TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT

Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise

Court File No. 436-00

Plaintiff,

vs.

Leonard Prescott, individually, and as current and former officer and/or director of Little Six, Inc.

Defendant.

MEMORANDUM OPINION AND ORDER

I. The History and Present Status of the Proceedings

In this matter, the Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise ("the Gaming Enterprise"), as successor and assignee of Little Six, Inc. ("LSI"), seeks reimbursement from the Defendant for payments, totaling $520,389.46, made by LSI to the Kelley Law Office ("the Kelley Office") in 1994. The Gaming Enterprise contends that the entirety of those payments went to pay for work done by the Kelley Office in defense of the tribal gaming license of the Defendant, Leonard Prescott, and that the entire amount of those payments should be reimbursed by Mr. Prescott, with interest, by virtue of a repayment commitment that Mr. Prescott executed on May 9, 1994. The

Gaming Enterprise also seeks both interest on the claimed amount, from 1994 forward, and its reasonable attorneys fees and costs incurred in this litigation.

These proceedings have a long history. LSI was a corporation chartered by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") to own and operate the Community's gaming facilities. In 1994, and for several years before 1994, Mr. Prescott was Chairman of the Board and Chief Executive Officer of LSI. Consequently, under section 11 of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2710, in order to hold his offices within LSI Mr. Prescott was obliged to possess a valid gaming license issued by the Community's Gaming Commission ("the Gaming Commission").

In 1994, Mr. Prescott's suitability to continue to hold such a license became a subject of proceedings before the Gaming Commission; and as those proceedings began Mr. Prescott asked the Board of Directors of LSI to indemnify him in advance for the attorneys fees and expenses that he would incur. In making this request, Mr. Prescott agreed to repay LSI, under certain circumstances.

On February 17, 2004, I concluded that those circumstances had, in fact, occurred, and I therefore awarded summary judgment to LSI on that issue. The question before me today is: what amount does Mr. Prescott owe, as a result of his May 9, 1994 commitment?

The fact that this question must be decided now, nearly eleven years after Mr. Prescott made the commitment, is a reflection and a consequence of the extraordinary nature of the struggle over Mr. Prescott's license. The struggle produced no less than five reported decisions from this Court and our Court of Appeals: In re: Prescott Appeal,

1 Shak T.C. 190 (Dec. 8, 1994); In re: Prescott Appeal, 1 Shak A.C. 11 (Nov. 7, 1995); In re: Prescott Appeal, 3 Shak T.C. 19 (Feb. 20, 1997); In re: Prescott Appeal, 1 Shak A.C. 120 (Apr. 30, 1998); and In re: Prescott Appeal, 1 Shak A.C. 146 (July 30, 1999). The struggle ended – at least with respect to the gaming license – in 1999, when the last-cited decision of our Court of Appeals was handed down. That decision held that substantial evidence supported a determination by the Gaming Commission that Mr. Prescott was unsuitable for continued licensure.

But in another sense the struggle continues, because after that Court of Appeals decision was rendered, LSI asked Mr. Prescott to reimburse the amounts that LSI had paid to the Kelley Office on his behalf in 1994, and Mr. Prescott declined that request. LSI then commenced the present case.

Mr. Prescott responded by moving to dismiss LSI's complaint on *res judicata* and official immunity grounds. That motion was denied, Little Six, Inc. v. Prescott, 4 Shak. T.C. 73 (August 8, 2000), and Mr. Prescott sought and was granted a certification for an interlocutory appeal. On appeal, the dismissal motion's denial was affirmed in Prescott v. Little Six, Inc., 1 Shak. A.C. 190 (Oct. 26, 2001). Upon remand, the parties engaged in discovery, which produced its own conflicts. (See Little Six, Inc. v. Prescott, 4 Shak. T.C. 169 [April 7, 2003]). At the conclusion of discovery, LSI moved for summary judgment; and on February 17, 2004, I granted LSI's motion in part and denied it in part. Specifically, I granted the summary judgment on the issue of Mr. Prescott's liability to reimburse LSI for the fees and expenses that LSI had paid on his behalf; but I denied the motion with respect to the particular dollar amount of those fees and expenses, because Mr. Prescott had credibly argued that during the pertinent period the Kelley Office had

been performing services for LSI as well as for him, and that he should not be obliged to reimburse LSI's payments for LSI's own work.

A trial therefore was necessary to establish the dollar amounts paid by LSI to the Kelley Office for work done to defend Mr. Prescott's license. That trial took place on August 23 and 24, 2004. Thereafter, the parties filed post-trial briefs; and then, as a consequence of a filing difficulty, on February 4, 2005 the parties were obliged to re-file all exhibits that were received during that trial[1].

On February 14, 2005, LSI and the Gaming Enterprise jointly moved to substitute the Gaming Enterprise for LSI as the party plaintiff in the proceedings. Mr. Prescott did not file a response, and that motion was granted on April 27, 2005.

Today, I decide the amount that Mr. Prescott should reimburse LSI pursuant to his agreement. I also decide the plaintiff's claims for interest and for reasonable attorneys fees and expenses incurred in these proceedings.

