UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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**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)

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**DUSTIN PARKER, NORA WEBER, AND ANDREW HERNANDEZ,**

*Third-Party Plaintiffs*,

*v.*

**CLINT HALFTOWN,**

*Third-Party Defendant*.

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**PAUL MEYER, JUSTICE FOR NATIVE FIRST PEOPLE, LLC, AND C.B. BROOKS LLC,**

*Third-Party Plaintiffs*,

*v.*

**CLINTON HALFTOWN AND JOHN DOES 1-10,**

*Third-Party Defendants*.

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THIRD-PARTY COMPLAINTS**

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Third-Party Defendant, Clint Halftown, through undersigned counsel, respectfully submits this memorandum of law in support of his motion to dismiss the third-party complaints filed against him by Third-Party Plaintiffs/Defendants Dustin Parker, Nora Weber, and Andrew Hernandez (collectively, the "Parker Defendants") [ECF No. 65] and Paul Meyer, Justice for Native First People, LLC, and C.B. Brooks LLC, (collectively, the "Meyer Defendants") pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and to strike the third-party complaints for misjoinder pursuant to Rule 14(a)(4).

## PRELIMINARY STATEMENT

Defendants have brought these third-party actions in a transparent effort to circumvent the Cayuga Nation's sovereign immunity. Taken together, the actions consist of nothing more than ten previously-asserted counterclaims against the Nation identically repled as direct claims against a Nation government official, and reintroduced by way of gratuitous personal attacks. The Second Circuit has flatly rejected such contrivances. This Court should do so here.

All of Defendants' third-party claims are barred by the doctrine of tribal sovereign immunity, whether afforded to the Nation as a sovereign or to Mr. Halftown as a Nation government official. Congress has not abrogated tribal sovereign immunity for any of the third-party claims, and the Nation has not waived it. This Court lacks subject matter jurisdiction over them as a result, and they must all be dismissed.

The third-party claims also run headlong into Rule 12(b)(6). Defendants have not adequately pled any of their causes of action but, instead, have offered only the kind of naked assertions and formulaic recitations the Supreme Court has made clear will not suffice. Several of the claims also fail as a matter of law either because they arise from a void contract or from one that was not actually breached. At bottom, the pleaded facts fall far short of supporting any of the

legal conclusions, and Defendants altogether fail to state a claim. What is more, the scant facts Defendants plead in support of their state law third-party claims do not overlap with the facts underlying the original federal RICO claims in this case. Defendants' state law claims, therefore, are not part of the same case or controversy, and this Court lacks supplemental jurisdiction to hear them.

Finally, in addition to being dismissed for lack of subject matter jurisdiction and failure to state a claim, all of the third-party claims should be stricken for misjoinder pursuant to Rule 14(a)(4) because the outcome of Defendants' third-party claims does not depend on the outcome of the Nation's RICO claims against Defendants.

## BACKGROUND

Defendants have built an illegal business enterprise out of importing and selling contraband cigarettes from a makeshift convenience store they call "Pipekeepers," currently located in the Town of Montezuma. The Nation commenced these RICO proceedings against Defendants to put a stop to that racketeering enterprise. Compl., ECF No. 1. In lieu of answering the Complaint, the Parker Defendants and the Meyer Defendants both filed motions to dismiss. ECF Nos. 34 and 35.

By its August 12, 2022 Memorandum-Decision and Order, this Court denied those motions in part, determining it had subject matter jurisdiction over these proceedings and permitting the Nation's 18 U.S.C. § 1962(a) RICO claim against Defendants to proceed. ECF No. 59. That triggered Defendants' obligations to answer the Complaint, and both groups filed an Answer with Counterclaims on August 26, 2022. ECF Nos. 60 and 61.

Two weeks later, both groups of Defendants filed third-party complaints against Mr. Halftown, who is a member of the Cayuga Nation's governing body, the Cayuga Nation Council, and the Nation's federal representative. All of the counterclaims and third-party claims arise from

property rights involving a gas station located at 126 East Bayard Street in Seneca Falls (the "Property") that the Meyer Defendants once leased from the Seneca-Cayuga Nation of Oklahoma under a written commercial lease [ECF No. 61, Ex. A] and, in turn, claim to have subleased to the Parker Defendants for a four-year term. Indeed, the third-party claims against Mr. Halftown are nothing more than a pared down, but identical, set of Defendants' previously-asserted counterclaims against the Nation.[1]

The Nation purchased the Property from the Seneca-Cayuga Nation of Oklahoma free and clear in December 2021, and currently operates its "Lakeside Trading" gas station and convenience store at the location.

