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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV **PLAINTIFFS' REPLY BRIEF RE: PAINTIFFS' MOTION FOR CLASS CERTIFICATION**

INTRODUCTION

During the next twelve months, the Defendants will hold more than fifty and perhaps as many as one hundred 48-hour hearings involving Indian children and their parents. *Every* parent involved in those hearings has the identical interest in obtaining an answer to the following question of law: Does a parent who may lose custody of his or her child in one of Defendants' 48-hour hearings have a right under the Due Process Clause to receive, prior to the hearing, a copy of the state's petition for temporary custody? That question is raised in the instant litigation. Its very presence qualifies this case for class certification under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Indeed, there are at least eleven common questions of law presented in this litigation, each one of which is sufficient to warrant the certification of a (b)(2) class. These eleven questions, beginning with the one listed above, are:

> 1. Does a parent who may lose custody of his or her child in one of Defendants' 48-hour hearings have a right under the Due Process Clause to receive, prior to the hearing, a copy of the state's petition for temporary custody?
>
> 2. Does a parent who may lose custody of his or her child in that proceeding have a right under the Due Process Clause to receive, prior to the hearing, a copy of the affidavit filed by the state in support of the state's motion for temporary custody?
>
> 3. Does a parent who may lose custody of his or her child in that proceeding have a right under the Due Process Clause to present evidence?
>
> 4. Does a parent who may lose custody of his or her child in that proceeding have a right under the Due Process Clause to cross-examine the person who submitted the affidavit?
>
> 5. Does it violate the Due Process Clause when the court makes a finding, as these courts invariably do, that "active efforts have been made to provide remedial services and rehabilitative programs" to the parents, even though no evidence had been introduced on this subject during the hearing?
>
> 6. Does it violate the Due Process Clause when the court makes a finding, as these courts invariably do, that removing the children from their parents is "the least restrictive alternative available," even though no evidence had been introduced on this subject during the hearing?

7. Do the Defendants have a policy, practice, and custom of violating the substantive requirement of Section 1922 of the Indian Child Welfare Act (ICWA) by failing to ensure at their 48-hour hearings that the emergency removal of an Indian child from his or her home will terminate immediately after the emergency has ceased to exist?

8. Judge Thorstenson issued a written decision, a copy of which is attached as Exhibit 6 to Plaintiffs' Complaint, in which the Judge explained Defendants' policy that "ICWA, including its notice requirements, is not implicated at the 48-hour hearing." (at p. 3). Is this a correct statement of federal law, or should the Defendants be enjoined from its further enforcement?

9. Do the Defendants have a policy, practice, and custom of violating Sec. 1912(d) of ICWA in the manner set forth in paragraphs 99-102 of Plaintiffs' complaint?

10. Do the Defendants have a policy, practice, and custom of violating Sec. 1912(e) of ICWA in the manner set forth in paragraphs 102-112 of Plaintiffs' complaint?

11. Do the Defendants have a policy, practice, and custom of violating both the Due Process Clause and ICWA by coercing parents to waive their federal rights in the manner set forth in paragraphs 113-129 of Plaintiffs' complaint?

This Court has granted class certification in cases that presented far more compelling grounds for legitimate challenge than exist here. For instance, in *Lambertz-Brinkman v. Reisch*, 2008 WL 4774895 (D.S.D. Oct. 31, 2008), the Court certified a (b)(2) class of 130 prisoners receiving psychotropic medications. The members of the class had differing medical complaints, differing diagnoses, and varying prescriptions. But what made the case worthy of class treatment is that all the juveniles shared a common question of law: Were the defendants denying and/or delaying the provision of adequate medical care? *See Lambertz-Brinkman*, 2008 WL 4774895 at **1-2.

Similarly, in *Christina A. ex rel. Jennifer A. v. Bloomberg*, 197 F.R.D. 664, 667 (D.S.D. 2000), the Court certified a (b)(2) class of nearly a hundred juveniles at Plankinton, each of whom was incarcerated for different reasons, had varying needs and complaints, and had been treated differently by staff. But all of these juveniles were impacted by the same policies that were being challenged in the lawsuit, and all of them sought declaratory and injunctive relief

from the continued enforcement of those policies. As a result, the plaintiffs qualified for treatment as a class under (b)(2).

Here, as in *Lambertz-Brinkman*, "[a]ll members of the class seek a declaration that an illegal policy and practice exists and an injunction should be issued prohibiting such practice." *Id.*, 2008 WL 4774895, *2 (citing *DeBoer v. Mellon Mortgage Co*., 64 F.3d 1171, 1174 (8th Cir. 1995)). In fact, all members of the putative class seek eleven declarations and injunctions. Here, as in *Christina A.*, a sizeable group challenges policies and practices that, they allege, "amount[s] to or result[s] in constitutional deprivations of Plaintiffs' rights." Accordingly, here as in those cases, certification of a (b)(2) class is appropriate.[1]

Subsection (b)(2) was formulated to permit "'class members [to] complain of a pattern or practice that is generally applicable to the class as a whole.'" *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). This is precisely the situation in the instant case.

