IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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

Plaintiff,

vs.

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)

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

Third-Party Plaintiffs,

vs.

CLINTON HALFTOWN AND JOHN DOES 1-10,

Third-Party Defendants.

MEYER DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS

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INTRODUCTION

The Cayuga Nation has moved to dismiss the counterclaims asserted by the Meyer Defendants (and Parker Defendants) based on tribal sovereign immunity from suit. Dkt. No. 75. At the same time, Clint Halftown has moved to dismiss the third-party actions that seek to hold him personally responsible for the torts and contract breaches that he orchestrated. Dkt. No. 76. These coordinated motions to dismiss should be heard together inasmuch as they show the Cayuga Nation and Halftown invoking principles of immunity to try to leave counterclaimants and third-party plaintiffs without any remedy in any court, while the Nation continues to pursue its one surviving RICO claim.[1]

Sovereign immunity from suit does not apply to the Meyer Defendants' counterclaims for three separate and independent reasons: (1) the Commercial Lease Agreement[2] contains a contractual waiver of sovereign immunity that binds the Cayuga Nation as the successor-in-interest under the Lease; (2) the Meyer Defendants directly challenge the right, title and interest of the Cayuga Nation to possess and occupy the demised premises in contravention of their leasehold rights, which triggers an exception to sovereign immunity known as the "immovable property" exception; and (3) the counterclaims are not barred because they arise out

[1] The Court granted motions to dismiss by both the Parker Defendants and Meyer Defendants dismissing the substantive RICO claim under 1962 (c) and conspiracy claim under (d), leaving only a claim under (a) pertaining to investment in a business using funds generated from racketeering activity, which was not separately moved against. With no actionable racketeering activity surviving the motion to dismiss, it is not clear how this derivative claim has any viability. It certainly will be tested by way of a summary judgment motion, if not before.

[2] A copy of the Commercial Lease Agreement is attached as Exhibit A to the Meyer Defendants' Answer and Counterclaims, Dkt. No. 61.

of the same transaction or occurrence as the RICO claim and can be limited to a set-off against the monetary damages sought by the Cayugas.

With respect to the sufficiency of the pleadings alleging state law tort and contract claims, the detailed factual contentions underlying them more than satisfy the *Iqbal/Twombly* pleadings requirements. Should the Court find any cause of action insufficiently pled, the Meyer Defendants respectfully request permission to amend their counterclaims.

LEGAL STANDARD

The well-pleaded facts supporting the Meyer Defendants' counterclaims are presumed to be true on a motion to dismiss under Rule 12(b)(6). *Bryant v. N.Y. State Educ. Dep't*, 692 F.3d 202, 220 (2d Cir. 2012). 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Twombly*, 550 U.S. at 556). With respect to a jurisdictional challenge (tribal sovereign immunity from suit) that implicates Rule 12(b)(1), a plaintiff's allegations are presumed to be true. *See E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001) ("Such motions may take one of two forms. First, a party may make a facial challenge to the plaintiff's allegations concerning subject matter jurisdiction, thereby questioning the sufficiency of the complaint. In addressing a

facial attack, the district court must accept the allegations in the complaint as true.") (internal citations omitted). And the Cayuga Nation, as the governmental entity claiming sovereign immunity from suit, bears the burden of proving its claimed immunity. *See Woods v. Rondout Valley Central School Dist. Bd. of Educ.*, 466 F.3d 232, 238 (2d Cir. 2006) ("Placing the burden of proving entitlement to Eleventh Amendment immunity on the asserting governmental entity is also consistent with our procedures for evaluating immunity claims by foreign entities under the Foreign Sovereign Immunities Act."); *City of New York v. Golden Feather Smoke Shop*, No. 08-cv-3966 (CBA), 2009 WL 705815, at *4 (E.D.N.Y. Mar. 16, 2009) (stating that the reasoning in *Woods* "applies with equal force in the case of a party claiming tribal sovereign immunity as an `arm of the tribe.'").

