APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2022

Submitted: February 22, 2023 Decided: August 21, 2023

Amended: August 22, 2023

Docket No. 22-349-cv

DOUGLAS J. HORN,
Plaintiff-Appellant,

CINDY HARP-HORN,
Plaintiff,

— v. —

MEDICAL MARIJUANA, INC., DIXIE HOLDINGS, LLC, AKA DIXIE ELIXIRS, RED DICE HOLDINGS, LLC,
Defendants-Appellees.

DIXIE BOTANICALS,
Defendant.

Before:

WALKER, LYNCH, and ROBINSON, *Circuit Judges.*

Plaintiff-Appellant Douglas Horn appeals from an order of the United States District Court for the Western District of New York (Jonathan W. Feldman, *M.J.*)

granting summary judgment to Defendants-Appellees on his claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). On appeal, Appellant argues that the district court erroneously held that he lacks RICO standing to sue for his lost earnings because those losses flowed from, or were derivative of, an antecedent personal injury. We agree. RICO's civil-action provision, 18 U.S.C. § 1964(c), authorizes a plaintiff to sue for injuries to "business or property." While that language implies that a plaintiff cannot sue for personal injuries, that negative implication does not bar a plaintiff from suing for injuries to business or property simply because a personal injury was antecedent to those injuries. We therefore **VACATE** the order granting summary judgment to Appellees on Appellant's civil RICO claim, and **REMAND** to the district court for further proceedings consistent with this Opinion.

Jeffrey M. Benjamin, The Linden Law Group, P.C., New York, NY, *for Plaintiff-Appellant*.

Roy A. Mura, Scott D. Mancuso, Mura Law Group, PLLC, Buffalo, NY, *for Defendants-Appellees.*

GERARD E. LYNCH, *Circuit Judge*:

Plaintiff-Appellant Douglas J. Horn lost his job as a commercial truck driver, which he had held for more than ten years, after a random drug test detected tetrahydrocannabinol ("THC") in his system. He maintains, however, that he ingested THC unwittingly by consuming a cannabis-derived product that was marketed as THC-free by Defendants-Appellees Medical Marijuana, Inc., Dixie Holdings, LLC, a/k/a Dixie Elixirs,

and Red Dice Holdings, LLC ("Appellees"). He then brought this lawsuit in the United States District Court for the Western District of New York, asserting claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and state law. Granting partial summary judgment to Appellees, the district court (Jonathan W. Feldman, *M.J.*) held that Horn lacked RICO standing[1] because he sued for losses – in particular, his loss of earnings – that were derivative of, or flowed from, an antecedent personal injury.

We disagree. RICO's civil-action provision, 18 U.S.C. § 1964(c), authorizes a plaintiff to sue for "injur[ies] in his business or property" that are proximately caused by a violation of one of RICO's substantive provisions. While § 1964(c) implicitly excludes recovery for personal injuries, nothing in § 1964(c)'s text, or RICO's structure or history, supports an amorphous RICO standing rule that bars plaintiffs from suing simply because their otherwise recoverable economic losses happen to have been connected to or flowed from a non-recoverable personal injury. Accordingly, we **VACATE** the district court's order granting summary judgment to Appellees on Horn's RICO claim, and **REMAND** for further proceedings consistent with this Opinion.

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[1] Unlike Article III standing, RICO "standing" is not a jurisdictional requirement but instead concerns a merits issue, *i.e.*, whether the RICO statute gave the plaintiff a cause of action. *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 129-30 (2d Cir. 2003), *as amended* (Apr. 16, 2003) (Sotomayor, *J.*).

BACKGROUND

I. Factual Background

The following facts are undisputed for purposes of this appeal.

In February 2012, Horn was in a car accident that caused injuries to his hip and right shoulder. He was prescribed medicine for those injuries, but in the months following his accident, "he investigated natural medicines as an alternative to his other prescriptions." J. App'x 31. In or around September 2012, Horn discovered a magazine advertisement for Dixie X CBD Dew Drops Tincture ("Dixie X"), a product that was jointly produced, marketed, and sold by Appellees. The advertisement read as follows:

> **CBD for Everyone!**
>
> Using a proprietary extraction process and a strain of high-CBD hemp grown in a secret, foreign location, Colorado's Dixie Elixirs and Edibles now offers a new product line called Dixie X, which contains 0% THC and up to 500 mg of CBD. This new CBD-rich medicine will be available in several forms, including a tincture, a topical and in capsules. Promoted as "a revolution in medicinal hemp-powered wellness," the non-psychoactive products will first roll out in Colorado MMCs (medical marijuana centers), with plans to quickly expand outside the medical-marijuana market. "It has taken a tremendous amount of time, money and effort, but finally patients here in Colorado – and ultimately all individuals who are interested in utilizing CBD for medicinal benefit – will be able to have access

> to it," says Tripp Keber, Dixie's managing director. "We are importing industrial hemp from outside the US using an FDA import license – it's below federal guidelines for THC, which is 0.3% – and we are taking that hemp and extracting the CBD. We have meticulously reviewed state and federal statutes, and we do not believe that we're operating in conflict with any federal law as it's related to the Dixie X (hemp-derived) products."

Id. at 47.

It was important to Horn that Dixie X was free of THC and compliant with federal law. At the time, Horn and his wife, Cindy Harp-Horn, were working as a team of commercial truck drivers for Enterprise Transportation Company. As a commercial truck driver, Horn was subject to random drug testing by his employer, as required by the U.S. Department of Transportation. Mindful of that restriction, Horn and his wife sought to ensure the advertisement's accuracy by watching YouTube videos, reviewing the FAQ page of Dixie X's website, and calling a customer-service line – all of which corroborated the advertisement's representation that Dixie X did not contain THC. Satisfied with that investigation, Horn purchased Dixie X in October 2012.

To Horn's dismay, after he consumed the product, he failed his employer's random drug test and later a confirmatory drug test. Consequently, he lost his job, current and future wages, and insurance and pension benefits. At that time, he had twenty-nine years' experience as a commercial truck driver, including more than ten years driving for Enterprise Transportation Company. At some point, Horn's wife resigned from her

job, believing it was unsafe to work as a commercial truck driver without her husband.

Suspecting that Dixie X was to blame for his positive test, Horn purchased some more and had an independent lab test the product. Those tests confirmed that Dixie X contained THC.

II. Procedural History

On August 6, 2015, Horn and Harp-Horn filed a nine-count complaint in the United States District Court for the Western District of New York. Count 2 asserted a claim of RICO conspiracy under 18 U.S.C. §§ 1962(d), 1964(c). Underlying that claim were predicate acts of mail and wire fraud, 18 U.S.C. §§ 1341, 1343, and of engaging in transactions with money derived from specified unlawful activities, 18 U.S.C. § 1957. The other eight counts were New York state law claims for deceptive business practices/false advertising, fraudulent inducement, products liability, breach of contract, breach of express warranty, unjust enrichment, negligence, and negligent infliction of emotional harm.

The district court dismissed Harp-Horn's claims and whittled Horn's claims to two: (1) the civil RICO claim, as predicated on mail and wire fraud; and (2) the state-law fraudulent inducement claim. *See Horn v. Med. Marijuana, Inc. (Horn I)*, 383 F. Supp. 3d 114, 135 (W.D.N.Y. 2019); *Horn v. Med. Marijuana, Inc. (Horn II)*, No. 15-cv-0701, 2019 WL 11287650, at *3 n.3, *5 (W.D.N.Y. Nov. 22, 2019).

With a trial date approaching, on July 22, 2021, Dixie Holdings moved to preclude the trial testimony of Horn's damages expert, arguing that his lost earnings are not recoverable under RICO or the remaining state-law claim.

The district court construed that motion as dispositive, agreed with Dixie Holdings as to the RICO claim but not the state-law claim, and accordingly granted partial summary judgment to Appellees on the RICO claim. *Horn v. Med. Marijuana, Inc. (Horn III)*, No. 15-cv-0701, 2021 WL 4173195 (W.D.N.Y. Sept. 14, 2021). Following out-of-circuit precedent, the district court reasoned that Horn's lost earnings "flow[] from, and [are] derivative of, a personal injury" – that is, an unconsented bodily invasion by THC – and therefore "do not constitute an injury 'to business or property' that is recoverable in a civil RICO action" brought under 18 U.S.C. § 1964(c). *Id.* at *5. On January 24, 2021, the district court entered final judgment on Horn's civil RICO claim, thereby certifying this appeal, pursuant to Federal Rule of Civil Procedure 54(b). *Horn v. Med. Marijuana, Inc. (Horn IV)*, No. 15-cv-0701, 2022 WL 206235, at *4 (W.D.N.Y. Jan. 24, 2022).

DISCUSSION

Horn challenges the district court's decision to grant summary judgment to Appellees on his RICO claim. "We review de novo a district court's decision to grant summary judgment, construing the evidence in the light most favorable to the party against whom summary judgment was granted and drawing all reasonable inferences in that party's favor." *Covington Specialty Ins. Co. v. Indian Lookout Country Club, Inc.*, 62 F.4th 748, 752 (2d Cir. 2023), quoting *Bey v. City of New York*, 999 F.3d 157, 164 (2d Cir. 2021). We agree with Horn that the district court erred in holding that he cannot sue for his loss of earnings.[2] RICO's civil-action provision, 18 U.S.C.

[2] But we reach that conclusion under a different rationale than the one argued by Horn. Horn disputes that his lost earnings flow from a

§ 1964(c), does not bar a plaintiff from suing for injuries to business or property simply because they flow from, or are derivative of, an antecedent personal injury. In reaching that conclusion, we outline the plain and ordinary meaning of injury to "business" as used in § 1964(c) and then explain why RICO does not contain the limitation that the district court applied in this case.

I. The Plain and Ordinary Meaning of "Injured in His Business"

"[W]e start . . . with the text of the statute," *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021), "seek[ing] to discern and apply the ordinary meaning of its terms at the time of their adoption," *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537 (2021). Section 1964(c) authorizes "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [to] sue therefor in any appropriate United States district court . . . ." 18 U.S.C. § 1964(c). Because "Congress modeled § 1964(c) on the civil-action

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personal injury, arguing that any personal injury he suffered through his unwitting ingestion of THC was only incidental to his lost earnings. But a logically antecedent legal question is whether § 1964(c) bars a plaintiff from suing for injuries to business or property simply because they flow from, or are derivative of, a personal injury. It is that question we answer. How to apply a statutory provision like § 1964(c) "fairly includes the question of what that statute says," and we are not compelled to "accept an interpretation of a statute simply because it is agreed to by the parties." *Rumsfeld v. FAIR*, 547 U.S. 47, 56 (2006); *cf. United States v. Grubbs*, 547 U.S. 90, 95 n.1 (2006) ("It makes little sense to address what the Fourth Amendment requires of anticipatory search warrants if it does not allow them at all."); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (deciding a question that is logically antecedent to the issue presented).

provision of the federal antitrust laws, § 4 of the Clayton Act," *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 267 (1992), cases concerning antitrust standing inform our interpretation, but only to the extent relevant in this setting and consistent with the Supreme Court's instruction not to import into RICO barriers to standing that are "appropriate in a purely antitrust context" and not adapted to the purposes of RICO, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (rejecting this Circuit's old "racketeering injury" requirement).

As alluded to above, the key text here is the phrase "business or property." By using the disjunctive "or" to separate "business" from "property," Congress made clear that "'business' was not intended to modify 'property,' nor was 'property' intended to modify 'business.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (interpreting § 4 of the Clayton Act). We therefore give each of those terms its "independent and ordinary significance." *Id.* at 338-39.

At the time of § 1964(c)'s codification, the term "business" did not "embrace" a single "legal meaning." Black's Law Dictionary 248 (Rev. 4th ed. 1968). Instead, the term embraced concepts like "employment, occupation, or profession engaged in for gain or livelihood," and "commercial or industrial establishment or enterprise." *Id.*; *see also Flint v. Stone Tracy Co.*, 220 U.S. 107, 171 (1911) (explaining that "[b]usiness" as used in the Tariff Act of 1909 "is a very comprehensive term and embraces everything about which a person can be employed"). Non-legal dictionaries of the time reflect similar understandings. *See* Webster's Third New International Dictionary 302 (1971) (defining "business" as a "commercial or mercantile activity customarily

engaged in as a means of livelihood and typically involving some independence of judgment and power of decision," and as "a commercial or industrial enterprise").

Because the term "business" encompasses "employment," Horn has suffered an injury "in his business," as contemplated by the RICO statute. His suit is premised on his long-time employer terminating his employment as a commercial truck driver (for which he had twenty-nine years' total experience) because he tested positive for THC. That termination cost him current and future wages and his insurance and pension benefits – all of which were tied to his employment.

That is sufficient to state a "business" injury under the RICO statute. "A person does not have to wear a suit and tie to be engaged in 'business.'" *Diaz v. Gates*, 420 F.3d 897, 905 (9th Cir. 2005) (en banc) (Kleinfeld, *J.*, concurring). Nor does a person need to own a sole proprietorship or be an independent contractor. *Id.* at 905-06. "The distinction between 'business' and employment is so tenuous and uncertain that it is hard to see why we should attribute to Congress a purpose of making it, especially since they did not make it expressly." *Id.* at 906. And, as the Supreme Court has instructed, "RICO is to be read broadly." *Sedima*, 473 U.S. at 497. "This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Id.* at 497-98, citing *United States v. Turkette*, 452 U.S. 576, 586-87 (1981), and quoting Pub. L. 91-452, § 904(a), 84 Stat. 947. There is, in short, no reason to suppose that Congress sought to protect enterprises to the exclusion of ordinary employees, or to protect certain means of livelihood but

not others. Accordingly, when Horn lost his job, he suffered an injury to his business within the plain meaning of § 1964(c).[3]

II. The Antecedent-Personal-Injury Bar

Rather than apply the plain and ordinary meaning of the phrase "business or property," the district court adopted an atextual restrictive interpretation of the statute, adopted by the en banc Sixth Circuit over the dissent of five judges, that denies RICO standing to any plaintiff whose pecuniary loss "flows from, or is derivative of," an antecedent personal injury, even if the loss constitutes an injury to "business or property" within the plain and ordinary meaning of that phrase. *Horn III*, 2021 WL 4173195, at *3, citing *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 565-66 (6th Cir. 2013) (en banc) ("[B]oth personal injuries and pecuniary losses flowing from those personal injuries fail to confer relief under § 1964(c).").[4] In doing so, the district court deviated from the en banc Ninth Circuit, which had rejected a similar approach as "flawed" in *Diaz*, 420 F.3d at 901-02.[5]

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[3] The term "property" presents a less straightforward inquiry. In light of our holding that Horn suffered an injury to his business, we have no need to decide whether Horn suffered an injury to property when he lost his job.

[4] While Judge Clay concurred in the judgment, he did so on alternative grounds, rejecting the majority's standard as "imprecise and atextual." *Jackson*, 731 F.3d at 570 (Clay, *J.*, concurring in the judgment).

[5] The district court also drew support from the Seventh and Eleventh Circuits. *See Horn III*, 2021 WL 4173195, at *3. Those circuits ask whether the plaintiff's claimed pecuniary losses are more properly understood as part of a personal injury claim, and in doing so assess whether those losses are derivative of, flow from, or are intertwined

We understand the justification of that rule, which we call the antecedent-personal-injury bar, to be as follows: (1) by expressly authorizing suit for injuries to "business or property," § 1964(c) implicitly excludes suit for other types of injuries – most notably, "personal injuries"; and (2) for that implied limitation to retain significance, Congress must also have implicitly intended to exclude injuries to business or property that flow from an antecedent personal injury, as most personal injuries lead

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with an antecedent personal injury. *See Evans*, 434 F.3d at 928-30 & n.26; *Doe*, 958 F.2d at 770; *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988). While neither circuit has placed decisive weight on the presence of an antecedent personal injury, *see Grogan*, 835 F.2d 848 (leaving open whether losses "resulting from murder" are recoverable under RICO); *Evans*, 434 F.3d at 928 (leaving open whether a victim of false imprisonment could, in a future case, recover "promised or contracted for wages" or losses to a "lawful business enterprise or activity"), we think that those circuits, for substantially the same reasons as the Sixth Circuit, get the inquiry backwards. The question is not whether a plaintiff's claimed pecuniary losses are more properly understood as part of a personal injury claim, or whether the injury is derivative of, flows from, or intertwined with a personal injury. Instead, the question is whether the plaintiff's pecuniary losses constitute an injury to "business or property." 18 U.S.C. § 1964(c). That is all the plaintiff must show.

We acknowledge that in one summary order, we affirmed a district court's order dismissing a plaintiff's civil RICO claim, *see Gause v. Philip Morris Inc.*, 29 F. App'x 761 (2d Cir. 2002), which relied in part on the Seventh Circuit's approach, *see Gause v. Philip Morris*, No. 99-cv-6226, 2000 WL 34016343, at *4 (E.D.N.Y. Aug. 8, 2000). While we endorsed "the reasons stated" by the district court, all we actually said, which we do not question here, was that "[p]ersonal injuries of smokers are not injuries to 'business or property' within the meaning of [RICO]." *Gause*, 29 F. App'x 761. In any event, summary orders do not have the force of precedent, *see* 2d Cir. Local R. 32.1.1(a), even if we may sometimes consider them persuasive, *see United States v. Payne*, 591 F.3d 46, 58 (2d Cir. 2010).

to some pecuniary losses. *See Jackson*, 731 F.3d at 563-66. Otherwise, the district court explained, a plaintiff could "easily recast damages for personal injury as a financial loss of 'property' in order to invoke civil RICO." *Horn III*, 2021 WL 4173195, at *3.

We are not persuaded, and thus reject the antecedent-personal-injury bar. *Cf. Diaz*, 420 F.3d at 901-02. As an initial matter, we agree that § 1964(c) implicitly excludes recovery for personal injuries. *See RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 350 (2016); *see also Reiter*, 442 U.S. at 339 (interpreting § 4 of the Clayton Act). In other words, "a person physically injured in a fire whose origin was arson is not given a right to recover for his personal injuries" under § 1964(c); rather, he may recover for things like "damage to his business or his building" caused by the fire. *Bankers Tr. Co. v. Rhoades*, 741 F.2d 511, 515 (2d Cir. 1984), *vacated on other grounds*, 473 U.S. 922 (1985). At its core, civil RICO was "designed to remedy *economic* injury." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987) (emphasis added); *accord Bascuñán v. Elsaca*, 874 F.3d 806, 817 & n.45 (2d Cir. 2017).

But the negative implication that RICO excludes recovery for personal injury does not mean that a plaintiff cannot sue for injuries to business or property simply because they flow from, or are derivative of, a personal injury. "The force of any negative implication . . . depends on context," *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017), quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013), and nothing in RICO's text or structure "provides for ignoring damage to a[] . . . legal entitlement because it arose following a personal injury," *Jackson*, 731 F.3d at 579 (Moore, *J.*, dissenting). Thus, "[w]hile it seems

undisputed that RICO liability will not attach where the injuries alleged are personal ones, there is no textual reason to extend that bar" to an injury to business or property "for which a personal injury was a necessary precursor." *Id.* at 570-71 (Clay, *J.*, concurring in the judgment) (internal citations omitted); *see also Diaz*, 420 F.3d at 903 (Kleinfeld, *J.*, concurring) ("The RICO statute tells us what kinds of injuries give rise to RICO claims.").

