**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| **DAVID JONES, KEITH WILCOX and KEELY VONDELL, Individually and on behalf of Oneida Nation Enterprises LLC 401(k) Plan and on behalf of all the similarly situated Participants and beneficiaries of the plan,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**TURNING STONE ENTERPRISES LLC, f/k/a ONEIDA NATIONS ENTERPRISES, LLC; and EMPLOYEE BENEFITS PLAN & INVESTMENT COMMITTEE OF THE ONEIDA NATION ENTERPRISES, LLC 401(K) PLAN; John and Jane Does 1-30 in their capacities as members of the Administrative Committee,**<br><br>**Defendants** | **Civil Action No.: 5:24-cv-01596 (GTS/ML)** |

**DEFENDANTS' MEMORANDUM OF LAW SUPPORTING**
**MOTION TO DISMISS UNDER RULE 12(B)(1) FOR LACK OF JURISDICTION**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**OTHER AUTHORITIES**



**RULES**



**REGULATIONS**

## INTRODUCTION

Plaintiffs' ERISA class action lawsuit is barred by the Oneida Indian Nation's sovereign immunity. Plaintiffs – former police officers of the Nation who were last employed by the Nation more than five years ago – have sued arms of the Oneida Indian Nation for purported violations of fiduciary duties in administering the Nation's 401(k) retirement plan. The Nation provides those retirement benefits – including a 5% match from the Nation – to attract and retain Nation employees, who in turn help advance the goals of maintaining the Nation's self-sufficiency.

Defendant Turning Stone Enterprises, LLC ("Turning Stone"), in sponsoring the Nation's 401(k) plan for Nation employees, and Defendant Employee Benefits Plan & Investment Committee of the Oneida Nation Enterprises, LLC 401(K) Plan (the "Committee"), in administering the plan, act on behalf of the Nation. The actions taken by the Defendants for the Nation are protected by sovereign immunity just as if the Nation were a named defendant. (The official name of the plan is now Turning Stone Enterprises, LLC 401(k) Plan.)

Turning Stone is formed under the laws of the Nation, is managed by the Nation Representative, and exists solely to serve the Nation by employing Nation employees, including the police officers who have brought this action. Courts previously have recognized that Turning Stone (known as Oneida Nation Enterprises, LLC, or ONE before a recent name change) and the Nation's Turning Stone Resort Casino, where most Turning Stone employees work, are arms of the Nation entitled to immunity. As for the Committee, the Nation Representative appoints the members – whom he can remove at will. The Nation Representative monitors the Committee's actions regarding the Nation's retirement plan, which include the selection of the investment choices at issue here. Even though Plaintiffs' complaint is willfully silent regarding the Oneida

Indian Nation, Plaintiffs must now confront the reality that Defendants Turning Stone and the Committee are arms of the Nation and that the Nation's sovereign immunity bars Plaintiffs' claims.

The only way this suit could proceed is if in ERISA Congress had abrogated the Nation's sovereign immunity or if the Nation had waived its immunity. Neither has occurred. Plaintiffs' complaint contains no allegation that either waiver by Congress or by the Nation has occurred.

The Supreme Court has emphasized that Congress may abrogate tribal sovereign immunity from private lawsuits to enforce a statute only with a clear statement abrogating immunity in the text of the statute. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387 (2023). No such statement exists in ERISA, which does not mention tribes in the civil enforcement provision or in any of the liability provisions. 29 U.S.C. §§ 1105, 1106, 1109, 1132. While ERISA does apply to some tribal plans, the application of a statute to tribes has no bearing on the question of immunity to private civil enforcement. The Second Circuit recognizes that a statute may apply to a tribe and yet not abrogate a tribe's immunity to private civil enforcement actions, although the federal government may bring enforcement actions. *E.g.*, *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86 (2d Cir. 2001).

The Nation has not waived immunity. While the Summary Plan Description states that participants may sue in a "court of competent jurisdiction," ample precedent establishes that such language is not a waiver of immunity to a private enforcement action in federal court.

Because tribal sovereign immunity bars Plaintiffs' claims, the Court lacks jurisdiction. This action, therefore, should be dismissed with prejudice pursuant to Rule 12(b)(1).

## FACTS

A motion to dismiss on the ground that claims are barred by tribal sovereign immunity is a challenge to the Court's jurisdiction. *Garcia*, 268 F.3d at 84 ("On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists."). Such a motion is thus a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, and so, in addition to reviewing allegations in the complaint, "the court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings, such as affidavits." *Zappia Middle E. Constr. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000).

