RYAN GORDON (SBN 278414)
LAW OFFICE OF RYAN GORDON
11110 Landale Street
Studio City, CA 91602
Phone: 949 375 2099
E-mail: ryan.robert.gordon@gmail.com

Attorneys for Defendants, Lance Ott, David Yeager
Steve Baghoomian, Colton Dane Lasater,
Charles Christopher, and Cirrata Ventures, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

SIVA ENTERPRISES, a California corporation, and AVIS BULBULYAN, an individual,;

Plaintiffs,

v.

LANCE OTT, an individual; DAVID YEAGER, an individual; STEVE BAGHOOMIAN, an individual; COLTON DANE LASATER, an individual; CHARLES CHRISTOPHER, an individual; CIRRATA VENTURES LLC, a California Limited Liability Company and DOES 1 through 25, inclusive;

Defendants.

CASE NO.: 2:18-cv-06881- CAS-GJS

NOTICE OF MOTION AND MOTION TO DISMISS FEDERAL CLAIMS PURSUANT TO FRCP 12(b)(1) AND 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

[*Declaration of Steve Baghoomian, Declaration of Ryan Gordon, filed concurrently herewith. Request for Judicial Notice on October 1, 2018*]

Complaint Filed: August 10, 2018

Date: October 22, 2018
Time: 10:00am
Location: First Street Courthouse,350 W. First Street, Courtroom 8D, 8th Floor, Los Angeles, CA 90012

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on October 22, 2018 at 10:00am at the US District Court for the Central District of California, located at the First Street Courthouse at 350 W. First Street, Courtroom 8D, 8th Floor, Los Angeles, CA 90012, DEFENDANTS Lance Ott, David Yeager, Steve Baghoomian, Colton Dane Lasater, Charles Christopher, and Cirrata Ventures, LLC (collectively, "Defendants") will and hereby does move this Court for an order dismissing the two remaining federal causes of action in Plaintiffs Avis Bulbuyan and Siva Enterprises' (collectively, "Plaintiffs") First Amended Complaint (FAC), which are their first cause of action for Misappropriation of Trade Secrets (18 U.S.C. §§ 1836 et seq.) and their eleventh cause of action for Violation of the Lanham Act / Federal Unfair Competition (15 U.S.C. §§ 1125(a)), pursuant to Federal Rules of Procedure, Rule 12(b)(1) or, alternatively, Rule 12(b)(6). Alternatively, Defendants request that this Court, pursuant to *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976), abstain or defer to a State Court action pending between these same parties as of October 1, 2018,

The grounds for this motion under rule 12(b)(1) are that Plaintiffs have no "injury in fact" given that these two federal claims seek protection for ideas, trade secrets, confidential information and/or plans, which Plaintiffs call "confidential business information," that are used and purposed at aiding and abetting cannabis producers and distributors in the violation of the federal proscription on cannabis cultivation and trafficking. Therefore, the Defendants' alleged misappropriation, and use of Plaintiffs ideas, trade secrets, confidential information and/or plans, did not cause Plaintiffs any legal "injury in fact" for purposes of Article III standing. This motion requests this Court to dismiss the complaint pursuant to rule 12(b)(1), including all supplemental claims asserted therein.

Alternatively, this motion requests that this Court dismiss Plaintiffs' two federal claims under FRCP rule 12(b)(6) because: Plaintiffs' confidential business

information is not a trade secret within the meaning of 18 U.S.C. § 1839 and, therefore, Plaintiffs have no claim for violations of trade secrets under 18 U.S.C. § 1836; Further, Plaintiffs have no claims against Defendants for violating the Lanham Act, since Plaintiffs' recovery and use of this confidential business information violates federal law and is not protected under the Lanham Act. Further, Plaintiffs' Lanham Act claim is itself nonsensical and legally improper, as Defendants' alleged use of Plaintiffs' confidential information cannot cause the public to confuse Defendants with Plaintiffs as the public, by definition, cannot even know that this supposed confidential information exists, let alone who to attribute it to. Finally, the ideas Plaintiffs seek to protect as their originator are not protected by the Lanham Act. See *Dastar Corp. v. Twentieth Century Fox Film Corp*., 539 U.S. 23, (2003). For these reasons, Defendants seek an order from this Court dismissing Plaintiffs claims under rule 12(b)(6) and declining to exercise supplemental jurisdiction on the state law claims.

