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GREEN EARTH COFFEE LLC
and CARLOS ZAMBRANO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEFAN BOKAIE; CAROL BOKIE; SURINDER UPPAL; MARIE UPPAL; GURJIWAN UPPAL; PATRICK WARD; BRENDA WARD; NEERA BHANDARI; and SANDEEP BHANDARI,

Plaintiffs,

GREEN EARTH COFFEE LLC, a California limited liability company; CARLOS ZAMBRANO, an individual; FLYING ROOSTER, LLC, a California limited liability company; EXCHANGE BANK, a California corporation; and DOES 1 through 25, inclusive,

Defendants.

Case No. 3:18-cv-5244

REPLY BRIEF IN SUPPORT OF DEFENDANT CULTIVATORS' MOTION TO DISMISS

Date: November 29, 2018
Time: 2:00pm
Dept: Courtroom 9, 19th Floor
Judge: Jon S. Tigar
Trial Date: Not yet set
Action Filed: August 28, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUES TO BE DECIDED

1. Have Plaintiffs alleged injury to their "business or property" as required under RICO at 18 U.S.C. § 1964(c)? 2. Are Plaintiffs' alleged damages too speculative and remote to be actionable under RICO? 3. Do Plaintiffs lack standing to allege RICO violations because they were not targeted by illegal activity? 4. Have Plaintiffs alleged a "pattern of racketeering" as required under RICO at 18 U.S.C. § 1961(5)? 5. Have Plaintiffs alleged "economic injury" as required under California Business & Professions Code section 17200?

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Plaintiffs' opposition shows why this suit is not properly pled as a RICO case. No one disputes the Plaintiffs have alleged significant grievances, but (even if true) these are properly understood as state law claims for nuisance as well as perhaps a claim under local Sonoma County land use ordinances.

It appears the parties generally agree on the necessary elements for a civil RICO action. To pursue a claim for damages under the civil RICO statutes, the Plaintiffs here must prove: (1) an injury "in [their] business or property;" (2) that the injury occurred "by reason of" a section 1962 violation under RICO; and (3) that there has been a "pattern of racketeering activity." See Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 653 (2008); Chaset v. Fleer/Skybox Int'l, LP., 300 F.3d 1083, 1086 (9th Cir. 2002); see also Opp. Br. (Docket #22), p.7. Plaintiffs have not put forward allegations to satisfy any of these elements or any case indicating they may have a cause of action under RICO other than Safe Streets decided by the Tenth Circuit using Colorado law (discussed below); no amendment can transform this personal injury case into a federal RICO case. Plaintiffs' allegations of annoyances from the smells and sounds coming from the cannabis farm, as well as speculative reduction in their property value from living next to a cannabis farm, are decidedly not actionable under RICO because they do not constitute concrete damage to "business or property" as required by 18 U.S.C. § 1962(c). Moreover, Plaintiffs cannot establish "proximate causation" as they were not "targeted" by any specific RICO predicates, so their alleged harms are too speculative and indirect to be actionable under

federal RICO law, nor can they show a "pattern of racketeering" as required under RICO (e.g., at least two predicate "RICO" acts over a "substantial period of time").

II. Relevant Facts

As pled, the Plaintiffs own parcels of real property located on Herrerias Way in Sonoma County, California, and next door to Defendant Cultivators' cannabis farm. Complt. ¶¶ 4, 5, 21, 25. Previously, in 2017, Defendant Cultivators "began commercial cannabis operation at 6697 Moro Street in Sonoma County." Complt. ¶ 18. Plaintiffs do not allege any connection to, or damages from, operations at 6697 Morro Street and, in or about March 2018, the Defendant Cultivators "abandoned the Morro Street Site and moved their operation to 3062 Adobe Road." Complt. ¶ 21.

