

2021

Hitting the Trip Wire: When does a Company Become a "Marijuana Business"?

Lauren A. Newell
Ohio Northern University, l-newell@onu.edu

Follow this and additional works at: https://digitalcommons.onu.edu/law_faculty



Part of the [Business Organizations Law Commons](#), and the [Food and Drug Law Commons](#)

Recommended Citation

Lauren Newell, Hitting the Trip Wire: When does a Company Become a "Marijuana Business"?, 101 Bos. U. L. Rev. 1105 (2021).

This Article is brought to you for free and open access by the Pettit College of Law at DigitalCommons@ONU. It has been accepted for inclusion in Law Faculty Scholarship by an authorized administrator of DigitalCommons@ONU. For more information, please contact digitalcommons@onu.edu.

**HITTING THE TRIP WIRE:
WHEN DOES A COMPANY BECOME A “MARIJUANA
BUSINESS”?**

LAUREN A. NEWELL*

ABSTRACT

Like the alcohol industry was during Prohibition, the marijuana industry is a profitable one. And, as bootlegging was then, selling marijuana in the United States is currently illegal. Despite the number of states that have legalized or decriminalized the sale of marijuana for medical or recreational use under state law, marijuana sales remain illegal as a matter of federal law under the federal Controlled Substances Act of 1970 (“CSA”). Individuals and entities that violate the CSA face substantial criminal and civil liability, including prison time and fines, alongside a host of additional negative consequences arising from business, tax, bankruptcy, and banking law, as well as other sources. The negative consequences that marijuana businesses face have been discussed in detail elsewhere. This Essay asks a different question: not what are the negative consequences, but rather, when do those negative consequences attach? In other words, when does a company become a “Marijuana Business”?

For purposes of this discussion, a Marijuana Business is an entity that participates, contributes, or assists, directly or indirectly, in the retail and/or medical marijuana industry to an extent that exposes it, its owners, and its agents to potential criminal and civil liability and other negative business consequences. In short, these are the companies that should be worried about the fact that they are engaging in an industry that is illegal under federal law. To identify the circumstances that result in a company’s being a Marijuana Business, this Essay analyzes seven hypothetical companies that directly participate in the marijuana industry or support others that do. For each, the Essay asks whether the facts are sufficient to establish criminal liability either directly under the CSA or indirectly under criminal conspiracy or aiding and abetting liability theories.

* Associate Dean for Academic Affairs and Professor of Law, Ohio Northern University Pettit College of Law. Thanks are due to Bryan Ward for his helpful comments, to Madalynn Helmig for her excellent research assistance, and, as always, to Rodney Salvati for his insight and inspiration.

CONTENTS

INTRODUCTION: MARIJUANA BUSINESSES.....	1107
I. CRIMINAL LIABILITY	1108
A. <i>Controlled Substances Act</i>	1108
B. <i>Conspiracy Liability</i>	1109
C. <i>Aiding and Abetting Liability</i>	1109
II. HYPOTHETICALS	1111
A. <i>Brad's Buds LLC</i>	1111
B. <i>Entire Foods Market Inc.</i>	1112
C. <i>Wonderful Warehouses Corp.</i>	1112
D. <i>Galaxy Brands, Inc.</i>	1113
E. <i>Larry's Landscaping Corp.</i>	1119
F. <i>Frida's Fertilizers LLP</i>	1123
G. <i>Jovial Janitors Inc.</i>	1128
III. EXTENSIONS AND CONCLUSIONS	1131

There's no such thing as good money or bad money. There's just money.

—Charles “Lucky” Luciano

INTRODUCTION: MARIJUANA BUSINESSES

Like the alcohol industry was during Prohibition, the marijuana industry is a profitable one.¹ And, as bootlegging was then, selling marijuana in the United States is currently illegal. Despite the number of states that have legalized or decriminalized the sale of marijuana for medical or recreational use under state law,² marijuana sales remain illegal as a matter of federal law under the federal Controlled Substances Act of 1970 (“CSA”).³ Individuals and entities that violate the CSA face substantial criminal and civil liability, including prison time and fines, alongside a host of additional negative consequences arising from business, tax, bankruptcy, and banking law, as well as other sources. The negative consequences that marijuana businesses face have been discussed in detail elsewhere.⁴ This Essay asks a different question: not what are the negative consequences, but rather, when do those negative consequences attach? In other words, when does a company become a “Marijuana Business”?

For purposes of this discussion, a Marijuana Business is an entity that participates, contributes, or assists, directly or indirectly, in the retail and/or medical marijuana industry to an extent that exposes it, its owners, and its agents to potential criminal and civil liability and other negative business

¹ See *A Bootlegger's Story*, NEW YORKER (Sept. 25, 1926), <https://www.newyorker.com/magazine/1926/09/25/a-bootleggers-story-i-how-i-started> (describing the profitability of the illegal liquor business during Prohibition and concomitant encounters with law enforcement); Eli McVey, *Chart: US Cannabis Industry's Economic Impact Could Hit \$130 Billion by 2024*, MARIJUANA BUS. DAILY (July 21, 2020), <https://mjbizdaily.com/chart-us-cannabis-industrys-economic-impact-could-hit-130-billion-by-2024/> [<https://perma.cc/ZX44-3T6R>].

² See *State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/GAZ4-XGYJ>] (last updated May 17, 2021) (listing seventeen states and three U.S. territories that have legalized both recreational and medical marijuana sales and thirty-six states and four U.S. territories that have approved medical marijuana sales).

³ See generally 21 U.S.C. §§ 801-904.

⁴ E.g., Casey W. Baker, *Marijuana's Continuing Illegality and Investors' Securities Fraud Problem: The Doctrines of Unclean Hands and In Pari Delicto*, 12 J. BUS. ENTREPRENEURSHIP & L. 93 (2019); Julie Andersen Hill, *Banks, Marijuana, and Federalism*, 65 CASE WESTERN RESERVE L. REV. 597 (2015); Sam Kamin & Viva R. Moffat, *Trademark Laundering, Useless Patents, and Other IP Challenges for the Marijuana Industry*, 73 WASH. & LEE L. REV. 217 (2016); Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?*, 91 OR. L. REV. 869 (2013); Benjamin Moses Leff, *Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. 523 (2014); Robert A. Mikos, *State Taxation of Marijuana Distribution and Other Federal Crimes*, 2010 U. CHI. LEGAL F. 223; Lauren A. Newell, *High Crimes: Liability for Directors of Retail Marijuana Corporations*, 16 N.Y.U. J.L. & BUS. 419 (2020) [hereinafter Newell, *High Crimes*]; Lauren A. Newell, *Up in Smoke? Unintended Consequences of Retail Marijuana Laws for Partnerships*, 38 CARDOZO L. REV. 1343 (2017) [hereinafter Newell, *Up in Smoke*]; Luke Scheuer, *The “Legal” Marijuana Industry's Challenge for Business Entity Law*, 6 WM. & MARY BUS. L. REV. 511 (2015).

consequences. In short, these are the companies that should be worried about the fact that they are engaging in an industry that is illegal under federal law. To identify the circumstances that result in a company's constituting a Marijuana Business, this Essay analyzes seven hypothetical companies that directly participate in the marijuana industry or support others that do. For each, the Essay asks whether the facts are sufficient to establish criminal liability either directly under the CSA or indirectly under criminal conspiracy or aiding and abetting liability theories.⁵ Part I briefly introduces criminal liability under the CSA, along with the two complicity theories. Part II analyzes the hypothetical companies' actions and determines whether they are Marijuana Businesses. Part III concludes with factors that courts and companies can look toward to determine whether those companies are indeed Marijuana Businesses.

I. CRIMINAL LIABILITY

A. *Controlled Substances Act*

Section 841(a)(1) of the CSA provides that it is "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as authorized by other provisions of the CSA.⁶ The CSA designates "[m]arihuana" as a "Schedule I" controlled substance, meaning that it "has a high potential for abuse," it "has no currently accepted medical use in treatment," and "[t]here is a lack of accepted safety" for its use under medical supervision.⁷ Schedule I is the most restrictive controlled substance designation in the CSA.⁸ The only purpose authorized under the CSA for Schedule I substances is use in federal authorized research.⁹ This means that the manufacture, distribution, or dispensing of "marihuana," or the possession with intent to do one of those things, is a felony.¹⁰ As used in this Essay, both "cannabis" and "marijuana" fall within the statutory definition of "marihuana"—i.e., both are Schedule I controlled substances.¹¹

⁵ There are other theories of criminal and civil liability that could trigger negative business consequences and cause a company to become a Marijuana Business, such as liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. See Newell, *High Crimes*, *supra* note 4, at 463-66, for a discussion of potential RICO liability for companies engaged in the marijuana industry. For the sake of brevity, this Essay is limited to a discussion of criminal liability stemming from CSA violations.

⁶ 21 U.S.C. § 841(a)(1).

⁷ *Id.* § 812(b)(1), 812(c) Schedule I (c)(10).

⁸ *See id.* § 812(b)(1).

⁹ *Id.* § 823(f).

¹⁰ *Id.* § 841(b)(1)(B), (D).

¹¹ The CSA defines "marihuana" as "all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." *Id.* § 802(16)(A). The term does not include hemp. *Id.* § 802(16)(B). This Essay uses the term "cannabis" to refer to the *Cannabis sativa* plant and "marijuana" to refer to the parts

B. *Conspiracy Liability*

Section 846 of the CSA provides that “[a]ny person who attempts or conspires to commit any offense defined in [the CSA] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”¹² As the Supreme Court has observed, “Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.”¹³ No proof of an overt act in furtherance of the conspiracy is required to establish a violation of § 846.¹⁴ The act of agreement to violate the law constitutes the *actus reus*.¹⁵

The Courts of Appeals have adopted different tests for conviction of conspiracy under § 846, the relevant specifics of which are discussed below.¹⁶ Generally speaking, a conviction of conspiracy to violate the CSA requires proof that a conspiracy existed and that the defendant knew about the scheme to violate the CSA and agreed to be a part of the scheme.¹⁷ The *mens rea* element is satisfied when the defendant’s participation in the conspiracy is both knowing and voluntary.¹⁸ A conspiracy to commit a crime and the crime’s subsequent commission generally do not merge into a single offense; the conspiracy and the subsequent crime can be punished separately.¹⁹

C. *Aiding and Abetting Liability*

Title 18, § 2(a), of the United States Code establishes criminal liability for aiding and abetting a crime. Under this section, “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”²⁰ A person incurs aiding and abetting liability for “a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense’s commission.”²¹ The parameters of this offense are somewhat murky.²² It is not

of or products from the plant that contain a substantial amount of tetrahydrocannabinol, the psychoactive component of marijuana. *See Cannabis (Marijuana) and Cannabinoids: What You Need to Know*, NAT’L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH, <https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know> [https://perma.cc/5A6B-MYUR] (last updated Nov. 2019).

