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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 RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Hearing Date: January 31, 2013
Time: 10:00 a.m.
Courtroom: B, Hon. Maria-Elena James

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I. INTRODUCTION

By this action, the City of Oakland seeks redress for harm resulting from the federal government's illegal efforts in the *Harborside Action*[1] to forfeit property used by Harborside Health Center ("Harborside"). Harborside operates a licensed medical cannabis dispensary in Oakland in compliance with state and city law. 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, and causing the loss of $1.4 million in tax revenue each year. The demand for medical cannabis that the government willingly allowed to grow will not diminish. Instead, tens of thousands of patients will be forced either to forego their medicine or to obtain medical cannabis in back alleys and underground, illegal markets. Millions of dollars in cannabis sales will be diverted from a highly regulated and safe dispensing environment onto the streets, causing a public health and safety crisis for patients and the broader Oakland community that Oakland – cash-strapped and short on police resources – is ill-equipped to address.

The forfeiture action is beyond the government's authority and thus illegal because it violates the applicable statute of limitations and is barred by the doctrine of equitable estoppel. On those grounds, Oakland has stated claims for declaratory and injunctive relief over which this Court has jurisdiction under the Administrative Procedure Act ("APA"). To avoid judicial scrutiny of its illegal conduct, however, the government moves to dismiss this action by arguing lack of subject matter jurisdiction and failure to state a claim. The government's motion lacks merit and should be denied.

The government's subject matter jurisdiction argument rests on only one ground: sovereign immunity. The government, however, waived sovereign immunity for injunctive relief against agency action in the APA. 5 U.S.C. § 702. The government's refrain that Oakland lacks an ownership interest in, and is not a claimant to, the real property at issue in the *Harborside*

[1] *United States v. Real Property and Improvements Located at 1840 Embarcadero, Oakland, California*, No. CV 12-3567 MEJ (the "*Harborside Action*").

Action merely proves that Oakland does *not* have an "adequate remedy" under the forfeiture statute or anywhere outside the APA — and for that very reason *may proceed under the APA*. 5 U.S.C. § 704.

The government's arguments that Oakland has failed to state a claim are similarly meritless. As to Oakland's statute of limitations claim, the government does not dispute that it knew or should have known that Harborside has been operating openly, publicly, and continuously since *2006*, which is beyond the five-year statute of limitations. Under the Sixth Circuit's decision on analogous facts in *United States v. $515,060.42 in United States Currency*, 152 F.3d 491 (6th Cir. 1998), the statute of limitations on forfeiture for Harborside's allegedly continuing violation of the Controlled Substances Act ("CSA") accrued in *2006*. The government's complaint in the *Harborside Action* is therefore time barred. The government's reliance on *United States v. 5443 Suffield Terrace, Skokie, Ill.*, 607 F.3d 504 (7th Cir. 2010), which involved three discrete acts of smuggling over several years — rather than an ongoing business — is unavailing.

As to Oakland's equitable estoppel claim, the government does not deny that in the Ninth Circuit equitable estoppel may be asserted against the federal government. The government incorrectly asserts that Oakland's claim relies primarily on one document, the Ogden Memo. The government conveniently ignores a long *pattern of statements* by President Obama, Attorney General Eric Holder, and other officials representing that the federal government will not use the resources of the U.S. Department of Justice ("DOJ") to enforce the CSA against those who use or provide medical cannabis in compliance with state law. For example:

- President Obama stated in 2008, and his representatives repeated: "I'm not going to be using Justice Department resources to try and circumvent state laws on [medical cannabis] issues."
- Attorney General Eric Holder stated as late as June 2012 with regard to medical cannabis: "[W]e limit our enforcement efforts to those individuals, organizations that are acting out of conformity . . . with state laws."

Significantly, the government took enforcement action against only *unlicensed* dispensaries and took *no enforcement action* against *duly licensed* dispensaries in Oakland. Until filing its forfeiture action in July 2012, the government made no efforts to prevent Harborside

from operating. Nor did it take enforcement action against Oakland for licensing medical cannabis dispensaries.

These repeated policy statements and the demonstrable pattern of non-enforcement against dispensaries in compliance with city and state law provided Oakland with good reasons to believe and to rely on the statements of our nation's leaders in regulating and permitting the growth of a market for medical cannabis in Oakland. For its part, the government enabled and tacitly approved that medical cannabis market. Oakland and its residents will now face a host of ills if the government is permitted to repudiate its top officials' representations and its policy of non-enforcement. Certainly, Oakland has pled sufficient facts to satisfy the Ninth Circuit's equitable estoppel standard.

There is too much at stake for Oakland and its residents and medical patients to allow the government to escape judicial scrutiny, particularly at this initial pleading stage. Oakland deserves the opportunity to develop its case so that justice and the public interest can be served.

II. THE STANDARDS GOVERNING A MOTION TO DISMISS

The standards for a Rule 12 motion to dismiss are well established. In reviewing a motion under Rule 12(b)(1) for lack of subject matter jurisdiction, the Court "must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The Court must draw all reasonable inferences from the complaint in the complainant's favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The Court may also consider "any other particularized allegations of fact, in affidavits or in amendments to the complaint." *Table Bluff Reservation v. Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001) (quoting *Warth*, 422 U.S. 490 at 501).

