UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

OGLALA SIOUX TRIBE and ROSEBUD SIOUX TRIBE, as *parens patrie,* to protect the rights of their tribal members; and MADONNA PAPPAN, and LISA YOUNG, individually and on behalf of all other persons similarly situated, Plaintiffs, v. LISA FLEMING; MARK VARGO; HONORABLE CRAIG PFIEFLE; and LYNNE A. VALENTI, in their official capacities. Defendants.	Case No.: 13-5020 **DEFENDANT, VARGO'S BRIEF IN SUPPORT OF HIS MOTION TO STRIKE, AND IN THE ALTERNATIVE, HIS RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs have already sought—and were granted—summary judgment against Vargo for all of the allegations they raised against him in the complaint. Now, they want *more* summary judgment against Vargo. Instead of moving to amend the complaint, though, plaintiffs seek to skip ahead to the summary judgment stage. This is improper and their motion should be struck, or in the alternative, denied.

BACKGROUND

Plaintiff moved for partial summary judgment. (Doc. 261). Vargo moved to strike. In this brief, Vargo will argue that the motion for partial summary judgment should be struck. Then, in the alternative, Vargo will argue that partial summary judgment should be denied.

A. WHAT THE PLAINTIFFS ALLEGED IN THE COMPLAINT

Plaintiffs filed a complaint on March 21, 2013. (Doc. 1). In the complaint, plaintiffs alleged, among other things, that all defendants—presumably including Vargo in his official capacity—were violating 25 U.S.C. § 1922. Section 1922 is part of the codification of the Indian Child Welfare Act ("the Act"). Specifically, the plaintiffs alleged that § "1922 imposes two duties—one procedural, one substantive—on state officials. (Doc. 1, at ¶ 92). Regarding the substantive duty in their allegation, plaintiffs alleged that state officials have a duty to terminate emergency removal or placement once it is "no longer necessary to prevent imminent physical damage or harm to the child." (Doc. 1, at ¶ 93).

B. PLAINTIFFS' FIRST MOTION FOR SUMMARY JUDGEMENT

On July 14, 2014, plaintiffs moved "For Partial Summary Judgement Re: Violations of 25 U.S.C. § 1922." (Doc. 110). Specifically, plaintiffs sought an order to compel defendants—including Vargo—to fulfill his "§ 1922 duties." (Doc. 110, at p. 17). Presumably, these are the duties referenced in the complaint. In fact, plaintiffs dedicated two pages of their first motion for summary judgement to the "substantive" portion of § 1922. (Doc. 110, at pp. 13-14). Specifically, plaintiffs argued that they were entitled to summary judgement on the issue that "children in foster care 'shall' [be] return[ed] to their homes when the out-of-home placement 'is no longer necessary'" (Doc. 110, at p. 14)(citing § 1922).

C. THE RULING ON THE FIRST MOTION FOR SUMMARY JUDGEMENT

On March 30, 2015, the Court filed an Order regarding plaintiffs' motion "For Partial Summary Judgement Re: Violations of 25 U.S.C. § 1922." (Doc. 150). The Court granted plaintiffs' first motion for summary judgment against Vargo in

relation to § 1922. (Doc. 150, at p. 44). Specifically, the Court analyzed the § 1922 issues over nine pages of its Order. (Doc. 110, at pp. 27-35).

Put simply, plaintiffs alleged (in the complaint) that Vargo did not adhere to the requirements of § 1922. Then they sought summary judgment on that issue. The Court granted them summary judgment on this issue. Now they apparently want summary judgment on something else. By their own tacit admission, what they now seek summary judgment on was not something addressed in the Court's prior order. Which means it was not sought in the first motion for summary judgment. This means that plaintiffs are seeking summary judgment on claims not raised in the complaint.

In order to go down this road, plaintiffs must first properly amend their complaint to include the allegations upon which they now seek summary judgment.

DISCUSSION

A. PLAINTIFFS' MOTION SHOULD BE STRUCK

The instant motion for partial summary should be struck as an improper pleading. Plaintiffs are either seeking summary judgment on allegations not alleged in the complaint or they are seeking summary judgment on issues on which they already have achieved summary judgment. Either way, a second motion for summary is improper and should be struck, without requiring Vargo to respond.

1. Plaintiffs' Motion Should be Struck Because they Have Not Amended the Complaint

By seeking a second partial summary judgment, plaintiffs concede that they are seeking summary judgment on issues not resolved in the first motion for summary judgment. Since they previously ask for summary judgment against Vargo for all § 1922 issues and since the Court granted their motion completely, it follows that

they must now be asking for summary judgment on something not alleged in the complaint. Plaintiffs do not offer authority for the proposition that a court can grant summary judgment on claims not raised in the complaint—and Vargo is not aware of such authority. Accordingly, the motion (Doc. 261) should be struck.

2. Alternatively, Plaintiffs Motion Should be Struck Because Plaintiffs Have Already Achieved Summary Judgment

In the event that the Court concludes that the current claims were already alleged in the complaint, then the instant motion should be struck because it already has been resolved. Plaintiffs already moved for partial summary judgment against Vargo regarding the substantive § 1922 allegations in the complaint and obtained summary judgment on those allegations. Plaintiffs do not offer authority for the proposition that a party can seek summary judgment on issues on which they have already obtained summary judgment —and Vargo is not aware of such authority. Accordingly, the motion (Doc. 261) should be struck.

Vargo reserves the right to reply to any response to the motion to strike.

