UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

DAVID JONES, KEITH WILCOX and KEELY VONDELL, Individually and on behalf of Oneida Nations Enterprises LLC 401(k) Plan and on behalf of all the similarly situated Participants and beneficiaries of the plan, **Plaintiffs,** **v.** **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,** **Defendants**	**Case Action No. 5:24-cv-01596 (GTS/ML)**

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(B)(1) FOR LACK OF JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Defendants fail to cite a single ERISA case discussing the same issue facing the Court—and not by accident. Defendants seek to ignore the unique statutory framework of ERISA, the purpose of the 2006 Pension Protection Act that amended ERISA and prefer to discuss other areas of law where tribal immunity exists. However, Defendants are not immune from ERISA suit because ERISA abrogated sovereign immunity for tribal commercial plans and Defendants waived sovereign immunity for Plaintiffs' ERISA claims arising from Defendants' breach of fiduciary duties for the tribal commercial plan at issue here: Turning Stone Enterprises LLC 401(k).

In support of its Motion to Dismiss ("MTD"), Defendants fail to provide substantive arguments (or factual support with their numerous submissions outside the complaint) that address the pertinent issues before the Court. Defendants' grandstands and disingenuous statements are unfortunately impossible to ignore in full. Defendants speciously claim that Plaintiffs, "with the benefit of hindsight," "based on slim reeds," offer "a kitchen sink of allegations" in an attempt to cash in on baseless claims. MTD at 9-10. This could not be further from the truth. While these egregious statements aim to distract from the real issues before this Court, Plaintiffs nevertheless must address them.

Plaintiffs do not rely on hindsight for any allegations and rigorously analyze information that was available to Defendants' decision makers at the time. Information that Defendants allegedly considered, per their investment policy statement, when selecting and retaining investments. Compl. ¶¶ 3, 22, 25, 28, 70, 73. Example after example, Plaintiffs explain how Defendants either did not do what they promised to do, or arguably worse, just did not care enough to fix blatant investment issues pervasive throughout the plan for an egregious amount of time. *Id.* at ¶ 67 ("Further, the Committee's process in dealing with Harbor is not a singular and temporary

lack of common sense and judgment, but instead an example of the Committee's consistent and patently imprudent process spanning more than a decade") and ¶ 75 ("The Committee's decision-making with Harbor, FF35, JPMorgan, and AEG funds shows their consistently systematically flawed imprudent process, selecting the more expensive and less yielding option that included revenue sharing."). Plaintiffs are victims of breaches of fiduciary duties because their wages have been wasted and mismanaged for an unbelievable amount of time. *See generally*, Compl. Plaintiffs painstakingly reviewed, analyzed, and compared a tremendous amount of data and data points to support their well-pleaded allegations. *Id*. The fulsome allegations lead to the simple conclusion—Defendants either ignored or didn't respect their fiduciary duties to the class of plan participants, and this suit is the unfortunate and necessary result. Similarly, Plaintiffs have not addressed Defendants' connection to the Oneida Indian Nation or Defendants' relationship with that nation in their complaint for no other reason but that it is simply not relevant to this action. However, while the above needed to be addressed due to Defendants' choices on this limited MTD, Plaintiffs now turn to the actual issue before the Court.

Defendants claim that sovereign immunity bars Plaintiffs' claims. Defendants offer a lengthy analysis as to why Defendants are necessarily intertwined with the Oneida Nation. Plaintiffs do not contest and never intended to contest that Defendants have a connection, however strong, to the Oneida Nation. Defendants only enjoy immunity in certain circumstances, and here, their immunity does not extend to the claims in this action because ERISA abrogates tribal sovereign immunity, and Defendants waived sovereign immunity for Plaintiffs' ERISA claims. This case pertains only to Defendants' violations of ERISA for a *commercial* 401(k) plan, where no such immunity exists.

