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11
 12 **UNITED STATES DISTRICT COURT**
 13 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

14 WAGNER AERONAUTICAL, INC.;
 15 MAMMOTH FREIGHTERS LLC;
 16 WILLIAM WAGNER; and WILLIAM
 17 TARPLEY,

18 Plaintiffs,

19 v.

20 DAVID DOTZENROTH; SEQUOIA
 21 AIRCRAFT CONVERSIONS, LLC;
 22 CAI CONSULTING LTD.; CHARLES
 23 WILEY DOTZENROTH; ANDREW
 24 MANSELL; and STEVEN WELO,

25 Defendants.

Case No.: 21CV0994 L AGS

**OPPOSITION TO PLAINTIFFS’
 MOTION FOR PRELIMINARY
 INJUNCTION BY DEFENDANTS
 DAVID DOTZENROTH, SEQUOIA
 AIRCRAFT CONVERSIONS, LLC,
 CAI CONSULTING LTD., AND
 CHARLES WILEY DOTZENROTH**

Date: July 19, 2021

Dist. Judge: Hon. M. James Lorenz

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I. INTRODUCTION

Over a year and a half after discovering their alleged trade secrets were being used by defendants, plaintiffs now claim an urgent need for immediate injunctive relief. They claim trade secret protection in documents they freely shared with defendant David Dotzenroth in the hopes of forming a business with him, and with Wiley Dotzenroth, even though Wiley was not part of those discussions. Critically, neither Dotzenroth ever signed an NDA or secrecy agreement with plaintiffs governing those documents. Plaintiffs claim they “understood” their documents would be kept in confidence, but they provide no evidence that defendants were *obligated* to maintain their secrecy, as trade secret law requires. And although plaintiffs say they marked their trade secret documents with “proprietary” legends, overwhelming documentary evidence shows this claim to be a lie. Put simply, plaintiffs’ alleged trade secrets were not kept secret.

Remarkably, plaintiffs claim trade secret protection in supposedly secret design elements that are public knowledge (one such “secret” is actually on YouTube). And plaintiffs dramatically exaggerate the time and effort they spent preparing the business plan, schedule and roadmap that they seek to protect.

Plaintiffs made no effort to “claw back” or otherwise protect the documents they now claim as trade secrets when the parties’ preliminary discussions broke off in mid-2019. They made no effort to protect their purported trade secrets even after coming to believe – over a year and a half ago – that defendants were using them. Why the delay? Plaintiffs don’t explain it, but their emails to Dotzenroth shed a troubling light. They show that plaintiffs actually used proprietary information belonging to other companies – including Boeing, Precision Conversions, and IAI – to develop the documents in issue. Plaintiffs have unclean hands. For this and the other reasons detailed below, the motion should be denied.

II. FACTS

Plaintiffs tried to form a passenger-to-freighter aircraft conversion business

1 for Boeing 777's with defendant David Dotzenroth. The parties never agreed on
2 the essential business terms for that relationship, however. Doc. 1 (Complaint) ¶¶
3 7, 51, 53, 55. Through the course of their discussions about a *potential* business
4 arrangement, plaintiffs freely shared documents and information with Dotzenroth.
5 *Id.* ¶ 40 (“Dotzenroth received emails containing drafts of the business plan,
6 information used for the roadmap, and other important documents and
7 communications”); Doc. 16-2 ¶ 13. Plaintiffs now contend the documents and
8 information shared with Dotzenroth are confidential trade secrets – including a
9 business plan, budget, and schedule roadmap. Doc. 1 ¶ 83.

10 However, during the time these materials were shared with Dotzenroth –
11 before May-June 2019 (when plaintiffs say they parted ways with Dotzenroth) –
12 plaintiffs never had Dotzenroth sign an NDA or any confidentiality agreement.
13 Dotzenroth Dec. ¶ 2. Plaintiffs fail to present evidence that such a written
14 agreement exists, and they are not suing for breach of any such agreement (written
15 *or oral*) – as plaintiffs nearly always do in trade secret cases.

16 Dotzenroth never was a business partner of plaintiffs. Doc. 1 ¶¶ 51, 53, 55;
17 Dotzenroth Dec. ¶¶ 10-12, Exhs. 12-13. And plaintiffs repeatedly stress that
18 Dotzenroth had no expertise or other meaningful contributions to offer. *See, e.g.*,
19 Doc. 1 at 2:28-3:1 (Dotzenroth had “little or no aircraft conversion experience or
20 project management experience”); *id.* at 3:23-24 (Dotzenroth failed to “contribute
21 in any meaningful way to the conversion program”); *id.* at 14:23-27 (“there were
22 few roles he could fill”); *id.* at 15:12-14. Nevertheless, plaintiffs freely gave
23 Dotzenroth access to their most treasured secrets, according to them. They also
24 emailed their alleged trade secrets to Wiley Dotzenroth. Wiley Dotzenroth Dec. ¶¶
25 2, 5, Exhs. 1-3. But plaintiffs *do not even contend* that Wiley had some shared
26 understanding of confidentiality with them, much less an NDA obligating him to
27 secrecy. There was no such NDA. *Id.* ¶ 4.

28 Lacking any actual agreement obligating David Dotzenroth to secrecy,

1 Wagner says simply that “*We all understood* that such access was conditioned
2 upon Dotzenroth using the information to advance our own conversion program”
3 (Doc. 22 Exh. 3 at 5:24-26) and “*we all recognized* that we needed to keep our
4 plans – including our business plan and engineering strategy – confidential.” Doc.
5 22 Exh. 3 at 3:17-19 (emphases added). Tarpley’s account is similar. Doc. 22 Exh.
6 2 at 4:20-23 (“Wagner and I gave him access to the business plan and roadmap
7 documents. *We all understood* that such access was conditioned upon Dotzenroth
8 keeping the information confidential and using the information to advance our own
9 conversion program.”) (emphasis added). *See also* Doc. 1 ¶ 5 (alleging that plaintiffs
10 shared their information “with the understanding shared by Dotzenroth” that the
11 information was confidential).

12 Plaintiffs claim they protected their purported trade secrets by placing
13 “PROPRIETARY” legends on the materials containing them. *Id.* ¶ 44; Doc. 1 at
14 23:25-27; 25:12-14. Tarpley says Wagner was so careful that he would not even
15 email sensitive documents like the budget and schedule. Doc. 22 Exh. 2 at 6:3-7.

16 These assertions are false. In truth, Tarpley emailed work product to
17 Dotzenroth that included the conversion program development schedule, Wagner
18 design drawings showing [REDACTED] (a supposedly secret design
19 feature), the main deck cargo layout, and a weight analysis – all with no
20 “PROPRIETARY” or other confidentiality markings on them. Dotzenroth Dec. ¶¶
21 4-5, Exhs. 1-3. Tarpley actually received this design work from Wagner, who
22 emailed it to Tarpley without any “proprietary” designations. Dotzenroth Dec.,
23 Exh. 2. Wagner also emailed the 777 conversion schedule to Tarpley, who
24 forwarded it to Dotzenroth – with no proprietary markings. *Id.*, Exh. 1.