¹² 21 U.S.C. § 846.

¹³ *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

¹⁴ *United States v. Shabani*, 513 U.S. 10, 16 (1994).

¹⁵ *Id.* at 15-16.

¹⁶ *See infra* Sections II.D-G.

¹⁷ *See, e.g., United States v. Ross*, 58 F.3d 154, 159 (5th Cir. 1995).

¹⁸ *See id.*

¹⁹ *See Iannelli v. United States*, 420 U.S. 770, 777-78 (1975); *Pinkerton v. United States*, 328 U.S. 640, 644 (1946).

²⁰ 18 U.S.C. § 2(a).

²¹ *Rosemond v. United States*, 572 U.S. 65, 71 (2014).

²² *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (“[T]he rules for determining aiding and abetting liability are unclear . . .”).

necessary to establish that an aider and abettor participated in every element of the crime to satisfy the actus reus component, and there can be a conviction even if the aid pertains only to one of the crime's elements.²³ The statutory language "aid and abet" comprehends "all assistance rendered by words, acts, encouragement, support, or presence."²⁴ The amount of aid can be "minimal"; "[t]he quantity [of assistance] [is] immaterial," so long as the accomplice did "something" to aid the crime.²⁵ Thus, aiding and abetting is somewhat broader than conspiracy: "It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy."²⁶

The mens rea necessary to satisfy the intent element is not entirely clear.²⁷ "There is some tension" in the Supreme Court's cases on this point, with some cases suggesting a requirement of acting "purposefully or with intent" and others requiring mere knowledge—though this is perhaps a distinction without much of a difference.²⁸ In its recent aiding and abetting case, *Rosemond v. United States*,²⁹ the Court found the "intent requirement satisfied when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense."³⁰ The knowledge must be "advance knowledge," meaning that it must permit the defendant the opportunity to choose to aid the crime or to walk away.³¹ The government must prove "a state of mind extending to the entire crime," and the defendant's "intent must go to the specific and entire crime charged."³² Unhelpfully, the *Rosemond* Court reserved the question of how to treat "defendants who incidentally facilitate a criminal venture rather than actively participate in it" (e.g., a gun store owner who sells

²³ *Rosemond*, 572 U.S. at 73.

²⁴ *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993) (quoting *Aid and Abet*, BLACK'S LAW DICTIONARY 68 (6th ed. 1990)).

²⁵ *Rosemond*, 572 U.S. at 73 (second alteration in original) (quoting ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW § 37a, at 106 (1882)).

²⁶ *Nye & Nissen v. United States*, 336 U.S. 613, 620 (1949).

²⁷ *See Rosemond*, 572 U.S. at 71.

²⁸ *Id.* at 84-85 (Alito, J., concurring in part and dissenting in part) ("The Court refers interchangeably to both of these tests and thus leaves our case law in the same, somewhat conflicted state that previously existed. But because the difference between acting purposefully (when that concept is properly understood) and acting knowingly is slight, this is not a matter of great concern."); *see also* *Pereira v. United States*, 347 U.S. 1, 11-12 (1954) (suggesting that a jury could convict a defendant of aiding and abetting when the defendant "shared [the principal's] knowledge and agreed with him" about the means of carrying out the crime); *Bozza v. United States*, 330 U.S. 160, 164-65 (1947) (implying a knowledge standard). *But see* *Nye & Nissen*, 336 U.S. at 619 ("In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938))).

²⁹ 572 U.S. 65 (2014).

³⁰ *Id.* at 77.

³¹ *Id.* at 78.

³² *Id.* at 76.

a gun to a criminal, “knowing but not caring how the gun will be used”).³³ This uncertainty leaves open the possibility that companies that support or assist Marijuana Businesses may themselves become Marijuana Businesses.

II. HYPOTHETICALS

With the foregoing legal backdrop in mind, this Part analyzes seven hypothetical companies that could potentially be classified as Marijuana Businesses, beginning with the most likely to be Marijuana Businesses and ending with the least likely. It sets forth the applicable law in each jurisdiction and applies that law to the factual circumstances presented to conclude whether each company is a Marijuana Business.

A. *Brad’s Buds LLC*

Brad’s Buds LLC (“Brad’s Buds”) obtains a Marijuana Producer Tier 3 license from the Washington State Liquor and Cannabis Board.³⁴ Brad’s Buds cultivates and packages cannabis and sells it to licensed marijuana processors.

This first scenario is an easy one. Brad’s Buds’s license permits (under Washington law) it to “produce, harvest, trim, dry, cure, and package marijuana into lots for sale at wholesale to cannabis licensees.”³⁵ This is precisely the conduct in which Brad’s Buds is engaging. Section 841(a)(1) of the CSA makes it “unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”³⁶ Under the CSA, “[t]he term ‘manufacture’ means the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin . . . and includes any packaging or repackaging of such substance”³⁷ “[P]roduction” means “the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.”³⁸ By definition, cultivating cannabis plants constitutes production, and this production and packaging of the plants in turn constitute manufacture, so Brad’s Buds is manufacturing cannabis. Further, under the CSA, “distribute” means to “deliver (other than by administering or dispensing) a controlled substance.”³⁹ By selling cannabis to licensed processors, Brad’s Buds is clearly distributing a controlled substance. The fact that Brad’s Buds obtained a license in Washington to

³³ *Id.* at 77 n.8.

³⁴ See *Producer License Descriptions and Fees*, WASH. STATE LIQUOR & CANNABIS BD., https://lcb.wa.gov/mjlicense/producer_license_discriptions_fees [https://perma.cc/6TZC-GL4H] (last visited Apr. 13, 2021).

³⁵ *Id.*

³⁶ 21 U.S.C. § 841(a)(1).

³⁷ *Id.* § 802(15).

³⁸ *Id.* § 802(22).

³⁹ *Id.* § 802(11).

produce cannabis and sell it to processors leaves no question that Brad's Buds is knowingly or intentionally manufacturing and distributing cannabis. Thus, Brad's Buds is violating an express provision of the CSA in two respects, making Brad's Buds a Marijuana Business.

B. *Entire Foods Market Inc.*

Entire Foods Market Inc. ("Entire Foods") is a national grocery chain focused on organic and locally sourced foods with over \$15 billion in annual revenue. Entire Foods starts selling marijuana brownies in its California stores. Entire Foods derives \$50,000 of its annual revenue from sales of these brownies.

Here, Entire Foods is selling—i.e., distributing⁴⁰—marijuana, this time to grocery store customers in the form of brownies. It is not plausible that Entire Foods's sales are anything other than knowing and intentional. Thus, again, Entire Foods is violating § 841(a)(1) of the CSA and is a Marijuana Business.

It is somewhat tempting to compare the \$50,000 in annual revenue Entire Foods derives from the marijuana brownies, which are sold only in its California stores, with the \$15 billion in annual revenue Entire Foods garners from its nationwide operations. This may lead to the conclusion that Entire Foods is not truly in the "business" of selling marijuana because the vast majority of its revenue comes from other, presumably legal, sources. Although this is a tempting argument, it is unlikely to be a successful one. Section 841(a)(1) of the CSA does not ask whether someone is "in the business" of, or has a "primary business" of, distributing a controlled substance. Nor does it excuse distribution that amounts to a small percentage of a business's total revenues.

On the contrary, § 841 provides substantial penalties for infractions involving even small amounts of marijuana. Under § 841(b)(1)(D), a violation of § 841(a) involving less than fifty kilograms of marijuana results in a prison sentence of up to five years, a fine of up to \$1 million for an entity defendant, or both.⁴¹ A person who distributes "a small amount of marijuana for no remuneration" faces reduced penalties for simple possession.⁴² This subsection is inapplicable, however, given that Entire Foods is selling brownies, not giving them away for free. Moreover, even if Entire Foods fell under this subsection, it would still be violating the CSA; it would simply face smaller penalties for doing so. Thus, because Entire Foods's brownie sales violate the CSA's prohibition on distributing a controlled substance, Entire Foods is a Marijuana Business.

C. *Wonderful Warehouses Corp.*

Wonderful Warehouses Corp. ("Wonderful") is an Illinois corporation that owns and leases warehouse space to a variety of tenants. Wonderful

⁴⁰ *See id.*

⁴¹ *Id.* § 841(b)(1)(D).

⁴² *Id.* §§ 841(b)(4), 844(a).

derives 25% of its revenues from leasing warehouse space to tenants engaged in the business of growing cannabis, with full knowledge of the tenants' businesses.

In this scenario, Wonderful rents warehouse space to cannabis cultivators, knowing that its premises are being used for the purpose of growing cannabis. The fact that Wonderful does not itself cultivate cannabis, combined with the fact that the vast majority of Wonderful's rental business does not involve cannabis, initially makes it seem as though Wonderful is safe from being deemed a Marijuana Business. Unfortunately for Wonderful, this is not the case.

Under CSA § 856(a)(2), it is unlawful to “manage or control any place, whether permanently or temporarily, . . . as an owner, . . . and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.”⁴³ Again, “manufacture” includes “production . . . of a drug or other substance,”⁴⁴ and “production” includes the “planting, cultivation, growing, or harvesting of a controlled substance.”⁴⁵ Wonderful manages a place as an owner (its warehouses) and knowingly and intentionally leases the space to cannabis growers so they can unlawfully manufacture (grow) a controlled substance (cannabis). Wonderful is thereby violating § 856(a)(2), which makes Wonderful a Marijuana Business.

D. *Galaxy Brands, Inc.*

Galaxy Brands, Inc. (“Galaxy”), a Fortune 500 company,⁴⁶ obtains an 8% equity interest in Mary Jane’s Syrups, LLC (“Mary Jane’s”), a Vermont-based company that makes and sells marijuana-infused maple syrup in its Vermont stores. Galaxy is a passive investor and does not have the right to appoint any members of Mary Jane’s management.

At first glance, a Fortune 500 company's minority, passive investment in a small private company seems unlikely to be problematic. Galaxy does not make

⁴³ *Id.* § 856(a)(2).

⁴⁴ *Id.* § 802(15).

⁴⁵ *Id.* § 802(22).

