

Real Estate Concerns in the Cannabis Industry:

Harborside Health Center Case Study

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Overview of Harborside

Open since 2006

Bills itself as the largest provider of medical marijuana in the country, serving over 100,000 people

Over \$20 million in annual gross sales revenues

Generates over \$1 million in tax revenues for the city of Oakland

Leases its retail space in Oakland from a single landlord



Timeline



Timeline



July 2012

U.S. Justice Department
Files Lawsuit

Justice Department Files Suit

United States v. Real Property and Improvements Located at 1840 Embarcadero, Oakland, CA



In rem forfeiture action against the Harborside Health Center properties

Forfeiture provision of the Controlled Substances Act, 21 U.S.C. § 881(a)(7)

Filed alongside numerous forfeiture proceedings against properties of medical marijuana distributors

Various state court actions get filed in the same time frame

Forfeiture Proceedings

The United States does not seize the property at any point

Civil forfeiture initiated by the government pursuant to 18 U.S.C. § 985(c)(1)

- Proceedings are initiated by the government
 - filing a complaint;
 - posting a notice of the complaint on the property; and
 - serving notice and a copy of the complaint on the property owner.

Obviously the property owner isn't happy; her property is at risk!



Timeline



November 2012

Property owner motions for court to issue injunctive relief

Landlord Files a Motion for Injunctive Relief

Federal Rules of Civil Procedure Supplemental Rule G(7)(a):

- *Preserving and Preventing Criminal Use of Property.* When the government does not have actual possession of the defendant property the court, on motion or on its own, may enter any order necessary to preserve the property, to prevent its removal or encumbrance, or to prevent its use in a criminal offense.

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15	UNITED STATES OF AMERICA,	Case No. CV 12 3567 MEJ
16	Plaintiff,	Related Case: CV 12 3566 MEJ
17	v.	NOTICE OF MOTION, MOTION, AND
18	REAL PROPERTY AND IMPROVEMENTS	POINTS AND AUTHORITIES FOR
19	LOCATED AT 1840 EMBARCADERO,	ORDER PROHIBITING UNLAWFUL
20	OAKLAND, CALIFORNIA,	USE OF DEFENDANT PROPERTY
21	Defendant.	Hearing Date: December 13, 2012
22		Time: 10:00 a.m.
23	TO THE HONORABLE MARIA ELENA JAMES AND TO ALL PARTIES HEREIN, AND TO	Courtroom: No. B – 15 th Floor
24	THEIR ATTORNEYS OF RECORD:	Trial Date: None Set

Landlord's Claims & Oakland Enters the Ring



Landlord claims Rule G(7)(a) allows anyone to motion for a court order

- Section does not specify who may bring a motion
- While the Controlled Substances Act does not provide for citizen suits, Landlord claims that its motion does not implicate the CSA as a cause of action

City of Oakland collaterally attacks the forfeiture proceedings, claiming:

- The statute of limitations has run on the forfeiture claims brought by the federal government
- The federal government should be equitably estopped from continuing its forfeiture proceedings
- Oakland has standing (actual harm) due to loss of tax revenue

Timeline



January 2013

Magistrate judge rejects landowner's motion

Magistrate Judge Rules Landlord Cannot Evict a Tenant Under Rule G

Federal Rules of Civil Procedure Supplemental Rule G(7)(a)

- *Preserving and Preventing Criminal Use of Property.* When the government does not have actual possession of the defendant property the court, **on motion** or on its own, may enter any order necessary to preserve the property, to prevent its removal or encumbrance, or to prevent its use in a criminal offense.

Court rules that a landlord is not a proper movant

- Text of the rule does not allow a claimant to bring a motion in the context of Rule G
- Claimants cannot use the Controlled Substances Act (CSA) to substantiate their claim
- Injunctive relief was not appropriate because the Government was not planning on dismissing their forfeiture claims
- Even if injunctive relief were possible, the landlord did not have standing under the CSA.

Harborside is allowed to continue operations while litigation is ongoing

Timeline



August 2015

Oakland loses Ninth Circuit appeal to block federal lawsuit

Oakland Loses Collateral Attack

Oakland v. Lynch

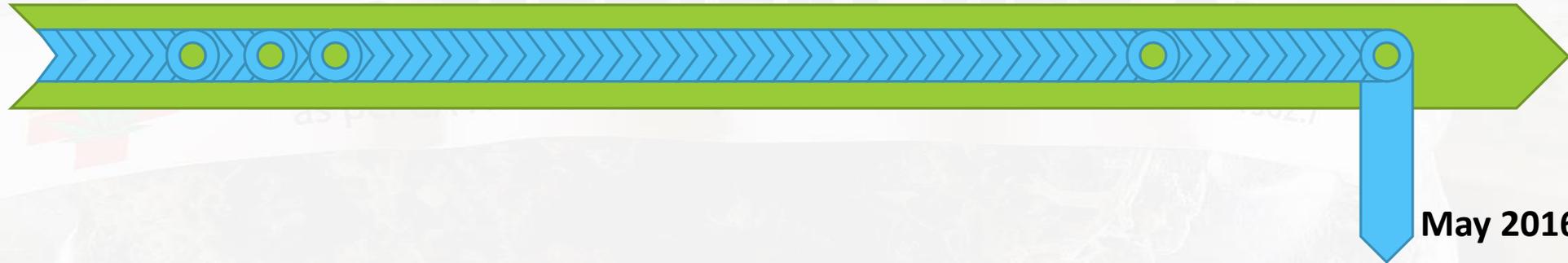
A Ninth Circuit panel ruled that Oakland does have standing because of tax losses

However, the panel said that allowing Oakland's attack would "impermissibly disrupt the existing forfeiture framework" because the forfeiture action is "committed to agency discretion by law."

Therefore, a Department of Justice forfeiture action cannot be challenged under the Administrative Procedure Act.

Ultimately, this ruling means that parties who do not have an interest in the forfeiture property at issue cannot intervene.

Timeline



May 2016

U.S. Justice Department
Voluntarily Dismisses
Lawsuit

Justice Department Dismisses Lawsuit



Hinkley-Rohrabacher Amendment

- SEC. 558. None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

U.S. attorney spearheading the case stepped down

Timeline



What can we learn from
Harborside?

Lessons from Harborside

What can we learn from this four-year legal battle to better advise our clients?



Lease Formation

Utilize an escape clause

- Reduces need for heightened rents for cannabis businesses
- Minimizes risk for landlords facing possible forfeiture

Lowered Risk?

Department of Justice backing down

Will courts be as friendly to recreational marijuana?