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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' RESPONSE TO MOTION TO DISMISS OF DEFENDANTS VAN HUNNIK AND MALSAM-RYSDON**

INTRODUCTION

When the state's attorney in Pennington County is informed that a child is being abused or neglected, the state's attorney refers the matter to the Department of Social Services (DSS) for further investigation. SDCL § 26-7A-10. DSS has the authority to immediately take an abused or neglected child into temporary custody. SDCL § 26-7A-14. If DSS then wants to retain custody, it must file an emergency petition seeking legal custody of that child either through its own attorney or by having the state's attorney file the petition on behalf of DSS. SDCL §§ 26-7A-13, 26-7A-9. A temporary custody hearing must be held within 48 hours ("48-hour hearing") after a child is taken into custody by DSS. SDCL § 26-7A-15.

The South Dakota Guidelines for Judicial Process in Child Abuse and Neglect Cases, issued by the South Dakota Unified Judicial System ("Guidelines") in 2007 (*available at* sdjudicial.com/courtinfo/childabuse.aspx) state that, in all temporary custody proceedings involving an Indian child, a DSS employee must fill out and sign an affidavit consistent with the requirements of the Indian Child Welfare Act, called an "ICWA affidavit," in support of the petition for custody. *See* Guidelines at 46; Plaintiffs' Complaint (Dkt. 1) ("Compl.") Ex. 3 (showing an example of an ICWA Affidavit). At each 48-hour hearing, a DSS employee is in the courtroom prepared to testify against the parents (*see* Guidelines at 37), and each Temporary Custody Order identifies by name the DSS employee who attended the hearing. *See* Compl. Ex. 2 (Temporary Custody Order of Plaintiff Pappan). At the conclusion of the hearing, if the court determines that the child cannot safely be returned home, the court assigns legal custody of the child to DSS. SDCL 26-7A-19(2); *see* Compl. Exs. 2, 7 (Temporary Custody Orders giving custody of Plaintiffs Pappan's and Young's children to DSS, respectively). For the next 60 days

until a second hearing occurs, DSS controls whether or not the child is returned to the custody of the parents, as well as whether, when, and how the parents may visit their child. Compl. Ex. 7 (Temporary Custody Order); S.D. Codified Laws § 26-7A-19(2).

Thus, DSS is intimately involved in every aspect of temporary custody proceedings involving Indian children in Pennington County—conducting the investigation, preparing the affidavit, attending the hearing, and controlling what happens to the child during the 60 days following the hearing—and has primary responsibility during that entire time for both the physical and legal custody of the child. Despite all of that, Defendants Kim Malsam-Rysdon, Secretary of DSS, and Luann Van Hunnik, Regional Manager for the DSS Division of Child Protective Services in Pennington County (the "DSS Defendants"), argue that this Court should rule as a matter of law that DSS is not responsible for *any* of the violations of Plaintiffs' due process and ICWA rights that are set forth in Plaintiffs' complaint. *See* Malsam-Rysdon's and Van Hunik's Memorandum of Law in Support of Motion to Dismiss (Dkt. 38) ("DSS Brief"). Notwithstanding the inclusion of multiple paragraphs of clear and specific allegations implicating the DSS Defendants in those violations, Defendants argue that Plaintiffs' complaint fails to adequately allege any particular actions by them that constitute a policy, practice, or custom. This argument is made, moreover, in the face of the Eighth Circuit's explicit holding (not cited in Defendants' brief) that the state officials who remove children from their parents' custody have a constitutional duty to ensure that those parents receive an "adequate post-deprivation hearing." *Whisman ex rel. Whisman v. Rinehart*, 119 F.3d 1303, 1310 (8th Cir. 1997).[1]

[1] DSS Defendants claim that the only reason they were included as defendants is because "Plaintiffs recognize that 42 U.S.C. § 1983 prohibits the issuance of injunctive relief against Judge Davis." *See* DSS Brief at 4. That is incorrect. If Judge Davis were the only tortfeasor, he would be the only defendant. Judge Davis is not responsible

To survive a motion to dismiss, "a complaint need not include detailed factual allegations." *Affordable Communities of Missouri v. Fed. Nat. Mortgage Ass'n*, 714 F.3d 1069, 1073 (8th Cir. 2013) (quoting *C.N. v. Willmar Public School*, 591 F.3d 624, 629 (8th Cir. 2010)). It must only contain facts stating a claim for relief that is "plausible" on its face, that is, "'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). As detailed below, Plaintiffs have substantially surpassed that threshold here, and, therefore, this Court should deny the DSS Defendants' motion to dismiss.