II. Factual Background

In 1994, there existed a very significant degree of tension between Mr. Prescott and other members of the LSI Board of Directors, on the one hand, and the officers of the Shakopee Mdewakanton Sioux (Dakota) Community, on the other hand. The General Council of the Community had changed the manner in which persons could become members of the Community. Mr. Prescott and other members of the LSI Board strongly objected to that change, and the LSI Board had authorized the Kelley Office to represent LSI in challenges to that change. (See e.g., Exhibit 42) Also, in response to claims made

[1] Citations to exhibits herein are to the exhibit numbers given the cited documents in the trial record. Citations to the transcript are to page numbers, as "T. [page]".

in local media stories to the effect that LSI was a poorly performing business entity, Mr. Prescott had released to the public certain financial information, to the extreme consternation of the Community's officers; and members of the Community's General Council questioned the business practices of LSI and certain expenditures that LSI had made, allegedly for the benefit of Mr. Prescott. LSI engaged the Kelley Office, pursuant to several retainer letters, to perform legal work for LSI on these matters, as well. (T. 13-14 and 252-253, and Exhibits 38 - 42).

On May 5, 1994, the Gaming Commission issued temporary emergency suspensions of the gaming licenses of Mr. Prescott and of Mr. F. William Johnson. (Mr. Johnson was at that time was the Chief Executive Officer of LSI). In response, Mr. Prescott engaged the Kelley Office to assist him in protecting his license, and he sought indemnification from LSI for the cost of that assistance. (T. 26-30). Therefore, on May 9, 2004, the Kelley Office prepared another retainer letter, addressed to Ms. Allene Ross, a member of the Board of LSI. That letter said, in pertinent part –

> Dear Allene:
>
> This letter will confirm that Little Six Inc. (the "Corporation") has retained the law firm of Douglas A. Kelley, P.A., to represent its officers and/or directors, including but not limited to Leonard Prescott and F. William Johnson[2], in any and all proceedings before the Shakopee Mdewakanton Sioux Community Gaming Commission (the "Commission") and any court of competent jurisdiction arising from the Commission's suspension, threatened suspension or other action affecting such individual's gaming licenses. Because Article 14 of the Corporation's Articles of Incorporation requires indemnification of officers and directors for expenses incurred in connection with the defense of any action, civil or criminal, to which they are made parties by reason of being an officer or director, and to ensure adequate legal representation of such officers and

[2] As noted above, at this time Mr. Johnson was the subject of a licensing inquiry similar to that involving Mr. Prescott; but Mr. Johnson subsequently resigned his position shortly thereafter, and no licensing proceedings against him went forward. (T. 53-54).

directors, the Corporation wishes to retain this firm. The following sets forth the terms of our representation.

1. This law firm agrees to represent the Corporation's officers and directors, including but not limited to Mr. Prescott and Mr. Johnson, in all phases of legal representation arising from any challenge to their gaming license. This representation may include, but is not limited to appearances before and preparation of submissions to the Commission, challenges to the Commission's authority before any court of competent jurisdiction, legal research, factual investigation, witness preparation, retention of expert witnesses, attendance at any and all required hearings and other proceedings, and any necessary appeals to any court of competent jurisdiction including the Shakopee Mdewakanton Sioux Community Tribal Court.

....

(Exhibit 6).

Ms. Ross countersigned this retainer letter on May 9, 2004. (Id.)

Also on May 9, 2004, Mr. Prescott addressed to LSI's Board of Directors the letter upon which the Gaming Enterprise, as successor to LSI, makes its claim here. Mr. Prescott's letter, again drafted by the Kelley Office (T. 46-47, and Exhibit 15, p. 13), said:

May 9, 1994

Board of Directors
Little Six, Inc.
2400 Mystic Lake Blvd.
Prior Lake, MN 55372

Re: Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024

Dear Board Members:

As an Officer and Director of Little Six, Inc. (the "Corporation"), I hereby request advance indemnification of all expenses, including reasonable attorneys' fees, costs and disbursements, incurred in connection with defense of the above referenced proceeding to which I have been made a party by reason of my position as an officer or director of the Corporation.

In connection with this request for indemnification, I certify that all times I (i) acted in good faith, (ii) with the care of an ordinarily prudent person under the circumstances and (iii) in a manner I reasonably believed to be in the best interests of the Corporation.

I agree to repay the Corporation all amounts advanced in connection with any part the [sic] defense of the above proceeding for which I am finally adjudged to be liable for negligence, fraud or misconduct in the performance of my duties to the Corporation.

Sincerely,
[signed]
Leonard Prescott

(Exhibit 7).

In response to Mr. Prescott's letter, the Board of Directors of LSI approved a "Written Action of the Board of Directors Taken in Lieu of a Meeting" – still on May 9, 2004 – the operative language of which was as follows:

NOW, THEREFORE, BE IT RESOLVED, that the non-interested directors of the Board of Directors hereby determine that the Company is required to indemnify Messrs. Prescott and Johnson with respect to expenses incurred in connection with the defense of the [Gaming] Commission's purported suspension of the Licenses [of Mr. Prescott and Mr. Johnson], and that in order to fulfill this indemnification obligation in such a manner as to ensure adequate legal representation of Messrs. Prescott and Johnson, the officers of the Company are hereby authorized an directed to enter into a retainer letter with and issue a $100,000 retainer to the law firm of Douglas A. Kelley, P.A. for the representation of Messrs. Prescott and Johnson before the Commission or any court of competent jurisdiction in connection with the purported suspension of the Licenses;

FURTHER RESOLVED, that Douglas A. Kelley, P.A. is hereby authorized to withdraw funds from the retainer in payment of the legal services authorized by these resolutions, in such amounts and at such times as these expenses are incurred;

FURTHER RESOLVED, that the Company's officers are hereby authorized and directed to pay any fees of Douglas A. Kelley, P.A., or any other fees incurred with respect to these matters, which exceed the amount of the retainer, at such time and in such amounts as submitted to the Company following depletion of the retainer; and

FURTHER RESOLVED, that Messrs. Prescott and Johnson shall reimburse the Company in the event that the non-interested directors find that a final determination has been made thereafter that Messrs. Prescott and Johnson are liable for negligence, fraud or misconduct in the performance of their duties to the Company, which determination shall not be established solely by a permanent suspension of the Licenses and which amount shall be determined by the non-interested directors.

