LIST OF SMSC TRIAL COURT OPINIONS

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COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Kimberly Amundsen, et al. Plaintiffs, vs. The Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, et al., Defendants.	)	File No. 049-94

MEMORANDUM AND ORDER

On September 16, 1996, at the end of a long procedural history, I decided this case: I granted in part and denied in part both the Plaintiffs' and the Defendants' motions for summary judgment. In doing so, I decided, one way or another, all the claims in the Plaintiffs' Complaint. I granted the Plaintiffs prayer for an order of mandamus to the Enrollment Officer ("the Enrollment Officer") of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), and I directed the Enrollment Officer to verify the data in each of the Plaintiffs' applications for membership in the Community, and to recommend in writing acceptance or rejection of each application within thirty days of my Order. I then denied all other aspects of

the Plaintiffs' motion for summary judgment, and granted the Defendants' motion for summary judgment as to all other aspects of the Plaintiffs' Complaint, holding that "neither the provisions of the 1993 Enrollment Ordinance [of the Community] nor any other applicable law creates anything like the clear, nondiscretionary duty, for [those other officers and entities] which would justify mandamus".

Thereafter, the Enrollment Officer complied with my mandamus order; and neither the Plaintiffs nor the Defendants appealed any aspect of my September 16, 1996 Order.

But beginning nine months after my decision, the Plaintiffs began the filing of what has become a series of post-judgment motions, sometimes supplemented by letters to the Court, urging that my September 16, 1996 Order be revisited and this case be reopened. In fairness, it must be said that many of the Plaintiffs' filings and letters have been prompted by an extremely slow set of Community processes; but it also must be said that there is nothing in the Community's Enrollment Ordinance or in any other positive law which imposes any speedier process. And clearly, none of these filings meets the requirements of Rule 28 of our Rules of Civil Procedure, which incorporates and adopts the stringent requirements of Rules 59 and 60 of the Federal Rules of Civil Procedure, relating to relief from a judgment or order.

Rule 59(e) of the Federal Rules of Civil Procedure requires that any motion to alter or amend a judgment be filed "no later than 10 days after entry of the judgment". Rule 60(b) of the Federal Rules of Civil Procedure provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud

> (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or its is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. ...
>
> (Emphasis added).

The first of the Plaintiffs' filings was received by the Court on June 17, 1997, when the Plaintiffs filed an "Emergency Motion to Reopen, Amend Order, and Enforce Judgment", reciting that, after the Enrollment Officer had made her recommendations in accordance with the mandamus order, the Community's other governmental arms (the Enrollment Committee, the Business Council, and the General Council) had taken no action on the applications. Shortly after that motion was filed (and perhaps prompted by the filing), the Enrollment Committee met and considered the Plaintiffs' applications. The Community responded to the Plaintiff's Emergency Motion by pointing out that nothing in the law of the Community required that the Plaintiffs' applications be processed within any timeframe. Nonetheless, and perhaps foolishly -- being concerned with the time that was being consumed by the Community's processes, and thinking that Court process might move things along -- I held a hearing on the July 15, 1997, and on July 28, 1997 issued a Memorandum and Order. During the hearing, I observed that there was no time frame established by the Community's ordinances, within which the Enrollment Committee was required to act, although "it seems probable that the [Enrollment] Committee is obliged to act within some reasonable time"; but I concluded that the fact that the Enrollment Committee had met and acted, whatever the root cause of their action might be,

mooted the Plaintiffs' motion.

Then, more than a year after that hearing, and nearly two years after my summary judgment order, the Plaintiffs filed another "Emergency Motion to Reopen, Amend Order, Show Cause and Enforce Judgment", on August 13, 1998, asserting that the Business Council had wrongly delayed placing the Plaintiffs' applications for membership before the General Council for a vote. The Plaintiffs asked for wide-ranging and radical relief: they asked the Court to take control of the Community's consideration of the Plaintiffs applications for membership by, inter alia, directing the General Council to vote on them, and requiring the General Council, when it considered the applications, to consider only certain specific criteria. After both sides filed briefs, I held a hearing on this motion, on September 14, 1998. During that hearing, I expressed the view, again, that none of the applicable law specified any particular timeframe for action, by the General Council, upon enrollment applications, but I thought, nonetheless, that it was likely that there was some requirement that the General Council would vote, one way or another, on all enrollment applications, at some point in time. I also noted that a representation had been made to the Court, by the Community's counsel, during the proceedings in July, 1997, to the effect that the General Council would consider the Plaintiffs' applications -- which struck me as a commitment to do so within some reasonable period of time. I therefore expressed the hope that the General Council would fulfill the commitment made by its counsel and take up the Plaintiffs' applications before it; and I took the Plaintiffs' motion under advisement, observing, as I did so, that--

> I will say this much: Indeed most of what the defendants say about the court's rules and the appositeness of the motions that are made here are questionable. Our rules, it seems to me, absolutely require respect and require people to follow them. I am not sure that there is much in this motion that comes

close to our rules.

Transcript of proceedings, Sept. 14, 1999, at 44.

Thereafter, in a later dated October 28, 1998, counsel for the Community informed the Court that on October 27, 1998 the General Council indeed did take action on each of the Plaintiffs' enrollment applications. But in a letter also written on October 28, 1998, counsel for the Plaintiffs wrote the Court stating that the General Council could not possibly have taken action because "non-qualified and illegally adopted individuals" took part in the vote. (Letter from James H. Cohen, Oct. 28, 1998, at 1.) The Plaintiffs then filed an "Amended Emergency Motion to Reopen, Amend Order, Show Cause, and Enforce Judgment and/or to Amend Judgment" on November 13, 1999, contending that the delays which had attended the consideration of their applications, through various stages of the Community's process, was inconsistent with the Community's Constitution, the Community's 1993 Enrollment Ordinance, the Indian Civil Rights Act, and the United States Constitution, and that the applications had been rejected without legal basis. The Plaintiffs asked me to review the entire record relating to the applications in camera to ascertain the basis for their rejection, and if I found there "to be no ... substantial and credible evidence controverting the membership eligibility" of the Plaintiffs, or that there was "bad faith" in the Community's rejection of the Plaintiffs, that I award the Plaintiffs retroactive per capita payments from the Community and direct the Defendants to show cause why they should not be held in contempt of court. Thereafter, Plaintiffs' counsel sent the Court a letter, dated January 18, 1999, discussing the adoption of persons into the Community whom the Plaintiffs consider to be "unqualified" for Community membership. On January 22, 1999, Defendants' counsel sent the Court a letter asking that I

disregard that letter submission and deny the Plaintiffs' Emergency Motion and its Amended Emergency Motion. Finally, on July 2, 1999, Plaintiffs' counsel sent the Court another letter requesting a ruling on their earlier motions; the Defendants on the same day filed a request for a scheduling order, to permit briefing of the motions; and on July 12, 1999 the Plaintiffs filed a Response, arguing that there is no need for further briefing on the motions, and that additional delay would be caused thereby.

As I indicated during the September 14, 1998 hearing, I do not believe that the Plaintiff's Emergency Motion to Reopen, Amend Order, Show Cause, and Enforce Judgment in any way complies with Rule 28 this Court's Rules of Civil Procedure. To the extent it relates at all to the relief requested in the original Complaint, it was not filed within the time contemplated by Rule 60(b) of the Federal Rules of Civil Procedure; and the Amended Emergency Motion to Reopen, Amend Order, Show Cause, and Enforce Judgment, filed on November 13, 1998, is even more defective in this regard. As a consequence, I do not believe that either motion actually is in a posture that requires a decision of the Court. But by filing this Memorandum and Order today, I hope to bring some closure to this: this case was decided nearly three years ago, and it was not appealed. Nothing even approaching the showing required by our Rule 28 and Rule 60 of the Federal Rules of Civil Procedure has been submitted to justify its reopening. The materials which the Plaintiffs have submitted in their three motions and accompanying letters recite processing delays which, although they are unfortunate, are in no way inconsistent with applicable law or with my September 16, 1996 Order. The post-trial submissions also make allegations relating to "unqualified" persons voting in the Community's General Council; but those allegations do not in any way relate to the matters which the Plaintiffs put at issue

when they filed this lawsuit. They are utterly outside the scope of this case.

I held the two post-trial hearings in this matter because I was personally concerned about the delays in processing the Plaintiffs' applications. Perhaps this was error. Perhaps I simply should have directed the Clerk of Court to return the motions as they were received. In any case, I now intend to leave no doubt: this case was closed in 1996, and no showing has been made since that time which would justify its being reopened.

ORDER

To the extent that the Plaintiffs' Emergency Motion to Reopen, Amend Order, and Enforce Judgment and Amended Emergency Motion to Reopen, Amend Order, Show Cause, and Enforce Judgment and/or to Amend Judgment may be deemed to be pending before this Court, they are DENIED.

July 19, 1999

John E. Jacobson
Judge

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

FILED OCT 26 1999

CARRIE L. SVENDAHL
CLERK OF COURT

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT

STATE OF MINNESOTA

In the Matter of:

The Children's Trust Funds Created
Under Shakopee Mdewakanton Sioux
Community Ordinance Number 12-29-88-002
With Trust Agreement Dated
September 9, 1992

File No. 374-99

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

The above-entitled matter came on for hearing before the undersigned on October 26, 1999, at 9:00 a.m. The Shakopee Mdewakanton Sioux (Dakota) Community (the "Community") filed a petition in this Court on June 16, 1999. Subsequently, the Community amended its petition on August 13, 1999. The Community's Amended Petition requests an order: (1) confirming its appointment of Merrill Lynch Trust Company of America ("Merrill Lynch") as trustee; (2) construing the trust document; (3) settling and allowing the accounts of Merrill Lynch dated December 31, 1992, December 31, 1993, December 31, 1994, December 31, 1995, December 31, 1996, December 31, 1997, Final Account Dated December 31, 1998, and an account for the period from and after December 31, 1998; (4) confirming the appointment of a successor trustee; (5) approving the transfer of Children's Trust Fund assets to the successor trustee; (6) ordering Merrill Lynch to transfer trust assets and administration of the trust to the successor trustee; and (7) discharging Merrill Lynch as trustee.

Steven F. Olson, Esq. and Brad S. Jolly, Esq. of BlueDog, Olson & Small, P.L.L.P., appeared on behalf of the Community.

James G. Bullard and Joshua Jay Kanassatega of Leonard, Street and Deinard, P.A., appeared on behalf of Merrill Lynch;

The Court, having considered the Petition and arguments of counsel herein, reviewed the accounts as to the assets which Merrill Lynch received and maintained pursuant to the Trust Agreement and as to distributions made in accordance with the Trust Agreement, and being fully advised in the premises, hereby enters the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. Pursuant to Community Ordinance Number 12-29-88-002, the Business Proceeds Distribution Ordinance, the Community and Merrill Lynch executed an eight-page Trust Agreement, dated September 9, 1992 creating separate revocable trusts, each trust bearing the name of an individual who could become a beneficiary.

2. Subsequently, the Community enacted Ordinance Number 10-27-93-002, the Gaming Revenue Allocation Amendments to the Business Proceeds Distribution Ordinance ("Gaming Revenue Allocation Amendments"), which amended and superseded various provisions of Ordinance No. 12-29-88-002, including the provisions regarding the establishment of a trust for minor Community members.

3. Merrill Lynch was the original and only trustee under the Trust Agreement prior to December 30, 1998, when Merrill Lynch was replaced.

4. Merrill Lynch invested the assets of the Children's Trust in accordance with the Trust Agreement and made various distributions from the Children's Trust until December 30, 1998. Such distributions were made pursuant to orders of this Court issued pursuant to Section 14.6 of the Gaming Revenue Allocation Amendments or otherwise in accordance with appropriate directions

from the Business Council, or its authorized agent. Since December 30, 1998, no authorized distributions have been made from the trust assets held by Merrill Lynch.

5. On December 30, 1998, the Business Council, in accordance with the powers reserved to it under the Trust Agreement, executed a First Amendment to the Trust Agreement.

6. Also on December 30, 1998, the Business Council removed Merrill Lynch as trustee, appointed the person acting from time to time as Community Controller as ex-officio trustee, and directed that Merrill Lynch transfer title to and custody of the Children's Trust Fund assets to the Community Controller as successor trustee.

7. On February 15, 1999, the Community ceased placing any additional trust assets with Merrill Lynch. From that date, the Community Controller, as ex-officio trustee, deposited the funds required by Section 14.6 of Ordinance Number 10-27-93-002 into a new trust account under his control.

8. The person currently acting as Community Controller is Joseph Dean.

9. On January 27, 1999, Merrill Lynch filed a petition in Minnesota District Court seeking release and discharge as trustee.

10. On June 16, 1999, the Community filed its petition for release and discharge of Merrill Lynch as trustee with this Court. In addition, the Community requested that the record in this case be sealed to protect the non-vested potential future beneficiaries and prevent disclosure of other matters.

11. On July 23, 1999, the Court held a telephone conference on this matter and requested the Petitioner to prepare a proposed amended order to seal the file which would permit certain individuals to view the record.

12. On July 29, 1999, the Court entered the amended order to seal the record.

13. On August 13, 1999, the Community amended its petition, removing some allegations. The Amended Petition made no new substantive allegations and requested no materially different prayers for relief, but provided a more up-to-date and accurate accounting.

14. Pursuant to stipulation filed with this Court, Merrill Lynch consented to this Court's exercise of special personal jurisdiction over Merrill Lynch for the sole purpose of hearing this Petition and issuing an order as requested herein.

15. Without deciding which beneficiaries are entitled to notice or whether any beneficiary has a vested interest in the Children's Trust Fund, the court ordered that all beneficiaries, whether present or future, vested or contingent, be notified of these proceedings.

16. Waivers of notice executed by certain beneficiaries who have attained the statutory age of 18, but not the statutory age of 25 were submitted by the Community and such notices are a proper waiver of notice of the hearing and proceedings on the Petition of the Community.

17. Notice of these proceedings, including all continuances, was mailed by the Community to all other beneficiaries who did not otherwise waive notice, as evidenced by the affidavit of mailing by the Community's attorney filed herein, and such notice was proper notice of the hearing and proceedings on the Petition of the Community.

18. No beneficiary or other person who could claim an interest in the Children's Trust Fund appeared to challenge the proceedings.

19. Both the original Petition and the Amended Petition were personally served upon Merrill Lynch. Merrill Lynch has had actual notice of the Community's Petition and all proceedings incidental thereto.

20. Merrill Lynch has provided accountings to the Community and this Court for the period up to and including September 1999. Merrill Lynch has represented to the Community and this Court that it has followed essentially the same trust administration practices in October of 1999 as it has followed during the preceding months of 1999.

21. The parties dispute the amount Merrill Lynch is entitled to be reimbursed out of the Children's Trust Fund for legal fees paid to Leonard, Street and Deinard, P.A. for services provided in these proceedings and the parallel proceedings in Minnesota District Court.

22. The parties also dispute the amount Merrill Lynch is entitled to paid out of the Children's Trust Fund from and after December 30, 1998, to the date of discharge, for services provided to the Children's Trust Fund.

23. The parties have asked the Court to determine the amounts due Merrill Lynch as reimbursement for legal fees paid to Leonard, Street and Deinard, P.A., as well as the amounts due Merrill Lynch for services provided to the Children's Trust Fund. Upon proper submissions, in accordance with this Order, the Court shall determine appropriate amounts to be paid to Merrill Lynch from the Children's Trust Fund for both reimbursement for legal fees paid to Leonard, Street and Deinard, P.A. and for services provided by Merrill Lynch to the Children's Trust Fund.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this matter as an exercise of the Community's inherent sovereignty and pursuant to Community Ordinance No. 2-13-88-01, Section II and Community Ordinance No. 11-14-95-003, Sections I, II, III, IV, and VI.

2. The Court has personal jurisdiction over the Community, the Business Council and all Community members who do or may claim an interest in the trust assets under Community

Ordinance Numbers 2-13-88-01 and 11-14-95-003 and the inherent authority of this Court over members of the Community. The Court has special personal jurisdiction over Merrill Lynch pursuant to and in accordance with its consent reflected in the stipulation filed herein.

3. The Court makes no determination or ruling on the rights of any beneficiary to notice of these proceedings or their rights or interests under the Children's Trust Fund.

4. Notice of these proceedings has been provided to or written waivers of such notice have been executed by all persons entitled to notice of these proceedings and the Court finds such notices and waivers sufficient.

5. The Business Council's removal of Merrill Lynch as trustee was a proper exercise of that authority retained by the Business Council pursuant to the Trust Agreement, Article I, §1.03(1).

6. The Business Council's appointment of the Community Controller as successor trustee, *ex-officio*, is appropriate given the governmental nature of the position and that it is not uncommon for governmental officials to act in such capacities.

7. The provision of section 1.03 of the Trust Agreement providing:

> The trustee shall not be liable to the Business Council, the General Council, the Shakopee Mdewakanton Sioux (Dakota) Community of Minnesota or the beneficiary of any trust for any action taken or not taken at the Business Council's direction or solely because any action was taken or not taken before the trustee received actual notice of the exercise of reserved power pursuant to this Paragraph [1.03]. The trustee shall be fully indemnified by the Business Council, the General Council, the Shakopee Mdewakanton Sioux (Dakota) Community of Minnesota and the applicable trusts for any action taken or not taken under these circumstances,

survives the discharge of Merrill Lynch as trustee for the period of the applicable statute of limitations for claims arising from actions or events occurring prior to February 15, 1999, the date the Community ceased providing additional trust funds to Merrill Lynch.

