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.

MEMORANDUM OF LAW IN OPPOSITION TO PARKER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff Cayuga Nation (the "Nation"), through undersigned counsel, respectfully submits this memorandum of law, together with its Local Rule 56.1(b) Response to Statement of Material Facts and the Declaration of B.J. Radford ("Radford Decl."), in opposition to the Motion for Summary Judgment, ECF No. 164 (the "Motion"), filed in these proceedings by Defendants Dustin Parker and Nora Weber (the "Parker Defendants").

PRELIMINARY STATEMENT

For nearly the past four years, the Parker Defendants have been operating a retail store on the Cayuga Nation Reservation that openly sells untaxed and unstamped cigarettes, cannabis, and other illicit items. Far from shying away from this, the Parker Defendants have gone so far as to broadcast their illicit wares over the radio waves and around the internet, drawing in customers from across the Canadian border, and from as far away as Florida, who seek to enjoy the upside of this black-market scheme while it lasts. All the while, they avoid payroll tax, evade income tax, eschew business records and banking institutions, and transact entirely in cash piled high in an onsite safe.

Now that they are moving for summary judgment, the Parker Defendants would have this Court believe that none of that is true. Never mind the plain reality on the ground, and never mind that the Parker Defendants specifically confirmed all of it at their depositions. Only by altogether ignoring the record and airbrushing their deposition transcripts can the Parker Defendants argue that summary judgment is appropriate. And only by palming off their reinvestment of illicit proceeds into their overarching brick-and-mortar enterprise as the discrete investment into predicate acts that fund the enterprise, can they claim the absence of proximate cause.

The law dictates a more principled approach to these how-much-is-enough questions. It also precludes the off-the-wall spoliation sanctions the Parker Defendants seek for the act of

discarding meaningless scrap paper, or the striking of expert testimony or reports that squarely comply with the Federal Rules of Civil Procedure and Evidence. For all of these reasons, and as set forth more fully herein, the Parker Defendants' Motion should be denied in its entirety.

STANDARD OF REVIEW

A motion for summary judgment may be granted "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party bears the burden of demonstrating the absence of disputed material facts by citing to 'the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.'" *Verdi v. Hla-Pe Win*, No. 9:22-CV-00825, 2024 U.S. Dist. LEXIS 35317, *8 (N.D.N.Y. Feb. 29, 2024) (quoting Fed. R. Civ. P. 56(c)). "A fact is material if it 'might affect the outcome of the suit,' as determined by the governing substantive law; a 'dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Id.* at *8–*9 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"The court's role with respect to such a motion is not to resolve disputed questions of fact but solely to determine whether, as to any material fact, there is a genuine issue to be tried," *Moll v. Telesector Res. Grp., Inc.*, 94 F.4th 218, 227 (2d Cir. 2024) (citation omitted), and "if the movant fails to meet its initial burden of production, the motion will fail even if the nonmovant does not submit any evidentiary matter to establish a genuine factual issue for trial." *Rosas v. Miri Gen. Contracting Inc.*, No. 24-CV-4243, 2025 U.S. Dist. LEXIS 92050, *6 (E.D.N.Y. May 14, 2025). "Moreover, the court may not make credibility determinations or weigh the evidence; [c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the

facts are jury functions, not those of a judge." *Moll*, 94 F.4th at 227 (citations and internal quotation marks omitted). "Indeed, in ruling on a motion for summary judgment, the court must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 227–228 (citations and internal quotation marks omitted).

"In sum, summary judgment is proper only when, with all permissible inferences and credibility questions resolved in favor of the party against whom judgment is sought, 'there can be but one reasonable conclusion as to the verdict.'" *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 546 (2d Cir. 2010) (quoting *Anderson*, 477 U.S. at 250)). "Where there are genuine issues of material fact that may reasonably be resolved in favor of either party, summary judgment should be denied." *Moll*, 94 F.4th at 228 (cleaned up) (citations omitted).

ARGUMENT

I. The Parker Defendants' Motion for Summary Judgment Must Be Denied Because It Is Unsupported by the Facts and the Law

The Nation's RICO claim against the Parker Defendants comes under Section 1962(a), which makes it unlawful for any person who has received income from a pattern of "racketeering activity" to invest or use any part of that income in any operation or enterprise that affects interstate commerce. 18 U.S.C. § 1962(a). In light of the statute's plain language, "[t]o state a claim under § 1962(a), the plaintiffs must allege that (1) a defendant person (2) received income derived from (3) a pattern of racketeering activity (4) and invested the racketeering income or its proceeds (5) in the acquisition of an interest in or the establishment or operation of (6) any enterprise (7) engaged in, or the activities of which affect, interstate or foreign commerce." *May v. Peninger*, No. 2:07-cv-00864, 2008 U.S. Dist. LEXIS 13606, *33 (D.S.C. Feb. 22, 2008).

Taking each of these elements in hand, the Parker Defendants' burden is to "demonstrat[e] the absence of disputed material facts by citing to the record[.]" *Verdi*, 2024 U.S. Dist. LEXIS

35317 at *8. Their argument to do so runs this way: To assert a claim under 18 U.S.C. § 1962(a), the Nation must demonstrate the Parker Defendants received "racketeering income,"[1] which (they say) the Nation cannot do "because the Nation cannot prove the Parker Defendants engaged in any predicate acts or engaged in a pattern of racketeering activity[.]" ECF No. 164-11, p. 4. And even if the Nation could, (they continue) "the Parker Defendants' activities are inherently local, and thus there is no impact on interstate commerce." *Id.*

That argument is jarringly inconsistent with the record. The Parker Defendants' deliberately blinkered view ignores what anyone who reads their deposition testimony can plainly see, or anyone who investigates the law can plainly discern.

