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/TWD)

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 POST-VERDICT RELIEF

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Plaintiff Cayuga Nation (the "Nation"), through undersigned counsel, respectfully submits this memorandum of law in opposition to the "Motion for Judgment as a Matter of Law and Alternative/Additional Post-Verdict Relief," ECF No. 325 (the "Motion"), filed in these proceedings by Defendants Dustin Parker and Nora Weber (the "Parker Defendants").

PRELIMINARY STATEMENT

This case was tried to a jury. After hearing all the evidence, the jury returned a liability verdict against the Parker Defendants and awarded limited damages. Defendants now ask this Court to undo the jury's hard work and set that verdict aside or remit it to zero. But their Motion fails to identify any legal basis that would justify judgment as a matter of law or remittitur. Instead, it asks this Court to revisit factual disputes, reweigh competing testimony, reconsider credibility determinations, and entertain arguments that were already raised and resolved before trial or presented to the jury and rejected. Post-trial motions do not serve that function.

Defendants largely repeat arguments this Court has already considered. They again challenge the Nation's damages evidence, renew objections to expert testimony that was admitted at trial, and invoke doctrines such as law of the case and *in pari delicto* in ways that do not align with the record or governing law. If anything, these arguments underscore only Defendants' disagreement with the jury's verdict. They do not provide a basis to disturb it.

The proof at trial showed that the Parker Defendants operated an unlawful tobacco business at Bayard Street and invested the proceeds from that business to open and stock a second store in Montezuma. That expansion caused real harm to the Nation's lawful tobacco operations. The jury heard that in the form of testimony from fact witnesses with direct knowledge of the Nation's businesses, and heard from competing experts regarding evidence of the dollar amount of damages.

The jury did not simply accept one side's view. Its award of damages suggests a careful assessment of causation and scope. Nothing about the jury's verdict reflects it was untethered from the evidence presented or that it warrants the court-ordered invalidation Defendants now seek.

The Parker Defendants also try to turn the resolution of this case into a debate about the legality of the Nation's own tobacco sales under New York State law. But that effort misses the point. Federal law allows the Nation to manufacture and sell Indian made cigarettes on its reservation without collecting state tax. New York's tax laws do not apply in this context—federal law does. Without an underlying state tax violation, there is no basis for Defendants' Contraband Cigarette Trafficking Act theory. And their attempt to equate their conduct with that of a sovereign Indian Nation misunderstands both preemption doctrine and the *in pari delicto* defense, which applies only where parties jointly participate in the same wrongdoing.

All told, the Parker Defendants are asking this Court to override a verdict simply because they disagree with it. The rules do not allow that. The evidence supports the jury's findings, the law supports the verdict, and there is no reason to disturb it. For the reasons set forth more fully herein, the Motion should be denied.

LEGAL STANDARD

Pursuant to Rule 50 of the Federal Rules of Civil Procedure, the court may grant a motion for judgment as a matter of law in a jury trial if it finds "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party" opposing the request. Fed. R. Civ. P. 50(a). The same standard applies where a party renews its request for judgment as a matter of law after the trial is complete. *See* Fed. R. Civ. P. 50(b).

"A Rule 50(b) motion can be made after the jury verdict, but only if a Rule 50(a) motion was made prior to the close of the evidence." *Holmes v. United States,* 85 F.3d 956, 962 (2d Cir.

1996). "Together, Rules 50(a) and (b) limit the grounds for judgment n.o.v. to those specifically raised in the prior motion for a directed verdict." *Id.* (citation omitted). Because "the specificity requirement is obligatory," *id.*, any post-trial motion "cannot assert a ground that was not included in the motion for a directed verdict." *Hilord Chem. Corp. v. Ricoh Elecs., Inc.*, 875 F.2d 32, 37–38 (2d Cir. 1989) (citation and internal quotation marks omitted); *accord Shannon v. Bellsouth Telecomms., Inc.*, 292 F.3d 712, 717 n.3 (11th Cir. 2002) ("If a party asserts new grounds in its renewed motion for judgment as a matter of law that it did not assert in its initial motion for judgment as a matter of law, a court may not rely on the new grounds to set aside the jury's verdict." (citation and internal quotation marks omitted)).

With respect to those specific issues raised in a previous Rule 50(a) motion, "[a] Rule 50(b) motion may be granted only 'if there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or the evidence in favor of the movant is so overwhelming that reasonable and fair minded persons could not arrive at a verdict against it.'" *Monsour v. N.Y. State Office for Developmental Disab.*, No. 1:13-cv-00336, 2018 U.S. Dist. LEXIS 113041, *27 (N.D.N.Y. July 9, 2018) (quoting *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 567 (2d Cir. 2011) (internal brackets omitted)).

"In assessing the sufficiency of evidence to support a jury verdict, a district court must view the record in the light most favorable to the nonmoving party, assuming all reasonable inferences were drawn and all credibility disputes resolved in its favor." *Id.* (quoting *Advance Pharm., Inc. v. United States*, 391 F.3d 377, 390 (2d Cir. 2004) (internal brackets omitted)). "[T]he court may not itself weigh credibility or otherwise consider the weight of the evidence; rather, it must defer to the credibility assessments that may have been made by the jury and the reasonable factual inferences that may have been drawn by the jury." *Williams v. Cty. of Westchester*, 171 F.3d 98, 101 (2d Cir. 1999) (citations omitted).