Plaintiffs will now address the specific arguments raised in Defendants' brief in the order in which Defendants presented them.

ARGUMENT

I. Plaintiffs' Motion for Class Certification is Not Premature.

Defendants' first argument is that Plaintiffs' Motion for Class Certification is premature. Defendants' argument flies in the face of Rule 23 and the cases construing it.

[1] The two cases most relevant to Plaintiffs' Rule 23 motion are *Lambertz-Brinkman v. Reisch*, 2008 WL 4774895 (D.S.D. Oct. 31, 2008), and *Christina A. ex rel. Jennifer A. v. Bloomberg*, 197 F.R.D. 664, 667 (D.S.D. 2000). Plaintiffs cite these cases repeatedly in their brief. Neither case is cited in Defendants' brief.

Rule 23 mandates that class certification should be addressed "[a]t an *early* practicable time after a person sues or is sued as a class representative." Fed.R.Civ.P. 23(c)(1)(A) (emphasis added). Plaintiffs' motion is faithful to that requirement.

The Supreme Court has recognized that federal district courts have authority under Rule 23 to certify a class whenever the prerequisites for class certification "are plain enough from the pleadings." *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). *See also Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 587 (9th Cir. 2010) (*en banc*). A Rule 23 determination is based on the allegations in the complaint, and not on whether the plaintiff is likely to prevail on those allegations. *See Dukes*, 603 F.3d at 587 ("it is the plaintiff's *theory* that matters at the class certification stage, not whether the theory will ultimately succeed on the merits.") (Emphasis in original, citing *United Steelworkers v. ConocoPhillips Co.*, 593 F.3d 802, 808-09 (9th Cir. 2010)).

There is an exception to the rule that federal courts should make Rule 23 determinations early in the litigation on the pleadings. That exception—which is not relevant here—occurs when a plaintiff's eligibility for class certification is not readily apparent from the pleadings and the defendant has requested discovery on a material issue of fact related to the Rule 23 issue. Defendants cite cases in their brief that recognize this exception, but those cases are inapplicable here for two reasons. First, Plaintiffs' eligibility for class certification is readily apparent from the pleadings. Second, nowhere in their brief do the Defendants request discovery or cite any facts that could be discovered that might defeat class certification.

Plaintiffs' theory of this case, set forth in detail in their complaint, is that scores of Indian parents in the months ahead will be subjected to the same unlawful policies, practices, and customs as the three named plaintiffs were subjected in their 48-hour hearings. Moreover,

attached to Plaintiffs' complaint are transcripts of two of Defendants' 48-hour hearings. These transcripts support Plaintiffs' allegations that the Defendants are pursuing the policies, practices, and customs challenged in the complaint.

Here, then, the Court need look no further than to the pleadings. *See In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 602 n.9 (D. Minn. 1999) ("pleadings alone can conclusively show that the requirements of Rule 23 have been satisfied."); *Fogie v. Rent-A-Ctr., Inc.*, 867 F. Supp. 1398, 1402 (D. Minn. 1993) (certifying class on record consisting of "pleadings and a few affidavits regarding the Rule 23(a) requirements.") Defendants point to no facts missing from the existing record that might undermine Plaintiffs' eligibility for class certification. *See Fogie*, 867 F. Supp. at 1402 (rejecting prematurity argument where defendants "had not articulated any specific facts which are necessary before the court decides the class certification issue").

As part of their argument on prematurity, the Defendants call Plaintiffs "disingenuous," a characterization that Plaintiffs do not appreciate and is not justified. *See* Defendant Judge Davis's Response to Plaintiffs' Motion for Class Certification (Dkt. 28) (hereinafter, "Davis Reponse") at 3. According to the Defendants, it is inconsistent for the Plaintiffs to claim in their motion for expedited discovery, as Plaintiffs did, that they need certain documents *to prevail on the merits* while at the same time claim in their Rule 23 motion that the Court can certify the class based on the allegations in the complaint. However, there is nothing inconsistent in making both of those arguments simultaneously. The burden of proof with respect to each motion is wholly different. Plaintiffs need to engage in discovery in order to prevail on the merits, and thus their motion for expedited discovery is appropriate. On the other hand, no discovery is necessary to resolve the Rule 23 issue, and therefore the Court can decide that issue now.

