IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT
STATE OF MINNESOTA

In Re: Trust under Little Six, Inc. Retirement Plans

Court File No. 055-95

MEMORANDUM OPINION AND ORDER

Factual Background

This matter arises from a Petition, filed in this Court on April 6, 1995, by Robert A. Burns and John Somers (hereafter, "Petitioners"), two of the four persons named as trustees (hereafter, "Trustees") in a document dated March 25, 1993, captioned "Trust Under Little Six, Inc. Retirement Plans" (hereafter, "the Trust"). Little Six, Inc. (hereafter, "LSI") is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community (hereafter "the Community") and wholly owned by the Community.

The Trust recites that it was created as a "grantor trust", to assist LSI in meeting its liability to various deferred compensation plans (hereafter, "the Plans") that had been established for the benefit of various management and highly compensated employees (hereafter, "the Beneficiaries") of LSI. Under the Trust, LSI was to deliver to the Trustees a payment schedule, pursuant to which the Trustees were to make payments to the Plans for the benefit of the Beneficiaries.

The Petition states that when the Trust was executed, the Petitioners believed that it had

been approved by the Board of Directors of LSI. The Trust instrument was signed, on behalf of LSI, by Mr. Leonard Prescott and Mr. F. William Johnson, then respectively the Chairman of the Board of LSI and the Chief Executive Officer of Little Six., Inc.. The Petitioners relate, however, that in February, 1995 they received copies of resolutions, adopted on January 12, 1995 by the Board of Directors of LSI, reciting that there was no prior action of the Board of Directors adopting or approving the Trust, that the Board declined to approve the Trust, and that the Petitioners and the other Trustees named in the Trust were directed to return to LSI all assets held by the Trust.

The Petition states that the Petitioners were of the view that some of the Beneficiaries would take the position that the Trust in fact was duly and properly approved by the Board of Directors of LSI, and the Petition recites that requests indeed had been made by some of the Beneficiaries for distribution trust assets to them. The Petition notes that these claims directly conflict with the direction of LSI to return all assets. The Petitioners state the view that if the Trust were properly approved when it was established, it now is irrevocable and its assets cannot be returned to LSI (absent circumstances which do not presently exist -- basically, LSI's insolvency), but if the Trust was not properly created it is revocable and its assets can be reclaimed by LSI.

So, the Petitioners seek the assistance of this Court. They note that section 8(a) of the Trust states that "in the event of a dispute between [LSI] and a party, Trustee may apply to a court of competent jurisdiction to resolve the dispute", and the Petitioners assert that this Court is such a Court. They request instructions from this Court with respect to whether to honor the direction of LSI to return the trust assets, or whether to honor various requests from the

Beneficiaries for distributions; they provide an accounting of their transactions, and requested an order approving their actions in the administration of the trust; and they request an order broadly discharging them from liability for actions they have taken while serving as trustees.

More or less contemporaneously with the filing of the Petition, four of the Beneficiaries -- Leonard Prescott, F. William Johnson, Peter Riverso, and Gary Gleisner[1] -- filed two civil actions in the United States District Court for the District of Minnesota, under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001 - 1500 (1994), seeking declaratory and injunctive relief against LSI and the Petitioners. They pointed out that the Federal Courts have exclusive jurisdiction to award equitable relief under ERISA, and therefore they asserted that this Court would have no jurisdiction over the disputes between the Beneficiaries and LSI as to the appropriate distributions of assets held by the Trustees.

However, on August 31, 1995 the United States District Court (Kyle, J.) held that the exclusivity of the jurisdiction of Federal Courts over ERISA matters did not extend to questions of whether an ERISA plan exists (citing International Association of Entrepreneurs of America v. Angoff, 58 F.3d 1266, 1269 (8th Cir. 1995). The District Court noted that the Beneficiaries had not attempted to exhaust their remedies in this Court, and therefore, citing National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) and Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1995), cert. denied 115 S.Ct. 779 (1995), the District Court dismissed the Beneficiaries' actions, stating that after any remedies in this Court have been exhausted the Federal Courts retain authority to review this Court's interpretations of Federal law de novo.

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[1] Subsequently, Gleisner and LSI filed a Stipulation with this Court, to the effect that Gleisner's claims had been settled and that he no longer is an interested party in these proceedings.

