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 **DEFENDANT MARTY INDIAN SCHOOL BOARD'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

Defendant, Marty Indian School Board, Inc. ("Board"), submits this memorandum of law in support of its motion to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1), based on tribal sovereign immunity and lack of subject matter jurisdiction, and under Fed. R. Civ. P. 12(b)(6), for failure to state a claim, and failure to exhaust tribal court remedies.

This action is plaintiff Timothy Stathis' second suit against the Board, his former employer, for alleged harms stemming from the Board's December 2017 termination of Stathis' employment as principal at the Marty Indian School. The South Dakota Supreme Court affirmed the South Dakota First Circuit Court's dismissal of Stathis' first suit. *Stathis v. Marty Indian School*, 2019 S.D. 33, 930 N.W.2d 653 (S.D. 2019) ("*Stathis I*"). For the reasons set forth herein, this Court should dismiss this reconfigured Complaint, which seeks to leverage state law claims that failed in the first Complaint, into federal court, by adding a claim under 42 U.S.C. § 1981.

Because the Board is a tribally-created, tribally-controlled entity of the Yankton Sioux Tribe, and the governing body of the Marty Indian School, a tribal entity of the Yankton Sioux Tribe, the Board possesses tribal sovereign immunity from unconsented suits. The Board has not

waived its immunity and Congress has not abrogated it, tribal sovereign immunity bars this action against the Board, and this Court lacks jurisdiction to hear the dispute. In addition, Stathis fails to state a claim for unlawful retaliation under 42 U.S.C. § 1981 because § 1981 does not apply to Indian tribal entities including the Marty Indian School Board, and because he fails to allege facts necessary to state a § 1981 claim. Furthermore, strong federal policy compels abstention from adjudicating Stathis' remaining claims, which are within the primary jurisdiction of the Yankton Sioux Tribal Court – not the federal district courts. Finally, the non-federal claims also must be dismissed for failure to state a claim and lack of supplemental or diversity jurisdiction under 28 U.S.C. § 1367(c) and 28 U.S.C § 1332.

BACKGROUND

The Yankton Sioux Tribe ("Tribe") is a federally recognized Indian tribe. Indian Entities Recognized…, 85 Fed. Reg. 5462, 5466 (Jan. 30, 2020). Acting through its elected governing body, the Yankton Sioux Business and Claims Committee, the Tribe chartered the Marty Indian School ("MIS") by approving the MIS Constitution and Bylaws, dated November 6, 2013. Declaration of Rebecca L. Kidder (hereinafter "Kidder Decl."), Exhibit 1. The Constitution and Bylaws describe MIS as "a legal entity of the Yankton Sioux Tribe," MIS Const., art. 1, § 3, and "a legal entity of the Yankton Business and Claims Committee," MIS Bylaws, art. 4, § 2; *see also Stathis I* at 34, ¶ 2. MIS is located on the Yankton Sioux Indian Reservation, on land held by the United States in trust for the Tribe. *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 684 (8th Cir. 1987); *see* Complaint (Doc. 1) ¶ 4. The School is funded by the Bureau of Indian Education as a "tribally controlled school" as that term is defined in the Tribally Controlled Schools Act of 1988, 25 U.S.C. §§ 2501-2511. *See* 25 U.S.C. § 2511(9). Pursuant to that act, MIS receives federal grants to be used "at the discretion of the [Board]" to fund MIS's "education related activities." *See* Compl. ¶ 5; 25 U.S.C. § 2502(a)(3). The grant application

attached to the Complaint states that MIS has been a "tribally owned and operated" boarding school since 1975, serving the Yankton Sioux Reservation and other reservations. Doc. 1-2 at 4.

The Board is the "governing body" of MIS. MIS Const., art. 1, § 1. The Board retains "the sole and exclusive right to the management and administrative control of the Marty Indian School system," and "establish[es] policy for the Marty Indian School." MIS Bylaws, art. 4, §§ 1, 2. Eligibility to serve on the five-member Board is "limited to enrolled Yankton Sioux Tribal members and any Native American person living within the exterior boundaries of the Yankton Sioux Reservation[.]" MIS Const., art. 2, § 1; *id.*, art. 3, § 7.

"Marty Indian School Board, Inc." was previously incorporated as a nonprofit corporation under the laws of the State of South Dakota, until the Board allowed its State status to expire and to be dissolved in 2015. Kidder Decl., Exhibit 2.

According to the Complaint, in 2017 Stathis worked as a principal for MIS. Compl. ¶¶ 6-9. He alleges the terms of his employment at MIS were governed by an annual contract between him and "Marty Indian School Board, Inc., a non-profit South Dakota corporation." *Id.* ¶ 6-7; Doc. 1-1 p. 1. The actual contract in dispute in this case is a contract dated April 6, 2017 – not the contract attached to the Complaint.[1] A true and correct copy of the actual contract is attached to the Declaration of Rebecca L. Kidder at Exhibit 3. Under the contract, Stathis agreed "to be governed by the policies of the School Board," Kidder Decl., Ex. 3 at 2 ("EMPLOYMENT"), and that violations of the Board's "Policies and Procedures Manual" could result in disciplinary measures "in the manner prescribed in the Policy and Procedures Manual." *Id.* ("DISCIPLINE"). If the contract "is terminated for any cause or reason," Stathis was to be paid a "pro rata amount"

[1] The relevant contract covered the 2017-2018 school year, but the contract attached to the complaint was for 2016-2017.

