CEDRIC C. CHAO (SBN 76045)
CChao@mofo.com
S. RAJ CHATTERJEE (SBN 177019)
SChatterjee@mofo.com
SETH A. SCHREIBERG (SBN 267122)
SSchreiberg@mofo.com
TARYN S. RAWSON (SBN 277341)
TRawson@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

BARBARA J. PARKER, City Attorney (SBN 69722)
BParker@oaklandcityattorney.org
DORYANNA MORENO, Chief Assistant City Attorney (SB 140976)
DMorena@oaklandcityattorney.org
MARK MORODOMI, Supervising Deputy City Attorney (SB 120914)
MMorodomi@oaklandcityattorney.org
AMBER MACAULAY, Deputy City Attorney (SBN 253925)
AMacaulay@oaklandcityattorney.org
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
Telephone: 510.238.3601
Facsimile: 510.238.6500

Attorneys for Plaintiff/Appellant City of Oakland

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 MOTION TO STAY FORFEITURE PROCEEDINGS PENDING APPEAL

Hearing Date: April 4, 2013
Time: 10:00 a.m.
Courtroom: B, Hon. Maria Elena James

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

NOTICE OF MOTION AND MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 4, 2013, at 10:00 a.m., or as soon thereafter as the matter may be heard by the Honorable Maria-Elena James in Courtroom B, United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff City of Oakland ("Oakland") shall and hereby does move the Court for an order staying all proceedings in the related case *United States v. Real Property and Improvements Located at 1840 Embarcadero, Oakland, California*, No. CV 12-3567 MEJ (the "*Harborside Action*") until the appeal in this *Oakland v. Holder* action (No. CV 12-5245 MEJ) has been fully resolved.

This Motion is based on this Notice of Motion and Motion, the supporting Opening Memorandum of Points and Authorities, the Declarations of Mayor Jean Quan, Arturo Sanchez (and Exhibits 1 to 3 thereto), Cedric C. Chao (and Exhibits 1 to 5 thereto), and Achim Brinker (and Exhibits 1 to 19 thereto), the Reply papers to be filed by Oakland, and such other written materials and oral argument as may be presented at or before the hearing on this Motion.

RELIEF REQUESTED

The City of Oakland seeks an order staying the *Harborside Action* until Oakland's appeal of the Court's Order Granting Defendants' Motion to Dismiss (Dkt. No. 53) in *Oakland v. Holder* is fully resolved by the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF ISSUES TO BE DECIDED

Whether the Court should stay the *Harborside Action* until Oakland's appeal in this action (Case No. CV 12-5245 MEJ) ("*Oakland v. Holder*") has been fully resolved by the Ninth Circuit?

Dated: February 27, 2013

Respectfully submitted,

MORRISON & FOERSTER LLP
OAKLAND CITY ATTORNEY

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

Attorneys for Plaintiff/Appellant
CITY OF OAKLAND

OPENING MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On February 14, 2013, this Court granted the government's Motion to Dismiss on threshold, procedural issues by ruling that the City of Oakland had failed to establish the jurisdictional requirements for judicial review under the Administrative Procedures Act ("APA"). (Dkt. No. 53.) Today, the City of Oakland is filing simultaneously herewith a timely Notice of Appeal to the Ninth Circuit Court of Appeals. Pending final adjudication of Oakland's appeal, the Court should preserve the status quo by staying the *Harborside Action.*

A stay is necessary to prevent irreparable harm to Oakland and its 400,000 residents and many daily visitors — including avoiding the risk of mooting Oakland's appeal and forfeiting Oakland's substantive claims and avoiding the very injuries *Oakland v. Holder* seeks to prevent.

In *Oakland v. Holder*, Oakland asserts independent claims based on equitable estoppel and the statute of limitations to prevent the government's illegal efforts to shutter Harborside Health Center's operations, which are licensed under Oakland's medical cannabis program. Oakland seeks to prevent injury to Oakland and its 400,000 residents and many daily visitors — including preventing an increase in crime, harm to public health, the loss of substantial tax revenue, and the undermining of Oakland's carefully crafted medical cannabis program — which will occur if Harborside is shuttered. Indeed, injury to Oakland has *already* occurred as a result of the government's decision to file and prosecute the *Harborside Action*.

If Oakland prevails on the threshold APA issues on appeal, Oakland will then be able to move its substantive claims forward. But if Oakland's substantive claims are compromised in the meantime, the result would be disastrous. For example, if Harborside is closed pending appeal, Oakland's appeal may become moot. Oakland and its 400,000 residents might lose, *i.e.*, forfeit, their substantive legal claims. And, Oakland and its residents will suffer the very injuries *Oakland v. Holder* was intended to prevent — including a public health and safety crisis — all without Oakland having the opportunity to develop and present its case on the merits. Further, absent a stay, Oakland will be prejudiced because the evidentiary and legal record in the

Harborside Action that will impact Oakland's claims will be developed without Oakland's ability to protect its interests.

Oakland's appeal raises many serious questions of law. On its Motion to Dismiss, the government asserted extreme and unprecedented legal positions without legal support, that will lead to undeniably bad public policy — the denial of a major U.S. municipality and its 400,000 residents of access to the courts to protect their unique and significant interests. Oakland's appeal raises at least ten questions of first impression in the Ninth Circuit, any one of which satisfies the quantum of showing on the merits necessary to support a stay. These questions include the following:

- Did Congress intend Oakland to be denied access to the courts to protect its interests in the public health and safety of its residents, in its tax revenues, and in the viability of its well-thought out scheme to regulate the distribution of medical cannabis?
- Under Section 704 of the APA, does Oakland lack an adequate remedy under the forfeiture statute?
- Does the forfeiture statute preclude Oakland from proceeding under the APA, in light of the grievance analysis in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2205 (2012)?
- Are Oakland's asserted grievances — including harm to the public health and safety of its residents, its loss of tax revenue, and the government's undermining of Oakland's medical cannabis regulatory scheme — different from the grievances addressed by the forfeiture statute, which concerns only direct economic interests in the real property subject to forfeiture?
- Does the forfeiture statute preclude a non-claimant from challenging the legality of a forfeiture proceeding that causes it harm other than to its interest in the property subject to forfeiture?
- With respect to APA Section 704's requirement that there be no other adequate remedy in court, is it sufficient that a judicial remedy exists for *someone else*, or must the *particular plaintiff* be able to avail itself of the remedy for it to be "adequate"?
- Can the filing of a civil complaint and a decision to prosecute constitute "final agency action" under the APA?
- Did the U.S. Department of Justice's filing of the forfeiture complaint and decision to prosecute here mark "the 'consummation' of that agency's decisionmaking process" under the U.S. Supreme Court's test for what constitutes a "final agency action" in *Bennett v. Spear*, 520 U.S. 154, 178 (1997)?
- Did the filing of the forfeiture complaint and decision to prosecute here constitute

actions from which "rights or obligations have been determined, or from which legal consequences will flow" under *Bennett v. Spear*?