If this Court finds dismissal inappropriate, Defendants request that it abstain pending the outcome of the Defendants state court action filed October 1, 2018, pursuant to *Colorado River Water Conservation District v. U.S*., 424 U.S. 800 (1976), as the factors set forth in that case, on balance, tip in favor of letting the California state action proceed first.

This motion will be and is based on the accompanying Memorandum of Points and Authorities, the concurrently filed Declarations Ryan Gordon and Steve Baghoomian, and Defendants' Request for Judicial Notice, to be filed on October 1, 2018. It is also based on all other papers and pleadings on file in this action, and on such other and further evidence as may be presented at the hearing on this application.

This Motion is made following a conference with counsel pursuant to L.R. 7-3, which took place in September 20, 26, 27, and 28, 2018. The concurrently

filed declaration of Ryan Gordon elaborates on the meet and confer process and attached letters exchanged during it.

Respectfully submitted,

DATED: September 29, 2018

LAW OFFICES OF RYAN GORDON

By: /S/Ryan Gordon
Ryan Gordon, Attorneys for Defendants Lance Ott, David Yeager, Steve Baghoomian, Colton Dane Lasater, Charles Christopher, and Cirrata Ventures, LLC

TABLE OF CONTENTS

Table of Authorities

Cases:

Statutes

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Cannabis cultivation, distribution, and sale are federal crimes. Those who aid and abet cannabis cultivators, distributors and sellers, are also committing a federal crime. This is still federal law. Plaintiffs cannot come to federal court and ask it to protect their trade secret ideas of how to break and evade federal law. In this forum, there is no value to types of these ideas because they are expressly proscribed by the Controlled Substances Act. *Indeed, Walter White cannot sue Jesse Pinkman for misappropriating his proprietary "blue meth" recipe and then helping third-party producers and distributors sell it*. While not precisely the situation before this Court, that analogy, as explained below, is not far off. Consequently, Plaintiffs need to go to state Court. Fortunately, there is already a state court action pending by Defendants arising out of these exact same issues, an action where Plaintiffs can get full and fair relief for the claims present in their First Amended Complaint (FAC).

To more specifically summarize the issues of this motion, Plaintiffs are Avis Bulbulyan ("Bulbulyan"), an individual, and Siva Enterprises ("Siva"), a corporation for which Bulbulyan is CEO and sole shareholder. Siva is a national cannabis consulting firm that assists businesses with cultivating cannabis and distributing it, it manages such businesses, and it assists these cannabis producers and distributors with getting licensed to produce and distribute their product. Plaintiffs claim they have secret so-called "confidential business information" unique to them that helps them accomplish these business operations But such business information, whether confidential or otherwise, in effect amounts to the aiding and abetting of cannabis trafficking, which is a crime.

Yet, Plaintiffs' claim their confidential business information entitles them to relief under two remaining federal claims, which serve as the basis for jurisdiction

in this Court: (1) Misappropriation of Trade Secrets (18 U.S.C. § 1836); (2) Violation of the Lanham Act (15 U.S.C. §§ 1125). At the foundation of both of these claims is Plaintiffs "confidential business information." Plaintiffs allege Defendants, all former employees of Siva except for Defendant Cirrata (a newly formed business), conspired to steal Siva's "confidential business information," which Plaintiffs allege amounts to misappropriation of trade secrets. It does not. This information has no legal value. Consequently, Plaintiffs have no "injury in fact" for purposes of Article III standing and, therefore, this Court should dismiss this claim pursuant to FRCP rule 12(b)(1) for want of subject matter jurisdiction.

Similarly, Plaintiffs remaining federal claim for violations of the Lanham Act is also based on the theory that Defendants wrongfully appropriated Siva's "confidential business information" and are employing it through their new business, Defendant Cirrata, to the confusion of the public, which now allegedly thinks Cirrata is Siva. But again, there is no legal protection for this "confidential business information" so, even if Defendants were wrongfully using it (which they are not, nor did they steal anything from Siva), the conclusion remains that Plaintiffs have no "injury in fact" for their Lanham Act claims, making dismissal appropriate under Rule 12(b)(1).