⁴⁶ The Fortune 500 list is a list of the 500 largest U.S. companies. *Fortune 500*, FORTUNE, <https://fortune.com/fortune500/> [<https://perma.cc/5A2X-L7VG>] (last visited Apr. 13, 2021). This example purposefully evokes comparisons to Fortune 500 alcoholic beverage maker Constellation Brands, Inc.'s recent investment of over \$4 billion in Canopy Growth Corporation, a Canadian company that sells medical and retail marijuana. *See* Press Release, Constellation Brands & Canopy Growth Corp., Constellation Brands to Invest \$5 Billion CAD (\$4 Billion USD) in Canopy Growth to Establish Transformative Global Position and Alignment (Aug. 15, 2018), <https://www.canopygrowth.com/wp-content/uploads/2018/08/CBI-CG-Press-Release-FINAL.pdf> [<https://perma.cc/NF7V-Q2X3>].

or distribute marijuana products, and it does not control⁴⁷ Mary Jane's, the company that does make and distribute those products. Determining whether Galaxy faces CSA liability requires a detour to review a recent bankruptcy case, *In re Malul*,⁴⁸ in which the Bankruptcy Court for the District of Colorado examined equity investment in Marijuana Businesses.⁴⁹

The debtor in *Malul* invested \$50,000 in Heartland Caregivers, LLC, a business that cultivated and sold medical marijuana to Colorado dispensaries.⁵⁰ The subscription agreement that the debtor executed entitled her to receive a percentage of Heartland's net revenues from operations until she recouped her initial investment, plus a percentage of all of Heartland's net revenues going forward.⁵¹ The debtor's investment was passive, affording her no voting rights or managerial powers.⁵² In vacating the debtor's motion to reopen her bankruptcy case to disclose her interests in Heartland as possible assets, the court found that the debtor's ownership interests in Heartland constituted a continuing violation of the CSA.⁵³ The court pointed to § 854(a), which makes it

unlawful for any person who has received any income derived, directly or indirectly, from a violation of [the CSA] . . . in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce.⁵⁴

Under § 854(c), "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."⁵⁵ The court also noted § 854(d), which provides that § 854 "shall be liberally construed to effectuate its remedial purposes."⁵⁶

Applying these provisions, the court found that

⁴⁷ For one possible definition of "control," see the Securities and Exchange Commission's formulation in 17 C.F.R. § 230.405 (2020): "The term *control* (including the terms *controlling*, *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." It is highly doubtful that Galaxy would be found to "control" Mary Jane's under this or any other variant of the definition.

⁴⁸ 614 B.R. 699 (Bankr. D. Colo. 2020).

⁴⁹ *Id.* at 701-02.

⁵⁰ *Id.*

⁵¹ *Id.* at 702.

⁵² *Id.*

⁵³ *Id.* at 713-14.

⁵⁴ 21 U.S.C. § 854(a).

⁵⁵ *Id.* § 854(c).

⁵⁶ *In re Malul*, 614 B.R. at 711 (quoting 21 U.S.C. § 854(d)).

it was illegal for [Heartland's founder] to incorporate Heartland, to solicit investments in Heartland, and to sell securities in Heartland. Concomitantly, it was illegal for [the debtor] to execute the Subscription Agreement and to own an interest in Heartland, and it would have been illegal for [the debtor] to accept distributions from Heartland on account of those interests.⁵⁷

The court did not point to any act by the debtor to cultivate or distribute marijuana in violation of § 841, “but rather, the illegality arose immediately upon the creation of [the debtor’s] equity interest by virtue of CSA § 854.”⁵⁸ Further, the court stated that the debtor’s criminal violations, by virtue of having executed the subscription agreement, could be pursued under a direct liability theory under § 854, a conspiracy theory under § 846, or an aiding and abetting theory under 18 U.S.C. § 2.⁵⁹

This is an extremely expansive reading of § 854, even given § 854(d)’s command to construe the section liberally. On its face, § 854 proscribes the use of marijuana-related funds to invest in, establish, or operate an enterprise that engages in or affects interstate commerce. In other words, it targets money laundering. It does not expressly prohibit investment of “clean,” non-marijuana-related funds in a company established to engage in the marijuana industry. Nor does it expressly prohibit acceptance of proceeds from a company engaged in the marijuana industry if those proceeds are not then used to invest in, establish, or operate a business engaged in or affecting interstate commerce. Perhaps this oversight stems from the fact that it seemed too obviously unnecessary to the statute’s drafters to bar investment in a company engaged in the marijuana industry, since that very engagement is prohibited under § 841.⁶⁰ Be that as it may, the court’s reading of § 854 is both novel and quite broad, insofar as the court reads into the text of the statute a blanket prohibition on investment in companies engaged in the marijuana industry.

Malul appears to be the first case in which a court has applied § 854 to non-drug-related money invested in a drug-related business. It remains to be seen whether other courts will take a similarly expansive view of § 854 or whether they will hew more closely to its text.⁶¹ If a court applies the *Malul* approach,

⁵⁷ *Id.* As a note, the court’s use of “incorporate” here is inaccurate, given that Heartland was a limited liability company—i.e., an unincorporated entity.

⁵⁸ *Id.* at 712.

⁵⁹ *Id.* at 711 n.84.

⁶⁰ See Newell, *High Crimes*, *supra* note 4, at 435-41 (describing the illegal purpose doctrine as applied to companies engaged in the marijuana industry); Newell, *Up in Smoke*, *supra* note 4, at 1361-62, 1364-69 (same).

⁶¹ In particular, the fact that this interpretation comes from a bankruptcy court potentially makes it less likely that other courts will follow suit. “[C]ourts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.” *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 240 (1934). *But see* Marcia S. Krieger, “*The Bankruptcy Court Is a Court of Equity*”: *What Does That Mean?*, 50 S.C. L. REV. 275, 299, 306 (1999) (contending that *Local Loan* misconstrues and misquotes a case it relies upon for the proposition that bankruptcy courts are courts in equity). The equity label, though of questionable accuracy, is

Galaxy appears to be in trouble: Galaxy has purchased an interest in a company with activities that almost certainly affect interstate or foreign commerce, given the Supreme Court's broad interpretation of this commerce standard.⁶² According to *Malul*, the acts of executing an investment agreement with Mary Jane's, owning the equity interest in Mary Jane's, and accepting any distributions from Mary Jane's on account of that interest would all constitute violations of § 854. Under this approach, it does not matter that Galaxy is a passive investor with a very small minority interest. The investment was illegal ab initio, and it makes Galaxy a Marijuana Business.

If a court applies § 854 more strictly, Galaxy's situation is more equivocal. On its face, the section does not bar Galaxy from investing non-marijuana-related funds into Mary Jane's. The mere fact of its equity ownership would not make Galaxy a Marijuana Business. Galaxy would, however, violate § 854 if it received any income from Mary Jane's and then used that income (or its proceeds) to invest in or start another business affecting interstate commerce. Likewise, since Galaxy, as a Fortune 500 company, is almost certainly engaged in interstate commerce, it would violate § 854 if it used any part of its proceeds from Mary Jane's to finance its own operations. Thus, Galaxy technically could invest in Mary Jane's without running afoul of § 854, but it would be extremely difficult to reap any financial benefits of that investment without doing so.

Regardless of whether § 854 is construed broadly or narrowly such that Galaxy is found to have violated it, Galaxy also risks being ensnared by a conspiracy theory of liability under § 846 or an aiding and abetting theory of liability under 18 U.S.C. § 2. To convict someone of conspiracy under § 846, the Second Circuit requires proof that the defendant (1) knew of the existence of the alleged scheme, (2) "knowingly joined and participated in it," and (3) had the specific intent to violate the underlying statute.⁶³ A conspirator need not know all of the conspiracy's details, but "the defendant must at least have had knowledge that a common endeavor existed"⁶⁴ and must have "intended to

used by bankruptcy courts "to justify discretionary decisions . . . , legitimize a particular determination," or "justify a deviation from accepted procedure or an order crafted for a particular situation." See Krieger, *supra*, at 298-306 (footnote omitted). This suggests that a court of general jurisdiction might apply the statutory text more strictly.

⁶² See *United States v. Lopez*, 514 U.S. 549, 559 (1995) (noting the "wide variety of congressional Acts regulating intrastate economic activity" that the Court found to have "substantially affected interstate commerce," including "intrastate coal mining," "intrastate extortionate credit transactions," "restaurants utilizing substantial interstate supplies," "inns and hotels catering to interstate guests," and "consumption of homegrown wheat"). Given the breadth of examples in which the Supreme Court has found an activity to substantially affect interstate commerce, it hardly seems a stretch to think that a company selling a retail marijuana product in stores available to interstate customers would be found to substantially affect both interstate and foreign commerce, especially since Vermont shares a border with Canada, which has fully legalized retail marijuana. See Cannabis Act, S.C. 2018, c 16 (Can.).

⁶³ *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984).

⁶⁴ *United States v. Nusraty*, 867 F.2d 759, 763 (2d Cir. 1989).

participate in it or to make it succeed.”⁶⁵ The Second Circuit permits proof of knowledge by establishing conscious avoidance—i.e., a conclusion that the defendant purposefully avoided gaining actual knowledge of a fact—when the facts permit such a conclusion to be reached.⁶⁶ Circumstantial evidence is sufficient to prove conspiracy.⁶⁷

Applying this test, first, Galaxy presumably knows that Mary Jane’s sells marijuana-infused maple syrup (a violation of § 841(a)(1)’s prohibition on distribution of a controlled substance⁶⁸), though proof of this knowledge, whether direct or circumstantial, is necessary. Investment documentation that makes reference to Mary Jane’s line of business would be a convenient way to establish knowledge, but only if that documentation specifies that Mary Jane’s sells syrup laced with marijuana. Otherwise, the prosecution may need to rely on a conscious avoidance instruction, asking the jury to conclude based on the circumstances that a company of Galaxy’s size would not be interested in Mary Jane’s unless it either actually knew or avoided knowing that Mary Jane’s was selling marijuana syrups.

Second, Galaxy has intentionally invested in Mary Jane’s. This demonstrates that Galaxy has participated in Mary Jane’s violation of the CSA by providing funding for Mary Jane’s operations. If the prosecution can establish Galaxy’s knowledge of Mary Jane’s marijuana-syrup sales, then Galaxy appears to have knowingly joined and participated in those sales by purchasing an equity stake. On the other hand, if the facts suggest that Galaxy invested in Mary Jane’s without knowing that Mary Jane’s infused its syrup with marijuana, this element would fail as well; its investment would still be intentional, but it would not have intended to participate in a scheme to distribute marijuana.

