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, **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**	**Civil Action No.: 5:24-cv-01596 (GTS/ML)**

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

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INTRODUCTION

Plaintiffs' opposition at page 2 agrees that Defendants Turning Stone and the Committee are arms of the Nation, which means that they share in the Nation's immunity unless it is clear that Congress abrogated tribal immunity or that the Nation waived its immunity. The opposition then fails to address, much less dispute, key legal and factual points in our moving papers concerning abrogation and waiver and, in any event, offers nothing showing clear abrogation or waiver.

In arguing abrogation, the opposition does not claim to identify text in ERISA that subjects Indian tribes to private civil enforcement suits. It argues instead that a 2006 amendment to ERISA that exempted tribal governmental plans but not tribal commercial plans must have been intended to subject tribes to private suits in federal court concerning commercial plans. At best, the opposition is arguing that, because Congress accepted ERISA's *applicability* to tribal commercial plans, it *abrogated* tribal immunity to suit concerning them. But the opposition oddly does not dispute the controlling legal rule that the question of a statute's *applicability* to an Indian tribe is distinct from the question of *abrogation* of tribal sovereign immunity to private civil enforcement. Consequently, the argument in the opposition that applicability equals abrogation of immunity is made in the teeth of an undisputed controlling legal rule – and so is irrelevant here and doomed. The opposition's pivot toward the 2006 amendment's scant legislative history is also irrelevant and doomed. The Supreme Court has been crystal clear that abrogation of tribal sovereign immunity must be found in statutory text and that legislative history is not a substitute.

In arguing waiver, the opposition does not dispute that the controlling legal rule requires a waiver to be clear. Yet it does not even assert that there has been a clear waiver here. The opposition nonetheless argues that a naked reference in a plan document to a "court of competent jurisdiction" is a waiver of immunity. Our moving papers demonstrated that the phrase has been

construed by the Supreme Court to mean pre-existing jurisdiction and does not confer jurisdiction, as it would if it were an immunity waiver. The opposition does not respond to that argument. Nor does it respond to the argument that the Nation preserved its immunity by changing ERISA's model language from "Federal court" to "court of competent jurisdiction." That change leaves the Nation free to decide whether or not to assert its immunity to suit in federal court or to open its own tribal court to ERISA plaintiffs. But, otherwise, the Nation and arms of the Nation are immune.

ARGUMENT

I. The Opposition Does Not Show That ERISA Abrogates Immunity.

A. The Opposition Does Not Identify A Clear Statement In ERISA Subjecting Tribes To Suit.

Plaintiffs' opposition acknowledges that an "unequivocally" "clear statement" by Congress is required to abrogate tribal immunity and that Congress's abrogation must be clearly discernable from the statute itself. Opp. at 3 & 11. The opposition, however, does not claim to identify any words in ERISA that address tribal immunity or subject Indian tribes to suit.

The opposition argues that "[c]ongressional abrogation of tribal immunity is 'clearly discernible' because the 2006 Pension Protection Act amended ERISA to explicitly include 'Indian Tribes.'" Opp. at 3. It did not. The amendment *excludes* tribal governmental plans, narrowing ERISA's reach. 29 U.S.C. § 1002(32). As Plaintiffs' opposition notes, ERISA "historically applied to Indian Nations" because some courts so held prior to the amendment. Opp. at 8. Accordingly, the amendment limits ERISA's applicability to tribes by excluding tribal government plans. The amendment's narrowing of ERISA's applicability to tribes is not an abrogation of immunity.

Even if the 2006 amendment could be read as "explicitly includ[ing] 'Indian Tribes,'" Opp. at 3, that would not abrogate immunity. When Congress abrogates immunity, "it has done so in clear language." *E.g.*, *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 546 (2d Cir.

1991) (identifying examples of abrogation, including statute "authorizing Navajo and Hopi tribes 'to commence or defend . . . an action against each other'"). Plaintiffs have not offered any such "clear language."

