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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CITY OF OAKLAND,

Plaintiff,

v.

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

Defendants.

No. CV 12-5245 MEJ

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

CITY OF OAKLAND'S REPLY IN SUPPORT OF ITS MOTION TO STAY LANDLORDS' MOTIONS

Hearing Date: December 20, 2012
Time: 10:00 a.m.
Courtroom: B, Hon. Maria-Elena James

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

I. OVERVIEW

The Court should grant the City of Oakland's motion to stay the landlords' motions to prohibit the use of real property as medical cannabis dispensaries until after Oakland's claims in *Oakland v. Holder* have been finally adjudicated. Ana Chretien, the landlord in the *Harborside Action* who filed the principal motion at issue, did not oppose Oakland's stay request.

The government does not dispute and thus concedes that if Oakland is correct that the forfeiture attempt in the *Harborside Action* is barred, then Ms. Chretien's motion will become baseless and moot. The government also concedes that Oakland's claims overlap with the issues in the landlords' motions and that the government waited almost six years to bring its Harborside forfeiture action. Indeed, the government fails to identify any specific harm if the stay is granted. Without question, the orderly resolution of issues in the coordinated proceedings, judicial efficiency, avoiding the risk of inconsistent rulings, preventing prejudice to Oakland (and its citizens and medical patients), the lack of harm to the government, and the public interest all militate sharply in favor of a stay.

The Court should reject the government's attempt to prevent a logical resolution of issues. The government implies that the Court lacks power to stay the landlords' motions. Not true. The Court has authority to structure the resolution of issues in the coordinated proceedings. The government also argues that Oakland lacks standing to bring *Oakland v Holder* and then attacks the merits of Oakland's claims. Those arguments, however, miss the point. The purpose of this stay motion is to allow Oakland an opportunity to litigate those very issues — not to decide them in this motion. And, even if the Court proceeds to examine the issues at this juncture, Oakland, in fact, does have standing, and its claims are meritorious.

The government's unstated goal in opposing this stay motion is to avoid judicial scrutiny of the legality of its forfeiture action. The government, through threats to confiscate her property, among other possible threats, has coerced Ms. Chretien to attempt to immediately close Harborside. The government's threats, however, are premised on an illegal forfeiture action, which is challenged in *Oakland v. Holder*. The government hopes to avoid judicial scrutiny of its illegal action by closing Harborside prematurely before Oakland can conduct discovery, develop

its case, and present its claims at trial. That, however, is not how our system of government is supposed to work — the executive branch is not above the law. Staying the landlords' motions until Oakland's claims have been adjudicated, on the other hand, will prevent the government from avoiding judicial scrutiny.

As has been well stated, "The United States wins its point whenever justice is done its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Justice here requires a stay.[1]

II. THE COURT HAS POWER TO STAY THE LANDLORDS' MOTIONS

The government's assertion that it is "axiomatic" (Opp. at 4:23-25) that Oakland cannot seek a stay in a related action to which it is not a party is simply wrong. This Court's discretion to stay proceedings is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Thus, the Court on its own could order a stay, even absent Oakland's motion. *See Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Contrary to the government's assertions, district courts do hear motions in one case to stay proceedings in another related case, as is requested here. *See Markel v. O'Quinn*, 566 F. Supp. 2d 1374, 1376 (S.D. Ga. 2008) (granting motion filed by insurance company in a declaratory relief action to stay underlying tort action where it was not a party; the court's "own interests in an orderly disposition of its caseload, and the parties' competing interests in the two actions" warranted a stay); *see also Garcia v. Gordon Trucking, Inc.*, 2011 U.S. Dist. LEXIS 76399 (E.D. Cal. July 14, 2011) (considering motion filed by plaintiff in one putative class action to stay motion to consolidate filed in competing putative class action). As in *Markel*, Oakland's motion to stay will ensure an orderly disposition of matters. In any event, the claimant Harborside has joined this motion, which moots any issue of whether a party to the *Harborside Action* is requesting a stay of the landlord's motion.

[1] In support of this Reply and the Motion to Stay, Oakland is simultaneously filing the Second Declaration of Cedric C. Chao (and Ex. 1) and the Declarations of Mayor Jean Quan, Arturo Sanchez, and Achim Brinker (and Exs. 1-17).

