No. 04-1197

In The

Supreme Court of the United States

LEONARD F. PRESCOTT, et al.,

Petitioners,

v.

LITTLE SIX, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case arises from conduct of senior executives of an Indian gaming enterprise, Little Six, Inc. (LSI), who during 1993 and 1994 tried to dramatically increase their compensation by diverting LSI's assets, without LSI's approval, to certain "benefit plans" which they created for themselves. Those same senior executives are the Petitioners here. Their actions were discovered, their gaming licenses were revoked, and they were terminated by LSI. They have nevertheless repeatedly attempted to use the courts to get the fruit of their unlawful acts.

To that end, in April 1995, in a case before the Court of the Shakopee Mdewakanton Sioux Community (the Community), Petitioners asserted LSI had formally adopted the five "benefit plans" which are at the heart of their case, and alleged the plans were therefore governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1053 ("ERISA").

Despite the fact that the status of the purported plans and the disposition of assets in them was pending before the Community Court, in May 1995 Petitioners brought suit in the United States District Court for the District of Minnesota, naming as defendants LSI, the purported plans, and the alleged trustees of a putative trust containing assets to fund the purported plans. *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217 (D. Minn. 1995) ("*Prescott I*"). In *Prescott I*, Petitioners asserted that LSI had formally adopted the purported plans, and that the purported plans were governed by ERISA. Petitioners asserted that the Tribal Court lacked jurisdiction to determine the existence *vel non* of the purported plans. LSI moved to dismiss the suit.

Consistent with all other Courts, the District Court held that while the federal courts have exclusive jurisdiction over many ERISA issues, non-federal courts have jurisdiction to determine the existence *vel non* of purported ERISA plans. Because the Community Court action was prior-filed, and based upon the federal Indian law doctrine requiring exhaustion of tribal remedies, the District Court dismissed. *Id.* Petitioners did not appeal.

Petitioners thereafter appeared before the Community Court in proceedings to resolve the existence *vel non* of the purported plans and the purported trust. After an evidentiary hearing, the Community Trial Court held LSI that had adopted the proposed plans, ERISA applied, and the Community Court therefore lacked jurisdiction.

LSI appealed to the Community Appellate Court, asserting the Trial Court erred because no competent evidence existed in the record that LSI's Board of Directors, which was charged with the duty and vested with exclusive authority to set officers' compensation, had ever formally considered the final draft of the proposed plans, let alone adopted them. The Community Appellate Court agreed and reversed the pivotal Trial Court findings that LSI had adopted the proposed plans. The Appellate Court then held that for the proposed plans to validly exist under Community law, formal action by LSI's Board of Directors was required because the proposed plans would increase officers' compensation. The Appellate Court held that because the plans were never adopted by LSI, and because adoption of the proposed plans by LSI was required by Community law, no benefit plans were created, and Petitioners therefore could not claim the protections of ERISA.

Upon remand, the Community Trial Court ordered the trustees to return all funds to LSI. Petitioners did not appeal that order, and the trust funds have been returned to LSI (and subsequently provided to the Community) and the trust dissolved.

Nine months after the funds were returned to LSI, Petitioners filed a second federal court suit against LSI, again asserting that the Tribal Court lacked jurisdiction to determine the existence *vel non* of the purported plans, and requesting that the District court declare that the proposed plans were properly adopted by LSI. LSI moved to dismiss, asserting the prior tribal and federal court orders were dispositive of the issues Petitioners asserted, and asserting sovereign immunity from suit precluded an exercise of subject matter jurisdiction.

The motion to dismiss was granted in part and denied in part: the District Court dismissed Riverso and Johnson's claims under three of the proposed plans because neither the proposed plans nor ERISA contained a waiver of the Community's sovereign immunity from federal court suit. The District Court did not dismiss the remaining claims. *Prescott, et al. v. Little Six, Inc., et al.*, 284 F. Supp. 2d 1224 (D. Minn. 2003).

LSI appealed the District Court's partial denial of the motion to dismiss. The partial grant of the motion to dismiss was not appealed. In its appeal, LSI asserted that the District Court had committed three independent errors, and that correction of any one of those errors required reversal and remand for dismissal. The United States Court of Appeals for the Eighth Circuit reversed the District Court and remanded for dismissal. In its decision, the Court of Appeals found it necessary to rule on only one

of the three independent grounds for reversal. *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004).