The Supreme Court just last year explained that it "has found a clear waiver of sovereign immunity 'in only two situations.'" *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42, 49 (2024) (citation omitted); *see Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 (2023) ("We have invoked that clear-statement rule, and applied it equivalently, in cases naming the federal government, States, and Indian tribes as defendants."). "The first is when a statute says in so many words that it is stripping immunity from a sovereign entity." *Kirtz*, 601 U.S. at 49. The second is "when a statute creates a cause of action and explicitly authorizes suit against a government on that claim." *Id.*; *see United States v. Miller*, 2025 WL 906502, at *11 (U.S. Mar. 26, 2025) ("If Congress establishes a cause of action that – by its own explicit terms – authorizes suits against the Government, then Congress need not also enact an independent waiver of sovereign immunity."). The opposition understandably does not argue that the 2006 amendment can be fit into either category one or category two. It follows that the amendment does not contain an abrogation of tribal immunity.

The opposition implies it is easy to meet the requirement of clear abrogation, describing the Supreme Court as having found clear abrogation in a statute that does not refer to Indian tribes, citing *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023). Opp. at 3. Unlike the 2006 ERISA amendment, the bankruptcy statute at issue in *Lac du Flambeau* comfortably fits within the first category in *Kirtz*. It contains a provision explicitly abrogating the immunity of "governmental units." 599 U.S. at 387. The statute then defines "governmental unit." *Id.* The Court concluded that the statute so broadly defines "governmental

unit" as to "unequivocally abrogate[] the sovereign immunity of any and every government that possesses power to assert such immunity. Federally recognized tribes undeniably fit that description; therefore, the Code's abrogation provision plainly applies to them as well." *Id*. at 386-88; *see id*. at 385 (must convey "intent to abrogate in unequivocal terms"), 387 (abrogation must be "unmistakably clear in the language of the statute") (internal quotation marks and citation omitted), ("clear-statement rule is a demanding standard"). *Lac du Flambeau* thus shows what is missing here and why the 2006 amendment does not abrogate tribal immunity.

Pivoting away from the 2006 amendment's text, the opposition invokes its legislative history. That invocation is an admission of defeat. "[I]t is error to displace sovereign immunity based on inferences from legislative history without clear statutory direction." *Kirtz*, 601 U.S. at 58 (A court "charged with asking whether Congress has spoken clearly has its answer long before it might have reason to consult the Congressional Record."). In any event, the opposition identifies nothing at all in the legislative history regarding tribal immunity or subjecting tribes to suit.

B. The Opposition Erroneously Equates Applicability And Abrogation.

Without a clear statement in ERISA abrogating immunity, the opposition argues repeatedly that Congress subjected Indian tribes to suit in 2006 by distinguishing tribal governmental and commercial plans and exempting tribal governmental plans, implying ERISA's applicability to tribal commercial plans. *E.g.*, Opp. at 4-6 & 11. But, as we explained in our moving papers, applicability and abrogation are distinct questions, and so applicability of a statute to Indian tribes does not equal abrogation of tribal immunity, a legal principle resting on ample Supreme Court and Second Circuit precedent and not subject to reasonable dispute. *See* Mem. at 17-18 (collecting

cases). Tellingly, the opposition does not dispute this legal principle. Consequently, the opposition's repeated reliance on some version of the formula applicability = abrogation is futile.

