IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YANKTON SIOUX TRIBE, Plaintiff, v. RYAN ZINKE, Secretary of the Interior, et al., Defendants,	)	Civ. No. 1:03-CV-01603 (TFH)

HERMAN LAW'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Herman Law f/k/a Herman, Mermelstein & Horowitz, P.A., submits this Supplemental Memorandum in Support of Motion to Intervene, pursuant to the Court's Order of October 11, 2018 (dkt. entry 85), as follows:

1. Introduction

The issue before the Court on Herman Law's Motion to Intervene is whether the proposed Complaint in Intervention presents a plausible claim for an attorney's charging lien that Herman Law has the right to protect in this case through intervention under Fed.R.Civ.P. 24(a). In its Supplemental Brief opposing intervention, Yankton Sioux Tribe either raises frivolous arguments or seeks to have this Court prematurely decide in its favor contested issues of fact, inviting error. Herman Law alleges, and the facts will bear out, that the fund to be created by the settlement of this action is the product of the work and services performed by Herman Law over a period of years. It has a right to a charging lien on this settlement because its work, at the very least, will have contributed to or aided in recovery of the fund. Sovereign immunity does not

apply as Herman Law is not suing the Tribe or otherwise seeking affirmative relief from the Tribe. Rather, under the law of the District of Columbia, the Tribe's underlying right to the settlement fund created through the resolution of this action is limited by the right to compensation of the attorneys who aided in creating the fund. Accordingly, Herman Law has a plausible claim to an attorney's charging lien which it has the right to protect through intervention.

2. Yankton Sioux Tribe's Supplemental Brief Fails to Comply With the Court's October 11 Order

This Court's Order of October 11, 2018, authorizes supplemental briefing on Herman Law's Motion to Intervene (dkt. entry 69), and sets a schedule allowing Yankton Sioux Tribe to file a brief and Herman Law to file a response. (dkt. entry 85). The Order expressly sets forth the matters to be addressed in the supplemental briefing, including the Court's direction to Yankton Sioux Tribe to "describ[e] the 2018 settlement agreement with the government … ." The Tribe's Supplemental Memorandum fails to describe the 2018 settlement agreement in any respect. (*See* Tribe's Supp. Brief, pp. 13 – 14). Its asserted reason for not making the Court-ordered disclosure is that the settlement terms are confidential under the form Joint Stipulation and Order entered by the Court in 2011 when settlement negotiations commenced between the Government and multiple Tribes. (Dkt. entry 68). Yet Yankton Sioux Tribe does not seek relief from the 2011 Joint Stipulation, nor an order allowing it to file a disclosure of settlement terms under seal; nor does it otherwise attempt to resolve the conflict between the Court's October 11 Order and the confidentiality provided under the 2011 Joint Stipulation and Order. Yankton

Sioux Tribe apparently seeks to evade the Court's settlement disclosure requirement,[1] and the reason is apparent to Herman Law: the current settlement reflects substantially the same terms agreed upon and approved by the Tribe when Herman Law represented the Tribe in 2012. It will provide a significant lump sum payment to be made by the Government in resolution of the tribal trust claims brought, litigated and negotiated in this case by Herman Law.[2] While ignoring the Court's Order to include the 2018 settlement terms in its Supplemental Brief, the Tribe's attorneys have the audacity to assert that a settlement was not reached in 2012, apparently expecting the Court to simply accept its bald factual statement. (Tribe's Supp. Brief, pp. 13-14). In disregarding the Court's direction to include the 2018 settlement disclosure in its Supplemental Brief, Yankton Sioux Tribe concedes that the present settlement is substantially and materially the same as the 2012 settlement negotiated by Herman Law and approved in a referendum vote by the Tribe's members. For present purposes, the Tribe should be deemed to have waived its arguments to the contrary.

In any event, a comparison of the terms of the 2012 settlement with the 2018 settlement is not necessary to the inquiry for purposes of Herman Law's Motion to Intervene. Assuming that the settlement terms include a lump sum payment, it cannot fairly be disputed that Herman Law's legal work and services in this action contributed to and aided in the creation of that fund.

