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TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED JAN 06 2020

LYNN K. McDONALD
CLERK OF COURT

TRIBAL COURT

OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

In Re the Dissolution of Marriage Of: Court File: 867-17

Amanda Gail Gustafson,

Petitioner,

v.

James Van Nguyen,

Respondent.

MEMORANDUM OPINION AND ORDER

This matter came on for an evidentiary hearing that commenced on October 31, 2019, continued November 13, 2019, and concluded on November 26, 2019. The Petitioner Amanda Gail Gustafson appeared at all three hearings along with her Attorney Gary A. Debele, Messerli & Kramer, P.A. The Respondent James Van Nguyen appeared pro se at the hearing on October 31, 2019. He also appeared at the final two proceedings along with his Attorney Jonathan D. Miller, Meagher & Geer, P.L.L.P.[1]

I. PRODECURAL HISTORY AND ISSUES PRESENTED

This matter is before the Court to resolve Petitioner Amanda Gustafson's motions to i) impose sanctions against the Respondent James Van Nguyen and ii) modify custody of the

[1] The Respondent had been represented by Adam J. Blahnik, Blahnik Law Office, PLLC. The Respondent released Mr. Blahnik from his representation after the parties failed to conclude the engagement of the Parenting Consultant. He proceeded Pro Se to the evidentiary hearing and later engaged Mr. Miller.

parties' minor child from joint custody and shared placement to sole custody and placement with the Petitioner.

The Petitioner first filed her request for sanctions on June 28, 2018.[2] The Court held open its consideration of this request in the Final Judgment of May 3, 2019.[3] The Petitioner filed an additional request for sanctions in a post-judgment motion filed on June 7, 2019, relating to the appointment of the Parenting Consultant required in the Final Judgment.[4]

Pursuant to the provisions and time frames set forth in the Scheduling Order for the evidentiary hearing:[5]

- The Respondent filed a Motion for Denial or Deferral of Petitioner's Motion for Sanctions per Rule 62.1 (Docket #196) on October 7, 2019, along with a supporting Declaration (Docket #197) and Memorandum of Law (Docket #198);
- The Petitioner filed a Counter Motion and Motion Regarding Sanctions (Docket #208) on October 21, 2019, along with a supporting Memorandum of Law (Docket #209), the Petitioner's supporting Affidavit (Docket #209), and a Proposed Order Regarding Sanctions (Docket #211);

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[2] See Petitioner's Notice of Motion & Motion (Docket #102) seeking attorney fees to enforce discovery demands.
[3] Findings of Fact, Conclusions of Law, Order for Final Judgment, Judgment and Decree (Docket #174), at 6 ("The Court will schedule an evidentiary hearing on Petitioner's request for sanctions.")
[4] Petitioner Amanda Gustafson's Notice of Motion and Motion (Docket #176), Par. 4 (seeking an order "that the Petitioner may raise her request for an award of attorneys' fees and costs in having to bring this motion in the evidentiary hearing on her prior sanctions motions . . . .")
[5] Scheduling Order of September 19, 2019 (Docket #193). This Scheduling Order also dealt with a separate issue of child support which is not relevant for the purposes of this Opinion and Order. After the October 31, 2019, evidentiary hearing, the Court dismissed the Respondent's Motion for Child Support in its Order of November 5, 2019 (Docket #227), for failure to comply with the requirements of Chapter IV Section 2(n) and Chapter II Section of the Domestic Relations Code. The only remaining issues remaining to be dealt with are the Petitioner's requests for sanctions and modification of custody.

- The Petitioner filed a Pre-Hearing Memorandum of Law with Exhibit & Witness Lists Regarding Petitioner's Request for Sanctions (Docket #213) on October 24, 2019; and
- The Respondent filed a Pre-Hearing Memorandum per Order of 9/19/10 with Exhibit & Witness List (Docket #215) on October 25, 2019.

The Court held an evidentiary hearing on October 31, 2019, as scheduled. In addition, because of circumstances described in the Court's Order of November 5, 2019 (Docket #227) and in correspondence from the parties[6], the Court continued the evidentiary hearing on November 13, 2019 and concluded the proceeding on November 26, 2019.

For the purposes of deciding the parties' remaining motions in this matter, the Court considers the issues before it as they have been set forth by the parties themselves in their respective pre-evidentiary hearing submissions. Unless noted as otherwise already decided or resolved, the Court will address each of those issues in turn.

As set forth in his Pre-Hearing Memorandum per Order of 9/19/19 (Docket #215), the Respondent presents only the issue of "weather (sic) the Court can hear the issues of sanctions at this [hearing]."

As set forth in her Pre-Hearing Memorandum of Law (Docket #213), at 2, the Petitioner presents the following issues[7]:

1. Whether the Court should impose sanctions against the Respondent for failure to comply in a timely fashion with the Court's order to vacate the Petitioner's residence;

[6] Letter from James Nguyen Complaining about Hearing on 10/31/19 & Service of SMSC No Trespass Notice (November 1, 2019) (Docket #226); Attorney Debele's Letter with Attachments Responding to 11/1/19 Letter from James Nguyen with Complaints of Unfair Treatment of James Nguyen at 10/31/19 Hearing (November 5, 2019) (Docket #230).

[7] The Court paraphrases here the Petitioner's presentation of issues in the interest of brevity, capturing the gist of each issue that she sets forth.

2. Whether the Court should impose sanctions against the Respondent for his failure to respond in a timely fashion during the drafting of the Final Judgment and Decree;
3. Whether the Court should impose sanctions against the Respondent for his failure to timely respond to pre-trial discovery requests and Court orders related thereto;
4. Whether the Court should impose sanctions against the Respondent for his failure to cooperate and act in good faith in the selection of a Parenting Consultant;
5. Whether the Respondent should be ordered to return to the Petitioner certain personal property allegedly still in his possession[8]; and
6. Whether the Court should modify custody of the parties' minor child from joint custody and shared placement to sole custody and primary placement with the Petitioner.

II. CONTINUING AUTHORITY TO HEAR THE PETITIONER'S MOTIONS FOR SANCTIONS AND FOR MODIFICATION OF CUSTODY

The Respondent argues that this Court does not have the authority to address the Petitioner's motions seeking sanctions and modification of custody while his appeal is pending and, therefore, should deny those motions. Alternatively, he argues that the Court should defer consideration of the Petitioner's motions until his appeal is resolved.[9]

This is not the first time that the Respondent has asserted that this Court does not have the authority to address and resolve the Petitioner's motions. The Court squarely addressed, thoroughly considered, and rejected these assertions in its Opinion and Order of September 11, 2019 (Docket #190). There, the Court found that it retains jurisdiction over the Petitioner's motion for sanctions "as necessary to oversee the enforcement of its judgment." Id., at 2 (citing

[8] The Court dismissed this request for sanctions at the Hearing on November 13, 2019 for failure of the Petitioner to provide any receipts, list, or inventory of the items of personal property that establish the existence and value of these items. See Hearing Transcript 10/31/19, at 53; Hearing Transcript 11/1319, at 4.
[9] Respondent's Prehearing Memorandum per Order 9/19/19 (October 25, 2019) (Docket #215); Respondent's Memorandum of Law for Rule 62.1 (October 25, 2019) (Docket #215).

Bd. of Educ. of St. Louis v. State of Mo., 936 F.2d 993, 996 (8th Cir. 1991); In re Grand Jury Subpoenas Duces Tecum, 85 F.3d 372, 375-76 (8th Cir. 1992); Huey v. Sullivan, 917 F.2d 1362, 1365 (8th Cir. 1992)).

The Court also found that the Petitioner's request for sanctions falls "within this Court's authority to address matters independent, supplemental, or collateral to the appeal, such as attorney's fees." Id., at 5 (citing Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 170 (1939); Harmon v. Farmers Home Admin., 101 F.3d 574, 587 (8th Cir. 1996)).

Finally, the Court found that it "may also continue its exercise of jurisdiction as necessary to protect the best interests of the Minor child." Id., at 3 (citing Domestic Relations Code, Chapter IV, Sec. 3(a); Perry v. Perry, 749 N.W.2d 399, 403 (Minn. Ct. App. 2008)).

These rulings constitute the law of this case and are binding upon the Respondent. Under the law-of-the-case doctrine, "'a court should not reopen issues decided in earlier stages of the same litigation.'" In re Raynor, 617 F.3d 1065, 1068 (8th Cir. 2010) (quoting Agostini v. Felton, 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). This well-established doctrine prevents "re-litigation of a settled issue," Id., unless the Court "is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice," Pepper v. United States, 562 U.S. 476, 131 S.Ct. 1229, 1250-51, 179 L.Ed.2d 196 (2011).

The Respondent has presented no precedent or analysis to convince the Court that its Opinion and Order of September 11, 2019 (Docket #190) falls within exceptions to the law-of-the-case doctrine. His pre-hearing memorandum of law cites neither case law contrary to the precedent relied upon by the Court nor new evidence that would warrant reconsideration of the law of this case. Instead, for the first time the Respondent cites "Rule 62.1" and, without citation to or analysis of relevant interpretation or precedent, simply states:

> This Issue falls under Rule 62.1 Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal. In this circumstance the Rule states when relief is pending appeal the Court may either defer considering the motion or deny the motion under 62.1(a)(1)-(2).[10]

The Court presumes that the Respondent references Rule 62.1 of the Federal Rules of Civil Procedure (FRCP). The Petitioner presumes the same and extensively addresses the applicability of FRCP 62.1 to her motions.[11]

The Court finds that FRCP 62.1 does not control and is not dispositive of the Petitioner's motions as the Respondent asserts. As the Petitioner correctly asserts, the Advisory Committee Notes to FRCP 62.1 do not support the Respondent's contention that this Court is barred from considering her motions. Similarly, those notes provide no rationale for this Court to defer the exercise of its continuing authority over matters that remain within its purview, particularly regarding the best interests of a minor child pursuant to the Community's Domestic Relations Code. In relevant part, the Advisory Committee Notes provide:

> Rule 62.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.[12]

As this Court previously ruled its Opinion and Order of September 11, 2019 (Docket #190) and here again affirms, the Respondent's Notice of Appeal has not deprived this Court of its authority to rule on the Petitioner's motions for sanctions and modification of custody. As the

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[10] Respondent Nguyen's Memorandum of Law for Rule 62.1 (October 7, 2019) (Docket #198).

[11] See Petitioner Gustafson's Memorandum of Law in Support of Counter Motion Regarding Sanctions (October 21, 2019), at 4-6. (Docket #209).

[12] FRCP 62.1, Committee Notes on Rules – 2009 (accessed on December 15, 2019, at https://www.law.cornell.edu/rules/frcp/rule_62.1) (emphasis added).

Advisory Committee notes make clear, nothing in FRCP Rule 62.1 defines when an appeal "defeats the [trial] court's authority to act in the face of a pending appeal."[13] And, to the extent that FRCP 62.1 may provide rationale for this Court's discretion to defer consideration of the Petitioner's motions pending appeal, the Court declines to exercise that discretion and chooses to fulfill its responsibilities under the Community's Domestic Relations Code.

The Respondent has failed to show manifest errors in law or present newly discovered evidence regarding his claims about this Court's authority to address the Petitioner's motions pending appeal. His attempted reliance on FRCP 62.1 is misplaced and unpersuasive. The Respondent's Motion for Denial or Deferral of Petitioner's Motion for Sanctions per Rule 62.1 (Docket #196) is **DENIED**.

III. THE PETITIONER'S MOTIONS FOR ATTORNEY'S FEES AS SANCTIONS

This Court's power to control its proceedings includes the power to assess attorney's fees as a sanction for willful disobedience of a court order or when a party has acted "vexatiously, wantonly, or for oppressive reasons." Brooks v. Corwin, 2 Shak. A.C. 5, (Aug. 4, 2008), at 3-4 (Slip Opinion). This power to award attorney's fees for bad behavior is inherent in the Court's power to control its courtroom and is separate from the authority to grant sanctions under Rule 11 of the Community's Rules of Civil Procedure. Id., at 4-5 (Slip Opinion).

In addition, Rule 24 of the Community's Rules of Civil Procedure incorporates "[t]he provisions of Rule 37 of the then-current Federal Rules of Civil Procedure (FRCP) concerning refusals to make discovery and the consequences thereof." Throughout FRCP 37, attorney's fees are provided as available sanctions for failure to make disclosures or to cooperate in discovery.[14]

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[13] FRCP 62.1, Committee Notes on Rules – 2009, supra.

[14] See, e.g., FRCP 37(a)(5) (regarding motions to compel disclosure or discovery); FRCP 37(b)(2)(C) (regarding failure to comply with a court order); FRCP 37(c)(1)(A) (failures to disclose or supplement an earlier response).

Against this backdrop of its authority to impose attorney's fees as sanctions, the Court now considers each of the Petitioner's remaining requests for such sanctions.

A. Failure to Comply in a Timely Fashion with the Court's Order to Vacate The Petitioner's Residence

The parties appeared before this Court on September 19, 2018, to commence trial as a fully contested matter. After several hours of negotiations, the parties reached a settlement that obviated the need for a trial. The parties stated the key provisions of their stipulation on the record, the Court approved them, and the parties agreed to begin implementing them. They were then to cooperate in preparing and submitting to the Court proposed findings of fact, conclusions of law, and a judgment for dissolution of their marriage consistent with their stipulation.[15]

The parties' stipulation, as included in both the Partial Judgement and Decree and the Final Judgment and Degree, provided that certain real property located in the City of Bloomington "shall be awarded to the Wife [the Petitioner] and that the Husband [the Respondent] shall vacate these premises no later than close of business on October 17, 2018."[16]

It is undisputed that the Respondent failed to vacate these premises by the October 17, 2018, deadline. Petitioner sought relief from this court. The Court responded by issuing an Order dated November 7, 2018 (Docket #154). In that Order, the Court stated the following:

> 4. Petitioner Amanda Gustafson is title owner to a homestead located at 5511 Southwood Drive, in the City of Bloomington, State of Minnesota. This homestead is currently occupied by Respondent James Nguyen.
> 5. Among the terms of agreement that the parties entered into and put on the record on September 19, 2018 was that Petitioner Gustafson would retain sole ownership of this Bloomington property and that Respondent Nguyen would vacate those premises on or before October 17, 2018.

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[15] See Affidavit of Amanda Gustafson in Support of Notice of Motion and Motion for Emergency Hearing (November 2, 2018) (Docket #155), at 1-2; Partial Enforcement Order (November 7, 2018) (Docket #160).
[16] Findings of Fact, Conclusions of Law, Order for Partial Judgment, Partial Judgment and Decree (February 13, 2019) (Docket #171), at 13; Findings of Fact, Conclusions of Law, Order for Final Judgment, Judgment and Decree (May 3, 2019) (Docket #174), at 15.

6. To date, Respondent Nguyen has refused to vacate those premises, despite entering into the agreement, placing it on the record, and with said agreement as to physical occupancy of this home having the effect of an order of this Court.

7. Therefore, this Court finds it appropriate to issue a specific order directing Respondent James Nguyen to immediately vacate the property located at 5511 Southwood Drive, in the City of Bloomington, State of Minnesota, and that if necessary, law enforcement from the City of Bloomington and Hennepin County shall be engaged to assist in his removal from these premises.

8. In the event Respondent Nguyen refuses to immediately vacate these premises, this Court will then consider appropriate additional sanctions being levied against Respondent Nguyen.

Despite the clear warning to the Respondent in paragraph 8 of this Order, he refused to obey for a second time an Order of this Court as it relates to this property. He finally vacated the premises on or about November 28, 2018, and then only after and as a consequence of the Petitioner's motion in this Court to enforce the terms of the parties' stipulation and a separate eviction action in the courts of the State of Minnesota.[17] When questioned by his attorney, the Respondent admitted that he agreed at the state eviction hearing to vacate the property that same day.[18]

The Respondent argues that he was justified in not vacating the home on the date he agreed because he had not received the title to a GMC truck that he had been awarded. He goes on to say that he was going to use equity in the truck to relocate to an apartment.[19] When questioned by his counsel as to whether receipt of the title of the truck was a condition to vacating the property, he answered no.[20] The Respondent clearly and undeniably knew that he was obligated to vacate the home no later than October 17, 2018, and that there were no pre-

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[17] Hearing Transcript 10/31/19, at 19-27; Hearing Transcript 11/26/19, at 11-12, 76-77; Petitioner Amanda Gustafson's Notice Motion and Motion (November 2, 2018) (Docket #154); Affidavit of Amanda Gustafson in Support of Notice Motion and Motion for Emergency Hearing (November 2, 2018) (Docket #155).

[18] Hearing Transcript 11/26/19, at 11.

[19] Hearing Transcript 11/1319, at 68.

[20] Id., at 72

conditions for him to do so. He intentionally and vexatiously abandoned his own stipulation and disobeyed this Court's Order, thereby resulting in costs to the Petitioner.

The Petitioner seeks sanctions equal to her attorney's fees in a total amount of $4,035 for bringing her motion to enforce the terms of the parties' stipulation and for bringing the eviction action in state court. She seeks an award of $3,035.00 as her attorney's fees incurred in bringing her motion in this court.[21] She also seeks an award of $1,000 of attorney's fees incurred in bringing the eviction action in state court.[22]

"'Bad faith in the conduct of the litigation, resulting in a fee award as a sanction for abuse of the judicial process, is the most familiar type of bad faith under which [attorney's] fees are awarded.'" Brooks v. Corwin, 2 Shak. A.C. 5 (Aug. 4, 2008), at 4 (Slip Opinion) (quoting Shimman v. Int'l Union of Operating Eng'rs, 744 F.2d 1226, 1230 (6th Cir. 1984). The Respondent's refusal to vacate the Bloomington property as he had agreed and affirmed to the Court, and then vacating the property only after the Petitioner sought an enforcement action in this Court and a collateral eviction action in the state court, epitomizes the type of bad faith and abuse of judicial process that warrants an award of attorney's fees. Not only did he renege on his commitment to the Petitioner. He reneged on his commitment to this Court and refused to obey a lawful Order of this Court. The Respondent should have vacated as he was required. He had no legal basis for staying in the homestead past the close of business on October 17, 2018.

The Court notes that that the Petitioner attempted informal measures, including emails from her attorney to the Respondent's attorney, to get the Respondent to vacate the premises before filing her motion in this court and seeking eviction through state court.[23] Those measures

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[21] Hearing 10/31/19, Exhibit 5, at PET 0184-0186 (Affidavit of Attorney Gary A. Debele Regarding Attorney Fees (November 7, 2018)) (Docket #161).
[22] Hearing Transcript 10/31/19, at 23, 27.
[23] See Hearing Transcript 10/31/19, at 20; Exhibit 5, at PET 0148-0152.

proved unsuccessful entirely due to the Respondent's continuing gamesmanship and evasiveness. The Petitioner's efforts to seek enforcement in this Court and through state court were entirely justified.

"'[T]he underlying rationale of 'fee shifting' is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant.'" Brooks v. Corwin, 5 Shak. T.C. 83 (Oct. 15, 2007), at 5 (Slip Opinion), aff'd Brooks v. Corwin, Shak. A.C. 5 (Aug. 4, 2008) (citing Hall v. Cole, 412 U.S. 1, 5 (1973)). Had the Respondent adhered to his stipulation and obeyed the Order of this Court we would not be addressing this matter. The Court finds that the amount the Petitioner seeks is both justified and reasonable.

The Petitioner's Motion (Docket #154) seeking sanctions in the form of attorney's fees in the amount of $4,035.00 for the Respondent's failure to timely vacate the Bloomington premises as required is hereby **GRANTED**.

B. Failure to Respond in a Timely Fashion during the Drafting of the Final Judgment and Decree

The Petitioner filed a motion on November 30, 2018, asking the Court to sanction the Respondent for his delays in responding to the draft divorce decree that her attorney was directed by the Court to draft following the placement of the comprehensive settlement agreement on the record on September 18, 2019.[24] She avers that her attorney provided a draft document to the Respondent and his attorney on October 22, 2018, and that a redlined response document was

[24] Petitioner Gustafson's Notice of Motion & Motion To Set Matter On For Trial (November 30, 2018) (Docket #164). See Petitioner's Memorandum of Law in Support of Courter Motion Regarding Sanctions (October 21, 2019) (Docket #209), at 7-8.

provided to her and her attorney on November 7, 2018.[25] The parties continued their interaction regarding the draft decree over the ensuing weeks, including at a hearing on December 7, 2018. As the Court noted in the Partial Judgment and Decree, "During the hearing [on December 7] the counsel for the two parties met for two hours to review the transcript of the [previous] proceeding and review the comments submitted by the Respondent and Mr. Blahnik [his attorney] to the written draft decree."[26]

The Court deems this aspect of the Petitioner's sanctions claim to be less about the process of attempting to agree upon a final divorce decree document and more about the fact that the parties simply could not agree on certain provisions. Ultimately, the parties were able to reach agreement on most of the provisions of the final judgment and decree. Where the parties failed to agree, the Court decided.[27] Based upon this record, the Court is unable to find sufficient evidence of bad faith, vexatious conduct, or an abuse of the judicial process during the parties' attempts to draft a final decree.

The Petitioner's Motion (Docket #164) seeking sanctions related to the drafting of the final judgment and decree is hereby **DENIED.**

C. Failure to Timely Respond to Pre-Trial Discovery Requests and Related Court Orders

The Petitioner filed a motion on June 28, 2018, seeking enforcement of her discovery requests and asking for sanctions against the Respondent for having to bring two discovery enforcement motions.[28] After a July 13, 2018, hearing on this motion, the Court issued an Order

[25] Affidavit of Amanda Gustafson in Support of Notice Motion and Motion Setting this Matter for Trial (November 30, 2018) (Docket #165), at 4-5.
[26] Findings of Fact, Conclusions of Law, Order for Partial Judgment, Partial Judgment and Decree (February 13, 2019) (Docket #171), at 2.
[27] See Findings of Fact, Conclusions of Law, Order for Final Judgment, Judgment and Decree (Docket #174), at 2-5.
[28] Petitioner Gustafson's Notice of Motion & Motion (June 28, 2018) (Docket #102).

that analyzed the Petitioner's discovery requests and the Respondent's objections to them. The Court overruled all the Respondent's objections and ordered him to provide full and complete answers to all of the disputed requests. The Court reserved its ruling on the Petitioner's request for sanctions.[29] She seeks attorney's fees in the amount of $4,811.00[30]

In now considering the Petitioner's request for sanctions related to discovery and mandatory disclosures, the Court relies upon its Order of August 17, 2018 (Docket #138) and incorporates it herein as the law of this case. The Court reiterates that it already has found that the Respondent did not comply with the Petitioner's legitimate discovery requests promulgated pursuant to Rules 21-23 of the Community's Rules of Civil Procedure, as well as with the specific mandatory disclosure requirements of Chapter IV, section 2, paragraph (n) of the Community's Domestic Relations Code. It ruled that the Petitioner's motion to compel discovery was justified and granted her motion.

The Court also reiterates its Finding of Fact 17 in the final Judgement and Decree:

> During this proceeding, the parties had every opportunity to conduct formal and informal discovery and to obtain employment, income and appraisals as necessary to determine the nature, extent and value of the parties' real and personal property. The Rule of the Court clearly require disclosure from both parties that will move the case to Final Judgment. If the Rules are not adhered to and the parties are less, then (sic) forthcoming in their responses this impedes the process. Here, the Wife [the Petitioner] served the Husband [the Respondent] with Interrogatories and Requests for Production of Documents. The Husband never served the Wife with formal or informal discovery. When the Husband failed to respond the Wife sought the assistance of the Court several times in ordering the Husband to respond to those requests. The Court issued orders directing the Husband to answer specified Interrogatories and to turn over certain documents which he never fully complied with. Husband did obtain approximately 38 subpoenas upon the individuals named. Throughout this

[29] Order of August 17, 2018 (Docket #138).

