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)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS DUSTIN PARKER, NORA WEBER and ANDREW HERNANDEZ'S MOTION TO DISMISS

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INTRODUCTION

The matter that brings us here derives from multiple enforcement actions Plaintiff took against Defendants'[1] business pursuant to the Cayuga Nation Amended and Restated Business License and Regulation Ordinance (the "Ordinance"), including forcing it to cease operations, confiscating property, and recently, pursuing legal action in the Cayuga Nation Tribal Court. (Ex. 1, Ex. 2). Indeed, enforcement actions were active before the Cayuga tribunal presently, apparently resolving any question about the tribal nature of the dispute. Plaintiff premised its prior enforcement actions on authority it purported to possess under the Ordinance. Yet, in order to maintain a continued lever of power over Defendants, Plaintiff now attempts to disown its own tribal-asserted authority in order to reclassify the business behavior at issue under the ordinance as federally-governed RICO conduct. The irony is too rich. It appears the motivation is too obvious.

It is not possible to discard the role the Ordinance plays in this matter, as it is the cornerstone of the dispute between the parties. On one side, Plaintiff asserts its business activities are exclusive to Cayuga Nation, which would render them Ordinance-controlled. On the other side, Defendants, who operated a smoke shop based on a legal opinion allowing them to do so, believed they were conducting business within their tribal rights. (Ex. 3). In order to adjudicate the dispute, this Court will have to answer whether Defendants were permitted to operate their smoke shop by interpreting the Ordinance, and perhaps, other applicable tribal laws, taking the issue squarely out of the jurisdiction of the federal court.

Moreover, even if the Court were inclined to extend jurisdiction, Plaintiff cannot substantively prevail on its claims under the Racketeer Influenced and Corruption Organizations

[1] Any reference to the "Defendants" contained within this response applies to Dustin Parker, Nora Weber, and Andrew Hernandez.

Act ("RICO"), 18 U.S.C. §§ 1961 et seq., because it has not plausibly alleged that Defendants engaged in RICO violations that have proximately caused harm to Plaintiff's business or property. Both a substantive RICO allegation and a RICO conspiracy allegation require proof that Plaintiff has been injured by the underlying RICO conduct. *See RJR Nabisco, Inc. v. Eur. Cmty,* 136 S. Ct. 2090, 2097 (2016) (RICO requires a showing that plaintiffs have been "injured in their business or property by reason of a violation" (quoting 18 U.S.C. § 1964(c))). Plaintiff alleges that Defendants' store injured their business by stealing away customers, which it assesses caused approximately $1,750,000 in lost revenues. Even assuming, arguendo, that Plaintiff has been injured, Plaintiff's argument fails to directly connect their alleged injuries to Defendants' alleged RICO conduct. Plaintiff offers nothing more than conclusory statements to demonstrate how it believes it is the intended target of the alleged RICO violations. Plaintiff's attempt to backstop these allegations with claims it is permitted to sue simply because of the foreseeable outcome that a competing business would result in financial loss. These hypothetical predictions are at odds with the limits and specificity requirements the Supreme Court and Second Circuit have imposed on establishing foreseeability and proximate cause under RICO. Plaintiff attempts to expand RICO liability and use it as a weapon to justify its own monopolization interests. The Court should reject these efforts, which would open the floodgates to similar suits initiated for similar nefarious purposes.

Equally objectionable is the irreconcilable truth that by claiming that the conduct of Defendants is in violation of, and pre-empted by, federal law, Plaintiffs are indicting their own conduct, either making what is locally permissible for it, impermissible for Defendants, or somehow immunizing itself from what it claims is federally impermissible for Defendants. In their own words, Plaintiff conducts the same exact business as Defendants, allegedly resulting in

direct harm to their business activities. This means not only is the Plaintiff subject to federal suits, if this is in fact a federal matter, then numerous other tribal-operated businesses across the country, are also violating federal law. Does Plaintiff really wish to facilitate a ruling that subjects the operation of what has become a prolific commodity trade throughout Indian country from the tribal sphere to the federal realm? Would this not result in further devastating economic impact to themselves, and in turn all other tribes, further forcing Plaintiffs to become the cause of their own alleged harm? (Ex. 4 -6). More importantly for this motion, does the Court want to take a hand in either of the incongruous possibilities, or to facilitate a monopoly in a limited market on sovereign land where federal law and policy have evolved to encourage and foster the autonomy of native people. The purpose of the civil RICO law was not to destroy business competition; it was to allow private parties to step into the shoes of prosecutors when they were directly injured by some racketeering activity.

Here, a finding that Defendants engaged in racketeering activity implicates Plaintiff and improperly involves the federal courts in a local, and as yet unresolved, matter. For these reasons, this suit should not be allowed to go forward.

