UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Timothy Stathis, Plaintiff, vs. Marty Indian School Board, Inc., Defendant.	4:20-cv-4174-RAL **MARTY INDIAN SCHOOL BOARD'S REPLY TO PLAINTIFF'S RESISTANCE TO MOTION TO DISMISS**

COMES NOW Defendant, Marty Indian School Board, Inc. ("Board") in the above-entitled action, by and through its counsel of record, and files its Reply to Plaintiff's Resistance to Defendant's Motion to Dismiss.[1]

This is the second suit Plaintiff has filed against the School Board, his former employer, for alleged monetary damages resulting from the termination of his employment as principal of the Marty Indian School. Plaintiff's Resistance to the Motion to Dismiss is a desperate attempt to keep this action in front of the courts knowing that the matter was already correctly decided in South Dakota State court. This is simply a reconfigured Complaint seeking to leverage state law claims that failed in the first Complaint, into federal court, by adding a claim under 42 U.S.C. § 1981. (*See, Stathis v. Marty Indian School,* 219 S.D. 33, 930 N.W. 2d 653 (S.D. 2019) ("Stathis I"). *See,* Doc. 7, Def. Br., at 1.

[1] Throughout this Brief, Plaintiff's Brief will be referred to as "Pl. Br.", Defendant's Brief in Support of the Motion to Dismiss will be referred to as "Def. Br.", the Complaint will be referred to as "Compl." and docket entries will be referred to as "Doc."

I. The Complaint should be dismissed for lack of jurisdiction based on sovereign immunity.

Defendant does not dispute any of the facts set forth in Plaintiff's Brief in Support of the Motion to Dismiss establishing that the Marty Indian School Board and the Marty Indian School are possessed of tribal sovereign immunity from suit. Pl. Br. at 2-3. None of the cases cited in the Plaintiff's Brief overturn what the Federal courts have consistently decided for over one hundred years: tribal nations are governmental entities entitled to governmental sovereign immunity.

Plaintiff concedes that there are only two mechanisms for the waiver of tribal sovereign immunity: explicit Congressional abrogation, or an explicit waiver of tribal sovereign immunity by the Tribe itself. Pl. Br. at 3; *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)*; *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Congressional abrogation *must* be expressly and unequivocally stated. *Santa Clara Pueblo*, 436 U.S. at 58. Plaintiff does not argue that Congress has abrogated the Defendant's sovereign immunity in this case, and indeed, nothing in the Tribally Controlled Schools Act grants any individual the authority to sue a tribal school. 25 U.S.C. §2501-2511. Instead, Plaintiff only argues Defendant waived its immunity from suit in the Contract. Pl. Br. at 3.

Plaintiff's citation to *Oglala Sioux Tribe v. C & W Enterprises*, is not persuasive, as that contract specifically included a waiver of immunity, and a consent to state law. 542 F.3d 224, 227-228 (8th Cir. 2008). The South Dakota Supreme Court has already decided that it lacks jurisdiction over this cased based on infringement and federal preemption. *Stathis v. Marty Indian Sch.*, 930 N.W.2d 653, 659 ("Stathis I"). The South Dakota Supreme Court explained:

> "There are two distinct barriers to a state's assumption of jurisdiction over reservation Indians: 'infringement' and 'preemption.' " *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 481 (S.D. 1991). "Although 'either barrier, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members,' we consider them together because 'they are related.' " Id. (*quoting White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143, 100 S. Ct. 2578, 2583, 65 L. Ed. 2d 665 (1980)).

Id.

A. Defendant did not Waive Sovereign Immunity in the Contract.

Plaintiff's points to no language in the Contract evincing a clear and unequivocal waiver of Plaintiff's sovereign immunity. Pl. Br. at 3. Plaintiff solely argues that State law applies to the Contract, by extracting a part of one sentence from the Contract, and asks this court to ignore the remainder of the Contract language. *Id.* But the School Law section of the Contract states: "The School Board is an entity of the Yankton Sioux Tribe, and is not bound by the laws of the State of South Dakota." Doc. 8-3 at 2. It also states, "Nothing herein shall be construed to constitute and [sic] acceptance by the School Board of the jurisdiction of South Dakota courts." *Id.* at 3. The contract explicitly placed the Plaintiff on notice that he was contracting with the School Board. *Id.* at 1. This was the reason the South Dakota First Judicial Circuit Court specifically held that the Contract does not contain a waiver of immunity, and that South Dakota law does not apply, and why it granted the motion on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement of tribal sovereignty. *Stathis v. Marty Indian Sch.*, 2019 S.D. 33, ¶ 12, 930 N.W.2d 653, 658.

Further evincing an intent for the School Board to have sole and exclusive control over school operations and decision making, Article IV, Section 1 of the School By-laws states, "the board retains and reserves unto itself the sole and exclusive right to the management and administrative control of the Marty Indian School system…" Doc. 8-1, at 14. Article I, Section 4

of the School By- laws authorizes the School Board President to call emergency meetings of the Board. Doc. 8-1 at 10.

The Plaintiff may disagree with the alleged actions on his contract for employment. But the facts alleged by the Plaintiff, even in their most favorable light, demonstrate that the School Board took an action it was authorized to take under the circumstances, and it did not waive sovereign immunity.