- Would allowing Oakland to proceed under the APA necessarily permit any third party to file a civil suit to collaterally attack a government agency's civil action? *I.e.*, would allowing Oakland to have standing open the "floodgates" to unmeritorious civil litigation or are the circumstances surrounding Oakland's grievances and *Oakland v. Holder* sufficiently unique that it mitigates or removes the government's "floodgates" argument?

Each of these questions deserves a full examination by the Ninth Circuit without the risk that the issues will be rendered moot, to the great prejudice of Oakland and its 400,000 residents.

A stay will not prejudice the government or the other parties. The government waited almost *six years* after Harborside began operations to bring the *Harborside Action*, and this Motion seeks only to preserve the status quo for the period in which an expedited appeal can be adjudicated. As this Court has observed, "any argument about the urgency of stopping Harborside's activities rings hollow." (Dkt. No. 38, Order Denying Claimant's Supplemental Rule G(7)(a) Motions at 15.) Further, Oakland will seek to expedite its appeal and, assuming cooperation from the government, there is no reason to believe the Ninth Circuit will not accelerate the schedule.

A stay would serve the public interest. The public health and safety of Oakland's 400,000 residents and many daily visitors takes precedence and trumps any purported interest the government might suggest. A stay is necessary to protect their interests. Further, the law regarding state-approved medical cannabis is of significant public interest, and those issues should be resolved without the risk of prejudice to Oakland and its residents. In addition, a stay is necessary to promote judicial efficiency, to preserve resources, and to avoid re-litigation — including repeated discovery and a re-trial — on overlapping issues in *Oakland v. Holder* and the *Harborside Action*, and to avoid the risk of inconsistent rulings.

II. *OAKLAND v. HOLDER* AND THE *HARBORSIDE ACTION* ADDRESS OVERLAPPING ISSUES

A. The *Oakland v. Holder Action*

The City of Oakland filed *Oakland v. Holder* on October 10, 2012, seeking declaratory and injunctive relief to prevent the government from pursuing the unlawful forfeiture of the property located at 1840 Embarcadero in Oakland, California — owned by Ana Chretien and leased by Harborside Health Center. (Dkt. No. 1, Oakland's Complaint, ¶¶ 61-80.) As alleged, the defendants acted contrary to law when initiating forfeiture proceedings because forfeiture is barred by the statute of limitations and the doctrine of equitable estoppel. (*Id.*) Harborside has operated openly and continuously at the 1840 Embarcadero location since 2006, in compliance with state law. (*Id.*, ¶¶ 37, 74.) The government filed the forfeiture action on July 9, 2012, considerably more than five years after the offense was discovered or reasonably could have been discovered, and after the statute of limitations had expired. (*Id.*, ¶¶ 63-64.) The forfeiture action against Harborside came after years of reassurance, in words and action, from the federal government that its prosecutorial resources would not be directed at those in compliance with state medical cannabis laws. (*Id.*, ¶¶ 42-51.) The Court related the *Oakland v. Holder Action* to the *Harborside Action* on October 17, 2012. (Dkt. No. 4.)

On December 10, 2012, the government filed a motion to dismiss Oakland's claims for lack of subject matter jurisdiction under FRCP 12(b)(1) based on sovereign immunity and for failure to state a claim under FRCP 12(b)(6). (Dkt. No. 24.) The Court granted the government's motion to dismiss for lack of subject matter jurisdiction, ruling that Oakland lacked standing under the APA on the grounds that (1) Oakland had an adequate alternate remedy to challenge the *Harborside Action*, and (2) the government's filing of the forfeiture action does not constitute a final agency action under the APA. (Dkt. No. 53 at 5-9.) The Court did not address the merits of Oakland's claims. Oakland timely filed a Notice of Appeal of the Court's Order. (Dkt. No. 54.) Indeed, Oakland is filing its Notice of Appeal 46 days prior to the deadline.

B. The *Harborside Action*

The *Harborside Action* is the underlying forfeiture action that prompted the *Oakland v.*

Holder Action. Filed July 9, 2012, the federal government seeks to forfeit the property at 1840 Embarcadero in Oakland. (Dkt. No. 1, *Harborside Action*.) The owner (Chretien) and lessee (Harborside) and others have filed claims in the *Harborside Action.* (*See* Dkt. Nos. 14, 27-31 and 33, *Harborside Action.*) A Case Management Conference is currently scheduled for March 14, 2013. (Dkt. No. 92, *Harborside Action*.)

III. THE *HARBORSIDE ACTION* SHOULD BE STAYED UNTIL OAKLAND'S APPEAL IS RESOLVED BY THE NINTH CIRCUIT

A. This Court Has the Power to Stay the *Harborside Action*

This Court undeniably has power to stay the related *Harborside Action* pending appeal. A court's power to enter a stay 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). Numerous courts in this circuit have granted stays pending appeal. *See, e.g., Lair v. Bullock*, 697 F.3d 1200, 1216 (9th Cir. 2012); *Welch v. Brown*, No. 2:12-CV-2484, 2013 WL 496382 (E.D. Cal. Feb. 7, 2013) (Shubb, J.); *Gray v. Golden Gate Nat'l Recreational Area*, No. C 08-00722, 2011 U.S. Dist. LEXIS 149232, (N.D. Cal. Dec. 29, 2011) (Laporte, J.); *Hunt v. Check Recovery Sys., Inc.*, No. C 05 4993, 2008 WL 2468473 (N.D. Cal. June 17, 2008) (Armstrong, J.); *Pokorny v. Quixtar Inc.*, No. 07-CV-00201, 2008 WL 1787111 (N.D. Cal. Apr. 17, 2008) (Conti, J.). And, courts clearly have the power to stay actions pending appeal in another related action. *See Sisters of Mercy Health System v. Kula*, No. 05-CV-0115, 2006 WL 2090090 (W.D. Ok. July 25, 2006) (holding movant had standing to seek a stay of a separate but related action pending before the same judge while action to which movant was a party was on appeal); *see also Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) ("A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case").

