COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six, Inc., et al. Plaintiffs, vs. Leonard Prescott and F. William Johnson, Defendants.	)	File No. 048-94

MEMORANDUM OPINION AND ORDER

Summary of Procedural History

In this case, Little Six, Inc. ("LSI") and its Board of Directors ("the Board") seek money damages against Leonard Prescott ("Prescott") and F. William Johnson ("Johnson"), two former employees and officers of LSI. LSI is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), and the single share of stock that it has issued is owned by the Community. Prescott was Chairman of the Community, and first President and later the Chairman of the Board of Directors of LSI. Johnson was LSI's first Chief Executive Officer, and later succeeded Prescott as the corporation's President.

In their Complaint, LSI and the Board allege that, during their tenure with LSI, Prescott

and Johnson unjustly enriched themselves, imprudently expended corporate funds in a variety of ways, and improperly took control of LSI from the Board through the creation of an "executive committee" and various of corporate officers. The Plaintiffs also assert that Mr. Prescott improperly disclosed confidential corporate information and misled the Board with respect to his background, and that Mr. Johnson breached an employment contract by accepting more compensation than he had agreed to receive. These alleged actions -- save, as I understand it, the issue raised by Johnson's alleged contract -- are asserted to have been in violation of the Shakopee Mdewakanton Sioux Community Corporation Ordinance, Ordinance No. 2-27-91-004 ("the 1991 Corporation Ordinance"), the Articles of Incorporation of LSI ("the LSI Articles"), a Code of Ethics adopted by LSI in September, 1993 as part of the corporation's Casino Policies, the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701 - 2721 (1988) ("the IGRA"), and the Community's Gaming Ordinance. LSI and the Board seek money damages from both Defendants.

After discovery, Prescott and Johnson moved for summary judgment, asserting inter alia that they were shielded from LSI's claims either by absolute immunity or qualified immunity. On April 1, 1997, I granted the Defendants summary judgment on several of the Plaintiffs' claims, but denied their motions with respect to the majority of the claims; and I specifically held that neither Defendant could assert an immunity defense in an action brought against them by LSI.

Prescott and Johnson appealed, to the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community, those portions of my order that denied them summary judgment; and on April 17, 1998 the Court of Appeals reversed my judgment in part. The Court of

Appeals agreed that no claims of absolute immunity could be made on behalf of either Prescott or Johnson, but held that both Prescott and Johnson possessed qualified immunity and that the 1991 Corporation Ordinance did not waive that immunity as to any litigation -- even litigation brought by LSI and the Board. The Court of Appeals remanded the matter to me to determine whether the Defendants were entitled to summary judgment on the basis of their qualified immunity.

I requested that the parties brief the summary judgment issue in light of the Court of Appeals holding; and today I decide the issues which were remanded to me.

The Mandate from the Court of Appeals

The Court of Appeals gave precise instructions with respect to the task which I am to undertake:

> [I]n order to succeed with a qualified immunity defense, an official must raise that defense in a timely manner and demonstrate that undisputed material facts reveal that his or her actions were objectively reasonable in light of the clearly established Community law [footnote omitted]. If the official is able to do this, he is entitled to immunity from suit, and the case should be dismissed.
>
> The first task of the trial court in this inquiry is to determine if the law was clearly established at the time the official acted. If it was not, the official could not be reasonably expected to anticipate subsequent legal developments and could not either actually or constructively "know" that his actions were illegal. [citation omitted]. In such a case, summary judgment for the official would be appropriate.
>
> If, on the other hand, the Community law is clearly established, a reasonably competent official is presumed to know the law governing his conduct, and the trial court should them determine if the material facts are undisputed. [citation omitted]. Summary judgment should be entered for the official only if there are no disputed material facts, and those facts show the official did not violate any established right as a matter of law. If, however, there is a dispute over the material facts concerning whether the official violated a clearly

established right, then summary judgment is not appropriate, and the case should move forward toward trial.

> Leonard Prescott and F. William Johnson v. Little Six, Inc., et al., Ct. App. No. 017-97 and 018-97, at 13 - 14 (decided April 17, 1998).

