UNITED STATES DISTRICT COURT
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)

DUSTIN PARKER AND NORA WEBER'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

This memorandum of law is submitted on behalf of Dustin Parker and Nora Weber (the "Parker Defendants") in support of their motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, seeking dismissal of the remaining RICO claim asserted against them in this action, brought by the Plaintiff, Cayuga Nation, by and through its lawful governing body, the Cayuga Nation Council (the "Nation"). Should the Court not grant their motion for summary judgment, the Parker Defendants move, in the alternative, for spoliation sanctions and exclusion of testimony from both of Plaintiff's proposed experts at trial.

PRELIMINARY STATEMENT

The Council's lone, remaining cause of action against the Parker Defendants alleges violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), specifically under 18 U.S.C. § 1962(a). (Compl. Count II.) Weeding past the thinly-veiled allegations in the Complaint, and examining the record, it becomes evident that there is no support for the Nation's § 1962(a) claim against the Parker Defendants; this entire action has been the Council's attempt to weaponize the RICO statute (while shielding itself with tribal sovereign immunity) in attempts to stifle any competition within the tribe, and to force a native-owned, competing business to shutter. As set forth below, summary judgment is warranted because the Nation's RICO claim is legally and factually untenable.

The Parker Defendants did not receive or invest racketeering income, and the Nation cannot demonstrate any injury that is both distinct and proximately caused by the alleged investment of such income. The Nation's allegations are based on speculation and unsupported assumptions, with no evidence of predicate acts, a pattern of racketeering, or a qualifying enterprise. Furthermore, the Nation's claims lack standing and are unsupported by the sovereign-interest doctrine.

For all these reasons, the Parker Defendants are entitled to summary judgment as a matter of law. Accordingly, summary judgment must be granted in favor of the Parker Defendants on the sole remaining federal claim. Should the Court fail to grant this relief, the Parker Defendants move, in the alternative, for spoliation sanctions and exclusion of testimony from both of Plaintiff's proposed experts at trial.

FACTUAL BACKGROUND

The Parker Defendants respectfully refer the Court to their Statement of Material Facts, submitted in accordance with Northern District of New York Local Rule 7.1(a)(3), and incorporated here by reference.

LEGAL STANDARD

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment shall be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a). The Supreme Court's Celotex trilogy—*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)—clarifies that the party seeking summary judgment may meet its burden by pointing out the absence of evidence supporting the nonmovant's case. In response, the claimant bears the burden to come forward with admissible evidence sufficient to prove each element of a claim under 18 U.S.C. § 1962(a). Failure to do so requires entry of summary judgment against the claimant.

Finally, at the summary judgment stage, a plaintiff must present competent evidence of damages. Speculative or conjectural losses, unsupported by documentation or expert testimony, are insufficient to withstand summary judgment. *See Leung v. Law*, 387 F. Supp. 2d 105 (E.D.N.Y. 2005); *Update Traffic Systems, Inc. v. Gould*, 857 F. Supp. 274 (E.D.N.Y. 1994).

ARGUMENT

I. THE COURT MUST FIND THAT THERE IS INSUFFICIENT EVIDENCE IN THE RECORD FOR THE NATION'S REMAINING RICO CLAIM AND AWARD SUMMARY JUDGMENT

The Nation's lone, remaining cause of action against the Parker Defendants is based on a violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1962(a) (Compl. Count II.) To establish any RICO claim, a plaintiff must show: "(1) a violation of the RICO statute, 18 U.S.C. § 1962; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962." *DeFalco v. Bernas*, 244 F.3d 286, 306 (2d Cir.2001), *cert. denied*, 534 U.S. 891 (2001) (citing *Pinnacle Consultants. Ltd. v. Leucadia Nat'l Corp.,* 101 F.3d 900, 904 (2d Cir. 1996)) (citing *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 767 (2d Cir.1994)).

Specifically, Section 1962(a) additionally requires a plaintiff to prove that the defendant invested income derived from a pattern of racketeering activity into the acquisition, establishment, or operation of an enterprise, and that the plaintiff suffered an injury caused by that investment, not merely by the predicate acts themselves. *Lugosch v. Congel*, 443 F. Supp. 2d 254, 270 (N.D.N.Y. 2006). Courts have consistently held that reinvestment of proceeds back into the same business does not satisfy this requirement, and that competitive harm or lost profits, absent a distinct investment injury, are insufficient. *See Blue Cross and Blue Shield of New Jersey*, *Inc. v. Philip Morris, Inc.*, 113 F. Supp. 2d 345 (E.D.N.Y. 2000); *Falise v. American Tobacco Co.*, 94 F. Supp. 2d 316 (E.D.N.Y. 2000); *USA Certified Merchants, LLC v. Koebel*, 262 F. Supp. 2d 319 (S.D.N.Y. 2003).

i. The Nation's Section 1962(a) Claim Fails as a Matter of Law

As set forth below, summary judgment is warranted because the undisputed record establishes that the Nation cannot prove the elements of an underling § 1962(a) violation for at least five separate reasons. First, the Nation cannot demonstrate that the Parker Defendants received "racketeering income." This is because the Nation cannot prove the Parker Defendants engaged in any predicate acts or engaged in a pattern of racketeering activity – the second and third reasons. Fourth, the Parker Defendant's activities are inherently local, and thus there is no impact on interstate commerce. Finally, the Nation cannot show a distinct "investment injury" that was caused by the Parker Defendants' alleged investment of racketeering proceeds. Any of these reasons provides this Court sufficient basis to summarily dismiss the Nation's RICO claim.

