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18 *Attorneys for Defendant Falcon International Corp.*

19 **IN THE UNITED STATES DISTRICT COURT**  
20 **FOR THE DISTRICT OF ARIZONA**

21 Harvest Health & Recreation Inc., a British  
22 Columbia, Canada corporation; Harvest Enterprises,  
23 Inc., a Delaware corporation; Harvest of California  
24 LLC, a California limited liability company; Harvest  
25 California Acquisition Corp., a Delaware  
26 corporation,

27 Plaintiff,

28 v.

Falcon International, Corp, a Delaware corporation;  
James Kunevicius, an individual; Edlin Kim, an  
individual; Falcon California, Inc., a Delaware  
corporation; Falcon Brands, Inc. a Delaware  
corporation; Coastal Harvest II, LLC, a California  
limited liability company; First Canyon Holdings,  
LLC, a Delaware limited liability company; G1  
Perez, LLC, a Delaware limited liability company;

No. 2:20-cv-00035-DLR

**DEFENDANT FALCON  
INTERNATIONAL, CORP.'S  
MOTION TO DISMISS FOR  
LACK OF SUBJECT MATTER  
JURISDICTION UNDER FED. R.  
CIV. PROC. RULE 12(b)(1)**

1 V1 Perez, LLC, a Delaware limited liability  
 2 company; Industrial Court L11, LLC, a Delaware  
 3 limited liability company; A1 Canyon, LLC, a  
 4 Delaware limited liability company; B1 Canyon,  
 5 LLC, a Delaware limited liability company; C1  
 6 Canyon, LLC, a Delaware limited liability company;  
 7 D1 Canyon, LLC, a Delaware limited liability  
 8 company; E1 Canyon, LLC, a Delaware limited  
 9 liability company; Industrial Court L5, LLC, a  
 10 Delaware limited liability company; Industrial Court  
 11 L6, LLC, a Delaware limited liability company;  
 12 Kane Concepts, LLC, a Delaware limited liability  
 13 company; MK Point, LLC, a Delaware limited  
 14 liability company; Cannoisseur Capital, LLC, a  
 15 Florida limited liability company; BAM668, LLC, a  
 16 California limited liability company; Rhino Group,  
 LLC, a Delaware limited liability company; Grey  
 Ghost Services, LLC, a Delaware limited liability  
 company; Betterworld Ventures, LLC, a California  
 limited liability company; Swoish Family Trust, an  
 entity; Albert Kim, an individual; John “Johnny”  
 Nasori, an individual; Noah Novello, an individual;  
 David Mitchell, an individual; Brian Brown, an  
 individual; Danielle Brown, an individual,

Defendants.

18 Defendant Falcon International Corp., (“Falcon”), by and through undersigned counsel,  
 19 hereby moves to dismiss the complaint (the “Complaint”) (Doc. 1) filed by the above-referenced  
 20 Plaintiffs (collectively, “Plaintiffs”) in this action.

21 This Motion is premised on a fundamental legal principle that Plaintiffs have ignored.  
 22 Simply put, this Court does not have subject matter jurisdiction to hear the claims asserted in the  
 23 Complaint for three separate, but equally compelling, reasons.

24 *First*, Plaintiffs do not have complete diversity with the defendants. As the Complaint’s  
 25 caption clearly evidences, at least one plaintiff (*e.g.*, Harvest Enterprises, Inc.) and one defendant  
 26 (*e.g.*, Falcon) are Delaware corporations. Complete diversity of citizenship is required here  
 27 because Plaintiffs are relying solely on the Federal Arbitration Act (the “FAA”) to compel  
 28 arbitration, which does not give rise to an independent federal question. Moreover, Section

1 9.11(a) of the at-issue merger agreement (the “Merger Agreement”) also makes clear that the  
2 state laws of Delaware apply. No federal question is implicated in any respect and Plaintiffs have  
3 not asserted anything to the contrary in their Complaint.