### A. Plaintiffs' Complaint Against Arms of the Nation Turning Stone and the Committee

Plaintiffs have sued Defendants Turning Stone and the Committee under ERISA. Plaintiffs' summonses to Defendants reflect their relationship to the Oneida Indian Nation. The summonses are to, respectively, "Turning Stone Enterprises, LLC f/k/a Oneida Nation Enterprises, LLC **c/o The Oneida Indian Nation**," and "Employee Benefits Plan & Investment Committee of the Oneida Nation Enterprises, LLC 401(k) Plan **c/o The Oneida Indian Nation**." Dkt. 2, 2-1 (emphases added). The summonses were sent to 2037 Dreamcatcher Plaza, the address of the Oneida Indian Nation's government programs and services administrative office. Declaration of Meghan Murphy Beakman ("Beakman Decl.") ¶ 23.

The complaint strains to avoid any mention of the Oneida Indian Nation or its relationship with Plaintiffs and Defendants. The complaint leaves out that the named Plaintiffs were sworn Nation police officers, whose job it was to enforce Nation law and protect Nation members. Beakman Decl., Exs. M, N, and O. The Complaint also describes Turning Stone as only "a large company . . . with over 5,000 employees, operating in the gaming, hospitality, nightlife, recreation,

and dining industries." Compl. ¶ 16. The Complaint fails to mention that Turning Stone is "[o]wned and operated by the Oneida Indian Nation" – a fact that is prominently highlighted on the front page of Turning Stone's website and obviously was known to the Plaintiffs given that they directed the summonses in this case to the Nation. https://www.turningstoneenterprises.com/; *see also* https://www.oneidaindiannation.com/enterprises/ (describing "Oneida Indian Nation's Turning Stone Enterprises").

Repeating the same allegations over and over, the Plaintiffs' complaint consumes fifty pages. It contains 215 paragraphs and attempts to allege six counts asserting claims for breaches of fiduciary duty and duty of loyalty and for engaging in prohibited transactions in violation of provisions of ERISA found in 29 U.S.C. §§ 1105(a), 1106(a) & (b), 1109(a), 1132(a)(2) & (3). Compl. ¶¶ 169-215. The complaint essentially alleges that everything about the Turning Stone 401(k) plan has been done wrong. That includes (a) the selection of allegedly "underperforming" and too-expensive funds with "unskilled" portfolio managers offered at giants such as Fidelity, Goldman Sachs and American Funds; (b) payments from plan participants' accounts to Fidelity for holding plan assets and doing the record keeping that allegedly should have been paid for by the plan sponsor and that are characterized as kickbacks; and (c) payments to investment advisor CapFinancial Partners, which advised the Committee concerning fund selection, that allegedly should not have been made from participants' accounts because the advisor did not do a good job or in any event because its fees were too high. *E.g.* Compl. ¶¶ 9, 33-39, 46-47, 49-55, 69, 74, 94-99, 136, & 136-48. Plaintiffs seek "relief . . . for losses suffered by the Plan . . . and . . . equitable and injunctive relief," including a "monetary surcharge," to have "Defendants . . . disgorge any profits they received" from the alleged breaches of fiduciary duty, and to "[i]mpose a constructive trust over these profits." Compl. ¶ 4 & Prayer for Relief (pages 51-52).

In recent years, defined contribution retirement plans have become lightning rods for vexatious class action litigation under ERISA, with over 463 cookie-cutter complaints filed since 2016. The script is familiar: with the benefit of hindsight, plaintiffs criticize the plan's fiduciaries regarding amounts paid in administrative fees and/or for not offering cheaper or better performing investment options. Based on these slim reeds, plaintiffs demand that courts open the door to multi-million-dollar discovery, hoping that the defendants will capitulate and settle rather than bear the financial burden of litigation. Plaintiffs' complaint largely follows the general playbook, offering a kitchen sink of allegations that do not plausibly state ERISA claims. But the issue here is not dismissal under Rule 12(b)(6) for failure to state a claim. It is dismissal under Rule 12 (b)(1) for lack of jurisdiction due to tribal sovereign immunity, to which we turn.

**B. Organization of Defendants Turning Stone and the Committee**

Defendant Turning Stone is a creature of the Oneida Indian Nation, exclusively serving the Nation and its interests, under the Nation's sole control. Turning Stone, known as Oneida Nation Enterprises, LLC before a recent name change, is a limited liability company formed by the Nation under Nation law, not a state or federal corporation formed under state or federal law. Beakman Decl., Ex. A at A4 (Articles of Organization). The Nation formed Turning Stone to be an arm and instrumentality of the Nation's government under the Oneida Indian Nation's Limited Liability Company Code, which the Nation enacted pursuant to its authority as a sovereign tribal government. *Id.* Turning Stone's Articles of Organization are signed and certified by "[t]he Oneida Indian Nation, a sovereign Indian nation," which is the "Sole Member" of Turning Stone. *Id.* The Articles are executed by Ray Halbritter, the Nation Representative. *Id.* at A5; *see also* https://experience.arcgis.com/experience/20ad1b9c9f4a40a586f3a4c72abe30bf/ (Bureau of Indian Affairs Tribal Leaders Directory). The Articles stipulate that "[t]he principal administrative office of the Company [Turning Stone] will be located . . . on land that is within the Oneida Indian

Nation Reservation and held by the United States in trust for the benefit of the Nation." Beakman Decl., Ex. A at A4, ¶ 2; *see* 25 U.S.C. § 5108 (authorizing tribal land to be held in trust by the United States for a tribe's benefit). The Articles specify that "[t]he Company will be managed by its sole member, the Nation, which shall at all times remain its sole member and solely control the Company" and "shall be liable for any final and non-appealable judgment issued against the Company." Beakman Decl., Ex. A at A4, ¶¶ 4, 5.

