UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:
Cecil Ray Barth
Deanna Joan Barth,
Debtors.

Case No. 09-36006
Chapter 7

Michael S. Dietz, Trustee,
Plaintiff,

vs.

Deanna Joan Barth and the Lower Sioux Indian Community in the State of Minnesota,
Defendant.

Adversary Proceeding No. 11-03233

In Re:
Morris Jerome Pendleton, Sr.
Constance Louise Pendleton,
Debtors.

Case No. 10-34267
Chapter 7

Paul W. Bucher, Trustee,
Plaintiff,

vs.

Morris Jerome Pendleton, Sr. and the Lower Sioux Indian Community in the State of Minnesota,
Defendant.

Adversary Proceeding No. 11-03234

In Re:
Linda Rose Whitaker,
Debtor.

Case No. 10-38674
Chapter 7

Paul W. Bucher, Trustee,
Plaintiff,

vs.

Linda Rose Whitaker and the Lower Sioux Indian Community in the State of Minnesota,
Defendant.

Adversary Proceeding No. 11-03235

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO: The Defendants and other entities specified in Local Rule 9013-3(a).

1. Plaintiff's, Trustees, Paul W. Bucher and Michael S. Dietz, ("Trustees") for the above bankruptcy estates, move the Court for the relief requested below and give notice of hearing.

2. The Court will hold a hearing on this motion at 10:00 a.m. on January 9, 2013, in Courtroom 2B United States Courthouse, at 316 North Robert Street, St. Paul, Minnesota.

3. Any response to this motion must be filed and served by delivery not later than January 4, 2012, which is five days before the time set for the hearing (excluding Saturdays, Sundays and holidays). **UNLESS A RESPONSE OPPOSING THIS MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed.R.Bankr.P. 5005 and Local Rule 1070-1. Petitions commencing the related Chapter 7 cases were filed on August 28, 2009, June 10, 2012, and December 6, 2010 respectively. The cases are now pending in this Court.

5. This motion arises under Fed.R.Bnkr.P 7056. This motion is filed under Fed.R.Bankr.P. 7056 and 9014 and Local Rules 9013-1, 9013-2, 9013-3 and 9013-5.

6. Movant requests summary judgment in this action requiring the turnover of certain assets by the debtors.

Introduction

Plaintiffs, Trustees, Paul W. Bucher and Michael S. Dietz, ("Trustees") bring this motion for summary judgment regarding the turnover of per capita payments of three Debtors who are qualified members of the Lower Sioux Indian Community ("Lower Sioux"). The legal issue for

the Court is whether the Debtors' interests in per capita payments are property of the bankruptcy estate. Trustees ask to Court to find that Debtors' contingent rights to payments are a property right, and that once the Lower Sioux authorizes a per capita payment, that the Debtors shall turnover the payments to the bankruptcy estate. These per capita distributions are the "Allocation of net profits", not the proceeds of a spendthrift trust.

Facts

This matter is consolidated from three chapter 7 bankruptcies.

Barth Bankruptcy: (Michael S. Dietz, Trustee)

Debtors Cecil Ray Barth and Deanna Joan Barth (collectively, "Barths"), filed for Chapter 7 bankruptcy relief on August 26, 2009. Deanna Joan Barth ("Mrs. Barth") is a qualified member of the Lower Sioux. Barths listed, "Lower Sioux Indian Community Member Periodic Distribution – Not Assignable" with a value of $3,500.00, as an account receivable, in Schedule B of their petition. (Hoss Aff. Ex. A)

The Barths exempted $3,500.00 of the Lower Sioux Indian Community Member Periodic Distribution – Not Assignable, in schedule C, pursuant to II U.S.C. § 522(d)(5). (Hoss Aff. Ex. A)

Mrs. Barth listed "Lower Sioux Community per capita", at $4,066.00 per month, as income in Schedule I of her petition. (Hoss Aff. Ex. A).

The Barths listed the following as income other than from employment or operation of a business in section two of their Statement of Financial Affairs:

$48,050.00	Lower Sioux Indian Community per capita payments-wife	2007
$51,500.00	Lower Sioux Indian Community-wife	2008
$27,050.00	Lower Sioux Indian Community-wife	2009 to date

(Hoss Aff. Ex. A).