[30] Affidavit of Gary A. Debele Regarding Attorney Fees (June 28, 2018) (Docket #104).

litigation the Husband has been less than candid in his requirement to disclose and failed to supplement his discovery responses.[31]

No evidence was introduced, or arguments made at the evidentiary hearings that would counter or require reconsideration of the law of this case regarding the Respondent's recurring and continuing non-compliance with discovery and disclosure requirements. In fact, his efforts to evade and elude were again apparent, as exemplified by the Respondent's answer to a question posed during his cross-examination:

> Q. When was the last time you filed an income tax return?
> A. I don't recall.
> Q. You don't recall?
> A. I don't recall.[32]

The Court agrees with the Petitioner's assessment of the Respondent's approach to discovery and disclosure in this matter. As the Petitioner testified:

> Q. What's your impression of what it's been like trying to get information from Mr. Nguyen in this divorce proceeding?
>
> A. It's been very hard. He hasn't given much of anything ever throughout this proceeding. We just try and try and just, you know, ask him to give us a little bit of the information so we can move on with the proceedings and he just doesn't .[33]

The Court finds that the Respondent's repeated failures to comply with discovery requirements and the Court's Orders related thereto warrant sanctions as provided in Rule 24 of the Community's Rules of Civil Procedure regarding "refusals to make discovery and the consequences thereof." [34] In addition, as already noted above, this Court's power to control its

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[31] Findings of Fact, Conclusions of Law, Order for Final Judgment, Judgment and Decree (Docket #174), at 10-11 (emphasis added).
[32] Hearing Transcript 11/26/19, at 42.
[33] Hearing Transcript 10/31/19, at 33.
[34] Rule 24 incorporates the Federal Rules of Civil Procedure in this regard. See generally FRCP 37 (attorney's fees are provided as available sanctions for failure to make disclosures or to cooperate in discovery). See, e.g., FRCP 37(a)(5) (regarding motions to compel disclosure or discovery); FRCP 37(b)(2)(C) (regarding failure to comply with a court order); FRCP 37(c)(1)(A) (failures to disclose or supplement an earlier response).

proceedings includes the power to assess attorney's fees as a sanction for willful disobedience of a court order or when a party has acted "vexatiously, wantonly, or for oppressive reasons."[35]

The Court has not in 31 years on this bench observed such blatant disregard from any litigant for the unambiguous requirements of discovery rules, Court Orders, and mandatory disclosure laws. It does not make this statement lightly but here the record is clear. When bad faith conduct as egregious as this delays the orderly process of a case, adds unnecessary costs, and wastes valuable judicial resources, attorney's fees as sanctions are justified. The amount sought by the Petitioner is reasonable.

The Petitioner's Motion (Docket #182) seeking sanctions in the form of attorney's fees in the amount of $4,811.00 for the Respondent's failure to comply with clear and unambiguous discovery and disclosure requirements is hereby **GRANTED**.

D. Failure to Cooperate and Act in Good Faith in the Selection of a Parenting Consultant

The Petitioner first filed a motion on June 7, 2019, seeking sanctions against the Respondent for failing to cooperate and act in good faith in the selection of the Parenting Consultant as required by the Final Judgment and Decree.[36] She also included this claim as part of her Counter Motion and Motion Regarding Sanctions filed on October 21, 2018.[37] She seeks attorney's fees in the amount of $6,502.50 as sanctions.[38]

The key facts regarding the parties' attempts to agree upon and engage a mutually acceptable Parenting Consultant are not in dispute. The Final Judgment and Decree, in the context of joint custody and joint placement rights, requires the parties to appoint a Parenting

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[35] Brooks v. Corwin, 2 Shak. A.C. 5, (Aug. 4, 2008), at 3-4 (Slip Opinion).
[36] Petitioner Amanda Gustafson's Notice of Motion and Motion (June 7, 2019) (Docket #176), at 2.
[37] Petitioner's Notice of Counter Motion and Counter Motion Regarding Sanctions (October 21, 2019) (Docket #208), at 2.
[38] Hearing Transcript 10/31/19, at 47.

Consultant and "[i]f the parties fail to engage the process to select the Parenting Consultant within 30 days of the date of this Order the parties shall refer the matter to the Court."[39] On June 7, 2019, the Petitioner filed a motion referring the Parenting Consultant matter to the Court and asked the Court to appoint her recommended candidate as the Parenting Consultant because the parties were unable to agree.[40] After much back-and-forth, the parties finally agreed upon a different candidate than the Petitioner had proposed in her motion. However, there is still no Parenting Consultant in place because the parties have been either unwilling or unable for a variety of alleged reasons to execute a contract with the agreed-upon candidate.[41]

The selection of a Parenting Consultant thus remains at a standstill. The parties have not yet engaged a Parenting Consultant and the Court has not yet appointed one. The dispute over sanctions seemingly has gotten in the way of the action that should be taken, namely getting a Parenting Consultant in place to assist the parents in the exercise of their joint custody rights and responsibilities. The Court is reluctant to grant sanctions as the record has developed. It views the Parenting Consultant issue as inherently intertwined with a multitude of co-parenting issues that plague the parties' judgment and ability to act in the best interests of their minor child. Rather than imposing sanctions and ordering the appointment of a Parenting Consultant, the Court instead chooses to directly address the parties' inability to functionally and realistically exercise joint custody and joint placement rights at this juncture of their young child's life. See Section IV, infra.

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[39] Findings of Fact, Conclusions of Law, Order for Final Judgment, Final Judgment and Decree (May 3, 2019) (Docket #174), at 26-27.
[40] Petitioner Amanda Gustafson's Notice of Motion and Motion (June 7, 2019) (Docket #176); Affidavit of Amanda Gustafson (June 7, 2019) (Docket #177).
[41] See Hearing Transcript of 10/31/19, at 43-46; Hearing Transcript 11/26/19, at 23-26, 61, 137-140.

The Petitioner's Motion (Docket #176) seeking the appointment of a particular Parenting Consultant and sanctions in the form of attorney's fees in the amount of $6,502.50 for the Respondent's failure to cooperate and act in good faith in the selection of the Parenting Consultant as required by the Final Judgment and Decree is hereby **DENIED**.[42]

IV. THE PETITIONER'S MOTION TO MODIFY CUSTODY AND PLACEMENT

The Court now turns to the Petitioner's motion seeking to modify custody and placement of the parties' minor child.[43] The Petitioner seeks "sole legal custody and sole physical custody of the minor child" as well as "parenting time during all of the days when the minor child is in preschool or school."[44] She seeks to limit the Respondent's parenting time "to alternating weekends, vacations, and holidays, and extended time during the summer months."[45] She alleges that the Respondent has refused to follow the parenting schedule provided in the Final Judgment and Decree and has otherwise been uncooperative in implementing a number of other provisions of the Judgement. She asserts that ongoing custody and parenting time disputes are seriously harming the parties' child.[46]

The Judgment entered on May 3, 2019, provides for joint legal custody and a specific parenting plan consistent with a co-parenting arrangement.[47] This arrangement relates back to a comprehensive settlement which the parties entered on the record on September 19, 2018, the

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[42] The same request for sanctions restated in Petitioner's Notice of Counter Motion and Counter Motion Regarding Sanctions (October 21, 2019) (Docket #208) is similarly denied.
[43] Petitioner's Notice of Counter Motion and Counter Motion Regarding Sanctions (October 21, 2019) (Docket #208), at 2-3.
[44] Id., at 2.
[45] Id., at 2-3.
[46] Id., at 2; Affidavit of Amanda Gustafson in Support of Counter Motion Regarding Sanctions (October 21, 2019) (Docket #210), at 4; Petitioner's Memorandum of Law in Support of Counter Motion Regarding Sanctions (October 21, 2019) (Docket #209), at 11.
[47] Findings of Fact, Conclusions of Law, Order for Final Judgment, Judgment and Decree (May 3, 2019) (Docket #174).

date on which trial was to begin.[48] The parties then embarked upon a process for drafting the findings of fact, conclusions of law, and judgment that were to incorporate their agreement.[49] The parties presented a document that resulted in the Partial Judgment and Decree entered on February 13, 2019. [50] This incorporated most of the provisions of their comprehensive settlement, including most of the joint custody co-parenting provisions, but reserved some issues for the Court to decide. The Final Judgment and Decree incorporated both the parties' stipulation and resolved the remaining matters left for the Court decide. Thus, within the context of these proceedings, the parties have been attempting to implement a co-parenting relationship and specific provisions of Court Orders related thereto since September 2018.

The Court considers Petitioner's Motion to Modify Custody technically to have been brought within one year of the entry of the Order which established the arrangement which she seeks to modify, whether that Order be viewed as the Partial Judgment of February 13, 2019 or the Final Judgment of May 3, 2019. Chapter III, Section 5 of the Community's Domestic Relations Code governs modification of custody orders. It provides that "no motion to modify a custody order may be made earlier than (1) one year after the date of a decree of dissolution" unless the parties agree in writing[51] or the Court

> has reason to believe that there may be persistent and willful denial or interference with visitation, or has reason to believe that the child's present environment may endanger the child's physical or emotional health or impair the child's emotional development.[52]

The Court "shall make such determination(s) based upon the affidavits of the parties."[53]

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[48] See Discussion in Section III.A., supra; Partial Enforcement Order (November 7, 2018) (Docket #160).
[49] See Discussion in Section III.B., supra.
[50] Findings of Fact, Conclusions of Law, Order for Partial Judgment, Partial Judgment and Decree (February 13, 2019) (Docket #171).
[51] Domestic Relations Code, Chapter III, Section 5.a.
[52] Id., Chapter III, Section 5.c.
[53] Id.

The Petitioner's affidavit in support of her Motion to Modify Custody provides sufficient reason for the Court to believe that either the Respondent has consistently interfered with her parenting time or that the current state of the parties' co-parenting relationship places the child in an environment that may endanger her emotional health and development. Among other things, she avers that the Respondent has refused to cooperate in the selection of a mutually agreeable Parenting Consultant as required by both the Partial and Final Judgment. She also avers that the Respondent has refused to follow the required co-parenting schedule and to support the child's attendance at the school which the Court ordered she should attend.[54] The Court therefore finds that the Petitioner's motion is timely and properly brought in accordance with the Chapter III, Section 5.c of the Domestic Relations Code.

The Court now must consider the substance of the Petitioner's request. In doing so, it

> . . . shall not modify a prior custody order after hearing on the motion unless it finds, upon the basis of facts that have arisen since the prior order or that were unknown to the Tribal Court at the time of the prior order, that a change has occurred in the circumstances of the child or the custodian and that the modification is necessary to serve the best interests of the child.[55]

The Domestic Relations Code provides a presumption that the custodian established by the prior order shall be retained with three exceptions. The applicable exception relevant to Petitioner's motion requires the Court to find that

> . . . the Child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.[56]

[54] Affidavit of Amanda Gustafson in Support of Counter Motion Regarding Sanctions (October 21, 2019) (Docket #210), at 4.
[55] Domestic Relations Code, Chapter III, Section 5.d.
[56] Id.

The Domestic Relations Code further provides that "[p]roof of an unwarranted denial or interference with duly established visitation . . . may be sufficient cause for reversal of custody."[57] This provision makes clear that, by definition, the failure to follow the requirements of a custody order and associated parenting arrangement may constitute a requisite change in circumstances that warrants a change in custody.

After listening to testimony at three hearings, reviewing the exhibits admitted into evidence, considering the previous fillings and orders of this Court, and assessing the respective credibility of each party, the Court finds that the Domestic Relations Code's prerequisites for modifying custody in this matter have been met and that the best interests of the parties' child require sole legal custody with the Petitioner subject to a reasonable visitation schedule with the Respondent. It is beyond doubt that the parties have an entirely dysfunctional and non-existent co-parenting relationship. This failure to fulfill the joint custody terms of the Judgment constitutes a sufficient change in circumstances to warrant a custody modification. The child currently is caught in the middle of a never-ending co-parenting tug of war. She is in a parenting environment which endangers her emotional health and impairs her emotional development. A sole custody arrangement is the appropriate and necessary remedy. The Court acknowledges that change for a child can be problematic but finds that any possible harm that might result from a change to a sole custody arrangement is outweighed by the advantages of a stable environment where there is one decisionmaker and clear boundaries between the custodial and non-custodial parents.

[57] Id., Chapter III, Section 3.d.

Each party testified extensively as to the current state of their co-parenting relationship.[58] They paint a picture of continual non-cooperation, non-communication (directly or through intermediaries), disagreement, and outright confrontational behavior on virtually all aspects of their co-parenting relationship, including exchanges at their respective parenting times, educational decisions, the choice of a Parenting Consultant, and efforts to alienate the affection of their daughter for the other parent. The Court accepts the picture of their relationship that the parties themselves have painted. It agrees that the parents agree on very little and are unlikely to agree on much more, if anything, in the future. The child is thus found in the untenable and unacceptable parental environment of constant disagreement, manipulation, anger, and conflict. She must be removed from that environment of failed co-parenting to further her best interests.

The Court finds that the child's best interests require that the Petitioner be the sole custodian. While each parent bears a degree of responsibility for this co-parenting dysfunctionality, the Court finds the Respondent bears the bulk of it.

The Petitioner at times has not followed the required parenting schedule and has exhibited behavior unbecoming of a loving parent.[59] She admits to struggles with substance dependency and mental health issues, for which she is seeking assistance and treatment.[60] These are concerning aspects for the Court to consider. However, the Court assesses the Petitioner as a basically honest individual who is willing to admit her faults and errors, who strives to overcome them, and who, most important, does her best to keep her problems from interfering with or

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[58] See Hearing Transcript 10/31/19, at 57-117 [Direct Testimony of Amanda Gustafson]; Hearing Transcript 11/13/19, at 14-62 [Direct Testimony of James Nguyen]; Hearing Transcript 11/26/19, at 31-36 [Direct Testimony of James Nguyen], at 77-102 [Cross Examination Testimony of James Nguyen], at 141-160 [Cross-Examination Testimony of Amanda Gustafson], and at 160-163 [Re-Direct Examination Testimony of Amanda Gustafson]. See also Hearing Transcript 10/31/19, at 93-110 [Direct Testimony of Andrew Bui]; and Hearing Transcript 11/26/19, at 170-174 [Cross-Examination Testimony of Andrew Bui].

[59] See, e.g., Hearing Transcript 11/26/19, at 141, 155-155.

[60] See, e.g., Id., at 141-142.

undermining her daughter's best interests. She professes to put her daughter's interests before her own.[61] The Court finds her credibility to be high in this regard.

The Respondent also admits to not following the required parenting schedule and has exhibited inappropriate behavior as a parent.[62] He asserts that he is the "rock" of the parental relationship with the parties' daughter and provides the type of stability and guidance that, according to him, the Petitioner cannot provide.[63] He too professes to put his daughter's best interests before his own.[64] However, in contrast to the Petitioner in this regard, the Court finds the Respondent's credibility to be extremely low. The Court does not come to this conclusion lightly. It does so only after observing the Respondent's demeanor on the witness stand as well as his pattern of evasive, non-compliant, and retaliatory behavior throughout this matter.

The Court concludes that the Respondent is prone to actions and behavior that place his daughter in the middle of his efforts to undermine a successful co-parenting relationship and to find ways for it to fail. For example, he admits that he unilaterally kept his daughter for extra days of "compensatory" parenting time to which he was not entitled.[65] He also fails to accept the Court's Order that the child should attend the International School of Minnesota and seeks to undermine it.[66] The Court is extremely concerned that the type of evasive, recalcitrant, non-compliant, and contemptuous behavior that the Respondent has shown throughout this matter[67]

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[61] See, e.g., Hearing Transcript 11/26/2019, at 165-166.
[62] See, e.g., Hearing Transcript 11/13/19, at 26, 29-30; Fn 75, infra, and accompanying text.
[63] See, e.g., Hearing Transcript 11/13/2019, at 58-62.
[64] See, e.g., Id., at 59; Hearing Transcript 11/26/2019, at 34.
[65] See, e.g., Hearing Transcript 10/30/2019, at 71-72; Exhibit 16, at PE 476; Hearing Transcript 11/13/2019, at 16-17.
[66] See, e.g., Hearting Transcript 11/26/2019, at 91.
[67] See, e.g., Discussion in Section III.A. supra [Respondent's failure to timely vacate Petitioner's premised]; Discussion in Section III.C., supra [Respondent's blatant disregard of clear and unambiguous discovery and disclosure requirements]; Order for Contempt (December 30, 2019) (Docket #242); Transcript 11/29/2019, at 37-51 [Respondent's continuing evasiveness about his employment, income, and real estate ownership, and changing story regarding growth of marijuana on his California parcels]. In sum, the Court views the Respondent as a person who evades compliance with or seeks to circumvent requirements when he is dissatisfied with them. He also

also is evident in his role as a parent. When he does not get his way, the Respondent attempts to strike back at those he deems responsible[68] and to antagonize others into conflict situations that reflect badly on them rather than on himself as the instigator.[69] He seems to disagree for the sake of disagreeing rather than on the merits of the matter at hand.[70]

In sum, the Respondent has exhibited a pattern of evading compliance with the Judgment and other Orders in this matter, as well as of hostile, manipulative, and/or abusive behavior toward the Petitioner, the minor child[71], professionals involved in this case, and other people in the child's life. All of this, in the Court's view, has placed the parties' minor child in an environment that endangers her emotional health and impairs her emotional development. The Respondent consistently and repeatedly has demonstrated his inability and/or unwillingness to

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remains coy and evasive about his own affairs, including his finances, who actually spends time with the child during his parenting time, and his living situation. Yet, he revels is exposing the problems and challenges of others, especially when it comes to the Petitioner and anyone else with whom he disagrees. He also is prone to lying when he simply does not want to recognize or admit the truth. See, e.g., Hearing Transcript 11/26/2109, at 76 [Respondent maintained that he moved out of Petitioner's house "voluntarily" until he was compelled to admit that he moved out only after an eviction proceeding was commenced and an eviction order was imminent].

[68] See, e.g., Order (August 17, 2018) (Docket #138), at 18 [Court found it necessary to approve the Custody Evaluator's request to withdraw because of Respondent's filings and unfounded accusations against her that undermined her ability to act as neutral]; Hearing Transcript 11/26/2019. At 63-70 [Respondent's pattern of initiating investigations, lawsuits, and other inquiries against individuals, attorneys, and other professionals involved in this and related matters]. In sum, the Court views the Respondent as a person who routinely seeks to assign blame to others when things do not go his way and who is generally unwilling to accept responsibility for his own conduct.

[69] See, e.g., Hearing Transcript 10/31/2019, at 85-89; Exhibit 20, Recordings 1.9 and 1.10; Hearing Transcript 11/26/2019, at 160-161; Exhibit 26 (Video). The Court views the Respondent as a person who gladly goads others into arguments, often records the situation, and then gloats about their reactions and behavior in an effort to make them look like the aggressors. He does not accept responsibility for any part that he played in the first place. See also Hearing Transcript 11/26/2019, at 85 [When asked if he takes any responsibility for provoking the Petitioner into the responses he talks about, the Respondent sarcastically replies, "Well, isn't this a good situation when there's no communication? There's no way for me to provoke her, right?"].

[70] Perhaps the best example of this involves the selection of the Parenting Consultant. See Discussion in Section III.D., supra.

[71] The Court is especially troubled by the Respondent's recording of a conversation that he had with his daughter. There, the Respondent clearly is attempting to manipulate the child's feelings toward him and her mother, as well as to alienate his daughter's affection toward her mother. In fact, it is clear that the child is uncomfortable with what the Respondent is saying and tries to change the subject of the conversation. Exhibit 20, Recording 1.11. See also Exhibit 20, Recordings 1.14 and 1.15 {Respondent records a conversation with his daughter where he also seeks to portray her mother as "mean" and ill-willed].

co-parent and to place his daughter's health, safety, and well-being before his own desires, anger, and emotions. If a joint custodial arrangement is to meet their daughter's needs, the parents must be able and, most importantly, must want to cooperate and act like responsible adults. The Respondent's behavior and actions demonstrate neither his ability nor his willingness to do what is necessary for the current joint custody and joint placement arrangement to succeed for his daughter's benefit.

In considering the minor child's best interests, the Court has been particularly mindful of the following statutory relevant factors for determining custody: unwarranted denial or interference with duly established visitation;[72] "the capacity and willingness of each parent to follow visitation and custody orders;"[73] "the capacity and willingness of the parents to place the needs of the child first and the ability to cooperate with one another for the sake of the child;"[74] "each parent's maturity and capacity and willingness to avoid conflict with one another;"[75] "each parent's willingness to accept full parenting responsibilities;"[76] and "the child's Tribal or cultural background."[77]

The weight of the evidence and the assessment of each party's respective credibility support application of these criteria in favor of the Petitioner being the sole custodian. The parties' daughter needs a stable parental and home environment, especially during the school year where consistency and routine are important factors. As for the Respondent's visitation rights, the Court seeks to provide him with ample opportunity within that framework, as well as

[72] Domestic Relations Code, Chapter III, Section 3.d.
[73] Id., Chapter III, Section 2.a.(3).
[74] Id., Chapter III, Section 2.a.(5).
[75] Id., Chapter III, Section 2.a.(6).
[76] Id., Chapter III, Section 2.a.(7).
[77] Id., Chapter III, Section 2.a.(11). The Court notes that the Petitioner is a citizen of the Community and is well-positioned to avail herself of the Community's programs and services to aid her in addressing her personal issues as well as in exercising her parental responsibilities.

on holidays, school breaks, extended vacations, and during the summer, for him to maintain and nurture a successful parent-child relationship.

For the foregoing reasons, the Petitioner's motion (Docket #208) seeking to modify custody and placement of the parties' minor child and providing for Respondent's reasonable visitation rights is hereby **GRANTED** on the terms and conditions set forth in Paragraph 6 of the Order below.

ORDER

Based upon the foregoing Memorandum Opinion and the findings contained therein,

IT IS ORDERED:

1. **Respondent's Motion for Denial or Deferral of Petitioner's Motions.** The Respondent's Motion for Denial or Deferral of Petitioner's Motion for Sanctions per Rule 62.1 (Docket #196) is denied.

2. **Respondent's Failure to Comply in a Timely Fashion with the Court's Order to Vacate Petitioner's Residence.** The Petitioner's Motion (Docket #154) seeking sanctions against the Respondent in the form of attorney's fees in the amount of $4,035.00 for the Respondent's failure to timely vacate the Petitioner's Bloomington premises as required is granted. Judgment in the amount of $4,035.00 in favor of the Petitioner and against the Respondent shall be entered.

3. **Respondent's Alleged Failure to Respond in a Timely Fashion during the Drafting of the Final Judgment and Decree.** The Petitioner's Motion (Docket #164) seeking sanctions against the Respondent related to the drafting of the final judgment and decree is denied.

4. **Respondent's Failure to Timely Respond to Pre-Trial Discovery Requests and Related Court Orders.** The Petitioner's Motion (Docket #182) seeking sanctions against the

Respondent in the form of attorney's fees in the amount of $4,811.00 for the Respondent's failure to comply with clear and unambiguous discovery and disclosure requirements is granted. Judgment in the amount of $4,811.00 in favor of the Petitioner and against the Respondent shall be entered.

5. **Respondent's Alleged Failure to Cooperate and Act in Good Faith in the Selection of a Parenting Consultant.** The Petitioner's Motion (Docket #176) seeking the appointment of a particular Parenting Consultant and sanctions against the Respondent in the form of attorney's fees in the amount of $6,502.50 for the Respondent's alleged failure to cooperate and act in good faith in the selection of the Parenting Consultant as required by the Final Judgment and Decree is denied.

