COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

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| Little Six, Inc., et al.<br><br>Plaintiffs,<br><br>vs.<br><br>Leonard Prescott, et al.,<br><br>Defendants. | ) | File No. 048-94 |

MEMORANDUM AND ORDER

Both Defendants in this action have moved for summary judgment. For the reasons set forth herein, the Court herewith grants Mr. Prescott's motion in part and denies it in part; and the Court denies Mr. Johnson's motion on its stated grounds, but grants Mr. Johnson summary judgment with respect to certain counts where the record discloses no facts upon which Mr. Johnson could be held liable.

The Plaintiffs seek damages against the Defendants for actions which the Defendants took, or allegedly took, during a period of time when the Defendants were the two senior officers of Little Six, Incorporated ("LSI"). LSI is a corporation chartered by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") under the provisions of the Shakopee Mdewakanton Sioux Community

Corporation Ordinance, Ordinance No. 2-27-91-004 ("the Corporation Ordinance"). Under the Corporation Ordinance, LSI was granted Articles of Incorporation ("the LSI Charter") on March 18, 1991. The LSI Charter provides that LSI shall issue one share of stock, which shall be wholly owned by the Community, and that each Member of the Community shall have the right to one vote on any matter properly before the Members of the Corporation. In issuing the LSI Charter, the Community explicitly granted to LSI the sovereign immunity from suit which the Community possesses, subject to certain express limitations which are discussed below.

At the time the LSI Charter was issued, Mr. Prescott was Chairman of the Community and, therefore, a member of the Community's Business Council ("the Business Council"). Constitution of the Shakopee Mdewakanton Sioux Community, Art. III. Section 7.3 of the LSI Charter provides that LSI's Board of Directors ("the LSI Board") shall consist of seven members, three of whom shall be the members of the Business Council. So, Mr. Prescott became a member of the LSI Board when the corporation was created. The Board then elected him its first Chairman, and selected him as the corporation's first President. On June 10, 1991, Mr. Prescott was succeeded in the latter position by Mr. Johnson. Eventually, Mr. Prescott became LSI's Chief Executive Officer ("CEO"); and thereafter he served as both Chairman of the Board and Chief Executive Officer until he was suspended, on May 5, 1994, and ultimately removed, on September 29, 1994.

Mr. Johnson was initially hired by the LSI Board as the

corporation's first CEO and second President. When he was succeeded by Mr. Prescott as CEO, on September 2, 1993, he became the corporation's first Chief Operating Officer ("COO"); and thereafter he served as President and COO until he, too, was suspended on May 5, 1994. Mr. Johnson then resigned both positions, on June 8, 1994.

The Plaintiffs contend that Mr. Prescott and Mr. Johnson exceeded the authority which they possessed in their corporate offices, and that they expended corporate funds for unauthorized purposes. During Mr. Prescott's and Mr. Johnson's tenure with LSI, the LSI Board created an Executive Committee ("the Executive Committee"), and delegated to it certain of LSI Board's responsibilities. Many of the points of dispute between the Plaintiffs and Mr. Prescott and Mr. Johnson concern the scope of the authority which the LSI Board gave to the Executive Committee; the actual manner in which the Executive Committee did or did not exercise its authority; and the correctness and completeness of representations made to the LSI Board concerning the actions of the Executive Committee.

Rule 28 of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux (Dakota) Community adopts the provisions of Rule 56 of the Federal Rules of Civil Procedure, with respect to motions for summary judgment. Under Rule 28, therefore, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. Pro. 56.

Motions for summary judgment in this matter were filed on June 25, 1996, by the Mr. Prescott, and on August 20, 1996, by Mr. Johnson. The motions were briefed and argued thereafter; but this Court's consideration of the motions was suspended pending the decision of the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community in appeals by Mr. Prescott and Mr. Johnson from this Court's denial of their motions to dismiss. When the Court of Appeals issued its decision, the motions for summary judgment were reinstated on this Court's docket.

Mr. Prescott's motion asserts that he is entitled to summary judgment on three grounds: First, he contends he is entitled to absolute immunity from this action, because his service on the LSI Board resulted directly from the fact that, when LSI was created, he was Chairman of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community")--a position which he maintains possesses absolute immunity from suit. Second, he asserts that, even if he is not entitled to absolute immunity for some or all of the actions which he took while he served LSI, still he should be protected by "official immunity"--the qualified immunity which attends the actions taken by government officials in good faith--because, he maintains, LSI is a governmental entity. Third, he contends that as the record in this matter has been developed through the discovery process, no factual basis has appeared for any of the allegations against him.

Mr. Johnson's motion is made on the grounds that he, too, is entitled to official immunity--that although he was an employee and officer of LSI, he asserts that he is entitled to the immunity that would protect a government official making good faith decisions within the scope of his responsibility.