In addition, the Nation lacks the requisite standing to sustain a RICO claim, as it cannot demonstrate the direct, personal injury to its business or property required by law. The record is devoid of evidence that the Nation suffered any direct, actual injury proximately caused by the Parker Defendants' conduct. Further, the Nation lacks Article III standing to pursue its RICO claims because it seeks to vindicate sovereign regulatory interests, such as tax enforcement, rather than direct proprietary injuries. Without standing, summary judgment must be granted in favor of the Parker Defendants.

ii. Failure to Demonstrate Receipt of "Racketeering Income"

"Racketeering Income" refers to income derived from a pattern of "racketeering activity," which is defined in 18 U.S.C.S. § 1961(1)(B) as any act which is indictable under specified provisions of Title 18, and includes proceeds obtained through criminal offenses, such as trafficking in contraband cigarettes, money laundering, and the distribution or possession of

controlled substances, as defined under 18 U.S.C. § 1961(1) (often referred to as the "predicate acts").

Here, the record does not support the existence of "Racketeer Income" as there is no evidence of predicate acts, and certainly not a "pattern" of them, discussed below.

iii. Absence of Predicate Acts

To establish a predicate act under § 1961(1), proof of a criminal violation is required.

Here, the Nation has not provided any such proof, relying instead on speculative assertions regarding contraband sales. *See, e.g.,* Parker Dep. Tr. 7:13–14 (Nation offers no evidence of criminal conduct). The record is devoid of any direct evidence—such as law enforcement reports, regulatory findings, or criminal convictions—demonstrating that Defendants engaged in the sale of contraband cigarettes or cannabis in violation of federal or state law. Instead, Plaintiff's claims rest on conjecture and unsupported allegations, which are insufficient to meet the burden of proof required for a RICO predicate act.

To the contrary, the record demonstrates that all cigarette inventory sold by Pipekeepers was purchased from licensed wholesalers, and there is no evidence of contraband-cigarette trafficking or the shipment of unstamped cigarettes across state lines. *See* 18 U.S.C. § 2342; *see also Update Traffic Systems, Inc. v. Gould*, 857 F. Supp. 274, 280 (E.D.N.Y. 1994) (dismissing RICO claim where plaintiff failed to show predicate acts).

Similarly, there is no evidence of money laundering, as the proceeds from Pipekeepers' operations were used solely for routine business expenses, with no evidence of proceeds concealment or transactions exceeding $10,000 involving criminal proceeds (SUMF ¶¶ 17, 18); *see* 18 U.S.C. §§ 1956, 1957.

Moreover, the Nation has failed to offer any admissible evidence demonstrating that these sales were illegal or that any proceeds are "derived from" such illegal acts. Testimony from both Parker and Dwyer confirms that all sales were conducted openly and that inventory was sourced from legitimate, native-owned wholesalers. The record is devoid of any evidence that either Pipekeepers, Mr. Parker or Ms. Weber have been subject to an adverse enforcement action against them from any New York or Federal regulatory agency or law enforcement body.

In sum, the Plaintiff's inability to produce concrete evidence of criminal violations, combined with the uncontroverted testimony regarding the lawful sourcing of inventory and the absence of enforcement actions, underscores the lack of any predicate act under § 1961(1). The record supports the conclusion that Defendants' business operations were legitimate and that Plaintiff's claims are based on speculation rather than substantiated fact.

iv. Failure to Establish a Pattern of Racketeering Activity

To establish liability under RICO, the Nation must prove a "pattern of racketeering activity," which requires at least two predicate acts within a ten-year period that are related and amount to, or pose a threat of, continued criminal activity. 18 U.S.C.S. § 1961(1), (5). The Court has already dismissed Counts I and III on proximate cause grounds, and the record lacks any evidence of ongoing or repeated criminal behavior amounting to a "pattern of racketeering activity."

The Nation has not identified any predicate acts occurring after January 1, 2022, and there is no evidence that Defendants' business operations were inherently unlawful or that any alleged unlawful conduct was Defendants' regular way of operating Pipekeepers. Without evidence of a pattern of racketeering activity, there is no "Racketeering Income"; thus, the Nation cannot satisfy a core element of its RICO claim, and summary judgment is warranted.

v. Failure to Demonstrate Any Impact on Interstate Commerce

The record does not show facts that any alleged enterprise, if an enterprise even existed, had any effect on interstate commerce. Section 1962(a) only applies to an "enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a). A sustainable RICO claim, therefore, must allege and demonstrate some impact on interstate commerce. *Cf. First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 173 n.12 (2d Cir. 2004). In determining what connections with interstate commerce must be proven ... to establish a violation of § 1962, the courts have ruled that the impact need not be great. *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001). If the activities of the enterprise affect interstate commerce, the jurisdictional element is satisfied. *Id.*

Here, the Nation's RICO claims are inherently local. The record does not show that Pipekeepers purchase goods from, or sell goods to, entities outside the state of New York, nor that it conducts any business activities that cross state lines. All suppliers and vendors referenced in the evidence are located within New York State, and there is no indication of any transactions or business relationships with out-of-state or international entities. None of this alleges even a scintilla of impact on interstate commerce. The claim thus fails to meet even the negligible burden imposed by this requirement.