## STANDARD OF REVIEW

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the plaintiff bears the burden of establishing that jurisdiction exists by a preponderance of the evidence. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). In ruling on such a motion, a court may consider evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment. *Luckett v. Bure*, 290 F.3d 493, 496–497 (2d Cir. 2002).

In considering a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true the well-pleaded factual allegations set forth in the complaint and draw all reasonable inferences in favor of the plaintiff. *Ashcroft v. Iqbal,* 556 U.S. 662, 677 (2009). In so doing, the Court need not give "credence to plaintiff's conclusory allegations" or legal conclusions offered as pleadings.

[1] *Compare* Parker Defs' Answer with Countercls., pp. 19–23 (Counts II–VII), ECF No. 60, *with* Parker Defs.' Third-Party Compl., pp. 7–11 (Counts I–VI), ECF No. 64, and Meyer Defs.' Answer with Countercls., pp. 16–19 (Count I, IV, V, and VI), ECF No. 61, *with* Meyer Defs.' Third-Party Compl., pp. 7–10 (Count I, IV, V, and VI), ECF No. 64.

*Cantor Fitzgerald v. Lutnick,* 313 F.3d 704, 709 (2d Cir. 2002) (internal quotation marks omitted). Indeed, the court should begin by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. If well-pleaded factual allegations exist, the court must then determine whether they plausibly give rise to entitlement for relief. *Id.*

To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Naked assertion[s]," "labels and conclusions," or "formulaic recitation[s] of the elements of a cause of action will not do." *Id.* at 555, 557. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. 678. And while a plaintiff need not establish a probability of success on the merits, he or she must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

## ARGUMENT

### I. The Third-Party Claims Must Be Dismissed Because this Court Lacks Subject Matter Jurisdiction Over Them

"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." *Makarova,* 201 F.3d at 113 (citation omitted). This Court lacks subject matter jurisdiction over all of Defendants' third-party claims because they are barred by the doctrine of tribal sovereign immunity. Moreover, Defendants' state law claims should be dismissed for the additional reason that they fail the test for supplemental jurisdiction under 28 U.S.C. § 1367.

### A. The Nation's Tribal Sovereign Immunity Bars All of the Third-Party Claims Against Mr. Halftown

"Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978) (citations omitted). "Like eleventh amendment immunity, foreign sovereign immunity, and qualified immunity, tribal sovereign immunity is immunity from suit, not merely immunity from liability." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 119–120 (2d Cir. 2019) (citing *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 754 (1998)). And it applies with equal force to direct suits and cross suits. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (citation omitted).

Tribal sovereign immunity broadly extends to both tribal government and commercial activity, whether on or off of Indian lands, *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 790 (2014), and "to individual tribal officials acting in their representative capacity and within the scope of their authority." *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 307 (N.D.N.Y. 2003) (citation and internal quotation marks omitted). So too, "[o]fficial tribal enterprises that act as a division or arm of the tribe are immune from suit as an extension of the tribe's sovereign immunity," *City of N.Y. v. Golden Feather Smoke Shop, Inc.*, No. 08-CV-3966, 2009 U.S. Dist. LEXIS 20953, *14 (E.D.N.Y. Mar. 16, 2009) (citations omitted), and that immunity "extends to officers of the commercial enterprise." *Allegany Capital Enter., LLC v. Cox*, No. 19-CV-160S, 2021 U.S. Dist. LEXIS 27846, *14 (W.D.N.Y. Feb. 12, 2021) (citing *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (additional citations omitted)).

All told, "[a]s a matter of federal law, an Indian tribe is subject to suit *only* where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa*, 523 U.S. at 754 (emphasis added). "[A] waiver of sovereign immunity cannot be implied," and Congressional abrogation of tribal sovereign immunity does not arise by implication. *Martinez*, 436 U.S. at 58 (citations and

internal quotation marks omitted). Rather, "[t]o abrogate tribal immunity, Congress must unequivocally express that purpose" and "to relinquish its immunity, a tribe's waiver must be clear." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

In all, Defendants assert ten third-party claims against Mr. Halftown. All but one of those claims come under the New York common law and fall into two categories: contract and tort. The remaining third-party claim is brought by the Parker Defendants under the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030.