Start with the Parker Defendants' claimed absence of an issue of fact relating to the commission of a predicate act. They assert "there is no evidence of predicate acts," and even if there were, "[t]o establish a predicate act under § 1961(1), proof of a criminal violation is required." ECF No. 164-11, p. 5 (emphasis added).

The opposite could not be clearer. "Congress enacted the Contraband Cigarette Trafficking Act, which established criminal and civil penalties for trafficking in untaxed cigarettes." *New York v. UPS*, 942 F.3d 554, 565 (2d Cir. 2019) (citing 18 U.S.C. § 2341 et seq.). "The CCTA makes it illegal 'for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband cigarettes,'" *id.* (quoting 18 U.S.C. § 2342(a)), and "[t]he CCTA defines 'contraband cigarettes' as 'a quantity in excess of 10,000 cigarettes, which bear no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found.'" *Id.* (quoting 18 U.S.C. § 2341(2)).

[1] The term "racketeering income" is defined by the Parker Defendants to "refer[] to income derived from a pattern of 'racketeering activity[.]'" ECF No. 164-11, p.4.

"Specifically, all cigarettes possessed for sale within New York State are subject to an excise tax imposed pursuant to New York Tax Law § 471[.]" *New York v. Grand River Enters. Six Nations*, No. 14-CV-910A(F), 2020 U.S. Dist. LEXIS 236928, *6 (W.D.N.Y. Dec. 15, 2020). "Thus, each pack of cigarettes delivered by a wholesale dealer to Indian reservation cigarette dealers must bear a cigarette tax stamp indicating the cigarette excise tax has been collected by the state licensed tax-stamping agent on behalf of the State." *Id.* at *7. And "the CCTA renders contraband any quantity of tobacco cigarettes in excess of 10,000 that do not bear evidence of payment of state or locally required tax, *including prepaid tax stamps issued by New York* where the cigarettes are 'found[.]'" *Id.* at *11 (emphasis added).

A violation of the CCTA is a predicate act under civil RICO. 18 U.S.C. § 1961(1)(B). Far from there being "no evidence of predicate acts" in the record, ECF No. 164-11, p. 5, Mr. Parker repeatedly admitted *in his own deposition testimony* that Pipekeepers purchases, receives, possesses, sells, and distributes unstamped and untaxed cigarettes in violation of the CCTA. ECF No. 163-3 (Parker Dep. 165:1–4 ("Q. Does Pipekeepers pay New York State excise tax on cigarettes or tobacco products sold at the store? A. No.")); *id.* (Parker Dep. 165:5–8 ("Do Pipekeepers customers pay an excise tax on cigarettes or tobacco products when they buy them from Pipekeepers? A. No.")); *id.* (Parker Dep. 163:18–20 ("all of our other products are native-owned and native-produced so there is no tax stamp on those.")). And Pipekeepers also sells cannabis by the ounce—a Class I controlled substance under 21 U.S.C. § 841 and 21 C.F.R. § 1308.11—which is likewise a predicate act under Civil RICO. 18 U.S.C. § 1961(1); ECF No. 163-3 (Parker Dep. 129:1–9).

The truth is Pipekeepers' customers come to the store for exactly these reasons. ECF No. 163-3 (Parker Dep. 205:2–24). And the Parker Defendants' claim that "the Nation has failed to

offer any admissible evidence demonstrating these sales were illegal or that any proceeds are 'derived from' such illegal acts," ECF No. 164-11, p. 6, altogether ignores the record.[2]

Their conclusory assertion that "proof of a criminal violation" is required to establish a civil RICO predicate act ignores the law with equal measure. In fact, it constitutes exactly the type of reading of the civil RICO statute the Supreme Court has long rejected. "[P]redicate acts involve conduct that is 'chargeable' or 'indictable,' and 'offenses' that are 'punishable,' under various criminal statutes." *Sedima v. Imrex Co.*, 473 U.S. 479, 488 (1985) (citing 18 U.S.C. § 1961(1)). In other words, "[a]s defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but *acts for which he could be*." *Id.* (emphasis added). A criminal conviction, a criminal investigation, or even "law enforcement reports" are not, as the Parker Defendants suggest, a prerequisite for a RICO claim. *See id.* What matters—and all that matters—for civil RICO purposes is that the violative conduct is "chargeable" or "indictable." *Id.* As set forth above, it undeniably is.

All of this easily demonstrates a "pattern of racketeering activity" for civil RICO purposes—that is, "at least two acts of racketeering activity . . . within ten years," 18 U.S.C. § 1961(5), or at a minimum an issue of material fact. And while the Parker Defendants claim that "[t]he Nation has not identified any predicate acts occurring after January 1, 2022," ECF No. 164-11, p. 6, the record plainly reflects that the Montezuma Pipekeepers store opened on February 12, 2022, ECF No. 30-1 (Mar. 15, 2022 Affidavit of Dustin Parker, ¶¶ 48–53), and the store has

[2] So too does the Parker Defendants' claim that "there is no evidence of money laundering, as the proceeds from Pipekeepers operations were used solely for routine business expenses, with no evidence of concealment or transactions exceeding $10,000 involving criminal proceeds." ECF No. 164-11, p. 5. Mr. Parker testified to spending a total of $280,000 in cash proceeds from Pipekeepers, stored in an onsite safe, to purchase at least two houses. ECF No. 163-3 (Parker Dep. 32:11–25; 33:1–25; 34:1–2; 83:10–25; 105:5–15).

retailed untaxed and unstamped cigarettes, cannabis, and other illicit items day in and day out from that day forward. ECF No. 163-3 (Parker Dep. 165:1–8).

