UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CAYUGA NATION, by and through its lawful governing body, the CAYUGA NATION COUNCIL,

Plaintiff,

v.

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)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO ALTER OR AMEND THE JUDGMENT IN THESE PROCEEDINGS

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Plaintiff Cayuga Nation (the "Nation"), through undersigned counsel, respectfully submits this memorandum of law in further support of its motion to alter and amend the Judgment in these proceedings, ECF No. 323 (the "Motion"), and in reply to the opposition papers filed by Defendants Dustin Parker and Nora Weber (the "Parker Defendants"), ECF No. 331.

PRELIMINARY STATEMENT

The Parker Defendants' opposition does not seriously engage with the Nation's central argument or the basic problem with the Judgment. The jury was never instructed on the concept of joint and several liability by the Court or by counsel, and it could not possibly have intended to endorse the Verdict Sheet to award damages that embody the application of a concept it did not even know. The jury was instructed to consider each defendant separately. The Verdict Sheet reflected that instruction by requiring a finding of separate damages for each defendant, and the jury completed the Verdict Sheet to award separate damages against each of the Parker Defendants.

Defendants ignore all of this and invite the Court to focus instead on legal positions taken in pleadings and papers the jury never saw, and in a chambers conference the jury did not observe, and to engraft those positions onto the jury's understanding. That invitation is at odds with logic and the law, both of which require the Court to interpret a verdict sheet in light of the Court's instructions to the jury and the information available to the jury at the time it deliberated. When all of that is considered here, the jury's award of separate damages is apparent.

The Parker Defendants insist that even if it does not reflect the jury's intended verdict, the Judgment cannot now be challenged because the Nation allegedly waived any challenge to the verdict during its brief exchange with the Court. But that argument altogether misses the point. As the Nation's opening papers make clear, it does not seek to disturb the jury's verdict or otherwise alter the jury's findings, because when the Verdict Sheet is read in conjunction with the Jury

Instructions, as the law requires, it is clear the jury found separate damages and recorded them on separate lines. Objection or not, that fact remains. Should this Court conclude that joint and several liability applies as a matter of law under 18 U.S.C. § 1962(a), that would not merge the two separate damages lines into one. It would simply require adding them together, and then trebling them under 18 U.S.C. § 1964(c).

In sum, the Nation is not challenging the verdict. It is challenging the Judgment because it does not properly reflect the verdict. That is precisely what Rule 59(e) authorizes within 28 days of a judgment's entry, and that right has not been waived. For the reasons set forth herein, together with those set forth in the Nation's opening papers, the Nation's Motion should be granted.

ARGUMENT

I. Defendants' Waiver Argument Misconstrues Both the Nature of the Motion and the Purpose of the Waiver Doctrine

Defendants' waiver argument rests on the fundamentally mistaken premise that the Nation is challenging the verdict returned by the jury. It is not. The Nation does not contend the separate damages recorded on the Verdict Sheet were internally inconsistent, nor does it seek to rewrite the jury's award or in any way alter its findings. All of that should remain unchanged. The Nation's Motion is directed at only the Judgment in these proceedings and its inconsistency with the jury's verdict.

That distinction matters. An internally inconsistent jury verdict requires the same jury to revisit its verdict to resolve that inconsistency. For example, "[v]erdicts are inconsistent when a jury renders different verdicts on two different causes of action, even though the only contested elements were the same as to both causes of action." *Cradle of Liberty Council, Inc. v. City of Phila.*, 851 F. Supp. 2d 936, 955 (E.D. Pa. 2012) (citation omitted). There, a timely objection ensures that the original factfinder is able to reconcile its own factual findings. *Bseirani v. Mahshie*, 881 F. Supp. 778, 784 (N.D.N.Y. 1995) (timely objection "promote[s] the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without resort to the presentation of evidence to a different body." (citation omitted)). Waiver advances that objective by forcing an objection before the jury is discharged. *See id*.

