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)
DUSTIN PARKER, NORA WEBER, and ANDREW HERNANDEZ, *Third Party Plaintiffs* v. CLINT HALFTOWN *Third Party Defendant.*	

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S NOTICE OF MOTION TO DISMISS

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Dustin Parker, Nora Weber and Andrew Hernandez (the "Parker Defendants"), by and through their undersigned counsel, submit this memorandum of law in opposition to the Cayuga Nation's (the "Nation") notice of motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) the Parker Defendant's counterclaims. The Nation clearly availed themselves to the jurisdiction of this Court when it brought its Civil RICO claims against the Parker Defendants in February 2021. It cannot now try to run away from that choice. Further, accepting the Parker Defendants' pleadings as true for the purpose of this motion, each of the claims against the Nation is legally sufficient.

INTRODUCTION

After utilizing this court to advance various civil Rico claims (most of which this court has dismissed) the Nation now pleads sovereign immunity on the counterclaims. The Nation cannot have it both ways. The law is clear: The Nation waived its sovereign immunity related to claims arising out of the same transaction or occurrence as its underlying claims.

The Parker Defendants counterclaims are embedded in the exact same facts as the Nation's claims. That is the operation of Pipekeepers is allegedly illegal because the Nation will not grant the licensure to operate under the Cayuga Nation Amended and Restated Business License and Regulation Ordinance (the "Ordinance"). The Nation purchased the property the Parker Defendants leased to operate their store and then the Nation seized that property without giving notice. Indeed, the Court's most recent opinion cites the same relevant facts regarding the Nations' seizure of the Parker Defendants' business operation pursuant to tribal ordinance, the resulting RICO claim, and the Parker Defendants now-resulting tort claims.

The simple truth is that throughout the multiple legal actions, initiated by both parties, there is no serious disagreement of the core overlapping facts. Moreover, the relevant facts are so

inextricable that attempting to dissemble and distinguish them would create ongoing legal actions in multiple jurisdictions over the same set of facts.

It cuts against every rule of fairness for the Nation to ask for the benefit of this Court's jurisdiction but then asking it to turn a blind eye towards its own ill behavior. The Nation availed itself of this Court's reach when it brought the underlying suit. Accordingly, this Court has jurisdiction to hear the sufficiently pled counterclaims and should therefore, deny the Nation's motion to dismiss.

FACTUAL BACKGROUND

In late Spring 2021, Paul Meyer ("Meyer") on behalf of Justice for Native People LLC, ("JNP") leased a property located at 126 East Bayard Street in the Town of Seneca, New York from then-owners, the Seneca Cayuga Nation. Dkt. No. 60, p. 16, ¶ 16. The terms of the lease provided for a four-year lease agreement with JNP beginning in May 2021. *Id.* Further, the lease provided that the property could only be used "exclusively for commercial business purposes," which included general retail. *Id.,* p. 16, ¶ 17.

A month after entering into the lease agreement, Meyer met with Dustin Parker ("Parker"), an enrolled member of the Cayuga Nation, about subletting a portion of the East Bayard Street Property. *Id*., p. 17 ¶ 18, 19. In August 2021, Parker and Meyer entered into a sublease agreement that ran concurrently with the lease signed by JNP with the Seneca Cayuga Nation. *Id*., p. 17 ¶ 20, Dkt. No. 60, Attachment A. Over the next few months, the business, "Pipekeepers" operated as a gas station and convenience store that sold tobacco-related products. *Id*., p. 17 ¶ 21, 22.

By November 2021, the Nation asserted its authority under the Ordinance to demand Pipekeepers seize operations. *Id*., p. 17 ¶ 24. The Ordinance prohibits the operation of any business on Nation land without a business license issued by the Nation and forbids Nation citizens from engaging in any business on Nation land that directly or indirectly competes with any

business conducted by the Nation. Dkt. No. 1, p. 9, ¶ 43. Parker opted to continue operating Pipekeepers and thus rejected the Nation's persistent demands. Dkt. No. 60, p. 17 ¶ 24. Unhappy with the competition, the Nation purchased the East Bayard Street Property in late December 2021, *Id*., and on January 1, 2022, without notice, the Nation evicted the Parker Defendants from the above-stated property. *Id*., p. 17, ¶ 25.

