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 / TWD)

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

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PRELIMINARY STATEMENT

Plaintiff's opposition confirms that the record contains no triable issue of fact as to any element of its sole remaining claim under 18 U.S.C. § 1962(a). After two years of discovery, Plaintiff (the "Nation") still cannot identify a single cognizable predicate act, cannot trace any "racketeering income" into an enterprise distinct from Pipekeepers, and cannot articulate a non-speculative injury proximately caused by the alleged investment of that income. In attempting to fill these blatant gaps, the Nation relies on a post-discovery declaration from its Chief Financial Officer ("CFO") that offers only self-serving legal conclusions that are insufficient for the Nation to withstand summary judgment.

As set forth in the Parker Defendants' opening brief, summary judgment is warranted because the Nation's RICO claim is legally and factually untenable: the record does not evidence that the Parker Defendants received or invested racketeering income, the Nation cannot demonstrate any injury that is both distinct and proximately caused by the alleged investment of such income, and the claims lack standing and are unsupported by the sovereign-interest doctrine. For these failings, which the Nation has not cured (and cannot), the Parker Defendants are entitled to summary judgment on the sole remaining federal claim.

FACTUAL BACKGROUND

The Nation has not identified any genuine disputed material fact that is essential to its claims under 18 U.S.C. § 1962(a). *See* Dkt. No. 192-2; *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). The Nation's "Statement of Additional Material Facts In Dispute" is supported in chief through a self-serving post-discovery declaration from its CFO, who the Nation also wishes to designate as an expert at trial. In this declaration, the Nation advances its claim of an exclusive right to all tax-free retail sales on the Reservation and asserts

that every customer who ever visited Pipekeepers would have otherwise patronized a Nation-owned store. *See* Dkt. No. 192-1. These sweeping statements are unsupported by any independent data, market analysis, or customer survey. Instead, the Nation simply declares itself the "single retailer" in a "unique geographic market," (*Id*. at ¶ 6-7) and insists - without evidence - that Pipekeepers is the only "meaningful competitor" (*Id*. at ¶ 16) and that every dollar earned by Pipekeepers is a dollar lost to the Nation. *Id*. at ¶ 17. Such legally conclusive assertions are not facts, but advocacy dressed as evidence.

Against this backdrop, it is important to remember that the Parker Defendants are a small, family-run business—true mom-and-pop shop owners—who have worked tirelessly to serve their community. Unlike the Nation, with its vast resources, Dustin Park and Nora Weber have operated Pipekeepers as a local business out of the first floor of their residence, providing jobs to their neighbors and giving back to their community. The Nation's attempt to wield RICO as a bludgeon against these individuals is not only legally unsound, but fundamentally unfair. Dustin Parker and Nora Weber are not a "criminal enterprise"; they are hardworking members of the community whose livelihoods are now threatened by overreaching litigation and unsupported claims. The Court should not allow the Nation's conclusory statements to obscure the real human cost to these Defendants and their family.

ARGUMENT

I. The Nation Still Fails To Meet The Essential Elements Of § 1962(A)

A. No Evidence of a Qualifying Predicate Act

The opposition concedes that a § 1962(a) claim requires proof of income "derived from a pattern of racketeering activity." Yet the Nation again identifies only the supposed *sale of contraband cigarettes and cannabis*—conduct it never even pled as a substantive CCTA or CSA violation and that it has never linked to any *actual* violation of 18 U.S.C. § 1961(1). The record is