First, we find it significant that § 1964(c)'s "by reason of" requirement "incorporates a proximate cause standard." *Diaz*, 420 F.3d at 901, citing *Holmes*, 503 U.S. at 265-68. Proximate cause considers, among other things, the permissible degree of attenuation between the claimed harm and the predicate act, and requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. Still, proximate cause "is generous enough to include the unintended, though foreseeable, consequences of RICO predicate acts," including, in some instances, harms that flow from, or are derivative of, each other. *Diaz*, 420 F.3d at 901, citing *Palsgraf v. Long Island R.R. Co.,* 248 N.Y. 339, 342-47 (1928) (Cardozo, *C.J.*).[6]

Thus, by enacting a proximate-cause limitation on RICO standing, Congress made a judgment concerning the permissible degree of attenuation between a predicate act and a redressable RICO injury. The antecedent-personal-injury bar coopts that judgment, imposing a more restrictive attenuation principle that bars suit whenever there is a necessary antecedent personal injury,

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[6] Because the district court addressed only whether Horn suffered a redressable injury to business or property, we take no position on whether Horn satisfies § 1964(c)'s other requirements, including proximate cause.

even where that injury and the resulting injuries to business or property were intended or foreseeable (*i.e.*, proximate). As a general matter, when Congress uses "explicit language in one provision," that "cautions against inferring the same" or a similar "limitation in another provision." *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 580 U.S. 26, 34 (2016) (internal quotation marks omitted) (declining to hold that the False Claims Act "mandate[s] dismissal" for "violating [its] seal requirement," in part because other provisions of the Act "require, in express terms, the dismissal of a relator's action" for other reasons); *accord Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1941 (2022). Reading the antecedent-personal-injury bar into the phrase "business or property" violates that principle, based on nothing more than an implicit limitation in the text of § 1964(c).

Second, the phrase "business or property" focuses on the *nature* of the harm, not the *source* of the harm, as demonstrated by the dictionary definitions of those terms. Section 1964(c) addresses the source of the harm elsewhere, requiring that civil suits be premised on a "violation of section 1962." And that source restriction cuts against reading into § 1964(c) yet another source restriction that would exclude injuries to business or property that flow from, or are derivative of, a personal injury. Section 1962(c) prohibits "any person employed by or associated with any enterprise" from conducting or participating in the "affairs" of the "enterprise[]" through a "pattern of racketeering activity." The term "racketeering activity" includes "murder" and "kidnapping," § 1961(1)(A), and neither of those acts, themselves, amount to "injury to business or property," *Diaz*, 420 F.3d at 904 (Kleinfeld, *J.*, concurring). Both

directly result in "personal injury to a human being." *Id.* But both acts may nonetheless "*give rise* to 'injury to business or property' under section 1964." *Id.* at 905 (emphasis added). Thus, because "personal injuries, including murder and kidnapping, are expressly listed in section 1961 as 'racketeering' conduct that can give rise to claims under the statute," § 1964(c) cannot be read to deny RICO standing for injuries to business or property simply because the plaintiff suffered an antecedent personal injury. *Id.* at 904.

Third, and relatedly, the antecedent-personal-injury bar precludes various types of civil suits that are at the core of RICO's substantive prohibitions. Murder and kidnapping are obvious examples. So too is the broader offense of "extortion," § 1961(1), which at the time of RICO's adoption generically meant to "obtain[] something of value from another with his consent induced by the wrongful use of force, fear, or threats," *United States v. Nardello*, 393 U.S. 286, 290 (1969); *accord Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409-10 (2003). Similarly, loan sharking – *i.e.*, the "collection of unlawful debt." § 1962(c); *see also* § 1961(6) (defining unlawful debt). Loan sharking was a principal evil with which Congress was concerned when it enacted RICO, *see* S. Rep. No. 91-617, at 158-59 (1969), undoubtedly due to the loan shark's frequent means of collecting debt: violence. *See* 18 U.S.C. §§ 891-894 (criminalizing extortionate extensions of credit and collection of debt); 18 U.S.C. § 1961(1)(B) (defining those crimes as racketeering activity). Yet, the antecedent-personal-injury bar would preclude recovery for injuries to business or property that flow from, or are derivative of, personal injuries that inevitably result from the murder of a business owner who

resists paying a demand for protection money; the kidnapping of a bar owner who refuses to sell his property to the mafia; the extortionate battery of a carwash owner who refuses to launder money; and the shooting of an individual who fails to pay an unlawful debt.

While RICO's scope has expanded beyond its originally anticipated applications, those are core applications of RICO, as unambiguously reflected by its text and structure. But under the antecedent-personal-injury bar, § 1964(c)'s *implicit* exclusion of personal injuries would trump those core applications of RICO even as to expressly covered injuries to business or property. The negative-implication canon "must be applied with great caution, since its application depends so much on context," Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012), and the context underlying § 1964(c) is, if nothing else, Congress's clear goal to thwart ruthless thugs whose violence exerts influence over legitimate business.[7] The

[7] RICO's legislative history reflects that understanding. RICO was passed as part of Title IX to the Organized Crime Control Act, whose purpose was to eliminate "the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." *See* S. Rep. No. 91-617, at 76. To some, § 1964(c) was central to attaining that end. *See* House Hearings on S. 30 and Related Proposals, Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong. 520 (1970) (statement of Hon. Sam Steiger) ("Title IX's civil provisions promise to be far more effective than any existing authority as a means of protecting legitimate businessmen from the ruthless and oppressive methods used by organized crime in its business dealings, and as a means of guarding the American principle of free competition in the market place."). It would thus be anomalous to deny civil plaintiffs access to RICO's remedies simply because their business or property losses flow from violent and ruthless criminal activity inflicted upon their persons.

antecedent-personal-injury bar would ignore that context by precluding recovery, not only where recovery is sought for pain and suffering or payment of medical bills resulting from personal injuries, but also for injuries to a victim's business or property whenever a personal injury is a necessary precursor.

Why, then, would Congress focus the nature of the harm specifically on "business or property," thereby implicitly excluding recovery for personal injury? The legislative history does not offer an answer. *See* Patrick Wackerly, *Personal Versus Property Harm and Civil RICO Standing*, 73 U. Chi. L. Rev. 1513, 1522-25 (2006) (examining records from the House of Representatives and the Senate, and concluding that "the legislative history of civil RICO from both chambers is largely silent regarding the purpose of § 1964(c)"). It could be that Congress simply adopted what it considered to be an effective civil-action provision in § 4 of the Clayton Act. *See Holmes*, 503 U.S. at 267. Alternatively, Congress may have "chose[n] to address [harm to business or property] in order to focus upon the harm racketeering does to interstate commerce." *Diaz*, 420 F.3d at 906 (Kleinfeld, *J.*, concurring).

That the rationale for excluding personal injury damages from liability under civil RICO may be mysterious does not matter in light of § 1964(c)'s text, which clearly limits liability to injuries to "business or property." There is thus no basis for a civil RICO claim for physical or emotional suffering that results from an injury to a victim's person. But, conversely, in the absence of any apparent explanation, there is no basis to extend that implicit exclusion to further exclude recovery for the types of injury that Congress expressly provided. After

all, § 1964(c) contains no language prohibiting "personal injury actions," which could be construed to preclude recovery of any damages that might typically be sought in such an action. Rather, the exclusion of liability for personal injury is a consequence of language that *authorizes* suit for injuries to "business or property," which is reasonably read to exclude claims for such injuries as pain and suffering or loss of consortium, which cannot be characterized as injuries to "business or property." Congress expressly authorized plaintiffs to sue for injuries to "business or property," and business and property are no less injured simply because there is an antecedent personal injury.

Fourth, the desire to deny recovery where there is an antecedent personal injury is partly based on a concern that the Supreme Court has instructed courts to ignore: a concern with "increasing the number of RICO claims" if RICO standing were recognized. *Jackson*, 731 F.3d at 571 (Clay, *J.*, concurring in the judgment). That policy "consequence[], assuming [it is] undesirable, cannot blind us to the statutory language." *Diaz*, 420 F.3d at 901. To the contrary, the Supreme Court has expressly cautioned lower courts not to use that concern to impose "additional, amorphous" RICO standing requirements even when a court might reasonably anticipate that civil plaintiffs will "misuse" RICO. *Sedima*, 473 U.S. at 481, 495. In *Sedima*, the Supreme Court reversed this Circuit's rule that a plaintiff must show a "racketeering injury" to have RICO standing. *Id.* at 495, 499-500. The Supreme Court explained that "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime," and that Congress enacted § 1964(c) to avoid the imposition of "inappropriate and unnecessary

obstacles in the way of . . . a private litigant" suing under RICO. *Id.* at 498 (internal quotation marks omitted; ellipses in original). While an expansive view of RICO might allow private litigants to use RICO in ways not previously anticipated (such as a "tool for everyday fraud cases," even against "respected and legitimate enterprises"), that "defect – if defect it is – is inherent in the statute as written." *Id.* at 499 (internal quotation marks omitted). "[I]ts correction must lie with Congress," not the judiciary. *Id.*

Not only are we bound by the Supreme Court's instruction in *Sedima*, but that instruction seems especially appropriate here. For one, there is no "misuse" of RICO when a victim sues a criminal enterprise for violence inflicted upon him that results in injury in his business or property, and thus no reason to be dismayed by the number of claims that might be filed alleging such injury. Such suits, as noted, are core applications of RICO. In this particular case, moreover, Horn does not seek damages for any personal injury, and indeed disclaims having suffered any, beyond what could be construed as an unconsented bodily invasion based on his ingestion of a fraudulently misrepresented product. His only claimed injury is the loss of his employment due to the detection of an illegal substance in his body – the very substance that defendants had represented was not present in the product it sold him.

Moreover, the antecedent-personal-injury bar produces a different policy concern, as it would generate arbitrary and inconsistent outcomes. For example, while the antecedent-personal-injury bar would allow a plaintiff to sue "for the fraudulent devaluation of welfare benefits, which do not arise following a personal injury," it would

bar a plaintiff from suing "for the fraudulent devaluation of worker's compensation benefits, solely because the latter do." *Jackson*, 731 F.3d at 580 (Moore, *J.*, dissenting). Likewise, that rule leads to "the anomalous result that one could be liable under RICO for destroying a business if one aimed a bomb at it, but not . . . if one aimed at the business owner" and successfully struck him, thus preventing him from conducting the business. *Diaz*, 420 F.3d at 901-02. It is not appropriate for a federal court to speculate which of two alternative policy consequences (*e.g.*, more unanticipated claims or inconsistent outcomes) would be a greater concern to Congress.

Finally, we should note that, under our approach, the phrase "business or property" is not boundless but instead "retains restrictive significance." *Reiter*, 442 U.S. at 339. Thus, contrary to the district court's atextual concern, a plaintiff cannot "easily recast damages for personal injury as a financial loss of 'property' in order to invoke civil RICO." *Horn III*, 2021 WL 4173195, at *3. The plaintiff must, instead, suffer an injury to business or property, and not all injuries can be recast to satisfy the definitions of those terms. Quite obviously, a person cannot sue for non-pecuniary injuries like "loss of consortium, loss of guidance, mental anguish, and pain and suffering," *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988), even though those injuries can be (imprecisely) quantified. Moreover, even if a plaintiff has suffered an injury to business or property, the plaintiff must satisfy RICO's proximate-cause standard, which requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. Thus, it is simply wrong to suggest that the antecedent-personal-injury bar is necessary to ensure "genuine limitations" in

§ 1964(c), *Jackson*, 731 F.3d at 563, or to give restrictive significance to Congress's implicit intent "'to exclude some class of injuries by the phrase "business or property"' when it enacted RICO," *id.* at 564, quoting *Reiter*, 442 U.S. at 339.

Accordingly, § 1964(c) does not bar a plaintiff from suing for injuries to business or property simply because those injuries flow from, or are derivative of, an antecedent personal injury. For that reason, the district court erred in granting summary judgment to Appellees on Horn's RICO claim.

CONCLUSION

For the reasons set forth above, we **VACATE** the district court's order granting Appellees' motion for summary judgment, and **REMAND** for further proceedings consistent with this Opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of August two thousand twenty-three,

Before: John M. Walker, Jr.,
Gerard E. Lynch,
Beth Robinson,
Circuit Judges.

Douglas J. Horn,
Plaintiff - Appellant,

Cindy Harp-Horn,
Plaintiff,

v.

Medical Marijuana, Inc., Dixie Holdings, LLC, AKA Dixie Elixirs, Red Dice Holdings, LLC,
Defendants - Appellees,

Dixie Botanicals,
Defendant.

AMENDED JUDGMENT

Docket No. 22-349

The appeal in the above captioned case from a judgment of the United States District Court for the Western District of New York was submitted on the district court's record and the parties' briefs. Upon

consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the district court's order granting Appellees' motion for summary judgment is VACATED, and the cause is REMANDED for further proceedings consistent with this Court's opinion.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

[SEAL]

APPENDIX C

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

DOUGLAS J. HORN, ET AL v. MEDICAL MARIJUANA, INC., ET AL	**INTERIM JUDGMENT IN A CIVIL CASE** CASE NUMBER: 15-CV-701

□ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Upon Court Order, the Court grants in part and denies in part Defendants' motion (docket #194, 200). The civil RICO claim is dismissed pursuant to the Court's authority under Rule 56(f), but Defendants' motion is otherwise denied.

Date: January 25, 2022

MARY C. LOEWENGUTH
CLERK OF COURT

By: s/ Colin J.
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DOUGLAS J. HORN,
et al.,

Plaintiffs,

v.

MEDICAL
MARIJUANA, INC.,
et al.,

Defendants.

Decision and Order

15-CV-701-JWF

PRELIMINARY STATEMENT

On July 22, 2021 – four days before trial – defendant Dixie Holdings, LLC filed a motion in which it identified potentially dispositive defects with plaintiff Douglas J. Horn's two remaining claims: (1) a civil RICO claim premised on mail and wire fraud, and (2) a state-law claim for fraudulent inducement. See Docket # 194. The trial was cancelled. After motion practice, the Court dismissed plaintiff's civil RICO claim. See Horn v. Medical Marijuana, Inc., No. 15-CV-701, 2021 WL 4173195 (W.D.N.Y. Sept. 14, 2021) [hereinafter Horn II]. Trial on the fraud claim was rescheduled to January 2022, but on November 19, 2021, plaintiff moved for entry of judgment on his civil RICO claim, pursuant to Federal Rule of Civil Procedure 54(b), with the intent to immediately appeal the Court's ruling. Docket # 208. Defendants do not oppose Plaintiff's motion. Docket # 213 at 5-6; Docket # 214 at 1 n.1. Because of the unusual procedural history of this case, the discreteness of the issue to be appealed, and

plaintiff's unique circumstances, the Court GRANTS plaintiff's motion.

DISCUSSION

Rule 54(b) provides:

> When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b) (emphasis added). The Rule creates "an exception to the general principle that a final judgment is proper only after the rights and liabilities of all the parties to the action have been adjudicated." Hogan v. Consol. Rail Corp., 961 F.2d 1021, 1024-25 (2d Cir. 1992). "The determination of whether to grant Rule 54(b) certification is committed to the discretion of the district court." Id. at 1025. While "sound judicial administration does not require that Rule 54(b) requests be granted routinely," the "task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of the case." Id. at 10, 12.

"Rule 54 (b) authorizes a district court to enter partial

final judgment when three requirements have been satisfied: (1) there are multiple claims or parties, (2) at least one claim or the rights and liabilities of at least one party has been finally determined, and (3) the court makes an express determination that there is no just reason for delay of entry of final judgment as to fewer than all of the claims or parties involved in the action." Linde v. Arab Bank, PLC, 882 F.3d 314, 322-23 (2d Cir. 2018) (internal quotation marks and brackets omitted). The first two requirements are met here. See Estate of Metzermacher v. Nat'l R.R. Passenger Corp., 487 F. Supp. 2d 24, 27 (D. Conn. 2007) (dismissed claims were "finally determined" for purposes of Rule 54 (b)).

The Court therefore will focus on the third requirement. "[I]n deciding whether there are no just reasons to delay the appeal of individual final judgments in [a] setting such as this, a district court [is to] take into account judicial administrative interests as well as the equities involved." Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 8 (1980); see also Novick v. AXA Network, LLC, 642 F.3d 304, 310-11 (2d Cir. 2011). Both factors favor the entry of partial final judgment as to the civil RICO claim premised on mail and wire fraud.

On the issue of judicial economy, a court's assessment of "judicial administrative interests" is necessary to "preserve[] the historic federal policy against piecemeal appeals." Novick, 642 F.3d at 310-11 (emphasis omitted). A court should consider "such factors as whether the claims [at issue are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [are] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." Curtiss-Wright, 446

U.S. at 8. That is, "a Rule 54(b) certification of the dismissal of fewer than all the claims in an action should not be granted if the same or closely related issues remain to be litigated." Harriscom Svenska AB v. Harris Corp., 947 F.2d 627, 629 (2d Cir. 1991) (internal quotation marks omitted).

The claim to be certified here is "separable or extricable" from plaintiff's surviving fraud claim and the other claims that have previously been dismissed. Ginett v. Comput. Task Grp., Inc., 962 F. 2d l085, 1096 (2d Cir. 1992) (internal quotation marks omitted). To be sure, all of plaintiff's claims "stem from essentially the same factual allegations," Cullen v. Margiotta, 618 F. 2d 226, 228 (2d Cir. 1980), but that fact alone is not dispositive. See Ginett, 962 F. 2d at 1095 ("[I]nterrelatedness cannot, in itself, 'inextricably intertwine' the claims so as to preclude appellate review; otherwise, . . . every multiclaim case[] would elude the entry of a rule 54(b) judgment, and rule 54(b) would be meaningless.") "Only those claims 'inherently inseparable' from or 'inextricably interrelated' to each other are inappropriate for rule 54(b) certification." Id.

Here, plaintiff seeks to appeal a narrow, dispositive issue with respect to his civil RICO claim premised on mail and wire fraud: whether his "requested 'loss of earnings' damages are [] recoverable in a civil RICO action," where the lost earnings are "predicated on the bodily invasion [he] allegedly sustained when THC was introduced into his system through the ingestion of Dixie X." Horn II, 2021 WL 4173195, at *2. In other words, the dispute is whether plaintiff's theory for damages is legally cognizable in a civil RICO cause of action. That is a discrete question of statutory interpretation, and neither

the previously dismissed claims nor the remaining fraud claim implicate that question in a way that would create a risk that the Second Circuit would be "forced to review identical legal issues in multiple appeals."[1] Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 154 (E.D.N.Y. 1999).

Likewise, there is little risk that successive appellate panels would need to retread the same factual ground. See id.; see also Arlinghaus v. Ritenour, 543 F.2d 461, 464 (2d Cir. 1976) (certification inappropriate where appellate court would be required to "review the same conduct twice"). In this respect, the present circumstances are unusual. Even in cases where the requested immediate appeal presents a discrete legal question, Rule 54(b) certification may be properly denied on the basis that a "fulsome review" of the legal issue requires consideration of the same underlying factual record relevant to the remaining claims. In re Trilegiant Corp., No. 12-CV-396, 2015 WL 13901228, at *5 (D. Conn. Mar. 26, 2015); see, e.g., Novick, 642 F.3d at 313-14; Uni-Rty Corp. v. Guangdong Bldg., Inc., 249 F.R.D. 149, 152 (S.D.N.Y. 2008) (certification of civil RICO claims inappropriate where successive appellate panels would need to "familiarize themselves with th[e] complicated factual

[1] To the contrary, resolution of this issue through Rule 54(b) certification could have the effect of significantly shrinking any subsequent appeal. If the Second Circuit were to affirm the Court's ruling, plaintiff's other, previously dismissed RICO claims would likely fail for the same reason, and it would therefore be unnecessary to address the separate legal grounds on which District Judge Geraci relied to dismiss them. See generally Horn v. Med. Marijuana, Inc., 383 F. Supp. 3d 114 (W.D.N.Y. 2019), modified on reconsideration, 2019 WL 11287650 [Nov. 22, 2019).

history" of the case in order to address issue of proximate causation).

By contrast, an assessment of the civil RICO claim which plaintiff seeks to appeal would demand little analysis of the underlying facts. The parties agree that it is simply a question of whether, assuming he has sufficient facts to prove his theory, plaintiff's requested "loss of earnings" damages are legally recoverable via a civil RICO action.[2] Horn II, 2021 WL 4173195, at *3 (quoting plaintiff's brief at Docket # 198 at 7). The underlying factual record is largely irrelevant, as this Court's Decision & Order on the issue demonstrates. See id. at *2-5. In addition, pretrial resolution of the RICO issue via Rule 54(b) certification will impact the length of the trial, the proof at trial, the arguments of counsel, and the instructions given to the jury at the close of the case, further serving the interest of judicial economy.