That is an unbroken period of nearly four years. The idea that there is "no evidence . . . that any allegedly unlawful conduct *was Defendants' regular way of operating Pipekeepers*," ECF No. 164-11, p. 6 (emphasis added), defies the plain reality that trafficking untaxed and unstamped cigarettes and cannabis *is Defendants' regular way of operating Pipekeepers*. As a matter of fact, it is the very heart of their business.

Interstate commerce, on the other hand, need not be central to Pipekeepers' business to satisfy civil RICO. "The law in this Circuit does not require RICO plaintiffs to show more than a minimal effect on interstate commerce." *DeFalco v. Bernas*, 244 F.3d 286, 309 (2d Cir. 2001) (citations omitted). "[A]ny . . . conduct having even a de minimis effect on interstate commerce suffices" to establish that an enterprise "engages in or affects interstate commerce." *Castilo v. United States*, 2013 U.S. Dist. LEXIS 161183, *21 (S.D.N.Y. Nov. 12, 2013) (quoting *United States v. Mejia*, 545 F.3d 179, 203–204 (2d Cir. 2008)).

"This burden is extremely low." *Allstate Ins. Co. v. Afanasyev*, No. 12 CV 2423, 2016 U.S. Dist. LEXIS 19084, *33 (E.D.N.Y. Feb. 11, 2016). Even still, the Parker Defendants forcibly insist it cannot be met here because "[t]he record does not show that Pipekeepers purchase goods from, or sell goods to, entities outside the state of New York . . . and there is no indication of any transactions or business relationships with out-of-state or international entities." ECF No. 164-11, p. 7. "None of this," they say, "alleges even a scintilla of impact on interstate commerce." *Id.*

That is not true. Once again, the Parker Defendants airbrush the record. Worse still, they fail to own up to their own testimony in these proceedings. Mr. Parker testified that Pipekeepers customers have traveled both *across state lines* and *across international borders* to come purchase

goods from the store, with customers having driven in from Florida and traveled in from Canada. ECF No. 163-3 (Parker Dep. 206:12–16 ("A. I've had people come from Florida. Q. They drive from Florida. A. Yes.")); *id.* (Parker Dep. 206:23–25 ("Q. Do you have any customers come from Canada? A. Yes.")). These cross-state-line and cross-border sales are more than sufficient to satisfy the interstate commerce requirement in this Circuit. *DeFalco*, 244 F.3d at 309; *Mejia*, 545 F.3d at 203 ("conduct having even a de minimis effect on interstate commerce suffices"); *accord United States v. Muskovsky*, 863 F.2d 1319, 1325 (7th Cir. 1988) (finding effect on interstate commerce based on the use of interstate telephone calls to verify credit card transactions).

Mustering one last alternative, the Parker Defendants insist they are entitled to summary judgment—even if the record obliterates all their other arguments—because the Nation cannot "establish an actual injury to its business" distinct from the commission of a predicate act or "that [the Nation's] alleged injury was proximately caused by the Parker Defendants' conduct." ECF No. 164-11, p. 9.

While the Parker Defendants' analysis starts off on the right foot, it ultimately veers off course. It is correct that "[i]n the context of subsection 1962(a) . . .the plaintiff [must] allege a 'use or investment injury' that is distinct from the injuries resulting from predicate acts." *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir. 1996). But it is incorrect that "it is not enough to allege the Parker Defendants used racketeering income to operate a purported enterprise, and that enterprise harmed the Nation." ECF No. 164-11, p. 8. In fact, the opposite is true: "[B]ecause the conduct constituting a violation of § 1962(a) is investment of racketeering income, a plaintiff *must allege* injury from the defendant's investment of the racketeering income to recover under § 1962(a)." *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990) (emphasis added). "Put another way, plaintiffs must allege that defendants engaged in racketeering activity, derived

income therefrom, invested that income in an enterprise, and, as a result of that investment, caused injury to the plaintiffs." *Wiltshire v. Dhanraj*, 421 F. Supp. 2d 544, 548 (E.D.N.Y. 2005).

The Parker Defendants, no doubt, reinvest some of the revenue they generate from the predicate CCTA and other violations committed at the Pipekeepers store to purchase more illicit products to retail from the store in cyclical fashion. But that is not all. The revenues were also reinvested and used to purchase the brick-and-mortar Pipekeepers store for $180,000 and to build its drive-thru for untold other amounts. ECF No. 163-3 (Parker Dep. 105:4–11). Much more, the continued reinvestment of those revenues is the store's lifeblood: circulating to keep the lights on, pay the staff, stock all the products on the shelves, and even finance radio and internet marketing to drive in new business. ECF No. 163-3 (Parker Dep. 60:14–15; 70:5–7; 70:23–25; 71:1–2; 171:1–19; 196:16–25; 197:1–3).

Surely, the predicate CCTA violations and the reinvestment of revenues from these and other violations to fund more illicit sales damage the Nation. But the sale of illicit cigarettes is not itself an "enterprise"—it is *just a part* of the Pipekeepers business, and *just a building block* of the cognizable Section 1962(a) harm. Just as a grocery store is distinct from the produce it sells, the Pipekeepers brick-and-mortar store is distinct from the CCTA predicate acts or the attendant income. Section 1962(a) is satisfied "by showing the use or investment of *that income* in acquiring, establishing, or operating *an enterprise*." *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F. Supp. 276, 283 (S.D.N.Y. 1991) (emphasis added) (citation omitted). And what causes real and lasting harm to the Nation is the Pipekeepers brick-and-mortar enterprise, which operates as a polished and seemingly licit retail store on the Cayuga Nation Reservation, selling various products, blasting out advertisements on the radio waves, and drawing in customers from as far as Florida and Canada. The reinvestment of predicate act income has been used by the Parker Defendants to

acquire, establish, and operate the brick-and-mortar enterprise; and it is the *result* of the investment that injures the Nation and constitutes a distinct and cognizable injury for Section 1962(a) purposes. *Wiltshire*, 421 F. Supp. 2d at 548.

