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15  
 16 UNITED STATES DISTRICT COURT  
 17 NORTHERN DISTRICT OF CALIFORNIA

18 CITY OF OAKLAND,

19 Plaintiff,

20 v.

21 ERIC HOLDER, Attorney General of the  
 United States; and MELINDA HAAG, U.S.  
 22 Attorney for the Northern District of  
 California,

23 Defendants.

No. CV 12-5245 MEJ

Related Cases: No. CV 12-3566 MEJ  
 No. CV 12-3567 MEJ

**DECLARATION OF CEDRIC CHAO  
 IN SUPPORT OF CITY OF  
 OAKLAND’S MOTION TO STAY  
 FORFEITURE PROCEEDINGS  
 PENDING APPEAL**

Hearing Date: April 4, 2013

Time: 10:00 a.m.

Courtroom: B, Hon. Maria Elena James

1 I, Cedric Chao, declare as follows:

2 1. I am a partner at the law firm of Morrison & Foerster LLP, counsel of record for  
3 Plaintiff City of Oakland (“Oakland”) in this action. I am duly licensed to practice law before the  
4 courts in the State of California and before this Court. I make this declaration in support of the  
5 City of Oakland’s Motion to Stay Forfeiture Proceedings Pending Appeal.

6 **Absent a Stay, Oakland’s Appeal May Become Moot and Oakland May Lose Its**  
7 **Substantive Claims**

8 2. If a stay is not granted pending Oakland’s appeal in the Ninth Circuit, the  
9 prejudice to Oakland will be several fold, as described below.

10 3. First, Oakland faces the risk that its appeal will become moot if Harborside is  
11 closed while Oakland’s appeal is pending. This could result if the government prevails in the  
12 forfeiture action, or if either Harborside or the landlord (Ana Chretien) succumbs to the pressures,  
13 financial or otherwise, applied by the government. Oakland might suffer the harm it seeks to  
14 prevent — for example, the closing of Harborside and the resulting health and safety crisis —  
15 before the Ninth Circuit has a chance to rule.

16 4. Oakland risks not just the mootings of its appeal, but also the loss of its claims. If  
17 Oakland’s position on standing is upheld on appeal — but Harborside is closed down in the  
18 interim — Oakland and its 400,000 residents will have lost meritorious legal claims unnecessarily  
19 and unjustly.

20 5. The most recent statistics available from the Federal Judicial Center indicate that  
21 in the Ninth Circuit, the median time from the filing of the Notice of Appeal to final disposition is  
22 15.3 months, for the 12 month period ending September 30, 2012. *See* Federal Judicial Center,  
23 *Federal Court Management Statistics for the Courts of Appeals* (September 2012), a true and  
24 correct copy of which is attached hereto as Exhibit 1. That means that even though Oakland filed  
25 its Notice of Appeal today, 46 days early, a decision from the Ninth Circuit would not be  
26 expected, statistically speaking, until May 2014. The forfeiture proceedings may well have  
27 concluded by that time, or the dispensary might have succumbed to governmental pressure and  
28 closed its doors, depriving Oakland of its day in court.

1           **Absent a Stay, Oakland Will Lose Its Right to Participate in Arguments and**  
2           **Evidentiary Development That May Impact Oakland's Case**

3           6.       Even if the Ninth Circuit remands the case to this Court with instructions to allow  
4 Oakland's case to proceed and even if the forfeiture case has not concluded as of that date,  
5 Oakland will have lost the opportunity in the intervening months to bring its resources and unique  
6 interests and perspective to bear in the discovery and motion practice against the government.  
7 Thus, Oakland will have lost its right to make arguments and develop evidence, thereby harming  
8 its case on the merits.

9           7.       If the case is remanded to the District Court and Oakland begins to take discovery,  
10 it will contend with a factual record on issues central to its case that it did not participate in  
11 shaping. Government officials whom Oakland wishes to depose may have already given previous  
12 deposition testimony in the forfeiture proceeding. Or, there may be a trial record in the forfeiture  
13 proceeding that will bear on Oakland's case. Oakland would be required to try to "unscramble  
14 the egg."

15           8.       The City of Oakland and its 400,000 residents have unique perspectives, unique  
16 grievances, and unique strengths, and much more far-reaching interests than the Claimants in the  
17 *Harborside Action*. This entitles Oakland to develop its own arguments and record on the statute  
18 of limitations and estoppel issues present in both cases.

19           9.       Since equitable estoppel is proved based on the government's representations to  
20 *each party* and on *that party's* understanding of and reliance upon such representations, the  
21 evidence to be sought and proffered by each party is necessarily individualized.