Accordingly, the requirement of interstate commerce necessary to support a claim under RICO is not satisfied.

vi. No Distinct Investment Injury

The Nation's claim (also) fails because it cannot, as a matter of law, demonstrate any factual support establishing a distinct investment injury or a causal nexus between the alleged reinvestment of racketeering proceeds and a separate, actionable injury.

Section 1962(a) prohibits the use or investment of "any income derived . . . from a pattern of racketeering activity" in the acquisition, establishment, or operation of any enterprise that affects interstate commerce. 18 U.S.C. § 1962(a). To state a claim under Section 1962(a), the Nation must allege it suffered an injury caused by the investment itself that is distinct from any injuries caused by the predicate acts of racketeering. *See Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir. 1996), *vacated in part on other grounds by*, 525 U.S. 128 (1998). Put another way, it is not enough to allege that the Parker Defendants used racketeering income to operate a purported enterprise, and that the enterprise harmed the Nation. *Id.* at 133. Rather, the Nation must establish a separate and distinct "injury by reason of defendants' investment of racketeering income in an enterprise." *Kaczmarek v. Inter. Bus. Machs. Corp.*, 30 F. Supp. 2d 626, 628 (S.D.N.Y.1998) quoting *Ouaknine v. MacFarlane*, 897 F.2d 75, 82-83 (2d Cir. 1990)(internal quotation marks omitted). "The essence of a violation of § 1962(a) is not commission of predicate acts but investment of racketeering income." Id.

Here, the Nation does not, and cannot, identify any injuries stemming directly from investments purportedly made by the Parker Defendants that are distinct from injuries stemming from predicate acts.

Moreover, the Nation's theory that Parker's purchase of the new location for Pipekeepers constitutes a qualifying investment injury is unavailing. The record demonstrates that the new Pipekeepers store is substantially the same business as the original, except that it no longer sells gasoline. (See Weber Dep. at 89–90.) The move to the new location was not a strategic expansion

or reinvestment of racketeering proceeds, but rather a direct response to the Nation's own actions in evicting Pipekeepers from the original Bayard Street property. (See Parker Dep. at 88–89; Weber Dep. at 81–83.) Thus, any alleged reinvestment was compelled by the Nation's conduct and does not constitute the type of investment injury required for standing under § 1962(a).

Applying case law from this circuit here, this deficiency alone defeats Nations Section 1962(a) claim. *See West 79th Street Corp. v. Congregation Kahl Minchas Chinuch*, No. 03 Civ. 8606RWS, 2004 WL 2187069, at *12 (S.D.N.Y. Sept. 29, 2004) ("[A]llegations that income derived directly or indirectly from the purported racketeering activity was reinvested into the same enterprise allegedly responsible for that activity are insufficient as a matter of law to sustain a Section 1962(a) claim."); *see also Woods v. Mercier*, No. 11-CV-6502, 2012 WL 3925852, at *5 (W.D.N.Y. Sept. 7, 2012) (Holding that "alleg[ations] that income derived directly or indirectly from the purported racketeering activity by the [ ] defendants was reinvested into the same enterprise purportedly responsible for that racketeering activity . . . are insufficient as a matter of law to sustain a Section 1962(a) claim.")

Because the alleged reinvestment merely sustained the ongoing operations of the original enterprise, rather than constituting a distinct investment in a separate entity or venture, the Nation cannot establish the type of investment injury required to support a claim under § 1962(a).

vii. Failure to Show Parker Defendants Caused an Injury to the Nation

Even assuming *arguendo* that the requirements to show a violation 18 U.S.C. 1962(a) were met and the Nation could establish an actual injury to its business, it cannot demonstrate that its alleged injury was proximately caused by the Parker Defendants' conduct.

Plaintiff's alleged injuries are derivative and speculative, as they depend on the independent decisions of consumers and broader market forces, rather than any direct action by

Defendants. The Second Circuit has made clear that where a plaintiff's claimed losses could have resulted from factors other than the alleged racketeering activity, such as ordinary market competition or consumer choice, proximate cause is lacking. *See Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459 (2006) ("Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of [the plaintiff's] lost sales were the product of [the defendant's] decreased prices.").

Here, as the Court noted, the Cayuga Nation's loss of revenue could have resulted from factors other than Defendants' alleged sale of cigarettes in violation of the CCTA, and without additional factual details, the Complaint nor any submissions allow a plausible inference of direct causal connection. (*See* Memorandum Decision and Order on Motion to Dismiss ("MTD Order") at 19 (Dkt. 59)).

The Court has already determined that proximate cause is lacking with respect to Plaintiff's claims under 18 U.S.C. §§ 1962(c) and (d), and the same reasoning applies to the present claim. Specifically, the Court found that the Cayuga Nation failed to sufficiently allege a direct causal connection between Defendants' alleged racketeering activity and the Nation's purported injuries, emphasizing that the requirement of proximate cause under RICO demands a direct relation between the injury asserted and the injurious conduct alleged. *See Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010); *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 141 (2d Cir. 2018). The Court concluded that the Nation's alleged loss of revenue was too remote and could not be directly attributed to Defendants' conduct. (*See* MTD Order at 18-20). In dismissing Counts I and III, the Court held that "customers' decisions not to purchase unstamped cigarettes from Cayuga Nation stores were not themselves acts of racketeering," and thus could not satisfy RICO's proximate-cause requirement. (MTD Order at 20 (citation and internal

quotation marks omitted).) ("But the Cayuga Nation's loss of revenue could have resulted from factors other than Defendants' alleged sale of cigarettes in violation of the CCTA, and without additional factual details, neither the Complaint nor any submissions allow a plausible inference of direct causal connection. *See Anza*, 547 U.S. at 459 (finding discontinuity between the RICO violation and the asserted injury, explaining that the plaintiff's 'lost sales could have resulted from factors other than the [defendant's] alleged acts of fraud' and that '[b]usinesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of [the plaintiff's] lost sales were the product of [the defendant's] decreased prices'").