6. **Petitioner's Motion Seeking to Modify Custody and Placement of the Parties' Minor Child.** The Petitioner's Motion (Docket #208) seeking to modify custody and placement of the parties' minor child and to provide reasonable visitation rights is granted as follows.

   a. **Custody and Placement.** The Petitioner Amanda Gail Gustafson shall have sole legal custody and sole physical custody of the parties' minor child Adelyn Jade Nguyen. Sole legal custody means that the Petitioner shall have the sole authority to make all major parental decisions in the best interests of the minor child, including but not limited to the areas of education, religion, health, consent to marry as a minor, and consent to enter military service as a minor. Sole physical custody means that the minor child shall reside with the Petitioner at all times except when the Respondent may exercise visitation rights as provided in this order.

   b. **Child's Relationship with Parents**. Neither parent shall do any act which may estrange or alienate the child from the other parent or which may hamper the natural

development of the love and affection of the child for each parent. The parents shall facilitate and encourage a close and continuing parent-child relationship between the child and the other parent. The parents shall place the needs of the child first in implementing the terms of this Order.

c. **Access to Records Regarding the Child.** Unless otherwise ordered by the Court or specifically allowed by Community law , the Respondent may access the child's records relating to health care, school, and protection services only with the consent of the Petitioner who shall have sole authority regarding those records and whose consent shall not be unreasonably withheld. "Health Care" shall include medical care, dental care and orthodontics, optical care, and counseling or mental health care.

d. **Role of Parents in Child's Life, Communication, and Compliance with No-Contact or Restraining Orders.** The parents shall undertake their parental relationship on the basis of good faith regarding their minor child's best interests consistent with the Petitioner's rights and responsibilities as sole legal custodian. The parents shall conduct themselves in a manner that provides a sound moral, social, economic, and educational environment for the child. They shall endeavor to keep themselves informed of their child's social, cultural, and educational activities so that they might support their child and participate where possible and appropriate. The non-custodial parent is authorized to consent to emergency medical care to the minor child at the time the child is with that parent and the other parent is not reasonably accessible to give such consent.

All communication and interactions between parents as well as all arrangements for effectuating the Respondent's visitation rights shall take place without violating

any restraining or no-contact order that may affect the parties. When they are unable to speak directly with each other either for legal or for practical reasons, the parents shall communicate through a third party, such as a relative, friend, or other trusted intermediary, to facilitate their communication as necessary. Neither party shall engage in harassing communications or behavior toward the other.

e. **Parenting Time/Father's Visitation Rights.** Consistent with the Petitioner's sole legal custody and physical custody rights, the Petitioner shall have placement of the parties' minor child at all times not specifically awarded to the Respondent as visitation rights as provided in the following schedule:

1) **Every Other Weekend.** The Respondent shall have visitation every other weekend from no later than 5:00 p.m. on Friday until no later than 5:00 p.m. on Sunday. This schedule shall begin on the weekend of Friday, January 10 to Sunday, January 12, 2020, and shall continue every other weekend after that until the end of the child's 2020 school year. At the start of each school year after that, the parties shall work out in good faith the schedule and sequencing of these alternating weekend visitations for the coming school year.

2) **Holiday and School Release Schedule.** The Respondent shall have visitation as provided in the holiday and school release schedule contained in the final Judgment and Decree (Conclusion of Law #8.b). This holiday schedule is specifically incorporated herein as if fully set forth in its entirety. It shall supersede the Respondent's every-other weekend visitation schedule.

3) **Summer Break**. Starting the first Friday after the school year ends, the Respondent shall have visitation every third week during the summer from Friday

at 5:30 p.m. until the following Friday at 5:30 p.m. This schedule shall continue until the third day before the next school year begins, at which time the Petitioner shall have physical custody for the remaining portion of the summer break. The Respondent's regular visitation schedule of every other weekend as provided above shall resume once the new school year has begun.

4) **Extended Vacation Schedule.** Each party shall have three non-consecutive weeks of vacation time with the minor child, which shall supersede the alternating weekend visitation schedule but shall not disrupt the above holiday schedule. Said vacation time shall be selected and mutually agreed upon no later than April 1 of each year for the following 12 months until March 31 of the following year. The child shall not be removed from school for the purposes of an extended vacation without the Petitioner's consent.

5) **Visitation at Other Times.** The Respondent's visitation schedule set forth above shall constitute a minimum visitation arrangement and does not prevent the parties from arranging visitation at other mutually agreeable times.

6) **Logistics and Arrangements for Visitation.** Unless the parents otherwise agree in advance, all exchanges for visitation shall take place at a neutral site. Each shall provide the other with sufficient advance notice of the proposed exchange site to afford sufficient opportunity to make plans and to accomplish the exchange at the required time. Only the parties, their family members, or persons acting in their official or professional capacity (such as law enforcement officers, protective services personnel, and teachers) shall be allowed to do the pick-ups and drop-offs without prior approval of the other parent. Close friends of the

parties may also be allowed to do pick-ups and drop-offs if they are mutually agreed to by the parties. Transportation and other costs associated with transferring placement shall be paid by the parent who incurs them.

7) **Childcare.** The parents may use family members or other trusted individuals to provide daycare during their respective physical custody and visitation times. The costs of such care shall be paid by the parent seeking the service.

f. **Parenting Consultant.** The Petitioner may, but shall not be required to, engage a Parenting Consultant to assist her in the exercise of her sole legal custody and sole placement rights.

7. Monetary Judgment. This Order provides for a monetary judgment in the total amount of $8,846.00 in favor of the Petitioner and against the Respondent as sanctions in the form of attorney's fees. Such amount shall be paid to Petitioner no later than 30 days from the entry of this Order.

8. Relationship to Previous Orders. To the extent not inconsistent with this Order and in all other respects, all previous Orders of this Court shall remain in full force and effect.

Date: January 6, 2020

BY THE COURT:

Henry M. Buffalo Jr., Judge
Shakopee Mdewakanton Sioux
Community Tribal Court

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED FEB 1 2 2020

LYNN K. McDONALD
CLERK OF COURT

**IN THE TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY**

In Re Marriage of:
Amanda Gustafson,

Court File No. 867-17

Petitioner,

v.

ORDER

James Van Nguyen,

Respondent.

On February 12, 2020 the Petitioner filed a motion seeking an expedited review without a hearing. The Petitioner in her motion seeks the following:

1. An Order sealing the records in this file.
2. An Order prohibiting the vacation time of the Respondent from February 11 to the 17th and approving the vacation time of the Petitioner from March 6 to the 15th.
3. An Order clarifying the allocation of the costs for a Parenting Consultant as between the parties.

The Court has reviewed the motion and accompanying affidavit including nine emails dating from May 8, 2019 to January 14, 2020. These emails show the parties attempts to reach agreement on vacation dates, holiday dates and payment for the services of the Parenting Consultant.

The Petitioner argues against the Respondents request for the vacation time as it violates this Court's Orders in two ways. First the proposed vacation time will result in the child being taken out of school and second, that the Respondent's request will be a fourth vacation period

within a year and therefore not allowed. Pursuant to this Court's Orders the year commencing the vacation schedule begins April 1st and ends March 31st of each year.[1]

The Court in review of this file notes that the Respondent had taken three vacation periods on May 15-22, 2019, August 3-11, 2019 and November 16-23, 2019. Therefore, the request for February is the fourth vacation in the year and violates the Order. The proposed time is also in violation of this Court's Order that the child is not to be removed from school for extended vacation without the consent of the Petitioner. The period during which the Respondent requested is during school time and the Petitioner did not consent.[2] The Petitioner request is **GRANTED**.

ORDER

1. The Petitioner's request to deny Respondent's February vacation time is granted.
2. The Respondent shall file his response to the Petitioner's request to seal the file, to exercise the vacation period from March 6th to the 15th and why the Respondent should not pay the fees of the Parenting Consultant by close of business on February 20, 2020. The Petitioner may file a Reply by the close of business on February 24, 2020.
3. The Court will consider the matter without a hearing.

Date: February 12, 2020

BY THE COURT:

Henry M. Buffalo, Jr., Judge,
Shakopee Mdewakanton
Sioux Community Tribal Court

[1] See Order dated May 3, 2019 Conclusions of Law paragraph 8(c) and Order dated January 6, 2020 paragraph 6(e)(4).
[2] Id., at page 29 Order of January 6, 2020.

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED FEB 28 2020

LYNN K. McDONALD
CLERK OF COURT

IN THE TRIBAL COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RSERVATION **STATE OF MINNESOTA**

In Re Marriage of:

Amanda Gustafson, Court File No. 867-17

Petitioner,

v. ORDER

James Van Nguyen,

Respondent. .

On February 12, 2020 the Petitioner filed a motion seeking an expedited review without a hearing. The Petitioner in her motion seeks the following:

1. An Order sealing the records in this file.
2. An Order prohibiting the vacation time of the Respondent from February 11 to the 17th and approving the vacation time of the Petitioner from March 6 to the 15th.
3. An Order clarifying the allocation of the costs for a Parenting Consultant as between the parties.

The Respondent timely filed his response to this motion on February 20, 2020 and the Petitioner filed her reply on February 24, 2020. The Respondent sets forth his response and raises new issues as follows:

1, Denying Petitioner's motion to the seal this court file.

2. Denying the Petitioner to modify the Parties previously agreed upon vacation schedule.

3. Clarifying the Petitioner may retain an agreed upon parenting consultant by both

parties and bear the sole responsibility of paying for those services.

4. Granting Respondent's request for attorney Jonathan D. Miller to withdraw from this above- captioned case pursuant to his previously filed Notice of Motion for Withdrawal as Counsel and related pleadings.

5. Granting Respondent's request to reassign this case file to a different Judge pursuant to rule 32 (a) of the Rules of Civil Procedure.

6. For such other and further relief as the Court deems just and equitable.

The Court reserves all issues but will address the Petitioner's request to go forward with the planned vacation commencing March 6, 2020. The Court has reviewed the motion and accompanying affidavit including nine emails dating from May 8, 2019 to January 14, 2020. These emails show the parties attempts to reach agreement on vacation dates, holiday dates and payment for the services of the Parenting Consultant. It is clear from the emails that the parties anticipated a 3rd and final vacation period for the Petitioner. The Petitioner modified the dates for that vacation in response to the Respondent's plans and finalized the dates as March 6, 2020 to March 15, 2020. Respondent objects to the vacation time of Petitioner arguing that the weekend of the 6th to the 8th is his scheduled parenting time, that he had plans for a wedding in his family on March 14th and a planned birthday party on March 7th. All dates conflict with Petitioner's request.

The Petitioner informs the Court that the March 14th wedding date is no longer an issue. That she had provided the weekend of February 13 to the 16th in compensatory time and has also offered the weekend of February 28th which is not Respondent's weekend for parenting time leaving the only conflict with those dates the birthday of the child's friend.

In considering the request the Court notes that the parties have established a vacation schedule that provides for 3 non-consecutive weeks during the year which commences on April 1st of each year with the vacation time to be taken by March 31, of the following year. The Respondent has taken his three weeks of vacation time and the Petitioner's proposed vacation time is her 3rd week as agreed to and consistent with the Order. That reason alone would provide support for granting Petitioner's request. However a more important basis for granting that request lies within the purpose of the parties agreement to set aside this vacation time as longer periods that will facilitate and enhance the parent/child relationship especially as the child continues to deal with the separation of the family unit caused by the divorce. The Court will grant the request of the Petitioner's dates for the vacation.

ORDER

1. That it is in the best interest of the child to grant the Petitioner's request to take the 3rd and final vacation for the year.

2. That the remaining issues continue under consideration of the Court.

3. The parties shall provide to the Court the dates for the 3 non-consecutive weeks of vacation by close of business on April 1, 2020.

Date: February 28, 2020

BY THE COURT:

Henry M. Buffalo, Jr., Judge,
Shakopee Mdewakanton
Sioux Community Tribal Court

Filed on March 31, 2020

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY
LYNN K. McDONALD
CLERK OF COURT

TRIBAL COURT

OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

Michael Hamilton, in his capacity as
Conservator for the Estate of Amanda
Brewer-Ross,

Plaintiff,

v. Court File: 930-19

Great Northern Insurance Company,

Respondent.

MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION AND SUMMARY

This case is before the Court on a motion to dismiss brought by the Respondent Great Northern Insurance Company. This matter involves a claim for loss under a homeowner's insurance policy. The Complaint was filed on November 22, 2019.[1] The Answer was filed on December 13, 2019.[2] Among other defenses, the Respondent alleges that the Shakopee Mdewakanton Sioux Community (Community) Court lacks subject matter and personal jurisdiction.[3] The Respondent filed a Motion to Dismiss on January 30, 2020, asking the Court to dismiss this action "for duplicity, and for lack of personal and subject matter jurisdiction under Rules 8(b) and 12(b)" of the SMSC Rules of Civil Procedure.[4]

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[1] Docket #1.
[2] Docket #2.
[3] Answer, ¶¶ 12, 13.
[4] Respondent Great Northern Insurance Notice of Motion & Motion to Dismiss (Docket #9) (01/30/2020).

The Court scheduled oral argument on Respondent's Motion[5] and the parties submitted their respective memoranda of law on this motion.[6] Oral argument was held on February 27, 2020.[7]

Diana Young Morrissey, Walle-Friedman & Floyd, P.A.., and Sarah I. Wheelock, SMSC Legal Department appeared on behalf of Plaintiff Michael Hamilton. Ms. Wheelock provided oral argument. Joseph F. Lulic, Brownson P.L.L.C., appeared on behalf of Respondent Great Northern Insurance Company and provided oral argument.

For the reasons set forth below, Respondent's Motion to Dismiss (Docket #9) is denied. The Court finds that the Plaintiff Michael Hamilton has met his burden of showing a *prima facie* case that this Court has both subject matter jurisdiction over his claim and personal jurisdiction over the Respondent. Furthermore, the Court finds that this case should not be dismissed in favor of a parallel federal court action. This case is properly before this Court consistent with the "exhaustion of tribal remedies" doctrine adopted by U.S. Supreme Court.

II.

PLAINTIFF'S BURDEN OF ESTABLISHING JURISDICTION

The burden of establishing jurisdiction rests with the party asserting it. *LSI v. Prescott and Johnson*, 2 Shak. T.C. 152 (Jul. 1, 1996). "[W]hat is necessary is a *prima facie* showing, taking the [Plaintiff's] allegations as true." *Id.*, at 158 (citing *Wessels, Arnold & Henderson v. National Medical Waste, Inc.*, 65 F.3d 1427 (8th Cir. 1995)).

The Court construes this standard as analogous to what is necessary to survive a motion

[5] *See* Clerk's Notice – Motion Hearing on 2/27/20 (Docket #13) (02/03/2020).
[6] *See* Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10 (January 30, 2020); Plaintiff's Memorandum of Law Opposing Respondent's Motion to Dismiss (Docket #14); Respondent's Reply Memorandum (Docket #21) (February 24, 2020.
[7] *See* Transcript of Oral Argument (02/27/2020).

to dismiss for failure to state a claim under Rule 12(b)(6) of the SMSC Rules of Civil Procedure which parallels Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Plaintiff must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A motion to dismiss should be granted if the Plaintiff "can prove no set of facts in support of [his] claims which would entitle [him] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Plaintiff's complaint and supporting documentation "must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984) (quoting *Sutliff, Inc. v. Donovan Cos*., 727 F.2d 648, 654 (7th Cir. 1984) (emphasis in original).

Applying these principles to the case at hand, the Plaintiff bears the burden of establishing this Court's jurisdiction over his claim. Furthermore, the Court must take as true the Plaintiff's direct and inferential allegations that, if proved, would establish the basis for this Court's subject matter and personal jurisdiction under a viable legal theory.

The Court notes that this case is procedurally in its early stages. There have been no evidentiary hearings. Discovery is in its early stages. We are in the modern-era of "notice pleading" where a complaint need only contain "a short and plain statement of the claim"[8] and where "[e]ach averment of a pleading shall be simple, concise, and direct."[9] Thus, "[a]ll pleadings shall be so construed as to do substantial justice."[10]

Consistent with this mandate, the Court finds the factual record to consist of the direct allegations and averments contained in the Complaint and the Answer, as well as the fair and

[8] SMSC Rule of Civil Procedure 9(a).
[9] SMSC Rule of Civil Procedure 9(c).
[10] SMSC Rule of Civil Procedure 9(d).

logical inferences that can be drawn from them. In addition, as is generally the case with respect to motion practice, the Court construes the pleadings *in pari materia* with the parties' respective memoranda of law and exhibits, as well as Counsels' statements and representations at oral argument. This is consistent with the letter and spirit of Community Rule of Civil Procedure 11(b).[11]

III.

STATEMENT OF FACTS

Against this backdrop, the Court takes as true the following jurisdictionally relevant facts that derive from Plaintiff's direct and inferential allegations.

Plaintiff Michael Hamilton filed this lawsuit as the Conservator for the Estate of Amanda Brewer-Ross. He is an employee of the Community and is head of the Community's Conservator Department.[12] He was appointed as Ms. Brewer-Ross' Conservator by this Court in an Order dated December 1, 2017.[13] His appointment was made in accordance with the Community's Conservatorship Ordinance, Resolution 03-11-08- 016, and he performs his duties on behalf of Ms. Brewer-Ross pursuant to that Ordinance.[14]

Ms. Brewer-Ross is a member of the Community and is a resident in Shakopee,

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[11] Rule of Civil Procedure 11(b) in relevant part provides:

> Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
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> * * *
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> > 3) the factual contentions have evidentiary support or, if specifically, so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;
> >
> > * * *.

[12] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 2. The Court takes judicial notice that the Plaintiff undertakes his Conservator role pursuant to the authority and requirements of the SMSC Conservatorship Ordinance (as amended) 03-11-08-016.

[13] Complaint, ¶ 2.

[14] Transcript of Oral Argument (02/27/2020), at 27.

Minnesota.[15]

Respondent Great Northern Insurance Company is an Indiana Corporation. It is a property and casualty insurer licensed to do business in the State of Minnesota.[16]

The Respondent insured a home owned by Ms. Brewer-Ross located at 3162 Little Crow Drive, Shakopee, MN.[17] This was a homeowner's policy that, among other things, insured against loss due to fire.[18] A fire substantially destroyed the home and its contents on November 26, 2017, at time when the homeowner's policy was in effect.[19]

The policy in question was renewed on February 2, 2017, with an effective period until February 2, 2018.[20] It established coverage limits of $1,275,000 for the dwelling and $510,000 for the dwelling's contents with an annual premium of $6,173.32.[21] The factors for determining the annual premium for renewal of this policy included a 24% premium reduction "for having systems or components that are new or have been upgraded in the last 7 to 10 years." [22]

The policy in question did not contain a choice of law or choice of forum clause regarding disputes that might arise under it.[23]

The Plaintiff, in his capacity as Conservator for the Estate of Ms. Brewer-Ross, filed a claim with the Respondent under the homeowner's policy for the fire loss.[24] The Respondent

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[15] Complaint, ¶3.
[16] Complaint, ¶1; Answer, ¶1.
[17] Complaint ¶4; Answer ¶3; Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16).
[18] *Id.*
[19] Complaint, ¶¶4, 6.
[20] Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16), at Coverage Summary Renewal, Page 1.
[21] Complaint, ¶5; Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16), at Coverage Summary Renewal, Page 1, and at Premium Summary Renewal, Page 1.
[22] Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16), at Premium Discount Summary, Page 1.
[23] Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16); Respondent's Reply Memorandum (Docket #21) (February 24, 2020), at 5; Transcript of Oral Argument (02/27/2020), at 41.
[24] Complaint, ¶8.

has denied that claim, asserting, among other things, that Ms. Brewer-Ross has not complied with her obligations to cooperate under the policy's provisions.[25] Each party states a claim that the other has breached contractual obligations under the homeowner's insurance policy.[26]

The insured home was located on land within the Community's reservation that is held in trust by the United States for the benefit of Community and that was leased to Ms. Brewer-Ross as a Community member pursuant to tribal law.[27]

SMSC Home Mortgage, a Community-owned enterprise, provided the financing for the insured home, carried a mortgage on the home, and was listed as the Mortgagee in the homeowner's insurance policy.[28] SMSC Home Mortgage also filed a claim with the Respondent for the fire loss.[29] Respondent represents that this claim by SMSC Home Mortgage was paid on May 18, 2018.[30]

When issuing the homeowner's policy to Ms. Brewer-Ross, the Respondent knew it was insuring a home on Community reservation land, owned by a Community member, and financed

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[25] Complaint, ¶¶9-15; Answer, ¶¶15-17.
[26] Complaint, ¶¶16-22; Answer, ¶¶15-18.
[27] Complaint, ¶8. Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 1. *See also* Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 3 ("Summary of factual stipulations and agreements"). Plaintiff's Exhibit 2 is a Rule 26(f) report jointly filed by the same parties to this case in a pending federal case. The aspect of a potential "duplicative proceeding" is addressed in Section III, *infra.* At this point, the Court notes that the Respondent's Counsel disputes that Section 4 of the Rule 26(f) Report entitled "Summary of factual stipulations or agreements" contains "stipulated facts." *See* Transcript of Oral Argument (02/27/2020), at 21-23. The Court offers no opinion on the effect or consequences in the federal court for signing and filing the Rule 26(f) Report in relation to Counsel's representations to this Court. For the purposes of this case, however, the Court has no reason to doubt the authenticity of Plaintiff's Exhibit 2. Respondent's Counsel acknowledges that he signed and submitted this report to the federal court. Transcript of Oral Argument, at 22. The Court therefore takes at face value the factual stipulations and agreements contained in that report. In any event, for the purposes of deciding Respondent's Motion to Dismiss, the Court must take them as true since the Plaintiff has incorporated them into his allegations.
[28] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9; Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16), at Additional Interests Summary, Page 1; Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 3 ("Summary of factual stipulations and agreements");
[29] Complaint, ¶8.
[30] Respondent's Reply Memorandum (Docket #21) (February 24, 2020), at 7-8.

through SMSC Home Mortgage.[31]

The Plaintiff commenced parallel actions in two courts involving the same parties and the same claims. This action was commenced on November 22, 2019. A state court action was commenced on November 26, 2019, in Minnesota State Court, Scott County, which was later removed to federal court.[32]

There are now cases simultaneously pending in the Community's court and in the U.S. District Court (Minnesota)[33] involving the same parties and the same claims because, as the parties have told the Federal Court:

> With the statute of limitations about to run on this insurance coverage claim, plaintiff filed parallel suits in SMSC Tribal Court and Minnesota State Court to ensure that the claim would not be time-barred. Plaintiff informed the courts and opposing counsel of his preference to proceed to conclusion in SMSC Tribal Court, as the venue with the closest connection to the case. Defendant removed the state court action to federal court. On February 27, 2020 the SMSC Tribal Court will hear argument on defendant's motion to dismiss. If the motion is denied, plaintiff will move to stay this [federal] case so the Tribal Court matter can proceed. If the dismissal motion is granted and plaintiff's appeal from that ruling is denied, plaintiff will proceed with this [federal] case.[34]

On December 16, 2019, Plaintiff provided notice to this Court, the Scott County District Court, and the Respondent of the parallel tribal and state actions and explained his rationale for filing parallel actions.[35]

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[31] Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 3 ("Summary of factual stipulations and agreements").

[32] Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 1 ("Procedural Posture"); Petitioner's Attorney Morrissey's Letter to Tribal Court, State Court, & Respondent Attorney Lulic of December 16, 2019 (Docket #6); Petitioner's Attorney Morrissey's Letter to Tribal Court, Federal Court, & Attorney Lulic of December 27, 2019 ; Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 2-3.

[33] Michael Hamilton v. Great Northern Insurance Company, Civil File NO. 19-CV-0311. *See* Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17).

[34] Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 1-2.

[35] Petitioner's Attorney Morrissey's Letter to Tribal Court, State Court, & Respondent Attorney Lulic of December 16, 2019 (Docket #6).

On December 27, 2019, after the state court action was removed to federal court, Plaintiff provided similar notice to this Court, the Federal District Court (Minnesota) and the Respondent regarding the pendency of parallel tribal and federal actions.[36]

III.

