

1 Richard Mooney, Esq. (SBN: 176486)
RJM Litigation Group
2 505 Montgomery #1100
San Francisco, CA 94111
3 415.874.3711
richard.mooney@rjmlitigation.com
4 Attorneys for Specially Appearing Defendants
5
6
7

8 **CALIFORNIA SUPERIOR COURT**
9 **FOR THE COUNTY OF LOS ANGELES**

10 Alexandria Real Estate Equities, Inc. and Joel S.) Case No. 19STCV05246
11 Marcus,)
12 Plaintiffs,) **Steven Marcus's Notice of Motion and**
13 vs.) **Motion To Disqualify Counsel**
14 Steven Marcus and Bugsby Property, LLC,)
15 Defendants.)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
26)
27)
28)
Action Filed: February 13, 2019

NOTICE OF MOTION AND MOTION TO DISQUALIFY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

To Plaintiffs and their Attorneys of Record:

Please Take Notice that Defendant Steven Marcus will, and hereby does, move this Court for an order disqualifying Gibson Dunn & Crutcher LLP (“Gibson Dunn”) from representing Plaintiffs Alexandria Real Estate Equities, Inc. (“ARE”) and Joel S. Marcus (along with ARE, “Plaintiffs”) in this action. The motion will be heard by the Honorable Richard J. Burdge Jr., California Superior Court Judge, in Department 37 of the California Superior Court for the County of Los Angeles, located at 111 N. Hill St. in Los Angeles, California (90012) on June 22, 2020 at 8:30 a.m. or at another time and/or on another date as specified by the Court. Steven Marcus brings this motion on the grounds that Gibson Dunn previously represented him on one or more substantially related matters and that Gibson Dunn’s inaccurate and potentially perjurious statements are both an ethical violation and clear grounds for removal from this action.

For the avoidance of doubt, Steven Marcus brings the Motion subject to and without waiving the arguments set out in Defendants’ pending *Motion To Quash Service of Summons for Lack of Personal Jurisdiction or, in the Alternative, To Dismiss on Grounds of Inconvenient Forum* filed on March 25, 2019 in this action.

The Motion is based upon this Notice of Motion and Motion, the included brief in support thereof, the declaration(s) filed herewith, the pleadings in the record of this matter, all matters of which the Court may take judicial notice, and any oral or written evidence or argument presented at or before the hearing.

Dated: December 10, 2019

RJM Litigation Group



By: _____
Richard Mooney
Attorneys for Specially Appearing Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. Introduction..... 1

II. Background..... 2

 A. Factual Background..... 2

 B. The Current Litigation..... 3

III. Gibson Dunn’s Past Conduct..... 7

 A. Gibson Dunn’s Prior Multiple Representations of Steven Marcus 7

 1. Transit Wireless..... 7

 2. Silvercup Joint Venture – ABQ NDA 8

 3. Unit Six Owners, LLC Representation..... 9

 4. Mr. Lance’s Further Representation of Steven Marcus..... 11

 B. The “First Filed Fallacy”—Gibson Dunn’s Efforts to “Backdate” a Filing..... 11

 1. Gibson Dunn’s Inaccurate Statements – *No Timestamp*..... 12

 2. Gibson Dunn’s Attempted Explanation—“computer glitch” 16

IV. Governing Legal Standards 17

 A. Representation Adverse to a Former Client..... 17

 B. The Duty of Candor to the Court..... 19

V. Argument..... 19

VI. Conclusion..... 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

Beachcomber Mgmt. Crystal Cove, LLC v. Superior Court,
13 Cal.App.5th 1105 (2017) 19

Lister v. State Bar,
51 Cal.3d 1117 (1990) 8

Shandralina G. v. Homonchuk,
147 Cal.App.4th 395 (2007) 19

Western Continental Operating Co. v. Natural Gas Corp. of Cal.,
212 Cal.App.3d 752 (1989) 19

Rules

Cal. Bus. & Prof. Code § 6068 19

California Rule of Court 9.40(c)(1) 18

California Rule of Court 9.40(f) 18

California Rules of Professional Conduct Rule 1.6 20

California Rules of Professional Conduct Rule 1.9(a) 17, 18, 20

California Rules of Professional Conduct Rule 3.3 19, 20

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Gibson Dunn filed this action on behalf of its long-standing clients, Plaintiffs Alexandria Real
4 Estate Equities, Inc. (“ARE”) and its Executive Chairman Joel Marcus, who seek to avoid justly and
5 fairly paying Defendants Bugsby Property, LLC (“Bugsby”) and Steven Marcus for critical work
6 provided to Plaintiffs. This entire Declaratory Relief action is based on an unconscionable,
7 fraudulently-obtained, temporally inapplicable, and fully expired December 27, 2013 CNDA that
8 involves only one of the two Plaintiffs (ARE, and *not* Joel Marcus) and one of the two Defendants
9 (Steven Marcus, *an individual*—with no mention of affiliates or related entities—and *not* Bugsby
10 Property, LLC).

11 Gibson Dunn perpetrates its conflicted and factually flimsy cause notwithstanding its full
12 awareness that it had previously represented Defendant Steven Marcus on closely-related and
13 contemporaneous matters thorough which it acquired pertinent, private, and privileged confidential
14 information. Betraying the intimate confidence of their former client, Gibson Dunn’s allegiance
15 blindly falls with the larger and presumably more lucrative clients (Plaintiffs). Gibson Dunn, led by
16 Randy Mastro, has not only engaged in unethical behavior and false assertions, but has made Steven
17 Marcus’s professional history, track record, and personal finances a central narrative in this action.
18 *See, e.g.*, Complaint ¶¶ 45-48. Shockingly, their pleadings and declarations contain systemic
19 falsehoods, and their representation is not permitted under the laws of professional conduct. They
20 attempt to weaponize the very information with which they were previously entrusted. The
21 unjustifiable and improper attack in this action was not brought by a far-flung Gibson Dunn partner
22 uninvolved in the prior representations and mediation – this attack has been spearheaded by Mr.
23 Mastro, co-chair of Gibson Dunn’s Litigation Practice Group, with the aiding and abetting of his
24 long-time New York partner Andy Lance—the partners *most involved* in the prior representations—
25 along with Gibson Dunn’s west coast “inner circle”.