The Supreme Court has made clear that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa*, 523 U.S. at 760. More broadly, it has stated time and again, without qualification, that the doctrine of tribal sovereign immunity requires dismissal of "*any suit* against a tribe absent congressional authorization (or a waiver)," *Bay Mills*, 572 U.S. at 789 (emphasis added), a principle that does not admit of any exception for tort claims. *See Kiowa*, 523 U.S. at 758 (recognizing that sovereign immunity may preclude suit by "those who are unaware they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, *as in the case of tort victims*." (emphasis added)).

The tribal sovereign immunity afforded to the Cayuga Nation as a federally recognized Indian nation, and extended to Mr. Halftown as a government official, bars all of Defendants' third-party claims and requires their immediate dismissal.

A party "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority."

*Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (citation omitted); *see Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2002) (holding "a plaintiff cannot circumvent tribal immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." (citation and internal quotation marks omitted)). But that is exactly what Defendants seek to do here.

While the caption is new, the target is the same. Other than swapping out the names of the parties (*e.g.* "Halftown" for "Plaintiff"), Defendants' third-party claims against Mr. Halftown are word-for-word identical to the counterclaims they have already asserted against the Nation. *Compare* ECF Nos. 60 (Counts II–VII) and 65 (Counts I–VI), and ECF Nos. 61 (Count I, IV, V, and VI) and 64 (Count I, IV, V, and VI). By naming Mr. Halftown, Defendants are simply trying another angle to get at the Nation and circumvent its tribal sovereign immunity. Nonetheless, "[i]f the sovereign tribe is the target, then immunity applies," *Allegany Capital Enter., LLC v. Cox*, No. 19-CV-160S, 2021 U.S. Dist. LEXIS 27846, *14 (W.D.N.Y. Feb. 12, 2021).

If anything, Defendants' attempts to reframe their counterclaims against the Nation as direct claims against Mr. Halftown only reinforce the indispensable application of tribal sovereign immunity to *all* of the claims. Defendants have pled (in their respective counterclaims and third-party claims) that the Nation's and Mr. Halftown's actions were identical and interchangeable. But the Nation can only act at the behest of its lawful governing body, the Cayuga Nation Council. And as Defendants well know, Mr. Halftown is a member of the Council. Defendants' pleadings, therefore, are only compatible if Mr. Halftown is alleged to have acted in his capacity as a government official—whether by taking part in the Nation's governance or seeing through its governmental action. In either case, the Nation's tribal sovereign immunity acts to bar the claims. *Chayoon*, 355 F.3d at 143 (2d Cir. 2004); *Frazier*, 254 F. Supp. 2d at 310.

Ultimately, Congress has not abrogated tribal sovereign immunity for the garden-variety state common law claims Defendants assert, nor has it done so for claims under the Computer Fraud and Abuse Act—which does not mention tribal sovereign immunity at all. *See* 18 U.S.C. § 1030; *see also C&L Enters.,* 532 U.S. at 418 (2001) ("To abrogate tribal immunity, Congress must unequivocally express that purpose."). The Nation, for its part, has not in any way waived its tribal sovereign immunity here; and the fact that the Nation brought the underlying action in which the third-party complaints have been filed does not change that. *See Potawatomi*, 498 U.S. at 509.

Therefore, all of Defendants' third-party claims are precluded under the broad principle of tribal sovereign immunity articulated by the Supreme Court in *Potawatomi*, *Kiowa*, and *Bay Mills*, and "the settled precedent in the Second Circuit . . . that 'courts must dismiss any suit against a tribe absent congressional authorization or waiver[.]'" *Oneida Indian Nation v. Phillips*, 360 F. Supp. 3d 122, 133 (N.D.N.Y. 2018) (quoting *Cayuga Indian Nation v. Seneca County*, *N.Y.*, 761 F.3d 218, 220 (2d Cir. 2014) (additional citations omitted)).

