

1 Jeffrey A. Lake, Esq. (SBN 159234)  
JEFFREY A. LAKE, A.P.C.  
2 444 West "C" Street, Suite 400  
San Diego, CA 92101  
3 Telephone: (858) 487-5253  
4 Email: jlake@lakeapc.com

5 Attorneys for Defendant DARRYL COTTON

6  
7 **SUPERIOR COURT OF CALIFORNIA**  
8 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**  
9

CITY OF SAN DIEGO,	)	Case No.: 37-2016-00005526-CU-MC-CTL
	)	
Plaintiff,	)	<b>OPPOSITION TO EX PARTE</b>
vs.	)	<b>APPLICATION FOR TEMPORARY</b>
	)	<b>RESTRAINING ORDER OF DARRYL</b>
DARRYL COTTON in individual; and DOES	)	<b>COTTON</b>
1 through 50, inclusive,	)	
	)	IMAGED FILE
Defendants.	)	
	)	
	)	Date: March 17, 2016
	)	Time: 8:30 a.m.
	)	Dept.: C-61
	)	Judge: Hon. John S. Meyer
	)	Cmplt. Filed: February 18, 2016
	)	Trial Date: Not Set
	)	

19 **I.**

20 **INTRODUCTION**

21 Plaintiff, City of San Diego ("City") is attempting to procure a Temporary Restraining Order  
22 ("TRO") against Defendant DARRYL COTTON ("Cotton") the land owner of the property located at  
23 6176 Federal Blvd., San Diego ("Property"). The City has provided no evidence that Cotton has  
24 anything to do with the alleged operations of the business at the Property.

1 Furthermore, as the City points out in their moving papers:

- 2 1. An investigation of a dispensary operating at the Property commenced on October 21, 2015;
- 3 2. From August 3, 1987 to January 13, 2016, the Property was zoned to Southeastern San
- 4 Diego Planned District Industrial zone (SESDPD-I-1). **At that time, the zone allowed for**
- 5 **Medical Marijuana Consumer Cooperative (MMCC) with a Conditional Use Permit.**
- 6 (Emphasis added);
- 7 3. Effective January 14, 2016 that the Southeastern San Diego Planned District Industrial zone
- 8 was eliminated by the City of San Diego and the Property was rezoned to a Commercial
- 9 Office zone (CO-2-1) (See Declaration of City of San Diego Land Development
- 10 Investigator Rowdy Sperry dated February 24, 2016 at page 3 paragraphs 8 and 11).

11 Because at the time Cotton leased the Property MMCC's were a permissible use at the Property  
 12 and because Cotton has no involvement with the operation of the alleged MMCC at the Property,  
 13 Cotton has not violated the San Diego Municipal Code (SDMC), he is not the Responsible Party for the  
 14 alleged use at the Property and he should not enjoined for committing a perfectly legal act. Should a  
 15 Temporary Restraining Order (TRO) be issued against Cotton in this case it would be a Mandatory  
 16 Injunction, forcing him to evict his tenant as the result of a lease that at the time, was for a permissible  
 17 use.

18 **II.**

19 **POINTS AND AUTHORITIES**

20 **A. The Proposed Scope of the TRO is Overbroad.**

21 **a. If issued, the TRO should apply to the Tenant of Subject Property only.**

22 Plaintiff in this action bases their proposed TRO on the grounds that the tenant at the Property  
 23 does not have a Conditional Use Permit for the operation of a MMCC at the Subject Property.  
 24 However, as set forth above, Cotton is not operating a MMCC at the Subject property or anywhere else

1 in the City of San Diego. Plaintiffs have presented no evidence that Cotton is engaging in, or has in the  
2 past, engaged in any other activities that resulted in code violations within the City of San Diego or that  
3 there is any potential for irreparable harm at any location other than the Subject Property. Furthermore,  
4 at the time Cotton leased the Property MMCC's were a permissible use at the Property. Therefore,  
5 should a TRO be granted it should be limited to the tenant of Subject Property.