of his salary according to the fraction of the school year he actually worked. *Id.* ("COMPENSATION FOR CONTRACT TERMINATION"). In addition, the contract states the following figures under the heading "BUY OUT CLAUSE:"

> $500.00 thru June 2017
> $1,000.00 thru July 2017
> $1,500.00 from August 2017 thru school year

Id. at 3. In a section labeled "SCHOOL LAW," the contract specifies that:

> **The School Board is an entity of the Yankton Sioux Tribe, and is not bound by the laws of the State of South Dakota**. The By-laws and Policies and Procedures Manual of the School Board shall be binding and controlling on the parties and shall control the conduct of the operation of the school. Any matter by [*sic*] controlled by the By-laws and Policies and Procedures will be controlled by the laws of the State of South Dakota. If any ambiguity or question as to whether the laws of the State of South Dakota or the By-laws and Policies and Procedures Manual of the School Board is controlling shall arise, the By-law and Policies and Procedures of the School Board shall be binding and controlling. The exceptions to South Dakota School Law includes, but is not limited to, the following matters, to wit:
>
> Administrator or Supervisor Retirement, School Calendar, Continuing Contract and Tenure, and Conflict of Interest. Nothing herein shall be construed to constitute and [*sic*] acceptance by the School Board of the jurisdiction of South Dakota courts.

Id. at 2-3 (*emphasis added).*

For purposes of this Motion to Dismiss, all facts alleged in the Complaint are taken as true. *Midwestern Mach., Inc. v. Nw. Airlines, Inc.,* 167 F.3d 439, 441 (8th Cir. 1999). Stathis alleges that as part of his duties as principal, he designed a system for distributing performance bonuses to MIS employees, which ultimately, allegedly, proved unpopular with the Board, some MIS employees, and members of the community. Compl. ¶¶ 11-12, 17. Stathis alleges his "insistence on maintaining" this system "led to an impromptu sit-in demonstration at the school library." *Id.* ¶¶ 17, 18. The day after the student "sit-in," November 16, 2017, the MIS Superintendent notified Stathis that he was suspended for ten days. *Id.* ¶ 21. On December 1,

2017, following a Board meeting, Stathis "was advised that his employment had been terminated[.]" *Id.* ¶ 26. Stathis alleges that "an offer was made to pay out to [Stathis] the remainder of his contract," and that he accepted this offer. *Id.* A check for the payout amount was allegedly delivered to Stathis on December 12th, but the MIS Superintendent later demanded Stathis return the check, which Stathis did. *Id.* ¶¶ 28-30. Stathis alleges he was unemployed for the rest of the 2017-2018 school year, until he began working as a teacher in California on August 13, 2018. *Id.* ¶ 33-36.

Stathis first sued the MIS Board and seven named individual tribal member defendants in South Dakota State Court, alleging claims for breach of contract, wrongful termination, defamation and punitive damages. *Stathis I* ¶ 1. The South Dakota First Circuit Court granted MIS's motion to dismiss Stathis' complaint "on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement of tribal sovereignty." *Id.* ¶ 12. The South Dakota Supreme Court affirmed, solely on the ground that federal law preempted the State court's jurisdiction over the dispute. *Id.* ¶¶ 23, 24.

In *Stathis I*, the Court addressed "the question whether a non-Indian may sue a tribal entity, tribal employees, and tribal members in state court for contractual and other civil claims which arose from conduct that occurred on the reservation." *Id.* ¶ 15. The Court recognized that "[t]here are two distinct [but "'related'"] barriers to a state's assumption of jurisdiction over reservation Indians: 'infringement' and 'preemption.'" *Id.* (quoting *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 481 (S.D. 1991), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980)). The Court observed 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.'" *Id.* ¶

18 (quoting *Sage* at 482 and *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1305 (9th Cir. 1988)). The Court explained that "[t]his presumption of tribal court jurisdiction is based on necessity. As part of its inherent sovereignty, a tribe must be able to 'regulate the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" *Id.* (quoting *Sage* at 482 and *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 428 (1989)).

Stathis I relied on two federal laws that govern the operation of and funding to tribal schools including MIS: the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301-5423, and the Tribally Controlled Schools Act, 25 U.S.C. §§ 2501-2511. The two federal acts emphasize the "crucial importance" of "tribal and community control" over the education of tribal children to advance the important federal goals of preserving the "inherent authority of Indian nations" and achieving "the measure of self-determination essential to [Indian children's] social and economic well-being." *Stathis I* ¶¶ 21, 22 (quoting 25 U.S.C. §§ 2501(a), 5301(b)(3), 5302(c)). The South Dakota Supreme Court held that the "clear intent of Congress" leaves no room for "state court entanglement into the education of Indians living on the reservation," and that "[t]he ability of MIS and the [T]ribe to resolve disputes regarding employment contracts" – Stathis' dispute in that case and this one – "is inherently part of maintaining an educational process," a power and responsibility reserved to the Tribe and MIS as a tribal entity. *Id.* ¶ 23.

More than ten months after dismissal of the state court action in *Stathis I*, and after Stathis had moved from South Dakota to California, Stathis filed this suit in federal court, dropping the individual defendants and defamation claims, reframing the facts originally alleged to restate the contract and wrongful termination claims and to support a new claim for retaliation

under the Civil Rights Act of 1991, 42 U.S.C. § 1981. The Defendant MIS Board now moves to dismiss the Complaint.

