UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

Plaintiff,

v.

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

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, C.B. BROOKS LLC, AND JOHN DOES 1-10,

Defendants.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff Cayuga Nation ("Plaintiff" or the "Nation"), through undersigned counsel, respectfully submits this memorandum of law in further support of its motion for a preliminary injunction [ECF No. 2] and in reply to the opposition papers filed by Defendants Dustin Parker, Nora Weber, and Andrew Hernandez [ECF No. 30] (collectively, "Defendants"), and Paul Meyer, C.B. Brooks, LLC, and Justice for Native First People, LLC [ECF No. 31].[1]

PRELIMINARY STATEMENT

Defendants' opposition papers confirm that they are violating RICO. Defendants do not—and cannot—deny that they are trafficking in contraband cigarettes or selling marijuana. Nor do they dispute that they are running an operation on the Nation reservation that purloins Nation revenues. And they offer no material legal arguments in defense of their ongoing RICO operation. Instead, Defendants attempt to change the conversation, and accuse the Nation of engaging in the same conduct it seeks to stamp out.

But Defendants and the Nation are nothing alike. Unlike Defendants, the Nation does not engage in any illegal conduct, and it possesses rights, privileges, and various responsibilities to its members that it seeks to vindicate by this litigation and to protect by the present motion for preliminary injunction. Defendants, on the other hand, are engaging in illegal conduct, and seek only to protect their self-interests and bottom line.

[1] Defendant Paul Meyer, and his two limited liability companies C.B. Brooks, LLC and Justice for Native First People, LLC state their only involvement in the alleged RICO conspiracy "is acting as the landlord in the sublet of commercial property to Dustin Parker and 126 Bayard Street in Seneca Falls, and then as the seller of a commercial parcel to Parker in the town of Montezuma[.]" Defs.' (Meyer, C.B. Brooks, LLC, and Justice for Native First People, LLC) Opp'n Mem., p. 1 [ECF No. 31]. Accordingly, Meyer alleges, the requested injunction has no bearing on him or his entities. Therefore, to the extent a preliminary injunction is issued with respect to all Defendants, it should be of no moment to Meyer and his business entities.

Just two days after Plaintiff commenced this action and moved for injunctive relief, Defendants opened a new store at 7153 State Route 90N in the Town of Montezuma (the "New Pipekeepers Store"). For going on two months now, Defendants have been operating out of that heavily-secured house and selling contraband from a drive-thru window while holding themselves out as the Cayuga Nation. Nearly two months of running a RICO enterprise in plain sight is enough.

For the reasons set forth herein, in addition to those set forth in Plaintiff's opening memorandum, this Court should issue a preliminary injunction enjoining Defendants from operating the New Pipekeepers Store (or operating any similar business from another location) during the pendency of this litigation.

ARGUMENT

Plaintiff's opening papers squarely staked out its position that, consistent with *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016), private parties can obtain interim relief under RICO from the district courts in the Second Circuit. Pl.'s Opening Mem., pp. 4–6. Defendants implicitly concede that such relief is permissible, and they have waived any argument to the contrary by not raising it in their opposition papers. *See Adams v. N.Y. State Educ. Dep't*, 752 F. Supp. 2d 420, 452 n.32 (S.D.N.Y. 2010) (collecting cases where district courts have deemed failure to oppose specific arguments as a waiver of those issues). Thus, Defendants do not dispute that this Court may issue the preliminary injunction Plaintiff requests, but contend only that it should not.

Plaintiff has made the requisite three-part showing required for the issuance of a preliminary injunction. *See N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). If anything, Defendants' opposition has only bolstered Plaintiff's case. This Court should issue a preliminary injunction.

1. Defendants' Opposition Demonstrates That Plaintiff is Likely to Succeed on the Merits

Defendants do not deny that they received, possessed, and sold unstamped and untaxed Indian and non-Indian brand cigarettes in their operation of the former Pipekeepers store, or that they continue to receive, possess, and sell such cigarettes at the New Pipekeepers Store today. Quite the opposite, they effectively *admit* they have been violating the Contraband Cigarette Trafficking Act, 18 U.S.C. §§ 2341–2346 ("CCTA") for many months now—and that they continue to receive and sell contraband cigarettes to this day. Defendants, instead, stake their argument against Plaintiff's motion for a preliminary injunction on the position that the Cayuga Nation allegedly sells unstamped and untaxed cigarettes too, and therefore, they argue, comes to this Court seeking equitable relief with unclean hands.[2]

This position suffers from a number of flaws. To start, for likelihood-of-success-on-the-merits purposes, Defendants have all but conceded to engaging in a pattern of "racketeering activity" under 18 U.S.C. § 1961(1) by violating the CCTA in their operation of the two Pipekeepers stores. And that concession establishes an equally strong likelihood of success on Plaintiff's 18 U.S.C. § 1956 (money laundering) and 18 U.S.C. § 1957 (engaging in monetary transactions in property derived from specified unlawful activity) predicate act allegations. This concession about *Defendants'* activities is all that matters. While Defendants seek to shift focus to

