

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION, by and through its lawful governing  
body, the CAYUGA NATION COUNCIL,

*Plaintiff*

Case No. 5:22-cv-128  
(BKS/ATB)

v.

DUSTIN PARKER, NORA WEBER, JOSE VERDUGO, JR.,  
ANDREW HERNANDEZ, PAUL MEYER, BLUE BEAR  
WHOLESALE, LLC, IROQUOIS ENERGY GROUP, INC.,  
JUSTICE FOR NATIVE FIRST PEOPLE, LLC, AND C.B.  
BROOKS, LLC, AND JOHN DOES 1-10,

*Defendants.*

**MEMORANDUM OF LAW IN OPPOSITION TO REQUEST FOR A PRELIMINARY  
INJUNCTION**

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**TABLE OF CONTENTS**

	<b>Page</b>
PRELIMINARY STATEMENT .....	1
COUNTERSTATEMENT OF FACTS .....	2
I.    The Parties .....	2
II.   Pipekeepers Stores .....	3
LEGAL STANDARD.....	5
ARGUMENT.....	6
I.    Plaintiff Fails to Allege Irreparable Harm .....	6
II.   The Plaintiff is Unlikely to Succeed on the Merits of the Case.....	8
III.  The Balance of Equities Favors the Defendant, not the Plaintiff .....	9
CONCLUSION.....	11

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Am. Inst. of Chem. Engineers v. Reber-Friel Co.</i> , 682 F.2d 382 (2d Cir. 1982).....	10
<i>Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.</i> , 187 F.3d 229 (2d Cir. 1999).....	8
<i>Doninger v. Niehoff</i> , 527 F.3d 41 (2d Cir. 2008).....	9
<i>Faiveley Transp. Malmö AB v. Wabtec Corp.</i> , 559 F.3d 110 (2d Cir. 2009).....	6
<i>Federal Express Corp. v. Fed. Espresso, Inc.</i> , 201 F.3d 168 (2d Cir. 2000).....	5
<i>Freedom Holdings, Inc. v. Spitzer</i> , 408 F.3d 112 (2d Cir. 2005).....	6
<i>GICC Capital Corp. v. Technology Finance Group, Inc.</i> , 67 F.3d 463 (2d Cir. 1995).....	8
<i>Goldblatt v. Englander Comm’ns, L.L.C.</i> , 431 F. Supp. 2d 420 (S.D.N.Y. 2006).....	5
<i>Gov’t Emps. Ins. Co. v. Wellmart RX, Inc.</i> , 435 F. Supp. 3d 443 (E.D.N.Y. 2020) .....	6
<i>Grand River Enter. Six Nations, Ltd. v. Pryor</i> , 481 F.3d 60 (2d Cir. 2007).....	6
<i>H.J. Inc. v. Northwestern Bell Tel. Co.</i> , 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989).....	8
<i>Jackson Dairy, Inc. v. H.P. Hood &amp; Sons, Inc.</i> , 596 F.2d 70 (2d Cir. 1979).....	7
<i>Kamerling v. Massanari</i> , 295 F.3d 206 (2d Cir. 2002).....	6
<i>N. Am. Soccer League, LLC v. United States Soccer Fed’n, Inc.</i> , 883 F.3d 32 (2d Cir. 2018).....	6

*Purchase Real Estate Group, Inc. v. Jones*,  
2010 WL 1837809 2010 U.S. Dist. LEXIS 43201 (S.D.N.Y. Apr. 30, 2010) .....9

*Sterling v. Deutsche Bank Nat’l Trust Co.*,  
368 F. Supp. 3d 723 (S.D.N.Y. 2019).....10

*Winter v. Natural Res. Def. Council, Inc.*,  
555 U.S. 7 (2008).....5

*World Wide Polymer, Inc. v Shinkoong Synthetic Fibers Corp.*,  
694 F.3d 155-161 (2d Cir. 2012) .....7

## PRELIMINARY STATEMENT

Dustin Parker, Nora Weber and Andrew Hernandez (“Defendants”) respectfully submit this memorandum of law in opposition to Plaintiff Cayuga Nation’s (“Nation”) motion for a Preliminary Injunction (“PI”). Because the Plaintiff cannot meet its burden of proving irreparable harm and a substantial probability of success on the merits, which are necessary for imposing relief, the Defendants respectfully ask the Court to deny the present motion.

