UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

Plaintiff,

v.

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

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.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

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Plaintiff Cayuga Nation (the "Nation"), through undersigned counsel, respectfully submits this reply memorandum of law in further support of its motion to dismiss [ECF No. 75] the counterclaims [ECF Nos. 60 and 61] filed by Defendants Dustin Parker, Nora Weber, and Andrew Hernandez (collectively, the "Parker Defendants") and Paul Meyer, C.B. Brooks, LLC, and Justice for Native First People, LLC (collectively, the "Meyer Defendants") in response the opposition papers filed by the Parker Defendants [ECF No. 77] and the Meyer Defendants [ECF No. 78].

PRELIMINARY STATEMENT

Faced with overwhelming confirmation that the Nation's tribal sovereign immunity bars all of their counterclaims, Defendants vainly search for a conceivable exception. None applies here. The Nation did not implicitly waive its sovereign immunity by commencing this action or purchasing the Property; Defendants cannot shoehorn their counterclaims into the definition of recoupment; and the Property's location on the Cayuga Nation Reservation removes any possible pretense that the immovable property exception could apply. Defendants have also failed to demonstrate that this Court would have supplemental jurisdiction over their state law counterclaims even in the absence of tribal sovereign immunity. And beyond that, they are unable to explain how their pleadings offer enough detail to plausibly state a claim even if the counterclaims were not barred and jurisdiction were not foreclosed.

ARGUMENT

I. Defendants' Arguments That the Nation's Tribal Sovereign Immunity Does Not Bar Their Counterclaims Are Without Merit

A. The Nation Did Not Waive Its Tribal Sovereign Immunity to Compulsory Counterclaims by Commencing This RICO Action

The Parker Defendants assert, in conclusory fashion, that "[i]t is well settled that by initiating an action, a sovereign waives its immunity with respect to compulsory counterclaims."

Parker Defs.' Opp'n Mem. of Law, p. 6, ECF No. 77. But the exact opposite is true. In fact, "Supreme Court precedent couldn't be clearer on this point: a tribe's decision to go to court doesn't automatically open it up to counterclaims—even compulsory ones." *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1011 (10th Cir. 2015) (citing *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)); *Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1097 (9th Cir. 2017) (same); *Cayuga Indian Nation v. Seneca Cnty.*, 260 F. Supp. 3d 290, 299 n.13 (W.D.N.Y. 2017) (holding "[t]he Supreme Court's statement on this point is unequivocal[.]").

The single authority the Parker Defendants cite in support of their broad contention only confirms the well-accepted principle that Congress may expressly carve out exceptions to sovereign immunity, and that it has narrowly done so under 11 U.S.C. § 106(b) for compulsory counterclaims in bankruptcy proceedings when a governmental unit files a proof of claim. *In re Charter Oaks Assocs.*, 361 F.3d 760, 768 (2d Cir. 2004).

Even assuming Defendants' counterclaims are compulsory (they are not, *see infra*), that does not change the fact that Congress has not abrogated tribal sovereign immunity for the garden-variety state common law claims Defendants assert or for claims under the Computer Fraud and Abuse Act, and the Nation has not in any way waived its sovereign immunity to the counterclaims by bringing this RICO action. *Potawatomi*, 498 U.S. at 509; *Ute Indian Tribe*, 790 F.3d at 1011.

B. Defendants' Counterclaims Are Not Excepted from the Nation's Tribal Sovereign Immunity Because They Are Not Claims for Recoupment

"[I]t is well established that when the United States or an Indian tribe initiates a lawsuit, a defendant may assert counterclaims that sound in recoupment even absent a statutory waiver of immunity." *Oneida Indian Nation v. New York*, 194 F. Supp. 2d 104, 136 (N.D.N.Y. 2002) (citing *United States v. Forma*, 42 F.3d 759, 764 (2d Cir. 1994) (additional citations omitted)). The

distinguishing feature of a recoupment claim is that it must be "'in the nature of a defense' to defeat a plaintiff's claims, not a vehicle for pursuing affirmative judgment." *Ute Indian Tribe*, 790 F.3d at 1101 (quoting *Bull v. United States*, 295 U.S. 247, 262 (1935)); *Forma*, 42 F.3d at 764 (recognizing recoupment may only be utilized to reduce or defeat the sovereign's claim, but not to obtain an affirmative judgment against the sovereign).