25 Tarpley also emailed at least seven iterations of the draft business plan to
26 Dotzenroth, starting with the very first version on January 19, 2019. Dotzenroth
27 Dec. ¶ 7, Exh. 4. The draft business plan had no “proprietary” or “confidential”
28 markings on it. *Id.* Tarpley sent additional iterations of the business plan by email,

1 again with no “proprietary” or “confidential” designations. Dotzenroth Dec. ¶ 7,
2 Exhs. 4-10. These drafts included *all* of the information plaintiffs claim as
3 confidential in their Complaint, including design features, costs, marketing
4 strategy, and the like. *Ibid.*; Dotzenroth Dec. ¶ 8, Exh. 10. Tarpley also emailed
5 unmarked documents containing the information now claimed as trade secret –
6 including “revenue projections,” “development costs,” “schedule estimates,” and
7 “program input financing.” Doc. 22. Exh. A at 4:10-12. Dotzenroth Dec., Exhs. 1-
8 14. *After* parting ways with with Dotzenroth, Tarpley emailed Dotzenroth “an
9 analysis comparing the different Jumbo Jet models and their suitability for
10 conversion” (Doc. 22 Exh. 2 at 3:13-14). Dotzenroth Dec. ¶ 14, Exh. 14 (“The
11 777-300ERCF is clearly the best aircraft out there.”).¹

12 Plaintiffs allege that they found out in late 2019 that Dotzenroth took their
13 supposed trade secrets and used them to pursue a conversion program of his own.
14 Doc. 1 ¶ 57 (alleging that Dotzenroth organized a meeting with NIAR in Kansas in
15 November 2019 to which plaintiff Wagner was invited, where the Dotzenroths
16 “were simply presenting the conversion program that Wagner and Tarpley had
17 developed”). Indeed, Wagner states under oath that he learned of the trade secret
18 theft *in late 2019*. Doc. 22 Exh. 3 at 7:20-8:2 (“In late 2019 . . . I noticed that
19 Wiley was preparing some materials for the business presentation that appeared to
20 reflect information from the conversion program and business plan that I had
21 developed with Tarpley.”). Tarpley says he recognized that Dotzenroth’s
22 documents seemed to be based on plaintiffs’ business plan “[i]n early 2020.” Doc.
23 22 Exh. 2 at 7:9-14. Plaintiffs’ Complaint is more direct. Doc. 1 ¶¶ 59-60 (alleging

24
25 ¹ Exhibit 14 (which compares different Jumbo Jet models for conversion suitability) and
26 Exhibit 13 (which includes development costs, program input financing, and revenue
27 projections) were emailed by Tarpley to Dotzenroth on July 18 and July 16, 2019 – two
28 months *after* Tarpley and Wagner say they decided to part ways with Dotzenroth, and a
month after they say they “no longer included Dotzenroth on communications about our
conversion program.” Doc. 16-3 ¶20; Doc. 16-2 ¶17.

1 that Dotzenroth attempted to enlist plaintiff Tarpley’s assistance in February 2020,
2 and Tarpley “*immediately recognized* that Dotzenroth was using the information
3 and business plan that Tarpley had prepared with Wagner,” and that Dotzenroth’s
4 plan “contained a conversion program schedule and design features from Wagner
5 and Tarpley’s conversion program and discussed in the materials Dotzenroth
6 stole”) (emphasis added); *id.* ¶¶ 63-64 (alleging that a conversion program sent to
7 plaintiff Wagner by NIAR on March 3, 2020 “like the Dotzenroths’ November
8 2019 presentation in Wichita – bore striking similarities to Wagner and Tarpley’s
9 own conversion program – not least of which was the [REDACTED]
10 [REDACTED].”). Despite learning defendants were using their alleged trade secrets
11 in late 2019, and despite repeated reminders throughout 2020, plaintiffs did not get
12 around to suing until May 25, 2021, and they did not seek an injunction until June
13 21, 2021 – over a year-and-a-half after coming to believe defendants were using
14 their alleged trade secrets. And before suing, they did literally nothing to protect
15 their supposedly secret and valuable information. Dotzenroth Dec. ¶ 13; Wiley
16 Dotzenroth Dec. ¶ 9.

17 Why did plaintiffs not try to protect their alleged trade secrets even after
18 coming to believe they were stolen? Perhaps because they don’t actually own
19 them. Plaintiffs appear to have borrowed from a 757 Combi conversion schedule
20 belonging Precision Conversions – a competitor – using it as the template for their
21 own. Dotzenroth Dec. ¶ 20, Exh. 18. Tarpley (a former Boeing employee) also
22 emailed Dotzenroth a Boeing proprietary analysis of the market opportunity for
23 777 conversions. *Id.* ¶ 19, Exh. 17. The “novel and unique” design feature of the
24 [REDACTED]? Straight out of an IAI 777 conversion presentation
25 marked “proprietary” by IAI, which Tarpley emailed to Dotzenroth on January 24,
26 2019. *Id.* ¶ 18, Exh. 16 at 229-230 (“Look what I found in my files for 2014.”).

27 Public information shows that plaintiffs’ “novel and unique” design
28 elements are actually well known in the industry, and have been for years. Wiley

1 Dotzenroth Dec. ¶¶ 10-13, Exhs. 4-6. Plaintiffs’ supposedly secret [REDACTED]
2 [REDACTED] design can be seen in a 2010 YouTube video posted by IAI Bedek. *Id.* ¶
3 13. The [REDACTED]? They are described in numerous publicly available
4 publications on passenger to freight conversions. *Id.* ¶10, Exhs. 4-6.

5 Defendants did not misappropriate any intellectual property belonging to
6 plaintiffs. They pursued a different business model – involving a consortium of
7 industry players with whom plaintiffs had no relationships, and that consortium is
8 developing its own engineering data to convert the 777 aircraft that defendants
9 identify and procure. Plaintiffs knew about defendants’ program, and acceded to it.
10 Dotzenroth Dec. ¶ 15. It was only when defendants’ critical meetings were taking
11 place that plaintiffs sprang into action. *Id.* Plaintiffs not only filed the case; they
12 apparently publicized it (Dotzenroth Dec. ¶¶ 23-24). They also larded their
13 Complaint with extensive (and false) allegations about Dotzenroth’s supposed
14 incompetence. Doc. 1 at 2:28-3:1, 3:13-14, 3:23-24, 3:26, 10:10-11, 12:3-8, 14:23-
15 27, 15:12-14, 15:21-22, 15:23, 15:24-25, 20:6-7, 19:22. Their filings center on
16 highly misleading descriptions of Wagner’s conversion expertise, which conceal
17 the fact that he is an adjudicated intellectual property thief, who filed bankruptcy
18 after being hit with a \$3.8 million judgment for misappropriating trade secrets
19 concerning 727 conversion engineering data (which overlaps with 757 data).
20 Dotzenroth Dec. ¶ 27; Fitzgerald Dec. ¶2, Exh. 1.

21 Plaintiffs’ bad faith allegations and anti-competitive use of the Court’s
22 process have already damaged the NIAR/KMC conversion program, which
23 jeopardizes jobs. Dotzenroth Dec. ¶¶ 24-25. The lawsuit succeeded in spooking at
24 least one major prospective partner in the venture. *Id.* ¶ 24. Now, through this
25 motion, plaintiffs hope to forever hobble the NIAR/KMC competing enterprise, by
26 obtaining an absurdly overbroad injunction that would vaguely prohibit defendants
27 from “further misappropriating Plaintiffs’ trade secrets and unfairly competing
28 against Plaintiffs.” Doc. 22. Exh. A at 1:4-5. The Court should reject this request.