At its core, this dispute is about whether the Nation’s supposed leadership can continue to enjoy a monopoly eliminating all competitive sales by individual tribal members. The Plaintiff operates Lakeside Trading convenience stores, which operate seven days a week, from 8:00 a.m. to 9:00 p.m., selling Native and national branded cigarettes without tax stamps, and offering smokable marijuana and edibles. Plaintiff, thus, engages in the very “illicit” activity that it accuses the Defendants of committing: selling unstamped cigarettes and marijuana. If there is a RICO violation, as the Plaintiff claims, it is, itself, exposed.

Prior to this point, the factual record was incomplete. This brief aims to more fully detail the reality of the situation between the Plaintiff and the Defendants: that is the Defendants operated a convenience store that the Plaintiff admitted directly cut into his business. The Plaintiff failed in his attempt to persuade the store’s landlord to stop Pipekeepers’ operations. When that failed, the Plaintiff purchased the store’s property from the owner and without notice, evicted the Defendants through the use of force. When it appeared the Defendants were ready to open another convenience store nearby, the Plaintiff filed the case at bar, and are now, attempting to use the Court to eliminate its competition.

This Memorandum of Law addresses the legal principles and the facts set forth in supporting Exhibits. And to establish that the Plaintiff is clearly not entitled to a Preliminary Injunction.

### **COUNTERSTATEMENT OF FACTS<sup>1</sup>**

The facts supporting Defendants' opposition to the Motion are more fully articulated in Parker's March 15, 2022 affidavit (Ex. 1), Vincent Vance's March 11, 2022 declaration (Ex. 2) Defendant Meyer's February 7, 2022 declaration (Ex. 3), and legal opinion of Michael Rhodes-Devey, Esq., dated December 14, 2021 (Ex. 4), and are only recounted in summary in this Statement of Facts.

#### **I. The Parties**

Parker is an enrolled member of Cayuga Nation and the owner operator of Pipekeepers, a registered business in the counties of Seneca and Cayuga Counties, New York. (Ex. at ¶¶ 2, 5) Between August 2021 and December 2021, Pipekeepers Tobacco and Gas operated a convenience store under the trade name Pipekeepers at 126 East Bayard Street in the Town of Seneca, New York. (Ex. 1 at ¶ 10) In February of 2022, Parker purchased a property at 7153 State Route 90N, Montezuma, New York, and began operations of a new Pipekeepers convenience store. (Ex. 1 at ¶¶ 48, 53)

Weber is Parker's wife and the office manager and bookkeeper for Pipekeepers. (Ex. 1 at ¶ 20)

Andrew Hernandez is an employee of Pipekeepers. (Ex. 1 at ¶ 21)

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<sup>1</sup> This "Counterstatement of Facts" is based upon evidence that the Defendants assert through affidavits and records. This overview is included to provide the necessary context for the relevant legal arguments that follow.

Paul Meyer is the owner of Justice for Native First People, LLC, and C.B. Brooks, LLC., and the former sublessor of 126 East Bayard Street in the Town of Seneca Falls, New York. (Ex. 3 at ¶ 2)

Blue Bear Wholesale, LLC is a foreign limited liability company registered at 76 Geronimo Lane, Akwesasne, New York. (Compl. at ¶ 18)

Iroquois Energy Group, Inc. is a domestic business with an address of 5677 Transit Road, Suite 212, Lockport, New York. (Compl. at ¶ 19)

Plaintiff, the Cayuga Nation, is a federally recognized sovereign Indian Nation. (Compl. at ¶ 11) Clint Halftown is a member of the Cayuga Nation. Halftown's mother, Sharon Leroy is a Secretary of the Cayuga Nation. In addition to engaging in the Nation's affairs, the Plaintiff is engaged in several business enterprises, including owning and operating convenience stores called Lakeside Trading on the Nation's land. (Ex. 1 at ¶ 9) The stores sell tobacco related products, such as unstamped cigarettes, and marijuana. (Ex. 2 at ¶ 2) One Lakeside Trading store is located at 299 Cayuga Street, Village of Union Springs, New York. (*Id.*) In addition, the Plaintiff operates a wholesale cigarette distribution company that other stores use to purchase their products for resale. (Ex. 1 at ¶ 9)

## **II. Pipekeepers Stores**

This is a case where a Plaintiff is trying to eliminate business competition through civil RICO.