BACKGROUND

The Counterclaims consist of 23 detailed charging paragraphs that are incorporated by reference into each of the subsequent causes of action labeled as counterclaims. The Cayugas' conclusory attack on the sufficiency of these pleadings all but ignores the detailed allegations found in paragraphs 1 thru 23. These allegations include the salient facts regarding the Defendant Justice for Native First People, LLC's execution of a four-year Commercial Lease Agreement with the Seneca-Cayuga Nation of Oklahoma for 126 Bayard Street, and development of that property for subletting as a gas station and convenience store, with the Meyer Defendants investing $80,000 to upgrade the property. Counterclaims (Dkt. No. 61) at 12-13, ¶¶ 1-6. Further background facts include the property's sub-letting to

Dustin Parker (*id.* at 13-14, ¶¶ 9-13), questions being raised by the owner (Seneca-Cayuga Nation of Oklahoma) about the legality of the gas station and convenience store operated by Dustin Parker, and efforts by the Meyer Defendants to address those concerns. *Id.* at 14-15, ¶¶ 15-17. The background facts conclude with a recitation of the actions by the Cayuga Nation / Clint Halftown after acquiring the property, in particular their actions in taking over possession and occupancy of the property by force, forcibly evicting Dustin Parker and forcibly ousting the Meyer Defendants. *Id.* at 15-16, ¶¶ 18 to 23. The following counterclaims "repeat and reallege the allegations contained in the preceding paragraphs [¶¶ 1 to 23] as if specifically set forth herein": Count I alleges breach of the Commercial Lease Agreement based on the Meyer Defendants' leasehold interest running with the land as a matter of law; Count II demands specific performance of the Commercial Lease Agreement; Count III alleges the Cayuga Nation tortiously interfered with the Meyer Defendants' rights under the Commercial Lease Agreement; Count IV alleges the Cayuga Nation trespassed on the property subject to Meyer's leasehold interest; and Count V alleges the Cayuga Nation converted the Myer Defendant's personal property stored on the demised premises. The Meyer Defendants seek in Count VI recovery of attorneys' fees and costs under the Commercial Lease Agreement.

The Tribe claims in its papers that it "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."

Memorandum of Law in Support of Motion to Dismiss Defendants' Counterclaims ECF 75-1 at 3 (emphasis added). They also suggest (with no support in fact or law) that the Commercial Lease Agreement, and the Meyer Defendants' right to occupy the premises, did not "survive the sale"—that the Cayuga Nation apparently "rejected" the Commercial Lease (*id*. at 8) which is a "void contract." *Id*. at 1. None of these intimations or suggestions have evidentiary weight and would not be admissible in any event to counter a motion to dismiss.

ARGUMENT

I. The Commercial Lease Agreement created a leasehold interest in real property that runs with the land; any purchaser of the real property—including the Cayuga Nation—is subject to that leasehold interest under basic principles of property law.

As an initial matter, Oklahoma law governs the Commercial Lease Agreement.[3] As explained below, the result is the same whether this Court applies Oklahoma law or New York law: purchasers of real property take the land subject to pre-existing leasehold interests including any waiver of rights by the prior owner.

A. Oklahoma law on a leasehold interest: it is a conveyance of an estate in real property that runs with the land.

The Oklahoma Supreme Court describes a lease as vesting "a right in the lessee to the possession of land for a definite term" which becomes "a grant of an estate in real property when it takes effect in possession." *Ferguson v. District Court of Oklahoma County*, 544 P.2d 498, 499 (Okla. 1975). "During the term of the

[3] **Section 19.09 Governing Law**. All matters pertaining to this agreement (including its interpretation, application, validity, performance and breach) in whatever jurisdiction action may be brought, shall be governed by, construed and enforced in accordance with the laws of the State of Oklahoma. ECF 61, Exhibit A, Commercial Lease Agreement at p. 16.

lease, the lessee holds an outstanding leasehold in the premises which for all practical purposes is equivalent to absolute ownership." *Id.* In contrast, "[t]he estate of the lessor during such time is limited to his reversionary interest which ripens into perfect title at the expiration of the lease." *Id.*