Petitioners suggested that the Court of Appeals grant *en banc* review. Without even finding it necessary to have LSI provide a response, the Court of Appeals, without dissent, denied the suggestion for *en banc* review.

Petitioners now seek to have this Court review the Court of Appeals decision.

After the Court of Appeals issued its mandate that the District Court dismiss this matter, and for reasons wholly unrelated to the present matter, LSI ceased operations and distributed all of its remaining assets to the Community. LSI was dissolved by Community Court order on January 17, 2005, and all of its remaining assets have been distributed to the Community.

STATEMENT OF FACTS

The Shakopee Mdewakanton Sioux Community is a federally recognized Indian Tribe, 68 Fed. Reg. 68179, 68182 (Dec. 5, 2003), which possesses and exercises all inherent sovereign powers of a tribal government. *Prescott II*, Joint Appendix 144 (hereinafter Jt. App.) (Constitution of the Shakopee Mdewakanton Sioux Community of Minnesota). LSI was an arm and instrumentality of the Community, and was the means through which the Community engaged in lawful gaming activities in compliance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). As a corporation wholly owned by the Community and created under Community laws, LSI shared the Community's sovereign powers. Jt. App. 217

(Articles of Incorporation of Little Six, Inc., Art. 3.1); Jt. App. 156a (Community Business Corporation Ordinance § 4.11).

Petitioners are former executive officers of LSI, Jt. App. 54 (Complaint ¶¶ 7-10), who, in 1993 attempted to give themselves substantial, unauthorized increases in compensation by establishing various deferred compensation arrangements, naming themselves as beneficiaries, and contributing to their individual plan accounts substantial sums from LSI's revenues. *In re Trust Under Little Six, Inc. Retirement Plans*, 1 Shak. App. Rptr. 182, 189 (Shakopee Mdewakanton Sioux Community App. 2001) (hereinafter *In re Trust*, republished in Appendix hereto) ("here the Claimant's reliance was not induced by their employer – instead it was the Claimants *themselves* who sought to establish these plans for *themselves*." (emphasis in original)).

These proposed plans included a severance pay arrangement known as the "Little Six, Inc. Separation Pay Plan", Jt. App. 79, and three unfunded, non-qualified deferred compensation arrangements: the "Little Six, Inc. Supplemental Retirement Plan", Jt. App. 86; the "Little Six, Inc. Retention Plan", Jt. App. 94; and the "Little Six, Inc. Executive 457 Plan", Jt. App. 102.

None of the proposed plans were ever presented to or approved by LSI's Board of Directors, *In re Trust*, App. 2, so under Community law, none was ever validly adopted or effective. Jt. App. 232 (Article 8.6, stating "officers [of the corporation] shall receive such salary or compensation as may be fixed by the Board of Directors."); *In re Trust*. In *In re Trust*, the Tribal Appellate Court held: "Because we conclude that the trust and plans at issue were never

properly adopted by LSI under Community law, an ERISA plan was never created." *In re Trust*, App. 2. *See also id.* at 11 ("Because these plans were never formally approved by LSI, there is no ERISA plan created that affects the rights of the Claimants").

The proposed plans were to be unfunded, and the plan documents state that benefits were to be provided out of LSI's general assets. Notwithstanding the unfunded status of the Supplemental Retirement Plan, the Retention Plan, and the Executive 457 Plan, Petitioners established a trust known as the "Trust Under Little Six, Inc. Retirement Plans", Jt. App. 298, to hold funds which Petitioners transferred from LSI, which Petitioners hoped would provide a potential source for payment of the compensation which Petitioners were seeking to provide themselves. The trust was intended to be what is commonly called a "rabbi trust".

Consistent with Petitioners' intent to establish a "rabbi trust" for their own benefit, Section 1(d) of the Trust Agreement provides:

> Plan participants and their beneficiaries shall have no preferred claim on, or any beneficial ownership interest in, any assets of the Trust. Any rights created under the Plans and this Trust Agreement shall be mere unsecured contractual rights of Plan participants and their beneficiaries against Company [LSI]. Any assets held by the trust will be subject to the claims of the Company's general creditors. . . .

Trust Under Little Six, Inc. Retirement Plans, Jt. App. 298.