B. State Incorporation of a Tribal Entity is not a waiver of sovereign immunity: there is no waiver "by estoppel."

The assertion that the status of the school as a "non-profit South Dakota corporation" is an express waiver of immunity likewise fails to meet the required clear and unequivocal waiver standard. Pl. Br. at 8-9. *See,* Def. Br. at 8-12. This Court has specifically held that the status of a tribal entity as a South Dakota non-profit corporation does not operate as a waiver of sovereign immunity. *J.L. Ward Assoc., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp.2d 1163, 1176 (D.S.D. 2012); *see also, Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 483-84 (S.D. 1988).

Failing to find an express waiver of immunity required to maintain a suit against the School in South Dakota courts, Plaintiff argues that the School waived its immunity under the "waiver by estoppel doctrine." Pl. Br. at 9,10. Given the explicit contractual language stating that the School Board is not subject to suit in state courts, is an entity of the Yankton Sioux Tribe, and is not subject to the laws of South Dakota, it is not plausible that the Plaintiff detrimentally relied on incorporation of the school under State law as a basis for contracting with the Marty Indian School Board, thinking that state law would apply and State courts would have jurisdiction. *See* § I.A, *supra;* Pl. Br. at 8. The Plaintiff was placed on notice by the explicit

language in the contract that the School Board was not subject to State law, or suit in South Dakota courts.

Implied waivers of sovereign immunity under equitable jurisdiction of a court do not exist. *Berry v. Time Ins. Co.*, was a case involving company's efforts to prevent the occurrence of a condition precedent in the insurance contract constituted bad faith. 798 F. Supp. 2d 1015, 1020 (D.S.D. 2011). The "waiver by estoppel" that the Court ruled on was the waiver of a condition precedent, not a waiver of sovereign immunity. *Id.* at 1019-20. There were no governmental parties or tribal interests involved.

The Tribal government and its tribal governmental entities, just like state and federal governmental entities, are not subject to the equitable estoppel doctrines applicable to private parties. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 2009 WL 11318298 at *9 (W.D. Tenn., Aug. 13, 2008), *aff'd,* 585 F.3d 917 (6th Cir. 2009) (holding that a contracting party's reasonable belief that the tribe had waived its immunity did not create a waiver by estoppel); *Native American Distributing v. Seneca-Cayuga Tobacco, Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) (holding that the Tribe's false statement that it waived its immunity did not create a waiver by estoppel); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1289 (11th Cir. 2001) (holding that waiver by estoppel does not apply, even when the Tribal Chairman promised that the Tribe would not take certain actions that it subsequently takes). Plaintiff wrongly relies on SDCL 47-22-73, a state law of no applicability.

Waivers of tribal sovereign immunity may not be implied or inferred under any equitable principles of law. Rather, courts strictly construe language and strictly apply statutes dealing with alleged waivers of tribal sovereign immunity. *Citizen Band Potawatomi*, 498 U.S. at 509.

Because the Employment Contract does not include any explicit waiver of sovereign immunity, this case should be dismissed.

C. Sovereign Immunity Applies and Equitable Arguments to Abrogate Immunity are Frivolous and Without any Foundation in Law.

Plaintiff does not dispute that tribal sovereign immunity applies to contract actions brought in federal or state courts by employees of tribal entities that are an arm of the Tribal government, including tribally chartered schools. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Geidosh v. Little Wound School Bd., Inc.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997); *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 584 (8th Cir. 1998); *Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108 (1998); *Sage*, 473 N.W.2d at 482. Consequently, this Court lacks jurisdiction to hear this dispute.

"It is 'inherent in the nature of sovereignty not to be amenable' to suit without consent." *The Federalist No. 81*, at 511 (Alexander Hamilton) (Benjamin Wright ed., 1961). The Plaintiff has lost sight of the fact that suits against governments of the United States, states, or municipalities and counties are likewise barred by the doctrine of sovereign immunity. Unless the Plaintiff can somehow force a waiver of sovereign immunity where none exists, Plaintiff asserts that justice is "subverted." Pl. Br. at 14 ¶ 4. As Justice Holmes noted in *Rock Island, Ark. & La. R.R. v. United States*, 254 U.S. 141, 143 (1920), "[m]en must turn square corners when they deal with the Government." This is true for any government - federal, state, local, or tribal.

The Plaintiff here boldly seeks nothing short of overturning the entire doctrine of sovereign immunity, arguing that tribal sovereignty should be abandoned or, in the alternative, abrogated to such a degree that non-Indians can raise discrimination, tort, or contract claims

essentially with no limits. Pl. Br. at 8.[2] Plaintiff concedes that he filed in South Dakota State court "with the expectation of the claims of sovereign immunity and other defenses raised by Defendants." Pl. Br. at 1. Plaintiff has gone too far in his pleadings in advocating for the treatment of tribal governments and tribal entities not as sovereign governments, but instead, as private parties. His characterization of tribal sovereign immunity as an "anachronism," and an "unfortunate mistake as a function of judicial creativity", but only as it applies to tribes, should not be rewarded. Pl. Br. at 3, 7. Plaintiff urges this Court to view tribal sovereign immunity as judicially created doctrine "'developed without reference to or basis in the Constitution…" is based not on the law, but rather, on an academic law review article from 2002. Seielstad, Andrea M.,The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on A Fundamental Aspect of American Indian Sovereignty, 37 Tulsa L. Rev. 661, 668 (2002).