B. New York law on a leasehold interest: it is a conveyance of an interest in real property that runs with the land.

New York views the "fundamental purpose" of a lease is to "serve as a vehicle for the conveyance of an interest in real property." *219 Broadway Corp. v. Alexander's*, Inc., 46 N.Y.2d 506, 511 (1979); *see Matter of Albee Fuel Corp. v. Gallman*, 42 A.D.2d 323, 326-27 (3d Dept. 1973) ("The right of possession is clearly a necessary incident of legal title to real property and to the extent that the lease precludes possession by an owner, a lease necessarily affects interests in real property."). "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." *52 Riverside Realty Co. v. Ebenhart*, 119 A.D.2d 452, 453 (1st Dept. 1986) (citing *Bank of N.Y. v. Hirschfeld*, 37 N.Y.2d 501 (1975)); *Peak Dev., LLC v. Construction Exch.*, 100 A.D.3d 1394, 1395 (4th Dept. 2012) ("We note . . . the well-established principle that 'a successor-in-interest to real property takes the premises subject to the conditions as to the tenancy, including any waiver of rights, that [its] predecessor in title has established if the successor-in-interest has notice of the existence of the leasehold and of the waiver."). "Moreover, possession of premises constitutes constructive notice to a purchaser of the rights of the

possessor." *Ebenhart*, 119 A.D.2d at 453 (citing *Phelan v. Brady*, 119 N.Y. 587 (1890)).

Thus, when the Cayuga Nation purchased the real property from the Seneca-Cayuga Nation of Oklahoma, it took the property subject to the tenancy governed by the Commercial Lease Agreement. *See Peak Development,* 100 A.D.3d at 1395 ("We note at the outset that, when plaintiff purchased the property in June 2003, it took the property subject to the month-to-month tenancy with defendants governed by the lease and lease extension.") No lawful process exists for a purchaser of real property to reject a pre-existing leasehold interest running with the land. The Cayuga Nation cites none because none exists. Contrary to the Cayuga's apparent position, they cannot void the lease simply because they want to be rid of it. The Cayuga Nation cites no case law that would authorize its wrongful, unilateral termination of the Commercial Lease Agreement.

II. The Cayuga Nation, as the successor-in interest to the Seneca-Cayuga Nation of Oklahoma under the Commercial Lease Agreement, is subject to the contractual waiver of immunity in the Agreement.

The Seneca-Cayuga Nation of Oklahoma agreed in the Commercial Lease Agreement to waive its sovereign immunity from suit as stated in Section 19.10, which provides:

> **Section 19.10 Limited Waiver of Sovereign Immunity**. The (Landlord/Lessor) Seneca-Cayuga Nation aka Seneca-Cayuga Tribe of Oklahoma, a Federally Recognized Tribe, with a constitution ratified on May 15, 1937, and it's Business Committee, wherein such Committee is acting in its capacity as a political governing body of the Seneca-Cayuga Nation Landlord grants a clear and unequivocal limited waiver of its sovereign immunity from suit and

> collection only for the limited purposes as set forth in this Section 19.10 as follows: (a) the dispute shall be brought by and limited to Tenant and no other party or entity; (b) the dispute shall be limited to causes of action arising under this Agreement (c) any action is limited only to actions brought in the United States District Court for the Northern District of Oklahoma; (d) any such award or damages resulting from the dispute shall be limited to the occupancy rights of the subject property and potential sub-lease revenues referenced in this Agreement and no other assets of the Landlord; and (e) this limited waiver of Landlord's sovereign immunity shall terminate when this Agreement terminates.

Under well-settled New York law cited above, "a successor-in-interest to real property takes the premises subject to the conditions as to the tenancy, *including any waiver of rights*, that [its] predecessor in title has established if the successor-in-interest has notice of the existence of the leasehold and of the waiver." *Peak Development, LLC*, 100 A.D.3d at 1395 (emphasis added). And "possession of premises constitutes constructive notice to a purchaser of the rights of the possessor." *Ebenhart*, 119 A.D.2d at 453. Accordingly, the waiver of sovereign immunity from suit as set forth in Section 19.10 is binding on the Cayugas as the successor-in-interest to the Seneca-Cayuga Nation of Oklahoma with regard to 126 Bayard Street.

