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 THIRD-PARTY PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO CLINTON HALFTOWN'S MOTION TO DISMISS THIRD-PARTY COMPLAINT

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INTRODUCTION

Third-Party Plaintiffs Paul Meyer, Justice for Native First People, LLC and C.B. Brooks LLC ("Meyer Third-Party Plaintiffs"), hereby respond to the motion to dismiss filed by Third-Party Defendant Clinton Halftown (Dkt 76). The Meyer Third-Party Plaintiffs expressly incorporate by reference the opposition filed by the Parker Third-Party Plaintiffs to the same motion to dismiss filed by Halftown.

Halftown calls the long recognized legal doctrine of *Ex parte Young*—a venerable Supreme Court case he studiously avoids mentioning[1] —a mere "contrivance" to "circumvent the Cayuga Nations sovereignty." Dkt. 76-2 at 1 (ECF page 7); *id.* at 7 (ECF page 19). The Supreme Court views *Ex parte Young* as an important limitation on tribal sovereign immunity from suit. *See Mich. v. Bay Mills Indian Cmty.*, 572 U.S. 782, 796 (2014) ("As this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct."). In fact, as discussed below, the Second Circuit has specifically held *Ex parte Young* applies to Indian tribes in New York, and under that doctrine individual members of a tribe (including tribal officers) are amenable to suit for prospective injunctive relief. This would encompass Third-Party Plaintiff Justice for Native First People, LLC's claim seeking to end the ongoing trespass / invasion of its leasehold rights. Moreover, Third-Party Plaintiffs'

[1] "Indeed it is not extravagant to argue that Ex parte Young is one of the three most important decisions the Supreme Court of the United States has ever handed down." 17A WRIGHT MILLER § 4231 (3d ed. 200 7)(quoted in *Vann v. Kempthorne*, 534 F.3d 741, 755 (D.C. Cir. 2008)).

intentional tort claims are permitted—not barred by tribal sovereignty from suit—to the extent they are brought against Halftown in (a) his individual capacity and seek damages from him personally or (b) his official capacity but his actions fall outside the scope of his tribal authority.

Thus, the law provides Third-Party Plaintiffs with avenues to have a remedy notwithstanding the claim of tribal sovereign immunity from suit. What the Halftown motion to dismiss seeks to do is to wield sovereign immunity without limits to block any relief in any court for the torts committed by him, while he and the Tribe pursue their one remaining RICO claim.[2] The Court should not permit such one-way only litigation which flies in the face of fairness, not when specific exceptions to sovereign immunity exist.

With respect to the sufficiency of the pleadings alleging state law tort 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 Third-Party Plaintiffs respectfully request permission to amend their claims.

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[2] 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.

LEGAL STANDARD

The well-pleaded facts supporting the Meyer Third-Party Plaintiffs' claims 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." 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 Third-Party Defendant Clinton Halftown, as the party claiming sovereign immunity from suit, bears the burden of proving that 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 Third-Party Complaint (Dkt. 64) consists of 37 detailed charging paragraphs that are incorporated by reference into each of the subsequent four counts. Halftown's conclusory attack on the sufficiency of these pleadings all but ignores the detailed allegations found in paragraphs 1 thru 37. 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. Dkt. No. 64, at ¶¶ 15-20. Further background facts include the property's sub-letting to Dustin Parker (*id.* at ¶¶ 23-28), 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 ¶¶ 29-32. 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 ¶¶ 33-37. The following claims "repeat and reallege the allegations contained in the preceding paragraphs (¶¶ 1 to 37) as if specifically set forth herein": Count I alleges Clint Halftown tortiously interfered with the Meyer Third-Party Plaintiffs' rights under the Commercial Lease Agreement; Count IV (should read Count II) alleges that Clint Halftown trespassed on the property subject to Meyer's leasehold interest; Count V (should read Count III) alleges Clint Halftown converted the Myer Defendant's personal property stored on the demised premises. The Meyer Defendants seek in Count VI (should read Count IV) recovery of attorneys' fees and costs under the Commercial Lease Agreement.