Pendleton Bankruptcy (Paul W. Bucher, Trustee)

Debtors Morris Jerome Pendleton, Sr. ("Mr. Pendleton") and Constance Louise Pendleton (collectively, "Pendletons") filed for Chapter 7 bankruptcy relief on June 10, 2010. Mr. Pendleton is a qualified member of the Lower Sioux. Pendletons listed, "Lower Sioux Indian Community Periodic Distribution – Not Assignable," with a value of $1,695.00, as an account receivable, in Schedule B of their petition. The Pendletons exempted $1,695.00 of Lower Sioux Indian Community Periodic Distribution – Not Assignable, in Schedule C, pursuant to 11 U.S.C. § 522(d)(5). The Pendletons listed the asset as owned by Mr. Pendleton. Mr. Pendleton provided his occupation as "Retired" in Schedule I. Mr. Pendelton listed his Employer as, "Lower Sioux Community" in Schedule I. Mr. Pendleton listed $3,500.00 as his monthly gross wages, salary, and commissions in Schedule I. (Hoss Aff. Ex. B).

Pendletons listed the following as income other than from employment or operation of a business in section two of their statement of financial affairs:

$51,500.00	Lower Sioux Indian Community Per Capita Payments-Husband	2007
$48,625.00	Lower Sioux Indian Community Per Capita Payments-Husband	2008
$15,000.00	Lower Sioux Indian Community Per Capita Payments-Husband	2009 to date

Hoss Aff. Ex. B).

Whitaker Bankruptcy (Paul W. Bucher, Trustee)

Debtor Linda Rose Whitaker ("Ms. Whitaker") filed for Chapter 7 bankruptcy relief on December 6, 2010. Ms. Whitaker is a qualified member of the Lower Sioux. Ms. Whitaker did not list any interest in per capita tribal payments in Schedule B of her petition. Ms. Whitaker listed a, "loan secured by future per capita payments", in Schedule D. Ms. Whitaker listed

income of $3,750.00 per month, as "Per Capita payments from Lower Sioux Indian Community" in Schedule I. (Hoss Aff. Ex. C).

On July 13, 2010, Ms. Whitaker executed a Promissory Note to Dakota Finance Corporation in the amount of $20,175.00. (Hoss Aff. Ex. D). On July 13, 2010, Ms. Whitaker executed a Security Agreement and Assignment of Per Capita Distribution in favor of Dakota Finance Corporation. (Hoss Aff. Ex. E).

Ms. Whitaker listed the following as income other than from employment or operation of a business in section two of her Statement of Financial Affairs:

2010: Unknown Lower Sioux Indian Community Per Capita payments

2009: $53,475.00 Lower Sioux Indian Community Per Capita payments, gambling winnings

2008: $56,200.00 Lower Sioux Indian Community Per Capita payments, gambling winnings

(Hoss Aff. Ex. C).

(Hereafter, Mrs. Barth, Mr. Pendleton and Ms. Whitaker shall be referred to collectively as the "Qualified Member Debtors").

The Lower Sioux has an ordinance specific to the allocation of casino profits. The Lower Sioux Indian Community in Minnesota Gaming Revenue Allocation Ordinance identifies how the Lower Sioux allocates the "available net profits from Community-owned gaming establishments". (Hoss Aff. Ex. F, Section 100). Upon information and belief, the controlling version of the Revenue Allocation Ordinance was amended on October 27, 2009, and approved by the United States Department of Interior on December 4, 2009. *Id.* The October 27, 2009, version of the Revenue Allocation Ordinance includes a new section entitled, Anti-alienation /Spendthrift Provisions, (Section 302(G)), which states:

> **Anti-alienation/Spendthrift Provisions.** The per capita payments made under this Ordinance are a personal benefit to the Community Members who qualify. The per

> capita payments are periodic payments, not a property right. The right to receive a per capita payments does not accrue or vest until the Community actually makes a payment to Community Members who qualify. Additionally, no benefit, right or interest of any Community Member under his (sic) Ordinance, including per capita payments, shall be subject to anticipation, alienation, sale, transfer, assignment pledge, encumbrance or charge, seizure, attachment or other legal, equitable, or other process. However, the restriction on transfer does not impair the ability of the community, its subdivisions or its wholly owned entities to exercise its right of setoff for loans or advances made to Community Members nor to child support payments governed under the Lower Sioux Indian Community Domestic Relations Code no to federal or state income tax liens. Nor shall this restriction prevent, or impair the validity of, an assignment of per capita payments that is made by a Community Member to a financial institution, if such assignment is approved, in advance, by resolution of the Lower Sioux Community Council; and the recipient of any such approved assignment shall have the right to enforce the assignment, and to compel the Lower Sioux Indian Community to honor the terms of the assignment, in an action brought in the Court of the of the Lower Sioux Indian Community.

(Hoss Aff. Ex. F).

