

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Case Nos. 03-2684L and 01-568L

Sheldon Peter Wolfchild, *et al.*,

Plaintiffs,

vs.

United States,

Defendant.

MOTION FOR A HEARING SEEKING
TO ENJOIN AND FOR MISCELLANEOUS RELIEF
(REDACTED)

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INTRODUCTION

The *Wolfchild* plaintiffs and intervenor-plaintiffs (collectively, “plaintiffs”) seek a hearing on a motion, and hereby make a motion, to enjoin the Shakopee Mdewakanton Sioux Community (“SMSC”) and the United States to prevent further interference with the judicial process and for miscellaneous relief.

SMSC, through its Chairman Stanley Crooks, offered \$1 million to the Oglala Sioux Tribe if it officially withdrew its continued support of the *Wolfchild* plaintiffs’ litigation in the instant action, including the rescission of its previous *amicus curiae* brief to the United States Supreme Court. The *Wolfchild* plaintiffs move this Court to enjoin the SMSC and the Defendant United States from SMSC’s use of government-regulated casino revenue to “interfere” with the legal and judicial process.

In the alternative, if warranted, this Court should consider referring this matter to the U.S. Attorney’s Office for the Districts of Minnesota and South Dakota to consider opening an investigation¹ consistent with the United States Attorney Manual Section 9-4.000, et seq.²

¹ See, e.g., United States Attorney Manual 1-7.531, noting the distinction between “reviewing a request for an investigation” and “opening an investigation”).

² See also *id.* 9-1.00 (“The Criminal Division supervises the enforcement of all federal criminal laws except those that are specifically assigned to other divisions. However, the scope of the Criminal Division’s jurisdiction is not limited to criminal matters but extends to civil matters as well. The statutes currently administered by the Criminal Division are set forth in USAM-9-4.000. The Criminal Division will provide assistance to a U.S. Attorney in any matter within the jurisdiction of the Division....”)

STATEMENT OF FACTS

A. The Shakopee Mdewakanton Sioux Community offered \$1 million to the Oglala Sioux Tribe to withdraw its support of the *Wolfchild* plaintiffs in the instant action.

The Oglala Sioux Tribe³ filed an *amicus curiae* brief in support of the *Wolfchild* Plaintiffs' petition⁴ before the U.S. Supreme Court for discretionary review of the Federal Circuit decision regarding this Court's certified questions on the trust implications of the 1888, 1889, and 1890 Appropriation Acts.⁵ The Oglala Sioux Tribe did so because the ultimate disposition of the instant litigation will affect their tribal members:

The interest of the Oglala Sioux Tribe ("the OST") in this litigation stems from the fact that approximately 2,000 members of the Tribe are also members of the plaintiff class of lineal descendants of the 1886 Mdewakanton⁶

In addition, the Oglala Sioux Tribe sought to promote the general welfare of the [Oglala Mdewakanton lineal descendant] tribal members because the United States breached its fiduciary obligations to these people:

³ The Oglala Sioux Tribe reside on the Pine Ridge Reservation, South Dakota, the second largest reservation in the United States. It consists of 2,000,000 acres. <http://home.comcast.net/~zebra/TC-Tribal-Council.htm>.

⁴ App. 10-11; Oglala Sioux Tribal Council Resolution 09-216 (Sept. 29, 2009).

⁵ Act of June 29, 1888, ch. 503, 25 Stat. 217; Act of Mar. 2, 1889, ch. 412, 25 Stat. 980; Act of Aug. 19, 1890, ch. 807, 26 Stat. 336.

⁶ App. 196.

[T]he Tribe has an interest in promoting the general welfare of these tribal members [because] ...[t]he Federal Government breached its fiduciary obligation, thus making the Federal Government liable in money damages for breach of trust to the *Wolfchild* plaintiffs, including those plaintiffs who are also members of the OST.⁷

Counsel for the *Wolfchild* plaintiffs again sought the support of the Oglala Sioux Tribe through an *amicus curiae* filing in this Court for the current October 22, 2010 hearing.⁸ *Wolfchild* plaintiff's counsel's efforts were denied — not because of a change of heart – but because of an overt offer of \$1 million from the SMSC's

⁷ App. 196.

⁸ “The most common reason why amici come forward, however, is that a party has solicited them.” David G. Knibb, *Federal Court of Appeals Manual* 762 §32:13 (5th ed. Thompson–West 2007). Besides the unique perspective of another non-party Native American tribe or community may provide the Court, the decision to seek an *amicus curiae* for this Court's most recent proceeding regarding ‘statutory use restriction’ issues, as with the Supreme Court petition for a writ of certiorari, included not only the effects of a decision on people similarly situated, but on persons situated differently. Kaardal Decl. ¶ 9. See for instance, App. 218-25 describing the interest of the Miwok as *amicus curiae* before the Supreme Court. As this Court recognizes, the motions before it and the scheduled hearing on October 22, 2010 may significantly advance this litigation or bring it to an end.” Kaardal Decl. ¶ 10. Regardless, SMSC used its monetary resources to supplant the legal process that it has itself inclined to join from time-to-time — ironically — as an *amicus curiae*, but then steadfastly avoids the legal process as this case continues to its conclusion. *See e.g.*, Dkt. 27 (Aug. 31, 2004) Motion to participate as *amicus curiae* by SMSC and Prairie Island; Dkt. 91 (Aug. 8, 2005) Motion for leave to file *amicus curiae* supplemental memorandum in support of Defendant's motion for reconsideration by SMSC and Prairie Island (Aug. 8, 2005); Dkt. 302 (Oct. 10, 2006) Motion to Quash Summonses by SMSC and Prairie Island; Dkt. 688 (July 31, 2008) (“Counsel for *amicus curiae* Shakopee Mdewakanton Sioux Community (“SMSC”) ...expressly reserves all jurisdiction objections to Ms. Walker's Motion [for discovery prior to August 6, 2008 hearing regarding disclosure of Anonymous Walker intervening plaintiffs].”)