Alternatively, for both similar and different reasons, this Court may also dismiss these claims under Rule 12(b)(6). Plaintiffs cannot claim misappropriation of trade secrets because information to facilitate ongoing illegal activities is not a trade secret. See *Alderson v. U.S.*, 718 F.Supp.2d 1186 (2010). This also undercuts their Lanham Act claim. But, their Lanham Act is further compromised by the fact that it makes no sense. How can Defendants' (Cirrata's) use of Plaintiffs' so-called "confidential business information" be confusing the public about Cirrata's identity when the public does not even know that such alleged confidential information even exists, let alone that it belongs to Siva? By definition the public cannot be confused as to the owner of any confidential information because it's

"confidential." Further, their Lanham Act claim is also not actionable based on Supreme Court precedent, which holds that "ideas" regarding the origin of goods and services are not protectible under the Lanham Act and, instead, fall under the purview of Federal copyright.

In sum, this Court should dismiss these federal claims under 12(b)(1) of 12(b)(6) and dismiss the supplemental state law claims, which serve as the bulk of Plaintiffs' FAC. Indeed eleven out of the remaining thirteen causes of action are state law claims. Dismissal would allow these parties to litigate in California State Court where Defendants have a lawsuit pending related to Plaintiffs' business. (See Gordon Decl., ¶¶ 6-13, Ex. 3; See also Request for Judicial Notice filed/to be filed on October 1, 2018.). Given California's interest in cannabis and cannabis businesses, this seems like the appropriate path, as Plaintiffs' decision to file the FAC appears purely motivated by forum shopping.

II. MATERIAL FACTS

Plaintiff Siva Enterprises ("Siva") aids cannabis businesses in their ultimate sale and distribution of recreational cannabis; it does this by providing consulting services to those who grow, cultivate, and distribute cannabis (in violation of federal law), it guides and represents cannabis growers and distributors in gaining California licenses (licenses which violate federal law), and it provides management to growers and distributors. (See Declaration of Steve Baghoomian, "Baghoomian Decl.", concurrently filed herewith.)

Plaintiffs FAC admits this. It states "SIVA Enterprises provides a full suite of business solutions and operational services for the cannabis industry nationwide. Its services include consulting, local and state licensing, compliance, brand development, product and brand development, manufacturing and distribution…." (P's FAC ¶ 12.)

The FAC claims federal jurisdiction based on 28 U.S.C. section 1331 based on its two remaining federal claims[1]: (1) Misappropriation of Trade Secrets (18 U.S.C. § 1836); (2) Violation of the Lanham Act (15 U.S.C. §§ 1125). Both of these federal claims seek legal protection for SIVA's "Confidential Business Information" for which the FAC states "SIVA's valuable, confidential, proprietary and trade secret information is not generally known to the public and the result of much time, effort and expense and investment by BULBULYAN. Such information includes a listing of SIVA's clients and their contact information, the identities of key decision makers at each client, the sensitive needs and preferences of each client, details as to the types of services needed by the clients, on-boarding documents, SIVA's business strategies and comprehensive operations manuals, business plans, accumulated market data, financial modeling workbook, other form templates, as well as other confidential and proprietary information. This information is referred to below as SIVA's "Confidential Business Information." (P's FAC ¶ 14.)

This motion seeks to dismiss the FAC's two federal causes of action: its first cause of action for Misappropriation of Trade Secrets and its eleventh cause of action for Lanham Act violations.

III. THIS COURT MUST DISMISS PLAINTIFFS COMPLAINT FOR LACK SUBJECT MATTER JURISDICTION

A. Legal Standard For Motions Brought Under Rule 12(b)(1)

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows for a motion to dismiss based on lack of subject matter jurisdiction. Fed. R. Civ. Pro. 12(b)(1) . It is a fundamental precept that federal courts are courts of limited jurisdiction. *Vacek v. United States Postal Serv.*, 447 F.3d 1248, 1250 (9th Cir. 2006)

[1] The FAC's third federal claim, which was its Thirteenth Cause of Action for "Honest Services Fraud" under 18 U.S.C. §§ 1346, 1341 and 1343, was dismissed by stipulation 9/28/18 during the meet and confer process for this motion

The Article III case or controversy requirement limits federal courts' subject matter jurisdiction by requiring, inter alia, that plaintiffs have standing. *Chandler v. State Farm Mut. Auto. Ins. Co*. 598 F3d 1115, 1122 (9th Cir. 2010).