The opposition dismisses important Supreme Court and Second Circuit precedents as irrelevant because they do not concern ERISA. Opp. at 8-10. Those cases show, however, that the applicability of a statute to tribes does not mean that Congress abrogated tribal immunity. The clearest example is the Indian Civil Rights Act. As its title shows, the statute is all about tribes, explicitly imposing obligations and limitations on them. Yet the Supreme Court held that the statute does not abrogate immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) ("Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."); *accord*, *Michigan v. Bay Mills Indian Comm.*, 572 U.S. 782 (2014) (no abrogation of tribal immunity to suit by a state for tribal violation of Indian Gaming Regulatory Act); *Salamanca*, 928 F.2d at 546 (no abrogation of tribal immunity for alleged violations of federal statute regarding tribe's leases); *Vann v. Kempthorne*, 534 F.3d 741, 747 (D.C. Cir. 2008) ("Congress can impose substantive constraints upon a tribe without subjecting the tribe to suit in federal court to enforce those constraints, as the Supreme Court made clear in *Santa Clara Pueblo*."); *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1232 (11th Cir. 2012) ("a tribe may retain its immunity from suit even where its conduct is governed by state and federal law").

Notwithstanding a contrary suggestion in the opposition, Opp. at 8-9, the multiple Second Circuit decisions about statutes that do not expressly mention tribes are relevant. In those cases, the Second Circuit assumed that the statutes *do* apply to tribes and held that tribal immunity remains intact. *See, e.g.*, *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2d Cir. 2001); *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000).

The opposition argues that "Second Circuit rulings on the Americans with Disabilities Act ('ADA') that found no waiver of sovereign immunity" are irrelevant because the ADA excludes tribes from a definition of employer under Title I of the statute. Opp. at 8. But the case to which the opposition is referring is an Eleventh Circuit case, and the provision of the ADA at issue was not Title I, but rather Title III. *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1133 n.17 (11th Cir. 1999). Title III does not exclude tribes.

Like Plaintiffs here, the *Miccosukee* plaintiffs argued that a statute's exclusion of tribes from its applicability in one respect showed an abrogation of immunity in another respect where the statute applies to tribes. They "argue[d] that evidence of Congress's intent to subject Indian tribes to the requirements of Title III is found in Title I of the ADA," which "excludes Indian tribes from the definition of 'employer,' thus exempting them from coverage of that portion of the ADA." *Id*. The court explained that "[t]his argument supports the conclusion we reached . . . that Title III applies to Indian tribes" even though it does not mention them. *Id*. However, the fact that Title III applies to tribes "sheds no light upon the critical question of whether tribes also may be sued by private citizens for violating the law." *Id*. The court held that the applicability of Title III of the ADA to tribes was insufficient to abrogate tribal immunity. *Id.* at 133-34. The same analysis applies to ERISA.

The opposition argues that "tribal commercial employers *must be* included in the Act's definition" of various terms because, "absent abrogation, there is no logical way to govern tribal commercial plans." Opp. at 7 (emphasis added). As we have explained, the federal government can enforce ERISA against tribes, just as it can enforce OSHA, which is silent as to tribes. Mem. at 18-19; *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (OSHA). The

argument that tribal commercial employers "*must be*" included is an implicit admission that Congress did not include them – and thus that there is no clear abrogation of immunity.

Finally, Plaintiffs identify five out-of-circuit cases supposedly holding that the 2006 amendment abrogates tribal immunity. Opp. at 4. Three – *Dobbs*, *Stopp* and *Bolssen* – say nothing at all about tribal immunity under ERISA. The two unpublished district court decisions – *Vandever* and *Coppe* – do hold that the amendment abrogated tribal immunity but are clearly erroneous. Both make the same mistake as the opposition, erroneously equating applicability of ERISA with abrogation of tribal immunity.

II. The Opposition Does Not Demonstrate A Clear Immunity Waiver.

The opposition remarkably never asserts it is "clear" that the Nation waived immunity. But that is the standard for finding a waiver of tribal sovereign immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). In the absence of argument that the standard has been met, Plaintiffs' waiver argument must fail. Plaintiffs have the burden to prove a clear waiver of tribal sovereign immunity. *Garcia*, 268 F.3d at 84.

The opposition finds a waiver in a summary plan document (SPD) indicating that employees may file suit in "a court of competent jurisdiction." Opp. at 14. Yet the opposition fails to offer any response to arguments in our moving papers showing that the SPD contains no waiver.