In determining whether a complaint states a claim upon which relief can be granted, the Court must assume that "all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). From the factual allegations in the complaint, the Court then "draws all reasonable inferences in favor of the plaintiff." *Ass'n for L.A. Deputy Sheriffs v. Cnty. of L.A.*, 648 F.3d 986, 991 (9th Cir. 2011). The complaint need only

"state a claim to relief that is plausible on its face," alleging no more than the "factual content" necessary to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal quotation marks omitted). The "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1019 (N.D. Cal. 2009) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Under these standards, Oakland has pled sufficient facts to (1) establish injury and to defeat the government's sovereign immunity argument, and (2) state claims for declaratory and injunctive relief regarding the legality of the government's forfeiture action. Oakland is entitled to develop and to present its case and thereby protect its and its 400,000 citizens' significant interests.

III. FACTS

A. Regulation of Medical Cannabis in Oakland Before 2006

In 1996, California voters adopted Proposition 215, the "Compassionate Use Act," Cal. Health and Safety Code § 11362.5. The Compassionate Use Act was intended to "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction" and "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." Cal. Health and Safety Code §§ 11362.5(b)(1)(A)-(C). (Compl., ¶ 12.) In 2003, the California Legislature added the "Medical Marijuana Program Act" ("MMPA") to the Health and Safety Code. The MMPA exempts dispensaries from prosecution under the California Health and Safety Code. (Compl., ¶¶ 17-19.)

Following the enactment of the MMPA, Oakland designed a regulatory scheme for medical cannabis dispensaries in order to maintain public health and safety. (Compl., ¶ 21.) In February 2004, Oakland authorized its medical cannabis dispensary permitting process, allowing

up to four dispensaries. Oakland, Cal. Code of Ordinances, ch. 5.80 *et seq.* In November 2004, Oakland residents passed Measure Z, which required Oakland to tax and regulate the use of medical cannabis. (Compl., ¶ 21.) Following the enactment of this ordinance, Oakland conducted a public and transparent competitive application process that resulted in the granting of four permits for medical cannabis dispensaries. (Compl., ¶ 22.) Once the permits had been granted, Oakland devoted substantial resources to closing *unlicensed* dispensaries. (*Id.*) Oakland actively monitors licensed dispensaries, including annual audits of their financial statements and employee backgrounds to ensure compliance with City and State law. (Compl., ¶¶ 20-23.) Oakland requires dispensaries to send their medical cannabis to an independent laboratory for quality control testing. (Compl., ¶ 29.)

B. Harborside Has Operated Openly Since 2006

Through the competitive permitting process, Harborside received a permit from Oakland to operate a medical cannabis dispensary and opened in 2006. (Compl., ¶¶ 24, 37.) Oakland had licensed three other dispensaries by 2007. (Compl., ¶ 37.) Federal authorities have been aware of Oakland's regulations and the ongoing operations of Harborside and the other three dispensaries since their inception. (Compl., ¶ 36.)

Since Harborside opened in 2006, it has operated transparently in the public domain. For example, it has a public website, Facebook page, and reviews on Yelp.com. (*Id.*, ¶ 38.) Since Harborside opened, its website has openly listed its inventory and notified the public of its business address and contact information. (*Id.*, ¶ 37.) Harborside was also the subject of press coverage during its early days of operation. For example, in April 2007, Harborside and its CEO Steven DeAngelo were profiled in the *San Francisco Chronicle Magazine*. (*Id.*, ¶ 39.)

C. The Federal Government Affirmatively Represented That It Would Not Take Legal Action Against Dispensaries That Complied With State Law

While Oakland implemented its medical cannabis program, federal government officials repeatedly affirmed—by word and deed—that they would not enforce the CSA against dispensaries that complied with state law. (Compl., ¶ 42.) Among other statements, government officials made the following policy representations:

- 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]." (Compl., ¶ 43.)

- Once President Obama was elected, this policy of non-enforcement became the DOJ's official stance. In February 2009, White House spokesman Nick Shapiro told the *Washington Times*, "The president believes that federal resources should not be used to circumvent state laws . . . ." (*Id.*, ¶ 44.)

- Attorney General Holder stated during a press conference in February 2009 that what the President "said during the campaign is now American policy." (*Id.*, ¶ 45.)

- Attorney General Holder stated in March 2009 that "[t]he 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.)

- On October 19, 2009, Deputy Attorney General David W. Ogden distributed a memorandum (the "Ogden Memo") that was made public via an official press release the same day. The purpose of the memorandum was to provide "clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana" and United States Attorneys were told they "should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." (*Id.*, ¶ 47.)

- In the press release accompanying the Ogden Memo, Attorney General Eric Holder announced: "It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana." (*Id.*, ¶ 49.)

- In May 2010, Attorney General Holder testified before the House Judiciary Committee as follows when asked about medical marijuana enforcement policy: "We look at the state laws, and what the restrictions are . . . . Is marijuana being sold consistent with state law?" (*Id.*, ¶ 50.)

- 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.*, ¶ 51.)

The government's pattern of enforcement and non-enforcement confirmed these representations. In 2006, DEA agents took enforcement actions against New Remedies Cooperative, an *unlicensed* dispensary in downtown Oakland, but federal authorities took no action against any licensed dispensaries in Oakland until 2012. (Compl., ¶¶ 40-41.) Similarly, while the government condemned a proposal to license cannabis *cultivation facilities* in Oakland, it did not condemn or take any action regarding licensed cannabis *dispensaries*. (*Id.*, ¶ 56.)