6 **b. Requiring Cotton to Evict the Tenant at the Subject Property is a Mandatory Act.**

7 An injunction is a court order by which an individual is required to perform, or is restrained  
8 from performing, a particular act; a writ framed according to the circumstances of the individual case.  
9 (See *American Heritage Dictionary of the English Language*, Fifth Edition 2011).

10 An injunction commands an act that the court regards as essential to justice, or it prohibits an  
11 act that is deemed to be contrary to good conscience. It is an extraordinary remedy, reserved for  
12 special circumstances in which the temporary preservation of the status quo is necessary.

13 A Preventive Injunction is an injunction directing an individual to refrain from doing an act is  
14 preventive, prohibitive, prohibitory, or negative. This type of injunction prevents a threatened injury,  
15 preserves the status quo, or restrains the continued commission of an ongoing wrong, but it cannot be  
16 used to redress a consummated wrong or to undo that which has already been done.

17 Although the court is vested with wide discretion to fashion injunctive relief, it is also restricted  
18 to restraint of a contemplated or threatened action. It also might compel Specific Performance of an act.  
19 In such a case, it issues a mandatory injunction, commanding the performance of a positive act.  
20 Because mandatory injunctions are harsh, courts do not favor them, and they rarely grant them.

21 Not only are mandatory injunctions disfavored by the courts, Plaintiff has offered no legal  
22 authority requiring Cotton to evict the tenant at the Property or requiring him to take any other  
23 measures to ensure compliance with the TRO. Therefore, Plaintiff's Ex parte Application for a TRO  
24 against Cotton should be denied.

1 **B. Defendant's are Entitled to an Automatic Stay because the Subject TRO is a Mandatory**  
2 **Injunction.**

3 *Assuming Arguendo* that this court issues a TRO against Cotton via Plaintiff's Ex Parte  
4 Application, this matter must be immediately stayed.

5 California Code of Civil Procedure section 904 provides:

6 An appeal may be taken in a civil action or proceeding as provided in Sections 904.1,  
7 904.2, 904.3, and 904.5.

8 California Code of Civil Procedure section 904.1 provides in pertinent part:

9 (a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other  
10 than in a limited civil case, may be taken from any of the following:

11 (6) From an order granting or dissolving an injunction, or refusing to grant or dissolve an  
12 injunction.

13 California Code of Civil Procedure section 916 provides:

14 (a) Except as provided in Sections 917.1 to 917.9, inclusive, and in Section 116.810, the  
15 perfecting of an appeal stays proceedings in the trial court upon the judgment or order  
16 appealed from or upon the matters embraced therein or affected thereby, including  
17 enforcement of the judgment or order, but the trial court may proceed upon any other  
18 matter embraced in the action and not affected by the judgment or order.

19 (b) When there is a stay of proceedings other than the enforcement of the judgment, the  
20 trial court shall have jurisdiction of proceedings related to the enforcement of the  
21 judgment as well as any other matter embraced in the action and not affected by the  
22 judgment or order appealed from.

23 Under California law, perfecting an appeal from a mandatory injunction automatically stays the  
24 injunction. *Paramount Pictures Corp. v. Davis*, 228 Cal. App. 2d 827 (1964). Under Section 916(a) of  
the California Code of Civil Procedure, the perfecting of an appeal stays the proceedings below. The  
trial court has no authority to hinder the stay of a mandatory injunction once an appeal is perfected,  
unless a specific statute provides otherwise. *Agricultural Labor Relations Bd. v. Superior Court*, 149  
Cal. App. 3d 709 (1983). The perfecting of an appeal by the filing of a notice of appeal generally  
stays proceedings in the trial court including the enforcement of the judgment. (Code of Civ. Proc., fn.

1 § 916, subd. (a); Cal. Rules of Court, rule 1(a.) *California Commerce Bank v. Superior Court (San Marcos National Bank)* 8 Cal. App. 4th 582 [10 Cal. Rptr. 2d 418] (1992).

