UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

Plaintiff

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.

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF DUSTIN PARKER, NORA WEBER and ANDREW HERNANDEZ

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Dustin Parker, Nora Weber and Andrew Hernandez ("Defendants"), by and through counsel, submit this memorandum of law in support of their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) the three RICO counts the Cayuga Nation (the "Nation") asserts against them. The Defendants vigorously dispute the Nation's factual allegations. Nonetheless, even accepting the pleadings as true for the purpose of this motion, each of the Nation's claims against the Defendants are legally deficient and must be dismissed with prejudice.

INTRODUCTION

At its core, this is an internal dispute between a leadership faction within the Nation and some of the Nation's members over a common business on tribal land. Over the last several decades, the Nation, under the leadership of Cliff Halftown of the Halftown faction, has attempted to monopolize certain businesses, such as casinos and the selling of unstamped cigarettes and other smokable products. To preserve their monopoly, Halftown, through the Nation, employs a variety of tactics, which includes the creation and enforcement of internal tribal directives, also known as ordinances. These directives, such as the "Cayuga Nation Amended and Restated Business License and Regulation Ordinance" (the "Ordinance"), prohibit businesses from operating on the Nation's land without a license. (Compl. at ¶ 43) The Ordinance also forbids the Nation's members from engaging in any business that directly or indirectly competes with any business conducted by the Nation. (*Id.*) Halftown, on behalf of the Nation, enforces and arbitrarily imposes restrictions on tribal members to maintain the status quo and prevent competition. When members, such as the Defendants, do not comply or agree with the Ordinance, Halftown and his faction resort to

violence, intimidation and punishment.[1] (Ex. 1 at 3) These tactics are well-documented and have been recurring under Halftown's leadership.

The Nation commonly relies on its sovereign status to assert power over its members when it is a benefit, such as the issuance of licensure under the Ordinance. With this Complaint, however, the Nation now seeks to extend their power by having a federal court eliminate internal competition through a civil RICO action. By characterizing the Defendants business, one convenience store operating in broad daylight and open to the public, as a shadowy criminal enterprise, the Nation alleges that the Defendants have caused the Nation to lose "untold" customers resulting in the loss of millions of dollars in revenue. Even if true, competition, and any purported losses in revenue without a predicate offense, is not, itself, actionable. Moreover, the Complaint states no facts that support the Plaintiff's broad claims sufficient to withstand a motion to dismiss.

Accordingly, each of the Nation's three civil RICO claims against the Defendants must be dismissed with prejudice.

LEGAL STANDARDS

I. Federal Rule of Civil Procedure Rule 12(b)(1)

A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it. *See* Fed.R.Civ.P. 12(b)(1). In resolving a motion to dismiss for lack of subject matter jurisdiction

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[1] On July 31, 2020, Tara Sweeney, Assistant Secretary of Indian Affairs detailed the abuse of the Nation power under Halftown. The letter states, "[T]wo recent events during which the Nation used its governmental power in a manner that raised serious concerns from local governments, the State, and the Department [of the Interior], and the Department of Justice." The letter then describes the Nation bulldozing several businesses controlled by tribal members who opposed the tribal government. The letter further describes how the Nation used members of the tribal police force to violently confront tribal members who opposed the demolition.

under Rule 12(b)(1), a district court, may refer to evidence outside the pleadings. *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000); see also *Kamen v. American Tel. & Tel. Co.,* 791 F.2d 1006, 1011 (2d Cir.1986). A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that jurisdiction exists. *See Malik v. Meissner,* 82 F.3d 560, 562 (2d Cir.1996).

II. Federal Rule of Civil Procedure Rule 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1939, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Factual allegations must "nudge[ ] [a plaintiff's] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. A claim is plausible when the plaintiff pleads facts which allow the court to draw a reasonable inference the defendant is liable. *Iqbal*, 556 U.S. at 678. To assess the sufficiency of a complaint, the court is "not required to credit conclusory allegations or legal conclusions couched as factual allegations." *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013).

While legal conclusions may provide the "framework of a complaint," "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678–79.