D. Oakland Detrimentally Relied on the Government's Statements and Conduct

In reliance on the government's statements and conduct, Oakland permitted and regulated the growth of the medical cannabis industry within Oakland. (Compl., ¶¶ 52-60.) Oakland developed a detailed regulatory scheme for the safe distribution of medical cannabis that serves thousands of Oakland residents. Oakland adjusted its ordinance to ensure that Oakland's regulations and licensed dispensaries complied with state law. (*Id.*, ¶ 57.) The Oakland City Administrator's Office has dedicated substantial resources to administering the medical cannabis dispensary permit program. (*Id.*, ¶¶ 55, 59.)

By allowing Harborside and other licensed dispensaries to operate for a number of years, the government encouraged and enabled a market for medical cannabis in Oakland. Closing dispensaries will not reduce the demand for medical cannabis, but will instead create a distribution vacuum that likely will precipitate price increases, crime, and street violence. (*Id.*, ¶ 35.) If Oakland's medical cannabis dispensaries are shut down, medical patients served by the dispensaries will resort to the black market, creating a public safety hazard for themselves, Oakland, and its residents. (*Id.*, ¶ 32.) Instead of obtaining medicine from a city-regulated dispensary located in a commercial area with ample lighting and security, medical patients, including the elderly and disabled, will either go without medicine or, in many cases, seek medical cannabis from street level drug dealers. (*Id.*, ¶ 33.) This will increase crime and divert scarce Oakland Police Department resources from addressing the violent crime, illegal guns, and other public safety crises that are causing the loss of many lives in Oakland. (*Id.*) Oakland will lose its ability to monitor the quality and production methods of medical cannabis sold in the dispensaries. This will create health risks for medical patients, who will not know whether their medicine is tainted or produced with harmful chemical additives or pesticides. (*Id.*, ¶ 34.) The government's illegal forfeiture action will divert millions of dollars of cannabis sales from the regulated market to the streets, creating unsafe conditions for the patients and the Oakland community and a public health and safety crisis.

Oakland has also come to rely on revenue from duly licensed dispensaries. In June 2009,

Oakland increased the business tax rate on medical cannabis dispensaries to 1.8 percent of gross sales, and, by the end of 2009, Oakland's four permitted dispensaries generated $28 million in gross sales. (*Id.*, ¶ 53.) In November 2010, Oakland increased the business tax rate to 5 percent of gross sales, and the business tax revenue increased from $7,450 in 2006 to $434,193 in 2010 once the new tax rate went into effect. (*Id.*) In 2012, Oakland was projected to receive $1.4 million in business tax revenue from four licensed dispensaries. (Compl., ¶ 54.) Oakland made specific budget projections in anticipation of that revenue. (*Id.*)

E. Contemporary Science and the Government Itself Recognize the Benefits of Medical Cannabis

The benefits of medical cannabis to patients suffering from chronic pain associated with debilitating illnesses such as cancer, AIDS, and multiple sclerosis are well-documented. (Compl., ¶ 25.) In 1999, an Institute of Medicine study funded by the Office of National Drug Control Policy concluded that scientific studies supported medical cannabis to treat patients who suffer from severe pain, such as those with AIDS or those who are undergoing chemotherapy. (*Id.*) The American College of Physicians, noting that marijuana has been used "for its medicinal properties for centuries," has lamented that federal laws have "hindered" research into further therapeutic benefits and "urge[d] review of marijuana's status as a Schedule I controlled substance and its reclassification into a more appropriate schedule." (*Id.*, ¶ 26.) A May 2012 study in the Open Neurology Journal similarly concluded that "[b]ased on evidence currently available the Schedule I classification is not tenable; it is not accurate that cannabis has no medical value, or that information on safety is lacking." (*Id.*, ¶ 27.)

The government has openly recognized the health benefits of medical cannabis. In fact, the government has sought exclusive ownership rights to cannabis compounds and their use by applying for and/or securing U.S. and international patents. (*See* Plaintiff's Request for Judicial Notice ("RJN"), Exs. 1-3 (U.S. Patent No. 6,630,507 B1 (filed Apr. 21, 1999) and international patent application WO 2009/140210 A2).) In 2003, the United States Department of Health and Human Services, as assignee (owner), was awarded a patent for a synthetic cannabinoid. (RJN, Ex. 1.) The abstract in the government's '507 patent (drafted by government scientists) 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." (*Id.*, at [57].) Similarly, the government's '210 patent publication openly extolls "analgesic" (pain-relieving) and "healing properties of Cannabis sativa (marijuana)" that "have been known throughout documented history." (RJN, Ex. 3 at [0004].) In its '210 patent application, 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. (*Id.*) The U.S. government (through its scientists and the Department of Health and Human Services) has extolled under penalty of perjury the many medical benefits of cannabis and even now seeks to commercially develop synthetic cannabis. In light of the above admissions and irrefutable evidence, it is impossible for the U.S. Department of Justice to argue in good faith that cannabis does not have significant medical benefits or that the judiciary must decide the important issues in this case by closing its eyes to the reality of medical science.