**B. There Is No Supplemental Jurisdiction Over the State Law Third-Party Claims**

Defendants assert that jurisdiction exists over all of their third-party claims pursuant to 28 U.S.C. § 1367(a). Parker Defs.' Third-Party Compl., p. 2 at ¶ 9, ECF No. 65, and Meyer Defs.' Third-Party Compl., p. 4 at ¶ 14, ECF No. 64. However, supplemental jurisdiction cannot be found over any of Defendants' state law claims because they are not part of the same "case or controversy" as the Nation's original federal claims.

In short, claims "are part of the 'same case or controversy' within § 1367 when they derive from a 'common nucleus of operative fact'" with the original federal claims. *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328, 335 (2d Cir. 2006). The "common nucleus" may be found where either (1) "the facts underlying the federal and state claims substantially overlap[]"

or (2) "the federal claim necessarily brought the facts underlying the state claim before the court." *Id.* (citation omitted). Neither is the case here.

The original federal claims in this action are the Nation's RICO claims against Defendants. Those claims center on Defendants' association-in-fact racketeering enterprise that, among other things, arrogates the Nation's sovereign right to sell untaxed cigarettes, violates the Contraband Cigarette Trafficking Act, and unlawfully invests racketeering income to fuel the continued acquisition and sale of contraband cigarettes. The facts underlying that conduct, and the attendant federal RICO claims, do not overlap with the facts undergirding Defendants' state law third-party claims. Those facts—the Nation's purchase of the Property from the Seneca-Cayuga Nation of Oklahoma, its use and occupancy of those premises as owner, the terms of Defendants' leases, and the on-site storage of sundry personal property—are completely detached from the original federal claims.

The only possible connection between the parties' claims is that a common piece of real property is mentioned in both, albeit for different reasons. Apart from that, the facts are entirely unaffiliated. That thin reed is not enough to support supplemental jurisdiction. *See Torres v. Gristede's Operating Corp.*, 628 F. Supp. 2d 447, 468 (S.D.N.Y. 2008) (determining supplemental jurisdiction was not present where "the only possible connection between the parties' claims is that they both arise out of [plaintiff's] employment at [the same store]").

Far from overlapping, the principal facts underlying the third-party claims share nothing in common with, and say nothing at all about, the Nation's RICO claim. What logically follows is that the Nation's federal RICO claim did not, and could not, necessarily bring Defendants' state law third-party claims before the Court. For that reason, this Court lacks supplemental jurisdiction over Defendants' state law claims, and they should be dismissed pursuant to Rule 12(b)(1).

## II. The Third-Party Claims Must Be Dismissed Because They Fail to State a Claim

Defendants fail to state a claim on any of their ten third-party claims. Simply put, "[t]o survive a motion to dismiss, 'a [pleading] must contain sufficient factual matter, accepted as true to 'state a claim that is plausible on its face.'" *Carlin v. Davidson Fink LLP*, 852 F.3d 207, 212 (2d Cir. 2017) (quoting *Iqbal*, 556 U.S. at 678 (additional citation omitted)). For a number of reasons, Defendants' pleadings do not do so.

### A. The Tortious Interference Claims Are Inadequately Pled and Fail as a Matter of Law

"Under New York law, the elements of tortious interference with contract are (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006) (citations and internal quotation marks omitted).

As a matter of pleading, the Meyer Defendants do not even superficially allege, let alone provide factual support for, a claim that the Seneca-Cayuga Nation of Oklahoma breached the Commercial Lease. Without that allegation, they do not, and cannot, claim that Mr. Halftown procured a breach. Nor do they, or can they, allege facts that trace damages to a breach they do not even claim occurred.

But even putting those deficiencies aside, as a matter of substance, the only thing the Seneca-Cayuga Nation of Oklahoma is alleged by the Meyer Defendants to have done is sold the Property to the Nation. While Defendants may prefer that sale had not occurred, it was not a breach of contract. The Commercial Lease does not contain any provision that prevents or constrains the Seneca-Cayuga Nation of Oklahoma's sale of the Property. *See* ECF No. 64, Ex B. As a result, the

Meyer Defendants' claim of tortious interference does not "state a claim for relief that is plausible on its face" and must be dismissed. *Iqbal*, 556 U.S. at 678.