22           **Absent a Stay, Oakland and Its 400,000 Residents Will Be Deprived of Access to the**  
23           **Courts**

24           10.      The end result of the government's extreme arguments concerning the forfeiture  
25 statute and the Administrative Procedure Act, which were adopted by the Court, is that a major  
26 U.S. municipality and its 400,000 residents are denied access to the courts to seek redress for their  
27 grievances and harms. As pled in the Complaint, and as testified to in the Declarations of Mayor  
28 Jean Quan and Deputy City Administrator Arturo Sanchez, these grievances are far reaching,

1 grave, and unique. We believe that this result is not consistent with Congressional intent  
2 underlying either the forfeiture statute or the APA. Equally fundamental, this result is not  
3 consistent with our system of laws.

#### 4 **Oakland Has Already Suffered and Continues to Suffer Harm**

5 11. The harms Oakland will suffer are not merely prospective harms should  
6 Harborside be closed. In fact, Oakland *has already suffered and will continue to suffer* injuries  
7 because of the government's decision to file and prosecute the forfeiture action.

8 12. As explained in the contemporaneously filed Declaration of Arturo Sanchez, the  
9 filing of the forfeiture action has had a "chilling effect" on Oakland's medical cannabis program.  
10 (*See Sanchez Decl.*, ¶¶ 19-21.)

#### 11 **Oakland Is Committed to Litigate the Appeal Expeditiously**

12 13. Oakland is committed to prosecuting the appeal and the *Oakland v. Holder Action*  
13 expeditiously.

14 14. Oakland will seek an expedited appeal in the Ninth Circuit, pursuant to Ninth  
15 Circuit Rule 27-12. Of course, the government's cooperation in expediting the appeal will be  
16 required.

17 15. The Notice of Appeal filed today illustrates Oakland's intent to litigate  
18 expeditiously. Per Federal Rule of Appellate Procedure 4(a)(1)(B)(iii), Oakland's Notice of  
19 Appeal was due within 60 days of the Court's February 14, 2013 Order, since the defendants are  
20 United States officers sued in their official capacities. This means that Oakland's Notice of  
21 Appeal was not due until April 15, 2013, but Oakland is filing 46 days early.

#### 22 **The Public Interest Weighs Heavily in Favor of a Stay**

23 16. The right of patients to access medical cannabis at issue in this case is a national  
24 issue of great moment. This issue deserves a full airing with the input of Oakland, which has  
25 developed the most advanced and detailed legislative framework in the nation for regulating  
26 medical cannabis dispensaries, and did so in reliance on the government's promises that the  
27 Justice Department's resources would not be directed at those in compliance with state cannabis  
28 laws. This public interest favors a stay, which would allow procedural issues regarding

1 Oakland's standing to be resolved before the forfeiture case proceeds, so that Oakland's voice  
2 regarding access to medical cannabis can be heard.

3 17. According to the 2010 U.S. Census, approximately one-third of Americans live in  
4 states that have legalized medical cannabis.<sup>1</sup> As of November 26, 2012, eighteen states and the  
5 District of Columbia have passed legislation legalizing the medical use of cannabis. (*See*  
6 *Oakland's Opening Memorandum* at 22 fn. 16.) Two states, Washington and Colorado, recently  
7 decriminalized use of cannabis for all purposes. A true and correct copy of an article describing  
8 the confused public policies concerning medical cannabis, Rebecca Richman Cohen, *The Fight*  
9 *Over Medical Marijuana*, N.Y. Times, Nov. 7, 2012, is attached hereto as Exhibit 2.

10 18. Recently, California Governor Jerry Brown, discussing the recent ballot  
11 propositions in Washington and Colorado, as well as California's policy towards medical  
12 cannabis, stated: "It's time for the Justice Department to recognize the sovereignty of the  
13 states.... It shouldn't try to nullify reasonable state measures.... We don't need some federal  
14 gendarme to come and tell us what to do." A true and correct copy of the transcript of a CNN  
15 interview with Governor Jerry Brown, dated November 11, 2012, is attached hereto as Exhibit 3.

16 19. This rapid evolution in public opinion in favor of medical cannabis is sweeping the  
17 nation. According to a 2010 Gallup Poll, "70% of Americans [said] they favor making marijuana  
18 legally available for doctors to prescribe in order to reduce pain and suffering." A true and  
19 correct copy of an article by Elizabeth Mendes titled *New High of 46% of Americans Support*  
20 *Legalizing Marijuana*, analyzing survey results from Gallup's annual Crime poll, published on  
21 October 28, 2010, is attached hereto as Exhibit 4.

22 20. These trends, and the intense public interest in medical cannabis, were underscored by  
23 a front-page article in today's *San Francisco Chronicle*, reporting the results of a Field poll. Seventy-  
24 two percent (72%) of California voters support the right to use medical cannabis, and "67 percent  
25 oppose[] federal efforts to crack down on businesses that sell medical cannabis legally under state

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26 <sup>1</sup> Per the 2010 U.S. Census, the total U.S. population was 308.7 million, and the total  
27 population in the 18 states that have legalized medical cannabis was 100.4 million. *See*  
28 <http://2010.census.gov/2010census/data/apportionment-dens-text.php>.