The rabbi trust was intended by those officers of LSI who created the scheme to provide a source of funds from which they could obtain their illegal gains in the unfunded, deferred compensation plans listed in Appendix A to the Trust Agreement. (*Id.*, preambles (b) and (f)). The trust arrangement also was never presented to, nor approved by, the Board of Directors of LSI. *In re Trust* at 6.

Through Resolution LSI-01-12-95-001, the Board of Directors of LSI expressly declined to adopt or approve any of the plans or the trust, and directed the return of the assets of the trust to LSI in accordance with Sections 1(b), 4, and 12(b) of the Trust Agreement. (Jt. App. 322). The Trial Court subsequently approved return of the trust assets to LSI. *In re Trust Under Little Six Retirement Plans*, Order (Shakopee Mdewakanton Sioux Trial Court Mar. 12, 2002), Jt. App. 237. The assets have been returned to LSI, and there is no longer a trust fund related to the proposed plans.

REASONS FOR DENYING THE PETITION

In this matter corrupt former officers of an Indian gaming tribal enterprise wanted to increase their compensation. They knew that, under applicable law, such increases had to be approved by the corporation's Board of Directors. Yet, they purported to establish deferred compensation plans to which they contributed gaming revenues. The Board of Directors did *not* approve the deferred compensation plans. The lack of authorization did not faze Petitioners. They simply acted as if the corporation granted the increase in compensation, and they now claim

that because they acted as if the corporation approved the increases in compensation, they can enforce those increases as *de facto* ERISA plans. The Court of Appeals for the Eighth Circuit found their argument an insufficient basis upon which to permit the petitioners to obtain their illegal and ill-gotten gains.

Petitioners now come to this Court and assert that, other than the decision below, every reported decision from State or federal courts holds that ERISA requires the enforcement of the type of unlawful diversion of corporate funds which Petitioners attempted to perpetrate upon their employer.

This case does not provide a vehicle for resolving any conflict in lower court decisions, nor does it provide a vehicle for clarifying any broad principles of ERISA law. Petitioners presented their argument to the Court of Appeals, that Court analyzed that argument, correctly discussed the applicable law, and then applied that law to the facts of this case. Petitioners do not agree with the Court of Appeals application of the law to the facts of this case, but this case is not one of the few cases which should occupy this Court's time.

I. Petitioners seek to have this Court re-determine a factual issue, but Petitioners do not present any unsettled legal issue.

A. The settled facts of this case do not present the question presented by Petitioners.

Petitioners ask this Court to grant certiorari over the following question:

> Whether federal common law developed under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq., must yield to tribal corporate law to determine the enforceability of employee benefit plans established by an Indian tribal corporation in favor of its employees.

The facts of this case clearly do not present that issue. The very core of the Court of Appeals decision is based upon the fact, established as *res judicata*, that there is *not* an employee benefit plan established by an Indian tribal corporation. *See, e.g.*, *Prescott II*, Pet. App. 9 ("Because as a matter of tribal law no benefit plan exists, there is nothing here to which ERISA could apply.").

Petitioners' incorrect factual assertion is based upon findings of the Community Trial Court. But those factual determinations were rejected and reversed by the Community Appellate Court. The Community Appellate Court's reversal of the Tribal Court finding, and the legal effect of that reversal, is the primary issue addressed in *In re Trust*. In *In re Trust*, the appellate Court wrote that the Community Trial Court had found that "LSI had adopted the trust and benefit plans at issue here. Because we agree with LSI that there is *no evidence* in the record that the LSI Board adopted these plans, or the trust in conformance with Community law, we reverse." *In re Trust*, App. 6 (emphasis added)). Petitioners are merely presenting a hypothetical question, based upon the facts as Petitioners want them to be, not based upon the facts of this case. The Court should deny the request to hear the hypothetical question which Petitioners pose.

B. There is no disagreement in the lower courts on the question presented by Petitioners.

Petitioners do not assert that there is a divergence of opinions in the lower courts. In fact, Petitioners cite decisions from the Court of Appeals for the Eighth Circuit, every other United States court of appeals, and several state supreme courts which have reached the issue which their petition presents, all of which hold that federal law is used to determine the enforceability of a benefit plan which an employer has created.