III. The immovable property exception to sovereign immunity applies because the Meyer Defendants' counterclaims seek to vindicate their leasehold interest and restore their lawful occupancy through specific performance.

The historic common law immovable property exception to sovereign immunity, which predates the Constitution, applies to the Cayugas—as it does to foreign nations and the Several States—because the dispute directly concerns the right, title and interest in real property, specifically the competing claims to

possession and right of occupancy between the fee owner (Cayuga Nation) and leasehold interest holder (Meyer Defendants). This falls squarely within the immovable property exception to sovereign immunity, as explained below.

A. Like sovereign immunity enjoyed by states and foreign nations, tribal sovereign immunity does not bar actions based on immovable property held by one sovereign in the territory of another sovereign.

Indian tribes are " 'domestic dependent nations' " that exercise "inherent sovereign authority." *Oklahoma Tax Com'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)). While "tribes are subject to plenary control by Congress . . . they remain 'separate sovereigns pre-existing the Constitution.' " *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) ("*Bay Mills*") (quoting *Santa Clara Pueblo v Martinez*, 436 U.S. 49, 56 (1978)). "Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills*, 572 U.S. at 788 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). "Among the core aspects of sovereignty that tribes possess— subject, again, to congressional action— is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.' " *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

The immovable property exception to sovereign immunity is a long-recognized principle of common law and international law. It requires a foreign state that owns real property outside of its jurisdiction to "follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 374 (2d Cir. 2006), *aff'd* 551 U.S. 193 (2007) ("*Permanent Mission*"). The Supreme Court expressed the unavailability of sovereign immunity

in immovable property cases in *Schooner Exchange v. McFaddon*, 7 Cranch 116, 145 (1812), and relied upon the writings of Cornelius van Bynkershoek, De Foro Legatorum 22 (Godon J. Laing trans. 1946) (1744), which observed that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *See Permanent Mission*, 551 U.S. at 199-200 (citing and quoting from *Schooner*). As a result, "that property which a prince has purchased for himself in the dominions of another shall be treated just like the property of private individuals and shall be subject in equal degree to burdens and taxes." *Upper Skagit Indian Tribe v. Lundgren*, 138 S.Ct. 1649, 1657 (2018) ("*Upper Skagit*") (Thomas, J. dissenting, joined by Alito, J.) (quoting Bynkershoek, De Foro Legatorum Liber Singulars 22). The immovable property exception applies to foreign sovereign immunity. *See* 28 U.S.C. § 1605 (a) (4) ("A foreign state shall not be immune from the jurisdiction of courts of the United States in any case . . . in which rights in property in the United States are acquired by succession or gift or rights in immovable property situated in the United States are in issue"); *Permanent Mission,* 551 U.S. at 200 (28 U.S.C. § 1605 (a) (4) was "meant 'to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice' "). It also applies to state sovereign immunity. *See Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924) (state sovereign immunity does not extend to "[l]and acquired by one State in another State").

As Justice Thomas articulated in his dissent in *Upper Skagit,* the immovable property exception to sovereign immunity is "well established" "hornbook law" that "plainly extends to tribal immunity." 138 S.Ct. at 1657. While the majority's decision in *Upper Skagit* refrained from addressing the immovable property exception due to preservation issues, *see Upper Skagit,* 138 S.Ct at 1654, it is clear from the oral argument that the majority of the Supreme Court supported applying the immovable property exception to tribal sovereign immunity. *See* Oyez, Upper Skagit Indian Tribe v. Lundgren Oral Argument – March 21, 2018, www.oyez.org/cases/2017/17-387, last accessed on October 17, 2022. A transcript is available on the same website. [4]