4 *Second*, this Court does not have subject matter jurisdiction over this case because  
5 Plaintiffs’ claim, *i.e.* their request to compel arbitration, was not ripe for adjudication at the time  
6 that they filed their Complaint. It is axiomatic that federal courts only possess jurisdiction over  
7 justiciable cases and controversies that are ripe for adjudication. *Golden v. Zwickler*, 394 U.S.  
8 103, 108 (1969). Prior to filing the Complaint, Plaintiffs failed to provide notice of any alleged  
9 default under the Merger Agreement and failed to provide notice of any dispute prior to  
10 arbitrating, which is required under the Merger Agreement. Plaintiffs also did not seek to  
11 arbitrate any dispute under the rules and regulations of the American Arbitration Association as  
12 contemplated by the Merger Agreement. In short, Plaintiffs have no basis to seek judicial relief  
13 for their claim and are ignoring the clear jurisdictional defects in the Complaint in search of a  
14 judicial venue to publicize meritless claims<sup>1</sup> that will be easily disproven in arbitration.<sup>2</sup>

15 *Third*, even if the claim were ripe to be heard (which it is not), it is now moot because  
16 Falcon already has agreed to arbitrate the parties’ disputes. *See Tur v. YouTube, Inc.*, 562 F.3d  
17 1212, 1214 (9th Cir. 2009) (“[D]ismissal for mootness is a dismissal for lack of jurisdiction.”)  
18 Tellingly, Plaintiffs do not assert that they asked Falcon to engage in arbitration after delivering  
19 a required Notice of Dispute under the Merger Agreement. Now that Falcon has received notice  
20 of a dispute, it will continue to abide by the terms of the Merger Agreement, and Falcon remains  
21 confident that Plaintiffs’ baseless allegations—which were gratuitously inserted into the  
22 Complaint without a shred of evidence or factual underpinning—will be resolved in Falcon’s  
23

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24 <sup>1</sup> Plaintiffs seek to distract from the clear jurisdictional deficiencies in the Complaint by making  
25 inflammatory and meritless allegations of illegal conduct on the part of certain Falcon  
26 representatives, which allegations stem from an attempt by a former Falcon independent  
contractor to extort a monetary settlement from Falcon in an entirely unrelated matter.

27 <sup>2</sup> It is Falcon’s view that this abuse of the judicial process may give rise to sanctions under Fed.  
28 Rule Civ. Proc. 11, which Falcon reserves the right to pursue.

1 favor.

2 Accordingly, Plaintiffs' Complaint should be dismissed with prejudice under Fed. R. Civ.  
3 Proc., Rule 12(b)(1) for lack of subject matter jurisdiction.

4 **I. RELEVANT FACTUAL BACKGROUND**

5 Harvest and Falcon have been actively pursuing a merger since the fall of 2018, the  
6 original terms of which were first set forth in an option agreement entered into in October 2018  
7 and which was superseded by the Merger Agreement originally entered into on February 14,  
8 2019 and later amended on June 7, 2019. The pending merger was publicly announced on  
9 February 14, 2019 via a press release in which Harvest disclosed that it had purchased Falcon  
10 "for a non-material undisclosed amount of stock," which it later disclosed in the Complaint to be  
11 \$155 million. While the pending merger was significant at the time, it was quickly overshadowed  
12 by Harvest's announcement in March 2019 that Harvest planned to buy Verano Holdings for the  
13 publicly disclosed price of \$850 million.

14 Harvest and Falcon engaged in discussions to amend the Merger Agreement after both  
15 received a "second request" to their pre-merger notification filings under the Hart-Scott-Rodino  
16 Antitrust Improvements Act of 1976, which Harvest and Falcon both understood would delay the  
17 consummation of the pending merger to a date beyond the date in the Merger Agreement after  
18 which either party had the option to terminate the Merger Agreement. On June 7, 2019, Harvest  
19 and Falcon amended the Merger Agreement and, among other things, as Harvest has disclosed  
20 in the Complaint, increased the purchase price to \$240 million.

21 An additional material inducement to Falcon's agreement to amend the Merger  
22 Agreement was an increase in Harvest's commitment to provide funding to Falcon both for  
23 operations and for certain previously agreed-upon capital expenditures. These advances were  
24 made pursuant to promissory notes in favor of Harvest that are convertible into equity of Falcon,  
25 at Falcon's or Harvest's option, the most recent of which is convertible at a \$250 million pre-  
26 conversion valuation of Falcon. To punctuate the parties' mutual commitment on these points,  
27 the Merger Agreement provided that Falcon could terminate the Merger Agreement and require  
28 the payment of a \$50 million breakup fee should Harvest breach its obligations to provide the

1 agreed-upon funding.

2 In the late summer and fall of 2019, Harvest fell behind on its contractual obligations to  
3 fund Falcon under the Merger Agreement. Falcon provided notice to Harvest of its default under  
4 the terms of the Merger Agreement through its counsel on September 5, 2019. Harvest failed to  
5 cure timely the default, which gave rise to Falcon's right to terminate the Merger Agreement and  
6 to demand the breakup fee.