To effectuate their eviction, the Nation hired dozens of armed security guards to forcefully prevent the Parker Defendants from entering the premise of their own business. *Id*., p. 17, ¶ 26. Not only did the guards seize the East Bayard Street Property, they also confiscated Pipekeepers inventory and other items of value, including cash, computers and other personal belongings. *Id*. The seizure resulted in the loss of approximately $200,000 in inventory and an additional $200,000 in lost profits from selling that inventory. *Id*., p. 17, ¶ 28. To compound the wrong, after acquiring the East Bayard Street Property and evicting the Parker Defendants and preventing them to conduct business at Pipekeepers Tobacco and Gas, the Nation proceed by opening its own store, Lakeside Trading, at the very same location, to sell the very same property it confiscated. *Id*., p. 18, ¶ 30.

To this day, the Nation has not provided the Parker Defendants with an inventory of the items it seized during its unlawful eviction. *Id*., p. 18, ¶ 31. Nor, has the Nation provided the Parker Defendants with any compensation for the items it seized. Further, the Nation used financial data maintained on confiscated computers at the East Bayard Street Property to bolster its claims against the Parker Defendants by calculating the stores profits. Dkt. No. 1, p. 12, ¶ 56.

In February 2021, the Nation brought the underlying action alleging three civil RICO actions into this Court. Dkt. No. 1. In July 2022, the Court dismissed two of the three civil RICO counts brought by the Nation. Dkt. No. 59. Further, the Court ruled it had jurisdiction to hear the Nation's complaint. Dkt. No. 49. In response, the Parker Defendants filed its counterclaims based

on the same transactions asserted by the Nation's remaining civil RICO count. Dkt. No. 60. Additionally, the Nation moved to dismiss based on this Court not having subject matter jurisdiction to hear the Parker Defendants counterclaims, and the Parker Defendants failure to state a claim.

LEGAL STANDARD

"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 v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). In reviewing a motion to dismiss under Rule 12(b)(1), a court "must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff, but jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (internal quotation marks and citation omitted). "The plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005).

A Rule 12(b)(6) motion tests the legal sufficiency of a complaint and requires a court to determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). When ruling on a Rule 12(b)(6) motion, a court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See, e.g., Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009). To survive such a motion, however, the plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). A claim is facially plausible "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. at 678, 129 S.Ct. 1937 (*citing Twombly*, 550 U.S. at 556, 127 S.Ct. 1955).

LEGAL ARGUMENT

I. The Cayuga Nation's Waived Tribal Immunity as to the Counterclaims.

A. The Counterclaims are permissible because they derive from the same transaction or occurrence as the underlying action.

It is well settled that by initiating an action, a sovereign waives its immunity with regards to compulsory counterclaims. *See e.g., In re Charter Oak Assocs*., 361 F.3d at 768 (noting agreement among circuits that once a state initiates federal action by filing proof of claim in bankruptcy, "it waives its immunity as to at least some counterclaims, specifically compulsory counterclaims").

In assessing whether different claims arise from the same transaction or occurrence, courts apply the test for compulsory counterclaims developed under Fed.R.Civ.P. 13 and its predecessors. *See* Fed.R.Civ.P. 13(a)(1). Under that test, a pleading must state as a counterclaim any claim that "the pleader has against an opposing party if the claim ... arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." As the Supreme Court has stated, Rule 13(a) "was designed to prevent multiplicity of actions and to achieve resolution in a single law suit of all disputes arising out of common matters." *Southern Const. Co. v. Pickard*, 371 U.S. 57, 60, 83 S.Ct. 108, 110, 9 L.Ed.2d 31 (1962). The rule "was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint." *Adam v. Jacobs*, 950 F.2d 89, 93 (2d Cir. 1991) (*quoting Southern Const. Co.,* 371 U.S. at 83).