Here, the Cayugas are required to "lay down the prince" when they acquired 126 Bayard Street in fee simple in December 2021. By purchasing private land within the taxing and regulatory jurisdiction of the City of Waterloo, County of Seneca, and New York State, the Cayugas are deemed to have the character of a private party.[5] The Cayuga Nation can no more violate the leasehold interest of the Meyer Defendants (reject it or void it) than if a private developer had purchased the

[4] Justice Kagan found the immovable property exception an "extremely strong argument." Justice Ginsburg asked: "Is it not the case that no other political entity would be immune from such a -- from such a quiet title suit, not the United States, not a state of the United States, not a foreign government? So you are claiming a kind of super-sovereign immunity for the tribe that no -- no one else gets?" No justice expressed any skepticism as to the applicability of the common law rule. The preservation issue concerned the majority of the court, which accounts for the decision to remand to permit the Washington State Supreme Court to address the immovable property exception in the first instance. The Upper Skagit Tribe read the writing on the wall and sold its property to moot the case to avoid the inevitable application of the immovable property doctrine.

[5] Indeed, under *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202-203 (2005) the Cayuga Nation cannot exercise tribal sovereignty—"in whole or in part"—over such fee lands. *But cf. Cayuga Nation v. Tanner*, 6 F.4th 361, 378-380 (2d Cir. 2021) (holding that fee lands owned by Cayuga Nation fit definition of a "reservation" under the Indian Gaming Regulatory Act.).

land. The same result would obtain if the Kingdom of Spain purchased the fee lands, or the State of Oklahoma became the successor-in-interest to the Seneca-Cayuga Nation of Oklahoma under the Lease.

Because the instant counterclaims directly challenge the Cayuga Nation's right of possession and occupancy of 126 Bayard Street, and the Meyer Defendants' leasehold interest is an estate in property that diminishes the Cayuga Nation's rights as owner, the Meyer Defendants' counterclaims, which seek to vindicate their leasehold rights, fall squarely within the immovable property exception to sovereign immunity. *See Cayuga Indian Nation v. Seneca Cnty.*, 978 F.3d 829, 831-832 (2d Cir. 2020) (holding that county's foreclosure on tax lien "did not seek to establish [county's] *rights in real estate such as are the animating concern of the immovable-property exception*") (emphasis added). Those "animating concerns" are directly presented here by the Meyer Defendants' seeking to establish their rights in real estate in contravention of the Cayuga Nation's claim to fee simple absolute ownership "free and clear" of such leasehold interest. *See Pinnacle Madison Ave. Corp. v Italian Trade Agency ITA*, 2022 US Dist LEXIS 180739, at *16-17 (S.D.N.Y. Sep. 30, 2022) (holding immovable property exception applied where party sought a license to permit it access to building owned by Italian Trade Agency, "which, if granted, would impinge on 'one of the quintessential rights of property ownership,' i.e., . . . the 'right to exclude others'").

B. <u>This Court should not expand tribal sovereign immunity.</u>

Failing to apply the immovable property exception in this case would expand tribal sovereign immunity beyond the limits proscribed by Congress and effectively

qualify tribes as "super-sovereigns." The immovable property exception is a well-recognized common law doctrine that "predates both the founding and the Tribe's treaty with the United States." *Upper Skagit*, 138 S.Ct at 1657-1658 (Thomas, J., dissenting); *see Permanent Mission,* 551 U.S. at 200*; Schooner Exchange*, 7 Cranch at 144-145. Thus, the inherent sovereignty enjoyed by tribes is subject to the immovable property exception (and other historical common-law doctrines) absent congressional authority to the contrary. *See generally Bay Mills*, 572 U.S. at 788; *Santa Clara Pueblo*, 436 U.S. at 58. We are not aware of any federal legislation exempting tribes from long-standing common law doctrines, or more expressly that tribal sovereign immunity from suit is not subject to the immovable property exception.