President, Stanley Crooks, to have the Oglala Sioux Tribe withdraw from the judicial and legal process in this case.⁹

An *amicus curiae* filing constitutes knowledge for this Court to accept as valuable, if it so wishes.¹⁰ As represented in the Oglala Sioux Tribe's original Resolution authorizing the Supreme Court *amicus curiae* brief, the Oglala Sioux Tribe has their own independent view of historical events and their impact on the present:¹¹

⁹ The Oglala Sioux Tribe is poor. Of its approximate tribal native population of 20,806 (an enrolled membership of 17,775), the unemployment rate stands at 45% and the Oglala Sioux people are in need of economic development. *See*, http://home.comcast.net/~zebrec/TC_Tribal_Council.htm.

¹⁰ It is of course, recognized that some judges are openly hostile to *amicus curiae* because they are more "friends of the parties" than to the courts. *Wolfchild* counsel does not suggest to presume this Court's position on *amici curiae* filings; however, counsel is conscience of United States Court of Appeals for Seventh Circuit Judge Richard Posner's rules of thumb for justification of *amici curiae* filings:

- (1) When a party is not represented competently, or at all;
- (2) When the *amicus* has an interest in another case that may be affected by the present appeal, but that the interest would not entitle *amicus* to intervene in the present case; or
- (3) When the *amicus* has unique information or perspective that can help the court beyond what counsel for the parties can provide.

Voices for Choices v. Illinois Bell Telephone Co., 339 F.3d 542 (7th Cir. 2003);
National Organization for Women, Inc. v. Scheidler, 223 F.3d 615 (7th Cir. 2000);
Ryan v. Commodity Futures Trading Comm'n., 125 F.2d 1062, 1064 (7th Cir. 1997).
See also Knipp, *Federal Court of Appeals Manual* 763.

¹¹ *Id.*

WHEREAS, the Oglala Sioux Tribe is aware and believes that the so-called “rebellion” of the Dakota people near Ft. Snelling, Minnesota was caused in large part because of the United States Government’s failure to live up to its treaty obligations with the Dakota people, and that it was the United States Government itself that participated and caused the co-called “rebellion” and the facts giving rise to the Wolf Child (sic) Lawsuit...¹²

The Oglala Sioux Tribe also explored and ensured itself that its *amicus curiae* efforts were not contrary to the interests or would otherwise hurt the interests of other “sister Sioux Tribes *and communities*”:¹³

WHEREAS, the Oglala Sioux Tribe believes that supporting the Wolf Child (sic) plaintiffs in their Petition for Certiorari will not be adverse to any interests of the Oglala Sioux Tribe’s sister Sioux Tribes and communities....¹⁴

In other words, the Oglala Sioux Tribe’s narrow focus was and continues to be that of the legality of the federal government’s actions as opposed to its obligations. The *Wolfchild* case constitutes an issue of national importance involving the legal framework “in holding the United States accountable for legal

¹² App. 10.

¹³ (Emphasis added).

¹⁴ App. 11. *See also* App. 196, (“The OST wishes to emphasize that it is taking no position on the efforts of the *Wolfchild* plaintiffs to seek relief other than money damages for the breach of trust from the Federal Government under the Indian Tucker Act. However, the OST does not endorse the efforts of the *Wolfchild* plaintiffs to claim or take reservation and/or trust land from either the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community or the Lower Sioux Indian Community, or to claim or take “income, profits and proceeds from all [of these tribes] reservation businesses” including “casino profits.”)

violations and injustices regarding Native Americans”¹⁵ — “the *future of the next seven generations remain at the forefront of our actions.*”¹⁶

The Chair of the Oglala Sioux Tribe’s Economic and Business Development Committee Phillip Good Crow did meet with SMSC Chairman Stanley Crooks at Crooks’ invitation — without the [REDACTED]¹⁷ — to discuss “the Wolfchild case.”¹⁸ At the meeting, “Chairman Crooks stated that he will provide the Oglala Sioux Tribe with one million dollars (\$1,000,000) for the proposed construction of a tribally owned convenience store near the Prairie Winds Casino if the Oglala Sioux Tribe will rescind the resolution authorizing submittal of the amicus brief to the U.S. Supreme Court.”¹⁹ As a result of the meeting with Crooks, Good Crow moved in his committee to rescind Oglala Sioux Tribe support of the *Wolfchild* plaintiffs:

¹⁵ *Sheldon Peters Wolfchild, et al. v. United States*, Petitioners Petition for a Writ of Certiorari (Nov. 2009). *See also* Oglala Sioux Tribe Memorandum (Oct. 6, 2009), App. 9 (“While we are sensitive to the concerns expressed by President Crooks, we continue to maintain that the Oglala Sioux Tribe is not ‘attacking’ the Shakopee, Prairie Island and Lower Sioux Communities. The dual issues regarding the trust obligations of the federal government and the *future of the next seven generations remain at the forefront of our actions.*”) (Emphasis added).