The reason is straightforward: A mandatory injunction works a change in the status quo, and therefore a stay is necessary to preserve the parties' positions and prevent the Court of Appeal's decision from being mooted. This automatic stay applies only to mandatory, and not prohibitory, injunctions. And the appeal does not completely divest the trial court of jurisdiction; the trial court may continue to "proceed upon any other matter embraced in the action and not affected by the judgment or order" on appeal. Cal. Code Civ. Proc. Section 916(a). And the trial court has inherent authority to modify the injunction. See 6 Witkin, Cal. Proc.4th (1997) Prov. Rem. Section 396.

The current TRO, like the Injunction in *Feinberg, supra*, is mandatory. It compels Cotton to take affirmative action by evicting the tenant. As such, it is respectfully requested that should this honorable court issue a TRO against Cotton, the TRO be automatically stayed pending Defendant's appeal.

**a. Defendants Will Suffer Irreparable Harm if a TRO is Issued and a Stay is Not Granted.**

In deciding whether to grant a temporary restraining order, the court looks at two additional factors. "The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) "The ultimate goal of any test to be used . . . is to minimize the harm which an erroneous interim decision may cause." (*Id.* at p. 73.).

As set forth above, should Cotton be forced to evict the tenant at the Property he, among other things will lose the rental income necessary to pay the mortgage on the Property thereby subjecting the Property to foreclosure and the potential loss of ownership of the Property. He will incur the expense

1 of attorney’s fees and costs to pursue an eviction of the tenant. Should the tenant be evicted, the tenant  
2 could leave the Property damaged or in a state of disrepair. Furthermore, if evicted the tenant  
3 disappear thereby making the recovery of potential civil penalties levied against the property  
4 impossible to recover.

5 **C. Federal Law is Not Relevant or Controlling in This Proceeding.**

6 Any claim that Cotton is violating federal law, specifically the Controlled Substances Act  
7 (CSA), is irrelevant. Plaintiff does not have the power to prosecute Cotton in these proceedings under  
8 federal law because the San Diego Municipal Code is governed by California law.

9 In *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433 (*Tilehkooh*), the court refused to find a  
10 probation violation for use and possession of medical cannabis in violation of the federal marijuana  
11 laws. (*Id.* at p. 1436.) The court reasoned, “The California courts long ago recognized that state courts  
12 *do not enforce the federal criminal statutes.*” (*Id.* at p. 1445, italics added.) The *Tilehkooh* court held  
13 further:

14 The State tribunals have no power to punish crimes against the laws of the United  
15 States, as such. The same act may, in some instances, be an offense against the laws  
16 of both, and it is only as an offense against the State laws that it can be punished by  
the State, in any event.  
(*Id.* at p. 1433.)

17 Similarly, in *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, the court  
18 applied the reasoning in *Tilehkooh* to rule that the City had to return a qualified patient’s medical  
19 marijuana after it had been seized during a traffic stop because the act was strictly a federal, not a state  
20 offense. The court explained:

21 Unless the substance’s possession is also prohibited under state law, the state has no  
22 authority to invoke the sanction of destruction set forth in the statute. In other words,  
23 the question of whether a substance is lawfully possessed for purposes of Health and  
24 Safety code section 11473.5 turns on state, not federal law. If, as here, the defendant’s  
possession of a controlled substance is lawful under California law, then the  
substance is “lawfully possessed” for the purpose of that section.  
(*Id.* at p. 380.)

1 In 2010, the Fourth District Court of Appeal held that cities may not rely on federal preemption  
2 to ban medical cannabis collectives or dispensaries. (*Qualified Patients v. City of Anaheim* (2010) 187  
3 Cal.App.4th 734, 761-762 (*Qualified Patients*.) The court reasoned, “[A] city may not stand in for the  
4 federal government and rely on purported federal preemption to implement *federal legislative policy*  
5 *that differs from corresponding, express state legislation concerning medical marijuana.*” (*Ibid.*, italics  
6 added.)