III. THE GOVERNMENT IGNORES THE KEY *LANDIS* FACTORS AND THE HARM TO OAKLAND ABSENT A STAY

A. The *Landis* Factors Favor a Stay

The government notably fails to address the *Landis* factors that govern this stay motion and that strongly militate in favor of a stay. (*See* Oakland's Opening Brief at 6:12-7:10.)

1. Oakland Will Be Harmed Absent a Stay: The stay is necessary to protect the rights of Oakland and its citizens. The government does not deny that if Oakland is correct and the *Harborside Action* is barred, then there is no basis for the landlords' motions. The landlords' motions are brought under Supplemental Rule G, which is particular to civil forfeiture proceedings. The landlords cannot invoke Rule G where the underlying forfeiture proceeding was beyond the government's authority in the first place. Since *Oakland v. Holder* challenges the validity of the forfeiture proceedings, Oakland's claims logically must be adjudicated first. Oakland cannot be deprived of its day in court, and the government cannot be allowed to avoid judicial scrutiny of the legality of its actions.

2. A Stay Will Not Harm the Government: The government's claim that the stay will harm "the federal Government's interest in ensuring enforcement of its laws" rings hollow. (Opp. at 13.) The government waited nearly *six years* while Harborside was openly operating before initiating the Harborside forfeiture proceeding. The government makes no offer of how it will be prejudiced by delaying the landlords' motions (or for that matter delaying the entire forfeiture actions) until after the Court can adjudicate the lawfulness of the forfeiture actions.[2]

3. A Stay Will Promote the Orderly Course of Justice: The government does not dispute, and thus concedes, that Oakland's requested stay will (a) promote efficiency, (b) conserve the Court's and the parties' resources, and (c) avoid the risk of inconsistent rulings. Nor does the government justify its suggestion that the issues in the coordinated proceedings be adjudicated in a fractured and piecemeal manner, which would result from the denial of a stay.

[2] Oakland will ask the Court at the December 20, 2012 hearing to stay the forfeiture actions in their entirety until after this case has been finally adjudicated.

B. The Public Interest, Including the Interests of Patients, Favors a Stay

The public interest strongly favors a stay. The right of patients to access medical cannabis is, without doubt, one of the most discussed topics today. Approximately one-third of Americans live in states that have legalized medical cannabis.[3] According to a 2010 Gallup Poll, "70% of Americans [said] they favor making marijuana legally available for doctors to prescribe in order to reduce pain and suffering." (Second Chao Decl., Ex. 1.) The medical efficacy of cannabis cannot be credibly denied, nor can the harm to patients' health and safety if patients are suddenly deprived of their medicine.

The public interest in patient care favors a stay. Shuttering Harborside will injure patients by denying them the medical benefits of cannabis, a factor that favors a stay.[4] The therapeutic properties of cannabis have been widely recognized for decades, if not centuries. Scientists, including *government scientists*, seeking to understand the underlying biology continuously discover new benefits and applications for medical cannabis. Despite the government's refrain that cannabis has no medical benefit, the government's own patents and scientific research reveal that the government believes in the medical efficacy of cannabis. The government has sought exclusive ownership rights to cannabis compounds and their use by applying for and securing U.S. and international patents.[5] The government's own '210 patent publication openly extolls "analgesic" (pain-relieving) and "healing properties of *Cannabis sativa* (marijuana)" that "have been known throughout documented history," and the government admits that "*legitimate medical use[s] of marijuana*" exist and include treatments of chemotherapy-induced vomiting and appetite stimulation in HIV/AIDS and multiple sclerosis patients.[6] Additionally, the

[3] Per the 2010 U.S. Census, the total U.S. population was 308.7 million, and the total population in the 18 states that have legalized medical cannabis was 100.4 million. *See* http://2010.census.gov/2010census/data/apportionment-dens-text.php.

[4] The government concedes that "the public has a general interest in having access to doctor-recommended treatments." (Opp. at 13.) Here, Harborside only provides medical cannabis to patients with a doctor's recommendation.

[5] The U.S. Department of Health and Human Services is the assignee of U.S. Patent No. 6,630,507 B1 and the international patent application WO 2009/140210 A2. (Dkt. No. 16-12, Chao Opening Decl. Ex. 11; Brinker Decl., Ex. 1.)