[2] A number of the allegations contained in the Declaration of Vincent Vance [ECF No. 30-2] are categorically false, including that the Nation sells unstamped premium brand cigarettes. Declaration of B.J. Radford, sworn to March 22, 2022 ("Radford Decl."), ¶ 18. The Nation fully understands and complies with the requirements and programs imposed upon its tobacco sales by New York law as enforced by the New York State Department of Taxation and Finance. Radford Decl., ¶ 19. To the extent the nation sells unstamped or untaxed native-brand cigarettes, it does so in compliance with the law and under the unique privilege afforded to it as an Indian nation, as such cigarettes are manufactured on the Nation's reservation or on the reservations of other Indian nations within New York State. *Id.*, ¶ 21. The Nation does not sell "rollie" cigarettes that fail to comply with applicable state or federal law or other illegal tobacco products. *Id.*, ¶ 22.

the Nation's businesses, numerous courts have recognized that "the defense of unclean hands is not available in civil RICO actions." *Smithfield Foods, Inc. v. United Food & Commercial Workers Int'l Union*, 593 F. Supp. 2d 840, 847 (E.D. Va. 2008) (collecting authorities, including *Local 851 of the Int'l Bhd. of Teamsters v. Kuehne & Nagel Air Freight Inc.*, No. 97 CV 0378, 1998 U.S. Dist. LEXIS 3779 (E.D.N.Y. 1998)).

Moreover, Defendants' unclean-hands defense is meritless. "Unclean hands" is no answer to the fact that Defendants sell "rollie" cigarettes that fail to comply with *federal* law—the Nation makes no such sales. And more fundamentally, for purposes of selling cigarettes that are untaxed and unstamped under *state* law, Defendants and the Nation are not alike.

There are four elements for a CCTA violation, all of which are satisfied with respect to Defendants: "that a party (1) knowingly 'ship, transport, receive, possess, sell, distribute or purchase' (2) more than 10,000 cigarettes (3) that do not bear tax stamps, (4) under circumstances where state or local cigarette tax law requires the cigarettes to bear such stamps." *City of N.Y. v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966 (CBA), 2009 U.S. Dist. LEXIS 76306, *75 (E.D.N.Y. Aug. 25, 2009) (citations omitted); 18 U.S.C. § 2342.

The CCTA "explicitly incorporates the tax law of the state in which the alleged contraband cigarettes are found." *United States v. Morrison*, 686 F.3d 94, 96 (2d Cir. 2012) (citing 18 U.S.C. § 2341(2)). "New York State imposes a tax on all cigarettes possessed for sale or use in New York State, except for those cigarettes it is 'without power' to tax." *LaserShip, Inc.*, 33 F. Supp. 3d 303, 313 (S.D.N.Y 2014) (citing New York Tax Law § 471). Cigarette sales by the Cayuga Nation supply an immediate example of those the State may, in some cases, be "without power" to tax. In *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614 (2010), the New York Court of Appeals determined the State could not enforce New York Tax Law § 471 with respect to two Cayuga

Nation owned-and-operated stores located on its approximately 65,000-acre reservation where it sold cigarettes that did not bear New York tax stamps to both its tribal members and non-Indian consumers.

This conclusion is consistent with Supreme Court precedent explaining that state interests in taxation and regulation must at times yield to an Indian nation's legitimate "interest in raising revenues for essential governmental programs," *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156 (1980), which "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services," *id.* at 156–57. Indeed, the Cayuga Nation uses proceeds from cigarette sales to raise critical revenues for essential Cayuga governmental programs for its citizens, to make quarterly distributions to its citizens, and to help the Nation reacquire lands on its reservation. Radford Decl., ¶ 11. The governmental programs funded by the Nation's cigarette sales include payments for health care services for Cayuga members, educational scholarships for Cayuga children, and housing assistance for Cayuga citizens. *Id.*, ¶ 12. The Nation also makes meat and vegetable distributions to more than 100 Cayuga households. *Id.* The Cayuga Nation is able to generate significant revenues from cigarette sales to support much of this only because of the sovereign rights the Nation properly may exercise on its own reservation. *Id.*,¶ 15.