DUPLICATIVE PROCEEDINGS AND EXHAUSTION OF TRIBAL REMEDIES

The Respondent first asks this Court to dismiss the tribal court action in favor of the pending federal court action "due to the pendency of a concurrent, duplicative proceeding in Federal Court."[37] It relies principally on two Eighth Circuit cases[38] for the proposition that cases identical in substance should not be litigated simultaneously in courts of different jurisdictions. It argues that the tribal court action "must" be dismissed consistent with this precedent to avoid wasting "precious judicial resources."[39]

The Plaintiff counters that the Respondent's assertion fails "because it ignores the tribal court exhaustion doctrine"[40] set forth by the U.S. Supreme Court in the seminal *National Farmers Union*[41] and *Iowa Mutual*[42] cases. He asserts that "federal courts require a litigant to first exhaust its remedies in tribal court, which includes the tribal court determining its own jurisdiction and any appellate tribal courts reviewing the lower court's determinations."[43]

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[36] Petitioner's Attorney Morrissey's Letter to Tribal Court, Federal Court, & Respondent Attorney Lulic of December 27, 2019 (Docket #23).
[37] Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 3. The Court notes that it seems more logical to address the Respondent's jurisdictional challenges before addressing its duplicative proceeding challenge. However, the Court will address it first since the Respondent has posited that a resolution on this issue in its favor would make its jurisdictional challenges moot. The Court therefore will presume that it has jurisdiction over Plaintiff's claim for this aspect of Respondent's motion.
[38] *Ritchie Capital Mgt., L.L.C. v. BMO Harris Bank, N.A.*, 868 F.3d 661 (8th Cir. 2017) (involving two federal forums) and *Fru-Con Construction Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009) (involving federal and state forums).
[39] *Id.*, at 4. *See also* Respondent's Reply Memorandum (Docket #21), at 3 ("all of the courts who have been presented with such a scenario have held that a duplicative case must be dismissed").
[40] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 4.
[41] *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).
[42] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).
[43] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 4.

The Respondent replies that the exhaustion doctrine cannot be relied upon where the Plaintiff commenced the duplicate action in federal court in the first place instead of a different party seeking relief in federal court from an alleged improper assertion of tribal court jurisdiction.[44]

While not articulating it as such, the Respondent is asking this Court to apply an abstention doctrine recognized by federal courts. A good summary of the federal abstention doctrine is found in *Standing Rock Housing Authority v. Tri-County State Band*, 700 F.Supp. 1544, 1545 (D. So. Dak. 1988):

> In *Colorado River Water Cons. Dist. v. United States,* 424 U.S. 800, 814-16, 96 S.Ct.1236, 1244-45, 47 L.Ed.2d 483 (1976), the Supreme Court recognized three abstention doctrines: 1) *Pullman* abstention, where a state court determination of pertinent state law may moot a federal constitutional issue; 2) *Thibodeaux* or *Burford* abstention, where the federal court faces difficult questions of state law bearing on policy problems of substantial public importance transcending the case then at bar; and 3) *Younger* abstention, where federal jurisdiction has been invoked to restrain state criminal or tax proceedings. This case does not fit into any of these three abstention doctrines. *Colorado River,* however, articulated a fourth abstention category based on "exceptional circumstances" and "considerations of wise judicial administration."

The case at hand also fits within the fourth abstention category recognized in *Colorado River*. It involves the contemporaneous exercise of concurrent jurisdiction in duplicate cases that does not fit in any of the other three categories. "Proceedings are duplicative if the issues in one case 'substantially duplicate those raised by a case pending in another court.'" *Ritchie Capital Mgt., L.L.C. v. BMO Harris Bank, N.A.*, 868 F.3d 661, 664 (8th Cir. 2017) (citing *Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 n.3 (8th Cir. 2011)).

Abstention from the exercise of jurisdiction is the exception not the rule. It is matter of discretion not of mandate. As the Supreme Court has held:

"The doctrine of abstention, under which a District Court may decline to exercise

[44] *See* Respondent's Reply Memorandum (Docket #21), at 2.

> or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 -189 (1959). "[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Alabama Pub. Serv. Comm'n v. Southern R. Co*., 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result).

Colorado River, 424 U.S. at 813-814.

Further support for the discretionary nature of a court's abstention authority lies in the standard by which an appellate court reviews the exercise of that authority. A federal district court's decision to dismiss federal proceedings in favor of another forum is reviewed for abuse of discretion. *Mountain Pure, LLC v. Turner Holdings, LLC,* 439 F.3d 920, 926 (8th Cir.2006) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr.,* 460 U.S. 1, 19, (1983)).

The Supreme Court has noted the need for different approaches when applying the abstention doctrine in matters of concurrent federal jurisdiction and of concurrent federal-state jurisdiction:

> Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.

Colorado River, 424 U.S. at 817-818 (internal citations omitted).

The primary cases upon which Respondent relies for its "duplicative case" theory involve instances of each. *Ritchie Capital Mgt., L.L.C. v. BMO Harris Bank, N.A.*, *supra,* addressed abstention where there was concurrent federal jurisdiction between a district

court and a bankruptcy court. *Fru-Con Construction Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009) addressed federal abstention where there was concurrent state jurisdiction.

Both cases addressed the question of whether the federal district court should abstain from exercising its jurisdiction in favor of the other forum. Both hold that a court's exercise of its abstention authority is one of discretion not of mandate. Neither supports Respondent's assertion that this case must be dismissed in favor of the parallel action in federal district court. And, neither addressed federal abstention in an instance of concurrent federal and tribal jurisdiction.

In *Fru-Con Construction*, 574 F.3d at 534, the Eighth Circuit noted that federal courts

> have a "virtually unflagging obligation ... to exercise the jurisdiction given them, even when there is a pending state court action involving the same subject matter." [*Mountain Pure, LLC v. Turner Holdings, LLC,* 439 F.3d 920, 926 (8th Cir.2006)] (internal citations omitted). Thus, a federal court may divest itself of jurisdiction by abstaining only when parallel state and federal actions exist and exceptional circumstances warrant abstention. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-18, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

The Eighth Circuit goes on to note that "[s]ix non-exhaustive factors have been developed to determine whether, in the case of parallel state and federal proceedings, exceptional circumstances warrant [federal court] abstention." *Fru-Con Construction*, 574 F.3d at 534.[45]

In *Ritchie Capital Mgt.,* 868 F.3d at 666, the Eighth Circuit held "that while the district

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[45] These factors are:

> (1) whether there is a res over which one court has established jurisdiction, (2) the inconvenience of the federal forum, (3) whether maintaining separate actions may result in piecemeal litigation, unless the relevant law would require piecemeal litigation and the federal court issue is easily severed, (4) which case has priority — not necessarily which case was filed first but a greater emphasis on the relative progress made in the cases, (5) whether state or federal law controls, especially favoring the exercise of jurisdiction where federal law controls, and (6) the adequacy of the state forum to protect the federal plaintiffs rights.

Fru-Con Construction, 574 F.3d at 534, citing *Mountain Pure, supra,* 439 F.3d at 926.

court appropriately invoked its discretion to abstain, the court should have stayed the action rather than dismiss it." *Ritchie Capital Mgt., supra,* 868 F.3d at 666 (8th Cir. 2017).

Like a federal district court, this Court has a virtually unflagging obligation to exercise its jurisdiction even if it may abstain from doing so in exceptional circumstances. The question thus presented is whether exceptional circumstances exist in this case to warrant abstention in favor of the federal court action. They do not.

The prevailing law remains that, vis-à-vis a federal court, a tribal court should have the first opportunity to determine its jurisdiction over the matter at hand and, if jurisdiction is found, to carry the case out to its conclusion (including appeals). *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985). *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-20 (1987), specifically addressed tribal exhaustion in the context of federal court diversity jurisdiction, which is the basis for the Minnesota District Court's jurisdiction in the parallel case here. The Supreme Court held in *Iowa Mutual* that "proper respect for tribal legal institutions requires that they be given a 'full opportunity to consider the issues before them.'" *Id.*, at 16.

Interestingly, the tribal exhaustion doctrine is rooted in the same precedent underlying the duplicative proceedings abstention concept. In *Iowa Mutual,* 480 U.S. at 16 n.9, the Supreme Court noted that

> the [tribal exhaustion] rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist.* v. *United States,* 424 U. S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances. In *Colorado River,* as here, strong federal policy concerns favored resolution in the nonfederal forum.

Nothing in the tribal exhaustion doctrine is inherently contradictory to the federal abstention doctrine. Applying it here is not only logical, but clearly preferential from the perspective of both the tribal court and the federal court.

The Respondent seeks to stand the tribal exhaustion principle on its head by asking this Court to defer its jurisdiction to the very court whose precedent holds that this case should be in tribal court in the first place. Federal law and policy presumptively favor resolution in tribal courts of matters falling within tribal authority and jurisdiction. This approach is consistent with general federal court abstention principles vis-à-vis other federal forums or state courts. It serves to prevent piecemeal or duplicative proceedings and to ensure that a matter is handled in the most appropriate forum.

The next question is whether any of the exceptions to the tribal exhaustion doctrine apply. In *National Farmers Union, supra*, 471 U.S. at 856 n.21, the Supreme Court noted:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," cf. *Juidice v. Vail*, 430 U. S. 327, 430 U. S. 338 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

The third exception clearly does not apply here. The Respondent will have the opportunity to appeal this Court's decision to the Community's Appellate Court. And, in accordance with the tribal exhaustion doctrine, it will have the opportunity to seek federal court review.[46] Neither of these opportunities are futile.

As for the second exception regarding an express jurisdictional prohibition, the Respondent asserts no such express and unequivocal bar in this aspect of its motion to dismiss. Certainly, the Respondent argues that there is no tribal jurisdiction in this case pursuant to federal precedent relating to when tribal jurisdiction may be exercised over non-Indians. However, this points to a debatable question rather than to an absolute jurisdictional bar. The Supreme Court adopted a variant of this exception in *Strate v. A-1 Contractors*, 520 U.S. 438,

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[46] *Iowa Mutual*, *supra*, 480 U.S. at 19. *See also FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990).

451 (1997) holding that where it is "plain" that the tribal court lacks jurisdiction, exhaustion "must give way, for it would serve no purpose other than delay." Just as there are no clear jurisdictional prohibitions within the meaning of *Iowa Mutual*, this Court's jurisdiction is not plainly lacking. The question of whether tribal court jurisdiction may be exercised under the facts of this case requires a particularized inquiry. *See* Section IV of this Opinion, *infra*. However, by no means is it obvious at the outset that this Court's jurisdiction is plainly lacking to obviate the need for the type of analysis and application of precedent undertaken in Section IV.

As for the first exception, the Respondent expresses concern about the fact that the Plaintiff simultaneously filed parallel actions in two different courts. The Respondent asserts, "The existence of the exhaustion doctrine is not and cannot be justified for commencing duplicative litigation."[47] At oral argument, the Respondent sharpened this point by asserting, "[T]his case presents . . . conduct that shouldn't be sanctioned or allowed by any court, which is to commence the same lawsuit in two different jurisdictions involving the same parties, the same claims, and same subject matter."[48]

The Plaintiff fully admits to commencing parallel actions in two courts involving the same parties and the same claims. This action was commenced on November 22, 2019. A parallel action was commenced in Minnesota State Court, Scott County, on November 26, 2019. The Plaintiff explains that he did so because a two-year statute of limitations was about to expire, and he wanted to ensure that his claim would not be time barred in whichever court has jurisdiction.[49]

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[47] Respondent's Reply Memorandum (Docket #21), at 2.
[48] Transcript of Oral Argument (02/27/2020), at 6.
[49] Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 1 ("Procedural Posture"); Petitioner's Attorney Morrissey's Letter to Tribal Court, State Court, & Respondent

The Plaintiff has been transparent as to why he filed his claim simultaneously in two different jurisdictions. Plaintiff's Counsel provided a letter on December 16, 2019, to this Court, the Scott County District Court, and the Respondent explaining his rationale and expressing preference for venue in the SMSC Tribal Court.[50] After removal of the state action to federal court, Plaintiff promptly informed the federal District Court both by letter of December 27, 2019, and in the joint Rule 26(f) report on February 11, 2020. There, he again expressed his preference for venue in this Court and explained that he would be seeking a stay of the federal action pending the disposition of the Respondent's motion to dismiss here.[51]

The Court finds no bad faith on the part of the Plaintiff in commencing this action. A party engaging in bad faith litigation certainly would not make such a concerted effort to disclose its actions and intentions to all courts involved. The Plaintiff has been open and upfront about the protective nature of his filings. He clearly is not engaging in ill-intended forum shopping. Rather, he represents, and the Court agrees, that he is exercising his fiduciary responsibilities to protect Ms. Brewer-Ross' estate and best interests consistent with his role as her Conservator. In this regard, the Court notes that, as the parties certainly must concede, jurisdiction over the Plaintiff's claim is a matter of some complexity in the context of the interrelationship of tribal, state, and federal jurisdictions.

The Court also notes that the Plaintiff's and his Counsels' efforts to disclose and explain the procedural posture of this case in two courts are entirely consistent with their obligations

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Attorney Lulic of December 16, 2019 (Docket #6); Petitioner's Attorney Morrissey's Letter to Tribal Court, Federal Court, & Respondent Attorney Lulic of December 27, 2019 (Docket #23); Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 2-3.

[50] Petitioner's Attorney Morrissey's Letter to Judge & Respondent Attorney Lulic of December 16, 2019 (Docket #6).

[51] Petitioner's Attorney Morrissey's Letter to Judge & Respondent Attorney Lulic of December 27, 2019 ; Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 1 ("Procedural Posture").

under SMSC Rule of Civil Procedure 11(b) which in relevant part provides:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> . . . .

The Court does not understand the Respondent to be claiming that Plaintiff's actions in either court are frivolous. The Court finds that, for the purposes of deciding Respondent's motion to dismiss, the action in this Court was not frivolously commenced.

Similarly, the Court does not understand the Respondent to be claiming that the Plaintiff has acted with improper purpose. Rather, the Respondent argues that procedurally only one of the actions should move forward in the interest of judicial efficiency and proper resolution of the Plaintiff's claim in only one forum. From this perspective, the Respondent argues that the Plaintiff's efforts to pursue his claim in two courts at once should not be countenanced.

The authority cited by Respondent undermines his own contentions. As the Eighth Circuit noted in *Ritchie Capital Mgt.,* 868 F.3d at 666:

> [T]he statute of limitations is always a concern in abstention cases. *See, e.g.*, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 n.2 (1995). For this reason, we have emphasized a preference for stays over dismissals to preserve any claims that might not be resolved by the parallel proceedings. *See Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 797-98 (8th Cir. 2008). We have implemented that preference even when plaintiffs did not clearly explain why further proceedings in the abstaining court were likely. *See Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 882-83 (8th Cir. 2002).

This Court also recognizes a party's interest in protecting against the running of a statute of limitations. It does not infer or find an improper motive or duplicitous intent on the Plaintiff's part given his significant efforts at transparency.

The Respondent also argues that there would be no tribal exhaustion issue had the parallel action remained in state court. As the parallel action no longer is in state court, this Court offers no view and makes no finding regarding this contention. The fact is that the parallel action is now in federal court because the Respondent successfully asked that it be removed there. The Respondent has no standing to now complain about or seek refuge from the consequences of its own litigation strategy and choices.

Absent exceptional circumstances, a party must first exhaust remedies in tribal court before pursuing remedies in federal court. The Respondent here has not demonstrated any such exceptional circumstance. The tribal exhaustion doctrine clearly applies to this case. This Court will not abstain from exercising its responsibility to determine whether jurisdiction exists in this case and, if it is found, to exercise its jurisdiction over this matter.

IV.

JURISDICTION

Subject matter and personal jurisdiction in this case is contingent upon three things. First, the Community must retain the sovereign authority to govern or regulate the conduct, activities, or transaction underlying Plaintiff's claim. Second, the Community must retain the power to exercise that authority over the nonmember, non-Indian Respondent. Third, the Respondent must have had sufficient minimum contacts with the Community to be compelled to answer and defend against Plaintiff's claim. The Court finds that the Plaintiff has made a *prima facie* case that these jurisdictional prerequisites have been met.

A.

SUBJECT MATTER JURISDICTION

The Respondent asserts that this Court lacks subject matter jurisdiction because "[t]he alleged breach [of the homeowner's insurance policy] did not occur on reservation land and does not relate to tribal self-government."[52] It relies heavily on the fact that it is a non-Indian entity located outside of the reservation. Citing *Montana v. United States*, 450 U.S. 544 (1981), it asserts that, as a rule of law, the Community may not exercise jurisdiction over non-Indians. It argues that neither of the *Montana* exceptions to this general rule apply here.

Citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Plaintiff counters that subject matter jurisdiction exists pursuant to the Community's inherent authority to condition both member and nonmember conduct occurring on tribal land. He argues that *Montana* does not apply because, unlike in that case, the land involved here is tribal trust land located on the reservation. Alternatively, the Plaintiff asserts that both Montana exceptions provide for tribal court jurisdiction in this case.

To have subject matter jurisdiction, the Community must have the authority to govern or regulate the type of transaction, conduct, or activity that underlies a particular claim as well as the parties involved in that claim.[53] Here, the Community must have the authority to govern the contractual relationship involved in a homeowner's insurance policy that was issued by a non-tribal corporation located in Indiana.

The Court finds that the Plaintiff has made a *prima facie* case that: i) the Community possesses and indeed has exercised its authority to govern and regulate a contractual relationship

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[52] Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 7.
[53] The Supreme Court has described its doctrine of tribal court jurisdiction over nonmembers as pertaining to "subject-matter, rather than merely personal, jurisdiction." *Nevada v.* Hicks, 533 U.S. 353, 367 n.8 (2001).

between a tribal member and a non-Indian entity involving a homeowner's insurance policy in force on tribal lands within the reservation; and ii) the Community may exercise that authority with regard to the Plaintiff's breach of contract claim against the Respondent.

1.

Subject Matter Jurisdiction Under the Community's Jurisdictional Amendment

Under the Community's Ordinance known as the Jurisdictional Amendment, this Court has "original jurisdiction over all civil causes of action arising on lands subject to the jurisdiction of the . . . Community." SMSC Resolution 11-14-95-003, §I.[54] Such lands include "all lands having Reservation or trust status." *Id.*

Plaintiff has sufficiently alleged several key facts to support a finding that these threshold jurisdictional prerequisites have been met. Ms. Brewer-Ross' home was located on land held in trust for the benefit of the Community. Neither party here questions the Community's ability to govern and regulate that land, certainly with regard to tribal members and, if certain conditions are met, with regard to nonmembers as well. The land was leased to Ms. Brewer-Ross pursuant to tribal law for the purpose of building her home. A Community-owned entity provided the financing for the home and held a mortgage on the home.

However, the Respondent asserts that these facts are not by themselves enough to provide jurisdiction because any alleged breach of the homeowner's insurance contract took place off the reservation. The Court disagrees.

The Respondent's position ignores other elements which demonstrate that the Plaintiff's case arose on the reservation. For example, from the facts presented here, it appears that Ms. Brewer-Ross negotiated and consummated the insurance contract on her end while on the

[54] *See also Bryant and Rouse v. Anderson Air., Inc.*, 5 Shak T.C. 92 (Nov. 6, 2007).

reservation. The insurance premiums were billed to and paid from a location on the reservation. Ms. Brewer-Ross' reliance on the insurance contract took place on the reservation. The place of economic impact due to the fire loss was on the reservation. Ms. Brewer-Ross' injury and loss due to the Respondent's alleged breach therefore also were on the reservation. And, the location for tender of payment for the loss was on the reservation for the mortgagee and presumably would be on the reservation for Ms. Brewer-Ross. There are additional potential facts that Plaintiff raised during oral argument that also come into play, including whether the Respondent entered onto the reservation to inspect the home prior to issuing the policy and after the fire loss.[55]

The Court's finding that the Plaintiff's cause of action arose on the reservation is supported by *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. 2014). That case involved a home owned by tribal members located on a reservation that was damaged by a tornado. The home was insured by an off-reservation non-Indian company. Following the loss, a company adjuster inspected the property. A dispute eventually arose regarding the quality of the reconstruction work performed by the insurance company's contractors. A tribal court action was commenced involving the contractors, the homeowners, and the insurance company. One of the homeowners' claims involved a potential breach of contract claim. Among other defenses, the insurance company asserted that the tribal court lacked jurisdiction because "the alleged breach would have occurred with the failure to make the proper payment. And, according to [the insurance company] this would have occurred where the payment would have originated from, which was off the reservation." *Id.*, at 13-14.

The Federal Court, North Dakota District, rejected this argument because it "ignores

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[55] Transcript of Oral Argument (02/27/2020), at 46-47.

other elements, such as where the [homeowners'] reliance on being fairly dealt with (including the receipt of any necessary communications) took place and, perhaps more importantly, where the harm occurred." *Id*, at 15. In reaching this conclusion, the District Court examined common principles applied in conflict of law situations and other circumstances requiring a determination where a cause of action arose. It cited factors such as where the economic impact was felt, where the place of injury was, where the harm took place, and where payment was to be made. *Id.*, at 15-16.

The Respondent makes the same argument here that the insurance company made in the *State Farm* case. Like the District Court there, this Court rejects that argument in applying similar factors. Plaintiff has sufficiently alleged that his cause of action arose on the reservation.

Section II of the Jurisdictional Amendment defines this Court's jurisdiction over persons. It provides that jurisdiction extends to "all persons whose actions involve or affect the . . . Community or its members, or where the person in question enters into consensual relationships with the Community or its members through commercial dealings, contracts, leases, or other arrangements." SMSC Resolution 11-14-95-003, §II. A "person" includes all natural persons and corporations "whether members or non-members of the . . . Community." *Id*.

There is no question that jurisdiction is found over the Respondent pursuant to these provisions. The Respondent falls squarely within the definition of a "person." It indisputably entered a consensual relationship with a Community member involving a contract, namely a homeowner's insurance policy. Plaintiff also sufficiently alleges that the Respondent has undertaken actions which involve or affect the Community and one of its members by its alleged breach of the homeowner's insurance policy. As for Ms. Brewer-Ross, the Plaintiff alleges the effect of economic harm due to the Respondent's failure to pay an insurance claim. The Plaintiff

also argues that the alleged facts would allow this Court to conclude that the Community has a strong interest in a number of ways, including that that insurance companies live up to their contractual obligations toward Community members, that a Conservatorship established pursuant to Community law properly fulfills its obligations, and that the Community judicial system is afforded the opportunity to resolve disputes involving Community members and Community interests.[56] Also relevant is the fact that the Community leased the land to Ms. Brewer-Ross and financed her home with Community funds as part of the Community's overall land use and housing policies.[57]

Section III of the Jurisdictional Amendment defines this Court's jurisdiction over common law causes of action. It provides that this Court "shall have subject matter jurisdiction over all civil causes of action pursuant to Section I & II herein, and arising at common law, including, without limitation, all contract claims . . ., all tort claims . . ., all property claims . . ., all insurance claims . . . ." SMSC Resolution 11-14-95-003, §III.

Once again, there is no question that jurisdiction is found over Plaintiff's claims pursuant to these provisions. At least two types of common law actions are involved here, a contract claim and an insurance claim.

In sum, the Court finds that, pursuant to the Jurisdictional Amendment, the Plaintiff has made a *prima facie* case that subject matter jurisdiction exists over this common law contract and insurance claim matter and over the Respondent. Having found that Plaintiff's cause of action arose on the reservation, the plain meaning of the Jurisdictional Amendment's unambiguous provisions readily supports this conclusion.

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[56] *See, e.g.,* Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9.
[57] *See, e.g.,* Transcript of Oral Argument (02/27/2020), at 34-35.

2.

Subject Matter Jurisdiction Under Federal Law

The subject matter jurisdiction analysis would be over if the Community's Jurisdictional Amendment were the only law in play in this case. However, a number key U.S. Supreme Court decisions and their progeny have established a number of rules applied in federal court regarding tribal court jurisdiction over non-Indians.[58] The federal court retains continuing jurisdiction to review this Court's jurisdiction once the Respondent exhausts its tribal remedies.[59] Therefore, the Community's Jurisdictional Amendment must be construed in a manner that is consistent with the precedent that a federal court would apply in determining whether tribal court jurisdiction exists.

In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Supreme Court announced the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." It then set forth two exceptions to this rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id.