[6] Brinker Decl., Ex. 1 (WO 2009/140210 A2 at paragraph [0004]).

government's own '507 patent praises cannabinoids' unexpected antioxidant properties that "make[] cannabinoids useful in the treatment and prophylaxis of wide variety of oxidation associated diseases, such as ischemic, age-related, inflammatory and autoimmune diseases" as well as "in the treatment of neurodegenerative diseases, such as Alzheimer's disease, Parkinson's disease and HIV dementia."[7] The government has even capitalized on its patent rights by licensing the '507 cannabinoid patent to the pharmaceutical company KannaLife,[8] presumably for commercial development.

A wealth of new data has substantially altered scientific understanding regarding the medical benefits of cannabis.[9] Science now shows that compounds found in medical cannabis have dramatic benefits for patients. For example, since 2001, scientists funded by the government's own National Institutes of Health have proven the benefit of medical cannabis for HIV-associated anorexia and weight loss,[10] neuropathic pain,[11] a wide range of inflammatory diseases,[12] and the suppression of AIDS-virus infections.[13] The National Institute on Alcohol Abuse and Alcoholism ("NIAAA") has contributed research supporting the benefits of medical cannabis. Dr. Pal Pacher, an internationally acclaimed NIAAA faculty member, has discovered numerous benefits of cannabis, including the prevention of diabetic complications in the heart,

[7] U.S. Patent No. 6,630,507 B1 (Abstract). (Dkt. No. 16-12, Chao Opening Decl. Ex. 11.)

[8] Brinker Decl., Ex. 2 (Press Release: KannaLife Sciences, Inc. Signs Exclusive License Agreement with National Institutes of Health Office of Technology Transfer).

[9] *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001), is inapposite because Oakland is not raising a necessity defense to the CSA. Further, science has advanced significantly since 2001, as described in the government's own documents.

[10] Brinker Decl., Ex. 9 (Barry M. Bredt et al., *Short-Term Effects of Cannabinoids on Immune Phenotype and Function in HIV-1 Infected Patients*).

[11] Brinker Decl., Ex. 10 (D. I. Abrams et al., *Cannabis in Painful HIV-Associated Sensory Neuropathy*).

[12] Brinker Decl., Exs. 17 and 11 (Mohanraj Rajesh, et al., *Cannabidiol Attenuates High Glucose-Induced Endothelial Cell Inflammatory Response and Barrier Disruption*; Parkash Nagarkatti et al., *Cannabinoids as Novel Anti-Inflammatory Drugs*).

[13] Brinker Decl., Ex. 13 (Cristina M. Costantino et al., *Cannabinoid Receptor 2-Mediated Attenuation of CXCR4-Tropic HIV Infection in Primary CD4$^+$ T cells*).

such as fibrosis,[14] and protection from chemotherapy-induced kidney damage[15] and transplantation-related liver damage.[16] How can the government credibly deny the benefits of medical cannabis when the government itself is funding cutting-edge research proving the medical benefits of cannabis and seeking patents based on such research?

Without access to medical cannabis, patients will suffer. The ability of medical cannabis to relieve excruciating neuropathic pain in cancer, HIV, and multiple sclerosis patients is undisputed, and is only one of the many clinically proven benefits of medical cannabis.[17] Importantly, medical cannabis was proven to alleviate extreme pain even in patients who cannot be helped by the strongest conventional medications.[18] Although a few cannabis-based surrogate drugs exist, these either do not relieve pain[19] or they are still subject to lengthy and uncertain regulatory approval processes.[20] KannaLife, for example, is likely years away from having an approved cannabinoid drug on the market. Thus, shutting down access to irreplaceable medications will leave critically ill patients scrambling without recourse. Moreover, personal responses to drug treatments are known to be highly variable and unpredictable.[21] Thus, denying access to medicinal cannabis undoubtedly will increase the suffering even in patients who are experiencing less severe conditions, such as glaucoma, that might be manageable with conventional drugs. Shutting off access to proven medicine would force patients to endure a

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[14] Brinker Decl. Ex., 14 (Mohanraj Rajesh et al., *Cannabidiol Attenuates Cardiac Dysfunction, Oxidative Stress, Fibrosis, and Inflammatory and Cell Death Signaling Pathways in Diabetic Cardiomyopathy*).