Argument

The Trustees bring this motion for summary judgment seeking a judgment requiring Debtors turnover any post-petition per capita payments to their respective bankruptcy estates.

Summary Judgment Standard

Rule 7056 provides that summary judgment should be rendered "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Id.; see Fed. R. Civ. P. 56(c). Upon review, the evidence is viewed in the light most favorable to the nonmoving party and all justifiable inferences are drawn in the nonmoving party's favor. Ludwig v. Anderson, 54 F.3d 465, 469 (8th Cir. Minn. 1995) (citing Schrader v. Royal Caribbean Cruise Line, Inc., 952 F.2d 1008, 1013 (8th Cir. 1991)).

The party moving for summary judgment has the burden of demonstrating the absence of genuine issues of material fact. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.

574, 586-88 (U.S. 1986) (quoting Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e) – "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial'"). "A disputed fact is 'material' if it must inevitably be resolved and the resolution will determine the outcome of the case, while a dispute is 'genuine' if the evidence is such that a reasonable Jury could return a Verdict for the nonmoving party." (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Planned Parenthood of Minnesota/South Dakota v. Rounds, 372 F.3d 969, 972 (8th Cir. 2004); Fenney v. Dakota, Minnesota & Eastern R.R. Co., 327 F.3d 707, 711 (8th Cir. 2003). Johnson v. Mich. Claim Serv., Inc., 471 F. Supp. 2d 967, 971 (D. Minn. 2006)).

Once the moving party meets its burden, the party opposing summary judgment must show more than a metaphysical doubt as to the material facts. Id. This requires the nonmoving party to proffer specific facts which show a genuine issue for trial. Id. (citing Fed. R. Civ. P. 56(e)). In responding to a summary judgment motion, the nonmoving party may not rely merely on allegations or denials in the pleadings, but must set out specific facts showing a genuine issue for trial. First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288 (U.S. 1968); Fed. R. Civ. P. 56(e).

"It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288-289 (U.S. 1968). Here, there are no genuine issues of material fact and Plaintiff's summary judgment motion should be granted.

Turnover Standard

Section 542 of the Bankruptcy Code identifies the duties imposed upon those in possession of property of the bankruptcy estate. Section 542(a) requires a debtor to turn over to the trustee any non-exempt property in his or her possession:

> (a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

In re Woods, 288 B.R. 220, 222 (B.A.P. 8th Cir. 2003); 11 U.S.C. §542(a).

Tribal Gaming Law

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701–2721 and accompanying federal regulations, 25 CFR § 290.1–290.26, govern Tribal Revenue Allocation Plans. Casino gaming is Class III gaming under the IGRA. 25 U.S.C. § 2703(8). Each tribe that engages in casino gaming must negotiate a "compact" with its State, which must be approved by the Secretary of the Interior. 25 U.S.C. § 2703(7)(E) and (10). The IGRA addresses per capita payments made out of a Tribe's gaming revenues. Each tribe is required to adopt an ordinance allocating its gaming revenues, and obtain approval. The Lower Sioux's Revenue Allocation Ordinance (as amended October 27, 2009) is attached to the Affidavit of Scott J. Hoss as Exhibit F).

1. **Debtors' Post-Petition, Per Capita Payments are Property of the Bankruptcy Estate.**

Debtors' rights to receive per capita payments derive from their status as qualified members ("Qualified Members") pursuant to the Lower Sioux Constitution and the Revenue Allocation Ordinance. Once the status is confirmed a Qualified Member's right is contingent

upon the existence of net profits and the ultimate decision by the Lower Sioux to make a distribution of those profits. However, if any profits are distributed to a Qualified Member, the payments must be equal for all Qualified Members.

The controlling bankruptcy law is 11 U.S.C. § 541(a). At the commencement of a bankruptcy case an estate is created that includes "all legal or equitable interests of the debtor in property." §541(a)(1). The scope of this provision is broad and all encompassing. *In re Kedrowski*, 284 B.R. 439, 445 (Bankr. W.D. Wis. 2002). This provision is intended to include all property rights of the debtor, including contingent property interests. *Id. (citing Movitz v. Palmer (In re Palmer)*, 167 B.R. 579 (Bankr.D.Ariz.1994)). Property is, "construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *United States v. Sims (In re Feiler),* 218 F.3d 948, 955 (9th Cir.2000) (quoting *Segal v. Rochelle*, 382 U.S. 375, 379 (1966)). "A debtor's contingent interest in future income has consistently been found to be property of the bankruptcy estate. In fact, every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541." *In re Edmonds*, 273 B.R. 527, 528 (Bankr. E.D. Mich. 2000) aff'd, 263 B.R. 828 (E.D. Mich. 2001)[1](citing *Segal* at 379). The definition is broad, and includes both tangible and intangible property. *United States v. Whiting Pools, Inc*., 462 U.S. 198, 204–05 (1983).