26 Defendants therefore bring this motion to vindicate their rights and to require Plaintiffs (a
27 publicly-traded company worth approximately \$25 billion and an executive earning \$12 million per
28

1 year) to engage counsel that is free of conflicts and cannot unfairly disadvantage Steven Marcus
2 through the abuse of confidential information obtained as part of an attorney-client relationship.
3 Furthermore, Gibson Dunn’s inaccurate and potentially perjurious statements are both an ethical
4 violation and clear grounds for removal from this action. Gibson Dunn should be disqualified.¹

5 **II. BACKGROUND**

6 **A. Factual Background**

7 In late 2013, after years in which ARE’s NYSE-traded shares had underperformed those of
8 ARE’s real estate peers by more than 47%, creating a backdrop of distress, ARE’s then Chairman
9 and CEO, Defendant Joel Marcus was about to lose his job. *See* Declaration of Steven Marcus filed
10 herewith (“Steven Marcus Decl.”) ¶ 2. Faced with this crisis, Joel Marcus turned to his son Steven
11 Marcus of Bugsby Property, LLC for Bugsby’s advice and assistance. Bugsby had expertise in equity
12 capital markets and activist shareholding, joined with a long-term knowledge of ARE’s business and
13 strategies, and was uniquely qualified to diagnose the causes of ARE’s stagnation and sustained
14 underperformance. *Id.* ¶ 3. At Joel Marcus’s and ARE’s request, and with explicit and implicit
15 assurances that appropriate market-based compensation would be provided if the work was
16 successful, Bugsby investigated and analyzed the reasons for ARE’s share underperformance and
17 developed and presented to ARE a comprehensive strategic plan (the “Bugsby Blueprint”) to reverse
18 that underperformance, unlock over \$13 billion dollars in enterprise value, and save Joel Marcus’s
19 eight-figure per year compensation package. *Id.* ¶ 4.

20 Bugsby determined that ARE’s long-standing policy of funding growth through the issuance
21 of dilutive common equity directly correlated with the stock underperformance and that a shift to
22 other financing, joint venture, and co-investment sources was critical to reversing the vicious cycle.
23 The Bugsby Blueprint thus propelled ARE’s stock to long-term outperformance and allowed Joel
24 Marcus to retain his position. *Id.* ¶ 5. After Bugsby’s conceptual and strategic work was done (and

25
26 ¹ As set out in the accompanying notice of motion, Steven Marcus files this motion without
27 intending to waive his pending arguments regarding personal jurisdiction and inconvenient
28 forum scheduled for hearing on February 28, 2020. Indeed, the motion is only filed now in
response to Plaintiffs’ motion to compel a deposition of Steven Marcus—the single pre-trial
arena in which possession and use of confidential information would be most advantageous.

1 conveyed) and ARE and its executives were persuaded of the Bugsby Blueprint’s efficacy, they
2 determined to implement the Bugsby Blueprint. Steven Marcus Decl. ¶ 6. ARE continues to benefit
3 from the Bugsby Blueprint to this day, and uses Bugsby’s advice in its annual Investor Day
4 presentations (presented annually since 2011 in New York City to promote its stock), and in its
5 quarterly earnings updates. The core tenets that Bugsby discovered, explained and actioned in late
6 2013 (prior to December 20, 2013) remain prolific, long-term winners for ARE, and they have richly
7 benefitted Joel Marcus personally.

8 At issue in this matter for declaratory relief is an alleged and *ex post facto* Confidentiality and
9 Non-Disclosure Agreement (“CNDA”) that: (1) was signed by and applies to only Defendant, Steven
10 Marcus, *an individual*; (2) Defendant Bugsby Property, LLC is a non-signatory of, as Bugsby
11 explicitly refused to sign a similar agreement sent by ARE at the same time; (3) was signed on
12 December 30, 2013, has an Effective Date of December 27, 2013, and could only possibly govern
13 Steven Marcus’s individual, prospective work “*to be provided*” (explicitly by the CNDA’s Permitted
14 Use term, not including prior work) *from* December 27, 2013; (4) clearly is signed and lists
15 “Recipient” as “Steven Marcus, *an individual*” residing at 32 N Moore Street, #6 New York, NY
16 10013, notably and explicitly lacking language extending it to affiliates or related parties and (5) was
17 dubiously obtained by ARE as a product of duress and fraud. Steven Marcus Decl. ¶ 7 & Exh. A. In
18 this action, the *only potentially* relevant agreement involves *only one* of the two Plaintiffs and *one of*
19 *the two* Defendants and could only apply *prospectively*, if at all.

20 **B. The Current Litigation**

21 On January 30, 2019, seeking to avoid litigation, prior counsel for Bugsby Property, LLC and
22 Steven Marcus sent ARE and Joel Marcus correspondence expressing their openness to an amicable
23 resolution, along with a draft complaint they intended to file in New York State Court absent such
24 resolution. *See* Declaration of Richard Mooney filed herewith (“Mooney Decl.”) ¶ 2 & Exh. A. ARE
25 and Joel Marcus were unwilling to talk, counsel Gibson Dunn responding only with an acerbic
26 February 7, 2019 letter threatening to “seek Rule 11 sanctions and pursue a malicious prosecution
27 claim upon its dismissal.” Mooney Decl. ¶ 3 & Exh. B. Prior counsel for Bugsby Property, LLC and
28

1 Steven Marcus responded on February 8, 2019 indicating that Gibson Dunn had not responded in
2 any way to the invitation offered on January 30th. *Id.* Bugsby Property, LLC and Steven Marcus’s
3 good faith settlement approach was not only rebuffed, but Plaintiffs used this time to initiate this
4 action in California, in a clandestine “forum shopping” attempt, and to manufacture the artifice of
5 their “First Filed Fallacy”.