In all events, "[t]he standard for granting such motions is high." *Loma Linda Univ. v. Smarter Alloys, Inc.*, No. 19-CV-607, 2025 U.S. Dist. LEXIS 173651, *13 (W.D.N.Y. Sep. 5, 2025) (citing *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 479 (2d Cir. 2001)). And "[t]he burden on the movant 'is 'particularly heavy' where, as here, the 'jury has deliberated in the case and actually returned its verdict.'" *Perry v. City of N.Y.*, 78 F.4th 502, 517 (2d Cir. 2023) (citation omitted)).

ARGUMENT

I. The Nation Proved a Cognizable RICO Injury

The Parker Defendants contend that the Nation may not recover RICO damages predicated on an injury to a business that purportedly violates the Contraband Cigarette Trafficking Act ("CCTA"). ECF No. 325-1, pp. 8–9. According to Defendants, because this Court has already held that the Nation cannot recover RICO damages based on an injury to the Nation's cannabis business, the law-of-the-case doctrine requires reaching the same conclusion with respect to the Nation's tobacco business. *Id.*

Defendants' argument lacks merit. The-law-of-the-case doctrine does not apply because the legal questions are different. The Court concluded that the Nation cannot recover RICO damages based on cannabis-related injuries because federal law expressly bans cannabis sales. By contrast, federal law does not expressly ban the Nation's tobacco sales. Under the CCTA, cigarettes are contraband only if they bear "no evidence of the payment of applicable State or local cigarette taxes." 18 U.S.C. § 2341(2). "If there are no 'applicable State or local cigarette taxes,' cigarettes are not contraband." *United States v. Wilbur*, 674 F.3d 1160, 1173–1174 (9th Cir. 2012).

Here, there are no "applicable State or local cigarette taxes" because federal Indian law preempts New York's tax law. Preempted state law is "without effect," *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013), and "is no law at all." *Campbell v. University City Development Partners, Ltd.*, 72 F.4th 1245, 1257 (11th Cir. 2023) (quotation marks omitted). Or, put another way, when federal and state law conflict, federal law *is* state law: "[F]ederal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood v. Drown*, 556 U.S. 72, 734 (2009). Thus, federal Indian law *is* the applicable State law at issue—and federal Indian law permits the Nation to operate its tobacco business without paying state tax.[1]

Because state law does not apply—both on its own terms, and as a result of the preemptive effect of federal Indian law—the Nation is not making a sovereign immunity argument. It does not claim it is *immune from being sued*; it claims it is *not violating New York tax law or the CCTA* because federal Indian law displaces State law.

Although the Parker Defendants have long been on notice of the Nation's preemption argument, they make no arguments on this issue. Indeed, beyond referring to the law-of-the-case doctrine, Defendants make no argument that the Nation's injuries associated with its tobacco business are not cognizable under RICO. The Nation recognizes that no federal court has ever adjudicated this complex preemption issue. Given the lack of briefing from Defendants, the Court should merely hold that the law-of-the-case doctrine does not apply and that Defendants have forfeited any additional arguments.

[1] Indeed, the "applicable" state law at issue expressly provides that "*no tax shall be imposed* on cigarettes sold under such circumstances that this state is without power to impose such tax." New York Tax Law § 471 (emphasis added). Here, federal Indian law forecloses the State's power to impose a tax.

If the Court reaches the preemption issue, it should hold that federal Indian law preempts New York tax law as applied to the Nation's on-reservation tobacco business. Crucially, the Nation does not sell "premium" brand cigarettes manufactured by the large cigarette manufacturing companies, apart from the Nation's own small allotment of tax-free "premium" brand cigarettes.[2] The Nation's tobacco sales at issue are sales of "Cayuga"-brand cigarettes the Nation manufactures itself on its own reservation or cigarettes manufactured by neighboring and affiliated Indian nations. As applied to these sales of Cayuga- and other Indian-manufactured cigarettes, federal Indian law preempts New York tax law for two reasons. *First*, the Nation's interests in selling Indian-manufactured cigarettes on its own reservation outweighs the State's interest in collecting tax. *Second*, the 1794 Treaty of Canandaigua preempts the state tax.

First, as the Nation explained in detail in its trial brief, ECF No. 241, pp. 18–27, the State's tax is preempted under the applicable interest-balancing test. In short, the Nation manufactures and sells on its reservation its own "Cayuga"-brand cigarettes and other Indian-manufactured cigarettes. The issue is whether the State is entitled to impose taxes on non-Indian purchasers of those cigarettes and demand that the Nation collect those taxes and remit them to the State. Under Supreme Court precedent, the State may impose that obligation *only if* the state tax is not preempted as applied to the Nation's sales to non-members. *See Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 156–157 (1980).

"[W]hen a state seeks to tax non-members who engage in economic transactions on Indian reservations," "courts must subject a state tax scheme over on-reservation, non-member activities to a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Oneida Nation of New York v. Cuomo*, 645 F.3d 154, 165 (2d Cir. 2011) (quotation marks omitted).

[2] *See Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011).

"Eschewing mechanical or absolute conceptions of state or tribal sovereignty, this interests-balancing analysis instead determines whether, in the specific context, the exercise of state authority would violate federal law." *Id.* (quotation marks and alterations omitted).