Under the Articles, the "sole purpose of the Company is to implement the will of the Nation and to further the Nation's purposes and interests by employing employees and providing common administrative support services to the Nation's government and the Nation's economic development initiatives in order to fund the governmental goals of the Nation, and to care for the needs of its members and to support and further the sovereignty and economic self-sufficiency of the Nation." *Id.* ¶ 6. "For all purposes, . . . the Company shall be an instrumentality and a subordinate arm of the Nation, which solely controls it and is solely entitled to its revenues." *Id.* ¶ 7. The "Company shall be entitled to all of the privileges and immunities of the Nation, including immunity from state regulation and taxation and immunity from suit." *Id.*

Turning Stone's Operating Agreement contains similar provisions. Beakman, Decl., Ex. B. The Operating Agreement further states that "[t]he Company shall have only those assets of the Nation formally assigned or leased to it by the Nation or by a Nation entity, or acquired in the course of its business, all of which shall be beneficially owned by the Nation." *Id.* at B4, § 8. And, pursuant to § 7(b) of the Operating Agreement, Nation Representative Ray Halbritter is the Manager of Turning Stone. *Id*. at B4.

In addition to the Nation Representative managing Turning Stone, there is one-to-one overlap between the executives of the Nation and the executives of Turning Stone. The individuals

who hold the positions of Chief Operating Officer, General Counsel, Senior Vice President for Administration, Senior Vice President for Finance, and Senior Vice President for People & Culture with the Nation have exact same titles in their positions with Turning Stone. Beakman Decl. ¶¶ 17-21. The Nation and Turning Stone also share the same human resources functions, including payroll, hiring and benefits. *Id.* ¶ 22.

As for the Defendant Committee, it is exclusively controlled by the Nation and acts under a delegation of authority by Nation Representative Halbritter to serve employees of Turning Stone and other Nation employees. *See* Beakman Decl., Ex. C. "The Sole Manager of Turning Stone Enterprises" (Nation Representative Ray Halbritter, as explained above) "appoints the Committee." *Id.* at 1. The "members" of the Committee "shall remain on such committee at the will of, and may be removed (with or without cause) by, the Nation Representative(s) of the Oneida Indian Nation." *Id.* at 1-2. The "Sole Manager" (the Nation Representative) "delegates to the Committee, all administrative and asset management responsibility for the Plans, including the responsibility to adopt each new Plan, adopt all amendments to the Plans, reserve the right to determine any contributions to any Plan and to suspend or terminate any Plan or any contributions under such Plan." *Id.* at 2. The "Sole Manager" also "monitors the current appointees to the Committee to ensure such delegation(s) is/are appropriate and updates and replaces such appointments as deemed necessary." *Id.* Finally, "Turning Stone Enterprises shall indemnify and hold harmless, directly from its own assets (including the proceeds of any insurance policy the premiums of which are paid from Turning Stone Enterprises' own assets), each member of the Committee against any cost or expense (including, but not limited to, counsel fees) or liability . . . arising out of any act or omission to act in connection with the Plans unless arising out of such person's own fraud or willful misconduct." *Id.* at 5-6.

### C. Defendants Turning Stone, as Sponsor, and the Committee, as Administrator, of Benefits to Nation Employees on Behalf of the Nation

To attract and support employees, Turning Stone sponsors the Nation's 401(k) plan. As the Complaint acknowledges, the plan "covers substantially all eligible employees of Turning Stone Enterprises." Compl. ¶ 9. Those employees are Nation employees. The named Plaintiffs were three of those Nation employees – sworn members of the Nation's police force and part of a governmental department within the Nation. Beakman Decl., Exs. M, N, O.

Multiple sources, including publicly available materials and documents received by Plaintiffs, demonstrate that employees employed and managed by Turning Stone are Nation employees serving the interests of the Nation.

Like every Nation employee, each of the Plaintiffs received an employee guidebook bearing the Nation seal. Beakman Decl., Ex. D (2018 Employee Guidebook). With the 2018 version, the employees affirmatively acknowledged that the "*Oneida Indian Nation* has the right to make changes in policies, procedures, practices, wages, and *benefits* at any time" and that the employees or the Nation could terminate their "*employment with the Nation*" at will. Beakman Decl. Exs. E, F, G (Employee Guidebook Acknowledgement of Receipt and Understanding) (emphasis added). That document, which is signed by the employees, further highlighted updates to "*our Employee Benefits program*," including the "5% matching contribution to *the 401k retirement plan*." *Id*. (emphasis added).