6 As confirmed by the Court’s electronically applied file stamp, this action for declaratory relief
7 was filed on February 13, 2019 at 12:09 p.m. See Mooney Decl. ¶ 4 & Exh. C. Neither Defendants
8 nor their prior counsel were informed of this filing by courtesy copy, despite the above-mentioned
9 February 7, 2019 threatening letter to the same counsel. It was clear that Gibson Dunn was interested
10 in cloaking the subterfuge of this action, and kept it from Defendants while serving it slowly by The
11 Hague Convention protocol. In the end, Defendants learned about this action through a February 15,
12 2019 filing in a *separate* matter frivolously and maliciously brought by ARE against Steven
13 Marcus—which was *dismissed* in its entirety with prejudice, notwithstanding ARE’s three separate
14 efforts to create a complaint that could survive motions to dismiss. Mooney Decl. ¶ 5.

15 On March 26, 2019, Defendants promptly filed a motion in this Court seeking (*inter alia*)
16 dismissal for lack of personal jurisdiction. Mooney Decl. ¶ 6. After Plaintiffs served and Defendants
17 responded to jurisdiction-related discovery and the parties briefed the issues, the Court on September
18 20, 2019 issued a tentative decision announcing the Court’s intention to deny the motion as to Steven
19 Marcus and to grant it as to Bugsby Property, LLC. *Id.* ¶ 7. “Plaintiffs have not demonstrated that
20 personal jurisdiction exists Defendant Bugsby by virtue of the CNDA executed by Defendant Steven
21 Marcus.” At the September 23, 2019 hearing the Court graciously acceded to Plaintiff’s request that
22 a decision be postponed so that Plaintiffs could conduct “some additional jurisdictional discovery”
23 and set a further hearing on the motion for January 10, 2020. *Id.* ¶ 8.

24 In response to an *ex parte* application by ARE and Joel Marcus, that hearing has been
25 continued to February 28, 2020, and the Court will hear Plaintiffs’ motion seeking yet more
26 jurisdiction-related discovery, including in particular the deposition of Steven Marcus, on
27 January 17, 2020. Mooney Decl. ¶ 9. Steven Marcus intends to request (also via *ex parte* application)
28

1 that the Court advance this motion to also be heard on January 17, 2020, to avoid the unjust possibility
2 of properly-disqualified counsel using confidential client information in an adversarial cross-
3 examination of its prior client. *Id.* ¶ 10.

4 The artifice employed here by Gibson Dunn attempts to use the expired CNDA governing
5 only the relationship between Steven Marcus, *an individual* (prospectively from December 27, 2013
6 at earliest) and ARE to avoid not only claims by Steven Marcus individually against ARE, but also
7 claims by Steven Marcus against Joel Marcus; claims by Bugsby Property, LLC against ARE; and
8 claims by Bugsby Property, LLC against Joel Marcus. Procedurally, the effort is baseless because
9 this Court does not have personal jurisdiction over either Defendant and in any event would be an
10 inconvenient forum for resolution of the dispute. Substantively, the effort is equally baseless,
11 because (*inter alia*):

12 1. The CNDA has no bearing on Bugsby. It is between Steven
13 Marcus, *an individual* (only) and ARE (only). It explicitly
14 lacks any “affiliates” or related-party type language
15 suggesting that it is meant to or could bind any persons or
16 entities other than Steven Marcus, *an individual*. It was
17 signed by Steven Marcus, *an individual*, and contains his
18 residential address (32 North Moore Street #6; New York,
19 NY 10013) in the signature block. Indeed, ARE knows full
20 well the agreement does not govern Bugsby Property, LLC,
21 as ARE put as much pressure as it could on Bugsby to also
22 sign a separate CNDA and yet Bugsby refused. Steven
23 Marcus Decl. ¶ 7 & Exh. A.²

24 2. The CNDA has no bearing on the time frame during which
25 Bugsby Property, LLC performed and conveyed work to and
26

27 ² Bugsby suspected at the time that the pressure was designed to provide cover in case ARE and
28 Joel Marcus decided to refuse to compensate Bugsby even if its recommendations were
successful, and it was largely for that reason that Bugsby refused. Steven Marcus Decl. ¶ 8.

1 for ARE and Joel Marcus—from late November to
2 December 20, 2013. The CNDA, however, was later signed
3 on December 30, 2013 and has an “Effective Date” of
4 December 27, 2013. *Id.*

5 3. The CNDA specifically has a *prospective* Permitted Purpose
6 clause limiting the scope of the CNDA to “advice to be
7 provided to Alexandria” (emphasis added) after the
8 Effective Date of December 27, 2013. Steven Marcus Decl.
9 ¶ 7 & Exh. A. Thus, it could not encompass advice, ideas,
10 and value *already completed and conveyed* to both Joel
11 Marcus and ARE prior to that time.

12 4. All of Bugsby’s ideas, and the entire Bugsby Blueprint, were
13 conceived of and delivered using only publicly available
14 information and primary research, consistent with Bugsby’s
15 investment management background. Steven Marcus Decl.
16 ¶ 9. This runs contrary to Gibson Dunn’s false claims that
17 ARE “agreed to furnish certain confidential information” to
18 either Defendant. *See* Complaint ¶ 38

19 5. The CNDA further provides that: “Neither party shall assign
20 or transfer any rights or obligations under this Agreement
21 without the prior written consent of the other party.” Steven
22 Marcus Decl. ¶ 7 & Exh. A.

23 6. Joel Marcus is not a party to the CNDA, and is not covered
24 by any of its provisions, even if the CNDA were assumed to
25 be valid. The CNDA could not relieve him of obligations
26 duly owed to Defendants.

27 7. The CNDA in its entirety expired on December 28, 2018.
28

- 1 8. The CNDA is void for failure of consideration by ARE.
- 2 9. The CNDA is unenforceable as it was procured by ARE
- 3 through fraud and duress and would be, if interpreted as
- 4 ARE and Joel Marcus seek, unconscionable.

5 For all those reasons and others, Defendants expect to prevail in this litigation. The threshold

6 issue, however, is not which parties will prevail, but which lawyers may present evidence and

7 arguments in favor of and against the parties. Based on the substantial relationship and overlap

8 between this matter (described above) in which Randy Mastro and Gibson Dunn are *acting adverse*

9 *to* Steven Marcus, and the prior matters (described below) in which Gibson Dunn, Mr. Mastro, and

10 Mr. Mastro’s partner and close collaborator Mr. Lance *represented* Steven Marcus, the answer must

11 be the disqualification of Gibson Dunn.