8. This Court concludes that the Community has demonstrated that it is entitled to all the relief requested in its Amended Petition.

NOW, THEREFORE, it is hereby ORDERED that:

1. The appointment of Merrill Lynch as trustee is confirmed.

2. The notices and waivers of notice provided to all beneficiaries, whether present or future, vested or contingent, are sufficient for all purposes, and all persons who, or who may claim an interest in these proceedings, the assets of the trust, the performance by Merrill Lynch of its duties as trustee, or any other matter relating to or arising out of the Children's Trust, the administration thereof, or these proceedings has received notice and been given an opportunity to be heard, and such notice is, therefore, deemed approved and confirmed.

3. The accounts of Merrill Lynch, as trustee, provided to this Court in this matter up to and including September 1999 and its acts therein recorded are approved and confirmed.

4. Merrill Lynch is directed to provide a final accounting to the successor trustee, within a reasonable period of time, which shall cover the period from and including October 1999 to the date of the final transfer of the trust assets to the successor trustee in accordance with this Order.

5. The investment of the trust assets is hereby approved and confirmed.

6. The distributions by Merrill Lynch, in accordance with instructions from the Business Council and otherwise in accordance with order of this Court, as set forth in the Petition, are approved and confirmed.

7. Based on the certified invoice filed with this Court, payment to Deloitte & Touche, LLP in the amount of $28,145.00 from the trust assets for services provided to the Children's Trust Fund, including out-of-pocket expenses, is approved and permitted.

8. The Court shall determine, after further proceedings, the amounts Merrill Lynch is entitled to be paid out of the Children's Trust Fund as reimbursement for legal fees paid to Leonard, Street and Deinard, P.A. for their services to Merrill Lynch in matters related to these proceedings and parallel proceedings in Minnesota District Court, as well as fees, if any, due Merrill Lynch for the period from December 30, 1998, through the date of discharge. To that end, Merrill Lynch is directed to provide the Court, no later than November 2, 1999, with a detailed invoice of the services provided and the fees charged by Leonard, Street and Deinard, P.A. as well as the a detailed statement of the fees charged by Merrill Lynch from December 30, 1999, through the date of discharge. In addition, both parties shall submit letter briefs, not to exceed three (3) pages in length, to the Court by November 2, 1999, explaining the amounts they feel Merrill Lynch is entitled to be paid out of the Children's Trust Fund for its services and those of Leonard, Street and Deinard, P.A. Notwithstanding the Courts reservation of jurisdiction to decide this issue, the balance of the relief in this Order shall be effective immediately.

9. The person acting from time to time as Community Controller is hereby approved as the successor trustee, *ex-officio*, and Merrill Lynch is directed to transfer the trust assets, within 10 days of the date of this Order, to the following account established by the successor trustee for the purpose of depositing and maintaining the trust assets therein:

Account Name

Shakopee Mdewakanton Sioux Community of Minnesota Children's Trust Fund

Account Number
13580500

Financial Institution
Norwest Bank Minnesota, N.A.

10. The indemnification of Merrill Lynch provided in Section 1.03 of the Trust Agreement is reaffirmed and survives the discharge of Merrill Lynch as trustee for the period of the applicable statute of limitations for claims arising from actions or events occurring prior to February 15, 1999, the date the Community ceased providing additional trust funds to Merrill Lynch.

11. On acknowledgment of receipt of trust assets by the Community Controller, Merrill Lynch, Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch Asset Management, L.P., and their affiliates, predecessors, successors, parents, subsidiaries, assigns, officers, partners, stockholders, attorneys, directors, agents, employees, past and present, are hereby released and discharged from all liability and responsibility under the trust to the Shakopee Mdewakanton Sioux (Dakota) Community, the vested beneficiaries, any non-vested potential future beneficiaries, and any and all other persons now or hereafter claiming any interest with respect to any of the trust which is the subject of this action, except for claims of liability arising out of Merrill Lynch's failure to comply with this Court's Order.

Dated this 26th day of October, 1999.

BY THE COURT:

Judge John Jacobson
Shakopee Mdewakanton Sioux (Dakota)
Community Tribal Court Judge

TRIBAL COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Earlman David,	) Case No.: 385-99
Plaintiff,	) ORDER
vs.	)
Shakopee Mdewakanton Sioux (Dakota) Community, and Berkley Administrators,	)
Defendant	)

SUMMARY

This appeal was filed on July 19, 1999 from a decision of Hearing Examiner Tamara G. Garcia, dated June 22, 1999. The Court upon review of the Hearing Examiner's Findings, Order and Memorandum, and the Appellant's Request for Appeal, the decision of the Hearing Examiner is affirmed.

FACTS

The Hearing Examiner found that the Appellant was employed by the Little Six, Inc., a corporation wholly owned by the Shakopee Mdewakanton Sioux (Dakota) Community, in the Casino Beverage Department as a porter. On or about August 27, 1998, the

employee sustained a work-related injury to his left knee arising out of and in the course and scope of his employment with the employer. The nature of the Appellant's injury to his left knee was a sprain. The Hearing Examiner found that Dr. Paul G. Johnson placed the employee at maximum medical improvement and rated no permanent impairment at the time of his examination on February 2, 1999. The Notice of Maximum Medical Improvement/Assessment of Permanent Impairment was served on the employee on February 26, 1999. The employee has offered no medical evidence to refute the opinion of Dr. Paul G. Johnson except that he disagrees with the opinion and indicates he is still in pain. The employee was found to have reached maximum medical improvement from his August 27, 1998 work related injury. The employee sustained no permanent impairment as a result of the August 27, 1998 work related injury. The Hearing Examiner based on the evidence presented ruled that Ordinance C.3. n. inapplicable and dismissed the Employee's Claim Petition dated March 4, 1999 with prejudice and denied Employee's claim in all respects.

CONCLUSIONS

The Hearing Examiner indicates in her Memorandum in the matter before her at the time that the employer and the administrator had the burden of proving the applicability of Ordinance C.3.n., which essentially sets forth circumstances under which no benefits are allowed. Ordinance C.3.n. states: "A pre-existing

condition, including a degenerative condition, established by medical evidence, whether pre or post injury, which significantly causes, aggravates or otherwise contributes to the disability or need for medical treatment." The Health Provider Report indicates the employee's alleged employment activity or environment solely caused the employee's injury or disease in his opinion. The Report does however indicate arthritic changes pre dating the work related injury and possible meniscal pathology which he recommended the employee undergo an MRI and or arthroscopy to which the employee declined further work-up. The Hearing Examiner because of the employee's declination for further work-up did not have the evidence necessary to conclude the employee's pre-existing arthritic changes in any way caused, aggravated, or otherwise contributed to the employee's August 27, 1998 work related injury. The Hearing Examiner was correct in her assessment that the medical evidence presented on whether or not Ordinance C.3.n. barred employee's claim for benefits to be inconclusive and therefore inapplicable. The employer and administrator did however make a good faith effort to achieve that burden of proof and had the employee cooperated in undergoing further work-up such burden may have been met. The Court must therefore agree that Ordinance C.3.n. is inapplicable.

The Hearing Examiner found that the Employee's Claim Petition should be dismissed with prejudice and the Employee's claim

should be dismissed in all respects due to the medical evidence presented that the employee was placed at maximum medical improvement as defined in Ordinance B.2. and that the employee sustained no permanent impairment as a result of said August 27, 1998 work related injury. The Hearing Examiner was correct.

On Appeal the employee attempts to explain his reasons for not pursuing further medical work-up by stating he feared retaliation and racial discrimination, abuses which he alleges have prevented him from medical examination from a "neutral physician" or having the Health Care Provider place him on work restrictions. The employee was given the opportunity to undergo further work up and according to him to even have work restrictions placed on his employment activities to which he admittedly declined. His arguments implying racial abuse are non sequitur in this context. Had he been denied further work up there might have been some logic to his allegation of discrimination.

However the Court is constrained to the review of the medical record and the findings of the Hearing Examiner based on such record in this hearing context. The factual record is adequate. Absent any medical evidence contradicting the finding of "Maximum Medical Improvement" or that the employee sustained no permanent impairment the Court must affirm the decision of the Hearing Examiner.

Dated this 30th day of October, 1999

Robert Grey Eagle

Robert Grey Eagle
Judge Of Tribal
Court

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

In Re: Conservatorship of: Court File Number 401-99

Dean Brooks,

Proposed Conservatee.

ORDER APPOINTING CONSERVATOR
OVER THE FINANCIAL ESTATE
OF DEAN BROOKS

This matter came duly on for hearing before Henry M. Buffalo, Jr., Judge of the above-named Court on December 13, 1999, on the Petition of Larry Nerison, seeking appointment of Larry Nerison as conservator over the financial estate of his son, the Conservatee, Dean Brooks. The Petitioner, Larry Nerison, appeared personally and through his attorney, Thomas J. Hunziker, Esq.; the Conservatee Dean Brooks appeared personally and through his attorney F. Clayton Tyler; the Shakopee Mdewakanton Sioux (Dakota) Community through its Business Council appeared by and through their attorneys, Andrew M. Small and William J. Hardacker; also present was the Conservatee's mother, Mary Brooks, and Dr. R. Owen Nelsen. The Court having considered the evidence and being fully advised in the premises herein now makes the following:

1. That the hearing on the Petition for Conservatorship of the Estate of Dean Brooks was held at a special term of this Court at the Stillwater Prison, at Minnesota State Correctional Facility Stillwater, 970 Pickett Street North, Bayport, MN 55003.

2. The Shakopee Mdewakanton Sioux (Dakota) Community, through its Business Council, filed a Motion to Intervene in this matter on December 3, 1999. The Motion was filed pursuant to the Courts Rules of Civil Procedure 19(a) and 19(b). That the Conservatee, Dean Brooks, nor the Conservator, Larry Nerison, objected to the Motion on the part of the Community to Intervene.

3. The Conservatee, Dean Brooks, is the adult son of Petitioner, Larry Nerison and Mary Brooks.

4. The Conservatee, Dean Brooks, suffers from a major mental illness, schizophrenia, with mixed paranoid and disorganized features and suffers the effects of long term chronic alcohol and drug abuse; and is therefore lacking sufficient understanding or capacity to make or communicate responsible decisions concerning his financial estate or financial needs.

5. The Conservatee, Dean Brooks, has money and property which are being dissipated and expended for purposes other than the proper needs of the Conservatee for his care, treatment, support and welfare.

6. The Conservatee, Dean Brooks, is incapable of exercising his rights and powers to possess and manage his estate, collect all debts and claims in his favor or compromise them, to invest all funds not needed for current debts and charges.

7. The Conservatee is in need of a Conservator to protect his financial estate.

8. The Conservator, Larry Nerison, and Mary Brooks, the alternate Conservator, are among those available and willing to discharge the trust as the Conservator.

9. That the Conservator, Larry Nerison, and Conservatee's mother, Mary Brooks, together with advice of counsel, have determined that the sum of $25,000.00 is the minimal amount of funds needed on a monthly basis to take care of the legal, medical and other necessities of the Conservatee. That the balance of funds that Conservatee, Dean Brooks, is entitled to as a member of the Mdewakanton Community shall be held in trust by the Shakopee Mdewakanton Sioux (Dakota) Community, by and through its Business Council until such time as proper demand is made by the Conservator for additional funds needed on behalf of the Conservatee.

10. That the Conservator has not sought the right to exercise dominion or control of the real estate owned the Conservatee.

CONCLUSIONS OF LAW

1. The Conservatee, Dean Brooks, is an incapacitated person lacking sufficient abilities to properly possess and manage his financial affairs.

2. A Conservator of the estate of Dean Brooks should be appointed with limitations on the amount of funds actually received by the Conservator from the Community.

NOW THEREFORE, IS ORDERED:

1. The Motion to Intervene by the Shakopee Mdewakanton Sioux (Dakota) Community by and through its Business Council is hereby granted.

2. That Larry Nerison be and hereby is appointed as Conservator of the estate of Dean Brooks.

3. That Mary Brooks is appointed as the alternate Conservator should Larry Nerison become incapacitated or is otherwise unwilling to carry on his responsibilities as Conservator over the estate of Dean Brooks.

4. The Letter of Conservatorship issue to Larry Nerison upon the filing of an Oath, without bond.

5. That the Conservator have the power and duty to:

a. Possess and manage the estate, collect all debts and claims in favor of the Conservatee, or with the approval of the Court, compromise them, institute suit on behalf of the conservatee and represent the Conservatee in court proceedings, and invest all funds not currently needed for debts and charges and management of the estate.

b. Pay out of the Conservatee's estate all just and lawful debts of the Conservatee.

c. Pay the reasonable charges for the support, maintenance and legal and medical needs of the Conservatee in a manner suitable to the Conservatee's station in life and the value of his estate.

6. That the balance of the Conservatee's estate in excess of an allowance of $25,000.00 per month paid by the Tribe to the Conservator shall remain in trust with the Shakopee Mdewakanton Sioux (Dakota) Community by and through kits Business Council.

Date: December 20, 1999

BY THE COURT,

Henry M. Buffalo, Jr., Judge

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Vernice Walker Weber and Barbara Jean Maxwell,	)	
Plaintiffs,	)	
v.	)	File No. 364-99
Shakopee Mdewakanton Sioux Community; Shakopee Mdewakanton Sioux Community Enrollment Committee; and Anita Wentland, Susan Totenhagen, Cherie Crooks-Bathel, Lanny Ross and Darlene McNeal, individually and as members of the Shakopee Enrollment Committee,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Defendant's motion to dismiss, under Rule 12(b)(6) of our Rules of Civil Procedure. In their Complaint, the Plaintiffs alleged that they filed applications for enrollment to the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"); that on June 15, 1997 they received notices ("the Notices") from the Defendant Anita Wentland, Acting Enrollment Officer of the Community, stating that the Defendant Enrollment Committee had rejected their membership applications; that the Notices did not state a reason for the rejections; that the Plaintiffs appealed their rejections to the Community's General Council ("the General Council"), but that their appeal rights were rendered meaningless

because of their ignorance of the grounds of the Enrollment Committee's decision; and that on October 30, 1998, the General Council voted to deny their appeal.

In pertinent part, the Enrollment Ordinance provides that the notices which are sent to rejected applicants "shall state the grounds for rejection". Section 6, Ordinance No. 6-08-93-001. The Notices which the Plaintiffs received, informing them that the Enrollment Committee had rejected their applications, said simply--

> The applicant has failed to meet her/his burden of proving eligibility for enrollment under Article II, Section 1(c) of the Community Constitution, as required by Section 6 of Enrollment Ordinance No. 6-08-93-001.

The Plaintiffs assert that this conclusory statement in the Notices violated both the due process provisions of the Indian Civil Rights Act, 25 U.S.C. §1302 (1994) ("the ICRA") and the requirements of the Enrollment Ordinance itself. They contend that their right of appeal to the Community's General Council was rendered meaningless, because they could not know what defects the Enrollment Committee saw in their applications. As relief, they seek a writ of mandamus compelling the Defendants to notify the Plaintiffs of the reasons for the Enrollment Committee's decision, and permitting the Plaintiffs a reasonable amount of time to appeal the Enrollment Committee's decision, once such new notices are issued.

The Defendants respond that the Plaintiffs' action should be dismissed because the Complaint has not alleged and cannot allege a property or liberty interest in enrollment which would trigger the protections of the ICRA; that the breadth of discretion given to the Enrollment Committee under the Enrollment Ordinance precludes the issuance of a writ of mandamus; and that, since the General Council now has acted in this matter, and since the General Council's decisions in this regard are not reviewable by this Court, the matter essentially is moot.

There is force to each of the arguments the Defendants make: it is clear that applicants for enrollment in the Community do not have a liberty or property interest in enrollment. Crooks v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 016-07 (SMS(D)C Ct. App. Nov. 4, 1998). Hence the due process requirements of the Indian Civil Rights Act have no applicability to the processing of enrollment applications. It also is clear that the Enrollment Committee makes a decision with respect to an enrollment application, its discretion is very broad; and when the General Council makes a decision on an appeal, its discretion is unreviewable and its decision is final. Feezor v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 311-98 (SMS(D)C Tr. CT. May 19, 1999). For this latter reason, the Court agrees with the Defendants that the Plaintiffs' Complaint should be dismissed as being moot: the Plaintiffs completed their appeal to the General Council, the General Council acted upon the appeal, and there remain no active enrollment applications before any body of the Community. This Court cannot second guess or review the decision of the General Council on any enrollment application.

However, the General Council of the Community has by ordinance created procedures which the Enrollment Committee must follow; and if in a given case such procedures have been mandated by the General Council and have not been followed by the Enrollment Committee, an applicant for enrollment can, at least under certain circumstances, maintain an action in this Court to correct the procedural deficiencies. Amundsen v. SMS(D)C Enrollment Committee, No. 049-94 (SMS(D)C Tr. Ct. Apr. 14, 1995). When the General Council adopted Section 6 of the Enrollment Ordinance, it specifically required that the notice which unsuccessful applicants receive "shall state the grounds for rejection". That language is mandatory, and in

the view of the Court it creates a duty upon the Enrollment Committee and the Enrollment Officer to provide something more than a mere statement that the applicant has been rejected.