1 **III. ARGUMENT**

2 **A. Plaintiffs’ Burden in Seeking a Preliminary Injunction**

3 Any injunction is an "extraordinary remedy," which does not issue as a
4 matter of course. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982).
5 *See also Associated Students, Inc. v. NCAA*, 493 F.2d 1251, 1257 (9th Cir. 1974)
6 (“It is well established and conceded that a preliminary injunction is 'an
7 extraordinary remedy, and will not be granted except upon a clear showing of
8 probable success and possible irreparable injury.'”). A plaintiff “must establish that
9 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in
10 the absence of preliminary relief, that the balance of equities tips in his favor, and
11 that an injunction is in the public interest.” *Winter v. Natural Resources Defense*
12 *Council, Inc.*, 55 U.S. 7, 20 (2008). No injunction will issue unless plaintiffs meet
13 their burden of showing either: a combination of *probable* success on the merits,
14 and the possibility of irreparable injury; or, a serious question on the merits and the
15 balance of hardships tipping *sharply* in plaintiffs’ favor. *Gilder v. PGA Tour, Inc.*,
16 936 F.2d 417, 422 (9th Cir. 1991). Plaintiffs fall far short on all elements here.

17 **B. Plaintiffs Will Not Succeed on the Merits**

18 **1. Plaintiffs’ Trade Secret Claims Are Not Just Weak; They Fail**

19 Claims under the federal Defend Trade Secrets Act (“DTSA”) and
20 California’s Uniform Trade Secrets Act (“CUTSA”) “may be analyzed together
21 because the elements are substantially similar.” *Spice Jazz LLC v. Youngevity Int’l,*
22 *Inc.*, No. 19-CV-0583-BAS-DEB, 2020 WL 6484640, at *3 (S.D. Cal. Nov. 4,
23 2020) (quotation marks and citation omitted). Under both, a plaintiff must plead
24 and prove: “(1) that the plaintiff possessed a trade secret, (2) that the defendant
25 misappropriated the trade secret[,] and (3) that the misappropriation caused or
26 threatened damage to the plaintiff.” *Id.* To satisfy their obligation to show that they
27 possessed a trade secret at all, plaintiffs must demonstrate, among other things, that
28 they took “reasonable measures to keep [the] information secret.” 18 U.S.C.A. §

1 1839(3)(A); *see also* Cal. Civ. Code § 3426.1(d)(2) (same). “The test for trade
2 secrets is whether the matter sought to be protected is information (1) which is
3 valuable because it is unknown to others and (2) which the owner has attempted to
4 keep secret.” *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1454 (2002).

5 “If an individual discloses his trade secret to others who are under no
6 obligation to protect the confidentiality of the information, or otherwise publicly
7 discloses the secret, his property right is extinguished.” *Ruckelshaus v. Monsanto*
8 *Co.*, 467 U.S. 986, 1002 (1984) (quoted in *In re Providian Credit Card Cases*, 96
9 Cal. App. 4th 292, 304 (2002)). The evidence shows that is what happened here.
10 Plaintiffs never signed the Dotzenroths to an NDA or secrecy agreement, and they
11 repeatedly emailed their alleged trade secrets to the Dotzenroths with no
12 “proprietary” or “confidential” markings. They did so *even after* they say they
13 parted ways with David Dotzenroth. Dotzenroth Dec., Exhs. 13-14. Because the
14 Dotzenroths had no legal obligation to protect that information, plaintiffs lost any
15 right to protect it.

16 **a. Plaintiffs Did Not Protect Their Alleged Trade Secrets**

17 NDAs are how confidential information is protected in business. In general,
18 the disclosure of alleged trade secrets to others who are not bound by an NDA
19 destroys any trade secret protection. *Whyte*, 101 Cal. App. 4th at 1454-55 (finding
20 no trade secret protection in documents shared with customer not bound by secrecy
21 agreement); *Cinebase Software, Inc. v. Media Guar. Tr., Inc.*, No. C98-1100 FMS,
22 1998 WL 661465, at *10-11 (N.D. Cal. Sept. 22, 1998) (failing to secure
23 nondisclosure agreements constituted unreasonable efforts to maintain secrecy
24 despite securing the information with passwords, limiting access to a “need-to-
25 know” basis, and marking documents confidential); *Southwest Stainless, L.P. et al.*
26 *v. Sappington et al.*, 582 F.3d 1176, 1189-90 (10th Cir. 2009) (no trade secret
27 protection in pricing information disclosed to customer with no restriction on
28 customer’s right to share it).

1 “Trade secrets are a peculiar kind of property. Their only value consists in
2 their being kept private. . . . Once the data that constitute a trade secret are
3 disclosed to others, or others are allowed to use those data, the holder of the trade
4 secret has lost his property interest in the data.” *DVD Copy Control Assn., Inc. v.*
5 *Bunner*, 31 Cal. 4th 864, 881 (2003). Plaintiffs shared their data with no NDAs in
6 place here, and without even marking them as “proprietary.” As a result, they “lost
7 [their] property interest in the data.” *Id.*

8 Dotzenroth never signed an NDA with plaintiffs during the time they were
9 sharing supposedly trade secret information with him. Dotzenroth Dec. ¶ 2. In fact,
10 he was never asked to. *Id.* Tarpley emailed Dotzenroth the specific conversion
11 schedule and design information now claimed as trade secrets in emails and
12 documents without any “proprietary” or “confidentiality” markings on them.
13 Dotzenroth Dec. ¶ 4, Exh. 1 (a B777 conversion “program development
14 schedule”); *id.*, Exh. 2. *Cf.* Doc. 1 at 2:9-10 (alleging the “misappropriated
15 information” includes “a schedule roadmap”); *id.* at 10:18-20 (alleging plaintiffs’
16 trade secret business plan “outlined a customized development schedule”). Tarpley
17 also sent Dotzenroth design drawings with no proprietary designations that showed
18 the [REDACTED]. Dotzenroth Dec. ¶ 4, Exh. 2 at 10-15. *Cf.* Doc. 1
19 at 17:4-8 (alleging that Dotzenroth “was using design features from Wagner’s and
20 Tarpley’s program including [REDACTED] that was unique to
21 Wagner and Tarpley’s conversion program and discussed in the materials
22 Dotzenroth stole”). In fact, Tarpley emailed *a competitor’s* proprietary 777
23 conversion presentation showing [REDACTED] that plaintiffs falsely
24 allege was “unique to Wagner and Tarpley’s conversion program” (Doc. 1 at 17:4-
25 8). Dotzenroth Dec. ¶ 18, Exh. 16.