B. The Ninth Circuit Employs a Flexible Standard for Granting a Stay Pending an Appeal

Courts in the Ninth Circuit examine four factors on a motion to stay pending appeal. *First*, a movant must show a "minimum quantum of likely success necessary to justify a stay," which the Ninth Circuit has described as a "reasonable probability" or "fair prospect," "a substantial case on the merits," or when "serious legal questions are raised." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011).[1] These formulations are "essentially interchangeable." *Id.* The Ninth Circuit is clear that this standard *does not require* a movant to show that success on appeal is more likely than not. *Id.; Brown v. Wal-Mart Stores, Inc.*, No. 5:09-CV-03339, 2012 U.S. Dist. LEXIS 163731, at *4-5 (N.D. Cal. Nov. 15, 2012) (Davila, J.) ("movant need not demonstrate that it is more likely than not that it will win on the merits"); *Gray v. Golden Gate Nat'l Recreational Area*, No. C 08-00722, 2011 U.S. Dist. LEXIS 149232, at *3-4 (N.D. Cal. Dec. 29, 2011) (Laporte, J.) (same). On the contrary, District Courts in the Ninth Circuit, including in this District, have clarified that showing that "serious legal questions are raised" suffices to satisfy this first prong. *See Gray*, 2011 U.S. Dist. LEXIS 149232 at *3-4 (holding that "showing that 'serious legal questions' have been raised on appeal will satisfy the requirement of likelihood of success on the merits"); *Brown*, 2012 U.S. Dist. LEXIS 163731, at *4-5 ("serious legal questions" will satisfy first prong); *Rajagopalan v. Noteworld, LLC*, No. C11-5574, 2012 U.S. Dist. LEXIS 80704, at *2-6 (W.D. Wash. June 11, 2012) (Settle, J.) (holding that movant raising "legitimate, substantial questions" on appeal satisfies merits prong warranting a stay pending appeal).

Second, courts consider whether the applicant will be irreparably injured absent a stay. *Third*, courts consider whether the issuance of a stay will substantially injure the other parties interested in the proceedings. And, *fourth*, courts weigh the public interest. *See Leiva-Perez*, 640 F.3d at 964.

[1] The standard for determining whether to grant a stay pending appeal is similar to the standard for issuing a preliminary injunction. *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988).

Courts in the Ninth Circuit examine these factors on a flexible "continuum," which is "essentially the same as the 'sliding scale' approach" applied to requests for preliminary injunctions; "the elements . . . are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.* at 964-66; *Brown*, 2012 U.S. Dist. LEXIS 163731 at *4-5 (applying sliding scale). Under the Ninth Circuit's "serious questions" test, a movant seeking a stay "must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the [movant']s favor." *Leiva-Perez*, 640 F.3d at 970; *Apple, Inc. v. Samsung Elecs. Co.*, No. 12-CV-00630, 2012 U.S. Dist. LEXIS 92314, at *6-9 (N.D. Cal. July 3, 2012) (Koh, J.) (applying test to motion to stay pending appeal); *Jimenez v. Napolitano*, No. C-12-03558, 2012 U.S. Dist. LEXIS 107655, at *6-8 (N.D. Cal. Aug. 1, 2012) (Whyte, J.) (applying test to motion to stay removal pending petition for writ of habeas corpus).

C. Oakland Satisfies the Ninth Circuit Standard for Staying the *Harborside Action* Pending Appeal

Here, Oakland has raised serious questions of first impression in the Ninth Circuit as well as shown a probability that it will suffer irreparable harm absent a stay. The gravity of potential harm to Oakland is extreme — including a loss of its substantive claims. The balance of hardships tips sharply in Oakland's favor, particularly given that the government waited almost six years to bring the *Harborside Action*.

1. Oakland Has Raised Serious Questions of First Impression in the Ninth Circuit

As stated above, Oakland has raised at least ten serious legal questions of first impression in the Ninth Circuit. Neither the government nor the Court cited any Ninth Circuit decision on whether a non-claimant may sue under the APA to enjoin the government from seeking forfeiture of property. Courts regularly find that a movant raises "serious questions" sufficient to support a stay by raising novel and unsettled legal questions of first impression. *See, e.g.*, *Gray*, 2011 U.S. Dist. LEXIS 149232 at *5 ("issues presenting unsettled questions of law" and issues that "are

matters of first impression in this circuit" presented serious legal questions); *Hunt v. Check Recovery Sys., Inc.*, No. C 05 4993, 2008 WL 2468473 at *3 (N.D. Cal. June 17, 2008) (Armstrong, J.) (Serious legal questions are "questions of first impression on which no binding precedent exists"); *Pokorny v. Quixtar Inc.*, No. 07-CV-00201, 2008 WL 1787111 (N.D. Cal. Apr. 17, 2008) (Conti, J.) (stay granted when appeal "raised two serious legal questions" involving splits in authority); *Stop H-3 Ass'n v. Volpe*, 353 F. Supp. 14, 16 (D. Haw. 1972), *rev'd on other grounds*, 533 F.2d 434 (9th Cir. 1976) (injunctions "frequently issued where the trial court is charting new and unexplored ground and the court determines that a novel interpretation of the law may succumb to appellate review"). The same conclusion applies here.

The ten serious questions identified above revolve around three main issues. As demonstrated below, Oakland's arguments on these issues present a substantial case on the merits.

a. Can Oakland and 400,000 Residents Be Denied Access to the Courts?

In this action, the government took the extreme and unprecedented position that, despite Oakland's constitutional injury and prudential standing and despite what the Court found to be "significant and wide-reaching" interests, Oakland should be barred from protecting its interests in a court of law. The Court accepted the government's position. If upheld, the government's position (and the Court's Order) will result in denying Oakland and its 400,000 residents access to the judicial system — contrary to our notions of the rule of law — and undermining the very purpose of the APA.