[1] The Joint Status Report filed by the Government and the Tribe on October 5, 2018 (dkt. entry 83) , represents that the Tribe's General Council was scheduled to have a referendum vote on the 2018 settlement agreement on November 6, 2018, and that another status report would be filed on November 9, 2018. As of the filing of this Memorandum, no such filing has been made.

[2] Upon information and belief, the amount of the lump sum to be paid by the Government in settlement is slightly greater than the amount negotiated by Herman Law and approved by the Tribe's General Council in 2012, but not great enough to compensate for the loss in the time value of money from 2012 to 2018. Herman Law is herewith filing a Motion to File Under Seal certain exhibits in unredacted form, which are those exhibits attached to its Motion for Leave to File Additional Exhibits (dkt. entry 86). These unredacted exhibits disclose the payment amount and terms of the 2012 settlement.

Herman Law is thus entitled to a charging lien and the right to protect its lien in this proceeding. The *amount* of the lien, whether determined by the 25% contingency fee agreed upon or another means, would be determined in subsequent proceedings in this action.

3. The Tribe Improperly Raises Issues of Fact at this Stage Concerning Herman Law's Contingency Fee Agreement With the Tribe

A. Herman Law's Contingency Fee Agreement Was Authorized by the Tribe

It is unnecessary for present purposes to address facts concerning the 2003 Contingency Fee Agreement between Herman Law and the Tribe. Nonetheless, the Tribe essentially asks this Court to find the Contingency Fee Retainer Agreement invalid based entirely on unsworn and unsupported statements in its papers. The Tribe asserts "the lack of a tribal general council referendum vote approving or 'confirming' the Purported Contract with [Herman Law]." (Tribe's Supp. Brief, p. 4). Initially, this argument is based on a faulty construction of the Tribe's foundation documents, which authorize the Tribe's Business & Claims Committee to retain counsel to prosecute land claims in the nature of those brought in this action. (*See* dkt. entry 72-1, p. 3, Constitution and Bylaws of the Yankton Sioux Tribe Business and Claims Committee, Art. III, § 1). The Amended Bylaws are consistent with this authorization, as they provide the Committee with the authority to transact Tribal business of a routine nature and to negotiate contractual agreements. (*Id*., p. 10, Art. IV, §§ 1, 2). Approval of a contract such as to settle a lawsuit, however, requires a referendum vote, *i.e*., a majority vote by the Tribe's members by secret ballot at a polling place. (Id., Art. I, §§ 1, 2). Reading these formation documents as a whole demonstrates that the appropriate procedures were followed and approvals obtained concerning both Herman Law's Contingency Fee Retainer Agreement in 2003, which was approved by the Business and Claims Committee on the Tribe's behalf, and the settlement of the Tribe's breach of trust claims, which were approved by referendum vote in February, 2012.

The Tribe cites to *Calvello v. Yankton Sioux Tribe*, 584 N.W. 2d 108 (S. D. 1998), which is not to the contrary. There, the plaintiff sued the Tribe to enforce an employment contract that was not approved by referendum vote of the Tribe's General Council, resulting in the suit's dismissal on grounds of sovereign immunity. *Id*. at 113. The retention of counsel by the Business and Claims Committee to prosecute claims relating to Tribal land matters is distinguishable under the plain meaning of the pertinent documents.

In any event, the issues raised by the Tribe which it seeks to have summarily decided in its favor, are, to say the least, premature. They are not a basis to deny Herman Law leave to intervene. *See United States v. Sum of $70,990,605*, case no. 12-1905 (RDM), 2018 U.S. Dist. LEXIS 164568 *12 (D.D.C. Sept. 25, 2018) (noting that attorneys should be allowed intervention upon presenting a plausible claim of entitlement to a charging lien, and that whether the attorneys are "entitled to prevail is another matter"); *see also Williams & Humbert, Ltd. v. W. & H. Trade Marks, Ltd*., 840 F. 2d 72, 75 (D.C. Cir. 1988) ("[a]n application to intervene should be viewed on the tendered pleadings – that is, whether those pleadings allege a legally sufficient claim or defense and not whether the applicant is likely to succeed on the merits"). As discussed above, the issues raised by the Tribe may concern the method of calculating or determining the amount of the lien, but are not relevant to the issue before the Court of whether Herman Law is entitled to intervene to protect its charging lien.