(Exhibit 8).

Following the approval of this Written Action, the LSI Board provided a $100,000.00 retainer to the Kelley Office, and the Kelley Office deposited that amount in its lawyer's trust account[3].

These actions by Mr. Prescott, the Kelley Office, and the LSI Board of Directors were taken after the Kelley Office had sought and received certain advice from the law firm of Lindquist & Vennum concerning the scope of and procedures for corporate indemnification of Mr. Prescott. The Lindquist & Vennum firm advised the Kelley Office that LSI's indemnification of Mr. Prescott, and of any other officers and directors of the corporation who might be subject to Gaming Commission's procedures, was appropriate if, *inter alia*, in advance LSI had received "...a written undertaking by them to repay all amounts advanced, if its ultimately determined that they are not entitled to indemnification under Article 14 [of LSI's Articles of Incorporation]". (Exhibit 5[4]).

---

[3] Oddly, the retainer arrangements described in the Kelley Office's retainer letter (Exhibit 6), and the retainer arrangements described in the Board's Written Action (Exhibit 8) are not the same (see e.g., T. 334 – 338); and actually the manner in which the Kelley Office's bills were submitted to LSI, and in which the balance of the retainer periodically was drawn down and replenished, do not appear to have strictly followed the processes contemplated by either document. (See e.g., T. 49 – 52 and Exhibits 16, 17, 19, 20, 22, 25, 26, 28, 29, 30, and 32).

[4] The date of the letter that is Exhibit 5 was May 11, 1994. However, it appears from the testimony received at trial that at least the substance of the letter's advice had been given prior to May 9, 1994. (T. 29).

The Gaming Commission's subsequent inquiry into Mr. Prescott's suitability for licensure was very wide-ranging. (See generally, Transcript of Gaming Commission hearings in File No. 94-0024[5]). The Gaming Commission looked not only at Mr. Prescott's professional and personal history, but also at the manner in which LSI had conducted its gaming activities and performed its corporate functions during Mr. Prescott's tenure with the corporation. For example, the Gaming Commission's hearings focused a considerable degree of attention on a document that has come to be known as "The Winston Report" – a report, prepared at the request of the Gaming Commission by a certified public accountant named Mervin Winston, that broadly examined and criticized the corporate and business operations of LSI and its gaming enterprise. (T. 116-117, 255-257, Gaming Commission Transcript 16 – 54).

It appears from the record that after May 9, 1994 the nature of the Kelley Office's work did not radically change, though the work level increased. Mr. Prescott and the LSI Board had been at odds with the Community's Gaming Commission, Business Council, and General Council with respect to a number of issues for a considerable period before May, 1994, and the Kelley Office had been employed in efforts to defend the Board's positions and to attack positions of the Gaming Commission, the Business Council, and the General Council, on a variety of issues; and after May 9, 1994, that situation continued.

By way of example, for a number of months before the Gaming Commission began its hearings, Mr. Winston had been gathering material for his report, and as Mr.

---

[5] The transcript of the Gaming Commission's hearings was introduced by joint stipulation at the end of trial (T. 342), and was not given an identifying Exhibit number. Citations to that Transcript will be to "Gaming Commission transcript, at [page].

Winston had proceeded the LSI Board had grown concerned about the effect that his activities and reports might have on the corporation and on the Board. (T. 253-254). Consequently, during the period before May, 1994, the Board had asked the Kelley Office to undertake the creation and implementation of a strategy to protect the corporation and the Board from the possible effects of Mr. Winston's inquiries, and the Kelley Office initiated a background investigation of Mr. Winston, with the notion of gathering ammunition that might have been of value in attacking Mr. Winston's credibility; and those efforts continued after May 9, 1994. (T. 252- 260).

Similarly, during the period before May, 1994, the Kelley Office on behalf of the Board had sought to engage federal authorities to reverse the policies of the Business Council and the General Council, had filed litigation for the same purposes (T. 21), and had engaged an investigator (a Mr. Ron Urbanski) to *inter alia* examine the personal history of the Community's Chairman (see e.g., Exhibit 15); and similar activities continued after May 9, 1994. (See, e.g. Exhibit 18).

At trial, testimony provided by the Kelley Office indicated that in May, 1994, members of the LSI Board believed it likely that they, like Mr. Prescott and Mr. Johnson, would find their gaming licenses challenged by the Gaming Commission – hence the breadth of the authorization in the Kelley Office's May 9, 1994 retainer letter. (T. 44).

For detailed explanation of the Kelley Office's work, a voluminous documentary record pertaining to the services of the firm, and to the payments that were made by LSI to the firm, was admitted into evidence at trial. That record includes all of the itemized billings and summary billings that the Kelley Office sent LSI during the pertinent period. Neither LSI nor Mr. Prescott offered any testimony from an actual client concerning

these services and payments, however: Mr. Prescott did not testify, nor did any other past or present officer of LSI. The only witnesses that discussed the Kelley Office's work, the reasons for the work, and the persons or entities for whom the work was performed, were two attorneys from the Kelley Office – Mr. Douglas Kelley, and Mr. Steven Wolter.

Mr. Kelley and Mr. Wolter were examined in detail with respect to the nature of the work that they and others in the Kelley Office did during the period in question. (Trial transcript, pp 5 – 238 [testimony of Douglas Kelley], and pp 249 – 342 [testimony of Steven Wolter]). Each was asked to address each day's billing from the Kelley Office for the months in question; and although each testified that his memory was affected and diminished by the time that had elapsed between performing the services and providing the testimony, each indicated that he had a grasp of at least the broad outlines of the work that the billings reflected.