The government is wrong. The very purpose of the APA is to allow parties to challenge governmental actions when they otherwise lack a private right of action.[2] That is precisely the

[2] *See Bowen v. Massachusetts*, 487 U.S. 879, 903-904 (1988) (APA "manifests a congressional intention that it cover a broad spectrum of administrative actions" and "purpose was to remove obstacles to judicial review of agency action."); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (APA's "generous review provisions" must be given a "'hospitable' interpretation."); *United States Lines, Inc. v. Federal Maritime Com.*, 584 F.2d 519, 525 (D.C. Cir. 1978) (APA "embodies a broad determination by Congress to subject the decisions of government agencies to review by the courts").

situation in which Oakland finds itself. If the government is allowed to shutter Harborside and Oakland's other licensed dispensaries, Oakland and its 400,000 citizens will suffer significant injury, including endangering the public health and safety of Oakland's citizens and medical patients, causing the loss of $1.4 million in tax revenue each year, and undermining Oakland's carefully crafted scheme for regulating the distribution of medical cannabis. (Quan Decl., ¶¶ 8-9, 11-12; Sanchez Decl., ¶¶ 17-18.) The APA gives Oakland the mechanism to seek redress for those harms.

b. Does the Forfeiture Statute Give Oakland an Adequate Legal Remedy Under Section 704 of the APA When Oakland Cannot Assert a Claim Under the Forfeiture Statute and Asserts Grievances Not Addressed by the Forfeiture Statute?

In its Motion to Dismiss, the government argued, and the Court agreed, that the civil forfeiture statute, 18 U.S.C. § 983(a)(4)(A) and Supplemental Rule G(5)(a)(i), provided Oakland an "adequate remedy" that precludes standing under the APA because *other* hypothetical plaintiffs — but not Oakland — may file claims in the forfeiture proceeding to protect their property interests. Oakland respectfully disagrees for a number of reasons, including the following:

First, the "well-established meaning of 'adequate remedy' [under Section 704] . . . refers to the adequacy of a remedy for a *particular plaintiff* in a particular case rather than the adequacy of a remedy for the average plaintiff in the average case of the sort at issue." *Bowen v. Massachusetts*, 487 U.S. 879, 927 (1988) (Scalia, J., dissenting) (emphasis added). Here, the government conceded and the Court has held that Oakland may not proceed under Supplemental Rule G to file a claim in the forfeiture action: "[I]t is undisputed that Plaintiff lacks standing to file a claim or otherwise participate in the *1840 Embarcadero* forfeiture proceeding as a claimant." (Dkt. No. 53 at 5.) Indeed, Under 18 U.S.C. § 983 and Supplemental Rule G, only "[a] person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending." Fed. R. Civ. P. Supp. R. G(5)(a)(i). Oakland does not have an interest in the property at 1840 Embarcadero and is not a claimant in the

forfeiture action. Oakland therefore cannot have an "adequate remedy" under the forfeiture statute.

Second, courts allow plaintiffs to proceed under the APA where a statute provides *others* an adequate remedy for the alleged governmental conduct, but not the particular plaintiff(s) before the court. For example, *El Rio Santa Cruz Neighborhood Health Center, Inc. v. Dep't of Health and Human Services* held that the plaintiff physicians who challenged the denial of medical malpractice coverage had no adequate remedy under the Federally Supported Health Centers Assistance Act of 1995 ("FSHCAA") because, while that statute provides a remedy for those who receive *affirmative* coverage claims, it is "silent" regarding available remedies to those, like the plaintiffs, who receive *negative* coverage determinations. 396 F.3d 1265, 1267, 1272 (D.C. Cir. 2005). The court, therefore, had jurisdiction under the APA. *Id*. at 1270. Similarly, *Doe v. Hagee* rejected the government's argument that the Federal Tort Claims Act ("FTCA") provided an adequate remedy where the plaintiffs sued under the APA for sexual harassment during military recruitment. 473 F. Supp. 2d 989, 1000 (N.D. Cal. 2007). Because the FTCA applies only to past sexual assault, it did not provide an adequate remedy to the particular plaintiffs in *Doe*, who claimed future injury as a result of their fear of future sexual assault. *Id*. Just as the plaintiffs in *El Rio* and *Hagee* fell outside the scope of the FSHCAA and the FTCA, Oakland falls outside the scope of the civil forfeiture statute and therefore lacks an adequate alternative remedy outside of the APA.

Third, the Supreme Court's analysis in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2205 (2012), confirms that the forfeiture statute does not preclude Oakland from proceeding under the APA. In *Patchak*, the U.S. Supreme Court allowed a plaintiff to proceed under the APA under nearly identical circumstances where the plaintiff's *grievance* was not covered by an alternative statute that provided the same relief requested under the APA. There, the plaintiff sued under the APA alleging that the government lacked authority under the Indian Reorganization Act when it took title to land to hold in trust for a tribe seeking to open a casino and sought to strip the government of title to that land. *Id.* at 2202-03. As its injury, the plaintiff alleged economic, environmental, and aesthetic harms from the casino's

operation, including "increased crime." *Id.* at 2203. The government argued that the plaintiff's APA action was barred by sovereign immunity given the Quiet Title Act ("QTA"). According to the government, the QTA authorizes suits to challenge title or interest in real property but specifically does not apply to trust or restricted Indian lands, and therefore the QTA barred the plaintiff from challenging the government's title to Indian land under the APA. *Id.* at 2205. In other words, the government argued that the plaintiff could not circumvent the QTA by proceeding under the APA. In analyzing the issue, the Court adopted the rule that, "*When a statute 'is not addressed to the type of grievance which the plaintiff seeks to assert,' then the statute cannot prevent an APA suit.*" *Id.* (emphasis added). The Supreme Court held:

> The QTA's "Indian lands" clause does not render the Government immune because the *QTA addresses a kind of grievance different from the one [the plaintiff] advances* . . . . [T]he QTA . . . concerns . . . quiet title actions. And [plaintiff's] suit is *not* a quiet title action, because although it contests the [government's] title, it does not claim any competing interest in the [property].