ARGUMENT

I. Congress Abrogated Tribal Sovereign Immunity in its 2006 Amendment of ERISA

Indian Nations maintain a unique status as quasi-sovereign governments, independent in some respects, but subject to Congress's plenary powers. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."). The Supreme Court holds that "until Congress acts, the tribes retain their existing sovereign powers[.]" *Id.* "Congress need not invoke 'magic words' to abrogate immunity" or "make its clear statement in a single [statutory] section." *F.A.A. v. Cooper*, 566 U.S. 284, 291 (2012); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 76 (2000). According to the Supreme Court, "[t]he clear-statement question is simply whether, upon applying 'traditional' tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is 'clearly discernable' from the statute itself." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023) (quoting *Cooper*, 566 U.S., at 291).

Nothing exemplifies this sentiment more than the recent Supreme Court holding in *Lac du Flambeau*, which found that Congress expressly abrogated tribal sovereign immunity in the Bankruptcy Code even without mentioning "Indian Tribes" anywhere in the statute. 599 U.S. at 394 ("Congress did not have to include a specific reference to federally recognized tribes in order to make clear that it intended for tribes to be covered by the abrogation provision."). When it comes to ERISA, Congressional abrogation of tribal immunity is "clearly discernible" because the 2006 Pension Protection Act amended ERISA to explicitly include "Indian Tribes." Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended at 29 U.S.C. § 1002(32)

(2006)).[1] A close examination of the ERISA statute's structure and Congressional intent in the 2006 amendment shows that Congress wanted tribal government plans to be exempt and retain sovereign immunity, while subjecting commercial tribal plans to *all* of ERISA. When the 2006 amendment is read in tandem with other sections, Congress abrogates Indian Nations' sovereign immunity when they are functioning as commercial employers and creating commercial employee benefit plans.

While this is an issue of first impression in the Second Circuit, courts across the country applying this principle have held that Congress clearly abrogated tribal sovereign immunity in its 2006 amendment for tribal commercial plans. *See Vandever v. Osage Nation Enter., Inc.*, No. 06-CV-380-GKF-TLW, 2009 WL 702776, at *4 (N.D. Okla. Mar. 16, 2009) ("ERISA abrogates tribal sovereign immunity"); *Coppe v. Sac & Fox Casino Healthcare Plan*, No. 2:14-CV-02598-GLR, 2015 WL 6806540, at *3 (D. Kan. Nov. 5, 2015) ("The statutory language of ERISA in 29 U.S.C. § 1003(b)(32) demonstrates that Congress specifically intended for Indian tribes to maintain sovereign immunity for some employee benefit plans and to abrogate it for others."); *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275, 2010 WL 1225342 (10th Cir. March 31, 2010)[2] (in order to determine whether the tribe's Plan is one exempt from ERISA under amended § 1002(32), a court must consider whether substantially all of the services of all of the tribe's employees who are participants in the Plan, performed essential governmental functions"); *Stopp v. Mut. of Omaha Life Ins. Co.*, No. CIV-09-221-FHS, 2010 WL 1994899, at *3 (E.D. Okla. May 18, 2010) (finding tribal plan subject to the provisions of ERISA); *Bolssen v. Unum Life Ins. Co. of Am.*, 629 F. Supp. 2d 878, 883 (E.D. Wis. 2009) (holding that the Oneida plan in question is not

[1] Hereafter referred to as the 2006 amendment.
[2] The Tenth Circuit is well-versed in tribal issues as it encompasses 68 federally recognized tribes while the Second circuit only has approximately 13.

a governmental plan exempt from ERISA). These courts correctly interpreted the 2006 amendment.

A. Congressional Intent and History of ERISA

Congress specifically intended for Indian Nations to maintain sovereign immunity for some employee benefit plans and to abrogate it for others. 29 U.S.C. 1003(b)(32); *Dobbs,* WL 1225342. Importantly, ERISA exempts governments from application, meaning there are no suits against governments because such claims simply do not exist. 29 U.S.C. § 1002(32). Historically, the exception defined "government plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." *Id.* In 2005, Congress considered adding a provision in 29 U.S.C. § 1002(32) that would wholly exempt Indian Nations and retain their tribal immunity:

> [a plan] established and maintained by an Indian tribal government (as defined in section 7701(a)(40) of the Internal Revenue Code of 1986), a subdivision of an Indian tribal government (determined in accordance with section 7871(d) of such Code), an agency or instrumentality of an Indian tribal government or subdivision thereof, or an entity established under Federal, State, or tribal law that is wholly owned or controlled by any of the foregoing.