Notably, the Supreme Court has refused to expand tribal sovereign immunity by exempting tribes from common law principles applicable to all other sovereigns. In *Lewis v. Clarke*, 137 S. Ct. 1285, 1290-1292 (2017), the Supreme Court evaluated "common-law sovereign immunity principles" and held that tribal sovereign immunity does not bar individual-capacity damages actions against tribal employees for torts committed within the scope of their employment, even though the tribe would indemnify the tribal employee. In *Sherrill*, 544 U.S. at 221, the Supreme Court applied common-law equitable relief to tribal sovereign immunity in the form of "laches, acquiescence, and impossibility" without congressional intervention. In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986) ("*Three Affiliated Tribes*"), the Supreme

Court recognized that when a tribe sues a non-Indian, the defendant "may assert a counterclaim arising out of the same transaction or occurrence that is the subject of the principal suit as a set-off or recoupment" despite Congress never enacting such an exception to tribal sovereign immunity. Recently, the Second Circuit applied common law principles to define the scope of tribal sovereign immunity in holding that individual tribal officials may be sued for state law violations "under a theory analogous to *Ex parte Young*." *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 120 (2d Cir. 2019).[6]

C. Expanding tribal sovereign immunity would impair important state interests and leave private citizens without a remedy at law.

Chief Justice Roberts filed a concurrence in *Upper Skagit*, 138 S.Ct at 1655 (joined by Kennedy, J.) in which he makes clear that leaving private citizens without legal recourse, when a dispute involves tribal ownership of *fee lands*, is unacceptable: "[t]he correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right."

[6] The district court decision in *Oneida Indian Nation v. Phillips*, 360 F. Supp. 3d 122, 133 (N.D.N.Y. 2018) (Suddaby, J.) *aff'd on other grounds,* 981 F.3d 157 (2d Cir. 2020) incorrectly treated the immovable property exception as a "carve out" to tribal sovereign immunity from suit that requires congressional action. The immovable property exception predates the Constitution and congressional recognition of tribal sovereign immunity and, as a result, does not represent a novel limitation of tribal sovereign immunity requiring congressional action, but rather represents a centuries old common law rule to be applied uniformly to foreign nations, states and tribes. Additionally, while the Supreme Court did not expressly apply the immovable property exception in *Upper Skagit*, the concurrence, dissent, and oral argument all indicate that the Supreme Court would have applied the immovable property exception if the argument had been properly preserved. In light of the well-established hornbook law cited in the dissenting opinion, the common law rule should be applied to tribes just as it is to foreign sovereigns and state sovereigns.

If this Court rejects the application of the immovable property exception to tribal sovereign immunity it will embolden the Cayugas (and other tribes) to assert tribal sovereignty in far-reaching ways that disrupt the local community and leave private citizens without legal recourse. Tribes everywhere, if unconstrained by the immovable property doctrine, are free to "repurchase" as much land as their casino wealth permits, take the property off the tax rolls, engage in activities that drain local services (such as sewer, water, fire and emergency services), develop the property in ways that violate zoning and land use laws and interfere with the rights of adjacent landowners, and perhaps even engage in noxious business activities (e.g., waste disposal, pig farming, or fracking) with serious off-site impacts, and not be subject to the enforcement powers of the state or local authorities, or lawsuits by impacted private parties. *See Oneida Indian Nation v. Madison Cnty,* 605 F.3d 149, 159 (2d Cir. 2010) *(*reciting nonsense nursery rhyme to illustrate absurdity of making tribal fee lands subject to ad valorem property taxes but depriving local taxing authorities of right to collect the taxes that are lawfully due and owing).

Giving tribes greater sovereign power than States and foreign nations cannot be reconciled with the diminished status of tribes as "quasi-sovereigns" under the Constitution and federal common law. *E.g., Three Affiliated Tribes*, 476 U.S. at 890-891 ("Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.") (quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940)).

IV. The Meyer Defendants' Counterclaims are not barred by sovereign immunity from suit because they arise out of the same transaction or occurrence and can be limited to a set-off against the Cayuga Nation's claimed RICO damages.

