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

Defendants.

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

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiff Cayuga Nation ("Plaintiff" or the "Nation"), through undersigned counsel, respectfully submits this memorandum of law in opposition to the motions to dismiss filed by Defendants Dustin Parker, Nora Weber, and Andrew Hernandez (collectively, "Defendants") [ECF No. 34] and Paul Meyer, C.B. Brooks, LLC, and Justice for Native First People, LLC (collectively, the "Meyer Defendants") [ECF No. 35] (the "Motions").

PRELIMINARY STATEMENT

The object of the civil RICO statute is not just to compensate victims but to turn them into prosecutors, "private attorneys general" commissioned to eliminate racketeering activity from their surroundings. The Nation has brought this civil RICO action seeking to do just that. It has not brought any claims outside of RICO, whether under Nation law or otherwise. A simple reading of the Complaint bears that out, in addition to clearly establishing the Nation's standing and three well pleaded RICO causes of action.

Defendants, do not, and cannot, deny that they are trafficking in contraband cigarettes, selling marijuana, or otherwise committing various "racketeering activity" in violation of RICO. So they try to reframe this lawsuit as one that does not actually seek this Court's enforcement of RICO against an illicit enterprise but, rather, seeks to enforce a Nation business ordinance against a tribal competitor. As Defendants would have it, this Court should jettison the case as nothing more than an internal tribal dispute.

But RICO is *federal law*. It resides entirely outside and independent of any Nation ordinance or legislation. This case is not about eliminating business competition or enforcing a Nation ordinance; it is about stamping out a virulent RICO enterprise. The Nation has the right to bring this civil RICO action and this Court unassailably has jurisdiction to hear and adjudicate it. For the reasons set forth herein, the Motions should be denied.

STANDARD OF REVIEW

"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." *Brady v. Int'l Bhd. of Teamsters, Theatrical Drivers & Helpers Local 817*, 741 F.3d 387, 389 (2d Cir. 2014) (citation omitted). Dismissal pursuant to Rule 12(b)(1) "is inappropriate unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Raila v. United States*, 355 F.3d 118, 119 (2d Cir. 2004).

To survive a motion to dismiss under Rule 12(b)(6), "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 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court must "accept as true all of the allegations contained in the complaint," but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citation omitted).

In sum, a "district court should grant a motion to dismiss a RICO claim only if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *McLaughlin v. Anderson*, 962 F.2d 187, 190 (2d Cir. 1992) (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249–50 (1989) (citation omitted)). "In applying this standard, a court must read all well pleaded allegations in the complaint in the light most favorable to the plaintiff." *Commer. Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374, 380 (2d Cir. 2001) (citations omitted).

ARGUMENT

Defendants make three principal arguments in support of the Motions.[1] First, that this Court lacks subject matter jurisdiction over this civil RICO case; second, that Plaintiff lacks standing to bring the action; and third, that the Complaint does not allege the requisite elements of a civil RICO claim. Each of those arguments misrepresent the facts and misapprehend the law, and should be rejected for the specific reasons below.

1. This Court Unquestionably Has Subject Matter Jurisdiction Over Plaintiff's Civil RICO Claims

Few facts are needed to resolve the question of this Court's subject matter jurisdiction. Plaintiff has brought a plainly-labeled civil RICO action under 18 U.S.C. § 1964(c) asserting violations of 18 U.S.C. §§ 1962(a), 1962(c), and 1962(d). Federal courts have subject matter jurisdiction over civil RICO claims pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 1964(c). Therefore, this Court clearly has subject matter jurisdiction over this case.

But Defendants are not deterred by these procedural niceties. Instead, they try to convince this Court that an internal tribal dispute is all that is before it, arguing this case is nothing more than an effort by the Nation to enforce the Cayuga Nation Amended and Restated Business License and Regulation Ordinance (the "Ordinance") against Defendants in federal court. Because Defendants oppose the Ordinance as a matter of tribal law, and federal courts lack authority to resolve internal tribal disputes, Defendants say this Court lacks subject matter jurisdiction here. *See* Defs.' Opening Mem., p. 7 [ECF No. 34-1].