The testimony of both Mr. Kelley and Mr. Wolter can be summarized by saying that, on a daily basis from at least April, 1994 through June, 1994, attorneys and staff of the Kelley Office, and other persons engaged by the Kelley Office to assist by way of investigation, public relations, and/or accounting or professional services, sometimes were performing work only or largely for Mr. Prescott, sometimes were performing work only or largely for LSI, and very often were performing work that, in Mr. Kelley's words, was "mixed". (See e.g., Transcript 106 – 108).

Some specific examples will give a flavor for this testimony. When Mr. Kelley was examined by Steven Olson, counsel for LSI, these exchanges occurred:

> Q. Looking at the entry for your time for 5/2 of '94, what does it appear that you were doing on that day?
> A. Well, it looks as though we are drafting pleadings to a possible removal proceeding. It looks like we are attending a meeting at the Decathalon Club;

it looks like I'm meeting with John Lee with regard to the sexual harassment charges; meeting with Steve Wolter with regard to finances and so forth.

Q. And, again, the services which you were performing on that date were in anticipation of some action being taken by the Gaming Commission against Mr. Prescott?

A. Yes, but I would think that some of these would intermix services, that I would not – if your talking the subject here, that I would not allocate to Mr. Prescott.

(T. 90).

Or again –

Q. Looking at 5/3 for your entry, your time entry, what were you involved with there?

A. Well, it looks as though one part of it is clearly related to the Gaming Commission because we were drafting a letter to them. I don't know what the phone conversation with Lenore was about. "Review audio tape of Channel 4 Dimension Report." As I recall, that was kind of a broad-based attack by Tom Gasperolli of Channel 4 that would have included charges pertinent to Leonard and also to the corporation generally, and then we met – had a phone conversation with Joe Plumer, I don't recall exactly what that was about, and then Steve and I and John met about that.

(T. 92)

Or again –

Q. And then looking at your entry for 5/4, what does it appear you were doing that day?

A. Well, first of all, it appears as though I must have reviewed a memo by Steve on possible avenues of removal. You haven't asked me, but I'm presuming what the purpose of this is are some of these chargeable to Leonard or not, and I would suspect that would be with regard to the defense. "Meet with Steve Wolter and John Lee re: laundry list of accusations," that would be mixed, because I think there were allegations against the corporation and allegations against Leonard personally. "Challenge to the Gaming Commission Ordinance;" "Letter to the United States Attorney's Office," that would be corporate. "Review Mona, Meyer and McGrath op-ed, letter to employees," I think that would be Corporate; "Phone conversation with Dennis McGrath re: the same," I think that would be Corporate. The Dimension video, as I mentioned before, I think would be mixed. The revenues for Hinckley and Mille Lacs and Mystic Lake's would be mixed. "Review memo re: removal of Leonard Prescott and Bill Johnson," I think that would be chargeable to Leonard.

Q. Do you have any way to conclude at this point in time how much of the work, this five hours that you spent, would be allocated to Leonard's defense and how much to the corporation's defense?
A. I can't.

(T. 93-95).

Mr. Kelley candidly explained his difficulty, as follows:

THE WITNESS: Just so – Your Honor, so you understand, when I'm saying some of these things were mixed, some of them were attacks against the corporation generally that they were not managing their money appropriately overall, they didn't have adequate controls, that kind of stuff, and then some of these things were specific to Leonard very directly, and so that's why it is kind of hard for us to sort them out.

(T. 95-96).

Mr. Wolter, in his testimony, attempted a more specific breakdown of the firm's billings:

BY MS. CHARLSON:

Q. Mr. Wolter, you have what has been marked as Exhibit D before you. Do you recognize Exhibit D?
A. Yes.
Q. What is it?
A. Exhibit D is a schedule that was prepared by staff in our office that went through these bills that I took my yellow highlighter and pencil to and just transcribed by date, by billing person, by hour, by billing rate and then ultimately the amount of the fee charged for each of the services that I designated to be attributable to Mr. Prescott's indemnification, and this, again, is for that period of time that is evidenced by the bills which I believe you have offered as Exhibit C. It is May 27, '94 through June 27th.
Q. So just for an example, to make sure I'm reading this chart in Exhibit D properly, can I have you turn in Exhibit C to Page 12 of the first subsection of bills? It is Bate stamp LS 200093.
A. I have it.
Q. And that date at the top of the page is 5/11/94, the first entry, RMH?
A. Correct.
Q. Do we have the same thing?
A. Yes.
Q. Looking at that, you have drawn a line through 8.5 hours, and below that, in a circle in pencil is 6.5 hours. How do you interpret that?

A. Well, that pertains to the billing entry for RMH, which is Rodney M. Haggard, our chief investigator, and if you look at the actual bill, 200093, he had an eight-an-a-half hour charge for that particular day and then has a fairly detailed breakdown of the services he provided, and because the things I highlighted in yellow pertain to a meeting with Mr. Prescott about background information, meeting with Mr. Kelley and me about expungement and meeting with John Lee about sexual harassment and paternity issues, I allocated six-and-a-half of that eight-and-a-half hours to Mr. Prescott. As I testified in deposition, this was my best good faith effort. As I told Mr. Olson, there is more art than science at play here, but I came up with six-and-a-half of that eight-and-a-half hours.

(T. 269-271).