ARGUMENT

I. This Court Lacks Jurisdiction Over Intra-Tribal Disputes

The internal dispute between the Halftown faction and the Defendants is outside the jurisdiction of this Court. It is well settled that "federal courts lack authority to resolve internal disputes about tribal law." *Cayuga Nation v. Tanner*, 824 F.3d 321, 327-28 (2d Cir. 2016) (citing

Shenandoah v. U.S. Dep't of Interior, 159 F.3d 708, 712 (2d Cir. 1998). It is "a bedrock principle of federal Indian law that every tribe is capable of managing its own affairs and governing itself." (quoting *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (internal quotation marks omitted))." The Second Circuit in *Tanner* concluded that "[t]he foregoing principles compel the conclusion that we lack jurisdiction to resolve the question of whether this lawsuit was properly authorized as a matter of tribal law." 824 F.3d at 328. These same principles compel the conclusion that the present suit is non-justiciable because tribal law lies at the heart of it -- the Amended and Restated Business and Licensing Ordinance ("Ordinance") -- and the Halftown faction is seeking to have the federal court enforce the Ordinance against a member. The fact that the Halftown faction is bringing a RICO action does not confer federal jurisdiction when the central dispute is intra-tribal. See *Rabang v. Kelly*, 328 F. Supp. 3d 1164, 1168 (W.D. Wash. 2018).[2]

The Court does not need to reach too far into case law in light of the Complaint's own robust position that tribal matters are sovereign:

> (1) Indian nations exercise exclusive sovereign rights on their federal reservations, including a right, in certain circumstances, to sell goods without paying or collecting taxes. These rights historically extend to specific sales of cigarettes and tobacco products. The Nation has exercised these rights, in part, by manufacturing and selling "Cayuga" and other "native brand" cigarettes on its federal reservation (the "Cayuga Nation Reservation"). (Compl. at ¶ 1)

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[2] Courts are hesitant to inject itself into internal tribal disputes masked as RICO violations. See Sac and Fox Tribe of the Mississippi in Iowa v. Bear, 258 F.Supp.2d 938, 942–44 (N.D. Iowa 2003) aff'd sub nom. In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig., 340 F.3d 749 (8th Cir. 2003) ("this Court does not have jurisdiction [under RICO] to determine which Tribal Council is properly in place under the Tribal Constitution. This is an intra-tribal dispute over which this Court has no subject matter jurisdiction.").

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(2) Plaintiff, the Cayuga Nation, is a federally-recognized sovereign Indian nation. (Compl. at ¶ 11)

(3) Among those attributes of sovereignty, Indian nations enjoy exclusive privileges to conduct certain economic activity on their own reservations free from interference by the State, including with regard to the application of state tax obligations. (Compl. at ¶ 30)

(4) In line with these principles, the Cayuga Nation conducts certain economic activity on its own reservation free from state tax and regulatory laws, even in transactions with non-Indians. (Compl. at ¶ 35)

By its own admission, the Nation enjoys sovereignty to oversee the affairs of the tribe. Among those intra-tribal issues subject to sovereignty, are business affairs carried out by local ordinance, such as the one at issue here. The Ordinance is designed to protect the Nation's business pursuits from internal competition. As such, the Ordinance limits tribal members' ability to operate businesses that compete directly with the Nation. Members who want to operate a business that intrudes on the Nation's prospects, must receive permission of certain leadership and then, pay fees to that leadership from their business. Based on the narrow scope of the Ordinance application and its purpose, to regulate its members, it is clear that the Ordinance is a tribal law. In accordance with *Tanner*, the enforcement of the Ordinance must be left to the tribe and must not be resolved by this Court. Accepting the sovereign status of the Tribe as true, the Court having no proper place in resolving this business dispute, must allow the parties to resolve the matter according to tribal law.

With respect to the RICO claim, the Nation is asking the Court to interpret and apply the Ordinance against the Defendants. The Nation essentially uses its Ordinance as a double edged sword. The Nation enjoys sovereignty to control its members' businesses by requiring them to

obtain licensure under the Ordinance. At the same time, the Nation is asking the Court to interpret the Ordinance as enforceable against members who do not recognize the Ordinance's arbitrary application. Here in lies the Nation's true complaint, that it is sovereign from the federal government to enforce laws and restrict members from certain business activities. When a group of members, such as the Defendants, do not comply with the arbitrarily applied tribal laws, the Nation seems to say it can use non-compliance as a backdrop to assert criminal allegations in federal court. Thus, preventing internal competition and maintaining power.

But the interpretation of the Ordinance, and its authority, and who can enforce it is solely derived from the tribe. The Defendants disagree with its application as it relates to their business. That makes this dispute internal and one for the Tribe to resolve, and a non-justiciable dispute in federal court. See *Quinault Indian Nation v. Pearson*, 868 F.3d 1093 (9th Cir. 2017) (affirming tribal immunity from suit to counterclaims in context of RICO action by tribe against tribal members who operated smoke shop without collecting taxes in violation of tribal code - no discussion of justiciability).