Late last summer, Parker and Meyer entered into a four-year sublease agreement for a property located on Cayuga tribal land. (Ex. 1 at ¶ 12; Ex. 3 at ¶ 8) The purpose of the lease was

to provide Parker a small retail convenience store (Ex. 1 at ¶ 16) Shortly after obtaining the lease, Parker opened up Pipekeepers. (*Id.*)

Within a few months of opening Pipekeepers, the Plaintiff, the owner and operator of several convenience stores, began harassing Parker with in person visits and demands to close Pipekeepers down. (Ex. 1 at ¶¶ 22-23, 25-28; Ex. 3 at ¶ 10) Public reporting shows Pipekeepers severely impacted the Plaintiff's business, as quoted in Cayuga Nation News reporting on the Nation's takeover of the retail store run by Parker:

“The Cayuga Nation has suffered significant financial losses due to the illegal operation of Pipekeepers, Tobacco & Gas over the last four months,” said Cayuga Nation leader Clint Halftown.

<https://cayuganation-nsn.gov/news/cayuga-nation-purchases-126-e-bayard-st-property>(last visited March 11, 2022). After Parker rejected the Plaintiff's demands to close his business, the Plaintiff purchased the property at the end of December 2021. (Ex. 1 at ¶ 27; Ex. 3 at ¶ 13)

On January 1, 2022, the Plaintiff rid itself of the competition by evicting the Defendants without any notification. (Ex. 1 at ¶ 43; Ex. 3 at ¶¶ 14-15) To execute the eviction, the Plaintiff hired dozens of armed, private security guards to enter the Defendants' premise without warning or notice and confiscated the inventory and property located at Pipekeepers. (Ex. 1 at ¶¶ 34-35, 42; see also Ex. 3 at ¶ 15) When Parker and Weber arrived at Pipekeepers, the guards physically manhandled them, resulting in a physical altercation. (Ex. 1 at ¶ 36)

The seizure resulted in approximately \$200,000 worth of inventory and gas, with a retail value of approximately \$400,000, confiscated by the Plaintiff. (Ex. 1 at ¶ 42) Shortly after seizing the Defendants property, the Plaintiff opened a new Lakeside Trading convenience store at the



former Pipekeepers location and began selling the Defendants' inventory. (*Id.* at ¶ 47) The Defendants have been unable to retrieve their property from the store, and the Plaintiff has not provided compensation for the unlawful confiscation of their property, inventory and business. (*Id.* at ¶ 44-46)

Despite the setbacks and financial hardships caused by the Plaintiff, Parker purchased a new commercially zoned property in Montezuma, New York. (*Id.* at ¶ 48) The property is home to the new Pipekeepers store, which again, competes with Lakeside Trading. (*Id.* at ¶ 53) This new store threatens to cut into the Plaintiff's profits. It is, therefore, unsurprising that the Plaintiff is attempting to weed out the competition by weaponizing civil RICO against another lawful business.

#### LEGAL STANDARD

On this Motion, Plaintiff bears a heavy burden. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *see also Goldblatt v. Englander Comm'ns, L.L.C.*, 431 F. Supp. 2d 420, 424 (S.D.N.Y. 2006) ("A preliminary injunction is an 'extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'"). To obtain injunctive relief, the movant must demonstrate "(1) the likelihood of irreparable injury in the absence of such an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation plus a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Federal Express Corp. v. Fed. Espresso, Inc.*, 201 F.3d 168, 173 (2d Cir. 2000). The Plaintiff cannot meet any of those factors.