B. Herman Law is Not a "Successor," but the Same Entity as Herman & Mermelstein, P.A.

The Tribe asserts that the Contingency Fee Agreement "does not contain a successor clause" that would permit "successor law firms" to continue in a contractual relationship with the Tribe. (Tribe's Supp. Brief, p. 3). This is a frivolous argument that reflects a fundamental lack of

understanding of corporate law. A search of Florida corporation records on the internet, which the Tribe's attorneys have apparently conducted, reveals the spuriousness of this argument. The firm name of Herman & Mermelstein, P.A. appears on the Contingency Fee Retainer Agreement attached to the proposed Complaint for intervention. A *name change* amendment to the firm's articles of incorporation was filed on February 6, 2009, changing the name from Herman & Mermelstein P.A. to Mermelstein & Horowitz, P.A. Another name change amendment was filed on September 23, 2010, changing the firm's name to Herman, Mermelstein & Horowitz, P.A. Finally, a name change amendment was filed on June 7, 2013, changing the firm's name to Herman Law Firm, P.A.[3] (Copies of these name change amendments from the public record are attached hereto as composite Exhibit "A"). Of course, these name change amendments were just that; there is no change in the entity's existence or form. The argument that there is a "successor" as a result of name change amendments is utter nonsense.

C. The Contingency Fee Agreement Plainly Encompasses the Claims Presently Being Settled

Yankton Sioux Tribe argues that the Contingency Fee Retainer Agreement does not include the breach of trust claims being settled because of its reference to a "claim for damages" in the first paragraph. This ignores plain language in the Agreement that makes clear that the claims brought and litigated in this case are subject to the Agreement and the firm's representation this action. Specifically, the Agreement provides that the firm shall be entitled to a percentage of the recovery from "gross proceeds," which term is expressly defined broadly to include "any amount obtained in settlement, by judgment or court order, reparation, Congressional or Government Act, *or through an accounting or other remedy* … ." (Emphasis added). *See 1010 Potomac*

[3] "Herman Law" is a registered fictitious name listed in Florida corporate records, owned by Herman Law Firm, P.A.

Assoc. v. Grocery Mfrs. of Am., Inc., 485 A.2d 199, 205 (D.C. App. 1984) ("[t]he writing must be interpreted as a whole").[4] The Tribe's argument is otherwise disingenuous given Herman Law's continuing work in this action as counsel of record over a period of nine years with the Tribe's full knowledge and participation while receiving no compensation.[5]

4. Sovereign Immunity Does Not Preclude Herman Law's Charging Lien

A. New Case Law Further Supports Herman Law's Motion to Intervene

The Court's Order of October 11, 2018, provides that the Tribe, in its supplemental brief, may "cite any new legal authority relevant to the Tribe's opposition to the motion." The Tribe's Supplemental Brief, 15 pages in length, strays far from this instruction in the Court's Order. Indeed, the Tribe acknowledges that it relies upon only one case that may be considered new authority arising since the original briefing of the Motion to Intervene in 2012: *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S. Ct. 2024 (2014) (Tribe's Supp. Brief, p. 13). The Supreme Court's decision in *Bay Mills,* however, is inapposite to the issue of intervention in the instant case. There, the Court considered whether sovereign immunity precluded the State of Michigan from suing an Indian Tribe in federal court to enjoin its operation of a casino outside

[4] The instant lawsuit, filed in 2003, is the principal action in which Herman Law pursued breach of trust claims against the Government on behalf of Yankton Sioux Tribe. Herman Law brought a second breach of trust case in the Court of Federal Claims in 2006 to protect the Tribe's interests and with the Tribe's authorization, given the impending expiration of the statute of limitations. That case was subsequently dismissed by the Court of Federal Claims because of the pendency of the instant case. In any event, it has no relevance or bearing on Herman Law's entitlement to attorneys' fees and a charging lien in this matter.