Plaintiffs have alleged "noxious odors" coming from the 3062 Adobe Road site since April 2018 and that these odors permeate "draperies, furniture, carpeting and clothing." Complt. ¶ 26. Also, these odors have allegedly caused a number of serious discomforts. For example, one Plaintiff alleges that the "smell of cannabis irritates his nose and throat, making him cough and causing a build-up of phlegm which clogs his breathing tube." Complt. ¶ 27. Plaintiffs have also alleged that the "commercial cannabis grow is also loud . . . depriving them of the sense of serenity they previously felt at home." Complt. ¶ 31. Lastly, the Plaintiffs allege the "open and ongoing conspiracy to commit federal crimes near [P]laintiffs' home[s] further diminishes their market value by causing potential buyers to fear associated criminal activity or by otherwise making the homes less attractive to buyers." Complt. ¶ 47. Notably, the Plaintiffs allege no unlawful conduct othen than cultivation of cannabis by the Defendant Cultivators. Complt. ¶ 37. There are no allegations that the Defendant Cultivators imported, received, concealed, bought, sold, or otherwise dealt in cannabis.

III. Argument

A. No Proximate Causation; Damages Alleged are too Speculative and Plaintiffs were not Intended Victims.

The Supreme Court has "repeatedly observed that Congress modeled [RICO's] § 1964(c) on the civil-action provision of the federal antitrust laws." Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267 (1992)(internal citations omitted). The courts have accordingly held that a civil litigant under RICO must show more than an indirect

connection between the alleged racketeering and an injury to business or property; a RICO litigant must establish proximate causation akin to what is required under the Clayton Act or its predecessor, the Sherman Act. See, e.g., Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453 (2006) (citing Holmes, 503 U.S. at 268). Calling upon authorities interpreting federal anti-trust laws, the Supreme Court has articulated three "functional tests" for deciding whether a plaintiff under RICO has alleged actionable harm:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any problems attendant upon suits by plaintiffs injured more remotely.

Holmes, 503 U.S. at 269 (internal citations omitted). Thus, the federal courts have consistently held that by-standers, *i.e.*, those who are neither targeted by RICO predicate acts nor competitors to those engaged in RICO violations, lack standing to seek a remedy under RICO. See id., 503 U.S. at 266 n.10 (holding RICO is not intended to capture the "ripples of harm" that may "flow" out into the broader world); Anza, 547 U.S. at 458 (2006); Hamm v. Rhone-Poulenc Rorer Pharms., Inc., 187 F.3d 941, 952, 953 (8th Cir. 1999) (former employees injured by fraudulent scheme held to be without RICO standing because the fraudulent scheme was not directed at them); see also MPA (Docket # 17), pp.11-12. [1]

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[1] Consider two similar New York securities fraud cases. In the first, the district court concluded shareholders lacked standing under RICO to sue company executives because the shareholders were not the targets of the fraud even though the share price suffered because of it. In re American Exp. Co. Shareholders Litigation, 840 F.Supp. 260, 262-64 (S.D.N.Y. Dist. 1993). In the second, the district court concluded a company lacked standing under RICO to sue some of its officers for securities fraud because the company was not the target of the fraud, even though the RICO violations had resulted in manipulation of the company's stock price and increased the threat of potential stockholder suit. In re Crazy Securities Litigation, 714 F.Supp. 1285, 1289-91 (1989).

Here, all three factors weigh in favor of dismissal. Firstly, the Plaintiffs were not the targets of the RICO predicate acts; there harm was not contemplated, intended or especially foreseeable. The court would need to tease apart any harms between those coming from the cannabis farm versus smells and sounds in the world around Petaluma (local fires, fertilizers, tractor exhausts and noises, etc.). Secondly, calculating any damages from smells and sounds among all the neighbors in a way that avoids overlapping remedies would be nearly impossible (are all neighbors harmed equally despite distance to the farm, direction of the winds, location of the generator, etc?). Thirdly, insofar as the Plaintiffs allege the cannabis farm violated local land use ordinances, the natural person to enforce the violation would seem to be the County of Sonoma, which established the land use ordinances in the first place. See, e.g., Medger Evers Houses Tenants Ass'n v. Medgar Evers Houses Assocs., 25 F.Supp.2d 116, 119, 121-22 (E.D.N.Y. Dist. 1998)(holding tenants who had alleged their building owner had been defrauding HUD through a pattern of racketeering lacked "proximate cause" injury because fact-finder could not "determine whether the complained of conditions at the Medgar Evers Houses in fact resulted from the false statements to HUD, as opposed to, for example, the defendants' poor management of the housing project" and because HUD was the better party to bring suit, as the entity targeted by the fraud.)

