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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' STATEMENT OF

UNDISPUTED FACTS RE:

DEFENDANTS' DUE PROCESS

VIOLATIONS

INTRODUCTION

On January 28, 2014, the Court granted Plaintiffs' motion to obtain transcripts of every third temporary custody ("48-hour") hearing involving an Indian child conducted by Defendants since January 1, 2010. *See Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 5:13-5020 (D.S.D. Order Granting Motion for Expedited Discovery Jan. 28, 2014) (Docket 71). Pursuant to that Order,

Plaintiffs have now obtained and carefully examined more than 120 transcripts and related court filings.

In accordance with Civil Local Rule of Practice 56.1(A) of the United States District Court for the District of South Dakota, Plaintiffs hereby present the following material facts as to which there is no genuine issue to be tried in support of their Second Motion for Partial Summary Judgment for Defendants' violations of the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF UNDISPUTED FACTS

Indian Parents are Deprived of a Timely and Meaningful Opportunity to Contest the State's Petition for Temporary Custody During 48-Hour Hearings

1. From January 2010 to the present, in 100 percent of the 48-hour hearings conducted by Judge Davis (except for those in which jurisdiction over the child was promptly transferred to a tribal court), Judge Davis granted the South Dakota State's Attorney's and Department of Social Services' ("DSS") (together, "the State") request for continued custody and removed all the Indian children involved in those hearings from their homes. *See* Transcripts of 48-Hour Hearings before Judge Davis, Beauchamp Decl. Ex. 1, Case Nos. A10-50, A10-177, A10-270, A10-306, A10-358, A10-404, A10-460, A10-523, A10-544, A10-773, A10-783, A10-901, A10-955, A10-1035, A10-1064, A10-1170, A10-1191, A10-1201, A11-480, A11-497, A12-219, A12-648, A12-839, A14-444, A14-445, and A14-446.

2. Between 2010 and 2013, eighty-nine percent of the 823 children involved in 48-hour hearings remained in the continued care or custody of DSS for at least one day following the hearing. In forty-five percent of those cases, the children remained in DSS custody for more than 30 days following the 48-hour hearing. In thirty-four percent of those cases, children remained in DSS custody for more than 60 days following the 48-hour hearing. Defs. Van

Hunnik and Valenti's Answers to Interrogs. and Responses to Reqs. For Production ("DSS Interrog.") No. 12(b)-(c), Decl. of Peter W. Beauchamp in Supp. of Pls.' Motions for Partial Summ. J. ("Beauchamp Decl.") Ex. 5.

3. During 2010, 2013, and thus far in 2014, fewer than twenty percent of adjudicatory custody hearings held in Pennington County pursuant to SDCL § 26-7A-1(2) involving an Indian child were held within 50 days of the child's removal from their home. Beauchamp Decl. Ex. 3, Davis RFA Nos. 26-28.

4. During 2010 and 2013, fewer than twenty percent of advisory hearings held in Pennington County pursuant to SDCL § 26-7A-54 involving an Indian child were held within 30 days of the child's removal from their home. Beauchamp Decl. Ex. 3, Davis RFA Nos. 29-30.

5. No South Dakota state statute prohibits Judge Davis and the other Seventh Circuit judges from convening an adjudicatory custody hearing (as referenced in SDCL § 26-7A-1(2)) within 10 or 20 days of the 48-hour hearing. Beauchamp Decl. Ex. 4, Davis Am. Interrog. No. 12(c). Nonetheless, Judge Davis does not schedule adjudicatory custody hearings within 20 days of the 48-hour hearing because of his belief that "in practice it is impossible." *Id. But see* Beauchamp Decl. Ex. 3, Def. Davis' Am. Answers to Pls.' First Set of Reqs. for Admissions ("Davis Am. RFA") No. 10 (admitting that if "the attorneys for the interested parties are in agreement that the advisory and adjudicatory hearings should be expedited, then the circuit judge could consider that stipulation").

A. Defendants Have Failed to Provide Plaintiffs with Adequate Notice

6. Judge Davis relies upon the State's Attorney and/or DSS employees to provide parents with copies of the petition for temporary custody and the ICWA affidavit, despite the fact that

SDCL 26-7A-37 authorizes the court to provide parents with these documents. Beauchamp Decl. Ex. 3, Davis Am. RFA Nos. 22-23.