In fact, the only party that has taken inconsistent positions with respect to these two motions are the Defendants. Defendants cited as one reason for opposing Plaintiffs' motion for expedited discovery the fact that "plaintiffs [had] not yet moved to certify the class." (Dkt. 18, p. 10.) Yet now that the Plaintiffs have moved to certify the class, the Defendants argue that the request is premature.[2]

For the reasons set forth in Plaintiffs opening brief, and as apparent on the face of the pleadings, the Plaintiffs have satisfied all of the requirements for a Rule 23(b)(2) class. The Court has more than enough information about Plaintiffs' theory of the case to grant class certification at this time. Defendants' prematurity argument lacks merit.

II. The Definition of the Class is Clear and Unambiguous.

The three Named Plaintiffs seek to represent a class consisting of "all other members of federally recognized Indian tribes who reside in Pennington County, South Dakota and who, like the plaintiffs, are parents or custodians of Indian children." (Dkt. 24 p. 2.) This definition encompasses all the people who will be impacted by the same policies, practices, and customs that the Named Plaintiffs were subjected to during their 48-hour hearings.

Defendants argue that the proposed definition of the class is overly broad because the term "Indian children" might include children who do not fall within ICWA's protections. However, it is obvious from Plaintiffs' complaint that the term "Indian children" is intended to employ ICWA's definition of that term, to wit: "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for

[2] In the same paragraph in which the Defendants call the Plaintiffs "disingenuous," they also state that the transcripts of the Young and Walking Eagle 48-hour hearings are relevant to the class certification issue and that these transcripts were "inexplicably" not attached to Plaintiffs' complaint. Plaintiffs disagree. Indeed, the Plaintiffs invite the Defendants to file those transcripts with the Court under seal within the next three days if the Defendants believe they have any bearing on the Rule 23 issue.

membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Under this statutory definition, only those "Indian children" who are protected by ICWA are members of the proposed class.

If it is not already obvious that the term "Indian children" in Plaintiffs' definition of the class means "Indian children" as defined in ICWA, there is an easy fix. "District courts are permitted to limit or modify class definitions to provide the necessary precision." *In re Monumental Life Ins. Co*., 365 F.3d 408, 414 (5th Cir. 2004); *see also Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 619 (6th Cir. 2007) ("[D]istrict courts have broad discretion to modify class definitions."). Accordingly, if the Court sees any ambiguity in Plaintiffs' definition of "Indian children," Plaintiffs respectfully suggest that the Court add the words "as defined in 25 U.S.C. § 1903(4)" to the end of the proposed class definition, as this will instantly resolve any ambiguity.

Similarly, the Defendants claim that the words "parents" and "custodians" in Plaintiffs' definition of the class are too imprecise. Here again, both of those words have obvious reference to the same words in ICWA. *See* 25 U.S.C. § 1903(6) and (9) (defining the words "custodian" and "parent"). Plaintiffs therefore believe that these words are sufficiently clear. However, if the Court sees a need for any further clarification, the Court can add a citation to the statutory provisions, which will instantly resolve any ambiguity.

In short, the definition of the class set forth in Plaintiffs' motion is sufficiently precise. If any clarification is needed, the Court has the authority to amend Plaintiffs' proposed definition. Defendants are not justified, however, in defeating Plaintiffs' motion for class certification when there is such an easy fix to any perceived ambiguity.

III. The Putative Class Meets All Four Prerequisites of Rule 23(a).

1. Rule 23(a)(1): Numerosity

Defendants concede that the proposed class is sufficiently numerous. *See* Davis Response at 6.

2. Rule 23(a)(2): Commonality

As this Court explained in *Lambertz-Brinkman* and *Christina A.*, the "commonality" requirement is satisfied whenever a question of law or fact is common to the class, even if factual differences also exist. *Lambertz-Brinkman*, 2008 WL 4774895 at *2; *Christina A.*, 197 F.R.D. at 667-68. *See also J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) (holding that subsection (a)(2) requires "only a single issue common to the class."); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.")

Thus, the Defendants gain no ground by claiming that abuse and neglect cases contain individualized facts. That is certainly true. It is also irrelevant.

Listed above are eleven questions of law common to the class, which are ten more than necessary to qualify for class certification. Plaintiffs satisfy the "commonality" requirement.[3]

Defendants' reliance on *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994), is misplaced. *Coleman* denied class certification because the plaintiff's complaint "contain[ed] only the barest

[3] Defendants find it "curious" that the Plaintiffs attached to their complaint the transcript of only one of the three Named Plaintiffs' hearings. *See* Davis Response at 7. According to the Defendants, if the Court compares all three transcripts, the Court will find factual differences in the three cases. Here again, if the Defendants believe that those differences are relevant to the Rule 23 issue, they should file the transcripts. What the Court will discover--and as the Defendants do not dispute--is that all three plaintiffs faced the same questions of law.

of conclusory allegations, and fail[ed] even to state that [the named plaintiff] will fairly represent the interests of the purported class." *Id*., 40 F.3d at 259. Those defects are not present here.