¹⁶ *Id.*

¹⁷ [REDACTED]

¹⁸ [REDACTED]

¹⁹ [REDACTED]

[REDACTED]

20

An official transcript of the August 20th meeting of the Economic and Business Development Committee reveals that SMSC's Crooks made it a precondition that Oglala Sioux Tribe terminate *amicus curiae* support of the Wolfchild plaintiffs in order to receive the \$1 million:

[REDACTED]

21

[REDACTED]

22

Good Crow prevailed at the committee meeting. By a vote of 4 in the affirmative, none in the negative and 1 not voting, the committee voted "to refer the E&BD agenda item 'Rescinding Resolution 09-216' to the Tribal Council and be decided as a whole."²³

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

Notably, Crooks had previously sought to de-rail efforts of *Wolfchild's* counsel to elicit *amici curiae* filings in support of the *Wolfchild* plaintiffs' Supreme Court petition for a writ of certiorari.²⁴ After successfully procuring the unanimous support of the Oglala Sioux Tribal Council to file an *amicus curiae* brief in the Supreme Court, *Wolfchild* plaintiffs' counsel scheduled a September 30, 2009 conference call involving the leaders of other Sioux tribes to garner further *amici curiae* support. On the eve of that conference call, Crooks explained his displeasure of the *Wolfchild* lawsuit and appealed to the nine Sioux tribal leaders from South Dakota, North Dakota, and Nebraska²⁵ to deny their participation:²⁶

For the past five years the Shakopee Mdewakanton Sioux Community and the Prairie Island Indian Community have opposed the plaintiffs' lawsuit; we have supported the position of the United States in this matter and we filed amicus briefs describing our position. While plaintiffs attempt to describe their grievances as trust claims, their lawsuit does nothing to strengthen or support Tribal sovereignty or Tribal government authority ...

* * *

This lawsuit is not about ongoing trust duties that our Tribal governments maintain today with the United States; the lawsuit is about pursuing

²⁴ App. 3-5.

²⁵ This included Joseph Brings Plenty, Cheyenne River Sioux Tribe; Rodney Bordeaux, Rosebud Sioux Tribe; Josh Weston, Flandreau Sioux Tribe; Michael Jandreau, Lower Brule Sioux Tribe; Ron His Horse is Thunder, Standing Rock Sioux Tribe; Michael Selvage, Sisseton-Wahpeton Oyate; Robert Cournoyer, Yankton Sioux Tribe; and Roger Trudell, Santee Sioux Tribe. [REDACTED] [REDACTED] also received Crooks' September 29, 2009 memorandum. App. 3.

²⁶ The September 29, 2009 "Memorandum" was authored by Stanley Crooks of SMSC, Gabe Prescott of Lower Sioux Indian Community and Ronald Johnson of Prairie Island Indian Community; App. 3-5.

individual claims to the detriment of federally recognized Tribal governments...

* * *

As the elected Tribal leaders for the three Indian Tribes affected by this lawsuit, we certainly hope that you understand why we respectfully request that you do not consider supporting plaintiffs' lawsuit in any manner.²⁷

The September 29th memorandum is, on its face, indicative of political discourse and subsequent exchange among tribal leaders regarding the *Wolfchild* controversy. While several tribes felt that the Oglala Sioux Tribe's support of the *Wolfchild* petition to the Supreme Court as "attacking the three communities [SMSC, Prairie Island, and Lower Sioux],"²⁸ the Oglala Sioux Tribe responded with the dignity of historic reflection of their interrelation with other Sioux tribes and the concerns of the Oglala Sioux Tribe with unfulfilled federal obligations to Native Americans:

The sacred hoop of the Great Sioux Nation was formed by the seven council fires that included the Mdewakanton people. As relatives in leadership of the seven council fires we are often watchful of issues that have the potential to impact the special relationship between the federal government and treaty tribes. The land issues, health concerns, educational needs and community safety issues are treaty obligations that are continually under attack.

The support of the Oglala Sioux Tribe as a *friend of the court* in *Wolfchild v. United States* should not be considered an attack on any other tribe; our hearts and minds must focus on the survival of all tribal nations and our future generations.²⁹

²⁷ App. 4-5.

²⁸ App. 9.

²⁹ App. 7.

With SMSC's 2010 invitation to the Oglala Sioux Tribe's Economic and Development Committee chair, Good Crow, Crooks sought to have the Oglala Sioux Tribe rescind the 2009 resolution that authorized the submission of the Supreme Court *amicus curiae* brief.³⁰ Crooks expressed concern about one specific paragraph implicating SMSC and stating that the *amicus curiae* brief would not adversely affect "any interest of the Oglala Sioux Tribe's sister Sioux Tribes and communities."³¹ But, the rescission is effectively SMSC's overt attempt to dismantle the express support of the Oglala Sioux Tribe for the *Wolfchild* plaintiffs.³²

Crooks offered the Oglala Sioux Tribe \$1 million [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁴ Crooks did take the matter through Good Crow to the Economic and Business Committee and succeeded in having the Committee support Tribal Council consideration of the rescission of the

³⁰ *Id.*

³¹ *Id.* (emphasis in the original). See also Oglala Sioux Tribe Res. 09-216, App. 11.

³² [REDACTED].

³³ [REDACTED] (Original emphasis).

³⁴ [REDACTED]

amicus curiae resolution in exchange for \$1 million.³⁵ The full Tribal Council will vote on this matter on September 28th. Regardless of the outcome, the Plaintiffs *amicus curiae* practice has been effectively undermined.³⁶

Considering the Oglala Sioux Tribe's need for the infusion of moneys for economic development, it is understandable, on the one hand, that the Committee accepted Crooks' "offer." But, on the other hand, it is this "demand" for the purchase of the Tribe's right to petition the courts to protect the rights of the Tribe's affected individual members and the impact to this case.³⁷ The "offer," in light of the current status of the *Wolfchild* proceedings and the possible impending final disposition of the legal issues, seems far beyond "native inter-tribal or community politics."