As this Court knows, the binding precedents on this matter are voluminous. *Hagen,* 205 F.3d at 1043; *Dillon,* 144 F.3d at 583; *Geidosh,* 995 F. Supp. at 1055-59 (D.S.D. 1997); *Amerind Risk Mgmt. Corp. v. Malaterre,* 633 F.3d 680, 684-85 (8th Cir. 2011). *See also,* Def. Br. at 5-12. They are on point to monetary suits against by employees, and they are clear. Asserting a §1981 discrimination claim does not alter the applicability of the sovereign immunity doctrine. *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 673 (10th Cir. 1980); *Yashenko v. Harrah's NC Casino Co., LLC*, 352 F.Supp.2d 653, 663-64 (W.D.N.C. 2005); *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 555 U.S. 271, 276 (2009); *Sayger v. Riceland Foods, Inc.*, 735 F.3d 1025, 1031-32 (8th Cir. 2013).

[2] F.R.C.P. 11 sanctions are available if a party signs and files pleadings which contain claims, defenses, and other legal contentions that are not warranted by existing law or by presenting a frivolous argument for extending, modifying, or reversing existing law or establishing new law.

Indian tribes are "domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). Any interference with or abrogation or wavier of that sovereignty, including governmental immunity, must be clear and unequivocal. *Id.* at 790. That is the law, that is the concept, that is the fact. It is not optional, but mandatory. Plaintiff fails to understand that sovereign immunity as applied to tribes was not created with the intent to deny anyone justice, but rather to protect the tribe, the same as any governmental entity within the United States. The Plaintiff concedes that under the Supreme Court's decision in *Williams v. Lee*, "tribes and their members have a right to 'make their own laws and be ruled by them.'" 358 U.S. 217 (1959); *see also*, Pl. Br. at 11-12. *Williams v. Lee* established the doctrine of infringement, correctly recognizing that tribal nations have been governed by their own laws since time immemorial. *Williams v. Lee* recognizes that

> the exercise of state jurisdiction in this case would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves, which right was recognized by Congress in the Treaty of 1868 with the Navajos and has never been taken away.

Id. at 217-223. Like the Navajo Treaty of 1868, the Yankton Sioux Tribe is entitled to make its own laws and be governed by them under the Treaty of 1858. As the Eighth Circuit recognized in *Yankton Sioux Tribe v. Podhrasky*,

> The original boundaries of the Yankton Sioux Reservation were created by treaty between the Tribe and the United States on April 19, 1858, 11 Stat. 743 (1858 Treaty). In that treaty, the Tribe ceded more than 11,000,000 acres of land to the United States and reserved to itself approximately 430,4004 acres in what is now Charles Mix County, South Dakota. The United States guaranteed to the Tribe "the quiet and peaceable possession of the said tract," 11 Stat. at 744, and agreed that, with certain exceptions, "[n]o white person ... shall be permitted to reside or make any settlement upon any part of the tract herein reserved for said Indians," 11 Stat. at 747.

606 F.3d 994, 998 (8th Cir. 2010), *cert. denied*, *Yankton Sioux Tribe v. Daugaard*, 564 U.S. 1019 (2011).

Numerous federal laws and policies recognize and celebrate the inherent right of tribal nations to self-determination. *See*, *e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. 93-638 (Jan. 4, 1975), 88 Stat. 2203, 25 U.S.C. § 5301 et seq. (expressing federal policy favoring Tribal control of Indian people's relationships among themselves and with non-Indians); Pres. Mem. on Tribal Consultation, 86 Fed. Reg. 7491 (Jan. 26, 2021) (reaffirming tribal sovereignty and self-governance as "cornerstones of Federal Indian policy").

The Supreme Court most recently upheld the validity of treaties with Indian Tribes, explaining the "perils of substituting stories for statutes," in the context of the gradual, persistent, de facto chipping away of tribal rights, and emphasized that "extratextual sources," including "subsequent historical events," cannot "overcome congressional intent as expressed in a statute." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2474 (2020). That is uniquely true here, where South Dakota forswore jurisdiction over the tribal lands as a condition of its entry into the union of the United States in Article XXII of the South Dakota Constitution. S.D. CONST. art. XXII. The South Dakota Constitution specifically required the State to abdicate all jurisdiction over tribal lands. *Id.* Quite simply, Plaintiff's story about how narrowing the doctrine of sovereign immunity to allow suits in federal or state court against tribal nations for monetary damages will not wreak havoc on the ability of tribal nations to make their own laws and be governed by them is exactly the type of reliance on storytelling rather than law that Supreme Court in *McGirt* cautioned against just a few short months ago. 140 S. Ct. at 2474

If courts were to abandon all jurisdictional requirements based on equitable arguments, then tribes and other governmental entities would be subject to endless litigation without bounds in

any court where a plaintiff chose to file an action. Plaintiff may not like that tribes and tribal officials and employees are immune from suit absent an explicit waiver of immunity, and that court involvement is limited by the infringement doctrine, but this discontent does not amount to an injustice that compels this Court to assert jurisdiction where none exists. As the South Dakota Supreme Court explained in *Risse v. Meeks*,

> Risses conceded to the trial court that they could have litigated this matter in tribal court and their sole justification for not doing so was because "we ain't going there [.]" Personal dissatisfaction with using a tribal court as the jurisdiction for the resolution of a legal dispute has been rejected as a valid basis to create jurisdiction to proceed in another court system.

