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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; MELINDA HAAG, U.S. Attorney for the Northern District of California,

Defendants.

CASE NO. 3:12-cv-5245 (MEJ)

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STAY

Hearing Date: December 20, 2012
Hearing Time: 10:00 a.m.
Courtroom: B

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 4

I. PLAINTIFF LACKS STANDING TO SEEK A STAY OF PROCEEDINGS IN FORFEITURE CASES IN WHICH IT IS NOT A PARTY, PARTICULARLY WHERE IT HAS NO OWNERSHIP OR POSSESSORY INTEREST IN THE PROPERTIES SUBJECT TO FORFEITURE, AND IT FAILED TO FILE A CLAIM IN THOSE CASES BEFORE THE APPLICABLE DEADLINES 4

II. PLAINTIFF IS UNLIKELY TO SUCCEED IN THE CAUSES OF ACTION THAT IT ASSERTS IN THIS CASE 7

A. Plaintiff's Statute of Limitations Claim Must Fail 7

B. Plaintiff's Estoppel Claim Must Fail 9

III. PLAINTIFF'S ASSERTION OF HARM DOES NOT WARRANT ITS REQUESTED STAY 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Alternative Cmty. Health Care Co-op., Inc. v. Holder, No. 11-2585, 2012 WL 707154 (S.D. Cal. Mar. 5, 2012) … 10

Can v. DEA, 764 F. Supp. 2d 519 (W.D.N.Y. 2011) 4

Golden Gate Rest. Ass'n v. City & County of San Francisco, 512 F.3d 1112 (9th Cir. 2008) 13

Hammitt v. United States, 69 Fed. Cl. 165 (2005) 5

Heckler v. Cmty. Health Servs., Inc., 467 U.S. 51 (1984) 10, 13

Leyva v. Certified Grocers of California, Ltd., 593 F.2d 857 (9th Cir. 1979) 6

MAMM v. Holder ("*MAMM I*"), 866 F. Supp. 2d 1142, 1155-56 (N.D. Cal. 2011) ..10, 11, 12, 13

MAMM v. Holder ("*MAMM II*"), No. 11-5349, 2012 WL 2862608, (N.D. Cal. July 11, 2012) 10

Martin v. Leonhart, 717 F. Supp. 2d 92 (D.D.C. 2010) 4-5

New Hampshire v. Maine, 532 U.S. 742 (2001) 10

Sacramento Nonprofit Collective v. Holder, 855 F. Supp. 2d 1100 (E.D. Cal. 2012).....10

United States v. $11,500.00 in U.S. Currency, 797 F. Supp. 2d 1092 (D. Or. 2011) 6

United States v. $20,193.39 U.S. Currency, 16 F.3d 344 (9th Cir. 1994) 5

United States v. $21,404.00 in U.S. Currency, No. 08-1688, 2008 WL 5274539 (D. Ariz. Dec. 18, 2008) 6

United States v. $133,420 in U.S. Currency, 672 F.3d 629 (9th Cir. 2012) 5

United States v. $487,825.000 in U.S. Currency, 484 F.3d 662 (3d Cir. 2007) 6

United States v. $515,060.42 in U.S. Currency, 152 F.3d 91 (6th Cr. 1998) 8

United States v. 5443 Suffield Terrace, Skokie, Ill., 607 F.3d 504 (7th Cir. 2010) 7-8

United States v. All Funds in the Account of Property Futures, Inc.,

820 F. Supp. 2d 1305 (S.D. Fla. 2011) 6

United States v. Bell, 602 F.3d 1074 (9th Cir. 2010) 10, 11

United States v. Hicks, 722 F. Supp. 2d 829 (E.D. Mich. 2010) 12

United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483 (2001) 2, 13, 14

United States v. Real Prop., 135 F.3d 1312 (9th Cir. 1998) 6

United States v. Real Prop. Located at 22 Santa Barbara Dr., 264 F.3d 860 (9th Cir. 2001) 6