Moreover, the presence of more direct victims, namely, New York State and federal tax authorities, further severs any causal chain between Defendants' alleged conduct and Plaintiff's claimed injuries. The Court recognized that any direct harm from the alleged trafficking of contraband cigarettes or smokeless tobacco in violation of the CCTA would be suffered by the governmental entities entitled to the payment of taxes, not by the Cayuga Nation. *See New York v. United Parcel Serv., Inc.*, 942 F.3d 554, 597 (2d Cir. 2019) (holding that the direct victims of cigarette tax evasion are the governmental entities entitled to the tax revenue). As the Court explained, "the requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." (MTD Order at 19-20 (quoting *Anza*, 547 U.S. at 460)).

Accordingly, the record fails to establish the necessary causal connection required for relief.

viii. Lack of Injury to Business

Plaintiff's damages theory is entirely speculative and unsupported by competent evidence. It is well established that a plaintiff "only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation [of § 1962]." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). A plaintiff will only have standing if it alleges the existence of an actual, present injury, not some speculative injury that might only possibly occur. *Anitora Travel, Inc. v. Lapian*, 677 F. Supp. 209, 216 (S.D.N.Y. 1988). Mere speculation of an injury is insufficient to state a civil RICO claim. *Id.*

A required element of any RICO claim is that the plaintiff must show it suffered injury to its business or property as a result of the alleged racketeering activity. Here, the record does not support Plaintiff's claim that it suffered such injury. The court has found that the Cayuga Nation failed to provide evidence that Defendants' conduct caused any actual harm to its business, reputation, or customer relationships. The Nation's assertions of lost revenue and reputational harm were found to be conclusory and unsupported by evidence. Moreover, the court noted that any alleged loss of revenue could have resulted from factors other than Defendants' alleged conduct, and there was no evidence of customer confusion or loss directly attributable to Defendants.

As such, the Nation cannot establish the required element of injury to its business, and its RICO claims must fail on this basis establish a Distinct Enterprise: Pipekeepers and Defendants are not legally distinct; § 1962(a) requires an enterprise "separate and apart" from the investing person.

ix. Lack of Article III Standing

The Cayuga Nation lacks Article III standing to pursue its RICO claims because it seeks to vindicate sovereign regulatory interests, such as tax enforcement, rather than direct proprietary injuries. The Supreme Court has made clear that RICO standing requires a plaintiff to allege injury

to its business or property, not to its sovereign or regulatory interests. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972); *see also* MTD Order at 19 (noting that "any direct harm would be to the governmental entities entitled to the payment of taxes on cigarettes"). The Nation's asserted injuries are thus not cognizable under RICO, and its claims are barred by the sovereign-interest doctrine.

For all these reasons, summary judgment should be granted in favor of the Parker Defendants on Plaintiff's § 1962(a) claim.

x. No Genuine Issue of Material Fact Precludes Judgment

The Nation bears the ultimate burden of proving each element of its claim under § 1962(a). After the completion of full discovery, the Nation cannot point to any admissible evidence establishing that Parker or Weber received any racketeering income, that any such income was used or invested in acquiring or operating an enterprise, or that the Nation suffered any injury to its business that was proximately caused by such investment. The absence of proof on any one of these essential elements is fatal to the Nation's claim; the absence of proof on all three mandates the entry of judgment as a matter of law. *See* Fed. R. Civ. P. 56(a).

II. IN THE ALTERNATIVE: THE COURT MUST ISSUE SANCTIONS AGAINST THE NATION FOR SPOLIATION

The Parker Defendants respectfully move, pursuant to the Court's inherent authority and Federal Rule of Civil Procedure 37, for sanctions arising from the Cayuga Nation's destruction of contemporaneous paper records documenting the quantity and nature of personal property seized from Pipekeepers Tobacco & Gas on January 1, 2022. The undisputed evidence—principally the sworn declaration (Dwyer Decl. ¶¶ 3–4) and deposition testimony (Dwyer Dep. 14:22–15:24;

17:11–18:2; 18:20–24; 21:20–22:1) of the Nation's own representative, Tiffany Dwyer—establishes that (i) those records once existed, (ii) they were destroyed after the duty to preserve indisputably arose, and (iii) their loss has irreparably prejudiced the Parker Defendants' ability to prove the full measure of damages on their counterclaims for conversion and trespass to chattels. Sanctions, including an adverse-inference instruction and such other relief as the Court deems just, are therefore warranted.

i. Factual Background

1. Seizure and Inventory

On January 1, 2022, the Cayuga Nation forcibly entered the Pipekeepers premises at 126 E. Bayard Street, Seneca Falls, removed all merchandise, cash, gasoline, fixtures, and equipment, and immediately shuttered the store. (Dwyer Dep. 14:22–15:24; 18:20–24; 21:20–22:1.) Ms. Dwyer and another Nation employee were then ordered to "go through all of the boxes, count every item in every box" and record the results in a laptop spreadsheet. (Dwyer Dep. 14:22–15:6; 17:11–18:2.)