The existence and scope of the debtor's interest in property is determined by reference to state law. *Id. (citing Miner v. Bay Bank & Trust Co. (In re Miner)*, 185 B.R. 362 (N.D.Fla.1995); *In re Bridgepoint Nurseries, Inc*., 190 B.R. 215 (Bankr.D.N.J.1996)).

In Minnesota, tangible and intangible property rights are recognized. *Sprint Spectrum LP v. Comm'r of Revenue*, 676 N.W.2d 656, 662 (Minn. 2004). Black's Law Dictionary identifies

[1] In *In re Edmonds*, the Court found that Debtor's interest in profit sharing was property of the bankruptcy estate. 273 B.R. at 531.

tangible property as, "[p]roperty that has physical form and characteristics". Black's Law Dictionary 343 (7th ed.2000). Black's defines tangible personal property as, "[c]orporeal personal property of any kind; personal property that can be seen, weighed, measured, felt, or touched, or is in any way perceptible to the senses." Pursuant to Minnesota's adoption of the Uniform Commercial Code, a general intangible is described as, "any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter of credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software." Minn. Stat § 336.9-102(42).

Debtors' right to receive an "equal share" of the net profits is a property interest. The right is simply contingent upon a distribution being made. If a distribution is made, all Qualified Members receive the same amount. (Hoss Aff., Ex. F, Section 302A). It is similar to a distribution on shares of stock, or an ownership interest in a limited liability company. Regardless of whether a distribution is certain, if a distribution is made, the distribution is equal (based on the amount, and type, of ownership). Pursuant to the Lower Sioux's own Revenue Allocation Ordinance, it treats each Qualified Members equally.

The majority of reported cases on this matter agree that per capita payments are property of the bankruptcy estate. *In re Kedrowski*, 284 B.R. 439 (W.D. Wis. 2002); *Johnson v. Cottonport Bank*, 259 B.R. 125 (W.D. La. 2000); *In re Mc Donald*, 353 B.R. 287 (D. Kansas 2006)(The Court ordered Debtor turnover per capita payments to the bankruptcy trustee); *In re Hutchinson*, 354 B.R. 523 (D. Kansas 2006)(The Court found that the per capita distributions do constitute property of the estate); *In re Howley*, 439 B.R. 535 (D. Kansas 2010).

In *Kedrowski*, the Court determined that a debtor's right to receive per capita payments constitutes property of the debtor's bankruptcy estate. 284 B.R. at 451-52. The Court determined that even though it is possible that no distribution will be made, the contingent (intangible) interest in distributions is still property of the estate. *Id.* at 447. The *Kedrowski* Court granted the trustee's request for the turnover of debtor's per capita payments (made to the debtor) to the bankruptcy trustee. *Id.* at 452.

The Court in *Johnson v. Cottonport Bank*, determined that a debtor's interest in per capita payments is property of the bankruptcy estate. 259 B.R. 125. The Court related the right to such payments as to the, " interest in the future income from a trust, a right to receive an annuity, and a share of ownership or the right to receive payments from an entity such as the Tribe." *Id.* at 130.

In Wisconsin a split in authority exists on this issue. In two Wisconsin cases the trustees' requests for turnover of per capita payments was denied. *In re DeCora*, 396 B.R. 222 (W.D. Wisc. 2008); *In re Elena M. Fess,* 408 B.R. 793 (W.D. Wis. 2009). In *DeCora*, the Court determined that the rights of a hypothetical lien holder pursuant to 11 USC §544(a) did not apply to per capita payments. In *DeCora* the bankruptcy trustee attempted to assert the hypothetical lien rights to circumvent an unrecorded/perfected lien that the Ho-Chunk Nation had against the per capita payments. 396 B.R. 224. This is not the situation in this case.

In *Fess*, the Bankruptcy Judge disagreed with *Kedrowski*. In *Fess*, the Court determined that the contingent nature of the payments (not a Qualified Member's property until paid by the Tribe) disqualified the eventual payment from the wide net cast by §541(a)(1). The *Fess* Court compares per capita payments with a Payment on Death ("POD") benefit on a bank account or a will. *Id*. at 798. The *Kedrowski* Court compares the payments to stock dividends. 284 B.R. 447.

