

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
No. 03-2684L & No. 01-568L (consolidated)**

	)	
Sheldon Peters Wolfchild, et al.,	)	
Plaintiffs,	)	
vs.	)	<b>Honorable Charles F. Lettow</b>
The United States of America,	)	
Defendant.	)	

**AMICI CURIAE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY’S AND  
PRAIRIE ISLAND INDIAN COMMUNITY’S MEMORANDUM IN OPPOSITION  
TO WOLFCHILD PLAINTIFFS’ MOTION TO ENJOIN AND FOR  
MISCELLANEOUS RELIEF (DOCKET NO. 787)**

Dated: October 8, 2010

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Amici curiae the Shakopee Mdewakanton Sioux Community (“SMSC”) and Prairie Island Indian Community (“PIIC”) (collectively “Amici” and, with Lower Sioux Indian Community, “Tribes”), submit this memorandum in opposition to the *Wolfchild* Plaintiffs’ Motion for a Hearing Seeking to Enjoin and for Miscellaneous Relief (Redacted) (Docket No. 787) (“Motion to Enjoin”). The Court should summarily deny Plaintiffs’ motion.

### **INTRODUCTION**

Plaintiffs’ Motion to Enjoin is the third attempt by Plaintiffs to distract the Court with baseless and needless motion practice that slanders the Amici and their leaders, particularly those of SMSC, a federally recognized Indian tribal government.

The first unwarranted accusation was made in 2006, when the *Wolfchild* Plaintiffs accused SMSC of giving a \$1 million grant to the Flandreau Santee Sioux Tribe to purchase a convenience store for the purported purpose of dissuading the tribally owned *Lakota/Dakota Journal* from publishing a judicial notice regarding the case. Counsel for the Flandreau Santee Sioux Tribe refuted this allegation. He explained that the only reason the *Journal* had initially been reluctant to publish the notice was because the description of it given by a paralegal in the *Wolfchild* Plaintiffs’ counsel’s office led him to believe that the *Wolfchild* Plaintiffs were “running an ad which I thought was to solicit clients for this litigation.” *See Wolfchild* Plaintiffs’ Index of Exhibits (Docket No. 788-2) at 18. Flandreau’s tribal attorney did not have any problem with a “legal notice,” *id.*, and the notice was duly published. Flandreau’ legal counsel concluded his letter to the *Wolfchild* Plaintiffs by debunking their spurious allegations:

The SMSC has not asked Lakota Media, Inc., or the Tribe to refrain from publishing any notice or statement regarding the *Wolfchild* case. I hope this letter makes it clear any conclusion that SMSC has done

otherwise or that my client has accepted money for the purpose of not publishing the notice as requested by your office is false and incorrect.

*Id.* at 19. There was simply no truth to the *Wolfchild* Plaintiffs' allegations.

The second unwarranted accusation was made by the Plaintiffs in 2008, when the Anonymous Walker Plaintiffs accused an SMSC researcher of improperly obtaining the names of members of that Plaintiff group. The names erroneously appeared in the public court file due to either an error by the Anonymous Walker Plaintiffs' counsel in filing the names in unredacted form with the clerk's office, or a filing error within the clerk's office. The inadvertent disclosure of these names was fully, promptly, and voluntarily remedied by SMSC and its counsel upon discovery.<sup>1</sup>

Now, for a third time, the *Wolfchild* Plaintiffs come to the Court with redacted, anonymous allegations that SMSC has offered \$1 million to the Oglala Sioux Tribe ("Oglala" or "OST") to build a convenience store, if OST will rescind a year-old Tribal Council resolution authorizing the filing of an amicus brief to the Supreme Court. That resolution and amicus brief unsuccessfully urged the Supreme Court to review the Federal Circuit's March 2009 decision in this case, *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009). As discussed in more detail below, there is no factual basis to these allegations, nor would they be improper even if they were true (which they are not).

Procedurally, no justification exists for the Plaintiffs' anonymous and redacted filings. Plaintiffs seek to impute nefarious intent to the Amici without any evidence worthy of the

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<sup>1</sup> The 24 exhibits, totaling 168 pages, contained in the *Wolfchild* Plaintiffs' Index of Exhibits (Docket No. 788-2) relating to the Anonymous Walker Plaintiffs' baseless assertions of wrongdoing against SMSC are ample evidence of the inordinate burden and expense associated with this type of motion practice by the Plaintiffs.

name. In the seven-year history of this case there has been absolutely no evidence of any unlawful retaliation by the Amici. The Anonymous Walker Plaintiffs' episode demonstrates conclusively that there is no reasonable concern about retaliation. Here, there can be no conceivable "retaliation" by the Amici against anyone living on the Pine Ridge Reservation, hundreds of miles away in western South Dakota. There is no justification for barring the Amici from making amicus filings in this Court based on sealed, anonymous and unfounded allegations. The *Wolfchild* plaintiffs' goal is the antithesis of due process.