Under that interest-balancing test, the State's tax is preempted. Tribal interests are at their "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville*, 447 U.S. at 156–157. For example, in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), the Supreme Court held that states could not regulate Indian gaming as applied to Indian tribes who were "generating value on the reservations through activities in which they have a substantial interest." *Id.* at 220.

Here, the Nation and other affiliated Indian nations are "generating value on the reservations"—specifically, manufacturing the cigarettes they seek to sell on the reservations. This case thus differs dramatically from *Colville*, in which it was "painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." 447 U.S. at 155. The Nation and other Indian nations are not simply marketing a tax exemption; they are manufacturing products on their own sovereign territory. Under *Colville*, *Oneida*, and *Cabazon*, the State may not interfere with the Nation's business by imposing taxes.

Second, the State's tax is independently preempted by the 1794 Treaty of Canandaigua. Under that Treaty, the Nation may sell not only Cayuga-manufactured cigarettes, but also cigarettes manufactured on-reservation by other New York tribes, without paying state tax. That Treaty was entered between the United States "and the Tribes of Indians called the Six Nations," which had met "in a general council." Treaty of Canandaigua, Preface, 7 Stat. 44. In Article II, the

Treaty guaranteed not to disturb the Oneida, Onondaga, and Cayuga Nations on their respective reservations "or either of the Six Nations, nor their Indian friends residing thereon and united with them," in their free use and enjoyment of those reservations. *Id.*, Art. II. In other words, the United States agreed not to disturb the Oneida, Onondaga, Cayuga "or either of the Six Nations," including "their Indian friends residing thereon and united with them," *in their free use and enjoyment of the Oneida, Onondaga, and Cayuga reservations.* Similarly, in Article III, the Treaty defined lands of the "Seneka" (now Seneca) Nation, which the United States again agreed it would "never claim the same, nor disturb the Seneka nation, *nor any of the Six Nations*, or of their Indian friends residing thereon and united with them, *in the free use and enjoyment thereof*." *Id.*, Art. III.

In Article VI, the Treaty agreed that the United States would "deliver to the Six Nations, and the Indians of other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars"—with no differentiation of how those goods would be divided among the Six Nations, other than by the Six Nations themselves. *Id.*, Art. VI. Similarly, "to promote the future welfare of the Six Nations," the Treaty pledged that the United States would make additional annual payments to the Six Nations "forever," again with no differentiation among the Nations apart from that the payments would be used "for the affairs of the Six Nations, and their Indian friends aforesaid," so long as "such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States." *Id.*, Art. VI, VII. Other treaties similarly addressed communal issues of the Six Nations.

Together, these and other provisions protected a right of free movement and free trade among the Six Nations, whose members often lived, worked, and traded on reservations of the Six Nations other than their own. There are thus longstanding and treaty-protected trading relationships among the Seneca, Cayuga, Onondaga, Oneida, Mohawk, and Tuscarora Nations.

This is consistent with their formal alignment, dating back to around the year 1200 (or around 1720 for the Tuscarora), in a joint confederacy (known as the Haudenosaunee Confederacy), sharing certain laws and functions. These New York Nations thus have historic and treaty-based rights to live, work, and support economic development on each of their respective reservations, and to trade among themselves in mutual enhancement of economic development. They have the right to view broadly and holistically the concept of "value generated on the reservation by activities involving the Tribes." *Colville*, 447 U.S. at 156–157.

It is significant that the state of New York has taken no action to suggest that it views the transportation or sale of native-brand cigarettes manufactured and sold on federal "Indian Country" lands in New York, and compliant with federal packaging and excise tax requirements, as within the scope of its tax laws. As stated above, New York's own tax law exempts "cigarettes sold under such circumstances that this state is without power to impose" a tax. New York Tax Law, § 471. Under the well-established authority set forth above, New York lacks the power to tax "value generated on the reservation by activities involving the Tribes." *Colville*, 447 U.S. at 156–157. New York thus lacks the power to tax native-brand cigarettes manufactured on a New York reservation under the direct authority of a sovereign New York Nation, in full compliance with applicable federal law.

Because New York's tax is preempted, the Nation is in full compliance with the CCTA. As such, the Nation may recover RICO damages for injuries to the Nation's tobacco business.

II. The Parker Defendants' Renewed Challenges to Plaintiff's Expert Testimony Do Not Support Judgment as a Matter of Law

The Parker Defendants argue that "[t]he methodology of the Nation's experts[3] is unreliable and must be rejected," and a verdict must now be directed in their favor based upon the various criticisms asserted by their expert, Stephen Ferraro, in his written rebuttal report, ECF No. 164-10, and elicited again from the Parker Defendants during the course of his testimony at trial. *See* ECF No. 317 (Day 3 Trial Transcript).

But this is not the first time this Court has seen these arguments in writing, or the first time that it has addressed them. The Parker Defendants raised these exact same arguments over four months ago in a pretrial summary judgment motion seeking the exclusion of the testimony of the Nation's expert, James S. Flynn. ECF No. 164. A comparison of the Parker Defendants' two filings is illustrative.