The Community argues that in this case the notices which the Plaintiffs received did, in fact, provide something more: the Community points out that, had the notices simply said they Plaintiffs were rejected then the Plaintiffs would not have known whether there (a) could not qualify for enrollment under any circumstances -- that there was nothing they could submit or attempt to prove which could change things, or (b) had simply failed to meet an evidentiary burden -- which was apparently the case for the applications here at issue.

This can be conceded. But in the view of the Court, the tiny amount of information that is conveyed by notifying an applicant that his or her application "has not met the burden" is not sufficient to state "grounds" under Section 6 of the Enrollment Ordinance. In the view of the Court, the language used by the General Council in Section 6 requires that the notices give an unsuccessful applicant at least some basic idea of the areas in which his or her application has been found deficient. It is not necessary that the applicant be given an extended or detailed review of an application's defects; but an indication should be given as to whether, for example, there is question whether the ancestor(s) to whom the applicants trace their lineage were indeed Mdewakantons residing in Minnesota on May 20, 1886; or whether the applicants attempt to trace their lineage to a Mdewakanton who concededly resided in Minnesota on May 20, 1886 does not provide a clear genealogical linkage to that person. In short, an unsuccessful applicant should be given some idea of how he or she might add to or amend an application to be more likely to meet the burden which the General Council has established.

At bottom, of course, the actual decisions which are made on enrollment applications are

for the Community alone to make. A person who clearly traces his or her lineage to a Mdewakanton who clearly resided in Minnesota on May 20, 1886 is not entitled, as a matter or right, to membership in the Community. He or she can be rejected by the General Council on any basis the General Council deems appropriate. But the language of Section 6 of the Enrollment Ordinance which the General Council adopted does, in the Court's view, require that before the General Council considers any appeal from an Enrollment Committee rejection, the applicant be given some real idea of the basis for the Enrollment Committee's actions.

The Enrollment Ordinance provides that unsuccessful applicants for enrollment in the Community can reapply for membership at any time. Therefore, if the Plaintiffs reapply for membership, and if they are again rejected by the Enrollment Committee, such rejection should convey more information about the Enrollment Committee's views than did the previous rejections. At present, however, inasmuch as the Plaintiffs have no presently pending enrollment applications before the Community, this matter must be dismissed.

ORDER

For the foregoing reasons, and based on all the pleadings and materials filed herein, this matter is DISMISSED.

December 22, 1999

Judge John E. Jacobson

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

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Marriage of	)	
	)	
John J. Vig, Sr.,	)	
	)	
Petitioner,	)	
	)	
and	)	Court File No. 306-98
	)	
	)	
Patricia Ann Vig,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

This matter came on for hearing on January 11, 2000, on the Petitioner's Motion to Reopen the Judgment and Decree ("the Judgment") herein. The Judgment was originally filed on August 19, 1998, and was amended in accordance with a stipulation of the parties on November 18, 1998. The Judgment allocated certain property of the parties and was based on a Marital Termination Agreement, signed by the Petitioner on July 28, 1998 and by the Respondent on July 29, 1998, and filed with the Court on August 3, 1998. The Amended Judgment was based on a Stipulation signed by the Petitioner on October 29, 1998 and by the Respondent on November 10, 1998, and filed with the Court on November 18, 1998.

The Petitioner's Motion to Reopen is made under Chapter III, section 5.g. of the Shakopee Mdewakanton Sioux (Dakota) Community Domestic Relations Code ("the Domestic Relations Code"), adopted by General Council Resolution No. 5-23-95-002 (May 25, 1995). That Section provides:

g. Modification of Property Award.

All divisions of real and personal property provided by this Section (5) shall be final, and may be revoked or modified only where the Court finds the existence of one of the following:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under the Shakopee Mdewakanton Sioux (Dakota) Community Rules of Civil Procedure;

(3) Fraud, whether denominated intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party;

(4) The judgment and decree or order is void; or

(5) The judgment has been satisfied, released, or discharged, or a prior judgment and decree or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment and decree or order should have prospective application.

A motion for modification must be made within a reasonable time, and for a reason under clause (1), (2), or (3), not more than one year after the judgment and decree, order, or proceeding was entered or taken. A motion under this subsection does not affect the finality of a judgment and decree or order or suspend its operation. This subsection does not limit the power of the Tribal Court to entertain an independent action to relieve a party from a judgment and decree, order, or proceeding or to grant relief to a party not actually personally notified as provided in the Shakopee Mdewakanton Sioux (Dakota) Community Rules of Civil Procedure, or to set aside a judgment for fraud upon the Court.

Under this section, the grounds asserted by the Petitioner in support of his Motion to

Reopen are two. First, he asserts that at the time of the dissolution the Respondent agreed, should she ever decide to sell a business named "Buffalo Spirit", which she was awarded under the Judgment, then she would first offer to sell the business to the Petitioner at "an agreed price" (Petitioner's Memorandum of Law, at 2 (filed Nov. 18, 1999). Second, he asserts that he and the Respondent agreed that, should any court enforcement of the Judgment be sought, it would be sought in this Court. In an affidavit supporting his Motion, Petitioner alleges that Respondent has failed to comply with these two agreements or understandings. Specifically, he alleges that several months after the date of the Judgment she sold the "Buffalo Spirit" business to the Petitioner's son at a price which the Petitioner contends was inflated; and when, reacting to that sale, the Petitioner ceased making maintenance payments under the Judgment, the Respondent sought enforcement of the Judgment in the District Court for Scott County, Minnesota. (The record reflects that the Scott County District Court granted the Respondent's motion for relief, but stayed the effectiveness of its Order for sixty days pending this Court's consideration of the Petitioner's motion.)

The Respondent advances several arguments in opposition to the Petitioner's Motion. First, she contends that the Motion is not timely, under the above-quoted provisions of section 5.g., for several reasons. She asserts that section 5.g. should be interpreted to mean that the one-year reopening period began to run on August 19, 1998, when the original Judgment was filed -- noting that the November 18, 1998 amendment to the Judgment was unrelated to the portions of the Judgment which the Petitioner seeks to reopen by his present motion. She also asserts that, even if the one-year period commenced with the filing of the November 18, 1998 amended Judgment, still the Motion to Reopen was not timely brought because, although the

Motion was served on Respondent's counsel in the Scott County District Court proceeding on November 18, 1999, she herself was not served until several days later and, she contends, her counsel in the Scott County District Court proceedings had no authority to represent her or accept service in proceedings before this Court. Also, at oral argument, her counsel asserted that even if there had been authority in counsel to accept service, still service would not have been timely because, in computing the one-year period for the section the day of the filing of the Judgment should be counted, so the last possible day for service under section 5.g. would have been November 17, 1999. Lastly, the Respondent argues that, on the face of the Judgment and the agreements on which the Judgment was based, there are no grounds for reopening the matter.

Following the parties' oral argument, I ruled from the bench that the Respondent's last-described argument seemed to me to be correct, and that I therefore was not obliged to reach and decide her other arguments. This Memorandum memorializes that decision.

In my view, the Marital Termination Agreement is decisive both on the Petitioner's contention that the Respondent was obliged to offer the "Buffalo Spirit" business to him, and on his argument that this Court somehow was designated by the parties as the only forum for resolving disputes that might arise under the Judgment. Therefore, on the face of the Motion to Reopen there are not adequate grounds stated under Chapter III, section 5.g. of the Domestic Relations Code.

The Marital Termination Agreement says this:

> 10. **BUSINESS -- "BUFFALO SPIRIT"**. Wife is awarded all right, title, possession, interest and equity in and to the parties [sic] business, named "Buffalo Spirit", located at 2400 Mystic Lake Blvd., Prior Lake, Minnesota 55372.

> Wife agrees to assume all liability associated with or related to the business and shall indemnify and hold husband harmless from any obligation to make payment of the same.

The Marital Termination Agreement also says this:

> 32. **COMPLETE AGREEMENT.** The parties have made this agreement intending that it be a full, complete and final settlement and satisfaction of any and all claims of any kind nature or description which involves issues addressed in the Agreement to which either party may be entitled or may claim to be entitled, now or in the future, against the other. Except as is expressly provided herein to the contrary, each is released from any and all further liability of any kind, nature or description whatsoever to the other.

And when the Judgment was amended by the parties Stipulation in November, 1998, substantially identical terms were included in the Stipulation and in the amended Judgment.

Under these circumstances, in my view it simply cannot be argued that there could be any legally enforceable understanding or agreement that conditioned or limited the Respondent's rights in "Buffalo Spirit". The Petitioner formally agreed, before this Court, not once but twice, that the Respondent was being given "all right, title, and interest" in the business, and that the agreements which were filed with the Court comprised the entirety of the parties enforceable bargains -- that neither party had any other agreement or obligation to the other. Therefore, on the face of the documents filed in this matter the Respondent had the right to sell "Buffalo Spirit" to any person at any price she chose. No oral agreements or understandings can properly be alleged to alter that right.

Similarly, the Marital Termination Agreement and the subsequent Stipulation are absolutely silent on the subject of enforcement. There is nothing within them that can be read to create exclusive jurisdiction in this Court. (Indeed, it is not clear to me that, if there were such a provision, it would be enforceable in all circumstances; but happily that question is not

before me).

Hence, I have concluded that the Petitioner's Motion to Reopen on its face does not state adequate grounds under Chapter III, section 5.g. of the Domestic Relations Code.

ORDER

For the foregoing reasons, and based on all pleadings and materials filed herein, the Petitioner's Motion to Reopen the Judgment in this matter is DENIED.

January 11, 2000

John E. Jacobson
Judge

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

FILED
JAN 12 2000

JEANNE A. SZULIM
CLERK OF COURT

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

COUNTY OF SCOTT STATE OF MINNESOTA

The Business Council of the Shakopee Mdewakanton Sioux (Dakota) Community, on its own behalf and on behalf of the Shakopee Mdewakanton Sioux (Dakota) Community,	)	
Plaintiff,	)	
vs.	)	File No. 00-421
A group calling itself T.I.M.E. Working Committee of the General Council,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter was filed on January 11, 2000. In the Complaint, the Plaintiffs allege that the Defendant group has been holding itself out to members of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") to "undermine and expropriate for itself the governmental power" of the Community's government. (Complaint, ¶6). The specific actions which the Defendant group is alleged to have taken include drafting and distributing a notice of and agenda for a meeting, which was to be held on (and which apparently was held on) January 11, 2000, in Minneapolis, Minnesota. The letterhead on the agenda identifies its sender as "Shakopee 2000", and gives an address of P.O. Box 15025, Minneapolis, Minnesota. The

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letterhead uses the seal of the Community. (Complaint, Ex. 2). The body of the agenda includes a number of matters that, if they were to be effectively dealt with, clearly would require the exercise of the governmental power of the Shakopee Mdewakanton Sioux (Dakota) Community, such as "Approval of Current Voting Members' List", "Enrollment of Constitutionally Qualified Persons", "Approval of Tribal Election Ordinance", "Nomination and Election of Officers of the Business Council", and "Amendment of By-Laws". (Ibid.). The Defendant group also allegedly circulated a list captioned "74 Constitutionally Qualified Members Who are Eligible to Vote in the Shakopee Tribal Election for Officers of the Community in January, 2000". (Complaint, Ex. 4). A casual perusal of that list reveals that the Community's current Chairman, Vice-Chairman, and Secretary-Treasurer do not appear, and that the names of a number of persons who have unsuccessfully sought membership through litigation in this Court do appear.

The Plaintiffs seek injunctive and declaratory relief against the Defendant group, to prevent it from holding itself out as possessing or exercising any powers of the Community's government; and the Plaintiffs seek a Temporary Restraining Order, under Rule 65 of this Courts Rules of Civil Procedure, restraining the Defendant group and its members form "taking, or purporting to take any action under the guise of General Council or Business Council authority, and from disrupting, or attempting to disrupt normal Community government and business operations", or "attempting to interfere with the Community's normal election processes". (Proposed Temporary Restraining Order, filed December 11, 2000).

The undersigned Judge held a hearing on the Plaintiff's Motion for Temporary Restraining Order by a telephonic conference, on the record, beginning at 1:00 p.m., December

12, 2000. Participating on behalf of the Plaintiffs were Andrew Small, Esq. and Jack Blair, Esq., of the law offices of Bluedog, Olson & Small, P.L.L.P.. William Hardacker, General Counsel for the Community, was present on the conference call but did not participate. Also present on the conference call was James H. Cohen, Esq., who is identified in the Complaint as being an attorney and advisor to the Defendant group. The Plaintiffs filed with the Court an affidavit of Ms. Danielle Olson, which stated that on January 10, 2000 she served Mr. Cohen with a true copy of the Summons and Complaint, Motion for Temporary Restraining Order, and supporting papers on Mr. Cohen. The Plaintiffs also filed an affidavit of Mr. Scott A. Gray, stating that on January 11, 2000 he left copies of the pleadings in a meeting at Suite 100 of the Minneapolis Grain Exchange. However, during the telephonic hearing Mr. Cohen denied knowing who the Defendant group was, denied having been served with the pleadings herein, and denied having any knowledge or the contents of the pleadings.

During the telephonic hearing, Mr. Small argued that the actions of the Defendant group could work great harm to the Community if its pretense to governmental authority were not the subject of a Restraining Order. Mr. Cohen responded by contending that it seemed to him that the actions complained of were simply those of disgruntled Community members who were voicing their protest against actions of the Community government.

At the conclusion of Mr. Small's and Mr. Cohen's argument, I denied the Community's motion. As I made clear on the record, my reasons for doing so had nothing whatever to do with any notion that there is any legitimacy to the actions of the Defendant group as those actions are outlined in their "agenda" and "membership list". To the contrary, the body of caselaw built up over the years in this Court makes it abundantly clear who the Community's

government is, and who constitutes the Community's membership. Instead, the reasons for my denying temporary relief largely lie in the transparency of the pretense which the Defendant group is engaged. It is absolutely clear that no governmental authority could be or has been invoked by their activities. I suspect that the plain truth of that statement is evidenced by the fact that when Mr. Gray, the process server, entered the group's meeting room yesterday he found only five persons present.

The right of persons to express views which differ from those of the majority, and are contrary to those of the government of the Community, is a profoundly important one. It is embodied in Article VI of the Constitution of the Community, and is protected by the Indian Civil Rights Act of 1968, 25 U.S.C. §1326 (1994). The right protects the expression of views that are contrary to the views of the majority -- indeed, that is its primary purpose, since it is unlikely that efforts would be made to stop the expression of popular views. The right also protects the expression of views that are demonstrably false. Clearly, however, the right does not extend to expressions where there is a clear and present danger of direct and tangible harm following from them -- classically, one cannot yell "Fire!" in a crowded theater. But in my view, the facts that are before the Court do not present such a case. The efforts of the Defendant group are patently those of persons without a legitimate claim to governmental authority, and harm of the sort which is required to override their rights to free speech has not been demonstrated to flow from their actions.

ORDER

For these reasons, the Plaintiffs' Motion for Temporary Restraining Order is DENIED.

January 12, 2000

Judge John E. Jacobson

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COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In the Matter of:	)	
	)	
The Children's Trust Funds Created	)	
Under Shakopee Mdewakanton Sioux	)	File No. 374-99
Community Ordinance Number 12-29-88-002	)	
With Trust Agreement Dated	)	
September 9, 1992	)	

MEMORANDUM OPINION AND ORDER

Summary

This matter concerns trusts which the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), as Settlor, established for certain children by a trust agreement ("the Trust Agreement") dated September 9, 1992.

The Trust Agreement is a fairly straightforward document. In its section 1.02, it recites that it establishes a trust pursuant to Section 6 of the Community's Ordinance No. 12-29-88-002 (commonly referred to as the "Business Proceeds Distribution Ordinance" or "BPDO"). In its section 1.01, it states that the Community has created individual trusts for individual children; and it provides that the assets of those separate trusts are to be combined, under the Trust Agreement, into a single trust for ease of administration. Its section 1.03(3) expressly makes the Trust Agreement and all the trusts created under it revocable "by a written instrument executed by the Business Council after such revocation is approved by a majority vote of those

voting members present at a General Council meeting in which a quorum exists". Its section 1.03(1) unambiguously reserves to the Business Council the power "[t]o appoint additional and successor trustees and to remove any acting trustee by a written instrument executed by the Business Council". And its section 5 provides--

> Except as modified by this agreement, the rules of law and statutes of the Shakopee Mdewakanton Sioux Community and/or the State of Minnesota, insofar as legally possible, shall govern in all respects the validity, interpretation and enforcement of this agreement and all matters of trust administration under this agreement.

For more than seven years, from the date the Trust Agreement was originally signed until December 30, 1998 -- Merrill Lynch Trust Company of America ("Merrill Lynch") was the sole trustee. There is nothing in the record which suggests that Merrill Lynch experienced any particular concern relating to the Business Council's authority to execute the Trust Agreement in 1992, or any difficulty in interpreting the Trust Agreement or establishing appropriate legal frames of references for the investment and administrative functions required by the Trust Agreement. Nor is there anything suggesting that anyone found fault with Merrill Lynch's actions. To the contrary, in a Stipulation which the Community's Business Council and Merrill Lynch placed before this Court on October 26, 1999, it was agreed that all of Merrill Lynch's accountings, investment decisions, and distributions of trust assets should be confirmed by the Court -- save for two issues, which I decide today.