[15] Brinker Decl., Ex. 15 (Hao Pan et al., *Cannabidiol Attenuates Cisplatin-Induced Nephrotoxicity by Decreasing Oxidative/Nitrosative Stress, Inflammation, and Cell Death*).

[16] Brinker Decl., Ex. 16 (Partha Mukhopadhyay, *Cannabidiol Protects Against Hepatic Ischemia/Reperfusion Injury by Attenuating Inflammatory Signaling and Response, Oxidative/Nitrative Stress, and Cell Death*).

[17] Brinker Decl., Exs. 3 and 4 (Robert H. Dworkin et al., *Pharmacologic Management of Neuropathic Pain: Evidence-Based Recommendations*; Ronald J. Ellis et al., *Smoked Medical Cannabis for Neuropathic Pain in HIV: A Randomized, Crossover Trial*).

[18] *Id.*

[19] Brinker Decl., Exs. 5 and 6 (Marinol[R] and Cesamet[R] package inserts).

[20] Brinker Decl., Ex. 7 (Sativex[R] trial).

[21] Brinker Decl., Ex. 8. (Ashraf G. Madian et al., *Relating Human Genetic Variation to Variation in Drug Responses*).

painful readjustment period during which patients must experiment with various iterations or cocktails of conventional drugs, without the certainty that a new medicine can be identified.[22]

IV. THE GOVERNMENT'S ARGUMENTS ON THE MERITS OF *OAKLAND V. HOLDER* ARE BOTH (1) IRRELEVANT TO THIS STAY MOTION AND (2) WRONG

The government conflates Oakland's motion to stay with its own Rule 12(b) motion to dismiss by raising (1) Oakland's standing to bring the *Oakland v. Holder Action* and (2) the merits of Oakland's claims. The government is confused. The purpose of *this* motion is to ensure Oakland a *fair opportunity to develop the record and to present its claims* — not to determine whether Oakland will ultimately prevail. To prevail on its motion to stay, Oakland is not required to now argue the motion to dismiss. To the extent the Court desires a preview, Oakland will proceed to describe its prima facie case.

A. Oakland Has Standing to Bring the *Oakland v. Holder Action*

The government argues that Oakland lacks standing because it has not filed a claim in the *Harborside Action*. The government misunderstands the law. Oakland is not a claimant to the real property, so it need not file a claim in the forfeiture proceedings. Rather, Oakland has standing to protect its economic and regulatory/public health and safety interests by bringing its own *independent claims* under the Administrative Procedures Act ("APA").

Oakland has standing under the U.S. Constitution, which requires only an actual or imminent "injury in fact" that is "fairly traceable to the challenged action of the defendant" and is "likely" to "be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).[23] "Pecuniary injury is clearly a sufficient basis for standing." *Central Ariz. Water Conservation Dist. v. United States EPA*, 990 F.2d 1531, 1537 (9th Cir. 1993) (citation

[22] The government does not dispute other public interest factors cited in Oakland's Opening Brief, such as an increase in crime, distribution of adulterated cannabis, and the drain on Oakland's resources that will follow if Harborside is closed. (*See* Opening Brief at 11.) These factors also favor a stay.

[23] All that is required at the pleading stage are "general factual allegations of injury resulting from the defendant's conduct," since the Court will "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

omitted). Such monetary loss includes loss of tax revenue specifically traceable to the act or statute in question.[24] Cities, such as Oakland, also have standing "to vindicate . . . proprietary interests as might be congruent with the interests of their inhabitants" including sales tax revenues, and "the possibility of actual injury to its ability to function as a municipality in regulating persons and property within its jurisdictional control." *Colorado River Indian Tribes v. Parker*, 776 F.2d 846, 848-849 (9th Cir. 1985). Here, the City of Oakland has alleged economic loss in the form of lost business tax revenue specifically attributable to dispensary permits. (*See* Dkt. No. 1, Compl., ¶¶ 1, 53-54.)