But a problem for all of this testimony derives from the manner in which the Kelley Office dealt with certain requests made by LSI in late 1994 and 1995. Mr. Prescott's licensing hearings before the Gaming Commission ended on June 22, 1994 (T. 301), and his gaming license was revoked by the Gaming Commission on July 1, 1994. As a consequence, Mr. Prescott's tenure with LSI ended. Then, in September, 1997, LSI terminated its relationship with the Kelley Office; retained the firm of Bluedog, Olson and Small, P.A., as its new counsel; formally requested that the Kelley Office transfer to the Bluedog office all of LSI's files in the Kelley' Office's possession; and, by Resolution No. 9-29-94-002 (Exhibit 34), terminated its indemnification of Mr. Prescott's and Mr. Johnson's efforts to protect their gaming licenses. LSI also requested that the Kelley Office provide a detailed explanation of the billings that had been submitted to LSI. (T. 62- 63)

But the Kelley Office continued thereafter to represent Mr. Prescott in his efforts to overturn the Gaming Commission's decision. And, indeed, the Kelley Office continued to represent Mr. Prescott in matters relating to his tenure with LSI up to and through the date of the trial in this matter. (T. 268). Therefore, in considering how to

respond to LSI's various requests in late 1994, the Kelley Office retained Mr. Michael J. Hoover, a former director of the Minnesota Lawyer's Professional Responsibility Board, as independent counsel to assist the Kelley Office in meeting its ethical obligations. (T. 63-64, and 280). Through Mr. Hoover, the Kelley Office then turned over a considerable amount of material to LSI's new counsel. (See Exhibits 38 – 44).

The significance of that activity for the present proceedings lies in the fact that Mr. Hoover asserted to LSI's new legal counsel that the last bill sent by Kelley Office to LSI for corporate services – that is, for any legal services other than those provided to Mr. Prescott under his indemnification agreement – was dated May 6, 1994. (Exhibits 38, 39, 40, 41, 42, and 44); and the last work covered by the May 6, 1994 billing was done on April 26, 1994. (Exhibits 13 and 14).

The work that the Kelley Office did beginning on April 27, 1994 was, in fact, billed to LSI, with a series of invoices that began on May 19, 1994 and continued for months thereafter. (Exhibits 15, 17, 18, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 45, 46, and 47). And many of those subsequent billings were captioned "General Corporate Matters", or "Corporate Matters", or "General Corporate and Board of Director Matters", although the Kelley Office began to generate billings captioned "Indemnification" only with work dating after June 27, 1994. But the fact remains that, in 1995, Mr. Hoover informed LSI that no work was done by the Kelley Office after April 26, 1994 that was not protected by a lawyer-client privilege running to Mr. Prescott (a privilege that Mr. Prescott declined to waive). (Exhibit 44).

At trial, Mr. Wolter testified about the Kelley Office's position with respect to these matters, as follows:

Q. Are you familiar with Mr. Hoover?
A. I am.
Q. How are you familiar with him?
A. Mike Hoover was a former director of the Lawyer's Professional Responsibility Board years ago. We engaged Mr. Hoover at some point along this continuum. We used him from time to time in terms of questions about ethics or questions about the Lawyers Professional Responsibility Rules, and specifically in this case, we engaged Mr. Hoover when Mr. Olson, I believe it was, told us that we were being terminated by LSI and began demanding that we return certain – or turn over certain files, and the concern was at that time Mr. Olson was the chief lawyer for the [Gaming] Commission which had issued its final findings on or about July 3rd of '94. We were appealing from those findings, and we thought that it was very unfair if we were to be required to turn over everything that might show where we have been and where we were going in response to LSI's demands, so we engaged Mr. Hoover, and we told him everything he needed to give us informed advice about the issue, and we followed his advice in responding to requests from Mr. Olson and LSI.

(T. 279-280).

The exhibits in the record indicate that the amounts billed by the Kelley Office and the amounts paid by LSI during the period in question were as follows:

- On May 20, 1994, LSI paid $106,591.61[6].
- On May 20, 1994, LSI paid $64,561.07. (Exhibit 15).
- On June 3, 1994, LSI paid $95,868.21. (Exhibits, 17, 18 and 19).
- On June 15, 1994, LSI paid $151,554.10. (Exhibit 23).
- On July 15, 1994, LSI paid $101,814.47. (Exhibits 24 and 25).

The July 15, 1994 payment is the last payment tendered by LSI to the Kelley Office that is reflected in the record. But the record indicates that thereafter, on November 4, 1994,

[6] A portion of this payment apparently related to the bills of May 6, 1994, mentioned by Mr. Hoover's letters [see Exhibit E]; and two bills, totaling $3,518.00, apparently were sent by the Kelley Office to LSI on May 6, 1994. Each of the two contained itemizations dated May 3, 1994. One of the May 6, 1994 bills [Exhibit 38] totaled $3,030.50, and stated that it was for Key Personnel Background Investigations; the other [Exhibits 13 and 14] totaled $487.50, and stated that it was for matters relating to the new members issue.

the Kelley Office withdrew $50, 252.06 from its lawyers trust account – apparently from monies previously remitted by LSI, in one or more of the foregoing payments – to pay bills of August 4, 1994 and November 4, 1994. (Exhibits 27, 28, 29, and 30).

From this, it appears that for services rendered from April 27, 1994 (the last date on which, according to Mr. Hoover, the Kelley Office performed work that was not protected by Mr. Prescott's attorney-client privilege) through December, 1994, when the last of LSI's payments was drawn by the Kelley Office from its trust account LSI paid to the Kelley Office a total of $516,871.46 (that is, a total of $520,389.46 in payments, minus $3,518.00 represented by the two May 6, 1994 billings[7]).