In their Opposition Brief, Plaintiffs gloss over this very important point. They address none of the authorities cited in the moving papers and instead cite to Sedima S.P.R.L. and quote Ainsworth v. Owensby, 326 F.Supp.3d 1111 (D. Or. 2018)(citing Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 649-50 (2008)). The Sedima S.P.R.L. decision seems to have nothing to say about this particular point, as the defendant was in fact the intended target of the racketeering. See Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 483-84 (1985). The Sedima Court held that RICO does not require a showing of a criminal conviction and that RICO does not require a showing of a "racketeering injury," *i.e.*, "an injury caused by conduct that RICO was designed to deter." See id. at 489-500. Meanwhile, the Oregon district court's quote in Ainsworth is not supported by Bridge. The issue before the Supreme Court in Bridge was "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud." Bridge, 553 U.S. at 646. In essence, the plaintiffs in Bridge sued certain competitors under RICO

who they felt were defrauding County officials in order to win government bids. See id. at 642-45. Like any unlawful competition, where one competitor intends to harm the other, the defendants in Bridge were therefore the targets of the racketeering crimes even though the fraudulent writings were delivered to County officials.

As a matter of policy, it should not be a trivial thing to allow by-standers to bring federal RICO claims. Absent clear Congressional intent to "upset the established distribution of power between federal and state governments," Plaintiffs attempt to use RICO to override local land use laws in Sonoma County should be viewed skeptically.[2] See Gregory v. Ashcroft, 501 U.S. 452 (1991). As in Jackson, principles of judicial restraint argue in favor of dismissal. Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 568 (6th Cir. 2013)(rejecting the plaintiffs attempt to use RICO to interfere with state's administration of workers' compensation). Notably, the Plaintiffs have alleged, as their sixth cause of action, a violation under local ordinances, Sonoma County Code §§7-5, 7-13, and 26-92-200(a). Complt, ¶¶ 73-74.

B. There Has been no Pattern of Racketeering.

To establish a "pattern of racketeering activity," a plaintiff must allege "at least two acts of racketeering activity," in other words at least two RICO predicate acts expressly identified by the statute. 18 U.S.C. § 1961(5). A complaint that alleges only one RICO predicate act has failed to state a claim under RICO. See, e.g., Clark v. Time Warner Cable, 523 F.3d 1110, 1116 (9th Cir. 2008). And even multiple RICO predicate offenses, if for a single purpose, are insufficient to establish a pattern of racketeering. See, e.g., Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1535 (9th Cir. 1992) (holding no

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[2] The Plaintiffs' cavalier attempt to use the federal courts to override County land use ordinances is readily apparent: For example, Plaintiffs build their case partly on conduct that occurred at the earlier property at 6697 Moro Street, which is miles away from their homes. Complt ¶¶ 18-21, 35. Similarly, the Plaintiffs are not shy to note that their suit is designed to stop the cultivation of cannabis, even if it occurs nowhere near them. Opp. Br., p.17 ("Defendants note that cultivation on Adobe Road is scheduled to end by November 15 under the terms of the stipulated abatement order with the County. That order, assuming defendants abide by it, leaves them free to cultivate at other locations.")

pattern of racketeering because conduct was "in a sense a single episode with the singular purpose of impoverishing [plaintiff]"); see also MPA, p.13.

Plaintiffs' Opposition Brief is largely silent on this front. While they allege several different violations under the Controlled Substances Act (Opp. Br., p.3), they have only identified one RICO predicate act under 18 U.S.C. § 1961(5), *i.e.*, the cultivation of cannabis. And, while they also allege Defendant Cultivators are in "the business of growing, processing, distributing and selling cannabis and cannabis products" (Complt. ¶ 6), this is just a conclusory inference to be disregarded by the courts in a 12(b)(6) motion. See, e.g., Bell Atl. Corp. v. Twombly, 5505 U.S. 544, 555 (2007). Plaintiffs do not claim any of the Defendants processed, distributed or sold any cannabis whatsoever.