These two exceptions have come to be known as the consensual relations exception and

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[58] *See generally* Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. Colo. L. Rev. 1187 (2010), *accessible at* http://scholar.law.colorado.edu/articles/221.
[59] *Iowa Mutual*, *supra*, 480 U.S. at 19. *See also FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990).

the self-government exception.[60] Under the facts that Plaintiff alleges, the Court finds jurisdiction under the *Montana* consensual relations exception. Because it does so, it is unnecessary to address whether jurisdiction also could be found under the self-government exception. It is similarly unnecessary to address the Plaintiff's assertion that *Montana* and its progeny do not apply because Ms. Brewer-Ross' home was located on tribal trust land.[61]

Montana specifically addressed tribal authority over non-Indian conduct on fee lands within the reservation. However, in subsequent cases, the Supreme Court reinforced and applied *Montana* where the underlying land was held in trust status. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no tribal court jurisdiction over litigation between nonmembers arising out of a vehicle accident on a state highway within a reservation notwithstanding tribal ownership underlying the road easement); *Nevada v. Hicks*, 533 U.S. 353 (2001) (no tribal power to regulate a search by state officers investigating off-reservation crime even though the search was of an Indian-owned residence on tribal trust land.)

The Respondent asserts that neither of the *Montana* exceptions apply because "[t]he alleged breach did not occur on reservation and does not relate to tribal self-government."[62] However, the Plaintiff has alleged sufficient facts to support a finding that his cause of action

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[60] *See* Alexander Tallchief Skibine, *Incorporation Without Assimilation: Legislating Tribal Civil Jurisdiction Over Non-Members*, Utah Law Digital Commons (01/2019), at 5, *accessible at* https://dc.law.utah.edu/scholarship/173/.

[61] The Plaintiff asserts that *Montana* does not control here because the cause of action arose within the reservation on tribal trust land. He argues that pursuant to M*errion v. Jicarilla Apache Tribe*, 455 U.S. 120 (1982) and its progeny, a tribe has unequivocal authority to regulate non-Indians on tribal trust lands as an incident to a tribe's power to exclude persons from such lands. Plaintiff cites, among other cases, *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) in support of this argument. He also cites *Nevada v. Hicks*, 533 U.S. 353 (2001) for the proposition the land ownership can be the dispositive determinant of tribal authority over non-Indians within the reservation. The Court notes that Plaintiff's construction of *Merrion* and *Hicks* is a matter of disagreement among the federal circuits. *See* Skibine, *supra* n.58, at 8. *See also*, *Window Rock Unified School Dist. v. Reeves*, 861 F.3d 889, 907 (9th Cir. 2017) (Circuit Judge Christen, dissenting). Notably, the Supreme Court held in *Hicks* that "[t]he ownership status of land . . . is only one factor to consider" even though "[i]t may sometimes be a dispositive factor." 533 U.S. at 360. Here, the Court finds that land ownership indeed is one of the dispositive factors supporting jurisdiction under the *Montana* consensual relations exception.

[62] Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 7.

arose on the reservation. *See* Discussion of the Community's Jurisdictional Amendment §I in Section IV.A.1, *supra.* Moreover, the Respondent too narrowly construes *Montana* and related precedent that addresses tribal powers necessary to protect tribal self-government and control internal relations.

As one commentator has noted, "Although not explicitly spelled out by the [Supreme] Court, it can be inferred that the two exceptions reflect what the *Montana* Court believed were powers 'necessary to protect tribal government or to control internal relations.'"[63] The Court agrees. The *Montana* consensual relations exception is unambiguous. "A tribe may regulate, through taxation, licensing, or *other means* the activities of nonmembers who enter into consensual relationships . . . through *commercial dealing, contracts*, leases, or other arrangements." *Montana*, 450 U.S. at 565 (emphasis added). The Supreme Court clearly connected the dots between tribal self-government and the regulation of consensual relationships expressed through commercial dealings and contracts.

The facts of this case support the application of the *Montana* consensual relations exception. The Respondent entered a consensual commercial relationship with Ms. Brewer-Ross espoused in a homeowner's insurance contract. That policy covered a home owned by a Community member. The home was located on the reservation on tribal trust land. SMSC Home Mortgage, a Community entity, was included as an additional insured in that policy and can be inferred to be a party to that contract. During this consensual relationship, the Respondent directed its conduct toward the reservation. While some of the Respondent's conduct that may have contributed to the alleged breach occurred outside of the reservation, a number of elements of that conduct occurred or were sufficiently related to the reservation to

[63] Skibine, n.5, *supra*, at 5 (citation omitted).

demonstrate the Plaintiff's cause of action arose on the reservation. The Respondent has pointed to no authority that all its actions involved in the alleged breach must occur on the reservation for subject matter jurisdiction to attach. In fact, precedent is to the contrary. "[T]he focus for the purposes of the first *Montana* exception . . . is not limited to where the conduct necessary to establish a particular element for breach of contract . . . took place . . . ." *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. 2014), at 16. *See also Dish Network Service L.L.C. v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013) ("Even if the alleged . . . tort occurred off tribal lands, jurisdiction would not clearly be lacking because the . . . claim arises out of and is intimately related to DISH's contract . . . and that contract relates to activities on tribal land").

The Court is aware that the *Montana* exceptions are narrow ones and "cannot be construed in a manner that would `swallow the rule.'" *Plains Commerce Bank v. Long Family Cattle Company*, 554 U.S. 316, 330 (2008) (*quoting Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 655 (2001)). The Supreme Court has noted that "*Montana's* consensual relation exception requires that the tax or regulation imposed . . . have a nexus to the consensual relationship itself." *Atkinson Trading Co.*, 532 U.S. at 656. Nevertheless, "[d]espite the limitations recognized in *Montana* and subsequent cases, the [Supreme] Court has consistently acknowledged that '[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.'" *Dolgencorp, Inc. v. Miss. Band Indians*, 746 F.3d 167, 172 (5th Cir. 2014), *aff'd* 579 U.S. ___ (2016) (quoting *Iowa Mutual, supra,* 480 U.S. at 18).

Dolgencorp is particularly instructive regarding the application of the *Montana* consensual relations exception to a common law claim asserted in tribal court against a non-Indian corporation. *Dolgencorp* involved a tort claim by a tribal member against a non-Indian

corporation. There, the Fifth Circuit analyzed the common law claim under the *Montana* framework. 746 F.3d. at 172. Here, the Court must analyze a common law contract claim and chooses to do so under the *Montana* framework. As *Dolgencorp* instructs, in considering tribal regulation through common law "'courts applying *Montana* should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claims on the nonmember.'" 746 F.3d at 173 (quoting *Attorney's Process & Investigative Services, Inc., v. Sac & Fox Tribe*, 609 F.3d 927, 938 (8th Cir. 2010)). *Accord State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. 2014).

In *Dolgencorp*, the non-Indian corporation argued "that *Plains Commerce* narrowed the *Montana* consensual relationship exception, allowing tribes to regulate consensual relationships with nonmembers only upon a showing that the specific relationships 'implicate tribal governance and internal relations.'" 746 F.3d at 167. The Respondent here makes a similar argument. As the Firth Circuit rejected this argument, so too does this Court. *Plains Commerce* does not require "an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.'" *Dolgencorp*, 746 F.3d at 175. It is difficult to envision how a single business transaction, like the issuance of single homeowner's insurance policy, could ever have such an impact. *See Id.* ("It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact"). "Nothing in *Plains Commerce* requires focus on the highly specific rather than the general." *Id.*

As this precedent is applied to this case, the nexus component of the tribal jurisdictional analysis centers on the connection between the alleged breach of the homeowner's contract and

the consensual action of the Respondent entering the reservation insurance market. *See Dolgencorp*, 746 F.3d at 174 (examining the nexus between the alleged tortious misconduct and Dolgencorp's consensual action to participate in a tribal youth employment program). Here, taking the Plaintiff's allegations as true, the Respondent knowingly and voluntarily insured a home owned by a tribal member that was located on tribal trust land. It also knew that a tribal entity financed the home and included that entity as an additional insured under the policy. The inference to be drawn is that this insurance transaction is found within the context of the Community's efforts to provide safe and stable housing on the reservation for Community members.[64] The Plaintiff has alleged sufficient facts to demonstrate the connection between the Respondent, its alleged breach, and tribal self-government.

Dolgencorp instructs that this Court should conduct its analysis "at a higher level of generality" regarding the ability of the tribe to govern the overall context in which a particular consensual relationship exists or to establish the rules by which that relationship is to be conducted. *Id.* In doing so, the Court finds that the particular homeowner's policy was issued within the context of the Community's power of self-government in relation to a reservation housing policy and related ordinances, as well as its assertion of common law to govern contractual relationships by application of common law. Moreover, the provisions of a homeowner's policy not only provide protection for the insured premises and for the mortgagee. They also provide general liability protections to the wider public regarding the negligent conduct of the insured. From this boarder perspective, the breach of a homeowner's insurance policy certainly may have a direct and substantial effect on the Community and its members beyond the immediate effect on Ms. Brewer-Ross.

[64] *See* Transcript of Oral Argument (02/27/2020), at 44-47; Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9 (assertions regarding the Community's interests in protecting its Members).

To further highlight the nexus between the Plaintiff's claim and the Community's right of self-government, the Court takes judicial notice of the Community's Consolidated Land Management Ordinance. Among other things, this Ordinance regulates eligibility for assignment of residential land (Chapter 3), residential land lease (Chapter 4), home financing (Chapter 6), and building and fire codes (Chapter 7). As the Plaintiff avers, [65] each of these provisions serves to provide the social, cultural, and economic environment that provide for and support the Respondent's opportunity to market insurance on the reservation.

For example, the Community has expressed "[a] primary policy . . . to make affordable, high quality housing available to its members on the Community's Reservation and trust lands." Consolidated Land Management Ordinance, §6.1. To support this policy, the Community's home financing program provides "financing for the acquisition, recoupment, construction and improvement of single family, primary residence by and for members." *Id.* This financing is provided from a home loan fund established with Community funds. *Id.*, §6.7. Any loan from this fund must be secured by the member's per capita payments that are disbursed from revenue derived from Community enterprises and assets. *Id.*, §6.4.

To someone outside of the tribal community, the issuance of a homeowner's policy may look like a run-of-the-mill transaction involving only the homeowner and the insurance company. However, from the Community's perspective, the homeowner's policy at issue in this case could not have been issued in the first place had Ms. Brewer-Ross not been eligible to lease tribal trust land, to build her home there, and to secure financing from the Community's home loan fund which she could obtain only by providing the security of her Community-provided per capita payments. Moreover, the Community's land use and housing policies must be viewed

[65] Transcript of Oral Argument (02/27/2020), at 34-35.

from a historical perspective. The Community has adopted these policies and related laws in the face of significant challenges to meet the social, cultural, and economic needs of its members on what is but a fraction of its historic territory.[66] The Community's comprehensive and integrated efforts to maximize housing opportunities for members on tribal lands are indeed an exercise of the right to self-government. These efforts are undermined if homeowner's insurance policies are not available to insure homes on tribal lands or if the parties do not live up to their obligations under such policies.[67]

Support for the Court's approach and conclusions in this case is found in *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. 2014). There, after tribal remedies had been exhausted, the Federal Court, North Dakota District, reviewed a tribal court's decision that it had jurisdiction over a property insurance claim by tribal member homeowners against an off-reservation insurance company. *See* Discussion of this case in relation to the Community's Jurisdictional Amendment §I in Section IV.A.1, *supra.* In *State Farm*, the insurance company made two of the same arguments that the Respondent makes in this case, namely that "whatever relationship it had with the [tribal member homeowners] did not affect tribal self-government or internal tribal relations, " and that "not even the first *Montana* exception applies, given . . . a narrowing of the first exemption by *Plains Commerce Bank*."2014 WL 1883633 at 11.

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[66] *See generally* Kathryn L.S. Pettit, et al., *Continuity and Change: Demographic, Socioeconomic, and Housing Conditions of American Indians and Alaska Natives*, U.S. Department of Housing and Urban Development (January 2014) *accessible at* https://www.huduser.gov/portal/publications/pdf/housing_conditions.pdf; Alan L. Neville and Alyssa Kaye Anderson, *The Diminishment of the Great Sioux Reservation Treaties, Tricks, and Time*, Great Plains Quarterly 33:4 (Fall 2013), *accessible at* https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3568&context=greatplainsquarterly.

[67] *See* discussion in Section IV.B.2, infra, regarding the Community's significant challenges in meeting the housing, social, cultural, and economic needs of its growing and aging population on its small present-day land base, as well as its "manifest interest" in ensuring that an off-reservation insurance company honors its contractual obligations with respect to Community member homes located on trust lands.

In rejecting these arguments, the Federal Court in *State Farm* examined the connections between the alleged breach, the consensual acts of the insurance company, and tribal self-government in light the Supreme Court's holding in *Plains Commerce* and as *Plains Commerce* was construed and applied in *Dolgencorp*. It concluded, "State Farm entered into an agreement to provide property damage and loss coverage for a residence owned by tribal members located on the . . . reservation. . . . [T]his was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception." *Id.*, at 17. It further concluded, "[T]here is a sufficient nexus between the [homeowners'] claims (whether characterized as a breach of contract, a tort, or both) and the consensual relationship arising out of the property insurance contract to provide for tribal court jurisdiction. *To the extent the claims are for breach of contract, they obviously go to the heart of the consensual relationship*." *Id.* (emphasis added).

Like the Federal Court in *State Farm*, this Court also concludes that *Plains Commerce* has not narrowed the *Montana* consensual relations exception to prevent its application regarding a breach of insurance contract claim regarding a tribal member's home located on tribal land. Indeed, honoring the obligations of that contract goes to the very heart of the consensual relationship and relates more broadly to a tribe's self-governmental interest to maximize safe and affordable reservation housing opportunities for its members.

The Respondent also implies that, even if the Community has the requisite authority, it has not in fact enacted regulations that govern the Respondent as an insurance company doing business on the reservation.[68] It specifically asserts that the homeowner's policy in question is

[68] *See* Transcript of Oral Argument (02/27/2020), at 19-21.

not regulated by the Community but by the State of Minnesota.[69] The Court offers no opinion on whether the Respondent is regulated by the State of Minnesota. That issue is not presented here. Moreover, it is not relevant here that the Community might not currently be regulating all aspects of the insurance industry within the reservation through comprehensive statutes or regulations.

What is relevant is that the Community's Jurisdictional Amendment Ordinance specifically regulates the type of contractual consensual relationship at issue in this case. Through this Ordinance, the Community has chosen to exercise its authority by adopting common law. *See* SMSC Resolution 11-14-95-003, §III.[70] The Community's decision to regulate consensual relationships need not be expressed through a comprehensive legislative enactment. *See Attorney's Process & Investigative Services, Inc., v. Sac & Fox Tribe*, 609 F.3d 927, 938 (8th Cir. 2010) ("If the Tribe retains the power under *Montana* to regulate . . . conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through [common law] tort claims . . . ."). The Community's choice of common law as its regulatory modality over contractual relations and insurance claims on the reservation falls squarely within its sovereign prerogatives and within what the *Montana* Court called "other means." *Montana*, 450 U.S. at 565.

The Community's Jurisdictional Amendment Ordinance also lays to rest the Respondent's arguments that, by exercising jurisdiction in this case, the Court would be acting as a court of general jurisdiction.[71] This Court recognizes that it has only that authority which the

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[69] Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 9 (citing Minn. Stat. §65A.01 subd. 3).

[70] §III of this Ordinance provides:

> "common law" shall mean the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from the usages and customs, or from the judgements (sic) and decrees of courts recognizing and affirming such usages and customs, and is generally distinguished from statutory law.

[71] Transcript of Oral Argument (02/27/2020), at 19.

Community has delegated to it. *See* SMSC Resolution 11-14-95-003 *passim*. The Court also recognizes that its adjudicatory jurisdiction cannot exceed the Community's legislative jurisdiction. *See Strate v. A-1 Contractors*, 520 U.S. 438, 439 (1997). This Court is not acting as court of general jurisdiction of the type discussed in *Hicks*. *See* 533 U.S. at 366-367. As the Supreme Court noted, "A state court's jurisdiction is general, in that it 'lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe'" *Id.*, 533 U.S. at 367 (citation omitted). Here, this Court is not attempting to assert inherent tribal court authority where the Community has no legislative authority. Nor is it attempting to adjudicate a case arising under the laws of any other jurisdiction. Rather, it is exercising authority specifically delegated by the Community to adjudicate a case arising under the Jurisdictional Amendment regarding a contractual relationship that, consistent with both Community law and federal precedent, is within the Community's sovereign power to regulate.

In sum, the Court finds that the Plaintiff has made a *prima facie* case consistent with relevant federal precedent that subject matter jurisdiction exists over Plaintiff's common law breach of contract and insurance policy claims, as well as over the non-Indian Respondent.

B.

PERSONAL JURISDICTION

As with subject matter jurisdiction, personal jurisdiction must be analyzed both in terms of the Community's laws and in terms of relevant precedent that a federal court would apply in determining whether tribal court personal jurisdiction exists. For personal jurisdiction, the specific linkage between Community law and federal law is explicit. The Community's courts

already have ruled that the *International Shoe*[72] "minimum contacts" standard is to be applied in construing the Community's long-arm statute.

The Court finds that the Plaintiff has made a *prima facie* case that personal jurisdiction exists over the Respondent pursuant to both the Community's long-arm statute and relevant federal precedent.

1.

Personal Jurisdiction under Community Law

The Jurisdictional Amendment Ordinance serves as the Community's long-arm statute. It provides a straightforward approach as to when off-reservation actors may be called to answer claims arising on the reservation. Where a civil cause of action arises "on lands subject to the jurisdiction of the . . . Community," SMSC Resolution 11-14-95-003, §I, this Court's jurisdiction extends to "all persons whose actions involve or affect the . . . Community or its members, or where the person in question enters into consensual relationships with the Community or its members through commercial dealings, contracts, leases, or other arrangements." *Id.*, §II. A "person" includes all natural persons and corporations "whether members or non-members of the . . . Community." *Id.*

In carrying forward the same analysis and findings with respect to subject matter jurisdiction set forth above,[73] the Court finds with respect to personal jurisdiction that: i) the Plaintiff's cause of action arose on the reservation for the purposes of asserting personal jurisdiction under the Jurisdictional Amendment; ii) the Plaintiff has alleged sufficient facts to demonstrate that the Respondent engaged in conduct that affects the Community and its

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[72] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
[73] *See* discussion in Section IV.A.1, *supra* (Subject Matter Jurisdiction Under the Community's Jurisdictional Amendment).

members; iii) the Respondent entered into a consensual relationship at least with a Community member if not with the Community itself through a commercial transaction and contract; and iv) the Respondent falls squarely within the Ordinance's definition of a person. Under the facts alleged by Plaintiff, personal jurisdiction over the Respondent exists within the plain meaning of the Jurisdictional Amendment.

However, that is not the end of the analysis. This Court has adopted the *International Shoe* "minimum contacts" test when considering personal jurisdiction over those who do not reside on the reservation. *.LSI v. Prescott and Johnson*, 2 Shak. T.C. 152, 158 (Jul. 1, 1996). *See also In re the Marriage of Nguyen and Gustafson*, __ Shak. A.C. ___, ___ (Slip Opinion at 10) (Jan. 21, 2020). This Court may exercise personal jurisdiction over an off-reservation respondent if the respondent has "certain minimum contacts with [the Community] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

2.

Personal Jurisdiction Under the *International Shoe* Test

The Respondent asserts that it is inappropriate for a tribal court to apply the *International Shoe* minimum contacts analysis in relation to a non-Indian. It offers no other test. Instead, the Respondent falls back on the same arguments it makes with respect to subject matter jurisdiction, namely that tribal courts presumptively do not have jurisdiction over non-Indians and the *Montana* analysis should govern the personal jurisdiction analysis as well. Alternatively, the Respondent argues that it did not have sufficient continuous and systematic contacts with the Community to support personal jurisdiction under the *International Shoe* test.[74]

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[74] Respondent's Reply Memorandum (Docket #21), at 5. See also Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 4-6.

The Plaintiff counters that, consistent with *International Shoe* and its progeny, the Respondent established the requisite minimum contacts by purposely availing itself of the opportunity to do business within the Community and by entering the insurance contract involved in this action. It also argues that the Respondent misconstrues personal jurisdiction by focusing on the Community's sovereign authority over non-Indians rather than on the familiar minimum contacts doctrine that ensures due process for litigants.[75]

The Respondent conflates subject matter and personal jurisdiction in relation to non-Indians. Certainly, the threshold determination must be made regarding subject matter jurisdiction which includes inquiry into both the sovereign authority to regulate in the first place and the authority to regulate the non-Indian involved. The "limitation on jurisdiction over nonmembers pertains to subject matter, rather than merely personal jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe." *Hicks*, *supra,* 533 U.S. at 637 n.8. As one commentator has observed, "First, the tribal court has to determine whether it possesses judicial jurisdiction over the suit. And second, the court must resolve whether the tribe has the legislative authority to regulate the conduct of non-Indians engaged in the activities at issue." F. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction,* 31 Ariz. L.Rev. 329, 335 (1989). Subject matter jurisdiction addresses the court's authority to hear the case in the first place.

Personal jurisdiction addresses due process considerations consistent with "'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316. These concerns might relate to whether a party has been served with adequate process to be informed of the action against it. Or, as contemplated by *International Shoe*, they might involve whether a

[75] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 6-7

party had reason to know that a court could compel it to answer a claim in that forum as opposed to another forum. Moreover, personal jurisdiction due process considerations apply to any party regardless of tribal membership even though they seemingly are sharpened regarding a non-Indian party. Nevertheless, these due process considerations remain distinct from the question of the court's power to adjudicate the matter at hand.

The Respondent asks the Court to re-examine the application of *International Shoe* claiming that it is an inappropriate precedent in relation to tribal jurisdiction over a non-Indian. In *LSI v. Prescott and Johnson*, the respondents contended that the *International Shoe* standard is inapplicable in tribal court because "the Full Faith and Credit Clause of the United States Constitution underpins [that standard]." 2 Shak. T.C. at 158. In this case, the Respondent makes a similar argument. It contends that "[a]pplying a minimum contacts analysis is not appropriate as [this] case does not involve one Tribal court asserting control over a foreign Tribal member, as would be analogous to *Int'l Shoe.*"[76]

In the *LSI* case, the Court rejected this type of argument noting that "it is the I*nternational Shoe* test which courts have used when considering the power of tribal courts over persons who are not members of the tribe." 2 Shak. T.C. at 158. The Court pointed to precedent that applied the *International Shoe* standard in a federal court review of tribal court personal jurisdiction over a nonmember. *Id.*, citing *Hinshaw v. Mahler*, 42 F.3d 1178 (1994). Similar precedent can be found where a state court examined the existence of tribal court personal jurisdiction in determining whether a tribal court judgment should be afforded full faith and credit by the state. *See, e.g., Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993) (applied "traditional federal long-arm jurisdictional analysis" to find that tribal court had personal

[76] Respondent's Reply Memorandum (Docket #21), at 4.

jurisdiction; "the same due process standards which govern state court assertions of jurisdiction over nonresident defendants apply to tribal courts"). Subsequent cases in the Community's courts have reinforced this rationale. *See, e.g., In re the Marriage of Nguyen and Gustafson*, *supra,* Slip Opinion at 10-12. There is no need to revisit the application of the *International Shoe* test. It is the straightforward and logical benchmark used by courts in coordinating the exercise of their respective authorities.

Moreover, the Court rejects the notion that tribal courts are outlier judicial forums that fail to provide the same type of due process protections provided by state and federal courts. The Respondent posits that a tribal court "operates under a separate system, applying different rules of procedure, and offering different judicial remedies from Respondent's personal jurisdiction."[77] The Community's laws and procedures indeed may differ in some respects from those of the State of Indiana. They also may differ from those of other states and of other tribes for that matter, just as the laws between states differ. This is the norm in a federal system consisting of multiple sovereigns. The Supreme Court has squarely addressed this point in relation to tribal courts. The Petitioner in *Iowa Mutual, supra,* contended that "the policies underlying the grant of diversity jurisdiction – protection against local bias and incompetence – justify the exercise of federal jurisdiction" but not of tribal jurisdiction. 480 U.S. at 18. The Supreme Court responded, "We have rejected similar attacks on tribal court jurisdiction in the past. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union* and would be contrary to the congressional policy promoting the development of tribal courts." *Id.*, 480 U.S. at 19 (internal citations omitted). The same rationale applies in the context of personal jurisdiction. There is no logical

[77] Respondent's Reply Memorandum (Docket #21), at 4.

reason why a tribe may not exercise long-arm jurisdiction over non-Indians for claims arising within the tribe's territory once subject matter jurisdiction has been established.