12 **III. GIBSON DUNN’S PAST CONDUCT**

13 **A. Gibson Dunn’s Prior Multiple Representations of Steven Marcus**

14 **1. Transit Wireless**

15 In 2010, just three years prior to the central events at issue here, Gibson Dunn partner Randy

16 Mastro (along with his Gibson Dunn partner and close collaborator Andy Lance) represented Steven

17 Marcus and a company of which Steven Marcus was the principal, Northmoore Capital Management

18 LLC (“NCM”). Steven Marcus Decl. ¶ 10. The representation involved Gibson Dunn’s support of

19 NCM’s bid to acquire Transit Wireless, a transaction that required the approval of New York’s

20 Metropolitan Transit Authority (“MTA”). *Id.* ¶ 11. As part of that representation, Mr. Mastro (and

21 his partners at Gibson Dunn, including Mr. Lance) requested and Steven Marcus provided a broad

22 range of confidential information on his professional background so that Mr. Mastro could best

23 position Steven Marcus and NCM in their efforts to obtain MTA approval. *Id.* ¶ 12. That information

24 included, for example, confidential information and specifics related to Steven Marcus’s prior

25 business track record, expertise as a public capital markets investor, performance information on this

26 track record, confidential information regarding his relationship with his father, Plaintiff Joel Marcus,

27 including details and information not known to Joel Marcus; and confidential information regarding

1 the relationship Steven Marcus had previously had with and knowledge of Plaintiff ARE and its
2 business. *Id.* ¶ 13.

3 It is true that Gibson Dunn and Steven Marcus did not sign a formal engagement letter in
4 connection with this representation (as the bid concluded before a formal letter could be signed, and
5 the signing was delayed when Gibson Dunn sent the proposed letter to the wrong address, *see* Steven
6 Marcus Decl. ¶ 14 & Exh. B). Of course, however, a formal engagement letter is not needed to create
7 an attorney-client relationship. *See, e.g., Lister v. State Bar*, 51 Cal.3d 1117, 1125-26 (1990). There
8 is no doubt about the attorney-client relationship here, as there is a clear history of numerous emails
9 labelled “PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT” and
10 “ATTORNEY-CLIENT” among Mr. Mastro, Mr. Lance, and Steven Marcus. *See* Steven Marcus
11 Decl. ¶ 15 & Exh. C. Indeed, Mr. Mastro went so far as to join NCM’s Advisory Board for the
12 project, publicly endorsing it in front of public and private bodies, and Mr. Lance gave similar
13 endorsements in communications with the MTA directly. *Id.* ¶ 16 & Exh. D (PowerPoint deck
14 presented to the MTA prominently featuring Mr. Mastro’s involvement with and representation of
15 Steven Marcus). Today, these same Gibson Dunn partners duplicitously slander Steven Marcus’s
16 professional track record and background (including making defamatory statements to media outlets
17 like the Boston Globe), as Gibson Dunn illicitly uses the privileged and confidential information it
18 obtained through representation against its former client. *Id.* ¶ 17 & Exh. E.

19 2. Silvercup Joint Venture – ABQ NDA

20 In late 2010, just three years before the matter at issue, Gibson Dunn, again led by Andy
21 Lance and lead counsel in this action, Randy Mastro, commenced representation of Steven Marcus
22 and NCM in a developing joint venture between NCM and Silvercup Studios. Steven Marcus Decl.
23 ¶ 18. The joint venture pursued the acquisition of ABQ Studios in Albuquerque, New Mexico. *Id.*

24 Ironically, and rather appropriately, the joint venture dissolved over a single issue – an NDA
25 with unusual terms, negotiated and agreed on behalf of the joint venture in the name of NCM –
26 advised, negotiated and represented by Andy Lance of Gibson Dunn. Steven Marcus Decl. ¶ 19 &
27 Exh. F (Non-Disclosure Agreement). The NDA at issue clearly lists NCM’s address (this NDA
28

1 including NCM “and its affiliates”) as c/o Gibson, Dunn & Crutcher; 200 Park Avenue, 48th Floor,
2 New York, NY 10166. *Id.*

3 Following Gibson Dunn’s miscues, including a clear mistake, confusion and conflation of the
4 contracting parties on the receiving end of the NDA (in some cases parallel to their artificial
5 arguments in this matter), Gibson Dunn chose to side with the more lucrative and larger client,
6 Silvercup, as the parties negotiated a private settlement to end their joint efforts (parallel to their
7 actions in this matter, allying with the more lucrative client). Steven Marcus Decl. ¶ 20. This
8 settlement, advised on behalf of Silvercup by both Mr. Mastro and Mr. Lance opposing NCM and
9 Steven Marcus, notably included *separate releases and signatures at all times* for both Steven
10 Marcus, in his *individual capacity*, and Northmoore Capital Management, LLC, a separate entity of
11 which Steven Marcus was the managing member. *Id.* ¶ 21 & Exh. G (settlement agreement treating
12 Steven Marcus and NCM separately). Thus, not only is Gibson Dunn conflicted in this matter, having
13 obtained confidential information material to this action, and unethically adverse to its former client,
14 but it also uses arguments directly contradictory to its own past practices.

15 The confidential information obtained by Gibson Dunn during the course of this
16 representation included, for example, confidential information related to Steven Marcus’s prior
17 business track record, expertise as a distressed companies / markets investor, performance
18 information on this track record, the structure of businesses in which Steven Marcus has or had an
19 interest, confidential information regarding investment banking contacts, co-investment and
20 financing sources. Steven Marcus Decl. ¶ 22.