In turn, Plaintiffs advance a novel argument for close-ended continuity in this case. Specifically, they wish to tack on the time the Defendant Cultivators allegedly engaged in cannabis cultivation at the earlier 6697 Moro Street site, even though the Plaintiffs themselves have no connection (or concern) with that property. Opp. Br., p.17. Put differently, the Plaintiffs argue close-ended continuity by suggesting that the Defendant Cultivators have a history of engaging in racketeering unrelated to the Plaintiffs. While courts have been flexible about what can constitute a related "pattern of racketeering," Defendant Cultivators are unaware of any case (and Plaintiffs have offered none) finding an actionable pattern of racketeering from just consistency in the participants and the nature of the crime. See Howard v. America Online, Inc., 208 F.3d 741, 749 (9th Cir. 2000)(holding "merely having the same participants is insufficient to establish relatedness" under RICO); Vild v. Visconsi, 956 F.2d 560, 566-68 (6th Cir. 1992)(holding that acts by same defendants against plaintiff are unrelated to acts against third parties). If focused correctly on activities at 3062 Adobe Road, the Plaintiffs have not pled closed-end continuity as both the Supreme Court and Ninth Circuit have repeatedly held that predicate acts extending over a few months does not satisfy the requirement. See, e.g., Turner v. Cook, 362 F.3d 1219, 1231 (9th Cir. 2004); MPA, p.15.

To allege open-ended continuity, a plaintiff must point to "past conduct that by its nature projects into the future with a threat of repetition." See, e.g., Allwaste, Inc. v. Hecht,

65 F.3d 1523, 1528 (9th Cir. 1995). But Plaintiffs acknowledge the Defendant Cultivators voluntarily chose to stop operations at 3062 Morro Street after about a year of operations and that Defendant Cultivators then voluntarily chose to stop operations at 3062 Adobe Road after less than a year of operations. Complt., ¶ 21; Opp. Br., p.17.

While open-ended continuity is not defeated by a "fortuitous" cessation of the criminal activity (see, e.g., Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1529-30(9th Cir. 1995), it seems that, in all cases so holding, the defendants were forcibly stopped from committing further racketeering by outside forces. See, e.g., Sebastian Intern., Inc. v. Russolillo, 186 F.Supp.2d 1055, 1067 (C.D.C. Dist. 2000)("[T]here is no evidence here to suggest that [d]efendants, if able, will not continue to distribute counterfeit Sebastian products.") Here, the Defendant Cultivators and Flying Rooster voluntarily agreed to stop cannabis cultivation this November. Because one cannot assume an admission of wrongdoing from such a freely given settlement of a dispute, all one can surmise here is that the Defendant Cultivators are in the business of conducting, in a **serial fashion**, less than one year of cannabis cultivation on different properties within Sonoma County under its cannabis land use ordinance.

C. There Has Been no Injury to "Business or Property" Within the Meaning of RICO.

To have an actionable claim under RICO, a plaintiff must show damage to either his "business or property." 18 U.S.C. § 1964(c); Sedima v. Imrex Co., 473 U.S. 479, 496 (1985). It is undisputed that the business or property requirement has "restrictive significance." Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Congress "cabin[ed] RICO's private cause of action to particular kinds of injury." E.g., RJR Nabisco, Inc. v. Eur. Cmty., 136 S.Ct. 2090, 2108 (2006).

For purposes of this motion, the Defendant Cultivators are willing to address each of the damages alleged by the Plaintiffs, even the ones not pled in their Complaint.[3] In summary, the Plaintiffs now allege the following types of injuries:

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[3] Plaintiffs sprinkle throughout their opposition a number of allegations that are found nowhere in their Complaint. For example, the opposition brief claims the Plaintiffs spent money on around-

(i) personal discomforts, including nausea and difficulty breathing and swallowing, together with costs to avoid, lessen or otherwise remediate the offending smells and sounds;

(ii) a suspected decrease in their residential property value; and

(iii) loss of "use and enjoyment" of their property because of smells and sounds.[4]

Opp. Br., pp. 6-7. Each of these deserves careful consideration, but first the Plaintiffs' opposition makes a bold assertion about the "business or property" requirement under RICO that warrants a response.