The Parker Defendants continue "[e]ven assuming *arguendo* that the requirements to show a violation of 18 U.S.C. § 1962(a) were met and the Nation could establish an actual injury to its business, it cannot demonstrate its alleged injury was proximately caused by the Parker Defendants' conduct." ECF No. 164-11, p. 9. That argument is without legs too.

For civil RICO purposes, proximate cause "means that there must be some 'direct relation between the injury asserted and the injurious conduct alleged.'" *Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 140 (2d Cir. 2018) (quoting *Holmes*, 503 U.S. at 268). "The 'direct relation' requirement generally precludes recovery by a 'plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts.'" *Commer. Cleaning Servs.*, 271 F.3d at 381 (quoting *Holmes*, 503 U.S. at 268). Accordingly, "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to plaintiffs injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

There is plainly a "direct relation between the injury asserted and the injurious conduct alleged" here. *Holmes*, 503 U.S. at 268. The Parker Defendants' Pipekeepers store unlawfully operates on the Cayuga Nation Reservation as a seemingly lawful retailer, selling illicit products that directly undermine the entirely-licit sales taking place at actual Nation-owned stores and steal away the attendant profits. It is difficult to imagine a scenario where the injurious conduct is more related to the injury asserted. If anything, causation would be satisfied here under lesser circumstances.

In *Commer. Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374 (2d Cir. 2001), Plaintiff brought a putative class-action suit for damages under civil RICO against defendant, a business competitor, alleging defendant engaged in a pattern of racketeering activity by hiring undocumented aliens for profit in violation of Section 274 of the Immigration and Nationality Act, 8 U.S.C. § 1324(a) (a RICO predicate offense). The complaint alleged defendant's illegal hiring practices enabled it to lower its variable costs and thereby underbid plaintiff and other competing firms. *Id.* at 378. Finding that plaintiff and the putative class members were "not alleging an injury that was derivative to others[,]" the Second Circuit determined plaintiff did "not seek to recover based on 'the misfortunes visited upon a third person by the defendant's acts'" but, rather, "claim[ed] to have lost profits directly as a result of [defendant's] underbidding, which it achieved through its violation of § 1324(a)." *Id.* at 384 (quoting *Holmes*, 503 U.S. at 268) (additional citation omitted). Thus, proximate cause was satisfied and plaintiff had civil RICO standing. *Id.* The same holds here where the Nation's lost profits are the direct result of the Parker Defendants undermining the Nation's legitimate business, which Defendants achieve through various RICO predicate offenses, including the violation of 18 U.S.C. § 2341.

The Parker Defendants broadly contend "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." ECF No. 164-11, p. 10. They suggest that it could just be that the Parker Defendants operate their store in a more desirable way than the Nation, or that customers seem to prefer it for some other reason, and that is why the Nation has lost business and profits. *Id.*, p. 9. Or maybe it is just the free market at work. *See id.* In any case, as the Parker Defendants would have it, since something other than their RICO

enterprise could have caused the same injury to the Nation there cannot be proximate cause here. *See id.*

That argument is undermined by the Second Circuit's holding discussed above. *Commer. Cleaning Servs.*, 271 F.3d at 384 (collecting cases permitting standing for claims for lost business revenues and customers). Numerous other precedents militate against it as well. *See, e.g.*, *Anza*, 547 U.S. at 459 (holding "[t]he attenuated connection between [defendant's] injury and the [plaintiffs'] injurious conduct thus implicates fundamental concerns expressed in *Holmes*."); *Leung v. Law*, 387 F. Supp. 2d 105, 122 (E.D.N.Y. 2005) (holding "an act which proximately caused an injury is analytically distinct from one which furthered, facilitated, permitted or concealed an injury which happened or could have happened independently of the act." (citation omitted)).

At the same time, it also proves too much and immediately leads to absurd results. For example, Section 1961 defines "racketeering activity" to include "any act or threat involving murder, kidnapping, gambling, [or] arson . . . ." 18 U.S.C. § 1961(1)(A). Under the Parker Defendants' logic, because a random electrical fire can burn down a house just as well as arson, there is no proximate cause under RICO when a person intentionally sets fire to a neighbor's house. That, of course, is not true. While the root cause of the house fire may not be immediately perceptible from looking at a pile of ash and rubble, it may still be determined through a careful and perceptive analysis. Lost profit damages are no different. *See Commer. Cleaning Servs.*, 271 F.3d at 384.

At bottom, the Parker Defendants' contention that the Nation's "damages theory is entirely speculative and unsupported," ECF No. 164-11, p. 12, is belied by the fact that the Nation has suffered real, actual, and quantifiable harm—and it pled exactly that. ECF No. 1 (Compl., pp. 13–

17). And the Nation has, and will, put forth competent evidence to support that at trial. ECF Nos. 164-8 & 164-9; *see* Radford Decl. "Issues of proximate cause are normally questions of fact for the jury to decide," *Packer v. Skid Roe, Inc.*, 938 F. Supp. 193, 196 (S.D.N.Y. 1996), and "weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" on summary judgment. *Moll*, 94 F.4th at 227. With that in mind, B.J. Radford has been disclosed as an expert witness for the Nation who will testify as to causation, ECF No. 164-8, and the jury must be afforded the opportunity to hear her testimony. Any dispute the Parker Defendants may have as to what she may say "clearly present[s] a dispute over a material issue of fact" that forecloses summary judgment. *Anderson*, 477 U.S. at 248.