S. 1783, 109th Cong. § 1313(b) (2005). However, Congress amended the exemption and chose to enact a much more specific formulation that removes tribal commercial plans from the exemption and thus removes sovereign immunity. *Compare Id. with* Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780. The next version, and the version that actually passed as the amendment, shows Congress contemplated abrogation of immunity for commercial plans. 29 U.S.C. § 1002(32). The language demonstrates ERISA protects tribal immunity *only if* all the employees in the plan established by an Indian tribe are "in the performance of essential

governmental functions but not in the performance of commercial activities [whether or not an essential government function].” *Dobbs*, 2010 WL 1225342 at *1285.

The legislative history behind this amendment further explains and emphasizes that Congress wanted to eliminate legal ambiguity as to the status of employee benefit plans established and maintained by tribal governments. *See* Alicia K. Crawford, *The Evolution of the Applicability of ERISA to Indian Tribes: We May Finally Have Cong. Intent, but It's Still Flawed*, 34 AM. INDIAN L. Rev. 259, 278 (2010)[3] (“After thirty-two years, and no doubt in part a response to the NCAI's resolution, Congress finally broke its silence regarding whether ERISA would govern a tribal employee benefit or pension plan.”); *Practical Reasoning and the Application of General Federal Regulatory Laws to Indian Nations*, 22 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 123, 130 (2016) (Before ERISA included specific reference to Indian Nations, it was maintained as a general applicability regime). Congress directs that commercial tribal plans are subject to all of ERISA as employers (defined in the Act), and tribal *governmental* plans are exempt and not subject to any of ERISA’s provisions. *See* 150 Cong. Rec. S9526, 9533. (ending the different interpretations of courts on how to determine whether a tribal governmental plan is subject to all of ERISA); *cf. Donovan v. Coeur d'Alene Tribal Farm*. 751 F.2d 1113, 1114 (9th Cir. 1985); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991). Thus, ERISA explicitly limited tribal commercial plans’ sovereign immunity and made an intentional distinction between commercial and governmental plans, after previously considering language that did not make this distinction.

[3] Even scholars with favorable views towards Indian Tribal sovereignty like the one cited here admit that ERISA must apply, and that the 2006 amendment abrogates tribal sovereign immunity. (“ERISA would abrogate tribal immunity as to the plans that did not fall under this [government plans] definition.”).

Similarly, Congress never intended to carve out or sever portions of ERISA, nor is the abrogation limited to only certain sections of ERISA. *See* 29 U.S.C. § 1003(b); 29 U.S.C. § 1002. Again, Congressional intent to abrogate tribal sovereign immunity for commercial tribal plans necessarily follows because, absent abrogation, there is no logical way to govern tribal commercial plans like Congress intended. Due to the 2006 amendment, tribal commercial employers must be included in the Act's definition of "employer," "persons," and "fiduciary." *See generally*, 29 U.S.C. § 1002. Reading this differently annuls the purpose of the amendment and spirals this area of law back into pre-amendment uncertainty.

The reasoning behind the congressional intent to distinguish commercial and governmental tribal plans is based on Congress's power to regulate interstate commerce and, indeed, this purpose underlies ERISA's 2006 amendment. U.S. CONST. art. I, § 8, cl. 3. 153. Congress stated that the recent growth in employee benefit plans "has been rapid and substantial[,] that the operational scope and economic impact of such plans is [sic] increasingly interstate[,] ... that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce," and that disclosure of such plans and the requirements thereof is needed "to provide for the general welfare and the free flow of commerce." 29 U.S.C. § 100 1(a) (2006). The same is true for Defendants and other Indian Nations that are increasingly engaging in business activities and commerce with people and business organizations inside and outside reservations. Congress decided to treat Indian Nations' commercial plans the same as any other commercial employer. *See generally*, Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor and Employment Law*, 2008 MICH. ST. L. REV. 435, 446-47; *see also* Ex. H. Accordingly, commercial tribal plans are employers and fiduciaries that must uphold the obligations and standards of ERISA,

they fall squarely into the original intent of Congress in enacting ERISA, and are subject to "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001.