But where no such inconsistency exists, the rationale for waiver disappears. Here, there was no inconsistency on the face of the Verdict Sheet and nothing for the jury to reconcile. The Jury Instructions directed the jury to consider each Defendant separately, and the Verdict Sheet provided separate lines for the jury to do just that. ECF No. 310. The jury complied with those instructions and completed the Verdict Sheet accordingly. *See id.* That is precisely the Nation's point in its Motion. *See* Op. Mem. of Law, ECF No. 323-1, p. 5 ("The jury did exactly that, endorsing the Verdict Sheet to award damages of $75,619 against Defendant Dustin Parker and a separate award of $75,619 against Defendant Nora Weber."). The Parker Defendants' waiver argument attempts to extend a framework meant to preserve the jury's role as factfinder into a situation where no factfinding error is alleged.

The Parker Defendants' reference to a brief post-verdict colloquy regarding the Court's interpretation of the Verdict Sheet does nothing to change that. While it is true that the Nation contends the Court's interpretation of the verdict is inconsistent with the Jury Instructions and the Verdict Sheet, that is not the type of inconsistency that demands an objection lest it be waived. *See Bseirani*, 881 F. Supp. at 784. An objection is required when there is an internal inconsistency in the *verdict itself*. *See id.* The Nation's position is that a verdict awarding separate damages attributable to separate Defendants on separate lines is consistent with the content of the Jury Instructions and the format of the Verdict Sheet.

Nothing about counsel's exchange with the Court transforms the legal right to substantively challenge the contents of a yet-to-be-issued Judgment into a forfeited factual objection. Whatever impression counsel may have had at the time the verdict was read, it cannot authorize the entry of a Judgment that is inconsistent with what the jury actually found.

Rule 59(e) expressly authorizes the Court to correct a judgment that does not conform to the verdict or misapplies governing law. Indeed, the "purpose of Rule … 59(e) motions is to ensure the Court did not overlook anything before it." *Clarendon, Ltd. v. Chase Manhattan Bank, N.A.*, 92 Civ. 6214, 1995 U.S. Dist. LEXIS 905, *6 (S.D.N.Y. Jan. 26, 1995). Defendants' position would nullify that purpose. Because this Motion seeks correction of the Judgment entered by the Court, not the alteration of the jury's verdict, waiver doctrine does not apply.

II. Defendants Do Not Reconcile Their Interpretation of the Verdict with the Jury's Knowledge, the Jury Instructions, or Applicable Law

The central argument of the Nation's Motion is that when the Verdict Sheet is read in conjunction with the Jury Instructions, as the law requires, it plainly announces separate damages awards against separate defendants. Because the Judgment does not accurately reflect that, it contains clear legal error and inflicts manifest injustice that requires it be altered and amended. *Utica Mut. Ins. Co. v. Clearwater Ins. Co.,* No. 6:13-cv-1178, 2022 U.S. Dist. LEXIS 48999, *8 (N.D.N.Y. Mar. 18, 2022).

Although their second argument is framed as a response to this argument, *see* ECF No. 331, pp. 10–14, the Parker Defendants never seriously confront it. They do not identify any part of the Jury Instructions that informed the jury it could or would be awarding joint and several damages. They do not explain how a jury instructed to consider defendants separately, and presented with a Verdict Sheet requiring separate damages findings, could be presumed to have intended a single, unified award. And they do not reconcile the layout of the Verdict Sheet with their interpretation of it, beyond rhetorically asserting "[t]he verdict form's per-defendant entries simply capture the jury's findings as to the Defendants' liability." *Id.*, p. 13.

Instead, they flatly assert "[t]his argument is unavailing because it disregards the entire litigation history." *Id.*, pp. 10–11. They continue "[w]hen reviewing the verdict sheet for a potential inconsistency, a court 'must adopt a view of the case, if there is one, that resolves any seeming inconsistency.'" *Id.*, p. 11 (citation omitted). And they proceed to devote the whole of their argument to referencing matters entirely outside the jury's knowledge. First, they point to joint and several liability being pled in a Complaint the jury *never saw*. *Id.*, p. 11. Next, they emphasize a position counsel set forth in a chambers conference the jury *never heard*. *Id.* Then, they reference a proposed verdict form the jury was *never given*. *Id.*, pp. 13–14.