Therefore, because "[t]he issue presented here . . . is a discrete and straightforward legal issue which the Court of Appeals can resolve quickly and which will serve the goal of judicial economy," judicial administrative interests do not militate against certification. Roebuck v. Guttman, 678 F. Supp. 68, 70 (S.D.N.Y. 1988).

The equities also favor the immediate entry of judgment. Ordinarily, the most obvious factor weighing

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[2] In his Rule 54(b) motion, plaintiff now accuses the Court of "defining away" his claim by framing his damages in terms of "personal injury/bodily invasion." Docket # 208-1 at 5. While plaintiff is clearly critical of the Court's rationale, the Court does not interpret plaintiff's remarks to mean that he is retracting his prior acknowledgment that the "nexus between the RICO violations" and his "resulting economic damages" is the "harm of the THC that was introduced into [his] system." Docket # 198 at 7.

against an immediate appeal is that it "simply delays trial." Campbell v. Westmoreland Farm, Inc., 403 F.2d 939, 942 (2d Cir. 1968). That concern is not so salient here. This case has been ready for trial since December 2019. Docket # 125. With the COVID-19 pandemic, scheduling conflicts among counsel, and intervening motion practice, trial was delayed to January 2022. On December 2, 2021, the Court held a status conference and indicated that it intended to grant plaintiff's Rule 54(b) motion. See Docket # 216. At the time of the status conference, it was far from clear that the trial could even proceed on schedule: as the Court previously informed the parties, there were other trials scheduled for the same timeframe that could have taken priority over this case, and, unfortunately, COVID transmission had been extremely high in Western New York in the preceding weeks.[3] Cf. Vaad L'Hafotzas Sichos, Inc. v. Kehot Pub'n Soc'y, No. 10-CV-4976, 2014 WL 1026592, at *2 (E.D.N.Y. Mar. 20, 2014) (denying certification where the court was confident it could try the case "and render a final, appealable judgment in less time than it would take to pursue an immediate appeal to completion"). The potential for further delay due to the pandemic and possible scheduling conflicts, and the parties' agreement that an immediate appeal is appropriate, diminish the Court's otherwise strong intent to give the parties their day in court. Cf. Gidatex, S.r.L. v. Campaniello Imps., Ltd., 73 F. Supp. 2d 345, 348 (S.D.N.Y. 1999) (finding that equities did not favor certification where nonmoving party "vigorously

[3] Indeed, the highly transmissible Omicron variant has since emerged, which may have necessitated an adjournment of trial regardless of the merits of the Rule 54(b) motion. In-person court appearances, including jury trials, have been significantly reduced in 2022.

oppose[d] postponement of the trial date").

More importantly, the potential for "hardship or injustice," Harriscom, 947 F.2d at 629, and the interest of "fairness to the parties," New York v. AMRO Realty Corp., 936 F.2d 1420, 1426 (2d Cir. 1991), weigh heavily in favor of certification. The claim plaintiff seeks to immediately appeal was dismissed days before trial and resulted in the cancellation of trial. Plaintiff, a cross-country truck driver by trade, was thereby forced to incur "a substantial loss of money and time" due to the sunk costs of travel and trial preparation. Docket # 198 at 6 n.2; see also Docket # 208-1 at 10-11. The unique financial and personal hardships that plaintiff has already faced, and may face again if the Court's ruling on the RICO claim is reversed, render the risk of duplicative trials more unfair and harsh than in the mine run of cases. See In re Gentiva Secs. Litig., 2 F. Supp. 3d 384, 390 (E.D.N.Y. 2014) ("The mere potential for duplicative trials should not by itself result in 54(b) certification, except in the infrequent harsh case." (internal quotation marks omitted and emphasis added)); Bowne of New York City, Inc. v. AmBase Corp., 161 F.R.D. 270, 273 (S.D.N.Y. 1995) (in deciding whether partial final judgment is appropriate, a court "can take into account whether delay would cause financial hardship to either party"). Plus, as defendants point out, definitive appellate resolution of plaintiff's civil RICO claim could dramatically alter the potential damages, see 18 U.S.C. § 1964(c), and may therefore help to facilitate settlement of this matter. See Docket # 213 at 9; see also Curtiss-Wright, 446 U.S. at 8 n.2; Polycast Tech. Corp. v. Uniroyal, Inc., 792 F. Supp, 244, 278 (S.D.N.Y. 1992) ("Whether or not trebled damages are available to plaintiffs if they prevail on the merits is a

question of considerable importance to all parties. An appellate ruling on the issue in advance of trial may enhance settlement negotiations.").

For these reasons, the Court concludes that there is "no just reason[] to delay the appeal." Curtiss-Wright Corp., 446 U.S. at 8. In reaching this conclusion, the Court is mindful that Judge Geraci previously denied a Rule 54(b) motion filed by plaintiff with respect to the claims dismissed at summary judgment. See Horn v. Med. Marijuana, Inc., No. 15-CV-701, 2019 WL 4871499 (W.D.N.Y. Oct. 3, 2019). However, the certification request that Judge Geraci considered – entry of partial final judgment as to all of Cindy Harp-Horn's claims as well as Douglas Horn's claims under Sections 349 and 350 of New York General Business Law – stands in stark contrast to the narrow request before this Court. Given the number of claims and issues, the prior request presented a greater likelihood of duplicative effort in successive appeals. Id. at *1. Furthermore, intervening developments, including the pandemic and the unnecessary expenses and hardships plaintiff has already borne, give rise to "countervailing equities" that did not exist before Judge Geraci. Id. at *2.

As a matter of law, I determined that plaintiff's primary cause of action, his civil RICO claim, is not cognizable. Both parties agree that an immediate appeal of this determination is appropriate and justified. Based on the unique posture of this case, I concur. If my determination as to the viability of plaintiff's RICO claim was erroneous, absent Rule 54(b) relief, this case would have to be tried again with the RICO cause of action reinstated, an event that would be inefficient and costly. Accordingly, the Court concludes that entry of a partial

final judgment pursuant to Rule 54 (b) is appropriate with respect to plaintiff's civil RICO claim predicated on mail and wire fraud.

CONCLUSION

For the reasons stated above, the Court GRANTS plaintiff Douglas J. Horn's Rule 54(b) motion (Docket # 208). The Clerk of Court is directed to enter partial final judgment on Douglas J. Horn's civil RICO claim predicated on mail and wire fraud, which the Court dismissed in its September 14, 2021 Decision & Order. See Docket #206.

SO ORDERED.

Jonathan W. Feldman
JONATHAN W. FELDMAN
UNITED STATES
MAGISTRATE JUDGE

Dated: Rochester, New York
January 20, 2022

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DOUGLAS J. HORN,
et al.,

Plaintiffs,

v.

MEDICAL
MARIJUANA, INC.,
et al.,

Defendants.

Decision and Order

15-CV-701-JWF

PRELIMINARY STATEMENT

On July 22, 2021, defendant Dixie Holdings, LLC ("Dixie LLC") filed a motion *in limine* to preclude the testimony of Mark P. Zaporowski, Ph.D., plaintiff's expert economist. Docket # 194. While styled as a motion *in limine*, in truth Dixie LLC's motion is of a dispositive nature: it contends that the kinds of damages that plaintiff seeks to recover are not recoverable through either of his remaining claims. Defendants Medical Marijuana, Inc. and Red Dice Holdings, LLC join in the motion. Docket # 200. Plaintiff opposes the motion. Docket # 198.

On August 3, 2021, the Court informed the parties that it intended to dismiss plaintiff's civil RICO claim (with a written Decision and Order to follow) and requested the parties brief the issue of the Court's subject matter jurisdiction over the state-law fraud claim. Docket ## 203-05.

Having reviewed all the briefing submitted, and for

the reasons set forth below, the Court concludes that plaintiff's civil RICO claim must be dismissed as a matter of law, that plaintiff's fraud claim is viable insofar as plaintiff seeks to recover lost earnings, and that the Court retains subject matter jurisdiction over the fraud claim. Accordingly, defendants' motion is GRANTED IN PART and DENIED IN PART.

DISCUSSION

Prior to the scheduled jury trial, plaintiff had two remaining causes of action: a civil RICO claim and a state-law fraudulent inducement claim.[1] In both claims plaintiff sought to recover damages for the losses he incurred when his employment as a truck driver was terminated, including "past and future lost compensation, lost health benefits, lost retirement savings and difference in work effort mileage driven." Docket # 179 at 2. To support his damages calculations, plaintiff intended to proffer at trial the testimony of Dr. Zaporowski, who calculated the value of plaintiff's total economic damages. Id. Defendants contend that plaintiff cannot recover these kinds of "loss of earnings" damages in connection with either a civil RICO or state-law fraud claim. As will be discussed below, defendants are correct with respect to the former claim, but not the latter.

Delay and Prejudice to Plaintiff: Before discussing the merits, the Court will address plaintiff's arguments on the timing of Dixie LLC's motion. See Docket ## 197, 198. As the Court stated on the record at the prior conferences on this motion, the timing of the motion and

[1] Plaintiff had other claims that were previously addressed and dismissed by Judge Geraci. See Horn v. Medical Marijuana, Inc., 383 F. Supp, 3d 114 (W.D.N.Y. 2019).

the prejudice to plaintiff resulting therefrom is both concerning and unfortunate. However, the Court has already concluded that the Dixie LLC's delay in raising these potentially dispositive issues was not attributable to bad faith. Furthermore, once raised, the Court could not avoid deciding the issue. If defendants were correct on the damage issue, it would have made little sense to proceed to trial, as the Court would be required to instruct the jury on the law as to recoverable damages. If plaintiff cannot, as a matter of law, recover the type of damages he seeks, the trial would have essentially been a pointless exercise in futility. Deciding the issue now, however late it has been raised, still ensures that the parties, the Court and the jurors do not spend time or energy on claims for which plaintiff cannot recover the damages he seeks. While the Court acknowledges the costs plaintiff has incurred due to the delay of trial, judicial economy and fairness to the parties require resolution of the damage issues prior to the commencement of trial.

Plaintiff also makes two threshold arguments that merit only brief comment. First, plaintiff cites Dixie LLC's eleventh affirmative defense in its answer to argue that Dixie LLC has long known about this issue. See Docket # 9 at 11; Docket # 198 at 6. The eleventh affirmative defense is that plaintiff's injuries "do not arise out of any [RICO] predicate acts" and that plaintiff "is therefore without standing." Docket # 9 at 11. That issue is different than the one Dixie LLC now raises – that plaintiff's damages are not recoverable as injuries to "business or property" under the RICO statute. Second, plaintiff claims that Judge Geraci decided this issue at summary judgment, which is incorrect. See generally Horn v. Medical Marijuana, Inc., 383 F. Supp. 3d 114

(W.D.N.Y. 2019). Accordingly, the Court turns to the merits of the pending motion.

Cognizable Damages in Civil RICO claims: Defendants argue that plaintiff's requested "loss of earnings" damages are not recoverable in a civil RICO action because they are predicated on the bodily invasion plaintiff allegedly sustained when THC was introduced into his system through the ingestion of Dixie X. The Court agrees.

RICO establishes a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). Defendants' argument implicates the first clause in this provision: that one must be injured "in his business or property" in order to recover under Section 1964 (c).

This statutory language has a long history. Congress modeled Section 1964(c) and its private right of action on the "the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act," Holmes v. Secs. Inv'r Protection Corp., 503 U.S. 258, 267 (1992), which provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . . " 15 U.S.C. 15(a) (emphasis added). In the context of the Clayton Act, the Supreme Court has held that the "business or property" clause encompasses harm to "commercial interests or enterprises," Hawaii v. Standard Oil Co. of California, 405 U.S. 251, 264 (1972), but not "personal injuries suffered." Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Compare id. ("[A] consumer . . . acquiring goods or services for personal use [] is injured in 'property' when the price of those goods or services is

artificially inflated by reason of the anticompetitive conduct complained of."), with Chadda v. Burcke, 180 F. App'x 370, 371-72 (3d Cir. 2006) (summary order) (consumer's injuries suffered from use of a cosmetic "at most" asserted a "personal injury" that did not support an antitrust claim).

In interpreting and applying Section 1964(c), courts have taken the same approach. "[A] plaintiff only has standing [under civil RICO] if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation."[2] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) (emphasis added). An injury to "business or property" under Section 1964(c) contemplates "a proprietary type of damage" or "economic injury." Bascufian v. Elsaca, 874 F.3d 806, 817 (2d Cir. 2017). As a simple example, "a person physically injured in a fire whose origin was arson is not given a right to recover for his personal injuries; damage to his business or his building is the type of injury

[2] Although the issue is sometimes framed as one of "standing," as in Sedima, the Court notes that this label is "misleading." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 128 n.4 (2014). The Supreme Court has made clear that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.,* the court's statutory or constitutional power to adjudicate the case." Id.; see also Am. Psychiatric Ass'n v. Anthem Health Plans, Inc., 821 F.3d 352, 359 (2d Cir. 2016) ("[W]hat has been called 'statutory standing' in fact is not a standing issue, but simply a question of whether the particular plaintiff has a cause of action under the statute." (internal quotation marks omitted)); Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 887 (10th Cir. 2017) ("[W]hat we once called 'RICO standing' or 'statutory standing' we now properly characterize as the usual pleading-stage inquiry: whether the plaintiff has plausibly pled a cause of action under RICO.").

for which§ 1964(c) permits suit." Bankers Trust Co. v. Rhoades, 741 F.2d 511, 515 (2d Cir. 1984), vacated on other grounds, 473 U.S. 922 (1985)

The limitation is perhaps easier to state than to apply. A fundamental difficulty is that money "is a form of property," Reiter, 442 U.S. at 338, and "[m]ost personal injuries" will entail "some pecuniary consequences," including "loss of earnings, loss of consortium, loss of guidance, mental anguish, and pain and suffering." Doe v. Roe, 958 F.2d 763, 770 (7th Cir. 1992). A litigant could easily recast damages for personal injury as a financial loss of "property" in order to invoke civil RICO. See, e.g., id. (noting that, theoretically, one could view the "economic aspects of [a personal injury]" as "injuries to 'business or property'"); Grogan v. Platt, 835 F.2d 844, 846 (11th Cir. 1988) (discussing plaintiffs' argument that "persons who are killed or injured by RICO predicate acts suffer real economic consequences as a result"). As a result, in deciding whether an injury is "to business or property" – and thus recoverable under civil RICO – or is personal – and thus not recoverable – courts do not look solely at whether there is a "financial loss." Doe, 958 F.3d at 770. Instead, they ask whether the plaintiff seeks to recover for a loss that flows from, or is derivative of, a personal injury. If it does, then it is not recoverable under civil RICO. See Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 565-66 (6th Cir. 2013) ("[B]oth personal injuries and pecuniary losses flowing from those personal injuries fail to confer relief under § 1964(c)."); Grogan, 835 F.2d at 848 (holding that plaintiffs "cannot recover under RICO for those pecuniary losses that are most properly understood as part of a personal injury claim").

In recognition of this distinction, courts have held that lost earnings or wages are not recoverable if they flow from a personal injury. See Evans v. City of Chicago, 434 F.3d 916, 926-27 (7th Cir. 2006) ("The loss of income as a result of being unable to pursue employment opportunities while allegedly falsely imprisoned . . . are quintessentially pecuniary losses derivative of personal injuries arising under tort law."), overruled on other grounds, Hill v. Tangherlini, 724 F.3d 965 (7th Cir. 2013); Jackson, 731 F.3d at 565. Here, plaintiff does not allege that defendants engaged in a fraudulent scheme that directly caused his loss of employment. To the contrary, plaintiff acknowledges that "[t]he nexus between the RICO violations . . . and [plaintiff's] resulting economic damages . . . is the harm of the THC that was introduced into [his] system by Defendants' product." Docket # 198 at 7 (emphasis added). In other words, what connects defendants' fraudulent scheme to plaintiff's loss of employment and earnings is a personal injury; the bodily invasion that plaintiff suffered when he unwittingly ingested THC. Cf. Doe v. Brown Univ., 304 F. Supp. 3d 252, 265 (D.R.I. 2018) (plaintiff sufficiently alleged tort of battery, where she claimed defendant "spiked" her drink, which caused her "harmful mental and physical effects"). Unfortunately for plaintiff, he may not recover lost earnings arising from that sort of personal injury in connection with a civil RICO claim. Accord Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 241 (2d Cir. 1999) (noting that smokers cannot assert RICO claims for fraudulent cigarette marketing "because the RICO statute requires an injury to 'business of property'"); Genty v. Resolution Trust Corp., 937 F.2d 899, 918-19 (3d Cir. 1991) ("RICO plaintiffs may recover damages for harm to business and property only, not

physical and emotional injuries due to harmful exposure to toxic waste."); Aston v. Johnson & Johnson, 248 F. Supp. 3d 43, 49-50 (D.D.C. 2017) (loss of earnings in connection with pharmaceutical drug); Zimmerman v. Poly Prep Country Day Sch., 888 F. Supp. 2d 317, 329-30 (E.D.N.Y. 2012) (plaintiffs could not recover lost wages and out-of-pocket expenses caused by sexual abuse); Bougopoulos v. Altria Grp., Inc., 954 F. Supp. 2d 54, 66 (D.N.H. 2013) ("lost income" due to plaintiff's inability to work from smoking); Gotlin v. Lederman, 367 F. Supp. 2d 349, 357 (E.D.N.Y. 2005) (where plaintiffs alleged that defendants fraudulently misrepresented quality of cancer treatment, dismissing civil RICO claim and noting that "allegations of a financial loss incidental to a personal injury such as loss of earnings or pain and suffering are not considered injury to property or business"), aff'd, 483 F. App'x 583 (2d Cir. 2012) (summary order); Gause v. Philip Morris, No. 99-CV-6226, 2000 WL 34016343, at *4 (E.D.N.Y. Aug. 8, 2000) (where plaintiff alleged tobacco companies fraudulently marketed cigarettes and thereby caused her to smoke and develop emphysema, she could not recover lost income under civil RICO on the theory that she was unable to work due to her illness), aff'd, 29 F. App'x 761 (2d Cir. 2002) (summary order).

The cases that plaintiff cites in his opposition memorandum do not persuade the Court otherwise. Indeed, many of those cases demonstrate the distinction that courts draw between business/property injuries and personal injury, as they involve economic harm flowing directly from RICO predicate acts without any intervening personal injury. See Denney v. Deutsche Bank AG, 443 F.3d 253, 260, 265 (2d Cir. 2006) (scheme to market unlawful tax strategies allegedly caused plaintiffs

to, inter alia, pay "excessive fees" for the advice, sustain penalties from the IRS, and incur costs to remediate their tax situations); City of New York v. Fedex Ground Package Sys., Inc., 175 F. Supp. 3d 351, 369-71 (S.D.N.Y. 2016) (delivery service's circumvention of New York cigarette taxes caused state and local governments to lose tax revenue); Kriss v. Bayrock Grp. LLC, No. 10-CV-3959, 2016 WL 7046816, at *19 (S.D.N.Y. Dec. 2, 2016) (real estate organization, which was engaged in fraudulent activities, enticed "real estate finance professionals" to join organization and caused them to pass up "lucrative opportunities" elsewhere); Rodonich v. House Wreckers Union, 627 F. Supp. 176, 180 (S.D.N.Y. 1985) (union unlawfully disciplined union members in scheme to suppress dissent, which caused lost wages).

Plaintiff cites two cases as supporting the view that he may recover lost earnings resulting from his claimed bodily invasion. The Court is not convinced by either. First is Jerry Kubecka, Inc. v. Avellino, 898 F. Supp. 963 (E.D.N.Y. 1995). In Kubecka, it was alleged that the defendants murdered two executives in connection with a dispute over garbage disposal contracts in Long Island. Kubecka, 898 F. Supp. at 966. The plaintiffs included two corporations that alleged they were "injured in their business or property . . . [when] their executives were murdered and thereby removed as executives." Id. at 969. The court agreed, apparently accepting that the murders interfered with the corporations' operations in such a way as to constitute an injury to "business or property" under RICO. Id. Whatever the soundness of that rationale with respect to corporate losses, it does not support the proposition that an individual who loses his job due to personal injury caused by RICO predicate acts may

maintain a RICO claim.