[5] As a final frivolous argument in Section I of its Supplemental Brief, Yankton Sioux Tribe asserts that it is "unclear" how the undersigned may appear in this Court at this time without local counsel, asserting that this is in violation of the local rules. Of course, this ignores that Herman Law now appears in this matter on its own behalf to protect its interests in its attorney's fees, and is not representing a client.

of Indian lands. 134 S. Ct. at 2029 – 30. It held that sovereign immunity precluded this action as against the Tribe, although the State could bring such a suit against individuals, and that the Indian Gaming Regulatory Act did not by its plain language abrogate sovereign immunity for the claim brought in that case. *Id*. at 2030 – 35. Here, in contrast, Herman Law's intervention to protect and enforce a charging lien for attorney's fees is not analogous to a suit against the Yankton Sioux Tribe for affirmative monetary or injunctive relief. Rather, Herman Law seeks only compensation from the fund that its legal work in this action served to create.

Intervention to protect a charging lien sought in this case is analogous to the claim for attorney's fees held to fall outside of a Tribe's sovereign immunity in *Guidiville Rancheria of Cal. v. United States*, case no. 12-cv-1326 YGR, 2015 U.S. Dist. LEXIS 109057 (N.D. Cal. Aug. 18, 2015). There, the City of Richmond moved for an award of attorney's fees and costs as prevailing party pursuant to contract in a lawsuit brought against it by an Indian tribe. **The Court found that claims for attorney's fees are inherent to the lawsuit brought by an Indian tribe and are *not* precluded by sovereign immunity**:

> Offsets and claims for "recoupment" which might otherwise be characterized as compulsory counterclaims, can be asserted in response to a lawsuit filed by a tribe, but such claims cannot seek relief beyond the breadth of the tribe's claims without running afoul of tribal immunity.

Id. at *15. Where an Indian tribe affirmatively files a lawsuit, sovereign immunity does not protect it from the consequences that would be encountered by any other litigant in doing so, particularly those that concern an obligation for attorney's fees and costs arising in the case:

> [B]y asserting a claim for attorneys' fees under [the contract], [the Tribe] expressly consented to this Court's jurisdiction to decide the issue of attorneys' fees *against* theTribe as well. …

> While the Tribe's mere participation in litigation does not waive sovereign immunity for all counterclaims, … the claim for attorneys' fees here is not a counterclaim or other affirmative claim on the treasury of the Tribe. Rather, the Tribe's *liability* to the City for attorneys' fees is directly reciprocal of, and arising from, the Tribe's *claim* against the City for attorneys' fees on the contract. Stated differently, the Tribe affirmatively availed itself of the attorneys' fees provision of the agreement. The Tribe cannot now declare that the same provision cannot be construed to operate against it.

Id. at *16 – 17 (emphasis original). Likewise, in *Elem Indian Colony of Pomo Indians of the Sulphur Bank Racheria v. Ceiba Legal, LLP*, 230 F. Supp. 3d 1146 (N.D. Cal. 2017), the Court held that an award of attorney's fees against the plaintiff tribe under the Lanham Act was not subject to sovereign immunity as it was concomitant to the claim brought in the case:

> Plaintiff chose to assert claims under the Lanham Act. In doing so, ***it committed to the practical consequences of those claims,*** including "the risk that its position would not be accepted, and that the Tribe itself would be bound by an order it deemed adverse."

Id. at 1150. Analogously, here the Yankton Sioux Tribe availed itself of this Court in seeking affirmative relief, represented by Herman Law as counsel of record. Attorneys representing parties in lawsuits in this Court are entitled to be compensated and to a charging lien when the result of the lawsuit is the creation of a fund to benefit the party.