The employee guidebook describes employees as "[e]mployees of the Nation" (page 21), "Nation employees" (page 25), and "the Nation's most valuable asset" (page 31). Beakman Decl., Ex. D. The remainder of the 57-page employee guidebook repeatedly underscores that all employees represent the Nation and serve the interests of the Nation. Employees are asked at pages 6-7 to follow "The Oneida Way" and are told that the "Nation is committed to treating our

employees with respect and dignity." *Id.* At page 9, employees are told that "[t]he Oneida Indian Nation is the largest employer in Madison and Oneida counties" and "[t]he Oneida Indian Nation's entity, Oneida Nation Enterprises, LLC ('ONE') [now Defendant Turning Stone] is the employer for the Oneida Indian Nation's operations and enterprises" – and so Turning Stone is an administrative convenience by which "Nation employees" are hired and managed on behalf of Nation businesses. *Id.*

At page 44, the guidebook explains that the 401(k) plan is "the *Nation's* 401k retirement plan" in which "the *Nation* will generously match 5% of the employee's contributions." *Id.* (emphasis added). In 2018, the "Nation contributed more than $4.2 million to employees' 401(k) retirement accounts." *See* Beakman Decl., Ex. H (2018 Turning Stone Enterprises Economic Impact Fact Sheet).

The 401(k) statements themselves highlight the direct relationship between the Nation and the 401(k) plan. Those statements, including the ones received by the Plaintiffs, prominently feature the Nation seal. Beakman Decl., Exs. I, J, K (401(k) statements).

## ARGUMENT

### I. The Complaint Must Be Dismissed Because the Nation's Sovereign Immunity Bars All Claims against the Defendants.

Indian tribes maintain the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 387 (2023) (citations omitted). Because of tribal sovereign immunity, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). This immunity applies to tribal commercial operations. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 785 (2014). It also extends to tribal business entities that function as an arm or instrumentality of the tribe. *See*

*Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 305 (N.D.N.Y. 2003) (Scullin, J.) (immunity of Oneida Indian Nation bars suit arising from "the activities of a tribal entity such as the Casino"), *aff'd on other grounds*, *Frazier v. Brophy*, 358 F. App'x 212 (2d Cir. 2009); William C. Canby, Jr., American Indian Law in a Nutshell, at 105 (7th ed. 2020) ("When a subentity or corporation of a tribe bears such a close relationship that it functions as an 'arm' of the tribe, it is entitled to a tribe's immunity. A tribal casino is immune when it functions as an 'arm' of the tribe, which it typically does when the tribe owns and operates it.").

Here, Defendants are immune from suit because (1) the Oneida Indian Nation is immune from suit and the Defendants share in the Nation's immunity, (2) ERISA does not abrogate the Nation's immunity from suit, and (3) the Nation has not waived immunity.

**A. The Oneida Indian Nation Is Immune from Suit, and Defendants Are Immune Because They Are Arms of the Nation.**

The Oneida Indian Nation is a federally recognized Indian tribe, 89 Fed. Reg. 944, 946 (Jan. 8, 2024). Its entitlement to assert sovereign immunity is clear. *Oneida Indian Nation v. Phillips*, 981 F.3d 157 (2d Cir. 2020) (affirming dismissal by Suddaby, J. of counterclaim against Nation by Nation member regarding land ownership); *Doe v. Oneida Indian Nation*, 278 A.D.2d 564 (N.Y. 3rd Dep't 2000) (affirming dismissal of tort claim against Nation by hotel patron).

It is commonly known in Central New York that Nation businesses are arms and instrumentalities of the Nation. None more so than Turning Stone Resort Casino, where most members of the putative class in this case work. The Second Circuit has referred to "the Tribe-operated Turning Stone casino," *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 563 (2d Cir. 2016), and has stated that "Turning Stone is a commercial enterprise, owned and operated by the Oneida Indian Nation of New York, a federally recognized Indian tribe[,]" *Laake v. Turning Stone Resort Casino*, 740 Fed. App'x 744, 745 (2d Cir. 2018). Judges in this District

have written to the same effect. *Laake v. Turning Stone Resort Casino*, 2017 WL 6626677, at *3 (N.D.N.Y. Oct. 25, 2017) (McAvoy, J.) ("Defendant Turning Stone Resort Casino . . . is owned and operated by the Oneida Indian Nation . . . ."); *Town of Verona v. Jewell*, 2015 WL 1400291, at *1 (N.D.N.Y. Mar. 26, 2015) (Kahn, J.) ("The land is the location of OIN's Turning Stone Resort & Casino . . . .").