On August 29, 1998, the Business Council of the Community, acting under the above-noted express powers in the Trust Agreement, voted unanimously to replace Merrill Lynch as trustee, effective December 30, 1998, and to designate as successor trustee the person who is acting from time to time as the Community's Controller. The Business Council at that time also

decided to make certain changes in the trust arrangements, which are discussed below.

After receiving notice of the Business Council's decision, Merrill Lynch consulted the Minneapolis law firm of Leonard, Street, & Deinard, P.A. for advice on matters relating to the authority of the Community and the Business Council, the validity of the Business Council's decision, and other matters relating to the Trust Agreement. Eventually, Merrill Lynch initiated an action in the District Court for Hennepin County, Minnesota, asking that Court to exercise jurisdiction over the Community and the assets that were managed under the Trust Agreement, seeking a determination as to the Business Council's authority to execute the Trust Agreement, and the conformance of the Business Council's substitution of trustees with the Community's law and the Indian Gaming Regulatory Act of 1988.

The Community and the Business Council resisted that action, contending that neither the District Court for Hennepin County nor any other court of the State of Minnesota had jurisdiction over the Community or its officers, and that this Court was the appropriate forum for the resolution of any questions that might arise under the Trust Agreement. On June 1, 1999, the Community filed the present action before this Court.

During the period that led up to and followed the filing of the present action in this Court, Merrill Lynch and the Community engaged in discussions aimed at resolving the questions posed by Merrill Lynch in its Hennepin County District Court action. One issue which concerned Merrill Lynch was the extent to which notice of the Business Council's actions, and of the proceedings in this Court and in the Hennepin County District Court, should be given to various classes of children who were or who might be beneficiaries under the Trust Agreement. At least in part, this issue apparently arose because, when the Business Council

made its decision to replace Merrill Lynch as trustee, it also decided to alter the way in which trust assets pass in the event that a child for whom a trust account has been established dies before he or she attains the age of eighteen years. Before the Business Council took its actions, the estate of a deceased minor child would receive any trust assets that had been held in the trust for that child, whereas after the Business Council's action the trust assets that would have gone to the child pass to the Community. Inasmuch as the Trust Agreement is expressly revocable, the rights of minors to any monies held by the trust is contingent only. And, given that fact, the Business Council apparently took the position that no notice needed to be given to the children or the parents or guardians of the beneficiary children who were not yet eighteen years of age; and Merrill Lynch apparently was concerned about the correctness of that view[1].

Eventually, the notice question was resolved without extensive briefing or argument: after conferring with the parties, this Court advised them that notice of the proceedings should be sent to all children (or their parents or guardians) who had contingent interests under the trusts, and the Business Council duly provided such notices. Conferences between the parties also produced an agreed-upon procedure by which this Court and the Hennepin County District Court each would be presented with a stipulation ("the Stipulation") consenting to the entry of an Order generally confirming Merrill Lynch's actions as trustee. Consequently, on October 26, 1999, in accordance with the Stipulation, this Court entered agreed-upon Findings of Fact, Conclusions of Law, and an Order; and on the same date the Hennepin County District Court entered a similar Order.

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[1] The word "apparently" in this sentence is used advisedly: the record before the Court contains references to these concerns, but it seems likely that a substantial amount of material was generated by the parties which was not filed with the Court.

These events resolved all matters that might have been at issue between the parties, save two. The Stipulation identified two remaining unresolved matters: (1) the extent to which legal fees incurred by Merrill Lynch after the August 29, 1998 notice should be charged to the trusts, and (2) the extent to which Merrill Lynch should receive the trustee's fees contemplated by the Trust Agreement, for the period after December 30, 1998.

The legal fees incurred by Merrill Lynch with the Leonard, Street, & Deinard firm totalled $476,694.58. Merrill Lynch and Leonard, Street, & Deinard are of the view that the entirety of that amount should be paid by the trusts. The Community, on the other hand, contends that the vast bulk of the attorney's fees claimed by Merrill Lynch were incurred only to protect Merrill Lynch, not to protect either the trust assets or the beneficiaries' rights, and therefore those fees should not be reimbursed by the trusts.

The trustee's fees for the period December 31, 1998 through August 30, 1999[2] total an additional $108,068.68. Merrill Lynch argues that it continued to perform the trustee's functions during that period, and therefore should receive the compensation which the Trust Agreement contemplates for such services. The Community argues that Merrill Lynch was unambiguously terminated as trustee under the Trust Agreement on December 30, 1998, received no additional assets from the Community after that date, made no distributions or investments after that date, and therefore is entitled only to any actual costs and expenses which it incurred in winding up its trustee's responsibilities.

In the Stipulation, the parties agreed that both of these issues would be submitted to this

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[2] Merrill Lynch waived any claim to trustee's fees for the period from September 1, 1999 through October 26, 1999.

Court for decision. Thereafter, Merrill Lynch submitted copies of the Leonard, Street, and Deinard billings; the Community submitted an affidavit of one of its attorneys outlining the manner in which the parties and their attorneys had interacted during the period in question. And both parties submitted three-page letter briefs discussing the fee issues.

I have reviewed all of the materials submitted by the parties, and have considered case law generally applicable to trustees' legal fees in Minnesota and other American jurisdictions. To some extent, as I will explain below, it has been difficult for me to ascertain, from the materials presented by the parties, what the nature was of significant amounts of work described by the itemizations in the Leonard, Street, and Deinard billings. But it is clear that Merrill Lynch and Leonard, Street, & Deinard have the burden of establishing that the trusts should pay the trustee's legal fees and, for most of those fees, they have not met that burden. Although some of the work done by Leonard, Street & Deinard clearly did relate to valid concerns about the rights of the trusts' beneficiaries, and arguably did bring a benefit to them, it seems to me that most of the firm's billings arose from work done to protect Merrill Lynch itself. In addition, it seems to me that the amount of legal work done was far out of proportion to the issues presented.

I also have concluded that the Community is correct when it argues that Merrill Lynch should not receive full trustee compensation for the period after it had unambiguously been terminated from that function by the Community entity which, under the Trust Agreement.

Discussion

In Minnesota, and in American jurisprudence generally, a trustee is entitled to

reimbursement from the trust for attorneys fees when the trustee is obliged to bring an action primarily for the benefit of the trust for the purpose of clarifying ambiguous language in the trust instrument, but this general principal is subject to clear limits:

> In the sound and cautiously exercised discretion of the court, and not as a matter of right, attorney's fees and other expenses reasonably and necessarily incurred by all necessary parties to litigation may be allowed and properly charged to the trust estate where such litigation, with respect to substantial and material issues, is necessary to resolve the meaning and legal effect of ambiguous language used by the settler in the trust instrument, if adjudication is necessary to the proper administration of the trust, and if, without unnecessary expense or delay, the litigation is conducted in good faith for the benefit of the trust as a whole.
>
> In re Atwood's Trust, 35 N.W. 2d 736, 740 (Minn. 1949); see also In re Great Northern Iron Ore Properties, 311 N.W.2d 488 (Minn. 1981).

Several elements of this rule deserve emphasis here. First, the decision as to whether attorney's fees should be awarded rests with the discretion of the court, which will consider whether the services of the applicant have been reasonable and of benefit to the estate. See generally, Bogert, The Law of Trusts and Trustees, at 559 (Rev. 2nd Ed. 1980). See also, In re Hormel, 504 N.W.2d 505, 513 (Minn. App. 1993); In re Vokal's Estate, 263 P.2d 64, 69 (Cal. App. 2d 1953); Phillips Exeter Academy v. Gleason, 157 A.2d 769, 777 (N.H. 1960); A.M. Swartout, Annotation, "Allowance of Attorneys' Fees in, or Other Costs of, Litigation by Beneficiary Respecting Trust", 9 A.L.R.2d 1132 (1950).

It is clear, under the Atwood doctrine and the stream of cases of which it is a part that where a trustee sues to construe a trust instrument no attorneys' fees should be allowed if the suit was unnecessary. Ferguson v. Rippel, 92 A.2d 647, 652-53 (N.J. Super. 1952), cert. denied 94 A.2d 548 (N.J. 1953). See also, Bank of Mississippi v. Southern Memorial Park, Inc., 677 So.2d 186, 191-92 (Miss. 1996); and 9 A.L.R.2d 15.

It also is clear, under Atwood and similar cases, that where a trustee employs an attorney for the trustee's benefit and not for the benefit of the estate, the trustee who must pay the attorney without reimbursement from the trust estate. Scott and Fratcher, The Law of Trusts, 188.4, at n. 10 (4th Ed. 1988).

To apply these doctrines in the present circumstances, I have carefully scrutinized the materials submitted by Merrill Lynch. The sole source of the documentation provided to the Court with respect to the legal fee issue is the collection of itemized monthly billing statements of the Leonard, Street & Deinard firm; I find that much of this documentation is sketchy as to the exact nature of the legal work done by the firm; and the materials which were filed of record in this case as it progressed do not shed substantial additional light on the matter. In short, it is extremely difficult for me to divine the nature of large amounts of the legal work that was undertaken.

Specifically, during November and December, 1998, the period immediately preceding the effective date of the Business Council's notification that Merrill Lynch was being replaced as trustee, the Leonard, Street & Deinard billings to Merrill Lynch totalled $34,260.00. Some of the itemized work during that period had a clear purpose and some apparent relationship to a legitimate concern for the welfare of the trust's beneficiaries -- for example, in December, 1998 a number of work entries related to "Legal research regarding trustee duties", to "a trustee's duties to beneficiaries in a revocable trust", and to "notice requirements for revocation of a trust". But those entries account for only a very small portion of the law firm's bill during the period. The vast bulk of the billing appears under amorphous headings like "prepare legal strategy regarding response to Community's August 28, 1998 notice", and "Study and analysis

of various trust issues". Indeed, in the two months of November and December, 19998, those two descriptions or close variants of them accounted for at least the following hours of work: 6.00, 4.75, 4.00, 5.00, 5.00. 4.00, 4.75, 8.00, 9.00, 5.00, 9.00, 7.50, 2.00, 1.75, 7.25, 4.00, 5.25, 1.00, 5.00, 3.00, 2.00, 2.50, and 1.50. Those hours were generally billed at the rate of two hundred dollars per hour.

This same pattern continued in January, 1999. Research on "various trust issues" continued, and beginning on January 11, 1999, work began on preparation of a Petition for Discharge of the trustee. During January, those two descriptions covered at least the following hours: 10.00, 6.00, 9.00, 10.25, 1.50, 5.00, 4.00, 3.75, 3.50, 1.50, 4.75, 0.50, 2.00, 4.50, 6.00, 1.50, 4.50, 1.50, 7.75, 0.50, 7.50, 1.50, 8.00, 8.00, 0.50 and 8.00. Again, the general billing rates ranged from two hundred dollars to two hundred and forty dollars per hour. The total bill for the month was $29,263.37.

During February, 1999, a considerable amount of the legal activity apparently was devoted to issues respecting notice to beneficiaries of the trusts. However, a considerable amount of activity also involved discussions with attorneys for the Community about "alternatives" to the Petition for Discharge that had been the subject of so much work in January, and research evidently was done on the question of whether or not a Minnesota state court had jurisdiction over the assets of the trust. In addition, a significant number of hours were spent analyzing a motion the Community evidently made to seal the file in the Hennepin County District Court proceeding. In all, 178 hours of legal work were billed, about half of which were at a rate of $200.00 per hour or more. The total bill for the month was $30,624.04.

During March, work relating to providing notice to trust beneficiaries appears to have

predominated. Substantial research was done aimed at obtaining addresses for beneficiaries and their families, and the dominant rates at which the work was billed was lower than in previous months -- from $115.00 per hour to $160.00 per hour. However, a substantial amount of work, totalling perhaps one-third of the $28,393.91 total bill, involved "legal strategy" and assessing undefined "risks and benefits" of various possible tacks which Merrill Lynch might take.

April and May saw a remarkable increase in billing. The total bill for the work done in those two months was $122,181.43. Included are such items as "outline arguments with respect to lack of tribal court jurisdiction; review Mdewakanton Sioux Community constitution and ordinances creating judicial court and defining jurisdiction", and "[s]tudy and analysis of Shakopee Ordinance creating judicial court". Considerable work was done in responding to a motion in which the Community evidently had asked the Hennepin County District Court to dismiss the Petition proceedings for want of jurisdiction. Dozens of hours were spent researching issues such as "subject matter jurisdiction". Tens of thousands of dollars were expended on memoranda. Some of this work apparently had to do with the potential recusal of the Hennepin County District Judge to whom Merrill Lynch's Petition had been assigned. Other aspects of the work had to do with notice should be given to trust beneficiaries. Other aspects, perhaps the dominant share of the work, seemingly had to do with resisting a motion to dismiss which the Community apparently had filed in response to Merrill Lynch's Petition in Hennepin County District Court. And the exact nature of other aspects of the work -- significant numbers of hours -- is just not clear from the billing records. It is clear, in any case, as late as May 11, 1999, research described as "Analyze U.S. Supreme Court decisions regarding state court jurisdiction over Indian tribes" -- work which one certainly would have expected to have been

comprehended in the substantial effort that preceded the filing of the Petition in Hennepin County -- was still being done. In all, in those two months, the firm billed a total of 646.5 hours of work, sixty percent of which was done at a rate of $185.00 per hour or more.

In June, the work continued at the same great rate. Two hundred and fifty-six hours of work was billed. Some of this work still clearly had to do with ascertaining the nature of the interests of trust beneficiaries, and providing appropriate notice to them. Other aspects of the work had to do with responding to one or more subpoenas which apparently had been served upon Merrill Lynch by the Community. More work was done aimed at resisting the Community's motion to dismiss. Research was done on "case law regarding enforcement of contracts with Indian tribes in Public Law 280 jurisdictions and abstention doctrine issues raised in Community's reply memorandum". Work was done relating to a letter to the Secretary of the Interior "regarding request for clarification...with respect to Community's Constitution and other laws". Evidently, Freedom of Information Act requests were made to the United States Department of the Interior. On June 30, work was done to "[a]nalyze cases regarding exhaustion of tribal court remedies...". The bill for the month was $52,471.30.

In July, a new high in billing occurred. The total of the fees billed in that month was $77,661.25. Some billings related to "tribal exhaustion and challenge to enforcement of state court judgment" and "the rule in Williams v. Lee". Sixteen entries were simply denominated "Continue legal research". Many others entries are equally unspecific. Clearly, in any event, the dominant issue for Merrill Lynch and its attorneys in July continued to have to do with whether the Hennepin County District Court had jurisdiction over its Petition, and whether this Court had any legitimate role to play with respect to the Trust Agreement.

In August, settlement discussions with the Community appear to have dominated the legal work. The entry "Continue research regarding issues raised by Community's revised settlement proposals" appears nineteen times. The total bill for the month was $60,145.76.

September saw a decrease in activity. Early in the month, this Court notified the parties that if a consent judgment were to be brought before it, notice should be provided to all trust beneficiaries -- both those who possess vested interests and those whose interests are contingent. This decision was communicated to the parties as a matter of judicial administration: the parties had not ever briefed or argued the issue to the Court. The legal work which followed appears mainly to have involved preparing the Stipulation, and the Findings of Fact, Conclusions of Law, and Order that were eventually presented to this Court and to the Hennepin County District Court. The total bill for the month was $20,141.66.

October saw the conclusion of the dispute between the parties. Interestingly, at least one billing item for the month -- which was billed to Merrill Lynch -- is "telephone conference with Todd Zuckerbrod and Sara Fortunoff regarding billing issues; office conference regarding same". During the month, the final Stipulation and implementing documents were prepared, and short hearings were held in this Court and in the Hennepin County District Court, at which time the Stipulation was accepted and the Orders were entered. The total bill for the month was $27,236.07.

As I remarked above, I find many of the billing entries for these months opaque. And clearly, when the purpose of a billing is unclear then the burden of the trustee to establish a trust-related purpose for the work has not been carried. In addition, I find that the bulk of the litigation expenses incurred by Merrill Lynch were for its own protection, and not for the benefit

of the trust; and I find that, in any event, these expenses were substantially higher than reasonably necessary to resolve the core issue that was of importance to the trust. It seems clear that an action was commenced in a State court, and long after commencement of that proceeding research still was being done on fundamental jurisdictional issues -- despite the fact that very significant research and drafting expenditures had been incurred before the filing.

In my view, the situation here is similar to that in In Re Corcoran Trusts, 282 A.2d 653 (Del. Ch. 1971), aff'd.sub nom. Bankers Trust Co. v. Duffy, 295 A. 2d 725 (Del. 1972). There, the trustee sought leave of the court to account on behalf of itself and all predecessor trustees concerning their respective acts in the administration of three inter vivos trusts. No request for judicial accounting and settlement had been made by any trust beneficiaries, and none of the trust instruments required such an accounting, and in fact the beneficiaries and the guardian ad litem objected to certain parts of the accounting. Id. at 655-56. The court concluded that the request for accounting primarily desired by the trustee for its own protection, that is, for the protection of "the present sole and successor trustees and its predecessors from the risks of future suits". Id. at 653, 656. Consequently, the court allowed only twenty-five percent of the claimed attorneys fees--the amount attributable to legal work that the court determined actually benefited the trust. The Delaware Supreme Court subsequently affirmed the decision, concluding, "It seems patently clear that the immunization from liability of the trustees does not benefit the trust but only the trustees individually". 295 A.2d, at 727.