It is important to note here that the qualified immunity which the Court of Appeals held applicable to Prescott and Johnson and other officers of the Community "does not precisely mimic the federal law regarding qualified immunity". Ibid at 14. Specifically, the Court of Appeals said--

> Relying on federal law, Appellants argue that "Community law" should only extend to rights established either by statute or by the Community Constitution, and should not include the common law causes of action alleged by Appellees. This Court, however, is not concerned with preserving a federalist system of government as are the federal courts, nor does this Court have an explicit statute, such as 42 U.S.C. §1983 to interpret. Therefore, a Community official may be held liable for a violation of any clearly established right under Community law, whether that right is statutory, constitutional, or common law.

Ibid at 13, n. 4 (emphasis added).

In the briefing that was submitted after the Court of Appeals rendered its decision, the Plaintiffs and the Defendants disagreed with respect to whether a cause of action that is implied in the law, rather than expressly described in a statute or regulation, can survive an assertion of the qualified immunity defense in this jurisdiction. As I read the opinion of the Court of Appeals, it seems clear to me that, on this point, the Plaintiffs are correct: the emphasized language in the foregoing quotation, which states that a cause of action in this jurisdiction can be founded on the "common law", must mean that a cause of action which is not directly based on a statute or regulation can be asserted against a person who possesses official immunity, provided that the Community's common law was sufficiently clear at the time of the acts

complained of.

The first step in the analysis which I must conduct is to determine what violations of law Prescott and Johnson are alleged to have committed, and whether the Community's Constitution, ordinances, regulations, and common law prohibited such actions at the time the actions are alleged to have occurred.

The Allegations in the Complaint

The Complaint contains eight numbered counts, but one count -- Count I -- contains no less than fifteen sub-counts, of which thirteen still are alive. (I granted summary judgment to the defendants as to Count I, subcounts 66.H.and 66.N. on April 1, 1996). The thirteen live subcounts in Count I allege that the Defendants breached duties owed to LSI and the Board by creating the Executive Committee; by giving to that entity powers which should have been reserved to the Board; by creating corporate officer positions which should have been approved by the Board; by utilizing the Executive Committee to approve payments to themselves and others of large sums through salaries, bonuses and benefits, which should have been approved by the Board; by expending corporate funds for trips and athletic events which should have been approved by the Board; by utilizing corporate funds to pay allegedly personal legal fees; by allegedly misrepresenting personal background (as to Prescott) in a gaming license application and expending corporate funds to defend individual gaming licenses; by disclosing confidential information; and by presenting allegedly inaccurate or misleading information to the Board and to the Executive Committee. (Complaint, ¶¶66.A. - 66.O.).

Count II alleges that the Defendants prevented the Community from being the "sole

operator, conductor and owner of all gaming enterprises on the Reservation" (Complaint, ¶76), and that those actions created a cause of action for damages under the IGRA, the Tribal-State Compact[1], and the Community's Gaming Ordinance. Counts III, IV, V, VI, and VII all appear to be common law claims: Count III alleges a civil conspiracy between Prescott and Johnson to commit the acts and omissions described in Count I; Count IV alleges that the funds spent by virtue of the acts described in Count I constituted conversion; Count V alleges that these acts and omissions resulted in the unjust enrichment of the Defendants; Count VI alleges that in or about June, 1993 Prescott and Johnson committed fraud by misrepresenting the level of their compensation to the Community's Business Council and General Council; and Count VII alleges that in or about June, 1993 Prescott and Johnson negligently misrepresented their compensation to the Business Council and the General Council. Finally, Count VIII appears to be a common-law breach of contract claim, alleging that when Johnson accepted the salary increases, bonuses, and perquisites described in Count I, he violated the terms of an employment contract into which he and LSI had entered in June, 1991.

The Applicable Law at the Time of the Matters Complained Of

In the Complaint and in the briefing materials that have been submitted following the Court of Appeals decision, the Plaintiffs cite a number of sources of written Community law which they deem to be pertinent to the claims in their Complaint, although the Counts and

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[1] There are two Tribal-State Compacts between the Community and the State of Minnesota, the first dating from 1989, governing video games of chance, the second dating from 1992, governing blackjack. The Complaint does not specify which of these Compacts is at issue. For the purposes of this decision, both Compacts will be considered.