The irony of SMSC's condition precedent is hardly palpable. SMSC itself has used the *amicus curiae* process to influence the judicial and legal process in the instant case in the past.³⁸ In fact, on September 21, 2010, *Wolfchild* counsel received an email communication from SMSC counsel requesting that the Plaintiffs consent to SMSC's and Prairie Island's "fil[ing of] a motion for leave to participate as

³⁵ [REDACTED]

³⁶ Kaardal Decl. ¶ 21.

³⁷ As previously noted, approximately 2,000 Oglala Sioux Tribal members are *Wolfchild* plaintiffs. *See*, Kaardal Decl. 1.

³⁸ *E.g.*, Dkt Nos. 27, 29, 30, 32, 72, 83, 91, 97, 98, 99.

amicus, and an amicus memorandum in opposition to the plaintiffs' cross-motion for partial summary judgment"³⁹ As this Court would recall, in SMSC's last "participation" in the instant case occurred in January 2007 opposing the *Wolfchild* plaintiffs' effort to have a summons served upon SMSC under 41 U.S.C. § 1114(B).⁴⁰ Importantly, in the January 2007 memorandum, SMSC argued to this Court that the *Wolfchild* plaintiffs should not be side-tracked and focus on the efficient resolution of the instant dispute:

The Court should not allow the *Wolfchild* plaintiffs' nonjusticiable, parochial grievances with the Tribes to side-track the efficient resolution of the case for the rest of the parties.⁴¹

Crooks' latest actions have not only side-tracked but de-railed the efficient resolution — a cause *Wolfchild* counsel sought to achieve — with the assistance of other perspectives through *amici curiae* filings on the legal issues now before this Court.⁴²

The practical consequence of the intervention of SMSC was that no Sioux tribe would participate in the September 30th teleconference call discussion on *amici curiae* support.⁴³ The Oglala Sioux Tribe eventually filed its *amicus curiae*

³⁹ Kaardal Decl. ¶ 22, App. 255.

⁴⁰ Dkt. 387, 398.

⁴¹ Shakopee Reply Memo. to Quash Summons 32 (Jan. 11, 2007)(Dkt. No. 398).

⁴² Kaardal Decl. ¶¶ 4, 9, 11.

⁴³ Kaardal Dec. ¶ 13.

brief *alone* in the Supreme Court of the United States.⁴⁴ Basically, the SMSC has deterred eight Sioux Tribes from participating in this lawsuit on behalf of the *Wolfchild* plaintiffs in the United States Supreme Court and, now, has deterred the ninth Sioux Tribe from participating as *amici curiae* in this Court for the October 22, 2010 hearing.

B. The past activities of the SMSC representatives regarding the judicial and legal process of the instant case also included the use of gaming revenue regulated by the federal government – a defendant in this case.

The Indian Gaming Regulatory Act¹ (IGRA) is codified at 25 U.S.C. § 2701, et. seq. The IGRA defines “Indian tribe” to include SMSC as a community.⁴⁵ The Act authorizes Interior to withhold approval of the communities’ revenue allocation plan providing for per capita payments if the revenue allocation plan was legally inadequate and authorizes Interior to withhold approval of the communities’ gaming ordinances and resolutions if net gaming revenues were being used for unauthorized purposes.⁴⁶ Interior, inclusive of the National Indian Gaming Commission, investigates violations of the IGRA.⁴⁷

⁴⁴ App. 190-210.

⁴⁵ 25 U.S.C. § 2703. The *Wolfchild* plaintiffs do not concede or otherwise admit that the use of the word “tribe” or “Indian tribe” means the same as “historic Indian tribe.” SMSC, Prairie Island, and Lower Sioux are “communities” created under the provisions of the 1934 Indian Reorganization Act, as political governmental entities who have used their authority to exclude (and in the case of Lower Sioux – actively disenrolling as members) — 1886 Mdewakanton from benefits under which, but for their ancestors, the community governments could not have been created in the first instance.

⁴⁶ 25 U.S.C. § 2710.

SMSC Chairman Crooks' recent offer to the Oglala Sioux Tribe of \$1 million are moneys from IGRA-regulated casino revenues. The action is reminiscent of past SMSC use of government-⁴⁸regulated casino revenues to interfere with the *Wolfchild* Plaintiffs' judicial and legal process in the instant case.

As this Court may recall in 2006, SMSC interfered with the *Wolfchild* plaintiffs' publication of a Court-ordered notice in the Lakota Dakota Journal.⁴⁹ The notice sought to provide notice to all lineal descendants, who were not then parties to the lawsuit, of the opportunity to become parties.

⁴⁷ The Bureau of Indian Affairs at the Department of the Interior has issued regulations regarding several aspects of the Indian Gaming Regulatory Act (IGRA): 25 CFR part 290, Tribal Revenue Allocation Plans; 25 CFR part 291, Class III Gaming Procedures; 25 CFR part 292, Gaming on Trust Lands Acquired After October 17, 1988; 25 CFR part 293, Class III Tribal State Gaming Compact Process. The National Indian Gaming Commission has its own regulations. 25 CFR Part 501, et seq. NIGC's powers under 25 CFR Part 573.06 include temporarily closing Native American gaming operations due to illegalities. For example, in 2003, NIGC temporarily closed the gaming operations of the Sac and Fox Tribe of the Mississippi in Iowa (Meskwaki) for illegalities.

