UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

Plaintiff,

-against-

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, AND C.B. BROOKS, LLC, AND JOHN DOES 1-10,

Defendants.

Case No. 5:22-cv-128 (BKS/TWD)

THE PARKER DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF POST-VERDICT RELIEF

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Dated: February 5, 2026

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Dustin Parker and Nora Weber (the "Parker Defendants") respectfully submit this Reply Memorandum of Law in further support of their motion seeking post-verdict relief. (ECF No. 325.)

PRELIMINARY STATEMENT

The Nation's Opposition rests on three faulty premises: (1) that federal Indian law preemption transforms the Nation's sale of unstamped cigarettes into lawful conduct; (2) that the testimony of its experts was sufficiently reliable to support the jury's verdict; and (3) that the *in pari delicto* doctrine does not apply.(ECF No. 330 at 20-22.) None of these arguments withstands scrutiny.

The Nation's preemption argument is a post-hoc rationalization, unsupported by any judicial determination; furthermore, it is directly contradicted by the record. (Trial Tr. Day 1, 191:13-192:2.) The Nation cannot simultaneously claim that federal Indian law preempts New York tax law as to its sales while arguing that the same conduct by the Parker Defendants constitutes CCTA violations and RICO predicate acts. The Nation's defense of its experts fails to address the fundamental unreliability identified by this Court. (ECF No. 233 at 7-9, 11-12.) And the *in pari delicto* doctrine applies because the Nation participated in the same conduct it accuses the Parker Defendants of committing, under the same Reservation-wide scheme.

For these reasons, and those set forth in the Parker Defendants' opening memorandum (ECF No. 325-1), this Court should grant judgment as a matter of law in favor of the Parker Defendants, or in the alternative, order remittitur to zero or enter a net judgment for the Parker Defendants.

ARGUMENT

I. THE PARKER DEFENDANTS PROPERLY PRESERVED THEIR RULE 50(B) ARGUMENTS

As an initial matter, the Nation argues that the Parker Defendants are "precluded from asserting" certain arguments under Rule 50(b) "because they did not raise this specific argument in their post-trial motion under Rule 50(a)." (ECF No. 330 at 6.) This argument is both procedurally and substantively flawed.

Procedurally, the Parker Defendants properly preserved their arguments through an oral Rule 50(a) motion, in accordance with the Court's instruction, made at the close of the Nation's evidence.[1] The Court reserved decision on this motion, and at the close of trial, the Parker Defendants' counsel asked to renew its motion for a directed verdict. The Court responded: "I would include that in your motion that you do at 28 days." (Trial Tr. Day 4, 700:15-16.)

Moreover, these issues were extensively briefed before trial. (See Parker Defendants' pretrial summary judgment motion ECF No. 164-11.) At the Final Pretrial Conference, the Court questioned the Nation's damages methodology, specifically addressing Flynn's assumption that all Pipekeepers sales represented lost Nation sales. (Final Pretrial Conference Tr. at 17-18.)

The Nation's attempt to invoke waiver is therefore unavailing. The Parker Defendants' oral Rule 50(a) motion at the close of the Nation's case, combined with their extensive pretrial briefing,

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[1] After the plaintiff rested its case, the Parker Defendants' Counsel stated: "Your Honor, I'm not sure how you want me to do this, but I am going to make a motion for a directed verdict. I can do it verbally, we can submit papers, however your Honor would like to handle it.. So your Honor, of course it's the burden of the plaintiff to prove their case. They have now put in their evidence, and on a RICO claim, I'm not going to go through every element, but they have not put forward factual evidence to support much of their claim. This is not a wide ranging RICO claim, it's a very specific claim. They have to show that there was an investment that was made from the Bayard Street property into a continuing or an expanding enterprise.... They've completely failed to do that." (Trial Tr. Day 2, 466:3-18.)

more than satisfied the preservation requirement. *See Holmes v. United States*, 85 F.3d 956, 962 (2d Cir. 1996) (Rule 50(b) motion may renew arguments raised in prior Rule 50(a) motion).