Procedural Developments Subsequent to Filing of Petition

Until recently this Court has regarded the issues raised by the Petition as being of a piece with the massive ongoing proceedings attending Little Six, Inc. v. Prescott and Johnson, SMS(D)C Tr. Ct. 048-94 (April 1, 1997), reversed in part, SMS(D)C Ct. App. 017-97 and 018-97 (April 17, 1998). In pleadings and briefs, that larger litigation appeared to put at issue the validity and legal effect of a wide range of actions taken, or purportedly taken, by LSI and by Leonard Prescott and F. William Johnson during their tenure as officers of LSI -- actions that included the establishment of the Trust and the Plans. It thus had seemed altogether likely that the resolution of that larger litigation necessarily would bring in train a resolution of this matter, and so, with this Court's encouragement, the Petition stood without formal response from LSI or the Beneficiaries.

But the belief that the Prescott and Johnson litigation will resolve the matters raised by the Petition now appears to be forlorn. The Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community has held that even if Mr. Prescott and Mr. Johnson did not actually have the authority to take the various actions complained of in that case, they both were officials of the Community who are entitled to qualified immunity from civil actions against them, and that the Community had not waived that immunity, even for actions brought against them by the Community itself. Little Six, Inc. v. Prescott and Johnson, SMS(D)C Ct. App. 017-97 and 018-97 (April 17, 1998). On remand, therefore, the issues which the Prescott and Johnson case now will resolve may well be different than the issues which must be decided in this one. Here, the fundamental question is not whether Mr. Prescott and Mr. Johnson could have believed in good faith that they had the authority to set up the Trust, but whether the Trust in fact was properly

and legally established under the laws of the Community.

As a result, counsel for Prescott, Johnson and Riverso very properly prodded the Court to move this matter forward, and in a telephone conference with counsel on September 24, 1998 the Court directed non-petitioning parties to file responsive pleadings by October 26, 1998. In response, Prescott, Johnson, and Riverso filed motions to intervene and to dismiss together with a supporting memorandum, and LSI filed a letter brief, urging the Court to take jurisdiction over this matter and to issue a declaratory judgment confirming the Trustees' accounts, validating their transactions, and discharging them.

The Motion to Intervene.

In support of their motion to intervene, Prescott, Johnson and Riverso contend that granting their intervention is mandated by Rule 19(a) of this Court's Rules of Civil Procedure, because each of them is so situated as perhaps to be adversely affected by a distribution of property that may be ordered by the Court; and they contend that even if their intervention is not mandated, nonetheless it is permissible under our Rule 19(b), because their claims present issues of fact and law that are common to those raised in the Petition.

Clearly, they are correct on both counts. Their financial stake in this matter is obvious: at the conclusion of this litigation and any subsequent proceedings in Federal Court, the assets that are held by the Trust, and that are the subject of the Petition, will go either to the Beneficiaries or to LSI. And the fundamental issue raised by the Beneficiaries' claim to those assets is the same as that raised by the Petitioners: under the law of the Community, was the Trust properly created?

The Motion to Dismiss

In support of their motion to dismiss, Prescott, Johnson, and Riverso make several arguments. First, they contend that the actions which the Petitioners ask this Court to rule upon are "off-reservation trust account activities", and that this Court has been given no jurisdiction over such matters, either by Ordinance 12-13-88-001, by which this Court was created, or by any subsequent action of the General Council of the Community. Second, they argue that the Petitioners mischaracterize the relief they seek as a "trust accounting" -- that what the Petitioners really seek is a declaratory judgment, and that the rules of this Court do not provide for such relief. Third, they contend that this matter is not properly pleaded--that our rules require all actions to be commenced by the filing of a Complaint (SMS(D)C R. Civ. P. 4), which must be served on all defendants (SMSC R. Civ. P. 5), who may answer or present their objections within twenty days (SMSC R. Civ. P. 8(a) and 12). Absent this framework, they contend, the rigorous exposition of facts and law that follows from case and controversy requirements is lacking.