As she counted, Ms. Dwyer simultaneously jotted quantities on "loose 'sticky notes' and scrap papers." (Dwyer Decl. ¶ 4; Dwyer Dep. 16:24–17:5.)

2. Destruction of Paper Records

Ms. Dwyer admits that each sticky note was "immediately discarded in the moment and in the ordinary course" once its contents were typed into the spreadsheet. (Dwyer Decl. ¶ 4.) She further concedes that no inventory whatever was prepared for non-tobacco, non-cannabis property—including "fixtures, cash, gasoline, snack foods, and beverages." (Dwyer Decl. ¶ 3; see also Dwyer Dep. 18:21–19:2; Court's 5-22-24 Minute Entry.)

3. Litigation Posture

The Nation initiated this RICO action on February 10, 2022, barely five weeks after the seizure. By that date the duty to preserve relevant evidence was absolute, but litigation was certainly contemplated at the time the destruction occurred; BJ Radford testified that representatives from Barclay Damon – including at some point, counsel, David Burch - were there through the entire process of reviewing the inventory from Pipekeepers. (Radford Dep. 38:11–17.) Thus, it is unconscionable that any documents were destroyed and that the Nation did not properly account for all of the seized assets.

Years later, after the Court pressed Plaintiff's counsel at the May 28, 2025, conference on the topic of what inventory was conducted, the Court ordered a sworn statement to clarify the record. (Court's 5-28-25 Minute Entry.) Ms. Dwyer's June 6, 2025, declaration now confirms that no such inventory exists because the contemporaneous paper records were destroyed and the remaining items were never properly accounted for despite counsel being onsite during the inventory. (Dwyer Decl. ¶¶ 3–4.)

4. Prejudice to the Parker Defendants

The Nation chose not to keep an inventory of the categories and quantities of cash, gasoline, fixtures, and convenience-store merchandise seized by the Nation, and it destroyed documentation of its initial inventory—information the Parker Defendants cannot now recreate with precision. (Dwyer Decl. ¶ 4; Dwyer Dep. 18:21–19:2.) The Nation has thus deprived the Parker Defendants of the best and only contemporaneous evidence supporting millions of dollars in damages on their counterclaims.

ii. Applicable Legal Standard

The "obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation . . . as for example when a party should have known that the evidence may be relevant to future litigation." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *see also Fujitsu Ltd. v. Federal Express Corp*., 247 F.3d 423, 436 (2d Cir. 2001).

The Second Circuit defines spoliation as "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co*., 167 F.3d 776, 779 (2d Cir. 1999) (citing *Chambers v. NASCO, Inc*., 501 U.S. 32, 43-45 (1991)) (additional citations omitted).

> A party seeking sanctions for spoliation of evidence must establish three elements:
>
> (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the [evidence was] destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim ... such that a reasonable trier of fact could find that it would support that claim. *Residential Funding Corp. v. DeGeorge Fin. Corp*., 306 F.3d 99, 107 (2d Cir. 2002) (internal quotation marks omitted).

Guard Ins. Group, Inc. v. Techtronic Indus. Co., 80 F. Supp. 3d 497, 503 (W.D.N.Y. 2015).

iii. The Nation Had an Undisputed Duty to Preserve the Inventory Records

The duty to preserve attaches when litigation is "reasonably foreseeable." Here, the Nation seized the Parker Defendants' business on January 1, 2022 and, within weeks, sued them for alleged racketeering. The Nation cannot plausibly contend it did not foresee litigation over the very property it confiscated when it had counsel present at the time. Under settled law, that duty extended to **all** documents memorializing the seizure—including Ms. Dwyer's sticky-note tallies and the original laptop file used to create the tobacco/cannabis spreadsheet.

iv. The Nation Willfully Destroyed Notes After the Duty to Preserve Arose

The second element (destruction with a culpable state of mind) is likewise met here. A "culpable state of mind" for purposes of spoliation ranges from simple negligence to bad faith and willful destruction. A "culpable state of mind" for purposes of spoliation ranges from simple negligence to bad faith and willful destruction. *In re Mosdos Chofetz Chaim Inc.*, 624 B.R. 576, 583 (Bankr. S.D.N.Y. 2021) (citing *Official Comm. of Unsecured Creditors of Exeter Hldgs., Ltd. v. Haltman*, No. CV 13-5475 (JS9AK), 2015 WL 5027899, *7 (E.D.N.Y. Aug 25, 2015) and *First Am. Title Ins*. Co. *v. Moses (In re Moses)*, 547 B.R. 21, 47 (E.D.N.Y. 2016)). As the Second Circuit held in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002), a "'culpable state of mind' is not limited to bad faith or gross negligence" and further held that based on the actual effect of the spoliation, i.e., if it truly destroys one's ability to mount a defense, even a negligent state of mind suffices to be "culpable." *See also Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75-76 (S.D.N.Y. 1991).