Id. at 2206 (emphasis added). The Supreme Court explained that quiet title is "understood to refer to suits in which a plaintiff not only challenges someone else's claim, but also asserts his own right to disputed property." *Id.* The plaintiff in *Patchak*, however, was "not an adverse claimant"; he did not contend he owned the property; nor did he seek any relief corresponding to such a claim; he "want[ed] a court to strip the United States of title to the land, but not on the ground that it is his and not so that he can possess it." *Id.* at 2207. The Supreme Court held that the plaintiff, under these circumstances, was "not trying to…circumvent the QTA's 'Indian lands' exception." *Id.* at 2208. Accordingly, the QTA did not bar the plaintiff's APA claim or override the APA's general waiver of sovereign immunity because his grievance was not addressed by the QTA. *Id; see also Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Salazar*, No. 2:12-CV-3021, 2013 U.S. Dist. LEXIS 12714 (E.D. Cal. Jan. 30, 2013) (same analysis); *Pine Bar Ranch LLC v. Interior Bd. of Indian Appeals*, No. 11-35564, 2012 U.S. App. LEXIS 25488 (9th Cir. Dec. 13, 2012) (same).

The *Patchak* "grievance" analysis governs here, but neither the government nor the Court addressed this analysis or analyzed Oakland's grievances in *Oakland v. Holder* per *Patchak*.

Just as the QTA did not bar the plaintiff in *Patchak* from proceeding under the APA, the forfeiture statute does not preclude Oakland from proceeding under the APA because Oakland's grievances are not addressed by the forfeiture statute. Oakland's grievances include that the government's forfeiture of the Harborside property will harm public health and safety, deprive Oakland of tax revenues, and undermine its regulatory scheme (similar to the *Patchak* plaintiff's grievance of economic, environmental, and aesthetic harm flowing from a casino's operation). Indeed, the injury has already begun. (*See* Sanchez Decl., ¶¶ 19-21.) It is undisputed that the forfeiture statute does not address Oakland's grievances (just as the QTA did not address the grievances in *Patchak*). The government concedes that the forfeiture statute allows only those who assert a direct interest in the property to make a claim, and that Oakland does not assert such an interest. (*See* Dkt. No. 24, Motion to Dismiss at 6:11-21.) Although Oakland seeks to stop the forfeiture (just as the plaintiff in *Patchak* attempted to strip the government of title), Oakland does not seek to do so on the grounds that Oakland has an interest in the Harborside property or that Oakland should take possession of the property (just as the plaintiff in *Patchak* did not seek to own or possess the property in his case).

The government's focus on the relief Oakland seeks in *Oakland v. Holder* is inapposite under the *Patchak* grievance analysis. *Patchak* forecloses the government's argument that Oakland cannot proceed under the APA because the forfeiture statute allows "someone", *i.e.*, claimants, to contest forfeiture. The plaintiff in *Patchak* was allowed to proceed under the APA even though he sought to strip the government of title to land, which was a result available under the QTA. The Court's analysis turned on whether the QTA addressed the plaintiff's "grievance" — not whether the same result was available under the QTA. Here, because the forfeiture statute does not address *Oakland's grievances*, the forfeiture statute likewise does not bar Oakland's APA action even though Oakland seeks to prevent the forfeiture, which is a result sought by the claimants under the forfeiture statute.

Finally, each decision the government relied upon for its contention that the forfeiture statute was the only means to challenge the government's seizure and forfeiture of property involved "claimants" who had an ownership interest in the property at issue. (Dkt. No. 24, Mot.

at 5:19-6:8, 7:14-27.) The government cited no authority that would deny *non-claimants*, such as Oakland, the right to file an APA lawsuit to redress an independently cognizable injury resulting from the DOJ's actions.

c. Did the Government's Decision to File and Prosecute the *Harborside Action* Constitute Final Agency Action When Its Decision Was for All Practical Purposes Final and When Legal Consequences Flowed from that Decision?

The government argued, and the Court agreed, that the government's filing of a complaint can never constitute "final agency action" under the APA. (Dkt. No. 41 at 7.) Oakland respectfully disagrees for a number of reasons, including the following:

First, Athlone Industries, Inc. v. Consumer Product Safety Com. held that the Consumer Product Safety Commission's *filing of a complaint* constituted final agency action under Section 704. 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983). *Athlone* explained, "By filing a complaint . . . the Commission, for all practical purposes, made a final determination that such proceedings were within its statutory jurisdiction." The government's decision to prosecute and to file the *Harborside Action* was similarly "for all practical purposes . . . a final determination that [the forfeiture] proceedings [are] within its" authority.

The Court distinguished *Athlone* because it concerned the filing of an administrative complaint rather than a civil action. (Dkt. No. 53 at 6.) That distinction, however, cuts in Oakland's favor because an administrative complaint may begin an administrative investigation and lead to further agency action whereas the government here has made a final determination that it has authority to assert a forfeiture action. Whereas an administrative complaint might *be less final* then a civil complaint, it *cannot be more final*.

The Court also asserted that *Athlone's* "interpretation of a statute and whether its resulting action based on that interpretation exceeded its jurisdiction" is different than what DOJ has done in this case. (*Id*. at 6.) But the DOJ's decision to prosecute and file the *Harborside Action* is also an interpretation of its own authority which it exceeded in violation of the statute of limitations and the doctrine of equitable estoppel. The distinction is without a difference.

The Court ruled that a civil action does not fit within the APA's definition of agency action found at 5 U.S.C. § 551(13). (Dkt. No. 53 at 8). The APA's definition of "agency action," however, includes a "sanction." *See* 5 U.S.C. § 551(a)(13) ("Agency Action" includes the whole or part of an agency … sanction."). And, the DOJ's decision to prosecute and file the Harborside Action constitutes a "sanction." The APA defines a sanction to "include[] the whole or part of an agency (A) prohibition, requirement, limitation, or other condition affecting the freedom of a person … (C) imposition of penalty or fine; (D) destruction, taking, seizure, or withholding of property… or (G) taking other compulsory or restrictive action."). 5 U.S.C. § 551(a)(10). Here, the decision to file a forfeiture suit affects the freedom of Oakland to regulate medical cannabis dispensaries and protect the public health and welfare of its residents, imposes a monetary penalty through lost tax revenue, seizes property within Oakland's jurisdiction, and takes restrictive action undermining Oakland's regulatory scheme, all but ensuring a public health and safety crisis. (Sanchez Decl., ¶¶ 19-21; Quan Decl., ¶¶ 8, 14-15.) Indeed, the risk to Oakland presented by the *Harborside Action* is so severe that it is difficult to articulate a more harsh sanction than the action taken by the DOJ.