In assessing whether tribal entities like Defendants Turning Stone and the Committee share in their tribe's immunity, courts look at a variety of factors to determine if they are arms or instrumentalities of Indian tribes. Federal appellate courts have evaluated such things as "the method of creation of the economic entity; its purpose; the structure, ownership, and management, including the amount of control the tribe has over the entity; the tribe's intent with respect to the sharing of its sovereign immunity; and the financial relationship between the tribe and the entity." *Mestek v. Lac Courte Oreilles Cmty. Health Ctr.*, 72 F.4th 255, 259 (7th Cir. 2023) (citation omitted); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010)). District courts within this Circuit have addressed similar factors. *Warren v. United States*, 859 F. Supp. 2d 522, 540 (W.D.N.Y. 2012) (considering seven factors) (citations omitted), *aff'd*, 517 F. App'x 54 (2d Cir. 2013); *Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442, 477 (E.D.N.Y. 2009) (eight factors).

Under any factor or set of factors evaluated by courts, Turning Stone and the Committee are arms of the Nation, tribal instrumentalities that share the Nation's immunity because they are controlled by the Nation and exist solely to serve its interests, with the result that litigation against them for executing duties assigned by the Nation threatens the Nation and its interests. Courts in this District have held that Turning Stone (formerly named Oneida Nation Enterprises) and the Nation's Turning Stone Resort Casino, where most Nation employees hired by Turning Stone

work, are instrumentalities and arms of the Nation that share its immunity. *Smith v. Oneida Emp. Servs.*, 2009 WL 890614 (N.D.N.Y. Mar. 30, 2009) (Scullin, J.) (suit by employee against Oneida Nation Enterprises dismissed for lack of jurisdiction based on tribal sovereign immunity); *Laake*, 2017 WL 6626677, at *3 (McAvoy, J.) (dismissing claim against Turning Stone Resort Casino for lack of jurisdiction because "[c]ourts have recognized TSRC as entitled to tribal sovereign immunity as an enterprise of the Nation"), *aff'd*, 740 Fed. App'x at 745 (affirming because "Turning Stone is a commercial enterprise, owned and operated by" the Nation and "is entitled to sovereign immunity").

Everything about Turning Stone and the Committee demonstrates that they are part of the Nation and exist to serve as arms of the Nation. Turning Stone is organized under the laws of the Oneida Indian Nation, not under state or federal law. Beakman Decl., Ex. A. Turning Stone's Articles underscore both that Turning Stone "shall be an instrumentality and a subordinate arm of the Nation, which solely controls it" and that the Nation and its Nation Representative manage it. Beakman Decl., Ex. A at A4, ¶ 7; *see also* Beakman Decl., Ex. B at B4, ¶ 7(a), (b) ("management of the Company shall be vested in the Nation"). As the sole member of the limited liability company, the Nation is the governing body of Turning Stone and solely controls it.

The Nation has also designated the Nation Representative to oversee day-to-day management of Turning Stone. Beakman Decl., Ex. B at B4, ¶ 7(b). As manager, he "may be removed by the Nation at any time with or without cause." *Id.* In addition, the executives of the Nation are the executives of Turning Stone, and the two entities share human resources functions, including with respect to benefits. Beakman Decl. ¶¶ 17-21. As for the Committee, the Nation Representative appoints the members of the Committee, monitors their performance (which would include decisions regarding funds offered in the 401(k) plan), and has full authority to remove

members if they are not doing a good job with respect to the benefit plan they administer – or for any other or no reason. Beakman Decl., Ex. C.

The purposes of Turning Stone and the Committee are to serve the purposes of the Nation and its government. They do that by hiring, managing and providing benefits, including a 401(k) plan, to Nation employees. The Plaintiffs in this action are perfect examples of such employees. Before they left Nation employment more than five years ago, they were sworn officers in the Oneida Indian Nation Police Department. *See* https://www.oneidaindiannation.com/police/ (Department website).

Turning Stone exists to facilitate and promote the successful operation of Nation businesses on Nation land within the Oneida reservation, businesses whose proceeds are used by Turning Stone to operate the Nation's businesses or else go to the Nation to reinvest in Nation businesses or to fund Nation government and activities such as education and health care. Turning Stone's purposes thus include "to, on behalf of and for the sole benefit of the Nation, employ employees of the Nation and its entities and provide common administrative support functions to the operations of the Nation and its entities." Beakman Decl., Ex. B at B3, ¶ 3.

In employing Nation employees and providing support to the Nation's operations, Turning Stone sponsors and the Committee administers a 401(k) retirement plan to benefit the employees. This is a governmental role because employees of a sovereign entity are involved. As the Second Circuit recognized in holding that a public corporation running New York's state retirement system is an arm of the state sharing in the state's immunity, the provision of retirement benefits is "an important governmental function" that "assists and promotes the efficient operation of the affairs of the state itself." *McGinty v. New York*, 251 F.3d 84, 97 (2d Cir. 2001) (internal quotation marks omitted). The Nation's retirement plan serves the same purposes, in particular facilitating the

hiring and work of employees who produce revenues that fund the Nation's government and all of its social and economic activities. As explained above, the plan is referred to as the "Nation's plan," it is the "Nation" that contributes a five percent match to its employees (totaling over $4 million in 2018 alone), and plan statements include the seal of the Nation. Beakman, Decl., Ex. D at 44, Ex. H.