7 **D. Warrantless Code Compliance Inspections are Illegal without Permission.**

8 San Diego Municipal Code section 12.0104 provides:

9 §12.0104 Authority to Inspect

10 A Director and any designated Enforcement Official are authorized to enter upon any  
11 property or premises to ascertain whether the provisions of the Municipal Code or  
12 applicable state codes are being obeyed, and to make any examinations and surveys as  
13 may be necessary in the performance of their enforcement duties. These may include the  
14 taking of photographs, samples or other physical evidence. All inspections, entries,  
15 examinations and surveys shall be done in a reasonable manner. If an owner, occupant or  
16 agent refuses permission to enter or inspect, the Enforcement Official may seek an  
17 administrative inspection warrant pursuant to the procedures provided for in California  
18 Code of Civil Procedure Section 1822.50 through 1822.59.

15 CCP § 1822.50 provides:

16 An inspection warrant is an order, in writing, in the name of the people, signed by a judge  
17 of a court of record, directed to a state or local official, commanding him to conduct any  
18 inspection required or authorized by state or local law or regulation relating to building,  
19 fire, safety, plumbing, electrical, health, labor, or zoning.

19 CCP § 1822.51 provides :

20 An inspection warrant shall be issued upon cause, unless some other provision of state or  
21 federal law makes another standard applicable. An inspection warrant shall be supported  
22 by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle  
23 to be inspected and the purpose for which the inspection is made. In addition, the  
24 affidavit shall contain either a statement that consent to inspect has been sought and  
refused or facts or circumstances reasonably justifying the failure to seek such consent.

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

CCP § 1822.53 provides:

Before issuing an inspection warrant, the judge may examine on oath the applicant and any other witness, and shall satisfy himself of the existence of grounds for granting such application.

CCP § 1822.55 provides:

An inspection warrant shall be effective for the time specified therein, but not for a period of more than 14 days, unless extended or renewed by the judge who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such inspection warrant must be executed and returned to the judge by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed, is void.

CCP § 1822.56 provides:

An inspection pursuant to this warrant may not be made between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, nor in the absence of an owner or occupant of the particular place, dwelling, structure, premises, or vehicle unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the regulation being enforced. An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning, which, if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. Where prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary in the circumstances shown.

See also, *Connor v. Santa Ana* (1989) 897 F.2d 1487, wherein the Ninth Circuit Court of Appeal held that police officers could not legally enter fenced, private property to abate a nuisance without a warrant, even though the property owner had been provided with extensive administrative hearings. In the absence of a property owner's and occupant's consent, barring exigent (emergency) circumstances, government officials engaged in the inspection of private property or abatement of a public nuisance must have a warrant to enter that private property where such entry would invade a constitutionally protected privacy interest.



1 Therefore, if granted, the TRO language requiring the allowance of warrantless code  
2 compliance searches at the Subject Property should be stricken.

3 **E. Arrest and Removal of Anyone at the Subject Property to Ensure Compliance with a TRO**  
4 **is Prohibited.**

5 San Diego Municipal Code section 12.0105 provides:

6 §12.0105 Power to Arrest

7 A Director or any designated Enforcement Official is authorized to arrest without a  
8 warrant any person whenever the Enforcement Official has reasonable cause to believe  
9 that the person has committed a violation of the Municipal Code or applicable state codes  
in his or her presence. Pursuant to Penal Code Section 836.5 the Enforcement Official  
can only arrest a person by issuing a misdemeanor field citation.

10 Not only are "obey the law" injunctions disfavored by the courts for being unnecessary, the  
11 City's attempt to circumvent the criminal search warrant requirements established by the constitution  
12 by seeking a TRO empowering the "arrest and removal" also directly violate the San Diego Municipal  
13 code. Therefore, if granted, the TRO language requiring the arrest and removal of people from the  
14 Subject Property should be stricken.

15 **III.**  
16 **CONCLUSION**

17 For the reasons set forth above Plaintiff's request for a Temporary Restraining Order should be  
18 denied. Alternatively, if granted, the Order should be limited in scope as set forth herein and an  
19 Automatic Stay should be issued.

20 Respectfully submitted,

21 Dated: 3/15/16

JEFFREY A. LAKE, A.P.C.

22 By: [Signature]  
23 Jeffrey A. Lake, Esq.  
24 Attorneys for Defendant  
DARRYL COTTON