III. Discussion.

A. The Scope of Mr. Prescott's Principal Repayment Liability.

Mr. Prescott argues that the testimony of Mr. Kelley and of Mr. Wolter – the only testimony adduced at trial concerning the scope of the Kelley Office's work – unambiguously affirmed that the Kelley Office was working for LSI and its Board of Directors, as well as for Mr. Prescott, from April, 1994 through December, 1994. And, Mr. Prescott asserts, payment for work done on behalf of LSI, or on behalf of its Board of Directors, should not be his financial responsibility. That argument follows from the opinion that I rendered on February 17, 1994, when I ruled that summary judgment could not be awarded to LSI on the issue of damages:

[7] In its written argument, LSI has made reference to a conclusion, by the Kelley Office in 1995, that $513,797.85 was billed to Mr. Prescott. (Plaintiff's Post-Trial Brief, at 3). But despite considerable effort, the Court has been unable, from the record before it, to locate a reference to that amount, or to calculate how it was derived.

> The May 9th, 1994 letter states that Prescott agreed to "repay the Corporation all amounts advanced in connection with any part [sic] the defense of the above proceeding. . ." The letter clearly states at the top that the subject of the letter is "Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024." There is no other proceeding referenced above, and that file number is in fact the file number of the proceeding against Prescott. The phrase "the above proceeding" and the reference to a very specific proceeding, make it clear that neither party intended that Prescott would be liable for general corporate work the Kelly firm did for LSI or for other directors, but instead that both parties intended for Prescott to be responsible only for the fees and costs advanced to him in connection with the litigation involved in "Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024". And even a cursory review of the billing record upon which LSI bases its approximately $515,000 figure makes it clear that there is a factual dispute over whether that figure includes more than just money used by Prescott in Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024.

Mr. Prescott also argues that he should not be obliged to repay to LSI any fees or expenses incurred for work done by the Kelley Office on his behalf that did not strictly relate to his 1971 felony conviction, or to his failure to disclose that conviction on certain forms that he filed with the State of Minnesota. In making this argument, he points to the final paragraph of his May 9, 1994 indemnification which is worded as follows:

> I agree to repay the Corporation all amounts advanced in connection with any part the [sic] defense of the above proceeding for which I am finally adjudged to be liable for negligence, fraud or misconduct in the performance of my duties to the Corporation.
>
> (Exhibit 7, [emphasis added]).

Mr. Prescott notes that it was his 1971 conviction, and his failure to disclose that conviction before it was expunged, that the Court of Appeals in 1999 cited in upholding the Gaming Commission's revocation of his gaming license. In re: Prescott Appeal, 1 Shak A.C. 146, at 151 - 153 (July 30, 1999). That conviction, he argues, was the only "part [of] the defense of [the Gaming Commission's] proceeding for which [Mr. Prescott

was] finally adjudged to be liable for negligence...". Therefore, his argument goes, any work that the Kelley Office did on his behalf relating to any of the other matters that were explored by the Gaming Commission in 1994 should not be the subject of the repayment obligation.

The Plaintiff, on the other hand, asserts that all payments made by LSI to the Kelley Office, from the May 20, 1994 payment onward, were made on behalf of Mr. Prescott and must be repaid. In support of this argument, the Plaintiff first notes that the May 9, 1994 Written Action of LSI's Board of Directors speaks thusly with respect to Mr. Prescott's repayment obligation:

> ...
> FURTHER RESOVED, that Messrs. Prescott and Johnson shall reimburse the Company in the event that the non-interested directors find that a final determination has been made thereafter that Messrs. Prescott and Johnson are liable for negligence, fraud or misconduct in the performance of their duties to the Company, which determination shall not be established solely by a permanent suspension of the Licenses and which amount shall be determined by the non-interested directors.
> ...

(Exhibit 8).

From this provision, the Plaintiffs argue that on September 29, 1994, when the LSI Board of Directors rescinded its earlier approval of Mr. Prescott's indemnification and demanded repayment of all amounts that had then been paid to the Kelley Office, the non-interested directors thereby (1) found that a final determination had been made that Mr. Prescott was guilty of negligence, fraud or misconduct, and (2) determined that $520,389.46 – that is, all amounts that had been paid to the Kelley Office from May 20, 1994 onward – should be refunded by Mr. Prescott. (Exhibits 34 and 35; Plaintiff's Post-Trial Brief, at 3).

As to Mr. Prescott's assertion that from late April, 1994 through December, 1994 the Kelley Office was working for LSI and for other directors of the corporation at the same time it was working for Mr. Prescott, the Plaintiffs place heavy weight on the representations that Mr. Hoover made in 1995 on behalf of the Kelley Office to the effect that, after April 26, 1994, there was no work product generated by the Kelley Office that was not protected by an attorney-client privilege running to Mr. Prescott.

The Plaintiffs also point out that the Kelley Office used monies held in the firm's trust account to pay "General Corporate" bills that the firm had sent to LSI:

> ...On November 4, 1994, the Kelley Law Office removed $79,000 from the indemnification retainer account, to pay its August and September, 1994 "General Corporate" bills and to pay for its November, 1994 "Indemnification" bill. (Ex. 47). The only authorization which the Kelley Law Office received regarding the funds given to it in trust was the May 9, 1994 Written Action of the Board of Directors, which only authorized payment of indemnification expenses from the retainer.
>
> The Kelley Law Office could lawfully withdraw from the indemnification account the full amount billed to "General Corporate Matters", detailed in exhibits 27 and 29, only if every single one of its tasks billed as "General Corporate" work in the August and September 1994 bills was for Defendant. ...
>
> (Plaintiff's Post-Trial Brief, at 11).