Here, there is no other conclusion that can be reached but that Ms. Dwyer admits she "immediately discarded" each note after transcribing the numbers. (Dwyer Decl. ¶ 4; Dwyer Dep. 16:24–17:5.) That deliberate act—undertaken *during* a litigation-triggering event and *after* the Nation began contemplating suit—constitutes at least gross negligence and, on this record, willfulness. There is no suggestion that the notes were lost accidentally, misplaced, or destroyed pursuant to any routine policy; rather, they were thrown away contemporaneously and intentionally.

v. The Destroyed Records Are Relevant and Their Absence Prejudices the Parker Defendants

Relevance is easily satisfied: the quantity and nature of seized property goes to the heart of the Parker Defendants' conversion and trespass-to-chattels counterclaims and to damages

exceeding $400,000 in retail inventory, $80,000 in fixtures and improvements, and substantial cash proceeds. Without the contemporaneous records, Defendants must rely on testimony years after the fact and on Plaintiff's self-serving, incomplete spreadsheet—plainly prejudicial under any standard. (Dwyer Decl. ¶¶ 3–4; Dwyer Dep. 18:21–19:2.) "Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 467 (S.D.N.Y. 2010), *abrogated on other grounds by Chin v. Port Auth. of N.Y. &* New Jersey, 685 F.3d 135 (2d Cir. 2012); *see also Sekisui Am. Corp. v. Hart*, 945 F. Supp. 2d 494, 508 (S.D.N.Y. 2013) ("When evidence is destroyed intentionally, such destruction is sufficient evidence from which to conclude that the missing evidence was unfavorable to that party.") (citation omitted); *Arista Records LLC v. Usenet.com*, 608 F. Supp. 2d 409, 439 (S.D.N.Y. 2009) ("When evidence is destroyed in bad faith, that alone is sufficient to support an inference that the missing evidence would have been favorable to the party seeking sanctions, and thus relevant.") (citations omitted).

vi. Appropriate Sanctions

The elements of spoliation having been met, the Court should impose sanctions for the offending behavior. Given the Nation's conduct and the resulting prejudice, the Parker Defendants respectfully request: 1) an adverse-inference instruction directing the jury to presume that the destroyed notes would have corroborated Defendants' valuation of all seized non-tobacco, non-cannabis property; 2) evidentiary preclusion barring the Nation from disputing the quantity or value of such property; 3) fees and costs incurred in bringing this motion; and 4) such further relief as the Court deems just, including potential monetary sanctions or directed fact findings under Rule 37(b)(2).

vii. Relief is Warranted

The Nation's intentional destruction of the only contemporaneous inventory records—after litigation was not merely foreseeable but already contemplated—strikes at the integrity of these proceedings and irreparably harms the Parker Defendants' ability to prove their counterclaims. (Dwyer Decl. ¶¶ 3–4; Dwyer Dep. 16:24–17:5; 18:21–19:2.) Spoliation sanctions are therefore not only appropriate but necessary to redress that harm and to deter future misconduct.

For all the foregoing reasons, the Parker Defendants respectfully request that should the Court fail to award the Parker Defendants Summary Judgment, *in the alternative*, the Court grant their motion and impose the sanctions set forth above.

III. IN THE ALTERNATIVE: THE COURT MUST EXCLUDE OR SIGNIFICANTLY LIMIT THE TESTIMONY OF THE NATION'S PROPOSED EXPERTS

Pursuant to Federal Rule of Evidence 702 and the Court's gate-keeping responsibility, the Parker Defendants respectfully move to exclude or severely limit the expert testimony of James S. Flynn offered by Plaintiff. The Nation proffers Mr. Flynn to quantify "lost profits" it allegedly sustained from February 2022 through May 2025. The Parker Defendants also move to exclude the testimony of BJ Radford, the Nation's Chief Financial Officer, whose opinions and assumptions underlie and inform Mr. Flynn's damages analysis.

As demonstrated below, and confirmed by The Parker Defendants' rebuttal expert, Stephen L. Ferraro, Mr. Flynn's opinions rest on insufficient facts, employ speculative and results-oriented methodologies, disregard basic principles of damage measurement, and offer no reliable basis from which a jury could determine either the existence or the quantum of any loss. (*See* Expert Report of James S. Flynn ("Flynn Report"); Ferraro Rebuttal Report at 2-3, 5-6, 14-18.) Because the

Nation cannot satisfy Rule 702's requirements of sufficient data, reliable methodology, and helpfulness to the trier of fact, Mr. Flynn's and Ms. Radford's testimony should be excluded.

i. Rule 702 Standard

Under Rule 702, the proponent of expert testimony bears the burden of establishing by a preponderance that: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied those principles and methods to the facts of the case. Evidence that fails any of these prongs is inadmissible. In addition, even if Rule 702 were satisfied, testimony whose probative value is substantially outweighed by the danger of unfair prejudice, confusion, or wasted time must be excluded under Rule 403.

In evaluating expert testimony under Fed. R. of Evid. 702, a district court serves a "gatekeeping role." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). In doing so, the court must determine whether the testimony "rests on a reliable foundation and is relevant to the task at hand." *Id*. "[T]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of Rule 702 are satisfied." *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007).

In assessing the reliability of an expert's proposed testimony, the Court's focus "must be solely on principles and methodology, not on the conclusions they generate." *Daubert*, 509 U.S. at 595. Although Rule 702 embodies a liberal standard of admissibility for expert opinions, a district court should admit expert testimony only where it is offered by a qualified expert and is relevant and reliable. *In re AXA Equitable Life Ins. Co. COI Litig.*, 595 F. Supp. 3d 196, 250 (S.D.N.Y. 2022); *Nimely v. City of New York*, 414 F.3d 381, 395-96 (2d Cir. 2005).

Expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith. *See In re AXA*, 595 F. Supp. 3d at 250; *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 214 (2d Cir. 2009)); *Chefs Diet Acquisition Corp. v. Lean Chefs, LLC*, No. 14-cv-8467 (JMF), 2016 WL 5416498, at *10 (S.D.N.Y. Sept. 28, 2016).