In their first motion, the Parker Defendants argued "[d]espite 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. Instead, he extrapolated supposed Nation profits solely from data produced by Pipekeepers. This 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." ECF No. 164-11, p. 29 (citation omitted). Here, they repeat "Mr. Flynn did not review the Nation's contemporaneous income statements, sales journals, or bank records, but instead extrapolated supposed profits solely from data produced by Pipekeepers, resulting in a lost-profits model detached from plaintiff's actual performance and devoid of plaintiff-side documentation." ECF No. 325-1, p. 10.

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[3] The Nation was permitted to present expert evidence at trial from only one witness: James S. Flynn. ECF No. 301. Ms. Radford was permitted to testify only as a fact witness. *Id.*

They next argued "[t]he 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. Mr. Flynn ignores this contrary evidence and provides no reconciliation for these discrepancies." ECF No. 164-11, p. 29. They now argue once more "the limited cigarette-sales reports produced by the Nation for Lakeside Trading 1 and 2 show stable or even increasing sales during the alleged loss period - a critical inconsistency that Mr. Flynn ignores and fails to address." ECF No. 325-1, p. 10.

There, as here, they continued "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. This assumption is refuted by publicly documented unlicensed stores, other tribal outlets, and extensive tourism-driven traffic in the Finger Lakes region." *Compare* ECF No. 164-11, pp. 29–30 *with* ECF No. 325-1, p. 10 ("Mr. Flynn's methodology assumes a closed market in which every sale made by Pipekeepers necessarily displaced a sale by the Nation, as assumption refuted by evidence of other unlicensed stores, tribal outlets, and significant tourism driven traffic in the region."). For good measure, their argument that "Mr. Flynn fails to account for other causal factors such as market wide inflation or deflation, post-COVID supply-chain disruptions, changes in the Nation's own product mix and marketing, and pricing decisions by the Nation's vertically integrated wholesale entities" remains unchanged. *Compare* ECF No. 325-1, p. 11 *with* ECF No. 164-11, p. 32. So too does their assertion that "Mr. Flynn also imposes arbitrary gross-profit margins without independent verification or error testing and fails to conduct any 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," *Compare* ECF No. 325-1, p. 11 *with* ECF No. 164-11, p. 31, and their claim that "Mr. Flynn fails to account for the Nation's ability to manipulate intercompany pricing between its vertically integrated entities[.]" *Compare* ECF No. 325-1, p. 11 *with* ECF No. 164-11, p. 29.

Even where the heading is new, the argument is not. In a different section of their memorandum of law, the Parker Defendants assert that "[t]he Nation's damages model is speculative and unsupported by financial data or expert analysis" and argue "the necessary non-speculative bridge from predicate act to racketeering income, to investment/use, to direct investment is absent from the record" because "as Stephen Ferraro explained at trial, the Nation's damages theory fails to establish this connection because it relies on misleading sales data that does not account for other significant factors affecting revenue, such as the impact of COVID-19." ECF No. 325-1, p. 14. "This approach," they say, "ignores market trends, competition, and other causal factors, and does not demonstrate that any alleged racketeering activity directly caused the Nation's claimed injury." ECF No. 325-1, p. 14 (citations omitted). This argument has likewise been raised before. *See* ECF No. 164-11, p. 32 ("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. Without isolating these independent variables, any attribution of loss to Pipekeepers is unreliable.") (citations omitted).

All told, this Court already heard and rejected *each and every one* of the above arguments when it declined to grant the Parker Defendants' motion for summary judgment or to preclude the testimony of James Flynn. ECF No. 301, p. 16. That ruling controls here where the Court is presented with the same arguments, in the same litigation, seeking the same dispositive determination. *Dilaura v. Power Auth. of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992) ("Under the doctrine of law of the case, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." (quoting Moore's Federal Practice 0.404[1], at 117 (1991)) (additional citations omitted)).

For purposes of Rule 50(b), the admissibility of James Flynn's expert testimony is settled, ECF No. 301;[4] it must be considered as part of the evidentiary record supporting the verdict; and it must be credited "in the light most favorable to the nonmoving party, assuming all reasonable inferences were drawn and all credibility disputes resolved in its favor." *Monsour*, No. 1:13-cv-00336, 2018 U.S. Dist. LEXIS 113041 at *27 (citation and internal brackets omitted). At the same time, the Parker Defendants are precluded from again raising any of these expert-related arguments on the Rule 50(b) posture because they failed to specifically articulate them in their Rule 50(a) motion. *Hilord Chem. Corp.*, 875 F.2d at 37–38; *see* ECF No. 317, pp. 465–490 (Day 2 Trial Transcript).

Preservation issues aside, the jury heard extensive testimony from Mr. Flynn at trial. *See* ECF No. 316, pp. 435–465. He specifically explained the preparation and contents of his written report, the documents he analyzed, the tobacco and tobacco-related products he considered, the nature and methodology of his damages calculation, how he accounted for periods where the Parker Defendants did not produce records, and his ultimate damages conclusion. *See id*. He further acknowledged his base assumption "that any and all sales made from defendants' unsanctioned tribal store represent a loss of sales and lost profits from the plaintiff's sanctioned

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[4] Indeed, at trial the Nation specifically moved to qualify James Flynn "as an expert in the field of accounting, business valuation, forensic accounting, and the accounting of financial damages," counsel for the Parker Defendants stated "I have no objection, your Honor," and the Court announced "I will accept him as an expert in this field." ECF No. 317, p. 438 (Day 2 Trial Transcript).

tribal store," *id.*, p. 442, that he gave the assumption "careful consideration," *id.*, p. 443, and that he concluded that the "base assumption was reasonable and logical[.]" *Id.* Finally, he testified that, in his opinion, the damages to the Nation caused by the Parker Defendants' on-reservation sale of untaxed and unstamped cigarettes were $3,150,807, and he held that opinion with a reasonable degree of professional certainty. *Id.*, p. 451. What is more, he made clear his opinion that, if the jury were to conclude that the Parker Defendants were taking away only 80%, or even 60% of the market from the Nation, as opposed to 100%, his $3,150,807 damages conclusion *would not go down to zero*: it would simply go down by 20% or 40%, respectively. *Id.*, p. 464.