Finally, assuming Galaxy’s knowledge of the marijuana sales, it is likely possible to prove that Galaxy has the specific intent to violate both § 841(a)(1) and § 854. Galaxy’s purchase of an ownership interest in Mary Jane’s provides Mary Jane’s with capital to further its syrup sales, in violation of § 841(a)(1). Also, Galaxy’s equity interest is in an entity that uses marijuana-related income in its operations in violation of § 854. There is no indication that Mary Jane’s syrup sales are clandestine or that Galaxy has earmarked its investment funds for some other, legitimate business purpose. Thus, because Galaxy is

⁶⁵ *United States v. Cirillo*, 499 F.2d 872, 883 (2d Cir. 1974); *see also United States v. Cianchetti*, 315 F.2d 584, 588 (2d Cir. 1963) (requiring an “affirmative attempt” to further the purposes of the conspiracy); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940) (conspirator must “promote [the] venture himself . . . [and] have a stake in its outcome”).

⁶⁶ *See United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (“[A] conscious avoidance instruction may be given only (i) when a defendant asserts the lack of some specific aspect of knowledge required for conviction, and (ii) the appropriate factual predicate for the charge exists, *i.e.*, the evidence is such that a rational juror may reach the conclusion ‘beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.’” (citation omitted) (quoting *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993))).

⁶⁷ *United States v. Wardy*, 777 F.2d 101, 107 (2d Cir. 1985).

⁶⁸ *See* 21 U.S.C. § 841(a)(1).

intentionally financing the operations of a company that is selling a marijuana product, Galaxy can likely be convicted on a conspiracy liability theory under §§ 841(a)(1), 846, and 854, making Galaxy a Marijuana Business.

Alternatively, Galaxy could be liable on an aiding and abetting theory under 18 U.S.C. § 2. Criminal liability will attach under § 2 when the aider and abettor “(1) takes an affirmative act in furtherance of [the] offense, (2) with the intent of facilitating the offense’s commission.”⁶⁹ In the Second Circuit, the defendant’s act must have “actually contributed to the success of the specific crime that the defendant is charged with aiding and abetting.”⁷⁰ “[T]he quantum of assistance provided by an accomplice may be trifling, [but] it cannot be zero.”⁷¹ Defendants have the requisite intent when they “actively participate[] in a criminal venture with full knowledge of the circumstances constituting the charged offense,” “participate in it as in something that [they wish] to bring about’ and ‘seek by [their] action to make it succeed.”⁷² Knowledge can be established by proof of either actual knowledge or conscious avoidance of the relevant knowledge.⁷³ Both knowledge and intent may be established through circumstantial evidence.⁷⁴

Given the “low hurdle” of the aiding and abetting affirmative act requirement,⁷⁵ Galaxy’s provision of funding to Mary Jane’s likely supplies the necessary *actus reus*. Galaxy has not simply provided information to Mary Jane’s that is useful for participation in the marijuana industry,⁷⁶ sold Mary Jane’s equipment that happened to be used to make the syrup,⁷⁷ or merely

⁶⁹ *Rosemond v. United States*, 572 U.S. 65, 71 (2014).

⁷⁰ *United States v. Delgado*, 972 F.3d 63, 67 (2d Cir. 2020), *cert. denied sub nom. Anastasio v. United States*, 141 S. Ct. 1114 (2021). For instance, the Second Circuit has concluded that the facts did not support accomplice liability where the defendant agreed to try to obtain and deliver cocaine to an accomplice for resale but the accomplice obtained and later sold cocaine obtained from a different source. *See United States v. Labat*, 905 F.2d 18, 20-23 (2d Cir. 1990). The court reversed the defendant’s conviction because there was insufficient evidence to support the charge of possession with intent to distribute the specific batch of cocaine sold. *Id.* at 23.

⁷¹ *Delgado*, 972 F.3d at 75.

⁷² *Rosemond*, 572 U.S. at 76-77 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

⁷³ *See United States v. Reyes*, 795 F. App’x 10, 13 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2551 (2020).

⁷⁴ *See United States v. Cruz*, 363 F.3d 187, 199 (2d Cir. 2004).

⁷⁵ *Delgado*, 972 F.3d at 74; *see also supra* text accompanying notes 23-25.

⁷⁶ *See Mann v. Gullickson*, No. 15-cv-03630, 2016 WL 6473215, at *1, *4 (N.D. Cal. Nov. 2, 2016) (rejecting a complicity liability theory where the defendant provided hydroponic and licensing consulting services to people trying to enter the marijuana industry).

⁷⁷ *See In re Way to Grow, Inc.*, 597 B.R. 111, 126 (Bankr. D. Colo. 2018) (declining to find liability under 18 U.S.C. § 2 where the debtor sold hydroponic farming equipment that was used by customers including, but not limited to, marijuana growers).

recommended that Mary Jane's sell marijuana-laced syrup.⁷⁸ Instead, Galaxy has purchased an ownership interest in Mary Jane's and is, therefore, directly or indirectly funding Mary Jane's marijuana-syrup sales operations. If there were facts suggesting that Mary Jane's had a wide variety of operations—e.g., if Mary Jane's sold an assortment of non-marijuana-infused jams, cheeses, and honeys—then there could be some question of whether Galaxy is contributing to the success of this specific crime in making its equity investment. The question would grow thornier if Mary Jane's earmarked the capital raised from Galaxy's investment for building a new dairy barn, for example. But, assuming that Mary Jane's solely (or even primarily) makes marijuana-infused maple syrup, then a court would likely find that providing general funding to Mary Jane's contributes to its success in selling marijuana-infused syrup sufficiently for aiding and abetting liability.

Whether Galaxy has the requisite *mens rea* is less clear on these bare facts, but it is easy to imagine the case that a prosecutor might build. By purchasing an equity stake in Mary Jane's, Galaxy is actively participating in Mary Jane's criminal business venture, likely with full knowledge (or at least conscious avoidance) of exactly what Mary Jane's is selling, as discussed earlier with respect to conspiracy. The question is then whether Galaxy is seeking, by providing this funding, to make Mary Jane's sales succeed. The answer presumably is yes. Why would Galaxy invest in a syrup business it hoped would fail? Absent facts demonstrating a different reason for Galaxy's investment in Mary Jane's, the most plausible reason for its equity purchase is that Galaxy wants to aid Mary Jane's syrup sales and share in the resulting profits. Thus, it is likely that a court would find that Galaxy had the requisite intent and took the necessary affirmative act by investing to expose it to accomplice liability. So, whether under a direct or indirect theory of liability, Galaxy is likely to be a Marijuana Business.

E. *Larry's Landscaping Corp.*

Larry's Landscaping Corp. ("Larry's") offers a variety of landscaping services, including planting services, to its customers in Maine. Larry's was hired to plant cannabis plants for some local cannabis cultivators on the cultivators' property. The cultivators supplied the plants. Larry's provided the tools, landscaping equipment, and personnel, and it planted the plants.

This next scenario similarly provides several avenues by which a company that is not squarely in the marijuana industry could be deemed a Marijuana Business. The first is again under CSA § 841(a), banning the knowing or intentional "manufacture" of "or possess[ion] with intent to manufacture"

⁷⁸ See *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (implicitly rejecting argument that a doctor's recommendation that a patient use medical marijuana encourages illegal marijuana use).

marijuana.⁷⁹ As discussed before, under § 802(15), the term “manufacture” includes the “production” of a controlled substance,⁸⁰ and under § 802(22), “production” means “the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.”⁸¹ If planting constitutes production and production constitutes manufacture, then Larry’s planting cannabis plants constitutes manufacturing a controlled substance. The only real question is whether Larry’s planted knowingly or intentionally.

Though we would certainly need more facts to prove the crime, the planting, and therefore the manufacture, was likely both knowing and intentional. Larry’s was hired by cannabis cultivators to plant cannabis plants. Imagine that the cannabis cultivators called Larry’s and said, “We are cannabis cultivators. We’d like to hire you to plant cannabis plants for us.” Larry’s then agreed, and Larry’s employees then did plant the plants. Larry’s pretty clearly has the positive intent to plant cannabis plants. Because of the CSA definitions of “production” and “manufacture,” Larry’s intent to plant cannabis is necessarily intent to manufacture cannabis.

The situation is somewhat trickier if the cultivators had hired Larry’s to plant “some plants” but did not disclose that they are cannabis cultivators, or even used aliases to conceal the nature of their businesses.⁸² Then, the inquiry would focus more on Larry’s knowledge in planting the plants. “[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.”⁸³ In other words, Larry’s would need to know that its employees are not only planting plants but are also specifically planting cannabis and not, say, begonias.⁸⁴ This knowledge need not necessarily be positive knowledge. In the First Circuit, proof of either actual knowledge or “willful blindness” can satisfy the knowledge element.⁸⁵ Willful blindness occurs when

“(1) the defendant claims lack of knowledge; (2) the evidence would support an inference that the defendant consciously engaged in a course of deliberate ignorance; and (3) the proposed instruction, as a whole, could not lead the jury to conclude that an inference of knowledge [is] mandatory.” Evidence sufficient to meet requirement (2) can include

⁷⁹ 21 U.S.C. § 841(a).

⁸⁰ *Id.* § 802(15).

⁸¹ *Id.* § 802(22).

⁸² See *In re Way to Grow*, 597 B.R. at 129 (commenting that many of the debtor’s marijuana-industry customers used aliases in lieu of their businesses’ real names when dealing with the debtor).

⁸³ *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009).

⁸⁴ See *Hoover v. Wise*, 91 U.S. 308, 310 (1876) (“The general doctrine, that the knowledge of an agent is the knowledge of the principal, cannot be doubted.”); *Sperry Rand Corp. v. Hill*, 356 F.2d 181, 187 (1st Cir. 1966) (“What an agent learns within the scope of his authority is, normally, imputed to the principal.”).

⁸⁵ *E.g.*, *United States v. Pérez-Meléndez*, 599 F.3d 31, 41 (1st Cir. 2010); *United States v. Griffin*, 524 F.3d 71, 77 (1st Cir. 2008).

evidence that the defendant was confronted with “red flags” but nevertheless said, “I don’t want to know what they mean.”⁸⁶

If the circumstances put Larry’s on notice that it was being hired to plant cannabis but Larry’s deliberately remained ignorant of the nature of the plants being planted, that would be sufficient knowledge for its employees to have knowingly planted cannabis plants, and thereby to have knowingly manufactured marijuana. Although unlikely, it is theoretically possible to imagine that no Larry’s employees and none of its agents knows that the plants involved are cannabis plants or that the customers involved are cannabis cultivators. In those unlikely circumstances, Larry’s could perhaps avoid violating § 841(a)(1) and, thus, avoid being a Marijuana Business.