The plaintiff has the burden to establish that subject matter jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ; *Vacek, supra*, 447 F.3d at 1250. Thus, a court is "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears"(*Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989)), and the plaintiff bears the burden of establishing that such jurisdiction exists. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936) ; *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). The court's review "is not restricted to the pleadings'; rather, the court "may review extrinsic evidence to resolve any factual disputes which affect jurisdiction." *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1074 (N.D. Cal. 2007) (citing *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988)) .

B. Plaintiffs' Have No Standing Because They Have No Injury, As Their Federal Claims are Prohibited By Federal Law Under the CSA

"[T]he irreducible constitutional minimum of standing contains three elements," all of which the party invoking federal jurisdiction bears the burden of establishing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). First, the plaintiff must prove that he suffered an "injury in fact," i.e., an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (citations, internal quotation marks, and footnote omitted).

In this instance, both of Plaintiffs' remaining federal claims – its first and eleventh causes of action - are based on the theory that their so-called "confidential business information" constitutes a "legally protected interest" capable of being

"injured" for purposes of Article III standing. *Lujan v. Defenders of Wildlife, supra* at 560-61. It does not, as it entirely consists of ideas aimed at facilitating and directing the trafficking of recreational marijuana.

Federal law, however, continues to prohibit marijuana, through the Controlled Substances Act (CSA). See 21 U.S.C. §§ 812 (controlled substances), 844(a) (penalties). The CSA proscribes the possession, cultivation, and distribution of marijuana (21 U.S.C. §§ 841(a), 844(a)), and it imposes harsh criminal sanctions for violations of these bans. (E.g., id. at § 841(b)(1)(B).) The CSA also proscribes various marijuana-related activities. See, e.g., § 843(c)(1) (prohibiting individuals from placing advertisements to buy or sell Schedule I drugs); § 854(a) (barring the investment or use of any income derived illegally from violations of the CSA); § 863(a) (prohibiting the distribution of drug paraphernalia). Section 856 of the CSA prohibits knowingly renting, managing, or using property "for the purpose of manufacturing, distributing, or using any controlled substance." Section 846 makes it a crime to attempt or conspire to violate the CSA, and a separate title, 18 U.S.C. Section 2, also makes it a crime to aid and abet a violation of the CSA.

There are no exceptions to this rule. See *United States v. Oakland Cannabis Buyers' Coop*., 532 U.S. 483, 491-95, (2001) (holding that medical necessity is not a defense to manufacturing and distributing marijuana). The Ninth Circuit has stated that "[a]nyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime" under the *CSA. US v. McIntosh,* 833 F.3d 1163, 1179 n.5 (9th Cir. 2016).

Here, Plaintiffs' FAC admits that its "confidential business information" aimed at aiding, abetting and facilitating the federal criminal proscription on marijuana. Plaintiffs freely admit they service "the cannabis industry nationwide" through "consulting, local and state licensing, compliance, brand development, product and brand development, manufacturing and distribution…." (P's FAC ¶

12.) This is merely a formal way of stating that Plaintiffs facilitate and assist marijuana growers and distributors in making and trafficking their product, and in acquiring federally prohibited state licenses to do so. This is still a crime; as the Supreme Court has stated, in reference to both statute (18 U.S.C. Section 2) and common law, "those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime." *Rosemond v. US.* 572 U.S. 65, 71 (2014.).

Indeed, just as Plaintiffs entire business is aimed at facilitating violations of the CSA *on a nationwide basis*, their so-called "confidential business information" serves the same purpose. For instance, to the extent the "confidential business information" was their client lists, that information consists of clients attempting, of succeeding, in violating the CSA. The remaining "confidential business information" (i.e., the "business strategies and comprehensive operations manuals, business plans, accumulated market data, financial modeling workbook) also are purposed at facilitating violations of CSA's proscriptions on distributing and advertising marijuana for sale. (21 U.S.C. §§ 841(a), 843(c)(1), 844(a), 846, 856.), The concurrently filed Declaration of Steve Baghoomian further confirms this conclusion.

As such, this "confidential business information" does not constitute a "legally protected interest" for purposes of Article III standing since its purpose - *and actual use* - is in violation of federal law. At worst, Plaintiffs claims are frivolous in this forum, but, at best, their claims are merely improper in Federal Court and must instead be presented in California state court.