7 Despite having the right to terminate the Merger Agreement and to demand the breakup  
8 fee, Falcon demonstrated restraint while Harvest's management requested time to deal with more  
9 pressing matters like raising funds and working to consummate their much larger pending  
10 acquisition of Verano Holdings. To provide Harvest time to deal with these matters without  
11 prejudicing the rights of either party as well as to provide the parties an opportunity to negotiate  
12 appropriate modifications to the Merger Agreement, the parties entered into a standstill  
13 agreement on October 30, 2019 which was later amended to extend the standstill period on  
14 November 29, 2019 (the "Standstill Agreement"). In substance, the Standstill Agreement  
15 provided that, without prejudicing the rights of either party, neither party would declare a default  
16 or otherwise seek to exercise rights or remedies against the other until the standstill period expired  
17 on January 5, 2020.

18 On January 6, 2020, the day following expiration of the standstill period and without  
19 giving the required prior notice to Falcon under the Merger Agreement or attempting to  
20 commence arbitration, Harvest filed the Complaint in this case.

## 21 **II. LEGAL ARGUMENT**

### 22 **A. Applicable Legal Standard**

23 Rule 12(b)(1) requires a court to dismiss claims over which it lacks subject-matter  
24 jurisdiction. A Rule 12(b)(1) challenge may be either facial or factual. *Safe Air for Everyone v.*  
25 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the court may dismiss a complaint  
26 when the allegations of and documents attached to the complaint are insufficient to confer  
27 subject-matter jurisdiction. *See Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d  
28 1036, 1039 n.2 (9th Cir. 2003). In this context, all allegations of material fact are taken as true

1 and construed in the light most favorable to the nonmoving party. *Fed'n of African Am.*  
2 *Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). In contrast, when a court  
3 evaluates a factual challenge to jurisdiction, a court is “free to weigh the evidence and satisfy  
4 itself as to the existence of its power to hear the case.” *Safe Air for Everyone*, 373 F.3d at 1039  
5 (“In resolving a factual attack on jurisdiction, the district court may review evidence beyond the  
6 complaint without converting the motion to dismiss into a motion for summary judgment.”).

7 **B. The Complaint Should Be Dismissed Because Plaintiffs Lack Diversity**  
8 **of Citizenship With Defendants**

9 A petition to compel under the FAA does not relieve a plaintiff from demonstrating to the  
10 court that it has subject matter jurisdiction over the dispute. Indeed, the petition to compel must  
11 be supported by an independent basis for federal subject matter jurisdiction (*e.g.*, diversity of  
12 citizenship). This is required because the FAA by itself does not confer “federal question”  
13 jurisdiction. *See Vaden v. Discover Bank*, 556 U.S. 49, 58, 62 (2009); *Southland Corp. v.*  
14 *Keating*, 465 U.S. 1, fn. 9 (1984); *In re Wade*, 523 B.R. 594, 602 (Bankr. W.D. Tenn. 2014)  
15 (“The FAA does not create federal subject matter jurisdiction, as parties must still assert an  
16 independent basis for federal jurisdiction such as diversity jurisdiction or a federal question.”)

17 Plaintiffs must assert in their Complaint that no one plaintiff and defendant are “citizens”  
18 of the same state for diversity of citizenship to exist. *See* 28 U.S.C. § 1332(a)(1); *see also Am.*  
19 *Family Mut. Ins. Co. v. Baca*, No. CV-10-01879-PHX-NVW, 2011 WL 317618, at \*2 (D. Ariz.  
20 Feb. 1, 2011) (“For diversity jurisdiction under § 1332, each defendant must be a citizen of a  
21 different state from each plaintiff.”) (citing *Dolch v. United California Bank*, 702 F.2d 178, 181  
22 (9th Cir.1983)). Corporate parties are citizens of both the state in which they are incorporated  
23 *and* the state where their principal place of business is located. *See* 28 U.S.C. § 1332(c)(1). If  
24 any one plaintiff and any one defendant reside in the same state, then (1) diversity of citizenship  
25 does not exist, (2) the Court does not have subject matter jurisdiction over the parties, and (3) the  
26 complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(1).