In the view of the Court, neither Mr. Prescott nor Mr. Johnson is entitled to the sorts of immunity they claim, given the provisions of the Corporation Ordinance and the LSI Charter. The Court is not unmindful of the need to protect the decision-making process which corporate officers and employees must engage in. A corporate officer who acts in the good faith belief that he or she is authorized by his or her employer to take a certain course of action should not lightly be subjected to future liability, by the employer or the employer's owners, for that course of action. The Court will bear that need in mind, as this case proceeds.

But that protection, afforded to business officials, is not what Mr. Prescott and Mr. Johnson claim. They claim legal immunities arising out of the governmental nature of the Community, and the fact that the Community created and owns LSI; and those claims are untenable, under the particular circumstances of this case.

1. <u>The claims of absolute and qualified immunity from suit</u>.

Mr. Prescott's claim of absolute immunity is based on a cause-effect argument: he asserts that he was Chairman and CEO of LSI only because he was Chairman of the Community; and, he asserts, the

Chairman of the Community possesses absolute immunity from suit.

Mr. Prescott's and Mr. Johnson's claims of qualified immunity, on the other hand, are based on the contention that LSI is an arm of the Community's government, and on the assertion that officials of LSI therefore are government officials who are possess the sort of "good faith" immunity that attends the functions of government officials generally.

In the view of the Court, these arguments miss several points. First, Mr. Prescott's claim of absolute immunity is flawed because, from an early date, this Court has held that when the General Council of the Community adopted Ordinance No. 02-13-88-01 (the Community Court Ordinance), it waived the immunity--which otherwise is possessed by officers of the Community--for controversies, heard in this Court, pertaining to "the performance of their duty". Hove v. Stade, No. 002-88 (SMS(D)C Ct., July 15, 1988), at 5. Given this, it is difficult to see how Mr. Prescott could claim absolute immunity in litigation where the Community's basic claims against him are that he acted inconsistently with his duties under the Corporation Ordinance.

Perhaps even more importantly, neither Mr. Prescott nor Mr. Johnson, as officers of LSI, can claim an immunity any broader than that possessed by LSI itself under the Corporation Ordinance and the LSI Charter. The fact that Mr. Prescott may have become a member of the LSI Board because he was Chairman of the Community, and the further possibility that his ascent to the offices of Chairman and CEO of LSI also may somehow have been the result of

his governmental position, does not mean that his corporate position was not distinct from his governmental position. It was in his capacity as corporate officer that he acted when he made decisions for LSI, and it is under the Charter of that corporation that his immunity, or lack thereof, to litigation should be judged.

> The Charter contains the following provisions: ....
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> 3.1 Sovereign Immunity of Corporation. The Shakopee Mdewakanton Sioux Community confers on the Corporation all of the Community's rights, privileges and immunities concerning federal, state and local taxes, regulation, and jurisdiction, and sovereign immunity from suit, to the same extent that the Community would have such rights, privileges, and immunities, if it engaged in the activities undertaken by the Corporation. Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.
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> 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. Consent to suit by the Corporation shall in no way extend to the Community, nor shall a consent to suit by the Corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the Community. Consent shall not be required for an action commenced by a Member of the Corporation to enforce the provisions of these articles or the Shakopee Mdewakanton Sioux Community Corporation Ordinance in the Judicial Court of the Shakopee Mdewakanton Sioux Community.
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> Articles of Incorporation of Little Six, Inc., March 18 1991 (Emphasis added).

It seems clear that the first of these provisions, section 3.1, waived any immunity--including absolute immunity--which LSI or its officers might claim, as to actions brought by the Community or Members of the Corporation, in litigation brought in this Court.

It also seems clear that the Corporation Ordinance establishes a separate existence for corporate entities which are chartered under it. And from the LSI Charter it is evident that, although the Community is LSI's sole shareholder and possesses many powers which are unique to tribal entities, still LSI is a distinct entity, created to serve its Members. So, LSI's officers, acting in their corporate capacity, have a status and responsibility that is distinct from the status and responsibility which they might have as officers of the Community. Among these responsibilities, I believe--given the emphasized provision of section 3.2 of the Charter, quoted above--is the responsibility to answer litigation, brought by the Community or Members of the Corporation in this Court, under the Corporate Charter or the Corporation Ordinance. Therefore, neither Mr. Prescott nor Mr. Johnson has the sort of qualified immunity afforded government officials for this sort of action in this Court[1].

2. The record with respect to Mr. Prescott's expenditures and other alleged actions. In addition claiming immunity, Mr.

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[1] Clearly, the present litigation must be distinguished from instances where the plaintiff is neither the Community nor a Member of the Corporation. See e.g., Culver Security Systems, Inc. v. Little Six Inc., et al., No. 026-92 (SMS(D)C Ct., June 14, 1994): and Gavle v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996).