United States v. Schafer, 625 F.3d 629 (9th Cir. 2010) 11

United States v. Stacy, 734 F. Supp. 2d 1074 (S.D. Cal. 2010) 12

Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (en banc) 10

STATUTES

18 U.S.C. § 983 .....3, 4, 5, 6

18 U.S.C. § 1955 8

19 U.S.C. § 1595a 8

19 U.S.C. § 1621.....7

Controlled Substances Act ("CSA"), as amended, 21 U.S.C. §§ 801 *et seq.* ..... *passim*

21 U.S.C. § 841 .....2, 8

21 U.S.C. § 856 2

21 U.S.C. § 881 8

INTRODUCTION

Plaintiff, the City of Oakland, has initiated this separate action in an attempt to halt forfeiture proceedings that the United States has initiated against an Oakland property housing a marijuana dispensary. Plaintiff's lawsuit was filed after the time to assert a claim in the forfeiture action itself had passed. And in any event, Plaintiff lacks any ownership interest in the property. Plaintiff therefore lacks standing to participate in the forfeiture action. Apparently undeterred by these clear jurisdictional barriers, Plaintiff has now filed a motion *in this action* seeking to stay proceedings *in the forfeiture action* to enjoin unlawful use of the property in question. (And Plaintiff seeks the same stay with respect to another forfeiture action where the property in question is not in Oakland at all, but in San Jose.) Plaintiff cannot circumvent the requirements that apply to forfeiture proceedings by filing this separate lawsuit, nor can Plaintiff obtain a stay in proceedings in which it lacks standing to file a claim.

Even if these jurisdictional defects were disregarded, however, Plaintiff's requested stay should be denied. Plaintiff's request is based on the premise that Plaintiff could actually succeed in obtaining the ultimate relief that it seeks through this lawsuit. But the two claims Plaintiff asserts in its Complaint cannot possibly prevail. First, Plaintiff argues that the United States initiated forfeiture against the Oakland property outside the five-year statute of limitations because the marijuana dispensary began distributing marijuana on those premises over six years ago. Plaintiff fails to recognize, however, that under the Controlled Substances Act ("CSA"), every act of possession, distribution, or cultivation constitutes a separate offense that could independently justify forfeiture. Many of these illegal acts have occurred at the Oakland property during the five years before the United States issued forfeiture proceedings. The forfeiture proceedings thus fall well within the statute of limitations.

Second, Plaintiff argues that the United States is estopped from seeking forfeiture of the Oakland property because it had adopted a "policy of nonenforcement" of the CSA against all those in compliance with state law. Even assuming that the marijuana dispensary operating at the Oakland property – which is alleged to be the largest on the planet, with annual gross sales revenue of $20 million – were in compliance with California law, this claim cannot succeed.

Indeed, a member of this Court, as well as two other federal district courts in California, have already rejected similar arguments. As those courts recognized, the United States has never misrepresented the fact that marijuana distribution, possession, and cultivation remain illegal under federal law. Even if a change in enforcement policy had occurred, Plaintiff cannot meet its heavy burden to establish the "affirmative misconduct" that would be necessary before the United States could be estopped from enforcing the CSA. In addition, Plaintiff cannot plausibly assert that it has detrimentally relied upon the government's prior alleged nonenforcement policy when it has received a windfall of millions of dollars in tax and sales revenues through the operation of illegal marijuana dispensaries within its borders.

Finally, Plaintiff's claim of harm, should illegal use of the Oakland property be enjoined, does not warrant a stay of those injunction proceedings. The fact that Plaintiff filed this action relatively recently – well past the deadline to assert a claim in the forfeiture proceedings themselves – does not entitle Plaintiff to stay those proceedings simply so that it might present its own arguments first. In addition, while Plaintiff asserts that Oakland residents who need marijuana for medical purposes will suffer harm if the dispensary at the Oakland property is closed, the Supreme Court's decision that "marijuana has 'no currently accepted medical use'" under the CSA precludes consideration of such "medical necessity" arguments. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 491 (2001). There is a strong public interest in the enforcement of federal law, as well as in the protection of the public from drugs that federal regulatory authorities have not approved for medical use. In sum, Plaintiff's requested stay is wholly unjustified and should be denied.