ARGUMENT

I. Plaintiff Can Not Disavow the Role of Tribal Law and Ordinances While Claiming Tribal Sovereignty and Still Proceeding in a Tribal Forum.

Tribes are "domestic dependent nations" that exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L.Ed.2d 1112 (1991). As sovereign nations, tribes retain their original natural rights in matters of local self-government. *See Worcester v. Georgia*, 6 Pet. 515, 559, 8 L. Ed. 483 (1832); *see United States v. Mazurie*, 419 U.S. 544, 557, 95 S. Ct. 710, 717, 42 L.Ed.2d 706 (1975). Although no longer "possessed of the full attributes of sovereignty," tribal members remain a

"separate people, with the power of regulating their internal and social relations." *See United States v. Kagama*, 118 U.S. 375, 381–382, 6 S.Ct. 1109, 1112–1113, 30 L.Ed. 228 (1886); *see* also *Nevada v. Hicks,* 533 U.S. 353, 392, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (O'Connor, J., concurring in part and concurring in judgment) ("[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe"). This power includes making their own substantive law on internal matters, *see Roff v. Burney*, 168 U.S. 218, 18 S.Ct. 60, 42 L.Ed. 442 (1897) (memberships); *see Jones v. Meehan*, 175 U.S. 1, 29, 20 S.Ct. 1, 12, 44 L.Ed. 49 (1899) (inheritance rules); *see United States v. Quiver*, 241 U.S. 602, 36 S.Ct. 699, 60 L.Ed. 1176 (1916) (domestic relations), enforcing that law in their own forums. *See*, *e. g., Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

It is impossible to apply the contrast of sovereign versus local law without context as it relates to preemption, recognizing "[t]he unique historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination make it "treacherous to import . . . notions of pre-emption that are properly applied to . . . other [contexts]." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, (1983). Congress' objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress' overriding goal of encouraging "tribal self-sufficiency and economic development." *See White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143, 100 S.Ct. 2578, 2582, 65 L.Ed.2d 665 (1980) (footnote omitted). In part as a necessary implication of this broad federal commitment, we have held that tribes have the power to manage the use of their territory and resources by both members and nonmembers to undertake and regulate economic activity within the reservation. *Id*. at 151; *see* also *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed.2d 21 (1982).

At odds with Plaintiff's present arguments is the starting fact that the Complaint itself goes to great lengths to assert sovereignty. (Compl. at pp. 5-7). For example, the Complaint cites *California v. Cabazon Band of Mission Indians*, where the Supreme Court "has consistently recognized that Indian tribes retain attributes of sovereignty over both their members and their territory." 480 U.S. 202, 206 (1987) (internal quotation marks omitted), superseded by statute as stated in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014). (Compl. at ¶ 29). In the Complaint's next paragraph, Plaintiff claims "exclusive privileges" to conduct certain "economic activity." (Compl. at ¶ 30). The complaint highlights these notions of sovereignty to specifically argue that certain inherently tribal business activities on their land should operate free of government intervention.

Without even resorting to legal definitions of what does and does not constitute tribal business, the Complaint itself makes it crystal clear that the sale of specific items, such as those sold in smoke shops, are Tribal business activities, claiming, for example, that, "The Nation uses the proceeds of its cigarette sales to raise critical revenues for essential government programs for its members and the public." (Compl. at ¶ 36). Plaintiff controls the business activity through the "Cayuga Nation Amended and Restated Business License and Regulation Ordinance (the "Ordinance"), which prohibits the operation of any business on Nation land without a business license issued by the Nation." (Compl. at 43). The Ordinance also prohibits members of the Cayuga Nation from engaging in business that competes with "business conducted by the Nation." *Id*. As it relates specifically to Defendants, the Complaint states, "[w]hile Pipekeepers was under Defendants' control, it was absolutely not a Cayuga Nation store or otherwise operated in any way with the approval or consent of the Cayuga Nation." (Compl. at ¶ 41). Businesses that do not

comply with Plaintiff's Ordinances are "peaceful[ly]" evicted from their Defendants business, (Compl. at ¶ 4), and their inventory and property is confiscated. (Compl. at ¶ 53).