Additionally, to be admissible, expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. This inquiry essentially looks to whether the testimony is relevant, i.e., it must "fit" the facts of the case. *Daubert*, 509 U.S. at 591 ("Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility); *see also In re Zyprexa*, 489 F. Supp. 2d 230, 283 (E.D.N.Y. 2007).

ii. BJ Radford's Proposed Expert Opinions are Inadmissible

The Nation identifies its CFO, BJ Radford, as an expert on market definition, causation, and lost profits, yet serves no expert report. Radford proposes to give opinion testimony that:

(1) the Cayuga Nation enjoys "single-retailer status" for tax-free products;

(2) Pipekeepers is "the only meaningful competitor" within the relevant market; and

(3) "all sales Pipekeepers has made … would otherwise have been made by the Nation."

These opinions go well beyond lay testimony based on personal knowledge. They require specialized economic analysis and the same type of reliable methodology Rule 702 demands of Flynn. Because Radford provides no methodology, no data, and no calculations, and because the Nation declined to furnish the report required for retained or specially employed experts, her opinions must be excluded.

At most, Radford may testify as a fact witness concerning the Nation's books and records; she may not cloak speculative theories in the mantle of expert evidence.

iii. Mr. Flynn's Opinions Lack Sufficient Factual Foundation and Rely on Unsupported Assumptions

Mr. Flynn's opinions are fundamentally unsupported by sufficient facts or data, as required by Rule 702(b), and are further undermined by their reliance on unsupported assumptions provided by Radford. Despite the Nation's ability to produce contemporaneous income statements, sales journals, bank records, and related documentation, Mr. Flynn admits that he reviewed none of these records. (*See* Ferraro Rebuttal Report at 2-3, 5-6.) Instead, he extrapolated supposed Nation profits solely from data produced by Pipekeepers. (*See* Flynn Report at 2-3; Ferraro Rebuttal Report at 5-6.) This approach results in a lost-profits model that is detached from the plaintiff's actual performance and devoid of plaintiff-side documentation, rendering it facially deficient.

Moreover, the limited cigarette-sales reports that the Nation did produce for Lakeside Trading 1 and Lakeside Trading 2 show stable or even increasing sales during the alleged "loss" period. (*See* Ferraro Rebuttal Report at 5, Chart 1.) Mr. Flynn ignores this contrary evidence and provides no reconciliation for these discrepancies. In addition, because the Nation's retail and wholesale operations are vertically integrated, "sales" and "cost" figures can be shifted at will through journal entries with no cash impact. (*See* Ferraro Rebuttal Report at 6-7.) Mr. Flynn accepted the Nation's cost representations at face value, never auditing source documents, price lists, or bank statements that could confirm arm's-length pricing.

Mr. Flynn also disregards the presence of competing sellers. He assumes a "closed" market in which every sale made by Pipekeepers necessarily displaced a sale by the Nation. (*See* Flynn Report at 1; Ferraro Rebuttal Report at 8-10.) This assumption is refuted by publicly documented

unlicensed stores, other tribal outlets, and extensive tourism-driven traffic in the Finger Lakes region. (*See* Ferraro Rebuttal Report at 8-10.) Furthermore, this assumption is based on the unsupported assertions of BJ Radford, the Nation's CFO, who is expected to testify that Pipekeepers is the only meaningful competitor and that all sales made by Pipekeepers would otherwise have been made by the Nation. (*See* Plaintiff's Rule 26(a)(2) Expert Disclosure at 2-3; Ferraro Rebuttal Report at 8-10.) Mr. Flynn adopts these assumptions wholesale, without independent verification or economic analysis. By failing to collect data about these obvious competitors and by relying on Ms. Radford's baseless assertions, Mr. Flynn's analysis again lacks the factual foundation that Rule 702(b) demands.

iv. Mr. Flynn's Methodologies Are Unreliable, Speculative, and Not Generally Accepted

The methodologies employed by Mr. Flynn are unreliable, speculative, and not generally accepted within the field of forensic accounting, as required by Rule 702(c). For tobacco products, Mr. Flynn arbitrarily attributes the Nation's asserted average sales prices and costs to Pipekeepers' unit counts, without ever validating the accuracy of those prices. (*See* Ferraro Rebuttal Report at 14-15.) He applies an undisclosed averaging technique that groups dissimilar products—such as cartons, packs, cigars, cones, bags, and shirts—and assigns a single gross-profit percentage, thereby masking product-specific variation. Notably, he even computes damages for four tobacco products that the Nation concedes it never sold, including 225's, Jackpot, NAE, and Black Thirty-Three. (*See* Flynn Report at 9; Ferraro Rebuttal Report at 14-15.)

With respect to cannabis sales, Mr. Flynn's approach is even more problematic. He extrapolates all in-store cannabis sales for a 40-month period from only four days of handwritten cash logs, covering May 29 through June 1, 2025. (*See* Flynn Report at 3, 12; Ferraro Rebuttal

Report at 15-16.) Three of these four days are weekend days, which are historically higher-traffic days, thus artificially inflating the "average." Mr. Flynn then applies that average retroactively to February 2022, without accounting for any store-opening ramp-up, seasonality adjustments, or confirmation of comparable inventory offerings. (*See* Ferraro Rebuttal Report at 15-16.) Furthermore, he imposes a 50 percent gross-profit margin on cannabis products based solely on an unsupported representation by the Nation, despite Mr. Parker's sworn testimony that Pipekeepers applied margins closer to 20 percent. (*See* Flynn Report at 3; Ferraro Rebuttal Report at 16.)