It is apparent to me here that, as in the Corcoran/Bankers Trust situation, the primary benefit of the litigation undertaken by Merrill Lynch in the Hennepin County District Court, and in this Court, for that matter, was to the trustee and not to the trust. Moreover, the legal issues

raised and the time expended in the wholly unnecessary (from the point of view of the trust) foray into state court, went well beyond the need to simply determine whether Merrill Lynch had been properly discharged and replaced. The only real issue in that regard was whether all of the beneficiaries, regardless of whether their interest was vested, were entitled to notice of these proceedings and an opportunity to be heard. That issue could have been resolved simply by petitioning this Court for guidance -- indeed, it in fact was resolved by this Court without the need for extensive argument or conflict.

I do think it is clear that some portion of the legal work performed during this period was directed at ensuring that the interests of trust beneficiaries were protected, and that all beneficiaries received appropriate notice. But it is impossible for me to precisely determine what amount of the work falls into that category, so I am obliged to be arbitrary, to some extent. I have spent a considerable period of time trying to get an accurate and fair sense for the billings and the work, and I am comfortable that fifteen percent of it had a purpose other than simply protecting Merrill Lynch. Therefore, I today hold that fifteen percent of Leonard, Street and Dienard's legal fees, or $71,504.18 ($476,694.58 x .15), should be reimbursed by the trusts.

That leaves only the issue of the Trustee's fees before me. The allowance of compensation to a trustee, like the allowance of attorneys fees, "lies within the discretion of the trial court". In re the Trust Created by Voss, 474 N.W.2d 199, 201 (Minn. 1991). One of the factors relevant to the exercise of this discretion is whether the trustee has performed "all of its duties." Id. As in the case of attorney's fees, a court may withhold all or part of a trustee's compensation if the trustee is "of any breach of conduct." Workman v. Workman, 118 N.W.2d 764, 782-83 (Neb. 1962). See also, Heller v. First National Bank of Denver, 657 P.2d 992,

993 (Colo. App. 1982). Application of these principles to the present case leads me to the conclusion that Merrill Lynch should be allowed some but not all of its claimed fees.

Specifically, it seems clear to me that the legal course which Merrill Lynch chose, and the striking amount of legal work undertaken along that course, complicated and delayed the resolution of this matter past what reasonably could be allowed, even assuming that there were issues relating to protecting the trusts' beneficiaries which required attention. In this regard, I think LaSalle Nat. Bank v. McDonald, 188 N.E.2d 664 (Ill. 1963) is instructive: where litigation brought by the trustee extended past the point of reason, trustees fees should be denied to the trustee who was responsible for the delay.

I note that from the date the Community filed its Petition before this Court, June 17, 1999 to the date that all matters save the fee issues were resolved between the parties, October 26, 1999, was just over four months; and I do not think it is unreasonable to use that period as the one for which trustee's fees should be paid.

The Community argues that trustee's fees also should be reduced because during most of the period during which the Community and Merrill Lynch were disputing matters in judicial forums, the Community was not making new deposits of funds with Merrill Lynch. That argument is not without force, but the fact remains that Merrill Lynch still managed and was responsible for the bulk of the trusts' assets; and there has been no suggestion made that those duties were performed in an inappropriate manner.

I therefore have concluded that Merrill Lynch should be paid full trustee's fees for a period of four months out of the nine months in dispute between the parties. It appears from the materials attached to Merrill Lynch's letter brief dated November 2, 1999, that the trustee's

fees amount to about $12,000 per month. Therefore the Court will direct that trustees' fees be paid from the trusts the amount of $48,000.00.

Order

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

1. That the trusts established under the Trust Agreement shall reimburse the attorneys' fees of Merrill Lynch Trust Company of America in the amount of $71,504.18;

2. That the trusts established under the Trust Agreement shall pay trustee's fees to Merrill Lynch Trust Company of America in the amount of $48,000.00.

February 7, 2000

John E. Jacobson
Judge

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

In re: Trust Under Little Six, Inc. Retirement Plans	)	
Robert Burns, John Somers,	)	
Plaintiff-Interpleaders,	)	
v.	)	Court File No. 055-95
Little Six Inc.,	)	
Defendant-Intevenor,	)	
v.	)	
Leonard Prescott, F. William Johnson, and Peter Riverso,	)	
Defendant-Intervenors.	)	

MEMORANDUM OPINION AND ORDER

SUMMARY

Nature of the Case. This is an interpleader action. In it, I am called on to decide whether this Court has subject matter jurisdiction over a dispute involving a trust instrument, entitled "Trust Under Little Six, Inc. Retirement Plans" ("the Trust") which,

on its face states that it was established by Defendant-Intervenor Little Six, Inc. ("LSI") to fund and support certain employee benefit programs ("the Plans") for select LSI employees. The Plaintiffs ("the Trustees") are two of the named trustees, under the Trust. LSI and the Defendant-Intervenors Leonard Prescott, William Johnson, and Peter Riverso ("the Claimants") state conflicting claims to the assets of the Trust. LSI contends the Trust either was never validly created, or if it was created, nonetheless is revocable, and has been revoked, and therefore any assets held by the Trustees should be paid over to LSI. The Claimants, on the other hand, assert that the Trust is irrevocable, that the Plans all were properly created, that they are beneficiaries of the Plans, and that this Court lacks jurisdiction to hear any matter relating to them by virtue of the provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1500 (1994).

Procedural History. The Trustees commenced this action by filing a "Petition", on April 6, 1995. Thereafter, for a considerable period of time it appeared that the issues which the Trustees raised would necessarily be resolved in the context of broader litigation between LSI and Claimants Prescott and Johnson; but, as I noted in a Memorandum and Order filed in this matter on January 19, 1999, the resolution of that other litigation ultimately turned on issues (the official immunity of the Defendants) which have no dispositive effect on the questions raised by the Trustees. See Little Six, Inc., et al v. Prescott and Johnson, Nos. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). Therefore, this case requires its own resolution.

In accordance with my January 19, 1999 Memorandum Opinion and Order, the Trustees recast this litigation as an Interpleader action by filing a Complaint in

Interpleader[1], on February 17, 1999; and in that framework they sought guidance as to how they should proceed in the face of the conflicting claims of LSI and the Claimants. LSI filed an Answer Nunc Pro Tunc, generally denying that the Trust was properly created by LSI and praying that any assets held by the Trustees be returned to LSI. The Claimants filed an Answer asserting that the Trust was validly created and, as just noted, that this Court is without jurisdiction to grant the Plaintiff's their requested relief.

In my January 19, 1999 Memorandum Opinion I expressed the view that the issue of this Court's jurisdiction and the issue of the validity of the Trust and the Plans appeared be identical. That is, if the Trust and the Plans were validly created, then they would likely be subject to ERISA and to the exclusive jurisdiction of the Federal courts[2], whereas if the Trust and the Plans had not been validly established then ERISA would have no applicability and this Court would have jurisdiction over assets in the possession of the Trustees. Hence, I concluded that an evidentiary hearing was required to ascertain the circumstances surrounding the creation or non-creation of the Trust and the Plans. That hearing was held on October 4, 5, and 5, 1999. Ten witnesses testified, and several thousand pages of documents were received into evidence. Thereafter, LSI and the Claimants each submitted two sets of briefs, discussing their views of the meaning of this mass of evidence.

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[1] Actually, the Trustees termed their pleading a "Complaint in Intervention", notwithstanding my explicit guidance in the January 19, 1999 Memorandum and Order; but it is plain enough that the pleading fits within Rule 18 of the Rules of Civil Procedure of this Court, which incorporate Rule 22 of the Federal Rules of Civil Procedure relating to Interpleader.

[2] Throughout these proceedings LSI has argued that ERISA does not apply to Federally acknowledged Indian tribal governments or to corporations created by such governments. In my January 19, 1999 Memorandum Opinion and Order I discussed LSI's arguments and concluded to the contrary view -- albeit tentatively, because I was not obliged at that time to make a final decision on the issue. Today, I adopt my earlier view as the decision of the Court.

Plans at Issue in the Litigation. In its post-hearing briefs, LSI argued for the first time that, whatever else this Court might have jurisdiction to decide, this case does not properly present any issues with respect to two of the Plans -- the so-called "Separation Pay Plan" and the "Life Insurance Plan". LSI notes that the Plaintiff's Interpleader Complaint alleges that the Trust may be used to provide deferred compensation to LSI employees under three specific plans, called the "Supplemental Retirement Plan" (sometimes called the "SERP" plan, or "SERP I"), the "Executive 457 Plan", and the "Retention Plan" (sometimes called "SERP II"). (Complaint, ¶13.) The Complaint makes no mention of either the Separation Pay Plan or the Life Insurance Plan, apparently because those two Plans were not funded by the Trust. Likewise, the Claimants' Answer, responding to the allegations in the Complaint, does not identify the Separation Pay Plan or the Life Insurance Plan as being at issue in this matter.

LSI asserts that this silence requires the conclusion that no issues properly have been placed before the Court relating to the Separation Pay Plan or the Life Insurance Plan. The Claimants disagree, citing considerations of judicial economy and arguing that, during the hearing on this matter LSI did not object to the presentation of evidence with respect to the Separation Pay Plan and the Life Insurance Plan.

In my view, the Claimants are correct. The validity of all five of the Plans clearly was understood by all participants to be at issue during the three days of evidentiary hearing conducted on October 5 - 7, 1999. This case began only after the Claimants had sought relief in the United States District Court for the District of Minnesota, claiming that LSI improperly was denying them benefits under all five of the Plans. LSI resisted that action, contending that neither the Trust nor the Plans had been validly established under the laws of the Community. The United States District Court

dismissed the Claimants' action to permit the exhaustion of remedies in this Court with respect to the issue the validity of all of the plans put at issue by the Claimants. Prescott v. Little Six, 897 F.Supp. 1217 (D. Minn. 1995). The first paragraph on the first page of the Claimants' Hearing Brief stated the Claimants' view of the issues as follows:

> As this Court has previously directed, the sole issue to be resolved at the hearing is whether or not five separate employee-benefit plans established or maintained by Little Six, Inc. ("LSI") and a related "rabbi trust" created to fund LSI's obligations under some of its plans are governed by [ERISA].

Throughout the three days of the hearing in this matter evidence on all five of the Plans was introduced and discussed both by LSI and the Claimants. There was not a breath of a suggestion by anyone that, in fact, the issue before the Court concerned only three of the five Plans. Nor, in its post-hearing briefs does LSI suggest that any relevant evidence, testimony, or argument exists, or might exist, with respect to the validity of the Separation Pay Plan and the Life Insurance Plan which was not submitted in this proceeding.

In my view, then, the validity of the establishment of all of the five Plans has been placed before this Court. To hold otherwise would subject LSI and the Claimants to an entire new round of litigation -- perhaps more than one round -- which would involve only re-processing old documents, old testimony, and old arguments, at vast additional expense and to no purpose at all.

Conclusion. I have reviewed all of the materials and arguments submitted by the parties, and have concluded that the Trust and all five of the Plans were, in fact, validly created and approved as a matter of law by the LSI Board of Directors. Their procedural and documentary history may be muddled, but from the testimony and the documents

which I review in detail below, it is clear to me that the Trust and the Plans had an actual reality for LSI and its employees, and this fact was understood and accepted by the LSI Board. So, although there may exist no sheet of paper memorializing their approval by the Board of Directors, nonetheless the legal reality is that they were approved by the Board. It is the actual reality of the Trust and the Plans, not any mere paper formality, that controls here.

I also have concluded, as I discuss below, that the Trust and the Plans are governed by the ERISA. The comprehensive sweep of that legislation seems to me to permit no other conclusion. And under ERISA, this Court lacks subject matter jurisdiction over all aspects of the Trust and the Plans, and therefore I cannot provide the Trustees with the relief they seek. Their Complaint in Intervention is therefore dismissed.

FACTUAL BACKGROUND

LSI is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"). LSI operates under the Community's Corporation Ordinance, Ordinance No. 11-05-92-001, and is wholly owned by the Community. See Article of Incorporation of Little Six, Inc. § 4, Little Six, Inc. Exhibit ("LSI Ex.") 4. It was incorporated in March, 1991. Id. It is subject to the ultimate governance of its Board of Directors, and its corporate purpose is to seek to improve the "business, financial, or general welfare of the Corporation, the Members of the Corporation, and the Community." Id. To further this purpose, LSI conducts gaming on the Community's reservation under the terms of the Indian Regulatory Gaming Act (IGRA), 25 U.S.C. § 2701 et. seq. Opening Post Hearing Brief of LSI ("LSI Op. Br.")

at 2.

The salient period of LSI's history, for this litigation, is the period from the corporation's creation through early 1995. During that time, the Claimants served variously as officers, directors and/or managers of the corporation, and during that time the Trust and the Plans were created. Those years saw remarkable success for LSI's businesses, astonishing growth in the corporation's gross revenues and profitability, and concomitant growth in the complexity and demands of its administration. It was a vigorous, turbulent, and often disorganized time.

Not surprisingly, the parties offer markedly different interpretations of the events of that time, and particularly of the circumstances surrounding the creation of the Trust and the Plans. On the one hand, the Claimants presented evidence indicating that the Trust and the Plans were created by LSI in response to competition that the corporation began to experience for qualified high level employees. According to the Claimants, the Trust and the Plans were attempts to deal with the restrictions placed on the ability of a tribal corporation to offer standard employee benefit programs, such as stock options or (at that time) 401K pension plans[3]. Transcript of 10/5/99-10/7/99 Hearing ("Tr.") at 632, 247, 732; Prescott, Johnson, and Riverso Exhibit (PJR Ex.) 1008, 1015, 1077, 1220. Particularly relevant in this regard was the testimony of Mr. David Gilbertson, a former employee of LSI's Human Resources Department who was largely responsible for developing the Plans at issue in this suit. He testified that he was hired in 1992 at least in part to work on developing severance and benefits packages to retain key people

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[3] Given the fact that LSI is wholly owned by the Community, it has no ability to offer stock in itself to its employees; and throughout the time here in question Indian tribes and their corporations were not explicitly included within the universe of entities which were authorized by the Internal Revenue Code to offer 401(k) retirement plans. That latter situation was changed by subsequent Act of Congress.

in the LSI executive structure. Tr. 729-36. Mr. Gilbertson's testimony was corroborated by other contemporaneous documents that indicate a general concern at LSI about retaining key employees. See, e.g., LSI Ex. 39; PJR Ex. 1008, 1015, 1077, 1220. In particular, he testified that each of the Plans at issue in this suit were approved by the LSI Board of Directors at different points in time, and that the main motivation for these benefits packages was the Board's desire to retain top executives. Tr. 729-736 and 743-747.

LSI, on the other hand, is of the view that during the period at issue the corporation was being improperly managed by the Claimants Leonard Prescott and William Johnson, and that the Trust and many of the Plans were hidden from the LSI Board and were never properly approved or adopted by the corporation. LSI points out, and the Claimants admit, that no resolution of the LSI Board of Directors ever has been found which formally approves the Trust, or formally initiates and adopts any of the Plans, or clearly and explicitly delegates to any other entity (i.e., LSI's Executive Committee) the authority to do any of those things. LSI presented testimony by James St. Pierre, Melvin Campbell, Sr., Ronald Welch, and Allene Ross -- each of the persons, other than Mr. Prescott, who served on the LSI Board of Directors during the relevant time period -- and each testified, in one fashion or another, to having no recollection of any Board approval of the Trust or the Plans. LSI argues that the Plans were in fact largely attempts by Mr. Prescott and Mr. Johnson to covertly compensate themselves with little scrutiny from others within LSI or the Community. See Post Hearing Brief of LSI at 4-5. LSI's evidence on this latter point is mostly circumstantial, however: the argument is that Mr. Prescott and Mr. Johnson acted outside of the scope of their authority in creating these plans, and since they themselves benefited from these plans,

their actions must have been motivated purely by self-interest.

But regardless of the motivation Mr. Prescott and Mr. Johnson, in my view the evidence clearly establishes that the Trust and the Plans did, in fact, exist, and that at the time in question the LSI Board of Directors approved of their creation and existence. The evidence shows that until January, 1995, LSI administered and either paid actual cash benefits, or credited cash amounts to deferred accounts, for various LSI employees under all five Plans. See, e.g., LSI Ex. 19-21, 54; PJR Ex. 1039-1047, 1094-95, 1101, 1105-06, 1115-1119. The evidence also shows that each of the Plans included more beneficiaries than just the Claimants Prescott, Johnson, and Riverso. See, e.g., Original Trust Petition, PJR Ex. 1199; LSI Ex. 19, 20, 21; PJR Ex. 1039, 1040, 1043, 1115-1116, 1155-1158, 1165, 1171, 1171-1174. The Life Insurance Plan was available to LSI Senior Vice Presidents, Executive Vice Presidents, and Executive Management employees. PJR Ex. 1051 § D.2(1.1). Under it, LSI paid the insurance premiums and the employee's beneficiaries and LSI divided the death benefit. PJR Ex. 1051 § D.2(1.3). The LSI Executive 457 Plan was designed to be a deferred compensation plan similar to a 401(k) plan. It was open to employees who were in a senior management level or higher class. Ex. 1051 § E at 6. The Separation Pay Plan provided severance benefits when a high-ranking employee left LSI. PJR Ex. § A.2, parts 2-3. Participants in it were to be selected by the LSI Executive Committee. PJR Ex. 1051 § A.2, part 1. The Supplemental Retirement Plan provided deferred retirement benefits for LSI employees holding the title of Vice President, Senior Vice President, Executive Vice President, or Executive Management. PJR Ex. §C.2, part I. Under this plan, LSI put aside a certain percentage of the employee's compensation in an investment account, and these funds would be given to the employee six months after he or she left LSI. PJR Ex.