This is plainly illustrated by the following thought experiment: Just imagine if a plaintiff came to this Court seeking protection for how his personal information of how to grow and cultivate cocaine or methamphetamines. That plaintiff could make the exact same arguments: "I'm not touching the product… I'm only seeking protection for my ideas on how to grow and distribute the product," "I'm just

giving advice to farmers on how to grow it, market it, and deliver it," "I'm just advising on how to evade IRC code 280E but I'm not actually the one evading it," etc. *A Court would not grant that plaintiff any trade secret protection for such activities. Nor would a Court grant that person protection under the Lanham Act*. The same must follow here: Cannabis is still illegal under federal law and must be treated the same as cocaine or methamphetamines in situations when a plaintiff seeks legal protection, or seeks to profit in court, off his "knowing aid to persons committing federal crimes, with the intent to facilitate [that] crime…[as that plaintiff is himself] committing a crime." *Rosemond v. US.* 572 U.S. 65, 71 (2014.)

For these reasons, this Court should dismiss Plaintiffs' federal claims pursuant to FRCP rule 12(b)(1).

C. Because Plaintiffs Have No Standing To Assert These Claims In Federal Court, This Court Must Dismiss Plaintiffs State Law Claims

"[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety." *Arbaugh v. Y & H Corp*. (2006) 546 US 500, 514-515. Here, this Court has not subject matter jurisdiction over the federal claims for the reasons stated above and, therefore, it must dismiss this action entirely.

IV. ALTERNATIVELY, THIS COURT MUST DISMISS PLAINTIFFS' FEDERAL CLAIMS UNDER 12(B)(6), AS NO RELIEF FOR THEM CAN BE GRANTED, AND IT SHOULD DECLINE SUPPLEMENTAL JURSIDICITON OVER THE REMAIMING STATE LAW CLAIMS.

A. Legal Standards For Motions Brought Under Rule 12(b)(6)

A complaint may be dismissed for failure to state a claim for which relief can be granted under FRCP 12(b)(6). "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.3d 578, 581 (9th Cir. 1983). In ruling on an FRCP 12(b)(6)

motion to dismiss, the court takes "all allegations of material fact as true and construe(s) them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Where a Plaintiff cannot allege other facts consistent with the Complaint that could possibly cure the deficiencies identified in a motion to dismiss, the complaint must be dismissed without leave to amend. *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.1986)

B. Plaintiffs Have No Statutory Standing For Their Trade Secrets claim

For reasons similar to why this Court has no subject matter jurisdiction, Plaintiffs federal claims must be dismissed pursuant to FRCP 12(b)(1) for "lack of a cognizable legal theory [and] on the absence of facts that would support a valid theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)

Here, Plaintiffs' first federal claim is their first cause of action for Misappropriation of Trade Secrets under 18 U.S.C. § 1836. A "trade secret" within the meaning of this statute is "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." 18 U.S.C. § 1839(3).

However, there is no trade secret protection for ongoing illegal activities. See *Alderson v. U.S.*, 718 F.Supp.2d 1186 (2010), ("…the Court disagrees with Plaintiffs' legal premise that a person can receive trade secret protection for information about ongoing illegal activities. A trade secret only exists if the secret-holder takes *reasonable efforts* to maintain the secrecy of the information. *See* Uniform Trade Secrets Act § (1)(4)(ii). This element simply cannot be satisfied with respect to information about ongoing illegality. There is no objectively "reasonable" method for concealing information about ongoing illegality.")

In this case, all of Plaintiffs' "confidential business information" is, for the reasons explained previously, aimed at giving "knowing aid to persons committing federal crimes, with the intent to facilitate [that] crime" because, as the FAC admits, this information is used to facilitate the growth, distribution and sale of cannabis. *Rosemond v. US.* 572 U.S. 65, 71 (2014.). Showing a cannabis farmer how to grow better illegal crops, or managing that farmer's illegal business, or assisting that farmer with violating federal law under the guise of state regulatory compliance, are not trade secrets. They are merely ideas on how to evade federal law and are, therefore, unprotected. See *Alderson v. U.S.*, *supra.*

C. Plaintiffs Lanham Act Claim Fails

Plaintiffs' claims under the Lanham Act have similar problems. 15 U.S.C. §§ 1125(a). For one, all of these claims seek protection and recovery for Plaintiffs' "confidential business information" but, again, there is no legal protection for ideas purposed at aiding and abetting the commission of a crime because, that is itself a crime. See *Rosemond, supra*. "It is well-settled general law that the law will not grant relief when a cause of action is grounded upon an illegal transaction" and therefore this Court cannot enforce Plaintiffs' claim. *Higgins v. McCrea*, (1886) 116 U. S. 671, 686. Moreover, a court won't use its equitable power to facilitate illegal conduct. See *Warner Bros. Theatres, Inc. v. Cooper Found.*, 189 F.2d 825,

829 (10th Cir. 1951). Thus, Plaintiffs' claim for injunctive relief is also not actionable.