Under District of Columbia law,[6] "a charging lien, as recognized by the common law, gives an attorney the right to recover his taxable costs, or his fees and money expended on behalf of his client, ***from a fund recovered by his aid, and the right to have the court interfere to prevent payment by the judgment debtor or the creditor in fraud of the attorney's right to it***, …" *Elam v. Monarch Life Ins. Co*., 598 A.2d 1167, 1169 (D.C. App. 1991) (granting attorney's charging lien in response to certified questions from the U.S. Court of Appeals for the D.C.

[6] "The existence and effect of an attorney's lien is governed by the law of the place in which the contract between the attorney and the client is to be performed," which in this case is the District of Columbia. *Peterson v. Islamic Republic of Iran*, 220 F. Supp. 3d 98, 104 (D. D. C. 2016).

Circuit). The charging lien arises automatically where "it is reasonable to infer from the contingent agreement that the parties looked to the fund recovered as the source of the attorney's payment." *Id.* at 1170. The lien applies to the proceeds of settlements as well as judgments. *Id*. at 1171. In seeking relief in this Court, Yankton Sioux Tribe became subject to this common law rule. As in *Guidiville Rancheria* and *Elem Indian Colony*, Herman Law's right to intervene to protect its charging lien is reciprocal of and arises from the Tribe's claim and the lawsuit asserting it, brought by Herman Law, seeking relief in this Court.

The cases relied upon by Yankton Sioux Tribe are inapposite and do not alter the analysis. The Tribe first contends that *Watters v. WMATA*, 295 F. 3d 36 (D.C. Cir. 2002), stands for the proposition that attorney liens are subject to sovereign immunity, which is an overbroad and misleading assertion. In that case, the attorney plaintiff affirmatively brought a lawsuit against a government entity, WMATA, because it had paid a settlement to his former client in derogation of his attorney's claim of lien. *Id*. at 38 – 39. It was a suit for *breach* of an attorney's lien, and did not concern the attorney's right to assert the lien against the proceeds of the underlying claim. The sovereign entity in that case was in the position of the United States in this case, not Yankton Sioux Tribe. The *Watters* case was an independent suit seeking a money judgment against a sovereign entity. It was therefore not difficult for the Court to dismiss the case on sovereign immunity grounds. Here, in contrast, Herman Law asserts its charging lien against the proceeds of settlement to be paid through the resolution of this action.

Yankton Sioux Tribe next attempts to compare Herman Law's charging lien to a garnishment proceeding. In *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F. 2d 517 (5th Cir. 1966), the plaintiff obtained a judgment against an Indian tribe and then sought to collect the judgment through a garnishment proceeding against the tribe's bank. Such a proceeding, which seeks to

collect involuntarily upon funds belonging to the sovereign, cannot be fairly compared to the charging lien asserted by Herman Law upon the fund created through settlement of this case.

B. A Contingency Fee Charging Lien Does Not Affect Sovereign Immunity Under the Principles and Elements of the Doctrine of Recoupment

"A recoupment claim 'must (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claim.' " *Quinault Indian Nation v. Pearson*, 868 F. 3d 1093, 1100 (9th Cir. 2017) (citation omitted); *see also Flandreau Santee Sioux Tribe v. Gerlach*, case no. CIV 14-4171, 2018 U.S. Dist. LEXIS 18730 *11 (D.S.D. February 5, 2018) ("[r]ecoupment is a defensive action that operates to diminish the plaintiff's recovery rather than to assert affirmative relief") (citing *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982)). A recoupment claim conceptually is not subject to sovereign immunity: "Those [recoupment] claims do not directly implicate sovereignty interests because they seek merely an offset to the sovereign's requested relief instead of affirmative relief from the sovereign." *Quinault Indian Nation*, 868 F.3d at 1100.

Herman Law's charging lien against the proceeds of the agreement resolving this breach of trust lawsuit satisfies the elements of recoupment. It arises from the Yankton Sioux Tribe's breach of trust claims against the Government; the relief sought is the portion of the amount to be paid on those claims (25%) agreed upon in the Contingency Fee Agreement, or other reasonable amount which would necessarily be only a percentage of the fund; and it cannot exceed the recovery. Given the nature of the charging lien, as in *Quinault Indian Nation*, sovereign interests are not implicated because Herman Law is *not* seeking *affirmative* relief against the Tribe. *Id*.