21 **3. Unit Six Owners, LLC Representation**

22 At the exact same time as the events at issue in this action, Gibson Dunn partners and
23 collaborators Randy Mastro and Andy Lance (both resident in Gibson Dunn’s New York office at
24 200 Park Avenue, 48th Floor, New York, NY 10166), represented *both* Steven Marcus, a Defendant
25 in this action, *and* Joel Marcus, a Plaintiff in this action, in the formation, joint membership,
26 ownership, and operation of Unit Six Owners, LLC (“Unit Six”), as well as representing the LLC
27 itself. Steven Marcus Decl. ¶ 23. Unit Six was formed June 12, 2012 and was operational and
28

1 represented by Gibson Dunn contemporaneously with the events at issue in this action. *Id.* Gibson
2 Dunn’s representation: (1) included the same exact parties (including Steven Marcus, now materially
3 adverse as an unwitting Defendant to this action); (2) occurred at the same exact time (CNDA
4 effective date of December 27, 2013, and signature date of December 30, 2013); and (3) included the
5 same and substantially related matters between these two men (and at that time business partners),
6 many of which are clearly included by Gibson Dunn in this action’s Complaint, and more of which
7 may appear as Counterclaims in this action at a later date. *Id.* ¶ 24. Indeed, Unit Six’s primary
8 business address is listed directly in the operating agreement that Gibson Dunn prepared,
9 demonstrating the intimate privilege and confidence as: “Gibson, Dunn & Crutcher; 200 Park
10 Avenue, 48th Floor, New York, NY 10166.” *Id.* ¶ 25 & Exh. H (operating agreement confirming
11 Gibson Dunn address and examples of tax and New York State corporate documents sent to that
12 address).

13 During the course of representing Steven Marcus, Joel Marcus, and Unit Six, Gibson Dunn
14 acquired private, privileged and confidential information about Steven Marcus, his personal finances,
15 business interests, and familial relationships in the formation, operation and sale that they advised as
16 retained counsel to Unit Six. Steven Marcus Decl. ¶ 26. The sole asset of Unit Six was a residential
17 apartment at 32 N. Moore Street, Unit 6, New York, NY 10013. *Id.* ¶ 27. That address had been
18 Steven Marcus’s long-term primary residence; it also is the residential address listed on the signature
19 block for Steven Marcus, *an individual*, on the CNDA with ARE that is in question under this
20 injurious Declaratory Relief action being pursued by Gibson Dunn. *Id.* Furthermore, Gibson Dunn
21 (and specifically Mr. Mastro) was privy, by virtue of the attorney-client relationship between Gibson
22 Dunn and Steven Marcus, Joel Marcus, and Unit Six, to the intimate and discreet particulars of the
23 relationship between these family members, referenced in (among others) paragraphs 10, 11, 45, 46,
24 and 47 of the Complaint. *Id.*

25 Mr. Mastro and his Gibson Dunn partners attempt now to unfairly exploit confidential
26 information about Steven Marcus acquired in their prior, substantially related representation to their
27 advantage in this litigation. Indeed, Plaintiffs’ entire case as prosecuted by Gibson Dunn leans
28

1 heavily on this knowingly false narrative that Mr. Mastro and others at Gibson Dunn have created
2 by weaponizing the confidence once entrusted to them by Steven Marcus.

3 **4. Mr. Lance’s Further Representation of Steven Marcus**

4 Between January 23, 2014 and February 5, 2014—a time frame *less than a month* after the
5 December 27, 2013 Effective Date of the CNDA expressly at issue in this action—Gibson Dunn
6 partner Andy Lance represented both Steven Marcus and Joel Marcus (*i.e.*, the man who is one
7 Plaintiff in this action and the moving and driving force behind the other Plaintiff in this action,
8 against one of the unwitting Defendants in this action) in connection with a supposedly even-handed
9 effort to resolve certain issues between them. Steven Marcus Decl. ¶ 28. One of the subjects of this
10 effort was the future plans and respective interests of the family members’ and business partners’
11 interests in Unit Six, mentioned above, such interpersonal dealings between Joel Marcus and Steven
12 Marcus being substantially related and contemporaneous, with other issues involved in the mediation
13 also potentially relevant to this matter. *Id.* ¶ 29. Other subjects directly involved in the mediation
14 entrusted to Mr. Lance may appear as Counterclaims in this action at a later date. *Id.* Again, and
15 unsurprisingly, no conflict waiver was sought or obtained from Steven Marcus either before, during,
16 or after the period of the mediation. *Id.* ¶ 30.

17 As with the multiple representations above, and despite full acknowledgement orally and in
18 writing by Mr. Lance of his “mediator” position in that matter, Gibson Dunn now seeks to abuse and
19 exploit the confidence entrusted to Mr. Lance and their firm in the unethical use of confidential
20 information shared in his privileged position at the time.

21 **B. The “First Filed Fallacy”—Gibson Dunn’s Efforts to “Backdate” a Filing**

22 Improper use of privileged and confidential information to perpetrate this lawsuit against their
23 former client (detailed above) is merely the beginning of Mr. Mastro and Gibson Dunn’s flaunting
24 of core ethical principles injuriously against the interests of Steven Marcus. Misguided loyalty to a
25 well ensconced corporate client and its Executive Chairman should be enough to disqualify. Further
26 yet, and perhaps more shockingly, is Gibson Dunn and Mr. Mastro’s willing attempt to artificially
27 “backdate” their complaint in this matter, using filings and declarations under penalty of perjury to
28

1 wishfully and willfully manufacture a “race to the courthouse,” and to drag a New York-based
2 litigation (and uninvolved parties) to California.

3 As the Court is aware, in the context of determining whether the dispute among the parties
4 should be resolved in New York, where all the relevant conduct occurred, or in California, where
5 Plaintiffs to this action seek to “forum-shop”, it can be relevant to a court’s assessment which of the
6 two actions was filed first. Unfairly seeking advantage in forum determination, Gibson Dunn has on
7 at least three occasions made representations and/or sworn statements to courts that cross the line to
8 dishonesty – their “First Filed Fallacy.”³

9 **1. Gibson Dunn’s Inaccurate Statements – *No Timestamp***

10 Bugsby and Steven Marcus, having first attempted to avoid litigation by providing a New
11 York State court draft complaint to ARE and Joel Marcus and inviting settlement discussions before
12 filing, were forced to file that complaint on February 7, 2019 upon receipt of Mr. Mastro’s
13 vituperative letter making clear that ARE and Joel Marcus were unwilling to talk. Mooney Decl. ¶
14 10 & Exh. D (filed complaint in the action filed in New York County Supreme Court (the “New York
15 State Action”); *id.* ¶ 3 & Exh. B (letter from Mr. Mastro). In response, Gibson Dunn filed the
16 complaint in this action, seeking to avoid the proper forum—New York—where all relevant events
17 occurred. That complaint was filed—per the Court’s official timestamp—at February 13, 2019
18 (02/13/2019) 12:09 PM. *Id.* ¶ 4 & Exh. B. The date of the complaint’s filing, some *six days after*
19 the Bugsby Property, LLC and Steven Marcus New York State filing, is confirmed by the Court’s
20 docket. *Id.* ¶ 11 & Exh. E.