Quoting the Sixth Circuit's Jackson decision, Plaintiffs attempt to marginalize the importance of state law in deciding whether there has been damage to "business or property" within the meaning of RICO. While the Jackson court did indeed grapple with this issue, the decision does not weigh in Plaintiffs' favor. Firstly, the Jackson Court's analysis appears to be somewhat incongruent with controlling Ninth Circuit precedent. See, e.g., Canyon Cty. v. Syngenta Seeds, Inc., 519 F.3d 969, 975 (9th Cir. 2008). And secondly, even the Jackson decision acknowledges that, if a federal law standard for construing the meaning of "business or property" exists, it must necessarily be **narrower** than concepts of property rights under state law. As the court explained:

> We have never fleshed out the circumstances under which state law is not determinative of whether someone has a property interest at stake [in a RICO case], but several of our sister circuits have suggested that **federal law can constrict state definitions of property**. . . . 'one might expect federal law to decide whether a given interest, recognized by state law, **rises to the level of business or property**,' a question that 'depends on federal statutory purpose.'

Jackson, 731 F.3d at 574 (emphasis added and internal citations and quotations omitted)(quoting DeMauro v. DeMauro, 115 F.3d 94, 96 (1st Cir. 1997)); see also Price v. Pinnacle Brands, Inc., 138 F.3d 602, 607 (5th Cir. 1998).

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the-clock air conditioning and on "substantial cleaning . . . in an effort to remove the stench of cannabis from their carpets, furniture and draperies." Opp. Br., p.6.

[4] Oddly, for the first time, the Plaintiffs now claim the smells have made their homes "uninhabitable." Opp. Br. pp.12, 14. This is clearly hyperbole, as Plaintiffs are still living in their homes. Complt., ¶¶ 26-31.

Accordingly, whether there has been an injury to "property" within the meaning of RICO is a two-part inquiry. First, the alleged injury must be a recognized property interest under state law. See, e.g., Diaz v. Gates, 420 F.3d 897, 900 (9th Cir. 2005)(en banc). Second, the injury must be a "concrete financial loss, and not mere injury to a valuable intangible property interest." E.g., Chaset, 300 F.3d at 1086-87. Put more simply, RICO provides no remedy for personal injuries and not every property injury satisfies the "restrictive significance" intended by Congress. See, e.g., Sedima, 473 U.S. at 496. With this in mind, it is worth looking carefully at each of the harms presently alleged.

1. Personal Discomforts, Including Difficulty Breathing and Swallowing are Personal Harms; So Too are Costs Flowing Therefrom.

To begin, it seems that everyone agrees that personal harms and injuries do not satisfy the injury to "business or property" requirement under 18 U.S.C. § 1964(c). See RJR Nabisco, 136 S.Ct. at 2108; Safe Streets Alliance v. Hickenlooper, 859 F.3d 865, 888-89 (10th Cir. 2017); Jackson, 731 F.3d at 565 ("Although courts have used various terms to describe the distinction between non-redressable personal injury and redressable injury to property, the concept is clear: both personal injuries and pecuniary losses flowing from those personal injuries fail to confer relief under [RICO].").

Here, most of Plaintiffs' alleged harms are undoubtedly personal in nature. There can be no serious debate, for example, about whether difficulty breathing and nausea are redressable under RICO. The same must be true for the costs Plaintiffs allegedly spent on air conditioning and cleaning to avoid or mitigate offending odors because out-of-pocket costs "flowing from" personal nuisances are not compensable under RICO. See, e.g., Berg v. First State Ins. Co., 915 F.2d 460, 464 (9th Cir. 1990); see also MPA, pp. 6-9.

2. Decrease in Re-Sale Value is Too Speculative to be Actionable under RICO.

Plaintiffs' allegation of lost re-sale value in their homes is entirely speculative. None of the Plaintiffs have sold their property since the Defendant Cultivators leased 3062 Adobe Road. And, as a matter of law, once cannabis operations permanently stop in November, there can be no injury directly linked to a nuisance that has ended. See, e.g., Spaulding v. Cameron, 38 Cal.2d 265, 269 (1952)(critical of "speculative future losses based on the assumption that the nuisance will continue").

> [I]f a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages **until the nuisance is abated**. Recovery is limited, however, to actual injury suffered . . . . Prospective damages are unavailable.