B. VARGO'S RESPONSE, IN THE ALTERNATIVE, TO PLAINTIFFS' MOTION

In the event that the Court does not strike the plaintiffs' motion, it should consider the following alternative argument and the motion for partial summary judgment should be denied. First, the arguments in favor of striking the motion should also be considered in favor of denying the motion. Second, Vargo will address the substance of plaintiffs' brief in favor of summary judgment.

1. The Language of § 1922

This is the language of § 1922:

> Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from

> his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

25 U.S.C. § 1922. States may remove an Indian child or place an Indian child in a foster home—on an emergency basis—subject to the provisions of § 1922. The pertinent language of § 1922 is:

> The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child . . . .

25 U.S.C. § 1922. Plaintiff argues that placement must end in two instances. Plaintiffs argue that the two instances in which placement must end are:

- When placement is no longer necessary to prevent imminent physical damage; and
- When placement is no longer necessary to prevent imminent physical harm.

But the pertinent language of § 1922 contains "or." "Or" is disjunctive. *Resolution Trust Corp. v. CedarMinn Bldg. Ltd. Partnership*, 956 F.2d 1446, 1452 (8th Cir. 1992)("Accepted canon of statutory construction is to treat the disjunctive 'or' as giving independent meaning to the words it separates, unless the context of the statute requires otherwise"). Read disjunctively the two instances could also be read as:

- When placement is no longer necessary to prevent imminent physical damage; and
- When placement is no longer necessary to prevent harm.

Plaintiffs' reading may be incorrect. It certainly does not deserve summary judgment.

In its order regarding the first motion for summary judgment, the Court guided defendants to the Department of Interior Guidelines for State Courts; Indian Child Proceedings ("DOI Guidelines") and the South Dakota Guidelines for Judicial Process in Child and Abuse Cases ("SD Guidelines"). (Doc. 150, at p. 34). A reading of the SD Guidelines suggests that plaintiffs' interpretation might not be correct. The SD Guidelines, as cited by the Court and by the plaintiffs in the complaint, state:

> Pursuant to SDCL 26-7A-18, at the Temporary Custody 48 Hour Hearing the court shall consider evidence of the need for continued temporary custody . . . to determine whether continued temporary custody outside the home is necessary to protect the child. **The purpose is to decide whether the child can be safely returned home and when. The decision should be based on a competent assessment of the risks and dangers to the child.** The Court should evaluate the current and future danger to the child and what can be done to eliminate the danger.

(Doc. 150, at p. 32)(citing the complaint (citing SD Guidelines at p. 33))(emphasis added). This Court further acknowledged:

> The SD Guidelines provide where a child is an Indian, DSS must support its petition for temporary custody with an ICWA affidavit or by testimony from a "qualified expert that the continued custody of the child by the parent or Indian custodian is likely to result in serious **emotional or physical damage** to the child (25 USC 1912(e))."

(Doc. 150, at pp. 32-33)(citing SD Guidelines at p. 46)(emphasis added). Further this Court discussed the language of the temporary custody order recommended by the SD Guidelines:

> That there is probable cause to believe that the child(ren) is/are abused or neglected, ... That temporary custody is the least restrictive alternative in the child(ren)'s best interest . . . .That active efforts have ·been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proven unsuccessful. . . . That continued custody

> of the child by the parents or Indian custodian is likely to result in **serious emotional or physical damage** to the child.

(Doc. 150, at pp. 33-34)(citing the complaint)(emphasis added).

Both plaintiffs (in the complaint) and the Court (in it's Order) have acknowledged the return standard under South Dakota law is either:

- Serious emotional damage; or
- Serious physical damage.

And the "applicable State law" is a consideration under § 1922. This realization of course, is at odds with plaintiffs' assertion that the Act only allows state placements when there is the risk of physical damage, but not emotional damage. And importantly, the fact that plaintiffs' current position departs from the complaint is a clear indication that they need to first amend the complaint before seeking summary judgment.

2. **The Legislative History**

Plaintiffs argue that the legislative history of the Act supports their position. It does not. Plaintiffs offer an early version what became § 1922. The early version indicated that emergency placement of Indian children would be appropriate to "prevent imminent physical harm to the child." (Doc. 262 at p. 11). Plaintiffs argue that this proves the risk needs to be physical. It is likely the opposite. It is possible that Congress changed the ultimate codification of § 1922 from "prevent imminent physical harm to the child." to "prevent imminent physical damage **or harm to the child**" to emphasize that emergency placement appropriate in both instances. 25 U.S.C. § 1922(emphasis added).

3. **The Overarching Purpose of the Act**

Plaintiffs argue that the purpose of the Act supports their argument that emergency placement should be available to protect non-Indian children from emotional harm, but not Indian children. This is at odds with the Department of Interior's Final Rule regarding the implementation of the Act. "ICWA's standard of "imminent physical damage or harm" is focused on the health, safety, and welfare of the child, such that Indian children will not be placed at a greater risk than non-Indian children." Indian Child Welfare Proceedings, 81 FR 38,778, 38,817 (June 14, 2016) (to be codified at 25 C.F.R. pt. 23). Plaintiffs' interpretation places the health, safety an welfare of Indian children at greater risk than in-Indian children.

CONCLUSION

Plaintiffs have already sought—and were granted—summary judgment against Vargo for all of the allegations they raised against him in the complaint. Now, they want *more* summary judgment against Vargo. Instead of moving to amend the complaint, though, plaintiffs seek to skip ahead to the summary judgment stage. This is improper and their motion should be struck, or in the alternative, denied.

Dated: July 26, 2016.

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