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F I L E D

Clerk of the Superior Court

NOV 10 2016
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By: S. Klais-Trent, Deputy

5 Attorneys for Defendant DARRYL COTTON
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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,) **RESPONSE TO SEPEATE STATEMENT**
12 vs.) **OF UNDISPUTED FACTS OF DARRYL**
13) **COTTON**
DARRYL COTTON in individual; and DOES)
14 1 through 50, inclusive,) IMAGED FILE
15)
Defendants.)
16)
17) Date: December 2, 2016
18) Time: 10:30 a.m.
19) Dept.: C-61
20) Judge: Hon. John S. Meyer
21) Cmplt. Filed: February 18, 2016
22) Trial Date: Not Set
23)
24)

21 Pursuant to California Code of Civil Procedure section 437c(b)(1) Defendant Darryl Cotton ("Cotton")
22 submits this *Response Separate Statement of Undisputed Material Facts*, together with references to
23 supporting evidence, in support of its Motion for Summary Judgment as to the City's Complaint.
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MOVING PARTY'S UNDISPUTED MATERIAL FACTS AND SUPPORTING EVIDENCE	OPPOSING PARTY'S RESPONSE AND SUPPORTING EVIDENCE
<p>1. The property at 6176 Federal Boulevard, San Diego, California, (PROPERTY), is owned by "Darryl Cotton, a single man" (COTTON).</p> <p>Notice of Lodgment (NOL), Exhibit 1 (Grant Deed); Declaration of Rowdy Sperry in Support of the City's Motion for Summary Judgment (Sperry Decl.), 2:27-28, 3:1-3.</p>	<p>Not disputed.</p>
<p>2. The PROPERTY is also identified as Assessor's Parcel Number 543-020-02.</p> <p>NOL, Exhibit 1 (Grant Deed); NOL, Exhibit 2 (Property Tracking System Parcel Information Report).</p>	<p>Not disputed.</p>
<p>3. SDMC section 111.0101(a) provides that Chapters 11 through 14 of the SDMC are known as the Land Development Code. Chapter 15 of the SDMC contains regulations pertaining to Planned Districts and is also part of the Land Development Code.</p> <p>RJN, Exhibit 2 (SDMC § 111.0101(a)).</p>	<p>Not disputed.</p>
<p>4. In March of 2014, the City Council passed an ordinance allowing the SDMC to include Medical Marijuana Consumer Cooperatives as a permitted use in limited commercial and industrial zones in the City of San Diego.</p> <p>Sperry Decl., 3:9-12; RJN, Exhibit 9 (SDMC § 141.0614).</p>	<p>Not disputed.</p>
<p>5. Medical Marijuana Consumer Cooperatives are classified as a separately regulated use and are codified in SDMC section 141.0614.</p>	<p>Not disputed.</p>

1	RJN, Exhibit 9 (SDMC § 141.0614).	
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3	6. Prior to January 14, 2016, the PROPERTY was located in the Southeastern San Diego Planned District Industrial (I-1) zone.	Not disputed.
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5	Sperry Decl., 3:14-15.	
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7	7. SDMC section 1519.0305 and corresponding Appendix A, list the uses that were previously permitted in the Southeastern San Diego Planned District I-1 zone.	Not disputed.
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9	RJN, Exhibit 4 (SDMC § 1519.0305 and Appendix A).	
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11		
12	8. The operation or maintenance of a Medical Marijuana Consumer Cooperative (MMCC) was a permitted use in the Southeastern San Diego Planned District Industrial (I-1) zone only if a Conditional Use Permit was obtained prior to opening for business.	Not disputed.
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14	Sperry Decl., 3:15-17; RJN, Exhibit 4 (SDMC § 1519.0305 and Appendix A).	
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16		
17	9. The City never issued a Conditional Use Permit for the operation or maintenance of a MMCC, dispensary, or collective at the PROPERTY.	Not disputed.
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19	Sperry Decl., 3:17-19.	
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21	10. As of January 14, 2016, the City rezoned the PROPERTY into the Land Development Code. The PROPERTY is currently located in a Commercial Office zone (CO-2-1).	Not disputed.
22		
23	Sperry Decl., 3:20-24.	
24		
	11. SDMC sections 131.0520 and 131.0522 and corresponding use Table 131-05B list	Not disputed.