§ C.2, part 2-4. Finally, the Retention Plan was a deferred compensation plan similar to the 457 Plan. Ex. 1051 § J(1). Participation in it was restricted to upper level management employees who had been with LSI for more than 6 months, and who were selected by the Executive Committee. Ex. 1051 § J(2).

LSI developed detailed descriptions of each Plan. LSI Ex. 457; PJR Ex. 1023, 1024, 1028, 1029, 1032, 1033, 1036, 1051. The descriptions eventually were placed in an employee manual that was prepared by outside counsel for LSI. PJR Ex.1051. The written materials accompanying these Plans, either explicitly or implicitly, indicate that each, and the Trust itself, were considered to be subject to ERISA. See, e.g., LSI Ex. 5, 9, 12, 34; PJR Ex. 1049, 1051 (letter dated February 24, 1993 transmitting manual). LSI distributed copies of plan summaries to participants (Tr., 756-757), and provided participants with detailed annual summaries of the benefits accrued under the plans to date. See, e.g., PJR Ex. 1117, 1118, 1119, 1163.

LSI periodically placed money in the Trust, and Trust assets were used to pay claims under the 457 Plan, SERP I, and the Retention Plan. Tr. 151, 576, 593; LSI Ex. 19, 20, 21; PJR Ex. 1198. Under the Plans, if Trust assets were not sufficient to meet the corporation's liabilities under the plans, LSI was responsible for the remainder, presumably out of its general funds. LSI Ex. 5 at §2(c).

The events which prompted LSI to cease placing money in the Trust began to unfold in 1994. During that year, investigations were launched by Community officials into aspects of the administration of LSI. Mr. Prescott's gaming license was suspended and ultimately revoked by the Community's Gaming Commission (see In re Leonard Prescott Appeal from July 1, 1994 Gaming Commission Final Order, No. 015-97 [SMS(D)C Ct. App. July 30, 1999]). By early 1995, Mr. Prescott, Mr. Johnson, and

Mr. Riverso all had left LSI. Also by that time, a new Board of Directors had been installed, and on January 14, 1995 that new Board passed a resolution specifically stating that LSI never had adopted or approved any of the Plans, and never had formally adopted the Trust. LSI Ex. 26. The Board directed the Trustees to return the funds in the Trust to the Community. Id. The January 14, 1995 Resolution did acknowledge, however, that LSI had incurred liabilities under the 457 Plan and the Supplemental Retirement Plan (or SERP I) for the period from January 1, 1993 and December 31, 1994, and that LSI would authorize payments for these periods under the terms of those Plans. Id. But the Resolution stated that no additional amounts would be credited to participants in these Plans after December 31, 1994, and unilaterally terminated the Life Insurance Plan. Id. The Claimants' litigation in Federal Court and the instant proceedings followed.

DISCUSSION

1. The Validity of the Trust. In my view, all of the elements of a validly formed trust exist here. The Trust instrument states that it shall be governed and construed in accordance with the laws of Minnesota. LSI Ex. 5 at § 13(c). In Minnesota:

> In order to constitute an express trust there must be: (1) a designated trustee subject to enforceable duties, (2) a designated beneficiary vested with enforceable rights, and (3) a definite trust res wherein the trustee's title and estate is separated from the vested beneficial interest of the beneficiary.

Bush v. Crowther, 81 N.W.2d 615, 620 (Minn. 1942).

The Trust instrument in this case clearly indicates that there will always be specifically named Trustees, see LSI Ex. 5 preamble (a) and §§ 9-10, who have defined

duties, see LSI Ex. §§ 3, 5-8, which duties can be enforced in accordance with the laws of Minnesota, see LSI Ex. § 13(c). The Trust provides for designated beneficiaries, see LSI Ex. 5 § 1(c), § 2, who have enforceable rights, see LSI Ex. § 13(c). The Trust also provides for a *res* over which the Trustees hold legal title and the beneficiaries hold a beneficial interest. LSI Ex. 5 § 1. Beyond the four corners of the trust instrument, there is extrinsic evidence in the record too voluminous to catalog which indicates LSI did in fact provide funds for a *res*, which was managed by the Trustees, and which was paid out to members of the beneficiary class under the terms of the Trust and the associated Plans.

None of the parties seriously dispute these facts. But LSI argues that the Trust nonetheless was not validly formed for at least two reasons. First, LSI contends that Prescott and Johnson acted outside of the scope of their authority in executing the Trust agreement on behalf of LSI, and that the corporation should not be bound by their actions. Second, LSI points to the January 12, 1995 Resolution of the Board of Directors declining to adopt the Trust as evidence that the Trust is revocable under §1(b) of the Trust instrument -- which provides that the Trust will become irrevocable upon approval of the LSI Board -- and that LSI should therefore be able to reclaim the Trust funds and cancel the Trust.

In support of both arguments, LSI strongly argues that the Trust was never approved by the LSI Board of Directors, because there is no record of the Trust having even been submitted to or discussed by the Board. The Trust indisputably was signed by the Claimants Prescott and Johnson, purportedly on behalf of LSI; but LSI's contention is that Prescott and Johnson had no authority to bind LSI, because § 8.6 of the LSI Articles of Incorporation reserves the right to set officer compensation

exclusively to the LSI Board of Directors. See LSI Post Hearing Brief at 17; LSI Ex. 4. Section 8.6 states, "The officers [of LSI] shall receive such salary or compensation as may be fixed by the Board of Directors." LSI Ex. 4. And LSI asserts that Prescott and Johnson were not acting with the approval of the Board when they entered into the Trust and, therefore, LSI should not be bound by their actions.

But although no written Board resolution approving the Trust has been located by any of the parties, and although former Board members testified that they had no recollection of knowing about either the Trust of the Plans (e.g., Tr. 33-38, 369-370), in my view the preponderance of substantial and credible evidence is to the effect that the Trust and the Plans were in fact approved by the Board.

Mr. Gilbertson, who was hired in 1992 to develop benefits plans precisely of the kind involved in this suit, testified that the Board knew about the Trust and each of the Plans, and that the Board approved of each. Tr. 732-33, 738, 743-44. The state of the LSI recordkeeping from 1991 to 1994 leaves open the possibility that the Trust and the Plans actually were formally approved by the Board, but that a written record of that approval was never recorded or did not survive.[4] Tr. 446, 450-51. But in any case, whether or not there was formal approval by Board resolution, repeated references in the existing minutes of the Board and Board's Executive Committee, and numerous other aspects of the evidence, compel the conclusion that the Board in fact was aware that the Plans and the legal machinery necessary to implement them were effective and in operation. PJR Ex. 1056, 1091, 1102, 1121, 1144, 1162. At least three of the former

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[4] Allene Ross, former LSI Vice President, testified that during the relevant time period that LSI records were poorly kept and that "there were incomplete records or incomplete documents," with many meeting minutes and resolutions "created after the fact." Tr. at 446. Ms. Ross agreed that it was possible that resolutions implementing Board action might have been lost or not kept in the official LSI records. (Tr. 450-51).

Board members were beneficiaries under at least one of the Plans supported by the Trust (Tr. 124, 241, and 435). Two of the former Board members also were members of the Executive Committee, a subcommittee of the Board that took the initiative to address salary and compensation issue; and the evidence shows that those directors attended an Executive Committee meeting in August, 1993 where modification of some aspects of the Plans was discussed. PJR Ex. 1091. Finally and fundamentally, the Board allowed the Trust and the Plans to operate for a period ranging from more than one year to nearly two years. PJR Ex. 1056, 1091, 1102, 1121, 1144, 1162.

Whether or not the Board had complete knowledge of the details of Trust and each of the five Plans, at the very least it had "inquiry notice" of the Trust and the Plans by virtue of which knowledge must be imputed to it. At numerous Executive Committee and Board meetings, employee compensation and the need for benefit plans, and the specific terms of the Plans involved in this suit, were discussed. LSI Ex. 39; PJR Ex. 1008, 1015, 1056, 1077, 1091, 1102, 1121, 1144, 1162, 1220. LSI hired Mr. Gilbertson precisely to develop the Plans in this suit. Mr. Gilbertson met repeatedly with the Board and discussed the Plans. He contracted with outside counsel to develop the Plans. Reams of plan documents were published and distributed within LSI. And large sums of actual Plan benefits were distributed to a number of different beneficiaries within the LSI management structure. Under these circumstances, LSI cannot now claim that the Trust and the Plans are invalid.

It could be argued that the Board at that time lacked extensive education or training in the operation of large and complex businesses (Tr. 28-30, 75-77, 196-198, and 316-317), and that the any imputing of knowledge to them should be tempered by their lack of experience. But the fact is that the former Board members who testified,

and other members of the Community who at various times have served to steer and govern the Community's businesses, have done a remarkable and admirable job of developing the corporation. The Community's businesses have an enviable track record. And just as full credit for that business record should be given to the Community and its officials, so too must the obligation to act upon all of the information they possess.

Having concluded that the Trust and the Plans were properly adopted under Community law, it seems clear that, taken together, they constitute an ERISA plan subject to the exclusive jurisdiction of the federal courts. ERISA broadly covers any plan that is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce. See 29 U.S.C. § 1003. To determine if an ERISA plan exists, the pivotal inquiry is whether an employer has established a separate, ongoing, administrative scheme to administer plan benefits. Kulinski v. Medtronic Bio-Medicus, 21 F.3d 254, 257 (8th Cir. 1994). As discussed above, in this case the evidence shows that LSI specifically hired Mr. Gilbertson to develop and administer the benefit programs in question. Numerous plan documents were published and distributed to employees, making it clear that LSI thought ERISA applied to the Plans. Significant cash benefits have been distributed or allocated under the Plans. Given all these circumstances, I conclude that LSI has established a separate, ongoing administrative scheme to deliver these benefits, and the Trust and all five Plans constitute an ERISA plan.

LSI has argued throughout these proceedings that ERISA in fact does not apply to plans set up by Indian tribal governments. But the fact remains that the federal courts that have considered the matter have held that ERISA applies to benefit programs administered by tribes or tribal entities. See, Lumber Indus. Pension Fund v. Warm

Springs Forest Prod. Indus., 939 F.2d 683 (9th Cir. 1991); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989). Therefore, I conclude that any action brought by a fiduciary (such as the Trustees) or beneficiary (such as the Claimants) of the Plans or the Trust is subject to the exclusive jurisdiction of the federal courts. See 29 U.S.C. § 1132(e).

ORDER

For the foregoing reasons, the Interpleader Complaint filed by the Plaintiffs is dismissed.

Dated: March 29, 2000

John E. Jacobson
Judge

IN THE TRIAL COURT OF
THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six, Inc., a corporation chartered pursuant to the laws of the Shakopee Mdewakanton Sioux (Dakota) Community, Plaintiff, v. Leonard Prescott, individually, and as current and former officer and/or director of Little Six, Inc., Defendant,	)	Case No. 436-00

MEMORANDUM OPINION AND ORDER

INTRODUCTION

In his Motion to Dismiss, Defendant Leonard Prescott argues that Little Six, Inc.'s (LSI's) Complaint should be dismissed under the doctrine of res judicata, or in the alternative, because he is shielded by official immunity. Mr. Prescott also requests that he be reimbursed for his attorney's fees and expenses for this litigation, on the basis of Article 14 of the LSI's Articles of Incorporation. For the reasons set forth below, I have concluded that his motion must be denied.

FACTUAL BACKGROUND

A decision on this motion requires an examination of several previous cases between these same parties, and therefore, for clarity, the complaint in this action shall be referred to as the "2000 Complaint". In considering a motion to dismiss, this Court assumes all the facts alleged in the complaint as true and views the allegations in the light most favorable to the plaintiff. Welch et al. v. SMS(D)C, No. 059-95 (SMS(D)C Tr. Ct. Feb. 7, 1996), *affirmed*, Welch et al. v. SMS(D)C, No. 009-96 (SMS(D)C Ct. App. Oct. 14, 1996).

LSI is a corporation chartered by the Shakopee Mdewakanton Sioux (Dakota) Community under the provisions of the Community's Corporate Ordinance, No. 2-27-91-004. 2000 Complaint at ¶¶ 5-8. Under its Charter, LSI is wholly owned by the members of the Community and is charged with operating several of the Community's business interests. Id.

Between 1991 and 1994, Mr. Prescott served LSI and the SMS(D)C Community in a variety of capacities. He was the Chairman of the Community and President of LSI, and he later become Chairman of the Board of Directors of LSI. 2000 Complaint at ¶3. In his capacity as an officer of LSI, Mr. Prescott was required to obtain and maintain a gaming license under Community law. 2000 Complaint at ¶¶11-12.

In 1994, the SMS(D)C Gaming Commission ("the Gaming Commission") began an investigation into certain activities and actions undertaken, or allegedly undertaken, by Mr. Prescott while serving as an officer of LSI. In May 1994, the Gaming Commission suspended Mr. Prescott's gaming license and scheduled a hearing on whether or not his license should be revoked. 2000 Complaint at ¶¶13-16. On May 9, 1994, the LSI Board of Directors voted to indemnify Mr. Prescott for his legal fees in connection with those Gaming Commission proceedings. 2000 Complaint at ¶¶17-20. In the 2000 Complaint, LSI alleges that at that time Mr. Prescott agreed to reimburse LSI for the legal fee indemnification if the Gaming Commission, "or any other court, tribunal, or organization with appropriate authority, made a determination that [Mr. Prescott] was liable for negligence, fraud or misconduct." 2000 Complaint at ¶20.

In July 1994, the Gaming Commission decided to revoke Mr. Prescott's gaming license, concluding that some of his actions amounted to sanctionable misconduct. 2000

Complaint at ¶15. In September 1994, the LSI Board attempted to rescind its authorization to pay Mr. Prescott's legal fees, and directed its attorneys to demand that he pay the money back. 2000 Complaint at ¶26 and Exhibit A.

Mr. Prescott appealed the Gaming Commission's decision to this Court; and multiple motions, remands, and further appeals followed. Ultimately, in 1999, the SMS(D)C Court of Appeals concluded that the Gaming Commission's decision to revoke Mr. Prescott's license for misconduct was not unreasonable, and the Gaming Commission was affirmed. In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, No. 015-97 (SMS(D)C Ct. App. July 30, 1999).

In December of 1999, after the final Court of Appeals decision, LSI made a demand to be reimbursed for the legal fees for which it had indemnified Mr. Prescott. 2000 Complaint at ¶¶29-30 and Exhibit B. The 2000 Complaint alleges that the amounts demanded by LSI have not be reimbursed. Id. And although Mr. Prescott has yet to file an answer in this matter, it is the Court's understanding that at this point he does not claim to have repaid all the amounts LSI alleges he owes.

For the purposes of deciding this motion, it is important to note before the 2000 Complaint was filed, there were (and are) a number of cases in the SMS(D)C Court involving Mr. Prescott and LSI. First, there was the Gaming Commission appeal mentioned above. In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order, No. 015-97 (SMS(D)C Ct. App. July 30, 1999). Second, there is an ongoing case involving the rights of each party under various employee compensation plans. See, e.g., In re Trust under Little Six Inc. Retirement Plans, No. 055-95 (SMS(D)C Tr. Ct. Jan. 19, 1999). And third, around the same time the Gaming Commission began its initial investigation in 1994, LSI and the SMS(D)C Community filed a complaint against Mr. Prescott seeking money damages for various other alleged instances of misconduct. LSI, et al v. Prescott and Johnson, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). This last case is the one most relevant to Mr. Prescott's motion to dismiss, and the complaint in that case shall be referred to here as the "1994 Complaint".

In the 1994 Complaint, LSI alleged that Mr. Prescott and Mr. Johnson received over $500,000 in attorney's fees and expenses, which included money to defend themselves in proceedings before the Gaming Commission. 1994 Complaint ¶¶42-44.

The 1994 Complaint alleged that these fees were used for personal purposes. Id. In the Prayer for Relief, the 1994 Complaint requested that the amounts converted to person use be accounted for and returned. 1994 Complaint ¶¶110-111. The legal theories upon which LSI proceeded in the 1994 Complaint were breach of fiduciary duty, violations of the Indian Gaming Regulatory Act of 1988, civil conspiracy, conversion, and unjust enrichment. 1994 Complaint ¶¶64-91. Each of these counts in the 1994 Complaint included a reallegation of the legal fee indemnification issue as a basis for relief. Id. All of the counts in the 1994 Complaint ultimately were resolved either through Mr. Prescott's successful assertion of an official immunity defense, or on the merits, in Mr. Prescott's favor, in light of undisputed facts. LSI, et al v. Prescott and Johnson, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000).