The sale of untaxed and unstamped cigarettes by individual Indian nation members who lack a government apparatus, conduct their business in violation of tribal law, and simply pocket sales proceeds for personal gain are not supported by the same rationale. Nor are they supported by any statute or precedent. The cases cited in Defendants' "Opinion Letter on Sale of Tobacco on Indian Lands," Defs.' (Parker, Weber, and Hernandez) Opp'n Mem., Ex. 4 [ECF No. 30-4], say nothing at all about such a right being afforded to individual Indian nation members who not only

are distinct from the Nation but operate in direct violation of tribal law. And even if Defendants could permissibly sell untaxed and unstamped cigarettes to qualified members of an Indian nation or tribe on reservation land, the illegality of their selling such cigarettes to non-Indians—which they admit they are doing—is indisputable. So too is the illegality of their transacting with proceeds from such contraband sales. *See* 18 U.S.C. §§ 1956 and 1957.

Turning to Defendants' procedural argument, they contend the Complaint does not allege the requisite "continuity" for a RICO case against Defendants. *See* Defs.' (Parker, Weber, and Hernandez) Opp'n Mem., p. 8 [ECF No. 30]. In sum, the continuity necessary to prove a RICO pattern can be either "closed-ended continuity," or "open-ended continuity." *Cofacredit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999). "To satisfy closed-ended continuity, the plaintiff must prove a series of related predicates extending over a substantial period of time." *Id.* (citation and internal quotation marks omitted). On the other hand, "[t]o 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." *Id.* (emphasis added).

The Complaint specifically alleges such a threat. Compl., p. 14 at ¶ 67 ("Upon information and belief, 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."). Of course, the imminent threat of Defendants opening a new store and continuing their criminal activity was exactly the point of Plaintiff's filing a motion for preliminary injunction *before* the New Pipekeepers Store opened. And where, like here, "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." *Cofacredit, S.A.*, 187 F.3d at 242–243.

In all events, the Complaint plainly satisfies the "continuity" pleading requirement. What is more, the precise threat presented in the Complaint and targeted by the request for a preliminary injunction has materialized. Defendants' RICO enterprise opened—in the exact location Plaintiff specified—just two days after it commenced this action: What was a threat is now a reality.

To make the requisite showing of likelihood of success, the movant "need only make a showing that the probability of [its] prevailing is better than fifty percent. There may remain considerable room for doubt." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985) (citations omitted). That standard has plainly been satisfied here.[3] But even were that not the case, Plaintiff has demonstrated serious questions on the merits, and the balance of hardships decidedly favors the Nation.

Defendants' continued operation of the New Pipekeepers store does not just harm the Nation; it causes real and lasting hardship to all of its members by stealing away revenues that would otherwise be used to further their food, healthcare, education, and well-being. For their part, Defendants will not be uniquely deprived of a livelihood by the issuance of a preliminary

[3] Defendants suggest Plaintiff may be seeking a mandatory injunction, which disrupts the status quo and therefore must meet a heightened legal standard of showing "a clear or substantial likelihood of success on the merits." Defs.' (Parker, Weber, and Hernandez) Opp'n Mem., p. 6 [ECF No. 30]; Defs.' (Meyer, C.B. Brooks, LLC, and Justice for Native First People, LLC) Opp'n Mem., p. 3 [ECF No. 31]. That standard does not apply here because Plaintiff promptly pursued its remedies. *See Barrett v. Maciol*, No. 9:20-CV-537 (MAD/DJS), 2022 U.S. Dist. LEXIS 8000, *4–*5 (N.D.N.Y. Jan. 14, 2022). The operative status quo is the period of time at the time the Complaint was filed (when the New Pipekeepers Store was *not* open), and the injunction sought is prohibitory. *See id.*; *see also N. Am. Soccer League, LLC v. U.S. Soccer Federation, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (explaining that the "status quo" is "the last actual, peaceable uncontested status which preceded the pending controversy" (quoting *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (per curiam))). Even still, Plaintiff has demonstrated a clear or substantial likelihood of success on the merits all the same.

injunction. They will be prevented only from making money through illegal means—a presumptive restraint the law places on all people.

2. Defendants' Conduct Since the Commencement of this Action Has Irreparably Harmed Plaintiff and Will Continue to Do So Absent the Issuance of a Preliminary Injunction

Defendant Parker now seeks to downplay his intentional affiliation of the former Pipekeepers store with the Cayuga Nation. Defs.' (Parker, Weber, and Hernandez) Opp'n Mem., Ex. 1 [ECF No. 30-1] ("Parker Decl."), ¶¶ 17–18. And he says the new Pipekeepers store does not demonstrate any affiliation to the Cayuga Nation. Parker Decl., ¶ 50. But, just recently, he stated in a sworn federal filing: "I am . . . one of the many leaders of the Cayuga Nation . . . working in an **official capacity** running the **Cayuga Nation** Pipekeepers Store" and that "Pipekeepers is a 100% complete and exclusively run **Cayuga Nation Store** solely by Cayuga Nation members as myself[.]" *Cayuga Nation v. Diebold, et al.*, 6:21-CV-06630-CJS (W.D.N.Y. 2021), ECF. No. 31, ¶¶ 1 and 6 (emphasis added).[4] Defendants' opposition still goes out of its way to refer to the Nation as "the Halftown faction" and not "the Cayuga Nation." Defs.' (Parker, Weber, and Hernandez) Opp'n Mem., p. 7 [ECF No. 30]; Parker Decl., ¶¶ 6, 9, 33, and 50 [ECF No. 30-1].