IV. THE COURT HAS SUBJECT MATTER JURISDICTION BECAUSE THE GOVERNMENT WAIVED SOVEREIGN IMMUNITY IN THE APA

This Court has subject matter jurisdiction.[2] Contrary to the government's argument, the government waived sovereign immunity in the APA, which allows suits against the government for declaratory and injunctive relief from improper agency action.

A. The APA Contains a Broad Waiver of Sovereign Immunity

The APA provides a broad waiver of sovereign immunity:

[2] The government does not dispute that Oakland has standing to bring this action 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). Nor does the government dispute that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, which "confer[s] jurisdiction on federal courts to review agency action." *Califano v. Sanders*, 430 U.S. 99, 105 (1977); *see Spencer Enters. v. United States*, 345 F.3d 683, 687-688 (9th Cir. 2003).

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .

5 U.S.C. § 702. The "central purpose" of the APA is to "provid[e] a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Thus, the "generous review provisions" of the APA must be given "a hospitable interpretation" such that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). The Ninth Circuit has held that "[Section] 702 waives sovereign immunity in all actions seeking relief from official misconduct except for money damages." *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). Indeed, the law creates a strong presumption that the waiver applies, and courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 (1986). The government provides no basis to overcome that presumption in this action for declaratory and injunctive relief.[3]

The government raises 5 U.S.C. § 704. But that provision, while placing limits on a cause of action under the APA, "does not provide a basis for dismissal on grounds of sovereign immunity." *Treasurer of N.J. v. United States Dep't of the Treasury*, 684 F.3d 382, 400 (3d Cir. 2012); *Michigan v. United States Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011) ("[T]he conditions of § 704 affect the right of action contained in the first sentence of § 702, but they do not limit the waiver of immunity in § 702's second sentence"); *Mannarino v. United*

[3] This is not surprising since the DOJ Manual advises its attorneys that the "sovereign immunity defense has been withdrawn … with respect to actions seeking specific relief other than money damages, such as an injunction, a declaratory judgment, or a writ of mandamus." Department of Justice Manual for U.S. Attorneys, Title 4-212 (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

States HUD, 2008 U.S. Dist. LEXIS 93781, 26-27 (W.D. Pa. Nov. 18, 2008) (rejecting inquiry into adequate remedies "because the APA waives the sovereign immunity of the United States in § 702 without reference to the limitation of [§ 704]").

B. Oakland Is Entitled to Seek Judicial Review Under Section 704 of the APA

Oakland may seek judicial review of the DOJ's action under APA Section 704, which provides that a "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704.

1. Oakland Lacks an "Adequate Remedy in a Court"

The government's assertion that Oakland has an "other adequate remedy in a court" for purposes of Section 704 is plainly wrong. It argues, incongruously, that (1) the forfeiture statute provides Oakland an adequate remedy, but (2) Oakland, lacking an interest in the real property being forfeited, cannot proceed under that statute.

To determine whether an adequate remedy exists, courts "focus[] on whether a statute provides an independent cause of action or an alternative review procedure." *El Rio Santa Cruz Neighborhood Health Center, Inc. v. Dep't of Health and Human Services*, 396 F.3d 1265, 1270 (D.C. Cir. 2005). The government does not dispute that *Oakland* lacks any "other adequate remedy in a court" to challenge the government's illegal forfeiture actions. Neither the CSA, nor the forfeiture statute, nor any other statute provides *Oakland* a remedy for the DOJ's illegal action. The contention that Oakland has an adequate alternative remedy because *other injured parties* have a remedy under the forfeiture statute defies the very purpose of the APA's "adequate remedy" provision. As Justice Scalia has explained, 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. at 927 (Scalia, J., dissenting).[4]

[4] *See also San Carlos Apache Tribe v. United States*, 417 F.3d 1091 (9th Cir. 2005) (Tribe had standing under the APA because it lacked private right of action under alternative statute); *Sharkey v. Quarantillo*, 541 F.3d 75, 91 (2d Cir. 2008) (allowing judicial review where "statutory scheme provides no alternative mechanism for judicial review of [Plaintiff's] claims" regarding her immigration status).

Accordingly, courts routinely 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. 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. 473 F. Supp. 2d 989, 1000 (N.D. Cal 2007).

Oakland, the "particular plaintiff" here, has no "adequate remedy" under the forfeiture statute, or otherwise outside of the APA, to challenge the government's improper forfeiture action against Harborside. The government admits this by asserting that, while *claimants* seeking access to property subject to a forfeiture proceeding have an adequate court remedy, Oakland cannot be a claimant because it lacks a direct interest in the property. (Mot. at 6:12-14.) Just as the plaintiffs in *El Rio* and *Hagee* fell outside the scope of relief provided by the FSHCAA and the FTCA, Oakland falls outside the scope of the civil forfeiture statute and therefore lacks an adequate alternative remedy except under Section 704 of the APA. The government's reference to whether Oakland filed a *timely* claim in the forfeiture action is beside the point because Oakland cannot file a claim in that action.

2. This Case Involves "Final Agency Action" by the DOJ

The government's motion *does not claim* that final agency action under Section 704 is

missing here.[5] For good reason: the DOJ's decision to file the *Harborside Action* and seek forfeiture based on operations of a medical cannabis dispensary licensed by Oakland constitutes a final DOJ action under Section 704.