I believe are wrong on all points. Whatever may have been the scope of the jurisdiction which this Court was given by the Community's General Council, when the Court was created in 1988 by Ordinance No. 12-13-88-001, our jurisdiction has been significantly expanded since that time. Specifically, for present purposes, I believe that sections 10.01 and 10.02 of Ordinance No. 3-27-90-003 provide sufficient jurisdiction and authority to hear this matter, if the hearing of it has not been pre-empted by ERISA. Ordinance No. 3-27-90-003 provides:

> 10.01 Jurisdiction. The jurisdiction of the Tribal Court as set forth in Shakopee Mdewakanton Sioux Community Ordinance No. 02-13-88-01 is hereby expanded to include the following:

(a) Subject matter jurisdiction over all cases, controversies and proceedings, to the maximum extent permitted by law, including, but not limited to those involving the ownership, possession, use or occupancy of Reservation lands, including without limitation all proceedings authorized by other provisions of this Ordinance; and

(b) Personal jurisdiction over all persons, to the maximum extent permitted by law, including but not limited to, lessees, occupants, guests and persons in possession of, and all persons having or claiming any interest in or right to, Reservation lands, whether Indian or non-Indian; and over all other persons who voluntarily submit themselves to the jurisdiction of the Tribal Court in actions brought by or against Community members, residents, or the Community.

10.02 Authority. With respect to matters within its jurisdiction, the Tribal Court shall have all of the inherent powers of a court of general jurisdiction in the State of Minnesota, including but not limited to the power to issue orders, injunctions, decrees, subpoenas or writs necessary to implement its decisions, the power to punish for contempt, the power to administer oaths or affirmations, the power to enforce its decisions by a personal command to the party or parties or to the Community Sheriff or other appropriate officer, and the power, in its discretion, to declare the respective rights, status and other legal relations of the parties to any action, whether or not further relief is or could be claimed.

Hence, personal jurisdiction over the Petitioners, the Trustees, and the Beneficiaries would not appear to be an issue here: the Petitioners and Trustees have contracted with LSI, a corporation wholly owned by the Community, and the Petitioners have voluntarily placed themselves before this Court. Their contacts with the Community clearly are "consensual relationships with the tribe or its members, through commercial dealing, contracts ... or other arrangements". Montana v. United States, 450 U.S. 544, at 565 (1981). So, too, are the contacts of Messrs. Prescott, Johnson and Riverso, each of whom have moved to intervene, and each of whom is a former employee of LSI who worked on the Shakopee Reservation and who is claiming benefits relating to that employment. All other Beneficiaries also are either present or former employees of LSI whose claim to the assets of the Trust would derive from their

employment on the Reservation. LSI has not yet pled, but inasmuch as it urges the Court to hear this matter, it would seem likely that the corporation will not urge that we do not have personal jurisdiction over it in this context.

And although the case's procedural posture is somewhat unusual, I do not think it requires that the matter be dismissed. The opinions of this Court have stressed the importance of a "case or controversy" to our adjudicatory process, and we have been very reluctant to grant "advisory opinions". See generally, In re Advisory Request from the Business Council -- Payment of Revenue Allocation to Thirty One Members, No. 37-094 (SMS(D)C Tr. Ct., Feb. 11, 1994). But this not a case where the Petitioners merely are requesting this Court's advice. They are the very real subject of conflicting claims made to assets which they control. And although the argument that this Court's Rules of Civil Procedure do not comprehend a pleading such as the Petition has some force, at bottom what the Petition says is simply that the Petitioners are subject to competing, incompatible claims to the same property -- the assets of the trust are being claimed by LSI and by the Beneficiaries -- and they ask this Court to sort out those claims. If the Petitioners had styled their pleading as a Complaint in Interpleader, under our Rule 18, which incorporates Rule 22 of the Federal Rules of Civil Procedure, then I think there would have been no question as to the propriety of their pleading.

Hence, I do not think that dismissal is warranted for any of the reasons stated in the motion filed by Prescott, Johnson and Riverso.

But I do think there remains a question with respect to the subject matter jurisdiction of this Court. Although the General Council has given us broad authority, we clearly cannot be given authority which the General Council does not possess. In my view, that includes authority

to adjudicate any action brought by the trustees of a plan that is subject to ERISA. Such jurisdiction appears to me to be exclusively in the Federal Courts, under 29 U.S.C. §1132(e) (1994). So, if the Trust is subject to ERISA, I think this Court likely has no jurisdiction to grant the Trustees any relief.