Finally, the Parker Defendants pronounce that "[t]he Supreme Court has made clear that RICO standing requires a plaintiff to allege injury to its business or property, not its sovereign or regulatory interests[.]" ECF No. 164-11 (citing *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972)). But that finds no support in the very precedent the Parker Defendants cite, which has nothing at all to do with RICO. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972) was an antitrust suit brought by the State of Hawaii where the Supreme Court held that injuries to Hawaii's general economy did not fall within Section 4 of the Clayton Act, which authorized the recovery of treble damages for injuries to a person's "business or property." *Id.* at 263–266. Its holding is entirely inapplicable here, and, in any case, the injury the Nation alleges is specifically to its business or property—not to its sovereign interests.

In all events, the Parker Defendants have failed to meet their "burden of demonstrating the absence of disputed material facts by citing to the record[.]" *Verdi*, 2024 U.S. Dist. LEXIS 35317 at *8. Indeed, a principled review of the record demonstrates disputed material facts abound. Because "there are genuine issues of material fact that may reasonably be resolved in favor of

either party," the Parker Defendants' motion for summary judgment should be denied. *Moll*, 94 F.4th at 228.

II. There Is No Basis to Impose Spoliation Sanctions Against the Nation

In the alternative to awarding summary judgment, the Parker Defendants argue that "the Court must issue sanctions against the Nation for Spoliation," ECF No. 164-11, p. 13, for the "destruction of paper records." *Id.*, p. 14.[3] The timing, circumstances, and nature of the "paper records" disposed put an end to that argument before it begins.

After purchasing it from the Seneca-Cayuga Nation of Oklahoma, the Nation lawfully took possession of the property from which Pipekeepers first operated (126 E. Bayard Street, Seneca Falls, New York) on January 1, 2022. ECF No. 1 (Compl., ¶ 4); ECF No. 164-3 (Radford Dep. 21:23–25; 22: 1–2). The next week, the Nation undertook a thorough inventory of all tobacco and tobacco-related, and cannabis and cannabis-related products onsite, and memorialized that inventory in a detailed Excel spreadsheet. ECF No. 164-3 (Radford Dep. 31–34). Specifically, B.J. Radford (the Nation's CFO) and Tiffany Dwyer (a Nation staff member), worked together to count inventory and record it on the spreadsheet. ECF No. 164-3 (Radford Dep. 32:6–8; 34:10–13).

To facilitate the counting process, Ms. Dwyer utilized "loose 'sticky notes' and scrap papers on which *only* hash marks or numbers were jotted down as various items were counted and tallied[.]" ECF No. 158, p. 2 at ¶ 4 (emphasis added). These "sticky notes" and scrap papers "did not include even product names, and were otherwise meaningless." *Id.* When Ms. Radford and

[3] The Parker Defendants limit their spoliation arguments to paper records and thus have waived any arguments relating to any other tangible things. *Farmer v. United States*, No. 15-cv-6287, 2017 U.S. Dist. LEXIS 127275, *9 (S.D.N.Y. Aug. 9, 2017) (collecting cases).

Ms. Dwyer were finished counting, the spreadsheet had *all* of the inventory on it, ECF No. 164-3 (Radford Dep. 34:14–16 ("Q. When she finished, she had a spreadsheet with all the inventory information on it? A. Yes.")), and Ms. Radford maintained the spreadsheet in final form on her desktop. ECF No. 164-3 (Radford Dep. 34:21, 23).

That original spreadsheet was produced to the Parker Defendants at the very beginning of these proceedings as CN000025; it has been discussed time and again with the Court; and its production is reflected on the docket. *See* 05/22/2024 Text Minute Entry. As Ms. Dwyer explained, "[a]s the numbers were read off and *fully incorporated* into the spreadsheet that was produced in these proceedings as CN000025, these loose 'sticky notes' and scrap papers were immediately discarded in the ordinary course." ECF No. 158, p. 2 at ¶ 4 (emphasis added).

The Parker Defendants say that Ms. Dwyer's discarding these "sticky notes" and scrap papers in the ordinary course amounts to "intentional destruction of the only contemporary inventory records . . .[that] strikes at the integrity of these proceedings and irreparably harms the Paker Defendants' ability to prove their counterclaims." ECF No. 164-11, p. 19. "Spoliation sanctions," they say, "are therefore not only appropriate but necessary to redress that harm and deter future misconduct." *Id.*

Those statements are as absurd as they are hyperbolic. The Parker Defendants were indisputably provided with the full original spreadsheet of inventory that was created in real time as the inventory was counted, and that is the contemporary record of the inventory. Everything that was tallied was included in the spreadsheet, and the "sticky notes" and scrap papers (which did not even include product names or descriptions) were as meaningless after the fact as random tally-scratches on a wall. They would have been indecipherable even by the Nation the second they were set aside.

Undeterred by this hard reality, the Parker Defendants press on, insisting the Nation had "an undisputed duty" to preserve the "sticky notes" and scrap papers, that the Nation "willfully destroyed notes after the duty to preserve arose," the "destroyed records are relevant," and sanctions are appropriate. ECF No. 164-11, pp. 16–19.