devoid of: (i) a single seized pack bearing an out-of-state tax stamp, (ii) any agency finding of unstamped sales in violation of state or federal law, or (iii) any law enforcement reports, regulatory findings, or criminal convictions against the Parker Defendants which might demonstrate that Defendants engaged in the sale of contraband cigarettes or cannabis in violation of federal or state law at the Pipekeepers premises at 126 E. Bayard Street.[1] At most, Plaintiff proffers deposition sound-bites that are untied to either store location, speculation that customers "could" cross state lines, and vague assertions, again without reference to either store location, that Pipekeepers "does not charge" sales tax. To support these claims, the Nation relies primarily again on the post-discovery Declaration of its alleged expert and CFO Radford, consisting of legal arguments and conclusory self-serving statements, which is noticeably devoid of personal knowledge foundation or evidentiary support. Speculation that unlawful racketeering *might* have occurred is not proof that it *did* occur at the Pipekeepers premises at 126 E. Bayard Street, let alone twice within ten years as required by § 1961(5). The Nation's failure to establish even one predicate act is fatal. *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).

B. The Opposing Papers Do Not Salvage the "Investment Injury" Requirement

Plaintiff does not dispute that § 1962(a) demands an injury *caused by the use or investment* of racketeering income, *not* by the predicate racketeering itself. *Lugosch v. Congel*, 443 F. Supp.

[1] To be clear, based on the Nation's proclaimed "reinvestment" theory raised in its opposition – which the Court should summarily reject under established precedent – the Nation would have to point the Court to evidence in the record that the Defendants committed predicate acts at least twice within ten years at the premises at 126 E. Bayard Street, in order to have alleged racketeering income to "reinvest" in the Montezuma Property. Again, this theory is without merit and contrary to established precedent, but now that the Nation has finally articulated this theory, the vague assertions as to the predicate acts, which the Nation has coasted upon throughout this litigation, must be rejected by the Court.

2d 254, 270 (N.D.N.Y. 2006). The Nation's only retort is that Pipekeepers allegedly "reinvested" cash proceeds into store operations, even attempting to distinguish the "Pipekeepers brick-and-mortar enterprise". But Pipekeepers is the *very* alleged enterprise through which the Nation claims the supposed racketeering occurred. Case law from this Circuit is clear that "reinvesting" profits back into the same enterprise cannot satisfy § 1962(a); this deficiency alone defeats the Nation's 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.")

The Nation cites no admissible evidence—indeed, no evidence at all—showing investment of tainted funds into any *distinct* operation. Its theory therefore collapses as a matter of law.

C. The Record Remains Devoid of Any Cognizable Injury or Proximate Cause

The Nation now relies almost exclusively on Ms. Radford's declaration (Dkt. 192-1) to posit harm. Yet the declaration: (i) is replete with legal conclusions (e.g., Pipekeepers "necessarily" captured every sale on the Reservation) that are inadmissible and (ii) is unsupported by any contemporaneous data, independent survey, or economic methodology. The Nation is incorrect to assert that "[a]ny 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". First, *Anderson* does not stand for this premise – indeed, the opposite, and second, this quote is absent from the cited source. *See Anderson*, 477 U.S. at 248.

Plaintiff's new "Hail Mary" claim that "customers" travel from "Florida" or "Canada" for "cross-state-line and cross-border sales" rests on inadmissible hearsay (which doesn't actually address any illegal products or whether *any* products were even purchased by those individuals), not admissible evidence. Regardless, the Nation's attenuated causal chain is precisely the type rejected in *Anza v. Ideal Steel* and its progeny. Any alleged tax ramifications impact New York State or federal tax authorities; the Court previously found 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 v. Steel Supply Corp.*, 547 U.S. 451, 460 (2006).

D. The Nation Lacks Standing

The above point, raised by the Court on the Parker Defendants' motion to dismiss, speaks to the Nation's standing on its sole remaining claim under 18 U.S.C. § 1962(a), a deficiency the Nation's opposition fails to cure. As established in the opening brief and confirmed by the record, the Nation does not allege or demonstrate any direct injury to its business or property that was *caused by the use or investment* of racketeering income, as required for RICO standing. Instead,

the Nation's actual asserted injuries are to its sovereign or regulatory interests, which are not cognizable under RICO.

