

CITY OF DANA POINT

AGENDA REPORT

Reviewed By:	
DH	X
CM	X
CA	X

DATE: FEBRUARY 7, 2012

TO: CITY MANAGER/CITY COUNCIL

FROM PATRICK MUÑOZ, CITY ATTORNEY

SUBJECT: APPROVAL OF A CONTRACT FOR LEGAL SERVICES WITH SHULMAN HODGES & BASTIAN LLP TO COLLECT JUDGMENTS

RECOMMENDED ACTION:

That the City Council authorize the City Manager to execute the agreement attached as Action Document A with Shulman Hodges & Bastian LLP on behalf of the City.

BACKGROUND:

As the Council is aware, the City has been awarded judgments against three medical marijuana dispensaries, which total approximately seven million dollars (\$7,000,000.00). Based on cost efficiencies, and in order to ensure that the City is able to collect the maximum amount of money from the dispensaries and their operators, the City Attorney recommends hiring an outside law firm, such as Shulman Hodges & Bastian LLP, that specializes in debt collection and which is willing to perform collection services on a contingency (as opposed to hourly) basis.

The Shulman Hodges & Bastian LLP retainer agreement is attached as Action Document A. It proposes that the City pay a five thousand dollar (\$5000.00) retainer, to cover hard costs which the City will be responsible for, along with thirty-three percent (33%) of any gross recovery obtained to Shulman Hodges & Bastian LLP for their collection efforts. Costs in excess of \$1000 will require City Manager approval.

FISCAL IMPACT:

An upfront cost of five thousand dollars (\$5000.00) for the retainer, and ongoing miscellaneous hard costs and expenses, along with thirty-three percent (33%) of any gross recovery obtained.

ALTERNATIVE ACTIONS:

As the City Council may suggest.

ACTION DOCUMENT:

Page No.

A. Retainer Agreement	2
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ACTION DOCUMENT A

Please respond to:
Irvine

James C. Bastian, Jr.
Mark Bradshaw
Lynda T. Bui
Franklin J. Contreras, Jr.
Melissa Davis Lowe
Kiara W. Gebhart
Ronald S. Hodges
Robert E. Huttenhoff
J. Ronald Ignatuk
John Mark Jennings
Rika M. Kido
Paul S. Ocampo
Gary A. Pemberton
Michael J. Petersen
Samuel J. Romero
Leonard M. Shulman

Of Counsel to the Firm
A. Lavar Taylor
Donald R. Kurtz
Gregory J. Anderson

February 6, 2012

The City of Dana Point
Attn: Pat Munoz - City Attorney
33282 Golden Lantern, Suite 210
Dana Point, CA 92629

Via Email Only
pmunoz@rutan.com

Re: Legal Representation by Shulman Hodges & Bastian LLP

Dear Pat:

We are pleased that you have asked Shulman Hodges & Bastian LLP (the "Firm") to serve as your counsel in connection with the legal matter set out below. We appreciate your confidence and look forward to working with you. This letter sets forth general information concerning our services and the fees and expenses which you should anticipate. If you are in agreement with the provisions concerning our engagement set forth in the balance of this letter, please sign the enclosed copy in the space provided, place your initials where called for, and return it to us. Understand that the Firm has not yet been retained and that our services will not commence until this agreement is signed and returned along with the retainer monies referred to below (if any). Once executed, this agreement may not be changed or modified except by a written document signed by each of us. If you have any questions concerning any of these provisions, please do not hesitate to call. Once again, we are pleased to have the opportunity to serve you.

IDENTITY OF THE CLIENT(S):

The client(s) retaining the Firm by this agreement is: The City of Dana Point. The client(s) will be referred to in this agreement as "You," "Your" or "Client."

SUBJECT OF REPRESENTATION:

You have engaged the Firm to represent You in connection with collection of judgments procured against the following entities and certain principles of such The Point Alternate Care, Inc., Kathy Lynn Ray, Holistic Health, Garrison Williams, Beach Cities Collective and David Lambert.

Please understand that a writ proceeding or appeal is not covered by this agreement. In the event you wish for the firm to handle any writ or appeal, including the mere

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filing of a Notice of Appeal or other writing necessary to preserve your right to appellate review, a separate written fee agreement is required. This agreement also does not include any post trial motions (e.g., defense of motions to set aside judgment, for new trials, etc.) other than motions contemplated to be filed by the Firm related to judgment enforcement proceedings.