The Second Circuit developed an approach to determine when a counterclaim arises out of the same "transaction or occurrence," and is therefore compulsory. *Harris v. Steinem,* 571 F.2d 119, 121–122 (2d Cir.1978). Relying on that approach, it is necessary to determine:

> whether the essential facts of the various claims are *so logically connected* that considerations of *judicial economy and fairness* dictate that all the issues be resolved in one lawsuit.... Thus precise identity of issues and evidence between claim a counterclaim is not required.... Conversely, at some point the essential facts and the "thrust of the two claims are so basically different that such accepted 'tests of compulsoriness' as 'logical relation' are not met...." (citations omitted).

Id. at 123*; see also Adam,* 950 F.2d at 92. The factors considered "as indicators of the compulsory nature of a claim are: (1) identity of facts between original claim and counterclaim; (2) mutuality of proof; (3) logical relationship between original claim and counterclaim." *Federman v. Empire Fire and Marine Insurance Co.,* 597 F.2d 798, 811 (2d Cir.1979).

The Parker Defendant's counterclaims are compulsory because they arise out of the same transaction or occurrence as the Nation's claims. That is, there is a "logical relationship" between the Nation's claims and the Parker Defendant's counterclaims insofar as "essential facts of the claims" are "so logically connected that considerations of judicial economy and fairness dictate that all issues be resolved in one lawsuit." *Jones v. Ford Motor Credit Co.,* 358 F.3d 205, 209 (2d Cir. 2004) (internal quotations and citations omitted).

The essential facts raised by the Nation's claims relate to the operation of Pipekeepers, and the Parker Defendants ability to sell tobacco related products in Pipekeepers. The Nation's complaint alleges, that in late 2021, they informed the Parker Defendants that Pipekeepers operated illegally, that is without the approval of the Nation under the Ordinance. The Parker Defendant's

counterclaim alleges it lawfully operated Pipekeepers and the Nation's seizure of their property amounts to unlawful conversion. *See, e.g., Cabiri v. Government of the Republic of Ghana*, 160 F.3d 193, 198 (2d Cir. 1999) (breach-of-contract counterclaim logically related to sovereign's eviction proceedings against plaintiff where both concerned with the same employment contract, relationship and core issue in both was whether employment was lawfully terminated); *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991) (counterclaim to enforce agreement was compulsory because it arose out of same transaction as claim to rescind agreement); *Fashion Fragrances & Cosmetics Ltd. v. Croddick*, 2004 WL 1106130, at *6 (S.D.N.Y. May 17, 2004) (counterclaims compulsory where they concerned performance under agreement until plaintiff's termination and plaintiff's claims involved same events).

Indeed, the Nation alleges the Parker Defendants violated the Ordinance and therefore, civil RICO by operating Pipekeepers. The Nation then seized Pipekeepers and the Parker Defendants inventory and began selling the inventory as its own in the exact same location. It is hard to imagine how the underlying actions in the RICO complaint and the claim of conversion could more inextricably linked. Moreover, the matter presently before the Court have the same exact parties as the underlying claim. Taking this into account, it is evident the events leading up to this present claim are wholly borne of the actions the Nation took against the Parker Defendants' business under its Ordinance. The relationship between the Parker Defendants' counterclaims to the claims of origin are inherently common and the very definition of a compulsory counterclaim subject to this Court's jurisdiction.

B. Because the counterclaims arise from the same transaction or occurrence as the underlying action, this Court has ancillary jurisdiction over the counterclaims.

Ancillary jurisdiction allows a district court once it has acquired jurisdiction over a case or controversy to decide matters incident to the main claim that otherwise could not be asserted

independently. Courts invoke ancillary jurisdiction to avoid piecemeal litigation that might occur due to the irreconcilability between article III limits on jurisdiction and the permissive rules of joinder adopted by the Federal Rules of Civil Procedure. *Federman v. Empire Fire & Marine Ins. Co.,* 597 F.2d 798, 810 (2d Cir. 1979).