The second case is Blue Cross Blue Shield of New Jersey, Inc, v. Philip Morris, Inc., 36 F. Supp. 2d 560 (E.D.N.Y. 1999). There, medical insurers sued tobacco companies to recover "economic damages they incurred in the medical treatment of diseases caused by tobacco use." Blue Cross, 36 F. Supp. 2d at 565. They claimed tobacco companies had fraudulently misrepresented the health consequences of smoking and brought RICO claims premised on, among other things, mail and wire fraud. Id. at 565-66. The court held that the insurers' medical expenditures constituted a loss to business or property and that "[a]ny personal injuries to smokers . . . caused by [tobacco companies'] alleged racketeering are separate and distinct from the [insurers'] economic injuries suffered by their businesses." Id. at 569-71.

Blue Cross is unpersuasive. As a general matter, the reasoning in Blue Cross is inconsistent with the history, logic, and interpretation of the "business or property" clause that the Court has described above. For that reason, the decision "has been criticized by numerous courts" and has been acknowledged to "rest[] on tenuous legal footing." Magnum v. Archdiocese of Philadelphia, No. 06-CV-2589, 2006 WL 3359642, at *4 n.6 (E.D. Pa. Nov. 17, 2006). Regardless, even if the Court were to accept the distinction that Blue Cross drew between insurers and insureds, that distinction does not help plaintiff: he is not attempting to recover economic damages that are "separate and distinct" from the bodily invasion he suffered from unwittingly consuming THC. As plaintiff himself admitted, his "economic damages" resulted from "the harm of the THC that was introduced into [his] system by Defendants' product." Docket # 198

at 7; accord Zimmerman, 888 F. Supp. 2d at 330 (distinguishing Blue Cross on the basis that "Plaintiffs' alleged lost wages and out-of-pocket expenses are, in their own wards, closely associated with the personal injuries they incurred as a result of Defendants' misconduct" (internal quotation marks omitted)).

In sum, because plaintiff's loss of earnings flows from, and is derivative of, a personal injury he suffered, his lost earnings do not constitute an injury "to business or property" that is recoverable in a civil RICO action. And because plaintiff does not seek to recover any other damages, his RICO claim fails as a matter of law and must be dismissed. See Fed. R. Civ. P. 56(f).

Plaintiff's Fraud Claim: Noting that New York only permits recovery for "out-of-pocket" losses in a fraud action, defendants next assert that a fraud plaintiff is categorically prohibited from recovering lost earnings. Docket # 194 at 4-6. The Court disagrees.

In New York, if a plaintiff can prove the elements of a claim for fraud, he is entitled to recover "any proximately caused damages." Carbon Capital Mgmt., LLC v. Am. Express Co., 932 N.Y.S.2d 488, 494 (2d Dep't 2011); see also Williams v. Goldberg, 109 N.Y.S. 15, 16 (App. Term. 1908) ("All manner of fraud is abhorrent to the law, and if one person sustains injury through the fraud of another he will be afforded a proper remedy."); Goldberg v. Mallinckrodt, Inc., 792 F.2d 305, 307 (2d Cir. 1986) ("Under New York law, damages for fraud must be the direct, immediate, and proximate result of the fraudulent misrepresentation."); 60A N.Y.Jur.2d Fraud and Deceit § 190 ("The injured party is entitled to recover in a tort action for deceit only such damages as result directly, necessarily, and proximately from the fraud." (footnotes

omitted)). What damages are recoverable in a given case will necessarily depend on the nature of the fraud and of the resulting injuries. Hotaling v. A.B. Leach & Co., 247 N.Y. 84, 88 (1928) ("Varying circumstances must logically require variation in the application of th[e] measure of damages.").

Where the fraud occurs in the context of a business transaction, the measure of damages will ordinarily be "the difference between the amount paid and the value of the article received." Hotaling, 247 N.Y. at 87-88. Where the fraud proximately causes other consequential expenses, such damages may also be recovered. See Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 423 (1996) (noting that consequential damages are recoverable in fraud action so long as they "naturally flow[]" from the fraud); see, e.g., Idrees v. Am. Univ. of the Caribbean, 546 F. Supp. 1342, 1350 (S.D.N.Y. 1982) (student fraudulently induced to enroll in medical school could recover "tuition, inscription fee, application fee and round-trip air fare between New York and [the school]"); Orbit Holding Corp. v. Anthony Hotel Corp., 503 N.Y.S.2d 780, 783 (1st Dep't 1986) (where seller of property fraudulently concealed lease, purchaser could recover for costs of settling dispossess proceeding with tenant); Cayuga Harvester, Inc. v. Allis-Chalmers Corp., 465 N.Y.S.2d 606, 619 (4th Dep't 1983) (fraud plaintiff could recover damages for lost crops that resulted from the purchase of defective machine).

Finally — and more relevant here — New York courts have long permitted a fraud plaintiff to recover damages for personal injury proximately caused by fraud. See Kuelling v, Roderick Lean Mfg. Co., 183 N.Y. 78, 89 (1905) (collecting cases and holding that "one who sells an article,

knowing it to be dangerous by reason of concealed defects . . . is liable in damages to any person . . . who suffers an injury by reason of his willful and fraudulent deceit and concealment."); Tulloch v. Haselo, 218 N.Y.S. 139, 141 (3d Dep't 1926) ("[A] cause of action for deceit may arise where, as the result of false representation, the damage results in personal injuries."); see, e.g., Simcuski v. Saeli, 44 N.Y.2d 442, 451-53 (1978) (where medical provider fraudulently advised patient about treatment, patient could recover damages for the "depriv[ation] of the opportunity for [a] cure"); Kuelling, 183 N.Y. at 88-89 (fraudulent concealment of defect in agricultural implement, which caused plaintiff "severe injuries," gave rise to fraud claim and recovery of proximately caused damages); Williams, 109 N.Y.S. at 16 (tenant could recover damages in fraud action for physical injuries incurred when ceiling collapsed on her, where defendant's agent fraudulently misrepresented ceiling's condition); Tulloch, 218 N.Y.S. at 142 (positing that if a person misrepresented the safety of a gun and a recipient were injured "by reason of the defects in the gun," a "cause of action for common-law deceit would arise in his favor"); Young v. Robertshaw Controls Co., 481 N.Y.S.2d 891, 893-94 (3d Dep't 1984) (finding that plaintiff stated viable fraud claim, where she alleged that fraudulent concealment of defective control valve caused the explosion of a water heater and the death of her husband, and where she sought compensatory damages for husband's "conscious pain and suffering and wrongful death"); see also City of New York v. Lead Indus. Ass'n, 597 N.Y.S.2d 698, 700 (1st Dep't 1993) ("Misrepresentations of safety to the public at large, for the purpose of influencing the marketing of a product known to be defective, gives rise to a separate cause of action for fraud.").

The position of New York courts on the scope of recoverable damages in a fraud action mirrors in large part that of the Restatement (Second) of Torts:

> The recipient of a fraudulent misrepresentation is entitled to recover as damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation

Restatement (Second) of Torts § 549(1)(a)-(b) (1977); see also Clearview Concrete Prods. Corp. v. S. Charles Gheradi, Inc., 453 N.Y.S.2d 750, 755 (2d Dep't 1982) (citing Section 549 favorably). In addition to those categories of damages, the Restatement provides that "[o]ne who by a fraudulent misrepresentation . . . causes physical harm to [a] person . . . who justifiably relies upon the misrepresentation[] is subject to liability to the other." Id. § 557A (emphasis added). The "ordinary rules as to legal cause" – i.e., proximate cause – govern claims for fraudulent misrepresentation causing physical harm. Id. § 557A cmt.; see generally id. § 431 (discussing "legal cause").

Plaintiff's fraud claim fits within this overall framework. As defendants acknowledge in their briefing, plaintiff is essentially alleging that he suffered a personal injury as a result of defendants' fraud: he was induced to consume Dixie X by defendants' misrepresentations,

which caused him to suffer a bodily invasion through the ingestion of THC and which, in turn, rendered him ineligible for his employment. See Docket # 194 at 2; Docket # 200 at 7-9, 15; Docket # 201 at 7. Defendants also acknowledge that the damages plaintiff seeks are intended to compensate for the losses he incurred because of his personal injury. See Docket # 194 at 4; Docket # 200 at 7-9, 12; Docket # 201 at 7. Plaintiff's theory is, at its core, a fairly conventional one. A plaintiff claims he was injured by a product that he was induced to purchase by allegedly fraudulent marketing practices, and he seeks to recover for the earnings he lost because of his injury. It would be difficult for defendants to argue that this represents some novel theory of relief, as, again, they repeatedly analogize plaintiff's claim to commonplace toxic-exposure cases. See Docket # 200 at 7, 10-11; Docket # 201 at 7-8.

Thus, the fundamental question is not whether plaintiff's theory of liability or damages fits generally within the framework of a fraud claim – it does – but whether he can establish a sufficiently strong causal connection between defendants' fraud and his claimed injury (i.e., the bodily invasion of THC) and alleged damages (i.e., the loss of wages/benefits from his employment). Proximate causation is an issue of fact for the jury. See Benitez v. N.Y.C. Bd. Of Educ., 73 N.Y.2d 650, 659 (1989); 79 N.Y.Jur.2d Negligence § 58. At trial, the jury will be tasked with deciding whether defendants' fraud was "a substantial factor in bringing about [plaintiff's] injury [and associated damages]," in that the fraud "had such an effect in producing the injury [and associated damages] . . . that reasonable people would regard it as a cause of the injury [and associated

damages]." N.Y. Pattern Jury Instructions § 2:70 (discussing in negligence context); see also id. § 2:70 cmt. (noting that "[c]ausation is relevant both to liability and to damages"). Regarding the intervening acts of "independent" actors like plaintiff's former employer, the jury will be tasked with deciding whether "a reasonably prudent person in the defendant[s'] situation" would have "foreseen that an act of the kind committed by [the independent actor) would be a probable result" of their fraud. N.Y. Pattern Jury Instructions § 2:72 (discussing in the negligence context); see also id. cmt. ("Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, connection is not automatically severed.").

To the extent defendants are inviting the Court to decide, as a matter of law, whether plaintiff will be able to sufficiently establish proximate causation at trial, the Court declines to do so. To be sure, "where only one conclusion may be drawn from the established facts[,] the question of legal cause may be decided as a matter of law." Benitez, 73 N.Y.2d at 659 (internal quotation marks and ellipsis omitted). But because proximate causation is a factual issue, it necessarily requires careful examination of the underlying circumstances. The time and place for that analysis is not now. While the Court has permitted defendants to raise a dispositive issue with respect to the civil RICO claim at this late juncture, that is because it represents a purely legal issue that can be resolved on the papers. Analyzing whether proximate causation can be adequately established is a factual issue deserving of fact-finding by a jury. Even now, defendants have not submitted any sort of Rule 56 Statement of Facts or admissible evidence in connection with their motion and

the Court will not embark on its own *sua sponte* analysis of the record to resolve the issue. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

Defendants do raise other purely legal arguments concerning plaintiff's fraud claim, which the Court can dispose of now. First, defendants assert that "loss of earnings" damages are wholly unrecoverable in a fraud claim, allegedly due to New York's "out of pocket" rule. This argument is unconvincing.

New York's "out-of-pocket" rule provides the "standard for measuring" the loss suffered due to fraud. 60A N.Y.Jur.2d Fraud and Deceit § 281. It limits recoverable damages to "the actual pecuniary loss sustained as the direct result of the wrong." Sw. Inv'rs Grp., LLC v. JH Portfolio Debt Equities, LLC, 93 N.Y.S.3d 775, 777 (4th Dep't 2019). "Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained" – as a result, "there can be no recovery of profits which would have been realized in the absence of fraud." Lama Holding Co., 88 N.Y.2d at 421; see also Pine Street Assocs., L.P. v. Hicks, No. 651440-2011, 2012 WL 1946822, at *6 (N.Y. Sup. Ct. May 24, 2012) ("[F]raud damages are not intended to provide a victim with 'benefit of the bargain damages,' and are limited to indemnifying the injured party for the actual losses sustained, that is, 'out-of-pocket' damages."). The rule's rationale "is that the value to the claimant of a hypothetical lost bargain is too undeterminable and

speculative to constitute a cognizable basis for damages." Starr Foundation v. Am. Int'l Grp., Inc., 901 N.Y.S.2d 246, 250 (1st Dep't 2010) (internal quotation marks and citation omitted).

Relying on this rule, New York courts have sometimes held that a fraud plaintiff cannot recover for the "the loss of an alternative bargain overlooked in favor of the fraudulent one." Geary v. Hunton & Williams, 684 N.Y.S.2d 207, 207 (1st Dep't 1999). Thus, lost profits which "would have been realized in the absence of fraud" are not recoverable, Lama Holding Co., 88 N.Y.2d at 421, nor are earnings that might be realized in connection with hypothetical future employment. See, e.g., Mihalakis v. Cabrini Med. Ctr. (CMC), 542 N.Y.S.2d 988, 990 (1st Dep't 1989) (medical student could not recover damages for "future earnings as a doctor" via fraud claim).

But these cases have no application here. Plaintiff is not seeking to obtain hypothetical lost earnings for an unrealized opportunity he could have undertaken absent the fraud; he is asking for damages to compensate for the actual job he already lost. In other words, we are not dealing with a hypothetical alternative bargain, but a realized, demonstrable loss of employment. See Cayuga Harvester, 465 N.Y.S.2d at 619 (stating that a plaintiff may not recover "profits based on the bargain it was fraudulently induced to make," but may recover damages for the "loss sustained because it made the bargain"). As numerous cases demonstrate, fraud claims premised on actual job loss are viable under New York law. See, e.g., Leidl v. Please Hold (UK) Ltd., No. 17-CV-6134, 2018 WL 1089748, at *5 (S.D.N.Y. Feb. 2, 2018) (where plaintiffs were fraudulently induced to quit employment, they were "entitled to any damages they actually suffered in the

form of lost wages" (emphasis added)); Kwon v. Yun, 606 F. Supp. 2d 344, 361 (S.D.N.Y. 2009) (collecting cases for the proposition that "loss of benefits flowing from one's previous employment all are cognizable losses in employment-related fraudulent inducement cases"); Laduzinski v. Alvarez & Marsal Taxand LLC, 16 N.Y.S.3d 229, 232 (1st Dep't 2015) (where plaintiff alleged he was fraudulently induced to quit job and accept new employment, concluding plaintiff had viable fraud claim and damages based on "his loss of employment"); Navaretta v. Grp. Health, 595 N.Y.S.2d 839, 841 (3d Dep't 1993) (plaintiff could recover "for injuries resulting from her reliance on defendant's allegedly false statements," including the "loss of benefits and salary connected with her former employment" (emphasis omitted)).

Of course, there is a separate question of how to calculate the value of lost employment. Because the fraud plaintiff would no longer have the jab, any inquiry into compensation for that loss may entail "hypothetical" questions of what earnings the plaintiff would have made, how long the plaintiff would have worked, etc. But such hypotheticals are not the target of the out-of-pocket rule. The case of Laduzinski v. Alvarez & Marsal Taxand LLC, 16 N.Y.S.3d 229 (1st Dep't 2015) is directly on point. There, a fraud plaintiff claimed he was induced to leave his former employment by the fraudulent misrepresentations of his new employer. Laduzinski, 16 N.Y.S.3d at 230-31. Citing the out-of-pocket rule, the defendants asserted that plaintiff could not recover "alleged loss of wages he claims he would have received from his prior [employer]." Brief for Defendants-Respondents, Laduzinski v. Alvarez & Marshal Taxand LLC, 16 N.Y.S,3d 229 (1st Dep't 2015), 2015 WL 93125741 at *38. The First Department rejected

that argument, holding that plaintiff's damages were not "speculative" and represented "the sum necessary for restoration to the position occupied before the commission of the fraud." Laduzinski, 16 N.Y.S.3d at 232.

The Fourth Department articulated similar reasoning in Cayuga Harvester, where a fraud plaintiff lost a corn crop as a result of a fraudulent misrepresentation related to a defective machine. 465 N.Y.S.2d 606, 618 (4th Dep't 1983). It rejected the defendants' claim that the valuation of the lost crops must exclude any "element of profit." Id. at 619. Rather, the plaintiff was entitled to recover the "profits that [it] would normally receive from [the] corn crop if sold at market value as a return on its investment in labor, seed, fertilizer and other expenses in the crop," since those profits and expenditures "were lost when the corn was destroyed." Id.

The distinction between unrealized future opportunities and actual lost employment makes sense in light of the overriding purpose of damages in the fraud context, which is "to restore a party to the position occupied before commission of the fraud." Alpert v. Shea Gould Climenko Casey, 559 N.Y.S.2d 312, 314 (1st Dep't 1990). A party is entitled to recover not only the difference in value of a fraudulent bargain, but any and all "proximately caused damages." Carbon Capital Mgmt., LLC, 932 N.Y.S.2d at 494; see also Castle Cooke v. Lincoln Mdse. Corp., 477 N.Y.S.2d 390, 390 (2d Dep't 1984) ("Out of Pocket considerations do not . . . prevent recovery of other consequential damages proximately caused by reliance upon the misrepresentation." (internal quotation marks and emphasis omitted)); Kaddo v. King Serv. Inc., 673 N.Y.S.2d 235, 237 (3d Dep't 1998) (distinguishing between "benefit of the bargain" damages, which are not

recoverable in a fraud action, and "consequential damages flowing directly from the wrong," which are). It would be inconsistent with the fraud plaintiff's right to be fully indemnified for his losses to hold that lost earnings associated with actual job loss are never recoverable in a fraud action. Lama Holding Co., 88 N.Y.2d at 423. Plus, it would conflict with those cases that unequivocally permit fraud plaintiffs to recover for personal injuries, which necessarily involve "pecuniary consequences" like "loss of earnings." Doe, 958 F.2d at 770. In short, New York law permits a fraud plaintiff to recover lost earnings resulting from actual job loss. Accordingly, the Court rejects defendants' first argument.

Next, defendants argue that one can only recover lost wages if "[the] alleged tort caused a loss of earning capacity." Docket # 194 at 6.

Much like their prior argument, this argument was addressed by the First Department's decision in Laduzinski. 16 N.Y.S.3d at 232. To reiterate, the Laduzinski plaintiff alleged he was fraudulently induced to quit his employment and accept a new job offer, but he was subsequently fired once his new employer secured his contact list. Id. at 230-31. The plaintiff did not allege any loss of earning capacity but stated that the fraud caused him to leave "his stable and well compensated employment . . . , which brought about a setback in his career." Id. at 231. The court rejected defendants' argument that such damages were unrecoverable and held that the plaintiff could obtain damages to compensate far his lost employment and "restor[e] [him] to the position [he] occupied before the commission of the fraud." Id. at 232. This holding cannot be reconciled with defendants' assertion, and I find the Laduzinski rationale both logical

and persuasive.

Furthermore, the primary case on which defendants rely – Clanton v. Agoglitta, 615 N.Y.S.2d 68 (2d Dep't 1994) – does not stand for the broad proposition defendants ascribe to it. Clanton did not involve a fraud claim, but an automobile negligence action. Clanton, 615 N.Y.S.2d at 68. The issue before the Appellate Division was whether a jury verdict "as to damages for impairment of earning ability" deviated "materially from what would be reasonable compensation" for purposes of N.Y. C.P.L.R. § 5501(c), and the court noted that the "basic rule is that loss of earnings must be established with reasonable certainty" and that the analysis must focus "in part" on the plaintiff's "earning capacity both before and after the accident." Id. at 69. The court did not purport to make any broad holding regarding the availability of loss-of-earnings damages in a fraud action.

In sum, defendants have not persuaded the Court that plaintiff's requested damages are precluded under New York law.[3] Because the Court has rejected defendants' arguments on the fraud claim, there is presently no reason why Dr. Zaporowski should be barred from testifying to the earnings and benefits plaintiff lost when he was terminated from his employment. Whether plaintiff can sufficiently connect those damages to defendants' fraud is an issue for the jury to decide at trial.