TAX RAMIFICATIONS:

Unless otherwise agreed either herein or elsewhere in writing, the Firm has not been retained to provide You with advice or direction regarding any possible tax ramifications arising out of the Firm's representation of You. You further understand that, unless otherwise agreed in writing, the Firm will not be responsible for alerting You throughout the representation of any actual or potential tax-related matters. The Firm strongly encourages You to discuss all tax matters with competent tax counsel. The Firm has on staff tax counsel that may be able to perform these services if you wish to retain the Firm to do so. Absent the Firm affirmatively taking on this responsibility in writing, the Firm will make no representation or warranty regarding any actual or potential tax ramifications to You concerning any tax matters, including the tax ramifications of any action taken with respect to the matter for which we are retained. Our tax counsel representation, should you choose to engage us to perform same, is expressly limited to advising you with respect to the tax effect of contemplated transactions. Because our tax advice is limited to specific matter(s) and the affect of any specific matter(s) must be viewed in the context of your entire tax situation, it is strongly recommend that you review the affect of the specific matter(s) with your Certified Public Accountant or other tax professional who is responsible for your overall taxes.

We do not engage in the sort of "Tax Planning" which involves the recommendation of specific business or transactional arrangements the primary purpose of which is to reduce taxes in excess of the sums involved nor do we render "tax opinions" with respect to such transactions.

CONTINGENCY FEE TO FIRM:

Client acknowledges that he/she has been advised by Firm and is aware that contingency fee arrangements are not set by law, and that a contingency fee between Firm and Client is negotiable (**except that contingency fee in claims against health care providers may not exceed limits contained in Bus. & Prof. Code Section 6146 & 6147(a)(4)**).

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- **An amount equal to thirty three percent (33%) of any Gross Recovery obtained, whether by way of settlement, judgment or compromise.**
- (a) **Costs and expenses as affecting contingency fee:**

Any costs and expenses paid in connection with Client's claim which remain outstanding at the time of settlement, judgment or compromise shall be paid from the total Gross Recovery (total Recovery prior to subtracting all unreimbursed costs), before the contingency fee is calculated. (For example, if the claim is settled for \$1,000, and the outstanding balance for costs and expenses is \$100, then the Net Recovery is \$900.00, but the contingency fee shall be based on the Gross Recovery.) Client's share of the Recovery shall be the balance remaining after reimbursement of such costs and expenses and payment of the contingency fee.
- (b) **Form of Recovery as affecting contingency fee:**

If the Recovery consists of payments to be made over a period of time, or other property not entirely cash or cash-equivalent, the contingency fee shall be based on the **present cash value** of the Recovery as determined by generally recognized accounting and appraisal standards. (For example, if the Recovery consists of \$1,000 payable at \$100/year over 10 years, its present cash value may be approximately \$380, depending on prevalent interest rates.) The contingency fee shall be paid out of the **first funds or property received** by Client.
- (c) **Meaning of "Recovery":**

Client agrees that Firm should be compensated for Firm's services that result in a benefit to Client. "Recovery" includes, but is not limited to, any amounts paid to You or on Your behalf whether a result of an arbitration award, judgment, settlement or otherwise, in the matter(s) that the Firm represents You. In addition, "Recovery" includes any benefit (monetary or otherwise) flowing to You or for Your benefit that is the result of Firm's services (for example, debt forgiveness). "Recovery" also includes, but is not limited to, the ultimate result of a matter (i.e. judgment or settlement) such as payments made during the course of litigation that were refused prior to or after You retained Firm, so long as the payments or other benefits are the result of Firm's services.

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INITIAL COST RETAINER:

As explained, the Firm normally requests a cost retainer when it begins working for new clients to secure the payment of its costs and expenses. It is necessary for You to remit a cost retainer of **\$5,000** which may be applied to Your ongoing billing. Alternatively the Firm may hold the retainer in trust until your final bill. You agree to restore the original retainer at every billing cycle if necessary. Any excess will be returned to You at the time our final billing is rendered. The Firm would appreciate Your prompt attention to this request, as the Firm cannot undertake representing You until this initial retainer is received.

JUDGMENT OVERTURNED ON APPEAL:

In the event any of the Judgments are overturned on appeal then to the extent the firm collected monies an account of the overturned judgment, the firm will still be entitled to be paid from Client the same amount the Firm would be entitled to be paid had the judgment not been overturned on appeal, with the exception being that there will be a cap of a total of \$100,000 on the fee recoverable by the Firm, exclusive of costs.