Notwithstanding the fact that their counterclaims are all plainly offensive in nature and specifically seek an affirmative judgment against the Nation, Defendants attempt to recast them as recoupment claims in an effort to get around the Nation's tribal sovereign immunity. But Defendants' effort fails. A recoupment claim "must (1) arise from the same transaction or occurrence as the plaintiff's suit; (2) seek relief of the same kind or nature as the plaintiff's suit; and (3) seek an amount not in excess of the plaintiff's claims." *Quinault*, 868 at 1100 (citation and internal quotation marks omitted); *Berrey v. Asarco Inc*., 439 F.3d 636, 645 (10th Cir. 2006) (same). Defendants' counterclaims inescapably fail all three parts of the test.

First, the counterclaims do not arise from the same transaction or occurrence as the Nation's civil RICO claim. Defendants contend that all of the parties' claims arise from the application of the Nation's Business Ordinance.[1] But this Court already rejected the position that the Ordinance has anything to do with this case. *See* Memorandum-Decision and Order, pp. 12 and 13 n.17, ECF No. 49 ("Here, Defendants argue that the application of the Ordinance 'lies at the heart' of the present suit . . . . The Court disagrees. . . . [T]here is no contention that the Court

[1] *See* Parker Defs.' Opp'n Mem. of Law, p. 7, ECF No. 77 ("[T]he Nation alleges the Parker Defendants violated the Ordinance and therefore, civil RICO, by operating Pipekeepers."); Meyer Defs.' Opp'n Mem. of Law, p. 17, ECF No. 78 ("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.").

would be required to render a decision making any determination regarding the Ordinance to resolve this case[.]"). Defendants' argument fares no better the second time around.

Far from being the same for recoupment purposes, the transactions or occurrences underlying the Nation's RICO claims, on the one hand, and Defendants' real and personal property claims on the other, are categorically different. *See Quinault Indian Nation v. Comenout*, No. C10-5345 BHS, 2015 U.S. Dist. LEXIS 36145, *7 (W.D. Wash. Mar. 23, 2015) (holding that defendant failed to establish counterclaims for recoupment where the Indian nation asserted that defendant failed to pay cigarette taxes in violation of RICO, and defendant counterclaimed that the Indian nation wrongfully deprived him of "a right to an interest" in land).

Second, Defendants do not seek relief of the same kind and nature as the Nation. The Nation has sought statutory damages pursuant to 18 U.S.C. § 1964(c) and a permanent injunction "enjoining Defendants from operating or financing an illicit cigarette business within the boundaries of the Cayuga Nation Reservation." Compl., p. 18, ECF No. 1. Meanwhile, Defendants seek common law damages and an order directing the Nation to restore Defendants' possession of the Property. ECF Nos. 60 and 61. Defendants' requests for relief are manifestly not the "mirror image" of the Nation's such that they could be in the nature of a defense or a set-off. *See Forma*, 42 F.3d at 764.

Third, Defendants seek an amount in excess of the Nation's claims. Indeed, they seek an unquantified and unlimited amount of damages to be determined at trial. *See* ECF No. 60, p. 23 and ECF No. 61, p. 19. Thus, the counterclaims cannot be for recoupment. *See United States use of Greenville Equip. Co. v. United States Cas. Co.*, 218 F. Supp. 653, 656 (D. Del. 1962) (holding a counterclaim in an "unlimited amount" cannot sound in recoupment).

C. The Nation Did Not Implicitly Waive Its Tribal Sovereign Immunity by Purchasing the Property from the Seneca-Cayuga Nation of Oklahoma

"It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978) (citations omitted), and "to relinquish its immunity, a tribe's waiver must be clear." *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). Yet the Meyer Defendants contend that the Nation implicitly waived its sovereign immunity when it purchased the Property from the Seneca-Cayuga Nation of Oklahoma, which had itself provided a limited written waiver of *its own* sovereign immunity in a Commercial Lease for the Property.