According to the Supreme Court, ancillary jurisdiction is properly asserted when for two separate, though sometimes related, purposes it becomes necessary: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees. *Kokkonen v. Guardian Life Ins. Co. of American*, 511 U.S. 375, 379-80, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (internal citations omitted); *accord Garcia v. Teitler*, 443 F.3d 202, 208 (2d Cir.2006) ("[A]ncillary jurisdiction is aimed at enabling a court to administer justice within the scope of its jurisdiction." (internal quotation marks omitted)). Further, it is well-settled law that under a federal district court's ancillary jurisdiction, compulsory counterclaims may properly be entertained solely by virtue of the court's subject matter jurisdiction over the main action. *See, e.g., Moore v. New York Cotton Exchange,* 270 U.S. 593, 609 (1926); *Harris v. Steinem,* 571 F.2d 119, 121–122 (2d Cir.1978).

The circumstances here clearly warrant the exercise of ancillary jurisdiction. First, the factual interdependence between the Nation's RICO claim and the counterclaim are material here, if the Parker Defendants are permitted to sell tobacco related products, then the Nation does not have viable RICO claims and their confiscation of the Parker Defendants business and property was unlawful. Second, it is illogical for the Parker Defendants to file this complaint against the Nation in another jurisdiction where doing so may delay, impede, or contradict the disposition of this Court's decision. In addition, this Court already determined it had jurisdiction to hear the

Nation's claims. Dkt. No. 59. Since the Court has subject matter jurisdiction over the Nation's underlying claim, it has ancillary jurisdiction over the Parker Defendants compulsory counterclaims.

C. The Cayuga Nation waived sovereign immunity as to counterclaims when it initiated this action.

The concept of recoupment is well established in the context of both federal sovereign immunity and tribal sovereign immunity. Although this Circuit has not addressed recoupment in the context of tribal sovereign immunity, precedent suggests recoupment applies here. This Circuit previously held that when federal government sues, it necessarily "waives immunity as to claims of the defendant which assert matters in recoupment"—meaning the defendant may counterclaim against the sovereign, but the counterclaim must arise out of the same underlying dispute as the sovereign's claim, must be limited to the same type of relief sought by the sovereign, and cannot exceed the potential recovery by the sovereign. *United States v. Forma*, 42 F.3d 759, 760 (2d Cir. 1994) (quoting Frederick, 386 F.2d at 488); *see also Rosebud Sioux Tribe v. A & P Steel, Inc*., 874 F.2d 550, 552 (8th Cir. 1989) (holding that when a tribe commences a suit in federal court, it waives it immunity as to counterclaims that assert matters in recoupment). Recognition of established rules of recoupment as applied to the sovereign immunity of the United States is significant because "[t]ribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States." *Miner Elec., Inc. v. Muscogee Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) ("Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are 'subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'"). It therefore follows, that principles of recoupment apply to tribal sovereign immunity.

Recoupment implies principles of equity and logic by permitting compulsory counterclaims that entitle a defendant to reduce the amount owed to a plaintiff if liability is established in the underlying action:

> "when the sovereign sues, it waives immunity as to the claims of the defendant which assert matters in recoupment – arising out of the same transaction or occurrence which is the subject matter of the [plaintiff's] suit, and to the extent of defeating the [plaintiff's] claim but not to the extent of a judgment against the [plaintiff] which is affirmative in the sense of involving relief different in kind or nature to that sought …"

Frederick v. United States, 386 F.2d 481, 488 (5th Cir. 1967)); *see also Berrey v. Asarco Inc.*, 439 F.3d 636, 644 (10th Cir. 2006); *see also Rosebud Sioux Tribe v. Val–U Constr. Co.,* 50 F.3d 560, 562 (8th Cir.1995). Courts in this Circuit have held the concept of recoupment pierces sovereign immunity, so long as such claim arises from the same transaction as plaintiff's claim, to reduce the amount of the damages recoverable. *See New York v. Gen. Elec. Co.,* No. 1:14-CV-747, 2015 WL 12748007, at *7 (N.D.N.Y. Sept. 29, 2015); *see also U.S. v. Livecchi*, 605 F. Supp. 2d 437, 450 (W.D.N.Y. 2009).

