

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND,

Appellant,

vs.

Case No. 13-15391

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

Appellees.

**CITY OF OAKLAND'S RESPONSE TO APPELLEES' MOTION FOR
RECONSIDERATION OF MOTION TO EXPEDITE APPEAL**

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Attorneys for Appellant City of Oakland

Appellant City of Oakland (“Oakland”) hereby responds to the Motion for Reconsideration of Motion to Expedite Appeal (Dkt. 35) submitted by Appellees Eric Holder and Melinda Haag (“DOJ”).

The DOJ’s motion is not well-taken. In moving for reconsideration under Circuit Rule 27-10, a party “shall state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood. Changes in legal or factual circumstances which may entitle the movant to relief also shall be stated with particularity.” 9th Cir. R. 27-10(a)(3). The DOJ makes no effort to comply with this Circuit rule, the advisory committee note to which states that motions for reconsideration “are not favored by the Court and should be utilized only where counsel believes that the Court has overlooked or misunderstood a point of law or fact, or where there is a change in legal or factual circumstances after the order which would entitle the movant to relief.” 9th Cir. R. 27-10 advisory committee note (emphasis added). The DOJ identifies no law or fact that was overlooked or misunderstood by the Court, and it identifies no change in fact or law after the Court’s September 16, 2013 order denying the DOJ’s motion to expedite. Instead, the DOJ merely repeats in its motion for reconsideration the same arguments it made in its motion to expedite the appeal,

and the DOJ takes the opportunity to reargue points made in the DOJ's Appellee's Response Brief filed on September 6, 2013.¹

While the DOJ is correct that Oakland has not identified any prejudice it will suffer if the Court of Appeals considers Oakland's appeal on an expedited basis, the DOJ misunderstands the standard for expediting consideration of an appeal. A motion to expedite an appeal requires "good cause," such as a showing that "irreparable harm may occur or the appeal may become moot if the appeal is not expedited." *See* 9th Cir. R. 27-12. The DOJ has identified no irreparable harm, let alone any real urgency. It merely expresses a desire to move forward with the Harborside forfeiture action so the "comprehensive civil forfeiture scheme" will not be "undermine[d]". Motion at 2. The DOJ's professed urgency to proceed with the forfeiture action rings hollow, however, since the DOJ waited six years before commencing it, during which time (a) Oakland's medical cannabis regulatory scheme was allowed to proceed in accordance with California state law,

¹ *See* Motion at 4. The DOJ avers "[i]t should be beyond dispute that the City of Oakland cannot file an action under the Administrative Procedure Act to collaterally enjoin a federal forfeiture action under 21 U.S.C. § 881(a)." That argument has nothing to do with the instant motion and, further, it disregards Oakland's fundamental right to protect its and the State of California's laws from attack by the federal government and to provide for the public health and safety of its residents in compliance with California law. As the District Court recognized, Oakland's appeal raises "serious legal questions," including "the novel legal issue regarding whether a municipality has standing under the APA to challenge a civil forfeiture action against property when the action may affect its regulatory scheme and its residents" and the right to access the court, which is "a right of paramount importance." ER 1068, 1072.

(b) Oakland came to rely on the tax revenues generated by sales of regulated cannabis, and (c) patients were allowed to discover the benefits of affordable medicinal quality cannabis in a safe environment.

The DOJ's position is particularly perplexing in light of the DOJ's recent reaffirmation of its policy of non-prosecution of persons and entities, including dispensaries, acting in compliance with state and local law concerning cannabis. *See* Cole Memorandum (Dkt. 32-4) and Senate Judiciary Committee Testimony (Dkt. 32-5, p. 17 (“[A]s long as [the dispensaries] are not violating any of the eight federal priorities in the course of what they’re doing, [] the federal government is not going to prosecute them and the state law is up to state law and up to state enforcement.”)).