But the Nation has never once claimed it did not assert joint and several liability in the Complaint or maintain that position in judicial conference, or, for that matter, that it continues to maintain that joint and several liability is appropriate under 18 U.S.C § 1962(a) to this day. Indeed, the separate lines in the Verdict Sheet that invited several, rather than joint and several damages findings were added over the Nation's objection. *See* ECF No. 317, p. 545. The Nation has been consistent about its legal position from the very start.

It is the Parker Defendants who have not. After staunchly opposing the application of joint and several liability throughout the entirety of these proceedings and in judicial conferences before and during trial, they now insist that joint and several liability is the only possible way anyone could have ever viewed the case. While that about-face is predictably compatible with the result they now seek, it is incompatible with everything they have said for nearly four years. And there can be little doubt they would not have abandoned their position about the application of joint and several liability if the jury had written $1,000,000 on the line for Dustin Parker and $500,000 on the line for Nora Weber. *See* ECF No. 323-1, p. 9.

In any event, the question for purposes of this Motion is not whether joint and several liability applies to a damages award under 18 U.S.C. § 1962(a) as a matter of law. If it does, which is a question for the Court to decide, then the two separate damages awards listed must simply be added together. *See* ECF No. 323-1, p. 13 (calculating joint and several damages). The question is whether a legal concept entirely unknown to the jury and completely absent from the Jury Instructions can be engrafted onto the jury's understanding after the fact and applied to its factfinding function.

It cannot. The controlling law in this Circuit is "[i]n interpreting a verdict sheet, it must be 'read in conjunction' with the jury instructions." *Perez v. Cty. of Rensselaer,* No. 1:14-CV-950, 2020 U.S. Dist. LEXIS 27849, *7 (N.D.N.Y. Feb. 19, 2020) (citing *Zaratzian v. Abadir,* 694 F. App'x 822, 824 (2d Cir. 2017)); *Turley v. ISG Lackawanna, Inc.,* 774 F.3d 140, 154 (2d Cir. 2014) ("A verdict form must be read in conjunction with the judge's charge to the jury." (citations and internal quotation marks omitted)).

The cases the Parker Defendants cite do not say otherwise. In fact, they do not even address the issue. *Harris v. Niagara Mohawk Power Corp.,* 252 F.3d 592 (2d Cir. 2001) came in the Rule 49 context, addressing inconsistent liability findings in a special verdict. So too did *Brooks v. Brattleboro Mem'l Hosp.,* 958 F.2d 525 (2d Cir. 1992) which stated "[w]hen special interrogatories are submitted to a jury pursuant to Fed. R. Civ. P. 49(a), the jury's answers thereto 'must be consistent with each other,' since they form the basis for resolving the case." *Id.* at 529 (citation omitted). *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 364 (1962) says exactly the same thing. Yet there is no special verdict at issue in this case; it does not involve Rule 49; and the issue here is damages, not liability. More still, there is no claim of inconsistency.

Even now, the Parker Defendants will go only so far as to admit the Nation "claims" the Jury Instructions "failed to instruct the jury on joint and several liability." ECF No. 331, p. 12. That is not the Nation's *claim*. It is reality. The Parker Defendants' refusal to acknowledge it does not make it any less real. And referring to the federal Circuit Court precedent the Nation cited on the specific issue of the contents of jury instructions and verdict sheets that have be deemed fit to award joint and several damages as mere "judicial guidance," *id.*, p. 12, does not alter its weight.

The precedent Defendants cite as contrary authority is not in fact contrary at all. *See id.* pp. 12–13 (citing *Shade ex rel. Velez-Shade v. Hous. Auth.*, 251 F.3d 307 (2d Cir. 2001)). In fact, it supports the Nation's position. In *Shade*, the jury awarded plaintiffs a total of $550,000 in damages and apportioned those damages among separate defendants because the jury instructions did not address joint and several liability and the verdict sheet invited apportionment. *Id.* at 310–311. Arguing the law required the application of joint and several liability, the plaintiffs moved for a new trial, which the district court granted. *Id.* At the second trial, the jury awarded damages of $0, and the plaintiffs appealed. *Id.* On appeal, the Second Circuit "reverse[d] that order [which granted a new trial] and instruct[ed] the Court to enter judgment for the plaintiffs on the first verdict." *Id.* at 313.