[4] Defendant Parker now concedes he is not the leader of the Cayuga Nation for good reason. Any notion that a group or individual other than the Cayuga Nation Council led by Clint Halftown as the Federally Recognized Representative are the leaders has been rejected as a matter of federal law. Prior to 2015, there was a leadership dispute within the Cayuga Nation. That leadership dispute was resolved by the Cayuga people through an internal governance process, which confirmed that a Cayuga Nation Council led by Clint Halftown (and not including Parker) is the proper governing body of the Cayuga Nation. That internal governance process was carefully reviewed, and the outcome of it was formally recognized, by the Department of the Interior, and the Department's decision was affirmed in federal court. *Cayuga Nation v. Bernhardt*, 374 F. Supp. 3d 1 (D.D.C. 2019). On November 14, 2019, then-Assistant Secretary-Indian Affairs Tara Sweeney again affirmed that the United States recognizes the Halftown Council "as the Nation's governing body *without qualification*" and that "[t]he Halftown Council is the Nation's government *for all purposes*." Letter from Assistant Secretary–Indian Affairs Tara Sweeney (Nov. 14, 2019) (emphasis added).

Defendant Parker has created enduring public confusion about the matter through his inconsistent conduct and statements. The upshot is that for non-Indians and Indians looking to patron a Cayuga Nation store (or otherwise support the Nation), there is a real risk of confusion about the origin of the source of goods and services at the New Pipekeepers Store. *See Century 21 Real Estate LLC v. Bercosa Corp.*, 666 F. Supp. 2d 274, 296 (E.D.N.Y. 2009).

Many customers patron Nation-owned businesses, at least in part, to support the Nation. Some customers may drive to the New Pipekeepers Store thinking it is a Cayuga Nation store and that their money will go to the benefit of the Nation: the Nation will have lost that potential relationship. Others may walk out of the New Pipekeepers store thinking the Nation is selling illegal "rollies": the Nation's reputation will have been damaged as a result. In either event, Defendants' continued operation of the New Pipekeepers Store will adversely affect the Nation's reputation or business "in ways that will be difficult to quantify and that will not lend themselves to monetary compensation." *Id.* at 296.

"[I]n cases where confusion about the origin of goods or services leads to damage to reputation or loss of a potential relationship with a client that 'would produce an indeterminate amount of business in years to come[,]' monetary damages are difficult to establish and are unlikely to present an adequate remedy at law." *Id.* (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004)). To that end, "the Second Circuit has held that 'loss of reputation, good will, and business opportunities' can constitute irreparable harm." *Millennium Pipeline Co., L.L.C. v. Seggos*, 288 F. Supp. 3d 530, 544 (N.D.N.Y. 2017) (quoting *Register.com, Inc.*, 356 F.3d at 404); *Really Good Stuff, LLC v. BAP Inv'rs, L.C.*, 813 F. App'x 39, 44 (2d Cir. 2020). That is exactly the case here.

The irreparable harm to the Nation is "neither remote nor speculative, but actual and imminent, and one that cannot be remedied if [the] court waits until the end of the trial to resolve the harm." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (citation omitted). It has been occurring since Defendants opened the New Pipekeepers Store more than a month ago, has continued through the pendency of this motion, and will continue through the end of trial if Defendants' operation of the New Pipekeepers Store is not enjoined by this Court.

3. A Preliminary Injunction Is in the Public Interest

The revenues of Nation-owned businesses directly contribute to urgent governmental assistance for Nation members. The New Pipekeepers Store steals away funding for these much-needed governmental programs. Those that would be deprived of the assistance the programs provide during the pendency of this litigation cannot be made whole by a money judgment at its end for the simple fact that immediately-needed food and healthcare cannot be provided to a person retroactively. Moreover, the New Pipekeepers store engages in the plainly illegal practice of selling "rollie" cigarettes. The public interest lies in stamping out that illicit conduct, both because it is contrary to law, and because it attracts criminal elements, sows unease in the community, and portends imminent conflict and law enforcement intervention. It is manifestly in the public interest to enjoin Defendants' operation of the New Pipekeepers Store.

CONCLUSION

For the reasons set forth in this memorandum together with Plaintiff's opening memorandum, and any other reasons that may appear to the Court or be presented at any hearing on the motion, Plaintiff respectfully requests that the Court issue a preliminary injunction enjoining Defendants from operating the New Pipekeepers Store (or operating a similar business from another location) during the pendency of this litigation.

Dated: March 22, 2022

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