Plaintiff used the Ordinance as its legal foundation to cease the operations of Defendants' business, and now, in its Opposition, attempts to disavow its reliance on its own Tribal Ordinance by calling it "unraised and irrelevant" to the matter at hand. (Pl's Opposition Mem., at p.5). However, the Ordinance is the mechanism responsible for the dispute at issue here, and that dispute has not yet been resolved in the tribal forum. Just last week, Defendants learned that Plaintiff filed suit against them in Cayuga Nation Tribal Court. (Ex. 2). The suit, contains nearly identical allegations, that Defendants are operating a smoke shop in violation the Ordinance. In fact, on March 11, 2022, this very same Plaintiff obtained an Order from the Cayuga Nation Tribal Court seeking fines against Defendants for operating their store. The Tribal Court granted Plaintiff's request "pursuant to the Cayuga Nation Amended and Restated Business License and Regulation Ordinance." The Ordinance and Plaintiff's enforcement of the Ordinance is the genesis of this Complaint.

Where a tribal matter is a predicate to a federal claim in logical sequence, such as RICO, courts generally require resolution of the tribal matter before entertaining any subsequent derivative federal claim. *See Rabang v. Kelly*, 328 F. Supp. 3d 1164, (Dist. Ct. Washington 2018) (Court declined jurisdiction for RICO purposes because court would first be required to resolve inherent tribal membership matter, which is governed by tribal law and tribal Constitution, and thus outside of federal purview.) While Plaintiff is correct that federal courts have jurisdiction over RICO claims, they refuse to acknowledge that resolution of its claims — whether on summary judgment or at a jury trial — would ultimately require the Court to render a decision about tribal law. Tellingly, the Court in *Rabang* admonished Plaintiffs for attempting to bypass the necessary

jurisdictional step of "tribal exhaustion," stating Plaintiffs could not "eliminate this inherent issue just by bringing their challenge as a civil RICO action." *Id.* at 1168. What results from the *Rabang* analysis is the foundational concept that where federal courts would be required to resolve the underlying tribal issue to reach the federal claim, it will not do so. *Id*. ("To resolve the enrollment dispute underlying Plaintiffs' claims, the Court would also have to interpret and make rulings regarding Nooksack Tribal law . . . [going] beyond the scope of a district court's jurisdiction"). *Id*.; see also, e.g., *Runs After v. United States,* 766 F.2d 347, 352 (8th Cir. 1985) ("disputes involving questions of interpretation of the tribal constitution and tribal law [are] not within the jurisdiction of the district court."). Just as in *Rabang*, Plaintiff here attempts to distance itself from the jurisdictional question by eliminating the necessary step of resolving the tribal issue.

Rabang is analogous to the present case in numerous ways. Plaintiff brings this Complaint under civil RICO because Defendants are not in compliance with an Ordinance that prohibits members from entering into competitive business activities resulting in Plaintiff's ability to monopolize certain marketplaces. Defendants, relying on legal counsel, believed that they were within their tribal rights to open a smoke shop. (Ex. 3). Plaintiff is thus asking the Court to settle the foundation ordinance-governed dispute and interpret whether Defendants are permitted to engage in this specific type of business activity on native land. This is exactly what the *Rabang* Court rightfully avoided.

Plaintiff's Opposition points out that this Court has jurisdiction over civil RICO cases. But that is not in question. Defendants do not seek to redefine RICO or counter Plaintiff's definition of RICO. Instead, Defendants argue that this Court should not exercise jurisdiction in this civil RICO because it is an intra-tribal dispute. As previously noted, Federal courts remain reluctant to exercise jurisdiction over intra-tribal disputes: "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." *Tanner*, 824 F3d at 327, (quoting *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008) (internal quotation marks omitted)).

Plaintiff's Opposition argues that the *Tanner* court would support exercising jurisdiction over intra-tribal disputes to prevent litigation from being discharged. (Opp. at pg. 5). But *Tanner* does not extend the court's jurisdiction to intra-tribal disputes. Instead, when addressing the question of jurisdiction over intra-tribal disputes, the Court states that it "does not need to address the question in order to establish the jurisdiction" in *Tanner*. 824 F.3d at 328. When citing *Tanner*, the Opposition fails to note that the Court in *Tanner* specifically stated that it was forbidden to answer questions related to disputed tribal law. *Id*. Because the Court has not extended its jurisdiction to intra-tribal disputes, the Court must dismiss this matter for lack of subject matter jurisdiction.

Further, the doctrine of federal court abstention now known as the "tribal exhaustion rule" provides that federal courts abstain from hearing certain claims relating to Indian tribes until Plaintiff has first exhausted those claims in a tribal court. *Garcia v. Akwesasne Hous. Auth.,* 268 F.3d 76, 79 (2d Cir. 2001); quoting *National Farmers Union Insurance Cos. v. Crow Tribe,* 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). This Court and the Supreme Court have required abstention under the tribal exhaustion rule in instances where Plaintiff was litigating a previously filed, ongoing tribal-court action, and was asking the federal court to interfere with those tribal proceedings. *Garcia*, 268 F.3d at 80. The Courts have only permitted federal interference under a narrow exception in ongoing tribal matters where" exhaustion would be futile

because of the lack of adequate opportunity to challenge the tribal court's jurisdiction." *Rabang*, at 1167. That exception is not present here. Plaintiff filed suit in Cayuga Nation Tribal Court against Defendants under local ordinance for the exact same conduct that has given rise to the present claims. That court, not this Court, is a better venue to interpret Defendants' rights to operate their business under tribal law and ordinances.