Under the *International Shoe* test, this Court may exercise personal jurisdiction over an off-reservation respondent if the respondent has "certain minimum contacts with [the Community] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316. "Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). A court may assert general personal jurisdiction when contacts are so continuous and systematic as to render a respondent

> essentially at home in the forum State. Specific jurisdiction, on the other hand, depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'

Id. (internal citations omitted).

As the Plaintiff concedes, facts are lacking at this point in the case to establish general personal jurisdiction over the Respondent. Personal jurisdiction must therefore be found under specific or case-linked jurisdiction.

Specific personal jurisdiction may be asserted where non-residents have had "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King v. Rudzewicz*, 471 U.S. 462, 471 (1985), citing *Shaffer* v. *Heitner,* 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment). This "'gives a degree of predictability to the legal system that allows potential [respondents] to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger*

King, 471 U.S. at 471, citing *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 297 (1980).

With respect to an off-reservation respondent who has not consented to suit, this “fair warning” requirement is satisfied if the respondent purposefully directed its activities at residents within the reservation and the litigation results from alleged injuries or harm that arose out of or related to those activities. *See Burger King*, 471 U.S. at 471. For example, this Court would not exceed its authority under a Due Process Clause analysis by asserting personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers on the reservation and those products subsequently injure Community members. *Id.*, at 472, citing *World-Wide Volkswagen Corp.* v. *Woodson, supra,* at 297-298. And, as particularly relevant to this case, the Supreme Court has held with respect to interstate contractual obligations “that parties who ‘reach out beyond one state and create continuing relationships and obligations with citizens of another state’ are subject to regulation and sanctions in the other State for the consequences of their activities.” *Burger King*, 471 U.S. at 472, quoting *Travelers Health Assn.* v. *Virginia,* 339 U. **S.** 643, 647 (1950).

In applying these principles, the “touchstone remains whether the [respondent] purposefully established ‘minimum contacts’” on the reservation. *Burger King*, 471 at 474. “Jurisdiction unquestionably could be asserted where the corporation's in-state activity is continuous and systematic" and that activity gave rise to Plaintiff’s claim. *Goodyear Dunlop, supra*, 564 U.S. at 923. In addition, “the commission of certain ‘single or occasional acts’ in a State may be sufficient to render a corporation answerable in that State with respect to those acts.” *Id.* This "purposeful availment" requirement ensures that a respondent will not be compelled into a forum “solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.”

Burger King, 471 U.S. 475 (citations omitted).

Thus, where a non-resident business deliberately has created continuing obligations between itself and Community members on the reservation, it has availed itself of the privilege of conducting business there. Because its activities are shielded by the benefits and protections of the Community's laws, it is "presumptively not unreasonable to require [that entity] to submit" to tribal jurisdiction. *Id.*, 471 U.S. at 476. *See also In re the Marriage of Nguyen and Gustafson*, *supra*, Slip Opinion at 10

Moreover, jurisdiction in these circumstances may not be avoided merely because the company may not have physically entered the reservation. *Burger King*, 471 U.S. at 476. *Accord In re the Marriage of Nguyen and Gustafson*, Slip Opinion at 10; *Crooks-Bathel v. Bathel*, 6 Shak. T.C. 1 (Feb. 17, 2010). The Supreme Court has consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction "so long as a commercial actor's efforts are 'purposefully directed' toward residents of another [forum]." *Burger King*, 471 U.S. at 476. "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a [forum] in which business is conducted." *Id.* If this were true in 1984 when the Supreme Court decided *Burger King*, it is truer today in our ever-more digital and virtual world.

Under the facts alleged by the Plaintiff, the Respondent has purposely availed itself of the opportunity to do business on the reservation with Community members. Its homeowner's insurance policy with Ms. Brewer-Ross is the result of that availment. The obligations upon which the Plaintiff sues arose out of that availment. Whether the Respondent engaged in

activities directed toward other Community members on reservation remains to be seen.[78] Nevertheless, the Respondent created a continuing relationship and continuing obligations with Ms. Brewer-Ross that demonstrate sufficient minimum contacts to establish personal jurisdiction. The policy in force when Ms. Brewer-Ross' home burned was a renewal policy. This indicates an ongoing relationship between the Respondent and Ms. Brewer-Ross rather than an isolated contact of a limited nature. The Respondent did not drop ship a product to Ms. Brewer-Ross from a distant warehouse. Rather, it entered into a longer term relationship with her that involved policy renewal, an ongoing and continual obligation to honor the terms of that policy, continuing administrative management of the policy, billings directed toward her on the reservation, and payments made by her from the reservation. Much, if not most, of the Respondent's conduct involved in its alleged breach of the homeowner's policy occurred within the reservation, including its post-fire activities to investigate the incident, its communications directed toward Ms. Brewer-Ross and the Plaintiff on the reservation, and its alleged failure to pay under the policy either Ms. Brewer-Ross or the Plaintiff on the reservation.

Moreover, the Respondent's and Ms. Brewer-Ross' contractual relationship existed within the context of the benefits and protections afforded by the Community's laws. As noted earlier in the discussion of subject matter jurisdiction, the Community's Consolidated Land Management Ordinance provides much of the social, cultural, and economic environment that makes possible the Respondent's opportunity to market insurance on the reservation. If Ms. Brewer-Ross' homeowner's policy is any indication, the Respondent was able to understand a significant economic opportunity on the reservation. Her policy established coverage limits of over $2 million for the dwelling and its contents for a premium of over $6,000 per year. From

[78] *See* Transcript of Oral Argument (02/27/2020), at 33.

the facts alleged, the Court infers that the Respondent, a sophisticated business entity, understood the nature of the homeowner's insurance market for homes built on tribal trust land, particularly where the Community guarantees any home loan involved. It also infers that the Respondent understood the economic costs and benefits when it entered that market. And, the Court notes that Ms. Brewer-Ross' premium was reduced by 24% for having systems or components that were new or had upgraded in the last 7 to 10 years presumably in compliance with the Community's Building Code found within the Consolidated Land Management Ordinance. The Plaintiff further points to other basic Community public infrastructure that afforded benefits and protections in relation to the Respondent's economic interests on the reservation generally and with respect its homeowner's policy with Ms. Brewer-Ross specifically. These include fire and other emergency services, as well as the civil engineering infrastructure of streets, water, sewer, and similar basic governmental services provided to and for the benefit of homeowners and those whose economic interests are at stake in relation to homeowners.[79]

Finally, and significantly, the Respondent had the opportunity to enforce its contract with Ms. Brewer-Ross in the Community's court. The Community's Jurisdictional Amendment Ordinance would provide jurisdiction over Ms. Brewer-Ross for a breach of contract claim brought by the Respondent. In fact, the Respondent has alleged such a breach as a counterclaim in its Answer.[80] It is not unreasonable for the Respondent to anticipate reciprocal personal jurisdiction with respect to Plaintiff's breach of contract claim.

The Respondent asserts that it was not "put on notice through a choice of law provision that this Court's personal jurisdiction would apply to any future disputes."[81] However, no such

[79] *See* Transcript of Oral Argument (02/27/2020), at 42-44.
[80] Answer, ¶¶14, 15.
[81] Respondent's Reply Memorandum (Docket #21), at 5.

provision is required to establish personal jurisdiction. *See* Burger *King*, 471 U.S. at 471; *In re the Marriage of Nguyen and Gustafson*, *supra*, Slip Opinion at 10. The test is whether the Respondent purposely established minimum contacts on the reservation, which it did. Moreover, the Plaintiff alleges that the Respondent has been subjected to long-arm jurisdiction in eighteen states.[82] If true, the Court may infer that the Respondent is a savvy participant in interstate commerce which understands long-arm jurisdiction and the policies underlying it. It was able to learn about and understand the ramifications of doing business on the reservation and about the types the benefits and protections afforded by the Community's laws. If it failed to undertake the steps to inform itself of Community Law and potential tribal jurisdiction, the fault lies with the Respondent itself. To paraphrase the Supreme Court, the Respondent had the experience and capability to structure its primary conduct toward both Ms. Brewer-Ross and the broader tribal community with some minimum assurance as to where that conduct would and would not render it liable to suit in tribal court. *See Burger King*, 471 U.S. at 471. In any event, the Plaintiff alleges that the Respondent in fact knew that it was doing business on the reservation when it entered into its agreement with Ms. Brewer-Ross. Taking that as true, there is no reason to think that the Respondent lacked fair notice of possible tribal jurisdiction over a breach of contract claim in a tribal forum. "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there." *World-Wide Volkswagen Corp.* v. *Woodson, supra,* 444 U.S. at 297.

Once it has been decided that the Respondent purposefully established minimum contacts within the reservation, those contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial

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[82] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 7.

justice." *Burger King*, 471 U.S. at 476, citing *International Shoe,* 326 U. S., at 320. These factors include the burden on the Respondent, the Community's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief. *See Burger King*, 471 U.S. at 476. *See also In re the Marriage of Nguyen and Gustafson*, *supra*, Slip Opinion at 12. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King*, 471 U.S. at 476.

The *forum non conveniens* factor plays no role here. The Respondent is willing to defend against Plaintiff's claims in the Federal Court, Minnesota District. That forum is no less inconvenient to the Respondent than is this Court located a short distance from the Federal Court.

The Community's interest in adjudicating this dispute is significant. "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King*, 471 U.S. at 473 (citations omitted). *See also Stade-Lieske v. Lieske*, 7 Shak. T.C. 1, 13-14 (May 15, 2014) (The Community has a substantial interest in the proper interpretation and application of its laws that govern the disposition of Community resources); *In re the Marriage of Nguyen and Gustafson*, Slip Opinion, at 12 (citing *Downing v. Goldman Phipps, PLLC*, 764 F.3d 906, 912 (8th Cir. 2014)).

Consistent with this precedent, the Plaintiff alleges that the Community "has a substantial interest in matters relating to Tribal member housing on the Reservation, which includes protecting a home with insurance and resolving an on-Reservation dispute in its own judicial system."[83] This Community's history is unfortunately no different than the experience of other

[83] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9.

tribes who find themselves with but a fraction of the lands they once held.[84] The Community faces significant challenges in meeting the housing, social, cultural, and economic needs of its growing and aging population on its extremely small present-day land base.[85] The Community therefore has a heightened interest in what might be viewed as an isolated event or singular harm in a larger, more populated forum. For example, as could be the case here, the loss of but one home on the reservation might result in the lost opportunity to continue to reside on the reservation. There may be no other place for the homeowner to go without incurring financial consequences including the state taxation of their per capita income and local property taxes to name a few. The Court may therefore infer that the Community has a "manifest interest" in ensuring that an off-reservation insurance company honor its contractual obligations with respect to even one Community member and that member's home located on trust land. The Plaintiff also asserts that the Community has a strong interest "to ensure that its Conservatorship Department can safeguard the health and wellbeing of Community conservatees like [Ms.] Brewer-Ross and procure homeowner's insurance benefits for them."[86] Taking Plaintiff's allegation as true regarding the Community's substantial interests in adjudicating the dispute, the balance is further tipped toward tribal court jurisdiction over the Respondent regarding its contacts with the reservation.

Finally, the Plaintiff's interest in obtaining convenient and effective relief further supports the assertion of personal jurisdiction. As the Court has found, the Plaintiff's cause of action arose on the reservation. It is axiomatic that, absent compelling reasons or an unequivocal jurisdictional bar, redress for a cause of action should be found where the wrong occurred. There

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[84] *See generally* Nevile and Anderson, n.66, *supra*.
[85] *See generally* Petit, et al., n.66, *supra.*
[86] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9.

are no such compelling reasons or jurisdictional bars in this case. This factor, too, tips the balance in favor of the exercise of personal jurisdiction over the Respondent.

In sum, the Court finds that, in accordance with both the Community's law and relevant federal precedent, the Plaintiff has made a *prima facie* case that personal jurisdiction exists over the Respondent. "[W]here a [respondent] who purposefully has directed [its] activities at forum residents seeks to defeat jurisdiction, [it] must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. The Respondent has not presented a compelling case that personal jurisdiction under the alleged facts is unreasonable.

V.

CONCLUSION

The Plaintiff has met his initial burden of establishing a *prima facie* case that this Court has both subject matter and personal jurisdiction in this matter and that this Court has a substantial interest in exercising its jurisdiction. Moreover, this Court will not abstain from exercising its jurisdiction in favor of the parallel action in federal court.

ORDER

BASED ON THE FOREGOING IT IS HEREBY ORDERED:

1. The Respondent's motion to dismiss is **DENIED**.

2. The Court will schedule a Pre-Trial Conference consistent with Rule 16. The parties shall meet and confer prior to the hearing to address the matters set forth in Rule 16 (a)-(d) and Disclosure and Discovery as found in Rules 21-23 and the federal rules therein mentioned. The parties shall submit a joint report to the Court 5 days prior to the Conference addressing the issues in Rule 16 and Disclosure and Discovery The parties shall submit a draft scheduling Order

setting dates for Discovery, any limitations, witnesses, time for trial, dates for Dispositive and Non-Dispositive motions, and any other matters the parties wish to address to the Court.

Date: March 31, 2020

BY THE COURT:

____
Henry M. Buffalo Jr., Judge
Shakopee Mdewakanton Community
Tribal Court

Filed on April 3, 2020

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY
LYNN K. McDONALD
CLERK OF COURT

IN THE TRIBAL COURT

OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION STATE OF MINNESOTA

In Re Marriage of Amanda Gustafson,

Court File No. 867-17

Petitioner,

v.

ORDER

James Van Nguyen,

Respondent.

On April 1, 2020 the Petitioner submitted the dates for family vacations to the Court pursuant to its Order. Those dates are as follows:

1. The week of June 30, 2020 through July 7, 2020.
2. The week of December 26, 2020 through January 2, 2021.
3. The week of March 7, 2021 through March 14, 2021

In making this submission the Petitioner has requested the Court clarify the dates for the Tet New Year of 2021 and the exchange location.

The Respondent submitted a Declaration on April 1, 2020. Attached to the Declaration were Exhibits A – H. In his Declaration he states that he wants a vacation week in the spring and a vacation week in the winter but does not expressly state the dates as the Petitioner has done in her submission. After reviewing the exhibits, the Court adopts the following family vacation dates for the Respondent:

1. The week of June 12 through the 19th .
2. The week of June 19 through the 26th .
3. The week of December 19 through the 26th.

The Court has also reviewed the request for clarification regarding the Tet New Year for 2021. The Court adopts the dates from February 12-14, 2021. The Court also has reviewed the Respondent's request to have the minor child attend a wedding the weekend of October3, 2020. The Court grants that request. The Court adopts as the exchange location the Caribou Coffee, 7950 Penn Ave S, Bloomington MN, 55431. Finally, Respondent shall provide the physical address of the location of his home where he engages in his parenting time to the Court and the Petitioner in case of emergency. The Respondent shall notify the Court and the Petitioner of any changes of the physical address of where the Respondent engages in his parenting time at least 30 days prior to any change.

Based upon the files and proceedings herein, this Court issues the following:

ORDER

1. The dates for Petitioner's family vacations in 2020-21 are as follows:
   a. The week of June 30, 2020 through July 7, 2020.
   b. The week of December 26, 2020 through January 2, 2021.
   c. The week of March 7, 2021 through March 14, 2021.

2. The dates for Respondent's family vacations in 2020 are as follows:
   a. The week of June 12 through the 19th.
   b. The week of June 19 through the 26th.
   c. The week of December 19 through the 26th.

3. The Respondent shall have parenting time on the weekend of October 3rd to facilitate the attendance at a wedding. If the wedding is cancelled the regular parenting time schedule shall apply.

4. The dates for the Tet New Year for 2021 shall be from February 12-14, 2021.

5. The exchange location the Caribou Coffee, 7950 Penn Ave S, Bloomington MN, 55431.

6. Respondent shall provide the physical address of the location of his home where he engages in his parenting time to the Court and the Petitioner in case of emergency. The Respondent shall notify the Court and the Petitioner of any changes of the physical address of where the Respondent engages in his parenting time at least 30 days prior to any change.

7. The Petitioner shall provide to the Court the name of the airline, the flight number and the date of travel of the return flight from Florida that was cancelled.

8. That all other requests of the parties are denied.

9. That both parties shall submit specific dates for family vacations for the 2021-22 year by no later than close of business on April 1, 2021.

10. The Court finds the foregoing to be in the best interests of the child.

Date: April 3, 2020

BY THE COURT:

Henry M. Buffalo Jr., Judge
Shakopee Mdewakanton Sioux
Community Tribal Court

Filed on May 4, 2020

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

LYNN K. McDONALD
CLERK OF COURT

TRIBAL COURT OF THE SHAKOPEE

MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

Daniel Edwin Jones,

Petitioner,

vs. Court File No. 491-02

Michelle Marie Steinhoff,

Respondent.

MEMORANDUM OPINION AND ORDER

On November 21, 2002, the Court approved a stipulated settlement in this matter. The parties' stipulation and the Court's Order provided, *inter alia,* that the Respondent would be awarded sole physical custody of the parties' child, that she would support the Petitioner's efforts to have their child enrolled in the Shakopee Mdewakanton Sioux Community ("the Community"), that she also would petition the Minnesota District Court for the First Judicial District to change the child's name from ████████████ to ███ ██████, and that the Petitioner in turn would pay child support to the Respondent at a rate greater than would have been required under the Community's Domestic Relations Code.

Paragraph 6 of the Court's Order said this, about the duration of those payments:

> The child support payments shall continue until the minor child covered by this Order reaches the age of 18, or 20 if still in

> secondary school; or until the child covered by this Order becomes emancipated, marries or dies, or until further Order[1].

Shortly after that Order was entered the parties' child indeed was enrolled as a member of the Community; his name was legally changed to ███████; a minor's trust account therefore was established for him under section 14.6 of the Community's Gaming Revenue Allocation Amendments to its Business Proceeds Distribution Ordinance, Ordinance No. 10-27-93-002; and regular payments were made by the Community into that account, until ██████ ███, when the █████ became eighteen years old.

Upon that event, █████ received a very substantial payment from his trust account, and also began receiving monthly *per capita* payments from the Community[2]. Contemporaneously, █████ voluntarily became the subject of a Conservatorship of Estate under the Community's Amended Conservatorship Ordinance, Ordinance No. 03-211-08-016. SMSC Court File No. 933-20.

Pursuant to Section 7(b) of the Conservatorship Ordinance, █████' Court-appointed Conservator has the authority and responsibility to administer and employ all of █████ assets –

> …as shall be reasonably necessary for the support and care of the Conservatee, including medical care and education given the size and nature of the property and the station in life or needs of the Conservatee …

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[1] On July 25, 2017, in response to a motion by the Petitioner, the Court filed a Memorandum Opinion and Order that modified, and decreased, the amount of the Petitioner's monthly payment obligations, but did not change the duration of the obligation.

[2] Those monthly payments, to the parties' child and to all other adult Community members, including the Petitioner, have been reduced and will be further reduced, for at least some period going forward, due to the enormous effect that the COVID-19 pandemic has had and will have on the Community's businesses.

Upon eighteenth birthday, without notice to the Respondent or any materials filed with the Court, the Petitioner ceased making any child support payments. He evidently asked the Community official responsible for withholding those payments from his *per capita* payments and transmitting them to the Respondent to cease doing so. That official asked for guidance from the Community's General Legal Counsel, who responded that, in his opinion, had become "emancipated" as that term was used in the Court's November 21, 2002 Order, and therefore the Petitioner no longer had any legal responsibility to make child support payments.

When the Respondent did not receive the payment that she expected in February, she contacted the Court's Clerk. The Court then requested a summary from the Conservator as to any payments that had been or would be made to the Respondent. In reply, the Conservator said:

> The Conservatorship has not established any amount of funds for the benefit of Mss. Steinhoff that would be paid out of estate. Nor is the Conservator aware of any obligation for such payments.
>
> is 18 years of age and he has not yet graduated from high school He still resides with his custodial parent, Michelle Steinhoff. He does not pay rent or utilities to his mother.
> …
> During the present uncertain circumstances of the "stay home" orders resulting from the Covid-19 pandemic, has told me that he has been helping with supplies and food at home.
>
> Certain funds are being provided from the estate to on a weekly basis, the amount of which varies depending on his attendance at high school. Specifically, is eligible to receive $1,000 per week as an allowance if his high school attendance is 80% or higher; if he does not meet the attendance requirement, receives $500 per week.

The Court convened a telephone hearing on April 2, 2020 to inquire as to the parties' positions with respect to the cessation of child support payments. The Petitioner participated and was represented by counsel, the Respondent participated *pro se*, and at the conclusion of the hearing the Court asked the Petitioner submit his position in writing, and the Respondent then to reply, also in writing.

Those materials now have been received and considered by the Court, and the Court has reached two conclusions: (1) "emancipation", as that term is used in the Court's November 21, 2002 Order, is a legal term of art with a very specific meaning – it refers to the possibility that before his eighteenth birthday might effectively have become personally and financially independent, and it therefore has no legal application to his circumstances after his eighteenth birthday; and (2) given ' present situation, it is very likely that, if presented with a proper motion, the Court could find that the parties' circumstances have changed in such a way as to make further child support payments from the Petitioner unnecessary – provided that it is clear to the Court that funds from the Conservator's accounts would ensure that and his mother have sufficient resources for their daily needs.

Some words are appropriate here with respect to the effect – or, rather, the irrelevance – of the "emancipation" term. In his written materials, the Petitioner's attorney provided the Court with a string of citations which ostensibly supported the proposition that "emancipation" can have some legal meaning for a person who no longer is a minor. The cases were: Lufkin v. Harvey,, 131 Minn. 238, 154 N.W. 1097 (Minn. 1915)[3]; Hill v. Hill, 523 So. 2d 445 (Ala Civ. Ct. App. 1988); Embree v Embree, 380 P.2d 216 (Idaho 1963); Moody v. Moody, 565 N.E. 2d 388 (Ind. Ct. App. 1991); Black v. Cole, 626 S.W. 2d 397 (Mo. Ct. App. 1981); Rapplean v.

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[3] This case, in the Petitioner's materials, was incorrectly cited as 54 N.W. 1097.

Patterson, 631 S.W. 2d 698 (Mo. Ct. App. 1982); Blue v. Blue, 40 N.W.2d 268 (Neb. 1949); Townsen v. Townsen, 137 N.W. 2d 789 (Ohio 1954); Mathews v. Matthews, 22 N.W. 2d 27 (S.D. 1946); Foutch v. Foutch, 469 P.2d 223 (Wash. Ct. App. 1970).

But none of these cases involved a person who had reached the age of eighteen years. Each involved a dispute over whether child support should continue to be paid for a minor, whose particular economic situation was the subject of dispute. For example:

> "Our courts have declared that emancipation is the "`**freeing of a child for all the period of its minority** from the care, custody, control, and service of its parents; the relinquishment of parental control, conferring on the child the right to its own earnings and terminating the parent's legal obligation to support it.' 67 C.J.S. Parent and Child § 86, page 811."
>
> Black v. Cole, 626 S.W.2d, at 398 (emphasis supplied).

Again, it is clear to the Court that emancipation" has one very specific meaning in law. That term was deliberately used by the parties here, each of whom was represented by counsel, when they adopted their Stipulation. It then was used by the Court when it approved that Stipulation. And the Court will not now re-write the Stipulation and its Order.