Most important for purposes of this motion, the DOJ still fails to identify any urgency. Nearly six months after declining Oakland's request to expedite the appeal, and more than two months after the District Court issued its Order staying the forfeiture action pending the appeal, DOJ attorney Adam Jed emailed Oakland's attorney Cedric Chao, informing him of the DOJ's intent to move for expedited consideration of the appeal and inquiring whether Oakland will join or consent in the motion. Declaration of Cedric Chao in Support of City of Oakland's Response to Appellees' Motion for Reconsideration of Motion to Expedite Appeal (“Chao Decl.”), ¶ 2. On September 11, 2013, Mr. Chao responded to Mr. Jed's

email, seeking an explanation of the DOJ's change in position regarding expediting the appeal, but the DOJ never responded. *Id.* The DOJ also has never addressed Oakland's concerns – first raised in Mr. Chao's September 11, 2013 email to Mr. Jed (Dkt. 32-3) and in subsequent correspondence with DOJ trial counsel – regarding the considerable public safety threat posed by the government's recent interference with armored car services companies that do business with Oakland's dispensaries, a threat raised (as to dispensaries in general) by Senate Judiciary Committee Chair Senator Patrick Leahy and acknowledged by Deputy Attorney General James Cole in testimony before the Senate Judiciary Committee on September 10, 2013. Chao Decl., ¶¶ 3-6, Exs. A-C; Dkt. 32-5 p. 10.

Since the DOJ provides no justification for expediting consideration of the appeal, it fails to show the requisite good cause. The motion for reconsideration should be denied.

Dated: September 23, 2013

Respectfully submitted,

DLA PIPER LLP (US)

By: s/ Cedric C. Chao
Cedric C. Chao

Attorneys for Appellant City of Oakland

CERTIFICATE OF SERVICE

Case No. 13-15391

I hereby certify that on September 23, 2013, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Cedric C. Chao

Cedric C. Chao

UNITED STATES COURT OF APPEALS
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vs.

ERIC HOLDER, Attorney General of the United
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Appellees.

Case No. 13-15391

**DECLARATION OF CEDRIC C. CHAO IN SUPPORT OF
CITY OF OAKLAND'S RESPONSE TO APPELLEES' MOTION FOR
RECONSIDERATION OF MOTION TO EXPEDITE APPEAL**

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Attorneys for Appellant City of Oakland

I, Cedric C. Chao, declare as follows:

1. I am a partner at the law firm of DLA Piper LLP (US), counsel of record for appellant City of Oakland (“Oakland”) in this action. I am duly licensed to practice law before the courts in the State of California and before this Court. I make this declaration in support of Oakland’s Response to Appellees’ Motion for Reconsideration of Motion to Expedite Appeal. Unless otherwise stated, I have personal knowledge of the facts set forth herein, and if called upon to do so, could and would competently testify thereto.

2. On September 7, 2013, I received an email from U.S. Department of Justice (“DOJ”) attorney Adam Jed, informing me of the DOJ’s intent to move for expedited consideration of the appeal and inquiring whether Oakland will join or consent in the motion. I responded on September 11, 2013, requesting an explanation of the DOJ’s assertion of urgency in light of its refusal nearly six months previously to agree to Oakland’s request to seek expedited consideration of the appeal. My letter also sought clarification of the DOJ’s positions in light of the Cole Memorandum (Dkt. 32-4) and pressure recently applied to armored car services companies doing business with dispensaries, including Harborside, resulting in a cessation of armored car services to Harborside. A true and correct copy of Mr. Jed’s emails to me and my response thereto was attached as Exhibit 1

to my declaration submitted in support of City of Oakland's Response to Appellees' Motion to Expedite Appeal, filed on September 12, 2013. Dkt. 32-3.

3. The government (a) has not responded to my September 11, 2013 email to Mr. Jed (Dkt. 32-3); (b) has not explained its newfound sense of urgency; (c) has not addressed the inconsistencies between its prosecution of the Harborside Health Center forfeiture action, on the one hand, and its stated policy of non-prosecution of persons and entities, including dispensaries, acting in compliance with state and local law concerning medical cannabis, on the other hand, as reaffirmed in the Cole Memorandum (Dkt. 32-4) and the testimony of Deputy Attorney General James Cole before the Senate Judiciary Committee on September 10, 2013 (Dkt. 32-5); and (d) has not addressed Oakland's concerns regarding the federal government's pressure on armored car companies that provide services to Oakland's medical cannabis dispensaries, which has resulted in a cessation of armored car services to Harborside (*see* Dkt. 32-3, #3).