3. Rule 23(a)(3): Typicality

In *Lambertz-Brinkman* and *Christina A.*, this Court rejected the same argument that the Defendants make here, to wit, that certification should be denied because members of the class had differences in their underlying facts. Here, as in those cases, the members of the class challenged the same policies, practices, and customs and sought the same relief, and this rendered them eligible for Rule 23 certification. *See Lambertz-Brinkman*, 2008 WL 4774895, at *2 ("Typicality exists if the proposed class members have the same or similar grievances in that they have been or will be subjected to the same allegedly unlawful treatment as the named plaintiffs."); *Christina A.*, 197 F.R.D. at 668 ("The fact that each named Plaintiff has personally experienced a different combination of [the challenged] conditions, policies and practices does not defeat the typicality of the claims because everyone in the class is subject to them.")

"The burden of showing typicality is not an onerous one." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 562 (8th Cir. 1982). Plaintiffs easily satisfy that burden.

4. Rule 23(a)(4): Adequate Representation

In their brief, the Defendants correctly cite case law for the principle that, to demonstrate adequacy of representation under (a)(4), the named plaintiffs must show (1) that their attorneys are competent to litigate the case, and (2) that "their interests are not antagonistic to the interests of the class." (Dkt. 28, p. 9-10, quoting *Minneapolis Firefighters' Relief Ass'n v. Medtronic, Inc*., 278 F.R.D. 454, 458 (D. Minn. 2011).) However, the Defendants then devote nearly their entire argument discussing an issue totally unrelated to either of those concerns.

According to the Defendants, a conflict might arise during the course of litigation between members of the class *and one of the tribal plaintiffs*. *See* Davis Response at 10 ("It is not an atypical situation for a tribe's interests and a member's interests to conflict.") Defendants discuss in their brief what they claim was a conflict of interest between Plaintiff Young and her tribe that arose during her 48-hour hearing. *See id*. at 11.

However, (a)(4) relates only to potential conflicts *within the class itself*, that is, conflicts between the named plaintiffs and other members of the class. Thus, even if a conflict could arise in the instant case between a member of the class and one of the tribal plaintiffs, that possibility has no bearing on the Rule 23 question.

Plaintiffs' attorneys are aware of the potential conflict between the individual plaintiffs and the tribal plaintiffs, and have addressed this issue with their clients. Plaintiffs' attorneys, and particularly Mr. Pevar, are experienced class action litigators with considerable expertise in Indian Law. Mr. Pevar is the author of *The Rights of Indians and Tribes* (Oxford University Press 2012) and currently is an Adjunct Professor at the University of Connecticut School of Law, where he teaches American Indian Law. From 1983 through 1999, Mr. Pevar taught Federal Indian Law at the University of Denver School of Law. Plaintiffs' attorneys assure the Court that this issue is known to Plaintiffs' counsel and has been addressed with the plaintiffs. In any event, the potential conflict between the putative class and one of the tribal plaintiffs is not an issue relevant to the Rule 23 inquiry.

Defendants suggest that a conflict could arise between one member of the putative class and another. However, that possibility is too far-fetched and speculative to defeat Plaintiffs' motion. *See New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 313 (3d Cir.

2007) ("Conflicts of interest are rare in Rule 23(b)(2) class actions seeking only declaratory and injunctive relief.")

For the reasons set forth above, Plaintiffs satisfy the (a)(4) requirement.

IV. The Putative Class Satisfies the Requirements of Rule 23(b).

Defendants devote only two paragraphs of their brief discussing whether the Plaintiffs meet the requirements of Rule 23(b)(2). Included in their discussion is the admission that "the proposed class here on its face would appear cohesive" with respect to mounting a (b)(2) action. *See* Davis Response at 13. The plaintiff class not only appears cohesive, it is cohesive. Each member of the class will face the same eleven issues of law in their 48-hour hearings that the Named Plaintiffs faced in theirs, and each seeks the same relief regarding them.

Certification of a class under (b)(2) is just as appropriate here as it was in *Lambertz-Brinkman* and *Christina A.* Certification of the class will allow Indian parents to raise (and for the Court to address) in one proceeding at least eleven issues of federal law that invariably arise in all of Defendants' 48-hour hearings involving the custody of Indian children. It is for cases such as these that the 23(b)(2) mechanism exists. Accordingly, class certification is warranted.

Respectfully submitted this 23rd day of May, 2013.

By: /s/ Stephen L. Pevar

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