In addition to the arguments contained in this brief, Plaintiffs incorporate by reference the arguments contained in their Response to Defendant Davis' Motion to Dismiss (Dkt. 43). Plaintiffs will now address Defendants' arguments in the order presented in their brief.

I. THE DSS DEFENDANTS ARE "POLICYMAKERS" FOR PURPOSES OF § 1983

Defendants Malsam-Rysdon and Van Hunnik are sued in their official capacities, which means that they, as individuals, are not defendants but rather the offices they occupy are defendants. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Ex parte Young*, 209 U.S. 123, 159-60 (1908). In order to prevail against these Defendants in their official capacities, the Plaintiffs must show that each one is a "policymaker" with respect to the policy, practice, or custom under scrutiny. A policymaker for purposes of governmental liability is one who "speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue," that is, one with "the power to make official policy on a particular issue." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). *See also Ware v. Jackson*

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for the multiple failures of the DSS Defendants to protect the rights of Indian parents set forth in Plaintiffs' complaint. The DSS Defendants are sued because, as explained in Plaintiffs' complaint, they deserve to be sued.

Cnty., Mo., 150 F.3d 873, 880 (8th Cir. 1998) ("Official policy involves 'a deliberate choice to follow a course of action made from among various alternatives' by an official who is determined by state law to have the final authority to establish governmental policy.") (citation omitted). Additionally an official can be held liable as a policymaker on just one "particular issue," so long as he or she "speak[s] with final policymaking authority . . . concerning the action alleged to have caused the particular constitutional or statutory violation at issue." *Jett*, 491 U.S. at 737.

Defendants Malsam-Rysdon and Van Hunnik are high-ranking officials within the State Department of Social Services. Secretary Malsam-Rysdon is the head of the Department of Social Services. SDCL § 1-36-2. Van Hunnik is a Regional Manager for the DSS Division of Child Protective Services, which encompasses all of Pennington County. In those capacities, both officials are policymakers with respect to some of the policies, practices, and customs performed by their subordinates. That is, each one "speaks with final policymaking authority," *Jett*, 491 U.S. at 737, regarding certain actions taken. The question in the present case is whether they speak with final policymaking authority over any of the activities or procedures challenged in this lawsuit. As explained below, these Defendants do have final policymaking authority over policies, practices, and customs that are challenged in Plaintiffs' complaint.

II. PLAINTIFFS' CLAIMS FOR RELIEF UNDER THE DUE PROCESS CLAUSE

The DSS Defendants contend that they should be dismissed from this lawsuit because, according to them, Plaintiffs' complaint does not identify any policy, practice or custom of DSS that "restricts the level of due process afforded *at* the 48-hour hearing." *See* DSS Brief at 8 (emphasis added). These Defendants argue that even if due process violations are occurring during 48-hour hearings, as alleged in Plaintiffs' complaint, the fault lies with the judiciary, not

them. *Id*. at 9 ("The process at the 48-hour hearing is solely under the control of the presiding judicial official.")

First, Defendants are overlooking the scope of Plaintiffs' allegations against them. The complaint does not merely challenge Defendants' conduct at 48-hour hearings. Instead, Plaintiffs make the significantly broader claim that the actions and inactions of these Defendants before, during, and after those hearings deny Plaintiffs their right to due process. For instance, Plaintiffs' complaint alleges that DSS has an independent obligation to provide to Indian parents *prior* to the hearing with copies of the petition for temporary custody and the ICWA affidavit, so that the failure of Malsam-Rysdon and Van Hunnik to train their staff to satisfy that duty violates Plaintiffs' rights to due process. *See* Compl. ¶ 46.