⁴⁸ There is no dispute that SMSC is a force in finance having funded anywhere from \$3.9 million to \$17.8 million in annual grants to tribes since 2001, and loaned more than \$210 million since 2008 to expand casinos, consolidate debt and build infrastructure of other tribes. Molly Young, *Shakopee Mdewakanton: A tribal force in finance*, (Aug. 16, 2010); <http://www.startribune.com/business/100651909.html>. But, here, the issue is the discretionary use of \$1 million as a condition precedent to obstruct the judicial and legal process of the *Wolfchild* plaintiffs.

⁴⁹ Or. 36 (Dec. 16, 2005), Dkt. 99; Kaardal Decl. ¶¶ 16-18.

On March 15, 2006, Laureen Allan, a Lakota Dakota Journal staff member, informed Mohrman & Kaardal that the Lakota Dakota Journal would not run the court-ordered notice because SMSC had given them \$1 million -- although it had not yet received the check.⁵⁰ On March 17, 2006, Lakota Dakota Journal Managing Editor wrote to Mohrman & Kaardal, P.A., confirming that the Lakota Dakota Journal would not run the court-ordered notice.⁵¹ Meanwhile, Flandreau Santee Sioux Tribe's and Lakota Media, Inc.'s counsel Rollyn H. Samp, insisted that the Lakota Dakota Journal made an "independent decision" not to run the court-ordered notice inferring the \$1 million as not influential.⁵² Regardless, as a result of the paper's position, the *Wolfchild* plaintiffs' attorneys moved to be relieved of its obligation to publish the notice in the Lakota Dakota Journal.⁵³

During the subsequent March 20, 2006 hearing, the Court expressed its concern with a possible "interference with process" especially since the Lakota Dakota Journal was the only Native American paper in South Dakota listed to publish the Court's notice:⁵⁴

⁵⁰ App. 16.

⁵¹ App. 17.

⁵² App. 18.

⁵³ Dkt. 107; 117; 123.

⁵⁴ Hrg. Transcr. 22:10-11 (Mar. 20, 2006), App. 250.

THE COURT: ...I'll just raise my second concern ... If, indeed Mr. Kaardal's allegations are true, there is an interference with process, and that's a serious matter.⁵⁵

The United States, in turn, represented to the Court a parallel set of circumstances when compared to the most recent Oglala Sioux Tribe incident:

MR. LONGSTRETH: ...The voice mail and the conclusion Mr. Kaardal drew in his papers; it's not apparent to me that that's necessarily reflective of the voice mail message; it just indicates that they are concerned, and the Shakopee community gives a large amount of money ...the grant was made, and it appears to be part of a large philanthropic effort that they make grants to other communities.

THE COURT: Well, that may be so, but it is highly suspicious, and Court would ask, Mr. Longstreth, that you address whether a referral is appropriate in this particular case.⁵⁶

After the Court's inquiry to Longstreth, the Lakota Dakota Journal changed "its" mind and decided to publish the court-ordered notice making the legal issue presented to the Court moot.⁵⁷

Then, in 2008, SMSC obtained information relating to the identity of anonymous plaintiffs filed under seal and "disclosed as a result of an examination by counsel's agents."⁵⁸ Although deemed an inadvertent disclosure by Court

⁵⁵ Hrg. Transcr. 22: 19-20; 23-25; 23:1 (Mar. 20, 2006), App. 250-51.

⁵⁶ Hrg. Transcr. 23:13-25 (Mar. 20, 2006); App. 251.

⁵⁷ Dkt. 123.

⁵⁸ Dkt. 672, App. 21-22.

personnel, it did require an examination by this Court of the occurrence⁵⁹ and particular steps to secure the protected materials from further use by SMSC.⁶⁰ Unlike the events of 2007 and now in 2010, no casino revenue apparently was used in obtaining the sealed Walker information, but the SMSC activity nevertheless remains indicative of a “pattern of behavior.”⁶¹

Because of Stanley Crooks’ \$1 million offer to the Oglala Sioux Tribe, the *Wolfchild* plaintiffs and this Court are deprived of an opportunity that cannot be regained because of SMSC’s actions. The deadline for the Oglala Sioux Tribe *amicus curiae* brief would have been October 22, 2010 – the date of the scheduled hearing on the government’s motion to dismiss and the *Wolfchild* plaintiffs’ cross-motion for partial summary judgment. But, with the SMSC’s standing offer of \$1 million to the Oglala Sioux Tribe, it appears “politically impossible” for the Oglala Sioux Tribe to file an *amicus curiae* brief in support of the *Wolfchild* plaintiffs in this Court.⁶²

⁵⁹ Dkt. 694, 698 (August 6 and 7, 2008 hearing transcripts — one public, one closed); *see also*, Dkt. 678 (Motion by Anonymous Walker Group for a Court Ordered Independent Federal Investigation (July 8, 2008)).

⁶⁰ Dkt. 717, App. 184-187.

⁶¹ Kaardal Decl. ¶ 20.

⁶² Kaardal Decl. 14.

ARGUMENT

- I. The SMSC actions offering \$1 million in exchange for rescinding Oglala Sioux Tribal support as an *amicus curiae* interferes with the judicial and legal process and, thus, judicial independence.
 - A. SMSC took from the court its discretionary authority to grant or deny an *amicus curiae* filing, showing disrespect for the judicial process and the law.