Subject Matter Jurisdiction: Because the Court

[3] To the extent defendants are merely arguing that plaintiff failed to mitigate his damages, the Court declines to address that issue. Like the issue of causation, that is a fact-sensitive question that would need to be resolved through a thorough analysis of the record evidence, which cannot be undertaken summarily at this juncture. Defendants may, of course, raise this issue at trial.

informed the parties prior to the issuance of this Decision and Order that it intended to dismiss the civil RICO claim – the only remaining federal cause of action it ordered supplemental briefing concerning the Court's continuing subject matter jurisdiction. The parties have filed their supplemental arguments, Docket ## 203-05, and they confirm to the Court that it continues to have subject matter jurisdiction over this matter.

First, diversity jurisdiction exists, insofar as plaintiff alleged damages exceeding $75,000 in good faith, Docket # 1; Am. Safety Cas. Ins. Co. v. 385 Onderdonk Ave., LLC, 124 F. Supp. 3d 237, 242 (E.D.N.Y. 2015), and the parties appear to agree there is complete diversity. Docket # 203 at 6; Docket # 204 at 2; see generally 28 U.S.C. § 1332. Second, even if it did not exist, the Court would exercise its discretion to retain supplemental jurisdiction over the fraud claim under 28 U.S.C. § 1367. The relevant factors support the exercise of supplemental jurisdiction: this case has been pending for more than five years, it is ready for trial, there are no novel issues of state law, and it would be unfair to the parties to force them to restart the litigation in state court. See generally Catzin v. Thank You & Good Luck Corp., 899 F.3d 77, 86 (2d Cir. 2018).

Accordingly, the Court retains subject matter jurisdiction over this action.

CONCLUSION

For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART defendants' motion (Docket ## 194, 200). The civil RICO claim is dismissed pursuant to the Court's authority under Rule 56(f), but defendants' motion is otherwise denied.

By separate order, the Court will set a status

conference for the purpose of rescheduling the trial.

SO ORDERED.

Jonathan W. Feldman
JONATHAN W. FELDMAN
UNITED STATES
MAGISTRATE JUDGE

Dated: Rochester, New York
September 14, 2021

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DOUGLAS J. HORN, et al.,

Plaintiffs,

v.

MEDICAL MARIJUANA, INC., et al.,

Defendants.

Case # 15-CV-701-FPG

DECISION AND ORDER

On September 15, 2020, Plaintiffs Douglas J. Horn and Cindy Harp-Horn filed a motion under Federal Rule of Civil Procedure 60(b), asking that the Court reconsider its ruling on one of their theories of liability under civil RICO. ECF No. 129. Specifically, the Court has held that "the mere presence of naturally occurring THC in a product does not render [the product] a controlled substance so long as it is derived from an excepted part of the *Cannabis sativa* plant." ECF No. 124 at 5-6. The Court concluded that, because Plaintiffs did not proffer any evidence "to show that Dixie X . . . is derived from a non-excepted part of the *Cannabis sativa* plant," they cannot "prove their RICO claim to the extent it is premised on the allegation that Dixie X is a controlled substance." *Id.* at 6. Plaintiffs now seek to relitigate that issue.

Normally, the Court would issue a briefing schedule to allow Defendants to weigh in on the matter. But given that the final pretrial conference is approximately two

weeks away, further briefing would only serve to delay the proceedings and is unnecessary, as Plaintiffs' motion does not merit relief. Accordingly, Plaintiffs' motion is DENIED.

Plaintiffs cite Rule 60(b)(1) as the basis for their motion, arguing that the Court's rulings are premised on a "mistake" that entitle them to relief. ECF No. 129-9 at 5; *see* Fed. R. Civ. P. 60(b)(1) ("On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding" due to "mistake, inadvertence, surprise, or excusable neglect"). Even if Rule 60(b)(1) were an appropriate vehicle for Plaintiffs' arguments,[1] in substance they seek to relitigate old issues, press new legal and factual theories, and, put simply, take a "second bite at the apple." *Acao v. Holder*, No. 13-CV-6351, 2014 WL 6460120, at *1 (W.D.N.Y. Nov. 17, 2014). That is not the purpose of Rule 60(b). *See Wallace Wood Props. v. Wood*, No. 14-CV-8597, 2015 WL 7779282, at *2 (S.D.N.Y. Dec. 2, 2015) ("A motion for reconsideration . . . is not intended to be a vehicle for parties to relitigate cases or advance new theories that they failed to raise in their underlying motion practice.").

This is consistent with this Circuit's position on waiver/abandonment in the context of summary judgment: where a party could have raised a legal theory or relied on certain facts during summary-judgment motion practice, it is not entitled to advance such theories or rely on such facts via a motion for reconsideration. *See,*

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[1] *But see Buck v. Libous*, No. 02-CV-1142, 2005 WL 2033491, at *1 n.2 (N.D.N.Y. Aug. 17, 2005) ("[S]ince an order denying summary judgment or granting partial summary judgment . . . is nonfinal, a party may not seek relief from such an order pursuant to Rule 60(b)." (internal quotation marks and citations omitted)).

e.g., Phoenix SF Limited v. U.S. Bank N.A., No. 14-CV-10116, 2020 WL 4699043, at *4 (S.D.N.Y. Aug. 12, 2020) ("[A] party that fails to raise an argument in its opposition papers on a motion for summary judgment has waived that argument."); *Rhee-Karn v. Lask*, No. 19-CV-9946, 2020 WL 1435646, at *1 (S.D.N.Y. Mar. 24, 2020) (declining to reconsider summary judgment order on basis that evidence in the record was allegedly "overlooked," where party "did not cite any of the evidence on which she now relies to argue that reconsideration of the [Court's] Opinion is warranted"); *see also CILP Assocs., L.P. v. PriceWaterhouse Coopers LLP*, 735 F.3d 114, 125 (2d Cir. 2013) (at summary judgment, district court is not required "to scour the record on its own in a search for evidence when the plaintiffs fail to present it" (internal quotation marks omitted)).

Plaintiffs' motion runs afoul of this authority. Plaintiffs primarily argue that, as a factual matter, there is evidence in the record sufficient to support the inference that Dixie X is derived from a non-excepted part of the *Cannabis* plant. Specifically, Plaintiffs allege that "[i]t has been shown scientifically that cannabinoids . . . in the concentration necessary to make a product like Dixie X[] are not found in the parts of cannabis that are exempted from the CSA definition of marijuana." ECF No. 129-9 at 19. Plaintiffs also argue that one can reasonably infer that "Dixie X is derived from *non-exempt* parts of the cannabis plant" from (1) Dixie X's label, which states the product contains "hemp whole plant extract"; (2) Dr. Cindy Orser's testimony about the manufacturing process; and (3) the fact that Dixie X contains THC far in excess of the amounts found in legal hemp products. ECF No. 129-9 at

15-16, 20.

These may be plausible arguments, but Plaintiffs articulate no reason why they did not raise them earlier.[2] In its decision on summary judgment, the Court explicitly stated that Dixie X's legality turned on the manner in which, and the part of the plant from which, it was produced. *See Horn v. Medical Marijuana, Inc.*, 383 F. Supp. 3d 114, 123-24 (W.D.N.Y. 2019). The Court initially concluded that Dixie X could be found unlawful, as "Defendants do not contend that the CBD byproduct from the extraction process can be described as anything other than a 'resin extracted from' the *Cannabis sativa* plant." *Id.* at 124; *see also* 21 U.S.C. § 802(16) (2012) (defining marijuana to include "the resin extracted from any part" of the *Cannabis sativa* plant, as well as "every compound" or "mixture" of the resin). As the Court highlighted in the order, this framework for assessing the legality of Dixie X was different than Plaintiffs' theory—they maintained that "the presence of any amount of THC" rendered Dixie X "a Schedule 1 controlled substance." ECF No. 69-26 at 12; *see also id.* at 12-14, 20-21; ECF No. 69-24 at 6 ("Any material, compound, mixture or preparation that contains any quantity of THC or marijuana extract containing one or more cannabinoids derived from any plant of the genus Cannabis is categorized as a DEA Schedule I controlled substance."); ECF No. 70-23 at 7 ("Dr. Graham showed that the Defendants' final product formulations of the

[2] Plaintiffs seem to suggest that there is new (non-binding) legal authority and helpful regulatory guidance that excuses the untimeliness of the present motion. The Court disagrees. The materials Plaintiff identify do not articulate a new or radical legal principle that Plaintiffs could not have previously anticipated; at best, they support a position that Plaintiffs could have taken from the outset.

Dixie X Dew Drops Tincture product with the presence of '*any*' amount of THC rendered it a Schedule 1 controlled substance as described under 21 U.S.C. §1308.11, and not eligible for an exemption to a Schedule I classification under 21 U.S.C. §1308.35 since it was formulated, marketed and distributed for human consumption.").

In their motion for reconsideration, Defendants "argue[d] that the Court erred insofar as it assumed that Dixie X contained resin extract derived from the *Cannabis sativa* plant and thus constituted marijuana." ECF No. 124 at 5 (internal quotation marks omitted). In ordering briefing on that motion, the Court expressly stated that if Plaintiffs intended "to challenge the moving defendants' factual assertions, they must do so in the manner contemplated by Federal Rule of Civil Procedure 56(c)(1)." ECF No. 98. Despite having notice of the Court's framework and of the need to produce supporting evidence, Plaintiffs did not make the factual argument they now make,[3] and instead argued that the Court's framework was incorrect. *See, e.g.*, ECF No. 112-1 at 2-3 (affidavit of Plaintiffs' expert); ECF No. 112-3 at 2 ("[I]t is immaterial whether the plant compound used to describe the formulation basis of the Dixie product was obtained

[3] Plaintiffs did cite Dr. Orser's testimony and the Dixie X label in their brief on the motions for reconsideration, but they did so in the context of distinguishing Defendants' product from those at issue in two related Ninth Circuit cases. *See* ECF No. 112-3 at 4-5. Plaintiffs did not develop an argument that those facts proved that Dixie X was derived from a non-excepted part of the *Cannabis* plant. To the contrary, they believed that the issue was "immaterial." *Id.* at 2. It was not incumbent on the Court to further develop these facts on Plaintiffs' behalf. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

from a resin extract or a non-resin extract."); ECF No. 112-3 at 3 ("[A]ny product that contains any amount of THC was a Schedule I controlled substance in 2012.").

Plaintiffs could have asked the Court to draw the factual inferences they now advance, but they took a different tack and wholly disagreed with the Court's framework for analyzing the issue. Plaintiffs have every right to craft their theory of the case, but, by the same token, the Court has no obligation to "perform an independent review of the record to find proof of a factual dispute," *Amnesty Am. v. Town of West Hartford*, 288 F.3d 467, 470 (2d Cir. 2002), or to develop a theory on Plaintiffs' behalf that they quite explicitly did not want to pursue. *Cf. Garcia v. Jackson Hurst Partners LLC*, No. 18-CV-3680, 2018 WL 4922913, at *2 (E.D.N.Y. Oct. 10, 2018) ("The purpose of the abandonment doctrine is to give effect to a plaintiff's right to control his or her theory of the case, and to winnow out legal theories that the plaintiff has chosen not to prosecute."). Undoubtedly, this was a complex issue, and the Court in no way faults Plaintiffs for advancing a legal theory at odds with the Court's view. But Plaintiffs cannot re-cast their own litigation strategy into a mistake or error on the Court's part.

For similar reasons, Plaintiffs err when they argue that Defendants did not provide sufficient evidence that Dixie X is manufactured from lawful *Cannabis* derivatives. *See* ECF No. 129-9 at 13. The quality of Defendants' evidence is beside the point: it is the plaintiff who bears the burden of proving a civil RICO claim. *See Arons v. Lalime*, 3 F. Supp. 2d 314, 320 (W.D.N.Y. 1998). Where the moving party will not bear the burden of proof at trial, it may "obtain summary judgment by showing

that little or no evidence may be found in support of the nonmoving party's case." *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1223-24 (2d Cir. 1994); *see also Ockimey v. Town of Hempstead*, 425 F. App'x 45, 45 (2d Cir. 2011) (summary order) ("[A] moving defendant is not required to file affidavits (or other materials) disproving the plaintiff's claims."). At summary judgment (and on the motions for reconsideration), Plaintiffs were required to affirmatively produce evidence sufficient to create a genuine issue as to whether Dixie X was derived from a non-excepted part of the *Cannabis* plant. Instead, Plaintiffs deemed the issue irrelevant and failed to affirmatively identify or articulate the relevance of the evidence they now cite. Plaintiffs were of course free to advance their theory in lieu of addressing the Court's position, but they are not entitled to a "do-over" once that failed.

Finally, to the extent Plaintiffs dispute the Court's interpretation of § 802(16) and the CSA, their motion cannot be used to relitigate that matter, *see Acao v. Holder*, 2014 WL 6460120, at *1, and, regardless, the Court finds their arguments unpersuasive. The purported legal distinctions Plaintiffs draw between "non-psychoactive THC" versus "psychoactive THC" and permissible versus impermissible levels of THC find no support in the plain language of the statute. *See* ECF No. 129-9 at 8-9, 17-18.

CONCLUSION

For the reasons discussed above, Plaintiffs' Rule 60(b) motion (ECF No. 129) is DENIED. The pretrial conference will go forward as scheduled, and all associated deadlines remain in place.

IT IS SO ORDERED.

Dated: September 16, 2020
Rochester, New York

Frank P. Geraci, Jr.
HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DOUGLAS J. HORN, et al.,

Plaintiffs,

v.

MEDICAL MARIJUANA, INC., et al.,

Defendants.

Case # 15-CV-701-FPG

DECISION AND ORDER

INTRODUCTION

Presently before the Court are the parties' cross-motions for reconsideration of the Court's April 17, 2019 Decision and Order, which resolved the parties' motions for summary judgment.[1] For the reasons that follow, Defendants' motions for reconsideration (ECF Nos. 97, 106) are GRANTED IN PART and DENIED IN PART, and Plaintiffs' cross-motion for reconsideration (ECF No. 112) is DENIED.

LEGAL STANDARD

Both sides cite Federal Rule of Civil Procedure 54(b)

[1] Plaintiffs initially filed a notice of appeal after the Court issued its Decision and Order. *See* ECF No. 92. That appeal has since been dismissed, and the Second Circuit issued its mandate on November 12, 2019. *See Horn v. Medical Marijuana, Inc.*, No. 19-1437, ECF No. 45 (dated Nov. 12, 2019); *see also Bedasie v. Mr. Z Towing, Inc.*, No. 13-CV-5453, 2017 WL 6816331, at *3 (E.D.N.Y. Dec. 21, 2017) (stating that jurisdiction returns to the district court after appeal once a mandate is issued).

as the basis for their motions. Rule 54(b) provides:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

"A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment…." *United States v. LoRusso*, 695 F.2d 45, 53 (2d Cir. 1982).

A litigant seeking reconsideration must set forth "controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Richard v. Dignean*, 126 F. Supp.3d 334, 337 (W.D.N.Y. 2015); *see also Micolo v. Fuller*, No. 6:15-CV-06374, 2017 WL 2297026, at *2 (W.D.N.Y. May 25, 2017) ("To merit reconsideration under Rule 54(b), a party must show 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent a manifest injustice.'").

BACKGROUND

In their motions, both sides take issue with the Court's ruling on whether "Dixie X Dew Drops"—the product at issue—constituted a controlled substance under the federal Controlled Substances Act ("CSA"). *See* ECF No. 97-3 at 4; ECF No. 112-3 at 3. Some background may be helpful.

Dixie X is a CBD oil. "CBD is short for 'cannabidiol,' and it is one of the 'unique molecules' found in the *Cannabis sativa* plant." *Horn v. Med. Marijuana, Inc.*, 383 F. Supp. 3d 114, 119 (W.D.N.Y. 2019) (internal citation omitted). The *Cannabis sativa* plant is the plant from which marijuana and hemp are derived. *Id.* The difference between the two is that "drug-use cannabis is produced from the flowers and leaves of certain strains of the plant, while industrial use [hemp] is typically produced from the stalks and seeds of other strains of the plant." *Id.* This leads to differences in the concentration of tetrahydrocannabinol ("THC") in each variety. THC is "the substance that gives marijuana its psychoactive properties." *Id.*

In 2012, the time of the relevant events, the general rule was that all parts and derivatives of the *Cannabis sativa* plant were defined as "marijuana" and prohibited under the CSA.[2] *See id.* at 123 (citing 21 U.S.C. §§ 802(16), 841(a)(1)). Despite its low THC content and lack of psychoactive effect, the industrial hemp plant and any derivatives fell within this definition because hemp "is a variety of the *Cannabis sativa* plant." *Id.*; *United States v. White Plume*, 447 F.3d 1067, 1073 (8th Cir. 2006) (noting that "the CSA does not distinguish between marijuana and hemp").

But the CSA carved out several exceptions to this general rule. Specifically, "[e]xcluded from the definition of marijuana were certain parts of the plant that are incapable of germination: (1) the mature stalks of the *Cannabis sativa* plant, (2) fiber produced from the stalks

[2] The CSA has since been amended to legalize industrial hemp production. *See Horn*, 383 F. Supp. 3d at 124 (discussing legislative history).

of the *Cannabis sativa* plant, (3) oil or cake made from the seeds of the *Cannabis sativa* plant, (4) any compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake[], and (5) the sterilized seed of the *Cannabis sativa* plant." *Horn*, 383 F. Supp. 3d at 123. Importantly, however, "resin extracted from mature hemp stalks was not excepted from the definition of marijuana." *Id.*; *see also* 21 U.S.C. § 802(16) (2012). As a result, hemp-based products could only be lawfully manufactured and sold in the United States to the extent they were derived from excepted parts of the *Cannabis sativa* plant (and thus were not considered marijuana under the CSA).

But there was another wrinkle: the CSA also separately prohibited THC, *see* 21 U.S.C. § 812(c)(17), and many hemp-based products contain "trace amounts of THC." *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1085 (9th Cir. 2003) [hereinafter "*Hemp I*"]. This raised a question: were products made from excepted parts of the *Cannabis sativa* plant nonetheless unlawful because they contained miniscule, non-psychoactive amounts of THC?

In a pair of cases from the early 2000s, the Ninth Circuit answered that question in the negative. *See Hemp I*, 333 F.3d at 1089-90; *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 357 F.3d 1012 (9th Cir. 2004) [hereinafter "*Hemp II*"]. First, it held that the prohibition against THC referred to synthetic, not naturally occurring, THC. *See Hemp I*, 333 F.3d at 1089-90; *Hemp II*, 357 F.3d at 1017. Second, it held that products made from excepted parts of the *Cannabis sativa* plant "were not included in the definition of marijuana—and therefore were not unlawful under the CSA—*even if* they contained

trace amounts of [naturally occurring] THC." *Horn*, 383 F. Supp. 3d at 123. The Ninth Circuit reviewed the legislative history and concluded that "Congress 'knew what it was doing' when it chose to exempt certain derivatives from the definition of marijuana notwithstanding the presence of trace amounts of THC." *Id.* at 124.

Based on these conclusions, the Ninth Circuit invalidated new DEA regulations to the extent they purported to ban hemp-based products that contained trace amounts of naturally occurring THC. *See Hemp II*, 357 F.3d at 1018-19. But products containing synthetic THC or marijuana were still prohibited under the CSA. *See Horn*, 383 F. Supp. 3d at 124.

This Court relied on the above authority to conclude that, in 2012, Dixie X was a controlled substance. *See Horn*, 383 F. Supp. 3d at 124. Given the apparent absence of dispute, the Court proceeded on the assumption that Dixie X's CBD byproduct constituted a resin extracted from the mature stalk. *See id.* at 124. This led the Court to conclude that Plaintiffs had a sufficient claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), as a RICO claim may be predicated on the distribution and sale of a controlled substance like marijuana. *Id.* at 131-32.