Yankton Sioux Tribe argues that the doctrine of recoupment does not apply because Herman Law is not a defendant in this action and its attorney's fees are not strictly in the nature of "offset." (Tribe's Supp. Brief, pp. 8 – 9). This argument seeks a technical and limited application of recoupment, and thus misses the point. Recoupment is an equitable doctrine; it is plain that the *principles* of this doctrine, which lie outside the scope of sovereign immunity, are applicable to Herman Law's interest in this case.

C. Alternatively, Yankton Sioux Tribe Waived Sovereign Immunity as to Herman Law's Charging Lien for Attorney's Fees Arising From this Action

A sovereign tribe may be found to have waived sovereign immunity where such waiver is "unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670 (1978). A tribe may further be found to have authorized someone to waive immunity based on the particular circumstances, "including the words and conduct of the requisite governing body, to determine whether that body conferred such authority." *First Bank & Trust v. Maynahonah*, 313 P. 3d 1044 ¶27 (Ok. App. 2013). In *Luckerman v. Narragansett Indian Tribe*, 965 F. Supp. 2d 224 (D.R.I. 2013), the attorney plaintiff brought suit in state court to collect attorney fees against the defendant tribe, based on a retainer agreement that purported to waive sovereign immunity. That retainer agreement was never signed by a representative of the tribe. *Id*. at 227. Nonetheless, because "the Tribe [did] not dispute the fact that it received the letter and continued to accept [the attorney's] legal services," the Court found an express waiver of sovereign immunity, noting that "the Tribe's conduct here cannot fairly be characterized as an implied waiver." *Id*. at 227 – 28.

In this case, Herman Law is prepared to demonstrate[7] that it conducted settlement discussions and negotiations with Government attorneys throughout the course of its representation until a settlement culminated in February, 2012. This included sessions in D.C. in early 2012 with Government attorneys and officials, attended by the Tribe's Officers. The Tribe's General Counsel, Thomasina Real Bird, also attended at least one of these sessions. Ultimately, a lump-sum offer and Joint Stipulation of Settlement was negotiated, and a referendum vote of the Tribe's General Council was scheduled for February 22, 2012, to decide whether to approve the settlement, in accordance with the Tribe's Constitution. Attorney Jeff Herman of Herman Law attended the General Council meeting that day. [8] The General Council approved a Resolution at that meeting which states in paragraph 4 as follows:

> The Tribe authorizes HMH [Herman Law] to direct the United States to pay the settlement amount to the Herman, Mermelstein & Horowitz, P.A. Trust Account, and directs HMH to disburse the settlement funds from its Trust Account in accordance with the Distribution Statement, attached to this Resolution as Exhibit "B."

The settlement for a lump sum payment was approved by the General Council by referendum vote on February 22, 2012, as certified by the Tribe's Business and Claims Committee.[9] This

[7] Herman Law here sets forth facts regarding the history of the 2012 settlement for the purpose of demonstrating that its Motion to Intervene raises plausible issues which must be resolved on their merits, not on Yankton Sioux Tribe's bald assertions of fact to the contrary.

[8] During the course of its representation, Herman Law's attorneys presented the status of the case and pertinent issues to meetings of the Tribe's General Council on multiple occasions. This conduct, demonstrating acceptance of Herman Law's legal services over a period of years, provides further factual support for waiver.

[9] Yankton Sioux Tribe Resolution no. 2012-019, also dated February 22, 2012, which certifies the referendum vote approving the settlement, states in a "whereas" clause that "[t]he Yankton Sioux Tribe approved the law firm of Herman, Mermelstein & Horowitz, P.A. ('HMH') to pursue land litigation against the United States and HMH has pursued these claims on behalf of the Tribe since July, 2003." The Resolution also expressly cites to the instant case, no. 1:03cv01603, as the vehicle for HMH pursuing the Tribe's claims.