It is understood that there is no right to file an *amicus curiae* brief in the U.S. Court of Federal Claims. But, the decision whether to allow participation by *amici curiae* is left entirely to the discretion of the court.⁶³ And, when making such a decision, this Court considers factors such as opposition of the parties, interest of the movants, partisanship, adequacy of representation and timeliness.⁶⁴ When a court's decision would directly affect a person or entity's rights or would set a controlling precedent regarding a claim of that person or entity, the Court may allow leave to file an *amicus curiae* brief.⁶⁵

But, in the instant case, the discretion of the court to decide whether to grant the Oglala Sioux Tribe leave to file an *amicus curiae* brief was taken out of this Court's hands. SMSC sought to and did de-rail the Court's discretionary powers *before that opportunity would have arisen*. SMSC has effectively disrupted the parties' efforts to complete the disposition of the instant case with a full panoply of

⁶³ See *American Satellite Co. v. United States*, 22 Cl.Ct. 547, 549 (1991).

⁶⁴ See *id.* at 549; *Leigh v. Engle*, 535 F.Supp. 418, 420 (N.D. Illinois 1982).

⁶⁵ See *Winkler-Koch*, 209 F.2d at 758-59; *American Satellite*, 22 Cl.Ct. at 549.

interests, legal thought and expertise.⁶⁶ The issue here is that the SMSC appears to have no respect for the judicial process and the law – and therefore SMSC interferes with impunity.⁶⁷

- B. SMSC's actions interfere with the legal process, depriving the *Wolfchild* plaintiffs an opportunity to bring different perspectives on the issue of "statutory use restrictions," culminating with the interference of judicial independence.

"[A]ny form of interference in the legal process could only complicate the issue."⁶⁸ With SMSC's offer of \$1 million to rescind the Oglala Sioux Tribe's resolution authorizing the *amicus curiae* brief in the Supreme Court in support of the *Wolfchild* petition for a writ of certiorari, SMSC effectively seeks to cease any future Oglala Sioux Tribe *amicus curiae* support in the instant case. By doing so — and getting the support from the Oglala Economic and Development Committee

⁶⁶ For instance, Mario Gonzalez, of the Gonzalez Law Firm in Rapid City, South Dakota, wrote the Supreme Court *amicus curiae* brief for the Oglala Sioux Tribe in support of the *Wolfchild* petition for writ of certiorari before the United States Supreme Court. He has extensive experience in Indian and tribal law, and knows "from firsthand experience that tribal matters have characteristics not seen elsewhere in the world, such as unique histories, traditions, cultures, treaties and laws that might not be important to most people but can be of extreme importance in Indian Country." <http://www.mariogonzalezlaw.com/#>

⁶⁷ See *Cosby v. Meadors*, 351 F.3d 1324, 1326-27 (10th Cir. 2003).

⁶⁸ Mary Carter Duncan, "Playing by Their Rules: The Death Penalty and Foreigners in Saudi Arabia," 27 Ga. J. Intl. & Comp. L. 231, 236 (1998) (The Saudi Arabia's response to the United Kingdom's concern over treatment of British citizens in Saudi's criminal process. In this instance, it regarded the punishment (death by public beheading) for two British nurses accused of murdering an Australian national in Saudi Arabia.)

with the \$1 million offer — SMSC has complicated the issue of what the *Wolfchild* plaintiffs should expect from this Court’s judicial and legal process. The present status of this case, and its future — for or against the plaintiffs — will come to fruition on October 22, 2010. This Court will hear the United States argue for dismissal of the action and will hear the *Wolfchild* plaintiffs argue for partial summary judgment.

Yet, SMSC, while now desiring its voice to be heard as an *amici curiae*,⁶⁹ it has deprived this Court of hearing— if it so desired — from others inclined to interject an opinion, a policy or legal analysis of the impact of the court’s disposition of the *Wolfchild* claims. The Oglala Sioux Tribe did come forward as an *amicus curiae* when *Wolfchild* plaintiffs were petitioning the United States Supreme Court, but the effort for a similar *amicus curiae* filing in this Court has been sabotaged.

The plain language of “interference with legal process” contemplates an intermeddling with or hampering of a presently pending legal proceeding.⁷⁰ Although explaining the necessity of judicial independence and detailing governmental and non-governmental influences on the judiciary, a California Law Review article grasps the concerns of the use of moneys, unavailable to others, that can take advantage and interfere with the legal process, even if no criminal or otherwise illegal act has been committed:

⁶⁹ App. 255; Kaardal Decl. ¶ 22.

⁷⁰ See, e.g., *Findlay v. McAllister*, 113 U.S. 104, 5 S.Ct. 401, 28 L.Ed. 930 (1885); *Michalson v. All*, 43 S.C. 459, 21 S.E. 323, 49 Am.St.R. 857 (1895).

A wider conception of judicial independence would not confine itself to restraining the actions of public officials. Rather, it would aim at preventing interference with legal processes wherever it may originate. Powerful economic or social interests have large stakes in judicial decisions, and can be expected to try to alter decision probabilities in their favor wherever they can legitimately do so. Obviously, there are many legal ways to take advantage of good lawyering to alter the decision agenda of courts and to ensure that cases are placed in their best light. But these methods are expensive and, therefore, are not available to everyone. Moreover, even if it is accepted that the way legal services are provided constitutes a real source of danger to judicial independence, it is not so clear how the situation may be ameliorated. Realistically, though, it does seem that genuine judicial independence may be substantially threatened by powerful nongovernmental interests acting legally to ensure themselves advantages in legal processes.⁷¹

SMSC's actions reflect an attempt to invade the province of judicial independence, indirectly, through the offer of government-regulated money to an almost economically desperate tribe. With this SMSC success, SMSC has interfered with not only the *Wolfchild* plaintiffs' legal process, but also the judicial process and the role of judicial independence in a constitutional democracy. The values undermined include three: first, the judicial independence to maintain the rule of law — that everyone is subject to the same publically communicated general legal rules.⁷² "This concern suggests the necessity of making sure that powerful people ... cannot manipulate legal proceedings to their advantage."⁷³ The second value includes the assurance that the courts are the institutions that determine which

⁷¹John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," 72 S. Cal. L. Rev. 353, 366 (1999).