BACKGROUND

The United States initiated a civil forfeiture action against the property located at 1840 Embarcadero, Oakland, California on July 9, 2012. *See United States v. Real Property and Improvements Located at 1840 Embarcadero, Oakland, California* ("*1840 Embarcadero*"), No. CV 12-3567 (C.D. Cal.). The forfeiture complaint alleges that the defendant real property is the business location of Harborside Health Center, a retail marijuana store that distributes marijuana in violation of the CSA, 21 U.S.C. §§ 841 and 856. *See* Compl., *1840 Embarcadero* (July 6,

2012). Pursuant to 18 U.S.C. § 983 and Rule G of the Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Claims ("Rule G"), any "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." Rule G(5)(a)(i); *cf.* 18 U.S.C. § 983(a)(4)(A). The time limit for filing such a claim is either set forth in a "direct notice" sent to a known potential claimant, or, for claimants who did not receive direct notice, "no later than 60 days after the first day of publication on an official internet government forfeiture site." Rule G(5)(a)(ii).

With respect to the *1840 Embarcadero* action, the United States served direct notice on certain potential claimants and also provided notice by publication on an official government forfeiture website, beginning on July 11, 2012. *See* Proof of Publication of Notice of Forfeiture Action, ECF No. 46, 1840 Embarcadero (Oct. 4, 2012). Thus, under Rule G(5)(a)(ii), any claim related to the forfeiture action by anyone who did not receive direct notice was due no later than September 10, 2012. One of those who filed a claim prior to the deadline in the *1840 Embarcadero* action was the Patient Mutual Assistance Collective Corporation ("PMACC"), which occupies the property and runs the Harborside Health Center.

Plaintiff, on the other hand, did not file a claim in *1840 Embarcadero* on or before the September 10, 2012, deadline. Rather, on October 10, 2012, Plaintiff filed the above-captioned lawsuit, naming Eric Holder, Attorney General of the United States; and Melinda Haag, U.S. Attorney for the Northern District of California, as defendants. Through this action, Plaintiff seeks a "declaratory judgment that Defendants and any agency under their authority have no right to seek civil forfeiture of the real property located at 1840 Embarcadero, Oakland, California based on purported violations of the Controlled Substances Act," as well as preliminary and permanent injunctions prohibiting Defendants from seeking such forfeiture. Compl. at 15. Pursuant to an administrative motion by Plaintiff, the Court has deemed the above-captioned action "related" to *1840 Embarcadero* pursuant to Local Rule 3-12. Both cases are thus before the same Judge. However, the cases have not been consolidated pursuant to Fed. R. Civ. P. 42.

The United States also initiated forfeiture proceedings against a San Jose property, where

another marijuana dispensary, also operated by PMACC, is located. *See United States v. Real Property and Improvements Located at 2106 Ringwood Avenue, San Jose, California* ("*2106 Ringwood*"), No. 12-3566 (C.D. Cal.). Because PMACC also filed a claim in that action, the 2106 Ringwood action was deemed related to the 1840 Embarcadero action, pursuant to an administrative motion by the United States. *See* Order of Aug. 20, 2012, ECF No. 11, *2106 Ringwood*.

On August 29, 2012, Concourse Business Center, the owner of the 2106 Ringwood property, filed a motion pursuant to Rule G(7)(a), for an order that would "prevent [the property's] use in a criminal offense." *See* Motion, ECF No. 13, *2106 Ringwood* (Aug. 29, 2012). The United States joined in the motion. *See* Joinder, ECF No. 16, *2106 Ringwood* (Sept. 7, 2012). On November 7, 2012, Ana Chretian, the owner of the 1840 Embarcadero property, filed a similar motion pursuant to Rule G(7)(a), *see* Motion, ECF No. 64, *1840 Embarcadero* (Nov. 7, 2012), and the United States joined in that motion as well, *see* Joinder, ECF No. 66, *1840 Embarcadero* (Nov. 8, 2012).