For her part, Ms. Radford offered detailed and exhaustive fact-based testimony regarding the basis for the zero-sum assumption grounded in "the thirty-plus years [she has] spent in Indian country selling cigarettes," ECF No. 315, p. 162, during the course of which she has "witnessed thousands of transactions and probably rang out hundreds of them," *id.*, p. 154, served as the Nation's CFO, and closely monitored the Nation's retail business performance. *Id.*, p. 142.

In addition to cross-examining Mr. Flynn and Ms. Radford, the Parker Defendants called their own expert, Stephen Ferraro to criticize Mr. Flynn's analysis and offer his own conclusion that the Nation failed to provide proof of damages. *See* ECF No. 317 (Day 3 Trial Transcript). Mr. Ferraro was also subjected to vigorous cross-examination by the Nation on the content of his written report and conclusions, including his inaccurate conclusion that the Oneida Nation sells untaxed cigarettes and is a competitor of the Nation's businesses (*id.*, pp. 520–521); his inclusion, as "competitors," of non-tribal stores who cannot sell untaxed cigarettes and are located up to several hundred miles away from the Nation's stores (*id.*, pp. 521–523); that he was not aware the Nation's financials have been independently audited since 2003 (*id.*, p. 524); and that he was provided, but did include in his report, Nation business records that demonstrate a decrease of over

$3 million in Nation store tobacco sales during the time the Parker Defendants have been operating the Pipekeepers store. *Id.*, p. 531.

All of this neatly tracks the Court's instruction when it denied the Parker Defendants' motion to exclude Mr. Flynn's testimony that "Defendants are well-equipped to challenge [Flynn's opinion] through cross-examination and the rebuttal of their own expert and which jurors will be able to evaluate and choose to accept or reject in favor of their own reason, judgment, and common sense[.]" ECF No. 301, p. 15. And it vindicates the prevailing rule of law that "a jury is not required to choose between adopting or rejecting an expert's testimony wholesale; it is free to accept or reject the expert's opinions in whole or in part and to draw its own conclusions from it." *City of N.Y. v. ExxonMobil Corp.*, 739 F. Supp. 2d 576, 604 (S.D.N.Y. 2010) (citing *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1121 (D.C. Cir. 1999) ("[The] trier of fact was free to accept or reject expert testimony, and was free to draw his own conclusion.").

The jury's verdict in these proceedings makes clear it did exactly that. *See* ECF No. 310. The jury, no doubt, heard both experts testify, evaluated their credentials, considered their methodologies, and observed their demeanor under cross-examination. Ultimately, the jury was entitled to credit the Nation's expert over Defendants' expert, in whole or in part, and vice versa. *See ExxonMobil Corp.*, 739 F. Supp. 2d at 604. Having heard all the testimony, and having received all the evidence, the jury found the Parker Defendants liable under 18 U.S.C. § 1962(a). But, even still, it awarded the Nation damages far below the amount concluded by Mr. Flynn.[5]

[5] The Nation respectfully refers this Court to its Motion to Alter and Amend the Judgment in these proceedings, ECF No. 323, for its position with respect to the jury's award of damages and for its position in opposition to the Parker Defendants' contention that the jury's verdict warrants entry of a "judgment awarding the Nation $0 on its 18 U.S.C. § 1962(a) claim after offsetting the $75,619 civil RICO verdict by the $298,000 conversion verdict[.]" ECF No. 325-1, p. 20.

That was the jury's prerogative. The Parker Defendants are not, in fact, arguing there is "a complete absence of evidence supporting the verdict [such] that the jury's findings could only have been the result of sheer surmise and conjecture[.]" *Monsour*, No. 1:13-cv-00336, 2018 U.S. Dist. LEXIS 113041 at *27. Nor can they, based upon the detailed trial record. They are instead asking this Court to revisit its prior rulings in these proceedings, reconsider the weight of the evidence, reweigh the experts' credibility, second guess the jury, and wrest away from it its reasoned verdict.

That is not permissible under Rule 50(b). *Williams*, 171 F.3d at 101 ("[T]he court may not itself weigh credibility or otherwise consider the weight of the evidence; rather, it must defer to the credibility assessments that may have been made by the jury and the reasonable factual inferences that may have been drawn by the jury."). The jury's "assessments of witness credibility and its choices between competing factual inferences are not to be second-guessed[.]" *Lore v. City of Syracuse*, 670 F.3d 127, 150 (2d Cir. 2012) (citation omitted). And "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (quoting *Anderson v. Bessemer City,* 470 U.S. 564, 574 (1985)).