The analysis under § 846’s conspiracy theory would turn on similar facts. In the First Circuit, proof of a conspiracy under § 846 requires proof of “the existence of a conspiracy, the defendant’s knowledge of the conspiracy, and the defendant’s voluntary participation in the conspiracy.”⁸⁷ This further requires proof of “an intent to agree and an intent to effectuate the commission of the substantive offense.”⁸⁸ The First Circuit also provides that willful blindness may satisfy the knowledge of the conspiracy element, though it is insufficient to show intent to join the conspiracy.⁸⁹ The government may prove the agreement by circumstantial evidence rather than express agreement.⁹⁰

On this theory, it is not necessary to prove that Larry’s itself manufactured marijuana—though that seems relatively easy to do under the CSA’s definition of “manufacture” and related words. Instead, under the First Circuit’s conspiracy test, the government would have to prove that Larry’s had the intent to enter into an agreement with the cultivators to plant cannabis, knowledge that it was planting cannabis, voluntary participation in the planting of cannabis, and intent to effectuate the manufacture of cannabis. First, Larry’s was hired to plant cannabis plants, meaning it affirmatively agreed with the cultivators that it would plant plants. Next, Larry’s voluntarily participated in the planting of the cannabis plants by doing the planting. What remains to be solved is whether Larry’s had knowledge that it was planting cannabis and whether it intended to effectuate the manufacture of cannabis.

These two elements are intertwined. Larry’s certainly intended to plant plants and presumably intended to see them grow so that it would not face angry customers seeking refunds or replacement plants. If Larry’s knew that it was planting cannabis plants, its desire to see them grow would constitute intent to

⁸⁶ *United States v. Ford*, 821 F.3d 63, 74 (1st Cir. 2016) (alteration in original) (citation omitted) (quoting *United States v. Gabriele*, 63 F.3d 61, 66 (1st Cir. 1995)).

⁸⁷ *United States v. Gomez-Pabon*, 911 F.2d 847, 852 (1st Cir. 1990).

⁸⁸ *United States v. Piper*, 35 F.3d 611, 615 (1st Cir. 1994); *see also* *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978) (“In a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.”).

⁸⁹ *See* *United States v. Lizardo*, 445 F.3d 73, 85 (1st Cir. 2006).

⁹⁰ *Id.* at 81.

effectuate the commission of the substantive offense of manufacturing cannabis.⁹¹ If, instead, Larry's was hired by cultivators hiding behind aliases and Larry's was entirely unaware of the nature of the plants it was planting, it likely can avoid the conspiracy charge. But, if the evidence (including circumstantial evidence) proves that Larry's was aware of a high probability that it was being hired to plant cannabis but intentionally refrained from inquiring about the nature of the plants, that could be deemed willful blindness toward the scheme to manufacture cannabis. Because it seems likely that Larry's knew or was willfully blind regarding the fact that it was planting cannabis, the fact that Larry's planted the plants would constitute Larry's voluntary participation in the conspiracy with the requisite knowledge, thereby making Larry's a Marijuana Business.

Finally, Larry's could be held liable on an aiding and abetting theory under 18 U.S.C. § 2. To prove aiding and abetting, the prosecution must show that the defendant (1) took "an affirmative act in furtherance of [the] offense, (2) with the intent of facilitating the offense's commission."⁹² The First Circuit considers whether the defendant "associate[d] himself with the venture, that he participate[d] in it as something he wish[ed] to bring about, that he [sought] by his action to make it succeed."⁹³ The defendant must be shown to be "a participant rather than merely a knowing spectator."⁹⁴ The defendant must have "participated with advance knowledge of the elements that constitute the charged offense."⁹⁵ This means the defendant must actually know, not just have reason to believe, that the facts that make the defendant's conduct meet the elements of the offense, though this knowledge may come from willful blindness.⁹⁶ Moreover, the defendant's knowledge may be proved through circumstantial evidence.⁹⁷

The facts indicate that cannabis cultivators hired Larry's to plant cannabis plants and that Larry's planted those plants. The offense is manufacturing cannabis. By planting the cannabis plants, Larry's has taken an affirmative act in furtherance of the offense of cannabis manufacture.

⁹¹ Here, the record shows beyond hope of contradiction that appellant, whether or not he meant personally to participate in the distribution of the contraband, nonetheless knowingly assisted in its asportation, with foreknowledge that the conspiracy extended beyond the theft to the eventual disposal at some later date of the purloined marijuana (totaling over 145 kilograms). He thus possessed the requisite *mens rea*.

Piper, 35 F.3d at 615.

⁹² *United States v. Encarnación-Ruiz*, 787 F.3d 581, 587 (1st Cir. 2015) (quoting *Rosemond v. United States*, 572 U.S. 65, 71 (2014)).

⁹³ *United States v. Martinez*, 479 F.2d 824, 829 (1st Cir. 1973) (alterations in original) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).

⁹⁴ *Id.* (quoting *United States v. Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962)).

⁹⁵ *Encarnación-Ruiz*, 787 F.3d at 588 (citing *Rosemond*, 572 U.S. at 68).

⁹⁶ *Staples v. United States*, 511 U.S. 600, 607 n.3 (1994); *United States v. Ford*, 821 F.3d 63, 73-74 (1st Cir. 2016).

⁹⁷ *United States v. Fernández-Jorge*, 894 F.3d 36, 47 (1st Cir. 2018).

Next, the government must show that Larry's had the intent to facilitate the manufacture of cannabis. To this end, Larry's has certainly associated itself with the manufacturing venture—its contractual agreement with the cultivators to plant their plants easily establishes this. The question remains whether Larry's participated in the growing of cannabis as something it wished to bring about and sought by its action to make succeed. In all likelihood, Larry's is indifferent as to whether the cannabis cultivators run successful, profitable cannabis cultivation operations. Larry's does not stand to gain from the relationship with the cannabis cultivators beyond the contractual amount paid to Larry's to plant plants. In this way, Larry's resembles the fertilizer seller discussed below⁹⁸—happy to sell its services/product but not engaged in the venture beyond that. This makes it seem as though there is insufficient evidence that Larry's relationship satisfies the elements for aiding and abetting liability, particularly if the required mens rea is purpose, rather than mere knowledge.

But, there is a critical distinction here: Larry's presumably wants the plants to thrive, if only because it does not want to provide a replacement or a refund for the failed plants.⁹⁹ Unlike a fertilizer seller, Larry's may retain some stake in what happens after the contract has been performed. In planting the cannabis plants, Larry's is using its efforts to make the operations succeed, inasmuch as it wants its planting efforts to succeed. Larry's thus could be found to have the requisite intent of active participation in the crime with full knowledge of the circumstances¹⁰⁰—assuming, of course, that Larry's knows it is planting cannabis and not begonias. If Larry's does not actually know that it is planting cannabis and is not willfully blind to that fact, then it likely does not have the requisite mens rea and would not be liable for aiding and abetting the cannabis growers' manufacture of cannabis. But, for the reasons discussed in connection with the conspiracy theory, Larry's most likely does have that knowledge, which means Larry's is likely a Marijuana Business.

F. *Frida's Fertilizers LLP*

Frida's Fertilizers LLP ("Frida's") sells organic fertilizer to commercial farmers in Colorado. Frida's sells to a broad base of customers but derives

⁹⁸ See *infra* Section II.F.

⁹⁹ Of course, the agreement between Larry's and the cultivators could provide that Larry's would plant the plants and the risk of plant failure would lie with the cultivators. Though this would minimize Larry's association with the venture, the government could still argue that Larry's wants the plants to grow to maintain its reputation as a landscaping company. A company known for planting duds and leaving its customers empty-handed is not likely to remain in business. It is for this reason that companies selling plants tend to offer some degree of guarantee. See, e.g., *Return Policy*, HOME DEPOT, https://www.homedepot.com/c/Return_Policy [<https://perma.cc/MAD4-CSQQ>] (last visited Apr. 13, 2021) (offering a one-year guarantee on shrubs, perennials, and trees); *Store Services*, LOWES, <https://www.lowes.com/l/store-services.html> (last visited Apr. 13, 2021) (same).

¹⁰⁰ See *Rosemond*, 572 U.S. at 76.

65% of its revenues from sales to cannabis cultivators. Frida's is aware that its customers are using the fertilizer to grow cannabis.

At first blush, Frida's seems as though it could escape being a Marijuana Business, and the complicity theories seem the most promising way to ensnare it. In the Tenth Circuit, a conspiracy conviction requires that "(1) there was an agreement to violate the law; (2) the defendant knew the essential objectives of the conspiracy; (3) the defendant knowingly and voluntarily took part in the conspiracy; and (4) the coconspirators were interdependent."¹⁰¹ The agreement may be inferred from the relevant facts and circumstances.¹⁰² Circumstantial evidence may establish the defendant's participation in the venture, "and the level of participation may be of 'relatively slight moment.'"¹⁰³ The government must prove that the conspirators shared a common purpose, though knowledge can be inferred, and proof that the defendant "had 'a general awareness of both the scope and the objective' of the conspiracy" can help establish knowing and voluntary participation.¹⁰⁴ Knowing participation can be inferred when the defendant acts in furtherance of the conspiracy's objectives.¹⁰⁵ "Interdependence is present when 'each alleged coconspirator . . . depend[s] on the operation of each link in the chain to achieve the common goal.'"¹⁰⁶ The defendant's actions must facilitate either the other coconspirators' objectives or the conspiracy as a whole.¹⁰⁷

The Tenth Circuit has recognized that the same evidence that supports a conspiracy conviction under the CSA can also support an aiding and abetting conviction under 18 U.S.C. § 2.¹⁰⁸ Aiding and abetting liability attaches when a person "(1) takes an affirmative act in furtherance of [the] offense, (2) with the intent of facilitating the offense's commission,' i.e., 'with full knowledge of the circumstances constituting the charged offense.'"¹⁰⁹ In the Tenth Circuit, "[a] conviction for aiding and abetting can rest on a wide range of underlying conduct, including 'acts, words or gestures encouraging the commission of the

¹⁰¹ *United States v. Isaac-Sigala*, 448 F.3d 1206, 1210 (10th Cir. 2006) (citing *United States v. Riggins*, 15 F.3d 992, 994 (10th Cir.1994)).