21 In their unethical and dishonest effort to circumvent the proper New York forum, Gibson
22 Dunn has repeatedly claimed, both in signed pleadings and in declarations signed under penalty of
23 perjury, that they filed the complaint in this Court on February 7, 2019—in some cases even claiming
24 that they filed this action *before* Bugsby and Steven Marcus filed the New York action. To try and
25
26

27 ³ Steven Marcus only became aware of this issue last month, in the course of reviewing, with
28 new counsel, the third inaccurate statement set out below.

1 avoid New York, they have gone too far in their evasion and crossed the line. The particular details
2 follow:

3 Statements in the New York State Action

4 Perpetrating their forum-shopping efforts, ARE and Joel Marcus filed in the New York State
5 Action a May 24, 2019 motion to dismiss for lack of personal jurisdiction or, alternatively, to dismiss
6 the action on the basis of *forum non conveniens*. See Mooney Decl. ¶ 12 & Exh. F. In that motion,
7 Gibson Dunn (in a pleading signed by Mr. Mastro) claimed:

8 “On the same day that Plaintiffs [Bugsby and Steven Marcus]
9 filed the instant action [*i.e.* February 7, 2019], Defendants filed
10 a declaratory judgment action (the “California Action”) in the
11 Superior Court of the State of California, County of Los
12 Angeles [and] The California Action will resolve the same
13 issues raised here.”

14 Mooney Decl. ¶ 12 & Exh. F (at page 6).

15 Of course, that was not true.

16 Accompanying the motion, Mr. Mastro submitted a declaration signed under penalty of
17 perjury (in New York practice, described as an “affirmation”). Mooney Decl. ¶ 13 & Exh. G. In the
18 declaration, Mr. Mastro doubled down on the statement in his motion, testifying under oath that
19 Gibson Dunn had filed this action on February 7, 2019. The correct filing date was February 13,
20 2019. *Id.* Interestingly, in this document—unlike the motion document discussed above and the
21 additional documents discussed below—Mr. Mastro attempted to explain away this Court’s official
22 timestamp. He testified:

23 Alexandria and Joel S. Marcus filed a declaratory judgment
24 action in the Superior Court of the State of California, County
25 of Los Angeles, on February 7, 2019. Due to errors generated
26 by the new electronic filing system in Los Angeles Superior
27

28

1 Court, the complaint first appeared as file-stamped on February
2 13, 2019.

3 Mooney Decl. ¶ 13 & Exh. G.

4 To further deceive the New York State Court, perpetuate their “First Filed Fallacy”, and to
5 pull the litigation to California, Mr. Mastro affirmed that he was attaching a copy of this action’s
6 Complaint as Exhibit 3 in the New York State Action. Mooney Decl. ¶ 13 & Exh. G (at ¶ 6 & Exhibit
7 3). Only Gibson Dunn *did not include* the bona fide timestamped copy of the complaint actually filed,
8 which would have carried the legitimate stamp of this Court from February 13, 2019 (02/13/2019
9 12:09 PM). Rather the Mastro Affirmation included a document—lacking any official notice from
10 this Court—with only the February 7, 2019 date located in the signature block. *Id.* It seems
11 inexplicable that a filing date some six full days earlier was alleged. Although Exhibit 3 is claimed
12 as an official court filing by Gibson Dunn, it notably has *no timestamp or official court markings of*
13 *any kind.*

14 Because of the inclusion of the non-timestamped version of the complaint (authorized by at
15 least *three* senior Gibson Dunn partners: signed by James Fogelman, with Randy Mastro and Jennifer
16 Rearden in the signature block; associate Andrew Roach’s name appears on the cover page), it is
17 difficult to conclude anything other than that Gibson Dunn’s conscious, coordinated intent was to
18 deceive the New York State Court. Gibson Dunn has since leaned heavily on the New York State
19 Court’s decision on *forum non conveniens*, as indicated by the September 10, 2019 Declaration of
20 Gibson Dunn attorney William F. Cole in Support of Plaintiff’s Opposition to Defendants’ Motion
21 to Quash:

22 Following the New York [State] court’s dismissal of the New
23 York [State] action, on August 6, 2019 I e-mailed counsel for
24 Steven and Bugsby and urged them to withdraw Steven and
25 Bugsby’s pending motion to quash in this Court in light of the
26 New York court’s order.

27 Mooney Decl. ¶ 14 & Exh. H.

28

1 The “First Filed Fallacy” and false representation of a February 7, 2019 complaint in this
2 action likely played a part in the New York State court’s decision on *forum non conveniens*. The
3 most forgiving light possible would seem to put an asterisk* on the New York State decision, creating
4 the possibility of a collateral attack on the New York State Court decision by Bugsby Property, LLC
5 and Steven Marcus.

6 Statements in this Action

7 Gibson Dunn continued the campaign to mislead the courts in this action, beginning in the
8 Opposition to Defendants’ Motion to Quash, signed by James Fogelman at Gibson Dunn on
9 September 10, 2019, which stated:

10 On February 7, 2019—the same day that Alexandria and Joel
11 filed their Complaint for declaratory relief in this Court—
12 Steven and Bugsby filed a lawsuit in New York [State Court].
13 Mooney Decl. ¶ 15 & Exh. I (at page 9). This was not, of course, an insignificant point. Rather,
14 Gibson Dunn urged the Court to consider the New York State Court decision as dispositive here,
15 asserting that:

16 This Court need not dwell for long on Defendants’ forum non
17 conveniens argument, which has already been soundly rejected
18 by the New York [State] court.