Consequently, when the Nation filed the underlying action, it forfeited the protection of sovereign immunity as it pertains to counterclaims arising from the same transaction of occurrence. See supra section I (A). Moreover, the relief sought here by the Nation is monetary, as is the Parker Defendants. Thus, the relief sought is in the same form or nature as the underlying claim. In addition, the Nation seeks monetary damages in the several millions of dollars. The Parker Defendants seek monetary damages of a lessor value. Therefore, the Parker Defendants counterclaims satisfies the requirements of recoupment. *Oneida Indian Nation v. Phillips*, 981

F.3d 157 at 173 (Menashi, S., concurring) (quoting *Berrey*, 439 F.3d at 644) (explaining that "[b]ecause Defendants' counterclaims arise from the same transaction or occurrence as the Tribe's claims and seek relief of the same kind or nature, but not in excess of the amount sought by the Tribe, they are claims in recoupment," and therefore the tribe had waived immunity as to those claims).

II. The Counterclaims Are Adequately Pled to State a Claim.

A. The Parker Defendants sufficiently pled the elements to show the Nation breached the sublease agreement.

In New York, a property-lease-agreement is analyzed in the context of contract law. *Rowe v. Great Atlantic and Pacific Tea Company, Inc.,* 46 N.Y.2d 62, 67–68, 412 N.Y.S.2d 827, 385 N.E.2d 566 (1978) ("A lease agreement, like any other contract, essentially involves a bargained-for exchange between the parties (and) [a]bsent some violation of law or transgression of strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third party"). When one party has breached the agreement, the other party may bring an action, "[t]he elements of a cause of action for breach of an agreement are (1) a contract existed; (2) the Plaintiff performed his or her obligations under the contract; (3) the Defendant failed to perform his or her obligations thereunder; and (4) damages resulted to the Plaintiff. *Tel. Mgmt. Corp. v. Barclays Servs. Corp.,* No. 11 CIV. 8570 DAB, 2013 WL 1344706, at *4 (S.D.N.Y. Mar. 28, 2013).

The Nation asks the Court to dismiss the claim for breach of lease because the Parker Defendants were unable to identify communications between the Nation and the former owner of 126 East Bayard Street Property, the Seneca Cayuga Nation. But the Nation fails to explain why such communications must be in the Complaint. Furthermore, the Parker Defendants would not have access to those communications because they were not a party to those negotiations. The

Parker Defendants were unaware the Seneca Cayuga Nation contemplated selling 126 East Bayard Street Property and were completely blindsided by the sale of the property. Further, this Court does not require the Parker Defendants to plead facts that are not within Defendants' possession. *See Arista Records, LLC v. Doe 3,* 604 F.3d 110, 120 (2d Cir.2010) (holding a plaintiff may survive a motion to dismiss by "pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant ....").

Even if the Parker Defendants were involved in those communications, and they were not, the Nation cannot tear apart a binding lease and sub-lease agreement after taking possession of a property. Parker and JNP had a valid, written lease agreement that followed the transfer of the property when the Nation purchased it from the Seneca Cayuga Nation. The Nation acted outside of its legal rights when it decided to unilaterally void the sublease agreement. *52 Riverside Realty Company v. Ebenhart*, 119 A.D.2d 452, 453 (1st Dept. 1986) ("It is well recognized in this State that the transferee of real property takes the premises subject to the conditions as to tenancy, including any waiver of rights, that his predecessor has established if the transferee has notice of the existence of the leasehold.").

B. The Parker Defendants sufficiently pled the elements to show tortious interference by the Nation.

Under New York law, a claim for tortious interference with contractual relations requires the plaintiff to adequately plead: [1] the existence of a contract between the plaintiff and a third party, [2] defendant's actual knowledge of the specific contract that was breached, [3] 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. *Rich v. Fox News Network, LLC*, 939 F.3d 112, 126-27 (2d Cir. 2019)). Moreover, a plaintiff must also allege "the contract would not have been breached "but for" the defendant's conduct." *Rich*, 939 F.3d at 127.