Defendants fail to properly interpret ERISA and the 2006 amendment. Instead, Defendants try to analogize substantially different Federal Statutory schemes and draw false equivalencies to purport that ERISA does not abrogate tribal sovereign immunity. Defendants' analysis contradicts the consensus from the judiciary, government, agencies, and scholars illustrated throughout this brief and falls apart when examined closely.

Defendants falsely analogize the Federal Medical Leave Act ("FMLA") with ERISA. FMLA is completely silent to Indian Tribes—ERISA is not. 29 U.S.C. § 2601 *et seq*.; MTD at 17; *see* Ezekiel J.N. Fletcher, *De Facto Judicial Preemption of Tribal Labor & Employment Law*, 2008 Mich. St. L. Rev 435, 459 (2008). Defendants try to draw the same false equivalency with the Age Discrimination in Employment Act ("ADEA") which is similarly silent as to Indian Tribes. *Id*.; 29 U.S.C. § 621 *et seq*; *see e.g. EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001) (finding the ADEA is silent with respect to Indian Nations); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (same). The FMLA and ADEA comparisons are wholly inapplicable as we are no longer in the pre-2006 amendment era when ERISA was silent. But contrary to the ADEA, ERISA historically applied to Indian Nations. *See, e.g*., *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (applied ERISA to Tribal plan); *Smart v. State Farm Insurance Co*. 868 F.2d 929 (7th Cir. 1989) (same). ERISA is not so ambiguous. Defendants rely on Second Circuit rulings on the Americans with Disabilities Act ("ADA") that found no waiver of sovereign immunity. 42 U.S.C. § 12101 *et seq.*; MTD at 17. The ADA analogy is arguably an even worse comparison because there, Congress expressly exempted Indian Tribes from the definition of "employer." 42

U.S.C. § 12111(5)(B)(i). The ADA provides: "[t]he term "employer" does not include-- (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe. . . ." 42 U.S.C. § 12111(5)(B)(i). ERISA is the opposite, as it shows express Congressional intent to include commercial tribal plans as subject to all of ERISA requirements for "employers" and "fiduciaries." *See* 29 U.S.C. § 1002.

Further, Defendants also rely on a Second Circuit case on the Indian Civil Rights Act ("ICRA") and makes a misleading proposition of law by inserting "ERISA" into a quote about ICRA. *See* MTD at 17 ("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.'"). ICRA could not be more different in its legislative history, purpose, and statutory text than ERISA. In ICRA, the bill of rights was extended to Native Americans, which, according to Congress, are better enforced in tribal courts that are more familiar with the traditions and customs relevant to ICRA provisions. *See* Robert D. Probasco, *Indian Tribes, Civil Rights, & Fed. Courts*, 7 TEX. WESLEYAN L. REV. 119, 130 (2001). Again, no equivalency can be drawn to ERISA, which was enacted to protect employees' benefits promised by their commercial employers and amended to explicitly include tribal commercial plans to achieve that purpose, abrogating their sovereign immunity for ERISA actions. Probasco's analysis of *Santa Clara Pueblo v. Martinez*, the case Defendants use in their quotation, illustrates the vast differences that led to such a determination:

> The basis for Justice Marshall's conclusion can be summarized as: (1) the ICRA is intended not only to protect individuals against the tribe but also to further Indian self-government; 2) federal enforcement of civil rights against the tribe conflicts with the goal of strengthening self-government;(3) Congress rejected proposals for other methods of federal review of ICRA violations; (4) the tribes who testified at the House hearings apparently did not think that federal jurisdiction for causes of action other than habeas corpus was authorized by the ICRA; (5) federal remedies other than habeas corpus are not essential to the enforcement of these limitations on tribal power; and (6) the tribal courts would be more familiar than federal courts with traditions and customs relevant to actions to enforce ICRA provisions.