That arguments fails for at least two reasons. First, the plain language of the waiver is properly restricted to Seneca-Cayuga Nation of Oklahoma, who could not possibly claim to waive the sovereign immunity of the Nation or any other sovereign. ECF No. 61, Ex. A, p. 16 at ¶ 19.10 ("Seneca-Cayuga Tribe of Oklahoma, a Federally Recognized Tribe . . . grants a clear and unequivocal waiver of *its* sovereign immunity from suit and collection only for the limited purposes as set forth in this Section 19.10[.]" (emphasis added)).[2] And second, the Nation cannot be deemed to have implicitly waived its sovereign immunity as a successor-in-interest to the Property because "a sovereign entity does not automatically waive its sovereign immunity through the mere act of succeeding [an entity] that is either not entitled to sovereign immunity or that has

[2] Section 19.10 also contains a provision requiring that any dispute be brought *exclusively* in the United States District Court for the Northern District of Oklahoma. So even if the waiver applied, *this* Court would still lack jurisdiction to hear Defendants' claims. *See, e.g.*, *Metzinger v. Dep't of Veterans Affairs*, 20 F.4th 778, 784 (Fed. Cir. 2021) (noting the "background principle that waivers of sovereign immunity are generally tied to particular courts"); *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512–513 (1940) (noting that "cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration" and concluding the same principle applies to tribal sovereign immunity).

waived such immunity." *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 686 n.7 (8th Cir. 2011) (collecting cases).

No matter how framed, "[c]onsent by implication, whatever its justification, still offends the clear mandate of *Santa Clara Pueblo*." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989). The Nation cannot be said to have implicitly waived its tribal sovereign immunity when it purchased the Property here.

D. The Immovable Property Exception Does Not Apply to Defendants' Counterclaims

The Supreme Court, in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018), explicitly declined to decide whether the "immovable property exception" extends to tribal sovereign immunity, and the Second Circuit has also stayed its hand. *Oneida Indian Nation v. Phillips*, 981 F.3d 157, 170 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021). That is because "the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country." *Upper Skagit*, 138 S. Ct. at 1654 (citations omitted).

Still, the Meyer Defendants invite this Court to be the first to decide that the immovable property exception applies to Indian tribes, basing that invitation on nothing more than their personal impressions of the Justice's statements at the *Upper Skagit* oral argument and the dissenting opinion in that case. Meyer Defs.' Opp'n Mem. of Law, p. 11, ECF No. 78. Judge Hurd recently declined an identical invitation in *Cayuga Nation v. Tanner*, 448 F. Supp. 3d 217, 244 (N.D.N.Y. 2020), admonishing that "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." *Id.* (quoting *Upper Skagit*, 138 S. Ct. at 1653). And even more recently, Judge Siragusa declined to opine on the matter, noting "[t]he Court takes no position on that point." *Cayuga Nation v. Diebold*, Case No. 21-CV-6630, 2022 U.S. Dist. LEXIS 65688, *20

n.18 (W.D.N.Y. Apr. 8, 2022). So too, this Court should decline to rule on whether the immovable property exception extends to tribal sovereign immunity in this case.

Indeed, this case is not a proper vehicle to make such a ruling in any event. The immovable property exception extends only to land acquired by a sovereign "outside of its own territory," *Cayuga Nation of N.Y. v. Seneca Cnty.*, 978 F.3d 829, 836 (2d Cir. 2020), and the Property at issue here indisputably rests entirely *inside* of the Nation's own territory on the Cayuga Nation Reservation. Therefore, the immovable property exception would be inapplicable here even were it deemed to extend to tribal sovereign immunity.

II. Defendants Have Not Asserted a Viable Basis for Supplemental Jurisdiction Over Their State Law Counterclaims

The Nation's opening papers squarely establish that supplemental jurisdiction under 28 U.S.C. § 1367 is required over all of Defendants' state law counterclaims, and that it cannot be found here because those claims do not arise from the same common nucleus of operative fact as the Nation's original federal RICO claims. Yet Defendants barely engage with this argument, briefly making two arguments that are inapposite.

Defendants argue that this Court should assert jurisdiction over the counterclaims under historical notions of ancillary jurisdiction in order "to avoid piecemeal litigation that might occur due to the irreconcilability between Article III limits and the permissive rules of joinder adopted by the Federal Rules of Civil Procedure." ECF No. 77, p. 8 and ECF No. 78, p. 21. Whatever the pragmatic appeal for asserting jurisdiction over Defendants' counterclaims might be, the test remains the "same case or controversy" rule set forth in 28 U.S.C. § 1367(a)—which Defendants have ignored, and, as the Nation explained in its opening papers, cannot be satisfied here. Naked appeals to policy simply do not suffice.

