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F I L E D
Clerk of the Superior Court
MAY 03 2016

MAY 3 16 AM 10:31

5 Attorneys for Defendant DARRYL COTTON

By: S. Klars-Trent, Deputy

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
10)
11 Plaintiff,) **OPPOSITION TO ORDER TO SHOW**
vs.) **CAUSE WHY PRELIMINARY**
12) **INJUNCTION SHOULD NOT BE ISSUED**
DARRYL COTTON in individual; and DOES) **OF DARRYL COTTON**
13 1 through 50, inclusive,)
14 Defendants.) **IMAGED FILE**
15)
16) **Date: May 20, 2016**
17) **Time: 10:30 a.m.**
18) **Dept.: C-61**
19) **Judge: Hon. John S. Meyer**
20) **Cmplt. Filed: February 18, 2016**
21) **Trial Date: Not Set**
22)

21 **I.**

22 **INTRODUCTION**

23 On March 17, 2016 this honorable court denied Plaintiff, City of San Diego ("City") attempt to
24 procure a Temporary Restraining Order ("TRO") against Defendant DARRYL COTTON ("Cotton")
the land owner of the property located at 6176 Federal Blvd., San Diego ("Property").

1 To date the City has provided no evidence that Cotton has anything to do with the alleged
2 operations of the business at the Property.

3 Furthermore, as was confirmed at the TRO hearing:

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

13 Because at the time Cotton leased the Property MMCC's were a permissible use at the Property
14 and because Cotton has no involvement with the operation of the alleged MMCC at the Property,
15 Cotton has not violated the San Diego Municipal Code (SDMC), he is not the Responsible Party for the
16 alleged use at the Property and he should not be enjoined for committing a perfectly legal act.

17 Furthermore, on April 6, 2016, the San Diego Police department executed a search warrant on
18 the Premises (See NOL Exhibit A - Search warrant dated March 30, 2016) and seized everything
19 relevant to the search warrant from the Premises. Since that date, the Premises have remained vacant.

20 II.

21 POINTS AND AUTHORITIES

22 A. The Proposed Scope of the TRO is Overbroad.

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

24 Plaintiff in this action bases their proposed TRO on the grounds that the tenant at the Property

1 does not have a Conditional Use Permit for the operation of a MMCC at the Subject Property.
2 However, as set forth above, Cotton is not operating a MMCC at the Subject property or anywhere else
3 in the City of San Diego. Plaintiffs have presented no evidence that Cotton is engaging in, or has in the
4 past, engaged in any other activities that resulted in code violations within the City of San Diego or that
5 there is any potential for irreparable harm at any location other than the Subject Property. Furthermore,
6 at the time Cotton leased the Property MMCC's were a permissible use at the Property. Therefore,
7 should a TRO be granted it should be limited to the tenant of Subject Property.

8 **b. Plaintiff's Motion for Preliminary Injunction is Moot.**

9 It is not accurate to state that the law only requires proof of a violation of zoning law in order to
10 issue a permanent injunction. Rather, "[t]o qualify for a permanent injunction, the plaintiff must prove
11 (1) the elements of a cause of action involving the wrongful act sought to be enjoined and (2) the
12 grounds for equitable relief, such as, inadequacy of the remedy at law." (*City of South Pasadena v.*
13 *Department of Transportation* (1994) 29 Cal.App.4th 1280, 1293, citing 5 Witkin, Cal. Procedure (3d
14 ed. 1985) Pleading, § 774, p. 218.) Indeed, a permanent injunction should only issue if the court
15 determines that "equitable relief is appropriate." (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th
16 640, 646.)