Of particular significance for current purposes, the Court below clearly stated that it agreed with the very rule of law which Plaintiffs seek to present to this Court. *Prescott II* (Pet. App. 8). Judge Bowman, writing for a unanimous Court below, cited with approval and analyzed his own prior opinion in *Kulinski v. Medtronics Bio-Medicus, Inc.*, 23 F.3d 254 (8th Cir. 1994), where the Court held that *if* the employer creates a benefit plan, enforceability of the plan is governed by ERISA. *Prescott II* (Pet. App 8). But, as noted above, the Court rejected Petitioners' arguments because in the present case there was not an "employee benefit plans established by an Indian tribal corporation in favor of its employees." This Court has provided clear notice to its bar that it will rarely grant certiorari to review an alleged misapplication of a properly stated rule of law to the facts, and will rarely review factual disputes. The present falls within both of these categories, and certiorari should be denied.

II. There is no disagreement in the lower courts on the very narrow issue which is presented by the facts of this case.

The issue presented by the facts of this case is very narrow:

> whether federal courts holdings that there can be *de facto* ERISA plans requires that federal courts enforce an attempt by Indian tribal gaming executives to give themselves unauthorized pay raises.

There is not a divergence of opinion in lower courts on the issue which is presented by the facts of this case. As Petitioners themselves note, all federal courts, including the Court of Appeals for the Eighth Circuit, recognize the rule that the courts will impose *de facto* plans on employers when the facts warrant that equitable remedy. In both the Community Court and the federal courts below, Petitioners asserted that application of the *de facto* plan rule to the present case should result in a *de facto* plan in favor of petitioners. Both courts correctly rejected Petitioners' attempt to stretch the *de facto* plan rule to the facts of this case, and this Court should not use its resources to determine if the Court of Appeals misapplied the uniformly accepted *de facto* plan rule to the unique facts of this case.

A. The rule regarding *de facto* plans cannot be used to provide benefits to executive officers who, without their employer's approval, sought to establish ERISA plans for themselves.

While all lower courts have adopted the *de facto* plan rule, no court has ever enforced a *de facto* plan in favor of

executive officers who purported to create the plans for themselves, in violation of the governing corporate documents and corporate law pursuant to which the entity existed. The lack of divergence in the courts below, by itself, strongly counsels against granting certiorari.

The merits of Petitioners' attempt to apply the *de facto* plan rule to their factual context provides additional basis for denying the writ of certiorari.

Consistent with standards of corporate governance generally, LSI's executive officers have no authority to increase their compensation. Such pay raises must be approved by LSI's Board of Directors. Jt. App. 232 (LSI Articles of Incorporation, Art. 8, § 8.6).

The reasons corporate officers cannot give themselves unapproved increases in compensation are self-evident.[1]

Despite the clear Community law and LSI Articles of Incorporation on the issue, Petitioners assert that the *de facto* plan rule gives them the right to dramatically increase their own compensation merely by claiming that they had established ERISA plans for their own benefit.

[1] Petitioners' attempts to increase their compensation prompted investigation by the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission, and served, *inter alia*, as the basis for revocation of Prescott's gaming license. *See In re Leonard Prescott*, #94-0024, Findings of Fact (Shakopee Mdewakanton Sioux Community Gaming Comm'n 1994), *aff'd, In re Leonard Prescott Appeal from 7/1/94 Gaming Commission Final Order*, 1 Shakopee App. Rptr. 146 (Shakopee Mdewakanton Sioux Community App. 1999). Similar conduct has recently been the focus of investigation and prosecution by federal authorities in cases involving Enron Corp., WorldCom, Inc., McKesson Corp., Arthur Anderson, Tyco International, Inc., and Global Crossing, Inc.

Petitioners cite *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*) for their claimed federal right to give themselves pay raises. *Donovan* holds that where an entity's actions cause a reasonable employee to believe that the corporation has created an ERISA plan for the benefit of the employee, courts can recognize the *de facto* existence of ERISA plans. *Id.* at 1373. The enforcement of *de facto* plans is premised on equitable principles, and relies on the same rationale as promissory estoppel:

> [T]here can be no doubt that ERISA was enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits; an employer was to be prevented from "pulling the rug out from under" promised retirement benefits upon which his employees had relied during their long years of service.