In opposition to this, Plaintiffs "meet and confer" letter (Ex. 2 to Gordon Declaration) argued that Lanham Act protection for cannabis businesses have been upheld in court and cited *Headspace International, LLC v. New Gen Agricultural Services, LLC*, 2017 WL 2903181 (C.D. Cal. June 19, 2017). Their argument is, however, facile. This case upheld protection for a trademark. It did not state that a business could seek protection for its business ideas and plans of how to evade federal law. Protecting a mark versus protecting illegal actions are entirely different things

For two, *Plaintiffs Lanham Act claim simply makes no sense*. Plaintiffs entire Lanham Act claim as alleged in the FAC is that "DEFENDANTS' unauthorized use in commerce of the Confidential Business Information as alleged herein constitutes use of a false designation of origin, and misleading description and representation of fact" in violation of 15 U.S.C. § 1125(a). See FAC ¶ 152. Defendants contend Plaintiffs' alleged use of their "confidential business information" is "likely to deceive consumers and business affiliates as to the origin, source, sponsorship, or affiliation of DEFENDANTS' services, and are likely to cause consumers and business affiliates to believe, contrary to fact, that DEFENDANTS' services are sold, authorized, endorsed, or sponsored by Plaintiffs." Even assuming Defendants were using Plaintiffs' confidential business information, how would that confidential information possibly be causing customers and business affiliates to confuse Defendants' company, Cirrata, with Plaintiffs' company, Siva, *if Plaintiffs held that information confidential to begin with*? It can't because no customers or business affiliates would ever have associated Siva's confidential information with Siva in the first place because, again, it was confidential. Plaintiffs are talking out of both sides of their mouths – this information cannot be a hidden "trade secret" while simultaneously being so

universally associated with Siva by the general public that the public thinks Cirrata is Siva.

Lastly, the Supreme Court has already essentially rejected Plaintiffs' Lanham Act claim. In *Dastar Corp. v. Twentieth Century Fox Film Corp*., 539 U.S. 23, (2003) the plaintiffs alleged that the defendant purchased video tapes from the plaintiffs, copied and edited the tapes, and then distributed the tapes as its own product. 539 U.S. at 26–27. The plaintiffs sued under the Lanham Act alleging that the defendant's "passing off" of the tapes as its own resulted in a "false designation of origin" of the tapes. *Id*. at 29. The Court focused on the definition of "origin" under the Lanham Act to determine whether it included the "entity that originated the ideas that 'goods' embody or contain." *Id*. at 32,. The Court held that "origin" *did not include the originator of the ideas* but instead refers to the producer of the actual good/service itself, the Court noted that including the originator of the ideas in the "origin" definition would put the Lanham Act in conflict with copyright law. *Id*. at 34. A telling passage from the Supreme Court is this:

> "Section 43(a) of the Lanham Act prohibits actions like trademark infringement that deceive consumers and impair a producer's goodwill. It forbids, for example, the Coca–Cola Company's passing off its product as Pepsi–Cola or reverse passing off Pepsi–Cola as its product. But the brand-loyal consumer who prefers the drink that the Coca–Cola Company or PepsiCo sells, while he believes that that company produced (or at least stands behind the production of) that product, surely does not necessarily believe that that company was the "origin" of the drink in the sense that it was the very first to devise the formula. ***The consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product—and typically does not care whether it is***. The words of the

Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers." Id. at 32-33.

We have the same situation here. Plaintiffs are attempting to argue its confidential business information, which are allegedly secret "ideas" on how to grow, cultivate and distribute, cannabis are confusing customers. Plaintiffs theory is that, by Defendants offering the same services, then confusion must ensue. The Supreme Court has rejected that theory, as "[t]he consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product." *Id*.