DISCUSSION

Both sides now move for reconsideration of this aspect of the Court's prior order. Defendants argue that the Court erred insofar as it assumed that Dixie X contained "resin extract derived from the *Cannabis sativa* plant" and thus constituted marijuana. ECF No. 97-1 at 5; *see also* ECF No. 106. Defendants dispute that fact and

contend there is no evidence in the record to support that conclusion.

Plaintiffs, on the other hand, dispute the Court's reasoning but not its conclusion. They contend that "any product that contains any amount of THC was a Schedule I controlled substance in 2012." ECF No. 112-3 at 3.

The Court takes up Plaintiffs' argument first and rejects it. Plaintiffs assert that Dixie X was a controlled substance because it contained THC, which was a Schedule I controlled substance in 2012. *See* 21 C.F.R. § 1308.11(d)(31). They also assert that Dixie X remained a controlled substance under 21 C.F.R. § 1308.35 because it was intended for human consumption. *See* 21 C.F.R. § 1308.35(a) (exempting certain cannabis-based products from the CSA so long as they are not intended for human consumption).

The problem with Plaintiffs' argument is that it runs headlong into the *Hemp* cases, where the Ninth Circuit invalidated the very regulations on which Plaintiffs rely. *See Hemp II*, 357 F.3d at 1019 (permanently enjoining enforcement of the regulations). The court stated in no uncertain terms that those regulations "may not be enforced with respect to THC that is found within the parts of *Cannabis* plants that are excluded from the CSA's definition of 'marijuana' or that is not synthetic." *Id.* at 1018. Accordingly, the mere presence of naturally occurring THC in a product does not render it a controlled substance so long as it is derived from an excepted part of the *Cannabis sativa* plant. *See id.* at 1018-19. Therefore, the Court denies Plaintiffs' motion for reconsideration.

Defendants' argument is persuasive, however. Defendants clarify that they dispute that Dixie X contains

a resin extracted from a mature hemp stalk. They submit the affidavit of Stuart Titus, CEO of Medical Marijuana, Inc., who avers that the CBD extract was not produced from the resin of any mature stalks. ECF No. 97-2 at 2.

Despite having an opportunity to do so, Plaintiffs do not proffer any evidence to show that Dixie X contains synthetic THC or is derived from a non-excepted part of the *Cannabis sativa* plant. Instead, Plaintiffs proffer supplemental affidavits of Kenneth D. Graham, their toxicology expert, who merely reiterates his opinions about the legality of hemp-based products. *See* ECF Nos. 112-1, 120. Those affidavits fail to create a genuine issue of material fact. *See SLSJ, LLC v. Kleban*, 277 F. Supp. 3d 258, 268 (D. Conn. 2017) ("As a general rule an expert's testimony on issues of law is inadmissible.").

Accordingly, because Plaintiffs have not presented any evidence to show that Dixie X contains either synthetic THC or natural THC derived from marijuana—as the CSA defines that term—Plaintiffs cannot prove their RICO claim to the extent it is premised on the allegation that Dixie X is a controlled substance. *See Horn*, 383 F. Supp. 3d at 131-32 (discussing RICO standards).

Nevertheless, the Court disagrees with Defendants that the RICO claim should be dismissed. Plaintiffs premise their RICO claim not only on Defendants' alleged distribution of a controlled substance, but also on Defendants' alleged mail and wire fraud.[3] *See* ECF No. 1

[3] Initially, Plaintiffs also alleged that Defendants violated 18 U.S.C. § 1957, but they did not present that theory in their summary judgment materials. *Compare* ECF No. 1 at 11, *with* ECF No. 60-25, *and* ECF No. 69-26. Accordingly, that theory has been abandoned.

at 10-11; ECF No. 2 at 4. Because the Court concluded that the RICO claim survived summary judgment on the controlled-substance theory, it previously declined to address whether "Defendants also engaged in other predicate acts of racketeering, including mail and wire fraud." *Horn*, 383 F. Supp. 3d at 132 n.11. The Court must now address those issues.[4]

Plaintiffs bring their RICO claim under 18 U.S.C. § 1962(c), which "makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Ferri v. Berkowitz*, 678 F. Supp. 2d 66, 72-73 (E.D.N.Y. 2009) (internal quotation marks omitted). "To establish a civil RICO claim . . . a plaintiff must allege (1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity, as well as injury to business or property as a result of the RICO violation." *Flexborrow LLC v. TD Auto Fin. LLC*, 255 F. Supp. 3d 406, 414 (E.D.N.Y. 2017) (internal quotation marks omitted).

"The pattern of racketeering activity must consist of two or more predicate acts of racketeering," *id.*, which must be "related" and must "pose a threat of continued criminal activity." *DeFalco v. Bernas*, 244 F.3d 286, 320 (2d Cir. 2001). Mail and wire fraud constitute racketeering activity. 18 U.S.C. § 1961(1)(B). "The mail and wire fraud statutes prohibit the use of those means of

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See Camarda v. Selover, 673 F. App'x 26, 30 (2d Cir. 2016) (summary order).

[4] The Court confines its analysis to those arguments that the parties raised in their summary-judgment and reconsideration briefing.

communication in furtherance of 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251, 256 (2d Cir. 2004), *rev'd in part and vacated in part on other grounds by Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). False advertising can constitute mail or wire fraud. *See, e.g., 4 K & D Corp. v. Concierge Auctions, LLC*, 2 F. Supp. 3d 525, 539 (S.D.N.Y. 2014) (allegedly false marketing materials could constitute predicate racketeering activities based on mail and wire fraud statutes); *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765 (8th Cir. 1992) (predicate acts of mail and wire fraud existed for civil RICO claim, where defendant falsely advertised his ability to provide commercial financing to prospective customers); *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966) (affirming mail and wire fraud convictions of defendant who fraudulently marketed "miracle weight-reducing drug").

The threat of continued criminal activity can be "closed-ended" or "open-ended." *Reich v. Lopez*, 858 F.3d 55, 60 (2d Cir. 2017). "Criminal activity that occurred over a long period of time in the past has closed-ended continuity, regardless of whether it may extend into the future. As such, closed-ended continuity is 'primarily a temporal concept,' and it requires that the predicate crimes extend 'over a substantial period of time.'" *Id.* (internal citations omitted). "[T]his Circuit generally requires that the crimes extend over at least two years." *Id.*

Open-ended continuity requires "criminal activity that by its nature projects into the future with a threat of repetition." *Id.* (internal quotation marks omitted).

"Some crimes may by their very nature include a future threat, such as in a protection racket." *Id.* "When the business of an enterprise is primarily unlawful, the continuity of the enterprise itself projects criminal activity into the future. And similarly, criminal activity is continuous when the predicate acts were the regular way of operating that business, even if the business itself is primarily lawful." *Id.* (internal quotation marks and citations omitted).

For substantially the same reasons that Douglas Horn's fraudulent inducement claim survived summary judgment, the Court concludes that Douglas Horn may proceed with his RICO claim based on predicate acts of mail and wire fraud. *See Horn*, 383 F. Supp. 3d at 128-31. There is evidence that Defendants advertised in at least three different media—on their website, in YouTube videos, and via their customer service representatives—that Dixie X did not contain THC. *See id.* at 129-30. There is evidence that these statements were false; "indeed, Defendants' own testing revealed that the product contained detectible amounts of THC." *Id.* at 129. Because Defendants tested Dixie X and found that it contained THC, yet advertised to the contrary, there is a basis to conclude that these statements were not mere misstatements or puffery, but part of a scheme to defraud. Furthermore, as the Court previously reasoned, Defendants had a motive to defraud consumers: "[a] jury could reasonably conclude that, to sell their products, Defendants needed to distinguish Dixie X from its unlawful counterparts; misrepresenting the THC content in the product would go a long way to dispelling consumers' concerns, as it did in Plaintiffs' case." *Id.* at 130.

In addition, these predicate acts are related and meet the test for open-ended continuity. Although the racketeering activity occurred during a circumscribed timeframe in 2012, there is sufficient evidence to conclude that Defendants' alleged acts of mail and wire fraud were "the regular way of operating [the] business" even though the business itself was "primarily lawful." *Reich*, 858 F.3d at 60. This is not a case where a defendant's scheme targets a particular victim, sets a specific goal, or is otherwise "inherently terminable." *Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 244 (2d Cir. 1999); *see also Howard v. America Online Inc.*, 208 F.3d 741, 750 (9th Cir. 2000) (no threat of continuing criminal activity where misleading advertising stemmed from "one-time change in pricing policy"). Rather, Defendants falsely advertised Dixie X through a variety of media, targeting consumers nationally. Their claim that that Dixie X contained no THC was not one-off promotional puffery; it was a fundamental selling point of the product. In other words, Defendants' false pitch about Dixie X could reasonably be viewed as their regular way of advertising, promoting, and selling the product, and there was no "obvious ending point" to that scheme. *Alkhatib v. N.Y. Motor Grp. LLC*, No. CV-13-2337, 2015 WL 3507340, at *21 (E.D.N.Y. June 3, 2015). The fact that Defendants later updated their website to reflect Dixie X's THC content does not undermine this conclusion. This is because "[w]hether predicate acts pose a threat of future conduct is evaluated as of the time the acts are committed." *Id.* at *20.

Accordingly, Defendants are not entitled to summary

judgment on Douglas Horn's RICO claim.[5] But for the same reasons set forth in the prior order, Douglas Horn is also not entitled to summary judgment on the RICO claim, and Defendants are entitled to summary judgment on Cindy Harp-Horn's RICO claim. *See Horn*, 383 F. Supp. 3d at 133.

CONCLUSION

For the reasons discussed above, Defendants' motions for reconsideration (ECF Nos. 97, 106) are GRANTED IN PART and DENIED IN PART, and Plaintiffs' cross-motion for reconsideration (ECF No. 112) is DENIED. The Court's prior order is modified insofar as Douglas Horn may now proceed with his RICO claim only to the extent it is premised on predicate acts of wire and mail fraud. He may not proceed with his claim on the theory that Dixie X is a controlled substance. By separate order, the Court will schedule a status conference to hear from the parties on the progress of this action.

IT IS SO ORDERED.

Dated: November 21, 2019
Rochester, New York

Frank P. Geraci, Jr.
HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court

[5] As the Court previously noted, Defendants are not precluded from raising issues of authentication and hearsay in their pretrial motions. *See Horn*, 383 F. Supp. 3d at 131. To the extent Defendants prevail on their arguments, the Court may revisit whether the RICO claim may proceed to trial. *Id.*

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DOUGLAS J. HORN, et al.,

Plaintiffs,

v.

MEDICAL MARIJUANA, INC., et al.,

Defendants.

Case # 15-CV-701-FPG

DECISION AND ORDER

INTRODUCTION

Plaintiffs Douglas J. Horn and Cindy Harp-Horn bring suit against Defendants Medical Marijuana, Inc. ("MMI"), Dixie Elixirs and Edibles ("Dixie LLC"), Red Dice Holdings, LLC ("RDH"), and Dixie Botanicals.[1] ECF No. 1. Plaintiffs allege that Defendants engaged in fraud, negligence, and unlawful conduct with respect to the sale and marketing of their hemp-based consumable oil—"Dixie X Dew Drops." Before the Court are six motions: (1) Plaintiffs' motion for partial summary judgment (ECF No. 60); (2) Defendants MMI and RDH's motion for summary judgment (ECF No. 61); (3) Defendant Dixie LLC's motion for summary judgment (ECF No. 62); (4) Plaintiffs' motion to amend (ECF No. 68); (5) Dixie LLC's motion to strike (ECF No. 71); and (6) Defendants MMI and RDH's motion to strike (ECF No. 74). The Court resolves all of these motions in this

[1] In August 2016, the Clerk of Court filed an entry of default against Dixie Botanicals after it failed to appear. *See* ECF Nos. 22, 28.

omnibus order.

LEGAL STANDARD

Summary judgment is appropriate when the record shows that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding whether genuine issues of material fact exist, the court construes all facts in a light most favorable to the non-moving party and draws all reasonable inferences in the non-moving party's favor. *See Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005). However, the non-moving party "may not rely on conclusory allegations or unsubstantiated speculation." *F.D.I.C. v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (quotation omitted).

BACKGROUND[2]

This case concerns a product called CBD oil. CBD is short for "cannabidiol," and it is one of the "unique molecules" found in the *Cannabis sativa* plant. ECF No. 61-8 at 18. The *Cannabis sativa* plant is better known as the plant from which marijuana is derived. But it is also

[2] Generally, when cross-motions for summary judgment are filed, the court "must consider each motion independently of the other and, when evaluating each, the court must consider the facts in the light most favorable to the non-moving party." *Physicians Comm. for Responsible Medicine v. Leavitt*, 331 F. Supp. 2d 204, 206 (S.D.N.Y. 2004). However, for purposes of describing the background of the case, the Court describes the facts as taken in the light most favorable to Plaintiffs, unless otherwise noted.

the species of plant from which industrial hemp is derived. The Eighth Circuit provides a helpful description:

> Both industrial hemp and the drug commonly known as marijuana derive from the plant designated *Cannabis sativa* L. In general, drug-use cannabis is produced from the flowers and leaves of certain strains of the plant, while industrial-use cannabis is typically produced from the stalks and seeds of other strains of the plant. All cannabis plants contain tetrahydrocannabinol (THC), the substance that gives marijuana its psychoactive properties, but strains of the plant grown for drug use contain a higher THC concentration than those typically grown for industrial use.

Monson v. Drug Enforcement Admin., 589 F.3d 952, 955 (8th Cir. 2009) (emphasis added). In other words, the distinction is one of degree—while "the marijuana plant and industrial hemp plant come from the same botanical species," the "hemp plant has been crossbred to have low concentrations of THC." Shelly B. DeAdder, *The Legal Status of Cannabidiol Oil and the Need for Congressional Action*, 9 BIOPLR 68, 72 (2015). CBD can be extracted from both the marijuana and hemp varieties of *Cannabis sativa*. *See id.* at 72 & n.34.

Products containing CBD have become hot commodities in recent years, and sales are "projected to grow tremendously." W. Michael Schuster & Jack Wroldsen, *Entrepreneurship and Legal Uncertainty: Unexpected Federal Trademark Registrations for Marijuana Derivatives*, 55 AMBLJ 117, 135 (2018). Advocates claim that CBD provides numerous health benefits, particularly in the area of pain management. *See*

id. at 128-29; *see also* ECF No. 61-8 at 19.

The product at issue here is a hemp-derived CBD oil called "Dixie X Dew Drops" (hereinafter "Dixie X"). Cindy Orser, Defendants' scientific expert, explains how these products are generally created. There is an initial "extraction step," where hemp is combined with a solvent like ethanol, butane, pressurized C02, or propane. ECF No. 61-8 at 79-80. This process yields a CBD extract, which is then distilled to remove plant compounds, solvents, THC, and other materials. *Id.* at 83. The intended end-product is a pure CBD concentrate that can then be infused into a consumable final product.

Like other CBD oil products, Dixie X contains CBD that is "isolate[d] and extract[ed]" from hemp plants. ECF No. 60-8 at 1; *see also* ECF No. 69-4 at 12-13. The resulting CBD is then "infuse[d] . . . into [a] line of hemp products." ECF No. 60-8 at 1. The label on Dixie X indicates that it contains "[p]ure glycerin, hemp whole plant extract, CBD extract derived from medicinal hemp, [and] cinnamon extract." ECF No. 60-15 at 1 (asterisk omitted). Importantly, despite the extraction and distillation process, Dixie X contains a detectible, albeit small, amount of THC. *See, e.g.*, ECF No. 60-14.

All three defendants played a role in the sale of Dixie X. MMI and Dixie LLC entered into a joint venture to produce, distribute, and sell Dixie X. *See* ECF No. 69-2 at 1. They formed RDH for that purpose in April 2012. *Id.* MMI would hold a 60% ownership stake in RDH, while Dixie LLC would hold a 40% stake. *See* ECF No. 68-2 at 106. Tripp Keber, who was also Dixie LLC's managing

member, would act as the manager of RDH.[3] *Id.* at 2. In practice, it appears that MMI provided financial support for the venture, Dixie LLC manufactured Dixie X, and RDH was responsible for selling the product. *See* ECF No. 61-1 ¶¶ 3-5. There is also a question of fact as to whether Keber acted as a director of MMI, though the exact dates of his tenure are unclear from the record. *Compare* ECF No. 61-11 ¶ 12, *with* ECF No. 68-2 at 79.

In September 2012, Plaintiffs purchased a 500 mg bottle of Dixie X. They had researched the product from various sources, and they hoped it would relieve the pain and inflammation Douglas was then suffering from as a result of a motor vehicle accident.[4] Plaintiffs claimed to have relied on four sources in deciding to purchase Dixie X.

Plaintiffs first learned about Dixie X in an issue of "High Times" magazine—a periodical dedicated to marijuana culture and news. In an article titled "High & Healthy" by Elise McDonough, there was the following writeup:

> CBD for Everyone!
>
> Using a proprietary extraction process and a strain of high-CBD hemp grown in a secret, foreign location, Colorado's Dixie Elixirs and Edibles now offers a new product line called Dixie X, which contains 0% THC and up to 500 mg of

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[3] "Tripp" appears to be the nickname of Vincent M. Keber, III. *See* ECF No. 69-2 at 2 (stating that "Vincent M. Keber, III" acted as manager of RDH); ECF No. 69-4 at 25 (stating that "Tripp Keber" is "President" of RDH).

[4] For ease of reference, the Court refers to Plaintiffs by their first names.

> CBD. This new CBD-rich medicine will be available in several forms, including a tincture, a topical and in capsules. Promoted as "a revolution in medical hemp-powered wellness," the non-psychoactive products will first roll out in Colorado MMCs (medical marijuana centers), with plans to quickly expand outside the medical marijuana market. "It has taken a tremendous amount of time, money and effort, but finally patients here in Colorado—and ultimately all individuals who are interested in utilizing CBD for medicinal benefit—will be able to have access to it," says Tripp Keber, Dixie's managing director. "We are importing industrial hemp from outside the US using an FDA import license—it's below federal guidelines for THC, which is 0.3%—and we are taking that hemp and extracting the CBD. We have meticulously reviewed state and federal statutes, and we do not believe that we're operating in conflict with any federal law as it's related to the Dixie X [hemp-derived] products."

ECF No. 61-7 at 42.

After reviewing the article, Plaintiffs decided to conduct further research. They watched two YouTube videos of interviews between podcasters and a person who identifies himself as Tripp Keber (the "YouTube interviews").[5] In these videos, Keber stated that Dixie X

[5] Plaintiffs cite a third YouTube video in their materials, but it appears that this video was posted on YouTube after Plaintiffs purchased Dixie X. *See* ECF No. 60-1 ¶ 7(c). The Court therefore disregards that video.

did not contain THC.[6]

Plaintiffs also reviewed an FAQ on the Dixie X website, which provided further information on the product:

> **Is CBD from hemp legal?**
>
> Our revolutionary Hemp oil cannabidiol (CBD) wellness products are legal to consume both here in the U.S. and in many countries abroad. The United States currently considers industrial hemp products to be legal as long as they are derived from industrial hemp and not from any part of the plants categorized . . . as marijuana. Dixie x's parent company Medical Marijuana, Inc., is a publicly traded company . . . that does not grow, sell or distribute any substances that violate United States Law or the controlled substance act . . . .
>
> **What is the difference between CBD from hemp and CBD from medical cannabis?**
>
> While the two plants are botanically related, our hemp contains no THC . . . . Medical cannabis contains THC and may provide relief from various ailments, however, with a psychotropic effect.

ECF No. 60-8 at 1-2.

Finally, Cindy called a "1-800" number associated

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[6] Plaintiffs failed to identify with specificity the times at which Keber made the relevant statements in the YouTube videos. The Court did not exhaustively review the YouTube videos, but only reviewed them in part to verify that Keber made the alleged statements. *Cf.* Fed. R. Civ. P. 56(c)(1)(A) (requiring a party to cite "particular parts of materials in the record" when supporting factual positions).

with Dixie X and spoke to a customer service representative. ECF No. 61-6 at 88-89. The representative confirmed that Dixie X contained "zero percent THC." *Id.* at 91.