E.g., Baker v. Burbank-Glendale-Pasadena Airport Auth., 39 Cal.3d 862, 869 (1985)(emphasis added). Even if operations do not stop in November, unless and until there has been a sale of property, there can be no measurable concrete injury. See, e.g., Clapper v. Amnesty Intern. USA, 568 U.S. 398, 409 (2013) ("[W]e have repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient.")(quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

With all this in mind, it has been well decided that a ***potential*** decrease in the value of property is considered too speculative to be actionable under RICO. See, e.g., Steele v. Hospital Corp. of America, 36 F.3d 60, 70-71 (9th Cir. 1994)("We have held that speculative injuries do not serve to confer standing under RICO, unless they become concrete and real."); Maio v. Aetna, Inc., 221 F.3d 472, 495 (3d Cir. 2000). Moreover, a link between the illegal conduct and the injury that is too remote, purely contingent, indirect, or speculative is insufficient under RICO. See, e.g., Hemi Grp., LLC v. City of N.Y., 559 U.S. 1, 9-10 (2010); see also MPA, pp. 9-11.

In opposition to this point, the Plaintiffs cite just two cases, Sepulveda and Safe Streets, on which they rely heavily. In Sepulveda, the court concluded, without any analysis or discussion, that plaintiff tenants had suffered loss of money by paying excessive rents for dwellings which were uninhabitable. See People ex rel. Sepulveda v. highland Fed. Savings & Loan, 14 Cal.App.4th 1692, 1700-01, 1717 (1993). The decision is inapposite, however. The defendants in the case were mortgage lenders who defrauded the plaintiffs into entering into essentially above-market rates, *i.e.*, mortgage rates that assumed habitable dwellings even though they were not. See id. at 1698-1700. Here, the Plaintiffs presumably agreed to their mortgage terms well before the Defendants moved into the neighborhood. Unless the allegedly wrongful conduct somehow changed their mortgage rates, this alleged harm of lost money is nothing but a backward way of arguing disappointed expectations, *i.e.*, that Plaintiffs have lost some use and enjoyment of their homes without a corresponding reduction in their mortgages.

But an injury to an "expectation" interest is not cognizable under RICO. See, e.g., McLaughlin v. American Tobacco Co., 522 F.3 215, 228-29 (2d Cir. 2008).

Next, while much can be said about the Safe Streets decision, doing so here is unnecessary because the case is not binding on this Court and the decision is contrary to Ninth Circuit and Supreme Court precedent. Much of the decision seems to come from the Tenth Circuit's desire to reject the district court's insistence on "evidentiary proof" of property damage at the pleading stage. See id. at 885, 888. That is certainly not being asked for here. Curiously, and almost as an afterthought, the Tenth Circuit acknowledged that "a plaintiff cannot recover for emotional, personal, or speculative future injuries under § 1964(c)," id. at 888-89, but then held that property owners had RICO standing because of an alleged decrease in their property value proximately caused by cannabis operations next door. See id. at 797-98. It seems the Safe Streets Court only reached this conclusion by relying on Gillmore v. Thomas, 490 F.3d 91 (10th Cir. 2007), even though Gillmore is off point. The plaintiffs in Gillmore had alleged fraudulent zoning by government officials which had changed, prior to initiation of the suit, the legal rights of the property owners in their real property. Gillmore, 490 F.3d at 888. Thus, the injury was more than speculative harm.

If there is any way to harmonize Safe Streets with Ninth Circuit authorities perhaps it is this: If under Gillmore a plaintiff has standing under RICO to sue for a presently existing harm to real property (even before sale of that property), then the Colorado district court should have accepted at face value the plaintiffs' allegations of a present harm **but only because** "Colorado has long recognized that invasion of one's property by noxious odors itself . . . is a direct injury to property." Id. at 886 (citing three state decisions). Thusly, the court writes:

> We address the alleged present nuisance and alleged diminished property value separately, though one stems in part from the other. . . . We conclude that the [plaintiffs] have plausibly pled an injury to their property in the form of a present interference with their use and enjoyment of that land, an interference that is caused by the enterprise's recurring emissions of foul odors. . . . Colorado's recognition of that property interest fortifies our conclusion that RICO incorporates this common view of property rights . . . . [The plaintiffs] aver that ***today*** their land is worth less than it was before, and that this diminution in value occurred because their new neighbors began their endeavors. Our holding in Gillmor plainly applies here, in fact, it does double duty.

Id. at 885-86 (citations omitted)(emphasis in original). However, unlike in Colorado, the loss of "use and enjoyment" of property is a personal injury, not a property injury under California law.

3. Loss of "Use and Enjoyment" of Property is not Actionable Under RICO Under Ninth Circuit Authority Applying California Law.