Subcounts themselves do not identify the specific legal requirements that the specific actions allegedly violated. The sources of written law which the Plaintiffs have identified are:

> -Article V of the Community's Constitution;
>
> -Sections 4.02, 4.017, 4.12, 21.0, 21.1, 31.0, and 36.0 of the 1991 Corporation Ordinance;
>
> -Sections 3.2, 7.2, 7.3., 7.7, 7.8, 8.1, 8.41(C), 8.6, and 9.0 of the LSI Articles; and
>
> -the Code of Ethics adopted by LSI on September 9, 1993.

I therefore will set forth and examine each of these provisions.

The Plaintiffs' allegations with respect to the Community's Constitution are that certain actions and payments authorized by Prescott and Johnson usurped the lawmaking power which the Community's Constitution delegates to the Community's General Council. So, although it is not clearly stated in the Plaintiffs' materials, the pertinent portion of the Constitution therefore likely is Article V, which states, in part--

> Section 1. Enumerated Powers. The general council shall exercise the following powers and may delegate such powers to the elected business council, subject to any limitations imposed by the Constitution or Statutes of the United States, and subject further to all expressed restrictions upon such powers contained in this constitution.
> ...
>
> (h) To promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety, morals and general welfare of the community by regulating the conduct or trade and the use and disposition or property upon the reservation, providing that any ordinance directly affecting non-members shall be subject to review by the Secretary of the Interior.

The various sections of the 1991 Corporation Ordinance which the Plaintiffs have cited, in various contexts, are as follows--

> 4.0 General Powers. Subject to any limitations provided in any other laws of the Community, or in a Corporation's articles, each corporation shall have

power:

...

4.02 Subject to the provisions of section 4.12 in the case of corporations wholly owned by the Community, To sue and be sued, complain and defend, in its corporate name, except that the extent of the corporation's liability shall be limited to the assets of the corporation and shall be subject to the limitations contained in Section 11 of this Ordinance.

...

4.017 To establish committees of the board of directors, elect or appoint persons to the committees, and define their duties and fix their compensation.

...

4.12 A corporation wholly owned by the Community, shall have the power to sue and is authorized to consent to be sued in the Judicial court of the Community, and other courts of competent jurisdiction, provided, however, that any recovery against such corporation shall be limited to the assets of the corporation, and that to be effective, such corporation, only upon action of the Board of Directors, must explicitly consent to be sued in a contract or other commercial document which specifies the terms and conditions of such consent.

...

21.0 Board of Directors The business and affairs of the corporation shall be managed by a board of directors, subject to any limitations set forth in the articles of incorporation. The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a member of the Shakopee Mdewakanton Sioux Community unless the articles of incorporation or bylaws so prescribe.

...

21.1 Special Committees. An affirmative vote of a majority of the board may establish committees having the authority of the board in the management of the business of the corporation only to the extent provided in the resolution. Committees may include a special litigation committee consisting of one or more independent directors or other independent persons to consider legal rights or remedies of the corporation and whether those rights or remedies should be pursued. Committees other than special litigation committees are subject at all times to the direction and control of the board. The committees shall consist of one or more persons, who need not be directors.

...

31.0 Director Conflict of Interest. A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has an interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if

any one of the following is true:

(1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction by a majority of the board or committee; but the interested director or directors shall not be counted in determining the presence of, or required number to constitute, a quorum and shall not vote.

(2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction by a majority of the shares entitled to vote that are owned by persons other than the interested director or directors; or

(3) the transaction was fair to the corporation at the time it was approved.

...

36.0 General Standards for Directors and Officers. Directors and officers shall discharge their duties:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner they reasonably believe to be in the best interests of the corporation.

The portions of the LSI Articles which the Plaintiffs have cited are these--

3.2 Consent to Sue and be Sued Required. The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction; provided, however, that any recovery against the Corporation shall be limited to the assets of the Corporation delineated at Article 6 of these Articles of Incorporation, and that, to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent. ...

...