The *Fess* comparison to a POD benefit is not helpful. Here, there is a history of per capita payments, a reasonable expectation of the payments (from month-to-month), and a large pool of equal recipients. The bankruptcy code addresses the difference between a POD benefit (§541(a)(5)) and the "proceeds, product offspring, rents, or profits of or from property of the estate" or "an interests in property that the estate acquires after the commencement of the case." §541(a)(6) and (7); *In re Potter*, 228 B.R. 422 (B.A.P. 8th Cir. 1999[2]).

The Lower Sioux's declaration that the per capita payments are not a property right is not determinative. However bold and creative, the Lower Sioux cannot simply declare that the per capita payments are, "not a property right", and thus exclude them from the bankruptcy estate. In fact, it is quite absurd to suggest that an interested party could merely declare that a contingent right is not a "property right", with any substantive effect. A rose by any other name would smell as sweet.

The Qualified Member Debtors receive significant sums in per capita payments. Likewise, it is estimated that the Qualified Member Debtors received approximately $50,000.00 per year, in per capita payments, since they voluntarily filed for bankruptcy protection. The net profit distributions are not a highly speculative contingent interest with a payment horizon in the distant future. These distributions are the allocation of profits from Indian Gaming Enterprises.

2. **11 U.S.C. §541(c)(2) does not Exclude Profits from the Bankruptcy Estate.**

The profits of the Lower Sioux's gaming operations are not held in a trust, spendthrift trust, or other impenetrable financial mechanism. The very first section of the Gaming Revenue Allocation Ordinance specifically describes the proceeds for which the per capital payments

[2] In *In re Potter*, the United States Bankruptcy Appellate Panel of the Eighth Circuit affirmed the bankruptcy court's decision determining that the debtors' entire interest in a trust is property of the estate. At the time of filing the debtor owned a contingent remainder in the corpus of a $150,000.00 trust. Debtor's 91 year old grandfather was the life beneficiary of the trust. Pursuant to §541(a)(6), the Court determined that the entire value of the asset, including any changes in the value that may occur after filing, was property of the estate. 228 B.R. 423-24.

derive as, "Allocation of available net profits from community – owned gaming establishments." (Hoss Aff. Ex. F, Section 100). These funds are distributed profits from a gambling operation owned by the actual recipients.

The Lower Sioux's recent amendments do not remove Debtors' rights to receive per capita payments from the purview of 11 U.S.C. §541. In 2009, the Lower Sioux amended its revenue allocation ordinance. The amendment added section 302(G), which states:

> **Anti-alienation/Spendthrift Provisions.** The per capita payments made under this Ordinance are a personal benefit to the Community Members who qualify. The per capita payments are periodic payments, not a property right. The right to receive a per capita payments does not accrue or vest until the Community actually makes a payment to Community Members who qualify. Additionally, no benefit, right or interest of any Community Member under his (sic) Ordinance, including per capita payments, shall be subject to anticipation, alienation, sale, transfer, assignment pledge, encumbrance or charge, seizure, attachment or other legal, equitable, or other process. However, the restriction on transfer does not impair the ability of the community, its subdivisions or its wholly owned entities to exercise its right of setoff for loans or advanced made to Community Members nor to child support payments governed under the Lower Sioux Indian Community Domestic Relations Code no to federal or state income tax liens. Nor shall this restriction prevent, or impair the validity of, an assignment of per capita payments that is made by a Community Member to a financial institution, if such assignment is approved, in advance, by resolution of the Lower Sioux Community Council; and the recipient of any such approved assignment shall have the right to enforce the assignment, and to compel the Lower Sioux Indian Community to honor the terms of the assignment, in an action brought in the Court of the of the Lower Sioux Indian Community.

(Hoss Aff. Ex. F). This new language does not afford the Lower Sioux's net profits with the desired insulation from Qualified Member's voluntary bankruptcies.

a. There is no "Trust"

The Qualified Member Debtors' per capita payments are not in, or a product of, a spendthrift trust. Pursuant to 11 USC §541(c)(2):

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

Here, there simply is no trust. Pursuant to Minnesota law, the requirements of a trust are:

(1) a designated trustee with enforceable duties;

(2) a designated beneficiary vested with enforceable rights; and

(3) a definite trust res in which the trustee has legal title and the beneficiary has the beneficial interest."

Bond v. Commissioner of Revenue, 691 N.W.2d 831, 837 (Minn.2005).

There is no trustee appointed here. Instead, the Lower Sioux distributes the profits pursuant to the Revenue Allocation Ordinance. (Hoss Aff. Ex. F). The Lower Sioux Community Council has limited authority to determine the percentage of the net profits to the Qualified Members. (Hoss Aff., Ex. F, Section 302). However, the Community Council does not have the authority to withhold a payment to one Qualified Member, while providing a payment to another. The only exceptions to this rule in the Revenue Allocation Ordinance is in the specific cases of, Minors and Incompetents. (Hoss Aff., Ex. F, Section 302C and D).

