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9  
10 **IN THE UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 \_\_\_\_\_ )  
13 UNITED STATES POSTAL SERVICE, ) Case No. 16-cv-4815-WHA  
14 )  
15 Plaintiff, )  
16 v. )  
17 CITY OF BERKELEY )  
18 Defendant. ) **FEDERAL RULE OF CIVIL**  
19 ) **PROCEDURE 26(F) JOINT**  
20 ) **REPORT AND JOINT**  
21 ) **CASE MANAGEMENT**  
22 ) **STATEMENT**

22 Pursuant to Federal Rule of Civil Procedure 26(f) and Civil Local Rule 16-9, Plaintiff  
23 United States Postal Service and Defendant City of Berkeley hereby submit this Joint Report.

24  
25 **I. JURISDICTION AND SERVICE**

26 Plaintiff asserts that the Court has jurisdiction under 28 U.S.C. §§ 1331, 1345, 2201, and  
27 2202, as well as 39 U.S.C. § 409(a). The Defendant has submitted a Motion to Dismiss

1 challenging the Court’s subject matter jurisdiction under Federal Rule of Civil Procedure  
2 12(b)(1). *See* ECF No. 11.

3 There are no issues in this case regarding personal jurisdiction or venue. The Defendant  
4 has submitted a waiver of the service of summons. ECF No. 7.

## 5 **II. FACTS**

6 **Plaintiff Postal Service’s Statement of Facts:** The Postal Service has determined that,  
7 in light of its financial difficulties, it should sell its underutilized properties to ensure that it can  
8 continue to provide effective and affordable postal services to the public, in compliance with its  
9 universal service obligation set forth in 39 U.S.C. § 101. Compl., ECF No. 1, ¶¶ 12, 26. In  
10 2012, the Postal Service concluded that the Berkeley Post Office at 2000 Allston Way, in  
11 Berkeley, California (“the Property”) should be among those sold because its operations require  
12 only about seven percent of the space available in the building. *Id.* ¶¶ 13–14. Following  
13 extensive community engagement over several months, in October 2013, the Postal Service’s  
14 broker began to market the Property. *Id.* ¶¶ 15–16.

15 The Defendant has taken multiple steps to try to block the sale of the Property, including:  
16 passing resolutions opposing the sale, *id.* ¶¶ 17, 41; appealing the Postal Service’s decision to  
17 sell, *id.* ¶¶ 18–20; and filing a lawsuit to enjoin the sale, *id.* ¶¶ 38–39. For the same purpose, the  
18 Defendant enacted Berkeley Municipal Code Chapter 23E.98, Civic Center District Overlay  
19 (“the Zoning Ordinance”), prohibiting any commercially viable uses of the Property. *See id.* ¶¶  
20 27–33. Because the operation of the Zoning Ordinance has rendered the Property unsuitable for  
21 commercial developers, the Postal Service has been, for practical purposes, prevented from  
22 selling the Property. *See id.* ¶¶ 1, 40. The Postal Service had entered into an agreement to sell  
23 the Property, but the prospective purchaser terminated that contract when it could not negotiate  
24 relief from the Zoning Ordinance with City officials within the timeframe provided by the  
25 agreement. *Id.* ¶ 37. Since that agreement was terminated, the Postal Service has not relisted the  
26 Property for sale—notwithstanding its determination that a sale remains necessary—because the  
27

1 Zoning Ordinance has depressed the market price of the Property to the point where a sale is  
2 financially untenable. *Id.* ¶ 40.

3 **Defendant City of Berkeley’s Statement of Facts:** The Defendant agrees with the sequence of  
4 events recounted by the Plaintiff, but believes that leaves out important facts.

5 The Property is a National Register listed historic resource, and as such is entitled to  
6 protection under Section 106 of the National Historic Preservation Act. The Defendant, along  
7 with the National Trust for Historic Preservation, the State Office of Historic Preservation and  
8 the Advisory Council on Historic Preservation, had substantive disagreements with Plaintiff  
9 about the adequacy of preservation measures it proposed as part of the sale of the Property. The  
10 Defendant also objected to the then-proposed relocation of postal services from the Property.

11 The Defendant does not agree with the Plaintiff’s statement that “the prospective  
12 purchaser terminated that contract when it could not negotiate relief from the Zoning Ordinance  
13 with City officials within the timeframe provided by the agreement”. The Defendant believes  
14 that the actual cause of the USPS’s inability to sell the property in 2014 was not the Historic  
15 Overlay ordinance but the condition of the Property and the expense of repairing it and  
16 conducting deferred maintenance given the price on which the Plaintiff insisted. Moreover, as far  
17 as Defendant is aware, the Property is not for sale and there is currently no buyer.

18 Finally, the Defendant disagrees as to the purpose of the Historic Overlay zoning and that  
19 it is even an appropriate issue for judicial inquiry at all. The purpose of the Historic Overlay  
20 zoning is stated in the ordinance itself, and does not include preventing the sale of the Property.

21 **III. LEGAL ISSUES:**

22 Based on the claims asserted in the Postal Service’s Complaint, and the issues raised in  
23 the currently pending motion to dismiss, the principal disputed legal issues in this action are:

- 24 • Whether the Zoning Ordinance violates the Supremacy Clause, U.S. Const. art. VI, cl. 2  
25 insofar as it regulates the Postal Service’s disposition of the Property;  
26 • Whether the Zoning Ordinance is preempted by federal law because it conflicts with  
27 federal law, and impedes the accomplishment and execution of the full purposes and  
28

1 objectives of federal law, including the Postal Clause of the Constitution, U.S. Const. art.  
2 I, § 8, cl. 7, the Property Clause of the Constitution, U.S. Const. art. IV, § 3, cl. 2, and  
3 the Postal Reorganization Act of 1970, 39 U.S.C. §§ 401(5), 403(b)(3), 404(a)(3); and

- 4 • Whether the Postal Service's claims are ripe.