Because the testimony and evidence in these proceedings viewed—as it must be under Rule 50(b)—in the light most favorable to the Nation reasonably supports the jury's verdict, the Parker Defendants' motion for a directed verdict must be denied. *Monsour*, No. 1:13-cv-00336, 2018 U.S. Dist. LEXIS 113041 at *27.

III. The Parker Defendants' Damages Allocation Arguments Do Not Warrant Judgment as a Matter of Law

The Parker Defendants argue that judgment as a matter of law is required because, in their view, the Nation failed to present sufficient evidence of an "allocated" investment injury under 18 U.S.C. § 1962(a). ECF No. 325-1, p. 12. As a threshold matter, as with their expert-based arguments addressed above, the Parker Defendants are precluded from asserting any such arguments under Rule 50(b) because they did not raise this specific argument in their post-trial motion under Rule 50(a). *Hilord Chem. Corp.*, 875 F.2d at 37–38; *see* ECF No. 317, pp. 465–490 (Day 2 Trial Transcript).

Their arguments fail on the merits all the same. To start, they argue "the Nation's failure to differentiate among defendants or to identify which investments were allegedly funded by racketeering proceeds force[d] the jury to engage in impermissible speculation, rather than making findings based on concrete evidence." ECF No. 325-1, p. 13.

That argument defies the reality of trial. The Nation put forth evidence of just one investment of racketeering income by the Parker Defendants into the RICO enterprise: namely, the investment of proceeds from the Bayard Street Pipekeepers store to stock the Montezuma Pipekeepers store with inventory before it opened. ECF No. ECF No. 317, p. 295 (Day 2 Trial Transcript) (Direct Examination of Dustin Parker ("Q: Isn't it true you used money from the Bayard Street store to stock the Montezuma store with inventory before it opened? A: Yes.")). The trial proof demonstrated that the money generated at the Bayard Street Pipekeepers store came from, among other things, the sale of untaxed and unstamped tobacco products—a violation of the CCTA and a predicate act under civil RICO. *See, e.g.. id.*, p. 281 & 285; *id.*, p. 379 (Direct Examination of Nora Weber). Dustin Parker confirmed that he commingled the Bayard Street monies into one account, rendering tobacco proceeds inextricably intertwined with other proceeds from the store (aside from cannabis). *Id.*, p. 360. Thus, racketeering proceeds were used and invested to stock the Montezuma store with its initial inventory and get it up and running.

The Nation also introduced specific evidence that commingled monies were used to make lease payments to Justice for Native First People, LLC, *see id.*, and the *Meyer Defendants* (not the Parker Defendants) invested the money from those lease payments to develop and retrofit the

Montezuma Property. But the jury rejected *any* investment injury claim against the Meyer Defendants. *See* ECF No. 310, p. 2.

This necessarily means the jury concluded the *only* investment injury *came from the Parker Defendants*, and that single investment injury was the cause of *all* the damages it awarded to the Nation. *See id*. The Parker Defendants, perhaps unwittingly, confirm this reality. *See* ECF No. 325-1, p. 13 ("With the Meyer Defendants removed from the damages calculus, any purported association-in-fact collapses to the Parkers' familial unit, underscoring the absence of a broader multi-actor structure, separable investments, or allocatable 'use/investment' injuries traceable to *anyone other than the Parker Defendants themselves*." (emphasis added)).

Contrary to the Parker Defendants' contention, the jury was not required "to speculate as to which alleged investments were attributable to which defendants, and to assume a direct causal link between each defendant's conduct and the injury claimed without particular evidence tying particular investments to particular acts of racketeering." ECF No. 325-1, p. 12. They found *a single* injury arising from *a single* investment by the Parker Defendants (a *single* two-person enterprise), and they awarded the Nation damages of $151,238 against the Parker Defendants for that investment injury.[6] Moreover, the limited amount of the jury's damages award defies any notion that it was calculated to include the harm inflicted by the Parker Defendants' racketeering activity broadly, as opposed to the harm inflicted by their investment of racketeering proceeds discretely.

Nothing in the Court's instructions required the Nation or the jury to trace each alleged investment dollar to a discrete dollar of loss with mathematical precision. *See* ECF No. 309. The precedents the Parker Defendants cite do not hold otherwise. *See* ECF No. 325-1, p. 13–14 (citing

[6] *See* n.5 *supra*.

Empire Merchants, LLC v. Reliable Churchill, LLP, 902 F.3d 132 (2d Cir. 2018); *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310 (2d Cir. 2011); and *Hemi Group, LLC v. City of New York, N.Y.*, 559 U.S. 1 (2010)). *Empire Merchants*, *Ideal Steel*, and *Hemi* stand for the principle that RICO liability requires a direct connection between the defendant's conduct and the plaintiff's injury. They do not impose a rigid allocation requirement or bar juries from drawing reasonable inferences from the evidence.

At bottom, the jury was asked to determine whether the Nation proved that Defendants used or invested racketeering proceeds in a way that caused the Nation injury, and whether that injury was sufficiently connected to Defendants' conduct. The Nation presented evidence from which the jury could reasonably draw that conclusion, including evidence concerning the source of funds, how those funds were used, and the resulting competitive harm and lost profits.