19 Mooney Decl. ¶ 15 & Exh. I (at page 18).

20 Statements in the New York Federal Action

21 After the New York State Action was dismissed, Bugsby Property, LLC elected to simplify
22 and streamline its claims by a new action in the proper forum, the United States District Court for
23 the Southern District of New York, not joined by Steven Marcus. Bugsby’s claims for just
24 compensation, and for work completed and conveyed prior to December 20, 2013 with the use of
25 only publicly-available information, stand in stark contrast to Defendants’ “tail wagging the dog”
26 confusion and conflation strategy. To evade Bugsby’s New York-based claims, Defendants have
27 attempted in multiple actions and jurisdictions to conflate Steven Marcus, *an individual*, and Bugsby
28

1 Property, LLC. Furthermore, and wrongly, Gibson Dunn has again propagated their “First Filed
2 Fallacy” and same day claims (without evidence) in their misguided Motion to Dismiss filed in the
3 New York Federal Action (currently awaiting resolution by that court). In particular, Gibson Dunn
4 argued:

5 On the same day that Bugsby and Steven filed the State Action,
6 Defendants filed a declaratory judgment action (the
7 “California Action”) in the Superior Court of the State of
8 California, County of Los Angeles
9 Mooney Decl. ¶ 16 & Exh. J (at page 6).

10 Accompanying that assertion in the motion to dismiss, Randy Mastro submitted a sworn
11 declaration in support, testifying under penalty of perjury:

12 Attached hereto as Exhibit 5 is a true and correct copy of the
13 Complaint for Declaratory Relief filed by Alexandria and Joel
14 Marcus against Bugsby Property LLC and Steven Marcus in the
15 Superior Court of the State of California, County of Los
16 Angeles on February 7, 2019 (the “California Action”).

17 Mooney Decl. ¶ 17 & Exh. K (at ¶ 7 & Exh. 5). The Exhibit 5 document accompanying the sworn
18 Declaration under penalty or perjury is not the complaint that was filed in this Court and
19 timestamped as such, but once again a copy with no timestamp and a false date. *Id.*

20 **2. Gibson Dunn’s Attempted Explanation—“computer glitch”**

21 In only the first of the abovementioned three sets of incorrect filings has Gibson Dunn
22 attempted to explain or evidence the false statements. In the May 24, 2019 New York State filing
23 and Declaration by Mr. Mastro alleges that the February 13, 2019 complaint had actually been sent
24 to the Court on February 7, 2019 but “Due to errors generated by the new electronic filing system in
25 Los Angeles Superior Court,” Mooney Decl. ¶ 13 & Exh. G, had not been accepted by the Court until
26 a full six days later at February 13, 2019 (02/13/2019 12:09 PM). Their “computer glitch”
27 explanation did not follow in the second and third reiterations of this falsehood, indicating that
28

1 Gibson Dunn may have believed they evaded detection. Looking carefully at this point, at no time
2 has Defendant Steven Marcus or undersigned counsel seen or been presented with any evidentiary
3 support for this alleged “computer glitch”.

4 To the contrary, no electronic filing outage/error is listed on the LASC Public Notices for the
5 time period February 7, 2019—February 13, 2019 ([http://www.lacourt.org/newsmedia/notices/
6 publicnotices](http://www.lacourt.org/newsmedia/notices/publicnotices)). Similarly, no error page or equivalent has been provided in any Declaration by
7 anyone at Gibson Dunn in any venue to support this erroneous claim, and no Return Copy or Notice
8 of Rejection about the “computer glitch” has been provided evidencing this claim. There are
9 approximately 75 Electronic Filing Service Providers listed on the LASC website
10 (http://www.lacourt.org/division/efiling/Civil_Providers.aspx), most if not all of which guarantee
11 24/7/365 dependable service and uploading. With the benefit of the doubt, if this “computer glitch”
12 was indeed real, it seems there were many ways for Gibson Dunn to have actually filed and received
13 a timestamp from the *subsequent six full days* from the alleged and fabricated February 7, 2019
14 “filing” date (as signed by Gibson Dunn partner James Fogelman) to the actual timestamped filing
15 date of February 13, 2019 (02/13/2019 12:09 PM) as confirmed by this Court.

16 **IV. GOVERNING LEGAL STANDARDS**

17 **A. Representation Adverse to a Former Client**

18 The ethics rule governing when a lawyer or firm may represent a client in a proceeding in a
19 manner adverse to a former client provides in pertinent part:

20 A lawyer who has formerly represented a client in a matter shall
21 not thereafter represent another person in the same or a
22 substantially related matter in which that person’s interests are
23 materially adverse to the interests of the former client unless the
24 former client gives informed written consent.

25 California Rules of Professional Conduct Rule 1.9(a).⁴

26 _____
27 ⁴ Although Mr. Mastro is a member of the New York Bar and not a member of the California
28 Bar, by acting *pro hac vice* in this action (even though he has not yet even applied for
(Continued...)

1 For purposes of applying this rule, the official comments to the rule provide in pertinent part:

2 [1]After termination of a lawyer-client relationship, the lawyer
3 owes two duties to a former client. The lawyer may not (i) do
4 anything that will injuriously affect the former client in any
5 matter in which the lawyer represented the former client, or (ii)
6 at any time use against the former client knowledge or
7 information acquired by virtue of the previous relationship. . . .

8 . . .

9 [3]Two matters are “the same or substantially related” for
10 purposes of this rule if they involve a substantial risk of a
11 violation of one of the two duties to a former client described
12 above in Comment [1]. For example, this will occur: (i) if the
13 matters involve the same transaction or legal dispute or other
14 work performed by the lawyer for the former client; or (ii) if the
15 lawyer normally would have obtained information in the prior
16 representation that is protected by Business and Professions
17 Code section 6068, subdivision (e) and rule 1.6 [*i.e.*, “the
18 secrets, of his or her client”], and the lawyer would be expected
19 to use or disclose that information in the subsequent
20 representation because it is material to the subsequent
21 representation.