Plaintiff then filed a Motion to Stay *in this action*, seeking to stay Ana Chretian's Rule G(7)(a) motion in *1840 Embarcadero* as well as Concourse Business Center's Rule G(7)(a) motion in *2106 Ringwood*. *See* Motion to Stay, ECF No. 16.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO SEEK A STAY OF PROCEEDINGS IN FORFEITURE CASES IN WHICH IT IS NOT A PARTY, PARTICULARLY WHERE IT HAS NO OWNERSHIP OR POSSESSORY INTEREST IN THE PROPERTIES SUBJECT TO FORFEITURE, AND IT FAILED TO FILE A CLAIM IN THOSE CASES BEFORE THE APPLICABLE DEADLINES

It is axiomatic that proceedings in an ongoing federal court case cannot be halted by a non-party who makes no attempt to participate in the case in question, but files a motion to stay in its own separate lawsuit. Indeed, courts have expressly held that civil forfeiture proceedings are the sole forum in which forfeiture may be contested. *Cf. Can v. DEA*, 764 F. Supp. 2d 519, 520 (W.D.N.Y. 2011) (recognizing that 18 U.S.C. § 983 provides exclusive remedy for those seeking to challenge civil forfeiture); *Martin v. Leonhart*, 717 F. Supp. 2d 92, 99-100 (D.D.C.

2010) ("Under the scheme established by Congress, the filing of a claim by an aggrieved party [pursuant to 18 U.S.C. § 983] is the exclusive means by which a claimant can have a judicial determination as to the forfeiture's validity."); *see also Hammitt v. United States*, 69 Fed. Cl. 165, 169 (2005) (forfeiture could not be challenged through takings claim filed separate from forfeiture action itself).

Here, of course, it is little wonder that Plaintiff has made no attempt to participate directly in either the *1840 Embarcadero* or the *2106 Ringwood* forfeiture proceedings because its participation would be jurisdictionally barred. For one thing, Plaintiff lacks standing to participate in these forfeiture actions. The Ninth Circuit has clearly stated that only those with "an ownership interest or a possessory interest" have standing to file a claim in a forfeiture proceeding. *See United States v. $133,420 in U.S. Currency*, 672 F.3d 629, 637-38 (9th Cir. 2012). Thus, even "unsecured creditors" lack standing, despite their financial interest in repayment of the debts owed to them. *See United States v. $20,193.39 U.S. Currency*, 16 F.3d 344, 346 (9th Cir. 1994); *see also* 18 U.S.C. § 983(d)(6)(B)(i) (excluding those with "general unsecured interest[s]" from the definition of owner).

Plaintiff does not claim any ownership or possessory interest in either of the properties that are the subjects of the two forfeiture actions at issue here. Rather, Plaintiff is a municipality. While Plaintiff suggests that the operation of a marijuana dispensary in the City of Oakland has generated "millions of dollars in business tax revenue" for the City, Pl Mem. 11, this does not qualify as an ownership or possessory interest in the *1840 Embarcadero* property, much less in the *2106 Ringwood* property, which is not even in the City of Oakland. Because there is no plausible basis upon which Plaintiff could assert an ownership or possessory interest in these properties, it could not have filed a claim in the forfeiture actions themselves, nor could it have sought to dismiss those actions. *See* Rule G(8) (only a claimant "who establishes standing to contest forfeiture may move to dismiss the [forfeiture] action").

In addition to its lack of ownership or possessory interest in the properties in question, Plaintiff would also be barred from directly participating in the forfeiture actions because Plaintiff has failed even to attempt to file a claim within the statutory time limit. *See* 18 U.S.C. §

983(a)(2) (requiring claimants wishing to dispute forfeiture of property to file claim within designated time period). Indeed, Plaintiff did not even initiate the instant lawsuit until well after the time for filing a claim in the forfeiture actions had passed. Plaintiff would therefore lack standing on this basis as well. "Failure to comply with procedural requirements for opposing forfeiture," including the time limits for filing a claim, "precludes a person from establishing standing as a party to a forfeiture action." *United States v. $21,404.00 in U.S. Currency*, No. 08-1688, 2008 WL 5274539, at *2 (D. Ariz. Dec. 18, 2008) (citing *United States v. Real Prop.*, 135 F.3d 1312, 1315 (9th Cir. 1998); *United States v. Real Prop. Located at 22 Santa Barbara Dr.*, 264 F.3d 860, 870 (9th Cir. 2001)); *United States v. $487,825.000 in U.S. Currency*, 484 F.3d 662 (3d Cir. 2007) ("To establish statutory standing in a forfeiture case, the claimant must comply with the procedural requirements set forth in Rule [G](6)(a) and § 983(a)(4)(A)."); *United States v. All Funds in the Account of Property Futures, Inc.*, 820 F. Supp. 2d 1305, 1319 (S.D. Fla. 2011) ("The law is well established that in order to establish statutory standing in a forfeiture case, strict compliance with the Supplemental Rules [including Rule G] is required."); *United States v. $11,500.00 in U.S. Currency*, 797 F. Supp. 2d 1092, 1097-98 (D. Or. 2011) ("Statutory standing requires that a claimant comply with the procedural requirement of 18 U.S.C. § 983(a)(4)(A) and the Supplemental Rules . . . .").