The premises underlying that conclusion are entirely false. Plaintiff has not in any way brought a dispute over the Ordinance to this Court. It has brought a civil RICO action based on

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[1] The Meyer Defendants adopt and incorporate by reference each and every argument asserted by Defendants in their motion to dismiss. Meyer Defs.' Opening Mem., p. 7, § III [ECF No. 35-1].

numerous 18 U.S.C. § 1961(1) predicate offenses. Those offenses have nothing to do with the Ordinance, which prohibits the operation of any business on Nation land without a Nation business license.

As detailed in the Complaint, the Nation has been pursuing, and continues to pursue, Defendants' violation of the Ordinance in the appropriate forum: the Cayuga Nation Civil Court. Compl., p. 9 at ¶ 44. Contrary to Defendants' contention, tribal law does not "lie at the heart" of this federal dispute: It has nothing to do with it. Thus, Defendants' cited language from *Cayuga Nation v. Tanner*, 824 F.3d 321, 327 (2d Cir. 2016) admonishing that "federal courts lack authority to resolve internal disputes about tribal law" falls completely flat.

If anything, *Tanner* supports the rejection of a similar ploy here. There, the Nation filed an action in district court seeking declaratory and injunctive relief that the federal Indian Gaming Regulatory Act preempted the application of a local anti-gambling ordinance of the Village of Union Springs. *Tanner*, 824 F.3d at 324. The Village argued that a rival "Unity Council" faction's unrelenting claim to Nation leadership raised a question of whether the Cayuga Nation, by and through its lawful governing body, the Cayuga Nation Council (with Clint Halftown as its federally-recognized representative) was the appropriate entity authorized to bring the federal lawsuit as a matter of *tribal law*. *Id.* Citing a decision by the Bureau of Indian Affairs, the court determined it was able to "conclude that Halftown may initiate litigation on behalf of the Nation in the instant matter, without resolving any questions of tribal law." *Id.* at 330.[2] What is more, it

[2] 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

instructed that to permit the insinuation of a tribal dispute to deprive the federal courts of subject matter jurisdiction over otherwise justiciable claims would "lead to an untenable result: tribes could be thrown of federal court by the mere suggestion that an individual or group of individuals initiating litigation on behalf of the tribe have overstepped their tribal authority." *Id.*

The same absurd result would arise here if Defendants were permitted to strip this Court of subject matter jurisdiction by unilaterally injecting into the case an unraised and irrelevant tribal law dispute, maintaining somehow "[w]ith respect to the RICO claim, the Nation is asking the Court to interpret and apply the Ordinance against Defendants." Defs.' Opening Mem., p. 9. That is illogical. The Nation is asking this Court only to interpret and apply RICO on its own terms.

Whether Defendants' conduct in trafficking in contraband cigarettes and laundering money violates the Ordinance—or, for that matter, any Nation law—does not make that conduct any less unlawful under RICO or any less illegal under the freestanding federal statutes the underpin the 18 U.S.C. § 1961(1) predicate offenses. And a business that is prohibited by the Ordinance by no means violates RICO as a sheer result. In either case, this Court's ability to fully resolve the civil RICO claims is completely independent of any reference to the Ordinance.

All told, if anyone is trying to litigate the Ordinance here, it is Defendants. Plaintiff mentions it just twice in its Complaint, and for purposes only of background. Compl., p. 9 at ¶¶ 43–44. Defendants make it the central theme of their Motion, mentioning it twenty-one times. *See*

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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).

Defs.' Opening Mem., pp. 5–10. That reality destroys any pretense that *Plaintiff* has put the Ordinance at issue in this case.

In all events, this Court has subject matter jurisdiction to adjudicate this civil RICO action, and the Motions should be denied.