For the year 2025, Mr. Flynn's projections are purely speculative. In the absence of any Pipekeepers data for January through May 2025, he simply re-uses 2024 monthly unit counts, applies unverified 2025 Nation pricing, and declares the result to be lost profit. (*See* Flynn Report at 7-8; Ferraro Rebuttal Report at 16-17.) This is conjecture, not expert analysis. Additionally, for a host of low-volume products for which the Nation provided neither price nor cost information, Mr. Flynn selects a flat 40 percent margin "based on expert judgment," which falls short of the rigor demanded by Rule 702. (*See* Flynn Report at 8; Ferraro Rebuttal Report at 17.) Finally, Mr. Flynn conducts no error testing or sensitivity analysis to determine how his conclusions might change in response to variations in pricing, margin, traffic volume, seasonality, or the presence of competitive entrants—basic procedures that are routinely applied in forensic accounting engagements. (*See* Ferraro Rebuttal Report at 17.)

v. Mr. Flynn Fails to Establish a Reliable Nexus Between Pipekeepers' Conduct and Any Alleged Nation Loss

Mr. Flynn's analysis offers no reliable nexus between Pipekeepers' conduct and any alleged loss suffered by the Nation, as required by Rule 702(d). His causation analysis is entirely derivative of unsupported assumptions provided by BJ Radford. In reality, such testimony would be used to bolster the account given by Radford – who is at best, a fact witness. See *Nimely v. City of New*

York, 414 F.3d at 398.("We have, in other factual contexts, disapproved of the practice of expert witnesses basing their conclusions on the in-court testimony of fact witnesses, out of concern that such expert testimony may improperly bolster the account given by the fact witnesses.") *See*, *e.g.*, *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003); *United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992).

The Flynn report contains no economic analysis of substitution effects, cross-elasticity, or market diversion. (*See* Flynn Report at 1; Ferraro Rebuttal Report at 8-10, 18.) Instead, it simply adopts the narrative advanced by Ms. Radford, who opines that Pipekeepers is the Nation's "only" meaningful competitor and that every Pipekeepers sale is a lost Nation sale. Mr. Flynn's causation analysis is thus not only conclusory, but is also entirely derivative of Ms. Radford's unsupported assumptions, compounding the unreliability of both witnesses. Rule 702 requires that expert opinion "help" the jury; an assumption that predetermines the outcome adds no helpful insight.

Furthermore, Mr. Flynn fails to isolate other causal factors that could explain any alleged loss. His report ignores marketwide inflation or deflation, post-COVID supply-chain disruptions, changes in the Nation's own product mix or marketing, and pricing decisions made by the Nation's vertically integrated wholesale entities that could depress reported gross profit. (*See* Ferraro Rebuttal Report at 7, 18.) Without isolating these independent variables, any attribution of loss to Pipekeepers is unreliable.

There is also evidence of profit manipulation. Arrowhead/Sweet Grass ledger data supplied by the Nation show monthly gross-profit percentages fluctuating from 23.65 percent to 133.97 percent—including a month where "net purchases" are negative. (*See* Ferraro Rebuttal Report at 7.) Such volatility underscores that the Nation can manufacture or suppress profit at will, defeating Mr. Flynn's attempt to "import" margins from the Nation's system into his model.

vi. The Danger of Unfair Prejudice and Juror Confusion Substantially Outweighs Any Probative Value

Even if portions of Mr. Flynn's testimony were deemed marginally relevant, the danger of unfair prejudice and juror confusion substantially outweighs any probative value, as contemplated by Rule 403. Mr. Flynn's presentation cloaks advocacy in the mantle of expertise, invites the jury to adopt a dollar figure reached through speculation, and risks diverting attention from the limited, reliable facts that actually exist. Admitting such testimony would necessitate extensive mini-trials on data integrity, accounting conventions, market structure, and the presence of competing sellers—wasting time and confusing jurors. Exclusion, or at minimum substantial limitation, is therefore warranted.

vii. Accordingly, Should the Court Fail to Grant Summary Judgment to the Parker Defendants, it Must Order the Testimony of Both of the Nation's Proposed Experts Excluded from Trial

The Nation has not carried—and cannot carry—its burden under Rule 702. Mr. Flynn's proposed testimony rests on inadequate factual inquiry, unreliable and result-oriented methodologies, and speculation about causation and damages. (*See* Ferraro Rebuttal Report at 2-3, 5-7, 14-18.) Moreover, because Mr. Flynn's opinions are inextricably based on the unsupported assumptions and opinions of BJ Radford, her testimony is likewise unreliable and should be excluded. Allowing the jury to hear such testimony would subvert, rather than assist, the truth-seeking process.

Accordingly, the Parker Defendants respectfully request that the Court grant this motion in limine and exclude both Mr. Flynn's and Ms. Radford's opinions in their entirety, or, at a minimum, strike every portion of the report and testimony that fails to satisfy Rule 702.

CONCLUSION

Because the Nation cannot prove (1) racketeering income, (2) its use or investment in a distinct enterprise, or (3) an investment-specific injury proximately caused by such use, Count II fails as a matter of law. The Court should enter summary judgment dismissing Count II with prejudice and direct the Clerk to close the case. In the alternative, the Court should grant Defendant's motions for spoliation sanctions and to exclude the Nation's expert testimony from trial.

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