Given that Plaintiff is barred from direct participation in the forfeiture proceedings, it certainly cannot halt those proceedings by filing a motion in an entirely separate lawsuit. While Plaintiff cites cases that discuss a district court's inherent power to stay proceedings, "pending resolution of independent proceedings which bear upon the case," *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857 (9th Cir. 1979), in none of the cited cases was a stay granted based upon a motion filed in the "independent proceedings" in question, by a non-party to the action in which the stay was sought. *See* Pl. Mem. 6-7. That Plaintiff seeks to employ such a tactic merely demonstrates that its lawsuit is itself problematic. This is not an "independent" proceeding in the sense that it merely happens to raise issues of law that might affect the outcome of the forfeiture actions. Rather, Plaintiff seeks to use the instant lawsuit as nothing more than a mechanism for circumventing the jurisdictional bars, described above, that prevent it from contesting forfeiture

in the forfeiture proceedings themselves. This effort is plainly improper, and Plaintiff's Motion to Stay should be denied on this basis alone.

II. PLAINTIFF IS UNLIKELY TO SUCCEED IN THE CAUSES OF ACTION THAT IT ASSERTS IN THIS CASE

Even if Plaintiff could somehow establish that its Motion to Stay was a proper mechanism through which proceedings in two separate forfeiture actions could be stayed, its Motion should be denied. Plaintiff's suggestion that this action might affect the outcome of the forfeiture proceedings is necessarily premised on the notion that Plaintiff might prevail in the causes of action that it has asserted in this lawsuit. But neither of the two claims that Plaintiff asserts is likely to succeed. For one thing, as already explained, Plaintiff lacks standing to obtain the relief it requests through this action – enjoining the forfeiture of the 1840 Embarcadero property. Only those with valid ownership or possessory interests in the property, who timely assert those claims in the forfeiture proceeding itself, may seek such relief. Moreover, as discussed below, neither of the causes of action identified in Plaintiff's Complaint has any merit whatsoever.

A. Plaintiff's Statute of Limitations Claim Must Fail

Count One of Plaintiff's Complaint alleges that the federal government's initiation of forfeiture proceedings against the 1840 Embarcadero property is barred by the five-year statute of limitations applicable to forfeiture actions, as set forth in 19 U.S.C. § 1621. Specifically, Plaintiff alleges that because Harborside Health Center began operating as a marijuana dispensary at the 1840 Embarcadero address in 2006, the United States should have known that Harborside was violating the CSA more than five years before it initiated forfeiture proceedings on July 9, 2012. *See* Compl. ¶ 64.

Section 1621 provides that "[n]o . . . forfeiture of property accruing under customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." 18 U.S.C. § 1621. As the Seventh Circuit has recognized, the five-year limitations period begins to run on the date of the "alleged offense," which "clearly means the alleged offense that gives rise to the civil forfeiture action." *United States v. 5443*

Suffield Terrace, Skokie, Ill., 607 F.3d 504, 508 (7th Cir. 2010). The court further explained that, "[w]hen there are multiple, distinct underlying crimes that independently could support forfeiture of the same property, nothing in the plain language of § 1621 bars a court from adjudicating a forfeiture action as long as at least one alleged offense is not time-barred, even if the statute of limitations has run on the remainder of the underlying crimes." *Id.* Thus, in *5443 Suffield Terrace*, the court held that a forfeiture action was not barred by the statute of limitations where the United States had discovered smuggled cigars in the property owner's house in 1997 and 1999, less than five years before the action was initiated, even though the United States had been previously aware of the owner's smuggling activities in 1996, outside the five-year limitations period. *See id.* The Seventh Circuit distinguished the case before it from an earlier Sixth Circuit case where the court concluded that, because the alleged offense was "the operation of a gambling business – a single, continuing offense,"[1] the five-year limitations period began when the government first discovered that ongoing offense. *See id.* (discussing *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 91 (6th Cr. 1998)).