27 Here, Plaintiffs admit that “diversity jurisdiction” is required for this Court to have subject  
28 matter jurisdiction. *See* Doc. 1, Compl., ¶ 46, and their sole claim is to compel arbitration under

1 the provisions of the Merger Agreement. However, Plaintiffs’ analysis concerning diversity of  
2 citizenship is woefully deficient. Plaintiffs appear to conclude that “since Plaintiff Harvest is a  
3 citizen of a different jurisdiction than that of all Defendants. . .” they have satisfied this required  
4 prong. That is a blatant misunderstanding of the law. Under 28 U.S.C. § 1332, Plaintiffs must  
5 demonstrate that *all* Plaintiffs reside in different states than that of any of the Defendants. It is  
6 obvious from the face of the Complaint that certain Plaintiffs are residents of Delaware. *Compare*  
7 Doc. 1, Compl., ¶ 2 (“Plaintiff Harvest Enterprises, Inc. is a Delaware corporation in good  
8 standing”) *with* Doc. 1, Compl., ¶ 2 (Defendant Falcon “is a Delaware corporation in good  
9 standing.”).

10 Because diversity of citizenship does not exist between Plaintiffs and Defendants, this  
11 Court lacks subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and the  
12 Complaint should be dismissed.

13 **C. Plaintiffs Failed to Provide Notice of a Dispute Under the Merger**  
14 **Agreement and Defendants Did Not Refuse to Arbitrate—i.e., The**  
15 **Issue Is Not Ripe**

16 Courts cannot issue advisory opinions in the United States. Thus, for a federal court to be  
17 able to decide a dispute, there must be a “case or controversy” before the Court. U.S. Const. art.  
18 III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). This longstanding  
19 jurisprudence is embedded directly into the FAA, which Plaintiffs helpfully quote in part in the  
20 Complaint, yet inexplicably ignore. *See* Doc. 1, Compl., ¶ 55 (quoting 9 U.S.C. § 4).

21 Under the express provisions of the FAA, a party seeking to compel arbitration must be  
22 “aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written  
23 agreement for arbitration.” *See* 9 U.S.C. § 4. In addition, before making the application to the  
24 Court, the FAA requires the aggrieved party to provide “five days’ notice in writing of such  
25 application” before filing it with the court. *See id.* (“Five days’ notice in writing of such  
26 application shall be served upon the party in default.”)

27 Plaintiffs’ Complaint asserts that the FAA applies to this litigation. However, it fails to  
28 allege that Falcon, or any of the other defendants, refused to arbitrate a dispute under the Merger  
Agreement. The reason for this is simple—Plaintiffs never asked Falcon (or any defendant) to

1 submit to binding arbitration under the Merger Agreement. Nor do Plaintiffs allege that they  
2 provided notice that a dispute relating to the Merger Agreement existed or that they provided  
3 Defendants with the requisite five business days to seek resolution of the dispute prior to  
4 submitting the dispute to arbitration. *See* Ex. A, Section 9.10.

5 Therefore, Plaintiffs have not alleged (nor could they allege) that Falcon or any defendant  
6 has refused to arbitrate any dispute relating to the Merger Agreement. Thus, the Complaint is  
7 not ripe under the FAA—it should be dismissed with prejudice.

8 **D. Now That Falcon Is on Notice of a Dispute, It Has Agreed to**  
9 **Arbitration Under the Merger Agreement**

10 Even if the Court were to look beyond the technical defects in Plaintiffs' Complaint, it is  
11 now moot. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 45, 117 S. Ct. 1055, 1058,  
12 137 L. Ed. 2d 170 (1997) (“To qualify as a case fit for federal-court adjudication, an actual  
13 controversy must be extant at all stages of review, not merely at the time the complaint is filed.”).  
14 In other words, a dispute must still exist after the Complaint is filed or it risks being dismissed  
15 as moot.

16 Here, Falcon—now that it has notice of the dispute—has agreed to arbitrate the dispute in  
17 accordance with the terms of the Merger Agreement. Thus, Plaintiffs' claimed grievance is now  
18 moot, and there is nothing left for the Court to decide. The Complaint therefore should be  
19 dismissed for this related, but independent reason as well.

20 **III. CONCLUSION**

21 For all of the foregoing reasons, Falcon respectfully requests this Court to dismiss the  
22 Complaint for lack of subject matter jurisdiction under Fed. R. Civ. Proc., Rule 12(b)(1).

23 DATED: January 17, 2020.

24 **RESPECTFULLY SUBMITTED,**

25 */s/ Sharon A. Urias*

26 Sharon A. Urias

27 **GREENSPOON MARDER LLP**

8585 E. Hartford Drive, Suite 700

Scottsdale, AZ 85255

28 *Attorneys for Defendant Falcon International Corp.*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 17, 2020, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ Sharon A. Urias  
Sharon A. Urias

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