7. Although Judge Davis “allows all parents to receive copies of all records which are requested, with the exception of police reports, which are specifically exempted from discovery,” Beauchamp Decl. Ex. 4, Davis Am. Interrog. No. 4, he does not specifically order that parents be provided with copies of these documents unless he “is made aware that the parents have not received a copy of any documents in the file,” *id.*, Davis Am. Interrog. No. 7. *See also id.* (“Judge Davis interprets [SDCL 26-7A-37] to permit copies to be made for parents *who request them.*” (emphasis added)); *id.* No. 12 (“If Judge Davis is made aware that a parent has made a request for documents to [DSS], and the document is not provided, then he will *typically* order it be provided.” (emphasis added)); Beauchamp Decl. Ex. 3, Davis Am. RFA Nos. 11-12.

8. Between January 2010 and January 2014,¹ DSS did not provide parents with the documents relevant to their case, including the petition for temporary custody and the ICWA affidavit. DSS instead deferred to “the social worker in court to decide whether or not a parent would receive documents,” though the social worker did not typically provide parents with a copy of the petition for temporary custody. Beauchamp Decl. Ex. 5, Def. Vargo’s Answers to Pls.’ First Interrog. (“Vargo Interrog.”) No. 1.

9. Between January 2014 and May 2014, nearly a year after the filing of the present lawsuit, DSS began to provide parents present at 48-hour hearings with copies of the ICWA Affidavit, the DSS affidavit, and a Court Report when applicable. During these five months, however, parents still did not typically receive a copy of the Petition for Temporary Custody. Beauchamp Decl. Ex. 5, Vargo Interrog. No. 2.

¹ Defendant Vargo’s answer to Plaintiffs’ Interrog. No. 1 refers to practices prior to January 2013, while Defendant Vargo’s answer to Interrog. No. 2 refers to practices following January 2014. Plaintiffs believe the initial reference contains a typographical error and should refer to practices prior to January 2014.

10. Parents who are present at the 48-hour hearings have only received a copy of the Petition for Temporary Custody since May 2014. Beauchamp Decl. Ex. 5, Vargo Interrog. No. 2.

11. A mandate that DSS or the State's Attorney provide parents with copies of temporary custody petitions, ICWA affidavits, or police reports relevant to their case prior to or during the 48-hour hearing would impose at most "limited" difficulties "and the expense would be minor." Beauchamp Decl. Ex. 5, Vargo Interrog. No. 10.

12. Judge Davis fails to advise parents of the allegations of abuse and neglect that have been made against them, alluding to unspecified "issues" that DSS has brought to the attention of the court. *See, e.g.*, Beauchamp Decl. Ex. 1, Case Nos. A10-460 at 2 (Judge Davis describes "issues regarding children in your respective families that were drawn to the attention of Department of Social Services . . . and then drawn to my attention" as basis for hearing), A10-50 at 2 (Judge Davis tells parents "there have been some issues regarding the children that have come to the State of South Dakota's attention" and "The allegation is that the children are abused and neglected by statute and by definition"), A10-404 at 2 (Judge Davis details "there have been issues involving care, custody and control of children in your respective care that's been brought to the Department of Social Services' attention"), and A10-487 at 4-5 (Judge Davis tells parents "it's obvious that there are issues with children in your respective families that have been brought to the attention of the Department of Social Services").

13. Judge Davis and the other Seventh Circuit judges distinguish between the petition for temporary custody sought by the State during 48-hour hearings and "formal" petitions for temporary custody, which parents must specifically request during 48-hour hearings. Beauchamp Decl. Ex. 4, Davis Am. Interrog. No. 1. *See also* Beauchamp Decl. Ex. 1, Case Nos. A12-749 at 10 (Judge Thorstenson instructs parents, "If anyone wants to proceed with a more

formal basis to start with, you need to let me know and the State can decide whether or not they'd like to file that formal petition immediately or how they'd like to proceed.”), and A10-955 at 3 (Judge Davis instructs, “You have a right . . . to a court proceeding . . . and to make the state prove the allegations in the petition, if you wish, on a more formal basis”).