Id. (summarizing 436 U.S. 49 (1978)). Therefore, inserting ERISA into an ICRA determination is entirely inappropriate.

The statutes that the courts in Defendants' cited cases (FLMA, ADA, ADEA, and ICRA) are not similar at all to ERISA, and for those differences, the result in analyzing ERISA must also be different. Courts note and understand these differences, which are reflected in ERISA decisions across the country, both pre-amendment and especially post-2006 amendment. This is why Defendants do not cite applicable ERISA case—ERISA case law and text do not support Defendants' argument.

The cases that Defendants cite that engage with ERISA do not deal with the same issue before this Court. All but one are pre-amendment cases that treat ERISA as a general applicability regime silent to Indian Tribes. *See* MTD at 16 (citing *Shanbaum v. United States*, 32 F.3d 180, 182 n.2 (5th Cir. 1994) to support the only waiver is for certain suits against the United States); MTD at 17 (Citing the pre-amendment case, *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) to support that ERISA contains no language abrogating immunity from suit). The 2006 amendment renders these cases irrelevant. The only case Defendants cite that even facially looks at ERISA post-amendment is *Francis v. Perez*, which responded to a tacked-on ERISA claim and only addresses the circumstances where the United States government may be sued. 256 F. Supp. 3d 1 (D.D.C. 2017) ("[Plaintiff] offers nothing but a barren cite to ERISA"). *Francis* only concerns the federal government waiver from suit, and federal sovereign immunity was unaffected by the 2006 amendment. *See Id.* None of these courts considered or took note of the changes Congress made to section 1002(32) to limit tribal commercial plan sovereign immunity.

Lac du Flambeau instructs that Congressional abrogation of sovereign immunity need not use "magic words" or "state its intent in any particular way." 599 U.S. at 388 (internal quotations omitted). Congress does not even need to "make its clear statement in a single statutory section." *Id*. Congressional intent must be "clearly discernible." The Congressional intent of the 2006 amendment is clear to limit and abrogate tribal sovereign immunity for commercial tribal plans. Nevertheless, Defendants ask for "magic words." Defendants list and read separate definitions and sections of ERISA and claim that the statute does not expressly abrogate ERISA. *See* MTD at 16. Such an approach contradicts the analysis of abrogation provided by the Supreme Court, the history and particularities of ERISA, and the consensus of interpreting the 2006 amendment. History, Congressional intent, and interpretation all show "clearly discernible" abrogation of tribal sovereign immunity for commercial plans.

B. Turning Stone Cannot Claim Immunity Because it is a Commercial Employer

This Court should apply the "essential governmental functions" and "commercial activities" standard intended by Congress to determine whether Defendants' plan is exempt from ERISA and can claim sovereign immunity. 599 U.S. at 394 ("As long as Congress speaks unequivocally, it passes the clear-statement test—regardless of whether it articulated its intent in the most straightforward way."). To find out whether a plan is commercial or governmental "requires a fact-specific analysis of the plan and nature of the plan's participants' activities." 29 U.S.C. § 1002(32); 475 F.3d at 1176. In addition to judicial interpretation, the Joint Committee on Taxation's (JCX) Technical Explanation of the pertinent section of the Pension Protection Act[4] provides some possible guidance as to what constitutes "commercial activities." Joint Comm. on Taxation, JCX-38-06, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006," as

[4] The 2006 amendment of ERISA.

Passed by the House on July 28, 2006, and as Considered by the Senate on August 3, 2006 (2006). For instance, the JCX includes as an exempt governmental plan one held by teachers in tribal schools, but this exemption would not protect a plan held by an employee of "tribally owned or operated hotels, casinos, service stations, convenience stores, or marinas, as the work conducted by the tribal employees would presumably be 'in the performance of commercial activities,' regardless of whether such activities were an essential governmental function." *Id.*

Here, the answer is clear: Defendants' plan is a commercial plan that is not exempt from ERISA and cannot claim sovereign immunity. As Defendants' own exhibits state—all employees can participate. Ex. D. The plan includes all employees, whether they are commercially employed in entertainment, casino, lodging, hotel, police, or other areas.[5] *See* MTD; Ex. D. This plan does not come close to meeting the narrow test for exempt plans where "substantially all of the services of all of the tribe's employees who are participants in the Plan, performed essential governmental functions" because it includes all commercial, and probably majority, casino employees. 29 U.S.C. § 1002(32). Whether the named plaintiffs were performing essential governmental functions is immaterial—it only matters if the plan was exclusive for government employees performing government tasks, which it is not.