Second, the government's decision to file and to prosecute the *Harborside Action* was a "final agency action" under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), which defines "final agency action" as "the 'consummation' of the agency's decisionmaking process" and "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" Here, the DOJ "for all practical purposes made a final determination" that it has statutory authority to proceed with the *Harborside Action* when it filed that action and decided to prosecute. That action marked the "consummation of the agency's decision-making process," and Oakland has nowhere to go within the DOJ — no appeal structure or any other avenue — to challenge that decision. The DOJ's action constitutes a "clear-cut" determination that DOJ has the authority to file and prosecute the *Harborside Action*.

Further, "legal consequences" flowed from the DOJ's decision to file and prosecute the *Harborside Action*. Courts find legal consequences where agency action has a "direct effect on the day-to-day business" of the petitioners, *Abbott Labs.*, 387 U.S. at 152, "will not be

reconsidered at any later date," *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982), or "cast a shadow over [Plaintiff's] customer relationships, [and] tainted almost every aspect of its long-term planning…." *CSI Aviation Servs. v. United States DOT*, 637 F.3d 408, 413-414 (D.C. Cir. 2011). The legal consequences of the *Harborside Action* and the government's decision to prosecute started flowing the moment the government decided to file and to prosecute the case. The filing of the *Harborside Action* and decision to prosecute had a chilling effect on Oakland's medical cannabis program. (Sanchez Decl., ¶ 19.) For example, in 2011, Oakland authorized four additional dispensary permits to be issued pursuant to its dispensary ordinance. (*Id.*, ¶ 20.) Given the government's recent reversal in its enforcement policy and the filing of the *Harborside Action*, property owners have been unwilling to rent space to the permitted dispensaries. To date, only one of the four newly licensed dispensaries has opened. (*Id.*) Further, the government's actions have begun to undermine the viability of Oakland's medical cannabis program. (*Id.*, ¶ 21.)

Third, contrary to the government's arguments, allowing Oakland to proceed under the APA will not open the proverbial "floodgates." There are numerous legal requirements that prevent every federal civil lawsuit from being subject to an APA claim. One requirement is actual injury sufficient to confer Article III standing. Many third parties will not have an actual cognizable injury resulting from the filing of a lawsuit. Another requirement is that the party fall under the zone of interest to be protected by the statute he claims was violated, to satisfy prudential standing. In many cases, a third party will not fall within the statute's "zone of interest." A third requirement is Section 704's requirement that no other adequate remedy is available. In many cases, an injured third party who has constitutional and prudential standing will also will have the right to intervene in the action directly or have an adequate alternative remedy. Finally, a fourth requirement is Section 704's final agency action requirement. Other complaints sought to be challenged by third parties might not constitute final agency actions, but ongoing investigations. Oakland's claims and the factual backdrop presented by Oakland's claims are unique and rare — a "perfect storm" — and in this particular case satisfy the legal

hurdles to establish an action under the APA. The Court can easily fashion relief narrowly tailored to Oakland's circumstances, without fear of opening the "floodgates."

2. Oakland Will Be Irreparably Harmed in the Absence of a Stay

a. If the Forfeiture Action Proceeds, Oakland's Appeal May Become Moot and Oakland and Its 400,000 Residents May Lose Their Substantive Claims

Oakland's appeal may become moot if Harborside is closed while the appeal is pending. The mootness doctrine asks "the basic question whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." *Flagstaff Med. Ctr., Inc. v. Sullivan*, 962 F.2d 879, 884 (9th Cir. 1992) (internal citations omitted). Here, Oakland seeks to enjoin the forfeiture action and prevent the shuttering of Harborside. If the *Harborside Action* proceeds, Harborside may close because of the government's ongoing prosecution, whether by attrition, by economic pressure on Harborside or on landlord Chretien, or by adverse results in the *Harborside Action*. In that event, any future decision by the Ninth Circuit (or this Court on remand) might no longer "have an impact" granting Oakland the relief it seeks. Oakland and its 400,000 residents will have already suffered harm that it intends to prevent by filing *Oakland v. Holder*.

"[T]he risk of mootness in the absence of any stay sufficiently satisfies the [irreparable harm] prong." *In re Klein Sleep Products, Inc.*, No. 93 CIV. 7599, 1994 WL 652459, at *1 (S.D.N.Y. Nov. 18, 1994). District courts regularly stay actions to avoid the risk of mooting an appeal. *See, e.g., Makaeff v. Trump University, LLC*, No. 10-CV-940, 2011 WL 613571 (S.D. Cal. Feb. 11, 2011) (staying action pending appeal after denying anti-SLAPP motion to strike counterclaim for defamation to avoid "risk mooting" the appeal because relief plaintiff sought was to be free of those proceedings); *In re St. Johnsbury Trucking Co., Inc.*, 185 B.R. 687, 690 (S.D.N.Y. 1995) ("[T]here is a risk that its appeal will be mooted absent a stay . . . . The government thus is threatened with irreparable injury"). The Court should do the same here.

Further, if Harborside is shuttered while Oakland's appeal is pending, Oakland and its 400,000 residents may lose their substantive claims. The Ninth Circuit has held, "[W]e join the

'growing consensus' in recognizing the clear appropriateness of a stay when valid claims would otherwise be forfeited." *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2002), *overruled on other grounds by Robbins v. Carey*, 481 F.3d 1143, 1149 (9th Cir. 2007). As explained by another court, "[I]t is…clear that irreparable harm may exist 'where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.'" *Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 448 (S.D.N.Y. 2010) (granting stay where plaintiff "might be deprived of any right to relief regardless of the appeal's outcome").

b. If the *Harborside Action* Proceeds and Harborside Is Closed, Oakland's Interest in Protecting Its Residents Would Be Irreparably Harmed

If Harborside is closed while the Ninth Circuit reviews Oakland's appeal, a cascade of harms will befall Oakland before it has a chance to develop and present its case on the merits. Harborside's closure would affect not just its owners and the patients, but the entire City.

If Harborside is closed, Oakland will suffer a public safety crisis it is not equipped to meet. By allowing Harborside and other duly licensed dispensaries to operate for a number of years, the federal government enabled a market for medical cannabis. (Quan Decl., ¶ 7.) The dispensaries now supply tens of thousands of patients who qualify for this medicine. (*Id.*) 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 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 would come at a moment when the OPD's resources are strained, exacerbating the harm to Oakland. (*Id.*, at ¶ 9.)