14. Judge Davis and the other Seventh Circuit judges regularly suggest that parents “work with DSS” and instruct parents that a “formal” petition has not been filed, implying that “significant rights” of the parents have not yet been implicated. *See, e.g.*, Beauchamp Decl. Ex. 1, Case Nos. A10-460 at 3 (Judge Davis informs parents, “If the state elects to file a formal petition the matter becomes much more serious.”), A10-404 at 2-3 (Judge Davis instructing parents, “You have an opportunity to work with the department [DSS] . . . to see if the issues are resolved and the children returned. If that doesn’t take place the state has a right to file a petition alleging abuse and neglect. . . . If the state elects to file on a formal basis, either today or at a later time, you folks need to understand that there are significant rights here”), and A10-783 at 4 (Judge Davis advising “the state has the ability to file a formal abuse and neglect petition, which then kind of ramps things up and there’s a full hearing, [and] you’re entitled to be represented by counsel”).

15. Judge Davis and the other Seventh Circuit judges regularly place the onus on parents to decide if they “want to work with the State on a voluntary basis” for up to 60 days in an attempt to resolve “issues” or to opt for more formal proceedings. *See* Beauchamp Decl. Ex. 1, Case Nos. A10-177 at 4 (Judge Davis instructing mother “You can ask that more formal proceedings take place, otherwise you work through it on an informal basis and the issues are resolved and everyone goes on down the road.”), and A12-749 at 10 (Judge Thorstenson instructs family members, “If anyone wants to proceed with a more formal basis to start with, you need to let me

know and the State can decide whether or not they'd like to file that formal petition immediately or how they'd like to proceed.”).

16. Indian parents are never asked during Defendants’ 48-hour hearings whether the emergency that required the removal of their child(ren) has terminated. *See* Beauchamp Decl. Ex. 4, Def. Davis’ Am. Answers and Resps. to Pls.’ First Set of Interrogatories and Second Set of Reqs. for Production (“Davis Am. Interrog.”) No. 15. *See also* Beauchamp Decl. Ex. 1, Case No. A10-1320 at 2-3 (Reflecting a father’s attempt to explain that domestic issue ended “over two months” prior, and Judge Thorstenson’s response: “I don’t want to get into the details of your case”).

17. Judge Davis concedes that: (a) not once in any of the 48-hour hearings over which he presided did the court inquire whether the cause of the child’s emergency removal had been rectified prior to the hearing; and that (b) he knows of only three 48-hour hearings, Case Nos. A12-571, A12-468, and A12-36, conducted in the Seventh Judicial Circuit since January 2010 in which an inquiry was made by the court into whether the cause of the child’s emergency removal had been rectified. Beauchamp Decl. Ex. 4, Davis Am. Interrog. No. 9. Furthermore, in two of those three cases, the inquiry into whether the cause of the child’s emergency removal had been rectified was initiated by counsel for an Indian tribe, and not by the court. *See* Beauchamp Decl. Ex. 1, Case Nos. A12-571 and A12-36.

18. The state’s Petitions for Temporary Custody, submitted to Judge Davis and the Seventh Circuit judges as recently as June 23, 2014, routinely fail to cite § 1922 or its standard. *See* Beauchamp Decl. Ex. 8, Petitions for Temporary Custody filed in the three 48-hour hearings held on June 23, 2014.

B. Defendants Have Failed to Provide Plaintiffs with an Adequate Opportunity to Present Evidence

19. From January 2010 to the present, it has been the prevailing practice of Judge Davis and the other Seventh Circuit judges during 48-hour hearings to continue to deprive Indian parents of legal and physical custody of their children for up to an additional 60 days without advising those parents that they have a right to testify during the 48-hour hearing. *See, e.g.*, Beauchamp Decl. Ex. 1, Case Nos. A10-50 (Judge Davis announces “intention to sign” 60-day Temporary Custody Order *before* asking parents if they understand their rights), A10-270 (Judge Davis signs 60-day Temporary Custody Order before ever addressing parents present in courtroom), A10-306 (Judge Davis signs Temporary Custody Order without allowing parents to testify), and A10-460 (same).