As discussed above, it is not the first time a defendant tried to argue immunity in an ERISA case post-2006 amendment. In *Coppe v. Sac & Fox Casino Healthcare Plan*, the court addressed the exact issue this Court is faced with here: did the 2006 Amendment abrogate immunity for Indian Tribes as commercial employers. The court found, in pertinent part, "***Congress's 2006 amendments to ERISA constitute an unequivocal waiver of sovereign immunity*** for tribal

[5] Counsel is currently in discussions with several other employees interested in potentially joining this action that worked as card dealers, convenience store shift managers, and sales managers.

employee plans that perform commercial functions." *Coppe v. Sac & Fox Casino Healthcare Plan*, No. 2:14-CV-02598-GLR, 2015 WL 6806540, at *3 (D. Kan. Nov. 5, 2015) (emphasis added); *Vandever v. Osage Nation Enter., Inc.*, No. 06-CV-380-GKF-TLW, 2009 WL 702776, at *4 (N.D. Okla. Mar. 16, 2009) (concluding that a "Congressional waiver has abrogated tribal sovereign immunity with respect to ERISA cases"). Only tribal government plans enjoy immunity, commercial plans do not. *Id.* No court has ever held that ERISA does not abrogate sovereign immunity when it comes to tribal commercial plans because Congress demands tribal commercial employers play by the rules and subjects them to ERISA in full force.

II. Defendants waived sovereign immunity when it comes to Plaintiffs' ERISA rights.

Additionally, Defendants also waived sovereign immunity for Plaintiffs' ERISA rights. The governing plan document lists several ways that a participant may bring action against the plan holders. MTD; Ex. L. The ERISA plan document is, in essence, the contract in question here. *Coppe*, 2015 WL 6806540 (In addition to finding ERISA abrogated immunity from suit, the court also found the Indian Nation waived immunity in its plan documents); *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 82 (2d Cir. 2001) (examining "ERISA plan documents" to ascertain what right were promised to Plaintiff); *Am. Fed'n of Grain Millers, AFL-CIO v. Int'l Multifoods Corp.*, 116 F.3d 976, 982 (2d Cir. 1997) (same). Defendants drafted the document, as is usually the case, and plan participants had no input into the language or terms.

Defendants, by their own volition, included attractive contractual language that first lists plan participants ERISA rights in a section titled "A. Statement of ERISA Rights" that discusses plan participant right to "Receive information About Your Plan and Benefits," "Prudent Actions by Fiduciaries," "Enforce your Rights," and "Assistance with Your Questions". *See* Defendants' MTD; Ex. L at 16-17. The "Receive information About Your Plan and Benefits" section explains

plan participants' rights under ERISA, mirroring section 104(b) to obtain and review certain plan documents. The "Prudent Actions by Fiduciaries" section explains that the people who operate the plan are "fiduciaries" and have a duty to prudently invest their wages and a duty to act in the interest of plan participants and beneficiaries, again consistent with ERISA fiduciary duties. Ex. L at 17. This section also explains that "[n]o one, including your [e]mployer, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a retirement benefit or **exercising your rights under the Plan and applicable law**"—ERISA. *Id.* (emphasis added).

Then, the "Enforce your Rights" section explains that plan participants may enforce their rights given in the above section generally given by ERISA in "a court of competent jurisdiction," well knowing that tribal courts have no authority to adjudicate ERISA matters and the only competent jurisdiction courts for "ERISA Rights" are exclusively in federal Court.[6] *Id.* at 16-17; *Peabody Holding Co., LLC v. Black*, No. CV-12-08252-PCT-DGC, 2013 WL 2370620, at *1 (D. Ariz. May 29, 2013). Defendants' contract explains that Plaintiffs have ERISA rights that they may enforce in "a court of competent jurisdiction" and thereby waived any sovereign immunity it may be able to claim in this Court of competent jurisdiction. No magic language is required to find waiver of sovereign immunity in a contract setting. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418–19 (2001).