DISCUSSION

A. CLAIM PRECLUSION/ISSUE PRECLUSION

The first issue raised by Mr. Prescott's motion to dismiss here is whether this action is barred by the doctrines of res judicata, by virtue of the resolution of the issues raised in the 1994 Complaint. Res judicata, which is the binding effect of a former adjudication, can take one of two forms: (1) claim preclusion, which bars relitigation of the same claim between two parties where a final judgment has been rendered on the merits in an earlier case by a court of competent jurisdiction, and (2) issue preclusion, which prevents the relitigation of a specific legal or factual issue decided between two related parties in an earlier case. See, e.g., W.A. Lang Co. v. Anderberg-Lund Printing, 109 F.3d 1343, 1346 (8th Cir. 1997).

1. Claim Preclusion

Claim preclusion bars a subsequent lawsuit when the first action was (1) between the same parties, (2) brought in a court of competent jurisdiction, (3) based on the same cause of action, and (4) resulted in a judgement on the merits. Lang, 109 F.3d at 1346. Mr. Prescott's Motion to Dismiss here is premised on the argument that this case is barred by the judgement in LSI v. Prescott and Johnson, 020-99, 021-99, 022-99

(SMS(D)C Ct. App. Feb. 1, 2000), which disposed of the 1994 Complaint.

There is little dispute that this case and the case commenced by the 1994 Complaint involve the same parties; and in the materials submitted to the Court there is little argument on the question of whether the 1994 case was litigated in a court of competent jurisdiction. The main contention between the parties is whether this suit and LSI v. Prescott and Johnson involve the same cause of action.

Most American courts evaluate whether two causes of action are the same if they stem from the same nucleus of operative facts:

> Whether the present action is the same cause of action as the prior action depends on whether it arises out of the same nucleus of operative facts as the prior claim. The legal theories of the two claims are relatively insignificant because a litigant cannot attempt to relitigate the same claim under a different legal theory of recovery. To determine whether the present claim and the prior claim constitute the same claim, we consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations. . . .
>
> In the final analysis the test would seem to be whether the wrong for which redress is sought is the same in both actions. A "claim" should be determined not by the actions of a plaintiff vindicating its rights but by the conduct or alleged conduct of a defendant breaching those rights.

United States v. Gurley, 43 F.3d 1188, 1195-96 (8th Cir. 1994) (citations and quotations omitted).

The preclusive effect of an earlier suit extends to claims that could have been raised in the suit but were not. See, e.g., Myers v. Price, 463 N.W.2d 773, 776-77 (Minn.Ct.App.1990). For example, in Gurley, a business created a toxic dump that leaked into the surrounding water. The U.S. Environmental Protection Agency (EPA) cleaned up the spill, and brought a suit for clean up costs under the Clean Water Act (CWA), which it won. Later, after the site kept leaking, the EPA cleaned it up again and brought another suit for actual and future clean up costs under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Eighth Circuit held that the CERCLA suit was barred by the CWA action because the two suits were for the same cause of action. Gurley, 43 F.3d at 1196-97. The court noted that the CERCLA claim could have been brought at the same time as the CWA claim, but was

not. Id. The court concluded that the wrong to be redressed by each action was the creation of the dump, and therefore, each suit involved the same cause of action. Id.

Mr. Prescott argues that the present lawsuit against him is to redress some of the same alleged wrongs as were the subject of the 1994 lawsuit, and therefore, the 2000 Complaint should be viewed as based on the same cause of action. He points out that both the 1994 and 2000 Complaint allege that he received over $500,000 in attorney's fees and expenses which included money to defend himself in proceedings before the Gaming Commission. 1994 Complaint at ¶¶42-44; 2000 Complaint at ¶¶21-23. In addition, both Complaints allege that these fees were used for personal uses, and both Complaints seek to have these sums returned to LSI. 1994 Complaint at ¶¶42-44, 110-111; 2000 Complaint at ¶¶28-30. So, Mr. Prescott argues the 2000 Complaint could be considered the same cause of action.

Mr. Prescott's argument is not without some force, but I conclude that in fact the causes of action in the two suits in fact simply cannot be considered the same, because LSI could not have brought its present breach of contract claim at the time it filed its 1994 Complaint. That is, LSI was wholly unable to allege a breach of contract claim in 1994, because such a claim could not exist until after LSI had demanded repayment from Mr. Prescott after the SMS(D)C Court of Appeals decision in July of 1999. According to the allegations in the 2000 Complaint, there are two conditions precedent to a breach of contract claim by LSI: (1) a finding of misconduct by an appropriate tribunal, and (2) a failure by Mr. Prescott to repay the money forwarded to him. These conditions do not appear to have existed until after LSI demanded repayment after the 1999 Court of Appeals decision, and after Mr. Prescott refused to honor the repayment request. 2000 Complaint ¶¶29-30. If LSI had alleged a breach of contract claim in 1994, it could not have pled in good faith that all the conditions precedent to its cause of action had occurred: the Gaming Commission's adjudication of misconduct against Mr. Prescott was still on appeal, and LSI had not made a demand for the money to which Mr. Prescott failed to respond.

Since I believe that this suit and the 1994 suit do not involve the same cause of action, it is not necessary for me to decide whether the issues raised by the 1994 Complaint were decided on the merits. I note that case law in other jurisdictions is

apparently split on this question, and I expressly do not make any conclusion as to which doctrine is more appropriate for this jurisdiction. Compare Lommen v. City of East Grand Forks, 97 F.3d 272, 275 (8th Cir. 1996) (official immunity decision is on the merits under Minnesota law), and Myers v. Price, 463 N.W.2d 773, 776-77 (Minn.Ct.App.1990); with Wade v. City of Pittsburgh, 765 F.2d 405 (3rd Cir.1985) (official immunity decision is not necessarily on the merits under Pennsylvania law).

2. Issue preclusion. Since claim preclusion does not bar this suit, I must consider whether this action should be barred by the doctrine of issue preclusion. Issue preclusion (or "collateral estoppel") applies to legal or factual issues "actually and necessarily determined," with such a determination becoming "conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). Issue preclusion applies when--

> (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Michels v. Kozitza, 2000 WL 622272, at 4 (Minn. App. (May 16, 2000)) (quotations omitted), citing, Willems v. Commissioner of Pub. Safety, 333 N.W.2d 619, 621 (Minn.1983). Issue preclusion "operates only as to matters actually litigated, determined by, and essential to a previous judgment." Roseberg v. Steen, 363 N.W.2d 102, 105 (Minn.App.1985).

Here, I think the legal issues clearly are not identical. The 1994 Complaint did not include a breach of contract claim on the same facts as the 2000 Complaint. Nor did the party against which estoppel would operate (LSI) actually have a full and fair opportunity to be heard on the breach of contract issue in 1994. See e.g., Parker v. MVBA Harvestore Systems, 491 N.W.2d 904 (Minn. Ct. App. 1992) (party claiming estoppel bears burden of showing issues are precisely identical). Therefore, I conclude that issue preclusion also does not apply to bar this suit.

B. OFFICIAL IMMUNITY

Mr. Prescott also argues that even if claim and issue preclusion do not bar this

suit, he is nonetheless entitled to relief on the basis of qualified immunity. The SMS(D)C law on qualified immunity states:

> [a]n official performing a discretionary function within the scope of their duty will be shielded from liability for civil damages as long as their conduct does not violate a clearly established right of which a reasonable official would have known. See Harlow, 457 U.S. at 818. In other words, an official is entitled to qualified immunity only if in light of pre-existing law, the unlawfulness of his conduct would be apparent to a reasonable official. Anderson v. Creighton, 483 U.S. 635, 640 (1987).
>
> The first task in this inquiry is to determine if the law was clearly established at the time the official acted. If it was not, the official could not be reasonably expected to anticipate subsequent legal developments and could not either actually or constructively "know" that his actions were illegal. Harlow, 457 U.S. at 818-19.

Prescott and Johnson v. LSI, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000) (citations omitted). So, deciding Mr. Prescott's immunity argument involves resolving two issues: (1) whether Mr. Prescott was acting within the scope of his duty, and (2) if so, whether the law clearly established such that a reasonable officer would know his actions were illegal.

In considering a motion to dismiss, this Court assumes all the facts alleged in the complaint as true and views the allegations in the light most favorable to the plaintiff. Welch et al. v. SMS(D)C, No. 059-95 (SMS(D)C Tr. Ct. Feb. 7, 1996), *affirmed*, Welch et al. v. SMS(D)C, No. 009-96 (SMS(D)C Ct. App. Oct. 14, 1996).

Assuming the facts alleged in the 2000 Complaint are true, I conclude that it is at least debatable whether Mr. Prescott's actions were within the scope of his duty.

> [F]or the purposes of qualified immunity analysis, to determine if an official's action was within the scope of his or her duty, we will ask whether there is a reasonable connection between the alleged act and the type of duties that the official is normally responsible for. If there is a reasonable connection, we will proceed with the next step of the immunity analysis.

Prescott and Johnson v. LSI, No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000). The crux of the 2000 Complaint is that Mr. Prescott has failed to repay money that was forwarded to him for legal expenses incurred at the time he was an officer of LSI. See 2000 Complaint ¶¶28, 32, 35. And it is difficult to conceive that failing to

pay back money rightfully owed to LSI could have been part of Mr. Prescott's job description when he was an officer of LSI. So, analyzed this way, the actions alleged in the 2000 Complaint likely were outside of the scope of his duty.

But employing this mode of analysis would permit any plaintiff to avoid a qualified immunity defense merely by alleging an illegal action and claiming that it was outside of the officer's scope of duty. This approach is frowned upon under SMS(D)C case law. See LSI v. , No. 020-99, 021-99, 022-99 (SMS(D)C Ct. App. Feb. 1, 2000) at 7-8 (rejecting argument that allegation of breach of fiduciary duty is sufficient to show officer acted outside of scope of duty).

On the other hand, entering into indemnification agreements with an employer does not seem completely unrelated to Mr. Prescott's duties as an officer of LSI. The LSI Articles of Incorporation clearly contemplate that officers may need to be indemnified for lawsuits against them in their official capacity, and that the officer shall be liable to reimburse LSI if he or she is adjudged guilty of negligence, fraud, or misconduct. See LSI Articles of Incorporation, Article 14. LSI, in its brief on this issue, states that LSI was under no obligation to indemnify Mr. Prescott, and that the indemnification agreement was a wholly voluntary contractual arrangement. See LSI's Response to Defendant's Motion to Dismiss, at 29. However, a close reading of LSI's Articles of Incorporation leads me to conclude that LSI's brief is not correct on this point. Therefore, it seems at least plausible that entering into an indemnification agreement was within the scope of Mr. Prescott's duty, see LSI's Articles of Incorporation, Art. 14, and that the Court should proceed with the rest of the immunity inquiry.

But assuming, without deciding, that Mr. Prescott's actions were within the scope of his duty, still I conclude he is not entitled to qualified immunity here. Assuming the facts as alleged in the 2000 Complaint are true, Mr. Prescott entered into an agreement to repay certain sums if certain events happened, those events did in fact happen, and he has not paid the money back. 2000 Complaint ¶¶31-38. If that is the case, it seems to me to be likely that a reasonable official would know, should have known, that not paying back sums as promised would violate clearly established rights of the other contracting party. This is particularly true in Mr. Prescott's case, given the specificity

of the allegations against him, and given the explicit decision of the Court of Appeals to affirm the Gaming Commission's findings of misconduct after years of litigation. Therefore, under the standards for qualified immunity utilized by this Court, I conclude that Mr. Prescott's claim for such immunity here must fail on the merits, even if he was acting within the scope of his duty when he signed the agreement which is the subject of the 2000 Complaint.

C. ATTORNEY'S FEES

Mr. Prescott has also asked for indemnification for his attorney's fees and expenses for defending this action. He bases his request on Article 14 of the LSI Articles of Incorporation, which states that officers or former officers sued for official actions can be indemnified if they are not adjudged guilty of misconduct. Since I am denying Mr. Prescott's motion to dismiss, I will take his motion for attorney's fees under advisement pending the resolution of the case in chief. If Mr. Prescott ultimately is successful in this litigation, he may renew his motion for attorney's fees at that time.

ORDER

For the foregoing reasons, the Motion to Dismiss filed by Defendant is dismissed.

Dated: August 8, 2000

Judge John E. Jacobson

STATE OF MINNESOTA
TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA)
COMMUNITY

Robert Famularo,

Plaintiff,

vs.

Little Six, Inc. d/b/a Mystic Lake
Casino

Defendant.

Court File No. 350-99

MEMORANDUM OPINION

Defendant Little Six, Inc. ("LSI") filed a motion for summary judgment asserting that Plaintiff Robert Famularo has failed to allege facts sufficient to state a claim for negligence, and Defendant, therefore, is entitled to judgment as a matter of law. Because Plaintiff has failed to establish a prima facie case of negligence, Defendant's motion is granted.

I. FACTS

Plaintiff alleges that, on or about April 13, 1997, he slipped and fell outside the entrance to Little Six Casino, owned and operated by Defendant LSI, and sustained injuries as a result. Plaintiff was a customer of LSI and planned to spend about eight to twelve hours gambling, as was his custom. Plaintiff entered the building when it was still daylight. Plaintiff claims he walked from the parking lot past a covered, handicap-access ramp to the steps at the front entrance to the Casino. On his way inside, he noticed a downspout streaming water across the parking lot/walkway in his path to the door. The stream of water created a wet area approximately four feet wide.

The weather was clear and the temperature above freezing when Plaintiff entered the Casino. At some point while he was inside, the temperature dropped below freezing. It was dark outside when Plaintiff left the Casino eight to twelve hours later at 3:00 a.m., but he could still see water flowing from the downspout as he exited the building. On his way out of the Casino, Plaintiff again avoided the covered, handicap-access ramp and walked through the same wet spot, which had frozen. Plaintiff slipped and fell on the ice. Management told a security guard to get salt, and the guard returned with salt pellets and sprinkled them around Plaintiff.

Plaintiff acknowledges that Little Six, Inc. has a comprehensive monitoring program. During spring months when ice and snow are possible, a Property Services employee is assigned an on-call pager with a mandatory response time of under a half-hour to ensure that hazardous conditions can be abated quickly once they are reported.

II. ANALYSIS

This case arises from Plaintiff's claim that Defendant negligently injured Plaintiff by failing to maintain safe premises and failing to warn Plaintiff of a dangerous condition on the premises. Defendant brought a motion for summary judgment claiming that Plaintiff has failed to allege facts sufficient to establish a prima facie case of negligence. Rule 28 of the SMS(D)C Rules of Civil Procedure requires that summary judgment only be entered for the moving party if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Nov. 27, 1995). Summary judgment is not appropriate where there are disputed issues of material fact. Welch et al. v. SMS(D)C, No. 023-92 (SMS(D)C Tr. Ct. June 3, 1993). When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the non-

moving party and give that party the benefit of all reasonable inferences drawn from the evidence. Barrientez v. SMS(D)C, No. 007-88 (SMS(D)C Tr. Ct. Sept. 7, 1990).

To establish a prima facie case of negligence, Plaintiff must allege facts sufficient to demonstrate (1) that Defendant owed him a duty, (2) that Defendant breached that duty, (3) that Defendant's breach was the proximate cause of plaintiff's injuries, and (4) that Plaintiff suffered actual injury. *See* Kostelnik v. Little Six, Inc., No. 019-97 (SMS(D)C Ct. App. March 17, 1998), at 5. Failure to allege facts sufficient to meet an essential element of a claim entitles Defendant to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

A business premises owner has a duty to keep the premises reasonably safe but is not an insurer of patrons' safety. *See* Anderson v. St. Thomas More Newman Center, 287 Minn. 251, 253, 178 N.W.2d 242, 243 (1970); Wolvert v. Gustafson, 275 Minn. 239, 241, 146 N.W.2d 172, 173 (1966). In cases of alleged premises liability for a plaintiff's slip and fall in a wet or icy area, a defendant property owner has no duty to ensure that all possible access routes are clear but only must provide suitable access to avoid liability. *See* Munos v. Applebaum's Food Market, Inc., 293 Minn. 433, 196 N.W.2d 921 (1972); McIlrath v. College of St. Catherine, 399 N.W.2d 173, 174 (Minn. Ct. App. 1987). Unless the dangerous condition alleged to cause plaintiff's injury resulted from the direct actions of the landowner or his or her employees, a negligence theory of recovery is appropriate only where the landowner had actual or constructive knowledge of the dangerous condition. Rinn v. Minnesota State Agr. Soc., 611 N.W.2d 361 (Minn. Ct. App. 2000) (citing Messner v. Red Owl Stores, 238 Minn. 411, 413, 57 N.W.2d 659, 661 (1953)). Constructive notice of a hazardous condition may be established through evidence that the condition had existed for an amount of time sufficient to constitute constructive notice, but speculation as to how long it had existed warrants judgment for the landowner. Rinn, 611

N.W. at 365 (citing Bob Useldinger & Sons, Inc. v. Hangsleben, 505 N.W.2d 323, 328 (Minn. 1993); Anderson v. St. Thomas More Newman Ctr., 287 Minn. 251, 253, 178 N.W.2d 242, 243-44 (1970)).