Resolution "unequivocally expresses" a waiver of sovereign immunity for purposes of Herman Law's interest in the settlement fund as the source of its 25% fee.

The Tribe's General Counsel, Ms. Real Bird, however, insisted on adding innocuous, non-material language to the settlement agreement, in response to which the Government requested another referendum vote to approve the written agreement terms as changed. Over the next few months certain of the Tribe's officials, under the counsel of Ms. Real Bird, acted to prevent a supplemental referendum vote and sought to renege on the settlement approved by referendum vote of the General Council on February 22. As this pattern developed, Mr. Herman was asked to come to a meeting of the General Council on May 21, 2012, ostensibly to address additional questions of members about the approved settlement and for the Tribe to schedule the supplemental referendum vote. At the outset of that meeting, Mr. Herman was ambushed with the following paraphrased question: "Why should the Tribe not fire you, so then it does not have to pay you because the Tribe has sovereign immunity?" Mr. Herman was excused from the meeting for the purpose of the General Council conducting a vote to terminate Herman Law, which it did. Ms. Real Bird's law firm was hired immediately thereafter, on information and belief, for a lower percentage contingency fee. The apparent plan and scheme was thus to seize a windfall from the termination of Herman Law and subsequent settlement on comparable monetary terms, with this windfall to be shared by the Tribe and Ms. Real Bird's law firm. Yankton Sioux Tribe now asserts that Herman Law has no interest in the settlement based on this misguided and meritless scheme to deny Herman Law an attorney's fee from settlement of this action. In any event, the Tribe's challenge to the waiver of sovereign immunity raises issues that cannot, as the Tribe proposes, be resolved as a matter of law at this stage in its favor. The Tribe's arguments provide no basis to deny Herman Law's intervention in this case.

A tribe's waiver of sovereign immunity may also be based on its filing of a federal court action.[10] It has been noted that tribal sovereign immunity is "similar, although not identical, to immunity afforded to the states under the Eleventh Amendment." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011). "Tribes and states both enjoy immunity from suit by virtue of their status as pre-Constitutional sovereigns." *Id*. "The scope of tribal immunity, however, is more limited." *Id.* (holding that *Ex Parte Young* may be applied to enjoin the unlawful exercise of tribal court jurisdiction). A state will be found to have waived Eleventh Amendment immunity "by voluntarily invoking the jurisdiction of the federal court, either by defending an action in federal court on its merits or by 'voluntarily submitting its rights to judicial determination' in federal court." *Dansby-Giles v. Jackson State University*, 638 F. Supp. 2d 698, 701 (S.D. Miss. 2009) (citing *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000)(other citations omitted)). In the same manner, by the filing of this action in federal court seeking affirmative relief, Yankton Sioux Tribe waived its sovereign immunity with regard to court orders and dispositions concomitant with the litigation of this case.

Yankton Sioux Tribe also contends that waiver requires a contract that contains dispute resolution procedures, relying upon *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla*., 532 U.S. 411 (2001). There, the Court held that a contract in which an Indian tribe consents to arbitration and enforcement of an arbitration award in state court is a waiver of sovereign immunity. *Id*. at 423. It does not, as Yankton Sioux Tribe contends, preclude other types and forms of waiver. *Id.* It is therefore inapposite to the issue here. Notably, Yankton

[10] As discussed above, *supra* pp. 8 - 10, the filing of a federal court action and necessary acceptance of the law, rules and orders of the court in doing so, may also be expressed as falling outside the contours of sovereign immunity.

Sioux Tribe has never raised with Herman Law any dispute or issue concerning the quality of legal work and services it rendered in this case.