Viewed objectively, the whole premise of the *Wolfchild* Plaintiffs' accusations is absurd. No reasonable person would offer anything, much less \$1 million, for the rescission of an old resolution which authorized the filing of an unpersuasive and unsuccessful amicus brief last year in another court. And even if OST now planned to submit an amicus memorandum to this Court in connection with the United States' pending motion to dismiss (Docket No. 765) and the *Wolfchild* Plaintiffs' motion for partial summary judgment (Docket No. 775), it is equally absurd to imagine that SMSC would offer \$1 million to forestall such a filing. To be clear: the Amici have no objection should OST seek leave to file an amicus memorandum, and SMSC has not offered anything of value to OST to prevent such a filing.

In sum, no factual or legal basis exists for any hearing on the *Wolfchild* Plaintiffs' motion. It should be denied summarily. The Amici have provided useful factual information and legal argument to the Court, and should continue to be allowed to petition to participate in this action as amici.

**FACTS**

**I. SMSC HAS NOT MADE ANY OFFER OF MONEY TO OST TO FORESTALL OR WITHDRAW THE FILING OF AN AMICUS PLEADING**

The *Wolfchild* Plaintiffs' redacted filing provides only the vaguest indication of when the alleged meeting between SMSC Chairman Stanley Crooks and some unnamed OST representative(s) occurred at which a purported \$1 million offer toward construction of a convenience store was made, conditioned upon OST's rescission of the 2009 resolution authorizing filing of an amicus brief at the Supreme Court. (The Motion to Enjoin at 10 alleges only a "2010 invitation" from SMSC to Phillip Good Crow, said to be the Chair of Oglala's Economic and Business Development Committee.) Presumably such a meeting would need to have occurred recently, if the alleged intention was to influence OST with respect to filing an amicus memorandum in connection with the motions calendared for hearing before this Court on October 22, 2010.

In fact, there have been no face-to-face meetings between Chairman Crooks and any Oglala representatives in over a year. On January 18, 2010, SMSC and Oglala representatives participated in a conference call related to an existing 2006 loan extended to the Oglala Sioux Tribe for the operation of its gaming enterprise. As a result of that call, in March 2010, SMSC agreed to provide in-kind consulting services free of charge by some of its casino managers to assist Oglala's casino management.

There have been no financial offers of any kind by SMSC to Oglala for financing a convenience store, much less an offer conditioned on anything involving the *Wolfchild* lawsuit. SMSC has for many years financed by grant and loan various projects on the Pine Ridge Reservation, the most recent being long-term financing for a tribal government casino

facility. An example of a social services project which received \$500,000 in grants in 2006 from SMSC is Cangleska, an organization working to prevent domestic violence on the Pine Ridge Reservation. *See also* Molly Young, “Shakopee Mdewakanton: A Tribal Force in Finance,” (Mpls. Star Tribune Aug. 16, 2010), cited in Plaintiffs’ Motion to Enjoin at 14 n.48, and available at <http://www.startribune.com/business/100651909.html> (detailing tribal lending projects in Upper Midwest). The allegations contained in the *Wolfchild* Plaintiffs’ Motion to Enjoin appear fabricated solely for the purpose of seeking to exclude the Amici from participation in this case.

## **II. OGLALA SIOUX DESCENDANTS ARE BEING HEARD IN THIS ACTION AS PARTIES**

The *Wolfchild* Plaintiffs’ overheated rhetoric notwithstanding, there is zero chance that the Court will not be informed of the views of key OST leaders about this case – because those leaders are themselves plaintiffs! OST President Theresa Two Bulls is an individual plaintiff, represented by the *Wolfchild* Plaintiffs’ lead counsel, see *Wolfchild* Plaintiffs’ Fifth Amended Compl., p. 199 (Docket No. 55). Further, the *Wolfchild* Plaintiffs claim that “approximately 2,000 Oglala Sioux Tribal members are *Wolfchild* plaintiffs.” Plaintiffs’ Motion to Enjoin at 11 n.37. It is implausible for the *Wolfchild* Plaintiffs’ counsel to argue that his clients are in any way disadvantaged should OST not seek leave to file an amicus memorandum, when those clients include the *President* of OST. The *Wolfchild* Plaintiffs who are Oglala tribal members are able in their role as parties to make any observations they feel necessary regarding the impact of the case on OST and its members.

Furthermore, it is unclear what would make OST unique compared to the many other tribes from whom Plaintiffs apparently have solicited amicus support. The only three tribes

whose reservations include the 1886 lands are the Amici and the Lower Sioux Indian Community. All other tribes, including OST, appear to be similarly situated to each other in terms of their interest, or lack thereof, in the outcome of this case.