Likewise, Plaintiffs allege that the DSS Defendants fail to take appropriate action *during and after* the 48-hour hearing to satisfy their constitutional duty to ensure that Indian parents receive "an adequate post-deprivation hearing." *Whisman*, 119 F.3d at 1310. Malsam-Rysdon and Van Hunnik are not off the constitutional hook simply because a judge presides over each 48-hour hearing. On the contrary, DSS must do everything it reasonably can to ensure that parents receive a meaningful hearing at a meaningful time. Two options available to DSS (and others will be explored in discovery) are: (1) DSS can request during the 48-hour hearing that DSS be permitted at that time to introduce evidence on the issues to be decided by the court, such as whether the child must be removed from the home, and (2) DSS can request during the 48-hour hearing that, if the court currently lacks the time to hear that evidence, then a second hearing should be convened shortly after the 48-hour hearing in which that evidence will be presented. Instead, Malsam-Rysdon and Van Hunnik have a policy, practice, and custom of ratifying and acquiescing in the policy, practice, and custom of Judge Davis to deny Indian

parents a meaningful hearing at a meaningful time. Executive officials, like Van Hunnik and Malsam-Rysdon, who acquiesce to an unconstitutional judicial process share liability for the injuries caused by it. *See Coleman v. Watt,* 40 F.3d 255, 262 (8th Cir. 1994) (denying a motion to dismiss where the complaint alleged that executive officials had adopted a judge's allegedly unconstitutional procedures); *see also Tilson v. Forrest City Police Dep't,* 28 F.3d 802, 807 (8th Cir. 1994) ("[I]naction or laxness can constitute government custom if it is permanent and well settled.") (citation omitted).

Plaintiffs' complaint contains numerous specific factual allegations concerning policies and practices of the DSS Defendants that contribute to a denial of due process. Plaintiffs allege that the DSS Defendants, as a matter of practice, fail to show Indian parents the petition and affidavit that lay out the allegations against them. Compl. ¶¶ 42, 46, 51. It asserts that these failures constitute deliberate indifference to Plaintiffs' due process rights. *Id.* ¶ 48. The complaint also states that the DSS Defendants have ratified and adopted practices of Defendant Davis that result in stripping Indian parents of the custody of their children without providing a meaningful hearing at a meaningful time. *Id.* ¶ 47. In addition, the complaint states that the DSS Defendants have failed to train their staff on how to seek and secure for Indian parents the federal rights to which those parents are entitled, and that as a result, Indian parents suffer irreparable injury. *Id.* at ¶¶ 46, 48.[2]

Thus, Plaintiffs' complaint makes specific allegations about the involvement of Malsam-Rysdon and Van Hunnik in the denial of Plaintiffs' constitutional rights. All of these allegations must be accepted as true at this stage of the proceeding. *See Butler v. Bank of America, N.A.*, 690 F.3d 959, 961 (8th Cir. 2012); *Palmer v. Ill. Farmers Ins. Co.*, 666 F.3d 1081, 1083 (8th Cir.

[2] These "failure to train" allegations are alone sufficient to warrant a dismissal of the DSS Defendants' motion to dismiss, as explained in more detail at the end of this brief. *See City of Canton v. Harris*, 489 U.S. 378, 387-88 (1989); *Whisman*, 119 F.3d at 1311.

2012); *U.S. v. Black Hills Tree Farm*, Civ. No. 09-5049, 2011 WL 1044376, at *3 (D.S.D March 17, 2011). These allegations, all of which are plausible, set forth the elements for official liability: the issuance of policy, by a person cloaked with final state authority, which results in constitutional injury to the plaintiff. *See Jett*, 491 U.S. at 737; *Ware*, 150 F.3d at 880; *Jane Doe A By and Through Jane Doe B v. Special Sch. Dist.*, 901 F.2d 642, 646 (8th Cir. 1990).

Although the DSS Defendants claim that they are not a "moving force" behind the constitutional violations challenged in this lawsuit, Plaintiffs' complaint asserts otherwise. A "moving force" inquiry asks whether the official's policy caused the constitutional violation, that is, whether there is "an affirmative link or a causal connection between the policy and the particular constitutional violation alleged." *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987) (citation omitted). Here, Plaintiffs' complaint draws a direct connection between Plaintiffs' constitutional injuries and the policies, practices, and customs of Malsam-Rysdon and Van Hunnik. *See* Compl. ¶¶ 46-49. Thus, Plaintiffs' complaint adequately alleges that the DSS Defendants violate Plaintiffs' rights under the Due Process Clause. Accordingly, Defendants' motion to dismiss those claims should be denied.

III. PLAINTIFFS' CLAIMS UNDER ICWA

The DSS Defendants begin their discussion of Plaintiffs' ICWA claims by adopting the argument contained in Judge Davis' brief in which he contends that ICWA is *wholly inapplicable* to 48-hour hearings despite the fact that these hearings result in removing Indian children from their homes for a minimum of 60 days. *See* DSS Brief at 9-10. Similarly, then, the Plaintiffs begin their discussion of Plaintiffs' ICWA claims by adopting the argument contained in the reply they filed to Davis' brief. *See* Dkt. 43 at 5-11. As explained in Plaintiffs' brief, the

argument that Davis proffers is inconsistent with both the plain language of § 1922 of ICWA and the legislative history of this historic, remedial legislation.