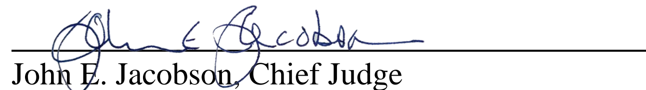
What the Petitioner now is saying is simply that requiring him to continue to pay child support under the parties' present circumstances, when the parties' child has at least some access to very significant financial resources, is unfair. And that argument may well have compelling force: the Domestic Relations Code, the parties' Stipulation, and the Court's Order all contemplate the possibility of amending child support obligations if the circumstances which prompted the original support order have significantly changed. The Petitioner had the opportunity, before and after his son's eighteenth birthday, to move the Court for a reduction or an elimination of his support obligations, and he still has that opportunity. But simply

unilaterally interpreting the term "emancipation" in a manner that is unsupported by the law does not will not accomplish what the Petitioner seeks to accomplish.

IT THEREFORE IS ORDERED;

1. That the Respondent shall present this Order to [redacted] Court-appointed Conservator of Estate, and shall discuss with him and with [redacted] the possibility of payment, by the Estate, to the Respondent, during such time as [redacted] [redacted] remains in the Respondent's home and remains in school, of some or all of the amounts which previously have been paid as child support by the Petitioner;
2. That the Respondent shall inform the Court and the Petitioner of the results of the discussion mandated by this Order; and
3. That, pending the foregoing actions, the Court will take under advisement the Respondent's request that the Court direct that the Petitioner continue to make child support payments.

Date: May 4, 2020



John E. Jacobson, Chief Judge

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY
LYNN K. McDONALD
CLERK OF COURT

TRIBAL COURT OF THE SHAKOPEE

MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

Daniel Edwin Jones,

Petitioner,

vs. Court File No. 491-02

Michelle Marie Steinhoff,

Respondent.

MEMORANDUM OPINION AND ORDER

On May 13, 2020, the Petitioner moved for "an order reducing/ending/terminating the child support award in this case". The Respondent has opposed that motion, and on June 5, 2020 moved for (i) $17,500, in a lump sum, as a retroactive increase in the adjusted child support that the Court awarded to her in August, 2017; (ii) an award of $88,928.61 reflecting what she contends are mandatory cost of living adjustments to the child support that she has received from the Petitioner since November, 2002; and (iii) an award of $24,908.60 in attorney's fees.

For the reasons set forth below the Court grants the Petitioner's motion and terminates his support obligation effective on the date that his motion was filed, and denies the Respondent's motions.

I. <u>The History of the Petitioner's Child Support Obligation.</u>

As this Memorandum Opinion and Order is being written there are 130 entries in the Court's pleadings log for this file, a fact that reflects the complex and often fraught nature of the parties' relationship over time. The Petitioner's present child support obligation was established by this Court's July 25, 2017 Memorandum Opinion and Order ("the July 25, 2017 Order"), in which the Court summarized the history, to that point, of the parties' agreements, disputes, and

litigation concerning support payments. The history began shortly after the birth of the parties' son, in February, 2002. In November, 2002, the parties stipulated, and the Court ordered, that the Petitioner would pay the Respondent $2,000.00 per month for child support. The stipulated order noted that –

> This is a voluntary upward departure from the child support guidelines and [sic] being paid in consideration of the following: [Respondent] legally changing the name of the minor child as stated herein [to give him the Petitioner's surname] and making all changes to legal records of the same; [Respondent] cooperating with the enrollment process of the minor child into the Shakopee Mdewakanton (Dakota) Community; and [Respondent] continuing to permit and encourage the minor child to participate in the Mdewakanton Sioux (Dakota) Community functions and programs.
>
> The child support payments shall continue <u>until the minor child covered by this Order reaches the age of 18, or 20 if still in secondary school; or until the child covered by this Order becomes emancipated, marries, or dies; or until further Order</u>.
>
> (Emphasis added.)

The stipulated order also contained a provision relating to additional payments the Respondent would receive, to compensate her for day-care expenses that she would incur:

> The [Petitioner] shall also pay the reasonable work-related and school-related day care expenses of the minor child. The [Respondent] expects to incur work related and school-related childcare expenses of approximately $1,040 per month. That [sic] [Petitioner's] obligation to pay said expenses shall commence upon verification that said expenses are being incurred. That [sic] the [Respondent] shall provide notice to the [Petitioner] and any entity responsible for income withholding if and when said expense decreases and thereafter the Plaintiff's obligation shall be adjusted accordingly.

In 2016, prompted by the fact that his *per capita* payments from the Shakopee Mdewakanton Sioux Community had become significantly less than they were in 2002, the Petitioner initiated proceedings seeking, *inter alia*, to reduce his support obligation, and the Respondent countered by asking to have his obligation increased. Considerable litigation followed, concluding with the July 25, 2017 Order.

What the Court said at that time, summarizing its reasoning when it reduced the Petitioner's support obligation but did not reduce it to the level the Petitioner sought, is relevant to the present proceedings. The Court said:

> The parties here bargained for and agreed to a particular amount of support and, in the Court's view, that agreement was binding on them. Effectively, in the Court's view, their agreement was a contract. Absent their agreement, the Respondent was under no obligation to give her son the Petitioner's surname, nor was she under any obligation to cooperate in the process of his enrollment in the Community; but, having made the agreement she undertook those obligations, and she met them. So, had no other relevant

events occurred, the Court likely would now conclude, given the parties' respective economic situations, that the Petitioner continues to be bound by his agreement, and that nothing in the Code authorizes or warrants adjusting the obligations he willingly undertook.

But there were other relevant events: the Respondent breached her obligation to inform the Petitioner that she no longer had day care expenses, and so, for several years, she collected thousands of dollars to which she was not entitled.

In the [Shakopee Mdewakanton Sioux Community's Domestic Relations] Code, the Community tells the Court that it "may modify" an award of child support if the award is "unreasonable and unfair", and if one or more of five listed factors exists. But the Code makes it clear that, in making any modification, the Court must "take into primary consideration the needs of the children". Here, it is clear that at least one of the Code's listed factors – a reduction in the Petitioner's income greater than 2.5% -- exists. But the words that the Code uses to guide the Court in considering any reduction – "unreasonable and unfair" – are powerful, and applying them to a situation where one party is in a vastly better economic situation that the other, but where the other party has knowingly taken monies to which she was not entitled, and yet where that party's present situation now qualifies her (or may qualify her) for a state-funded health insurance program, is not easy. The Code's phrasing – the Court <u>may</u> modify, but it is not <u>mandated</u> to modify – means that the Court has at least some discretion to consider equitable factors in making its decision.

The Petitioner argues that, given the uncertainty attending the Respondent's past and future earnings, the Court should simply look to Chapter III, section 7.c(<u>1</u>)(iii) of the Code and impute to the Respondent a gross monthly income of 150% of the state minimum wage, reduced by federal and state income taxes, and by social security and medicare taxes. That process would give the Respondent an imputed monthly income of $1,992.56; and with adjustments based upon parenting time, would lead to a formulaic award of $936.59 per month.

But, having carefully weighed the evidence (for a considerable period of time), the Court concludes that although it should modify the parties' child support arrangement, it should not reduce the presently effective amount by more than one-half. The Court believes that the Respondent at present is underemployed: she likely can work more hours that she has, she likely can receive a higher wage than she has been receiving, and although she has had health concerns she is not in any way disabled. But if the child support she receives were to be reduced by more than half – by more than $1,000 per month – the Court is of the view that the Respondent could not replace that loss with increases in her own income. And it is clear to the Court <u>that the life that the parties' son has with the Respondent, which has been shaped by the monies available to the Respondent, therefore would be adversely affected</u>. Again, this is not a situation where the Court is establishing an initial support matrix; the life of the child whose support is at issue – and <u>whose needs must receive "primary consideration" under the Code</u> – would, in the Court's view, likely be adversely affected by the support reduction that the Petitioner proposes.

Ultimately, given the precatory nature of the Code's language, the equitable considerations that are central in the "unreasonable and unfair", and the central importance of ensuring that the parties' son does not suffer because of the Court's action,

> the Court concludes that the Respondent can and should be able to improve her monthly take-home pay by $500.00 per month, and that therefore a reduction in the Petitioner's obligation in that amount will not work harm to the child and is appropriate under Chapter III, section 7.l of the Code. But that conclusion – that the child will not be harmed by the reduced award – clearly could not be reached if the reduction were made retroactive to August, 2016, and therefore the reduction must be prospective only.

(Emphasis in original)

II. The Petitioner's Motion.

The parties' present situation – their son's situation – is radically different than it was at the time of the July 25, 2017 Order was entered. Today, taking "into primary consideration the needs of the [child]", as Chapter II, Section 7.l. of the Code requires when a child support modification is sought, the Court concludes that the termination of the Petitioner's obligation clearly will work no harm to the parties' son. On February 12, 2020, his eighteenth birthday, the son received a considerable sum from the trust account that the Shakopee Mdewakanton Sioux Community had been holding for him, and he began receiving *per capita* payments from the Community.

It bears emphasizing that the agreement that the parties entered into in 2002, and that became the Court's November 21, 2002 Order, did not by its terms automatically terminate child support on the boy's eighteenth birthday. The parties agreed that they would do whatever they could to obtain Community membership for their son, and at the time of their stipulation *per capita* payments for members, and payments into the trusts for minor members, were more than they are today, but the stipulation nonetheless did not specify that the receipt of trust or *per capita* monies would be an automatic terminating event. It said that support would continue "until the minor child covered by this Order reaches the age of 18, or 20 if still in secondary school; or until the child covered by this Order becomes emancipated, marries, or dies; or until further Order". As the Court observed in its May 4, 2020 Memorandum Opinion and Order, the use of the term "emancipated", a legal term of art, has no applicability to their son's situation. And the fact is that on his eighteenth birthday their son did not gain unfettered access either to his trust monies or to his *per capita* payments, because his funds are controlled, under the Shakopee Mdewakanton Sioux Community's Conservatorship Ordinance, by his Court-appointed Conservator of Estate.

But given the record in this file – given the amounts that he does receive and has received – the monies that he has controlled and does control are, in the Court's view, more than sufficient to assure that his needs are met. On April 2, 2020, at the Court's request, the Conservator of Estate submitted a memorandum for the record, summarizing the present status of the funds available to the parties' son. In pertinent part the Conservator said –

1. I am providing this report in advance of a hearing in the matter of *Daniel Jones vs. Michelle Steinhoff*, SMSC Court File No. 41-02. The Clerk of Court directed the Conservator of Estate for Trevor Jones via e-mail dated March 30, 2020, to provide information regarding any financial support established under the Conservatorship for the benefit [sic] Ms. Steinhoff, mother of Conservatee Trevor Jones, prior to an April 2, 2020, hearing.
2. The Conservatorship has not established any amount of funds for the benefit of Ms. Steinhoff that would be paid out of Trevor Jones's estate. Nor is the Conservator aware of any obligation for such payments.
3. Trevor Jones is 18 years of age and he has not yet graduated from high school. He still resides with his custodial parent, Michelle Steinhoff. He does not pay rent or utilities to his mother.
4. Michelle Steinhoff has inquired about whether she can be added onto Trevor Jones's health insurance through the Community in some capacity so as to have her health insurance provided through him. The Conservatorship has not yet determined whether that is appropriate or possible.
5. During the present uncertain circumstances of the "stay home" order resulting from the Covid-19 pandemic, Trevor has told me that <u>he has been helping with supplies and food at home</u>.
6. Certain funds are being provided from the estate to Trevor Jones on a weekly basis, the amount of which varies depending on his attendance at high school. Specifically, <u>Trevor Jones is eligible to receive $1,000 per week as an allowance if his high school attendance is 80% or higher; if he does not meet the attendance requirement, Trevor Jones receives $500 per week.</u>
7. <u>Thus far he has received $1000 for 2 of the 6 weeks since the plan was initiated</u> It should be noted that because of the Covid-19 pandemic, schools in Minnesota are not open and we are in the process of re-evaluating attendance expectations during the present era of distance learning.

…

(Emphasis added.)

Hence, the Petitioner's motion is well-founded. Because the motion was filed on May 13, 2020, the Court terminates Petitioner's child support obligation effective on that date. The support obligation cannot, however, be terminated earlier than that date, given the provisions of Chapter II, Section 7.1.(3) of the Code:

> A modification of child support may be made retroactive only with respect to any period during which the petitioning party has pending a motion for modification but only from the date of service of notice of the motion on the responding party. However, modification may be applied to an earlier period if the Tribal Court makes express findings that the party seeking modification was precluded from serving a motion by reason of a significant physical or mental disability or a material misrepresentation of another party and that the party seeking modification, when no longer precluded, promptly served a motion.

The Petitioner does not contend that he was precluded from moving to modify his child support obligation before May 13 because of any disability, or that any delay was due to a material misrepresentation by another party. Therefore the modification that the Court can and does grant is effective May 13, 2020, and the payments that the July 25, 2017 Order mandated for March, 2020, and April, 2020, and May 1 – 12, 2020, remain the Petitioner's obligation.

III. The Respondent's Motions.

A. Reconsideration of the July 25, 2017 Order.

The Respondent argues that the Court erred when, in the July 25, 2017 Order, it denied her motion to increase her child support. She contends that when the Court concluded that she was "underemployed" at that time it did not properly consider the time demands that being a mother placed upon her. The Petitioner responds that the Respondent's own submission relating to her present earnings indicate that in fact, after the July 25, 2017 Order, she did in fact experience a very significant increase in earnings – suggesting that the Court's "underemployment" conclusion was valid. But, whether it was valid or not is irrelevant to the Respondent's motion, because under Rule 31(b) of our Rules of Civil Procedure, the time to appeal the July 25, 2017 Order's denial of her requested increase expired on August 25, 2017; and, just as Chapter II, Section 7.1.(3) of the Code gives the Court no power to reach back before the date of the Petitioner's motion to reduce or eliminate his child support obligation, it also gives the Court no power to reach back and retroactively increase the award.

B. Child Support Cost of Living Adjustment.

The Respondent argues that she should be awarded cost of living adjustments to the child support she has received, with the initial adjustment commencing in May, 2004, and additional compounded adjustments every two years thereafter. Her calculation of the total amount that would be payable, should the Court award her the adjustments she seeks, is $88,928.21. And she says:

> Please Note: Domestic Relations Code Chapter II, Section 7.K provides that a cost of living adjustment should be applied to the non-custodial parent's adjusted child support obligation biennially. It does not provide that the application of the adjustment is dependent on any filing in the Court. It also does not provide that the application of the adjustment is restricted from being retroactively, and biennially, from when the Order was established, which is what Respondent is entitled to, and what Respondent is requesting.
>
> Respondent's Affidavit with Exhibits (Amended), June 5, 2020, at 15.

Petitioner responds that the Respondent's calculations grossly misunderstand the manner in which the Code contemplates cost of living adjustments are to be made, and the Court agrees. Petitioner also argues that the amounts which the Respondent received for day-care costs during the years that she was not experiencing any day-care expenses vastly exceeds any amount that she could properly claim as cost of living adjustments, and again the Court agrees. But fundamentally, in the Court's view, the Respondent is foreclosed from now seeking retroactive adjustments to the eighteen years of child support because of the specific terms of the stipulation to which she agreed in November, 2002. That stipulation, adopted by the Court's November 21, 2002 Order, said:

> COST OF LIVING INCREASE OF SUPPORT: [Petitioner's] child support obligation may be adjusted every two years based upon a change in the cost of living (using the U.S. department of labor, bureau of labor statistics, consumer price index Mpls. St. Paul for all urban consumers (CPI-U), provided the [Respondent] file [sic] a motion with the Tribal Court seeking said adjustment.
>
> (Emphasis added.)

Until the parties' proceedings in 2016 and 2017, which resulted in the July 25, 2017 Order, the Respondent had filed no motions seeking cost of living adjustments, and she testified that she had not done so because she had been receiving day-care payments without having any day-care expenses:

> Q. Have you ever sought or asked for a cost of living adjustment?
>
> A. No, I have not.

Q. Why not?

A. Because I was getting that extra money.

Jones v. Steinhoff, Court File No. 491-02, April 21, 2017 Hearing Transcript, at 75:22 – 76:2.

With the parties' evidence before it, the Court's July 25, 2017 Order established a new child support payment level that became effective on that date. The July 25, 2017 Order did not otherwise modify the stipulated November 21, 2002 Order. Therefore, any award of a cost-of-living adjustment to the Respondent would, pursuant to the November 21, 2002 Order, have required a timely motion from her. The Petitioner argues, with force, that given the support she was receiving by virtue of the July 21, 2017 Order, no cost-of-living award would be mandated by the Code. But the fact that no motion ever was made, before the Respondent's June 55, 2020 filing, means that once again Chapter II, Section 7.1.(3) of the Code bars any retroactive adjustment of support.

C. Attorneys Fees.

The Respondent's motion for an award of attorney's fees relates to litigation, in this file, concerning the Petitioner's visitation with the parties' son. In 2016, in addition to seeking modification of his child support obligation, the Petitioner sought increased parenting time with the boy. Proceedings concerning that issue extended into 2018, and resulted in an Order filed on April 12, 2018, under which the Petitioner was given additional parenting time. Respondent contends that thereafter the Petitioner did not exercise his right to that time – that since April, 2018 the Petitioner and his son have had very little contact – and that therefore Petitioner has "willfully disregarded" the Court's Order and should be penalized under the authority of Chapter IV, Section 2.t, which section pertains to contemptuous conduct.

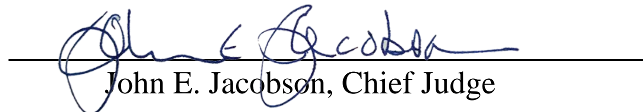
The only document submitted by the Respondent substantiating her attorney's fees – an April 17, 2020 e-mail from the Meagher & Geer law firm summarizing their fees over seven months in 2017 and 2018 – does not specify in any way the work that was involved in the generation of those fees, and therefore it could not serve as the proper basis for an award even if the Petitioner's conduct justified an award. But not exercising parenting time which the Court

has awarded is not contemptuous. The Court did not mandate that the Petitioner exercise the time that he was awarded. Under the Order the Petitioner had the right to exercise the time, but any number of factors, including the wishes of the parties' son, could well have led him to a conclusion that non-exercise was the best course. That may well be deeply unfortunate in terms of the Petitioner's relationship with his son, but it is not contempt of Court.

THEREFORE IT IS ORDERED:

1. The Petitioner's obligation to pay child support pursuant to this Court's July 25, 2017 Order is terminated effective May 13, 2020, but the Petitioner continues to be obligated to pay $1,500 per month for the months of March and April, 2020, and also to pay $580.65 for the period from May 1 to May 12, 2020.
2. The Respondent's motions to retroactively increase her child support payments, and for cost of living adjustments to those payments from 2002 to 2020, and for attorney's fees, are DENIED.

Date: July 6, 2020



John E. Jacobson, Chief Judge

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY
FILED DEC 16 2020
LYNN K. McDONALD
CLERK OF COURT

IN THE TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

In Re Marriage of:
Amanda Gustafson,

Court File No. 867-17

Petitioner,

v.

ORDER

James Van Nguyen,

Respondent.

On December 15, 2020, the Respondent requested that the Court clarify its previous Orders that addressed the Vacation schedule and Holiday schedule. This arises because of a disagreement between the parties. The Respondent claims that his vacation time set for December which commences December 19 and concludes December 26 supersedes the Holiday schedule because the Vacation Schedule was issued in a Court Order after the Holiday Schedule was adopted by the Court. Petitioner disagrees and seeks to have the Holiday schedule enforced which would result in the Petitioner having Holiday time on December 25th from 11:00 a.m. to 8:00 p.m. The Court has reviewed its Order and the Petitioner is correct. The Holiday schedule supersedes the Vacation schedule.[1]

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[1] See Order dated May 3, 2019, Conclusions of Law 8(b).

ORDER

The Petitioner shall exercise her rights under this Court's Order of May 3, 2019, commencing 11:00 a.m. on December 25, 2020 and ending at 8:00 p.m. on the 25th. The Respondent shall exchange the child with the Petitioner at the time required by the schedule on December 25th. The Petitioner shall exchange the child with Respondent at the time required by the schedule on December 25th. The parties shall pick up and drop off at the same location as previous exchanges.

Date: December 16, 2020

BY THE COURT:

Henry M. Buffalo, Jr., Judge,
Shakopee Mdewakanton
Sioux Community Tribal Court

TRIBAL COURT OF THE SHAKOPEE
MDEWAKANTON SIOUX COMMUNITY
FILED MAY 02 2023
MELISSA A. HINTZ
CLERK OF COURT

IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION | STATE OF MINNESOTA

Anthony Muellenberg, Crystal Kilcher, and Cherie Crooks,

Petitioners,

vs.

Court File No. 988-23

Keith B. Anderson, Chairman, Rebecca Crooks-Stratton, Secretary/Treasurer, Cole W. Miller, Vice Chairman, Angela D. Sauro, Election Commissioner, and the Shakopee Mdewakanton Sioux Community Business Council,

Respondents.

Memorandum Opinion and Order

The General Council used precise language to describe the vote required to approve a member's relinquishment of a land assignment to an adult child who is not a Community member. Assuming that the facts as pleaded are true for purposes of evaluating the respondents' motion to dismiss, the votes on two recent relinquishments did not meet that precise language, and thus not did receive the necessary number of votes for passage. Therefore, respondents' motion to dismiss the complaints in these consolidated cases is denied.

I.

Land management in the Shakopee Mdewakanton Sioux Community is governed by the Consolidated Land Management Ordinance (the "Ordinance"). *See* Ordinance § 1.2. Under the Ordinance, enrolled members "of the Community by order of birth . . . have priority to receive assignments of land for residential uses, except that enrolled members of the Community who are terminally ill, gravely ill or at an advanced age, may request relinquishment of the member's land assignment" to certain other persons, including adult biological children who are not enrolled in the Community. Ordinance §§ 3.1.1, 4.14, 4.14.1. A member's request to relinquish an assignment to a nonmember biological child must be approved by the Community's General Council.[1] Ordinance § 4.14.1.

On January 10, 2023, the General Council convened for a regular meeting to vote on, among other things, a resolution to approve the relinquishment of a land assignment from Barry Welch to Stephanie Welch (No. 01-10-23-011) and a resolution to approve the relinquishment of a land assignment from Gail Campbell to Lynn Blue (No. 01-10-23-012) (collectively, the "Relinquishment Resolutions"). Amended Complaint, *Muellenberg v. Anderson,* No. 988-23 at 1 & Ex. A and B (Feb. 15, 2023). During a 24-hour

[1] The General Council, the Community's governing body, is defined in the Community Constitution as "all persons qualified to vote in [C]ommunity elections." Const. art. III. And "Community members eighteen (18) years of age or over shall qualify as voters" in Community elections. *Id.* at art. IV.

vote, 172 General Council members were recorded as present, and the vote counts for the Relinquishment Resolutions were as follows:

- Resolution No. 01-10-23-011:
    - Yes - 86
    - No - 68
    - Abstentions - 17
    - Chair Not Voting - 1
- Resolution No. 01-10-23-012:
    - Yes - 77
    - No - 74
    - Abstentions - 20
    - Chair Not Voting - 1.

Id. at 2 & Ex. C, E, I. Based on the votes, the Relinquishment Resolutions were deemed approved. *Id.* at 2 & Ex. C, E.

Petitioners (collectively "Muellenberg"), who are Community members, filed two complaints (since consolidated) challenging the validity of the Relinquishment Resolutions. Muellenberg asks the Court to enjoin the land-assignment relinquishments, rescind the Relinquishment Resolutions, and declare the Relinquishment Resolutions as "failed." *Id.* at 2.[2] Respondents (collectively "Anderson"), the Community's officers and

[2] Crooks also sought to have the Court "discontinue use of the 24 Hour meeting Procedure until it can be re-addressed by the General Council." Crooks Complaint at 2. At the hearing on the motion to dismiss, however, Ms. Crooks indicated that she is no longer pursuing this relief. Transcript, *Muellenberg v. Anderson*, Nos. 988-23 at 35-36 (Mar. 27, 2023) ("Transcript") .

Election Commissioner, moved to dismiss the consolidated complaints for failure to state a claim upon which relief can be granted.

II.