4. On September 12, 2013, I wrote to Kathryn Wyer, the DOJ attorney who handles this case at the District Court level, about reports indicating the federal government had recently pressured Dunbar Armored, Inc. not to conduct business with Harborside Health Center (whose property is the subject of the forfeiture action that Oakland challenges in this case) and other medical cannabis dispensaries. My letter to Ms. Wyer explained Oakland's concern that

Harborside's inability to transport cash using armored car services posed a considerable public safety and security problem in that it invites armed robbery and thus endangers the employees and patients of Harborside as well as Oakland citizens, the police, and the public at large. I also expressed Oakland's position that the DOJ's actions violated the District Court's order staying the forfeiture action pending the appeal because the purpose of the stay is to maintain the status quo – *i.e.*, Harborside continuing to operate and provide medical cannabis to its patients as before – until the appeal is decided. Oakland asked the DOJ to permit Dunbar to continue providing armored car services to Harborside so that Oakland could avoid bringing a motion to enforce the stay. A true and correct copy of my September 12, 2013 letter to Ms. Wyer is attached hereto as Exhibit A.

5. Kathryn Wyer responded briefly to my September 12, 2013 letter on September 17, 2013. Ms. Wyer disputed Oakland's view regarding the government's violation of the District Court's Order staying the forfeiture action. Ms. Wyer failed to address the public safety concerns raised in my letter. A true and correct copy of Ms. Wyer's September 17, 2013 letter is attached hereto as Exhibit B.

6. I wrote to Ms. Wyer again on September 20, 2013, seeking clarification of the government's position regarding the provision of armored car

services to medical cannabis dispensaries, including Harborside. A true and correct copy of my September 20, 2013 letter is attached hereto as Exhibit C.

7. I have not received a response to my September 20, 2013 letter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 23, 2013, in New York, New York.

s/ Cedric C. Chao

Cedric C. Chao

CERTIFICATE OF SERVICE

Case No. 13-15391

I hereby certify that on September 23, 2013, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Cedric C. Chao

Cedric C. Chao

EXHIBIT A



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September 12, 2013
VIA EMAIL KATHRYN.WYER@USDOJ.GOV

OUR FILE NO. 000125-011501

Kathryn L. Wyer
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, N.W., Room 7124
Washington, D.C. 20530

Re: Oakland v. Holder - Defendants' Violation of the Stay Pending Appeal

Dear Kathryn:

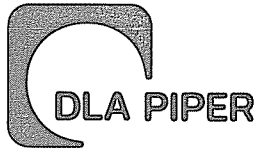
It has come to our attention that the federal government has recently pressured Dunbar Armored, Inc. not to conduct business with Harborside Health Center in Oakland. Based on press reports and testimony before the Senate Judiciary Committee on September 10, 2013, we understand that the DEA has likewise pressured other armored car services companies not to provide services to other medical cannabis dispensaries. As a result of the federal government's interference, Dunbar has ceased to provide armored car services to Harborside.

The government's interference with Harborside's ability to safely transport cash using Dunbar's armored car services to pay its bills, including utilities and taxes, violates the Court's Order entered on July 3, 2013, staying the forfeiture proceedings pending the outcome of Oakland's appeal. The purpose of the stay is to maintain the status quo, which the Court characterized as Harborside "operating its dispensary on the defendant property. That is the state of affairs Oakland seeks to preserve during the appeal process." The government's interference with Harborside's relationship with its armored car service greatly disrupts the status quo and thus violates the intent if not the strict letter of the Court's stay order.

In addition to disrupting the status quo, depriving Harborside of the ability to transport cash via armored car service creates a substantial public safety and security problem in that it invites armed robbery and thus endangers the employees and patients of Harborside as well as Oakland citizens, the police, and the public at large. In fact, in a hearing before the Senate Judiciary Committee on September 10, 2013, Senator Leahy questioned Deputy Attorney General James Cole about this problem:

And we're hearing that the DEA agents, in what seems to me like a significant step away from reality, are instructing armored car companies to cease providing services to marijuana dispensaries almost as if they are saying, 'Get out there so we can have robberies.'

Mr. Cole recognized this problem, testifying: "Obviously, there is a public safety concern when businesses have a lot of cash sitting around."