7.2 Duties and Powers. The Board of Directors is hereby vested with all powers necessary to carry out the purposes of the Corporation and shall have control and management of the business and activities of the Corporation. The Directors shall in all cases act as a board. The Directors may adopt such rules and regulations for the conduct of their meetings and the management of the Corporation as they

may deem proper, not inconsistent with the Shakopee Mdewakanton Sioux Community Business Corporation Ordinance and other tribal laws, or these Articles of Incorporation.

7.3 Election, Number and Tenure. Subject to the provisions of Section 7.5 of these Articles, which shall otherwise control, the Board of Directors established by of Incorporation shall consist of the three members of the Shakopee Mdewakanton Sioux Community Business Council, and no more than four (4) additional members, elected by a majority of the Board, for a maximum total of (7) seven. Notices of the election of any Director shall be sent by first class mail to the Members of the Corporation within 2 business days of the election.

...

7.7 Action of the Board. The vote of the Directors shall be the act of the Board, and each Director shall have one vote. The Board of Directors may take any required or permitted action without meeting, provided that the action is taken by at least a quorum and that consent to the action is evidenced in writing by at least a quorum of Directors including the Chairman, and the consent is included in the corporate minutes and records.

7.8 Quorum. A majority of Directors shall constitute a quorum for the transaction of business in any regular or special meeting. The quorum must either include the Chairman, or the action taken must occur with the written consent of the Chairman. The act of a majority of a quorum of Directors including the Chairman or on his written consent, shall be the act of the Board.

...

8.1 Number. At its initial meeting, the Board of Directors shall appoint a President, Vice-President, Secretary and Treasurer. Other officers and assistant officers and agents deemed necessary may be appointed by the Board of Directors. Individuals may hold multiple offices, but the offices of President and Vice-President may not be jointly held.

...

8.41.C. The President shall appoint, discharge and fix the compensation of all employees and agents of the Corporation other than the duly appointed officers by the Board of Directors, subject to the approval of the Board of Directors.

...

8.6 Compensation of Officers. The officers shall receive such salary or compensation as may be fixed by the Board of Directors. No officer shall be prevented from receiving compensation by reason of the fact that the officer is also a Director of the Corporation.

...

9.0 Distribution of Net Profit to Community Required. Any Net Profits or Dividends of the Corporation shall be delivered to the Community for distribution as provided by the Shakopee Mdewakanton Sioux Community Business Proceeds Distribution Ordinance No. 12.29-88-002, in the same manner as has occurred when the gaming businesses of the Community were operated directly by the

> Community. If the Corporation fails to make timely delivery of such Net Profits or Dividends as a result of any action or inaction by the Board of Directors, or officers and employees [sic] of the Corporation under their direction and control, and such failure is certified by the auditors for the Community or the Corporation, that certified failure shall be deemed to be sufficient cause for removal, pursuant to Article 7.15, 7.152, or 7.153, of the responsible Directors.

The Code of Ethics adopted by LSI on September 9, 1993 provides, with respect to confidential information (the aspect of the Code which the Plaintiffs deem relevant in their briefing materials), as follows--

> B. Confidential Information
>
> 1. As a result of their relationship with the Company, Directors, Officers and employees may have access to confidential information.
> 2. Nonpublic information of a financial, technical or business nature is not to be released to any outside person or entity except in the performance of corporate duties or with the express consent of the Executive Committee.

Finally, Section 11(a)(2)(A) of the IGRA, to which the Plaintiffs refer, mandates that any Indian tribe that conducts Class II or Class III gaming have a gaming ordinance that provides that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. §2710(a)(2)(a). And section 501 of the Gaming Ordinance which the Community's General Council voted on March 31, 1993 and April 19, 1993 contains exactly such a provision.

As I understand it, these are the provisions of the Community's Constitution, ordinances, and regulations that imposed clear legal requirements which the Plaintiffs allege were ignored by Prescott and Johnson.

Answering the Threshold Question: Did the Law Clearly Prohibit the Acts which the Defendants Are Alleged to Have Committed?

The Court of Appeals made it clear that, although the law pertaining to qualified immunity in this jurisdiction "does not precisely mimic" the Federal law, still the analytical steps which our courts must take are those described in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Harlow described the "threshold" question to be whether the law was clear at the time of the events at issue:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. [Footnote omitted]. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.
>
> 457 U.S., at 818 (1982).