II. THE NATION FAILED TO PROVE A COGNIZABLE RICO INJURY

A. Law of the Case Requires Dismissal of Tobacco-Based Damages

The Nation attempts to distinguish its unstamped cigarette business from its cannabis business by arguing that "federal law does not expressly ban the Nation's tobacco sales." (ECF No. 330 at 5.) This argument misses the point. The question is not whether the Nation's conduct is "expressly banned" but whether its unstamped cigarette business constitute "contraband" under the CCTA-the very predicate act the Nation alleges against the Parker Defendants.

Under the CCTA, cigarettes are "contraband" if they bear "no evidence of the payment of applicable State or local cigarette taxes in the State or locality where such cigarettes are found, if such evidence is required by the State or local law" 18 U.S.C. § 2341(2). New York law expressly requires such evidence through the affixing of tax stamps. N.Y. Tax Law §§ 471(1), 471-e(1).

The Nation concedes that it does not obtain tax stamps for any cigarettes it manufactures, nor for Indian-manufactured cigarettes that it resells. (Trial Tr. Day 1, 189:9–192:2.) The Nation further acknowledges that it does not track whether the ultimate purchaser is a tribal member or a non-member. (Trial Tr. Day 1, 190:3–190:17.) By its own admission, therefore, the Nation sells cigarettes that lack the tax evidence that New York law requires and that fall squarely within the CCTA's statutory definition of "contraband."

The Nation's preemption argument does not alter the governing analysis. Even assuming that federal Indian law preempts New York from collecting taxes from the Nation for sales to its members, that assumption does not mean that the unstamped cigarettes at issue cease to be "contraband" under the CCTA's unambiguous text. See 18 U.S.C. § 2341(2).

This Court has already applied the principle that RICO damages cannot be predicated on injuries to an illegal business. In excluding cannabis-based damages, the Court relied on the Ninth Circuit's reasoning in *Shulman v. Kaplan*, which held that plaintiffs lack statutory standing under RICO to recover for injuries to cannabis-related business or property. 58 F.4th 404, 410-14 (9th Cir. 2023). The same logic applies here: if the Nation's unstamped cigarette sales constitute "contraband" under the CCTA (the predicate act it alleges), then the Nation cannot recover RICO damages for injuries to that business.

The Nation argues that "the law-of-the-case doctrine does not apply because the legal questions are different." (ECF No. 330 at 5.) But the principle is the same: RICO does not provide a remedy for injuries to a plaintiff's illegal business operations. Permitting such recovery would undermine RICO's remedial purpose by rewarding a plaintiff for engaging in the very conduct Congress sought to eradicate. *See Shulman*, 58 F.4th at 411. Accordingly, the Nation should not be permitted to recover RICO damages for injuries to its contraband cigarette business.

B. *Federal Preemption Does Not Transform the Nation's Illegal Conduct into Legal Conduct*

The Nation's preemption theory fails for several independent reasons.

First, no court has ever held that federal Indian law preempts New York's cigarette tax laws as applied to sales by Indian nations. (ECF No. 330 at 7-8.) The Nation acknowledges that "New York State has never... contended that the Cayuga Nation... is required to collect New York cigarette taxes." (ECF No. 330 at 21.) But the absence of state enforcement is not equivalent to a judicial determination of preemption. Because of this, the Nation's preemption argument remains untested and unproven.

Second, the Nation's attempt to distinguish itself from the Parker Defendants based on sovereignty fundamentally mischaracterizes the nature of the conduct at issue. The Nation argues it is "legal" for the Nation to sell unstamped cigarettes but "illegal" for the Parker Defendants to do so. (ECF No. 330 at 20.) But if the Nation's conduct is truly lawful, then the Parker Defendants' identical conduct cannot constitute CCTA violations serving as RICO predicates. The Nation cannot have it both ways.

Finally, the Court should reject the Nation's invitation to adjudicate novel preemption questions in the context of this RICO damages action. The Nation's tobacco sales, like its cannabis sales, involve products that meet the statutory definition of "contraband," and damages predicated on injuries to such sales are not cognizable under RICO.

III. THE NATION'S EXPERT TESTIMONY REMAINS UNRELIABLE AND CANNOT SUPPORT THE VERDICT

A. Radford's "Zero-Sum" Assumption Is Speculative and Unsupported

The Nation's Opposition does not meaningfully address the fundamental unreliability of Radford's causation testimony. Instead, the Nation argues that its "zero-sum" market assumption-that every Montezuma Pipekeepers sale automatically displaced a Nation sale-is "reasonable" given the "extreme price differentiation and the absence of any other authorized sellers." (ECF No. 264 at 4-5; ECF No. 330 at 12.)