20. To the contrary, in a number of transcribed hearings, judges on the Seventh Circuit have expressly told Indian parents either that they are not permitted to say anything about the facts concerning their child(ren)’s removal during the 48-hour hearing, or that they are not permitted to give testimony. *See, e.g.*, Beauchamp Decl. Ex. 1, Case Nos. A10-1119 (Judge Thorstenson telling father: “Sir, I don’t want you to say anything with regard to the allegations per se but if you have questions about your -- about the procedures or the process, absolutely. I just want to make sure you don’t say anything.”), A10-1320 (Judge Thorstenson telling father: “I don’t want to get into the details of your case specifically just because that’s stuff that’s going to be coming out [in a later proceeding].”), A12-244 (Judge Thorstenson denying counsel’s request to present evidence at the 48-hour hearing, stating that a 48-hour hearing is not “that type of hearing.”), and A12-219 (following counsel’s request that “the court to order the state to present some kind of factual basis to support” continued custody of the child, Judge Davis denying the request on the grounds that “[t]his is a 48-hour hearing.”).

21. Indeed, Judge Davis admits that “no oral testimony is taken at a 48-hour hearing.”
Beauchamp Decl. Ex. 3, Davis Am. RFA No. 19. *See also* Beauchamp Decl. Ex. 4, Davis Am.
Interrog. No. 4(c)-(f).

22. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge ever in fact provide an Indian parent with the opportunity to testify during a temporary custody hearing. *See, e.g.*, Beauchamp Decl. Ex. 1, Case Nos. A13-609 at 2 (Addressing a number of cases, Judge Pfiefler advises, “This is an informal proceeding. We do not hold a full evidentiary hearing. We will not take testimony”), A13-639 at 3 (Judge Pfiefler advising “This is not a time and place for an evidentiary hearing. That remains for a later date.”), A13-738 at 2 (“This is an informal proceeding. By that I mean we don’t take any testimony”), A13-560 (Judge Pfiefler advising, “This is not a formal hearing in terms of presentation of evidence.”) and A13-731I at 2 (Judge Pfiefler advising “These are informal proceedings, meaning no testimony is taken”). *See also* Beauchamp Decl. Ex. 1, Case No. A12-302 at 6-7 (in which Judge Thorstenson refuses to allow mother to testify despite requests by private counsel “to put her on the stand”).

23. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge ever advise an Indian parent that they have a right to call witnesses in the 48-hour hearing. *See generally* Transcripts of 48-Hour Hearings before Judge Davis, Beauchamp Decl. Ex. 1.

24. In the 48-hour hearings over which he presided in 2010, Judge Davis typically did not specifically ask parents at the hearings if they wanted the opportunity to present evidence as to whether (a) the State had in fact undertaken active efforts to prevent a break-up of their family,

and (b) their child(ren) might safely be returned to the home. Beauchamp Decl. Ex. 3, Davis RFA Nos. 15-16.

C. Defendants Have Failed to Provide Plaintiffs with an Adequate Opportunity to Confront And Cross-Examine

25. From January 2010 to the present, in not one of the more than 120 hearings that were transcribed did Judge Davis or any other Seventh Circuit judge ever advise any parent or custodian of an Indian child that they had a right to contest the State's Petition for Temporary Custody during the 48-hour hearing. *See generally* Beauchamp Decl. Ex. 1, Transcripts of 48-Hour Hearings before Judge Davis.

26. From January 2010 to the present, in not one of the more than 120 hearings that were transcribed did Judge Davis or any other Seventh Circuit judge ever provide an Indian parent with the opportunity to contest the State's Petition for Temporary Custody during the 48-hour hearing. *See, e.g.*, Beauchamp Decl. Ex. 1, Case Nos. A12-867 at 9-13 (Tribe's attorney notes that Court has "not advised [parent] whether he has a constitutional right to oppose the petition for temporary custody in this hearing nor have you provided him with his advice of his rights under the Indian Child Welfare Act," and that "were he and the Tribe provided with an opportunity to contest the facts as they've been set forth, he would testify, and the evidence would show, that contrary to the affirmation made by the State here, there was no altercation at his house"), and A10-1119 at 6 (Judge Thorstenson instructs parent "I don't want you to say anything with regard to the allegations").