Rather than awarding the Nation the full amount of damages it sought, the jury returned a limited award reflecting its assessment of causation and scope. The Parker Defendants' disagreement with how the jury weighed that evidence to arrive at its damages figure does not render the verdict legally infirm or permit the Court to step into the jury's shoes, to reweigh the evidence, or to otherwise direct a verdict against the jury's will. *Williams*, 171 F.3d at 101.

IV. The *In Pari Delicto* Doctrine Does Not Apply in These Proceedings

Defendants claim that the *in pari delicto* doctrine applies because the Nation's "own conduct is indistinguishable from the conduct it challenges." ECF No. 325-1, p. 12.[7] That argument

[7] The Parker Defendants made no mention by name of the *in pari delicto* doctrine in their Rule 50(a) motion. *See* ECF No. 317, pp. 465–490 (Day 2 Trial Transcript). Even affording their broader arguments the most favorable interpretation, they never contended the Nation was *working together* with the Parker Defendants as the doctrine requires. Because they failed to specifically articulate the doctrine in their Rule 50(a) motion, they are precluded from raising it here. *Hilord Chem. Corp.*, 875 F.2d at 37–38.

fails for two reasons. *First*, the Nation's conduct and Defendants' conduct are not "indistinguishable." The Nation is a sovereign that manufactures its own cigarettes; Defendants are not sovereign and do not manufacture their own cigarettes. As a result, the Nation's conduct is legal and Defendants' conduct is illegal, foreclosing application of the *in pari delicto* doctrine. *Second*, even if Defendants were correct that the Nation was also violating New York tax law, that is an insufficient basis for applying the *in pari delicto* doctrine. Instead, Defendants must show that they were *working together* with the Nation. Defendants do not and cannot make that showing.

First, contrary to Defendants' claim, the Nation is not "engaged in the same RICO violations" and does not "bear[] equal culpability" as Defendants. ECF No. 325-1, p. 17. To the contrary, the Nation is acting legally and Defendants are acting illegally. Although New York law on its face does not distinguish between sovereign Nations and individuals, as explained above, federal Indian law preempts New York law with respect to the Nation's sales. By contrast, federal Indian law does not preempt New York law with respect to Defendants' sales; the Nation's preemption analysis applies only to Indian *nations*, and Defendants are not Indian nations.

Contrary to Defendants' contention (*id.*), the Nation is not "selectively exploit[ing] its sovereign immunity." The Nation is not claiming it *cannot be sued*; it is claiming that it is *not breaking state law*, because federal Indian law displaces state law. *See* U.S. Const. Art. VI (federal law is "the supreme Law of the Land").

Even if the Court were to disagree with the Nation's argument that its activities are lawful, or believes that the issue should not be decided in this litigation, the Nation is still differently situated from Defendants. At a minimum, the Nation has substantial arguments that its activities are lawful, which have not been rejected by any court. As further evidence that the Nation has acted reasonably, New York State has never, at any time during the 15 years since the *Oneida Nation* decision, contended that the Cayuga Nation (or any other Indian Nation in New York) is required to collect New York cigarette taxes on sales of Cayuga-manufactured or other Indian-manufactured cigarettes, or that the transportation of such cigarettes without New York tax stamps is unlawful. By contrast, Defendants have never articulated any colorable theory supporting the legality of their conduct. As such, Defendants and the Nation do not "bear[] equal culpability." ECF No. 325-1, p. 17.

Second, the *in pari delicto* doctrine does not apply for an additional reason: the Nation and Defendants are not cooperating. "The doctrine of *in pari delicto*, a term meaning 'of equal fault,' reflects the principle that a plaintiff who has participated in wrongdoing equally with another person may not recover from that other person damages resulting from the wrongdoing." *Republic of Iraq v. ABB AG*, 768 F.3d 145, 160 (2d Cir. 2014). Crucially, for the doctrine to apply, the plaintiff and the defendant must be participating in the same underlying scheme *together*: "Plaintiffs who are truly *in pari delicto* are those who have themselves violated the law *in cooperation with the defendant.*" *Id.* at 168 (emphasis in original; quotation marks and citation omitted). Thus, the doctrine might apply if a plaintiff and a defendant collaborated in operating a single illegal tobacco business.

That is not what Defendants allege here. Defendants instead allege that the Nation is selling unstamped cigarettes just like they are. *See* ECF No. 325-1, p. 16 ("[T]he Nation itself sells unstamped cigarettes (from both Great Swamp Enterprises and other Native Tribes) on the Cayuga Nation reservation; does not maintain records of whether sales are made to non-native customers; and does not collect New York State sales tax on those transactions."). Crucially, however, Defendants do not allege that the Nation has "violated the law *in cooperation with the* *defendant*." *Iraq*, 768 F.3d at 168 (emphasis in original). Instead, Defendants allege that the Nation is selling unstamped cigarettes, and Defendants are, in parallel, also selling unstamped cigarettes. That allegation does not justify application of the *in pari delicto* doctrine as articulated in *Iraq*.

V. Remittitur is Not Appropriate in These Proceedings

The Parker Defendants summarily reassert two of their Rule 50(b) arguments in support of their Rule 59 motion for remittitur. The change in procedural posture, however, does not improve the arguments' viability. Defendants' stock arguments do not engage in any individualized legal analysis and do not analogize or distinguish a single case or cite a claimed applicable precedent even in passing.