ARGUMENT

Nothing about Stathis' new action changes the conclusions reached by the South Dakota First Circuit Court and Supreme Court. The suit is barred by tribal sovereign immunity and – in part because Stathis cannot state a federal § 1981 claim against the Board – the authority to adjudicate Stathis' dispute in the first instance is reserved to the Tribe.

I. Sovereign immunity bars this unconsented suit against the Board, a tribal entity.

"[T]ribal sovereign immunity is a threshold jurisdictional question." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011). It may be asserted in a motion to dismiss under Rule 12(b)(1). *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000). "'[T]he trial court is free to weigh the evidence'" related to the Board's sovereign immunity, including matters outside the pleadings, "'and satisfy itself as to the existence of its power to hear the case.'" *J.L. Ward Assoc., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F.Supp.2d 1163, 1171 (D.S.D. 2012) (quoting *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990); *see Riley v. United States*, 486 F.3d 1030, 1032 (8th Cir. 2007).

It is firmly established that an Indian tribe enjoys sovereign immunity, which extends to any tribal agency or entity that "serves as an arm of the tribe," including tribal schools. *Hagen* at 1043 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998), and *Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998)) (holding tribal college was immune from suit); *see Giedosh v. Little Wound School Bd., Inc.*, 995 F. Supp. 1052, 1055-59 (D.S.D. 1997) (holding tribal school board qualified as "Indian tribe" for purpose of statutory

exemption from federal employment discrimination laws, in light of the "Board's relationship with the Tribe"); *see generally Amerind*, 633 F.3d at 684-85.

Neither the U.S. Supreme Court nor the Eighth Circuit has established a test for whether an entity is an "arm of the tribe" entitled to the tribe's sovereign immunity, but this Court has adopted the multi-part test used in other jurisdictions. *J.L. Ward*, 842 F.Supp.2d at 1172-73, 1176. In *J.L. Ward*, the Court enumerated the relevant factors:

> 1) the entity's method of creation; 2) the entity's purpose; 3) the entity's structure, ownership, and management, including the level of control the tribe exercises over the entity; 4) whether the tribe intended to extend its sovereign immunity to the entity; 5) the financial relationship between the tribe and the entity; and 6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entity.

J.L. Ward at 1176 (citing *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010)); *see also Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) (adopting this multi-factor test). Here, every factor weighs heavily in favor of the Board's sovereign immunity.

First, the Board was created by the Tribe under tribal law for the purpose of serving as the "governing body" of MIS. Kidder Decl., Ex. 1, MIS Const., art. 1, § 1. "Formation under tribal law weighs in favor of immunity." *Williams* at 177 (citing *Breakthrough* at 1191 and *White v. Univ. of Calif.*, 765 F.3d 1010, 1025 (9th Cir. 2014)); *see Weeks Const., Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 670-71 (8th Cir. 1986) (tribal "housing authority, established by a tribal council pursuant to its powers of self-government, is a tribal agency" possessing tribal sovereign immunity). The fact that the Board, for a period of time, also incorporated under South Dakota law does not diminish MIS' status as a tribal entity. *See J.L. Ward* at 1176 (health board possessed tribal immunity despite its "incorporation under South Dakota, rather than tribal, law"); *Giedosh*, 995 F. Supp. at 1059 (holding tribal school

incorporated only under South Dakota law as a non-profit corporation was an arm of the tribe exempt from Title VII and the ADA). Tribal sovereign immunity extends to tribal entities that are an arm of the tribal government, including tribally chartered schools. *Hagen*, 205 F.3d at 1043 (holding that tribal community college is immune from employment suit as an arm of the tribe); *see also Sage*, 473 N.W.2d at 483.

Second, as noted above, the Tribe created the Board to be the "governing body" of MIS. Kidder Decl., Ex. 3, MIS Const., art. 1, § 1. It is the Board's role under its organic documents to exercise "the sole and exclusive right to the management and administrative control of the Marty Indian School system," and to "establish policy for the [MIS]." *Id.*, MIS Bylaws, art. 4 §§ 1, 2. The Board oversees the "educational process for the students of the Marty Indian School" exercising authority delegated by the Tribe's governing body. *Id.*, MIS Const., art 1, §§ 2, 3. The Board therefore serves a fundamentally governmental purpose, which weighs strongly in favor of immunity. *See J.L. Ward* at 1176.

Third, the Board can only be comprised of Tribal members and other Native American residents of the Yankton Sioux Reservation, under MIS Const., art. 2, § 1, and the Board is directly accountable to the Tribe, again favoring the Board's immunity.[2] *See J.L. Ward* at 1176-77. The Tribe exercises control by specifying the Board's powers in the School Constitution and Bylaws, and by specifying in Board employment contracts that tribal law, the Bylaws and policies of the Board govern those contracts and the Board's conduct. Kidder Decl., Ex. 3 at 2.

[2] Currently, the Board of MIS is comprised of only members of the Yankton Sioux Tribe's governing body, the Business and Claims Committee, highlighting the status of the Board as a tribal entity. *See* Proof of Service, Doc. 3, served upon Yankton Sioux Tribal Chairman and MIS Board President Robert Flying Hawk.