585 N.W.2d 875, 878-879 (*citing Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18–19 (1987). As the South Dakota Supreme Court held, the "clear intent of Congress" leaves no room for "state court entanglement into the education of Indians living on the reservation." *Stathis I,* 930 N.W.2d at 661. The ability of the Tribe to resolve disputes regarding employment contracts internally is inherently part of maintaining an educational process.

Plaintiff in this case demonstrates no respect for the fundamental principle that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations[.]" *Montana v. United States*, 450 U.S. 544, 565 (1981). A tribal nation's location within a state's territorial boundaries does not give license to conflate the two independent governments and two separate and distinct justice systems. In *Washington State Department of Licensing v. Cougar Den, Inc*., the United States Supreme Court held that the canons of contract construction require treaty terms to be construed as tribes understood them. 139 S. Ct. 1000; 203 (2019). Here, the principles of *Cougar Den, supra*, apply. The contract should be interpreted as the Defendant interprets its terms, which is that the laws of the State of South Dakota do not apply to that contractual relationship.

Plaintiff's assertion that sovereign immunity has been "questioned" by the Supreme Court is erroneous. Pl. Br. at 4. None of the cases cited by Plaintiff hold that sovereign immunity does not apply to bar suits for monetary damages against tribal entities. Plaintiff cites *Lewis v. Clarke,* which is not a case bringing suit against a tribe or a tribal entity. 137 S. Ct. 1285 (2017). Pl. Br. at 4. This case was against an individual employee of a casino for conduct occurring outside of the Tribe's Reservation. *Id.* at 1289. The Court duly noted that its holding did not open the door for suits for monetary damages against the Tribe or any tribal entity. *Id.*

Citizen Band of Potawatomi upheld sovereign immunity against monetary damages, even though Justice Stevens referred to the "anachronistic fiction" of *all* sovereign immunity, not just tribal sovereign immunity. 498 US at 526; Pl. Br. at 5. Justice Stevens stated: "The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law," *Id.* at 526 (emphasis added). Contrary to Plaintiff's assertion that Tribal sovereign immunity is a "fiction" created exclusively by the United States Supreme Court to "victimize" non-Indians such as himself, Pl. Br. at 2, 5, 4, in the *Citizen Band of Potawatomi* the Supreme Court made a point of acknowledging:

> "…Congress has consistently reiterated its approval of the immunity doctrine. See, *e.g.,* Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.,* and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987)."

Id. at 514. The Court concluded, "[u]nder these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." *Id.* Plaintiff's action in this case sounds in law, not equity. Plaintiff does not seek equitable relief, but instead wants to force the

Defendant to be held legally accountable on legal theories that are meritless to obtain money damages. For this reason, *Citizen Band of Potawatomi* is inapposite.

Plaintiff's reliance on *Kiowa Tribe of Oklahoma v. Mfg. Techs, Inc.* is likewise misplaced. 523 U.S. 751 (1998). Pl. Br. at 5. Justice Kennedy in *Kiowa* expressed a personal opinion concerning abrogation of tribal sovereignty. Despite this personal view, he wrote the majority holding that Indian tribes enjoy sovereign immunity from civil suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. *Id. a*t 753.

Upper Skagit Indian Tribe v. Lundgren, 138 S.Ct. 1649 (2018) does not indicate the Supreme Court wants to do away with tribal sovereign immunity on fairness grounds. Pl. Br. at 5. Justice Roberts' comments in his concurring opinion were his attempt to imply an exception in a property title case, not a damages case, using common law principles. Regardless, Judge Gorsuch, writing for the majority, declined to decide the issue because the United States Supreme Court had never applied common law principles to abrogate tribal sovereignty. *Id. a*t 1654. As Justice Gorsuch explained, "in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us;" *Id.*

The Alabama State Supreme Court cases cited by Plaintiff are also unpersuasive. Pl. Brief at 5-6. *Wilkes v. PCI Gaming Auth*., 287 So.3d 330 (Ala); *Harrison v. PCI Gaming Auth.*, 251 So.3d 24 (Ala. 2017); and *Rape v. Poarch Band of Creek Indians*, 250 So.3d 547 (Ala. 2017). The only federal court to cite *Wilkes* declined to follow it. *See, Oertwich v. Traditional Vill. of Togiak*, 413 F. Supp. 3d 963, 968 (D. Alaska 2019). These are all cases about off-reservation conduct, or questioning the applicability of the doctrine in the unique circumstances of violations

of gaming laws at a casino. The cases primarily involve off-reservation conduct, unlike this case. The *Wilkes* case involved a tort committed on an off-reservation road by a tribal employee driving a tribal casino vehicle. 287 So.3d at 335. The Alabama Supreme Court held, "[i]n light of the fact that the Supreme Court of the United States has expressly acknowledged that it has never applied tribal sovereign immunity in a situation such as this, we decline to extend the doctrine beyond the circumstances to which that Court itself has applied it." *Id*. at 334.