On a motion to dismiss for failure to state a claim, "the Court must assume that all facts alleged in the [c]omplaint are true" and view them "in the light most favorable to the [plaintiff]." *Welch v. SMSC*, 2 Shak. T.C. 112, 115 (Feb. 7, 1996). The Court may also consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned." *Miller v. Redwood Toxicology Lab, Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012) (quotation omitted). A court may dismiss a case under Rule 12(b)(6) if "the [plaintiff] can prove no set of facts in support of the claim that would entitle [the plaintiff] to relief." *Welch*, 2 Shak. T.C. at 115; *see also Bryant & Rouse v. Anderson Air Inc.*, 5 Shak. T.C. 92, 94 (Nov. 6, 2007).

III.

Here, the motion to dismiss centers on the text of Section 4.14.1 of the Ordinance, which provides:

> An enrolled living member holding a valid assignment and lease and who is either terminally ill, gravely ill or at an advanced age, may request the Business Council to place before the General Council a request of the enrolled member to relinquish his/her land assignment to a living biological adult child who is not enrolled and otherwise eligible for adoption except for lack of a land assignment from the Community. . . . Authority to approve a request under this paragraph shall be vested solely in the General Council *and all such approvals shall be made by a majority of the*

> *voting members present at a regular meeting where a quorum is present.* The decision of the General Council on any request under this paragraph is final.

(Emphasis added).

Anderson argues that "a majority of the voting members present" means a majority of all members who are present *and* who are voting on the matter. Memorandum in Support of Respondents' Motion to Dismiss Amended Complaint, *Muellenberg v. Anderson,* No. 988-23 at 5 (Feb. 27, 2023) ("Anderson Mem."). In Anderson's view, Resolution No. 01-10-23-011 passed because 86 members voted for it, while only 68 members voted against it, and Resolution No. 01-10-23-012 passed because 77 members voted for it, while only 74 voted against it. Muellenberg, on the other hand, contends that "a majority of the voting members present" means a majority of all members who are eligible to vote and who are present. *See* Amended Complaint at 2. In Muellenberg's view, Resolution No. 01-10-23-011 failed because only 86 of the 172 members who were present voted in favor of it, and Resolution No. 01-10-23-012 failed because only 77 of the 172 members who were present voted in favor of it.

IV.

To understand the meaning of Section 4.14.1, the Court must begin with its text. *Ross v. Blake,* 578 U.S. 632, 638 (2016) (internal citation omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as

a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). And "[w]hen a word or phrase has a plain meaning," the court "presume[s] that the plain meaning is consistent with legislative intent and engage[s] in no further statutory construction." *Shire v. Rosemount, Inc.*, 875 N.W.2d 289, 292 (Minn. 2016). Thus, the Court must examine Section 4.14.1 itself and the broader context of the Ordinance as a whole.

The Ordinance provides that the "sole authority to sell, purchase, assign, lease, or otherwise convey any other interest in Reservation, trust, or tribal lands lies in the General Council unless delegated by the General Council to the Business Council." Ordinance § 2.1. Consequently, it includes numerous instances where the General Council must act. Notably, there are several places where the Ordinance only requires a "simple majority vote" for the General Council to act. *E.g.*, Ordinance §§ 3.4, 4.5, 4.9, 4.10. One such instance is in Section 4.14, regarding appeals from decisions by the Business Council on requests to relinquish land assignments from one member to another: "A quorum must be present to vote on the appeal [of a member denied a request to relinquish a land assignment to another member] and a simple majority vote shall be sufficient to uphold or reject the appeal." [3]

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[3] The parties agree that *Robert's Rules of Order* generally govern the procedure at General Council meetings, although Muellenberg contends the 1970 version governs because that's what the Community selected in its Bylaws and Anderson contends that under General Council Resolution 12-22-84-001, a more current version applies. On the record before it, the Court cannot discern which position is correct. Fortunately, with respect to the meaning of "majority vote," *Robert's Rules of Order* have not changed since 1970. *Robert's Rules of Order* provide that "when the term *majority vote* is used without qualification . . . it means more than half of the

The clause "simple majority vote" in Section 14.1 and elsewhere in the Ordinance is undeniably different from "a majority of the voting members present" in Section 4.14.1. Yet Anderson contends they mean the same thing—more than half of the votes cast, excluding abstentions. As a matter of statutory interpretation, however, the Court must conclude that the General Council intended "a majority of the voting members present" to mean something different from a "simple majority vote." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Blanton v. Hahn presented a similar question regarding a voting requirement. 763 P.2d 522 (Ariz. 1988). There, members of a church met to vote on terminating the pastor. *Id.* at 523. The meeting was attended by 26 members, and 18 members voted, all in favor of termination. *Id.* The church's bylaws provided the methods to terminate a pastor, among them a vote of the congregation: "'If the vote equals or exceeds three-fourths of the voting members present, the service of the Pastor shall terminate immediately.'" *Id.* (quoting the church bylaws) (emphasis removed). The members argued that the three-fourths requirement should be measured from the 18 members who voted on the

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votes cast by persons entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting." Anderson Mem. at Ex. D p.1 (*Robert's Rules of Order* § 44:1 (12th ed. 2020)); Pet.'s Opp. Mem. at Ex. 7 p.6 (quoting *Robert's Rules of Order Newly Revised* at 339 (1970)).

matter, while the pastor argued that it should be measured from the 26 members who attended the meeting, *id.* at 524, which would have meant that 20 members would have had to vote to terminate him. The court looked to *Robert's Rules of Order*, which illustrated various voting requirements. *Id.* Where a voting requirement included "members present," *Robert's Rules of Order* provided that the favorable votes should be measured against the total number of members attending a meeting, not just those members who voted. *Id.* Therefore, the court ruled in favor of the pastor. *Id.* at 524. The circumstances here are similar. Section 4.14.1 includes the phrase "members present," suggesting that the General Council intended the vote to be measured from the members who were present, not just those who voted.[4]

Anderson argues, however, that this interpretation would violate the general rule of construction that "an ordinance should be read to give effect to all its provisions and to avoid interpretations that would render ordinance language to be surplusage." Anderson Mem. at 16; Transcript at 20; *see also Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) ("[N]o word, phrase, or sentence should be deemed superfluous . . . or insignificant."). Anderson argues that because the General Council is comprised of members eligible to vote, Community Const. at art. III, it is redundant to use

[4] *See also Robert's Rules of Order* § 44:7 (12th ed. 2020); *Robert's Rules of Order Newly Revised* at 341 (1970) (same) (a body can modify the standard rule that a majority vote means a majority of those *present and voting* on a matter by prescribing that the majority vote must be of "the number of members present").

"voting" in the phrase "voting members present," unless "voting members" means something different from "eligible to vote." Transcript at 20.

While this argument has some appeal, the Court notes that the General Council used a similar approach in Section 1.10 of the Ordinance, which provides that "[t]his Ordinance may be amended only upon an affirmative vote of a majority of the eligible voting members of the General Council at a duly convened meeting where a quorum is present." This section demonstrates that in the context of the Ordinance, the General Council has chosen to refer to "voting members," even where it may be sufficient to refer only to "members." The Court finds that it also did so in Section 4.14.1.[5]

V.

Anderson also contends that reading Section 4.14.1 as Muellenberg proposes would mean that abstentions count as "no" votes, which is generally frowned upon by *Robert's Rules of Order*. Anderson. Mem. at 13. The Court acknowledges that reading Section 4.14.1 to require an affirmative vote of voting members who are present at the meeting—not just an affirmative vote of those voting on a particular resolution brought under Section 4.14.1—would essentially count abstentions (including the Chair's) as "no" votes. And while it is true that *Robert's Rules of Order* generally prescribes such voting mechanisms as "undesirable" because as a practical matter they take away a

[5] Because this is so, the Court need not examine the legislative history of the Ordinance presented by Anderson. *Ex parte Collett*, 337 U.S. 55, 61 (1949) ("[T]here is no need to refer to the legislative history where the statutory language is clear.").

member's ability to abstain, *Robert's Rules of Order* § 44:9 (12th ed. 2020); *Robert's Rules of Order Newly Revised* at 341-342 (1970), the Rules also clearly permit such voting mechanisms so long as they are specified. *Id.* Here, the Court is persuaded that the General Council intended such a result by using the language it did in Section 4.14.1, which, as noted above, requires something more than a "majority vote." When a "majority vote" is all that is called for, only a majority of those voting on a particular question would be required for the measure to pass—and abstentions would not impact the number needed for a majority.

Such was the case in *Feezor v. SMSC Business Council*, 3 Shak. T.C. 155 (May 19, 1999), cited by Anderson. *Feezor* involved the validity of two adoption ordinances, both enacted under Article II of the Community Constitution, which does not require any particular vote threshold.[6] 3 Shak. T.C. at 157. There, the Court upheld a 1993 adoption ordinance that was passed by a vote of 33 for, 32 against, 6 abstentions and 1 spoiled ballot. *Id.* at 159, 174, 187-88. But only a simple majority of those voting was required (as is typical under *Robert's Rules of Order*), *id.* at 174, so it made sense for the Court to find that the ordinance passed even though it would not have passed if the abstentions had counted as "no" votes.

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[6] It simply provides that "[t]he governing body shall have power to pass resolutions or ordinances, subject to the approval of the Secretary of the Interior, governing future membership, adoptions and loss of membership." Const. art. II, § 2.

Anderson also relies on *Paiute Indian Tribe of Utah v. Clark*, where the Paiute court noted that "because abstentions do not count as votes, 'majority vote' usually means the vote of those present and voting." 18 NICS App. 27, 30 (Aug. 2020). In that case, the tribal council consisted of six members, and removal of a member required a "majority vote of its members" where a quorum was present. *Id.* at 28, 30-31. At a meeting where three members were present, two voted in favor of removing another member. *Id.* at 30-31. The court concluded that three members did not constitute a quorum. *Id.* at 31. But notably, it went on to explain that the two votes in favor of removal was insufficient:

> But, even assuming a quorum, we believe the vote still violated the Constitution. The Constitution says the Tribal Council "by a majority vote of its members" may remove a council member. Paiute Indian Tribe of Utah Constitution art. XII, sec. 2(a). Because the Tribal Council consists of six members, a majority of four members would need to vote for removal to accomplish a removal. Had the Constitution stated that the Tribal Council could "by a majority vote" remove a council member, then perhaps a number less than four would suffice (assuming a quorum). But because the Constitution included the words "by a majority vote *of its members*," we read the Constitution as requiring at least four affirmative votes to remove.

Id. (emphasis in original). So while the court observed the general rule regarding majority votes, it found a different meaning where the language indicated that the vote should be measured against the membership, not the number of votes cast. This again is an example where particular language evidenced a legislative purpose to impose a heightened voting requirement. Thus, it supports Muellenberg's view that "a majority

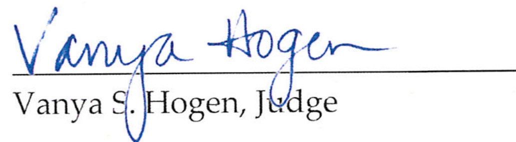
of voting members present" means a majority of all members who are eligible to vote *and* who are present, not a majority of members present and voting.

VI.

In the Ordinance, the General Council used very specific language regarding the vote necessary for a member to relinquish a land assignment to a non-member child. That language differs from the more typical "simple majority vote" used elsewhere in the Ordinance, and the Court must effectuate the specific language by giving it its plain meaning, which is a majority vote of the voting members *present* at a regular meeting. Taking the allegations in the amended complaint as true, the Court cannot find that Muellenberg has failed to state a claim upon which relief can be granted.

Accordingly, it is hereby ordered that Anderson's motion to dismiss is denied.

Dated: May 2, 2023



Vanya S. Hogen, Judge

TRIBAL COURT OF THE SHAKOPEE
MDEWAKANTON SIOUX COMMUNITY

FILED SEP 21 2023

MELISSA A. HINTZ
CLERK OF COURT

IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION	STATE OF MINNESOTA
Anthony Muellenberg, et al., Petitioners, vs. Keith B. Anderson, et al., Respondents.	Court File No. 988-23

Memorandum Opinion and Order

Under the Community's Tribal Court Ordinance, a case must raise a controversy, a requirement akin to the case-and-controversy requirement under the U.S. Constitution. One element of a "controversy" is that the plaintiffs have standing to raise it. Because at least one of the Petitioners in this case meets the standing requirement, the Respondents' motion to dismiss the complaints in these consolidated cases is denied.

I.

Land management in the Shakopee Mdewakanton Sioux Community is governed by the Consolidated Land Management Ordinance (the "Ordinance"). *See* Ordinance § 1.2. Under the Ordinance, enrolled members "of the Community by order of birth . . . have priority to receive assignments of land for residential uses, except that enrolled members of the Community who are terminally ill, gravely ill or at an

advanced age, may request relinquishment of the member's land assignment" to certain other persons, including adult biological children who are not enrolled in the Community. Ordinance §§ 3.1.1, 4.14, 4.14.1. A member's request to relinquish an assignment to a nonmember biological child must be approved by the Community's General Council.[1] Ordinance § 4.14.1.

On January 10, 2023, the General Council convened for a regular meeting to vote on, among other things, a resolution to approve the relinquishment of a land assignment from Barry Welch to Stephanie Welch (No. 01-10-23-011) and a resolution to approve the relinquishment of a land assignment from Gail Campbell to Lynn Blue (No. 01-10-23-012) (collectively, the "Relinquishment Resolutions"). Amended Complaint, *Muellenberg v. Anderson*, No. 988-23 at 1 & Ex. A and B (Feb. 15, 2023). During a 24-hour vote, 172 General Council members were recorded as present, and the vote counts for the Relinquishment Resolutions were as follows:

- Resolution No. 01-10-23-011:
  - Yes - 86
  - No - 68
  - Abstentions - 17
  - Chair Not Voting - 1
- Resolution No. 01-10-23-012:

[1] The General Council, the Community's governing body, is defined in the Community Constitution as "all persons qualified to vote in [C]ommunity elections." Const. art. III. And "Community members eighteen (18) years of age or over shall qualify as voters" in Community elections. *Id.* at art. IV.

- Yes - 77
- No - 74
- Abstentions - 20
- Chair Not Voting - 1.

Id. at 2 & Ex. C, E, I. According to an affidavit, Petitioner Cherie Crooks was among those who voted against the Relinquishment Resolutions. C. Crooks Aff. ¶ 3 (July 20, 2023).[2]

Following the vote, the Relinquishment Resolutions were deemed approved. Amended Complaint at 2 & Ex. C, E. The Petitioners—Crooks, Anthony Muellenberg, and Crystal Kilcher—initiated this consolidated matter, challenging the validity of the Relinquishment Resolutions. The Petitioners ask the Court to enjoin the land-assignment relinquishments, rescind the Relinquishment Resolutions, and declare the Relinquishment Resolutions as "failed." *Id.* at 2.

At the Court's invitation, the Respondents—Keith Anderson, Rebecca Crooks-Stratton, Cole Miller, Angela Sauro, the Community Election Commissioner, and the Community Business Council—have now moved to dismiss the consolidated complaints, arguing that Petitioners lack standing.

II.

With rare exception, it has been the Court's view that its "function is to hear

[2] The Court can review matters outside the pleadings in a factual challenge to subject-matter jurisdiction. *See, e.g., Osborn v. United States*, 918 F.3d 724, 729 (8th Cir. 1990) (explaining that a court is not confined to pleadings when the factual basis for subject-matter jurisdiction is challenged).

cases and controversies—that justiciability, and the adversarial process, alone produce the sort of complete record which permits sound decisions." *In re Advisory Request from the Bus. Council—Payment of Revenue Allocation to Thirty One Members*, 1 Shak. T.C. 142, 144 (Feb. 11, 1994); *see also* Tribal Court Ord. § II (stating that the Court has jurisdiction to hear "controversies"). Thus, this Court has followed the lead of its federal counterparts in treating standing as an essential component to its jurisdiction. *See Smith v. Bd. of Dirs. of Little Six, Inc.*, 2 Shak. T.C. 118, 124 (May 1, 1996). In other words, unless a plaintiff possesses standing, this Court cannot exercise jurisdiction. *See* SMSC R. Civ. P. 12(b). And unless Tribal law says otherwise, "this Court applies the federal court's interpretation of the 'case' or 'controversy' requirement found in Article III of the United States Constitution in determining a Plaintiff's standing to sue." *Smith*, 2 Shak. T.C. at 124.

III.

A party's standing rests on three elements: (1) injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The party asserting jurisdiction bears the burden of establishing these three elements. *Id.* at 561. Here, the Respondents argue that the Petitioners fail to satisfy any of these elements. The Court disagrees.

"Injury in fact has been judicially defined as an invasion of a legally-protected interest which is concrete and particularized." *Smith*, 2 Shak. T.C. at 125 (quotations

omitted). It "must be actual or imminent, not conjectural or hypothetical." *Id.* (quotation omitted). To satisfy this first element, the Petitioners direct the Court to *Coleman v. Miller*, 307 U.S. 433 (1939). In that case, certain state senators voted not to ratify an amendment to the U.S. Constitution. *Coleman*, 307 U.S. at 435-36. The voting results would have ordinarily disfavored ratification, but the presiding officer of the senate cast a deciding vote in favor of ratification. *Id.* at 436. The senators (along with some fellow legislators) brought suit challenging the purported ratification of the amendment. *Id.* The U.S. Supreme Court (like the state supreme court) found that the senators had standing to protect the effectiveness of their votes:

> Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification. We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.

Id. at 438.

The Respondents answer *Coleman* by directing this Court to decisions not to hear claims based on generalized injuries shared by the public at large. For instance, the Respondents cite *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982). In that case, the plaintiffs brought a claim under the Establishment Clause, challenging the conveyance of federal surplus land to a Christian college. *Valley Forge Christian College*, 454 U.S. at 468-69. The plaintiffs alleged that each of its members "would be deprived of the fair and constitutional use of his (her) tax

dollar for constitutional purposes in violation of his (her) rights under the First Amendment of the United States Constitution." *Id.* at 469 (quotation omitted). And the lower court further interpreted their claim as based on "an injury in fact to their shared individual right to a government that shall make no law respecting the establishment of religion." *Id.* at 482. The Court concluded that the plaintiffs lacked standing. *Id.* at 469-70. In reaching its decision, the Court summarized its jurisprudence on citizen standing:

> The Court of Appeals was surely correct in recognizing that the Art. III requirements of standing are not satisfied by the abstract injury in nonobservance of the Constitution asserted by citizens. This Court repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law. Such claims amount to little more than attempts to employ a federal court as a forum in which to air generalized grievances about the conduct of government.

Id. at 482-83 (quotations and citations omitted). As the Court put it, "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.* at 483.

The Respondents liken the Petitioners to citizens asserting general grievances, in contrast to the senators in *Coleman*. But Crooks is not a citizen asserting a general grievance. Crooks voted on the Relinquishment Resolutions in her capacity as a General Council member. She was exercising constitutional and statutory power delegated to the governing body of the Community. Const. Arts. III, IV; Ordinance § 4.14.1. Thus, Crooks was casting her vote in a capacity akin to that of the senators in *Coleman*. And if

Petitioners ultimately prove their contentions, then the Relinquishment Resolutions should not have passed based on the voting results, including Crooks's vote. Consequently, Crooks's vote was allegedly held for naught by the purported passage of the Relinquishment Resolutions. As in *Coleman*, this Court concludes that Crooks has "a plain, direct and adequate interest in maintaining the effectiveness" of her vote. *See Coleman*, 307 U.S. at 438.[3]

The Respondents further cite *Raines v. Byrd*, 521 U.S. 811 (1997), to suggest that Crooks has suffered no injury. *Raines* involved a constitutional challenge to the Line Item Veto Act by six members of Congress who had voted against it. Their challenge was not based on the "effectiveness" of their votes but rather simply on their view that the law—as validly passed—violated their constitutional rights as members of Congress. The *Raines* Court distinguished *Coleman*, saying the *Raines* plaintiffs "have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated." *Raines*, 521 U.S. at 824. Rather, the *Raines* plaintiffs just lost the vote. *Id.* at 824, 829-30. As this Court has already ruled, the land relinquishments required a majority vote of all General Council members

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[3] This holding is strictly limited to instances when a General Council member seeks to protect the validity of their vote in their capacity as a member of General Council. The Court expresses no opinion about whether a General Council member could bring a similar claim to protect the validity of their vote in their personal capacity, such as in a general election. Nor does the Court express an opinion about whether a General Council member could bring a claim to challenge the validity of an action based on generalized constitutional grounds.

present, *Muellenberg v. Anderson*, No. 988-23, Slip. Op. at 12 (May 2, 2023), which the Petitioners allege did not occur. Assuming without deciding that this is true and that Crooks voted against the Relinquishment Resolutions, then her vote (like those of the senators in *Coleman*) was not given effect—she did not simply lose the vote. Thus, *Raines* is inapplicable.

Having determined that the Petitioners—or at least one of them, Crooks—have established an injury in fact, the Court will quickly address the second and third elements of standing—a causal connection and redressability. "As to causal connection, the Supreme Court has noted that the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Smith*, 2 Shak. T.C. at 125 (quotation omitted). And redressability requires "that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quotations omitted).

The Respondents essentially argue that because the Petitioners did not establish an injury in fact, they cannot establish either of the final two elements of standing. For the reasons already discussed, this premise and the arguments stemming from it fail.

Furthermore, the Court notes that these elements are easily satisfied. The Petitioners claim that the Respondents' actions in declaring the Relinquishment Resolutions as passed resulted in the overriding and ultimate nullification of Crooks's vote—the injury in fact. And a favorable decision in this matter would negate that

outcome by requiring the Respondents to enforce the vote in a manner consistent with the Ordinance. The consequence would be the proper treatment of Crooks's vote. Thus, like the first, the second and third elements of standing are satisfied.

IV.

Next, the Court must determine which of the Petitioners may remain parties to this proceeding. The Respondents argue that even if Crooks has standing, Muellenberg and Kilcher do not, and therefore, they should be dismissed from this suit. But the Court need not address Muellenberg's and Kilcher's standing.

"It is settled" in federal courts "that in a case involving joined, individual plaintiffs bringing a shared claim seeking a single remedy, Article III's case-or-controversy requirement is satisfied if one plaintiff can establish injury and standing." *JD v. Azar*, 925 F.3d 1291, 1323 (D.C. Cir. 2019). "In that event, it is immaterial that other plaintiffs might be unable to demonstrate their own standing." *Id.* This has become known as the one-plaintiff rule. *See id.* at 1324; *California v. EPA*, 72 F.4th 308, 313 (D.C. Cir. 2023) (applying rule to petitioners in administrative-review action).

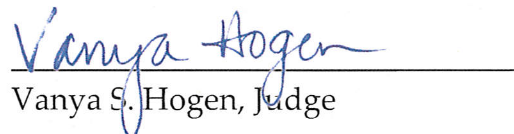
As previously discussed, this Court, in the absence of contrary tribal law, "applies the federal court's interpretation of the 'case' or 'controversy' requirement found in Article III of the United States Constitution in determining a Plaintiff's standing to sue." *Smith*, 2 Shak. T.C. at 124. As an extension of that precedent, the Court

will follow federal jurisprudence regarding the one-plaintiff rule.

This rule is not mandatory and at least one commentator has noted that it has seen exceptions for cases involving monetary relief or where relief would require a defendant to take different actions for different plaintiffs. Bruhl, Aaron-Andrew P., *One Good Plaintiff Is Not Enough*, 67 Duke L.J. 481, 498 (2017). But neither of these circumstances is present here. The Petitioners do not seek monetary damages. And they seek the same relief—invalidation of the Relinquishment Resolutions—which would apply equally to all of them. Instead, the Court finds that this is the quintessential case for application of the rule: "[T]he cases in which the one-plaintiff rule is invoked are usually cases involving injunctive or declaratory relief, such as cases that seek to enjoin an allegedly illegal government policy or action." *Id.* Therefore, Muellenberg and Kilcher may remain parties to this consolidated matter.

Accordingly, it is hereby ordered that the Respondents' motion to dismiss is denied.

Dated: September 21, 2023



Vanya S. Hogen, Judge