<p>the permitted uses in a CO-2-1 zone where the PROPERTY is located.</p> <p>Sperry Decl., 3:17-24; RJN, Exhibit 5 (SDMC §§ 131.0520 and 131.0522, and use Table 131-05B); NOL, Exhibit 2 (Parcel Information Report).</p>	
<p>12. A Medical Marijuana Consumer Cooperative, dispensary, or collective is not a permitted use in a CO-2-1 zone.</p> <p>Sperry Decl., 3:21-24; RJN, Exhibit 5 (SDMC §§ 131.0520 and 131.0522, and use Table 131-05B).</p>	<p>Disputed, improper legal conclusion, not a fact.</p>
<p>13. A distribution or storage business is also not a permitted use in a CO-2-1 zone where the PROPERTY is located.</p> <p>Sperry Decl., 3:24; RJN, Exhibit 5 (SDMC §§ 131.0520 and 131.0522, and use Table 131-05B).</p>	<p>Disputed, improper legal conclusion, not a fact.</p>
<p>14. Previously conforming rights do not apply to separately regulated uses. A MMCC is a separately regulated use.</p> <p>Sperry Decl., 3:25-28:4:1-2; RJN, Exhibit 3 (SDMC § 127.0107; RJN, Exhibit 9 (SDMC § 141.0614).</p>	<p>Disputed, improper legal conclusion, not a fact.</p>
<p>15. On October 21, 2015, Zoning Investigator Rowdy Sperry observed advertisements in a magazine and on the Internet for a marijuana dispensary business by the name of "Pure Meds". Some of the advertisement indicated the dispensary was operating from the PROPERTY.</p> <p>Sperry Decl., 2:18-26.</p>	<p>Disputed; hearsay, lacks foundation, lacks authentication.</p>
<p>16. In February of 2016, a detective with the San Diego Police Department went to the PROPERTY in an undercover capacity to purchase marijuana. When he entered the business he smelled the odor of marijuana.</p>	<p>Disputed; hearsay, lacks foundation, lacks authentication, improper expert opinion, not a fact.</p>

<p>RJN, Exhibit 11- Declaration of James Hunter in Support of Plaintiff's <i>Ex Parte</i> Application for TRO (Hunter Decl.), 2:27-28, 3:1-2.</p>	
<p>17. Inside the business Detective Hunter observed security cameras, a reception window, and an interior door with a security locking device to restrict access.</p> <p>RJN, Exhibit 11, Hunter Decl., 3:1-3.</p>	<p>Not disputed.</p>
<p>18. Inside the product room Detective Hunter observed a large display case containing marijuana product, THC infused edibles, and concentrated cannabis. He also observed a menu board listing the type and price of marijuana for sale, an ATM, and a cash register.</p> <p>RJN, Exhibit 11, Hunter Decl., 3:11-13.</p>	<p>Disputed; hearsay, lacks foundation, lacks authentication, improper expert opinion, not a fact.</p>
<p>19. Detective Hunter purchased 2.3 grams of marijuana for \$25. He was also given an additional 3.3 grams of marijuana and a marijuana cigarette for free for being a first time customer.</p> <p>RJN, Exhibit 11, Hunter Decl., 3:17-18, and attached photograph of marijuana product purchased in February 2016, during undercover buy.</p>	<p>Disputed; lacks foundation, improper expert opinion, not a fact.</p>
<p>20. On April 6, 2016, San Diego Police detectives executed a search warrant at the PROPERTY for drug trafficking.</p> <p>RJN, Exhibit 12- Declaration of Marisela Cooper in Support of Plaintiff City of San Diego's Motion for Preliminary Injunction (Cooper Decl.), 2:21-22.</p>	<p>Disputed; lacks foundation, lacks authentication, best evidence rule.</p>
<p>21. When Officer Cooper entered the business at the PROPERTY she could smell the odor of marijuana. Inside the dispensing room she observed display cases containing marijuana infused candies, marijuana, THC infused edibles and concentrated cannabis.</p>	<p>Disputed; hearsay, lacks foundation, lacks authentication, improper expert opinion, not a fact.</p>