26 Tarpley also emailed Dotzenroth design documents with no proprietary
27 designations, which Wagner had emailed with no proprietary designations.
28 Dotzenroth Dec. ¶ 4, Exhs. 2, 3. These included a main deck cargo pallet layout

1 and weight analysis. *Cf.* Doc. 1 at 11:7-11 (alleging that Wagner’s preliminary
2 design work included a “main deck cargo pallet layout, a weight analysis, and
3 other analyses,” and that this design information was “confidential, proprietary and
4 highly valuable”). They also included the supposedly secret 777 conversion
5 schedule. Dotzenroth Dec., Exh. 1. These emails originating with Wagner show the
6 falsity of Tarpley’s sworn testimony. *See* Doc. 22 Exh. 2 at 6:3-7 (“From the
7 beginning of my partnership with Wagner, he has always been extremely careful
8 about sharing technical documents, even with me. For some of the documents that
9 we used to prepare the business plan and roadmap – *such as the . . . schedule* –
10 Wagner sent me hard copies because he did not want to send the documents
11 electronically.”) (emphasis added).

12 Tarpley swears that the business plan contains “some of our most important
13 trade secrets,” and *is itself* a trade secret. Doc. 22 Exh. 2 at 2:19-22. But Tarpley
14 actually emailed the first version of the business plan to Dotzenroth with no
15 “proprietary” markings on it, or in the email transmitting it. Dotzenroth Dec. ¶ 7,
16 Exh. 4. He repeatedly emailed successive iterations of it, with no “proprietary”
17 markings, in emails that had no confidentiality notices. *Id.*, Exhs. 4-10. Those
18 many versions of the business plan included *all* of the purportedly proprietary
19 information that plaintiffs describe in paragraph 37 of their Complaint, including a
20 development schedule, a plan for achieving FAA certification, design features, cost
21 estimates, projected returns, and a business and marketing strategy. Dotzenroth
22 Dec. ¶ 8, Exhs. 4-10. **None of it was marked “proprietary.”** *Ibid.*²

23 _____
24 ² When moving to seal defendants’ summary judgment motion, plaintiffs made clear
25 *these* unmarked documents – which are the exhibits supporting that summary judgment
26 motion – are the very trade secrets allegedly misappropriated. Doc. 23 at 4:8-9
27 (“[Defendants’] exhibits . . . undisputedly disclose the trade secret and proprietary
28 information at issue in this case.”); *id.* at 2:25-26. Plaintiffs’ admissions prove that the
documents emailed by plaintiffs with no “proprietary” markings are and contain
plaintiffs’ alleged trade secrets, even though they were not marked “proprietary,” as
plaintiffs falsely allege they were.

1 The emails and documents sent by Tarpley show the disturbing falsity of
2 plaintiffs’ core allegation that Tarpley and Wagner “took individual actions to
3 ensure” their data and work product remained confidential, “including placing
4 “PROPRIETARY” legends on the material.” Doc. 1 at 13:4-6; *id.* at 23:25-27
5 (alleging plaintiffs marked “trade secret documents with a ‘PROPRIETARY’
6 legend”); *id.* at 25:12-14 (same). The truth is that plaintiffs repeatedly sent their
7 allegedly trade secret information to the Dotzenroths with no “PROPRIETARY”
8 legends, and with no NDA in place. That destroyed any trade secret protection that
9 might have protected it.

10 Trying to manufacture a basis for trade secret protection, plaintiffs allege
11 that Dotzenroth and the parties entered NDAs with outside parties like potential
12 investors, but this proves nothing. Absent a binding agreement under which the
13 *defendants were obligated* to maintain plaintiffs’ information in confidence,
14 plaintiffs have no trade secret claims against Dotzenroth, or the parties who
15 allegedly received information from him. *See Southwest Stainless*, 582 F.3d at
16 1189-90 (no trade secret protection for pricing information disclosed to customer
17 without restriction on customer’s right to share it, rejecting argument that
18 employee confidentiality agreements, password protections and confidentiality
19 reminders within company established trade secret status, since “*general* measures
20 to keep its company information private” did not prohibit customer to whom
21 pricing was disclosed from sharing such information with outside parties)
22 (emphasis in original); *Metro Sales, Inc. v. Core Consulting Grp., LLC*, No. CV
23 15-3233 (DWF/JSM), 2016 WL 11526757, at *5 (D. Minn. Feb. 26, 2016);
24 *McIntyre v. BP Expl. & Prod., Inc.*, No. 3:13-CV-149 RRB, 2015 WL 999092, at
25 *4 (D. Alaska Mar. 5, 2015), *aff’d*, 697 F. App’x 546 (9th Cir. 2017) (dismissing
26 trade secrets claim, finding that plaintiff did not “put Defendants on notice” that
27 information was intended to be confidential; “the proprietor of an alleged trade
28 secret” may not “unilaterally create a confidential relationship without the

1 knowledge or consent of the party to whom the secret is disclosed”).

2 There was no NDA or other binding agreement obligating the Dotzenroths to
3 maintain confidentiality. Indeed, although plaintiffs vaguely suggest an oral
4 confidentiality agreement was reached, they tellingly fail to sue for breach of
5 contract. That is because they have no enforceable confidentiality agreement to
6 enforce. The absence of such an agreement – with parties who plaintiffs say had
7 nothing meaningful to contribute to their venture – is fatal to plaintiffs’ claims.³

8 The use of NDAs with parties to potential transactions is standard practice in
9 the aviation industry. *See, e.g., Ashford v. Aeroframe Servs., L.L.C.*, 907 F.3d 385,
10 389 (5th Cir. 2018); *Airbus S.A.S. v. Aviation Partners, Inc.*, No. A-11-CA-1030-
11 LY, 2012 WL 2515414, at *1 (W.D. Tex. June 29, 2012); *Lockheed Martin Corp.*
12 *v. L-3 Commc’ns Corp.*, No. CIVA 105-CV-902-CAP, 2008 WL 4791804, at *1
13 (N.D. Ga. Sept. 30, 2008). Indeed, plaintiffs themselves say they use them all the
14 time. But they failed to do so here.

15 It would be particularly important to enter NDAs when dealing with
16 unproven parties who are not sharing their own confidential information. But
17 plaintiffs here allege that Dotzenroth was just such a nobody, who offered no
18 valuable information of his own. *See* Doc. 1 at 2:28-3:1 (alleging Dotzenroth “had
19 little or no aircraft conversion engineering expertise or project management
20 experience”); *id.* at 3:13-14 (Dotzenroth “is not an engineer and []lacked the
21 technical know-how to develop a conversion program”); *id.* at 3:23-24, 3:26,
22 10:10-11, 12:3-8, 14:23-27, 15:12-14, 15:21-22, 15:23, 15:24-25, 20:6-7, 19:22
23 (“the inexperienced and uninformed Dotzenroth”). These disparaging statements
24 are wrong, but they reinforce the conclusion that plaintiffs failed to take reasonable
25

26 ³ Plaintiffs are vague in describing what communications formed the basis of their
27 “understanding” of confidentiality, but any oral agreement to maintain secrecy beyond
28 one year would be void under the statute of frauds, because it could not by its terms be
performed within one year. Cal. Civ. Code § 1624(a)(1).

1 measures to protect their secrecy of their information. It is plainly unreasonable to
2 entrust trade secrets having “extraordinary value” (*id.* ¶ 43) to a person not bound
3 by an NDA, where he is believed to be unreliable, unpossessed of any valuable
4 information of his own, and unworthy of inclusion in a venture so heavily
5 dependent on intellectual property, as plaintiffs claim theirs was.