¹⁰² *United States v. Evans*, 970 F.2d 663, 669 (10th Cir. 1992).

¹⁰³ *Isaac-Sigala*, 448 F.3d at 1210 (quoting *United States v. Anderson*, 189 F.3d 1201, 1207 (10th Cir. 1999)).

¹⁰⁴ *United States v. Carter*, 130 F.3d 1432, 1440 (10th Cir. 1997) (quoting *Evans*, 970 F.2d at 670). *But see Evans*, 970 F.2d at 670 ("This is not to say, however, that a defendant may be convicted of a conspiracy that defies common sense simply because he or she possesses a general awareness of the breadth of its illegal activities.").

¹⁰⁵ *Carter*, 130 F.3d at 1440.

¹⁰⁶ *Evans*, 970 F.2d at 670 (alterations in original) (quoting *United States v. Fox*, 902 F.2d 1508, 1514 (10th Cir. 1990)).

¹⁰⁷ *Id.*

¹⁰⁸ *See Isaac-Sigala*, 448 F.3d at 1210.

¹⁰⁹ *United States v. Deiter*, 890 F.3d 1203, 1214 (10th Cir. 2018) (quoting *Rosemond v. United States*, 572 U.S. 65, 71, 77 (2014)).

offense, either before or at the time of the offense.”¹¹⁰ “Even mere ‘words or gestures of encouragement’ constitute affirmative acts capable of rendering one liable under this theory.”¹¹¹ While the actus reus element of aiding and abetting presents a rather low bar, the mens rea element is a somewhat bigger hurdle: the Tenth Circuit requires proof that the defendant both “shared in the ‘intent to commit the underlying offense,’ [and also] ‘willfully associated with the criminal venture.’”¹¹² Thus, inadvertent assistance with a crime unknown to the defendant will not result in aiding and abetting liability,¹¹³ though intent “may be inferred from the surrounding circumstances.”¹¹⁴

In this case, Frida’s sells fertilizer, which is a product generally applicable to a variety of crops. Though it is knowingly selling to cannabis growers, its sales are not contingent upon or directly affected by the fact that the farmers are growing cannabis, as opposed to a legal crop. Unlike the relationship between Larry’s and the growers in the previous Section, Frida’s relationship with the growers appears to end when the sale is concluded.

In an analogous situation, the Bankruptcy Court for the District of Colorado declined to characterize a hydroponic gardening supply company as violating the CSA on a conspiracy or aiding and abetting theory when the debtor’s business served a variety of customers, including customers outside of the marijuana industry; it intended to sell products to any hydroponic gardeners, not only to cannabis growers; and the debtor’s products were applicable to any hydroponically grown crops, not only to cannabis.¹¹⁵ Important to the court’s analysis was the lack of specific intent necessary to violate the CSA.¹¹⁶ The court found that the supply company had actual knowledge that it was selling to marijuana customers and had reason to believe that its customers would use the equipment to grow cannabis—essentially the situation that the Supreme Court reserved in *Rosemond*.¹¹⁷ The company sold products that would be cost prohibitive for growing anything other than cannabis, participated in marijuana industry trade shows, and even marketed its expertise in supplying the marijuana industry.¹¹⁸ Nonetheless, applying the Tenth Circuit’s aiding-and-abetting jurisprudence, the court found that the supply company lacked the intent to

¹¹⁰ *Williams v. Trammell*, 782 F.3d 1184, 1192 (10th Cir. 2015) (quoting *Wingfield v. Massie*, 122 F.3d 1329, 1332 (10th Cir. 1997)).

¹¹¹ *United States v. Bowen*, 527 F.3d 1065, 1078 (10th Cir. 2008) (quoting *United States v. Whitney*, 229 F.3d 1296, 1303 (10th Cir. 2000)).

¹¹² *United States v. Rosalez*, 711 F.3d 1194, 1205 (10th Cir. 2013).

¹¹³ *United States v. Rufai*, 732 F.3d 1175, 1190 (10th Cir. 2013).

¹¹⁴ *Gomez v. Lind*, No. 15-cv-02582, 2017 WL 6551147, at *9 (D. Colo. Oct. 16, 2017) (citing *Rosemond*, 572 U.S. at 78 n.9).

¹¹⁵ *In re Way to Grow, Inc.*, 597 B.R. 111, 126-27 (Bankr. D. Colo. 2018), *aff’d*, 610 B.R. 338 (D. Colo. 2019).

¹¹⁶ *See id.* at 126.

¹¹⁷ *Id.* at 129; *see also Rosemond*, 572 U.S. at 77 n.8 (reserving the question of incidental aid to a crime, such as a knowing gun sale to a criminal).

¹¹⁸ *In re Way to Grow*, 597 B.R. at 129-31.

violate the CSA and associate with the customers' violations thereof.¹¹⁹ It further declined to find that the debtor had conspired to violate the CSA, noting insufficient evidence of an actual agreement between the debtor and the purchasers of its equipment.¹²⁰ For similar reasons, Frida's is unlikely to be found guilty on either a conspiracy or an aiding and abetting theory.

Unfortunately for Frida's, though it likely escapes complicity liability, it has potential direct liability under the CSA. Section 843(a)(6) makes it unlawful to knowingly or intentionally "possess any . . . chemical, product, or material which may be used to manufacture a controlled substance . . . knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance."¹²¹ Further, § 843(a)(7) makes it unlawful to knowingly or intentionally "distribute . . . any . . . chemical, product, or material which may be used to manufacture a controlled substance . . . knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance. . . ."¹²² In the Tenth Circuit, to obtain a conviction under § 843(a)(6) or (7), "[t]he government must prove the defendant was aware, or had reasonable cause to believe, that the [chemical, product, or material] would be used for the specific purpose of manufacturing" a controlled substance.¹²³ Neither negligence nor recklessness with respect to the risk that the product being sold may be used to manufacture a controlled substance is sufficient.¹²⁴ Nor can the government obtain a conviction by proving that the defendant knew, intended, or had reasonable cause to believe the product would be put to some general illegal use; there must be knowledge as to the specific use of manufacturing a controlled substance.¹²⁵ Unlike the Eighth, Ninth, and Eleventh Circuits, which consider both subjective and objective factors in determining whether the mens rea element has been met in §§ 843(a)(6), 843(c)(7), and 841(c)(2) (which uses identical language), the Tenth Circuit interprets the "reasonable cause to believe" language as "akin to actual knowledge."¹²⁶ In other words, suspicions that a buyer's intended use is illegal or circumstances that would put a reasonable person on notice that something

¹¹⁹ *Id.* at 126.

¹²⁰ *Id.*

¹²¹ 21 U.S.C. § 843(a)(6).

¹²² *Id.* § 843(a)(7).

¹²³ *United States v. Truong*, 425 F.3d 1282, 1289, 1291 (10th Cir. 2005).

¹²⁴ *Id.* at 1289.

¹²⁵ *Id.*

¹²⁶ *Id.* (first quoting 21 U.S.C. §§ 841(c)(2), 843(6); and then quoting *United States v. Saffo*, 227 F.3d 1260, 1269 (10th Cir. 2000)). For circuits that include both objective and subjective considerations, see *United States v. Kaur*, 382 F.3d 1155, 1157-58 (9th Cir. 2004) (finding that the "reasonable cause to believe" standard of § 841(c)(2) is both an objective and subjective standard); *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005) (rejecting proffered jury instruction that required actual knowledge to convict under § 841(c)); and *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) (requiring either actual knowledge or a reasonable cause to believe the chemical would be used to manufacture a controlled substance).

illicit was occurring are insufficient in the Tenth Circuit.¹²⁷ A defendant has the requisite knowledge only if the defendant actually knows or intends that the chemical, product, or material the defendant possesses or distributes will be used to manufacture a controlled substance.

Here again, Frida's sells fertilizer to a number of customers, including cannabis growers. Frida's is aware that the customers are using the fertilizer to grow cannabis. As discussed earlier, under §§ 802(15) and (22), "growing" cannabis plants constitutes the "manufacture" of a controlled substance.¹²⁸ Thus, Frida's has actual knowledge that customers are using the fertilizer to manufacture a controlled substance.

Fertilizer is a "product" or "material" that may be used to grow (i.e., manufacture) cannabis. Frida's possesses the fertilizer. Frida's sells (i.e., "distributes")¹²⁹ the fertilizer to the cannabis growers. Frida's both possesses and distributes the fertilizer to the growers knowing that the growers will use it to manufacture cannabis, which puts Frida's in violation of §§ 843(a)(6) and (a)(7). This makes Frida's a Marijuana Business.

If the facts were different and Frida's only suspected, but did not know, that it was selling fertilizer to cannabis growers, Frida's likely could escape liability under the Tenth Circuit's strict interpretation of the § 843 mens rea requirements. The Tenth Circuit might decline to find the requisite intent even if Frida's could easily have gained that actual knowledge, though the Tenth Circuit does, in rare cases, grant a deliberate ignorance instruction.¹³⁰

¹²⁷ See *Truong*, 425 F.3d at 1290.

¹²⁸ See 21 U.S.C. § 802(15) (defining "manufacture" to include "production" of a drug); *id.* § 802(22) (defining "production" to include the "growing[] or harvesting of a controlled substance"); *supra* text accompanying notes 79-81.

¹²⁹ Section 802(11) defines "distribute" as "deliver (other than by administering or dispensing) a controlled substance." 21 U.S.C. § 802(11). The statute defines "dispense" as "to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance." *Id.* § 802(10). Frida's is not delivering fertilizer to cannabis growers pursuant to a practitioner's lawful order, so it is distributing—not dispensing—the fertilizer.

¹³⁰ See *United States v. Concha*, 233 F.3d 1249, 1252 (10th Cir. 2000). *Truong* makes clear the extent to which this instruction is rarely granted. There, the defendant sold pseudoephedrine multiple times from the gas station at which he worked in clandestine, after-hours sales. *Truong*, 425 F.3d at 1285. He told the police that he sold pseudoephedrine without knowing what the pills would be used for and that he did not keep records of his sales. *Id.* The sales were in cash, they were not rung into the cash register, and the product was sometimes concealed within a Styrofoam cup with a lid and straw. *Id.* at 1286. Nonetheless, the Tenth Circuit held that the evidence did not establish the specific mens rea necessary under § 843 because he did not have actual knowledge that the purchasers were planning to use the pseudoephedrine to make methamphetamine. *Id.* at 1291. Though "[t]he huge quantity and clandestine circumstances of the sales would surely have put any reasonable person on notice that something nefarious was going on," the court found the lack of specific knowledge of the intended purpose to make methamphetamine to be dispositive. *Id.* at 1290-91. Notably, in *Truong*, the government failed to challenge the district court's denial of a request for a "deliberate ignorance" jury instruction, so that was not considered on appeal. *Id.* at 1289 n.2.

