withdraw set for hearing along with this Motion for Summary Judgment.

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The Sheriff's job, duty and objective are to maintain law and order and prevent further violence. Sheriff Anderson's ability to keep the peace and prevent further violent outbreaks is directly contingent upon continuance of the injunctive relief granted by this Court. Indeed, prior to this Court granting injunctive relief, there had been numerous actual violent outbreaks, standoffs, threats of violence, and significant and intentional confusion regarding the Sheriff's law enforcement jurisdiction on the Rancheria. Sheriff Anderson urges this Court to aid him in his efforts to keep the peace and prevent further bloodshed by providing a permanent injunction and a clear declaration that tribal courts lack jurisdiction over the Sheriff.

This case is and has always been about preventing violence and bloodshed, and maintaining law and order. As Sheriff, Plaintiff is duty bound to enforce both Federal and State law. Sheriff Anderson cannot achieve these objectives without the aid of this Court. On behalf of himself, his officers who daily face threats they must try to control under the law, and on behalf of the public he is sworn to protect, Plaintiff respectfully requests that this Court grant his Motion for Summary Judgment and issue orders intended to prevent future violence and send a clear signal to Defendants and those many others watching this case, some already armed, that no one is above the law.

DATED this 4th day of June, 2014

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been filed electronically on this 4th day of June, 2014, and is available for viewing and downloading to the ECF registered counsel of record, if any, and has also been served by email as listed below.

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