First, in a two-sentence section titled "Lack of Allocation Among Defendants and Investments," the Parker Defendants assert that the Nation did not put forth a "lawful methodology to allocate § 1962(a) injuries among distinct alleged investments by different defendants" and "[t]hat omission rendered the jury charge and verdict form susceptible to speculation and requires remittitur to zero, as the damages award cannot be lawfully sustained without proper allocation." ECF No. 325-1, p. 19. As set forth above, the jury found *a single* injury arising from *a single* investment by the Parker Defendants (a *single* two-person enterprise). There were not "distinct alleged investments" at issue in its verdict.

In the similarly-abbreviated section that immediately follows, the Parker Defendants argue the Nation's one-for-one damages model was "insufficiently supported by comparative market, product, and consumer-choice evidence capable of showing a direct, non-speculative injury 'by reason of' investment/use" and "[t]his lack of proximate cause and non-speculative proof warrants remittitur to zero." *Id.* Once more, as detailed above, that is belied by the record which establishes

Ms. Radford offered detailed and exhaustive fact-based testimony regarding the basis for the zero-sum assumption grounded in "the thirty-plus years [she has] spent in Indian country selling cigarettes," ECF No. 315, pp. 162, during the course of which she has "witnessed thousands of transactions and probably rang out hundreds of them," *id.*, p. 154, served as the Nation's CFO, and closely monitored the Nation's retail business performance. *Id.*, p. 142.

While the Parker Defendants' final remittitur argument comes under the heading "Outcome-Determinative Expert Gatekeeping Errors," ECF No. 325-1, p. 18, it makes no mention of any "errors" and misrepresents that this Court held Ms. Radford's causation premise to be "unreliable." *Id*. Undeterred, the Parker Defendants go on to insist "[t]he verdict necessarily rested on Mr. Flynn's model, which assumed that *all* Pipekeepers tobacco sales equaled Nation losses[.]" *Id.* (emphasis added). That is impossible to square with the reality that the jury awarded damages totaling *less than 5%* of the one-for-one damages concluded by Mr. Flynn. *See* ECF No. 310, p. 2. Then, on the very next page of their memorandum of law, the Parker Defendants proceed to dismiss the jury's damages award as "nominal . . . relative to the claimed $3.15 million tobacco-only damages[,]" ECF No. 325-1, p. 19, after earlier in their brief calling it "*de minimis*[.]" *Id.*, p. 13.

Those statements are entirely incompatible with any notion that the jury's award in these proceedings was excessive, let alone so excessive as to warrant remittitur, which is appropriate when "the award is so high as to shock the judicial conscience and constitute a denial of justice." *Hardy v. Adams*, No. 9:17-cv-1382, 2024 U.S. Dist. LEXIS 33913, *5 (N.D.N.Y. Feb. 28, 2024) (citation omitted). Nor, as discussed above, have Defendants pointed to any discernable "error that caused the jury to include in the verdict a quantifiable amount that should be stricken." *Id.* at *4.

"It is well-settled that calculation of damages is the province of the jury." *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 337 (2d Cir. 1993) (citation omitted); *see*

Miller v. Huron Reg'l Med. Ctr., 936 F.3d 841, 846 (8th Cir. 2019) ("Remittitur is not appropriate merely because the district court would have awarded a different amount than the jury." (citation omitted)). "The jury's award should not be disturbed unless the quantum of damages found by a jury is clearly outside the maximum limit of a reasonable range." *Ahlf v. CSX Transp., Inc.*, 386 F. Supp. 2d 83, 87 (N.D.N.Y. 2005) (citation and internal quotation marks omitted). Whatever the upper limit of a reasonable range of damages may be, the jury's award here—which Defendants themselves call "*de minimis*"—falls far short of that limit. Remittitur should be denied.

VI. The Court Has Ruled Regarding Damages to the Nation's Cannabis Business

Defendants reiterate their position that "cannabis-business injuries are not cognizable 'business or property' under civil RICO." ECF No. 325-1, pp. 20–21. The Nation acknowledges that the Court has resolved this issue in favor of Defendants, ECF No. 286, and will not relitigate it here. However, for preservation purposes, the Nation notes that it respectfully disagrees with the Court's decision for the reasons stated in its trial brief. ECF No. 241, pp. 27–32.

VII. Meaningful Spoliation Sanctions Remain Warranted

The Parker Defendants argue—for now the third time—that "no sanction is warranted" for their spoliation of thousands of pages of business records and misrepresentations to the Court and counsel over the course of several years. ECF No. 325-1, p. 21. But this Court has expressly ruled that sanctions for the Parker Defendants' spoliation are warranted. ECF No. 227 (November 6, 2025 Memorandum-Decision and Order). Defendants' continued disagreement with this Court's decision does not negate its existence.

Defendants continue that, at most, "a nominal monetary sanction would be sufficient[.]" ECF No. 325-1, p. 21. But the purpose of monetary sanctions is "to punish the offending party for its actions and to deter the litigant's conduct, sending the message that egregious conduct will not be tolerated." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010) (citation and internal brackets omitted). Only meaningful monetary sanctions are fit to accomplish that purpose.

Where, as here, a party destroyed records for a period of over three years, made repeated misrepresentations to opposing counsel and the Court, and persisted in this conduct even after the Magistrate Judge enjoined it, meaningful monetary sanctions are warranted.

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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