II. The Plaintiff's RICO Claim Must Be Dismissed for Failure to State a Cause of Action

To demonstrate a RICO violation, a plaintiff must plausibly allege "that a defendant, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly participating in an enterprise, the activities of which affected interstate or foreign commerce." *Lynch v. Amoruso*, 232 F. Supp. 3d 460, 466 (S.D.N.Y. 2017) (quoting *Defalco v. Bernas*, 244 F.3d 286, 306 (2d Cir. 2001)). Thus, a plaintiff must allege "(1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity, as well as injury to the business or property as a result of the RICO violation." *Lundy v. Cath. Health Sys. Of Long Island Inc.*, 711 F.3d 106, 119 (2d Cir. 2013) (internal quotations omitted).

A. The Plaintiff Lacks Standing Under Civil RICO

To satisfy standing, a plaintiff in a civil RICO case is required to plead (1) a violation of the RICO statutes, (2) injury to its business or property and (3) that the injury was caused by the violation of the § 1962. *Gristede's Foods, Inc. v. Unkechauge Nation*, 532 F.Supp.2d 439 (E.D.N.Y 2007). Further, "standing should ordinarily not be presumed, and the burden rests upon the plaintiff to demonstrate standing." *Building Industry Fund v. Local Union No. 3, Intern. Broth. of Elec. Workers, AFL-CIO*, 992 F. Supp. 162, 172 (E.D.N.Y. 1996).

1. The Plaintiff Failed to Plead the Defendants Proximately Caused an Injury

The Complaint asks this Court to make a leap when assessing proximate cause. In a nutshell, the Complaint speculates that the Defendants store, operating an identical business model as Plaintiffs, caused the Nation lost revenues. In essence, Plaintiff's primary complaint is that Defendants business, which is the same as Plaintiffs', is encroaching on Plaintiff's profits. These facts are purely speculative, and provide no basis for concluding that the Defendants alleged acts led directly to the Nation's injuries. Even if the facts led to a conclusion of economic loss, there is no wrong that is actionable under the RICO statute. Defendants are entitled to enjoy the same benefits of operating a profitable business as Plaintiffs.

To sue under RICO, a plaintiff must establish not only "but for" causation, but also that the underlying § 1962 RICO violation was the proximate cause of his injury." *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 140 (2d Cir. 2018) (citation and quotation marks omitted). Where an asserted loss could have resulted from factors other than [the defendants'] alleged acts, a plaintiff cannot show proximate cause. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459 (2006); see also *Leung v. Law*, 387 F.Supp.2d 105, 122) (E.D.N.Y 2005) ("A predicate act cannot be deemed to have proximately caused a plaintiff's injury, even if it was an integral part

of the underlying criminal scheme, unless the plaintiff's original loss could not have occurred without the commission of the predicate offense.).

Here, the Complaint fails to allege facts that support the conclusion that the predicate acts by the Defendants directly caused injury to the Nation's business or property. The Complaint alleges that the Defendants store, diverted "untold" customers from their stores "ultimately resulted in $1,750,000 in lost revenues." (Compl. at ¶ 62) But the Complaint is devoid of any facts that would demonstrate how the Nation lost revenues while the Defendants operated their store.

Regardless, even if the Nation did lose revenues over those four months, those loses could be attributable to a number of reasons that are completely unrelated to the Defendants, or, even if directly attributable, the facts do not suggest or establish a wrong. Defendants might have operated in a more desirable way. Tribal customers might have preferred to shop at Defendants store, which is the essence of a free market. Perhaps reduced customer demand and/or economic difficulties caused reduced revenues that could have results absent the Defendants allegedly engaging in predicate acts. *Anza*, 547 U.S. at 459 ("[B]usinesses lose and gain customers for many reasons and it would require a complex assessment to establish what portion of [plaintiff's] lost sales were the product of the [defendant].)

Absent specific facts that point to diversionary behavior or direct business interference, the complaint cannot establish RICO worthy harms.

2. The Plaintiff Failed to Show It Suffered Concrete Financial Losses

Standing under Civil RICO requires more than merely "physical, emotional, or reputational harm." *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 530 F.Supp.2d 486-518 (S.D.N.Y. 2007) (quoting *State Farm Mut. Auto Ins. Co. v. CPT Med. Servs.*, P.C. 375 F.Supp.2d 141, 152 (E.D.N.Y. 2005)), aff'd, 328 Fed. Appx. 695 (2d Cir. 2009)). Standing requires a concrete

financial loss; unspecified lost business opportunities will not suffice. See, *Hecht v. Commerce Clearing House, Inc*., 897 F.2d 21, 24 (2d Cir. 1990). Therefore, a RICO plaintiff "only has standing 'if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation[,]'" and only when his or her "actual loss become clear and definite." *Denney v Deutsche Bank Ag*, 443 F.3d 253, 266 (2d Cir. 2006) (*quoting Sedima, S.P.R.L. v Imrex Co.,* 473 U.S. 479, 496, 105 S.Ct.3275, 87 L.Ed.2d 346 (1985)).