6 Wiley Dotzenroth never signed an NDA with plaintiffs, and was never asked
7 to. Wiley Dotzenroth Dec. ¶¶ 3-4. Nevertheless, and contrary to their
8 representations to the court about protecting the business plan with “proprietary”
9 markings, Tarpley sent the business plan to young Wiley with no such markings, in
10 an email with no such markings. *Id.* ¶ 5, Exh.1. Tarpley also sent conversion
11 design information and payload analyses to Wiley. *Id.*, Exhs. 2-3. Plaintiffs say the
12 business plan is “absolutely critical to a successful conversion program – and, for
13 that reason, highly valuable.” *Id.* at 11:11-13. By sending it to Wiley, *who is not*
14 *even alleged to have been part of the business discussions with Tarpley and*
15 *Wagner*, plaintiffs lost any right to claim trade secret protection in any information
16 in that document, i.e., in any of plaintiffs’ claimed trade secrets.

17 **b. Plaintiffs Continually Failed to Protect Their Purported Trade Secrets**

18 Plaintiffs not only failed to protect their information with an NDA or secrecy
19 agreement; they also failed to protect that information once they parted ways with
20 David Dotzenroth, *even after* coming to believe that he was using it in a competing
21 venture. According to plaintiffs, talks broke off in May 2019, except for one last
22 pre-schedule meeting in June 2019. Doc. 1 ¶ 55; Doc. 22 Exh. 2 ¶ 17; Doc. 22 Exh.
23 3 ¶ 20. Yet plaintiffs made no efforts to “claw back,” retrieve, or otherwise restrict
24 either Dotzenroth from using the information plaintiffs had sent them, at that time,
25 or at any time thereafter. Dotzenroth Dec. ¶¶ 13-14; Wiley Dotzenroth Dec. ¶ 9.
26 (And plaintiffs actually kept sending supposedly secret documents thereafter, even
27 though they swear they didn’t. Dotzenroth Dec. ¶¶ 13-14, Exhs. 13-14.)

28 Plaintiffs found out by no later than February 2020 that the Dotzenroths

1 were using plaintiffs’ supposed trade secrets in their own conversion program.
2 Doc. 1 ¶¶ 59-60 (alleging that Dotzenroth attempted to enlist plaintiff Tarpley’s
3 assistance in February 2020, and that Tarpley “*immediately recognized that*
4 *Dotzenroth was using the information and business plan that Tarpley had prepared*
5 *with Wagner,”* and that Dotzenroth’s plan “*contained a conversion program*
6 *schedule and design features from Wagner and Tarpley’s conversion program and*
7 *discussed in the materials Dotzenroth stole”*) (emphasis added); *id.* ¶¶ 63-64
8 (alleging that a conversion program sent to plaintiff Wagner by NIAR on March 3,
9 2020 “*like the Dotzenroths’ November 2019 presentation in Wichita – bore*
10 *striking similarities to Wagner and Tarpley’s own conversion program – not least*
11 *of which was [REDACTED].”*). Yet until this
12 lawsuit was filed on May 25, 2021 – over fifteen months after conclusively
13 learning their “trade secrets” were being used – plaintiffs did nothing to protect the
14 information they now claim to have acted vigilantly to safeguard. Dotzenroth Dec.
15 ¶¶ 13-14; Wiley Dotzenroth Dec. ¶ 9.

16 This also defeats plaintiffs’ long-after-the-fact attempt to claim secrecy in
17 information they knew was no longer secret. *See Rockwell Graphic Sys., Inc. v.*
18 *DEV Indus., Inc.*, 925 F.2d 174, 179 (7th Cir. 1991) (analogizing the requirement
19 that a “plaintiff to show that he took reasonable precautions” to maintain the
20 secrecy of a trade secret to “the duty of the holder of a trademark to take
21 reasonable efforts to police infringements of his mark”); *Compuware Corp. v.*
22 *Health Care Serv. Corp.*, 203 F. Supp. 2d 952, 957-58 (N.D. Ill. 2002) (granting
23 summary judgment on a trade secrets claim where the plaintiff knew that its trade
24 secret was being used by an unlicensed third party and “did not do anything about
25 it until it discovered that [the third party] was using it for a purpose of which [the
26 plaintiff] disapproved,” explaining that “[a]s a matter of law doing nothing to
27 enforce a confidentiality agreement is not a reasonable effort in the circumstances
28 to maintain a trade secret”), opinion withdrawn sub nom. *Compuware Corp. v.*

1 *Health Care Service Corp.*, No. 01 C 0873, 2002 WL 31598839 (N.D. Ill. Oct. 31,
2 2002) (opinion withdrawn due to settlement); *Bolt Assocs., Inc. v. Trustees of*
3 *Columbia Univ. in City of New York*, 249 F. Supp. 612, 618 (S.D.N.Y. 1966)
4 (denying preliminary injunction where plaintiff “was shown drawings” of the
5 allegedly trade secret-incorporating product and defendants “published an article”
6 about their work, yet the plaintiff “made no claim that his rights were violated”).

7 No cease-and-desist letter; no notification to Dotzenroth; no lawsuit;
8 nothing. It was only when Dotzenroth *succeeded* in moving his conversion
9 program forward, and only when plaintiffs realized they were losing conversion
10 partners and customers, that they finally filed this lawsuit, for a transparently anti-
11 competitive purpose. Dotzenroth Dec. ¶ 23. This opportunistic misuse of trade
12 secret litigation to counter competitive losses – in a case where plaintiffs did not
13 keep their purported secrets secret – is not OK. A party may not openly disclose
14 information to those who are not legally obligated to keep it secret, then belatedly
15 claim it was a trade secret all along after losing in the market.

16 A party can only claim trade secret information if it consistently and
17 effectively kept its information secret at all times. *See SortiumUSA LLC v. Hunger*,
18 No. 3:11-CV-1656-M, 2013 WL 11730655, at *11-12 (N.D. Tex. March 31, 2013)
19 (granting motion to dismiss based on plaintiff’s failure to mark the information as
20 confidential, require the defendant to execute a confidentiality agreement, and “its
21 failure to plead any other steps to protect the secrecy”); *OTR Wheel Engineering*
22 *Inc. v. West Worldwide Services Inc.*, No. CV-14-085-LRS, 2015 WL 11117430, at
23 * 2, (E.D. Wash. Nov. 30, 2015) (granting summary judgment where there was “no
24 ‘Confidential’ designation on the single document produced by
25 Plaintiffs”); *Convolve Inc. v. Compaq Computer Corp.*, 527 F. App’x 910, 921-3
26 (Fed. Cir. 2013) (finding that the information lost any “trade secret status” when it
27 was disclosed without markings required under NDA); *GTAT Corp. v. Fero*, No.
28 17-55-M-DWM, 2017 WL 2303973, at *4-5 (D. Mont. May 25, 2017) (failure to

1 consistently enforce protective measures resulted in denial of injunction).