<p>1 RJN, Exhibit 12, Cooper Decl., 2:23-26, and 2 attached photographs depicting the marijuana 3 products observed inside the dispensary on 4 April 6, 2016.</p>	
<p>4 22. In the dispensing room Officer Cooper 5 also observed a menu display board 6 containing the type and price of marijuana 7 products for sale, a cash register, and an 8 ATM. 9 RJN, Exhibit 12, Cooper Decl., 2:26-27, and 10 attached photographs depicting the marijuana 11 products observed inside the dispensary on 12 April 6, 2016.</p>	<p>Disputed; hearsay, lacks foundation, lacks authentication, improper expert opinion, not a fact.</p>
<p>10 23. Outside of the dispensing room Officer 11 Cooper observed an area containing about 12 300 marijuana plants. COTTON admitted 13 owning the marijuana plants. 14 RJN, Exhibit 12, Cooper Decl., 3:1-5, and 15 attached photographs depicting the marijuana 16 products observed inside the dispensary on 17 April 6, 2016.</p>	<p>Disputed; hearsay, lacks foundation, lacks authentication, improper expert opinion, not a fact.</p>
<p>14 24. SDMC section 121.0302(a) provides that 15 it is unlawful to maintain or use any 16 premises in violation of any of the 17 provisions of the Land Development 18 Code. 19 RJN, Exhibit 6 (SDMC § 121.0302).</p>	<p>Not disputed.</p>
<p>19 25. SDMC section 11.0210 defines a 20 "Responsible Person" as a person who is 21 responsible for causing or maintaining 22 violations of the Municipal Code. The 23 term "Responsible Person" includes but is 24 not limited to a property owner, tenant, person with a Legal Interest in real property or person in possession of real property. RJN, Exhibit 1 (San Diego Municipal Code (SDMC) §11.0210).</p>	<p>Disputed; legal conclusion, not a fact.</p>

<p>1 26. As the property owner, COTTON is a 2 Responsible Person for maintaining 3 violations of the SDMC at his 4 PROPERTY. 5 6 RJN, Exhibit 1 (SDMC §11.0210): Sperry 7 Decl., 4:3-5.</p>	<p>Disputed; legal conclusion, not a fact.</p>
<p>6 27. SDMC section 121.0311 also provides 7 that violations of the San Diego 8 Municipal Code shall be treated as strict 9 liability offenses regardless of intent. 10 11 RJN, Exhibit 7 (SDMC § 121.0311).</p>	<p>Disputed; legal conclusion, not a fact.</p>
<p>11 28. On May 20, 2016, this Court issued a 12 preliminary injunction enjoining 13 COTTON from operating or maintaining 14 a marijuana dispensary or marijuana 15 related business at the PROPERTY or 16 anywhere else in the City unless he 17 obtained the required permits. 18 19 RJN, Exhibit 10 (Preliminary Injunction 20 Order issued May 20, 2016).</p>	<p>Not disputed.</p>
<p>17 29. On June 15, 2016, City investigators 18 confirmed that the marijuana dispensary 19 had ceased operating at the PROPERTY. 20 All of the marijuana dispensary fixtures 21 and the marijuana products had been 22 removed. 23 24 Sperry Decl., 4:7-19.</p>	<p>Not disputed.</p>

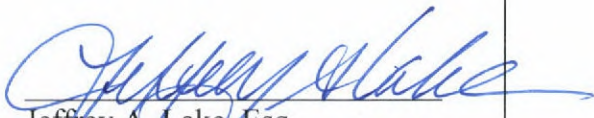
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<p>30. SDMC section 121.0311 provides that violations of the Land Development Code may be prosecuted as misdemeanors and that the City may seek injunctive relief and civil penalties in the Superior Court.</p> <p>RJN, Exhibit 7 (SDMC § 121.0311).</p>	<p>Not disputed.</p>
<p>31. SDMC section 12.0202(a) provides that any provision of the Municipal Code may be enforced by injunction in the Superior Court upon a suit brought by the City of San Diego.</p> <p>RJN, Exhibit 8 (SDMC § 12.0202(a)).</p>	<p>Not disputed.</p>
<p>32. SDMC section 12.0202(b) provides that the court may assess a maximum civil penalty of \$2,500 per violation of the Municipal Code each day a person commits, continues, allows or maintains a violation of the San Diego Municipal Code.</p> <p>RJN, Exhibit 8 (SDMC § 12.0202(b)).</p>	<p>Not disputed.</p>

Respectfully submitted,

Dated: 11/9/16

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

F I L E D
Clerk of the Superior Court

NOV 10 2016

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 11/9, 2016 I served the foregoing document(s) described as on the interested parties
9 as follows: **OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO**
10 **SEPARATE STATEMENT OF DISPUTED FACTS ASE MANAGEMENT STATEMENT OF**
11 **DARRYL COTTON.**

12 Onu O. Omordia, Esq. 13 1200 Third Ave., Ste. 700 14 San Diego, CA 92101	
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15 **BY MAIL:** I placed the documents in a sealed envelope and deposited such envelope in the
16 mail at San Diego, California. The envelope was mailed with postage thereon fully prepaid. I
17 am readily familiar with the firm's practice of collecting and processing correspondence for
18 mailing. It is deposited with U.S. postal service on that same day in the ordinary course of
19 business. I am aware that on motion of party served, service is presumed invalid if postal
20 cancellation date or postage meter date is more than one day after the date of deposit for
21 mailing in this proof of service.

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

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

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

Executed on 11/9, 2016 at San Diego, California.

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26 **JEFFREY A. LAKE**