When Turning Stone and the Committee serve critical functions with respect to the plan, they are doing so on behalf of the Nation to serve the Nation's goals to attract and provide for employees, mostly working in Nation businesses but some, like Plaintiffs, performing governmental policing and other functions. Just as Oneida Nation Enterprises (the former name of Turning Stone) was immune as against employment claims in *Smith*, Turning Stone and the Committee are immune here concerning actions taken to sponsor or administer the 401(k) retirement benefit for Nation employees. *See* 2009 WL 890614, at *3.

Plaintiffs' ERISA claims against Turning Stone and the Committee necessarily target the Nation. The claims challenge the investment choices offered by the Nation's 401(k) plan to Nation employees and the associated expense structure of the Nation's plan. Those things all reflect decisions made by the Defendant Committee for the Nation, pursuant to authority delegated by the Nation, subject to monitoring by the Nation Representative. And Turning Stone is an administrative convenience by which the Nation hires employees for, and operates, its businesses such as Turning Stone Resort Casino. The Plaintiffs implicitly admit that at paragraph 16 in the complaint where they allege that Turning Stone "operat[es] in the gaming, hospitality, nightlife, recreation, and dining industries," which obviously refers to the Nation's Turning Stone Resort and related businesses. The Nation has sole and total control of Turning Stone. The Nation owns

all of Turning Stone's property and funds Turning Stone. Turning Stone's revenues are either spent on the operation of Nation businesses or flow to the Nation, Turning Stone's sole owner.

It follows that it is the Nation's money that is deposited as an employer match into the Nation 401(k) in issue here and that it is the Nation's money that is used to pay employees hired and managed by Turning Stone. It also follows that the relief described in paragraph 4 of the Plaintiffs' complaint ("relief . . . for losses suffered by the Plan . . . and . . . appropriate equitable and injunctive relief") would reach the Nation's treasury and exert control over a 401(k) plan that is ultimately subject to the sole control of the Nation Representative. In these circumstances, that the Defendants are arms of the Nation could not be clearer. Indeed, the Plaintiffs issued summonses to Turning Stone and the Committee addressed to the Oneida Indian Nation at its administrative offices.

Because the Nation's immunity is applicable as to all Defendants and claims, there are only two remaining questions. In ERISA, under which this action is brought, did Congress abrogate the Nation's immunity? If not, did the Nation waive it? The answers to those questions are no and no.

**B. ERISA Does Not Abrogate the Nation's Immunity.**

To abrogate tribal sovereign immunity as to a particular claim, "Congress must make its intent unmistakably clear in the language of the statute." *Lac du Flambeau Band*, 599 U.S. at 387 (quote cleaned up). This "clear-statement rule is a demanding standard" and a "high bar." *Id.* at 385, 388. If "a plausible interpretation of the statute" exists "that preserves sovereign immunity, Congress has not unambiguously expressed the requisite intent." *Id.* at 388.

Under these principles, nothing in ERISA saves Plaintiffs' claims in this action. ERISA does not contain any provision expressly abrogating tribal sovereign immunity.

ERISA's civil enforcement provision under which Plaintiffs sue, Section 1132, is silent as to tribes and tribal government. Section 1132(a), the subsection on which Plaintiffs specifically rely, states only that "[a] civil action may be brought" in certain specific circumstances, including "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under Section 1109 of this title." 29 U.S.C. § 1132(a), (a)(2). In contrast to the absence of any mention of Indian tribes, Section 1132 explicitly waives certain immunity of the federal government. 29 U.S.C. § 1132(k); *Shanbaum v. United States*, 32 F.3d 180, 182 n.2 (5th Cir. 1994) ("The only waiver of sovereign immunity found in 29 U.S.C. § 1132 is found in § 1132(k), allowing specific actions against the Secretary of Labor."); *accord*, *Francis v. Perez*, 256 F. Supp. 3d 1, 6 (D.D.C. 2017). So, Section 1132 lacks any text abrogating tribal immunity but explicitly waives certain immunity of the federal government – powerful evidence that Congress did not intend to abrogate tribal sovereign immunity.

Section 1109, which Section 1132(a)(2) references, also does not mention tribes or tribal governments. Section 1109 applies only to "any person who is a fiduciary" as those terms are defined by ERISA. The definitions of "person" and "fiduciary" are found in sections 1002(9) and 1002(21)(A) and are similarly silent as to tribes and tribal governments. Under Section 1002(9), a "person" is "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." Section 1002(21)(A), defining the circumstances in which "a person is a fiduciary," contains nothing that would make an Indian tribe or tribal government such a "person" who is such a "fiduciary." None of the remaining liability provisions cited in Plaintiffs' complaint mentions tribes or tribal governments. *See, e.g.*, 29 U.S.C. §§ 1104, 1105, 1106.