2 “Secrecy is a requisite element of a trade secret.” *Nextdoor.com, Inc. v.*
3 *Abhyanker*, No. C-12-5667 EMC, 2014 WL 1648473, at *4 (N.D. Cal. Apr. 23,
4 2014). “It is axiomatic that without secrecy, no trade secret can exist. . . . ‘The
5 inquiry simply boils down to the question: was this information truly a secret?’”
6 *BDT Productions, Inc. v. Lexmark Int’l, Inc.*, 274 F. Supp. 2d 880, 891 (E.D. Ky.
7 2003) (quoting *Penalty Kick Mgmt., Ltd. v. The Coca-Cola Co.*, 164 F. Supp. 2d
8 1376, 1380–81 (N.D. Ga. 2001)). “A failure to require a third party to enter a
9 confidentiality agreement to protect alleged trade secrets is one clear way to waive
10 any trade secret protection that might exist.” *Id.*; see also *Auto Channel, Inc. v.*
11 *Speedvision Network, LLC*, 144 F.Supp.2d 784, 795 (W.D. Ky. 2001) (plaintiffs
12 waived any possible trade secret protection when they sent alleged trade secret
13 television pilot concepts as unsolicited promotional materials to cable networks,
14 with no requirement of secrecy); *BioCore, Inc. v. Khosrowshahi*, 96 F. Supp. 2d
15 1221, 1232 (D. Kan. 2000) (no protection for marketing materials provided
16 without confidentiality requirements). Put simply, plaintiffs’ claimed trade secrets
17 were not kept secret. Plaintiffs will not succeed on the merits.

18 **c. Plaintiffs Are Claiming Trade Secret Protection in Public Information**

19 The sworn testimony of William Wagner, described by plaintiffs as “one of
20 the world’s foremost experts on aircraft conversions,” is materially and
21 disturbingly false. He describes “several elements of our preliminary design that
22 were novel and unique.” Doc. 22 Exh. 3 at 5:4-5. Then, in testimony redacted
23 because plaintiffs’ lawyers contend it reveals trade secrets, he swears: “For
24 example, we initially opted to [REDACTED]”
25 *Id.* at 5:5-6. He also swears that so far as he is aware, this element was “unique to
26 our design.” *Id.* at 5:10-11.

27 In truth, [REDACTED] is
28 commonly done and widely known. You can see IAI Bedek Aviation doing it in

1 2010 on YouTube: <https://www.youtube.com/watch?v=kgNfsr0zd58> A screen shot
2 from that video reveals Wagner’s dishonesty:



12 Wiley Dotzenroth Dec. ¶ 13.

13 Wagner’s other claimed “novel and unique” design element was “
14 [REDACTED]
15 [REDACTED]” Doc. 22 Exh. C at 5:6-8.⁴ But this approach is also quite common, and is
16 described in numerous pieces of literature publicly available on the Internet, dating
17 back to 2014. Wiley Dotzenroth Dec. ¶¶ 10-12, Exhs. 4-6.

18 Plaintiffs assert defendants misappropriated these “unique aspects of
19 Wagner and Tarpley’s design,” namely “[REDACTED]
20 [REDACTED]” Doc. 22 Exh. A at 12:18-19. But they are blatantly
21 untruthful in representing to the Court that “Until Plaintiffs, no other conversion
22
23
24
25
26

27
28 ⁴ Wagner’s description of this design element is also redacted, reflecting plaintiffs’
counsels’ assertion that it is secret. Doc. 16-3 ¶11.

1 program had these features.” Doc. 22 Exh. A at 12:21-22.⁵

2 **d. Plaintiffs’ Claims of Trade Secret Ownership Are Dubious**

3 Plaintiffs apparently stole some of the information they claim to have
4 developed themselves. Dotzenroth Dec. ¶¶ 18-22, Exhs. 16-20. Tarpley sent
5 Dotzenroth proprietary documents belonging to Boeing, IAI, and Precision
6 Conversions. The vaunted conversion schedule plaintiffs tout as a key trade secret
7 originated with a “template” Precision Conversions 757 Combi conversion
8 schedule. *Id.*, Exh. 18 (Tarpley: “Maybe something like one of these . . .”).

9 Plaintiffs also dramatically exaggerate the time and effort spent on their
10 business plan. Tarpley sent his first draft of the business plan on January 18, 2019,
11 with an email saying, “*I have just been pounding on the keys as the thoughts*
12 *come.*” Dotzenroth Dec., Exh. 4 (emphasis added). Just over three weeks later, on
13 February 12, 2019, Tarpley sent a revised version of the business plan (Version
14

15 ⁵ Plaintiffs’ advocacy overreach is pervasive, including in their redactions of purportedly
16 secret material in the Complaint, which actually consists of general accounts of meetings
17 and phone calls. *See, e.g.*, Doc. 1 at 4:23-25 (“They received it during a 2019 meeting –
18 arranged by Dotzenroth – as potential investors in Wagner and Tarpley’s conversion
19 program”); *id.* at 15:1-2 (“In May 2019, Dotzenroth arranged for a meeting between
20 himself, Tarpley, Andrew Mansell, and Steven Welo.”); *id.* at 17:11-16 (“About a week
21 later, Dotzenroth called Tarpley and again inquired whether he could operate a
22 conversion program without Wagner. Tarpley again told Dotzenroth he would need
23 Wagner’s expertise. During this call, Dotzenroth also suggested that he might have a job
24 for Tarpley to work on the conversion program. Tarpley turned him down. Tarpley did
25 not believe that Dotzenroth would actually enter the P2F market with his own conversion
26 program. At that point, Dotzenroth had no funding or engineering resources.”). Plaintiffs
27 also attempt to imbue Tarpley’s emails with an aura of secrecy, saying he shared
28 documents and information using “password-protected email and file-sharing services,”
i.e., email and file-sharing services (since they all require passwords). *See also*
Dotzenroth Dec., Exh. 22 (the email in which, according to Tarpley, “Welo told me the
opportunity was ‘clearly significant and labeled the project ‘transformational.’”).
Tarpley’s description omits the rest of Welo’s not-so-rosy comments: “The Mammoth
opportunity is clearly significant, but there is also a ton of work to do . . . we
acknowledge how little we know about Mammoth’s financial projections and even the
amount of equity you may be looking to raise.”; “We are happy to discuss but the
feedback from you and Dave seems mixed.” *Id.*

1 12), which was 38 pages long and replete with all the information described by
2 plaintiffs in their Complaint and declarations. *Id.*, Exh. 10. According to plaintiffs,
3 *these* versions of the business plan contain the trade secrets they’re suing over.
4 Doc. 23 at 4:8-9; *id.* at 2:25-26. The roughly three-week process to create the
5 business plan took, according the plaintiffs, “more than a year of non-stop
6 laboring, thousands of engineering hours, and millions of dollars.” Doc. 1 at 19:10-
7 12. These exaggerations are amplified in Tarpley and Wagner’s sworn testimony.
8 Doc. 16-2 ¶¶ 4, 8; Doc. 16-3 ¶ 13.