Halftown repeats the false and non-evidentiary contention that the Tribe "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." Dkt. 76-1 at 3 (ECF page 9) (emphasis added). As set forth in the Meyer Defendants' Opposition (Dkt.78) to the Cayuga Nation's Motion to Dismiss Counterclaims (Dkt. 75), the Commercial Lease Agreement survived the sale and "runs with the land." Dkt 78 at 5-7 (ECF page 11-13). With respect to the sufficiency of the pleadings contained in the Third-Party Complaint, the Meyer Third-Party Plaintiffs incorporate by reference herein their arguments respecting the sufficiency of the counterclaims, as set forth in Dkt 78. *See id.* at 18-20.

ARGUMENT

I. Tribal sovereign immunity does not bar the third-party tort claims against Clinton Halftown.

A. *Ex parte Young* provides an exception to sovereign immunity from suit and allows actions to enjoin ongoing violations of state law (i.e. trespass).

Tribal sovereign immunity from suit, like the sovereignty wielded by states, is subject to an express and long-standing exception for actions against individual governmental officers for prospective injunctive relief. *See Bay Mills* 134 S. Ct. at 2035; *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 121 (2d Cir. 2019) ("the Supreme Court has already blessed Ex parte Young-by-analogy suits against tribal officials for violations of state law"). The Second Circuit has applied *Ex parte Young* to permit actions against tribal officers for alleged RICO violations. *Gringas*, 922 F.3d at 124. Third-Party Plaintiff Justice for Native First People LLC has a claim for trespass against Clinton Halftown (and John Doe Defendants 1-10) with that violation of state law continuing to the present with a commitment by the tortfeasors to keep their wrongful occupation of the leased premises. The fact that Third-Party Plaintiffs seek both prospective and retrospective relief for the trespass does not defeat the application of *Ex Parte Young*. *See Verizon Maryland Inc. v. Public Service Commission*, 535 U.S. 635, 646 (2002) (permitting the plaintiff to proceed with his claims even where plaintiff "seeks a declaration of the past, as well as the future," violations of law, so long as the violation is ongoing).

Accordingly, *Ex parte Young* is an expressly applicable exception to tribal sovereign immunity from suit and permits injunctive relief against Halftown to

enjoin his ongoing trespass violations. While Halftown may argue this doctrine does not apply because 126 Bayard Street in Seneca Falls is within "Indian country," that contention is flatly inconsistent with *City of Sherrill v. Oneida Nation*, 544 U.S. 197, 202-203 (2005) which forecloses exercises of sovereignty—"in whole or in part"—over fee lands that are located within the tribe's historic reservation boundary (unless and until taken into trust). The parcels in question are titled in fee simple, and for the past 200 years have been—and to this day continue to be—non-Indian lands within the undiminished plenary taxing and regulatory authority of New York State and its political subdivisions.[3]

B. Tribal sovereign immunity does not block state tort claims directed at tribal members in their individual capacity.

Third-Party Plaintiffs' state law tort claims may be brought against Halftown and the Doe Defendants in their individual capacities. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (officer of tribe not protected by tribe's immunity from suit) (citing *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 171-172 (1977)). The viability of Third-Party Plaintiffs' state law tort claims against Halftown and John Does 1-10 is illustrated by the Ninth Circuit's decision in *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013). There tribal members operated a tribal ambulance in San Diego County (off reservation) and were found amenable to suit for the wrongful death of a gunshot victim. The tribal EMTs were alleged to have failed to render aid. In

[3] But cf. *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.).

addressing the claim of tribal sovereign immunity, the Ninth Circuit held that the tort action could be maintained against the tribal members in their individual capacities since the damages would be paid for by the members who were named as defendants, and not by the tribe. *Id.* at 1089. The fact that the tribe might choose to indemnify the tribal EMTs did not make the suit one against the tribe. *Id.* at 190; *see Lewis v. Clark,* 137 S. Ct. 1285, 1292 (2017) (holding tribal sovereign immunity did not block state tort action against tribal employee (a non-Indian) who negligently operated a tribal vehicle on Interstate 95; fact that employee would be indemnified by tribe did not convert the action into a lawsuit against the tribe).