LSI has argued that even if the Trust was properly created, still ERISA would not apply to it because the assets of the Trust would not be considered "plan assets" under ERISA because, pursuant to the Trust instrument, the Trust's assets remained subject to the claims of LSI's general creditors. But that argument is troubling. ERISA broadly covers any plan that is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce. See 29 U.S.C. §1003 (1994). At least at first blush, both the Plans and the Trust would appear to fall within this definition. Cf. Kulinski v. Medtronic Bio-Medicus, 21 F.3d 254, at 257 (8th Cir. 1994). The fact that the Trust was intended to fund a "top hat plan", providing deferred compensation to a select group of management or highly compensated persons, means that it would not appear to be included in ERISA's funding, participation, vesting, or fiduciary requirements. See Duggan v. Hobbs, 99 F.3d 307 (9th Cir. 1996); 29 U.S.C. §1101(a)(1), 1081(a)(3), and 1051(2). But "top hat plans" are not completely exempt from ERISA -- they still are covered by ERISA's reporting, disclosure, administration, and enforcement provisions. See Miller v. Heller, 915 F. Supp. 651 (S.D.N.Y. 1996). So, while LSI can point to particular ERISA provisions from which their Plan may be exempt, it still seems likely that, if it was validly created, the plan will be subject to ERISA's basic requirements and to the exclusivity of the Federal Courts' jurisdiction.

On the other hand, if the Trust was not properly approved under Community law, as LSI

urges, then it is not subject to ERISA, and I believe that under section 10.01(a) of Ordinance No. 3-37-90-003 I will have jurisdiction to hear this matter. And under section 10.02 of Ordinance No. 3-37-90-003 it seems to me that I can fashion orders of the sort that Minnesota courts would give under Minn. Stat. §501B.16, et seq..

In short, the issue of this Court's subject matter jurisdiction, and the principal substantive question raised by the Petition, appear to be identical. If the Trust was not properly established under the law of the Community, then I have jurisdiction, but if the Trust was properly established, then I do not have jurisdiction. And from the present state of the record, I cannot make a determination on that fundamental issue. In 1995, LSI's Board of Directors adopted a resolution to the effect that the Trust was never properly approved, but that resolution is purely conclusory -- it does not provide any underlying information with respect to LSI's records. Similarly, the Petitioners state that, at the inception of the Trust, they gave to LSI a set of resolutions which would have served to approve the Trust; but there is no information available to the Court with respect to what, if anything, happened to those documents.

Therefore, it will be necessary for the Court to hold an evidentiary hearing, limited to the issue of whether the Trust was properly approved by LSI. If it was, then in all likelihood I will grant a motion to dismiss this case for want of jurisdiction. If it was not, then I will proceed to consider what relief is appropriate for the parties.

In the meantime, I am going to direct the Petitioners to amend their Petition to read as a Complaint in Interpleader, and to serve it under our rules on LSI and each Beneficiary. Once that is accomplished and responsive pleadings have been filed, an evidentiary hearing will be scheduled.

ORDER

For the foregoing reasons, and based on all of the pleadings and materials filed herein, it is herewith ORDERED:

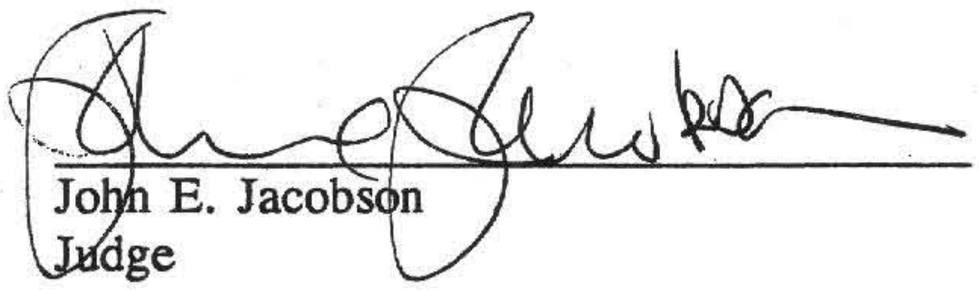
1. Within thirty days from the date hereof, the Petitioners shall amend their pleadings by filing a Complaint in Interpleader and shall serve LSI and all Beneficiaries

2. The Motion of Leonard Prescott, F. William Johnson and Peter Riverso to intervene in these proceedings is GRANTED;

3. The Motion of Leonard Prescott, F. William Johnson, and Peter Riverso to dismiss is DENIED; and

4. An evidentiary hearing, limited to the issue of whether the Trust was validly created, will be set for at a time convenient to the Court and the parties.

Dated: January 19, 1999



John E. Jacobson
Judge