The Parker Defendants, for their part, assert a tortious interference claim with respect to a claimed sublease with the Meyer Defendants. To start, that cause of action should be dismissed for repeating the same pleading inadequacies as the Meyer Defendants. That is, the Parker Defendants do not even allege, or provide factual support for, the fact that the Meyer Defendants breached any sublease, or trace any damages to such an unidentified breach.

But the Parker Defendants' tortious interference claim also suffers from deeper irremediable defects. New York's Statute of Frauds provides that real property leases for a period of more than one year must be in writing or they are void. N.Y. Gen. Oblig. Law § 5-703(2). Both Defendants plainly state that the sublease was for a term of *four years*, and neither claim it was in writing. *See* ECF No. 64, p. 5 at ¶ 27 and ECF No. 65, p. 4 at ¶ 27. Still, after identifying a certain document as the Commercial Lease between the Meyer Defendants and the Seneca-Cayuga Nation of Oklahoma, the Parker Defendants (perhaps accidentally) attach as Exhibit A to their third-party complaint a document that reflects the idea of a sublease with the Meyer Defendants. ECF No. 65, p. 3 at ¶ 22, Ex. A.

The document is headed "Exhibit A Leased Premises," and appears to be a fragment of another document, containing only pages "15 of 17" and "16 of 17." *See* ECF No. 65, Ex. A. Even more notably, it purports to be an agreement between Justice for Native First People, LLC (as sublessor) and the Cayuga Nation (as tenant) with Defendant Dustin Parker professing to sign on the Nation's behalf. *See id*.

That is a fraud. Defendant Parker does not represent the Cayuga Nation, is not a member of its governing body, and holds no authority elected or otherwise in the conduct of its affairs. The

United States Department of Interior, Bureau of Indian Affairs has made clear that the Cayuga Nation Council is "the Nation's governing body *without qualification*" and its "government *for all purposes*." Letter from Assistant Secretary–Indian Affairs Tara Sweeney (Nov. 14, 2019) (emphasis added).

The Parker Defendants have not pled that Defendant Parker holds any governmental office or position with the Nation. Indeed, he is unequivocally not a member of the Cayuga Nation Council and has no role in the Nation's government. *See* https://cayuganation-nsn.gov/government.html. Far from it, he is a flagrant anti-government dissident.

Not only is the lease invalid, it is simultaneously void under New York's Statute of Frauds because it does not does not "express[] the consideration." N.Y. Gen. Oblig. Law § 5-703(2). And it is only further proof that the Parker Defendants are, indeed, masquerading as the Nation, damaging its name and goodwill, and causing irreparable harm.

### B. The Claims for Attorneys' Fees are Inadequately Pled and Fail as a Matter of Law

The Meyer Defendants' claim for attorneys' fees against Mr. Halftown pursuant to Section 19.09 of the Commercial Lease fails as a matter of pleading because they do not allege that Mr. Halftown was a party to the contract. Because he unassailably was not, the claim also fails as a matter of law. *See* ECF No. 64, Ex B.

Moreover, the Meyer Defendants' do not provide any facts supporting even the broader contention that the Commercial Lease passed from the Seneca-Cayuga Nation of Oklahoma to the Nation. Their pleading contains nothing relating to the Nation's discussions or agreements with the Seneca-Cayuga Nation of Oklahoma concerning the purchase of the Property (or the assumption or rejection of the Commercial Lease), and nothing indicating the Nation made any representations to Defendants (or other third parties) that the Commercial Lease or a right to

occupy the premises would survive the sale. Even assuming it survived the sale (which it did not), there would still be no claim against Mr. Halftown.

The Parker Defendants' pleading is equally silent on any of these material facts. It does not allege that Mr. Halftown was a party to the Commercial Lease or to any purported sublease, or state how Mr. Halftown would otherwise be liable on a contractual attorneys' fees claim. Because it is indisputable that Mr. Halftown was not a party to any such agreements, the Parker Defendants' claim fails as a matter of law. What is more, as discussed above, any claimed sublease cannot be sued upon in the first place because it is void under New York's Statute of Frauds and it is invalid by virtue of Dustin Parker's fraudulent misrepresentation.