The argument Plaintiff makes regarding school board elections on the Sisseton Wahpeton reservation is likewise irrelevant. Pl. Brief at 6 (*citing* 1982 S.D. Op. Att'y Gen. 190 (1982). It is also miscited.[3] State attorney general opinions are not binding on federal courts. "Our precedent warns us against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement authorities.'" *Stenberg v. Carhart*, 530 U.S. 914, 940-41 (2000). *See Planned Parenthood Minn., ND, SD v. Daugaard*, 799 F.Supp.2d 1048, 1068 (D.S.D. 2011) (relying on *Stenberg).* The Marty Indian School Board is not subject to state law governing a state school district. It is a Tribally Controlled School Act funded and operated school and a tribal entity, which Plaintiff does not dispute. Def. Br. at 8, 11. *See also, Marty Indian Sch. Bd., Inc. v. State of S.D.*, 824 F.2d 684, 688 (8th Cir. 1987); *Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 938 (8th Cir. 2010) (observing that the "boundaries" of Indian tribes' sovereign power "are established by federal law").

Cournoyer v. Montana, 512 NW 2d 479 (SD 1994) does not stand for the proposition Plaintiff asserts here either. Pl. Brief at 6. *Cournoyer* addressed the issue of whether South Dakota courts could prohibit an attorney who was not licensed to practice law in the state of

[3] The correct South Dakota Attorney General Opinion number is 32, not 190: 82-32.

South Dakota from representing the Yankton Sioux Tribe in South Dakota courts. *Id.* at 480. The South Dakota Supreme Court held that South Dakota courts had jurisdiction to restrain a non-South Dakota licensed attorney from practicing in its state courts, but that South Dakota state courts had no jurisdiction to restrain the attorney from practicing law in the Yankton Sioux tribal courts. *Id.* at 480-481. The court explicitly held that its ruling has not "imposed state law on reservations." *Id.* at 480-81. (S.D. 1994) (*quoting McClanahan v. State Tax Comm. of Arizona*, 411 U.S. 164(1973).").

In *Cheyenne River Sioux Tribe Tel. Auth*., the South Dakota Supreme Court held that the South Dakota Public Utilities Commission's (PUC) authority to approve the sale of telephone exchanges did not infringe upon tribal self-government, which has nothing to do with this lawsuit. 595 N.W. 2d 604, 609 (1999). Plaintiff cites to this case as an example of a case where the South Dakota Supreme Court limited tribal sovereign immunity. Pl. Br. at 6. To the contrary, the South Dakota PUC initially attempted to condition its approval of the sale of the telephone exchanges to a tribal entity on the Tribe's waiver of its sovereign immunity. 595 N.W.2d at 607. The Court noted that requiring the Tribe to waive its immunity as a precondition to the sale is preempted by federal law and violates the United States Supreme Court's holding in *Three Affiliated Tribes of Fort Berthold Reservation*, 476 U.S. 877, 887 (1986), that a State's jurisdiction cannot be unduly burdensome on tribal or federal interests. *Id.* To the extent that *Cheyenne River Sioux Tribe Tel. Auth.* applies to this case, it upholds the right of tribal governments not to waive their sovereign immunity.

As the Plaintiff correctly points out, "There is certainly wisdom in precluding the state from interfering in matters of a purely tribal nature." Pl. Br. at 7. However, the Plaintiff deviates from this concept when he cites a string of cases to convince this court to analogize secular court

interference in religious cases when "a contract dispute [arises] over a non-religious matter between a Hutterite party and a non-Hutterite party." Pl. Br. at 7. Tribal entities and Tribes are not religious entities. They are governments. *See, Bay Mills Indian Cmty.*, 572 U.S. at 788 ("Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'"). *See also, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) ("Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.").

The lament that it is unfair for the Plaintiff not to have access to suit against the tribal entity and its officers and employees in state or federal courts is simply misplaced. Pl. Br. at 14-15. Plaintiff admits that he entered into a voluntary consensual contract with a Tribal entity. Pl. Br. at 7. He knew the contract would be performed on the Yankton Sioux Indian Reservation where the Marty Indian School is located, and he knew from the explicit language in the contract that the School Board would not be subject to suit in State court or subject to State laws. Doc. 8-3 at 2-3.

Plaintiff's assertion that, by not consenting to suit in federal or state court, Defendants and their legal counsel are perpetuating the "further isolation of tribes and their members from the rest of society" is not well taken. Pl. Br. at 10. Such assumptions about tribal nations and tribal members living within their homelands are based upon stereotypes of tribal peoples and tribal nations. Contrary to the Plaintiff's assertion, the Yankton Sioux Tribe and its members are not "isolated," nor is their self- determination as a nation to their detriment. As the court found in *Yankton Sioux Tribe v Podhrasky*, national policies of allotment of tribal lands and efforts to assimilate Indian persons into non-tribal governance systems were ultimately destructive to the health and well-being of the Yankton Sioux Tribe and its members. 606 F.3d at 1000–01.