All of this lacks even a thin veneer of the law. To start, the Parker Defendants must show "the party having control over the evidence had an obligation to preserve it at the time it was destroyed." *Matthews v. Sweeney*, No. 9:17-CV-0503, 2024 U.S. Dist. LEXIS 65150, *10 (N.D.N.Y. Apr. 10, 2024). Yet the Nation was under no duty to preserve any evidence at the time of the claimed spoliation in early January 2022. *See West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (holding duty arises when litigation is pending or a party is otherwise on notice that it is likely to be commenced). This litigation was not commenced until February 10, 2022, and more importantly, the Parker Defendants did not assert any claim against the Nation relating to the inventory until August 26, 2022. ECF No. 60.

Nor was the Nation otherwise on notice of the prospect of litigation by the Parker Defendants. *Rush v. Artuz*, No. 00-CV-3346, 2003 U.S. Dist. LEXIS 7158, *6 (S.D.N.Y. Apr. 3, 2003) ("A party may be put on notice through a discovery request, through the complaint itself, or through notification, prior to the filing of a complaint, that litigation is expected."). The first the Nation was put on notice that the Parker Defendants would assert a claim relating to the inventory was when the Parker Defendants asserted a claim relating to the inventory. ECF No. 60. And even were the Nation on notice, "the duty to preserve does not require a litigant to keep every scrap of paper[.]" *Danis v. USN Communs., Inc.*, No. 98 C 7482, 2000 U.S. Dist. LEXIS 16900, *99 (N.D. Ill. Oct. 20, 2000) (citing MOORE'S FEDERAL PRACTICE, § 37.120 (3d ed. 1999)).

At the same time, even if there were a duty (and there was not), the Parker Defendants must also show "the records were destroyed 'with a culpable state of mind[.]'" *Matthews*, 2024 U.S. Dist. LEXIS 65150 at *10. "[C]ourts in this Circuit have [generally] determined that a 'culpable state of mind' ranges from willful destruction in bad faith to simple negligence." *Schwarz v. FedEx Kinko's Office & Print Servs.*, No. 08 Civ. 6486, 2009 U.S. Dist. LEXIS 100200, *22 (S.D.N.Y. Oct. 27, 2009) (citations omitted). For spoliation purposes, the highest level of culpability is "willfulness" and the lowest is "negligence." *Id.* While the Parker Defendants insist their culpable-state-of-mind arguments meet the high bar of "willfulness," ECF No. 164-11, p. 17, they fail even to clear the low bar of "negligence."

"Negligence" for culpable-state-of-mind purposes, "is a failure to conform to the standard of what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding." *In re Pfizer Inc.*, 288 F.R.D. 297, 314 (S.D.N.Y. 2013) (citation and internal quotation marks omitted). Put differently, "[i]n the context of spoliation, ordinary negligence is the failure to identify, locate, and preserve evidence, where a reasonably prudent person acting under like circumstances would have done so." *Moore v. Wash. Metro. Area Transit Auth.*, No. TJS-24-2891, 2025 U.S. Dist. LEXIS 103669, *9 (D. Md. May 30, 2025). No reasonably prudent person would retain undecipherable "sticky notes" and scrap papers after tallying items into a spreadsheet. Not even a packrat would. Because the lowest bar of "negligence" cannot be met, any higher standard cannot be met either, and the requisite culpable state of mind cannot be satisfied. *Schwarz*, U.S. Dist. LEXIS 100200 at *22.

Because the Parker Defendants' spoliation argument fails to satisfy either the first or the second prong of the applicable test, the Court need not consider the third prong: whether the materials were relevant to the moving party's claim. *Matthews*, 2024 U.S. Dist. LEXIS 65150 at

*10. All the same, the materials were not relevant to the Parker Defendants' claim; and they could not possibly be. "Evidence is relevant if it has 'any tendency' to make any fact of consequence 'more or less probable than it would be without the evidence.'" *United States v. Lawrence*, No. 21-1668, 2022 U.S. App. LEXIS 34425, *2 (2d Cir. Dec. 14, 2022) (quoting Fed. R. Evid. 401). A jumbled pile of loose "sticky notes" and scrap papers with nothing but hash marks and numbers on them are altogether unintelligible and useless to anyone. A detailed Excel spreadsheet, on the other hand, is about as useful as it gets, and that is exactly what has been provided to the Parker Defendants.

Ultimately, the Parker Defendants have not been prejudiced by the Nation's conduct at all. Quite the opposite, the fact that the Nation undertook an inventory mitigates an issue the Parker Defendants created for themselves by their apparent intentional decision to keep no records whatsoever about what they purchased and stocked on their own store's shelves.[4] The Parker Defendants try to cloud this reality by spending several pages assailing the Nation's staff member for the wholly unremarkable act of discarding meaningless scrap paper in a wastepaper basket, while simultaneously maintaining and providing them with a detailed Excel spreadsheet.

No matter how framed, this is not spoliation, and it does not even begin to be sanctionable conduct in this—or any other—Circuit. The Parker Defendants' motion for spoliation sanctions should be denied.

[4] The Parker Defendants were provided by the Nation's IT vendor with a complete forensic imaging of all computers and electronic devices located on the premises at time the Nation lawfully took possession of 126 E. Bayard Street, Seneca Falls, New York, and confirmed their ability to access the complete imaging of these computers and devices nearly two full years ago. 12/21/2023 Text Minute Entry. If the Parker Defendants kept any records, they would have them.