### C. The Trespass and Conversion Claims Are Inadequately Pled

"Trespass is the intentional physical entry onto the property of another without justification or permission." *Woodhull v. Town of Riverhead*, 46 A.D.3d 802, 804 (2d Dep't 2007) (citations omitted). Yet Defendants do not detail how the Nation, as owner of the Property, was without justification or permission to enter upon it. Defendants' bitter disagreement with the Seneca-Cayuga Nation of Oklahoma's decision to sell the Property to the Nation does not make it any less legitimate. Nor does it otherwise diminish the Nation's rights in and to property that it owns.

More to the point, Defendants provide no facts to support a claim that Mr. Halftown even once entered the Property after the Nation took possession, let alone that he did so outside his capacity as a government official. It is the Nation who indisputably own and possesses the Property, and Defendants' efforts to plead Mr. Halftown in as a proxy for the Nation fail to state a claim.

"To state a claim for conversion under New York law, a plaintiff must allege that he has an immediate superior right of possession to a specific identifiable thing and that a defendant with intent to interfere with such ownership or possession exercised dominion or actually interfered with the property to the exclusion of or in defiance of the plaintiff's rights." *Van Brunt v. Rauschenberg*, 799 F. Supp. 1467, 1473 (S.D.N.Y. 1992) (citation and internal quotation marks omitted). That requires a plaintiff to sufficiently describe the "specific and identifiable property converted by the defendants." *Walden Terrace, Inc. v. Broadwall Mgmt. Corp.*, 213 A.D.2d 630, 631 (2d Dep't 1995). A vague or indefinite description of the property allegedly converted fails to state a claim. *Chang v. Gordon*, 96 Civ. 0152, 1997 U.S. Dist. LEXIS 13570, *27 (S.D.N.Y. Sep. 8, 1997) (dismissing conversion claim where plaintiff did not specifically identify which assets were converted).

The Meyer Defendants broadly allege only that Mr. Halftown interfered with their "personal property" [ECF No. 64, p. 9 at ¶ 50], while the Parker Defendants simply lump out broad categories "including but not limited to, inventory, cash, computers, and other personal effects." ECF No. 65, p. 9 at ¶ 71. But it is well settled that "[s]uch a description of the property allegedly converted is too vague and indefinite to support a claim for conversion." *Chang v. Gordon*, 96 Civ. 0152, 1997 U.S. Dist. LEXIS 13570, *27 (S.D.N.Y. Sep. 8, 1997) (dismissing conversion claim where plaintiff did not specifically identify which assets were converted, instead lumping the property into categories of "assets and operations"). Thus, the claim fails on its face here.

Finally, the Parker Defendants' trespass to chattels third-party claim is really a duplicative claim for conversion. While they call it "trespass to chattels," the Parker Defendants allege, with respect to the same obscure personal property, that Mr. Halftown has entirely deprived them of possession. *See* ECF No. 60, pp. 21–22. "[W]hen a defendant [allegedly] intrudes or exercises

control over property to the extent that a plaintiff is entirely denied of possession, the claim [for trespass to chattels] becomes one of conversion." *Jackie's Enters., Inc. v. Belleville*, 165 A.D.3d 1567, 1573 (3d Dep't 2018) (citations omitted). Therefore, the trespass to chattels claim fails to state a claim on its own terms, and it cannot survive as a conversion claim for the reasons set forth above.

### D. The Computer Fraud and Abuse Act Claim is Inadequately Pled

While the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 "is primarily a criminal statute, § 1030(g) provides a civil cause of action in limited circumstances." *Schatzki v. Weiser Capital Mgmt., LLC*, 10 Civ. 4684, 2012 U.S. Dist. LEXIS 92442, *4 (S.D.N.Y. June 30, 2012). However, "[t]he elements of a private cause of action under this statute are complex[.]"

> [A] civil action under subsection 1030 (g) of the CFAA requires: (1) establishing the elements of the particular substantive (criminal) offense under subsection 1030 (a); (2) establishing that the plaintiff suffered 'damage or loss' as a result of such a violation (although some, but not all, such offenses themselves already require 'damage' and one now requires 'damage and loss'); and (3) establishing one of the five types of conduct specified under subsection (c)(4)(A)(i), which are also required under subsection 1030 (g) (some of which might also constitute 'damage' or 'loss').

*Id.* (citation omitted).