II. Plaintiff failed to State a claim Upon Which Relief can be granted under 42 U.S.C. §1981.

A. The Defendant is Not Subject to Suit under 42 U.S.C. §1981.

Plaintiff claims that the Defendant violated school policy and the contract language, and that violation grants this court jurisdiction under 42 U.S.C. §1981, citing two South Dakota court opinions. Pl. Br. at 13. Neither *Nordhagen* nor *Iversen* asserted §1981 claims. *Nordhagen v. Hot Springs Sch. Dist. No. 23-2*, 474 N.W.2d 510, 512 (S.D. 1991), *Iversen v. Wall Bd. Of Educ.*, 522 N.W.2d 188, 192 (S.D. 1994). These cases involved state law claims asserting violation of state law and school board policies on contract renewal and a teach evaluation, and were reviewed under the arbitrary and capricious standard applying state law. 474 N.W.2d at 513; 522 N.W.2d at 188.

Plaintiff fails to respond to the argument or the cases holding that tribal entities are not subject to suit under 42 U.S.C. §1981. Def. Br. at 13-14 (citing 42 U.S.C. §2000e(b); *Wardle v. Ute Indian Tribe*, 623 F.2d 670, 672 (10th Cir. 1980); *Morton v. Mancari*, 417 U.S. 535, 548 (1974); *EEOC v. Fond Du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993). Plaintiff fails to address this Court's decision in *Dillon v. Yankton Sioux Housing Authority*, and the 11th Circuit's decision in *Taylor* specifically holding that Title VII and 42 U.S.C. §1981 do not apply to tribal entities. 144 F.3d at 581, n.3 (8th Cir. 1998); *Taylor v. Alabama Intertribal Council*, 261 F.3d 1032 (11th Cir. 2001). Nothing in the Tribally Controlled Schools Act provides an exception to the law that Tribally Controlled Schools like Defendant are not subject to 42 U.S.C. §1981 or Title VII actions, and nothing in the Act provides private parties with the right to sue the schools funded under that law. 25 U.S.C. §2501-2511; *see also* Pl. Br. at 15-17.

B. The Complaint fails to set forth facts necessary to establish a 42 U.S.C. § 1981 claim.

Plaintiff reiterates his concession that "the bonus program was 'motivation' for Defendant's firing him." Pl. Br. at 13. This is the point: there is no allegation the alleged termination was based on racially discriminatory motives in violation of the law, and for that reason alone, the Complaint should be dismissed. Nothing in the Complaint alleges any other "total context" that establishes "but for race, it would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l. Ass'n. of African American-Owned Media*. 140 S.Ct. 1009, 1019 (2020). He does not allege he engaged in any action "protected by §1981." *Hawkins v. 1115 Legal Service Care*, 163 F.3d 685, 693 (2d Cir. 1998). As the Supreme Court explained in *Bell Atl. Corp. v. Twombly*, "a plaintiff's obligation to provide the 'grounds of his entitle[ment] to relief' requires more than labels and conclusions…" 550 U.S. 544, 555 (2007). *See also* Def. Br. at 16-17. There are simply no factual allegations in the Complaint that establish any motivation for alleged contract termination based on race in the Complaint. There is no allegation of pretext. There is only an allegation of an action on his part the Board disagreed with, and that he is non-Indian. Doc. 1, Compl, at 3, ¶16 & 6, ¶37. This does not provide any facts to support a claim that he was engaged in an activity protected under 42 U.S.C. §1981, or that race was the cause for his termination. For this reason, he has failed to adequately plead the facts necessary for Defendant to defend against a claim of racial discrimination under Title VI or §1981. For both of the reasons set forth herein, the §1981 claim should be dismissed for failure to state a claim.

III. Plaintiff failed to exhaust Tribal court remedies.

In *Sage*, this Court ruled that contracts with tribal entities are not subject to state court jurisdiction or state law because that would infringe on the right of Tribes to make their own laws and to be governed by them. 473 N.W.2d at 482. Justice Henderson explained in his concurrence,

"Indian tribal courts must be left to determine disputes involving personnel matters in Indian schools." *Id.* at 484 (Henderson, J. concurring).

Plaintiff's assertion that all courts are closed to litigants seeking to sue a tribe, and characterizing himself as a victim, has no merit. Pl. Br. at 2. As pointed out in the Defendant's Brief, tribal courts should have original jurisdiction to determine their own jurisdiction over a dispute given the unique facts of a case, as well as to determine what law applies. Def. Br. at 18-22. The Plaintiff intentionally failed to exhaust by failing to file any claim in tribal court, which he concedes. Pl. Brief at 2. Plaintiff was in fact encouraged to file in tribal court by the South Dakota First Circuit Court dismissing his complaint. *Stathis v. Marty Indian School et al*., 11-Civ-18-000022, Findings of Fact, Conclusions of Law and Order Granting Defendant's Motion to Dismiss, ¶ 8. (S.D. 1st Circuit, August 14, 2018). He refused to file in tribal court, and now makes the bald allegation that seeking a remedy there is "illusory." Pl. Brief at 2.

The law requires that a Plaintiff seeking relief in federal court first exhaust their claims in tribal court. *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 699 (8th Cir. 2019) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) ("where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts"); *Amerind*, 373 F. Supp. 2d at 982.

> '[T]he reasons for exhaustion cited in *National Farmers Union* - the policy of supporting tribal self-government, the advantages of allowing a full record to be developed in tribal court, and the benefit of receiving the tribal court's expertise on these issues of tribal sovereignty – apply whether or not the dispute is already pending in tribal court.'