Interference with one's right to use and enjoy property is not a proprietary interest actionable under RICO. This is precisely what the Ninth Circuit has held in Oscar, Berg and Chaset. See, e.g., Berg, 915 F.3d at 464 (holding loss of enjoyment in property is "a personal injury in the form of emotional distress, not a claim for an injury to property as section 1964(c) [of RICO] requires"). It is disingenuous to suggest Diaz holds otherwise, as Plaintiffs have. Opp. Br., p.12. In Diaz, the Ninth Circuit concluded that interference with a "legal entitlement to business relations" is sufficient for RICO standing as an **interference with business** under RICO's injury to "business or property" test. See Diaz, 420 F.3d at 905 (J. Kleinfeld concurring); Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168 n.4 (9th Cir. 2002)(holding there exits a "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes."). Plaintiffs here do not allege lost employment or any other interference with their business relations. Their allegations of harm are precisely the kinds of claims rejected by the Ninth Circuit in Oscar and Berg and rejected by the Oregon district court in Ainsworth. See Oscar, 965 F.2d at 787; Berg, 915 F.2d at 464; Ainsworth, 326 F.Supp.3d at 1126 ("Like the unsuccessful claimants in Oscar and Steele, Plaintiffs allege no past or present intent to rent, sell, or otherwise monetize their property interest. . . . Although it is certainly reasonable to infer that their fair market values have dropped, that is an abstract harm."); see also MPA, pp.10-11.

In opposition, the Plaintiffs lean heavily on Safe Streets, Diaz and a few California cases (Insitoris, Orange County Water and Moore) to do two things: (1) reject an argument the Defendants didn't even make – that RICO requires a showing of physical damage to real property (see, for example, Opp. Br., p.12), and (2) to drive home the point that a right to use property is a recognized property interest under California law (see, for example, see Opp. Br., p.12-13 ("California law treats the right to use one's property . . . as one of the 'sticks' in the bundle of property right")).

This second point is black letter law (most likely in every state), but it certainly misses the point. The question at bar is whether the identified property interest is sufficiently concrete to be actionable under RICO. Again, in at least the Ninth Circuit, determining whether the Plaintiffs have adequately pled an injury to "property" under RICO requires a two-part inquiry – first, have plaintiffs alleged an injury recognized under state law as a property interest (see, e.g.,

Diaz, 420 F.3d at 900) and second, have they alleged "concrete financial loss not mere injury to a valuable intangible property interest" (e.g., Chaset, 300 F.3d at 1087)?

Plaintiffs try to distinguish this case from Oscar by relying on dicta found in the case that perhaps the plaintiffs in Oscar might have had an actionable claim under RICO had they been owners of the property rather than renters. Oscar, 965 F.2d at 786-87 ("Although one might measure an owner's loss by the diminution in fair market value the same cannot be said for a renter.") Reliance on this dicta would be misplaced, however. It is well understood that a leasehold interest is itself a form of property right. See, e.g., Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322-23 (2002). So the Oscar Court squarely considered whether interference with the "use and enjoyment" of a property right rises to a proprietary injury within the meaning of RICO and concluded that it does not.

In addition to trying to distinguish away Oscar, Plaintiffs cite to a handful of cases to argue that loss of enjoyment in property rises to a proprietary injury under RICO. Opp. Br., § VI.A.1. However, only some of these are RICO cases; and all of them (except for Safe Streets) held contrary, for example Oscar and Diaz. Consider, for example, the following:

(i) Safe Streets Alliance v. Hickenlooper, 859 F.3d 865 (2017). The Tenth Circuit only held in favor of the plaintiff landowners because the court found that "Colorado has long recognized that invasion of one's property by noxious odors itself . . . is a direct injury to property." Id. at 886 (citing to three state decisions). There appears to be no analogous state law in California, as Plaintiffs have not cited to any. Instead they cite to:

(ii) Orange County Water Dist. v. Sabic Innovative Plastics US, LLC, 14 Cal.App.5th 343 (2017). This is not a RICO case; it is a water rights case. Presumably the Plaintiffs cited to it because it stands for the proposition that there are different types of property interests recognized under California law sufficient to support a nuisance cause of action. See id. at 401-02 (To support a claim for nuisance, "[t]he property interest need not rise to the level of fee simple ownership"). But no one is moving to dismiss Plaintiffs' nuisance cause of action. Similarly, no one is denying that the Plaintiffs have a possessory interest in their land. Rather, Plaintiffs have failed to allege concrete injury to their "business or property" within the meaning of RICO. And Orange County Water District does not hold (much less say) that any nuisance is a direct injury to the land itself, as seems to be the case in Colorado.