Halftown's amenability to suit for his intentional torts is further illustrated by the decision in *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442, 478 (E.D.N.Y. 2009). *Gristede's* involved unfair business competition claims brought by a grocery chain against an Indian smoke shop allegedly selling illegal cigarettes. *Id.* at 478. The district court separated out the different strands of claims against one of the main defendants, Chief Henry Wallace, who owned and operated the smoke shop. *Id.* The district court observed that "plaintiff has sued Chief Wallace in his capacities as an individual, a tribal government official, and a business owner." *Id.* The court concluded that "Chief Wallace enjoys tribal immunity from suit only to the extent that he is sued in his official tribal capacity for acts within the scope of his tribal authority. Chief Wallace is not immune from suit to the extent that he is sued in his individual capacity or, in light of the court's conclusion that the Poospatuck Smoke Shop is not entitled to immunity, to the extent that he is

sued for acts in his capacity as the owner of the Smoke Shop. " *Id.*; *see Gristede's Foods v. Poospatuck*, 06-cv-1260 (KAM), at *5 n.1 (E.D.N.Y. Oct. 27, 2009) ("By decision dated October 8, 2009, the Court granted the 12(b)(1) motions as to the Unkechauge tribe and to Chief Henry Wallace in his tribal capacity, and denied the 12(b)(1) motion as to Chief Henry Wallace in his individual capacity and as to the Poospatuck Smoke Shop and Trading Post.").

Just as Chief Wallace was found amenable to suit when he was sued in his individual capacity, so too should Halftown be found amenable to suit. The state tort claims are sufficiently pled to assert personal liability against Halftown sued in his individual capacity, even though he holds a leadership position in the tribe, just as Chief Henry Wallace of the Unkechauge tribe was found a viable defendant in *Gristede's*. *See* Meyer Third-Party Complaint at ¶ 5. Moreover, like Chief Wallace, Halftown "enjoys tribal immunity from suit only to the extent that he is sued in his official tribal capacity for acts *within the scope of his tribal authority*." *Gristede's*, 660 F. Supp. 2d at 478 (emphasis added). The Third-Party Complaint alleges (in the alternative) that Halftown, to the extent he is deemed to have acted in his official capacity, exceeded the scope of his tribal authority in undertaking the tortious campaign against Third-Party Plaintiffs. *See* Meyer Third-Party Complaint at ¶ 5. Indeed, his *personal* economic gain from destroying a competing smoke shop should disqualify him from being treated in his official capacity—in other words he abused his position of authority for personal gain. That should be sufficient to remove Third-Party Plaintiffs' claims from the reach of tribal sovereign immunity from suit.

Thus, Third-Party Plaintiffs have alleged tortious interference with contract, trespass and conversion claims against Halftown in his individual capacity and seek to satisfy any judgments from his personal assets and not from the Cayuga Nation's coffers, and thus the claims do not implicate tribal sovereign immunity from suit. Alternatively, if Halftown is found to have acted only in his official capacity, Third-Party Plaintiffs have stated a claim against Halftown in his official capacity because his actions exceeded the scope of his authority.

II. The Third-Party Complaint is a proper procedural device to sue Halftown for driving the RICO prosecution for his own personal benefit and injuring Third-Party Plaintiffs.

Halftown argues that the third-party action is the wrong device because Third-Party Plaintiffs are not claiming to be derivatively liable for Halftown's misconduct, which is the typical use for a third-party action. But Rule 14(a)(3) does not say the device only authorizes derivative liability "claim overs." The language is much broader. "*Plaintiff's Claims Against a Third-Party Defendant*. The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

Here Third Party Plaintiffs are suing Halftown in both his official capacity (subject to *Ex Pate Young*) and in his individual capacity for his direct responsibility for the tortious campaign he orchestrated against the third-party plaintiffs for his own personal economic benefit. What Halftown is really saying is not that he has been mis-joined under Rule 14(a) but that he cannot be sued at all under *any* provision. To the extent the court concludes the present third