Prescott has argued that the factual record which has been developed in this matter through the discovery process, and as it is augmented with affidavits, requires the grant of his motion for summary judgment on all counts in the Complaint. But, upon review of the voluminous materials supplied to the Court, and mindful that the Court is obliged to make all inferences in the light most favorable to the non-moving party, Barry v. Barry, 78 F.3d 375 (8th Cir. 1996), as to most of these issues it is the Court's view that the record is not sufficiently unambiguous to permit the grant of summary judgment.

A. Payments allegedly made by or on behalf of Mr. Prescott.

The heart of the Plaintiffs' Complaint concerns (i) the amounts of compensation paid to Mr. Prescott (and to Mr. Johnson), which the Plaintiffs assert was at levels not authorized by LSI; and (ii) the payment of sums, allegedly at Mr. Prescott's or Mr. Johnson's behest, which the Plaintiffs assert were not for proper corporate purposes. The latter sorts of claims range from a skiing trip to Colorado and season tickets to the Minnesota Timberwolves basketball games to the payment of, or reimbursement of, attorneys' fees incurred in contesting the Community's Adoption Ordinance and assisting Mr. Prescott in defending his gaming license before the Community's Gaming Commission. With respect to each of these categories of expense, Mr. Prescott contends either that the Board of LSI approved the expenditures, or that an Executive Committee which the Board established approved the expenditures, or that he

was generally authorized to make the expenditures and the expenditures served a legitimate corporate purpose. And as to each, the Plaintiffs contend that neither the Board of LSI nor the Executive Committee explicitly approved the expenditures, or that if the Executive Committee and/or the Board approved the expenditures they were misled or without authority to do so, and/or that the expenditures served no legitimate corporate purpose.

In my view, the record before the Court, though it is voluminous--perhaps <u>because</u> it is voluminous--is simply not clear enough, on these points, to permit the granting of a motion for summary judgment. It may be, as Mr. Prescott contends, that the LSI may well have validly approved, <u>de jure</u> if not <u>de facto</u>, all of the expenditures in question. On the other hand, as to some expenses, such as the use of corporate funds to pay or defray legal fees attendant to challenging the validity of an Ordinance adopted by the Community's General Council, it may be that even if the LSI Board of Directors approved the expenditure, nonetheless the expenditure was inappropriate. But I think that, resolving all ambiguities in favor of the Plaintiffs, there is sufficient question in the record to require these issues to go to trial.

However, with respect to four categories of expenditures--Mr. Prescott's "surprise birthday party", his daughter's graduation party, fees paid to certain lobbyists and public relations firms, and a separation pay plan for a Mr. Gary Gleisner--it appears from the record that the Plaintiffs simply cannot hold Mr. Prescott liable for damages:

i. The birthday party. The record is clear that in June, 1993, a "surprise" birthday party was held for Mr. Prescott. The record also is clear that Prescott did not plan this party. It was, in fact, a surprise affair, instigated and planned by employees of LSI and at least one member of the LSI Board. The record also indicates that party served as an occasion to preview a corporate advertising campaign, and therefore may well have had a corporate purpose apart from the personal context. But in any case, Mr. Prescott simply had no responsibility for the party or for LSI's payment for the party, and therefore summary judgment is appropriate for Mr. Prescott on this issue.

ii. The graduation party. In contrast, it is clear that Mr. Prescott did plan and direct his daughter's graduation party, and that that event may well have served no purpose under LSI's Corporate Charter. But, whatever might result from those facts in another context, they have no consequence here because this is an action for money damages--for monies which Mr. Prescott owes the Plaintiffs--and Mr. Prescott has repaid LSI for the cost of the party. He therefore clearly owes the Plaintiffs nothing, on that score, and is entitled to summary judgment on that issue.

iii. Fees paid to lobbyists. The Plaintiffs allege that Mr. Prescott improperly utilized funds of LSI to pay fees to a lobbyist, Mr. Larry Kitto, and to a law firm, O'Connor & Hannan, and an advertising agency, Mona, Meyer, McGrath & Gavin. Mr. Prescott contends that nothing in the record suggests that those entities performed personal service for him; and in response the

Plaintiffs have tendered only materials indicating that LSI paid monies to the Democratic Congressional Campaign Committee. Under these circumstances, the Court must agree with Mr. Prescott: nothing produced by the Plaintiffs suggests that this category of expenditures was made to benefit Mr. Prescott rather than LSI. Accordingly, summary judgment for Mr. Prescott as to those expenditures is appropriate.

iv. Mr. Gleisner's separation pay. Mr. Prescott contends that he had no responsibility for the establishment of a separation pay plan for a Mr. Gary Gleisner, a former employee of LSI. The plan was raised in the Plaintiffs' Complaint; but they now have agreed with Mr. Prescott. Accordingly, summary judgment is granted as to that matter.

