STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
COUNTY OF LINCOLN	:ss)		SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY,)	41Civ. 20-275
Plaintiff,)	
v.)	MOTION FOR DISMISSAL OF COUNTER
DAVID TUNTLAND,)	CLAIM PURSUANT TO SDCL 15-6-12(b)(c)
Defendants.)	SDCL 13-0-12(0)(C)
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COMES NOW, the above-named Plaintiff, Lincoln County, by and through the undersigned counsel, and hereby requests a decision based on the Complaint as follows: Plaintiff filed a declaratory relief complaint on April 23, 2020 and served the Defendant on the same day. More than thirty days have passed since the service of the Complaint on the Defendant. The Plaintiff is entitled to judgment on the pleadings in that the time to challenge the Lincoln County Commissioner's decision expired. The Defendant has filed a Counterclaim pursuant to 42 U.S.C. 1983 claim but has failed to name an individual. Instead, Defendant named only Lincoln County. The Eleventh Amendment generally bars suits for damages against a state or state officials in their official capacities unless the state waives its sovereign immunity. See, e.g., Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989). Immunity from suit is a question of law for the court, not a question of fact for a jury to decide. See, e.g., Lopez v. Mendez, 432 F.3d 829, 835 (8th Cir. 2005) (discussing sovereign immunity); Entergy Ark., Inc. v. Nebraska, 358 F.3d 528, 556 (8th Cir. 2004)

A party cannot maintain a § 1983 action against a state official if the claim is against the official in his official capacity. *Hafner v. Delano*, 520 N.W.2d 587, 591 (S.D. 1994); *Will v. Michigan Department of State Police*, 491 U.S. 58, 64 (1989). Precedent establishes that state officials sued in their official capacities are not "persons" within the ambit of § 1983. Our Court has stated:

[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself. We see no reason to adopt a different rule in the present context, particularly when such a rule would allow petitioner to circumvent congressional intent by a mere pleading device. We hold that neither

the State nor its officials acting in their official capacities are "persons" under § 1983. Hafner, 520 N.W.2d at 591 (quoting Will, 491 U.S. at 71, 109 S.Ct. at 2312, 105 L.Ed.2d at 58). Insofar as Supervisors were sued in their official capacities, they were entitled to summary judgment as a matter of law. Hansen v. South Dakota Dept. of Transp., 584 N.W.2d 881 (1998).

While the Counterclaim mentions the County Commissioners, it does not name them as parties. Even if Defendant had named the individual Commissioners as parties, the Counterclaim would still be fatally flawed. Indeed, the focus of Defendant's allegations are actions taken by the Commissioners in their official capacities. Defendant's Counterclaim makes no colorable claim that the "Commission is charged with or exercises anything other than discretionary, policy-making functions and duties, for which there can be no tort liability." *Hansen v. South Dakota Dept. of Transp.*, 584 N.W.2d 881 (S.D. 1998) (citing SDCL 1-44-14).

WHEREFORE, Plaintiff is entitled to an order from this Court dismissing the Counterclaim.

Dated this 12th day of June, 2020.

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