COSTS:

In addition to fees for the services provided, You acknowledge that additional costs will be incurred on Your behalf. All costs and expenses which the Firm, in its discretion incurs in connection with the matter(s) for which it is engaged, will be for Your account. We shall, however, seek your pre-approval of any costs in excess of \$1,000. Costs and expenses shall include, but not be limited to, filing fees, photocopy charges, computer research, telephone usage, incoming and outgoing faxes, access postage, travel, expert fees, investigation expenses, messenger and delivery fees. The Firm may, in its discretion, advance such costs and expenses and any such sums so advanced must be paid by You upon presentation of the invoice reflecting costs incurred by the Firm on Your behalf. Understand, however, the Firm is under no obligation to advance any costs on Your behalf.

ATTORNEYS' FEES AWARDS:

During the course of our representation Firm may pursue claims for attorneys' fees, costs or sanctions. In the event the Court rules favorably said award belongs exclusively to Firm to compensate it for the services provided on Your behalf.

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ARBITRATION:

While we look forward to a mutually beneficial and enjoyable relationship with You, as You know, one of the jobs of a lawyer is to provide for the unanticipated. Accordingly, should any dispute arise between You and the Firm that is in any way related to the performance of this agreement by You or the Firm or in any way related to the Firm's representation of You in either the matter described above or in any other matter, including but not limited to disputes regarding fees, or claims regarding breach of contract, professional malpractice, breach of fiduciary duty or any other claim based in law or equity, You and the Firm agree to have any such claim(s) resolved through binding arbitration by the Judicial Arbitration and Mediation Services (J.A.M.S.), in Orange County, California. Without limiting the generality of the foregoing, You and the Firm expressly agree that any and all questions as to whether or not an issue constitutes a dispute or other matter arbitrable under this arbitration agreement shall themselves be settled by arbitration in accordance with this paragraph. This arbitration provision is self-executing, which means that either party may initiate the arbitration process, without resort to any court proceeding, by filing out and submitting a completed "Demand for Arbitration Before J.A.M.S." which is available at J.A.M.S.'s website. The arbitration shall be administered by a single arbitrator from J.A.M.S. pursuant to J.A.M.S.'s Comprehensive Arbitration Rules and Procedures, which are available for you to review at J.A.M.S.'s website. In the event that any provision of J.A.M.S.'s Comprehensive Arbitration Rules and Procedures is inconsistent with any provision of this Agreement, the provisions contained in this Agreement shall govern unless J.A.M.S.'s Comprehensive Arbitration Rules and Procedures expressly require otherwise, in which case the required J.A.M.S.'s Comprehensive Arbitration Rules and Procedures will be enforced to the extent required. The cost of the arbitration shall be split evenly among the parties to this agreement. Any award shall be final, binding and conclusive upon You and the Firm and a judgment rendered thereon may be entered in any court having jurisdiction of any such dispute. The prevailing party in any arbitration between You and the Firm, or in any litigation between You and the Firm required notwithstanding this arbitration provision, shall be entitled to recover reasonable attorneys' fees and costs (including administration expense associated with the arbitration itself.), so long as that party initiated or participated in the arbitration without resort to any court, except to seek provisional relief or in response to the other party's resort to that court. If You or the Firm seek to resolve any dispute covered by this paragraph by initiating litigation in any court, except to seek provisional relief, then the party who initiates the court proceeding shall NOT be entitled to recover reasonable attorneys' fees regardless of the prevailing party, but the other party shall be entitled to recover reasonable attorneys' fees if they are the prevailing party in any proceeding, including but not limited to obtaining an order

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compelling You to arbitrate the dispute. You and the Firm agree that service of all documents, including the "Demand for Arbitration Before J.A.M.S.," shall be made by regular U.S. mail. **YOU ACKNOWLEDGE THAT BY AGREEING TO ARBITRATION, YOU WAIVE ANY RIGHT THAT YOU HAVE TO A COURT OR JURY TRIAL FOR ANY AND ALL DISPUTES BETWEEN YOU AND THE FIRM, AND BY SIGNING THIS AGREEMENT YOU EXPRESSLY ACKNOWLEDGE THAT YOU ARE AWARE OF THE FOREGOING.** You further acknowledge and agree that the arbitration shall be governed by the laws of the State of California and that the forum for any dispute arising hereunder, including the site of the arbitration, shall be the County of Orange, State of California. The arbitrator shall follow the laws of California and may not invoke any other basis (including, but not limited to, notions of "just cause") to rule on the claims.