⁷² *Id.* at 366-67.

⁷³ *Id.*

laws survive as constitutionally legitimate.⁷⁴ And, the third value within this constitutional context ensures the courts give legitimate laws their full effect.⁷⁵

Here, SMSC has the economic power and, therefore, the political power to disrupt the autonomy of this Court to decide whom it may wish to hear from and to be persuaded by others regarding the Court's disposition of the *Wolfchild* claims. SMSC's economic power is derived from the Congressional generosity of the Indian Regulatory Gaming Act with the accumulation of gaming revenue regulated by the government – the defendant in this case.

SMSC, by the use of its IGRA-regulated casino revenues, influenced the Lakota Dakota Journal not to publish a court-ordered legal notice and the Oglala Sioux Tribe to rescind a resolution that offered *amicus curiae* assistance in the Supreme Court and to effectively deter any future *amici curiae* filing by the nine Sioux tribes. Through two separate and independent \$1 million offers, SMSC has directly interfered with the legal and judicial process.⁷⁶

⁷⁴ *Id.*

⁷⁵ *See, id.*

⁷⁶ *See, Findlay v. McAllister*, 5 S.Ct. 401 (1885) (Plaintiff recovered a judgment against a county on bonds it issued, with a special tax levied on property seized to satisfy the judgment. But the defendant, in an effort to prevent the collection of the tax prevented others from bidding for the levied property and influenced taxpayers not to pay a special tax. In addition, with the collection of payments for the judgment, if the county had used those moneys, except for the satisfaction of the judgment, both actions would result in the contempt of the process of the circuit court.)

While the Lakota Dakota Journal incident became moot, the present situation is not. The *Wolfchild* plaintiffs cannot now persuasively argue to the Oglala Sioux Tribe to forgo a \$1 million infusion of economic stimulus in exchange for greater discontent and greater strife between other Sioux tribes or even within its own people. The promise of a *future* legal determination that may enhance the analysis of the rule of law and the obligations of the United States to other Native Americans or Native American tribes in Congressional acts or agency actions is of little value when compared to SMSC's *present promise* of \$1 million.

As previously stated, the Court has been deprived, as have the plaintiffs, from the informed experiences and perspectives of the Oglala Sioux Tribe in what might be the last available legal determination in this Court regarding the rights of the 1886 Mdewakanton.

II. The Court should enjoin SMSC and the federal government from allowing any prospective use of IGRA gaming revenue in a manner that would interfere with the judicial and legal process of the instant matter.

Although the U.S. Court of Federal Claims, which was established by Congress under Article I of the Constitution, does not have general equity powers, the court has, no doubt, the power to issue an injunction if and when the court should deem it necessary or advisable to do so in order to protect the jurisdiction of the court. In 28 U.S.C. § 1651(a) (1982), Congress has provided that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." In short, this court is authorized to issue such writs as may be necessary or appropriate in aid of its jurisdiction. The proposition that the United States Court

of Federal Claims is authorized by section 1651(a) to issue writs necessary or appropriate in aid of its jurisdiction finds support in the decision by its predecessor court, the United States Court of Claims, in the case of *Kamen Soap Products Co. v. United States*.⁷⁷ Also, RCFC 71 (2008) permits the Court to enforce an order against a non-party as if it were a party.

In the instant case, with the advent of an attempt to interfere with the judicial and legal process of the Court, the imposition of injunctive relief is an appropriate remedy as an aid of the court's jurisdiction. First, this Court at the inception of the *Wolfchild* lawsuit determined the U.S. Court of Federal Claims had jurisdiction under the Indian Tucker Act.⁷⁸ Second, with the Federal Circuit's decision answering the certified questions regarding the 1888, 1889, and 1890 Appropriation Acts, the United States now challenges the jurisdiction of this Court under both the Tucker Act, 28 U.S.C. § 1491(a)(1) (2004) and the Indian Tucker Act, 28 U.S.C. § 1501 emphasizing the need for the plaintiffs to "point to some source of law ... that imposes an obligation on the United States to state a claim."⁷⁹ Essentially, the United States asserts that the Appropriation Acts do not create a

⁷⁷ 124 Ct.Cl. 519, 110 F.Supp. 430 (1953).

⁷⁸ *Wolfchild v. United States*, 62 Fed. Cl. 548 (2004) *rev'd*, 559 F.3d 1228 (Fed. Cir. 2009).

⁷⁹ Memo. in Support Mot. To Dismiss, 16, citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("Mitchell I"); *United States v. Mitchell*, 463 U.S. 206, 212 n.8 (1983) ("Mitchell II"); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1372 (Fed. Cir. 2001).

substantive source of law creating a money-mandating duty for monetary damages.⁸⁰

Thus, the disposition of this Court, on the motion and arguments of the United States, falls squarely upon the retention or rejection of subject matter jurisdiction over the plaintiffs' claims. Either determination will bring the action closer to a final disposition. Yet, with the importance of this single issue, a non-party — SMSC — sought to affect the right of another non-party — the Oglala Sioux Tribe — to petition the court through an *amicus curiae* brief, as both SMSC and the Oglala Sioux Tribe have done in the past. Moreover, SMSC sought to breach this right through the advantage and influence of monetary wealth gained through a Congressional Act upon an unequal economic entity and group of fellow Native Americans — namely, the Oglala Sioux Tribe and the Oglala Sioux Tribe's 1886 Mdwakanton.