B. Other actions of Mr. Prescott. This case also contains claims by the Plaintiffs for damages not relating to his compensation or to his emoluments. The Plaintiffs claim to have been damaged by allegedly unauthorized release to the public, by Mr. Prescott, of certain financial information. The Plaintiffs also claim that Mr. Prescott misrepresented his personal history, when he applied for a gaming license from the Community's Gaming Commission, and that he caused actionable damage thereby. Mr. Prescott asserts that as to each of these allegations there is no genuine issue of material fact, and that as to each the Plaintiffs cannot show either that he acted improperly or that they have sustained any damage.

It must be said, in truth, that the causal connection between

Mr. Prescott's alleged actions and some clear compensable damage to the Plaintiffs is not bright and clear, on this state of the record. But again the Court is mindful that, when considering a motion for summary judgment, to prevail the movant must demonstrate that there is no issue of genuine material fact and that he or she is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). So, if there is something credible in the record that may support the Plaintiffs claim, the Court will not foreclose the Plaintiffs' opportunity to prove their damages.

The record indicates that the LSI Board approved Mr. Prescott's release of information to the public only after the fact, and that the approval was later rescinded. What the net effect of all of this may be, as to Mr. Prescott's authority or as to the Plaintiffs' damages, remains to be seen. But from the evidence on the record, the Court cannot say that as a matter of law Mr. Prescott was authorized to release the information or that LSI was not damaged by the release.

The record also indicates that Mr. Prescott did not disclose, on his application for a Community gaming license, that he had been the subject of successful criminal prosecution. The record further indicates that his criminal record had been expunged at a time considerably before his license application was submitted, and that he did not report the record on the application for that reason. But, although these facts are significant, the Court cannot now say as a matter of law that the omission on his license application was proper or that it caused the Plaintiffs no damage.

2. The record with respect to Mr. Johnson. The Court's holding with respect to Mr. Johnson's claim for qualified immunity disposes of Mr. Johnson's motion, since he sought summary judgment only on that ground. But it is clear that nothing in the record supports certain of the allegations which the Complaint makes against Mr. Johnson; and so the Court herewith grants Mr. Johnson summary judgment, sua sponte, on these matters:

A. Disclosure of information. Mr. Johnson has contended that he disclosed no corporate information to any person (other than his own salary), and the Plaintiffs have agreed. Therefore, Mr. Johnson is entitled to summary judgment as to that issue.

B. Authorization of parties. The Complaint alleges that Mr. Johnson participated with Mr. Prescott the aforementioned graduation party for Mr. Prescott's daughters. However, the Plaintiffs in their reply to Mr. Johnson's motion for summary judgment have agreed that the record contains no evidence that Mr. Johnson participated in any way in this matter. Therefore, Mr. Johnson should have summary judgment on that claim.

C. Fees paid to lobbyists. The state of the record as to fees paid to Mr. Larry Kitto, the O'Connor & Hannan law firm, and the Mona, Meyer, McGrath & Gavin advertising agency, discussed above with respect to Mr. Prescott, applies equally to Mr. Johnson. Nothing in the record indicates that those firms performed personal service for Mr. Johnson; and therefore summary judgment on those fees is appropriate as him.

With respect to some of the other allegations in the Complaint

pertaining to Mr. Johnson, the record at this point appears to be tenuous; and as to matters pertaining to his compensation and emoluments, matters stand much as they do with respect to Mr. Prescott. But as to all such issues, the Court concludes that the Plaintiffs have made enough of a showing to take the matter to trial.

**ORDER**

For the foregoing reasons, and based upon all the pleadings and materials herein--

1. the Defendant Leonard Prescott's motion for summary judgment is GRANTED with respect to claims by the Plaintiffs to recoup (i) the costs of the surprise birthday party held for the Defendant Leonard Prescott in June 1993; (ii) the costs of the graduation party held for the daughter of the Defendant Leonard Prescott; (iii) any fees paid by Little Six, Inc. to Mr. Larry Kitto, the law firm of O'Connor & Hannan, and the advertising agency of Mona, Meyer, McGrath & Gavin; and (iv) the separation pay plan established by Little Six, Inc. for Mr. Gary Gleisner.

2. the Defendant William Johnson is GRANTED summary judgment, sua sponte, as to claims by the Plaintiffs to recoup (i) any damages which the Plaintiffs claim in this litigation to have suffered from the disclosure of corporate information to any member of the public; (ii) any sums expended for the graduation party for Mr. Prescott's daughters; and (iii) any fees paid by Little Six,

Inc. to Mr. Larry Kitto, the law firm of O'Connor & Hannan, and the advertising agency of Mona, Meyer, McGrath & Gavin.

3. In all other respects, the Defendants' motions for summary judgment are DENIED.

April 1, 1997

John E. Jacobson
Judge