Finally, Yankton Sioux Tribe seeks to avoid the effect of the corporate charter language in the Amended Bylaws of the Tribe's Business & Claims Committee, Art. XI. (*See* Dkt. Entry 74-4). (Tribe's Supp. Brief, pp. 10 – 11). In *Veeder v. Omaha Tribe*, 864 F. Supp. 889, 898 – 901 (N.D. Iowa 1994), the Court addressed the waiver of Indian sovereign immunity through formation documents such as the Amended Bylaws, in accordance with the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq*. The Court held that a waiver applies where the entity in suit is the same entity subject to a formation document agreeing to be treated as a corporation, which has the power to sue and be sued. *Id*. Here, the Bylaws were enacted for the Yankton Sioux Tribal and Claims Committee, and the Contingency Fee Retainer Agreement was entered into by "the Yankton Sioux Tribal Business and Claims Committee on behalf of the Yankton Sioux Tribe." They are the same entity; accordingly, as made clear in *Veeder*, the language in the Bylaws is sufficient to waive sovereign immunity.

D. Herman Law Did Not Accept the Tribe's Position on Immunity in Seeking to Resolve this Dispute

Yankton Sioux Tribe attaches as Exhibit "A" to its Supplemental Brief a letter from Herman Law to the Tribe's attorney dated September 25, 2012, which is a settlement communication seeking to resolve this dispute. Yankton Sioux Tribe frivolously asserts that Herman Law by this letter "recognized the Tribe's immunity as an obstacle… ." (Tribe's Supp. Brief, p. 1). Initially, the letter was sent *after* Herman Law's Motion to Intervene had been filed and briefed. It does not address the merits of the charging lien dispute, nor does it make any unconditional concessions. It was written because the Tribe's attorney had the audacity to demand a copy of

the Tribe's file with Herman Law in the wake of the scheme they had orchestrated to freeze Herman Law out of attorney's fees. The letter proposed that Herman Law would waive its retaining lien and provide a copy of their file if the Tribe waived its sovereign immunity arguments. The notion that this is in any way probative or relevant to the disputed issue of sovereign immunity is ludicrous.

5. Yankton Sioux Tribe's Filings in this Matter Are Made in Bad Faith and Sanctionable Under the Court's Inherent Authority

"Courts have an inherent power 'to protect their integrity and prevent abuses of the judicial process.' … This includes the authority to assess attorney's fees against a party who has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' "*Akl v. Virginia Hosp. Ctr.*, 471 B.R. 1, 11-12 (D. D.C. 2012) (citations omitted). The standard for imposing sanctions under the Court's inherent authority requires: "First, the court 'must find some connection between the sanctioned conduct and the process of the court in the litigation before it.' … Second, the court 'must make an explicit finding that [the target of the sanctions] acted in bad faith." *Id.* (citations omitted). Bad faith may be shown "indirectly" by the filing of a document "that is plainly frivolous, lacking even a colorable basis in law or fact," or "directly through evidence of subjective [improper motive]." *Id*. at 12 (citations omitted). Yankton Sioux Tribe's arguments, as addressed above, satisfy this description of plainly frivolous and lacking a colorable basis. They raise nonsensical arguments and seek to have this Court find facts at this stage in the Tribe's favor. They are further entirely unmoored from the standard for determining whether Herman Law has a plausible basis for intervention.[11] Moreover, upon information and belief, they are part and parcel of a bad faith scheme to evade Herman Law's attorney's fees and have

[11] The Tribe's Opposition to Herman Law's Motion to File Additional Exhibits is likewise frivolous. *See* Herman Law's Reply Memorandum filed this date.

Yankton Sioux Tribe and its present attorneys reap the windfall. Under the circumstances here, sanctions against Yankton Sioux Tribe and its attorneys pursuant to the Court's inherent authority are warranted.

6. Conclusion

Herman Law has a right to intervene in this action pursuant to Fed.R.Civ.P. 24(a) to protect its attorney's charging lien. The Tribe's sovereign immunity does not affect Herman Law's right to a charging lien because Herman Law is not suing or seeking affirmative relief against the Tribe. Herman Law therefore respectively requests that the Court grant its Motion to Intervene.

Dated: November 13, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via the ECF system on this 13th day of November, 2018 on all counsel of record.

/s/ Stuart S. Mermelstein