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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CV AMALGAMATED, LLC dba CALIGROWN, a California limited liability company,

Plaintiff,

v.

CITY OF CHULA VISTA, a California public entity; MARY V. KACHADOORIAN, an individual; and HINDERLITER, DE LLAMAS & ASSOCIATES, a California corporation; and DOES 1 through 100,

Defendants.

Case No. 3:24-cv-01348-RSH-DDL

REPLY BRIEF OF MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HINDERLITER, DE LLAMAS & ASSOCIATES' MOTION TO DISMISS SECOND AMENDED COMPLAINT

[PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY COURT]

Judge: Hon. Robert S. Huie, Courtroom 3B
Judge: Hon. David D. Leshner, Courtroom 3A

Date: June 6, 2025
Judge: Robert S. Huie
Ctrm.: 3B

Complaint Filed: July 30, 2024
Trial Date: Not Set

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Defendant HINDERLITER, DE LLAMAS & ASSOCIATES ("Defendant" or "HDL") submits the following Reply Brief of Memorandum of Points and Authorities in support of its Motion to Dismiss Second Amended Complaint ("SAC") filed by Plaintiff CV AMALGAMATED, LLC dba CALIGROWN ("Plaintiff" or "CVA"). This Reply Brief is filed following the conference of counsel concerning the motion, which was held telephonically on May 20, 2025.[1]

I. SUMMARY OF RESPONSIVE ARGUMENT

Like its complaint, CVA's Opposition deliberately blurs the lines between the City and HDL relative to its arguments, as well as to the alleged facts. This tactic is designed to divert attention away from the glaring deficiencies in its pleading *relative to HDL*. Simply put, HDL is not the city, is not a government actor, is not controlled or directed by the statutes cited by CVA, nor does HDL have any ministerial or other authority to deny applications or permits or to provide the relief that CVA ultimately seeks. HDL is an afterthought, dragged into this long standing feud between CVA and the City, which has festered for almost five years before CVA decided to belatedly add HDL.

Putting these observations aside momentarily, CVA's Opposition does not address or evade the most significant, incurable defects. Most important, it is plain based upon the undisputed facts that the relief that CVA seeks, as well as the theory on which it seeks damages, is illegal under federal law. CVA offers no meaningful response to this obvious conclusion other than blithely stating that it is premature for the court to consider this defense at the pleading stage. Notably, it offers no authority to support this argument. That is because there is none. The defense of illegality (and unclean hands) can be determined on the pleading where there are no

[1] Due to the late engagement of HDL's counsel, HDL was not able to meet and confer with CV's counsel prior to the filing of the Motion. Shortly before filing the motion, HDL's counsel requested a meet and confer but that meet and confer was held on May 20 in order to substantially comply with the Court's Chamber Rules.

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disputed facts. Such is the case here. CVA seeks lost profit damages for denial of an application for a permit to sell cannabis, which is by definition premised upon an illegal act – the commercial sale of cannabis. Federal law does not recognize any of CVA's damages, nor its right to a cannabis sales permit or its right to operate a cannabis business. Therefore, it cannot obtain relief in federal court.

Additionally, CVA's own pleading demonstrates that its claims *as to HDL* are time barred and the Opposition does not undermine this obvious conclusion. CVA's pleading makes clear that it takes issue with HDL's earlier scoring in 20**20** of CVA's application, but it does not take issue with the 20**23** re-scoring of its application. Instead, relative to the 2023 re-scoring, CVA *agrees* with that rescoring and, based upon that rescoring, wants the City to issue a permit (that is no longer available). CVA's current gripe is the 2023 failure to issue a permit. But HDL has not legal authority to issue a permit, nor was it involved in any decision not to issue a permit in 2023, nor did HDL control the City's decisions to not stay any issuance of permits pending the outcome of the underlying state litigation. The fault that CVA directs toward HDL occurred in 20**20**. But CVA's complaint naming HDL was filed on March 7, 20**25**. The claims against HDL are time barred.

Lastly, although both of the prior grounds are incurable and insurmountable, CVA joins the City's arguments regarding the many deficiencies of the City's various federal claims. Most important, all of these other claims are clearly deficient as to HDL for many if not all the same reasons outlined in the City's briefing and HDL's moving papers. CVA fails to mount any meaningful challenge to these arguments or to cite authorities that are on point or contrary to HDL's arguments.

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II. RESPONSIVE ARGUMENT

A. CVA's Claims Are Barred Based Upon Their Illegality.

CVA makes two arguments to try to evade the Illegality defense. First, CVA argues that it is premature to evaluate illegality. Second, CVA argues that its claim does not involve illegality. Both arguments fail.