Consequently, ERISA is like other federal statutes that have been held not to abrogate tribal sovereign immunity due to the absence of an express Congressional abrogation. ERISA "makes no reference to the 'amenity of Indian tribes to suit.'" *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (quoting *Garcia v. Akwesasne Hous. Auth*., 268 F.3d 76, 86 (2d Cir. 2001)) (holding that "officers and/or employees of Mashantucket Pequot Gaming Enterprise" are immune from Family and Medical Leave Act claims). And "[n]othing on the face of" ERISA "'purports to subject tribes to the jurisdiction of the federal courts in civil actions' brought by private parties." *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978)) (holding tribe immune from Copyright Act claims).

To be sure, some tribal benefit plans (including the Nation's) are, by implication of a 2006 amendment to ERISA, subject to its statutory scheme. Through that amendment, Congress exempted certain tribal plans from ERISA's reach by including them in the definition of "governmental plan." 29 U.S.C. § 1002(32). By implication, tribal plans, like the Nation's, that are not "governmental plans" may be subject to the requirements of ERISA. But that does not alter the reality that ERISA contains no provision abrogating the sovereign immunity of Indian tribes from private civil enforcement suits. *See Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (prior to amendment, holding ERISA applies to Indian tribes as a statute of general applicability but not addressing a tribal sovereign immunity defense or referring in any way to immunity or its applicability).

It is a fundamental mistake to confuse the question whether a statute is applicable to Indian tribes with the question whether Indian tribes are immune to private civil enforcement. Whether "an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Garcia*, 268 F.3d at 85 n.5 (quoting *Florida Paraplegic Ass'n*

*v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999)). The Second Circuit has repeatedly recognized this principle. *Id.* at 85–86 ("Regardless of whether the substantive norms of the ICRA, the ADEA, and the Age Discrimination Act all apply to tribes, none of the laws abrogates tribal sovereign immunity from suit."); *accord, Bassett*, 204 F.3d at 357 ("the fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it"); *Tremblay v. Mohegan Sun Casino*, 599 F. App'x 25, 26 (2d Cir. 2015) (even though "the ADEA's definition of employer does not exclude American Indian tribes," "Congress has not unequivocally expressed its purpose to abrogate tribal sovereign immunity pursuant to the ADEA").

The answers to the question whether a statute is applicable to Indian tribes and the question whether Indian tribes are immune from private civil enforcement are different here because the core legal principle determining the answer to each question is very different. "[L]aws of general applicability govern tribal entities unless Congress has explicitly provided otherwise." *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049, 1053 (9th Cir. 2017). In contrast, the "baseline position" regarding tribal sovereign immunity is that statutes do not abrogate tribal immunity unless Congress explicitly so provided. *Lac de Flambeau*, 599 U.S. at 387.

The absence of a private damages remedy against Indian tribes does not mean the absence of enforcement. When an Indian tribe is subject to a federal statute, the federal government may enforce the statute against a tribe because Indian tribes are not immune from federal enforcement. *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996) (rejecting argument that "the Secretary's enforcement action [under OSHA] is barred unless there is a clear and unequivocal waiver of tribal sovereign immunity" because "[t]ribal sovereign immunity does not bar suits by the United States"); *Garcia*, 268 F.3d at 85 (holding that, even though the Native American

Housing Assistance and Self–Determination Act allowed Attorney General to file civil action, "the statute cannot be an abrogation of sovereign immunity because, in the first place, tribes do not enjoy sovereign immunity from suit by the United States"). The Department of Labor has taken no action concerning the Nation's 401(k) plan because there is no basis for it.

**C. The Nation Has Not Waived Its Immunity.**

The Nation has not waived its sovereign immunity.

The Plaintiffs may point to the Summary Plan Description (SPD) for the Nation's plan, which states: "If it should happen that Plan fiduciaries misuse the Plan's money . . . , you may seek assistance from the U.S. Department of Labor, or you may file suit in a court of competent jurisdiction." Beakman Decl., Ex. L at 14. That reference does not authorize private enforcement actions in federal court against Indian tribes or arms or instrumentalities because, by virtue of the Nation's immunity, federal courts lack jurisdiction and so are not courts of competent jurisdiction.

In the largely parallel context of state sovereign immunity, a state does not consent to suit in federal court "even by authorizing suits against it 'in any court of competent jurisdiction.'" *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 676 (1999) (quoting *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573, 577–79 (1946)).

Consistent with the rule concerning state sovereign immunity, a contractual provision permitting suit against the Nation in a "court of competent jurisdiction," and not providing for private enforcement suits in federal court, does not waive the Nation's tribal sovereign immunity. *See Oneida Indian Nation v. Hunt Const. Grp., Inc.*, 67 A.D.3d 1345, 1346-47 (N.Y. 4th Dep't 2009) (holding that contractual clause allowing suit to be filed in "a court of competent jurisdiction" did not waive Nation's immunity beyond what it had expressly waived elsewhere in the contract because "the courts of New York are not courts of competent jurisdiction with respect to any other claims"); *Santana v. Muscogee (Creek) Nation, ex rel. River Spirit Casino,* 508 F.