2. The Complaint Clearly Establishes Plaintiff's Standing Under Civil RICO

"RICO grants standing to pursue a civil damages remedy to 'any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962].'" *Commer. Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374, 380 (2d Cir. 2001) (quoting 18 U.S.C. § 1964(c)) (alteration in original). That means "[i]n order to bring suit under § 1964(c), a plaintiff must plead (1) the defendant's violation of § 1962, (2) an injury to the plaintiff's business or property, and (3) causation of the injury by the defendant's violation." *Id.* (citation omitted). A cognizable RICO injury is one that is "by reason of" a RICO violation, which requires both factual and proximate causation. *Holmes v. Secs. Investor Prot. Corp.*, 503 U.S. 258, 267–274 (1992).

Defendants do not dispute that the Complaint adequately pleads Defendants' violation of 18 U.S.C. § 1962. *See* Defs.' Opening Mem., pp. 11–13. Indeed, Defendants do not deny that they have *actually* violated (and continue to violate) § 1962 by trafficking in contraband cigarettes and marijuana. Nor do Defendants argue that the Complaint fails to sufficiently plead an injury to Plaintiff's business or property—which, of course, it does. Compl., pp. 16–17 at ¶¶ 84, 89, and 95. Rather, Defendants focus their principal standing challenge on causation: specifically, proximate cause. *See* Defs.' Opening Mem., pp. 11–12.

For civil RICO purposes, proximate cause "means that there must be some 'direct relation between the injury asserted and the injurious conduct alleged.'" *Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 140 (2d Cir. 2018) (quoting *Holmes*, 503 U.S. at 268). "The 'direct

relation' requirement generally precludes recovery by a 'plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts.'" *Commer. Cleaning Servs.*, 271 F.3d at 381 (quoting *Holmes*, 503 U.S. at 268). Accordingly, "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to plaintiffs injuries." *Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451, 461 (2006).

There is plainly a "direct relation between the injury asserted and the injurious conduct alleged" here. *Holmes*, 503 U.S. at 268. Defendants' RICO enterprise falsely operates under the "Cayuga Nation" flag, claiming Cayuga Nation rights, privileges, customers, and revenues as its own, while being constituted of a criminal faction that has nothing whatever to do with the Nation. Operating as an imposter Nation business, Defendants sell contraband cigarettes that directly undermine the entirely-licit cigarette sales taking place at actual Nation-owned stores and steal away the attendant profits. It is difficult to imagine a scenario where the injurious conduct is more related to the injury asserted. If anything, standing would be satisfied here under lesser circumstances.

In *Commer. Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374 (2d Cir. 2001), Plaintiff brought a putative class-action suit for damages under RICO against defendant, a business competitor, alleging defendant engaged in a pattern of racketeering activity by hiring undocumented aliens for profit in violation of Section 274 of the Immigration and Nationality Act, 8 U.S.C. § 1324(a) (a RICO predicate offense). The complaint alleged defendant's illegal hiring practices enabled it to lower its variable costs and thereby underbid plaintiff and other competing firms. *Id.* at 378. Finding that plaintiff and the putative class members were "not alleging an injury that was derivative to others[,]" the Second Circuit determined plaintiff did "not seek to recover

based on 'the misfortunes visited upon a third person by the defendant's acts'" but, rather, "claim[ed] to have lost profits directly as a result of [defendant's] underbidding, which it achieved through its violation of § 1324(a)." *Id.* at 384 (quoting *Holmes*, 503 U.S. at 268) (additional citation omitted). Thus, proximate cause was satisfied and plaintiff had civil RICO standing. *Id.* The same holds here where the Nation's lost profits are the direct result of Defendants undermining the Nation's legitimate business, which Defendants achieve through various RICO predicate offenses, including the violation of 18 U.S.C. § 2341.