There is good reason to believe that demand for medical cannabis will continue even if dispensaries are closed because medical cannabis constitutes effective treatment that helps patients. 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 assertion 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.[3] 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.[4] Additionally, the 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."[5] The government has even capitalized on its patent rights by licensing the '507 cannabinoid patent to the pharmaceutical company KannaLife,[6] presumably for commercial development.

A wealth of new data has substantially altered scientific understanding regarding the medical benefits of cannabis.[7] Science now shows that compounds found in medical cannabis

---

[3] 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. (Brinker Decl., Exs. 1-3.)

[4] Brinker Decl., Ex. 3 (WO 2009/140210 A2 at paragraph [0004]).

[5] U.S. Patent No. 6,630,507 B1 (Abstract). (Brinker Decl. Ex. 1.)

[6] Brinker Decl., Ex. 4 (Press Release: KannaLife Sciences, Inc. Signs Exclusive License Agreement with National Institutes of Health Office of Technology Transfer).

[7] *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 and is asserting the health benefits of cannabis to explain the consequences of shuttering Harborside.

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,[8] neuropathic pain,[9] a wide range of inflammatory diseases,[10] and the suppression of AIDS-virus infections.[11] 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, such as fibrosis,[12] and protection from chemotherapy-induced kidney damage[13] and transplantation-related liver damage.[14]

Accordingly, patients will continue to seek out medical cannabis if licensed dispensaries are closed, but they will buy them under unsafe conditions — *e.g.*, from street level dealers — and the medicine they buy may be adulterated and unsafe. Oakland's permitting and regulatory scheme enables Oakland to ensure that licensed dispensaries sell medical cannabis under safe conditions only to those patients with valid patient identification cards or with a doctor's

---

[8] Brinker Decl., Ex. 16 (Barry M. Bredt et al., *Short-Term Effects of Cannabinoids on Immune Phenotype and Function in HIV-1 Infected Patients*).

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

[10] Brinker Decl., Exs. 15 and 17 (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*).

[11] Brinker Decl., Exs. 18 and 19 (Cristina M. Costantino et al., *Cannabinoid Receptor 2-Mediated Attenuation of CXCR4-Tropic HIV Infection in Primary CD4$^+$ T cells*; Patricia E. Molina, et al., *Cannabinoid Administration Attenuates the Progression of Simian Immunodeficiency Virus*).

[12] Brinker Decl. Ex., 12 (Mohanraj Rajesh et al., *Cannabidiol Attenuates Cardiac Dysfunction, Oxidative Stress, Fibrosis, and Inflammatory and Cell Death Signaling Pathways in Diabetic Cardiomyopathy*).

[13] Brinker Decl., Ex. 13 (Hao Pan et al., *Cannabidiol Attenuates Cisplatin-Induced Nephrotoxicity by Decreasing Oxidative/Nitrosative Stress, Inflammation, and Cell Death*).

[14] Brinker Decl., Ex. 14 (Partha Mukhopadhyay, *Cannabidiol Protects Against Hepatic Ischemia/Reperfusion Injury by Attenuating Inflammatory Signaling and Response, Oxidative/Nitrative Stress, and Cell Death*).

recommendation. Indeed, no one is allowed into the dispensary besides qualified patients and caregivers unless the City of Oakland receives advance notice. (Sanchez Decl., ¶ 16.) Oakland's regulations require that the medical cannabis be tested in designated independent laboratories and that all dispensary employees undergo a background check. (*Id*. and Ex. 1.) If Harborside is closed, ill patients who seek their medicine elsewhere may be exposed to unregulated, and possible adulterated cannabis. (*Id.*, ¶ 18; Quan Decl., ¶¶ 8 and 11.)

Oakland will also suffer economic and regulatory harm if Harborside is closed. Oakland will suffer the loss of substantial tax revenue and the undermining of Oakland's detailed and well thought-out scheme for regulating medical cannabis. (Quan Decl., ¶ 14.) Oakland's four licensed dispensaries have provided millions of dollars in business tax revenue to Oakland's general fund since 2006. (Compl., ¶¶ 34, 53-54.) Harborside alone has paid city taxes in excess of one million dollars (*see* Dkt. No. 69, Decl. of S. DeAngelo*, Harborside Action*, ¶ 6), along with an initial permit fee, while its customers pay an 8.75% sales tax on all purchases. This economic harm will further hinder Oakland's ability to address an increase in black market drug sales. Medical cannabis dispensaries provide revenue to cash-strapped Oakland and allow it to deploy scarce public safety resources to address crime. (*See* Quan Decl., ¶¶ 8, 11.)

c. If the *Harborside Action* Proceeds While Oakland's Appeal Is Pending, Oakland Will Be Prejudiced by a Record Formed Without Its Participation

If the *Harborside Action* goes forward pending appeal, Oakland will be prejudiced because a record on issues that overlap with Oakland's substantive claims will be developed without Oakland's ability to participate and shape that record. That record will impact Oakland's ability to prevail on its substantive claims. (Chao Decl., ¶¶ 6-7.) For example, government officials Oakland will need to depose may have already given deposition testimony in the forfeiture proceeding regarding Oakland's equitable estoppel or statute of limitations claims. (*Id.*, ¶ 7.) Oakland has unique perspectives, strengths, and far-reaching interests that differ from the claimants in the *Harborside Action* and that entitle Oakland to develop its own record on the statute of limitations and estoppel issues in both cases. (*Id.*, ¶ 8.)

In addition, there might be legal rulings in the *Harborside Action* that will prejudice

Oakland without Oakland's involvement. The Court acknowledged this same concern with regard to prejudicing claimants in the *Harborside Action* when ruling on the government's motion to dismiss Oakland's claim on the statute of limitations. (1/31/13 Tr. at 52:19-53:8.) The same concern applies here as to Oakland.