A "final agency action" under Section 704 marks "the 'consummation' of the agency's decision-making process" and "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties"). Judicial determinations of finality must be made in "a pragmatic" and "flexible" way and in light of the strong presumption of judicial review under the APA. *Abbott Labs.*, 387 U.S. at 149-150. "It is the effect of the action and not its label that must be considered." *Or. Natural Desert Ass'n v. United States Forest Serv.*, 465 F.3d 977, 985 (9th Cir. 2006). Indeed, "when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." *Chehazeh v. AG of the United States*, 666 F.3d 118, 129 (3d Cir. 2012). Accordingly, *Athlone Industries, Inc. v. Consumer Product Safety Com.* found 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."[6]

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[5] During oral argument on Oakland's Motion to Stay the Landlords' "Motions for Order Prohibiting Unlawful Use of Defendant Property," however, the government's counsel stated, "I don't know what the City would identify as the final agency action." (Dec. 20, 2012 Tr. at 8:13-15.) Except for this stray comment, the government has *not* raised "final agency action" as a defense.

[6] *See also Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967) (labeling regulations promulgated by Food and Drug Administration were final agency actions because they were "clear-cut," "made effective immediately," and had a "direct effect on the day-to-day business" of the petitioners); *Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982) (decision to exempt bus yard from requirement of environmental impact report prior to condemnation is "final" where it "is the culmination of the agency's administrative procedures and will not be

(Footnote continues on next page.)

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. 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 the DOJ has the authority to file the *Harborside Action*, and legal consequences flow from that action. The DOJ's action undermines Oakland's efforts to regulate medical cannabis dispensaries; jeopardizes the health and safety of Oakland citizens; and imposes economic and other harm set forth in the Complaint.[7] It also casts a chill over any licensed medical cannabis dispensary's ability to lease property — and therefore operate — in Oakland. Without judicial review, Oakland would have no remedy to protect its interests against the government's illegal action; such a result would contradict the fundamental purpose of the APA.

3. The Government's Authority Is Inapposite

The government relies on eight cases for the irrelevant proposition that a *claimant* in a forfeiture proceeding cannot use the APA to avoid the procedures set forth in 18 U.S.C. § 983.

(Footnote continued from previous page.)

reconsidered at any later date"); *CSI Aviation Servs. v. United States DOT*, 637 F.3d 408, 413-414 (D.C. Cir. 2011) (Department of Transportation enforcement action was final agency action where it "cast a shadow over [Plaintiff's] customer relationships, tainted almost every aspect of its long-term planning, and impaired the company's ability to fend off competitors").

[7] *Genendo Pharm. N.V. v. Thompson*, 308 F. Supp. 2d 881 (N.D. Ill. 2003), and *Ipharmacy.MD v. Gonzales*, 2007 U.S. Dist. LEXIS 43200 (M.D. Fla. June 14, 2007), are inapposite. Those decisions involved seizures of property as part of ongoing agency investigations and plaintiffs who were able to address the merits of the seizure in alternate proceedings. *See Genendo*, 304 F. Supp. 2d at 885; *Ipharmacy*, 2007 U.S. Dist. LEXIS 43200, at *10 ("the DEA's action was simply an initial step for further investigation that may or may not be litigated" in a proceeding where the plaintiff would have an opportunity to be heard). Here, there is no ongoing investigation; the DOJ's decision that it has authority to seek forfeiture is final; and Oakland has no other forum to protect its interests. Further, *Genendo* did not involve a claim that the government *lacked the authority to file a forfeiture action* and that the decision to proceed (despite the lack of authority) was the final agency action, as is the case here.

Decisions regarding administrative complaints that triggered an agency investigation, which was not a final agency action, are similarly inapposite. *See FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *Ukiah Valley Medical Center v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990). This case does not involve an agency investigation, but the results of a final decision by the DOJ to close Harborside through the forfeiture action.

(Mot. at 5:19-6:8, 7:14-27.) The government cites no authority, however, 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.

The first six decisions the government relies on to argue that "civil forfeiture proceedings are the exclusive forum in which a civil forfeiture may be contested" all rejected attempts by claimants who had a direct interest in the subject property to evade the forfeiture statute.[8] In all six cases, the claimants had notice of forfeiture, *an opportunity to be heard*, and the *ability* to file a timely claim in the forfeiture action. The courts reached the non-controversial conclusion that claimants who had an opportunity to contest forfeiture by filing a claim had "an adequate remedy" and are precluded from filing a separate APA claim where they fail to defend their rights in a timely fashion.[9] Those decisions are silent on the right of a *non-claimant*, such as Oakland, that lacks a direct interest in the property subject to forfeiture but has an *independent cognizable* injury as a result of the DOJ's actions, to file a civil suit for injunctive relief under the APA.[10]

The government misconstrues *Town of Sanford v. United States* and *Brem-Air Disposal v. Cohen*. *See* Mot. at 7 (citing *Town of Sanford v. United States*, 140 F. 3d 20 (1st Cir. 1998);

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[8] *See* Mot. at 5-6 (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); *Sarit v. United States Drug Enforcement Admin.*, 987 F.2d 10 (1st Cir. 1993); *Hernandez v. United States*, 86 F. Supp. 2d 331 (S.D.N.Y. 2000); *Moses v. United States*, 2009 U.S. Dist. LEXIS 21494 (D. Vt. Mar. 17, 2009).