We explained that the SPD tracks the notice-to-participants language of a federal regulation, *except* that the SPD deletes the regulation's provision that "you may file suit in a Federal court" and instead states that "you may file suit in a court of competent jurisdiction." Mem. at 21. "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.'" Mem. at 21. The opposition does not dispute that argument. Opp. at 13-16; *cf. Coppe v. Sac & Fox Casino*

Healthcare Plan, 2015 WL 6806540, at *4 (D. Kan. Nov. 5, 2015) (waiver where tribe included model language that plan member "may file suit in a federal court").

We also argued (1) that the reference to a "court of competent jurisdiction" in the SPD does not waive the Nation's immunity because the Supreme Court analogously has held that a state does not waive immunity to suit in federal court by agreeing to suit in a "court of competent jurisdiction" (Mem. at 19); (2) that the Fourth Department has held that the phrase "court of competent jurisdiction" in a Nation contract is not a waiver of immunity (Mem. at 19-20); and (3) that federal statutes providing for suit in a "court of competent jurisdiction" refer to pre-existing jurisdiction and do not confer jurisdiction where it does not already exist, as it does not with respect to an immune Indian tribe (Mem. at 20-21). The opposition does not contest these arguments.

The opposition's reliance on *C & L* is misplaced. Opp. at 14-15. In *C & L*, the Court was not construing generic "court of competent jurisdiction" language unaccompanied by any forum or dispute resolution details. Rather, the Court construed an agreement to arbitrate and attendant circumstances, not involved here, that made waiver clear. 532 U.S. at 414-16 & 419-21.

In *C & L*, the tribe conceded that it contractually waived immunity to arbitration, and so the only issue was an Oklahoma state court's jurisdiction to enforce an arbitration award. *Id*. at 422. The contract specifically incorporated AAA rules providing that "Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Id*. at 415. The contract also stated that it was governed by Oklahoma law, which provided that making an agreement in Oklahoma to arbitrate "*confers jurisdiction* on the [Oklahoma] court to enforce the agreement . . . and to enter judgment on an award thereunder." *Id*. (emphasis added). Unsurprisingly, the Supreme Court held that those contractual agreements and incorporations established a waiver of immunity.

In contrast to *C & L*, which involved a conceded waiver of immunity to arbitration and thus conferred jurisdiction on an Oklahoma court to enforce an arbitral award pursuant to AAA Rules and Oklahoma law, the naked phrase "court of competent jurisdiction" at issue here is not accompanied by any immunity waiver and incorporates nothing vesting or conferring jurisdiction on any court. *See Deschutes River All. v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1159 (9th Cir. 2021 ("There is a strong presumption against waiver of tribal sovereign immunity."); *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1245 (8th Cir. 1995) (purported waivers of tribal sovereign immunity are "strictly construed in favor of the tribe").

The opposition's final stab at turning "court of competent jurisdiction" into a waiver to suit in federal court is to suggest that the phrase can have no other meaning. Opp. at 15. That is not so. First, referring generically to a court of competent jurisdiction does not mean that there is one. Second, an Indian tribe sued in federal court can decide to waive immunity, and then the court would have jurisdiction. Third, the Nation's court would be a "court of competent jurisdiction" if the Nation enacts an ordinance granting the Nation court jurisdiction to decide disputes about the Nation's 401(k) plan. While ERISA is preemptive, requiring suit in federal court, that does not mean that an Indian tribe cannot confer jurisdiction on its court to decide ERISA disputes if a plaintiff voluntarily chooses to litigate in that forum and the Nation has waived immunity to such litigation.

CONCLUSION

The Court should dismiss this action with prejudice pursuant to Rule 12(b)(1).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I caused to be filed on April 4, 2025, this reply to Plaintiffs' opposition to Defendants' motion to dismiss under Rule 12(b)(1) for lack of jurisdiction with the Court using the CM/ECF system, which will send notice of its filing to all counsel of record.

/s/ Michael R. Smith
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