"A plaintiff must demonstrate standing 'with the manner and degree of evidence required at the successive stages of the litigation.'" *TransUnion LLC v. Ramirez*, 594 US 413, 431 (2021) (quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 561 (1991) (internal quotation marks omitted). The Nation has failed to establish in its opposition that it has standing at this point in the litigation - merely shrugging it off, stating "the injury the Nation alleges is specifically to its business or property—not to its sovereign interests." Dkt. 192 at 13. Yet the Nation's overarching theory, as evidenced by the Declaration of its CFO, is based on its self-proclaimed "single-retailer status" which is in turn based upon its asserted Sovereign Status. Dkt. 192-2.

The Supreme Court has made clear that standing under § 1964(c) requires a concrete injury to business or property, analogous to that required under the Clayton Act, upon which the injury requirements under RICO were modeled. *See Holmes v. Sec. Inv. Protection Corp.*, 503 U.S. 258, 272 (1992) (finding the plaintiff lacked standing and "underscoring the obvious congressional adoption of the Clayton Act direct-injury limitation among the requirements of § 1964(c).")

The Fifth Circuit's guidance is instructive: "[w]hen a government sues under the civil RICO statute, the 'business or property' element requires that the injury 'refer to commercial interests or enterprises.'" *Welborn v. Bank of NY Mellon Corp.*, 557 F. App'x 383, 387 (5th Cir. 2014) (citing *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)).[2] "A government cannot claim damages for general injury to the economy or to the Government's ability to carry out its

[2] *Hawaii* is a Sherman Act case. However, the phrase "business or property" is interpreted coextensively in the antitrust and RICO contexts." *Welborn*, 557 F. App'x at 387 (citing *Holmes v. SIPC*, 503 U.S. 258, 268 (1992)).

functions. Recovery is only authorized for injuries suffered in its capacity as a consumer of goods and services." *Id.* (internal quotation marks and citations omitted). The Nation's damages theory is entirely derivative of its asserted regulatory authority based on its Sovereign Status, and is not supported by any independent data or market analysis. Regardless, the Nation's attempt to reframe its alleged harm as lost business or profits is unavailing, as the record contains no admissible evidence of actual, direct, and non-speculative injury proximately caused by the Parker Defendants' conduct. For the same reasons and upon the same grounds, Plaintiff opposition fails to cure its lack of Article III standing.

"On top of the requirement of Article III standing, a plaintiff generally must also stay on the right side of the so-called prudential standing line, which normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Alix v McKinsey & Co.*, 739 F. Supp. 3d 172, 185 (S.D.N.Y 2024) (quoting *Patterson v. Patterson*, No. 20-cv-02552, 2022 WL 356513, at *4 (S.D.N.Y. Feb. 7, 2022) and *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 40 (2d Cir. 2015)). This speaks to the Court's prior finding regarding the Nation asserting (even highlighting again in its opposition) that the Parker Defendants have allegedly avoided state and federal tax laws as a basis for bringing this RICO action, when the relief they seek is for themselves, not the alleged tax-entitled governments. The Nation's opposition does not and cannot overcome this fundamental defect. Accordingly, the Nation lacks standing, and summary judgment should be granted on this independent ground.

II. THE COURT SHOULD STRIKE THE RADFORD DECLARATION AND RELATED ADDITIONAL MATERIAL FACTS

In opposition to the Parker Defendant's Motion for Summary Judgment, the Nation filed a declaration by CFO Radford (Dkt. 192-1), allegedly in her capacity as an expert (id. at ¶ 21), signed under penalty of perjury, containing legal conclusions and unsupported assertions in violation of

Federal Rule of Civil Procedure 56(c)(4). The Nation relied solely upon Ms. Radford's Declaration for thirteen of its Statements of Additional Material Facts, additionally in violation of Federal Rule of Civil Procedure 56(c)(2).