9 Though not mentioned in their motion, plaintiffs allege they were joint
10 venturers with Dotzenroth, and claim a breach of fiduciary duty because
11 Dotzenroth used information from the alleged joint venture to pursue his own
12 competing program. Doc. 1 ¶¶107-109. But if the parties were joint venturers, then
13 plaintiffs cannot pursue their claims, nor can they pursue their own conversion
14 program without sharing the profits with Dotzenroth. *See* Cal. Corp. Code §
15 16404(b)(1) (“A partner’s duty of loyalty to the partnership and the other partners
16 includes . . . account[ing] to the partnership and hold[ing] as trustee for it any
17 property, profit, or benefit . . . derived from a use by the partner of partnership
18 property or information[.]”); *Pellegrini v. Weiss*, 165 Cal. App. 4th 515, 524
19 (2008) (joint venturers’ rights and duties “are governed by the same rules which
20 apply to partnerships. . . . [J]oint venturers have a fiduciary duty to act with the
21 highest good faith towards each other regarding affairs of the partnership or joint
22 venture.”) (quotation marks and citations omitted).

23 If Dotzenroth was not permitted to use purportedly confidential information
24 because the parties had partnership duties, then neither were plaintiffs. The
25 partners would not own the trade secrets; only the joint venture would. Plaintiffs’
26 very act of suing to enforce *their* purported intellectual property rights
27 demonstrates that the parties were not in a joint venture, were not partners, and
28 therefore had no duties of secrecy. Because plaintiffs would be breaching such

1 duties to Dotzenroth by proceeding as they have. Plaintiffs, by using for their own
2 benefit the information developed during the purported joint venture, are
3 effectively admitting there was no joint venture. There was therefore no duty of
4 utmost good faith or accompanying confidentiality obligation.

5 The simple truth is that the parties had preliminary discussions about doing
6 business together, freely shared information with no NDAs or secrecy obligations
7 between them, and t went their separate ways after failing to agree on terms. Their
8 information never evolved to the point where any of them felt it important to bind
9 each other to NDAs. *See* Dotzenroth Dec. ¶ 30. They were all free to use the
10 information they had developed and shared in pursuing their own separate
11 ventures, as plaintiffs obviously recognized by doing just that, and by doing
12 nothing when they found out that Dotzenroth was also doing just that.

13 **e. Plaintiffs’ Proposed Injunction Is Fatally Vague and Wildly Overbroad**

14 “Every order granting an injunction and every restraining order must . . .
15 state its terms specifically” and “describe in reasonable detail . . . the act or acts
16 restrained or required.” Fed. R. Civ. P. 65(d)(1). Accordingly, “[v]ague and
17 nebulous relief will not stand,” “the relief sought must be specific, of a sort that a
18 Court can specifically order and enforce without difficulty.” *Hickey v. Chesney*,
19 No. CIV. A. 90-3631, 1991 WL 3511, at *1 (E.D. Pa. Jan. 9, 1991). Failure to seek
20 sufficiently specific relief will foreclose any possible injunction. *See Bollfrass v.*
21 *City of Phoenix*, No. CV-19-04014-PHX-SPL, 2019 WL 11680214, at *3 (D. Ariz.
22 Sept. 3, 2019) (“[T]he relief requested by the Plaintiffs is broad, overly vague, and
23 fails to request concrete relief.”); *Ippolito v. DeCamp*, No. 3:11-CV-00676-PK,
24 2012 WL 1259116, at *1 (D. Or. Apr. 11, 2012) (“[P]laintiff’s request for
25 injunctive relief is impermissibly vague. The Court can only speculate as to what
26 action plaintiff would have the Court take and what ‘harm’ he hopes to
27 avoid.”); *Interbake Foods, L.L.C. v. Tomasiello*, 461 F. Supp. 2d 943, 978–79
28 (N.D. Iowa 2006) (“The court finds that it is difficult to fashion an injunction of

1 proper scope in this case because the Confidentiality Agreement fails to define
2 what information is considered confidential and proprietary. Moreover, the
3 plaintiff’s Complaint and request for relief is equally as vague in this aspect.”).
4 This is all true of plaintiffs’ request here. Their notice of motion seeks an
5 injunction preventing defendants “from misappropriating Plaintiffs’ trade secrets
6 and competing unfairly.” Doc. 16 at 2:5-6. Elsewhere, they seek an injunction
7 prohibiting defendants from doing anything to advance “any conversion program”
8 that uses information “derived in any way from” the information in plaintiffs’
9 business plan and roadmap, “or any other proprietary information learned from
10 Defendants’ interactions with Plaintiffs.” Doc. 16-1 at 25:5-8. **Whatever that**
11 **might be.** Plaintiffs fail to specifically identify what particular data they claim as
12 trade secrets. Their only specific examples – the [REDACTED] and [REDACTED]
13 [REDACTED] – are widely known and publicly available. The rest of it –
14 including financial, schedule, cost, and market information – was freely emailed to
15 both Dotzenroths with no “proprietary” markings or NDA. The vague, overbroad,
16 and overreaching nature of plaintiffs’ request is reason alone to deny their motion.

17 **2. Plaintiffs’ Unfair Competition Claim Is Legally Frivolous**

18 In one of many examples of plaintiffs’ bad faith prosecution, they bring a
19 state law statutory claim for unfair competition under Bus. & Prof. Code § 17200.
20 Doc. 1 at 27-28, Doc. 16 at 18-19. In doing so, they ignore well-settled caselaw
21 that bars this claim. UCL claims based on the alleged theft of confidential
22 information are displaced, or preempted, by the Uniform Trade Secret Act. *Silvaco*
23 *Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 236 (2010); *K.C. Multimedia, Inc.*
24 *v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 958 (2009).
25 “CUTSA provides the exclusive civil remedy for conduct falling within its terms,
26 so as to supersede other civil remedies ‘based upon misappropriation of a trade
27 secret.’” *Silvaco Data*, 184 Cal. App. 4th at 236. Thus, causes of action that are
28

1 based on the same nucleus of facts as a trade secret misappropriation claim are
2 displaced by CUTSA. *Id.* at 241.

3 Information “that does not fit” CUTSA’s definition of a trade secret “and is
4 not otherwise made property by some provision of positive law, belongs to no one,
5 and cannot be converted or stolen.” *Silvaco*, 184 Cal. App. 4th at 239 n.22.

6 “[I]nformation cannot be ‘stolen’ unless it constitutes *property*. And information is
7 not property unless some law makes it so. If the plaintiff identifies no property
8 right outside of trade secrets law, then he has no remedy outside that law.” *Id.* at
9 239 (emphasis in original).

10 Plaintiffs’ UCL claim is based on the same nucleus of facts supporting their
11 trade secret claims, namely, defendants’ use of plaintiffs’ allegedly confidential
12 information. *See* Doc. 1 ¶104 (“After misappropriating Plaintiffs’ confidential and
13 proprietary information, and after learning the details of Plaintiffs’ engineering and
14 marketing strategy, Defendants started a conversion program to compete directly
15 with Plaintiffs’ conversion program.”); Doc. 16-1 at 18:14-16 (“Defendants
16 competed unfairly by using Plaintiffs’ business and marketing strategy to form a
17 new company . . .”). A UCL claim based on defendants’ alleged misappropriation
18 of information would be “a transparent attempt to evade the strictures of CUTSA
19 by restating a trade secrets claim as something else.” *Silvaco*, 184 Cal. App. 4th at
20 240. The law prohibits plaintiffs from doing so here. So to be accurate, the
21 assertion on page 18 of plaintiffs’ brief should be rewritten from saying
22 **“Plaintiffs’ Unfair Competition Claim Is Strong”** to say **“Plaintiffs’ Unfair**
23 **Competition Claim is Displaced.”** It is frankly inexplicable why this claim is in
24 the case, given the law and the requirements of Rule 11.