Kathryn L. Wyer
September 12, 2013
Page Two

Harborside is required to conduct its business in cash, including paying employees' compensation, utilities, taxes, and other obligations, because the federal government previously prohibited banks from providing financial services to dispensaries. Using armored car services is essential to Harborside's ability and legal obligation to ensure the safety and security of its operations in accordance with Oakland's regulations governing medical cannabis.

Oakland requests that Defendants cease the above-described pressure on Dunbar and inform Dunbar that it may continue to conduct business with Harborside without threat of penalty, sanction or other legal action throughout the duration of the stay. If Defendants will not voluntarily agree to Oakland's request, Oakland will have no choice but to bring a motion for enforcement of the stay to the District Court, including a request for attorneys' fees and costs. Given the public safety concerns resulting from the government's violation of the Court's stay pending appeal, I request your response by close of business on September 17, 2013. Thank you for your attention to this serious matter.

Very truly yours,

DLA Piper LLP (US)

A handwritten signature in black ink that reads 'Cedric C. Chao / KSK'.

Cedric C. Chao
Partner

CCC:ksk

WEST\241971777.1

EXHIBIT B

**U.S. Department of Justice**

Civil Division, Federal Programs Branch
20 Massachusetts Ave, N.W.
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Trial Attorney

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BY E-MAIL

September 17, 2013

Cedric C. Chao
DLA Piper LLP
555 Mission St., Ste. 2400
San Francisco CA 94105
cedric.chao@dlapiper.com

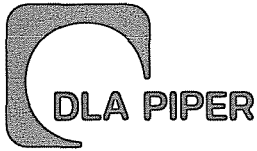
Re: *City of Oakland v. Holder*, No. 12-5245 (N.D. Cal.)

Dear Cedric,

I am in receipt of your letter dated September 12, 2013. I am not aware of any “interference” with Harborside as you have described it. I have, however, reviewed Judge James’ stay order, and it is clear that the stay order simply stayed two forfeiture actions from proceeding in court pending the City of Oakland’s appeal in the Ninth Circuit. No violation of the stay has occurred.

Sincerely,
/s/
Kathryn L. Wyer

EXHIBIT C



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September 20, 2013

Our File No. 000125-011501

VIA EMAIL KATHRYN.WYER@USDOJ.GOV

Kathryn L. Wyer
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, N.W., Room 7124
Washington, D.C. 20530

Re: ***Oakland v. Holder -- Defendants' Violation of the Stay Pending Appeal***

Dear Kathryn:

This is to follow up on my September 12, 2013 letter, and your September 17, 2013 response. I want to make sure I understand clearly your position.

1. Does the US Department of Justice ("DOJ") deny that its representatives have directed, pressured, or otherwise influenced armored car services to stop transporting cash for medical marijuana dispensaries around the country, as discussed by the Senate Judiciary Committee during the September 10, 2013 testimony of Deputy Attorney General Cole?
2. Does the DOJ deny that its representatives have directed, pressured, or otherwise influenced Dunbar Armored to stop transporting cash for Harborside Health Center, as indicated in my September 12, 2013 letter?
3. Does the DOJ contend that Judge James' Order Granting the City of Oakland's Motion to Stay Forfeiture Proceedings Pending Appeal, entered July 3, 2013, does *not* prevent the DOJ from directing, pressuring, or otherwise influencing Dunbar Armored to stop transporting cash for Harborside Health Center?
4. Does the DOJ accept or disavow Deputy Attorney General James Cole's acknowledgment before the Senate Judiciary Committee on September 10, 2013 that "there is a public safety concern when businesses [medical marijuana dispensaries] have a lot of cash sitting around?"
5. Will the DOJ voluntarily agree to cease interfering with Harborside Health Center's relationship with armored car services?
6. Will the DOJ voluntarily agree to inform Dunbar Armored that it may continue to conduct business with Harborside Health Center without threat of penalty, sanction, or other legal action throughout the duration of Judge James' stay?

Kathryn L. Wyer
U.S. Department of Justice
September 20, 2013

Page Two

Clear responses will enable me to intelligently assess the situation with my client, the City of Oakland, and thereafter to accurately describe the DOJ's position to the Court. Thank you.

Very truly yours,

DLA Piper LLP (US)

A handwritten signature in black ink, appearing to read "Cedric C. Chao". The signature is fluid and cursive, written over the printed name.

Cedric C. Chao
Partner

CCC:iah

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