I will begin this threshold analysis with the live subcounts in Count I. Each is alleged to constitute a "breach of fiduciary duty". (Complaint, ¶66). Several of the subcounts concern either the creation of the Executive Committee or actions which were approved by the Executive Committee: Paragraph 66.A. alleges that the creation of the Executive Committee "usurped" functions committed by law to the Board, and paragraphs 66.C., 66.D., 66.E., 66.F. allege that the compensation, bonuses and benefits paid to Prescott and Johnson and allegedly approved by the Executive Committee were improper because they lacked Board approval. Other subcounts allege that Prescott and Johnson created officer positions and authorized expenditures which by law required Board approval: paragraph 66.B. alleges that officer positions were improperly created; paragraph 66.I. alleges that payment of Prescott's personal attorney expenses was improperly approved; paragraph 66.J. alleges that payment for ski trips were improperly approved; and paragraph 66.K. alleges that payment for the use of a Target Center suite, for public events, was improperly approved.

In my view, the threshold question for each of these subcounts is whether, at the time the events took place, Community law clearly and unequivocally prohibited the creation and operation of an entity like the Executive Committee. It was the Executive Committee which evidently approved, at least in gross, all of the programs, plans and budgets at issue in these subcounts; and if the law clearly prohibited the Committee's creation or functioning, then I am obliged to continue my analysis; but if the Community's law was not clear with respect to the appropriateness of the Committee's creation and functioning, then the Defendants are entitled to summary judgment on these subcounts.

Having reviewed the pertinent provisions of the Community's Constitution, the 1991 Corporation Ordinance, the LSI Articles, the IGRA, and the Community's Gaming Ordinance, I conclude that the Community's law indeed was not clear with respect to whether the Executive Committee's creation and functioning was proper. It is true, as the Plaintiffs point out, that section 21.0 of the 1991 Corporation Ordinance provided that "[t]he business and affairs of the corporation shall be managed by a board of directors...", and section 8.6 provided that "officers shall receive such salary or compensation as may be fixed by the Board of Directors". But section 4.017 of the 1991 Corporation Ordinance permitted the Board to "establish committees of the board of directors, elect or appoint persons to the committees, and define their duties and fix their compensation", and section 21.1 authorized a Board to "establish committees having the authority of the board in the management of the business of the corporation only to the extent provided in the resolution". Likewise, section 7.2 of the LSI Articles permitted the Board to "adopt such rules and regulations for ... the management of the Corporation as they may deem proper, not inconsistent with the Shakopee Mdewakanton Sioux Community Business

Corporation Ordinance and other tribal laws, or these Articles of Incorporation".

The Executive Committee originally was established by Board Resolution No. 10-23-91-28, and its authority was purportedly modified and increased by Board Resolution No. 2-19-92-003. (In neither proceeding did Prescott vote). Resolution No. 2-19-92-003, in pertinent part, purported to grant the Executive Committee "the authority to manage the business and affairs of the Corporation subject to the authority of the full Board of Directors". The Executive Committee was composed of five members, four of whom also were members of the Board: Prescott, together with Allene Ross, Melvin Campbell and James St. Pierre. (Johnson was the fifth Executive Committee member).

In light of the terms of sections 21 and 4.017 of the 1991 Corporation Ordinance, and of section 7.2 of the LSI Articles, and given the fact that I see nothing in the other provisions of Community law that the Plaintiffs have cited which clearly prohibits the creation and operation of the Executive Committee, I simply cannot say that the Executive Committee's creation and its operation, including the manner in which it oversaw the expenditure of LSI funds and the administration of corporate programs, was contrary to clear Community law. Therefore, as to subcounts 66.A., 66.B., 66.C., 66.D., 66.E., and 66.F., 66.I, 66.J., and 66.K., I believe summary judgment must be granted to the Defendants. Simply put, as to none of these subcounts was the Community's law, in the period 1991 through 1994, sufficiently clear regarding to the authorization of expenditures to survive Prescott and Johnson's assertion of their qualified immunity defense.