party action does not fit the circumstances, then the Meyer Defendants will seek leave to join Halftown as a Plaintiff/Counterclaim-Defendant under Rule 20 of the Federal Rules of Civil Procedure. The answer cannot be that Halftown is not amenable to suit for any claim, under any theory or doctrine, and falls outside any rule for being added to this lawsuit The rule of law must have some application. And as Chief Justice Roberts expressed with some exasperation in *Upper Skagit*, the rule can't be "the tribe always wins." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1655 (2018) ("The 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.") (Roberts, J., concurring). Leaving Third-Party Plaintiffs without a remedy against Halftown is not a reasoned application of the rule of law. And it leaves parties in disputes with Indian tribes and their members to resort to self-help with prospects for conflict. *Id.* Indeed, as demonstrated in this case, Halftown (and Doe Defendants) resorted to forcible self-help to evict Parker when the courts should be available to resolve such disputes. Having no judicial remedy is an unacceptable outcome. *See Nation v. Campbell,* 34 N.Y.3d 282, 305 (N.Y. 2019) ("This dispute over Nation-held property has raged for five years. The allegations in the present complaint speak of violence, force, and theft, and [the trial court's] earlier decision attests to a lack of respect for court process. It is "essential in an ordered society that" we "rely on legal processes rather than self-help to vindicate [our] wrongs") (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (Garcia, J., dissenting)).

The Third-Party Complaint against Clint Halftown and Does 1-10 should be respected as a proper use of the court system to resolve the present dispute through litigation under judicial oversight.

III. Because the third-party claims arise from the same transaction or occurrence as the underlying action, this Court has ancillary jurisdiction over them.

The claims in the Meyer Third-Party Complaint substantially and materially overlap with the clams alleged in the Nation's underlying complaint, sufficient to find they both derive from a common nucleus of operative fact. The relevant portion of 28 U.S.C. § 1367(a) provides:

> "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

See Federman v. Empire Fire & Marine Ins. Co., 597 F.2d 798, 810 (2d Cir. 1979).

The Second Circuit recognizes that disputes are part of the "same controversy" when they "derive from a common nucleus of operative fact." *Promisel v. First Am. Artificial Flowers Inc.*, 943 F.2d 251, 254 (2d Cir.1991). In determining whether two disputes arise from a "common nucleus of operative fact," we have traditionally asked whether "the facts underlying the federal and state claims substantially overlapped … [or] the federal claim necessarily brought the facts underlying the state claim before the court." *Lyndonville Sav. Bank & Trust Co. v. Lussier*, 211 F.3d 697, 704 (2d Cir.2000) (internal citations omitted). "This is so even if the state law claim is asserted against a party different from

the one named in the federal claim." *Briarpatch Ltd. v. Phoenix Pictures*, Inc., 373 F.3d 296, 308 (2d Cir.2004).

Halftown argues the underlying claims do not overlap with the "undergirding" facts that are asserted in the Meyer Third-Party Complaint. First, a factual interdependence exists between the Nation's Civil RICO claim and the third-party clams asserted by both the Meyer Third-Party Plaintiffs and the Parker Third-Party Plaintiffs: 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. Moreover, the Nation purchased the property at 126 Bayard Street in Seneca Falls expressly to evict Justin Parker and shut down his competing smoke shop—the alleged RICO enterprise—while violating the Meyer Third-Party Plaintiffs' leasehold rights and committing the torts of trespass and conversion. These events share more than a common nucleus but constitute deeply related occurrences with extraordinary overlap. Since the Court has subject matter jurisdiction over the Nation's underlying claim, it has supplemental jurisdiction over the third-party claims against Halftown.

Halftown's reliance on *Torres v. Gristede's Operating Corp*, is misplaced. In *Torres*, the plaintiffs, former employees of the defendant, brought a class action lawsuit alleging violations of federal and state wage and hours laws. 628 F. Supp. 2d 447, 467 (S.D.N.Y. 2008). In response, the defendant brought counterclaims alleging the plaintiffs engaged in unfounded sexual misconduct at the workplace before terminating their employment with the defendant. *Id.*

The Court dismissed the claims finding a "complete absence of facts in the record regarding the counterclaims." *Id.* Nothing like that occurred here; the substantial overlap is patent.

Accordingly, the instant claims set forth in the Meyer Third-Party Complaint fall within this Court's ancillary jurisdiction.

CONCLUSION

For the foregoing reasons, the Meyer Third-Party Plaintiffs respectfully request that Third-Party Defendant Clint Halftown'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