More than a year ago, in a September 29, 2009 memorandum, the Amici, along with the Lower Sioux Indian Community, explained their views on the *Wolfchild* case openly and accurately to a number of tribal leaders, including OST President Two Bulls, and requested that they not support the Plaintiffs' efforts. *See Wolfchild* Plaintiffs' Index of Exhibits (Docket No. 788-3) at 4. Ultimately, OST chose to file an amicus brief with the Supreme Court, a filing to which the Amici made no objection. Likewise, the Amici have no objection should OST desire to file an amicus memorandum in this Court.

## ARGUMENT

### **I. NO VIOLATION OF LAW, CIVIL OR CRIMINAL, HAS OCCURRED**

#### **A. No Civil Violation Of Law Has Occurred, Or Could Occur**

There have been no financial offers of any kind by SMSC to OST conditioned on anything involving this lawsuit. Moreover, even if such an offer had been made (which it has not), it would not be improper. No law prohibits solicitation or discussion of amicus participation. Plainly, the *Wolfchild* Plaintiffs themselves have attempted to persuade tribal governments of the merits of such participation. No law prohibits the solicitation or even payment of funds to a potential amicus, though Supreme Court Rule 37.3(a) requires disclosure of monetary contributions to an amicus in that court.

Furthermore, the *Wolfchild* Plaintiffs' allegations that the Oglala Economic and Business Development Committee has recommended rescission of last year's Tribal Council resolution authorizing amicus participation at the Supreme Court does not preclude OST

from seeking to file an amicus memorandum in this Court. Even if the *Wolfchild* Plaintiffs' allegations were true, the Tribal Council remains free to disregard a tribal committee's recommendations.<sup>2</sup>

Plaintiffs' case citations are remarkably inapposite and offer no support for their claims. *See* Motion to Enjoin at 19 n.67, 20 n.70, and 22 n.76. *Cosby v. Meadors*, 351 F.3d 1324, 1326-27 (10th Cir. 2003), is a prisoner case dismissed as a sanction for failure to pay a filing fee. *Findlay v. McAllister*, 113 U.S. 104 (1885), is about a conspiracy to preclude collection of a tax to pay a public body's judgments. *Michalson v. All*, 43 S.C. 459, 21 S.E. 323 (1895), is a case of conversion (of cotton), a tort. Amici are aware of no cases addressing the factual scenario posited by the *Wolfchild* Plaintiffs.

The law review article cited by the *Wolfchild* Plaintiffs, *see* John Ferejohn, "Independent Judges, Dependent Judiciary: Explaining Judicial Independence," 72 S. Cal. L. Rev. 353 (1999), Motion to Enjoin at 21, likewise is not on point and deals with what the author acknowledges is wholly legal conduct. The article consists of a law professor's reflections on the lawful practice of people with more money than others being able to spend it on lawyers to have a better chance of prevailing in a controversy. It cannot support granting the *Wolfchild* Plaintiffs any relief here.

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<sup>2</sup> The *Wolfchild* Plaintiffs reference a Tribal Council meeting purportedly occurring on September 28, 2010, *see* Motion to Enjoin at 11. Amici have no information as to what occurred at that meeting (if it did occur), whether the subject of further amicus participation was discussed, or the outcome of any such discussion.

B. No Violation Of 18 U.S.C. § 1512 Or Interference With Any Judicial Process Has Occurred, Nor Could It

The *Wolfchild* Plaintiffs speculate that their allegations might show a violation of a federal criminal statute, 18 U.S.C. § 1512. They do not. 18 U.S.C. § 1512 prohibits interference with testimony, records, or documents, or evasion of legal process, not the filing or non-filing of a legal brief by a nonparty amicus.

C. Plaintiffs Cannot Seek Injunctive Relief Against Nonparties

While the Court has discretion to accept proffered amicus filings, it has no authority to enjoin nonparties like the Amici. A court may not enjoin non-parties who are neither acting in concert with the enjoined party nor are agents, employees, officers, etc., of the enjoined party. RCFC 65(d)(2); *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 12 (1945)(court may not grant “injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law”); *Alemite Manufacturing Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.) (“no court can make a decree which will bind anyone but a party”). Nor can the Court enjoin the expenditure of the Amici’s tribal funds by enjoining the defendant United States, which has no authority over those tribal funds. The Court likewise has no authority to order injunctive relief to protect a litigant’s “opportunity” to gain nonparty support.<sup>3</sup>

RCFC 71, “Enforcing Relief for or Against a Nonparty,” like the similarly worded Fed. R. Civ. P. 71, simply provides that the procedure for enforcing an order for or against a

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<sup>3</sup> *Kamen Soap Prods. Co. v. United States*, 110 F. Supp. 430 (Ct. Cl. 1953), cited in Plaintiffs’ Motion to Enjoin at 24, authorizes issuance of subpoenas duces tecum in this Court, and has no bearing on orders affecting amici.

nonparty is the same as for a party. However, Rule 71 does not provide an independent mechanism for making an order against a nonparty, i.e., a sanction. *See* 12 Charles Alan Wright, et al., *Federal Practice and Procedure* § 3031 (2d ed. 1997). Rule 71 provides for an injunction to be enforced against “the parties to the action, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them . . . .” *Id.* at § 3033.<sup>4</sup> There is no basis to employ RCFC 71 to regulate filings by an amicus or to sanction an amicus.