It must be understood here that I am not holding that all or any of the actions taken by

the Executive Committee were, in fact, legal and properly authorized by Community law[2]. Rather, I am holding that at the time the actions were taken the pertinent portions of the Community's law was not clear.

Subcounts 66.G., 66.L., 66.M. and 66.O. stand on a different footing from the subcounts just discussed. Subcount 66.G. arises from Johnson's alleged breach of his contract, and my treatment of it will follow from my discussion of Count VIII, below.

Subcount 66.L. relates to allegedly unauthorized disclosure of information by Prescott. As to that allegation, the threshold Harlow question is: did the Community law, at the time of the disclosure, clearly prohibit the disclosure? As I have noted, the pertinent Community law appears in the above-quoted section B of the Code of Ethics. That section permitted the disclosure of confidential information by an officer of LSI "...in the performance of corporate duties". Given this standard, I cannot say that the law of the Community was clear with respect to whether Prescott's disclosure was or was not prohibited, and therefore Prescott is entitled to qualified immunity and summary judgment as to subcount 66.L.

Subcounts 66.M. and 66.O. allege misrepresentation of facts -- by Prescott, in his gaming license application, and by Prescott and Johnson, generally with respect to information given to the Executive Committee and the Board. I think it is clear that the Community's law during the pertinent period prohibited Community officers or employees from misrepresent facts to the

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[2] A question as to whether particular actions of the Executive Committee, relating to the purported creation of a deferred compensation retirement plan for high-level executives of LSI may well be presented in another case that is before me, and it therefore is doubly essential that my holding in the instant case be understood only to be that the law of the Community did not clearly prohibit the creation and operation of the Executive Committee, for purposes of a qualified immunity analysis.

Board or to the Executive Committee -- the "General Standards" imposed upon officers and directors by section 36 of the 1991 Corporation Code must be interpreted to have this content. Therefore, as to subcounts 66.M. and 66.O., my Harlow analysis will proceed to a second stage, below.

First, however, I must apply the threshold Harlow question -- the state and clarity of the Community's law as it applies to the Plaintiff's allegations -- to Counts II, III, IV, and V; and, as to Counts VII and VII, I must correct an omission that I made when I last considered the Defendants' summary judgment motion.

Count II alleges that the acts described in Count I were inconsistent with section 11(a)(2)(A) of the IGRA and with the Community's Gaming Ordinance, because those acts deprived the Community of the measure of control over its gaming facilities. Hence, in the qualified immunity analysis the threshold question for Count II is: was it clear that the IGRA and/or the Community's Gaming Ordinance prohibited the sorts of conduct complained of by the Plaintiffs. And again, for the same reasons that I have just discussed, I must conclude that the law on this point was not clear. The creation and operation of the Executive Committee, the appointment of corporate officers, and the nature of the oversight which the Board gave to LSI's operations were not clearly contrary to Community law, and did not clearly remove control of LSI from the Community. Therefore, the Defendants are entitled to summary judgment on Count II.

The next three counts are subject to a common analysis, I think: Count III alleges that the actions which Prescott and Johnson conspired to obtain various approvals from the Executive Committee; Count IV alleges that Prescott and Johnson converted corporate funds to their own

use; and Count V alleges that Prescott and Johnson unjustly enriched themselves at LSI's expense. Clearly, Community law during the relevant period must be read to have prohibited conspiracy, conversion, and unjust enrichment. But I think that answering the threshold Harlow question involves more than that, as to these counts -- it involves answering the question whether the Community law was clear that the types of acts that the Plaintiffs complain of constituted conspiracy, conversion, and unjust enrichment. The pleading in the Complaint could be more specific, but I understand that the acts which are the subjects of Counts III, IV, and V are the same acts as those which are the subject of subcounts 66.A., 66.B., 66.C, 66.D., 66.E., 66.F., 66.I, 66.J., and 66.K. of Count I, as to which I have already concluded summary judgment for the Defendants is appropriate. So the same reasoning leads me to the same conclusions as to Counts III, IV, and V: given the provisions of the 1991 Corporation Ordinance and the LSI Articles, I do not believe that the Community's law clearly prohibited the acts complained of, and therefore summary judgment is appropriate for Counts III, IV, and V.