After reviewing all of this information, Plaintiffs decided to purchase Dixie X. On September 17, 2012, Cindy ordered a 500mg tincture of Dixie X through the Dixie X website and had it delivered to Plaintiffs' home in Fockwood, NY. Shortly thereafter, Douglas consumed the product.

In October 2012, as part of its normal practice, Douglas's employer, Enterprise Trucking, required that he submit to a random drug test. A few days after the drug test, Enterprise notified Douglas that he had tested positive for THC. At 29 ng/mE, Douglas's sample contained almost double the "cutoff" concentration of THC. Enterprise thereafter terminated Douglas's employment. Cindy, who worked with Douglas at Enterprise Trucking, resigned from the company because she believed it would be unsafe to work alone.

Soon thereafter, Plaintiffs purchased a second bottle of Dixie X to determine whether it had caused the positive test result. They sent the bottle to EMSL Analytical, Inc., for testing. Testing confirmed that Dixie X contained THC.

In August 2015, Plaintiffs brought this action, alleging that Dixie X caused Douglas's positive drug test and thereby caused him to lose his employment. Plaintiffs raise nine claims against Defendants:

1. Deceptive business practices and false advertising under New York General Business Law §§ 349, 350;

2. Fraudulent inducement;
3. Violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO");
4. Strict Products Liability;
5. Breach of Contract;
6. Breach of Express Warranty;
7. Unjust Enrichment;
8. Negligence; and
9. Negligent Infliction of Emotional Distress.

ECF No. 1.

Before turning to the motions, the Court discusses a legal issue that is foundational to this litigation: whether, in 2012, Dixie X constituted a controlled substance under the federal Controlled Substances Act ("CSA"). *See* 21 U.S.C. § 801 *et seq.* Plaintiffs argue that Dixie X is a controlled substance because it contains THC. Defendants counter that Dixie X is not a controlled substance because it is derived from lawfully imported hemp and contains less than .3% THC. This percentage is allegedly the maximum amount of THC that an imported industrial hemp plant can lawfully contain.

Taking the facts in the light most favorable to Plaintiffs, the Court agrees that, in 2012, Dixie X constituted a controlled substance under the CSA. But it reaches this conclusion for reasons different than those articulated by Plaintiffs.

Marijuana is a controlled substance under the CSA, and therefore, as a general matter, it is unlawful to distribute or dispense it. *See* 21 U.S.C. §§ 802(16),

841(a)(1). In 2012, the CSA defined marijuana as follows:

> The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

21 U.S.C. § 802(16) (2012). Breaking this definition down, the Court notes that marijuana was broadly defined to include "all parts" of the *Cannabis sativa* plant. The industrial hemp plant fell within this definition because it is a variety of the *Cannabis sativa* plant. *See, e.g., Monson,* 589 F.3d at 961-62; *Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1085 n.2 (9th Cir. 2003) [hereinafter "*Hemp I*"].

As the statute made clear, however, the definition of marijuana contained several exceptions. Excluded from the definition of marijuana were certain parts of the plant that are incapable of germination: (1) the mature stalks of the *Cannabis sativa* plant, (2) fiber produced from the stalks of the *Cannabis sativa* plant, (3) oil or cake made from the seeds of the *Cannabis sativa* plant, (4) any compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake (excluding resin extracts), and (5) the sterilized seed of the

Cannabis sativa plant. 21 U.S.C. § 802(16) (2012).

It bears emphasizing that resin extracted from mature hemp stalks was not excepted from the definition of marijuana. *See Hemp Indus. Ass'n v. Drug Enforcement Admin.*, 357 F.3d 1012, 1018 (9th Cir. 2004) (internal quotation marks omitted) [hereinafter "*Hemp II*"], Congress apparently included this "exception to the exception" for resin extract "out of concern that the 'active principle' in marijuana, later understood to be THC, might be derived from nonpsychoactive hemp and so be used for psychoactive purposes." *Id.* at 1018 n.5.

A few conclusions may be drawn from the definition of marijuana as it stood in 2012. First, the industrial hemp plant came within the statutory definition of marijuana despite its low THC concentration. At the time, the CSA made no distinction on the basis of THC concentration. *See Monson*, 589 F.3d at 961 ("[M]arijuana is defined to include *all* Cannabis sativa L. plants, regardless of THC concentration."); *N.H. Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 7-8 (1st Cir. 2000).

Second, and perhaps counterintuitively, certain derivatives of the industrial hemp plant were not included in the definition of marijuana—and therefore were not unlawful under the CSA—*even if* they contained trace amounts of THC. The Ninth Circuit reached this conclusion in a pair of cases from the early 2000s. *See Hemp I*, 33 F.3d at 1091; *Hemp II*, 357 F.3d at 1018. At issue in those cases were the validity of DEA rules that would have banned the possession and sale of products made from sterilized hemp seed, hemp-seed oil, and hemp-seed cake. *See Hemp I*, 333 F.3d at 1085; *Hemp II*, 357 F.3d at 1013-14. These products contain "minuscule trace amounts of THC" but do not have psychoactive effects.

Hemp I, 333 F.3d at 1085. The Ninth Circuit observed that these products fit "within the plainly stated exception[s] to the CSA definition of marijuana." *Hemp II*, 357 F.3d at 1017. The legislative history also indicated that Congress was aware that "hemp seed and oil contain small amounts of the active marijuana ingredient in marijuana, but that the active ingredient was not present in sufficient proportion to be harmful." *Hemp I*, 333 F.3d at 1089. Thus, Congress "knew what it was doing" when it chose to exempt certain derivatives from the definition of marijuana notwithstanding the presence of trace amounts of THC. *Hemp II,* 357 F.3d at 1018.

Third, the exemption for certain hemp-based products containing naturally-occurring THC did not extend to resin extracted from the plant. As discussed above, there was an explicit "exception to the exception" for such resins. *See id.* at 1018 n.5. In practical effect, this means that the legality of a hemp-based product turned on the manner in which it is produced: an oil made from hemp seeds was exempt and lawful, while a resin extracted from hemp stalks was not exempt and was unlawful. *See* 21 U.S.C. § 802(16) (2012).

The legal landscape has since shifted. In 2014, Congress passed the Agricultural Act of 2014. *See* 7 U.S.C. 5940. This legislation legalized industrial hemp cultivation under restricted conditions relating to research. Then, in 2018, as part of a more extensive legalization of industrial hemp production, the CSA was amended to exclude hemp from the definition of marijuana. *See* 21 U.S.C. § 802(16)(B)(i). Hemp is defined as the "Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers,

whether growing or not, with a [THC] concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. § 1639*o*(1). Thus, it appears that the CSA now excludes from the definition of marijuana *any* part, derivative, or extract of the *Cannabis sativa* plant if its THC concentration falls below that threshold level.

For purposes of this litigation, however, the question is whether Dixie X constituted a controlled substance in 2012. Based on the plain language of the statute, and taking the facts in the light most favorable to Plaintiffs, the Court answers that question in the affirmative. Dixie X is a mixture that contains extract from the *Cannabis sativa* plant. Defendants do not contend that the CBD byproduct from the extraction process can be described as anything other than a "resin extracted from" the *Cannabis sativa* plant. 21 U.S.C. 802(16) (2012) (defining marijuana to include "the resin extracted from any part" of the *Cannabis sativa* plant, as well as "every compound" or "mixture" of the resin). And Dixie X cannot come within any exception because resin extracts are explicitly excluded. *See id.; Hemp II*, 357 F.3d at 1018 n.5. In 2012, the CSA granted no exceptions to hemp derivatives on the basis of low THC concentration. Accordingly, Dixie X constituted a controlled substance under the CSA, and it was therefore unlawful to "knowingly or intentionally . . . manufacture, distribute, or dispense" it. 21 U.S.C. § 841(a)(1).

DISCUSSION

Before the Court are six motions. Substantively,

Defendants move for summary judgment on all claims,[7] and Plaintiffs move for partial summary judgment on the issue of liability on the New York General Business Law claims and the RICO violation. Procedurally, Plaintiffs have filed a motion to amend, and Defendants have filed two motions to strike certain evidence Plaintiffs submitted in connection with the motions for summary judgment. The Court will address the motion to amend and motions to strike before proceeding to the merits.

I. Motion to Amend

Plaintiffs move to amend their complaint in three respects. First, they argue that Defendant "Dixie Elixirs and Edibles" is misnamed and should be corrected to "Dixie Holdings, LLC a/k/a Dixie Elixirs." ECF No. 68-1 at 2. Second, Plaintiffs seek leave to withdraw three of their claims—breach of contract, breach of express

[7] Defendants MMI and RDH also move for judgment on the pleadings under Rule 12(c). The Court finds such motion untimely and declines to address it. Under Rule 12(c), a motion for judgment on the pleadings must be made after pleadings are closed but "early enough not to delay trial." Fed R. Civ. P. 12(c). Here, Defendants filed their answer in February 2016, and the deadline to amend pleadings was in March 2017. Defendants therefore had an extensive period in which to challenge Plaintiffs' complaint, but they waited more than one year after the later deadline, when discovery had already been completed, to raise their arguments. Under these circumstances, the Court concludes that consideration of Defendants' motion would delay trial—even though a trial date has not been set—insofar as it would require further litigation on issues tangential to the merits and would prevent timely resolution of those claims for which summary judgment is inappropriate. *See Grajales v. Puerto Rico Ports Auth.*, 682 F.3d 40, 46 (1st Cir. 2012) ("[O]nce the parties have invested substantial resources in discovery, a district court should hesitate to entertain a Rule 12(c) motion that asserts a complaint's failure to satisfy the plausibility requirement.").

warranty, and unjust enrichment. Third, Plaintiffs request to add a claim for false advertising under the Lanham Act. *See* 15 U.S.C. 1125(a).

As Defendants note, Judge Roemer issued a scheduling order in this case. Under the order, the parties had until March 21, 2017 to file motions to amend the pleadings. *See* ECF No. 31 at 1. Plaintiffs did not file their motion to amend until November 16, 2018—more than a year and a half after the deadline. *See* ECF No. 68. Consequently, the more onerous "good cause" standard set forth in Rule 16(b), rather than the "liberal standard of Rule 15(a)," governs. *Guadagno v. M.A. Mortenson Co.*, No. 15-CV-482, 2018 WL 4870693, at *4 (W.D.N.Y. Oct. 2, 2018). "To show good cause, a movant must demonstrate diligence before filing her motion, such that despite the movant's effort, the deadline to amend the pleadings could not have been reasonably met." *Scott v. Chipotle Mexican Grill, Inc.*, 300 F.R.D. 193, 197 (S.D.N.Y. 2014). Diligence is the primary consideration in deciding whether to permit an amended complaint, but a court may also consider "other relevant factors including . . . whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants." *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 244 (2d Cir. 2007).

Plaintiffs waited a substantial period of time after the deadline to amend their complaint. Furthermore, they did not file their motion until more than two months after the parties filed motions for summary judgment. Plaintiffs do not argue that they acted diligently or that they have otherwise satisfied the "good cause" standard; they merely claim that the new Lanham Act claim satisfies the *Twombly* pleading standard. Given these circumstances

and the absence of developed argument, the Court denies the motion to the extent that Plaintiffs seek to add the Lanham Act claim. *See Mohegan Lake Motors, Inc. v. Maoli*, No. 16CV6717, 2018 WL 4278352, at *5 (S.D.N.Y. June 8, 2018) ("The burden of showing diligence rests on the moving party.").

Nevertheless, the Court will grant the motion so as to correct the defendant's name and to permit Plaintiffs to withdraw three of their claims. Defendants identify no prejudice with respect to these amendments, and Defendant "Dixie Elixirs and Edibles" appears to concede that they were named incorrectly. *See* ECF No. 82 at 4. Despite Plaintiffs' delay and the pending summary judgment motions, the Court finds the technical correction of one party's name and the withdrawal of some claims appropriate and permissible.

Accordingly, Plaintiffs' motion is granted in part and denied in part. The name of Defendant "Dixie Elixirs and Edibles" is corrected to "Dixie Holdings, LLC a/k/a Dixie Elixirs." The Clerk of Court is directed to amend the caption to reflect this change. In addition, the Court permits Plaintiffs to withdraw their claims for breach of contract, breach of express warranty, and unjust enrichment.

II. Motions to Strike

Defendants have filed motions to strike certain materials on which Plaintiffs rely for summary judgment, arguing that they are inadmissible. Plaintiffs oppose the motions.

"[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." *Porter v. Quarantillo*, 722 F.3d 94, 97 (2d Cir.

2013). Under Rule 56(c)(2), a party "may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The 2010 Committee Notes "make clear," however, "that there is no need to make a separate motion to strike such inadmissible evidence." *Codename Enters., Inc. v. Fremantlemedia N. Am., Inc.*, No. 16 Civ. 1267, 2018 WL 3407709, at *4 (S.D.N.Y. Jan. 12, 2018) (internal quotation marks and brackets omitted). Instead, a court may consider arguments relating to the admissibility of evidence when it evaluates the merits of the summary judgment motion. *See id.* ("Because evidence inadmissible at trial is insufficient to create a genuine dispute of material fact, the Court need not engage in separate analysis of the motion to strike.").

Consistent with this authority, the Court considers it more practical to evaluate Defendants' evidentiary objections in the course of analyzing the parties' summary judgment motions, as opposed to assessing those objections separately within the context of a motion to strike. Defendants' motions to strike are therefore denied.

III. Motions for Summary Judgment

Defendants move for summary judgment on all claims, while Plaintiffs move for summary judgment as to liability on the General Business Law and RICO claims. The Court examines each claim in turn.

a. Deceptive Business Practices and False Advertising

Plaintiffs allege that Defendants violated Sections 349 and 350 of New York General Business Law. Section 349 makes unlawful "[deceptive acts or practices in the

conduct of any business, trade or commerce . . . in this state." N.Y. Gen. Bus. Law § 349(a). Section 350 renders false advertising unlawful under similar terms. *See id.* § 350. "To assert a claim under either section, a plaintiff must establish that the defendant engaged in consumer oriented conduct that is materially misleading, and [that] plaintiff was injured as a result of the deceptive act or practice." *Bowring v. Sapporo U.S.A., Inc.*, 234 F. Supp. 3d 386, 390 (E.D.N.Y. 2017). "The only difference between the two is that Section 350 more narrowly targets deceptive or misleading advertisements, while Section 349 polices a wider range of business practices." *Cline v. TouchTunes Music Corp.*, 211 F. Supp. 3d 628, 635 (S.D.N.Y. 2016).

Defendants argue, among other things, that the statutes do not apply because the deceptive transaction did not take place in New York. The Court agrees.

In *Goshen v. Mut. Life Ins. Co. of N.Y.*, 774 N.E.2d 1190 (N.Y. 2002), the New York Court of Appeals held that Sections 349 and 350 are limited in their territorial reach. "[T]o qualify as a prohibited act under the statute, the deception of a consumer must occur in New York." *Goshen*, 774 N.E.2d at 1195. The court reasoned that the purpose of the provisions was to "address commercial misconduct occurring within New York." *Id.* Absent a clear territorial limitation, the provisions could be applied "nationwide, if not globally]," which would induce a "tidal wave of litigation" against New York businesses and interfere with other states' abilities to "regulate their own markets and enforce their own consumer protection laws." *Id.* at 1196.

Goshen has not been interpreted uniformly. In *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115 (2d Cir. 2013), the

Second Circuit recognized that there are "two divergent lines of decisions . . . regarding the proper territorial analysis." *Cruz*, 720 F.3d at 123. "The first line of decisions . . . . focus[es] on where the deception of the plaintiff occurs and require[s] . . . that a plaintiff actually view a deceptive statement while in New York." *Id.* "The second line of cases . . . . focus[es] on where the underlying deceptive 'transaction' takes place, regardless of the plaintiff's location or where the plaintiff is deceived." *Id.*

The Second Circuit has adopted the second approach, stating that a court should "focus on the location of the transaction, and in particular the strength of New York's connection to the allegedly deceptive transaction." *Id.* at 122. A plaintiff has statutory standing under Sections 349 and 340 if "some part of the underlying transaction . . . occurred in New York." *Id.* at 124 (internal brackets omitted).

Using this standard, the *Cruz* court held that the plaintiff, a Virginia resident, had statutory standing to sue the defendant, an online currency trading platform based in New York. *See id.* at 118-19. The court found standing because: (1) the defendant received payment in New York; (2) the defendant only disbursed funds from customer accounts when the correct form was sent to its New York office; (3) the defendant required that all communications be directed to its New York office; and (4) the customer agreement provided that New York law governs all disputes and all suits must be brought in New York courts. *See id.* at 123-24. On these grounds, the court concluded that "the case . . . clearly involves a series of allegedly deceptive transactions that occurred in New York and implicate the interests of New York." *Id.* at 123.

Since *Cruz,* courts have examined the quantity and

quality of the connections to New York in deciding whether a plaintiff has statutory standing for purposes of Sections 349 and 350. And as *Cruz* demonstrates, in the case of online transactions, that analysis can become highly granular. For example, in *Cline v. TouchTunesMusic Corp.*, 211 F. Supp. 3d 628 (S.D.N.Y. 2016), the court found sufficient connections to permit a Section 349 claim. There, the plaintiff challenged a company's deceptive practices with respect to its "digital jukebox" application, which allowed smartphone users to purchase and play songs at bars and other venues. *See Cline v. TouchTunes Music Corp.*, No. 14-CV-4744, 2015 WL 127843, at *1 (S.D.N.Y. Jan. 7, 2015). Even though the plaintiff was not a New York resident and had only used the application outside of New York, the court allowed the claim to proceed because: (1) the company processed payments in New York; (2) the company's music servers were in New York; (3) the user agreement required that all suits be brought in New York and would be governed by New York law; and (4) users' music selections were transmitted to the company's New York servers. *TouchTunes*, 211 F. Supp. 3d at 633.

Here, Plaintiffs argue that there are sufficient connections to New York to implicate Sections 349 and 350 because: (1) they are New York residents; (2) Defendants shipped Dixie X to Plaintiffs' New York address; (3) Douglas consumed at least a portion of the product in New York; and (4) Defendants' marketing and advertising were available to consumers in New York. *See* ECF No. 70-23 at 23-24. The Court is not persuaded.

Plaintiffs do not appear to dispute that they viewed Defendants' marketing—and thus were deceived—outside of New York. *See id.* Under the stricter reading

of *Goshen*, Plaintiffs' claim fails. *See Cruz*, 720 F.3d at 123. Even under the broader approach endorsed by the *Cruz* court, the connections to New York are too attenuated to justify application of Sections 349 and 350. If any bright-line principle can be discerned from *Goshen* and *Cruz,* it is that Sections 349 and 350 are not intended to regulate New York businesses or protect New York residents solely on the basis of their residency; they are intended to police consumer transactions that "take place in New York State," regardless of the residency of the parties. *Goshen*, 774 N.E.2d at 1196 (stating that the analysis does not turn "on the residency of the parties"); *see also Cruz*, 720 F.3d at 122.

In this case, unlike in *Cruz* and *Cline,* Defendants were not located in New York and Plaintiffs do not allege that any part of the online transaction took place in New York. In the Court's view, the only relevant link is that Defendants shipped Dixie X into the state. But at that point, Plaintiffs had already been deceived by, and purchased the product from, the out-of-state Defendants. Application of Sections 349 and 350 would thus be based more on Plaintiffs' residency than on the location of the transaction itself. And as a matter of policy, the Court is not convinced that New York's interests are more strongly implicated in the transaction than those of other states. *See Goshen*, 774 N.E.2d at 1196.