Fourth, Tribal law establishes that the Tribe and its "enterprises" possess sovereign immunity. The Yankton Sioux Tribal Code states, "Except as required by federal law, or the Constitution and By-Laws of the Yankton Sioux Tribe, or specifically waived by a resolution or ordinance of the Tribal Council specifically referring to such, the Yankton Sioux Tribe shall be immune from suit in any civil action[.]" Yankton Sioux Tribal Code § 1-8-4. Under Yankton Sioux Tribal law, sovereign immunity extends to tribal entities. The Code specifies that "[n]othing contained … in this Code shall be construed as a waiver of the sovereign immunity of the Tribe or its officers or enterprises unless specifically denominated as such." *Id.* § 1-4-7.2. *See,* Kidder Decl., Exhibit 4 (YSTC Sections 1-4-5; 1-4-7.1; 1-4-7.2 and 1-8-4).

Fifth, the Board administers all school funds on behalf of the Tribe to operate the MIS. *See* Compl. ¶ 5. Federal law specifies that, subject to applicable federal restrictions, the use of these grant funds is entrusted to the Board's discretion. 25 U.S.C. § 2502(a)(3). This action for damages threatens to deplete the Board's treasury, directly impacting the funds on which Tribe depends to educate Tribal children. "Removing from the Tribe and the Board the choice of how to spend the finite dollars provided by the federal government for school operations also necessarily affects the Tribe's ability to make its own laws and be governed by them, … and runs contrary to Congress' declaration that 'parental and community control of the educational process is of crucial importance to the Indian people.'" *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987) (quoting 25 U.S.C. § 5301(b)(3)).

Sixth and finally, tribal self-determination is enhanced by recognizing that the Tribe's immunity extends to the Board. The policies underlying tribal sovereign immunity include "the preservation of tribal cultural autonomy and tribal self-determination." *J.L. Ward* at 1177; *see Breakthrough* at 1187 (policies also include "protection of the tribe's monies"). As outlined

above, the Board's operation of MIS, including the decisions the Board makes about how to use the federal funds it receives for that purpose, and its relationship with employees such as the Plaintiff, directly implicates these policies. *See Marty Indian School*, 824 F.3d at 687 (by "operating an Indian school tailored to the needs and goals of the Indian people," the Tribe "seeks to promote Indian self-determination"); 25 U.S.C. §§ 2501(d), 5301(b).

Accordingly, the Board is immune from suit unless there is a clear waiver or unequivocal congressional abrogation of tribal sovereign immunity. *Flandreau Santee Sioux Tribe v. Gerlach*, 162 F.Supp.3d 888, 893-94 (D.S.D. 2016) (citing *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) and *Rosebud Sioux Tribe v. Val-U-Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995)); *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 696 (8th Cir. 2019).

Plaintiff Stathis bears the burden of proving that either Congress or the Board has expressly and unequivocally waived tribal sovereign immunity. *Amerind*, 633 F.3d at 685-86. The Complaint in this case does not allege abrogation or waiver of any kind, and none exists. Similarly, no waiver was alleged in *Stathis I.* To the contrary, the primary federal laws governing the Board, the Tribally Controlled Schools Act and the Indian Self-Determination and Education Assistance Act, expressly state that nothing in such Acts "affect[s], modif[ies], diminish[es], or otherwise impair[s] the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 5332; 25 U.S.C. § 2507(a)(13) (incorporating § 5332 by reference). *See Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (characterizing Indian Self-Determination and Education Assistance Act as congressional "approval of the immunity doctrine," not abrogation); *see also Barron v. Alaska Native Tribal Health Consortium*, 373 F.Supp.3d 1232, 1241-42 (D.Alaska 2019) (no abrogation of tribal

sovereign immunity as to claims under 42 U.S.C. § 1981); *cf. Bunch v. Univ. of Arkansas Bd. of Trustees*, 863 F.3d 1062, 1067 (8th Cir. 2017) (section 1981 does not abrogate State sovereign immunity). Similarly, Stathis' employment contract contains no clear and express waiver of immunity. Kidder Decl., Ex. 3. Because the Board possesses tribal sovereign immunity which was neither waived nor abrogated, the Complaint must be dismissed for lack of jurisdiction.

II. Stathis fails to state a claim under 42 U.S.C. § 1981 against the Board.

A. The Board is not subject to suit under 42 U.S.C. § 1981.

Apart from the Board's tribal sovereign immunity, the Board is not subject to suit under 42 U.S.C. § 1981. Accordingly, Count One of the Complaint must be dismissed under Rule 12(b)(6).

Section 1981 is a law of general applicability that does not state on its face that it applies to tribes or tribal entities. Generally applicable acts of Congress "'apply to Indians as well as to all others in absence of a clear expression to the contrary.'" *Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 534 (8th Cir. 2020) (quoting *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960)). "'This general rule in *Tuscarora*, however, does not apply when the interest sought to be affected is a specific right reserved to the Indians.'" *Id.* at 535 (quoting *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993)). Such rights may be "based upon a treaty, … statutes, executive agreements, and federal common law." *Fond du Lac* at 248.

Here, the plain language of Title VII of the Civil Rights Act of 1964 specifies that Indian tribes are exempt from the prohibitions of Title VII. Under Title VII, "[t]he term 'employer' … does not include … an Indian tribe." 42 U.S.C. § 2000e (b); *see* 42 U.S.C. § 2000e-2(a) (prohibiting discriminatory employment practices by "an employer"); *id.* § 2000e-3(a) (prohibiting retaliatory conduct by "an employer"); *Wardle v. Ute Indian Tribe*, 623 F.2d 670,

672 (10th Cir. 1980). Title VII is expressly inapplicable to "any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." 42 U.S.C. § 2000e-2(i). Congress enacted these exceptions in light of Indians' "unique legal status" to protect the tribal right of self-government in employment matters. *Morton v. Mancari*, 417 U.S. 535, 548 (1974); *see Fond du Lac*, 986 F.2d at 249.