Considering the implications of this Court's disposition in this case as it will affect the Oglala Sioux Tribe and its members and how it may effect "seven generations" of Native Americans, SMSC's purchase of silence from the Oglala Sioux Tribe is unconscionable and a direct threat to this Court's judicial independence. This direct attack upon the Court's independence through a monetary offer to a potential *amicus curiae* filer is within the authority of the U.S. Court of Federal Claims to protect and aid its jurisdiction of adjudicating claims under the Indian Tucker Act. By the issuance of a prospective injunction imposed

⁸⁰ Memo. in Support Mot. to Dismiss 17-26.

upon both the Defendant United States — who has regulatory authority over IGRA gaming revenues — and SMSC, the appearance of judicial independence in this Court will remain intact.

While it is possibly too late for the *Wolfchild* plaintiffs in their attempts to assist the Court with a unique perspective from the Oglala Sioux Tribe as *amicus curiae*, the *Wolfchild* plaintiffs concede nothing to its opponents, parties and non-parties alike. But, it is unfortunate that SMSC is allowed to believe that the judicial and legal process is for the taking, depending whether one has the money. SMSC's success in dissuading the future filing of *amici curiae* briefs, and in rescinding past supportive acts, reflects how "powerful economic ... interests have large stakes in judicial decisions ... [where] genuine judicial independence may be substantially threatened by powerful nongovernmental interests acting legally to ensure themselves advantages in the legal process."⁸¹

Therefore, the imposition of equity relief in the form of an injunction to prevent the future misuse of federally-regulated gaming revenue is proper and just *and* within the authority of this Court in the protecting and aiding of its jurisdiction.

⁸¹ *Supra*, n.71, Memo. 23; *see also* App. 8-9 where Crooks, along with the leadership of the Lower Sioux and Prairie Island fear the possible outcome of the *Wolfchild* lawsuit: "...[W]e have supported the position of the United States in this matter and we filed *amicus* briefs describing our position...Plaintiffs' Complaint seeks to take the Reservations and trust land from the three Tribes and each Tribe's 'income, profits, and proceeds' from all reservation businesses, including 'casino profits.' Plaintiffs specifically request the Court to determine that the federal government's approval of each of our Gaming Compacts with Minnesota was a violation of fiduciary and statutory duties...."

III. Alternatively, if warranted, considering the circumstances of the SMSC offer of \$1 million to the Oglala Sioux Tribe to rescind its *amicus curiae* support to the *Wolfchild* plaintiffs, this Court should consider bringing this matter to the attention of the U.S. Attorney's Offices for the Districts of Minnesota and South Dakota to open an investigation.

It is the consequences of the SMSC's actions and attempts to interfere with the final phases of the *Wolfchild* litigation that forms the basis of the instant request. Whatever the final outcome of the legal arguments of the *Wolfchild* plaintiffs' claims on October 22, 2010, if for any reason, the *Wolfchild* plaintiffs feel abused by the judicial process because of SMSC's misuse of its economic power over the legal process, their belief in a constitutional democracy may be forever lost.

From the viewpoint of the *Wolfchild* plaintiffs, it is their protected right to due process to have their grievances against the United States government heard in a fair setting.⁸² SMSC's latest exercise of its economic power to influence the judicial and legal process has crossed the line.⁸³

Thus, the *Wolfchild* plaintiffs seek, alternatively, if this Court deems warranted, a referral to the United States Attorney's Office to investigate the seemingly "illegal" acts of SMSC under 18 U.S.C. § 1512.

In fact, it appears that 18 U.S.C. § 1512 bars corruptly obstructing, influencing or impeding any official proceeding – or any attempt to do so:

⁸² See U.S. Const. Amends. I, V, and XIV.

⁸³ *Wolfchild* Plaintiffs believe that this Court should consider other alternative remedies as well regarding the SMSC actions including awarding Plaintiffs' attorney fees and costs, and denying all requests of SMSC to participate as an *amicus curiae* in the instant matter.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

* * *

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process⁸⁴

In the viewpoint of the *Wolfchild* plaintiffs SMSC's actions are an ongoing attempt to hinder, prevent, or dissuade the Oglala Sioux Tribe from participating in an official proceeding through the filing of an amicus curiae brief.⁸⁵

⁸⁴ 18 U.S.C.A. § 1512.

⁸⁵ The statute further states:

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding

18 U.S.C.A. § 1512. SMSC's actions appear to be covered by this statutory text, too.

Under 18 U.S.C. § 1512, because of the pending hearing of October 22, 2010 on the motions of the United States to dismiss the plaintiffs' complaint and the plaintiffs' motion to amend their complaint and for summary judgment, this Court has vast jurisdictional authority to consider referring the matter to the U.S.

Attorney's Offices:

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.⁸⁶

⁸⁶ *Id.*

Accordingly, this Court should consider referring this matter to the attention of the U.S. Attorney's Offices for the Districts of Minnesota and South Dakota consistent with 18 U.S.C. § 1512 and the United States Attorney Manual.⁸⁷

CONCLUSION

The recent action of the SMSC offering \$1 million to the Oglala Sioux Tribe to dissuade the filing of an *amicus curiae* memoranda in the instant case should be examined by this Court. A hearing is necessitated to allow the full examination of the factual events described in the *Wolfchild* plaintiffs' memorandum. The Court has the jurisdiction and authority to prevent the use of government-regulated casino revenue to unduly influence or interfere with this judicial and legal process. The Court also has the authority to request the opening of an investigation by the United States Attorney's Offices. The Court should also consider awarding attorney's fees as an appropriate sanction and any other appropriate sanction.

Dated: September 21, 2010

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⁸⁷ *Supra*, n.1, 2; Memo. 2.