Defendants more broadly contend "where an asserted loss could have resulted from factors other than defendants alleged acts, plaintiffs cannot show proximate cause." Defs.' Opening Mem., p. 11. They go on to suggest that it could just be that Defendants operate their store in a more desirable way than the Nation, or tribal customers seem to prefer it for some other reason, and that is why the Nation has lost business and profits, or maybe it is just the free market at work. *Id.* In any case, as Defendants would have it, since something other than Defendants' RICO enterprise could have caused the same injury to the Nation there cannot be proximate cause here. *See id.*

That argument finds no basis in Defendants' cited precedents, which hold only that a plaintiff's injury must not be too far removed or attenuated from the injurious conduct. *See Anza*, 547 U.S. at 459 (holding "[t]he attenuated connection between [defendant's] injury and the [plaintiffs'] injurious conduct thus implicates fundamental concerns expressed in *Holmes*."); *see Leung v. Law*, 387 F. Supp. 2d 105, 122 (E.D.N.Y. 2005) (holding "an act which proximately caused an injury is analytically distinct from one which furthered, facilitated, permitted or concealed an injury which happened or could have happened independently of the act." (citation omitted)). At the same time, the argument is undermined by the Second Circuit's holding discussed

above. *Commer. Cleaning Servs.*, 271 F.3d at 384 (collecting cases permitting standing for claims for lost business revenues and customers).

It also proves too much, and immediately leads to absurd results. For example, Section 1961 defines "racketeering activity" to include "any act or threat involving murder, kidnapping, gambling, [or] arson . . . ." 18 U.S.C. § 1961(1)(A). Under Defendants' logic, because a random electrical fire can burn down a house just as well as arson, there is no proximate cause under RICO when a person intentionally sets fire to a neighbor's house. That, of course, is not true. While the root cause of the house fire may not be immediately perceptible from looking at a pile of ash and rubble, it may still be determined through a careful and perceptive analysis. Lost profits are no different. *See Commer. Cleaning Servs.*, 271 F.3d at 384.

Trying another angle, Defendants argue that Plaintiff lacks standing because, they say, it has failed to allege a concrete financial loss. Defs.' Opening Mem., p. 13. But that argument is belied by a simple reading of the Complaint, which alleges: "The Nation has been directly and proximately harmed by reason of Defendants' racketeering activity and RICO scheme, and conservatively estimates its attendant *lost revenue at $1,750,000*, in addition to the loss of untold customers and good will." Compl., p. 13 at ¶ 62 (emphasis added).

The Nation has suffered real, actual, and quantifiable harm—and it pled exactly that. *Id.* This is not at all "a mere expectation of pecuniary harm" that "cannot constitute 'business or property' under RICO." *Beter v. Murdoch*, No. 17-CV-10247 (GBD), 2018 U.S. Dist. LEXIS 107448, *15 (S.D.N.Y. June 22, 2018) (citing *Villoldo v. BNP Paribas S.A.*, 648 Fed. Appx. 53, 54 (2d Cir. 2016)). To the contrary, Plaintiff's specific $1,750,000 damages are consistent with, and vindicate, "the purpose of a civil RICO award" which "is to return the plaintiff to the same financial position he would have enjoyed absent the illegal conduct." *See Trs. of the Plumbers &*

Pipefitters Nat'l Pension Fund v. Transworld Mech., 886 F. Supp. 1134, 1146 (S.D.N.Y. 1995) (citation omitted).

For Rule 12(b)(6) purposes, this Court must accept specific damages allegation as true. *Iqbal*, 556 U.S. at 678. And, contrary to what Defendants suggest, there is no RICO requirement that Plaintiff "submit *evidence* of a 'concrete financial loss' . . . to *plausibly allege* an injury caused by a defendant's § 1962 violation." *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 885 (10th Cir. 2017) (holding "that neither § 1964(c)'s text nor any ruling by the Supreme Court" establishes such a requirement and rejecting the notion that plaintiff must submit "an appraisal quantifying the diminution in property value or comparator results of attempts to sell predating and postdating a RICO violation[] to *plausibly allege* an injury to his property caused by a defendant's § 1962 violation.").