Section 1981, on which Stathis relies, "is a broad, general provision guaranteeing equal rights and equal protection or prohibiting racial discrimination" in contracting, including employment contracting. *Wardle*, 623 F.2d at 673. Retaliation claims under § 1981 "are identical" to claims brought under Title VII. *Wright v. St. Vincent Health System*, 730 F.3d 732, 737 (8th Cir. 2013). Section 1981 evinces no "'clear and plain' congressional intent" to abrogate or limit Indian tribes' specific right to self-governance in their employment relationships free from the federal statutes that apply outside the reservation and to nontribal employers on the reservation. *See Fond du Lac* at 248-49. The specific provisions of Title VII, which "exempts Indian tribes from compliance with the prohibition against discriminatory discharge from employment," control over the more general provisions of § 1981. *Wardle* at 673.

The Eighth Circuit has relied on *Wardle*'s conclusion that the Title VII exemption bars equivalent claims under other federal laws, noting in *Dillon v. Yankton Sioux Tribe Housing Authority* that a fired employee "failed to allege a cause of action" for discriminatory termination under § 1981 and other general civil rights statutes. *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 584 n.3 (8th Cir. 1998); *accord Curtis v. Sandia Casino*, 67 Fed. Appx. 576, 577 (10th Cir. 2003); *Taylor v. Alabama Intertribal Council*, 261 F.3d 1032 (11th Cir.

2001) ("In our view, it would be wholly illogical to allow plaintiffs to circumvent the Title VII bar against race discrimination claims based on a tribe's Indian employment preference programs simply by allowing a plaintiff to style his claim as a § 1981 suit."); *Yashenko v. Harrah's NC Casino Co., LLC*, 352 F.Supp.2d 653, 663-64 (W.D.N.C. 2005).

Further, the Board is an "Indian tribe" for purposes of the specific right provided in Title VII, for many of the same reasons the Board qualifies as an arm of the Tribe for sovereign immunity purposes. *See Giedosh*, 995 F. Supp. at 1059; *Jim v. Shiprock Associated Schools, Inc.*, No. Civ 17-1114 RB/JHR, 2019 WL 2285918, *2-3 (D.N.M. May 29, 2019). For purposes of this action, the MIS Board is indistinguishable from the Oglala Sioux Tribe's Little Wound School Board, Inc., which this Court found came within the Title VII exemption in *Giedosh*, 995 F. Supp. at 1054-59, and from Navajo Nation's Shiprock Associated Schools, Inc., which the New Mexico District Court in *Jim* also found exempt from Title VII requirements. 2019 WL 2285918 at *2-3.

As discussed herein, *supra,* the Board was chartered under Tribal law, and at some point in time was incorporated as a nonprofit under state law, like the tribal entitles in *Giedosh* and *Jim*; the Board's membership is comprised of Tribal members; the Board and the MIS are governed by Tribal law and subject to oversight by the Tribe and the Tribe's governing body; the purpose of the Board and MIS "is to further the development, in this case the educational development, of the children living in Indian country, and to involve the Indian community in the education of the Indian children," *Giedosh* at 1057; and the Board administers federal funding on behalf of the Tribe as a tribally controlled school. To apply federal employment discrimination laws to a "school board which is established and controlled by individuals of the Tribe … would severely limit the 'Indian tribe' exemption of Title VII." *Id.* at 1059. In view of

these facts, and liberally interpreting the statutory language while resolving any doubts in favor of Indians, the Board is an "Indian tribe" under Title VII. As such, the Board is exempt from the prohibitions of Title VII and the more general statute at 42 U.S.C. § 1981. *Wardle*, 623 F.2d at 673; *Dillon*, 144 F.3d at 584 n.3.

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

Even if the Board were not exempt from the requirements of Title VII and 42 U.S.C. § 1981, the Complaint fails to allege the basic facts necessary to assert a § 1981 claim. "The elements of a retaliation claim under section 1981 are (1) protected activity, (2) subsequent adverse employment action, and (3) a causal relationship between the two." *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1051 (8th Cir. 2002). Section 1981 "provides protection from retaliation for reasons related to the enforcement of the express statutory right." *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 452 (2008). To prevail on a § 1981 claim, "a plaintiff must initially plead and ultimately prove that, 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).

"Protected activity" is defined by reference to Title VII, prohibiting an employer from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by [§ 1981], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [§ 1981]." 42 U.S.C. § 2000e-3(a); *Davis v. Jefferson Hosp. Ass'n*, 685 F.3d 675, 684 (8th Cir. 2012); *see Wright v. St. Vincent Health System*, 730 F.3d 732, 737 (8th Cir. 2013) (retaliation analysis is the same under § 1981 and Title VII); *Hawkins v. 1115 Legal Service Care*, 163 F.3d 684, 693 (2d

Cir. 1998) ("To be actionable under § 1981, the retaliation must have been in response to the claimant's assertion of rights that were protected by § 1981.").