Here, as there, the jury instructions made no mention of joint and several liability, and the Verdict Sheet invited apportionment. Defendants' interpretation of the Nation's expert's damages testimony or their selective excerpt from a closing argument does nothing to change that. But unlike the *Shade* plaintiffs, the Nation does not seek a new trial or a rewriting of the verdict. It seeks exactly what the Second Circuit ordered: separate awards of damages against separate defendants based upon the content of the Jury Instructions and the format of the Verdict Sheet. *See id.*

Contrary to the Parker Defendants' rhetoric, the Nation is not trying to "spin the jury's intent." *See* ECF No. 331, p. 14. It is trying to vindicate it. Read together, the Verdict Sheet and the Jury Instructions reflect separate damages awards against separate defendants. The Judgment does not. By treating those separate findings as a single award and by applying a legal concept never presented to the jury, the Judgment departs from the verdict the jury actually rendered. That departure constitutes clear legal error and results in manifest injustice, and the Judgment should be altered and amended to give effect to the jury's factual findings.

III. Defendants Have Waived Any Argument that Trebling of the Jury's Damages Award is Not Mandatory or that Such Trebling Must Occur Before Applying any Recoupment Setoff

As the Nation set forth in its opening papers, under 18 U.S.C. § 1964(c), "[w]here a plaintiff successfully obtains a judgment of civil liability under RICO, an award of treble damages is mandatory." *Allstate Ins. Co. v. Polack,* No. CV 08-0565, 2012 U.S. Dist. LEXIS 141927, *23 (E.D.N.Y. Sep. 12, 2012) (citing *Cullen v. Margiotta,* 811 F.2d 698, 713 (2d Cir. 1987) (noting that "civil RICO requires that a successful plaintiff be awarded treble damages")); *Khanna v. Am. Express Co.,* 2011 U.S. Dist. LEXIS 146542, *13 (S.D.N.Y. Dec. 14, 2011) ("RICO awards victorious parties mandatory treble damages"); 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . *shall* recover threefold the damages he sustains[.]" (emphasis added)). Only after those damages are trebled can any recoupment claim be deducted. *See Allstate Ins. Co. v. Abramov,* No. 16-CV-1465, 2020 U.S. Dist. LEXIS 31347, *37 n.19 (E.D.N.Y. Feb. 21, 2020) ("Drawing on the authority of other circuits, courts in this district have held that calculating set-offs after trebling damages is appropriate." (citation omitted)).

Where, as here, a judgment does not treble damages as required by a federal statute's mandate before applying any setoff for recoupment, it commits a clear legal error. To illustrate the consequences of this error, the Nation provided two alternative calculations that include trebling and recoupment: one interpretating the damages award as several and the other interpreting it as joint and several. ECF No. 323-1, pp. 10–13. In the case of several liability, the net result is a $77,857 judgment against *each* of the Parker Defendants. *Id.*, p. 11. In the case of joint and several liability, the net result is a $155,714 judgment against *both* of the Parker Defendants. Either result conforms with the law on trebling and recoupment.

The Parker Defendants do not dispute any of this in their opposition papers. In fact, they do not address the Nation's arguments with respect to trebling or recoupment at all. Their failure to respond confirms that the Judgment's treatment of trebling and recoupment cannot be defended as a matter of fact and warrants correction under Rule 59(e). And it concedes those arguments and waives any opposition to them as a matter of law. *In re UBS AG Secs. Litig.*, No. 07-CV-11225, 2012 U.S. Dist. LEXIS 141449, *11 (S.D.N.Y. Sept. 28, 2012) (recognizing that a party "concedes through silence" arguments made by its opponent that it fails to address); *First Capital Mgmt., Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 392–393 n.116 (S.D.N.Y. 2002) (considering an argument not addressed in opposition brief to be waived).

CONCLUSION

For all of these reasons, together with those set forth in the Nation's opening papers and any other reasons that may appear to the Court or be presented at any hearing on the matter, the Nation's Motion should be granted.

Dated: February 5, 2026

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