## **II. THE COURT SHOULD CONTINUE TO ACCEPT THE AMICUS FILINGS OF SMSC AND PIIC**

Finally, the *Wolfchild* Plaintiffs have not established any sound reason why the Court should preclude further amicus participation by SMSC and PIIC. These Amici have performed an important role in bringing potentially dispositive facts and law to the Court’s attention, e.g.:

- 1) The deliberations at the Department of the Interior (“Department”) in 1914-1915 concluding that the 1886 lands were not held in trust for the 1886 Mdewakanton descendants;
- 2) The importance of the 1944 Act as an indicator of Congressional intent that successor tribes to the historic Mdewakanton and Wahpakoota Bands, organized under the 1934 Indian Reorganization Act such as the Amici, could and should benefit financially from the 1886 lands;
- 3) Documents demonstrating the Department’s treatment of the 1886 lands as non-trust lands until 1980; and

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<sup>4</sup> For example, in a case in which the defendant corporation was held liable for patent infringement, the patent master (judge) obtained an attachment to enforce payment of his fees against three nonparty persons who controlled the corporation. *Id.*, citing *Robert Findlay Mfg. Co. v. Hygrade Lighting Fixture Corp.*, 288 Fed. 80 (E.D.N.Y. 1923).

- 4) Documents showing the genesis of Congressional intent in the 1980 Act, Pub. L. No. 96-557, 94 Stat. 3262, to change the status of the 1886 lands to trust land for the Tribes.

*See, e.g.*, Brief of *Amici Curiae* SMSC and PIIC in Support of Defendant's Motion for Reconsideration (Apr. 12, 2005) (Docket No. 66), at 14-19, 25-26; Supplemental Memorandum of *Amici Curiae* SMSC and PIIC in Support of Defendant's Motion for Reconsideration (Aug. 8, 2005) (Docket No. 91), at 29-36; Amended Appendix to Brief of *Amici Curiae* SMSC and PIIC in Support of Defendants' Motion for Reconsideration (Docket No. 83), Exh. 21 (Feb. 10, 1977 statement of Sen. H. Humphrey); Supplemental Appendix Exhibits for Supplemental Memorandum of *Amici Curiae* SMSC and PIIC in Support of Defendants' Motion for Reconsideration (Docket No. 98), Exhs. 48-56 (non-trust status of 1886 land until 1980), Exh. 82 (letter dated Dec. 9, 1975, Acting Area Director to Sen. H. Humphrey), Exh. 83 (Cong. Res. Serv. memo dated Feb. 3, 1976, to Rep. R. Nolan).

The most recent submission of SMSC and PIIC, Docket No. 785, provides facts and argument supplementing the United States' briefing on:

- 1) The status of knowledge of the "frozen funds" among both the Tribes and individual 1886 descendants in the 1970s and early 1980s;
- 2) The need for a *Chevron* analysis should the Court address the substance of the Department's 1981 decision to distribute the frozen funds to the Tribes, under the authority of the 1980 Act; and
- 3) The nonjusticiable nature of Plaintiffs' complaints over the Department's tribal recognition and tribal membership decisions.

Thus, while the Court has discretion to preclude SMSC and PIIC from participating as amici in this case, there is no sound reason to do so, certainly not based on the implausible and unsupported allegations of the *Wolfchild* Plaintiffs.

**CONCLUSION**

For the foregoing reasons, the Court should deny the *Wolfchild* Plaintiffs' Motion to Enjoin. Amici further request that the Court grant them leave to file their Memorandum in Opposition to Plaintiffs' Cross-Motion for Summary Judgment (Docket No. 785). On the merits, the Court should grant the United States' Motion to Dismiss (Docket No. 765).

Dated: October 8, 2010

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of October, 2010, a copy of the Motion of Amici Curiae Shakopee Mdewakanton Sioux Community and Prairie Island Indian Community for Leave to File Memorandum in Opposition to Plaintiffs' Motion to Enjoin and For Miscellaneous Relief (Redacted) (Docket No. 787), with the proposed Memorandum attached to the Motion for Leave, was filed electronically with the Clerk of the Court through its ECF System and electronic notice was delivered to the parties entitled to receive notice.

Dated: This 8th day of October, 2010.

*/s/ Philip Baker-Shenk* \_\_\_\_\_