22 California Rule of Professional Conduct 1.9, comments.

23 Caselaw interpreting and applying the substantively identical Rule 3-310(E) of the former
24 California Rules of Professional Conduct applicable until October 31, 2018 clarify and demonstrate
25 the application of these principles. In particular, “[i]n successive representation cases, where the

26 _____
27 permission to do so, which itself is in contempt of California Rule of Court 9.40(c)(1)),
28 Mr. Mastro has consented to be governed by California’s ethics rules. California Rule of
Court 9.40(f).

1 former client seeks to disqualify counsel from representing a successive client in current litigation
2 adverse to the former client’s interest, the former client must ‘demonstrate a “substantial
3 relationship” between the subjects of the antecedent and current representations.’” *Beachcomber*
4 *Mgmt. Crystal Cove, LLC v. Superior Court*, 13 Cal.App.5th 1105, 1116-17 (2017). A substantial
5 relationship exists where “the attorney had a direct professional relationship with the former client
6 in which the attorney personally provided legal advice and services on a legal issue that is closely
7 related to the legal issue in the present representation.” *Id.* at 1117.

8 Further, after “a substantial relationship has been shown to exist between the former
9 representation and the current representation, and when it appears by virtue of the nature of the former
10 representation or the relationship of the attorney to his former client confidential information material
11 to the current dispute would normally have been imparted to the attorney or to subordinates for whose
12 legal work he was responsible, the attorney’s knowledge of confidential information is *presumed.*”
13 *Western Continental Operating Co. v. Natural Gas Corp. of Cal.*, 212 Cal.App.3d 752, 759 (1989)
14 (emphasis supplied); *Shandralina G. v. Homonchuk*, 147 Cal.App.4th 395, 407 (2007).

15 **B. The Duty of Candor to the Court**

16 The governing ethics rule in this context provides in pertinent part:

- 17 (a) A lawyer shall not: (1) knowingly make a false statement
18 of fact or law to a tribunal or fail to correct a false statement of
19 material fact or law previously made to the tribunal by the
20 lawyer.

21 California Rules of Professional Conduct, Rule 3.3. In addition, “[i]t is the duty of an attorney to
22 do all of the following: . . . (d) To employ, for the purpose of maintaining the causes confided to
23 him or her those means only as are consistent with truth, and never to seek to mislead the judge or
24 any judicial officer by an artifice or false statement of fact or law.” Cal. Bus. & Prof. Code § 6068.

25 **V. ARGUMENT**

26 The record demonstrates that there is a substantial relationship between Gibson Dunn’s
27 former legal representation of Steven Marcus and its current representation of Plaintiffs in this
28

1 lawsuit. Thus, Gibson Dunn’s knowledge of Steven Marcus’s confidential information is
2 *presumed*—and Gibson Dunn therefore is properly disqualified.

3 At no time then or since has Gibson Dunn sought to obtain a conflict waiver or other form of
4 informed consent from Steven Marcus, brazenly denying the clear conflict of interest and breach of
5 confidence. The aforementioned facts conclusively demonstrate that: (1) Gibson Dunn represented
6 Steven Marcus in matters substantially related to the issues raised in this litigation, many of them at
7 the exact same time; and (2) that the transmission, acquisition and unethical misuse of Steven
8 Marcus’s privileged and confidential information by Gibson Dunn not only is presumed, but actually
9 occurred. All for the unfair and improper advantage adverse to Steven Marcus’s interests and against
10 any sense of fair play or justice.

11 The “First Filed Fallacy” and seemingly coordinated perjury on the part of Gibson Dunn to
12 obtain an unfair advantage should not be tolerated by this (or any) Court. Their actions are in clear
13 violation of Rule 3.3 and may invite further sanctions. Gibson Dunn’s willful disposition of the code
14 of ethics should see them disqualified.

15 In short, there can be no doubt that Gibson Dunn has a conflict of interest—in breach of Rules
16 1.6 and 1.9 of the Rules of Professional Conduct – representing Plaintiffs Joel Marcus and ARE
17 against Steven Marcus in this case. Furthermore, their ethical violations and misrepresentations –
18 including knowingly false statements – have been coordinated, persistent and committed in violation
19 of Rule 3.3. The firm should be disqualified in advance of any deposition or further discovery.

20 **VI. CONCLUSION**

21 For the preceding reasons, Defendants respectfully request that the Court order Gibson Dunn
22 to cease acting adversely to its former client, and to be removed for their false statements regarding
23 this matter.

24 Dated: December 10, 2019

RJM Litigation Group

25
26 

27 By: _____

Richard Mooney

28 Attorneys for Specially Appearing Defendants

1 **CERTIFICATE OF SERVICE**

2 I am employed in the County of San Francisco, State of California. I am over the age of 18
3 and not a party to the within action. My business address is 505 Montgomery Street, #1100, San
4 Francisco, CA 94111.

5 On December 10, 2019, I served on the interested parties in said action the within:

6 **Opposition of Defendants to Ex Parte Application re Motion Hearing Dates**

7 by placing a true copy thereof in a sealed envelope(s) addressed as stated below and causing such
8 envelope(s) to be deposited in the following manner.

9
10 **William F. Cole**
11 **Gibson Dunn**
12 **333 South Grand Avenue**
13 **Los Angeles, CA 90071**
14 **Email: bcole@gibsondunn.com**

*Counsel for Alexandria Real Estate Equities,
Inc. and Joel S. Marcus*

15 (MAIL) I am readily familiar with this firm’s practice of collection and processing
16 correspondence for mailing. Under that practice it would be deposited with the U.S. postal
17 service on that same day in the ordinary course of business. I am aware that on motion of
18 party served, service is presumed invalid if postal cancellation date or postage meter date is
19 more than 1 day after date of deposit for mailing in affidavit.

20 (EMAIL/ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the
21 parties to accept service by e-mail or electronic transmission, I caused the documents to be
22 sent to the persons at the e-mail addresses listed above. I did not receive, within a
23 reasonable time after the submission, any electronic message or other indication that the
24 transmission was unsuccessful.

25 I declare under penalty of perjury that I am employed in the office of a member of the bar of
26 this Court at whose direction the service was made and that the foregoing is true and correct.

27 Executed on December 10, 2019, at Discovery Bay, California.

28 /s/ Jessika L. Sprague
Jessika L. Sprague