1. Illegality Can Be Determined As A Matter of Law.

Illegality is typically a question of law for the court to decide. (*Hotels Nevada, LLC v. Bridge Banc, LLC*, 130 Cal.App.4th 1431, 1435-36 (2005); *Bovard v. Am. Horse Enterprises, Inc.*, 210 Cal.App.3d 832, 838-39 (1988), contract concerning manufacture of drug paraphernalia was illegal and determined correctly by trial court as question of law.) Further, such a defense may be resolved by a 12(b)(6) motion to dismiss. (*Sensoria, LLC v. Kaweske*, 548 F.Supp.3d 1011, 1023 (D. Colo. 2021)). To survive a 12(b)(6) based upon illegality, it is incumbent *upon the claimant* to identify a part of the claim that was not subject to the illegality defense. (*Id*.)

Here, the application of the doctrine of illegality is readily ascertainable from the four corners of CVA's pleading, as well as the underlying court proceedings, which the court has been asked to take judicial notice of. There is nothing in dispute here or that needs discovery. The Court should rule as a question of law and not allow the federal court to be used by CVA for recovery of alleged damages flowing from an illegal activity in violation of federal laws. (Dkt. 15 at ¶39, 44, 49).

CVA argues that it is premature, but the material facts are not in dispute. There is no dispute that: (a) CVA seeks damages for the denial of an application to obtain a permit to sell cannabis; (b) CVA is a cannabis sales company; (c) sale of cannabis is illegal under federal law; and (d) CVA's damages would be measured by its lost profits from illegal sales of a controlled substance prohibited by federal law – the CSA. Not only is the sale of cannabis illegal under the CSA, but it is also unlawful to knowingly "lease, rent, use or maintain…for the purpose of

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…distributing,…any controlled substance." (21 U.S.C. 856(a)(1)). Thus, CVA's leasing, renting, using or maintaining a business for this purpose is itself illegal.

2. Illegality Permeates CVA's Claim & Remedies.

CVA argues that this case is not about cannabis sales, but about wrongful denial of a permit. CVA argues that the Court's focus should be "Defendant's failure to follow the law governing the licensing scheme." But this sleight of hand does not make the illegality underlying its claim disappear. CVA fails to address or acknowledge that it is an illegal business and its remedy is inherently illegal. CVA fails entirely to show how any portion of the remedies it is seeking does not violate federal law, specifically the CSA.

"Generally, courts will not enforce an agreement whose sole object is unlawful." (*Bassidjii v. Goe*, 413 F.3d 928, 937-39 (9th Cir. 2005), providing court could not award damages for violation of commercial guarantees that were illegal; *see also* Cal. Civil Code §1598; *Tiedje v. Aluninum Taper Milling Co., Inc.*, 46 Cal.2d 450, 453-54 (Cal. 1956), party cannot enforce illegal contract). For instance, parties seeking to collect monies arising from illegal gambling activities were denied relief. (*Lee On v. Long*, 37 Cal.2d 499, 502-503 (Cal. 1951), "No principle of law is better settled than that a party to an illegal transaction cannot come into a court of law…and set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. (Citation omitted); *Fong v. Miller*, 105 Cal.App.2d 411, 413 (1951), parties' waiver of profits from illegal contract did not cure illegality or make dispute judiciable).

Similarly where parties attempt to circumvent state or federal law, they are denied relief. (*See e.g. Lala v. Maiorana*, 166 Cal.App.2d 724, 733 (1959), "Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract…the court has both the power and the duty to ascertain the facts in order that it may not unwittingly lend its assistance to

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the consummation or encouragement of what public policy forbids." (citation omitted).

Plaintiff takes issue with HDL's citation to *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944) for the general proposition that a federal court will not aid an illegal act, arguing that in *Yellow Cab*, no illegal act was ultimately found. But this is a distraction; CVA's business *is illegal* under federal law, even if the liquor distribution in *Yellow Cab* was found not to be illegal.

CVA also argues that granting its relief would not require the court to "assist in its violation of federal law" but that is not true. CVA is seeking damages against City and HDL resulting from the alleged wrongful denial of its applications for a permit to sell cannabis and operate a cannabis business. (Dkt. 15 at ¶39, 44, 49). The measure of damages in such a case *is* lost profits. (Civ. Code §3306; *see e.g. Parlour Enterprises, Inc. v. Kirin Group, Inc.*, 152 Cal.App.4th 281, 287-88 (4th 2007). The SAC identifies no other damages. (Dkt. 15). Thus, CVA seeks relief that would require this Court to award damages derived from activities that are illegal under federal laws.