III. The Nation's Experts Were Properly Disclosed and There is No Basis to Limit or Exclude Their Testimony

A. B.J. Radford is Entitled to Testify Without a Report Because She Was Not Retained or Specially Employed to Provide Expert Testimony in this Case

The Parker Defendants devote just half a page to their argument that B.J. Radford's opinions are inadmissible and her expert testimony should be excluded. ECF No. 164-11, p. 21. In that short space, they fail to reference a single precedent, the Federal Rules of Civil Procedure, or even the Nation's Rule 26(a)(2) Expert Disclosure—all of which doom their argument.

There are two types of experts under Rule 26. The first are "Witnesses Who Must Provide a Written Report," that is, a witness who is "retained or specially employed to provide expert testimony in the case" or "whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). The second are "Witnesses Who Do Not Provide a Written Report," that is, a witness who "is not required to provide a written report" under Rule 26(a)(2)(B). Fed. R. Civ. P. 26(a)(2)(C). For witnesses who are not required to provide a written report under Rule 26(a)(2)(B), the expert disclosure must provide only "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702 , 703 , or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ. P. 26(a)(2)(C)(i)–(ii).

"The Advisory Committee Notes to the 2010 Amendment which added Rule 26(a)(2)(C) to the Federal Rules of Civil Procedure specifies that 'a witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness *and also provide expert testimony* under Evidence Rules 702, 703, or 705." *Geary v. Fancy*, No. 12-CV-796W(F), 2016 U.S. Dist. LEXIS 43786, *7 (W.D.N.Y. Mar. 31, 2016) (emphasis in original).

After providing the information for Ms. Radford required by Rule 26(a)(2)(C)(i)–(ii), the Nation's Rule 26(a)(2) Expert Disclosure specifically designates Ms. Radford as a witness who is not required to provide a written report, and states: "Because Ms. Radford is not 'retained or specially employed to provide expert testimony in the case or [a witness] whose duties as the party's employee regularly involve giving expert testimony,' Fed. R. Civ. P. 26(a)(2)(B), she is not required to provide a written report or otherwise disclose information or materials set forth in Rule 26(a)(2)(B)(i)–(vi) of the Federal Rules of Civil Procedure. Accordingly, no such materials or additional information are provided here." ECF No. 164-8, p. 3 at ¶ 2(B).

Apparently overlooking both the plain language of the Federal Rules of Civil Procedure and that of the Nation's Rule 26(a)(2) Expert Disclosure, the Parker Defendants insist "[b]ecause Ms. 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." ECF No. 164-11, p. 21.

Again, Ms. Radford was not "retained or specially employed" and therefore she "is not required to submit an expert report in advance of testifying[.]" *Puglisi v. Town of Hempstead Sanitary Dist. No. 2*, 2013 U.S. Dist. LEXIS 111972, *5 (E.D.N.Y. Aug. 8, 2013) (citing Fed. R. Civ. P. 26(a)(2)(B)). She is required to disclose only that information required by Rule 26(a)(2)(C), which makes no reference to "methodology," "data," or "calculations."

Because the Nation's Rule 26(a)(2) Expert Disclosure for Ms. Radford fully complied with the Federal Rules of Civil Procedure, ECF No. 164-8, she "may both testify as a fact witness *and also provide expert testimony* under Evidence Rules 702, 703, or 705." *Geary*, 2016 U.S. Dist. LEXIS 43786 at *7 (emphasis in original). The Parker Defendants' arguments to the contrary are without merit.

B. James Flynn is Entitled to Testify to the Detailed Damages Conclusions in His Report as a Specially Retained Expert

A partner with Firley, Moran, Freer & Eassa, CPA, P.C., and "a certified public accountant, certified valuation analyst and chartered global management accountant specializing in business valuation and litigation consulting services . . . with over thirty years of experience with a focus on providing auditing, accounting, business advisory, tax and consulting services to a diverse set of clients," ECF No. 149-9, p. 3 of 20, James Flynn is undeniably credentialed under Federal Rule of Evidence 702(a) to "help the trier of fact understand the evidence or determine an issue of fact." Nevertheless, the Parker Defendants seek to disqualify Mr. Flynn as the Nation's expert as well.

Unlike Ms. Radford, Mr. Flynn was "retained or specially employed to provide expert testimony in the case" and submitted a written report in connection with the Nation's Rule 26(a)(2) Expert Disclosure. ECF No. 149-9. Mr. Flynn's report focuses on the monetary damages the Parker Defendants' conduct has inflicted on the Nation, while Ms. Radford's testimony focuses on causation. *See* ECF No. 164-8; *see also* Radford Decl.

As a rule, "a damages expert does need not to perform h[is] own causation analysis to offer useful testimony." *Luitpold Pharms., Inc. v. ED. Geistlich Sohne A.G. Fur Chemische Industrie*, No. 11-cv-681, 2015 U.S. Dist. LEXIS 123591, *27 (S.D.N.Y. Sep. 16, 2015). In fact, "[f]or the purpose of presenting his damage calculation methods, *a damages expert is entitled to presume causation* (a prerequisite to recovery which will have to be established by evidence other than his testimony)." *Id.* (emphasis added) (internal brackets and citation omitted).

Ignoring this applicable precedent, and citing none of their own, the Parker Defendants argue that Mr. Flynn's report runs afoul of Federal Rule of Evidence 702(b)—which requires that "testimony is based on sufficient facts or data"—because it presumes causation, which is left to Ms. Radford to establish. ECF No. 164-11, p. 22. To the contrary, that presumption falls

comfortably within the contours of Rule 702(b), and provides no basis to strike his report or limit his testimony. *Luitpold Pharms., Inc.*, 2015 U.S. Dist. LEXIS 123591 at *27.