Stanko at 700 (quoting *Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1303 (8th Cir. 1994) (Loken, J., concurring)).

While the doctrine of exhaustion of tribal remedies "is prudential, rather than jurisdictional," the doctrine is appropriate here, where a litigant seeks to apply state law to a tribal entity, which should be decided in the first instance under tribal law as interpreted by the Tribe or a tribal court. *Gaming World Internat'l., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir.2003) (quoting *Nat'l. Farmers Union*, 471 U.S. at 856 (internal citations omitted). The fact that Plaintiff failed to file an action in tribal court within the statute of limitations should not entitle him to now decry that relief there would have been "illusory." Pl. Br. at 2.

The doctrine requires the federal courts, on post-exhaustion review, to distinguish tribal court rulings on tribal law from rulings on federal law. The exhaustion doctrine allows federal courts to preserve the rights and values of tribal courts as instruments of tribal self-government by limiting their role to one of review and not determination of how the law applies to a tribal entity. Here, rather than bring the question of what the Plaintiff was required to do under tribal law, tribal school policy, and the contract, to the Tribe or the tribal court, he immediately sought to force the Plaintiff into State court, and now, after being advised to go to tribal court on that issue, decided to come straight to federal court.

It is not enough for the Plaintiff to say *Gerken* presents "a scenario not entirely unlike that of Plaintiff" to avoid tribal exhaustion requirements. Pl. Brief at 2. *Gerken v. Marty Indian School.*, 2001 NPICA 15 (N. Plains Intertribal Ct. App., May 16, 2003). "When a nonmember plaintiff sues a tribal [entity] defendant, the suit in effect seeks to regulate the tribal [entity], implicating the 'right of the Indians to make their own laws and be governed by them.'" *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1243 (10th Cir. 2017). It is the role of the Tribe and the tribal court, not the Plaintiff anticipating a result in tribal court, to rule on the issue of whether it has jurisdiction over the person and the subject matter. It is the

role of the tribal court to decide whether tribal sovereignty bars tribal court jurisdiction. By making the conclusory statement concerning the prospective outcome of his own case, the Plaintiff dismisses the tribal court as if it were not worth his time to consider as a venue to resolve his dispute.

IV. The Plaintiff Failed to state a claim for the State law claims alleged.

A. State law does not apply to this claim, or against the Defendant.

Plaintiff's only arguments on why state law applies were resoundingly rejected by the South Dakota First Judicial Circuit as the South Dakota Supreme Court recognized. *Stathis v. Marty Indian Sch.*, 2019 S.D. 33, ¶ 12, 930 N.W.2d 653, 658. The arguments are also addressed in §II.A, *supra.* The Contract specifically states, "The School Board is an entity of the Yankton Sioux Tribe, and is not bound by the laws of the State of South Dakota." Doc. 8-3 at 2. Any disputes about what other language in the Contract means are a matter of interpretation of tribal law, and the School's policies. The fact that the Contract makes clear that the Plaintiff does not consent "to the jurisdiction of South Dakota courts" certainly supports the decision that state law does not apply, and therefore all state law claims should be dismissed. *Id. at 3.*

State law governing state schools does not apply to tribal schools, for the reasons set forth in §III.A, *infra*. In *Sage v. Sicangu Oyate Ho*, this Court explained that,

> "It is well settled that civil jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands 'presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute'.

473 N.W.2d 480, 482 (S.D. 1991) (internal citations omitted).

B. If the Court dismisses the 42 U.S.C. § 1981 claim, the Court should decline to exercise supplemental jurisdiction over any state law claims.

Plaintiff does not address Defendant's arguments on the propriety of dismissing his state law claims if the Court dismisses his claim under 42 U.S.C. §1981. Def. Br. at 25. Under *Carnegie-Mellon Univ. v. Cohill*, and for all of the reasons set forth in the Defendant's brief, there is no basis to retain supplemental jurisdiction over the state law claims in this action. 484 US. 343, 350 n.7 (1988). Here, the case law is clear: the right of Tribal nations as sovereign governments to make their own laws and to have those laws applied in their own forums is fair and promotes judicial economy.

V. The Court Lacks Jurisdiction under 28 U.S.C. §1332(a) based on the amount in controversy.

Plaintiff's Affidavit filed in support of the Brief fails to allege $75,000.00 in damages arising before the contract end date set forth in the Contract of June 30, 2018. Doc. 11, at 2, ¶5. *See also,* Def. Br. at 24-25; Doc. 1, Compl. at 2, ¶7. Plaintiff never responds to Defendant's argument the school had no obligation under the Contract to employ Plaintiff after June 30, 2018 and therefore has no legal obligation to pay wages or relocation costs incurred after the contract end date. *Cf.* Pl. Br. at 14 to Def. Br. at 24-25.

Further, Defendant only sought to recover "an amount equivalent to the remainder of Plaintiff's contract," not that amount plus asserted fringe benefit payments for leave and annuity contributions. *Cf.* Doc. 1, Compl.. at 8, ¶A to Doc. 11, at 2, ¶5. He concedes in the Affidavit that he only had $42,326.00 in remaining payments on the Contract. Doc. 11, ¶5. He alleges in the Affidavit, but not the Complaint, that he is entitled to $2,800.00 in unused sick and personal leave without any factual basis for the claim, and $3,250.00 in "annuity match payments." *Id.* Even if true, that brings the claim to $48,376.00. But he is not entitled to payment for sick leave that would have accrued under the School's own policies, nor does he cite to any School Policy

that would permit him to receive both his rate of pay, and also annual and sick leave accrual. Whether he would have used leave during the remaining contract tenure also makes his claim for this value speculative.