Moreover, where a party seeks a mandatory injunction, which disrupts the status quo, the movant must meet a heightened legal standard by showing “a clear or substantial likelihood of success on the merits.” *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). As discussed below, the Plaintiff does not meet either standard, and their request for an injunction should be denied.

## ARGUMENT

### I. The Plaintiff Fails to Allege Irreparable Harm

Irreparable harm is “the single most important prerequisite for the issuance of a preliminary injunction.” *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (quoting *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005)). “To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation.” *Gov't Emps. Ins. Co. v. Wellmart RX, Inc.*, 435 F. Supp. 3d 443, 449 (E.D.N.Y. 2020) (quoting *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002)) (internal quotation marks omitted). Further, for the Plaintiff to satisfy the irreparable harm requirement, the Plaintiff must demonstrate that absent injunctive relief it will suffer an injury that is “neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.” *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quoting *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)).

Here, the Plaintiff offers no proof to show that preventing the Defendants from operating Pipekeepers will cause an actual, irreparable harm. In an attempt to cobble together an argument, the Plaintiff alleges that the Pipekeepers store injures its reputation and goodwill by engaging in

illegal activities while promoting themselves as members of the Cayuga Nation. (Pls. Mot. at 7) This assertion is an unsophisticated use of projection. The Plaintiff themselves are engaging in the same activity, that the Plaintiff alleges is illegal when undertaken by the Defendants. (See Ex. 2 at ¶ 8) It is illogical to think that Parker, a long-standing, enrolled member of the Cayuga Nation, would somehow injure the reputation and goodwill of the Plaintiff by engaging in identical business activities as Plaintiff. It also begs the question that if the alleged sale of such products by the Defendants are reputation-harming, why would the Plaintiff sell said products?

Further, if the issue is that Defendants are using the Plaintiff's flag (which they were not doing), that issue is extinguished since Defendants' new store does not display or show any outward affiliation with the Halftown faction. (Ex. 1 at ¶ 50) It is illogical to believe there is any "actual or imminent harm" to the Plaintiff when the Defendants are engaged in the same business activities as the Plaintiff and show no affiliation to the Plaintiff's brand.

The Plaintiff's motion, itself, reveals more believable motivation for this complaint: the Defendants' new Pipekeepers store deprives the Plaintiff of customers and business revenues. (Pls. Mot. at 7) Since, the alleged harm is the loss of business revenues, and that harm is compensable with money damages, injunctive relief is clearly improper. *World Wide Polymer, Inc. v Shinkoong Synthetic Fibers Corp.*, 694 F.3d 155-161 (2d Cir. 2012). The Plaintiff's complaint has already alleged monetary damages for losses between the months of August and December 2021. (See Compl. at ¶ 56) Accordingly, Plaintiff can reasonably seek quantifiable monetary damages, obviating injunctive relief. *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979).

## II. The Plaintiff is Unlikely to Succeed on the Merits of the Case

Plaintiff's proposed complaint does allege the requisite "continuity" for a RICO against the Defendants. In order to demonstrate a pattern of racketeering activity under Section 1962, a plaintiff must establish that the conduct in question amounts to, or constitutes a threat of, continuing racketeering activity. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989). Continuity may be closed or open-ended, with closed-ended referring to a pattern of criminal activity extending over a substantial period of time and open-ended referring to past criminal conduct that projects into the future with a threat of repetition. See *H.J. Inc.*, 492 U.S. at 241-42.; see also *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 466 (2d Cir. 1995).

To satisfy open-ended continuity, as is the case here, a plaintiff is not required to demonstrate that the predicate acts extended over a substantial period of time, but must show that there was "a threat of continuing criminal activity beyond the period during which the predicate acts were performed." *Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 242 (2d Cir. 1999). The Plaintiff's complaint offers allegations that Parker's now closed store sold various products that it believes were illegal. (Compl. at ¶ 37). But the Plaintiff closed Pipekeepers when they purchased the property and without notification, evicted the Defendants on January 1, 2022. (Compl. at ¶ 53) The only support the Plaintiff offers against the Defendants is the following, "Defendant Parker has acquired a new property located at 7153 State Route 90N, Village of Cayuga, Town of Montezuma, Cayuga County, New York, where he and others have installed a drive-thru window presumably for the sale of illicit drugs and fortified the property with security cameras and privacy fencing." (Pls. Mot., Ex. 1) This however, is conclusory and fails to show how the Defendants alleged illegal conduct has extended past their last store and to their new store.