Stathis alleges that by "designing a system in which Bureau of Indian Affair[s] grant funds were utilized in a manner consistent with the specific intent of said funds, [he] was engaging in protected activity." Complaint ¶ 37. He claims that this alleged protected activity – his creation of a system for using MIS's federal grant – "was causally related to the adverse employment action" he suffered, the suspension and subsequent termination of his employment. *Id.* ¶¶ 38, 39. Stathis also alleges he "was a racial minority," as "a Non-Indian working for an Indian school." *Id.* ¶¶ 16, 37. These allegations, even if they were true, are insufficient to state a retaliation claim under § 1981.

Designing a system for awarding performance bonuses using federal grant funds is not protected activity for purposes of a § 1981 retaliation claim. As noted above, § 1981 protects the right to "make and enforce contracts" (including the right to enjoy the benefits of the contractual relationship) free from discrimination. 42 U.S.C. § 1981. Stathis does not allege that his insistence on maintaining his preferred bonus system under the federal grant constituted any sort of opposition to an alleged infringement of the civil rights that § 1981 protects. Nor does he allege that his conduct was in any way akin to participating in a proceeding regarding any infringement of civil rights based on race. Plainly, he could not make such an allegation in good faith, because, as he alleges, he was merely carrying out one of his alleged responsibilities a principal, Compl. ¶¶ 9-12 – not vindicating his right, or the right of anyone else, to make and enforce a contract in the face of racial discrimination. *See 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).

In addition, Stathis fails to allege that race was the "but for cause" of his termination. *See Comcast* at 1019. Setting aside the questionable proposition that Stathis belongs to a protected class under § 1981 because he is a non-Indian working at a tribally controlled school, the Complaint fails to allege that the Board fired Stathis because of his race (or the race of anyone else). Instead, Stathis alleges that the reason for his termination was the Board's dissatisfaction with how he handled the award of school staff performance incentive payments. This activity has nothing to do with vindicating rights protected by § 1981, let alone having anything to do with Stathis' race or anybody else's. Furthermore, Stathis does not allege that the Board's alleged disagreement with his choice of bonus system was merely a pretextual reason, obscuring true discriminatory intentions. To the contrary, the Complaint alleges that the alleged disagreement with his choice of bonus system in fact "motivated" the Board to fire him. Complaint ¶ 42. The entire Complaint reflects this position. *See id.* ¶¶ 9-26. The Complaint itself alleges a non-pretextual, non-retaliatory, non-racial reason for the Board's employment action, which negates his claim of retaliation.

Taking the facts alleged in the Complaint as true, and drawing all reasonable inferences in favor of Stathis, he has not stated a facially plausible claim for retaliation under § 1981. As the Supreme Court held 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, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation')." 550 U.S. 544, 555–56 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* (internal citations omitted).

III. Stathis failed to exhaust available Tribal court remedies.

The Complaint should also be dismissed because Stathis failed to exhaust tribal court remedies. "'Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'" *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"). Moreover, "'the reasons for exhaustion cited in *National Farmers Union* [*Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985)] – 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)).

As the District Court in North Dakota has explained, "'The Eighth Circuit has held that a district court should begin this phase of its inquiry by addressing exhaustion and, if it determines that tribal remedies must be exhausted, give the tribal court the first crack at considering the bona fides of the sovereign immunity defense.'" *Malaterre v. Amerind Risk Mgmt.*, 373 F. Supp. 2d 980, 982 (D.N.D. 2005) (citing *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 28 (1st Cir.2000)).

The exhaustion rule is "prudential, … not an absolute bar to federal jurisdiction." *DISH Network Service LLC v. Laducer*, 725 F.3d 877, 883 (8th Cir. 2013); *see LaPlante*, 480 U.S. at 16 n.8 ("Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. …

[S]trong federal policy favor[s] resolution in the nonfederal forum."). Nevertheless, "[i]t is now settled that principles of comity require that tribal-court remedies *must* be exhausted before a federal district court should consider relief in a civil case regarding tribal-related activities on reservation land." *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622 (8th Cir. 1997); *Auto-Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1021 (8th Cir. 2007) ("even where a federal question exists, due to considerations of comity, federal court jurisdiction does not properly arise until available remedies in the tribal court system have been exhausted"); *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020, 1024 (8th Cir. 2014). In the Eighth Circuit, some decisions favor addressing exhaustion first, before reaching even threshold jurisdictional issues such as tribal sovereign immunity. *Romero v. Wounded Knee, LLC*, No. Civ. 16-5204-JLV, 2018 WL 4279446, *4 (D.S.D. Aug. 31, 2018). Other decisions dismiss claims based on a defendant's tribal sovereign immunity, while also concluding the plaintiff has failed to exhaust his tribal court remedies. *Stanko*, 916 F.3d at 696.

The Yankton Sioux Tribal Code created an independent judiciary, including a Tribal Court "of general, civil and criminal jurisdiction." YSTC § 1-2-1.2. The Tribal Court's territorial jurisdiction includes the Yankton Sioux Indian Reservation, *id.* § 1-4-2, and its subject matter jurisdiction generally covers "all civil causes of action," excluding any "matter which does not involve either the Tribe, its officers, agents, employees, property or enterprises, or a member of the Tribe, [or] member of a federally recognized tribe, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of the Tribe or its members bay be directly or indirectly affected," *id.* § 1-4-5. Kidder Decl., Ex. 4. The Tribal Court system "shall have exclusive original jurisdiction in all matters in which the Yankton

Sioux Tribe or its officers or employees are parties in their official capacities." *Id.* § 1-4-7.1.[3] Kidder Decl., Ex. 4. On the face of these provisions of Tribal law, the Tribal Court has original jurisdiction over a civil damages action by Stathis alleging that the Board violated its agreements with Stathis and wrongfully terminated his employment. *See Stanko* at 699.