5 No counter-claims have been filed in this lawsuit.

#### 6 **IV. MOTIONS**

7 The Defendant's motion to dismiss is currently pending. It has been fully briefed, and is  
8 set for hearing before the Court on December 22, 2016. The Plaintiff anticipates that, following  
9 narrow discovery with respect to the purpose of the Zoning Ordinance, it will move for summary  
10 judgment with respect to its Supremacy Clause and preemption claims.

#### 11 **V. AMENDMENT OF PLEADINGS:**

12 The parties do not presently anticipate that any additional parties will be joined or that  
13 further amendments to the pleadings will be necessary, but they reserve the right to make any  
14 such amendments.

#### 15 **VI. EVIDENCE PRESERVATION**

16 Each party represents that it has instituted reasonable document retention procedures so  
17 as to maintain relevant documents, electronic or otherwise, until this dispute is resolved.

#### 18 **VII. DISCLOSURES**

19 The parties exchanged initial disclosures on December 8, 2016. The Plaintiff identified  
20 its Vice President, Facilities as an individual likely to have discoverable information. Plaintiff  
21 also described the following as materials it may use to support its claims: video footage and  
22 minutes, also available online on the Defendant's website, of Berkeley City Council or Berkeley  
23 Planning Commission meetings, at which comments reflect that the primary purpose of the  
24 Zoning Ordinance is to prevent the sale of the Property. The Defendant identified its Planning  
25 Director as an individual likely to have discoverable information, and listed numerous  
26 documents containing its communications with the Plaintiff, other state and federal agencies, and  
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1 other organizations concerning the proposed sale of the Property and the City's views on that  
2 topic.

3 **VIII. DISCOVERY**

4 **A. Discovery to Date**

5 No discovery has yet been taken by the parties, and the parties hereby stipulate to a stay  
6 of discovery until after the Court's ruling on the Defendant's dispositive motion.

7 **B. Protective order**

8 If and when necessary and appropriate, the parties will address the scope of a protective  
9 order to govern this action.

10 **C. Privilege and Privilege Logs**

11 If and when necessary, the parties will address issues relating to privilege and privilege  
12 logs.

13 **IX. CLASS ACTIONS**

14 This is not a class action.

15 **X. RELATED CASES**

16 On September 21, 2016, the Court issued an order relating *City of Berkeley v. United*  
17 *States Postal Service*, 14-cv-04916-WHA to the above-captioned case. *See* ECF No. 8. There  
18 are no other related cases pending before this Court, or any other court or administrative body.

19 **XI. RELIEF:**

20 The Postal Service respectfully requests the following relief:

21 1. That this Court enter a judgment declaring that Berkeley Municipal Code Chapter  
22 23E.98, Civic Center District Overlay is invalid, null, and void insofar as it purports to regulate  
23 the Berkeley Main Post Office property;

24 2. That this Court enter a permanent injunction, enjoining the City of Berkeley and  
25 its successors, agents, and employees, from applying or enforcing Berkeley Municipal Code  
26 Chapter 23E.98, Civic Center District Overlay against the Berkeley Main Post Office, and from  
27

1 targeting the Berkeley Main Post Office through substantially similar Ordinances designed to  
2 prevent the sale of the Property;

3 3. That this Court award the United States Postal Service its costs in this action; and

4 4. That this Court award any other relief it deems just and proper.

5 **XII. SETTLEMENT AND ADR:**

6 The parties discussed Alternative Dispute Resolution. The Plaintiff does not believe that  
7 ADR would be appropriate at this time, given the nature of the claims raised and the relief  
8 sought.

9 The Defendant believes that some form of ADR would be useful because while it  
10 opposes the relocation of postal services from the Property as originally proposed by the  
11 Plaintiff, it would not necessarily object to some adaptive reuse of the Property that retains those  
12 uses, which is apparently acceptable to the Plaintiff. If the parties could agree on a program for  
13 adaptive reuse, it may be possible to settle this case.

14 The parties have filed their ADR Certifications.

15 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

16 The parties do not consent to a Magistrate Judge for all purposes. Plaintiff filed a  
17 Declination to Proceed Before a Magistrate Judge on September 6, 2016. *See* ECF No. 4.

18 **XIV. OTHER REFERENCES**

19 The parties do not presently believe that the case is suitable for referral to binding  
20 arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

21 **XV. NARROWING OF ISSUES**

22 The parties presently are not aware of any particular issues to be narrowed.

23 **XVI. EXPEDITED TRIAL PROCEDURE**

24 The parties agree that the issues presented are primarily legal, and amenable to resolution  
25 on a motion for summary judgment. They further agree that a trial is not necessary or  
26

1 appropriate in a case concerning whether a zoning ordinance violates the Supremacy Clause or is  
2 preempted by federal law.

3 **XVII. SCHEDULING**

4 The parties agree that it is premature to schedule additional deadlines before the Court  
5 has resolved the Defendant's currently-pending motion to dismiss.

6 **XVIII. TRIAL:**

7 As noted above, the parties agree that a trial is not necessary or appropriate in a case  
8 concerning whether a zoning ordinance violates the Supremacy Clause or is preempted by  
9 federal law.

10 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS:**

11 Plaintiff and Defendant are exempt from the requirement to file such a statement under  
12 Civil Local Rule 3-15(a).

13 **XX. PROFESSIONAL CONDUCT**

14 All attorneys of record for the parties have reviewed the Guidelines for Professional  
15 Conduct for the Northern District of California.

16  
17  
18 Agreed to and submitted by:

19  
20 Dated: December 15, 2016

Respectfully submitted,

21  
22 /s/ Zach Cowan  
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