The Parker Defendants do not even begin to trace out this complex set of elements in their pleading, much less "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In fact, they do not even claim to know, for sure, that Mr. Halftown—or for that matter, the Nation—ever had (or now has) their computer devices, let alone accessed any information on them.

All told, they offer just four conclusory allegations in support of the CFAA civil cause of action: (1) "The computers taken by Halftown are 'protected computers' pursuant to Section

1030(e)(2) of the Computer Fraud and Abuse Act"; (2) "Halftown knowingly and intentionally accessed the computers without authorization or exceeded authorized access to the computers, and thereby obtained information from the computers, in violation of 18 U.S.C. § 1030(a)(2)"; (3) "Halftown's actions to unlawfully access the computers and Third Party Plaintiffs' email and other communications gave him access to personal and potentially attorney-client privileged communications"; and (4) "The information that Halftown obtained included financial information related to the Pipekeepers store and private emails and other communications by Third Party Plaintiff."

Tellingly, there is not a single allegation of how Mr. Halftown had access to the computers, what he accessed, when he accessed it, or how he used the information. Defendants do not, for that matter, even provide a simple description of the type or number of computer devices allegedly breached. Indeed, there is not a single well-pled fact, only "conclusory allegations or legal conclusions masquerading as factual conclusions [that] will not suffice to prevent a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002).

Therefore, the Parker Defendants fail to state a claim against the Mr. Halftown under the CFAA, and their third-party claim should be dismissed.

## III. The Third-Party Claims Should Be Stricken for Misjoinder

Rule 14(a) provides that "[a] defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty *who is or may be liable for all or part of the claim against it*." Fed. R. Civ. P. 14(a) (emphasis added). It follows, then, that "[t]hird-party practice or impleader is permitted under Fed. R. Civ. P. 14 only where defendant can show that if he is found liable to the plaintiff, then the third party will be liable to it (the defendant)" and "may be utilized only when

the third-party complaint necessarily depends on the outcome of the main claim against the defendant." *Index Fund, Inc. v. Hagopian*, 417 F. Supp. 738, 743–744 (S.D.N.Y. 1976).

While third-party claims may come in a number of forms, including indemnification, contribution, and subrogation, "[r]egardless of the type of claim asserted, the outcome of the third-party claim must be contingent on the outcome of the main claim" to satisfy Rule 14(a). *Sidik v. Royal Sovereign Int'l, Inc.*, No. 2:17-cv-07020, 2019 U.S. Dist. LEXIS 229593, *4 (E.D.N.Y. Mar. 5, 2019) (citation and internal quotation marks omitted). If it is not, then impleader of the named defendant is improper and the third-party complaint must be dismissed. *See id*.

For Defendants' third-party complaints to satisfy Rule 14(a), they must show that if they are found liable under civil RICO then Mr. Halftown will be liable to them on their third-party claims. That is plainly impossible. The upshot of finding that Defendants are liable to the Nation under civil RICO for participating in a racketeering enterprise cannot possibly be that Mr. Halftown (the Nation's government official) is liable to Defendants on their sundry real and personal property claims. The outcome of one has nothing to do with the other.

In fact, as discussed in the context of supplemental jurisdiction in Section I(B) above, the third-party claims do not even arise from the same set of facts as the RICO claims. And even if they did, "the mere fact that the alleged third-party claim arises from the same set of facts as the original claims is not enough." *Farmers Production Credit Ass'n of Oneonta v. Whiteman*, 100 F.R.D. 310, 312 (N.D.N.Y. 1983) (citation omitted).

Ultimately, "[t]he crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-party defendant the liability asserted against him by the original plaintiff." *Id.* (citation omitted). Because no one can possibly claim that Mr. Halftown "is or may be liable

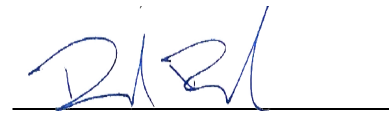
for all or part of" the Nation's RICO claim against Defendants, the third-party actions are impermissible, and should be stricken for misjoinder pursuant to Rule 14(a)(4).

**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 motion, Plaintiff respectfully requests that its motion be granted and all of Defendants' third-party claims be dismissed.

Dated: October 13, 2022

**BARCLAY DAMON LLP**



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