II. Plaintiff's Theory of Harm Remains Attenuated and Speculative, and It Has Not Identified a Cognizable Concrete and Definite Injury.

Plaintiffs cannot show that it has been injured "by reason of" Defendants' RICO violation. See *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 265 (1992); 18 U.S.C. § 1964(c). Congress intended this requirement to narrow the class of cases under RICO's reach; as the Supreme Court explained in *Holmes*, RICO targets the initial injury exacted by a violation of the law, and is not designed to capture "the ripples of harm" that may "flow" out into the broader world. *Id*. at 266 n.10 (quotation marks omitted). A RICO Plaintiff must show that a predicate act "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Bridge v. Phoenix Bond & Indem. Co*., 553 U.S. 639, 654 (2008) (quoting *Holmes*, 503 U.S. at 268). That an injury is foreseeable is not enough: proximate cause requires that the harm be the "direct" result of the racketeering activity. *Holmes*, 503 U.S. at 271. RICO Plaintiffs must establish that they are the "direct victims" or "intended targets" of Defendants' conduct. See *Anza v. Ideal Steel Supply Corp*., 547 U.S. 451, 458 (2006). A "link that is too remote, purely contingent, or indirect is insufficient" to establish proximate cause. *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) (plurality opinion) (quotation marks omitted).

The Supreme Court has repeatedly emphasized the limiting function of the proximate cause requirement in a series of decisions starting with *Holmes*. In *Holmes*, the Court held that a plaintiff must show "some direct relation between the injury asserted and the injurious conduct alleged," in

other words, that the underlying predicate acts were the immediate cause of the asserted harm. 503 U.S. at 268. There, an insurer could not, under RICO, recover losses from fraud that initially befell its members, even though the insurer ultimately had to pay the price for Defendant's scheme. *Id*. at 276. In *Anza*, the Court clarified that a defendant could not proximately cause a harm that occurred as a side-effect of the central violation. There, plaintiff claimed that defendant's scheme to evade taxes had allowed it to artificially deflate prices, and, thus, the law-abiding Plaintiff had lost business to the defendant. *Anza*, 547 U.S. at 458-61. The Court acknowledged Plaintiff's loss but held that the cause of Plaintiff's "asserted harms, however, is a set of actions entirely distinct from the alleged RICO violation. *Id*. at 458.

Plaintiff asserts that they have been injured by Defendants' business which caused lost revenues at $1,750,000, as well as the loss of "untold customers and goodwill." (Compl. at ¶ 62). The Opposition argues these facts coupled with Second Circuit holdings demonstrate Defendants proximately caused Plaintiff's harm. But the case cited by the Opposition is not analogous to the present case. In *Commer. Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc*, 271 F.3d 374, 378 (2d Cir. 2001), Plaintiff alleged Defendants engaged in a scheme specifically to gain a "significant business advantage over other firms in the 'highly competitive and price-sensitive cleaning services industry by knowingly hiring 'hundreds of illegal immigrants at low wages.'" 271 F.3d 374, 378 (2d Cir. 2001). Further, the complaint was able to allege two specific contracts that Plaintiffs previously obtained and subsequently lost after Defendant undercut its bids. *Id.* at 379. The Court specifically held, "RICO statute would grant standing if Plaintiff were a head-to-head bidder against [defendant] who lost because of [defendant's] illegally-enhanced reputation or economic power." *Id*. at 382.

In contrast to this case, the Complaint here does not describe a single instance where Defendants undercut the Plaintiff's business by stealing away even one customer. Further, the Complaint does not contain any language that would indicate Defendants operated their business in a manner that could undercut the Plaintiff which would result in the loss of customers. While Plaintiff alleges to have lost $1,750,000 in revenue to Defendants, there is no support in the Complaint that would demonstrate how Defendants' actions proximately caused this loss. The only theory asserted by Plaintiff is that Defendants operated in the same marketplace and it is, therefore, foreseeable that Defendants' business would cause Plaintiff a loss. (Compl. at ¶ 60). This foreseeability theory is insufficient in the Second Circuit. See *Sperber v. Boesky,* 849 F.2d 60, 66 (2d Cir. 1988) (foreseeability alone does not determine proximate cause).

CONCLUSION

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

Dated: Albany, New York
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