CELL PHONE AND E-MAIL COMMUNICATION:

The Firm hereby informs You and You hereby acknowledge that the Firm's attorneys sometimes communicate with their clients and their clients' professionals and agents by cell telephone, that such communications are capable of being intercepted by others and therefore may be deemed no longer protected by the attorney-client privilege, and that You must inform the Firm in writing if You do not wish the Firm to discuss privileged matters on cell telephones with You or Your professionals or agents.

The Firm hereby informs You and You hereby acknowledge that the Firm's attorneys sometimes communicate with their clients and their clients' professionals and agents by unencrypted e-mail, that such communications are capable of being intercepted by others and therefore may be deemed no longer protected by the attorney-client privilege, and that You must inform the Firm in writing if You wish to institute a system to encode all e-mails between the Firm and You or Your professionals or agents.

COOPERATION:

The Firm will provide services to You in accordance with this agreement and in reliance upon information and guidance provided by You. The Firm will keep You reasonably informed of progress and developments, and will respond to Your inquiries. To enable the Firm to consult with You effectively, You agree to cooperate fully with the Firm in all developments and to fully and accurately disclose all facts and documents that may be relevant to the matter or that the Firm may otherwise request and to preserve and provide same upon request. You also will make Yourself

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and other appropriate client personnel reasonably available to attend meetings, conferences, depositions, hearings and other proceedings as may be necessary.

NO GUARANTY OF SUCCESS:

Either at the commencement or during the course of the Firm's services, the Firm may express opinions or beliefs concerning various matters relating to the matters on which the Firm is consulting on, as well as various courses of action and the results that might be anticipated. Any such statement by any partner or employee of the Firm is intended to be an expression of opinion only, based on information available to the Firm at the time, and should not be construed by You as a promise or guaranty. Furthermore, You understand that the Firm has made no representation or guaranty concerning a successful outcome on the matter in which consulting services are being provided and that legal matters, particularly litigation, come with great expense and uncertain results.

CONFLICTS:

In undertaking this representation, the Firm's objective is to represent You to the best of its ability without forfeiting the continuing representation of the Firm's general clients. One purpose of this letter, therefore, is to avoid the Firm's disqualification from providing legal services for others on a more general basis for whom the Firm regularly represents in particular matters or controversies. Given the limited nature of the Firm's services to be provided, there are certain conditions to the Firm's engagement which the Firm would like to explain to You and to which the Firm would like to secure Your approval and consent.

The Firm is comprised of lawyers who have represented, and continue to represent, many different clients with various business interests in numerous industries. It is possible that during the time the Firm is representing Your interests in the current matter for which the Firm has been engaged, You become involved in transactions or disputes in which Your interests are adverse to those of one of the Firm's present or future clients. If such a conflict were to arise between Your interests and those of another present or future client of the Firm, the Firm will apprise You of that fact, but reserves the right to represent the interests of the other client with respect to that particular matter. If such conflicts cannot be resolved or are not waived by both parties, the Firm reserves the right to withdraw from its engagement of either or both parties.

Therefore, as a specific condition to the Firm's undertaking these consulting services, You understand and agree that the Firm may continue to represent, or may undertake

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in the future to represent, existing or new clients in any matter not entailing the specific matter in which the Firm is providing services to You, even if those matters ripen into or involve a dispute between such other clients and Yourself. The Firm agrees, however, that Your prospective agreement and consent to such conflicting representation shall not apply in any instance where, as a result of the Firm's representation of You, the Firm has obtained sensitive, proprietary or other confidential information of a non-public nature that, if known to any such other client, could be used to the material disadvantage of Your interests in the matter involved.

TERMINATION:

You may terminate this agreement at any time by written notice to the Firm. Your termination of the Firm's services will not affect Your responsibility for payment of outstanding statements, accrued fees and expenses incurred before termination or in connection with an orderly transition of the matter. If such termination occurs, Your papers and property will be returned to You promptly. The Firm's own files pertaining to all matters will be retained. It is agreed that all fees and costs accrued at the time of withdrawal will be immediately due and payable.

The Firm may terminate this agreement and withdraw from providing further services to You if You fail to fulfill Your obligations under this agreement, including Your obligation to pay the Firm's fees and expenses as they become due, or as permitted or required under any applicable standards of professional conduct or upon the Firm's reasonable notice to You, or if irreconcilable differences develop between the Firm and You which, in the Firm's sole discretion, would significantly impair the ability of the Firm to satisfactorily and effectively discharge its duties to You.