As fully explained in Defendant's Brief, at 24-25, Plaintiff's asserted relocation costs were not incurred until 2 months after the contract ended on June 30, 2018, and his "lost wages" claim could only be based on the time period from June 30, 2018 until August 13, 2018 – six weeks. Even assuming his calculations are correct that he would be owed $5,417.00 per month, this amounts to a lost wage claim of $8,125.50. Doc. 1, Compl, at 6, ¶33. Plaintiff's Affidavit presents a false claim for lost wages in the amount of $48,753.00 in addition to the Contract amount of $42,326.00. Doc. 11, at 2,¶5. He cannot legally claim both the full value of the remaining contract through June 30, 2018 and lost wages for the same time period. Even giving Plaintiff the benefit of the doubt as to his ability to prove lost wages relocation costs, and payout of leave, the value he asserts in the Affidavit of "actual damages" could not be more than $59,703.00.[4]

Plaintiff asserts in the Affidavit he is entitled to "general damages and punitive damages" as well as "negative pecuniary effect to my professional reputation and career possibilities." Doc. 11, at 2, ¶5. Plaintiff does not assert any facts that would support a claim of other "general damages" nor any claim of punitive damages for damage to reputation or "career possibilities" in the Complaint or the Affidavit, nor any actual claim based on such a theory in the Complaint. *See*, Doc. 1; Doc. 10. Plaintiff cannot attempt to do so now by Affidavit. Further, he elucidates

[4] In addition, he fails to disclose to the Court that he did receive unemployment payments that were charged to the School's unemployment account, and his lost wages claims would be reduced by those amounts.

no other possible "general damages," or any basis to claim other than actual damages in the Affidavit or the Complaint.

42 U.S.C. §1981a does not apply unless the court determines there is no right to recovery under §1981. 42 U.S.C. §1981a (a) (1). It is an ancillary statute to Title VII. As set forth in Section IV, *infra*, and Defendant's Brief at 15017, Title VII does not apply to tribal schools. 42 U.S.C. §1981a(b) only authorizes punitive damages where Plaintiff cannot recover under §1981, and where Plaintiff establishes the Defendant acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The Complaint does not allege any facts to support any finding of "malice or reckless indifference." Further, 42 U.S.C. §1981a (b) (2) excludes recovery of backpay or interest on backpay. Finally, Plaintiff's assertion he is entitled to pre-judgment interest is premised on state law that does not apply to a claim against a tribal school, SDCL 21-1-13.1. Doc. 1, p. 8 at ¶D. Plaintiff's contract specifically states that the Board "is not bound by the laws of the State of South Dakota." Doc. 8-3 at 2.

Plaintiff has failed to allege any factual or legal bases to support a legal right to any lost wages or general damages after June 30, 2018, payment of fringe benefits not payable under the contract, punitive damages claim, or unspecified other general damages. That makes this case one where the "legal impossibility of recovery is so certain as to virtually negative the plaintiff's good faith in asserting the claim." *Peterson v Traveler's Indemnity Co.,* 867 F.3d 992, 995 (8th Cir. 2017). It is the Plaintiff's obligation to establish jurisdiction by a preponderance of the evidence, and Plaintiff in filing the Complaint and Affidavit has not met that burden. *Scottsdale Ins. Co. v. Universal Crop Protection Alliance, LLC,* 620 F.3d 925, 931 (8th Cir. 2010).

Another undisputed fact that demonstrates the lack of damages of $75,000 necessary to establish federal court jurisdiction, is that Defendant signed a contract containing an express

provision regarding compensation upon separation prior to expiration of the contract term. Doc. 8-3, at 3. It specifically entitles him to nothing more than $1500,00 in compensation. *Id.* The Complaint acknowledges that the School tendered payment, and he declined to cash that payment. Doc. 1, at 32, ¶ 32.

VI. CONCLUSION

Plaintiff advocates here for this Court to ignore on point federal and state Supreme Court decisions without any foundation. Defendant urges the Court not to take the invitation to chaos, and instead, that the court adhere to the clear precedents in this matter. For the reasons set forth herein the Motion to Dismiss should be granted.

Dated: February 12, 2021

MARTY INDIAN SCHOOL BOARD, INC.

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WORD COUNT CERTIFICATE

I certify that the foregoing Defendant Marty Indian School Board's Brief in Support of its Motion to Dismiss, complies with the type volume limitation of Local Rule 7.1(b)(1). According to the word count of the word processing system used to prepare the brief, the brief contains 7,721 words, excluding the cover page, tables, signature block and this certificate.

/s/ Rebecca L. Kidder

CERTIFICATE OF SERVICE

The undersigned certifies that that on the 12th day of February 2021, the foregoing Marty Indian School Board's Reply to Plaintiff's Resistance to Motion to Dismiss was filed with the Clerk of Court for the United States District Court for the Southern Division by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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