[9] *See Martin*, 717 F. Supp. 2d at 99 ("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."); *Sarit*, 987 F.2d at 17 ("plaintiffs had had the means available under the forfeiture statute to take the case to a judicial forum, [but] they had failed to do so"); *Hernandez*, 86 F. Supp. at 337 (APA did not apply because plaintiff "[sought] monetary relief" and "was provided a remedy in the forfeiture proceedings instituted by the government against his [own] vehicle"); *Moses*, 2009 U.S. Dist. LEXIS 21494 at *6 (dismissal proper "[b]ecause a remedy is available in the criminal [forfeiture] case").

[10] Other courts have held that claimants have a remedy under the APA in administrative forfeiture matters where the claimant has no other adequate remedy to review an agency decision. *See, e.g., Beck v. United States*, 2011 U.S. Dist. LEXIS 24625 (D. Md. Mar. 10, 2011) (holding that jurisdiction under the APA proper where party asserted that "after receiving proper notice, they filed a timely claim which the agency has mischaracterized as untimely. Thus, under the Government's own characterization of the exclusivity provision of § 983, that provision is not applicable to Plaintiffs' claim.").

Brem-Air Disposal v. Cohen, 156 F. 3d 1002 (9th Cir. 1998). The government claims that these decisions stand for the proposition "that, where there exists a specific statutory process that can provide the remedy that a litigant seeks, the 'other adequate remedy' limitation in § 704 cannot be surmounted simply because the litigant could not succeed in obtaining relief through that process." (Mot. 7:18-21.) Not true. Unlike Oakland here, the APA plaintiffs in those decisions had viable alternative statutory remedies that they had chosen not to pursue.

In *Town of Sanford*, the town held tax liens on a property that was subject to forfeiture, and thus had a direct interest in the property. Subsequent to the forfeiture proceedings, the town discharged the liens and filed suit under the APA. *Town of Sanford*, 140 F.3d at 22. The First Circuit found that it lacked jurisdiction because the Town of Sanford, as a potential *claimant*, had an adequate remedy in challenging the forfeiture proceeding, but chose to forego that remedy by discharging the tax liens. *Id.* at 23. The court held that a "remedy is not inadequate for purposes of the APA because it is *procedurally inconvenient* for a given plaintiff, or because plaintiffs have *inadvertently deprived themselves of the opportunity* to pursue that remedy." *Id.* (emphasis added).[11] Similarly, *Brem-Air Disposal* held that the plaintiff could not proceed under the APA because it had an adequate remedy under the Resource Conservation and Recovery Act ("RCRA"), but failed to provide notice timely under the RCRA. 156 F.3d at 1004. The court specifically considered *Brem-Air*'s remedy, not a potential remedy for a *hypothetical* plaintiff. *Id.* (RCRA allows "any person, including Brem-Air [to sue]. …Brem-Air most certainly *could have* filed a citizen suit.") (internal quotation marks omitted).

Unlike the plaintiffs in *Town of Sanford* or *Brem-Air Disposal*, Oakland has not missed an opportunity to proceed under an alternative statute. Rather, Oakland never had an opportunity to

[11] *Mitchell v. United States*, 930 F. 2d 893, 897 (Fed. Cir. 1991), on which *Town of Sanford* relied, confirms that "adequate remedy" refers to a remedy available to a particular plaintiff. In *Mitchell*, the court found it lacked standing to address the plaintiff's back pay claim because the Court of Claims provided "adequate review procedures" and "the power to provide Mitchell a complete remedy." *Mitchell*, 930 F.2d 893, 897 ("Moreover the Claims Court *can provide Mitchell* a complete remedy. In other words, the Claims Court supplies *Mitchell* 'adequate review procedures.' Therefore, APA *Section 704* directs the district court case to the Claims Court. *In Mitchell's case*, there is an adequate remedy in another court.") (emphasis added).

file a claim under the forfeiture statute in the first place or to proceed under any other statute.

V. OAKLAND STATES A CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF BASED ON THE STATUTE OF LIMITATIONS

Oakland has stated a claim based on the government's failure to act within the applicable statute of limitations. The government does not contest 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 five years before the federal government filed the forfeiture action on July 9, 2012. The issue is whether the statute of limitations accrued in 2006 when the government became aware, or should have become aware, of Harborside's operations, or whether the statute of limitations is continually reset every millisecond of every day during the "continuing" operations of the Harborside dispensary in violation of the CSA (Dkt. No. 1, *Harborside Action*, Compl., ¶ 12.)

The parties agree that there are two relevant Court of Appeals decisions: *United States v. $515,060.42 in United States Currency*, 152 F.3d 491 (6th Cir. 1998) and *United States v. 5443 Suffield Terrace, Skokie, Ill.*, 607 F.3d 504 (7th Cir. 2010). The Sixth Circuit in *United States v. $515,060.42 in United States Currency*, 152 F.3d 491 (6th Cir. 1998) considered facts most closely analogous to those here, and its decision therefore governs this case.

In *$515,060.42 in United States Currency*, 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. 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. 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. No. 1, Compl., ¶ 12, *Harborside Action*.) Both CSA provisions on which the government bases the forfeiture action also identify a *continuing* 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 those in the Sixth Circuit's decision where the underlying offense was "conduct[ing]" and "manag[ing]" an illegal gambling business. *See* 18 U.S.C. § 1955.