Amato v. Western Union Int'l, Inc., 773 F.2d 1402, 1408 (2nd Cir. 1985). The lower courts have held that to accomplish ERISA's intended purpose, if an employer led its employees to believe that a benefit plan had been adopted, the employer should not then be able to deny that a plan existed. *Id.*

LSI wholly agrees with this principle, and chose to abide by it, even though not compelled to do so by federal law. As shown in this matter, where LSI's *non-executive* employees were led to believe that a plan had been established, and those employees might have relied upon that belief, LSI ratified the plans. Jt. App. 322 (LSI Resolution 01-12-95). On the other hand, where the intended beneficiaries were senior executive officers such as the Petitioners, who knew the proposed plans had never been

approved or adopted, there was not justified reliance, because those executives knew otherwise.[2]

Other than the now-vacated District Court decision below, no federal Court has ever applied the *de facto* plan analysis in favor of the very officers whose actions are alleged to have created the *de facto* plan. Despite exhaustive research, LSI has not even been able to locate any other case from any federal court, where an executive officer knew the compensation scheme he created was not properly authorized, yet attempted to claim he was misled into believing he was a participant in an approved plan. *See, e.g., Kenney v. Roland Parson Contracting Corp.*, 28 F.3d 254 (8th Cir. 1994) (masonry contractor misled bricklayer regarding existence of a plan); *Moeller v. Bertrang*, 801 F. Supp. 291 (D.S.D. 1992) (auto shop owner established a plan but then attempted to cancel it and deprive retirement benefits to a mechanic).

LSI has previously challenged Petitioners to cite even one case which supports their *de facto* plan argument, but the closest Petitioners have been able to come is *Bennett v. Gill & Duffus*, 1987 WL 34256 (S.D.N.Y. Dec. 29, 1987). *Bennett* falls far short of the facts in this matter. In *Bennett*, the Court held that sixteen employees could pursue their claim that there was a *de facto* plan. While one of the plaintiffs in the case was an executive of a subsidiary of the corporation, the plan at issue was created by the parent corporation, and the subsidiary's executive had not

[2] Because enforcement of *de facto* ERISA plans rest on equitable principles, equitable defenses apply. Here, Petitioners have unclean hands, for they seek ERISA's protection for their acts violating Community law and diverting gaming revenues to their personal use. Consequently, Petitioners would not be eligible for equitable remedies.

taken part in creating the alleged plan. As in all other cases finding *de facto* plans, the subsidiary's executive had been misled by his employer, the parent corporation. Petitioners cannot even point to any case which enforces a *de facto* plan in favor of any executive against the executive's own corporation, and petitioners lack any support for their assertion that the *de facto* plan should be applied to the facts of the present matter: executives who seek to both create and enforce a *de facto* plan.

In stark contrast to the cases which enforce *de facto* plans, LSI did not mislead Petitioners into believing that a plan existed. Prescott was the corporate CEO and was the *Chairman* of the Board of Directors, the very body required by Community law to have approved the proposed plans, Johnson was at every Board meeting where such matters were discussed, and Riverso participated in discussions of and was privy to all actions of the Board. Petitioners knew these proposed plans were never properly approved. They cannot now seek to have the courts create a *de facto* plan by claiming they thought there was a plan, when they clearly knew the Board had never approved the proposed plans, and that such approval was a necessary prerequisite to receiving the compensation the plans contemplated.

As the Tribal Appellate Court correctly held in the portion of its opinion which addressed Petitioners' claim that there were *de facto* plans, "here the Claimant's reliance was not induced by their employer – instead it was the Claimants *themselves* who sought to establish these plans for *themselves*." *In re Trust*, App. 9 (emphasis in original). The Tribal Appellate Court was correct: where Community law requires that executive officer compensation must be set by LSI's Board of Directors, ERISA does

not give those executive officers a federally enforceable right to increase their own compensation, in contravention of Community law.

B. This Court should not grant certiorari to determine the narrow issue of how the rule regarding *de facto* ERISA plans applies to tribally owned and chartered corporations which operate Indian Gaming Facilities.

Other than the federal District Court below, no federal court has ever applied the *de facto* plan rule to a gaming facility which is subject to the Indian Gaming Regulatory Act. The unique context in which the present case arises would significantly effect the analysis in this case, and the lack of case law in the lower courts, and the complete lack of any divergence in the lower courts, counsels against this Court hearing this case of first impression.