Section 302C of the Revenue Allocation Ordinance allows the Community Council to place per capita payments in trust for, "any individual who is declared incompetent by a court of competent jurisdiction." *Id.* Based on the specific use of the "trust" designation in this section, the Lower Sioux contemplated the need to protect the per capita payments of Qualified Members who are at risk for mismanaging the payments due to incompetence. It would not be necessary to place the funds in "trust" if they were already held as such.

Section 302D of the Revenue Allocation Ordinance provides a smaller payment, held in "trust" for minors. Here, the Lower Sioux clearly describes a policy whereby the parents of the minors are primarily responsible for their children. Neither Section 302C, not Section 302D apply to the Qualified Member Debtors.

Second, the Qualified Members are not vested with enforceable rights. The second requirement of a trust is a, "designated beneficiary vested with enforceable rights." *Bond v. Commissioner of Revenue*, at 837. The Qualified Members have a contingent right to funds, that is only vested upon the decision of the Community Council to make a payment. It appears that the Qualified Member Debtors agree on this point as they apparently argue their rights are so contingent that they fall outside of §541(a).

Third, net gaming revenues do not constitute a trust res. The final requirement of a trust is a trust res in which the trustee has legal title and the beneficiary has the beneficial interest. Although unclear, it appears the Lower Sioux has legal title, and the Community Council has only some allocation authority. The only certain beneficiary (assuming some net gaming revenue) is the Community Welfare and Economic Development Fund ("CWEDF"). The CWEDF has a minimum allocation of "not less than twenty-five percent (25%) of net gaming business revenues. (Hoss Aff. Ex. F, Section 310). In addition, the net gaming profits must be paid out within 12 months. (*Id*. at Section 302(A)(2) (the "Compulsory Payment of Per Capita Reserve").

The collection and holding of gaming profits for Qualified Members is simply not the creation of a trust.

b. **The Collection of Proceeds of the Indian Gaming Enterprise is not a Spendthrift Trust.**

Even if the gaming revenues were in a "trust", it is not a spendthrift trust. In Minnesota, a spendthrift trust is generally one in which: (1) the trust implicitly or explicitly prohibits the voluntary and involuntary alienation of the beneficiary's interest; (2) the beneficiary is a donee or testamentary beneficiary and is not the settlor of the trust; and (3) the beneficiary has no present

dominion or control over the trust corpus. *In re Fritsvold*, 115 B.R. 192, 195 (Bankr. D. Minn. 1990). Pursuant to Minnesota law, "the validity of a spendthrift trust is upheld on the theory that the owner of property, in the free exercise of his will in disposing of it, may secure such benefits to the objects of his bounty as he sees fit and may, if he so desires, limit its benefits to persons of his choice, who part with nothing in return, to the exclusion of creditors and others." *In re Mack*, 269 B.R. 392, 400 (Bankr. D. Minn. 2001) (*citing In re Moulton's Estate*, 233 Minn. at 290–91, 46 N.W.2d at 670 (Minn. 1951). The Court in *Moulton*, reiterated:

> The law rests its protection of what is known as a spendthrift trust fundamentally on the principle of cujus est dare, ejus est disponere. It allows the donor to condition his bounty as suits himself so long as he violates no law in so doing. When a trust of this kind has been created, the law holds that the donor has an individual right of property in the execution of the trust; and to deprive him of it would be a fraud on his generosity. **For the law to appropriate a gift to a person not intended would be an invasion of the donor's private dominion.** It is always to be remembered that consideration for the beneficiary does not even in the remotest way enter into the policy of the law. It has regard solely to the rights of the donor. Spendthrift trusts can have no other justification than is to be found in considerations affecting the donor alone.

Id. (emphasis added).