The Nation makes several increasingly nonsensical arguments to attempt to convince this Court that the Parker Defendants failed to pled tortious interferences. Each of these arguments fail. First, the Nation argues the Parker Defendants failed to assert tortious interference claim because after acquiring the property, the Nation is not bound to the Commercial Lease. This is wrong. It is well recognized in New York that "the transferee of real property takes the premises subject to the conditions as to tenancy, including any waiver of rights, that his predecessor has established if the transferee has notice of the existence of the leasehold." *52 Riverside Realty Company v. Ebenhart*, 119 A.D.2d 452, 453 (1st Dept. 1986) (citing *Bank of N.Y. v. Hirschfeld*, 37 N.Y.2d 501 (1975)).

Second, the Nation argues the Parker Defendants do not have standing to assert tortious interference because they were not parties to the lease between the Cayuga Nation and the JNP. Contrary to the Nation's argument, New York Courts have recognized subtenants have standing to assert tortious interference against their landlords. *See 100% Girls Brand, Inc. v. Hilson Mgmt. Corp.*, 25 F. App'x 25, 26 (2d Cir. 2001) (*citing Maruki, Inc. v. Lefrak Fifth Ave. Corp.*, 161 A.D.2d 264, 555 N.Y.S.2d 293, 296–97 (App. Div. 1st Dep't 1990).

Finally, the Nation claims the New York Statute of Frauds applies because the Parker Defendants sublease agreement was not memorialized in writing. Defendants disagree and have alleged otherwise. This is plainly a question of fact. Furthermore, as discussed earlier, Attachment A of the Parker Defendants' counterclaims, contains the first and last pages of the sublease agreement, *see supra Factual Background*. Dkt. No. 65-1. The agreement was notarized when the parties entered into the agreement in August 2021. The Parker Defendants therefore satisfy the Statutes of Frauds. As pled, the Parker Defendants have more than sufficient allegations to survive a motion to dismiss.

C. Parker Defendants sufficiently pled trespass claims.

To establish a *prima facie* case of trespass under New York law, Plaintiff must show that Defendants either entered without permission, or if permission was granted, "refused 'to leave after permission to remain ha[d] been withdrawn.' " *Long Island Gynecological Serv's, P.C. v. Murphy,* 298 A.D.2d 504, 748 N.Y.S.2d 776, 777 (2d Dep't 2002) (alteration in original) (quoting *Rager v. McCloskey,* 305 N.Y. 75, 79, 111 N.E.2d 214 (1953)).

The Parker Defendants' counterclaims, and great deal of the records in this proceeding, is replete with supporting facts which show that on January 1, 2022, the Nation entered the Property for the purpose to evict Pipekeepers and its owners, from the premise. The counterclaims build off of this generally accepted fact to provide the Court with further context, which is the Nation never provided the Parker Defendants notice to enter the property.

Because the Nation never provided notice, the Parker Defendants could not give the Nation permission to enter the property. Instead of leaving the Property when Parker and Nora Weber ("Weber") arrived, the Nation manhandled them and confiscated Pipekeepers property. Since the Nation never obtained permission to enter the property and would not leave when the rightful leaseholder arrived at the property, it is clear that the Parker Defendants trespass claim is sufficiently pled. *Murphy,* 298 A.D.2d 504 (Finding the defendant committed trespass by entering a property without permission.)

D. Parker Defendants sufficiently pled conversion and trespass to chattel claims.

Conversion is the "[u]nauthorized and wrongful exercise of dominion and control over another's personal property." *Pioneer Commercial Funding Corp. v. United Airlines, Inc*., 122 B.R. 871, 883 (S.D.N.Y.1991) (quoting Black's Law Dictionary 300 (5th ed.1979)). To establish a cause of action for conversion under New York law, a plaintiff must show (1) "legal ownership or an immediate superior right of possession to a specific identifiable thing" and (2) that the

defendant "exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights." *Id*. (*quoting Independence Discount Corp. v. Bressner*, 47 A.D.2d 756, 365 N.Y.S.2d 44, 46 (2d Dep't 1975)).