27. From January 2010 to the present, it has been the prevailing practice of Judge Davis and the other Seventh Circuit judges, in conjunction with the State), to deprive parents of legal and physical custody of Indian children for up to 60 days in temporary custody hearings without allowing the parents to exercise their legal right to contest the State's Petition for Temporary

Custody during the 48-hour temporary custody hearing (“48-hour hearing”), pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution and 25 U.S.C. § 1922 of the Indian Child Welfare Act (“ICWA”). *See generally* Transcripts of 48-Hour Hearings before Judge Davis, Beauchamp Decl. Ex. 1.² *See also* Beauchamp Decl. Ex. 3, Def. Davis’ Answers to Pls.’ First Set of Reqs. for Admissions (“Davis RFA”) No. 18 (admitting that in the 48-hour hearings over which he presided in 2010, Judge Davis normally scheduled the next hearing for approximately 60 days later).

28. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge ever provide an Indian parent with an opportunity to hear and confront the State’s evidence and cross-examine the State’s witnesses during the 48-hour hearing. *See generally* Transcripts of 48-Hour Hearings before Judge Davis, Beauchamp Decl. Ex. 1. *See also* Beauchamp Decl. Ex. 3, Davis RFA 14 (admitting that in the 48-hour hearings over which he presided in 2010, Judge Davis normally did not specifically ask the parents if they wanted the opportunity to cross-examine the person who signed the ICWA affidavit).

D. Defendants Have Failed to Provide Plaintiffs with Meaningful Access to Counsel

29. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge ever advise an Indian parent that they have a right to appointed counsel to represent them at the 48-hour hearing if they are indigent, or that they may request a brief continuance of the 48-hour hearing so that they may retain counsel. *See* Beauchamp Decl. Ex. 4, Davis Am. Interrog. No. 8 (“At the 48-hour hearing, parents and children . . . are almost always unrepresented at this stage.”); *id.* No. 12 (“At this initial stage, it

² For the Court’s convenience and in the interests of brevity and efficiency, Plaintiffs cite to and have provided the Court with only a representative sample of the more than 120 transcripts of 48-hour hearings presided over by Judge Davis and his colleagues that have been reviewed by Plaintiffs’ counsel during the course of discovery.

is functionally impossible for the parents or the children to have access to informed counsel.”).

See generally Beauchamp Decl. Ex. 1, Transcripts of 48-Hour Hearings before Judge Davis.

30. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge ever in fact provide an Indian parent with an opportunity to be represented by appointed counsel at the 48-hour hearing if the parents were indigent, nor did they ever grant a request for a continuance of the 48-hour hearing so that they might retain counsel.² *See generally* Transcripts of 48-Hour Hearings before Judge Davis, Beauchamp Decl. Ex. 1. This practice has effectively ensured that all Indian parents appear *pro se* at the 48-hour custody hearings. *See* Beauchamp Decl. Ex. 4, Davis Am. Interrog. No. 12.

31. Of the more than 120 transcribed temporary custody hearings reviewed by Plaintiffs’ counsel, in only one was a parent represented by counsel, Mr. Pat Duffy, who happened to arrive at the hearing with the parent. *See* Beauchamp Decl. Ex. 1, Case No. A12-302.

32. From January 2010 to the present, every time Judge Davis and the other judges on the Seventh Circuit have agreed during a 48-hour hearing to appoint counsel for Indian parents, the judges have delayed appointment of counsel until after the hearing’s conclusion and the granting of the Temporary Custody Order. *See, e.g.*, Beauchamp Decl. Ex. 1, Case Nos. A12-648 at 6-7 (following a mother’s request to meet with a public defender before deciding how to precede at 48-hour hearing, Judge Davis instructs her to “fill out an application [to] determine your eligibility” after the hearing), A13-298 at 11 (Judge Pfieffe instructs parents to “fill out a form” requesting court-appointed counsel after the hearing and submit the request “between now and

³ Requests by the Tribe for brief continuances so that the Indian parent(s) could be represented by counsel at the 48 hour hearing have always been denied, without exception. *See, e.g.*, Beauchamp Decl. Ex. 1, Case No. A14-60 I at 8 (In response to Tribe’s request that parent be represented by counsel, Judge Mandel replies, “I’m not going to appoint counsel at this time for the temporary custody matter. We’ll see where this proceeds and go from there. But as we sit here today, that’s denied.”).

the time of our next hearing.”), A12-867 at 14 (Judge Throstenson rejects request by Tribe’s attorney “to briefly continue this hearing for perhaps no more than a day so that [the father] can consult with counsel, come back here and present a meaningful answer to the accusations that have been made against him”), and A10-1238 at 3-4 (Judge Eklund tells to a parent who “wanted to work with the Dakota Plains [attorneys],” “Okay. That can be appointed later.”).