In *Three Affiliated Tribes*, 476 U.S. at 891, the Supreme Court recognized that when a tribe sues a non-Indian, the defendant "may assert a counterclaim arising out of the same transaction or occurrence that is the subject of the principal suit as a set-off or recoupment," despite Congress never enacting such an exception to tribal sovereign immunity. *See United States v. United States Fidelity Guaranty Co.*, 309 U.S. at 511-512; *Oneida Ind. Nation v. Phillips*, 981 F.3d 157, 172-73 (2d Cir. 2020) ("Many courts have recognized, however, that a tribe *does* waive its immunity for counterclaims that arise out of the same transaction and would defeat or reduce the tribe's requested relief. This 'recoupment' principle is well established in the context of both tribal sovereign immunity and federal sovereign immunity.") (original emphasis); *Berrey v. Asarco Inc.*, 439 F.3d 636, 644-645 (10th Cir. 2006) (sovereign immunity waiver extends to counterclaims addressing the same subject matter); *see generally Beecher v. Mohegan Tribe of Indians*, 282 Conn. 130, 137 (2007) ("Articulating a narrow exception to the foregoing rule, the United States Supreme Court has held that a defendant in a tribal action may assert counterclaims against the tribe to set off the tribe's claims and limit its recovery." (citing *United States Fidelity Guaranty Co.*, 309 U.S. at 511-12)). "This 'recoupment-counterclaim exception' is also found in state sovereign immunity jurisprudence." *Id.* (citing, *e.g.*, *United States v. Forma*, 42 F.3d 759, 764-65 (2d Cir. 1994)). "In both state and tribal sovereign immunity cases, however, the exception

is applicable only when the recoupment counterclaim arises out of the 'same transaction or occurrence' as the underlying claim." *Id.* (citing *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982)). *See, e.g., Rosebud Sioux Tribe v. A.P. Steel, Inc.,* 874 F.2d 550, 552-553 (8th Cir. 1989) (permitting counterclaim against tribe where counterclaim arose out of same contractual transaction and sought monetary relief and therefore satisfied the same transaction or occurrence test); *Canadian St. Regis Band of Mohawk Indians v. N.Y.*, 278 F. Supp. 2d 313, 359 (N.D.N.Y. 2003) (permitting recoupment counterclaim against tribe as a set-off against damages).

Here the Counterclaims directly arise from the same transaction or occurrence: namely, the Cayuga Nation's' purported enforcement action seeking to shut down a competing smoke shop based on an internal tribal business ordinance, and alleging the smoke shop operations at 126 Bayard Street violated RICO. The Cayugas' alleged RICO enforcement activity included the forcible entry onto the real property, forcible eviction of the sub-tenant (Dustin Parker) and forcible ouster of the leaseholder (Meyer Defendants)—all in furtherance of eliminating competition and setting up the Nation to operate a smoke shop in the same location. Accordingly, the Counterclaims challenging the Cayuga Nations' entry onto the real property and forcible expulsion of the subtenant and tenant rest on the same essential facts as the underlying RICO claim; indeed they are part and parcel of the Cayuga's RICO enforcement activity and would naturally constitute compulsory counterclaims. As such, the Counterclaims are logically related to the underlying

RICO claim and satisfy the "arising from the same transaction or occurrence" test for avoiding sovereign immunity from suit. *See Berrey,* 439 F.3d at 645; *Cabiri v. Government of the Republic of Ghana*, 165 F.3d 193, 198 (2d Cir. 1999) (breach-of-contract counterclaim logically related to sovereign's eviction proceedings against plaintiff where both concerned same employment contract and relationship and core issue in both was whether employment 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). *See* additional authority presented in Parker Defendants' Opposition to Cayuga Nations Motion to Dismiss Counterclaims, Dkt 77, at 5-11, which is incorporated by reference. In keeping with the doctrine of recoupment, the Meyer Defendants' claim for money damages is limited to a set-off against any RICO damages obtained by the Cayuga Nation.

V. The counterclaims are sufficiently pled.

The Cayuga Nation principally challenges under Rule 12(b)(6) the sufficiency of the pleadings regarding the existence of a valid lease agreement (Dkt 75 at 8-9), while generally challenging the Counterclaims as "naked assertions" or "formulaic recitations." Dkt. 75 at 1. As set out in "Background" above, the allegations for each Counterclaim (Count I thru Count VII) are detailed and specific by virtue of the express incorporation by reference of the core charging paragraphs, Paragraphs

1 thru 23. That is more than sufficient to survive a motion to dismiss. We address below the Cayugas' specific arguments directed to the pleadings.