Counts VI, VII, and VIII

Given the state of the record in this matter, Counts VI, VII and VIII present a somewhat different situation that do the foregoing matters. Counts VI and VII allege, respectively, that Prescott and Johnson committed fraud and negligent misrepresentation upon the Community's Business Council and the General Council by misrepresenting their compensation in or about June, 1993. But the recitations of the Complaint -- that is, paragraphs 1 - 63 -- contain nothing with respect to representations made to the Business Council or the General Council in or about June, 1993; and the list of Exhibits submitted by the Plaintiffs in response to Prescott's and

Johnson's summary judgment motion does not identify any minutes or other documents reflecting Business Council or General Council meetings, or any submissions by Prescott or Johnson to those bodies. Accordingly, as to Counts VI and VII, I hold that summary judgment is appropriate simply because, resolving all doubtful matters in favor of the Plaintiffs, there appears to be no issue of material fact and the Defendants are entitled to judgment as a matter of law.

Count VIII, and paragraphs 33 - 35 of the Complaint, allege that in 1991 Johnson and LSI entered into a written employment contract which established a ceiling for Johnson's compensation, and that Johnson breached that agreement by accepting additional payments. In his Answer, Johnson denied that he entered into any written contract with LSI, asserted that any agreement he had with the corporation was oral, and denied that he breached any agreement. Evidently, the extensive discovery engaged in by the parties did not turn up a written agreement, because the record submitted to the Court by the parties in connection with the motions for summary judgment contains nothing of the sort, and no explanation for its absence. Accordingly, I conclude that, as to the alleged written employment agreement there is no material issue of fact in dispute, and that Johnson is entitled as a matter of law to summary judgment on Count VIII.

I note, ruefully, that the state of the record as to Counts VI, VII and VIII is unchanged from the time when I first decided the Defendants' summary judgment motions. I simply did not then focus on the absence of any allegations or documents with respect to the General Council, the Business Council, or the Johnson contract document. Having now noted those matters, I think I clearly am obliged to rule upon their legal effect.

The Misrepresentation Allegations

Subcount 66.M. of Count I of the Complaint alleges that Prescott misrepresented his background in his gaming license application, and subcount 66.O. of Count I alleges that Prescott and Johnson generally misrepresented facts to the Board and the Executive Committee. As I have said, during the period that is pertinent to this case the Community's law clearly did not allow LSI's officers to misrepresent facts to the Board or to other corporate entities. So, the following guidance from the Court of Appeals applies with respect to subcounts 66.M. and 66.O.:

> If...the Community law is clearly established, a reasonably competent official is presumed to know the law governing his conduct, and the trial court should then determine if the material facts are undisputed. [Citation omitted]. Summary judgment should be entered for the official only if there are no disputed material facts, and those facts show the official did not violate any established right as a matter of law. If, however, there is a dispute over the material facts concerning whether the official violated a clearly established right, then summary judgment is not appropriate, and the case should move forward toward trial.
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> Leonard Prescott and F. William Johnson v. Little Six, Inc., et al., supra, at 14.

My examination of the record indicates that there are material facts at issue with respect to representations allegedly made by Prescott and Johnson on two discrete issues. A member of the Board has testified under oath that she relied on false statements made by Prescott and Johnson concerning the amount of compensation the two Defendants were receiving (Transcript of the November 28, 1995 deposition of Allene Ross, at 150-151). And the same person has testified that she supported a decision by the Board (later rescinded) to reimburse Prescott and Johnson for the expense of defending their gaming licenses suspension proceedings (Id, at 109) because of allegedly false statements made to her concerning the matters at issue in those proceedings.

Prescott and Johnson deny making any misrepresentations on any matter. But on the two issues just described I believe that there are material disputed facts which preclude the grant of summary judgment.

For the foregoing reasons, it is herewith ORDERED:

1. That as to subcounts 66.M. and 66.0. of Count I of the Plaintiffs' Complaint, the Defendants' motion for summary judgment is DENIED; and

2. As to all other Counts in the Plaintiffs' Complaint, the Defendants' motion for summary judgment is GRANTED.

April 8, 1999

John E. Jacobson
Judge