The reasons senior executive officers of an Indian gaming enterprise cannot give themselves unapproved increases in compensation are even more compelling than the reasons non-gaming executives cannot increase their own compensation. Senior executive officers of an Indian gaming enterprise are held to higher standards of conduct generally than are the senior executives of non-gaming enterprises. Because maintaining the integrity of Indian gaming requires strict compliance with all applicable laws, rules, and regulations, especially those governing access to and protection of the gaming enterprise's monetary assets, any unauthorized or improper appropriation of those assets is especially egregious. The inventory of a gaming enterprise is money, consequently employees are carefully monitored to ensure the protection of the enterprise's funds, and any unauthorized appropriation of the casino's

funds for personal purposes is strictly prohibited. *See, e.g.*, 25 U.S.C. §§ 2703(9); 2710(b)(2)(B) (requiring that tribal gaming laws limit use of gross gaming revenue to those purposes stated in the cited sections). The integrity of Indian gaming rests on the absolute integrity of those responsible for management and operation of gaming enterprises; senior executives must therefore avoid even the appearance of impropriety.

Because Congress enacted the IGRA "to provide a statutory basis for the regulations of gaming by an Indian tribe adequate to shield it from . . . corrupting influences," 25 U.S.C. § 2702(3), senior management of an Indian gaming enterprise cannot be permitted to deviate from laws, rules and regulations governing their conduct, especially those which govern how funds of an Indian gaming enterprise can be used by executives. If senior executives of a tribal gaming enterprise are permitted to ignore tribal laws governing gaming, and are allowed by the courts to unilaterally increase their compensation without obtaining approvals mandated by tribal law regulating gaming, then the integrity of Indian gaming will be the victim. Such a result defeats Congress' purpose when enacting the IGRA.

The *de facto* plan rule is a well-established equitable rule. Whether it applies to the executive officers who bring the present petition, and whether and how the Indian Gaming Regulatory Act impacts the equitable analysis of the *de facto* plan rule, are the types of fact specific issues which should not occupy this Court's time. Particularly in the present matter, where Petitioners do not even allege a divergence of opinions in the lower courts, this Court should deny the request for a writ of certiorari.

III. The holding which Petitioners seek to have this Court review is only one of several barriers to federal court judgment in this matter.

As discussed in LSI's statement of the case, LSI presented three independent arguments to the Court of Appeals, and the Court only found it necessary to rule on only one of those issues. The Court below did not reach LSI's very strong arguments that LSI has not waived its sovereign immunity from suit, nor did the Court reach the legally and factually complex arguments that ERISA does not apply to LSI. LSI's current lack of assets and its January, 2005 dissolution present additional impediments to relief.

Petitioners concede that LSI has sovereign immunity from suit, and concede that ERISA does not waive LSI's sovereign immunity. Petitioner Prescott asserts that the Community Corporation Ordinance waives the Community's immunity to Prescott's federal court suit, and LSI does not agree with Petitioners' strained interpretation of the Community statutes.[3] Petitioners also assert that language in the summary plan descriptions of the alleged *de facto* plans waives the Community's immunity. But imposition of a *de facto* plan based upon equity could not provide the express waiver of immunity, as explicitly required by Community statutory law and by this Court's prior holdings. LSI's sovereign immunity would either prevent this Court from reaching the merits of this case or would prevent the Court of Appeals from reinstating the District Court order even if Petitioners were to prevail in

[3] Whether the purported waiver in the Corporation Ordinance has any remaining effect, now that the corporation has been liquidated and dissolved appears to be an unsettled question of Community law.

this Court. LSI's arguments regarding the applicability of ERISA to a gaming entity which provides the sole income to an Indian Tribe provides further substantial impediment to Petitioners' attempt to retain relief. Combined, LSI's arguments on the merits of the present case, its arguments regarding sovereign immunity, and its arguments regarding the applicability of ERISA make it extremely unlikely that Petitioners would prevail even if this Court were to grant certiorari.

CONCLUSION

Granting the writ of certiorari would not develop the law, would not resolve any divergence of opinions in the lower courts, and would not address other legal bars to petitioners' claims. It would merely reaffirm that the Court of Appeals correctly applied the existing legal rules to the unique and limited facts of Petitioners' attempt to give themselves increases in compensation. For all of the reasons stated in this response, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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