Accordingly, the Court concludes that Plaintiffs do not have statutory standing to bring these claims against Defendants based on their purchase of Dixie X. Defendants are entitled to summary judgment on the General Business Law claims.

b. Fraudulent Inducement

Plaintiffs premise their fraudulent inducement claim on the alleged misrepresentations contained in the "High Times" article, the FAQ on the Dixie X website, the YouTube interviews of Tripp Keber, and the customer-service phone call. Plaintiffs argue that Defendants falsely claimed that (1) Dixie X did not contain THC; (2) Dixie X was a legal product; (3) Dixie X was safe to consume; (4) Dixie X had health and wellness benefits; (5) Dixie X was adequately tested; and (6) Dixie X would not cause a positive drug test. Defendants challenge whether Plaintiffs can satisfy any of the necessary elements for a fraudulent inducement claim.

"Proof of fraudulent inducement under New York law requires a showing that (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance." *Baker-Rhett v. Aspiro AB*, 324 F. Supp. 3d 407, 418-19 (S.D.N.Y. 2018) (internal quotation marks omitted). With respect to intent, the plaintiff must demonstrate that the defendant made a knowing or reckless misrepresentation and intended to defraud the plaintiff thereby. *Turner v. Temptu Inc.*, No. 11 Civ. 4144, 2013 WL 4083234, at *11 (S.D.N.Y. Aug. 13, 2013).

All of these elements must be proven by clear and convincing evidence. *See Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 447 (E.D.N.Y. 2013). Therefore, "[a]t the summary judgment stage, a party must proffer enough proof to allow a reasonable jury to find by clear and convincing evidence the existence of each of the elements necessary to make out a claim for fraud in the inducement." *Waran v. Christie's Inc.*, 315 F. Supp. 3d

713, 718 (S.D.N.Y. 2018). "Clear and convincing proof is highly probable and leaves no doubt. . . . . [The] standard demands a high order of proof and forbids the awarding of relief whenever the evidence is loose, equivocal, or contradictory because fraud will not be assumed on doubtful evidence or circumstances of mere suspicion." *Id.*

At the outset, the Court concludes that that Plaintiffs' claim may not proceed based on the following representations: that Dixie X was a legal product; that Dixie X was safe to consume; that Dixie X had health and wellness benefits; that Dixie X was adequately tested; and that Dixie X would not cause a positive drug test. This is because Plaintiffs have provided insufficient evidence to establish that, at the time those statements were made, Defendants knew they were false and intended to defraud consumers. *See U.S. ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 658 (2d Cir. 2016) ("[A] representation is fraudulent only if made with the contemporaneous intent to defraud—*i.e.*, the statement was knowingly or recklessly false and made with the intent to induce harmful reliance."). The difficulty is that Plaintiffs offer little in the way of evidence that illuminates the intent, state of mind, or beliefs of Defendants or their agents when the statements were made. For example, Plaintiffs point to no deposition testimony, company emails or documents, or other evidence that suggests that when the website FAQs were posted, Defendants knew their product was an unlawful controlled substance, was unsafe, and did not provide the purported wellness benefits. Given the absence of evidence related to the beliefs and knowledge of Defendants, their employees, and their agents, Plaintiffs' fraud claim fails as a matter of

law as to the above statements.

The only actionable statement is Defendants' misrepresentation that Dixie X did not contain THC. First, there is evidence that this statement is false—indeed, Defendants' own testing revealed that the product contained detectible amounts of THC.

Second, there is evidence that Douglas reasonably relied on the misrepresentation. Plaintiffs carefully researched the product to ensure that it did not contain THC. It is reasonable to conclude that the explicit representations in the FAQs and in the YouTube videos regarding the absence of THC would allay consumers' concerns about ingesting a product associated with marijuana.

Third, there is evidence that Douglas lost his job because he consumed Dixie X.

Fourth, there is evidence that Defendants made the false statements with the requisite knowledge and intent. In August 2012, Tripp Keber stated in the YouTube videos that Dixie X did not contain THC. But there is evidence that Defendants had been testing Dixie X "during its development and manufacturing" and had found the presence of THC. ECF No. 61-1 ¶ 6 (stating that testing "showed levels of THC well within legal limits"); ECF No. 61-13. Given Keber's high position within all three defendant companies, a jury could reasonably infer that he knew the results of such testing. And in light of his varying roles, a jury could attribute Keber's August 2012 statements to all three defendants. Similarly, because RDH represented on its website FAQs and through its customer service that Dixie X did not contain THC, despite having test results showing the presence of THC

in its products, a jury could find that RDH knew that such representations were false.[8] Furthermore, all three defendants had a motive to defraud consumers. A jury could reasonably conclude that, to sell their products, Defendants needed to distinguish Dixie X from its unlawful counterparts; misrepresenting the THC content in the product would go a long way to dispelling consumers' concerns, as it did in Plaintiffs' case.

Thus, Plaintiffs' fraudulent inducement claim is viable, at least in part. The Court also notes three other considerations that further limit Plaintiffs' claim.

First, Plaintiffs may not proceed with their claim based on the alleged misrepresentations contained in the "High Times" article. As Defendants point out, the article is not an advertisement but a writeup about Dixie X by a third party. The only arguable connection between the article's contents and Defendants is that the article quotes Tripp Keber. However, the article would be inadmissible to the extent that Plaintiffs intend to rely on it to prove that Tripp Keber actually made those statements. *See Larez v. City of Los Angeles*, 946 F.2d 630, 642 (9th Cir. 1991) (quotations of party opponent which are recited in newspaper article present hearsay problems insofar as they are "offered for the truth of the matter asserted: that [the party opponent] did in fact make the quoted

[8] The record suggests that RDH operated the Dixie X website: RDH was the entity tasked with selling Dixie X; RDH identifies itself as the seller in the FAQ; and RDH's parent company—MMI—is identified as the "parent company" in the FAQ. ECF No. 69-6 at 1. Plaintiffs do not explain how the statements in the FAQ may be attributed to Dixie LLC or Medical Marijuana. *See Mouawad Nat'l Co. v. Lazare Kaplan Int'l Inc.*, 476 F. Supp. 2d 414, 421 (S.D.N.Y. 2007) (discussing circumstances in which corporate parent is liable for acts of subsidiary).

statement"). Plaintiffs offer nothing but speculation to argue that Defendants had a role in publishing the article.

Second, Cindy's lost wages are not recoverable. A fraudulent inducement claim requires "a showing of proximate causation," *i.e.*, that the injury "is the natural and probable consequence of the defrauder's misrepresentation or . . . the defrauder ought reasonably to have foreseen that the injury was a probable consequence of his fraud." *Bank of Am. Corp. v. Lemgruber*, 385 F. Supp. 2d 200, 218 (S.D.N.Y. 2005). Cindy's lost wages were not the direct result of Defendants' alleged fraud; rather, they were derivative of Douglas's injury and too attenuated from Defendants' wrongful conduct to be actionable. *See Kregos v. Assoc. Press*, 3 F.3d 656, 665 (2d Cir. 1993) (stating that the losses for a fraud claim must be the "direct, immediate, and proximate result of the misrepresentation").

Third, Defendants argue that the website FAQs and YouTube videos are inadmissible insofar as they are not authenticated and contain hearsay. Further, Defendants contend that Plaintiffs did not produce the YouTube videos during discovery. Although these are colorable issues, both sides have failed to sufficiently develop them. The Court would benefit from further briefing on whether the printouts of the website FAQs can be authenticated. *See, e.g., United States v. Gasperini*, 894 F.3d 482, 489-90 (2d Cir. 2018) (discussing issue); *Universal Church, Inc. v. Universal Life Church/ULC Monastery*, No. 14 Civ. 5213, 2017 WL 3669625, at *3 n.7 (S.D.N.Y. Aug. 8, 2017) (same). Likewise, while Defendants argue that Plaintiffs failed to disclose the YouTube videos in discovery, they do not cite any specific discovery request that Plaintiffs did not adequately answer or supplement. Consequently, the

Court concludes that these issues are better raised in the context of pretrial motions than on summary judgment. To the extent Defendants prevail on their arguments, the Court may revisit whether the fraudulent inducement claim may proceed to trial.

In sum, Plaintiffs' fraudulent inducement claim is viable as to Douglas's claim for damages resulting from Defendants' misrepresentation that Dixie X did not contain THC. Defendants are otherwise entitled to summary judgment on the claim,

c. RICO

Plaintiffs and Defendants move for summary judgment on the RICO claim. Plaintiffs argue that all of the elements are satisfied as a matter of law based on the record evidence. Defendants counter that there is insufficient evidence to prove that they engaged in a pattern of racketeering activity. The Court concludes that there are genuine issues of material facts that preclude summary judgment in either side's favor.

Plaintiffs bring their RICO claim under 18 U.S.C. § 1962(c).[9] That provision "makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Ferri v.*

[9] In their Civil Rico Statement, Plaintiffs asserted violations of subsections (a), (b), (c), and (d) of Section 1962. Plaintiffs do not argue in their summary judgment briefing that they have viable claims under any subsection besides subsection (c). *See* ECF No. 60-25 at 5-7. The Court limits its analysis accordingly. *See Gaston v. City of New York*, 851 F. Supp. 2d 780, 796 (S.D.N.Y. 2012).

Berkowitz, 678 F. Supp. 2d 66, 72-73 (E.D.N.Y. 2009) (internal quotation marks omitted). "To establish a civil RICO claim . . . a plaintiff must allege (1) conduct, (2) of an enterprise, (3) through a pattern (4) of racketeering activity, as well as injury to business or property as a result of the RICO violation." *Flexborrow LLC v. TD Auto Fin. LLC*, 255 F. Supp. 3d 406, 414 (E.D.N.Y. 2017) (internal quotation marks omitted).

"The pattern of racketeering activity must consist of two or more predicate acts of racketeering," *id.*, which must be "related" and must "pose a threat of continued criminal activity." *DeFalco v. Bernas*, 244 F.3d 286, 320 (2d Cir. 2001). Racketeering activity is defined to include "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance . . . punishable under any law of the United States." 18 U.S.C. § 1961(1)(D). This definition extends to the cultivation, manufacture, and sale of marijuana. *See, e.g.*, *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 882 (10th Cir. 2017) (operation of marijuana cultivation facility "necessarily would involve *some* racketeering activity").

In this case, Plaintiffs have provided sufficient evidence to show a pattern of racketeering activity. Specifically, Douglas avers that he purchased two bottles of Dixie X—a controlled substance constituting marijuana under the CSA—from Defendants. These two transactions constitute two predicate acts of racketeering activity.[10] *See* 18 U.S.C. § 1961(1)(D). This is so even if

[10] To be sure, each defendant played a different role in the venture, and it appears that RDH had the responsibility of selling and distributing Dixie X to consumers. Nevertheless, liability under

Defendants subjectively believed that Dixie X was not a controlled substance, as such belief would not preclude a finding that they violated the CSA. It is unlawful "for any person knowingly or intentionally" to distribute or dispense a controlled substance. 21 U.S.C. § 841(a)(1). A defendant satisfies the knowledge requirement if he "knew he possessed a substance listed on the schedules" or, alternatively, if he "knew the identity of the substance he possessed" whether or not he knew it was listed on the schedules. *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015). Here, there are sufficient facts from which it can be inferred that Defendants knew the identity of the substance they possessed—a mixture containing a resin extract derived from the *Cannabis sativa* plant. In 2012, that substance fell within the definition of marijuana under the CSA. 21 U.S.C. § 802(16) (2012); *see also McFadden*, 135 S. Ct. at 2304 ("[I]gnorance of the law is typically no defense to criminal prosecution.").

These transactions also meet the relatedness and continuity requirements. *See DeFalco*, 244 F.3d at 320. The transactions are related, in that the sale of these controlled substances was the business of Defendants' venture. *See Reich v. Lopez*, 858 F.3d 55, 61-62 (2d Cir. 2017). Defendants' activities also presented a threat of continued criminal activity. The sale of hemp-based CBD products was no mere aberration of unlawful conduct: it was the *raison d'etre* of Defendants' venture. *See id.* at 60 (stating that criminal activity poses a continuous threat when the "predicate acts were the regular way of operating that business"). Indeed, in a June 2012 SEC filing, MMI indicated that it intended to invest heavily in

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RICO also extends to those who have "some part in directing" the affairs of the enterprise. *DeFalco*, 244 F.3d at 309.

RDH to "expand[] its operations state by state" and to "rais[e] additional capital to expand the operations of the company." ECF No. 69-4 at 32. Given the inherent illegality of the product and Defendants' intent to continue and expand those operations, Plaintiffs have provided sufficient evidence to prove a pattern of racketeering activity.[11] Therefore, Defendants are not entitled to summary judgment based on the arguments they raise.

But Plaintiffs are not entitled to summary judgment either. There is a genuine issue of material fact on one necessary element: whether Defendants' conduct proximately caused Douglas's injuries. "[A] plaintiff suing under RICO must establish that the RICO offense was the 'proximate cause' of the plaintiff's injuries." *Empire Merchs., LLC v. Reliable Churchill LLLP*, 902 F.3d 132, 141 (2d Cir. 2018). "Proximate cause requires some direct relation between the injury asserted and the injurious conduct alleged, and a link that is too remote, purely contingent, or indirect is insufficient." *Id.* (internal quotation marks, ellipses, brackets omitted).

Here, there is a genuine dispute of material fact as to whether Dixie X caused Douglas's positive drug test and thereby caused him to lose his job. Plaintiffs aver that Douglas had not used marijuana "for the 14 years [he] was a trucker," ECF No. 60-6 ¶ 18, and Plaintiffs' expert opines that Douglas's positive drug test resulted from his "daily use of Dixie X" in the days leading up to the test. ECF No. 60-21 at 5.

Defendants dispute this conclusion. Although

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[11] In light of this conclusion, the Court need not assess whether, as Plaintiffs claim, Defendants also engaged in other predicate acts of racketeering, including mail and wire fraud. *See* ECF No. 2 at 3-4.

Defendants do not contend that Douglas smoked marijuana or otherwise consumed a THC-laden product besides Dixie X, Defendants' expert asserts there is insufficient evidence to make a scientifically valid connection between Douglas's consumption of Dixie X and his positive drug test. The expert notes that there are many variables that affect whether and to what extent THC will stay in one's system, including dosage, frequency of use, individual rates of absorption and metabolism, etc. ECF No. 61-9 at 4. The expert opines that the absence of evidence on two relevant variables—the amount of THC contained in the *specific* bottle of Dixie X which Douglas consumed, and the exact amount of Dixie X that Douglas consumed prior to his drug test—renders it "impractical to calculate . . . a range of expected contaminating THC metabolite" in Douglas's urine sample at the time of his test. *Id.* at 4-5. And, as a result, "no one can opine with any degree of scientific confidence that it was the Dixie product used by [Douglas] that caused him to fail his" drug test. *Id.* at 5. The Court may not resolve this factual dispute on summary judgment. *See Scanner Techs. Corp. v. Icos Vision Sys. Corp., N.V.*, 253 F. Supp. 2d 624, 634 (S.D.N.Y. 2003) ("The credibility of competing expert witnesses is a matter for the jury, and not a matter to be decided on summary judgment.")

The Court does conclude that Plaintiffs are not entitled to recover under RICO for any damages Cindy sustained. The link between Cindy's pecuniary losses and Defendants' racketeering activity is "too remote" and "indirect" to satisfy the requirement of proximate causation. *Empire Merchs., LLC*, 902 F.3d at 141. Defendants' conduct did not directly cause Cindy to terminate her employment; it was only because Douglas

was terminated that Cindy suffered any harm as a result of Defendants' conduct. *See id.* (stating that a court should "rarely go beyond the first step when assessing causation under civil RICO" (internal quotation marks omitted)). Such indirect, derivative injuries are not cognizable under civil RICO. *See id.* at 141-44.

Because genuine issues of material facts exist as to Plaintiffs' RICO claim, summary judgment is inappropriate in their favor. Defendants are entitled to summary judgment on the RICO claim only as to Cindy's claim for damages.

d. Strict Products Liability, Negligence, and Negligent Infliction of Emotional Distress Claims

Plaintiffs argue that Defendants are liable under theories of strict products liability, negligence, and negligent infliction of emotional distress. The first two of these claims fail because Plaintiffs have not provided evidence that they suffered cognizable injuries. "The general rule under New York law is that economic loss is not recoverable under a theory of negligence or strict products liability." *Am. Tel. & Tel. Co. v. New York City Human Res. Admin.*, 833 F. Supp. 962, 982 (S.D.N.Y. 1993); *see also Labajo v. Best Buy Stores, L.P.*, 478 F. Supp. 2d 523, 532 (S.D.N.Y. 2007) (consumer who was allegedly deceived by store's free-magazine promotion could not bring negligence claim because "she does not allege any personal injury or property damage"). Plaintiffs seek damages for their economic losses, but they do not claim that they suffered any personal injury or injury to property as a result of Defendants' conduct. Their negligence and strict products liability claims therefore fail.

Granted, Plaintiffs allege that they suffered emotional distress due to Defendants' conduct. A claim for negligent infliction of emotional distress is cognizable in New York, and some courts have suggested that such a cause of action might be viable under a products liability theory. *See Luna v. Am. Airlines*, 676 F. Supp. 2d 192, 206 (S.D.N.Y. 2009); *O'Sullivan v. DuaneReade, Inc.*, No. 108570/05, 2010 WL 1726079, at *7 n.4 (N.Y. Sup. Ct. Apr. 20, 2010). Nonetheless, under New York law, a claim for negligent infliction of emotional distress must possess "some guarantee of genuineness." *J.H. v. Bratton*, 248 F. Supp. 3d 401, 416 (E.D.N.Y. 2017). This requires "a specific, recognized type of negligence that obviously has the propensity to cause extreme emotional distress, such as the mishandling of a corpse or the transmission of false information that a parent or child had died." *Id.* (internal quotation marks and bracket omitted). The element may also be satisfied where there is a "breach of the duty owed directly to the injured party [which] endangered the plaintiff s physical safety or caused the plaintiff to fear for his or her own physical safety." *Id.* (internal quotation marks omitted). "In the absence of such special circumstances, psychiatric testimony may suffice for such a guarantee of genuineness, but a plaintiff's uncorroborated testimony of upsetness will not." *Vumbaca v. Terminal One Grp. Ass'n L.P.*, 859 F. Supp. 2d 343, 376 (E.D.N.Y. 2012) (internal brackets and quotation marks omitted).

In this case, Plaintiffs' situation does not fall into any of the special circumstances for which a claim is recognized. *See Vaughn v. Am. Multi Cinema, Inc.*, No. 09 Civ. 8911, 2010 WL 3835191, at *5 (S.D.N.Y. Sept. 13, 2010) (termination of employment not a special

circumstance giving rise to claim for negligent infliction of emotional distress). Furthermore, Plaintiffs offer no evidence to otherwise establish a guarantee of genuineness: they do not even provide evidence from Douglas concerning the degree to which he suffered psychological trauma because of these events, let alone evidence from a medical or valid corroborating source. *See Luna*, 676 F. Supp. 2d at 208 (plaintiff, who had been served chicken dinner with "part of a lizard" in it, had viable claim for emotional distress, where plaintiff proffered medical testimony to support claim of psychological injury). Under these circumstances, Plaintiffs do not have a viable claim for negligent infliction of emotional distress.

Accordingly, without cognizable personal, property, or psychological injury, Plaintiffs' claims for negligence, strict products liability, and negligent infliction of emotional distress fail. Defendants are entitled to summary judgment on these claims.

CONCLUSION

For the reasons discussed above, Plaintiffs' motion to amend (ECF No. 68) is GRANTED IN PART and DENIED IN PART. Defendants' motions to strike (ECF Nos. 71, 74) are DENIED. Plaintiffs' motion for partial summary judgment (ECF No. 60) is DENIED. Defendants' motions for summary judgment (ECF No. 61, 62) are GRANTED IN PART and DENIED IN PART.

As a result of these rulings, the only surviving claims are Douglas's claims for fraudulent inducement and civil RICO. All other claims against Defendants are dismissed. The Clerk of Court is directed to amend the name of Defendant "Dixie Elixirs and Edibles" to "Dixie Holdings,

LLC a/k/a Dixie Elixirs." By separate order, the Court will schedule a status conference to hear from the parties on the progress of this action.

IT IS SO ORDERED.

Dated: April 17, 2019
Rochester, New York

Frank P. Geraci, Jr.
HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court