"[T]he exhaustion requirement should be waived only if the assertion of tribal court jurisdiction is frivolous or obviously invalid under clearly established law." *DISH Network*, 725 F.3d at 883. If "the law is murky or relevant factual questions remain undeveloped, the prudential considerations outlined in *National Farmers Union* require that the exhaustion requirement be enforced." *Id.*; *see also Window Rock Unified School Dist. v. Reeves*, 861 F.3d 894, 898 (9th Cir. 2017) (exhaustion is required when tribal court jurisdiction is "colorable or plausible"); *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 862 F.3d 1236, 1243 (10th Cir. 2017) ("Exceptions typically will not apply so long as tribal courts can make a colorable claim that they have jurisdiction") (internal quotation marks omitted).

The tribal court's jurisdiction to adjudicate Stathis' claims is not "obviously invalid" under the limitations established by federal law. *See 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"). "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). Even on "non-Indian fee lands" within the reservation, a "tribe may regulate … the activities of nonmembers who enter into consensual relationships with the tribe or its members, through

[3] The Tribal Code's next paragraph clarifies that this provision is not a waiver of tribal sovereign immunity. YSTC § 1-4-7.2, Kidder Decl., Ex. 4.

commercial dealing, contracts, leases, or other arrangements. … A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-66.

Several factors support the Tribal court's jurisdiction. First, the Supreme Court has emphasized "the critical importance of land status." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 338 (2008); *see Attorney's Process* at 940. Here, Stathis' claims arise from events that occurred at the Marty Indian School, on the Tribe's reservation trust land. *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 684 (8th Cir. 1987). Second, Stathis' claims are tied to his consensual employment relationship with MIS, a Tribal entity. The Complaint alleges breaches of a contractual employment agreement between Stathis and the MIS that he contractually agreed would be governed by tribal law. Kidder Decl., Ex. 3 at 2 ("School Law"). Third, Stathis' claims impact the Tribe's interest in protecting its self-government, specifically its authority, through the Board, to set policies for operating the tribal school and to make school employment decisions implementing those educational policies. Stathis' claims also implicate the Tribe's inherent sovereign "power to exclude," which "goes hand in hand" with regulatory authority to regulate the conduct of MIS employees. *Plains Commerce* at 335 (internal quotation marks excluded); *see Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 922 F.3d 892, 903-04 (9th Cir. 2019). There is no significant federal or state interest that ousts the application of tribal law or tribal jurisdiction in favor of state court or federal court jurisdiction. *Cf. Nevada v. Hicks*, 533 U.S. 353, 364 (2001). The South Dakota Supreme Court confirmed as much when it held the state court lacked subject matter jurisdiction in *Stathis I*, 2019 S.D. 33, ¶¶ 16-24.

Nor is there any barrier to the Tribal court's jurisdiction to decide Stathis' claim under § 1981, a federal law. *Cf. Hicks*, 533 U.S. at 366-68 (holding tribal courts cannot entertain tribal suits under 42 U.S.C. § 1983); *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1134-36 (8th Cir. 2019). Notably, federal law exempts Indian tribes and tribal agencies such as the Board from claims for retaliatory employment conduct under § 1981, as discussed above. Stathis' remaining claims implicate only contract law – which is a matter of tribal law – not state law.

It is also significant that Stathis, as a nonmember of the Tribe, is a plaintiff. "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*, 862 F.3d at 1247 (quoting *Hicks* at 361). Ultimately, there is strong basis for Tribal court jurisdiction in the first instance to adjudicate Stathis' claims, and a complete lack of basis to adjudicate any of his claims under state law, or in federal court. This is particularly true where the Complaint seeks punitive damages. As the First Circuit Court found,

> The South Dakota Supreme Court has held that state courts have no jurisdiction over an action for punitive damages for the conduct of a tribal member on tribal lands, because it would infringe on tribal sovereignty. *Risse v. Meeks*, 585 N.W.2d875, 877-878 (1998). Just as in *Risse v. Meeks*, while this Court does not have jurisdiction over the tort claims and contractual claims alleged in the Complaint, this court expresses no opinion on whether a cause of action lies in tribal court. That is a question for the Yankton Sioux Tribal courts to answer in the event the Plaintiff brings an action in tribal court.

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).

IV. The "state law claims" should be dismissed.

Stathis alleges diversity jurisdiction and supplemental jurisdiction over what he calls "state law claims," presumably meaning counts two, three and four. Compl. ¶ 1. These "state law claims" should be dismissed for lack of federal court jurisdiction, and because state contract

and common laws do not apply to Plaintiff's contract or his employment relationship with the Marty Indian School.