Oakland also has prudential standing to bring a suit under the APA. Section 10(a) of the APA provides that any "person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.[25] A plaintiff's interest need only be "arguably within the zone of interests to be protected or regulated by the statute" at issue. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (neighboring landowner had standing to sue Department of Interior regarding land seized pursuant to Indian Reorganization Act and zoned for use as a casino). This test "is not meant to be especially demanding" and should be applied in keeping with Congress's "evident intent" when enacting the APA "to make agency action presumptively reviewable." *Id.* The "benefit of any doubt goes to the plaintiff." *Patchak*, 132 S. Ct. at 2210. The statute at issue here is the Controlled Substances Act ("CSA"), which the government is enforcing through forfeiture proceedings. Economic interests are sufficient for prudential standing to challenge federal enforcement of the CSA.[26] In addition, the zone of interests protected by the CSA

[24] *See Wyoming v. Oklahoma*, 502 U.S. 437 (1992); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004) (City alleged cognizable economic injury where National Park Service plan would increase congestion, creating "aesthetic damage [that] will erode its tax revenue"); *see also Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1451 (10th Cir. 1994) (County had standing to challenge a United States Forest Service decision that caused "a loss of revenue sharing and sales tax monies").

[25] The City of Oakland, as a municipal corporation, is a person for purposes of the APA. *See City of Sausalito v. O'Neill*, 386 F.3d at 1200; 5 U.S.C. § 551(2).

[26] *See Hemp Indus. Ass'n v. DEA*, 357 F.3d 1012 (9th Cir. 2004) (distributors, manufacturers and vendors of products containing trace amounts of THC have standing to sue DEA to challenge rulemaking process); *United States v. Plume*, 447 F.3d 1067, 1074 (8th Cir.

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includes the public's interest in the use and regulation of controlled substances and their effects on public health, welfare, and safety.[27] Here, Oakland alleges that the federal government exceeded its authority by illegally enforcing the CSA through the forfeiture proceedings, thereby jeopardizing the public welfare of Oakland and its residents. Illegal enforcement of the CSA will also cause economic harm from lost tax revenue, and increased costs of police enforcement, in addition to untold costs associated with channeling thousands of patients into an unregulated black market. (*See* Quan Decl., ¶¶ 8, 11; Sanchez Decl., ¶ 26.)

B. The Government's Authority Is Inapposite

The government cites no authority that would prohibit Oakland from challenging the legality of the civil forfeiture by filing a lawsuit to protect its interests. Instead, the government relies on three inapposite decisions that it misconstrues and mischaracterizes. (Opp. at 4 (citing *Can v. DEA*, 764 F. Supp. 2d 519 (W.D.N.Y. 2011); *Martin v. Leonhart*, 717 F. Supp. 2d 92 (D.D.C. 2010); *Hammitt v. United States*, 69 Fed. Cl. 165 (2005)).) These decisions merely held that claimants with direct interests in the property subject to forfeiture may not file separate lawsuits to set aside resolved forfeiture proceedings. These decisions are irrelevant because they have no bearing on the right of a *non-claimant* that lacks a direct interest in the property subject to forfeiture, such as Oakland, to file a civil suit under the APA where it has an *independent cognizable* injury, particularly before actual forfeiture. None even involves the APA.

In all three decisions, the claimants had notice of forfeiture, *an opportunity to be heard,* and the ability to file a timely claim, but failed to do so. The courts reached the non-controversial conclusion that claimants who had an opportunity to contest forfeiture by filing a claim are precluded from filing a separate claim. Contrary to the government's representations, *Martin*

(Footnote continued from previous page.)

2006) (purchasers of industrial hemp have standing to sue DEA to block enforcement of a ban on production); *MD Pharm. v. DEA*, 133 F.3d 8 (D.C. Cir. 1998) (drug producer has standing to sue DEA where agency issued operating permit to competitor).

[27] *See Gonzales v. Oregon*, 546 U.S. 243, 250 (2006) (Oregon had standing to sue where Attorney General exceeded scope of authority under CSA by prohibiting physicians from prescribing drugs used in physician-assisted suicide in accordance with state law); *Gonzales v. Raich*, 545 U.S. 1, 13 n.5 (2005) (Medical cannabis patients in California had standing to sue Attorney General regarding alleged illegal enforcement of CSA).

does not address the right of a *non-claimant* to file suit under the APA. That case involved a claimant who had notice of the forfeiture proceeding, but rather than file a claim, filed a separate petition for administrative review, which was denied. *Martin*, 717 F. Supp. 2d at 95. Later, the claimant argued his petition was actually a claim in the civil forfeiture action. *Id.* at 96. The sentences before and after the passage quoted by the government clarify that the court's "holding" just rejects the claimant's attempt to obtain a second bite at the apple:

> *Accordingly, because plaintiffs did not file a timely claim with the DEA contesting the forfeiture, the forfeiture occurred and became final in the administrative process.* Under the scheme established by Congress, the filing of a claim by an aggrieved party [pursuant to 18 U.S.C. § 983] is the exclusive means by which a claimant can have a judicial determination as to the forfeiture's validity. *Because a federal district court has no jurisdiction to entertain a lawsuit which is brought by a claimant wholly apart from the procedure established by Congress, this Court lacks jurisdiction to review the merits of plaintiffs' complaint.*

Id. at 99-100 (emphasis added).

C. Oakland's Statute of Limitations Claim Is Meritorious

Oakland's statute of limitations claim indisputably has merit. The government does not contest, and therefore concedes, that (1) the five-year statute of limitations in 19 U.S.C. § 1621 applies here, and (2) the government knew or should have known that Harborside was dispensing medical cannabis since 2006, when Harborside opened, more than 5 years before the federal government filed the forfeiture action on July 9, 2012.

To attempt to save its late-filed forfeiture action, the government relies on *United States v. 5443 Suffield Terrace, Skokie, Ill.*, 607 F.3d 504 (7th Cir. 2010), to suggest that the statute of limitations did not begin to run when the government discovered Haborside's operation. There, the government sought forfeiture of property connected with a person who had been caught several times smuggling Cuban cigars into the United States. The claimant argued that since he had first been caught smuggling cigars in 1996, and the government did not file the forfeiture action until 2002, the action was barred. The court held that the discovery of two subsequent smuggling incidents in 1997 and 1999 were new "alleged offenses" within the five-year statute of limitations. *Id.* at 507-08. The court stressed that the claimant "forfeited his house *not because he operated a cigar smuggling business in general*," but because the government discovered in

1997 that he "had recently smuggled cigars into the country." *Id.* at 508 (emphasis added). Here, unlike the limited, discrete instances in which the claimant in *5443 Suffield Terrace* had been smuggling cigars, Harborside *has been continually operating* a "[medical cannabis dispensary business] in general." And, the government has known about it since 2006 and has intentionally elected to not bring any actions within the limitations period.

The Sixth Circuit decision, *United States v. $515,060.42 in United States Currency*, 152 F.3d 491 (6th Cir. 1998), is closely analogous to our facts and governs this case. There, the government brought a forfeiture action against currency seized as part of a federal investigation of a bingo gaming operation. The forfeiture action was filed in March 1994, but the government knew about the bingo games and the nightly cash takes in 1988, outside the five-year limitations period. In its defense, the government argued, as it does here, that the statute of limitations had not run because the gambling operation was a "continuing violation of gambling laws and that the currency seized was from relatively recent bingo operations." *Id.* at 502. The Sixth Circuit disagreed and held that:

> The statute of limitations does not run from the date of a particular violation, but from the date of "discovery" of an offense . . . . The Government cannot disregard its discovery of earlier occurring offenses in preference for later offenses which would produce a more favorable timeline.
> . . .
> The Government offers no excuses or mitigating circumstances for its delay in filing the underlying forfeiture action.

Id. at 502-503.

The same analysis applies here. Harborside has openly operated a continuing business in the same location since 2006. And, the government has charged a continuing business: "Since at least 2006 and continuing to the present, Harborside has operated a marijuana retail store engaged in the distribution of marijuana at the defendant real property." (Dkt. 1, Compl. ¶ 12, *Harborside Action*.) And, both CSA provisions on which the government bases the forfeiture proceeding identify a *continuing* purported offense. Section 856 provides that it is unlawful to "knowingly . . . rent, use or maintain any place . . . for the purpose of . . . distributing . . . any controlled substance." 21 U.S.C. § 856(a)(1). Section 841(a) prohibits "possession with the intent to . . .

distribute or dispense a controlled substance." (*Id.* ¶ 22.) These charges are analogous to the Sixth Circuit's decision where the underlying offense was "conduct[ing]" and "manag[ing]" an illegal gambling business.[28]

D. Oakland's Estoppel Claim Is Meritorious

Oakland has pled a meritorious claim based on equitable estoppel. The government's argument that Oakland has not pled "affirmative misconduct" is wrong. The Ninth Circuit has stated that "a pattern of false promises" may constitute affirmative misconduct. *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001). The Ninth Circuit explained that "there is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances." *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989).