I have considered all of these arguments, and have reviewed in detail the testimony elicited at trial and the exhibits submitted by the parties, including the transcript of the Gaming Commission's hearings concerning Mr. Prescott's license; and I have concluded that all of the amounts paid to the Kelley Office for work done from April 27, 1994 through December, 1994 must qualify as "expenses, including reasonable attorneys' fees, costs and disbursements, incurred in connection with defense of [Shakopee Mdewakanton Sioux Community Gaming Commission File No. 94-0024]", as

described in Mr. Prescott's May 9, 1994 letter. I also have concluded that to interpret Mr. Prescott's indemnification as being limited only to the fees and expenses that somehow related to his 1971 conviction and his failure to disclose that conviction would be both illogical and inconsistent with the history of the parties' understanding.

I do not doubt that both the Board of Directors of LSI and the Kelley Office attorneys were of the view, during the spring and summer of 1994, that the work that the Kelley Office was doing would help protect and defend not only Mr. Prescott but also the other members of the Board. At least until the middle of the summer of 1994, it appears that the LSI Board and Mr. Prescott had a communal interest in defending LSI's businesses, vindicating the Board's actions, and extricating Mr. Prescott from his travail, and I entirely accept Mr. Kelley's and Mr. Wolter's testimony that all members of the LSI Board were concerned that they, too, soon would be subjected to the Gaming Commission's attention. And clearly, for the brief period before he resigned, Mr. Johnson also was an intended and perhaps an actual beneficiary of the Kelley Office's work.

But it was Mr. Prescott alone who, from beginning to end, was the actual and only subject of the Gaming Commission's proceedings; and the Gaming Commission's inquiry into his suitability was extremely wide-ranging. Having reviewed the transcript of the Gaming Commission's proceedings, and having considered the Kelley Office's billings, I do not see anything that the Kelley Office did that was not, in some significant way, designed to serve Mr. Prescott's defense – be it the response to the Winston Report, the engagement of investigators to review the background of Mr. Prescott's adversaries, the engagement of Ernst & Young to provide expert accounting and financial evidence,

or the engagement of a public relations firm to assist in defending against what were perceived as media attacks against LSI and Mr. Prescott. The fact that some of these efforts may well also have served others as well as Mr. Prescott, and no doubt were perceived both by the LSI Board and the Kelley Office to be serving others as well as Mr. Prescott does not negate the fact that the direct beneficiary of these efforts was Mr. Prescott, who actually stood in the dock.

As I have noted, at least some of the Kelley Office's work during the period in question was a continuation of the type of work that was being done prior to April 27, 1994. For example, work appears to have continued on the challenges to the Community's new adoption ordinance, and on responding to earlier and ongoing media criticism of Mr. Prescott and LSI. (See e.g., Exhibit 15). So, if LSI and Mr. Prescott and the Kelley Office had agreed at the time that this ongoing work was attributable to the Kelley Office's representation of LSI, it would be impossible to fault that agreement.

But that is not what happened. Instead, in 1995 the Kelley Office took the position, through Mr. Hoover, that no work product produced by the Kelley Office's, after the period covered by the firm's May 6, 1994 billing, was not protected from LSI's viewing by a the attorney-client relationship between the firm and Mr. Prescott. Neither the Kelley Office's witnesses, nor Mr. Prescott in his argument, has offered a response or an explanation that negates the effect of that contemporaneous assertion of privilege; so I agree with the Plaintiff that the position taken by Mr. Prescott and the Kelley Office in 1995 must control my conclusions here.

I find further support for my conclusion in the decision of the Kelley Office to utilize trust account monies – monies that had been committed solely to Mr. Prescott's

indemnification – to pay bills for work that the firm had earlier labeled "General Corporate" work. Mr. Prescott did not then, and does not now, distance himself from the firm's decision. So those circumstances, too, powerfully substantiate the conclusion that the label affixed to the Kelley Office's billings, from April 27, 1994 onward, does not affect the conclusion that the firm's work was being done to further Mr. Prescott's battle to save, and ultimately to recover, his gaming license.

I also reject Mr. Prescott's argument that, regardless of what amount of the Kelley Office's work was attributable to him, still his repayment obligation under his indemnification agreement must be limited to the amounts the Kelley Office was paid for work that related to Mr. Prescott's felony conviction. Again, Mr. Prescott bases his argument on the one phrase, in the letter that the Kelley Office drafted for him: "I agree to repay the Corporation all amounts advanced in connection with any part [sic] the defense of the above proceeding for which I am finally adjudged to be liable for negligence [etc.]". (Exhibit 7). But that language, which apparently suffers from at least one typographical error or omission, surely is not unambiguous; so it is appropriate to consider its context. There is no testimony in the record either from Mr. Prescott or from any other person that was on the LSI Board of Directors on May 9, 1994. But Mr. Kelley testified it was his office's intent, in dealing with the advance indemnification issue, to implement the advice that his office had sought and received from the Lindquist and Vennum firm. (T. 35). And the Lindquist and Vennum firm's counsel was that LSI's directors and officers could receive advance indemnification, under LSI's Articles of Incorporation and under the Community's Corporation Ordinance, provided that, *inter alia* they executed, in advance, "a written undertaking...to repay all amounts advanced if

it is ultimately determined that they are not entitled to indemnification under Article 14". (Exhibit 5). The Lindquist & Vennum firm noted that if such an undertaking were not received, the other "non-interested" members of LSI's Board might themselves be liable to repay the advanced amounts to the corporation, in the event that the "interested" director or officer were ultimately determined to have engaged in negligence, fraud or misconduct in the performance of their duties. From this, I conclude that the understanding of the parties, on May 9, 1994, was that if Mr. Prescott ultimately did not prevail in any aspect of the defense of his licensing proceeding because he was found to have committed negligence, fraud or misconduct, he would repay all amounts that had been advanced for his defense by LSI.