Plaintiffs FAC does not allege Defendants are using any sort of distinctive but similar mark to Siva's mark (because Defendants are not), nor does the FAC allege that Defendants are passing their services off as Siva's. This claim is really just an unartfully pled trade secret claim, given its foundation of misuse of Plaintiffs' alleged "confidential business information." It also strongly hints of forum shopping.

D. <u>Because Plaintiffs' Federal Claims should be dismissed, this Court should decline its exercise of supplemental jurisdiction over the state law claims and allow this case to proceed in state court</u>

Although 28 U.S.C. §1367(a) authorizes courts to exercise supplemental jurisdiction, such jurisdiction "is a doctrine of discretion, not of plaintiff's right ." *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 172 (1997). As such, "district courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness and comity which underlie the pendent jurisdiction doctrine." Ibid at 172-73 .

Further, Section 1367(c) expressly states courts may decline to exercise supplemental jurisdiction over state law claims when "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction ...[and] in exceptional circumstances, there are other compelling

reasons for declining jurisdiction." (Emphasis Added). Factors to consider include the "circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims." Further a "federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." *City of Chicago*, 522 U.S. At 173, citing *Carnegie- Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988).

Here, Plaintiffs' complaint arises entirely out of California state law; defamation, breach of fiduciary duty, breach of state employment laws, etc. This is a California state lawsuit that is proper before California courts, especially as that state has an interest in the legal protections afforded to cannabis businesses. This is a very novel area of state law – *not federal* – and California should make the first rulings on it. (In fact, it is illegal under federal law). Consequently, this Court should decline supplemental jurisdiction and let California rule on the effect of its novel and unique cannabis regulations on the claims at issue.

Moreover, Defendants have filed a state court action in Los Angeles County so Plaintiffs already have a "home" for their claims in this lawsuit.

V. ALTERNATIVELY, IF THIS COURT DOES NOT DISMISS, IT SHOULD ABSTAIN AND/OR DEFER PENDING THE OUTCOME OF DEFENDANTS' CONCURRENTLY FILED CALIFORNIA STATE ACTION

In *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976), the Supreme Court established a doctrine of deference to state jurisdiction when parallel state and federal litigation are pending. *Coopers & Lybrand v. Sun-Diamond Growers of CA*, 912 F.2d 1135, 1138 (1990) (the *Colorado River* doctrine is not a recognized form of abstention but a form of deference). In the event this Court declines to grant the present motion to dismiss, Defendants move

this Court to enter a permanent stay of this action to allow the state court action to proceed first under Colorado River.

The threshold requirement for Colorado River doctrine is that the federal and state court actions must be substantially similar. *Fierle v. Perez*, 350 F. App'x 140, 141 (9th Cir. 2009). In this case, they unquestionably are. The state action involves Defendants Cirrata, Ott, Yeager, and Baghoomian, and they all allege fraud in the inducement of their employment contracts, as well as unfair competition based on false advertising against Plaintiffs Siva and Bulbulyan. Thus this case arises out of the same common facts that are at issue in this case, namely Siva's business operations. True, the state action sounds mostly in fraud, given the nature and scope of Bulbulyan's misrepresentations to investors and customers, including telling investors that Quincy Jones invested $10 million in Siva, that Siva owned multiple pieces of real property for growing cannabis, that Siva had raised $100,000.00, or that Siva was voted the number 1 cannabis firm by Entrepreneur Magazine (which is still on Siva's website today even though its Entrepreneur Magazine, a widely circulated periodical, has no relationship with Siva, let alone ranked it). None of these representations were true, yet you can read Bulbulyan's own emails where he makes these misrepresentations, as well as many other prevarications, attached to Defendants state court complaint. (See Exhibit 3 attached to Gordon Decl.) But, in any case, this state court forum is the proper place for Plaintiffs claims . Indeed they are compulsory cross claims in that forum. Thus, these two lawsuits are substantially similar for purposes of the *Colorado River* doctrine.

Additionally, to decide whether a particular case warrants a stay under *Colorado River*, a court weighs the following factors in a flexible balancing test:

(1) which court first assumed jurisdiction over any property at stake;

(2) the inconvenience of the federal forum;

(3) the desire to avoid piecemeal litigation;

(4) the order in which the forums obtained jurisdiction;

(5) whether federal law or state law provides the rule of decision on the merits;

(6) whether the state court proceedings can adequately protect the rights of the federal litigants;

(7) the desire to avoid forum shopping; and

(8) whether the state court proceedings will resolve all issues before the federal court. *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 978-79 (9th Cir. 2011), (enumerating factors); *Holder v. Holder*, 305 F.3d 854, 870 (9th Cir. 2002) (factors are subject to "flexible balancing test").