25 **C. Plaintiffs’ Claim of Irreparable Harm Fails**

26 Plaintiffs waited a year and seven months to seek an injunction. Their long-
27 delayed request for injunctive relief is not a sincere attempt to avoid irreparable
28 harm. Rather, it is a market-timed attempt to use the Court to hobble a competitor.

1 Dotzenroth Dec. ¶ 23 Plaintiffs’ transparent motivations aside, the Court can and
2 should deny their request for an injunction based on delay alone.

3 Preliminary injunctive relief is warranted where the need for relief is *urgent*.
4 Delay in seeking relief belies a claim of urgency. *Oakland Tribune, Inc. v.*
5 *Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (delay in seeking
6 injunctive relief “implies lack of urgency and irreparable harm”); *Gillette Co. v. Ed*
7 *Pinaud, Inc.*, 178 F. Supp. 618, 622 (S.D.N.Y. 1959) (injunction sought on theory
8 of urgent need for speedy action to protect plaintiff’s rights; by sleeping on rights,
9 plaintiff demonstrates lack of need for speedy action); *Programmed Tax Sys., Inc.*
10 *v. Raytheon Co.*, 419 F. Supp. 1251, 1255 (S.D.N.Y. 1976) (four-month delay
11 between learning of alleged harm and motion for injunctive relief “evidences a
12 lack of irreparable injury and constitutes a separate ground on which the
13 extraordinary equitable relief now requested by the plaintiff should be denied”);
14 *Givempower Corp. v. Pace Compumetrics, Inc.*, No. 07cv157 WQH, 2007 WL
15 951350 (S.D. Cal. Mar.23, 2007) (holding delay of two months, in circumstances
16 of case, negated showing of irreparable harm); *Hansen Beverage Co. v. Vital*
17 *Pharmaceutical, Inc.*, No. 08-CV-1545 IEG (POR), 2008 WL 5427601, at *6 (S.D.
18 Cal. Dec. 30, 2008) (“Delays in requesting an injunction, whether for months or
19 years, tend to negate a claim of irreparable harm”).

20 Because of plaintiffs’ extraordinary delay in moving for an injunction, such
21 relief would not preserve the status quo, but would alter it. The Court should deny
22 the request for this reason also. “[T]he very purpose of a preliminary injunction . . .
23 is to preserve the status quo and the rights of the parties until a final judgment
24 issues in the cause.” *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094
25 (9th Cir. 2010). Here, however, plaintiffs ask the Court to order defendants to stop
26 doing what they are already doing – and *have been doing for over a year and a half*
27 *with plaintiffs’ knowledge*. In effect, plaintiffs seek a mandatory injunction, since
28 defendants would have to “take action.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740

1 (9th Cir. 2015). But as the Ninth Circuit has cautioned, because “a mandatory
2 injunction goes well beyond simply maintaining the status quo *pendente lite*,” it is
3 “particularly disfavored.” *Id.* A “district court should deny such relief unless the
4 facts and law clearly favor the moving party,” and “[i]n plain terms, mandatory
5 injunctions should not issue in doubtful cases.” *Id.*; *see also Loxo Oncology, Inc. v.*
6 *Array Biopharma Inc.*, No. 18-CV-03062-PAB-MEH, 2019 WL 10270263, at *4
7 (D. Colo. June 26, 2019) (denying a preliminary injunction that would alter the
8 status quo by enjoining individuals from *continuing* to work on projects allegedly
9 incorporating trade secrets).

10 Plaintiffs assert that irreparable harm is presumed where proprietary
11 information is misappropriated, quoting Judge Sammartino’s unpublished TRO
12 order in *Amylin Pharms., Inc. v. Eli Lilly & Co.*, No. 11-cv-1061, 2011 WL
13 13240303, at *3 (S.D. Cal. May 23, 2011). They fail to disclose numerous
14 published district court decisions within the Ninth Circuit that hold there is no
15 presumption of irreparable harm in trade secret cases. *See, e.g., Cutera, Inc. v.*
16 *Lutronic Aesthetics, Inc.*, 444 F. Supp. 3d 1198, 1208 (E.D. Cal. 2020) (“this court
17 joins those district courts who have declined to rely on a presumption in
18 determining irreparable harm in the intellectual property context”); *V’Guara Inc. v.*
19 *Dec*, 925 F. Supp. 2d 1120, 1126 (D. Nev. 2013).⁶ Post-*Winter*, irreparable harm
20 should not be presumed in trade secret cases, as the published cases hold. But
21 regardless of whether irreparable harm is presumed, it is not present here.

22 **D. The Balance of Equities and Public Interest Favor Defendants**

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24
25 ⁶ Judge Sammartino actually quoted *TMX Funding, Inc. v. Impero Techs, Inc.*, 2010 WL
26 1028254, at *8 (N.D. Cal. March 18, 2010) in the passage quoted by plaintiffs, although
27 they do not disclose *TMX Funding* in their citation. Doc. 16-1 at 19:5-8. Plaintiffs also
28 do not disclose more recent authority criticizing *TMX Funding*, and holding that
irreparable harm is not presumed in trade secret cases in light of the Supreme Court’s
decision in *Winter. Arminak Sols., LLC v. 7-Eleven, Inc.*, No. 2:17-CV-01820-RGK-
PJW, 2017 WL 6888706, at *2 n.1 (C.D. Cal. Mar. 16, 2017).

1 Plaintiffs are guilty of unclean hands. They used proprietary data and
2 documents belonging to other companies in developing the information they now
3 claim to own. They are also guilty of laches, to an extreme degree.

4 An injunction here would not serve the public interest, particularly given the
5 breadth of how plaintiffs would frame it. Competition serves the public interest,
6 but plaintiffs would have the Court derail it. If successful, jobs will be lost in the
7 Wichita area. Dotzenroth Dec. ¶ 25. The public interest obviously disfavors unfair
8 competition, but the strictures of trade secret law require far more than plaintiffs
9 have shown or can show here. Plaintiffs freely shared the information they claim
10 was stolen, with parties having no legal obligation to protect it, and plaintiffs did
11 nothing for over a year and a half after learning that information was being used.
12 Plaintiffs have no legitimate claim to trade secret protection, and their supposedly
13 secret toothpaste is out of the tube. There is no legitimate public interest in the
14 Court trying to belatedly put it back. If defendants are liable, which they plainly
15 are not, plaintiffs have their remedy in damages.

16 **E. Any Injunction Would Require a Substantial Bond**

17 In the unlikely event the Court is inclined to enter an injunction, defendants
18 request to be heard about the amount of a bond. Given the huge dollar amounts
19 involved in cargo conversions, any such bond would need to be substantial.

20 **IV. CONCLUSION**

21 For the foregoing reasons, the Dotzenroth defendants respectfully request
22 that the Court deny plaintiffs’ motion.

23 Dated: June 28, 2021

FITZGERALD KNAIER LLP

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25
26 By: 

27 Kenneth M. Fitzgerald, Esq.
28 Attorneys for Dotzenroth
Defendants

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Dated: June 28, 2021



Kenneth M. Fitzgerald, Esq.