Unfortunately for Frida's, these facts indicate that the company did know what its fertilizer was being used for, which means it falls within the text of the statute. Frida's thus is a Marijuana Business.

G. *Jovial Janitors Inc.*

Jovial Janitors Inc. ("Jovial") provides commercial cleaning services for a variety of retail establishments in New Jersey,¹³¹ including retail and medical marijuana dispensaries. Jovial's employees use roughly the same equipment and supplies for all of its customers. It does not provide any different or unusual services for its dispensary customers. Jovial does not solicit dispensaries as customers or market itself as having particular expertise cleaning marijuana-related businesses.

Jovial cleans the premises of businesses that are clearly violating § 841(a)(1) of the CSA.¹³² Cleaning buildings is not conduct that directly violates the CSA, so Jovial will be a Marijuana Business only if it can be convicted under a complicity theory. To prove a drug distribution conspiracy under § 846 in the Third Circuit, "the government must establish: (1) a shared unity of purpose between the alleged conspirators, (2) an intent to achieve a common goal, and (3) an agreement to work together toward that goal."¹³³ When a conspiracy involves intent to distribute a controlled substance, the Third Circuit requires the government "to introduce drug-related evidence, considered with the surrounding circumstances, from which a rational trier of fact could logically infer that the defendant knew a controlled substance was involved in the transaction at issue."¹³⁴ It is not necessary to prove that the "defendant knew all of the conspiracy's details, goals, or other participants,"¹³⁵ and either actual knowledge or deliberate ignorance can suffice to demonstrate the requisite knowledge.¹³⁶ A conspiracy can be proved on the basis of circumstantial

¹³¹ New Jersey voters approved the legalization of retail marijuana in a legislatively referred constitutional amendment on November 3, 2020. *New Jersey Residents Vote to Legalize Recreational Marijuana*, CBS PHILLY (Nov. 4, 2020, 7:45 AM), <https://philadelphia.cbslocal.com/2020/11/04/new-jersey-residents-vote-to-legalize-recreational-marijuana/> [<https://perma.cc/83EU-HTAF>]. Retail sales of marijuana are not expected in New Jersey until closer to the end of 2021, making this a somewhat fanciful example. Kimberly Davis, *Advocate Believes Recreational Marijuana Sales Won't Begin in New Jersey Until 'Closer to Next Christmas,'* CBS PHILLY (Nov. 4, 2020, 10:31 PM), <https://philadelphia.cbslocal.com/2020/11/04/advocate-believes-recreational-marijuana-sales-wont-begin-in-new-jersey-until-closer-to-next-christmas/>.

¹³² 21 U.S.C. § 841(a)(1).

¹³³ *United States v. Bailey*, 840 F.3d 99, 108 (3d Cir. 2016).

¹³⁴ *United States v. Boria*, 592 F.3d 476, 481 (3d Cir. 2010).

¹³⁵ *Bailey*, 840 F.3d at 108 (quoting *United States v. Perez*, 280 F.3d 318, 343 (3d Cir. 2002)).

¹³⁶ *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 425 (3d Cir. 2013) (en banc); see also *United States v. Caminos*, 770 F.2d 361, 365 (3d Cir. 1985) ("[A] 'deliberate ignorance' instruction must make clear that the defendant himself was subjectively aware of the high

evidence and can be inferred “when evidence of related facts and circumstances make clear that the defendants could not have carried out their activities ‘except as the result of a preconceived scheme or common understanding.’”¹³⁷

If Jovial were charged with a conspiracy to distribute marijuana in violation of § 841(a)(1), the government would need to prove that Jovial shared a goal with its dispensary customers to further the purpose of distributing marijuana (unity of purpose),¹³⁸ Jovial knew of the dispensaries’ goal of marijuana distribution and intended to achieve that goal, and Jovial and the dispensaries agreed to work together toward the goal of marijuana distribution. The government would be unlikely to gather the requisite proof, even if it relied upon circumstantial evidence.

Proving knowledge of the dispensaries’ distribution scheme would obviously be the least burdensome element. Jovial’s staff is cleaning marijuana dispensaries. Even if cleaning only occurs outside of business hours, it seems highly likely that the nature of the dispensaries’ businesses would be obvious. Unlike the type of clandestine drug deals that warrant judicial scrutiny as to the degree and nature of the alleged conspirator’s knowledge,¹³⁹ these marijuana sales are occurring in businesses operating as marijuana sellers—in broad daylight, as it were. If Jovial were part of a conspiracy to sell marijuana, it appears relatively easy to prove that Jovial is aware that the conspiracy involved marijuana sales.

Proof of charges against Jovial likely fail because it is probably not possible to establish that Jovial shared a unity of purpose with the marijuana dispensaries to sell marijuana and that it intended and agreed, whether tacitly or explicitly, to work together toward that goal. Unlike conspirators who drive the car to the drug sale,¹⁴⁰ serve as lookout for the seller,¹⁴¹ or are paid to transport suitcases they did not pack,¹⁴² Jovial is merely providing cleaning services. Perhaps it could be argued that clean dispensaries are likely to sell more marijuana, but this is a stretch, to put it mildly. Jovial does not solicit dispensary customers or provide any unusual services for the dispensaries. There is no logical link between the cleaning Jovial does and the marijuana sales from which it could be inferred that Jovial shares the dispensaries’ goal of selling marijuana, intends to achieve the goal of selling marijuana, or has agreed to work with the dispensaries toward that goal. Without this proof of agreement, Jovial almost certainly cannot be convicted of conspiracy under § 846.

probability of the fact in question, and not merely that a reasonable man would have been aware of the probability.”).

¹³⁷ *Bailey*, 840 F.3d at 108 (quoting *United States v. Kapp*, 781 F.2d 1008, 1010 (3d Cir. 1986)).

¹³⁸ *See United States v. Korey*, 472 F.3d 89, 93 (3d Cir. 2007).

¹³⁹ *See, e.g., Boria*, 592 F.3d at 481-82 (collecting cases in which the Third Circuit found insufficient evidence for a jury to infer that drugs were involved).

¹⁴⁰ *See, e.g., United States v. Alston*, 899 F.3d 135, 143-44 (2d Cir. 2018).

¹⁴¹ *See, e.g., United States v. Carrasco-Deleon*, 781 F. App’x 94, 95-96 (3d Cir. 2019).

¹⁴² *See, e.g., United States v. Caraballo-Rodriguez*, 726 F.3d 418, 433-34 (3d Cir. 2013) (en banc).

The second possible complicity theory to examine is aiding and abetting. The Third Circuit recognizes that, under *Rosemond*, convicting a defendant of aiding and abetting a crime requires proof that the defendant (1) took “an affirmative act in furtherance of [the] offense, (2) with the intent of facilitating the offense’s commission.”¹⁴³ Acting in furtherance of a crime requires “more than associat[ion] with individuals involved in the criminal venture.”¹⁴⁴ Neither mere knowledge of the crime nor presence at the scene is sufficient for a conviction.¹⁴⁵ Establishing the actus reus element requires proof that “the defendant associated himself with the venture and sought by his actions to make it succeed,” including “some affirmative participation which, at least, encourages the principal offender to commit the offense.”¹⁴⁶ Both words and actions can be the basis of aiding and abetting culpability.¹⁴⁷ To have the necessary mens rea, the defendant must know of the substantive crime’s commission and act with specific intent to facilitate it.¹⁴⁸ Intent to commit a crime is found when the defendant “actively participates in a criminal scheme knowing its extent and character.”¹⁴⁹ Circumstantial evidence can be sufficient to support an aiding and abetting conviction, provided that the connection between the facts and the conclusion is “logical and convincing.”¹⁵⁰

Applying these standards, it is unlikely that Jovial will be found guilty of aiding and abetting a CSA violation. The government can easily prove the substantive offense: the marijuana dispensaries are operating in violation of § 841(a)(1) by distributing a controlled substance. Likewise, the government can probably prove Jovial’s knowledge of the dispensaries’ CSA violations; even without direct evidence of knowledge, a reasonable juror could infer that someone who cleans a store knows what the store sells.

Where the proof fails is in establishing that Jovial took an affirmative act to further the marijuana sales and had the specific intent of facilitating those sales. Under the Third Circuit’s jurisprudence, the government would have to prove more than the facts that Jovial is associated with the dispensaries by contracting to clean them, knows of the dispensaries’ marijuana sales, and even is present at the dispensaries when the sales are taking place.¹⁵¹ Proof that Jovial affirmatively participated in the marijuana sales, trying to make them succeed, in some way that at least encouraged the dispensaries to sell marijuana is needed.

¹⁴³ *United States v. Whitted*, 734 F. App’x 90, 93 (3d Cir. 2018) (quoting *Rosemond v. United States*, 572 U.S. 65, 71 (2014)).

¹⁴⁴ *United States v. Dixon*, 658 F.2d 181, 189 (3d Cir. 1981).

¹⁴⁵ *United States v. Mercado*, 610 F.3d 841, 846 (3d Cir. 2010).

¹⁴⁶ *Id.*

¹⁴⁷ *United States v. Centeno*, 793 F.3d 378, 387 (3d Cir. 2015).

¹⁴⁸ *See id.* at 387.

¹⁴⁹ *United States v. Colvard*, No. 1:13-cr-00109, 2015 WL 5123893, at *10 (M.D. Pa. Sept. 1, 2015) (quoting *Rosemond*, 572 U.S. at 77).

¹⁵⁰ *Mercado*, 610 F.3d at 846 (quoting *United States v. Soto*, 539 F.3d 191, 194 (3d Cir. 2008)).

¹⁵¹ *See id.*

In contrast with the prior examples, Jovial is not doing anything here that truly furthers the marijuana sales. Jovial is not selling the marijuana itself.¹⁵² It is not leasing the space from which the marijuana is sold.¹⁵³ It is not providing funding for the dispensaries¹⁵⁴ or helping the dispensaries to acquire their product.¹⁵⁵ It is merely cleaning the buildings from which the marijuana is sold.