The United States Court of Appeals, Eighth Circuit specifically address the validity and characteristics of spendthrifts trusts pursuant to Minnesota law in *In re Swanson*, 873 F.2d 1121, 1124 (8th Cir. 1989). In *In re Swanson*, the Court provided:

> It is clear that spendthrift trusts are recognized and enforced under Minnesota law. *See In re Trust Created under Agreement with McLaughlin,* 361 N.W.2d 43, 45 (Minn.1985) ("This court has long recognized the validity of spendthrift provisions * * *."). The question remains, however, whether the Fund qualifies as a spendthrift trust under Minnesota law. In *In re Moulton's Estate,* 233 Minn. 286, 46 N.W.2d 667, 670 (1951), the Minnesota Supreme Court noted that "[n]o particular form of words is necessary to create a spendthrift trust."
>
> Nevertheless, Minnesota law does not explicitly discuss many of the requirements typically imposed upon such trusts. For example, most jurisdictions do not enforce an otherwise valid spendthrift trust if the settlor of the trust is also its beneficiary. *See, e.g., McLean v. Central States, S.E. & S.W. Areas Pension Fund,* 762 F.2d 1204, 1207 (4th Cir.1985) (interpreting Illinois law). In addition, if the beneficiary has the power to

revoke the trust and exercise dominion and control over the trust *res,* most jurisdictions do not give the trust the protections that are generally afforded spendthrift trusts. *Id.* In the *Moulton* case the Minnesota Supreme Court made the following observation:

> The validity of a spendthrift trust is upheld on the theory that the owner of property in the free exercise of his will in disposing of it, may secure such benefits to the objects of his bounty as he sees fit and may, if he so desires, limit its benefits to persons of his choice, who part with nothing in return, to the exclusion of creditors and others.

In re Moulton's Estate, 46 N.W.2d at 670 (citations omitted). Thus, *Moulton* contemplates an arrangement wherein the settlor of the spendthrift trust is not also its beneficiary.

We do not believe that the Fund has the necessary characteristics of a traditional spendthrift trust to exclude it from the bankruptcy estate pursuant to § 541(c)(2). Notably, the Fund violates the rule that prohibits the beneficiary of a spendthrift trust from also being its settlor. The fact that the contributions to the Fund are made, at least in part, by the debtors compels a conclusion that the Fund would not be a valid spendthrift trust under Minnesota law.

In addition, our conclusion that the Fund does not qualify as a spendthrift trust under Minnesota law is compelled by the fact that the debtors are able to exercise dominion and control over the monies in the Fund. TRA members are entitled to a refund of their contributions to the Fund upon termination of employment. While this is a very limited right of control over the Funds, the ability of the beneficiary to control trust assets in any way is inimical to the policies underlying the spendthrift trust. We believe that the Fund is actually a form of deferred compensation, whereas a spendthrift trust is generally used to provide for the maintenance and support of its beneficiaries.

We recognize that the Fund does have some characteristics of a spendthrift trust, *i.e.,* it is not assignable and creditors are barred from levying upon monies held in the Fund. On balance, however, we believe that the Fund lacks the necessary characteristics of a traditional spendthrift trust. Nevertheless, we do not intend to state a broad rule that monies in any statutory trust are not excluded from the bankruptcy estate under § 541(c)(2).

Further, our decision in this case must be guided by the overriding policies of the Bankruptcy Code. We interpret § 541(c)(2) narrowly because a broad reading of this exclusion would run afoul of the policies sought to be furthered through the Bankruptcy Code. The policy of enlarging the bankruptcy estate to the maximum extent allowable under the Code is of paramount importance because only then will creditors receive the distribution that they are entitled to under the Code. Section 541(c)(2) thus strikes a delicate balance between enlarging the bankruptcy estate, while still honoring the spendthrift trust donor's wishes under state law. For it is the donor's desires which are protected through the concept of the spendthrift trust. The beneficiary's desires are of

> little significance when determining the validity of a spendthrift trust provision and when determining whether monies in such a trust are excludable under § 541(c)(2). Indeed, this is underscored by the legislative history of § 541(c)(2) which notes that "[t]he bankruptcy of the beneficiary [of a spendthrift trust] should not be permitted to defeat the *legitimate expectations of the settlor* of the trust." H.R.Rep. No. 595, 95th Cong., 1st Sess. 176, *reprinted in* 1978 U.S.Code Cong. & Admin.News 5787, 6136 (emphasis added).

In re Swanson, 873 F.2d 1121, 1123-24 (8th Cir. 1989). The Court concluded that the Debtor's interest in the Teachers Retirement Funds became part of the debtors' bankruptcy estate pursuant to §541 (despite the existence of express anti-alienation language).

A self-settled trust is not a spendthrift trust. If a trust is self-settled, spendthrift language is unenforceable. *In re Swanson,* 873 F.2d 1121, 1124 (8th Cir. 1989). The fact that the Lower Sioux gaming revenues are profits of an Indian Gaming Enterprise, owned and operated by the alleged beneficiaries, compels a conclusion that, however collected and distributed, the net profits are not in a spendthrift trust under Minnesota law.