Additionally, just as they argue with regard to the due process claim, the DSS Defendants assert that Plaintiffs have failed to allege any causal connection between these Defendants and any violation of Plaintiffs' rights under ICWA. *See* DSS Brief at 10 ("There exists no specific factual allegations that anyone in the SDDSS took action pursuant to an unconstitutional policy or custom to violate ICWA.")

That contention ignores several specific allegations in Plaintiffs' complaint. First, the complaint alleges that DSS is causing Indian parents to suffer irreparable injury because DSS never seeks to introduce evidence at 48-hour hearings sufficient to comply with the requirements of § 1912(d) of ICWA, which mandates that a party seeking to place an Indian child in foster care prove that it made active efforts to prevent the breakup of the Indian family. Compl. ¶¶ 101-102. Second, the complaint alleges that DSS is causing Indian parents to suffer irreparable injury because DSS never seeks to introduce evidence at 48-hour hearings sufficient to comply with the requirements of § 1912(e) of ICWA, which prohibits placing an Indian child in foster care in the absence of clear and convincing evidence that remaining with the parent is "likely to result in serious emotional or physical damage to the child." *Id.* ¶ 111-112. Third, the complaint alleges that DSS is causing Indian parents to suffer irreparable injury because DSS fails to comply with § 1922 of ICWA, which requires that an "emergency removal or placement terminate[ ] immediately when such removal or placement is no longer necessary," and which DSS violates for some 60 days after each 48-hour hearing. *Id.* ¶¶ 97-98. Fourth, the complaint alleges that Defendants Malsam-Rysdon and Van Hunnik are causing Indian parents to suffer

irreparable injury by failing to properly train their staffs to implement and enforce §§ 1912(d), 1912(e), and 1922 of ICWA. *Id.* ¶ 97.

Thus, the argument that the complaint fails to state a claim for relief under ICWA against Malsam-Rysdon and Van Hunnik in their official capacities is unfounded. Plaintiffs' complaint makes numerous plausible claims against these Defendants that cannot be decided on a Rule 12(b)(6) motion. Therefore, the DSS Defendants' motion to dismiss Plaintiffs' ICWA claims should be denied.

IV. PLAINTIFFS' CLAIMS OF UNCONSTITUTIONAL COERCION

Plaintiffs' complaint alleges that Indian parents are coerced by the Defendants into waiving their rights under the Due Process Clause and ICWA to adequate notice and to a meaningful hearing at a meaningful time. *See* Compl. ¶¶ 113-29. South Dakota law offers parents in temporary custody hearings with two options: they can insist on formal notice and a meaningful hearing, or they can agree to proceed informally for a period of time and, as Judge Davis calls it, "work with" DSS to recover custody of their children. *See* SDCL § 26-7A-19; Compl. Ex. 1 at 3, Ex. 5 at 3 (showing examples of the "work with" option).

The informal option is set forth in SDCL § 26-7A-19(2). There is nothing inherently wrong with this option. What *is* wrong is the manner in which the Defendants present the offer to Indian parents and implement it.

When Indian parents in Pennington County are asked whether they would like to voluntarily "work with" DSS, their children are already in the custody of DSS. The parents have not seen their children in two days, and they do not know where their children are being housed. The only information they have is that, according to a judge, if they agree to "work with" DSS, they may get their children back. Not surprisingly, nearly all of these parents accept the offer.

However, as discussed in Plaintiffs' response to Judge Davis' motion to dismiss, the Defendants fail to inform Indian parents what this option entails, what its (significant) disadvantages are, and what rights they are waiving. *See* Dkt. 43 at 21-22. Among other things, Indian parents are not informed (1) that DSS does not have enough staff to work with parents and, therefore, will be of little help in reuniting a family; (2) that DSS has not trained its staff to work effectively with Indian parents; and (3) that DSS has a duty to work with parents even if they decline the informal resolution option, so parents lose nothing by turning the option down.

DSS is the main beneficiary of this coercion. When parents agree to waive their rights, DSS gets what it seeks: an order granting DSS custody of the children for 60 days with no obligation to present evidence at a contested hearing, and judicial findings favorable to DSS, to wit, that DSS made active efforts to reunite the family, and that it is unsafe to leave the children at home.