Here, the government's multi-year policy of not enforcing the CSA against those in compliance with state law and its 180-degree reversal by bringing the forfeiture actions amount to affirmative misconduct. The government mischaracterizes Oakland's claim as "rel[ying] primarily on the 2009 Ogden memo." (Opp. at 9.) That is clearly not true. The government is silent about its own officials repeatedly affirming that the government would not enforce the CSA against those in compliance with state law. This pattern of false promises includes:

- Then-candidate Obama stated during the 2008 campaign: "I'm not going to be using Justice Department resources to try and circumvent state laws on [the] issue [of medical cannabis]." (*See* Dkt. No. 16-6, Chao Opening Decl., Ex. 5.)
- Attorney General Holder stated during a press conference in February 2009 that what the President "said during the campaign is now American policy." (*See* Dkt. No. 1, Compl. ¶ 45.)
- Attorney General Holder stated in March 2009 that "The policy is to go after those people who violate both federal and state law." The next morning, *The New York Times* reported "Obama Administration to Stop Raids on Medical Marijuana Dispensers." (*Id.* ¶ 46.)
- In May 2010, Attorney General Holder testified before the House Judiciary Committee as follows when asked about medical marijuana enforcement policy:

[28] As this Court has recognized, "[s]tatutes of limitations are statutes of repose representing a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Real Property and Improvements Located at 9167 Rock's Road*, 1995 WL 68440 at *4 (N.D. Cal. 1995) (citation omitted).

"We look at the state laws, and what the restrictions are . . . . Is marijuana being sold consistent with state law?" (*See* Dkt. No. 16-9, Chao Opening Decl., Ex. 8.)

- In June 2012, one month before filing the *Harborside Action*, Attorney General Holder testified before the House Judiciary Committee that "we limit our enforcement to those individuals, organizations that are acting out of conformity with state laws." (*Id.* Ex. 9.)

Until 2012, the *government's actions* in Oakland conformed to this stated policy. Four licensed medical cannabis dispensaries have operated openly in Oakland since 2006. (*See* Dkt. No. 1, Compl. ¶¶ 37-38.) Although DEA agents took enforcement action against two *unlicensed* dispensaries nearby, between late 2006 and April 2012, federal authorities did not act against duly licensed dispensaries operating in accordance with state law in Oakland. (*Id.* at ¶¶ 40-41.) The government does not allege that Harborside violates state law or any of the conditions of its permit. (*See* Dkt. No. 1, Compl., *Harborside Action*.)

Oakland also can show detrimental reliance. In reliance on the government's statements and conduct, Oakland has developed a regulatory scheme for the safe distribution of medical cannabis. (*See* Sanchez Decl., ¶¶ 13-15; Quan Decl., ¶ 11.)[29] As stated by Mayor Quan, "The Oakland City Council understood that if we complied with state law our local ordinance would be honored by the federal government. Our understanding was based on representations by the federal government and the government's conduct in allowing duly licensed dispensaries to operate, while closing other non-licensed dispensaries." (Quan Decl., ¶ 11.) By "allowing Harborside and other duly licensed dispensaries to operate for a number of years, the government enabled a market for medical cannabis. The dispensaries now supply tens of thousands of patients who qualify for this medicine." (Quan Decl., ¶ 7.) That demand for medical cannabis will not diminish — even if the dispensaries are closed. Instead, "the tens of thousands of patients who qualify for this medicine either will be forced to forego their medicine or be forced

[29] The letters attached to the Opposition that were sent by the Alameda County District Attorney in December 2010 and U.S. Attorney Melinda Haag in February 2011 did not concern licensed dispensaries or Oakland's ordinance permitting them, but concerned *an unrelated ordinance* that was under consideration for medical cannabis *cultivation facilities*. (Opp. Exs. A and B.) Although the *dispensary* ordinance at issue here was passed in 2004, Oakland received no communication that the government planned enforcement action against licensed dispensaries until October 2011. (*See* Sanchez Decl., ¶¶ 16-24.)

into the back alleys and underground, illegal markets, endangering their health and safety and further straining the limited resources of the Oakland Police Department (OPD)." (*Id.* at ¶ 8.) In that event, "millions of dollars in cannabis sales will be diverted from the regulated and safe dispensing environment onto the streets and will create unsafe conditions for patients and the Oakland community." (*Id.* at ¶11.) This result will increase street crime and violence and spread adulterated cannabis, causing a public health and safety crisis that Oakland is unequipped to address. For these reasons, the government's actions also threaten to work a serious injustice.