(iii) Institoris v. City of LA, 210 Cal.App.3d 16-17 (1989). This is also not a RICO case, but rather an inverse condemnation and nuisance case concerning questions about statutes of limitations. See id. at 13, 16. In the case, the plaintiff (a renter with a "10-year leashold interest") sued the City of Los Angeles alleging that the extreme noise level of an operating airport interfered with his enjoyment of his property. Interestingly enough, the Institoris case notes that under California law: "A property owner has an inverse condemnation remedy for ***property*** damage arising from airport operations. The owner or occupant of property has a common law and statutory remedy based on nuisance for ***personal*** injuries arising from airport operations." Id. at 18 (emphasis in original)(citing Greater Westchester Homeowners Assn. v. City of Los Angeles (1979) 26 Cal.3d 86, 98 (1979) and Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862 (1985)). Moreover, the court did not consider whether the loud noise produced harm to either property or person; and accordingly there is no suggestion in the case that California law treats a loud noise nuisance as direct injury to property.

(iv) Moore v. Regents of U. of Cal., 51 Cal.3d 120 (1990). In this case, the California Supreme Court considered whether a plaintiff had properly pled a cause of action for conversion when certain physicians and researchers used his cells for research without his permission. See id. at 148. Plaintiffs cite to Moore for the proposition that property rights include the right to "possess the property and exclude others, the right to sell or dispose of the property, and the right to use the property." Opp. Br., pp.10, 12. But again, no one debates that owning property gives one the legal right to use it. Nothing in Moore suggests that a nuisance of sound and smells is correctly characterized as a direct injury to property under California law.

(v) Ainsworth v. Owenby, 326 F.Supp.3d 1111 (Or. Dist. 2018). Finally, in Ainsworth, the Oregon District Court considered virtually indistinguishable claims under RICO brought by property owners against their neighbor for engaging in the open cultivation of cannabis. As the legalization of cannabis continues to roll across the country, one can certainly anticipate more RICO cases brought by residents angered by changes in local land use. Rejecting the plaintiffs reliance on Safe Streets, the Ainsworth Court first noted that the "Ninth Circuit has endorsed [a] . . . distinction between nuisance claims arising from personal and proprietary injuries." Id. at 1122. Turning to California and Oregon law (in contrast to Colorado law), the district court then concluded: "Like the homeowners in [Wilson v. City of Portland, 154 Or. 679 (1936)], whose senses were offended by the neighboring garbage dump, Plaintiffs' complaints of

overwhelming odors and noise form a personal injury. Such harms to human comfort are not compensable under RICO." Id. at 1123. California cases, noted the court, are in accord. See, e.g., Ingram v. City of Gridley, 100 Cal.App.2d 815, 823 (1950).

D. Plaintiffs' Reading of California Unfair Competition Law ("UCL") is Incorrect.

Lastly, Plaintiffs are simply mistaken about what needs to be alleged to support an unfair competition claim under California Business & Professions Code section 17204. To assert a UCL claim, a private plaintiff needs to have "suffered injury in fact and ... lost money or property as a result of the unfair competition." Cal. Bus. & Prof. Code § 17204. The purpose of section 17204 is to "eliminate standing for those who have not engaged in any business dealings with would-be defendants." E.g., Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 317 (2011). Here, the Plaintiffs have not engaged in any business dealings with the Defendants, nor lost money or any other property as a consequence thereof.

CONCLUSION

Plaintiffs have taken it upon themselves to police alleged conduct explicitly authorized by state law and, in doing so, they are trying to stretch RICO and UCL law well beyond their established limits. Defendant Cultivators therefore move the Court to dismiss Plaintiffs' RICO claims and their UCL claim and to decline to exercise supplemental jurisdiction over Plaintiffs' remaining state law claims. As this case is properly understood as a land use nuisance case between neighbors, the fundamental interests of economy, comity and fairness are better served by resolution before a California court.

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Respectfully Submitted,

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By _____
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