The declaration, full of legal conclusions and unsupported assertions, is inadmissible under the Federal Rules of Civil Procedure and Evidence, and should be stricken in its entirety, and such other relief as the Court deems appropriate, up to and including those available under Federal Rule of Civil Procedure 56(h). Because Radford provides no methodology, no data, and no calculations, and because the Nation declined to furnish a report, her opinions must be excluded, as her declaration does not show that she "is competent to testify on the matters stated" and her Declaration should be stricken from the record. *See* Fed Rules Civ Proc R 56(c)(4); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Accordingly, the Parker Defendants respectfully request that the Court strike or otherwise disregard the post-discovery Declaration of B.J. Radford (Dkt. 192-1) for the purposes of summary judgment.

In furtherance of this issue, the Parker Defendants request that the Court strike or otherwise disregard all "Additional Material Facts" submitted by the Nation that rely solely on the Radford Declaration (Paragraphs 1-13 of Plaintiff's "Statement of Additional Material Facts in Dispute" Dkt. 192-2). Because these "statements of fact" are not supported by admissible evidence, they cannot create a genuine dispute of material fact and should not be considered in opposition to summary judgment. *See* Fed Rules Civ Proc R 56(e). The Court should strike these paragraphs in their entirety rather than offer Plaintiff any opportunity to cure because Plaintiff strategically chose to cite *only to* the Radford Declaration, and the Court should not reward Plaintiff's tactical decision to rely solely on Ms. Radford's Declaration which fails under Federal Rule of Civil Procedure 26(c)(4).

III. PLAINTIFF'S ATTEMPT TO EXCUSE ITS SPOLIATION FAILS

Plaintiff's suggestion that no preservation duty existed until *August 2022* is untenable. On January 1, 2022 Nation police forcibly entered Pipekeepers, removed all merchandise, and barred Mr. Parker from the premises—conduct the Nation knew would prompt litigation (as evidenced by their retained Counsel being *on site* for at least a portion of the review), and indeed did. A duty to preserve plainly existed, yet Plaintiff now admits Ms. Dwyer "immediately discarded" the inventory notes generated during the January 2022 seizure.

Plaintiff also claims the handwritten tallies were "meaningless scrap paper" because an Excel spreadsheet was later created. That argument misconstrues spoliation. The discarded notes were the *only contemporaneous data source*; the spreadsheet is derivative, prepared by personnel aligned with Plaintiff, and lacks any independent verifiability. The destruction was at least grossly negligent and unquestionably prejudicial. An adverse inference and evidentiary sanctions therefore remain appropriate should the Court deny summary judgment.

IV. PLAINTIFF'S EXPERTS FAIL TO MEET THE STANDARDS OF RULE 702 AND DAUBERT

The Nation disclosed Ms. Radford as an expert on market definition, causation, and lost profits, asserting that she would give testimony as trial 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." The Nation did not provide an expert report from Ms. Radford, asserting that because she was 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" no report is required under Fed. R. Civ. P. 26(a)(2)(B). Ms. Radford's declaration, full of legal conclusions

and unsupported assertions, is inadmissible under the Federal Rules of Civil Procedure and Evidence, and the Nation should not be entitled to side-step a report with this offending document.

Regardless, both of the Nation's expert opinions are more prejudicial than probative under Rules 702 and 403, and the Court should exercise its gatekeeping role under Daubert and preclude both.

CONCLUSION

The Nation's opposition rests on conjecture, an inadmissible expert declaration, and legal conclusions masquerading as fact. After full discovery, the Nation still cannot demonstrate a qualifying predicate act, distinct investment, proximate injury, or interstate impact, and attempts to push through an inadmissible expert declaration upon which to hang its proverbial hat. Setting aside these antics, Plaintiff's opposition confirms that the record contains no triable issue of fact as to any element of its sole remaining claim under 18 U.S.C. § 1962(a), and the Nation's remaining claim fails as a matter of law. The Parker Defendants' motion for summary judgment should therefore be granted in full.

[*Signature block on next page*]

Dated: September 30, 2025

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