FILE STORAGE:

In providing services to You, the Firm may generate, receive or accumulate various materials. Upon Your request and prior to the closing of our files for this representation, the Firm will forward to You all important, original documents that it has accumulated. After closing the file, all remaining documents or materials may be archived without further notice to You. After three (3) years, the Firm reserves the right to permanently dispose of any unclaimed materials.

CONSENT TO USE OF INFORMATION:

In connection with future materials that, for marketing purposes, describe facets of our law practice and recite examples of matters we handle on behalf of clients, You

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agree that if those materials avoid disclosing Your confidences and secrets as defined by applicable ethical rules, they may identify You as a client, may contain factual synopses of Your matters, and may indicate generally the results achieved.

BINDING EFFECT:

This is a binding legal contract. The Firm has, by this contract, agreed to expend reasonable efforts and exercise reasonable judgment on Your behalf and may have to forego other engagements with other actual or potential clients. You agree to provide reasonable cooperation and assistance to the Firm and that the Firm shall be entitled to payment pursuant to this agreement, regardless of the outcome of the work and regardless of whether You are or are not satisfied with the results obtained by the Firm. This agreement is made and some or all services will be performed in the State of California and California law will govern our relationship.

JOINT AND SEVERAL LIABILITY:

Each of the parties signing this agreement on Your behalf is jointly and severally liable for the legal fees and costs incurred during this representation.

SEVERABILITY:

If any of these provisions is stricken in an arbitration or a court proceeding, the remainder shall constitute the agreement at the discretion of the Firm.

COUNTERPARTS:

Each person counter-signing the agreement warrants that he or she has authority to do so.

LIENS FOR UNPAID FEES:

A lien acts as security for unpaid fees and cost reimbursement that you owe the Firm. This lien could delay payments to You until any disputes over the amount to be paid to the Firm are resolved. You hereby grant the Firm a lien for any sums due and owing to the Firm for fees and costs relating to the Firm's services under this agreement.

The lien will attach to the retainers called for under this agreement, as well as any recovery that You may obtain in this matter whether by arbitration award, court order, judgment, settlement or otherwise, in the matter(s) for which You are retaining the

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Firm. You may seek the advice of an independent lawyer of Your choice about this lien. **BY SIGNING THIS AGREEMENT, YOU ACKNOWLEDGE THAT YOU HAVE BEEN ADVISED TO SEEK THE ADVICE OF AN INDEPENDENT LAWYER REGARDING THIS LIEN, AND THAT YOU HAVE BEEN GIVEN A REASONABLE OPPORTUNITY TO SEEK THAT ADVICE.**

The above provision regarding the granting of a lien to secure the Firm's fees has been explained, read, and approved by the client, and client understands and agrees that no act beyond obtaining Your signature to this agreement is necessary to perfect the Firm's lien rights.

REVIEW:

You acknowledge that the Firm has discussed the terms of this agreement and that the Firm has given You the reasonable opportunity to have this agreement reviewed by an attorney or other person of Your choosing prior to You signing it.

Please review this letter carefully and, if the terms and conditions of the Firm's representation and the billing arrangements meet with Your approval, please sign the enclosed copy of this letter and return it to the Firm so that we may begin work. Please call if You have any questions.

Thank you again for retaining Shulman Hodges & Bastian LLP on Your behalf. We appreciate the confidence that You have placed in the Firm and we look forward to working with You on this matter.

Very truly yours,

SHULMAN HODGES & BASTIAN LLP

Leonard M. Shulman
[Electronic Signature]

Leonard M. Shulman
LMS/ta

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ACKNOWLEDGED AND AGREED:

The undersigned, **after reading and understanding all of its terms, including those pertaining to the lien rights granted on page 9 and 10 to the agreement**, has agreed to the foregoing terms for the provision of legal services by Shulman Hodges & Bastian LLP, and agrees to such terms and conditions.

The undersigned has read and understands the consent provisions set forth above, and specifically consents to the waiver of the conflicts of interest set forth above.

THE CITY OF DANA POINT

Dated: _____ By: _____
Its: _____
Print Name: _____

RECEIPT OF SIGNED AGREEMENT CONFIRMED:

Dated: _____ By: _____
Ronald S. Hodges,
Case Acceptance Committee