A. Pleading of Breach of Lease Claim

The Cayugas call "conclusory" the allegation "that the Nation purchased the Property subject to the Commercial Lease." Dkt. No. 75 at 8. With respect to the sufficiency of the pleadings addressing the Commercial Lease Agreement, that agreement is attached to the Answer and Counterclaims, and the facts regarding its execution are alleged. The first Counterclaim (Count I) alleges that "Plaintiff-Counter Defendant [Cayuga Nation] acquired the property subject to the Commercial Lease Agreement and leasehold interest, and is bound by the provisions of the lease" (Ex A, 25) and that "Plaintiff-Counter Defendant knew of the Commercial Lease Agreement and leasehold interest when it acquired the property. Ex A, 26. What the Cayugas overlook in their attack on the factual pleading of Count I is the law regarding the Meyer Defendants' leasehold interest: namely, that the leasehold interest runs with the land as a matter of law and the Commercial Lease Agreement is binding on the Cayuga Nation, as the successor-in-interest, as a matter of law. *See* Section I, *supra*. Thus, all of the facts supposedly omitted by the Meyer Defendants from Count I (such as discussions between the Seneca-Cayuga Nation and the Cayuga Nation respecting the Commercial Lease, the Cayuga Nation's choice whether to assume or reject the lease, and whether the Nation made any representations about the lease surviving the sale) are irrelevant to establishing liability under Count I. It is sufficiently plead as is.

B. Tortious interference claim

The Cayuga Nation misperceives the nature of the tortious interference claim. To the extent the Cayuga Nation denies that it is bound by the Commercial Lease Agreement, it is properly deemed a tortfeasor in destroying the leasehold interest protected by the Commercial Lease Agreement, which runs with the land. To the extent the Commercial Lease Agreement is binding on the Cayuga Nation, and provides contractual damages for its breach, then the basis for a claim of tortious interference disappears. The Meyer Defendants are not alleging the Seneca-Cayuga Nation of Oklahoma procured a breach of the Commercial Lease Agreement or otherwise has any liability for the actions of the Cayuga Nation.

C. Trespass and conversion claims

The Cayuga Nation claims the Counterclaims "do not detail how the Nation, as owner of the Property, was without justification or permission to enter upon it." Dkt. No. 11. Again, as a matter of law, the Meyer Defendants' four-year leasehold interest in 126 Bayard Street runs with the land, "which for all practical purposes is equivalent to absolute ownership" during the period of the lease. *Ferguson*, 544 P.2d at 499; *see Peak Development, LLC*, 100 A.D.3d at 1395. Thus, under both Oklahoma and New York law, the owner of real property is subject to any leasehold interest that exists in the property, which fully displaces the owner's rights during the lease term. The owner cannot act as if no leasehold interest exists. This includes purporting to exercise the owner's right of possession and occupation which

lies dormant during the leasehold and revives only when perfect title reverts at the end of the lease term.

With respect to the conversion claim, the Meyer Defendants adequately alleged personal property was stored in the back half of the building at 126 Bayard Street. To the extent any further information is needed, the Meyer Defendants request the opportunity to amend their pleading of this counterclaim.

VI. 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 which otherwise could not be asserted independently. It is invoked to avoid piecemeal litigation which 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 found in two separate, though sometimes related, circumstances: "(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 (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).

Accordingly, the instant Counterclaims fall within this Court's ancillary jurisdiction.

CONCLUSION

For the foregoing reasons, the Meyer Defendants respectfully request that the Cayuga Nation's motion to dismiss be denied in its entirety.

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CERTIFICATE OF SERVICE

I, David H. Tennant, hereby certify that this document was filed through the Court's ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent via first class mail to those indicated as non-registered participants, if any.

/s/ David H. Tennant