In attempting to save its late-filed forfeiture action, the government relies on the Seventh Circuit decision in *5443 Suffield Terrace*, to argue that the statute of limitations did not begin to run when the government discovered Harborside's operation. In *5443 Suffield Terrace*, the government sought forfeiture of property connected with a person who had been caught smuggling Cuban cigars into the United States on three separate occasions. 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, in contrast to the claimant in *5443 Suffield Terrace*, who had smuggled cigars on three discrete occasions, Harborside *has been continually operating* a "[medical cannabis dispensary business] in general." The federal government has known about it since 2006 and

intentionally elected to not bring any actions within the limitations period.

Were the Court to grant the government's motion to dismiss Oakland's statute of limitations claim, the Court would frustrate Congress's purpose in imposing a statute of limitations for forfeiture actions. The government's theory—that the statute of limitations is re-set continuously—eviscerates and renders meaningless the statute of limitations. That cannot be right. 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. Feb. 10, 1995) (citation omitted).[12]

VI. OAKLAND STATES AN EQUITABLE ESTOPPEL CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

Oakland has pled a claim for equitable estoppel. The Ninth Circuit allows equitable estoppel claims against the government and identifies the traditional elements for that claim as follows:

> (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended ["reasonable reliance"]; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury ["detrimental reliance"].

Watkins v. U.S. Army, 875 F.2d 699, 709 (9th Cir. 1989). The Ninth Circuit also stated that

[12] Nor does the government fare any better if it tries to argue that every one of hundreds of thousands of sales over the 6 year period re-set the statute of limitations and that the government can pick and choose any sale occurring within the five years preceding the filing of the forfeiture complaint. *First*, the government's forfeiture complaint was pled as a "continuing business" whose operations violate the CSA; the government cannot be heard to re-characterize its complaint as based on discrete sales. *Second*, the government has never identified any particular sale in its forfeiture complaint, which only underscores the fact that its theory was of a continuing business operation. *Third*, the government was aware at all times that these transactions were occurring every business day, and the government pursuant to its leaders' promises and its publicly announced policy intentionally refrained from initiating federal forfeiture proceedings for nearly six years. To allow the government to initiate forfeiture now would make a mockery of the purpose of a statute of limitations.

equitable estoppel against the government involves a showing of "affirmative misconduct going beyond mere negligence." *Id.* at 707. Affirmative misconduct can be satisfied by "a pattern of false promises." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001). "[T]here is no single test for detecting the presence of affirmative misconduct; each case must be decided on its own particular facts and circumstances." *Watkins*, 875 F.2d at 707.

Here, the government challenges only whether Oakland has pled (1) affirmative misconduct and (2) reasonable and detrimental reliance.

A. The Government's Repeated Statements and Pattern of Non-Enforcement Satisfy the Affirmative Misconduct Requirement

Oakland has sufficiently pled a "pattern of false promises" and conduct by the federal government that constitutes affirmative misconduct. 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 action against Harborside amount to affirmative misconduct.

The government mischaracterizes Oakland's claim as "rel[ying] primarily on the 2009 Ogden memo." (Mot. 9.) The government ignores 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 stating 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]." (Compl., ¶ 43.)
- Attorney General Holder stating during a press conference in February 2009 that what the President "said during the campaign is now American policy." (*Id.*, ¶ 45.)
- Attorney General Holder stating 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 testifying before the House Judiciary Committee as follows when asked about medical marijuana enforcement policy: "We look at the state laws, and what the restrictions are . . . . Is marijuana being sold consistent with state law?" (*Id.*, ¶ 50.)
- In June 2012, one month before filing the *Harborside Action*, Attorney General Holder testifying before the House Judiciary Committee that "we limit our

> enforcement to those individuals, organizations that are acting out of conformity with state laws." (*Id.*, ¶ 51.)

The government's conduct sent a clear message that it would not enforce the CSA against duly licensed dispensaries in compliance with state law. Four licensed medical cannabis dispensaries have operated openly in Oakland since 2006. (*Id.*, ¶¶ 37-38.) Although DEA agents took enforcement action against two nearby *unlicensed* dispensaries between late 2006 and April 2012, federal authorities did not act against duly licensed dispensaries operating in accordance with state law in Oakland. (*Id.*, ¶¶ 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*.) Similarly, the government took enforcement action to condemn a proposal to license *cannabis cultivation* but took no similar action to condemn the licensing and regulation of cannabis dispensaries, such as Harborside. (Compl., ¶ 56.)

Watkins, where the Ninth Circuit found "affirmative misconduct," is instructive. There, the Army refused to reenlist a soldier because of his sexual orientation even though he had been candid about his sexual orientation during his 14-year career and even though the Army had repeatedly permitted him to reenlist in the past despite its policy that homosexuality constituted a nonwaivable disqualification for reenlistment. The Ninth Circuit held that the Army's repeated actions in violation of its own regulations constituted affirmative misconduct, and the Army was estopped from discharging the plaintiff, who had relied on that pattern of conduct. *Watkins*, 875 F.2d at 707-08, 711.