The Lower Sioux is not the "donor." Conversely, the Qualified Members are not donees. The policy of a spendthrift trust is to allow the "donor" to determine the rights associated with the gift. Here, the Lower Sioux (or its agents) are not the "donor." Instead, the Lower Sioux made a decision to enter into a casino gaming enterprise that is regulated by the IGRA. The Lower Sioux has limited control over the distributions, but is not asserting its rights as a donor in protecting the assets from the beneficiaries own actions. Instead, the Lower Sioux is attempting to keep its profits from the reach of its own Qualified Member's bankruptcy estates. This is an understandable goal, but not a spendthrift trust.

The Qualified Members have dominium over the alleged corpus of the trust. Ultimately, the Community Council makes the decision on whether to make a per capita payment. (Hoss Aff. Ex. F, Section 302). Upon information and belief, some (if not all) of the members for the Community Council are also Qualified Members. These same Qualified Members have

amended the Gaming Revenue Ordinance repeatedly. (*Id.*). Although a representative group, the very recipients (alleged beneficiaries) of the profit distributions are those who determine whether to make a distribution and also determine the amount of any distributions.

The Indian gaming enterprises are no different than a corporation, where a creditor seeks to garnish a shareholder's distribution. If the corporation does not make a distribution, there is no recovery. However, if the corporation makes a distribution, it must treat a class of shares identically, and make a pro-rata distribution. Once the distribution is determined, a creditor may recover the proceeds, pursuant to a charging order or a similar collection device. Corporations cannot create a spendthrift trust for the benefit of its own members, as the exclusion of creditors. Likewise, the Lower Sioux can determine that it will not make per capita payments. However, when (and if) they do, the payment vests with the Debtors (Qualified Members). The Lower Sioux, itself, describes the payments as issue as "allocation of available net profits."

CONCLUSION

The Trustees respectfully request that the Court require that the Qualified Member Debtors turnover any payments they have received, or do receive (post filing) as a result of their status as Qualified Members of the Lower Sioux. The Lower's Sioux's effort to shield its profits from a Qualified Member Debtor's bankruptcy estate, is legally ineffective.

Dated: November 8, 2012 DUNLAP & SEEGER, P.A.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:
Cecil Ray Barth
Deanna Joan Barth,
Debtors.

Case No. 09-36006
Chapter 7

Michael S. Dietz, Trustee,
Plaintiff,

vs.

Deanna Joan Barth and the Lower Sioux Indian Community in the State of Minnesota,
Defendant.

Adversary Proceeding No. 11-03233

In Re:
Morris Jerome Pendleton, Sr.
Constance Louise Pendleton,
Debtors.

Case No. 10-34267
Chapter 7

Paul W. Bucher, Trustee,
Plaintiff,

vs.

Morris Jerome Pendleton, Sr. and the Lower Sioux Indian Community in the State of Minnesota,
Defendant.

Adversary Proceeding No. 11-03234

In Re:
Linda Rose Whitaker,
Debtor.

Case No. 10-38674
Chapter 7

Paul W. Bucher, Trustee,
Plaintiff,

vs.

Linda Rose Whitaker and the Lower Sioux Indian Community in the State of Minnesota,
Defendant.

Adversary Proceeding No. 11-03235

ORDER

This matter came before the court on January 9, 2013, upon the Trustee's motion Summary Judgment.

Appearances, if any, were noted upon the record at the hearing.

Based upon the pleadings filed in this case and the arguments of counsel,

It is hereby ordered:

1. Plaintiffs' Motion for Summary Judgment is GRANTED.

2. The per capita payments payable to Defendant Deanna Joan Barth, based on her status as a Qualified Member of the Lower Sioux Indian Community, post-petition, are property of her bankruptcy estate.

3. The per capita payments payable to Defendant Morris Jerome Pendleton, Sr. based on his status as a Qualified Member of the Lower Sioux Indian Community, post-petition, are property of his bankruptcy estate.

4. The per capita payments payable to Defendant Linda Rose Whitaker based on her status as a Qualified Member of the Lower Sioux Indian Community, post-petition, are property of her bankruptcy estate.

5. Any additional per capita payments payable to Deanna Joan Barth, Morris Jerome Pendleton, Sr. and/or Linda Rose Whitaker, based on their status as Qualified Members of the Lower Sioux Indian Community, after the date of this Order are property of their respective bankruptcy estates.

6. Deanna Joan Barth, Morris Jerome Pendleton, Sr. and/or Linda Rose Whitaker are compelled to turnover any additional per capita payments that are made payable to them based on their status as Qualified Members of the Lower Sioux Community, to their respective bankruptcy estates.

Dated:

Dennis D. O'Brien
United States Bankruptcy Judge