3. A Stay Will Not Injure Either the Government or the Claimants

Neither the government nor any claimants in the *Harborside Action* will suffer any hardship from a stay. Harborside had been operating openly since 2006 — nearly six years — before the federal government filed the *Harborside Action*. The government does not deny that it was aware of Harborside's opening in 2006. (*See* Dkt. No. 24 at 8-9.) The government, nevertheless, waited until after the statute of limitations had elapsed to file the *Harborside Action*. The government cannot now credibly complain about preserving the status quo pending Oakland's appeal, particularly given the Court's finding that "any argument about the urgency of stopping Harborside's activities rings hollow." (Dkt No. 38 at 15.)

Nor would a stay harm any of the claimants. Harborside and the patients it serves would remain open pending Oakland's appeal. Summit Bank's security interest in the property would not be affected by a stay. (*See* Dkt. No. 31, *Harborside Action*.) Ms. Chretien renewed Harborside's lease in 2011 to run until approximately January 2016. (*See* Dkt. No. 65, Decl. of A. Chretien, *Harborside Action*, ¶ 4.) She would not be harmed by Harborside's continued operation during the pendency of this dispute because she will continue to receive rent according to the terms of the lease as well as payment for building security services. (*See* Dkt. No. 69, Decl. of S. DeAngelo, *Harborside Action*, ¶ 8.) As the Court noted in a previous order, "there is no evidence that Haborside's activities . . . are harming or threatening the value" of the property at 1840 Embarcadero. (Dkt. No. 38 at 13.) To minimize any delay, Oakland will seek to expedite its appeal. (Chao Decl., ¶¶ 13-15.)

4. The Public Interest Strongly Supports a Stay

Oakland v. Holder raises issues of significant public importance, and the public interest strongly favors a stay of the *Harborside Action*. Most fundamentally, *Oakland v. Holder* in large

part concerns protecting the public health and safety of Oakland's 400,000 residents and many daily visitors against the ills discussed above that would occur if medical cannabis dispensaries were closed. Protecting the health and safety of citizens is paramount.

Further, the right of patients to access medical cannabis is, without doubt, one of the most discussed topics today. A front-page article in today's *San Francisco Chronicle* reported that seventy-two percent (72%) of California voters support the right to use medical cannabis, and "67 percent oppose[] federal efforts to crack down on businesses that sell medical cannabis legally under state law." (Chao Decl., ¶ 20, Ex. 5.) Approximately one-third of Americans live in states that have legalized medical cannabis.[15] As of November 26, 2012, eighteen states and the District of Columbia have passed legislation legalizing the medical use of cannabis.[16] (Chao Decl., ¶ 17.) Two states, Washington and Colorado, recently decriminalized use of cannabis for all purposes, while fifty-four percent (54%) of registered voters in California similarly support legalizing marijuana and subjecting it to the same sort of restrictions that exist for alcohol. (Chao Decl., Ex. 5.)

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." (*See* Chao Decl., Ex. 4.) California Governor Jerry Brown, discussing the recent ballot propositions in Washington and Colorado, as well as California's policy towards medical cannabis, stated: "It's time for the Justice Department to recognize the sovereignty of the states.… It shouldn't try to nullify

[15] 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.

[16] Alaska: Alaska Stat § 17.37.010. Arizona: Ariz. Rev. Stat. Ann. §36-2801. California: Cal. Health & Safety § 11362.7. Colorado: Colo. Rev. Stat § 25-1.5-106. Connecticut: Connecticut General Statutes § 21A-254. Washington, D.C.: DC Municipal Regulations § 22-C. Delaware: Del. Code Ann. Tit. 16, § 4901A. Hawaii: Haw. Rev. Stat. § 329-A. Maine: Me. Rev. Stat. tit. 15, § 5821-A. Massachusetts: The ballot initiative (Question 3) was approved in the November 6 election and will take effect January 1, 2013; it will be codified at Massachusetts General Law § 94G. Michigan: MCL 333.26421-26430. Montana: Mont. Code Ann. § 50-46-301. Nevada: Nevada Revised Statutes § 453A.010. New Jersey: New Jersey Revised Statutes § 24.61-1. New Mexico: New Mexico Statutes Annotated § 26-2B-1. Oregon: ORS 475.300-475.346. Rhode Island: Public Laws § 21-28.6-1. Vermont: Vermont Statutes Annotated § 4471. Washington: Revised Code of Washington § 69.51A.005.

reasonable state measures.… We don't need some federal gendarme to come and tell us what to do." (*Id.*, Ex. 3.) Accordingly, this dispute should be addressed on the merits, and the serious questions raised on appeal should be resolved without the risk of prejudice to Oakland.

The public interest also includes "considerations of judicial economy." *Sutherland v. Ernst & Young LLP*, 856 F. Supp. 2d 638, 644 (S.D.N.Y. 2012). A stay is appropriate when "a later trial of the claims . . . could involve the relitigation of most if not all of the issues litigated in the first proceeding." *J & J Sports Productions, Inc. v. Brar*, No. 2:09-CV-3394, 2012 WL 4755037 at *2 (E.D. Cal. Oct. 3, 2012); *see also Eaton v. Siemens*, No. CIV. S-07-315, 2010 WL 2634207 at *1 (E.D. Cal. June 30, 2010) ("A stay ensures that the court is not required to try essentially the same case twice").

Here, a stay is necessary to promote efficiency, conserve the Court's and the parties' resources, and avoid the risks of re-litigation and of inconsistent rulings. By relating the two actions, the Court already decided that *Oakland v. Holder* and the *Harborside Action* involve overlapping facts and issues. (Dkt. No. 4.) Should Oakland prevail on the threshold APA issues, it will deserve a full opportunity to discover the facts, to develop a complete record for this Court, and to present its case. Discovery and trial in *Oakland v. Holder* will likely involve similar sets of witnesses, documents, and other evidence as in the *Harborside Action* with regard to Oakland's statute of limitations and equitable estoppel claims. Absent a stay, *Oakland v. Holder* will require re-litigation, and possibly re-trial, of overlapping issues, which would also create the risk of inconsistent rulings.

IV. CONCLUSION

For the reasons discussed above, and that will be presented in the City of Oakland's Reply papers and at oral argument, the Court should grant the City of Oakland's Motion and stay the forfeiture proceedings until the City of Oakland's appeal in *Oakland v. Holder* has been fully resolved.

Dated: February 27, 2013

Respectfully submitted,

MORRISON & FOERSTER LLP

OAKLAND CITY ATTORNEY

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

Attorneys for Plaintiff/Appellant
CITY OF OAKLAND