LC U-Bake LLC v. United States, Case No. 2:12-CV-0049, 2012 WL 1379048 (D. Or. Apr. 20, 2012), is also instructive. There, the plaintiffs obtained approval from the U.S. Department of Agriculture to participate in the food stamp program. After a year, the government notified the plaintiffs it was withdrawing authorization for their participation in the program. Concluding that the initial approval was "the result of broader [department] policy," and that the government had made "affirmative representations in violation of its own regulations," the court held that plaintiffs were likely to succeed on their equitable estoppel claim. *Id.* at *10-11.

Similar to *Watkins*, Oakland and Harborside were candid about medical cannabis

dispensaries, and the government repeatedly stated and confirmed by its conduct that it would allow dispensaries which operated in compliance with state law. And like the plaintiff in *LC U-Bake*, Oakland relied on the government's affirmative representations and conduct that it would not enforce the CSA against duly licensed dispensaries operating in compliance with state law. For the same reasons that the *Watkins* and *LC U-Bake* courts found sufficient allegations of equitable estoppel in those decisions, the Court should hold that Oakland has adequately pled "affirmative misconduct."

B. Oakland Reasonably and Detrimentally Relied on the Federal Government's Statements and Conduct

The government argues erroneously that Oakland has not pled reasonable reliance, that is, that Oakland as a matter of law could not have reasonably relied on the statements and conduct of federal officials. As noted above, Oakland's reliance was not solely or primarily based on the Ogden Memo, but on (1) a long *pattern of representations* by President Obama, Attorney General Holder, and other senior government officials that the government would not enforce the CSA against medical cannabis dispensaries in compliance with state law, and (2) a pattern of *governmental conduct* enforcing the CSA against unlicensed medical cannabis dispensaries and industrial cultivation, but *not* against duly licensed dispensaries.

If Oakland and its citizens cannot rely on the words of President Obama and Attorney General Eric Holder, then upon whom can they rely? The law provides that the government's representations are naturally trusted and that the government must turn "square corners." *See St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting) ("Our Government should not, by picayunish haggling over the scope of its promise, permit one of its arms to do that which, by any fair construction, the Government has given its word that no arm will do. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government"); *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government"); *Menges v. Dentler*, 33 Pa. 495, 500 (1859) ("Men naturally trust in their government, and ought

to do so, and they ought not to suffer for it"). The government's argument that reliance here was unreasonable is directly contradicted by these decisions. The government's argument assumes that the President and Attorney General Holder are not trustworthy and cannot reasonably be relied upon and that "the joke is on [Oakland and its 400,000 citizens and thousands of patients]". The Court should reject the government's position as unworthy of a country of laws.

The government's reliance on *Marin Alliance for Medical Marijuana v. Holder*, 866 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.[13] While both require reasonable reliance, Oakland is not required to prove that an "authorized government official" "affirmatively told" Oakland its dispensary ordinance was permissible to establish *equitable estoppel in a civil action*. *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 federal government. (*Id*., ¶¶ 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.

The other decisions relied on by the government are also inapposite. 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 the 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.

[13] *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'").

742, 755-56 (2001), 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 were a defense to revocation of a criminal defendant's supervised release.

C. Oakland Relied on the Federal Government's Conduct to Its Injury

Oakland has sufficiently pled detrimental reliance. *First*, Oakland will suffer injury because, unless the government is estopped, the demand for medical cannabis will be channeled into the black market that will cause a public health and safety crisis, among other injury. In reliance on the government's statements and conduct, Oakland has regulated and allowed the growth of a medical cannabis industry that serves thousands of patients. (Compl., ¶¶ 11, 20, 52.) Closing dispensaries will not reduce the demand for medical cannabis but will instead create a distribution vacuum. This should be no surprise because cannabis is highly effective for medical purposes, as the federal government and its scientists have admitted in its '507 patent and its '210 patent application and other publications. (RJN, Exs. 1-3; Compl., ¶¶ 26-27.)

If Oakland's medical cannabis dispensaries are shut down, medical patients, including the elderly and disabled, will have no option but to seek medical cannabis from street level drug dealers. (Compl., ¶ 33.) This will increase crime and divert scarce Oakland Police Department resources from addressing the violent crime, illegal guns, and other public safety crises that are causing the loss of many lives in Oakland. (*Id.*) This will also create health risks for medical patients, who will not know whether their medicine is tainted or produced with harmful chemical additives or pesticides because Oakland will lose its ability to monitor the quality and production methods of medical cannabis. (*Id.*, ¶ 34.)

Second, Oakland has projected over $1.4 million in business tax revenue from the four permitted operating dispensaries for 2012. That revenue will be sufficient to pay for a dozen additional police officers or firefighters, or even more librarians, park directors, or other essential municipal services. (*Id.*, ¶ 54.) Eliminating a source of substantial municipal revenue is

cognizable injury.

VII. CONCLUSION

The City of Oakland respectfully requests the Court to deny the government's motion to dismiss. Oakland has adequately pled facts to establish subject matter jurisdiction and to state a claim for declaratory and injunctive relief. Oakland seeks the opportunity to develop and present its case so that the important issues herein which affect the lives of so many people can be fully and openly addressed by the judiciary.[14]

Dated: January 14, 2013

Respectfully submitted,
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[14] Should the Court find the Complaint deficient in any regard, Oakland requests leave to amend the Complaint.