17 Ordinarily, injunctive relief is available to prevent threatened injury and is not a
18 remedy designed to right completed wrongs. [Citations.] "It should neither serve as
19 punishment for past acts, nor be exercised in the absence of any evidence establishing
20 *the reasonable probability the acts will be repeated in the future. Indeed, a change*
21 *in circumstances at the time of the hearing, rendering injunctive relief moot or*
22 *unnecessary, justifies denial of the request. [Citation.]" Unless there is a showing*
23 *that the challenged action is being continued or repeated, an injunction should*
24 *be denied.* (Emphasis added).

(*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1403, fn. 6, italics added, citing
Gold v. Los Angeles Democratic League (1975) 49 Cal.App.3d 365, 372; and then citing *Scripps*
Health v. Marin (1999) 72 Cal.App.4th 324, 332-333; and then citing *Paul v. Milk Depots, Inc.* (1964)
62 Cal.2d 129, 132-133.)

1 In the present case, the Premises were cleared out by the San Diego police department and the
2 Premises have been vacant ever since. As such, there has been a change in circumstances in that the
3 tenant has vacated the Premises and Cotton is under a criminal investigation regarding the use of the
4 Premises.

5 **B. 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 **C. 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 CCP § 1822.53 provides:

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

4 CCP § 1822.55 provides:

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

8 CCP § 1822.56 provides:

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

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


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

3 **III.**
4 **CONCLUSION**

5 For the reasons set forth above Plaintiff's motion for Preliminary Injunction should be denied.
6 Alternatively, if granted, the Order should be limited in scope as set forth herein.

7 Respectfully submitted,
8 Dated: 5/2/16

JEFFREY A. LAKE, A.P.C.

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10 By: 
11 Jeffrey A. Lake, Esq.
12 Attorneys for Defendant
13 DARRYL COTTON
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Clerk of the Superior Court

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By: S. Klais-Trent, Deputy

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7 Attorneys for Defendant DARRYL COTTON

8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 CITY OF SAN DIEGO,)	Case No.: 37-2016-00005526-CU-MC-CTL
)	
11 Plaintiff,)	DECLARATION OF JEFFERY A. LAKE,
12 vs.)	ESQ. IN SUPPORT OF OPPOSITION TO
)	ORDER TO SHOW CAUSE WHY
13 DARRYL COTTON in individual; and DOES)	PRELIMINARY INJUNCTION SHOULD
14 1 through 50, inclusive,)	NOT BE ISSUED OF DARRYL COTTON
)	
15 Defendants.)	IMAGED FILE
)	
)	Date: May 20, 2016
)	Time: 10:30 a.m.
)	Dept.: C-61
)	Judge: Hon. John S. Meyer
)	Cmplt. Filed: February 18, 2016
)	Trial Date: Not Set
)	

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21 1. I am personally familiar with all of the facts and circumstances set forth in this
22 declaration and could and would competently testify to the same if required.

23 2. I am the owner and managing partner of Jeffrey A. Lake, A.P.C. (Lake APC) and
24 attorney of record for Defendant DARRYL COTTON in the above-entitled matter.

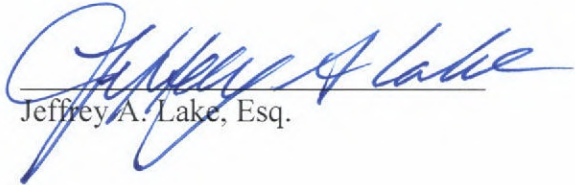
1 3. I am aware that pursuant to Penal Code section 1524 a search warrant was executed at
2 the premises located at 6176-6184 Federal Blvd., San Diego, California on April 4, 2016.

3 4. The premises located at 6176-6184 Federal Blvd., San Diego, California has been vacant
4 since April 6, 2016.

5 5. On May 1, 2016 I wrote the email lodged herewith as Exhibit B to San Diego Deputy
6 City Attorney Onu Omordia wherein I notified here that the premises located at 6176-6184 Federal
7 Blvd., San Diego, California has been vacant since April 4, 2016, and that she was welcome to conduct
8 an inspection of the Premises to confirm is was vacant.