In addition to the legally unprincipled argument addressed above, the Parker Defendants regurgitate a number of granular criticisms their expert made in his written rebuttal of Mr. Flynn's expert report, ECF No. 164-10, including the allegations that his "report contains no economic analysis of substitution effects, cross elasticity, or market diversion," and "fails to isolate other causal factors that could explain any alleged loss [including] . . . 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)." ECF No. 164-11, p. 25. They further parrot that "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." ECF No. 164-11, p. 24.

These arguments, even if tenable (which they are not), offer nothing in support of striking Mr. Flynn's report or his testimony under Rule 702. "Disputes as to the strength of [an expert's] credentials, faults in his use of different etiology as a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony." *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995); *see In re Axa Equitable Life Ins. Co. Coi Litig.*, 595 F. Supp. 3d 196, 250 (S.D.N.Y. 2022) ("[C]ontentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony." (citation omitted)).

"[A]rguments [that] go to weight, not admissibility, [] are properly addressed through vigorous cross-examination." *In re Axa*, 595 F. Supp. 3d 196 at 255. The same goes for the Parker Defendants' other arguments that proceed in this vein, including unsubstantiated claims of

"evidence of profit manipulation," ECF No. 164-11, p. 25, which are even further afield of a *Daubert* motion. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof," not exclusion, are generally the "appropriate means of attacking" expert testimony).

That leaves only the Parker Defendants' triplet of arguments that Mr. Flynn's approach much be rejected because it is "too speculative" when it comes to projecting Pipekeepers' tobacco and cannabis sales. ECF No. 164-11, pp. 23–24.

First, they claim that Mr. Flynn "applies an undisclosed averaging technique that groups dissimilar products . . . and assigns a single gross-profit percentage, thereby masking product-specific variation." ECF No. 164-11, p. 23. That argument is easily dispatched by simply opening Mr. Flynn's report, where *on the same page* the Parker Defendants cite, Mr. Flynn writes two detailed paragraphs explaining how the products were averaged. ECF No. 164-9, p. 9 ("To calculate the average sales price for each brand's cartons and packs, we averaged the sales price of the brand types within the brands (e.g. average sale price of all Seneca packs and cartons, regardless of which Seneca brand type was sold) as follows . . .")).

Second, the Parker Defendants claim "[w]ith respect to cannabis sales, Mr. Flynn's approach is even more problematic" because "[h]e 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." ECF No. 164-11, p. 23. They go on to say these four days are "historically higher-traffic days" and criticize Mr. Flynn for "appl[ying] that average retroactively to February 2022[.]" *Id.*, p. 24.

The temerity required to even make this argument is remarkable. As the Parker Defendants know, Mr. Flynn was required to utilize only four days of cannabis records because the Parker

Defendants *destroyed* the daily cannabis records *every single day* from the day the Montezuma store opened on February 12, 2022 until this Court intervened and ordered them to stop doing so on May 27, 2025 under penalty of contempt. ECF No. 152, 05/27/2025 Text Order. The Court then ordered the Parker Defendants to produce, by June 6, 2025, "any existing daily sales ledgers for cannabis and cannabis-related products sold by Pipekeepers." ECF No. 155, 05/28/2025 Text Order. And on June 6, the Parker Defendants produced just four days' worth of records for the dates of May 29 through June 1, 2025. ECF No. 163-2, p. 2 at ¶ 4. Without exception, it is singularly because of the Parker Defendants' destruction of records that Mr. Flynn was required to utilize the only records that existed at the time of his report: the four days' of records from May 29–June 1. This destruction is the subject of a pending spoliation motion by the Nation, ECF No. 163, and provides absolutely no basis for attacking Mr. Flynn's report.

Finally, the Parker Defendants assail Mr. Flynn for projecting the tobacco damages for 2025 based upon Pipekeepers' 2024 data rather than running calculations from Pipekeepers' actual 2025 sales information. ECF No. 164-11, p. 24. On the Parker Defendants' telling, Mr. Flynn could have used actual 2025 data but chose, instead, to set it aside.

As has become a pattern at this point, the record in these proceedings tells a different story than the Parker Defendants. Mr. Flynn relied on 2024 sales data because the Parker Defendants did not produce sales data for 2025. That is because the Court ordered the Parker Defendants (and the Nation) to produce data only through 2024, understanding that there must be a cutoff at some point, and the experts would be required to make projections. *See* ECF No. 155, 05/28/2025 Text Order ("The Parker defendants are ordered to disclose to the other parties, by 6/6/2025: (1) monthly reports to be generated by the Clover point-of-sales system on total sales (including by dollar value) of tobacco and tobacco-related products by Pipekeepers *from 2021 through 2024*" . . . [and]

"Plaintiff is ordered to disclose to the other parties, by 6/6/2025, an updated spreadsheet reporting, *through 2024*, retail sales volume[.]" (emphasis added)). The Parker Defendants' efforts to weaponize the consequences of this Court's Order to attack Mr. Flynn's dataset are entirely misplaced.

Ultimately, "the rejection of expert testimony is the exception rather than the rule." *Chery v. Conduent Educ. Servs., LLC*, 581 F. Supp. 3d 436, 448 (N.D.N.Y. 2022) (citation omitted). "Thus, to the extent that a party questions the weight of the evidence upon which the other party's expert relied or the conclusions generated from the expert's assessment of that evidence, it may present those challenges through cross-examination of the expert." *Id.* (internal alterations and citation omitted). This case is not the exception. The Parker Defendants' motion to strike the Nation's expert testimony and report should be denied.

CONCLUSION

For the reasons set forth herein, and any other reasons that may appear to the Court or be raised at any hearing on the matter, the Parker Defendants' Motion should be denied in its entirety.

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