In addition, Oakland has relied on the business tax revenues from its permitted dispensaries and made specific budget projections in anticipation of that revenue. (*See* Dkt. No. 1, Compl. at ¶ 54.) And, the City has dedicated employee resources to operating and maintaining the medical cannabis dispensary permit program. (*Id.* at ¶¶ 55, 59; Sanchez Decl. at ¶13.)

The government's reliance on *Marin Alliance for Medical Marijuana v. Holder*, 886 F. Supp. 2d 1142, 1155-56 (N.D. Cal. 2011) ("*MAMM I*") and *MAMM v. Holder*, 11-CV-5349, 2012 WL 2862608 (N.D. Cal. July 11, 2012) ("*MAMM II*"), is misplaced. *First*, *MAMM* involved a claim of "estoppel by entrapment," which is a defense to a crime having entirely different standards than a civil equitable estoppel claim.[30] *Second*, the estoppel claim in *MAMM* was based *only* on the Ogden memo, whereas this case involves a pattern of statements and conduct by the government. (*Id.* at ¶¶ 42-60.) *Third*, the plaintiffs in *MAMM* did not oppose the motion to dismiss the estoppel claim, a point the court relied upon. *MAMM II* at *11.[31]

[30] *See United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (entrapment by estoppel requires "(1) 'an authorized government official,' 'empowered to render the claimed erroneous advice,' . . . (2) 'who has been made aware of all the relevant historical facts,' . . . (3) 'affirmatively told him the proscribed conduct was permissible,'. . . (4) that 'he relied on the false information,' . . . and (5) 'that his reliance was reasonable'").

[31] The government's other decisions are inapposite as well. In *Alternative Cmty. Health Care Co-op., Inc. v. Holder*, No. 11-2585, 2012 WL 707154 at *2-3 (S.D. Cal. Mar. 5, 2012), the plaintiffs did not oppose the government's motion to dismiss the estoppel claim, which was also styled as "estoppel by entrapment." *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1111-12 (E.D. Cal. 2012), involved only the Ogden memo, not a pattern of statements and conduct at issue here. *United States v. Bell*, 602 F.3d 1074, 1082 (9th Cir. 2010), concerned the government's efforts to recoup waters diverted from an irrigation district and involved reliance on "decades" old government statements. *New Hampshire v. Maine*, 532 U.S. 742, 755-56 (2001),

(Footnote continues on next page.)

In contrast, this action is similar to other cases where the government was subject to equitable estoppel. *See, e.g.*, *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989) (government estopped from discharging soldier from Army because of sexual orientation when government knew of plaintiff's homosexuality and allowed him to remain in the Army); *LC U-Bake LLC v. U.S.*, No. 2:12-CV-0049, 2012 WL 1379048 (D. Or. April 20, 2012) (equitable estoppel prevented withdrawal of authorization to participate in food stamp program where approval was "result of broader [department] policy" and government made "affirmative representations in violation of its own regulations").

V. CONCLUSION

The Court should grant Oakland's motion to stay Ms. Chretien's motion to prevent Harborside from distributing medical cannabis. The Court should also stay the motion in the *San Jose Action* for purposes of judicial efficiency as the motions should be heard simultaneously.

Dated: December 11, 2012

Respectfully submitted,

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was "a case between two States," not an estoppel claim against the federal government. *United States v. Schafer*, 625 F.3d 629, 636-37 (9th Cir. 2010), involved an estoppel by entrapment defense in a criminal case. *See also United States v. Stacy*, 734 F. Supp. 2d 1074, 1079-80 (S.D. Cal. 2010) (same). And, *United States v. Hicks*, 722 F. Supp. 2d 829, 831-33 (E.D. Mich. 2010), addressed whether Michigan's medical marijuana laws was a defense to revocation of a criminal defendant's supervised release.