Here, the Plaintiff's allegations do not allege nor describe a concrete financial loss. The damages asserted by the Plaintiff, "lost revenue at 1,750,000" and a "loss of untold customers and goodwill." (Compl. at ¶ 62) The Nation does not explain how it quantified its lost revenue figure. Moreover, the Nation does not provide one instance that would suggest it lost a single customer to the Defendants. The damages the Plaintiff must prove to demonstrate its standing in a civil RICO case must be more than abstract. The damages must be actual and in the present. See *Sedima*, 473 U.S. 496. There is no factual basis to support the stated $1,750,000 damages.

As for the loss of "untold customers and goodwill," Courts have consistently held that these sorts of damages are not recoverable under civil RICO since they are indefinite and speculative. See *Trs. of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.,* 886 F.Supp. 1134, 1146 (S.D.N.Y.1995) ("A RICO plaintiff may not recover for speculative losses or where the amount of damages is unprovable."); *see also Hollander v. Flash Dancers Topless Club,* 340 F.Supp.2d 453, 459 (S.D.N.Y.2004), *aff'd,* 173 Fed.Appx. 15 (2d Cir.2006) (explaining that damages to plaintiff's "business reputation and goodwill" are not the type of injuries to business or property actionable under RICO); *Tsipouras v. W & M Props., Inc.,* 9 F.Supp.2d 365, 368 (S.D.N.Y.1998) (injury to character and business reputation not actionable under civil RICO).

B. The Plaintiff Fails to Allege a Pattern of Racketeering

To meet the "pattern of racketeering activity" element, a plaintiff must allege that the predicate acts have "continuity plus relationship which combines to produce a pattern." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (citation omitted). This continuity requirement "can be satisfied either by showing a 'closed-ended' pattern—a series of related predicate acts extending over a substantial period of time—or by demonstrating an 'open-ended' pattern of racketeering activity that poses a threat of continuing criminal conduct beyond the period during which the predicate acts were performed." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008) (citations omitted).

1. The Plaintiff Complaint Did Not Establish Open-Ended Continuity

To satisfy open-ended continuity, the plaintiff need not show that the predicates 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). In assessing whether or not the plaintiff has shown open-ended continuity, the nature of the RICO enterprise and of the predicate acts are relevant. *See Schlaifer Nance & Co. v. Estate of Andy Warhol,* 119 F.3d 91, 97 (2d Cir.1997); *GICC Cap. Corp. v. Tech. Fin. Grp., Inc.,* 67 F.3d 463, 466 (2d Cir. 1995).

Where the enterprise is engaged primarily in racketeering activity, and the predicate acts are inherently unlawful, there is a threat of continued criminal activity, and thus open-ended continuity. *See H.J. Inc.,* 492 U.S. at 242–43, 109 S.Ct. 2893 ("[T]he threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes."). Where the enterprise primarily conducts a legitimate business, there must be some evidence from which it may be inferred that the predicate

acts were the regular way of operating that business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity. *See id.* at 243, 109 S.Ct. 2893; *GICC Capital Corp.,* 67 F.3d at 466; *Azrielli v. Cohen L. Offs*., 21 F.3d 512, 518 (2d Cir. 1994).

Here, the Defendants operated a convenience store and gas station. (Compl. at ¶ 3). The store sold the same inventory as the other stores in the local area, including Plaintiffs' own operations. If the Defendants activity is unlawful, then the activity of the other stores owners (including convenient stores owned by the Nation) are also unlawful. In reality, the Plaintiff's chief grievance centers on Defendants' unwillingness to recognize the Nation's current leadership directives, which would eliminate their livelihood, and which has placed them in the crosshairs of violence and harassment, including this present litigation.

Additionally, the Plaintiff has not proven the Defendants are engaged in an open pattern of racketeering since it shut down the Defendants allegedly "illegal" operation on January 1, 2022. To support its spurious claims, Plaintiffs state that, "Defendant Dustin Parker together with other Defendants, are conspiring to operate their RICO enterprise out of the Planned Property imminently, not only having installed a drive-thru window but having fortified the property with external cameras and privacy fencing to evade law enforcement and otherwise shelter their illicit activity from public view." (Compl. at ¶ 67). However, Defendants installation of drive-thru window, external cameras, and a privacy fence should not be surprising to the Nation, considering Plaintiffs' threats and improper seizure of the Defendants' business. Outside of this assertion, the

Nation has provided no other details that would suggest the Defendants engaging in any racketeering activity.

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that this Court dismiss with prejudice all of the claims against them.

Dated: Albany, New York
March 21, 2022

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