Defendants also argue that all of their counterclaims are compulsory because they arise from the same transaction or occurrence, and therefore this Court has jurisdiction over them by virtue of its jurisdiction over the Nation's original RICO claims. But the Nation has shown that Defendants' counterclaims are *not* part of the same transaction or occurrence in Section I(B) above. And as set forth there, the only argument Defendants offer to say their claims arise from the same transaction or occurrence has already been foreclosed by this Court.

III. Defendants' Counterclaims Must Also Be Dismissed Because They Fail to State a Claim

Defendants' opposition papers confirm that this Court also should dismiss all of their counterclaims for failure to state a claim. Defendants do not—and cannot—resolve the pleading inadequacies the Nation has identified. Rather, Defendants largely ignore the Nation's arguments, and try to cloud the issues by spending many pages discussing matters that are irrelevant to the issues at hand.

First, with regard to the breach of contract counterclaims, the Nation identified two problems with the Parker Defendants' sublease claims: (1) Defendants pled that the sublease was for a term of four years and was not in writing, rendering it void under New York's Statute of Frauds, and (2) even if the sublease was not void, Defendants' only claim could be against the Meyer Defendants as sublessor, and not against any prime lessor because "there is no privity of contract between a landlord and a subtenant." *Neidich v. Gottlieb*, 169 A.D.2d 541, 542 (1st Dep't 1991). The Parker Defendants never contend that their pleading says the sublease was in writing or for a term less than a year, nor do they so much as mention the concept of privity or distinguish the cases the Nation has cited. The Meyer Defendants, for their part, admit their counterclaim for breach of the Commercial Lease is conclusory but suggest they were unable to plead anything more. This is not sufficient for the claims to survive.

With regard to the tortious interference counterclaims, the Nation specified that a key element of any tortious interference claim is defendant's intentional inducement of the third-party's breach of the contract, and that there is no allegation that the Seneca-Cayuga Nation of Oklahoma (the third-party) breached the Commercial Lease by selling the Property to the Nation. Defendants do not address this argument, or even more broadly contend that the Seneca-Cayuga Nation of Oklahoma breached the Commercial Lease in some other way. The Meyer Defendants simply say the "Nation is properly deemed a tortfeasor in destroying the leasehold interest protected by the Commercial Lease," ECF No. 78, p. 20, while the Parker Defendants decry "the Nation cannot tear apart a binding lease and sub-lease agreement after taking possession of a property." ECF No. 77, p. 12. But this misframes the issue. Defendants' tortious interference claims require the Seneca-Cayuga Nation of Oklahoma to have breached its lease by selling the Property. It unassailably did not.

Defendants arguments with respect to the conversion counterclaims proceed in much the same way. The Nation identified that those causes of action were inadequately pled because Defendants failed to describe the specific and identifiable property allegedly converted. The Parker Defendants simply ignore the argument. Meanwhile, the Meyer Defendants address this argument more or less in passing, saying "[w]ith 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." ECF No. 78, p. 21. But that vague description only proves the Nation's point that Defendants have not adequately pled their conversion causes of action by describing specific and identifiable property, and the claims must be dismissed.

Finally, with respect to the Parker Defendants' Computer Fraud and Abuse Act counterclaim, the Nation has highlighted that it does not contain a single allegation of who had

access to the computers, what they accessed, when they accessed, how they used the information, or even what type or number of computer devices are at issue. The Parker Defendants do not dispute any of this. If anything, they just double-down on the vagueness of their claim: "A review of the Parker Defendants[']s counterclaims shows that the Nation took possession of the Parker Defendant[']s inventory and possession [sic] when it seized the property, including computers." ECF No. 77, p. 16.

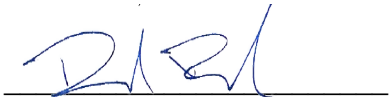
At bottom, Defendants fail to offer any plausible reading of their pleadings that would cure the defects the Nation has identified, and all of Defendants' counterclaims should therefore also be dismissed for failure to state a claim.

CONCLUSION

For the reasons set forth in this memorandum together with Nation's opening memorandum, and any other reasons that may appear to the Court or be presented at any hearing on the motion, the Nation respectfully requests that its motion to dismiss Defendants' counterclaims be granted in full and Defendants' counterclaims be dismissed with prejudice.

Dated: October 28, 2022

BARCLAY DAMON LLP



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