As I have noted above, I find those amounts to have totaled $516,871.46. I therefore conclude that that amount is Mr. Prescott's principal repayment liability.

B. Interest Owing on the Prinipal Repayment Liability.

As Mr. Prescott notes in his Closing Argument Brief, the parties were silent on the subject of whether Mr. Prescott would be obliged to pay interest in any amount, in the event of he were obliged to repay LSI's advances. His May 9, 1994 letter did not discuss the subject, nor did the May 9, 1994 Written Action of LSI's Board of Directors Taken in Lieu of a Meeting – nor, for that matter, did the Lindquist & Vennum advice to the Kelley Office. (Exhibits 7, 8, and 5). Mr. Prescott contends that this silence means that the parties formed no agreement on the subject, and absent such an agreement interest should not be owing. The Plaintiff, on the other hand, asserts that advanced indemnification is, by definition, "essentially a decision to advance credit", citing Advanced Mining Systems v. Fricke, 623 A.2d 82 (De. Ch. 1992); and inasmuch as Mr.

Prescott essentially had the use of LSI's money from the time it was paid to the Kelley Office, interest must be owing from that date.

The Plaintiff asserts that such interest should be calculated based on the amount that LSI would have received if LSI had deposited the advanced monies in a secure fund. Plaintiff presented testimony of Mr. Kyle Kossol, the Vice-President for Finance and Systems, who calculated the amounts of interest that would have accrued on the principal paid by LSI, compounded on a monthly basis, if those amounts had been invested as LSI's other funds had been invested, in "money market funds". (T. 243-249). In response, Mr. Prescott has argued that, if interest in fact is owing, it should be post-judgment interest only, calculated as interest on federal court judgments is calculated, pursuant to 29 U.S.C. §1961.

On these issues, I agree with the Plaintiff that interest must be paid on the amounts advanced by LSI. The notion that underlay Mr. Prescott's undertaking was that he would make LSI whole, if he ultimately were found to have committed negligence, fraud or misconduct. By necessity, LSI cannot be made whole unless the advanced amounts are repaid with interest. And as to the rate of interest, I also agree with the Plaintiff's proposition that the rate of interest must be reasonable. But I agree with Mr. Prescott that the provisions of 28 U.S.C. §1961 establish what reasonable interest is here. Mr. Prescott correctly notes that in the absence of applicable Community law on a subject, this Court often has looked to federal law for guidance – though, absent clear Congressional directive, such law is not controlling. There is no applicable positive Community law on the interest rates applicable to judgment, and I believe that adopting the floating rate established by 28 U.S.C. §1961 – which has the advantages of both being

easily ascertainable and being grounded in the most basic economic realities – is clearly appropriate. And in this case, I believe that adopting the rate both for pre-judgment and post-judgment interest (taking today's date as the date of judgment) also is appropriate. Under federal law, which I look to here, the award of post-judgment interest is mandatory (except in instances that have no applicability to this case), but the award of pre-judgment interest is a matter left to the sound discretion of the courts. Florence Nightengale Nursing Service, Inc v. Blue Cross Blue Shield, 41 F.2d 1476 (11th Cir. 1995). Here, pre-judgment interest clearly is appropriate, because the Plaintiff could not be made whole absent an award of pre-judgment interest; but I see no reason – and the Plaintiff has suggested none – to award a greater or different interest rate for the pre-judgment period than for the post-judgment period. Accordingly, interest on the award of $516,871.46 shall be computed according to the provisions of 28 U.S.C §1961[8].

C. Attorneys fees.

The Plaintiff seeks its reasonable attorneys fees, pursuant to the provisions of section 67 of the Community's Corporation Ordinance, as amended by Resolution No. 7-27-94-001. The Plaintiff points out that that section says that in an action brought under the Corporation Ordinance, "A prevailing party in any action shall be awarded costs and reasonable attorneys fees." Mr. Prescott has not responded to the Plaintiff's claim. Accordingly, the Plaintiff shall have until June 10, 2005 to submit an itemized claim for reasonable attorneys' fees and costs; Mr. Prescott shall have thirty days; Mr. Prescott

[8] The method of calculating interest under 28 U.S.C. §1961 was changed by Congress in 2000. For the purposes of this case, the method that the statute mandated before the change shall be applied for the period from July 1, 1994, when the Gaming Commission revoked Mr. Prescott's license to December 21, 2000, when the statute was amended; and the method presently mandated by the statute shall be applied for the period after December 21, 2000.

shall have until July 11, 2005 to respond; and the Plaintiff shall have until July 25, 2005 to reply.

ORDER

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

1. That the Defendant shall pay to the Plaintiff the sum of $516,871.46, as reimbursement for attorneys fees and expenses advanced in 1994 by the Plaintiff to the Defendant;
2. That the Defendant shall pay interest to the Plaintiff on the principal sum of the judgment herein at the rates specified by 28 U.S.C. §1961, for the period from July 1, 1994, such interest to be calculated as more fully described in footnote 7 of this Memorandum Opinion and Order;
3. The Plaintiff may submit, to the Court and the Defendant, an itemized statement of its reasonable attorneys fees and costs not later than June 10, 2005; the Defendant may submit a response not later than July 11, 2005; and the Plaintiff may submit a reply not later than July 25, 2005.

May 11, 2005

Judge John E. Jacobson