The United States Supreme Court addressed the exact argument that CVA is advancing in *Kaiser Steel Corp v. Mullins* 455 U.S. 72, 79-82 (1982). In *Kaiser Steel*, the Supreme Court acknowledged that there was a difference between cases in which the court is asked to order or sanction an illegal act and cases in which "the relief sought does not seek directly to order illegal activity," thereby leaving room for equitable considerations. However, as explained by the Ninth Circuit in *Bassidji v. Goe*, 413 F.3d 928, 936-37 (9th Cir. 2005), this instruction clearly embraced a clear distinction, specifically that:

> "the realm of nuanced judicial determinations concerning enforcement when an illegality defense is asserted **only begins "past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act**." (quoting *Kelly v. Kosuga*, 358 U.S. 516, 520 (1959)) Where the relief sought does not pass that point – that is , where a promise

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> can only "be enforced [by] commanding unlawful conduct," (*Kaiser Steel* at 79) -- **then the principle that "illegal promises will not be enforced in cases controlled by the federal law, takes center stage and does not admit of exceptions**. (*See also Kaiser Steel* at 81-82 (emphasizing that federal courts' authority to enforce agreements against public policy is "subject to the limitation that the illegality defense should be entertained in those circumstances where its rejection would be to enforce conduct that…laws forbid.") (*Id*., emphasis added).

California courts reach a similar result. (*Tri-Q, Inc. v. Sta-Hi Corp.*, 63 Cal.2d 199, 218-19 (Cal. 1965). Thus, CVA's argument fails. CVA's lawsuit is not seeking collateral relief *unrelated* to the sale of cannabis. Rather, it is seeking damages flowing from the denial of a permit to sell cannabis and directly from cannabis sales.

Many federal courts have followed the instruction from *Kaiser Steel* to deny relief that flows from violations of federal law, including the CSA. For example, in *Sensoria, LLC v. Kaweske*, 548 F.Supp.3d 1011, 1026 (D. Colo. 2021), it was determined that federal courts "may not vindicate equity in in or award profits from a business that grows, processes, and sells marijuana." That court rejected all damage claims but allowed an accounting claim to remain. (*Id*.) Likewise, the United States Bankruptcy Court for the District of Colorado has declined to administer marijuana-related assets or confer a federal benefit to debtors engaging in ongoing federal law violations. (*In re Malul*, 614 B.R. 699, 713-714 (D. Colo. 2020); *In re Way to Grow, Inc*., 597 B.R. 111 (D. Colo. 2018). Other bankruptcy courts have reached the same result. (*See e.g. In re Johnson*, 532 B.R. 53, 56-57 (W.D. Mich. 2015).

Other courts have denied relief where it would require them to grant damages based upon the violations of the CSA. (*See Polk v. Gontmakher*, 2020 U.S. Dist. LEXIS 89872 at *7 (W.D. Wash. 2020), "The Court cannot fathom how ordering Defendants to turn over the future profits of a marijuana business would not require them to violate the CSA."; *Wildflower Brands Inc. v. Camacho*, 2023 U.S. Dist. LEXIS 74940, at *7-8 (C.D. Cal. 2023), "That is, the Court would be tasked with

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allocating profits from a cannabis business, effectively sanctioning a violation of federal law."; *Gopal v. Luther,* 2022 U.S. Dist. LEXIS 30221 *7-8 (Dist. Ct. East. Dist. Ca 2022), federal court could not enforce an ownership interest in a cannabis business or order damages derived from cannabis). The *Polk* and *Gopal* holdings are particularly on point: in both the courts rejected claims just like CVA's seeking damages for the withholding of licenses or permits. "This court cannot enforce an ownership interest in a marijuana business or order damages derived from the cultivation and sale of marijuana, which is CRL's singular enterprise." (*Gopal, supra,* at *8). Accordingly, CVA's claims and case should be dismissed in their entirety based upon the defenses of illegality and unclean hands.[2]

B. CVA's Claims Against HDL Are Time Barred.

CVA tries to evade the plain argument in HDL's briefing as to the time bar. CVA tries to lump in HDL's acts with the City's acts, failing to acknowledge that each played a distinct role. There is no arguable basis for holding HDL responsible for the 2023 failure by the City to issue a permit. There is no dispute that HDL cannot issue a permit. There is no dispute the City never delegated that power to HDL. There is no dispute that HDL was not involved in the City's litigation with CVA, nor the City's decision to issue permits to other third parties during the litigation with CVA, thereby exhausting the available permits.

What is crystal clear from CVA's pleading is that the only (alleged) wrongful activity that it can identify with respect to HDL is the 2020 scoring of its original application that resulted in the 2020 denial. (Dkt. 15 at ¶10-18) CVA makes plain that it takes no issue with the 2023 rescoring of its application by HDL, and in fact it

[2] This Court also could *sua sponte* dismiss the case based upon abstention and comity principles, as state law clearly has more of an interest in the dispute. (*See e.g. MediGrow LLC v. Natalie M. Laprade Med. Cannabis Comm'n*, 487 F.Supp.3d 364, 376-77 (Md. Dist. Ct. 2020) Also, there is currently a state law proceeding between CVA and the City, further mitigating toward leaving the dispute to the state court to resolve. (*Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813-815 (1976), abstention appropriate where substantially similar proceeding pending in state court).