Under New York law, trespass to chattel may be committed by intentionally using or intermeddling with chattel in possession of another, where chattel is impaired as to its condition, quality, or value. Restatement (Second) of Torts, §§ 217(b), 218(b); *see also Register.com, Inc. v. Verio, Inc*., 356 F.3d 393 (2d Cir. 2004).

Here, the Nation does not argue the sufficiency of the conversion. The Nation instead argues the trespass to chattels claim is duplicative of conversion and should therefore be dismissed. The Nation conflates these claims as one. After evicting the Parker Defendants, the Nation confiscated their property, including inventory, computers, and personal property of Parker and Weber. In terms of the inventory, the Nation took the goods sold by Pipekeepers and resold them in their own store Lakeside Trading. Forever altering, or converting, the state of the property. Therefore, the Parker Defendants sufficiently pled each element of conversion.

In terms of trespass to chattel, the counterclaim alleges the Nation remains in possession of Pipekeepers computers and other personal possessions of Parker and Weber. The counterclaim alleges the Nation accessed the computers to obtain key personal and financial data against the Parker Defendants. Further, the Nation has not returned the computers or any personal possessions to the Parker Defendants. Courts within the Circuit have found, interference with information stored on a computer may give rise to trespass to chattel if the plaintiff is dispossessed of the information. *Davidoff v. Davidoff*, 12 Misc.3d 1162(A) *11, 2006 WL 1479558 (Sup.Ct. N.Y. Co.2006); *see also, Elektra Entertainment Grp., Inc. v. Santangelo,* 2008 WL 4452393 at *6 (S.D.N.Y. Oct. 1, 2008).

E. Parker Defendants sufficiently pled the Nation violated the Computer Fraud and Abuse Act.

The Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, in pertinent part, punishes an individual who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains ... information from any protected computer." 18 U.S.C. § 1030(a)(2)(C).4. The CFAA was initially enacted solely as a criminal statute to address the "then-novel problem of [computer] hacking." *Hancock v. Cty. of Rensselaer*, 882 F.3d 58, 63 (2d Cir. 2018). Ten years later, *see id*., it was amended to permit a civil cause of action. *Sewell v. Bernardin*, 795 F.3d 337, 339-40 (2d Cir. 2015).

In order to assert a CFAA claim under § 1030(c)(4)(A)(i)(I); a pleading must allege that a Defendant: (1) "knowingly and with intent to defraud;" (2) accessed a "protected computer;" (3) "without authorization" or "exceeded their authorized access;" (4) and by means of such conduct furthered the intended fraud and obtained anything of value; and (5) caused "loss to 1 or more persons during any 1–year period ... aggregating at least $5,000 in value." *See id* at § 1030(c)(4)(A), § 1030(g).

The Nation wrongly claims that the Parker Defendants failed to pled a violation of the CFAA, because they only provide just "four conclusory allegations to support" their claim and did not provide a "single allegation as to who had access to the computer." Dkt. No. 75, p. 13. The Nation again misconstrues the pleading standard. *See Arista Records, LLC v. Doe 3,* 604 F.3d 110, 120 (2d Cir.2010) (The Second Circuit has held that a plaintiff may survive a motion to dismiss by "pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant ..."). A review of the Parker Defendants counterclaims shows that the Nation took possession of the Parker Defendants inventory and possession when it seized the property, including computers. Further, the Parker Defendants

properly allege on information and belief the Nation maintains possession of the computers and used them to discover personal and financial data of Weber and Parker. To the extent any further information is needed, the Parker Defendants request the opportunity to amend their pleading on this counterclaim.

CONCLUSION

For the foregoing reasons, the Parker Defendants respectfully request that this Court deny the Nation's motion to dismiss.

Dated: Albany, New York
October 21, 2022

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