9 I declare under penalty of perjury under the laws of the State of California that the foregoing is
10 true and correct.

11 Executed 5/2 2016, at San Diego, California.

12
13 
14 Jeffrey A. Lake, Esq.

1 Jeffrey A. Lake, Esq. (SBN 159234)
JEFFREY A. LAKE, A.P.C.
2 444 West "C" Street, Suite 400
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3 Telephone: (858) 487-5253
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Clerk of the Superior Court
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By: S. Klais-Trent, Deputy
MAY 3 '16 AM 10:31

5 Attorneys for Defendant DARRYL COTTON

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7
8 **SUPERIOR COURT OF CALIFORNIA**

9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 CITY OF SAN DIEGO,) Case No.: 37-2016-00005526-CU-MC-CTL
11)
Plaintiff,) **NOTICE OF LODGMENT IN SUPPORT**
12 vs.) **OF OPPOSITION TO ORDER TO SHOW**
13 DARRYL COTTON in individual; and DOES) **CAUSE WHY PRELIMINARY**
1 through 50, inclusive,) **INJUNCTION SHOULD NOT BE ISSUED**
14 Defendants.) **OF DARRYL COTTON**
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23) **Trial Date: Not Set**
24)

21 Defendant DARRYL COTTON hereby lodges the following in support of his Opposition to
22 Motion for Preliminary Injunction:

23 Exhibit A: Search warrant dated March 30, 2016;

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Exhibit B: Email from Jeffrey A. Lake, Esq. dated May 1, 2016.

Respectfully submitted,

Dated: 5/2/16

JEFFREY A. LAKE, A.P.C.

By: 
Jeffrey A. Lake, Esq.
Attorneys for Defendant
DARRYL COTTON

1 **NAME OF ACTION:** *City of San Diego v. Darryl Cotton*
2 **CASE NUMBER:** 37-2016-00005526-CU-MC-CTL

MAY 03 2016

12071912 MAY 3 16 00:31

3 **PROOF OF SERVICE**

By: S. Klais-Trent, Deputy

4 STATE OF CALIFORNIA, COUNTY SAN DIEGO

5 I, **JEFFREY A. LAKE**, am employed in the County of San Diego, CA. I am over the age of
6 18 years and not a party to the within action; my business address is 444 west C Street, Suite 400, San
7 Diego, CA 92101.

8 On 5/2, 2016 I served the foregoing document(s) described as on the interested parties
9 as follows: **OPPOSITION TO OSC RE: PRELIMINARY INJUNCTION AND**
10 **ACCOMPANYING NOTICE OF LODGMENT AND DECLARATION OF JEFFREY A.**
11 **LAKE OF DARRYL COTTON.**

Onu O. Omordia, Esq. 1200 Third Ave., Ste. 700 San Diego, CA 92101	
--	--

12 **BY MAIL:** I placed the documents in a sealed envelope and deposited such envelope in the
13 mail at San Diego, California. The envelope was mailed with postage thereon fully prepaid. I
14 am readily familiar with the firm's practice of collecting and processing correspondence for
15 mailing. It is deposited with U.S. postal service on that same day in the ordinary course of
16 business. I am aware that on motion of party served, service is presumed invalid if postal
17 cancellation date or postage meter date is more than one day after the date of deposit for
18 mailing in this proof of service.

19 **BY PERSONAL DELIVERY:** I hand-delivered a copy of the papers referenced above to
20 the above-referenced person together with an unsigned copy of this proof of service.

21 **BY ELECTRONIC SERVICE:** I caused a true PDF of the document to be transmitted by
22 my office computer at 444 west C Street, Suite 400, San Diego, CA 92101 on this date to the
23 interested parties at their email addresses referenced above.

24 **(STATE):** I declare under penalty of perjury under the laws of the State of California, that
the foregoing is true and correct.

Executed on 5/2, 2016 at San Diego, California.


JEFFREY A. LAKE