But this argument conflates market structure with causation. The existence of a limited market does not establish that every competitor sale displaces a plaintiff's sale. As the Second Circuit explained in *Ideal Steel Supply Corp. v. Anza*, a RICO plaintiff must demonstrate a "direct relationship" between the alleged investment of racketeering income and the claimed injury - not merely that a competitor's existence caused some generalized harm. *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 321 (2d Cir. 2011).

The Court identified serious concerns about Radford's testimony in its November 17, 2025 Memorandum-Decision and Order. (ECF No. 233 at 7-9.) The Court "question[ed] the reliability of Radford's broad causation opinion: that every Montezuma Pipekeepers sale caused one of the Lakeside Trading stores to lose a sale." (ECF No. 233 at 7.) These concerns were well-founded.

Radford's "zero-sum" assumption ignores numerous alternative factors that could affect the Nation's sales, including the COVID-19 pandemic's positive impact on cigarette sales (Ferraro Rebuttal Report at 17); the presence of competing sellers in the broader market (ECF No. 233 at 8-9); evidence that both Lakeside Trading stores showed stable or increasing sales during the alleged loss period (ECF No. 164-11 at 29); and the Nation's vertically integrated corporate structure, which could artificially depress reported profits. (ECF No. 164-11 at 31.)

The Parker Defendants' expert, Mr. Ferraro, testified that the Nation's annual revenue data was misleading because COVID impacted the sales of cigarettes in a positive way and the trends tapered off long before the Pipekeepers store was open. (Trial Tr. Day 3, 534:1-535:24.)

Stripped of its flawed assumptions, the Nation's damages case collapses.

B. Flynn's Damages Model Inherits Radford's Fundamental Flaws

The Nation argues that because Flynn is a "damages expert," he "does not need to perform h[is] own causation analysis." This argument misses the point. Despite the Court's warning and its preclusion of certain testimony related to Radford's "single-retailer" theory (ECF No. 233 at 22-23), both experts confirmed at trial that the Nation's damages model remained based on the same unreliable assumptions. Ms. Radford testified: "Every customer that went to Pipekeepers would have been a customer of Lakeside Trading." (Trial Tr. Day 1, 165:1-2.)

Mr. Flynn confirmed he adopted this assumption wholesale, testifying that "The core assumption behind the calculation of damages for the plaintiff was that the ability to sell tax-free tobacco is a closed market, closed end market, and therefore any and all sales made from the defendants' unsanctioned tribal store represent a loss of sales and a loss of profits from the plaintiff's sanctioned tribal store." (Trial Tr. Day 2, 442:6-11.) Flynn's damages calculations are entirely derivative of Radford's causation opinions. (ECF No. 233 at 11-12; ECF No. 164-9 at 2.)

If Radford's "zero-sum" assumption is unreliable, then Flynn's model-which assumes that "all Montezuma Pipekeepers' sales (tobacco or cannabis) would otherwise have been made by the Nation"-is equally unreliable and does not support a jury award.

IV. THE *IN PARI DELICTO* DOCTRINE BARS THE NATION'S RECOVERY

The Nation argues that the *in pari delicto* doctrine does not apply for two reasons: (1) the Nation's conduct is "legal" while the Parker Defendants' conduct is "illegal"; and (2) the Nation and Defendants were not "cooperating." (ECF No. 330 at 20-22.) Both arguments fail.

As to the first argument, the Nation's claim of legality rests entirely on its untested preemption theory. As discussed above, no court has held that federal Indian law preempts New York's cigarette tax laws as applied to the Nation's sales. (*See* ECF No. 330 at 7-8, 20-21.) The Nation acknowledges that "at a minimum, the Nation has substantial arguments that its activities are lawful, which have not been rejected by any court." (ECF No. 330 at 20-21.) But having "substantial arguments" is not the same as having legal authority. The Nation cannot claim the benefits of a legal determination that has never been made.