App'x 821, 823 (10th Cir. 2013) ("Although the compact itself waives tribal immunity for tort and prize claims in a 'court of competent jurisdiction,' the term 'court of competent jurisdiction' does not alone confer jurisdiction on state courts because states are generally presumed to lack jurisdiction in Indian Country."). Put another way, "there is no court that has jurisdiction to hear claims for which the government has not waived its sovereign immunity." *W&W Steel, LLC v. Port Auth. of N.Y. & N.J.*, 142 A.D.3d 478, 483 (N.Y. 1st Dep't 2016) (citing *Oneida*, 67 A.D.3d at 1346). The same is true here because reference to "a court of competent jurisdiction" is not a waiver of immunity.

The phrase "court of competent jurisdiction" does not confer federal jurisdiction when it appears in a federal statute, and the principles underlying that rule support the conclusion that the same words in the SPD do not confer federal jurisdiction by waiving the Nation's immunity. Construing a clause in 12 U.S.C. § 1723 authorizing Fannie Mae "to sue and to be sued . . . in any court of competent jurisdiction, State or Federal," the Supreme Court concluded that the clause did not provide for federal jurisdiction. *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82, 88 & 92-93 (2017). "[T]his Court has understood the phrase 'court of competent jurisdiction' as a reference to a court with an existing source of subject-matter jurisdiction." *Id.* at 92. "In authorizing Fannie Mae to sue and be sued 'in any court of competent jurisdiction, State or Federal,' it permits suit in any state or federal court already endowed with subject-matter jurisdiction over the suit." *Id.* at 93. Even the statute's inclusion of the words "State or Federal," which do not appear in the SPD, did not change the result. The Court construed them to mean a state or federal court of competent jurisdiction, meaning pre-existing jurisdiction, and not to specify state and federal courts as courts of competent jurisdiction. Distinguishing an earlier decision, the Court said: "Nothing in *Red Cross* suggests that courts should ignore 'the ordinary sense of the language used[,]' . . . when

confronted with a federal charter's sue-and-be-sued clause that expressly references the federal courts, but only those that are courts 'of competent jurisdiction.'" *Id.* at 94 (citation omitted).

That there was no intent to waive tribal sovereign immunity by the "competent jurisdiction" reference in the Nation's 401(k) plan SPD is underscored by the difference between the SPD's language and the model plan language found in the Department of Labor's ERISA regulations. The SPD copies most of the model plan language in the regulations – but changes it to substitute "court of competent jurisdiction" for "Federal court," which is eliminated. *Compare* Ex. L at 14 (SPD) ("If it should happen that Plan fiduciaries misuse the Plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a court of competent jurisdiction."), *with* 29 C.F.R. § 2520.102-3(t) ("If it should happen that plan fiduciaries misuse the plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a Federal court."). The point of eliminating "Federal court" and substituting "court of competent jurisdiction" obviously was to preserve, not to waive, immunity to suit in "Federal court."

## CONCLUSION

The Court lacks jurisdiction because the sovereign immunity of the Oneida Indian Nation, which has not been Congressionally abrogated or waived by the Nation, extends to Turning Stone and the Committee as arms of the Nation. Consequently, this action should be dismissed with prejudice pursuant to Rule 12(b)(1).

Respectfully submitted,

*/s/ René E. Thorne*
René E. Thorne (Pro Hac Vice)
Stacey C.S. Cerrone (*Pro Hac Pending*)
Alex E. Hotard (*Pro Hac Pending*)
Steven Sheesley (*Pro Hac Pending*)
JACKSON LEWIS P.C.
601 Poydras Street, Suite 1400
New Orleans, Louisiana 70130
Telephone: (504) 208-1755
Facsimile: (504) 208-1759
Rene.thorne@jacksonlewis.com
Stacey.Cerrone@jacksonlewis.com
Alex.Hotard@jacksonlewis.com
Steven.Sheesley@jacksonlewis.com

Benjamin Wilkinson
667 Broadway, 9th Floor
Albany, NY 112207
Telephone: (518) 649 9639
Benjamin.Wilkinson@jackonlewis.com

*/s/ Meghan Murphy Beakman*
Meghan Murphy Beakman (512471)
General Counsel
Oneida Nation Legal Department
Oneida Indian Nation
5218 Patrick Road
Verona, New York 13478
Telephone: (315) 361-7937
Facsimile: (315) 361-8009
mbeakman@oneida-nation.org

*/s/ Michael R. Smith*
Michael R. Smith (601277)
Ivano M. Ventresca (*Pro Hac Forthcoming*)
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, D.C. 20036
Telephone: (202) 778-1800
Facsimile: (202) 822-8106

msmith@zuckerman.com
iventresca@zuckerman.com

*Attorneys for Defendants*