At bottom, Defendants' RICO enterprise engages in RICO violations that directly and concretely injure the Nation, and the Complaint asserts exactly that. Plaintiff has standing to proceed with the civil RICO claims asserted in the Complaint, and the Motions should be denied.

3. The Complaint Plainly Alleges the Requisite Elements of a Civil RICO Claim Including a Pattern of Racketeering

A RICO claim may be brought against: (1) any person; (2) who (a) invests in, or (b) acquires or maintains an interest in, or (c) conducts or participates in the affairs of, or (d) conspires to invest in, acquire, or conduct the affairs of; (3) an enterprise; (4) which (a) engages in, or (b) whose activities affect, interstate or foreign commerce; (5) through (a) the collection of an unlawful debt, or (b) the patterned commission of various state and federal crimes. *See* 18 U.S.C. § 1962. Defendants take issue with only the last element, claiming the Complaint does not allege the requisite "continuity" to support a pattern of racketeering sufficient to state a civil RICO claim. *See* Defs.' Opening Mem., pp. 14–15.

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 filing a motion for preliminary injunction [ECF No. 2] 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.

Still, Defendants call Plaintiff's allegations of Defendants' continued illegal operation "spurious"—claiming outside of Plaintiff's assertion that Defendants have fortified the New Pipekeepers Store, installed a drive-thru window, and put up privacy fencing "to evade law enforcement and otherwise shelter their illicit activity from public view," Compl., p. 14 at ¶ 67, "the Nation has provided no other details that would suggest Defendants engaging in any

racketeering activity." Defs.' Opening Mem., pp. 15–16. But the Complaint is littered with details suggesting Defendants continued engagement in racketeering activity, Compl., pp. 8–15 at ¶¶ 37–77, and those allegations are deemed to be true for present purposes. *Iqbal*, 556 U.S. at 678. The same goes for the Meyer Defendants, whose property dealings have formed the bedrock of the RICO enterprise's ground operation which is, at its core, engages in inherently unlawful predicate acts. Compl., pp. 8 and 13 at ¶¶ 38, 39, 64, and 65; *Cofacredit, S.A.*, 187 F.3d at 242–243.

Perhaps recognizing Plaintiff has, in fact, satisfied the pleading standard, Defendants up the ante and claim "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." Defs.' Opening Mem., p. 15 (emphasis added). While the law does not require Plaintiff to *prove* that at the pleading phase, Defendants have removed any doubt. By their own admission, they have been operating the New Pipekeepers Store for many months now, openly slinging untaxed and unstamped cigarettes and marijuana out of a drive-thru window. *See* Defs.' Resp. in Opp'n to Pl.'s Mot. for Prelim. Inj. [ECF No. 30].

Whether run out of the old Pipekeepers or the New Pipekeepers Store, Defendants' enterprise is not, as they suggest, a legitimate business that sells "the same inventory as the other stores in the local area[.]" Defs.' Opening Mem., p. 15. What the New Pipekeepers Store sells—*and all that it sells*—is contraband cigarettes and marijuana, in direct violation of 18 U.S.C. § 1961(1). As such, Defendants' enterprise is not just engaged *primarily* in racketeering activity, it is engaged *exclusively* in it. And none of this would be possible without the Meyer Defendants, who not only leased the old Pipekeepers to Defendants at a below-market rate but, when it was shut down, obtained and sold the New Pipekeepers Store to Defendants for a six-hundred percent profit. Compl., pp. 8 and 13 at ¶¶ 39, 64, and 65.

Under all applicable rules interpretation, the Complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face,'" *Iqbal*, 556 U.S. at 678, and plainly satisfies the "continuity" pleading requirement. *Cofacredit,* 187 F.3d at 242. Defendants arguments to the contrary are without merit, and the Motions should be denied.

CONCLUSION

For the reasons set forth in this memorandum, and any other reasons that may appear to the Court or be presented at any hearing on the Motions, Plaintiff respectfully requests that the Motions be denied in their entirety.

Dated: April 11, 2022

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