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uses HDL's 2023 rescoring as the basis for its claim that the City should have then issued it a permit. The only wrongdoing identified as to HDL occurred in 20**20**.

CVA argues that its claims against HDL did not accrue until 2023 but fails to explain this. In 2023, per CVA, HDL correctly re-scored its application, resulting in it ranking first in one district and second in another. (Dkt. 15 at ¶18). This allowed its application to proceed, forming the basis for its current claim that the City should have issued it a permit. (*Id*.) HDL clearly knew of HDL's role in the initial scoring no later than April 2020 when there was an administrative hearing and HDL's employee testified about the original scoring and ordered to re-score.[3] CVA offers no explanation as to why its claim against HDL would not have accrued then. Clearly, its claim against the City had accrued then, and was based upon the same occurrences, as it sued the City by September 2020. It simply chose not to sue HDL at that time (and not for four and a half years later).

CVA's Opposition is deceptive. It references that the instant (federal) action as to the City was filed on May 21, 2024. It hopes the court will overlook that the claim adding HDL was made on March 7, 2025 – just three months ago! It also hopes the court will ignore the fact that it has been in litigation in state court with the City over these same occurrences since September 2020.

There is no dispute that a two year statute of limitation applies to and bars CVA's claims. As CVA only sued HDL in March, 2025, there is no dispute that its claims against HDL are barred if they accrued prior to March 2023. HDL's scoring that CVA takes issue with occurred in 20**20** – *five years before it was sued*. There is no act identified *by HDL* after that date that CVA ascribes wrongdoing to. The claim is clearly time barred.

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[3] Note: HDL's moving papers mistakenly identified that April hearing occurring in 20**22** (at pg. 9, l. 18), which was a typo. That hearing occurred in April 20**20**. (*See CV Amalgamated LLC v. City of Chula Vista,* 82 Cal.app.5th 265, 274 (4th DCA CA 2022).

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C. CVA's Other Claims Are Equally Flawed As to HDL.

CVA's Opposition also fails to address meaningfully the many deficiencies in its other claims.

First, as to the Section 1983 claim, CVA fails to identify any ministerial or mandatory duties that HDL had (it had none), which impacted CVA. HDL is not a state actor, had no authority to control the permitting process, and there is no constitutional interest sufficient to support a due process violation. (*Gerhart v. Lake Cnty. Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011) Nor is there a protected property interest as discussed in the moving papers.

Second, CVA fails to rebut the City's correct position, which HDL joins, that there was no exhaustion of administrative remedies in 2023 after the rescoring. This is a jurisdictional bar. (*Johnson v. City of Loma Linda*, 24 Cal.4th 61, 70 (Cal. 2000).

Third, there was no constitutional violation, nor could there be because federal law does not recognize CVA's right to sell cannabis or operate a cannabis business. CVA has failed to show a federal or constitutional violation. (*Van Ort v. Est. of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996).

Fourth, CVA has not shown that HDL would not qualify for qualified immunity as a government agent performing work delegated by a government entity. (*Filarsky v. Delia*, 566 U.S. 377, 390 (2012).

Fifth, as discussed, Plaintiff's negligence and "duty to follow the law" claims fails to support any claim as to HDL as HDL had no statutory or other duty to issue a permit in 2023.[4] If Plaintiff intends to support these claims with the 2020 scoring error, such a claim is time barred since this claim was not filed until March, 2025.

[4]CVA references a typographical error regarding a citation (to "Wilson v. Workers' Comp. Appls. Bd."). (Dkt. 32 at p.14, l.21-28). But clearly HDL's citation is to *Wilson v. All Services Ins. Corp.*, 91 Cal.App.3d 793, 796 (Cal. Ct. of Appl 1979), which is cited correctly less than half a page above the typographical error. *Wilson* stands for the proposition that the scope of duty is determined by the contractual task assumed. HDL assumed no duty to issue a permit and could not do so.

III. REQUESTED RELIEF

For the foregoing reasons, Defendant HDL's motion to dismiss the claims against it should be sustained and Plaintiff's Second Amended Complaint should be dismissed as to HDL, with prejudice, due to the fatal defects in the complaint, including the fatal defenses of illegality and unclean hands, the lack of a duty and the bar of the statute of limitations.

While CVA requests leave to amend, acknowledging the many defects, it fails to address how it might cure these fatal defects – particularly the illegality and the statute of limitations. Leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." (*Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986); *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (dismissal with prejudice is appropriate only when the complaint could not be saved by amendment).) Dismissal without leave to amend is appropriate. CVA has tried unsuccessfully to plead viable claims and cannot do so.

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DATED: May 30, 2025

By: _____

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