Yet, once again, the DSS Defendants claim that Plaintiffs' complaint fails to link them to any violation of Plaintiffs' rights. And once again, the DSS Defendants are ignoring specific allegations in the complaint that link them to Plaintiffs' injuries. The complaint details DSS' specific participation in the policy, practice and custom of coercing Indian parents into waiving their federal rights. First, DSS fails to inform parents *beforehand* of what they need to know in order to make an informed choice, including information about DSS's staffing shortages, its inadequate training, and the fact that DSS has a duty to work with parents regardless of whether the proceeding is formal or informal. DSS also fails to perform the *afterwards* part of its bargain: parents do not receive the support and assistance that "working with" DSS should entail. *See* Compl. ¶¶ 121-123.

The complaint expressly asserts that "Defendants Malsam-Rysdon and Van Hunnik have inadequately trained their staff to work with Indian parents in a meaningful way. They have also failed to commit the staff and resources necessary to insure that Indian families will be reunited at the earliest reasonable opportunity." *Id.* ¶ 128. While Malsam-Rysdon and Van Hunnik may disagree with those factual assertions, they will need to wait until trial to have them rejected. At the pleading stage, these assertions must be presumed true, and they are sufficient to overcome a motion to dismiss.

Similarly, the complaint expressly asserts that the policy, practice, and custom of Malsam-Rysdon and Van Hunnik of "keeping Indian parents in the dark about the allegations against them, their right to a meaningful hearing at a meaningful time, and the consequences of their waivers, and then proceeding to deny those parents of their rights under the Due Process Clause and ICWA after obtaining waivers from them, violates the rights of Indian parents under federal law and causes them to suffer irreparable injury." *Id.* at ¶ 129. These allegations are sufficient to set forth a claim upon which relief may be granted.

V. THE FAILURE TO TRAIN

Neither Malsam-Rysdon nor Van Hunnik investigates allegations of abuse and neglect, prepare ICWA affidavits, attend 48-hour hearings, or attempt to reunite Indian families following their 48-hour hearings. Rather, they create the policies that their subordinates must follow in all of those situations and have a duty to train their subordinates in how to implement those policies.

Plaintiffs' complaint alleges that the DSS Defendants have failed to adequately train their staffs regarding Plaintiffs' rights under both the Due Process Clause and ICWA, and that these failures exhibits deliberate indifference to the rights of Indian parents. *See* Compl. ¶¶ 46 (alleging that these Defendants have failed to adequately train staff on the due process rights of

parents in 48-hour hearings), 48 (alleging that these Defendants' failure to train is the result of deliberate indifference), 97 (alleging that these Defendants have failed to adequately train staff in complying with ICWA), 128 (alleging that these Defendants have failed to train staff in how to assist in the reunification of Indian families after parents opt to "work with" DSS). Despite these express allegations, the DSS Defendants contend that "[t]he Complaint is devoid of how existing training is inadequate." *See* DSS Brief at 11. Plainly, that contention is erroneous.

To survive a motion to dismiss on a "failure to train" claim, a plaintiff must allege that (1) the training practices of a governmental policymaker were inadequate, (2) the policymaker was deliberately indifferent to the rights of the plaintiffs, and (3) these training deficiencies caused constitutional deprivation. *Ulrich v. Pope Cnty*., Civ. No 12-2813, ___ F. 3d. ___, 2013 WL 2157812 at *4 (8th Cir. May 21, 2013) (citing *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir.1996)). The allegations in Plaintiffs complaint easily satisfy that test, as they accuse Malsam-Rysdon and Van Hunnik of a "pattern of similar constitutional violations by untrained employees." *Connick v. Thompson*, __U.S. ___, 131 S. Ct. 1350, 1360 (2011) (citing *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 409 (1997).

These "failure to train" allegations are alone sufficient to warrant a denial of Defendants' motion to dismiss. *See City of Canton v. Harris*, 489 U.S. 378, 387-88 (1989); *Whisman*, 119 F.3d at 1311 (noting that the claims in that case were, like the claims here, "based upon failure to properly train and supervise as well as creating, encouraging and following the unconstitutional custom and practice of detaining children for [a prolonged period of time] without a due process hearing.").

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be denied.

Respectfully submitted this 10th day of June, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 10, 2013, I electronically filed the foregoing Brief with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants:

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