The Supreme Court weighed in on an analogous issue and concluded that an Indian Tribe can waive its right to assert sovereign immunity by contractually agreeing to a resolution procedure. *Id.* In that case, Potawatomi Indian Nation agreed to adhere to certain dispute resolution

[6] Subject to one exception where US state courts have concurrent jurisdiction for section 1132(a)(1)(B) claims.

procedures, but when it was time to enforce a judgment arising from that procedure, they asserted that "no court on earth or even on the moon" had jurisdiction to enforce it. *Id.* at 421. The Court, rightfully, didn't buy this argument because the alternative dispute resolution procedure the tribe agreed to had "a real-world objective" and the tribe couldn't avoid the practical consequences of their agreement. *Id.*

Here, it seems Defendants engage in similar gamesmanship, contractually promising ERISA rights enforceable in a court of competent jurisdiction to Plaintiffs and all plan participants, while simultaneously claiming in its Motion that it cannot be sued at all. Defendants try to argue that this language is meaningless and only included as a trick because Defendants claim it can dodge the practical real-world application of that language. Plaintiffs cannot turn to Tribal courts because such courts hold no jurisdiction to adjudicate ERISA matters, and here in the proper jurisdiction—Federal Court—Defendants now try to claim immunity from the enforcement they promised, negating its contractual promise of enforceable ERISA rights. *See* 29 U.S.C. 1132(e)(1); *Peabody Holding Co., LLC v. Black*, No. CV-12-08252-PCT-DGC, 2013 WL 2370620, at *1 (D. Ariz. May 29, 2013) (ruling that tribal courts do not have jurisdiction to adjudicate ERISA matters regardless whether the claim falls under exclusive federal jurisdiction, or the one type of excepted claim that gives concurrent jurisdiction with the state courts); *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004) (citing a tribal court decision that held a tribal court has no jurisdiction over the Plaintiffs' ERISA claims).

Defendants cannot abdicate their contractual obligation in their plan documents. *See Coppe*, 2015 WL 6806540 (holding that defendant waived sovereign immunity). This Court should not allow this contractual gamesmanship and hold Defendants to their promise just like the Supreme Court did in *C & L Enterprises, Inc.* and *Coppe.* 532 U.S. at 422; 2015 WL 6806540.

Defendants waived their right to claim sovereign immunity for ERISA claims in this Court of competent jurisdiction. To hold otherwise would render Defendants' promises of ERISA rights and enforcement meaningless and oppose the Supreme Court's treatment of this issue.

CONCLUSION

The Court maintains jurisdiction because ERISA abrogates sovereign immunity of the Oneida Indian Nation and its commercial enterprises. Additionally, Defendants waived sovereign immunity in their contractual terms of the plan documents. Consequently, the Court should deny the motion to dismiss.

Dated: March 28, 2025

Respectfully submitted,

/s/ Gary M. Klinger
Gary M. Klinger (admitted *pro hac vice)*
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
227 W. Monroe Street, Suite 2100
Chicago, IL 60606
Phone: 866-252-0878
gklinger@milberg.com

Alex Rudenco (admitted *pro hac vice)*
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
800 S. Gay Street, Suite 1100
Knoxville, TN 37929
Phone: (865) 247-0080
arudenco@milberg.com

Randi Kassan
MILBERG COLEMAN BRYSON PHILLIPS GROSSMAN, PLLC
100 Garden City Plaza, Suite 500
Garden City, NY 11530
Phone: 516-741-5600
rkassan@milberg.com

Attorneys for Plaintiffs and the Prospective Class

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2025, I caused a true and correct copy of the foregoing document to be filed with the Clerk of the Court for the Northern District of New York via the Court's CM/ECF system, which will send notification of such filing to the counsel of record in the above-captioned matter.

/s/ Gary M. Klinger