Again, perhaps customers are more likely to buy from a clean dispensary than a dirty one, but this link seems too attenuated to convict Jovial of aiding and abetting. It might be a different case if Jovial were receiving substantially all of its revenue from cleaning marijuana-related businesses, if it marketed itself specifically as a cleaner of dispensaries, if it had services or equipment specially tailored to marijuana-related businesses, or if it employed dispensary-cleaning specialists. In those circumstances, there would be a better argument that Jovial is not a cleaning service but a marijuana-industry cleaning service. The greater interrelation between Jovial's work, the survival of its business, and the success of its dispensary clients, the more plausible the argument that Jovial had the requisite intent to assist the dispensaries in their goal of selling marijuana.

The facts do not indicate any of this. Other than the fact that Jovial would prefer to have its customers remain in business (so they remain its customers), Jovial is relatively indifferent as to whether the dispensaries succeed in selling marijuana. It appears to offer generally applicable cleaning services that happen to be deployed at marijuana dispensaries but that would be equally useful elsewhere. Because Jovial lacks the specific intent to further the dispensaries' marijuana sales, it is not aiding and abetting those sales. Thus, Jovial is not a Marijuana Business.

III. EXTENSIONS AND CONCLUSIONS

As the foregoing examples demonstrate, the CSA casts a wide net of potential liability that may capture a number of seemingly innocent bystanders. It is easy to think of other companies that run the risk of being Marijuana Businesses,¹⁵⁶ such as the electricians that install grow lights, irrigation system companies that install systems for cultivation facilities, or even interior designers hired to make dispensaries look soothing and mellow. This discussion has purposefully excluded banks, law firms, and medical practices because their potential criminal liability is addressed elsewhere,¹⁵⁷ though they too could certainly be

¹⁵² See *supra* Sections II.A-B.

¹⁵³ See *supra* Section II.C.

¹⁵⁴ See *supra* Section II.D.

¹⁵⁵ See *supra* Sections II.E-F.

¹⁵⁶ Along this line, see generally Ryan Dadgari, *Powering Mary Jane: Marijuana and Electric Public Utilities* 10 GOLDEN GATE U. ENV'T L.J. 55 (2018) for a discussion of whether public utilities may face criminal liability for providing utility services to the marijuana industry.

¹⁵⁷ See generally, e.g., Hill, *supra* note 4; Kamin & Wald, *supra* note 4; Matt Lamkin, *Legitimate Medicine in the Age of Consumerism*, 53 U.C. DAVIS L. REV. 385, 445 (2019);

characterized as Marijuana Businesses. The Bankruptcy Court for the District of Colorado captured the situation nicely in *Malul*: “The result in this case emphasizes the need for professionals advising marijuana investors and entrepreneurs to account for the full breadth of prohibited acts under the CSA. . . . The law on these issues is not only in its infancy, but the results are highly fact specific.”¹⁵⁸ In other words, there is currently a lack of clear guidance about exactly how close a company can get to the marijuana industry before it is deemed a part of it.

What we know thus far is that the determination of when a company becomes a Marijuana Business is highly fact intensive and fact specific. Companies that obtain licenses to operate in the marijuana industry are the easiest cases; it is to no one’s surprise that they are Marijuana Businesses. It is also relatively simple—though not necessarily intuitive—to identify Marijuana Businesses based on their direct violations of the CSA, whether as landlords, equipment suppliers, or perhaps investors. The most difficult cases are companies that face only potential indirect liability under the conspiracy or aiding and abetting theories. They are difficult for two reasons: First, convicting these companies under those theories is so fact-intensive that it makes it harder to predict liability *ex ante*. And, second, these companies are engaging in conduct that is ostensibly wholly legal under both state and federal law. A company that sells marijuana-infused maple syrup knows (or should know) that it is selling marijuana in violation of the CSA. A company that sells organic fertilizer may not understand that its fertilizer constitutes a product that can be used to manufacture marijuana under circumstances that violate the CSA. And a janitorial services company almost certainly would not expect that mopping floors could be analyzed as potential evidence of a conspiracy to distribute marijuana. Although “ignorance of the law is typically no defense to criminal prosecution,”¹⁵⁹ it is not unreasonable for companies to want some clear guidance about how close to the marijuana industry fire they can get without getting burned.

With that in mind, courts, companies, and their advisors could consider a number of factors in evaluating cases that are not directly addressed under the CSA, including the following:

- (1) Percentage of the company’s revenue derived from the marijuana industry;¹⁶⁰

Raymond J. Walsh, Jr., Note, *Populations at Risk for Criminal Liability Under Compassionate Use Acts*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 275-76 (1999).

¹⁵⁸ *In re Malul*, 614 B.R. 699, 714 (Bankr. D. Colo. 2020).

¹⁵⁹ *McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015).

¹⁶⁰ *See, e.g., In re Way to Grow, Inc.*, 597 B.R. 111, 132 (Bankr. D. Colo. 2018) (“Debtors’ business activities constituting violations of the CSA are a major part of Debtors’ ordinary course of business. Whether marijuana-related customers account for 65% or 95% of Debtors’ revenue, eliminating all such revenue would be devastating to the Debtors.”), *aff’d*, 610 B.R. 338 (D. Colo. 2019); *Alterman v. Comm’r*, 115 T.C.M. (CCH) 1452, *1, *9 (2018) (considering derivation of revenue as a factor in determining whether the taxpayer had

- (2) Extent to which the company solicits business from customers clearly engaged in the marijuana industry;¹⁶¹
- (3) Whether the company markets itself as being part of the marijuana industry;¹⁶²
- (4) Degree to which the company offers products or services specialized for the marijuana industry (as opposed to generally applicable products or services);¹⁶³
- (5) Amount of capital the company invests in marijuana-related activity;¹⁶⁴
- (6) Percentage of the company's assets deployed in marijuana-related activity;
- (7) Amount of the company's physical space dedicated to marijuana-related activity;¹⁶⁵
- (8) Percentage of employee time engaged in marijuana-related activity;¹⁶⁶
- (9) Control, direct or indirect, of entities clearly engaged in the marijuana industry.¹⁶⁷

separate marijuana- and non-marijuana-related businesses for purposes of business-expense deductions under I.R.C. § 280E).

¹⁶¹ See, e.g., *In re Way to Grow*, 597 B.R. at 130 (describing the debtor companies' participation in marijuana-industry trade shows and their use of the shows to establish relationships with prospective customers).

¹⁶² See, e.g., *id.* at 130-31 (discussing press releases and "investor decks" used by the debtor companies to market themselves as suppliers for commercial cannabis growers).

¹⁶³ See, e.g., *id.* at 126 (declining to find conspiracy liability where the debtors' equipment sales were applicable to crops other than cannabis).

¹⁶⁴ See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM 20 (2017), https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf [<https://perma.cc/5UJK-U3GN>] (explaining that, when a company engages in multiple activities, "[i]deally, the principal good or service should be determined by its relative share of current production costs and capital investment at the establishment.").

¹⁶⁵ See, e.g., *Alt. Health Care Advocs. v. Comm'r*, 151 T.C. 225, 239-40 (2018) (considering the percentage of floor space dedicated to the taxpayer's marijuana- and non-marijuana-related activities to determine whether the taxpayer's non-marijuana-related activities constituted a separate trade or business for purposes of business-expense deductions under I.R.C. § 280E); *Californians Helping to Alleviate Med. Probs., Inc. v. Comm'r*, 128 T.C. 173, 176 (2007) (noting the percentage of the taxpayer's floor space dedicated to marijuana activity).

¹⁶⁶ See, e.g., *Alt. Health Care Advocs.*, 151 T.C. at 239-40 (considering the percentage of employee time dedicated to the taxpayer's marijuana- and non-marijuana-related activities).

¹⁶⁷ See, e.g., *Burton v. Maney (In re Burton)*, 610 B.R. 633, 634, 641 (B.A.P. 9th Cir. 2020) (affirming dismissal of a Chapter 13 bankruptcy case where the debtors owned a majority interest in a company engaged in the marijuana industry). *But see In re Malul*, 614 B.R. 699, 702, 711-12 (Bankr. D. Colo. 2020) (finding that debtor's investment in a company engaged in the marijuana industry was illegal notwithstanding the fact that the debtor had no

These factors would best be used by courts alongside direct evidence of actual knowledge and subjective intent as part of a totality-of-the-circumstances examination. Likewise, companies could utilize these factors in structuring their businesses and activities to avoid being Marijuana Businesses. Naturally, the more facts indicating that a company courts the marijuana industry and the more the company's viability depends upon the success of marijuana-industry customers, the more likely that company is to be a Marijuana Business.

This approach is imperfect because it does not clearly define the trip wire that companies must avoid hitting if they do not wish to become Marijuana Businesses. In this way, it is like a cardiologist's advice to eat a healthy diet: there is no telling exactly how much junk food can be eaten before the patient will have a heart attack, but each cheeseburger and hot fudge sundae contributes to the patient's risk. Ultimately, the patient will have to decide which indulgences are worth the coronary danger. Likewise, companies will have to decide which entanglements with the marijuana industry are worth the risk of becoming Marijuana Businesses.

Engaging in the modern marijuana industry couples this risk of criminal liability with substantial profit potential, much like operating a bootlegging operation during the Prohibition era.¹⁶⁸ The difference is that bootleggers and those who did business with them knew they were running unlawful businesses, while modern marijuana industry actors and supporting players may believe they are in the clear because their businesses are "legal" under state law. All indications suggest that the federal government is unlikely to take action against Marijuana Businesses operating in compliance with state laws,¹⁶⁹ but there is no guarantee that prosecutorial priorities will not change. Until then, those who choose to enter the marijuana industry, directly or indirectly, risk a visit from the fuzz and a trip to the big house.¹⁷⁰

voting rights in, or other indicia of control over, the company).

¹⁶⁸ See *A Bootlegger's Story*, *supra* note 1 (describing the profitability of the illegal liquor business during Prohibition).

¹⁶⁹ See Newell, *High Crimes*, *supra* note 4, at 105-09 (describing the federal government's evolving guidance on federal enforcement of the CSA against the state-legalized marijuana industry).

¹⁷⁰ SMOKY HILL MUSEUM, 1920S SLANG, https://www.smokyhillmuseum.org/file_download/inline/bdbdbb8-d584-42c5-bd7b-bb8b88c9870f [https://perma.cc/95JU-AWDW] (last visited Apr.13, 2021).