In this case, Plaintiff alleges that Defendant LSI negligently failed to provide a safe and reasonable alternative route to and from the building and that Defendant failed to warn him of the icy condition before he slipped and fell on it. Plaintiff argues that questions of material fact exist with regard to the reasonableness of an alternative route of ingress and egress, the Defendant's failure to warn him of the icy conditions, the nature of the icy conditions, and also with regard to the allegedly negligent design of the building entrance area. The Court disagrees. Accepting all of Plaintiff's contentions as true, Plaintiff fails to proffer facts sufficient to establish under the circumstances that Defendant breached its duty of care.

First, Plaintiff claims that the reasonableness of an alternative route presents a disputed issue of material fact. Plaintiff relies on Peterson v. W.T. Rawleigh Co., 274 Minn. 495, 144 N.W.2d 555 (1966), in which the plaintiff businessman was held to have stated a claim sufficient for a jury to find in his favor because his assumption of risk in walking across a slippery parking lot was justified in light of the lack of reasonable alternatives and the plaintiff's business related purpose for his visit. Rawleigh stands for the proposition that a possessor of land may be liable to invitees for physical harm caused to them by an open and obvious or known condition when the possessor should anticipate the harm despite such knowledge or obviousness. 274 Minn. at 497, 144 N.W.2d at 557-58. Rawleigh is distinguishable from the instant case, however, because unlike the Respondent Peterson in Rawleigh, Plaintiff Famularo had an alternative route to the one he took. Mr. Famularo could have chosen to avoid the water and walk on the covered handicap ramp, which was equally accessible from the lot where he parked. Plaintiff's case is

comparable to McIlrath v. College of St. Catherine, 399 N.W.2d 173 (Minn. Ct. App. 1990), in which the plaintiff claimed that the defendant College negligently failed to maintain her route of ingress to the campus bookstore. The evidence showed, however, that the plaintiff had not used the sidewalks that were undisputedly cleared for safe entrance to the building, and the Minnesota Court of Appeals upheld the trial court's grant of summary judgment to the defendant College.

In this case, Plaintiff asserts that he took the most direct route to the door, which was crossed by a stream of water, and no other reasonable alternative existed. Like the defendant College in McIlrath, however, Defendant LSI provides a safe alternative route of entrance to the building—a covered handicap entrance ramp, which Plaintiff Famularo chose not to use. Plaintiff would have had to turn and walk a longer distance in order to use the covered handicap entrance ramp provided, but the covered handicap ramp is provided, by law, for the very purpose of providing an alternative, safe route of entrance to the building. Plaintiff chose the direct route, but not the safest alternative. He had a choice, and that choice negates Plaintiff's contention that he had no reasonable alternative route of egress from the building.

Second, Plaintiff asserts that the reasonableness of Defendant's failure to warn him of the icy conditions presents a disputed issue of material fact. The Court acknowledges the existence of a disputed fact that would be material if Plaintiff alleged any negligent act or omission by Defendant. Plaintiff concedes, however, that Defendant has a comprehensive monitoring policy and a patrol whose duty is to identify and respond to hazardous conditions—and who did, in fact, respond to the condition in question by sprinkling salt pellets following Plaintiff's fall. Plaintiff does not suggest that Defendant deviated from its policy, or identified and failed to respond to the icy conditions. There is no evidence in the record, nor does Plaintiff claim any knowledge of the length of time that passed between the formation of perilous ice and the moment when

Plaintiff slipped and fell. It would be merely speculative to deduce when the wet area actually became hazardous and impossible to determine the point in time at which Defendant should be attributed constructive notice. Plaintiff's mere allegation that Defendant is liable because it negligently failed to warn him of the ice, absent any supporting factual allegations of negligent acts or omissions, is insufficient as a matter of law to withstand Defendant's motion for summary judgment.

Third, Plaintiff asserts that the condition of the wet area and lighting constitute disputed issues of material fact precluding summary judgment. Plaintiff and Defendant disagree about the exact depth and breadth of the wet area, as well as the intensity of lighting in the area. The Court disagrees that these issues are material. Plaintiff admits that the wet area was not hazardous when he walked through it on his way in. He did not notify management about a potential hazard. Plaintiff does not allege that the water was any deeper or wider when he left the building, only that it was frozen. Taking all of Plaintiff's allegations as true—that the water was "streaming" in a wide swath across the pavement before it froze, that it was dark outside and the area was only dimly lit—it still would be impossible to attribute constructive notice of the hazard to Defendant because of the impossibility of determining when the area became hazardous. Plaintiff appears to assert that Defendant should have been on notice that a wet area near the entrance could freeze, but it would be error to attach liability based on a duty to divine the concededly unpredictable weather conditions in Minnesota in April.

LSI only has a duty to its customers of reasonable care, not a duty to prevent all possible missteps. Plaintiff acknowledges that LSI has a comprehensive monitoring program. Plaintiff vaguely suggested in his deposition that the safety patrol was negligent—"he had to have known the ice was there"—but presents no further evidence. The fact that the temperature outside had

dropped by the time Plaintiff left the building was knowledge equally attributable to Plaintiff and Defendant. Defendant had no duty to warn Plaintiff of a condition known to him as soon as he walked outside and felt the relatively cold night air. The disputed conditions alleged by Plaintiff, therefore, do not present issues of material fact.

Finally, Plaintiff alleges the building was negligently designed. Plaintiff concedes that the building conforms to the Uniform Building Code standards, however, and Plaintiff does not present any evidence of a defect in the design that produced an unreasonable hazard. Plaintiff's entire negligence claim is based on speculation rather than material, factual allegations and cannot survive Defendant's Motion for Summary Judgment.

Defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

10/20/00
Date

Robert Grey Eagle
Hon. Robert A. Grey Eagle

STATE OF MINNESOTA
TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Robert Famularo,

Plaintiff,

vs.

Little Six, Inc. d/b/a Mystic Lake Casino

Defendant.

Court File No. 350-99

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court for hearing on September 11, 2000 before the Honorable Robert A. Grey Eagle at the Courthouse of the Community Center in Shakopee, 2330 Sioux Trail N.W., Prior Lake, Minnesota. Richard Dahl, Esq. appeared on behalf of the Defendant Little Six, Inc. (LSI). David O'Connor, Esq. appeared on behalf of the Plaintiff.

The Court issues this Order following a thorough review of the record in this case and the materials contained therein.

IT IS HEREBY ORDERED:

1. Defendant's Motion for Summary Judgment is granted.

2. Defendant LSI was not negligent in providing reasonably safe access to the Little Six Casino in connection with Plaintiff's allegations in the case.

3. LSI was not negligent in addressing the weather, water, and lighting conditions outside Little Six Casino in connection with Plaintiff's allegations in the case.

4. LSI was not negligent in designing the parking lot or building structures at Little Six Casino.

5. Based on the foregoing conclusions of law, the Plaintiff's negligence claims against Defendant are hereby dismissed with prejudice.

Dated: 10/20/00

Robert Grey Eagle
Hon. Robert A. Grey Eagle
Judge of the Tribal Court

IN THE TRIAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

David Gregory Crooks Plaintiff, v. The Shakopee Mdewakanton Dakota (Sioux) Community; the Shakopee Mdewakanton Dakota (Sioux) Community Business Council; the Shakopee Mdewakanton Dakota (Sioux) Community Enrollment Committee; Certain Unknown Members of the SMS(D)C Business Council and Enrollment Committee, Defendants.	)	Case No. 468-00

MEMORANDUM OPINION AND ORDER

INTRODUCTION

In this case, Plaintiff alleges that he is qualified for membership in the Community, and that the Community and/or its officers erred in how it handled his application for membership. See Complaint at ¶ ¶ 10-26. The Community did not file an answer, but instead filed a motion to dismiss, arguing that under Community law the Plaintiff has failed to state a claim upon which relief may be granted. Because I conclude that this Court has jurisdiction to hear this type of claim, and because I cannot say at this early stage that there is no set of facts under which Plaintiff would be entitled to relief, I deny the motion to dismiss.

FACTUAL BACKGROUND

Plaintiff claims to qualify for membership under Art. II, Sec. 1 of the SMS(D)C Constitution, which states:

> All descendant of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace their Mdewakanton Sioux Indian blood to the Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886, Provided, they apply for membership and are found qualified by the governing body, and provided further, they are not enrolled members of some other tribe or band of Indians.

Complaint ¶ 9. Plaintiff specifically alleges that he is at least ¼ Mdewakanton Sioux, that he is a lineal descendant of Amos Crooks, George Crooks, and Alice Crooks, that all of these individuals were living in Minnesota on May 20, 1886, and that all these individuals were listed as Mdewakanton Sioux residents on the Henton Census Roll. Complaint ¶ 11. Plaintiff also alleges that he is not presently enrolled in any other tribe or band of Indians. Complaint ¶12.

Plaintiff alleges that he filed an application for membership in October 1994, and that after a substantial delay, the Community's Enrollment Committee recommended that he be granted membership in July of 1996. Complaint ¶ 13, ¶ 24. Plaintiff also alleges that there were three challenges to his membership application by Community members, each of which were denied. Complaint ¶ 25. Nonetheless, despite the recommendation of the Enrollment Committee and the rejection of all challenges against his application, the General Council voted to deny Plaintiff's application. Complaint ¶ 25. Plaintiff alleges that to date he has never received an explanation of why his application was rejected. Complaint ¶ 25.

STANDARD OF REIVEW

Dismissal for failure to state a claim is not favored. Welch et al. v. SMS(D)C, No. 059-95 (SMS(D)C Tr. Ct. Feb. 7, 1996), *affirmed*, Welch et al. v. SMS(D)C, No. 009-96 (SMS(D)C Ct. App. Oct. 14, 1996). A case may be dismissed if it appears beyond a reasonable doubt that the pleader can prove no set of facts in support of the claim that would entitle him to relief. Id. In considering a motion to dismiss, the Court assumes all the facts alleged in the complaint are true and views the allegations in the light most favorable to the plaintiff. Id.

JURISDICTION

As an initial matter, it seems clear this Court has jurisdiction to hear this matter. Section II of Ordinance 02-13-88-01 states:

> The Shakopee Mdewakanton Sioux Tribal Court shall have original and exclusive jurisdiction to hear and decide all controversies arising out of the Shakopee Mdewakanton Sioux Community Constitution, it By-laws, Ordinances, Resolutions, other actions of the General Council, Business Council or its Officers or the Committees of the Community pertaining to: 1 – Membership . . . 3 – the procedures employed by the General Council, the Business Council, the Committees of the Community or the Officers of the Community in performance of their duties. The Tribal Court shall also have jurisdiction to hear and decide all controversies arising out of actual or alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301, et seq.

A review of the Complaint shows that this is clearly a matter that (a) involves membership, (b) involves the procedures employed by the General Council and Officers of the Community, and (c) involves allegations under the Indian Civil Rights Act. This Court has entertained claims related to membership issues and allegations of wrongdoing by officers of the Community in the past. Smith et al. v. SMS(D)C et al., No. 011-96 (SMS(D)C Ct. App. Aug. 7, 1997) (deciding membership question); Prescott and Johnson v. Little Six, Inc., No. 017-97 & 018-97 (SMS(D)C Ct. App. Apr. 17, 1998) (Community official may be held liable for violation of Community Constitution, statute, or common law). In addition, by its plain language Article VII, Sec. 2 of the Community Constitution makes available to non-members the protections of the ICRA. Cf. Art. VI, Sec. 1 (limiting distribution of Community resources to members). Therefore, this Court can see no reason why it should not accept jurisdiction to hear the claims brought in this case.

WHETHER PLAINTIFF HAS STATED A CLAIM

The real issue is whether Plaintiff's Complaint states a claim that this Court can remedy. Plaintiff's Complaint claims that the way in which the Defendants handled his application from 1996 to 1999 violated the Community's Enrollment Ordinance, violated the Community's Constitution, and failed to follow the Community's own enrollment procedures. Complaint ¶ 18-27. Plaintiff claims these actions violate his rights to Due Process and Equal Protection rights, and he has asked this Court to make a determination about his eligibility for membership. Complaint ¶¶ 27-28.

It may make more sense to begin by describing what this Court cannot do in response to Plaintiff's claims. This Court has held in the past that it will not make an independent determination of an individual's claim to membership. It is up to the Community, not this Court, to decide who meets the requirements for membership. There is no automatic or self-enrollment under Article II, Sec. (b) or (c) of the Community's Constitution for people who claim they meet the membership requirements -- applications for membership must be approved by the appropriate Community officials under standards established in accordance with the Constitution and the Enrollment Ordinance. Clifford Crooks, Sr. v. SMS(D)C, No. 016-97 (SMS(D)C Ct. App. Jan. 30, 1998).

However, this case does not appear to ask this Court to make an independent analysis of the Plaintiff's membership application. Instead, the Court understands this Complaint to center on a flaw in the enrollment process. The Plaintiff claims to have exhausted his administrative remedies, the appropriate Community officials have recommended his enrollment, all challenges to his application have been defeated, and yet the General Council, without any subsequent explanation, has denied his application. Although this Court cannot make an independent evaluation of Plaintiff's application, it seems appropriate for this Court to entertain Plaintiff's claim that this process itself, or the General Council's actions under this process, are in violation of the Community's Constitution.

Community cases support the notion that there is some relief that this Court can grant in response to these claims. First, it is true that an applicant for membership does not have a property interest sufficient to state a claim for the deprivation of due process. Clifford Crooks, Sr. v. SMS(D)C, No. 016-97 (SMS(D)C Ct. App. Jan. 30, 1998); see also Weber and Maxwell v. SMS(D)C, No. 364-99 (SMS(D)C Tr. Ct. Dec. 22, 1999). However, this does not mean that Community officials or the General Council are free to ignore Community law on enrollment or to act in an arbitrary manner. This Court has made it clear that if Community officials or the General Council disregard community law in the enrollment process, this Court has the power to remedy those deficiencies. Weber and Maxwell v. SMS(D)C, No. 364-99 (SMS(D)C Tr. Ct. Dec. 22, 1999) at 3 (court can correct procedural deficiencies); Stovern et al. v. SMS(D)C, 031-92 (SMS(D)C Tr. Ct. May 30, 1995); Amundsen v. SMS(D)C Enrollment Committee, No. 049-94 (SMS(D)C Tr. Ct. Apr. 14, 1995) at 9. In addition, if some part of the Enrollment Ordinance, or any Community legislation, violated the guarantees in the Community Constitution, this Court

would appear to have the power to invalidate such provisions. See, e.g., Prescott, et al. v. SMS(D)C, No. 040-94 (SMS(D)C Tr. Ct. July 31, 1995) (declaring Community law unconstitutional). Therefore, if Plaintiff can show that Community officials violated community law as it pertains to the enrollment process, or if Plaintiffs can show that some part of the enrollment ordinance itself is unconstitutional, it would appear there is relief this Court may grant.

For Plaintiff's equal protection claim, it does not appear necessary that Plaintiff demonstrate a protectable property interest. Instead, Plaintiff only need show that a Community law is based on an impermissible distinction, or that Plaintiff himself was singled out for unequal treatment under an otherwise facially neutral law. See, e.g., Ross v. SMS(D)C, No. 013-91 (SMS(D)C Tr. Ct. July 17, 1992) (analyzing equal protection rights of member under Article VII of SMS(D)C Constitution). If Plaintiff can show either of these results, there may be relief this court can grant as well.

In sum, this Court is not ready at this very early stage to dismiss Plaintiff's Complaint outright. Nothing in this order or opinion should be construed as indicating whether Plaintiff has any chance of succeeding on the merits of his case. This Court is simply convinced that, when reviewing the legal precedents of this Court, that the Complaint states claims upon which relief may be granted. At trial, Plaintiff will need to demonstrate that Community officials violated Community law in processing his application, or that the enrollment process itself somehow denies him a right protected under Community law.

ORDER

For the foregoing reasons, Defendant's Motion to Dismiss is **DENIED**.

Dated: October 31, 2000

Henry M. Buffalo, Jr.
Judge

STATE OF MINNESOTA
TRIBAL COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Robert Famularo,

Plaintiff,

vs.

Little Six, Inc. d/b/a Mystic Lake Casino

Defendant.

Court File No. 350-99

ORDER

On November 8, 2000, Plaintiff Robert Famularo filed a Motion for Amended Findings of Fact, Conclusions of Law or, alternatively, for a New Hearing. Plaintiff claims authority under Federal Rules of Civil Procedure 52.02 and 59.01. SMS(D)C Rule of Civil Procedure 28 adopts, inter alia, Federal Rules of Civil Procedure 52 and 59. Federal Rule 52 applies only to actions tried upon the facts, however, and Plaintiff's Motion seeks to amend an Order for Summary Judgment. Under both Federal Rules of Civil Procedure 52(b) and 59(e), any motion to amend a Judgment must be filed no later than 10 days after entry of the Judgment. Plaintiff's Motion dated November 8, 2000 seeks to amend the Court's Judgment filed on October 20, 2000. Plaintiff's Motion is not timely. Plaintiff's remedy lies, if at all, with the Tribal Court of Appeals.

Plaintiff's Motion is DENIED.

IT IS SO ORDERED.

11/28/00
Date

Robert Grey Eagle
Hon. Robert A. Grey Eagle