See *Purchase Real Estate Group, Inc. v. Jones*, 2010 WL 1837809 2010 U.S. Dist. LEXIS 43201, \*26 (S.D.N.Y. Apr. 30, 2010). (Mere conclusory assertions that the alleged business practices at issue will continue into the future are insufficient to sustain open-ended continuity.).

Everything that the Plaintiff proclaims as its focal point of illegal “racketeering” activity is precisely the same conduct that the Plaintiff engages in. The Plaintiff regularly engages in the same activity alleged as being unlawful when done by Parker. (Ex. 2 at ¶¶ 5-9) In fact, after seizing Pipekeepers, instead of shutting down the “illicit” operation, the Plaintiff resumed selling Defendants’ inventory. (Ex. 1 at ¶ 47). Thus, the Plaintiff (kettle) is calling the Defendants (black) for engaging in precisely the same conduct. It is quite curious for a plaintiff to make a RICO claim predicated on activities against a defendant, for which the plaintiff is directly engaged in. If Plaintiff here has made out a RICO violation on these facts, it has directly implicated itself in the same illegal activity. In truth, this claim does not establish RICO violations, but rather internal tribal feud between two competing businesses.

On these facts Plaintiff cannot make out viable predicate illegal acts different from their own, much less a corrupt organization different from itself. Plaintiff comes to this court seeking equitable relief when its hands are not just unclean but stained with nicotine tar and cannabis residue.

Plaintiff’s motion for a preliminary injunction must be denied because Plaintiff has no likelihood of success on the merits and its hands are unclean.

### **III. The Balance of Equities Favors the Defendant, not the Plaintiff**

Absent a clear and substantial likelihood of success on the merits, Plaintiff must show that the balance of hardships is “decidedly in [its] favor.” *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008). As the foregoing demonstrates, it is the Defendants who are likely to succeed on the merits

in this matter, and, further, public policy discourages the court from taking action that might deprive someone the loss of livelihood. See *Am. Inst. of Chem. Engineers v. Reber-Friel Co.*, 682 F.2d 382, 388 (2d Cir. 1982) (noting "the general public policy favoring robust and uninhibited competition," and "powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood"). Moreover, as already explained, Plaintiff's claims could be fully redressed with monetary damages.

In contrast, the Defendants will suffer significant, irreparable harm should they be prevented from continuing to operate the new Pipekeepers store. If this Court grants the relief the Plaintiff demands here, it will essentially promote the Plaintiff's attempt to monopolize the local retail stores on tribal land and sabotage the Defendants' employment. Being unable to work at Pipekeepers would prevent each of the Defendants from earning money to support their families while simultaneously crippling their business. *Sterling v. Deutsche Bank Nat'l Trust Co.*, 368 F. Supp. 3d 723, at 729 (S.D.N.Y. 2019) (Since the grant of an injunction "would cause harm to Defendants by delaying the resolution of this action and . . . such a delay would harm Defendants," this court has held "that the balance of hardships [does not] tip[] in [plaintiff's] favor, much less 'decidedly.'") This hardship should not be overlooked.

**CONCLUSION**

The Plaintiff has not established any of the elements for a preliminary injunction to disrupt Pipekeepers' business operations. For these reasons, the Defendants respectfully request that the Court deny the Plaintiff's request for a preliminary injunction.

Dated: Albany, New York  
March 15, 2022

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2022, I electronically filed the foregoing Memorandum of Law in Opposition with the Clerk of the Court, to be served on all parties of record via the CM/ECF system.

**NIXON PEABODY LLP**

By:  \_\_\_\_\_  
Daniel Hurteau, Esq.