A. Stathis has no right to relief under state law.

First, to the extent Stathis relies on the allegation that substantive state law governs these three claims, they should be dismissed for failure to state a claim. In *Stathis I,* the South Dakota Supreme Court held that federal law preempted the state court's authority to adjudicate these exact same claims. *Stathis I*, 2019 S.D. 33 at ¶ 1 (describing Stathis' claims "for breach of contract, breach of settlement agreement, [and] wrongful termination"); *id.* ¶ 24. To reach this conclusion with respect to the State's adjudicative jurisdiction, the South Dakota Supreme Court undertook the same analysis that applies to the State's civil regulatory jurisdiction. The court highlighted Indian tribes' inherent sovereign authority "to 'regulate the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,'" *id.* ¶ 18 (quoting *Sage* at 482) and explained how the State constitution and federal law preempts the application of state laws and state court jurisdiction over tribal schools on tribal land, *id.* ¶¶ 20-23. Moreover, Stathis' contract expressly states that the Board "is not bound by the laws of the State of South Dakota." Kidder Decl., Ex. 3 at 2 ("SCHOOL LAW"). Therefore, Stathis has no right to relief under state law against the MIS Board, and his purported "state law claims" must be dismissed under Rule 12(b) (6). The South Dakota Supreme Court has already considered Stathis' arguments regarding the applicability of state law to contractual claims asserted in this Complaint and upheld the decision to dismiss those claims.

B. The amount in controversy does not meet the threshold for diversity jurisdiction.

"Under 28 U.S.C. § 1332(a), district courts have original diversity jurisdiction over civil actions when the matter in controversy exceeds $75,000, without considering interest and costs, and when the citizenship of each plaintiff is different from the citizenship of each defendant." *Ryan ex rel. Ryan v. Schneider Nat. Carriers, Inc.*, 263 F.3d 816, 819 (8th Cir. 2001). The complaint must be dismissed "if it appears to a legal certainty that the claim is really for less than the jurisdictional amount. … The legal certainty standard is met where the legal impossibility of recovery is so certain as to virtually negative the plaintiff's good faith in asserting the claim." *Peterson v. Travelers Indemnity Co.*, 867 F.3d 992, 995 (8th Cir. 2017) (internal quotation marks omitted). "The plaintiff must establish jurisdiction by a preponderance of the evidence." *Scottsdale Ins. Co. v. Universal Crop Protection Alliance, LLC*, 620 F.3d 926, 931 (8th Cir. 2010).

Stathis' first count under § 1981 is subject to dismissal for the reasons set forth above. His recovery of damages (including punitive damages) under that count is, to a legal certainty, implausible. This leaves only the three "state law claims." The clear terms of Stathis' employment contract establish that the value of the claims asserted does not exceed $75,000.

The Complaint states, "[t]he term of employment under said contract was from August 1, 2017, through June 30, 2018." Complaint ¶ 7. Stathis therefore has no possible right to compensation under the contract past June 30, 2018. Indeed, under counts three and four (for breach of the employment contract and breach of an alleged oral agreement), he only seeks to recover "an amount equivalent to the remainder of Plaintiff's contract." *Id.* at p. 8, ¶ A. Under count two (for wrongful termination), Stathis seeks this amount, plus the "wages lost" during the period extending to the date he obtained "replacement employment in California," – another

forty-four days past the end of his MIS employment contract – "plus reasonable relocation expenses and general damages," in amounts that the Complaint does not even attempt to quantify. *Id.* at p. 8, ¶ C. Since Stathis has no basis to expect compensation of any kind after June 30, 2018, these requests for additional relief under Count Two should be stricken, and what remains is less than the jurisdictional threshold of $75,000.

Stathis' employment contract set his pay at $70,000 for the term of eleven months, or 334 days. Dividing his salary by 334 days results in a pay rate of $209.58 per day. When his employment was terminated on December 1, 2017, there were 212 days remaining under the contract. Multiplying that number by the daily pay rate, the most he could be owed for the remainder of the contract, and under the alleged oral agreement, was $44,430.96, far less than the $75,000 required to establish diversity jurisdiction under 28 U.S.C § 1332.

C. With no claim arising under federal law, the court should decline to exercise supplemental jurisdiction over the "state law claims."

Under 28 U.S.C. § 1367(c), "district courts may decline to exercise supplemental jurisdiction over a claim … if … the district court has dismissed all claims over which it has original jurisdiction." *See Gibson v. Weber*, 431 F.3d 339, 342 (8th Cir. 2005) (such dismissal is unambiguously a matter of district court's discretion). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). No reason exists in this case to depart from this general rule. Because there is no other basis for the court's jurisdiction over the "state law claims," they should be dismissed.

CONCLUSION

The Board respectfully requests an order dismissing the entire action with prejudice based on the Board's tribal immunity from suit or, alternatively, an order dismissing with prejudice the § 1981 cause of action for failure to state a claim, and dismissing the remaining claims with prejudice for failure to exhaust tribal court remedies, failure to state a claim, and lack of subject matter jurisdiction under 28 U.S.C § 1332 and 28 U.S.C. § 1367(c).

Dated: January 5, 2021

MARTY INDIAN SCHOOL BOARD, INC.

By: /s/ Rebecca L. Kidder

Rebecca L. Kidder
Peebles Kidder Bergin & Robinson LLP
1830 West Fulton Street, Suite 102
Rapid City, South Dakota 57702
(605) 791-1515
rkidder@ndnlaw.com

Attorney for Marty Indian School Board, Inc.

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 8,244 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 5th day of January 2021, the foregoing Notice of Appearance of Rebecca L. Kidder 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.

James D. Taylor
James D. Taylor, P.C.
520 N. Lawler, Suite 100
Mitchell, SD 57301

/s/ Rebecca L. Kidder
Attorney for Defendant
PEEBLES KIDDER BERGIN & ROBINSON LLP
1830 W. Fulton St., Ste. 102
Rapid City, SD 57702
Telephone: (605) 791-1515
Fax: (605) 791-1915
rkidder@ndnlaw.com