As to the second argument, the Nation misreads the governing authority in arguing that the *in pari delicto* doctrine requires the parties to be "cooperating" or acting "together." (ECF No. 330 at 25.) The doctrine does not require that the plaintiff and defendant acted in concert or had a formal arrangement. Rather, it bars recovery where the plaintiff "participated in wrongdoing equally with another person." *Republic of Iraq*, 768 F.3d 145, 160 (2d Cir. 2014).

Here, the "scheme" is the reservation-wide market for untaxed cigarettes, and both the Nation and the Parker Defendants were active, knowing participants in that market. The Nation's own theory of the case (and its damages) confirms that it participated in this scheme, and indeed, through this litigation, sought to enforce an exclusive right to the "closed market" for tax-free cigarettes on the Reservation. (Trial Tr. Day 2, 442:6-11.) Thus, at bottom, the Nation seeks to monopolize a market for untaxed cigarettes while using RICO to eliminate competitors who sell the same untaxed product on the Reservation.

The Court acknowledged at trial that "there remains a substantial question as to whether the Nation can recover damages under RICO where it is engaged in the same conduct as the Parker Defendants." (Trial Tr. Day 4, 700:20-701:3.) That substantial question should be resolved in favor of applying the *in pari delicto* doctrine.

V. IN THE ALTERNATIVE, THE COURT SHOULD ORDER REMITTITUR TO ZERO

If the Court declines to grant judgment as a matter of law, it should alternatively order remittitur to zero under Rule 59. Remittitur is appropriate where the jury's award is "unsupported by the evidence" or "contrary to the weight of the evidence." *Church & Dwight Co. v. SPD Swiss Precision Diagnostics GmbH*, 2018 U.S. Dist. LEXIS 151961, at *53 (S.D.N.Y. 2018). The Nation's own Opposition confirms that the jury's award was less than 5% of Flynn's damages calculation. (ECF No. 330 at 23.) This dramatic disparity demonstrates that the jury rejected the Nation's damages methodology-the only methodology presented-and necessarily engaged in speculation. As the Parker Defendants' expert testimony established, the Nation failed to prove any damages at all, and the *in pari delicto* doctrine independently bars recovery (see Section IV, *supra*); accordingly, the damages award must be remitted to zero.

VI. SPOLIATION SANCTIONS REMAIN UNWARRANTED

While the Court's November 6, 2025 Memorandum-Decision and Order found that the Parker Defendants' destruction of cannabis sales records constituted spoliation, the Court expressly "decline[d] to make a determination as to the appropriate sanction at this juncture" and further recognized that "[i]t is well accepted that a court should always impose the least harsh sanction that can provide an adequate remedy." (ECF No. 227 at 11; 10.)

Critically, the destroyed records relate exclusively to cannabis sales at the Montezuma Pipekeepers store - evidence that became irrelevant once this Court excluded cannabis-based damages from trial. (ECF No. 297; Trial Tr. Day 3, 497-499.) Because the Nation was not permitted to seek cannabis damages at trial, the destruction of cannabis records caused no prejudice to the Nation's remaining tobacco-based claims. See *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002)("spoliation sanctions must be proportionate and tailored to the prejudice suffered.")

Given the outcome of trial-in which the jury awarded the Nation only $75,619 against the Parker Defendants while awarding $298,000 to the Parker Defendants on their conversion counterclaim (Verdict, ECF No. 310)-any spoliation sanction would be disproportionate to the nonexistent prejudice. The Court should either withdraw its prior indication of sanctions or limit any sanction to nominal monetary relief that does not affect the merits or non-cannabis damages record. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010) (sanctions should not exceed what is necessary to remedy the prejudice).

REQUESTED RELIEF

For the foregoing reasons, and those set forth in the Parker Defendants' opening memorandum (ECF No. 325-1), the Court should: (1) grant judgment as a matter of law under Rule 50(b); or (2) alternatively, order remittitur to zero under Rule 59; or (3) alternatively, enter a net judgment for the Parker Defendants by offsetting the $298,000 conversion verdict against the $75,619 RICO award; (4) confirm the categorical exclusion of cannabis-based damages; (5) withdraw or limit any spoliation sanction to nominal monetary relief; and (6) grant such other relief as the Court deems just and proper.

Dated: February 5, 2026
Albany, New York

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