Going in order, the first factor, "which court first assumed jurisdiction over any property at stake" is no applicable because no real or personal property is at stake.

Next, the inconvenience of the federal forum is neutral. Defendants and their witnesses are not "inconvenienced" necessarily by federal court.

Next, the desire to avoid piecemeal litigation tips is strong in this case, since the two complaints are so similar and the effect of finding inconsistent facts would be great.

Next, in regards to the order in which the forums obtained jurisdiction, this might seemingly tip in favor of proceeding in Federal Court, but it does not, as Plaintiffs have not asserted any viable federal claims.

The next factor (whether federal law or state law provides the rule of decision on the merits) is the most salient and it tips strongly in favor of abstaining pending the state court action. Here, eleven of Plaintiff's thirteen remaining claims are based on California state law – and even their federal claims require the legality of cannabis in California. This strongly suggests this Court should let the California courts decide the state law case first.

The next factor (whether the state court proceedings can adequately protect the rights of the federal litigants) is a resounding yes – as, again, eleven of Plaintiff's thirteen remaining claims are based on California state law, so he can be completely made whole in state court.

Moving to the next factor, the desire to avoid forum shopping also tips in favor of state court jurisdiction. Here, Plaintiffs' basis for jurisdiction is 28 U.S.C. section 1331. But its federal claims are tenuous at best. Indeed, there is far more than a nontrivial argument that no federal trade secret protections apply to Plaintiffs' "confidential business information" and Plaintiffs' remaining federal claim under Lanham Act claim is internally inconsistent and is really just an attempt to contort that Act's proscriptions into a duplicative trade secret violation claim. These federal statutes aren't this plastic and Plaintiffs' attempt to misuse them to justify federal jurisdiction cries of forum shopping. This conclusion is made even stronger by the fact(s) that (1) Plaintiffs' third federal cause of action for Honest Services Fraud (dismissed on 9/28/18) did not even have a private right of action and was inserted just to establish forum shopping, and (2) the vast majority of claims in Plaintiffs' complaint are state law claims, involving state law issues such as employment law, privacy, fiduciary duty, and state specific cannabis laws. In light of these reasons, these federal claims appear purposed solely at forum shopping.

Invariably, Plaintiffs will claim that Defendants' state court action amounts to forum shopping but it does not. If Defendants' legal position is that the nature of Plaintiffs' business precludes recovery for damages arising out of that business, then Defendants cannot file their state law claims in federal court while maintaining logical consistency because, in filing in federal court, Defendants would be guilty of the same jurisdictional mistake that Plaintiffs have made.

Lastly, the remaining *Colorado River*, whether the state court proceedings will resolve all issues before the federal court, also tips in favor of state court

jurisdiction. Again, these are essentially all state law claims, Plaintiffs federal claims have state law counterparts that can provide similar relief (California has a parallel trade secrets tort and a parallel Unfair Competition Law similar to the Lanham Act), and the California State Courts can enforce these federal claims anyway.

In conclusion, there really is no reason for Plaintiffs' federal complaint to go forward. There is already a state court action ready, willing, and able to accommodate this dispute. If this Court chooses not to dismiss, it should at least defer, or abstain, pursuant to *Colorado River*, pending the outcome of the state court proceeding.

VI. CONCLUSION

For the foregoing reasons, this Court should dismiss Plaintiffs' federal claims pursuant to rule 12(b)(1), which dismisses the state law claims by operation of law. Alternatively, this Court should dismiss Plaintiffs' federal claims pursuant to rule 12(b)(6), and then decline to exercise supplemental jurisdiction over the remaining state law claims. Alternatively, this Court should defer or abstain to the state court action between these same parties filed on October 1, 2018.

Respectfully submitted,

DATED: September 29, 2018

LAW OFFICES OF RYAN GORDON

By: /S/Ryan Gordon
Ryan Gordon, Attorneys for Defendants Lance Ott, David Yeager, Steve Baghoomian, Colton Dane Lasater, Charles Christopher, and Cirrata Ventures, LLC