E. Judge Davis Has Failed To Base His Rulings on Evidence Adduced in the 48-Hour Hearing

33. From January 2010 to the present, it has been the prevailing practice of the defendants to act together to deprive Indian parents of custody of their child(ren) in 48-hour proceedings without advising parents that the State has any burden of proof in the hearing or that the court will order return of custody to the parents if the State fails to meet that burden of proof. *See generally* Beauchamp Decl. Ex. 1, Transcripts of 48-Hour Hearings before Judge Davis.

34. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge ever advise an Indian parent that the State had the burden of proof in the hearing, or that the law would obligate the court to order return custody of the child(ren) to the parent(s) if the State failed to meet that burden of proof. *See generally* Ex. 1, Transcripts of 48-Hour Hearings before Judge Davis. *See also* Beauchamp Decl. Ex. 3, Davis Am. RFA No. 19 (admitting “that an active efforts ‘probable cause’ finding is required for the temporary custody order, and that if an order is executed this ‘probable cause’ finding is made”).

35. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge ever advise an Indian parent that the State had the burden at the hearing of proving that returning custody of the child(ren) to the parent(s)

would be likely to result in serious emotional or physical harm to the child(ren). *See generally* Beauchamp Decl. Ex. 1, Transcripts of 48-Hour Hearings before Judge Davis.

36. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge require the State to present sworn testimony from a live witness. *See generally* Beauchamp Decl. Ex. 1, Transcripts of 48-Hour Hearings before Judge Davis. *See also* Beauchamp Decl. Ex. 3, Davis RFA No. 13.

37. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge receive or demand any documentary evidence as an exhibit from the State apart from the ICWA Affidavit, which, until only very recently, has been provided to Indian parents.

38. From January 2010 to the present, in not one of the more than 120 transcribed hearings did Judge Davis or any other Seventh Circuit judge make statements on the record detailing the evidence it relied upon as a basis for the findings of fact reflected in the Temporary Custody Order. *See generally* Ex. 1, Transcripts of 48-Hour Hearings before Judge Davis. *See also, e.g.,* Beauchamp Decl. Ex. 1, Case Nos. A10-1191 (In response to father's request, "I would just like to know what I did wrong that my son is not with me," Judge Davis replies "I honestly can't tell you at this point because nothing has been checked out and verified to come to me yet."), A11-497 at 4-5 (Judge Davis refusing to address mother's questions "What are the issues?" and "why am I getting punished for what his dad did?"), and A12-219 at 8 (Judge Davis denying motion by Tribe's attorney "asking the court to make findings of fact and conclusions of law under [South Dakota codified law] 267(a)13").

39. From January 2010 to the present, following 48-hour hearings in which no witness testified and no documents were offered or received as evidence, it has been the standard practice

of Judge Davis and the other judges of the Seventh Circuit to make determinative findings of fact that: (a) DSS is making active efforts to avoid removing children from their family; (b) foster care placement is the least restrictive available alternative; and (c) that returning custody to the parents would likely result in serious emotional or physical harm to the children. *See generally* Beauchamp Decl. Ex. 2, Temporary Custody Orders signed by Judge Davis.

40. From January 2010 to the present, following 48-hour hearings in which no witness testified and no documents were offered or received as evidence, it has been the standard practice of Judge Davis and the other judges of the Seventh Circuit to utilize a standardized Temporary Custody Order form that functions as a checklist for the above-described findings of fact. It is the prevailing practice of Judge Davis and the other judges to place checkmarks next to findings of fact without providing any explanation regarding the basis for their findings. *See generally* Beauchamp Decl. Ex. 2, Temporary Custody Orders signed by Judge Davis.

41. From January 2010 to the present, during 48-hour hearings in which no witness testified and no documents were offered or received as evidence, it has been the standard practice of Judge Davis and the other judges of the Seventh Circuit to sign Temporary Custody Orders detailing determinative findings of fact that have never been described on the record or detailed to the Indian parent(s) present for the 48-hour hearing. *See generally* Beauchamp Decl. Ex. 1, Transcripts of 48-Hour Hearings before Judge Davis.

42. At the conclusion of each and every 48-hour hearing involving Indian children presided over by him since 2010, Judge Davis has: (a) entered a temporary custody order finding 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,” and (b) entered a temporary custody order finding that “continued custody of the child(ren) by

the parents or Indian custody is likely to result in serious emotional or physical damage to the child(ren).” *See* Beauchamp Decl. Ex. 4, Davis Interrog. No. 14.

F. Judge Davis and the Other Seventh Circuit Judges Have Failed to Expressly Instruct DSS That It Must Return Custody of Minor Children if it Concludes That No Further Child Protections Concerns Remain

43. From January 2010 to the present, all of the orders issued by Judge Davis and his colleagues granting custody to DSS at the conclusion of 48-hour hearings have contained the following provision:

The Department of Social Services is hereby *authorized* to return full and legal custody of the minor child(ren) to the parent(s), guardian or custodian (without further court hearing) at any time during the custody period granted by this Court, if the Department of Social Services concludes that no further child protection issues remain and that temporary custody of the child(ren) is no longer necessary.

See, e.g., Beauchamp Decl. Ex. 2, Temporary Custody Orders (emphasis added). Thus, while DSS is authorized to return custody of children to their parents when the emergency has terminated, DSS is not ordered or instructed to do so. *See also* Beauchamp Decl. Ex. 1, Case No. A10-955 at 3-4 (Judge Davis responding to mother’s inquiry “Does that mean they keep my kid for 60 days?” by saying “No. It *authorizes* that 60-day period and they’re *authorized* to return him at any time within that if it looks like it’s appropriate.” (emphasis added)).

44. Judge Davis contends that the temporary custody orders he signs at the conclusion of 48-hour hearings “always, or almost always, include a specific instruction to the state official to return the child(ren) to the parent or guardian once no further imminent child protection issues remain and that temporary custody of the child(ren) is no longer necessary.” Beauchamp Decl. Ex. 3, Davis RFA No. 17. However, Plaintiffs have reviewed dozens of temporary custody

orders from Judge Davis and other judges in the Seventh Judicial Circuit, in none of which did the presiding judge instruct DSS to return the children. Rather, each order merely “authorized” DSS to return the children. *See generally* Beauchamp Decl. Ex. 2, Temporary Custody Orders signed by Judge Davis.

45. Likewise, the other Seventh Circuit judges also systematically fail to instruct DSS to return children to their parent(s) once the need for DSS custody of the children ceases. *See, e.g.*, Beauchamp Decl. Ex. 1, Case No. A13-845 at 5-6 (Judge Robert A. Mandel holding “I’m going to order that the Department of Social Services is authorized to return full legal and physical custody of the minor children to the parents, guardian, or custodian without further court hearing if it’s determined – that is, if they determine or conclude that there’s no further imminent child protection issues and temporary custody is no longer necessary.”), and at 7 (Deputy State’s Attorney Roxanne Erickson asking Judge Mandel to order “that DSS have *the discretion* to return the children to the parents if they’re out of custody and it appears that the safety concerns have been alleviated,” to which Judge Mandel replies, “Okay. We will do that.” (emphasis added)).

46. The printed form that Judge Davis and the other Seventh Circuit judges regularly use to enter a temporary custody order at the conclusion of a 48-hour hearing does not direct, order, or instruct DSS to return an Indian child to the home at any time; rather, this form only authorizes DSS to exercise that discretion. *See generally* Beauchamp Decl. Ex. 2, Temporary Custody Orders signed by Judge Davis.

Respectfully submitted this 11th day of July, 2014.

/s/ Stephen L. Pevar
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CERTIFICATE OF SERVICE

I hereby certify that, on July 11, 2014, I electronically filed the foregoing Statement 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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