In the *1840 Embarcadero* proceeding, the United States alleges that the property in question is subject to forfeiture pursuant to 21 U.S.C. § 881(a)(7) because it has been used, or is intended to be used, "to commit, or to facilitate the commission of," a violation of the CSA. *See* Compl. ¶ 24, ECF No. 1, *1840 Embarcadero*. Under the CSA, every sale or act of distribution or dispensing of marijuana constitutes a separate offense. *See* 21 U.S.C. § 841(a)(1). The situation here is therefore analogous to the separate acts of smuggling at issue in the Seventh Circuit case, rather than the ongoing operation of a gambling business at issue in the Sixth Circuit case. Plaintiff effectively concedes that numerous separate acts of dispensing and distribution of marijuana have occurred at the 1840 Embarcadero property within the five years prior to the

[1]The statutory provision. pursuant to which the forfeiture in the Sixth Circuit case occurred, defines the offense at issue as "conduct[ing], financ[ing], manag[ing], supervis[ing] direct[ing], or own[ing] all or part of an illegal gambling business." 18 U.S.C. § 1955(a). An "illegal gambling business" is one that "has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." *Id.* § 1955(b)(1)(iii). In contrast, with respect to the underlying offense in the Seventh Circuit case, every act of unlawful importation of "any article" provides a separate basis for forfeiture of the property used to facilitate that act. *Cf.* 19 U.S.C. § 1595a(a).

initiation of forfeiture proceedings. *See* Compl. ¶ 31 (noting that Harborside has paid more than $1 million in state and city taxes and that "customers pay 8.75% sales tax on all purchases"); Pl. Mem. 11-12. Any of these acts provide the basis for forfeiture and defeat Plaintiff's statute of limitations argument.

B. Plaintiff's Estoppel Claim Must Fail

Count Two of Plaintiff's Complaint alleges that the United States is estopped from enforcing the CSA against Harborside Health Center or initiating forfeiture proceedings against the 1840 Embarcadero property. This claim is also meritless. In raising this claim, Plaintiff relies primarily on the 2009 "Ogden memo," in which Deputy Attorney General David Ogden advised federal prosecutors on making "efficient and rational use of [the Department of Justice's] limited investigative and prosecutorial resources." *See* Ex. 7 to Pl. Motion to Stay, ECF No. 16-8. The memo noted that, in general, "prosecution of "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana," such as "individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen[,] . . . is unlikely to be an efficient use of limited federal resources." *Id.* At the same time, the memo emphasized that marijuana remains an illegal drug, that the distribution and sale of marijuana is a serious crime, and that the "prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority." *Id.* at 1. Thus, "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department." *Id.* at 1-2.

The memo also explicitly stated that it did not "'legalize' marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights . . . in any administrative, civil, or criminal matter." *Id*. at 2. The memo reiterated that "clear and unambiguous compliance with state law" would not "create a legal defense to a violation of the Controlled Substances Act," and that the memo was "intended solely as a guide to the exercise of investigative and prosecutorial discretion" and would not preclude investigation or prosecution where it serves important federal interests. *Id*. at 2-3.

Several courts – including Judge Armstrong in this Court – have already rejected claims that, in light of the Ogden memo, the United States is equitably estopped from enforcing the CSA against California marijuana dispensaries. *See MAMM v. Holder* ("*MAMM I*"), 866 F. Supp. 2d 1142, 1155-56 (N.D. Cal. 2011) (holding that plaintiff marijuana dispensaries "are hard pressed to claim that it was reasonable to rely on [the 2009 Ogden memo] that was not even addressed to them – and which unequivocally did not state that marijuana for medical reasons was 'legal'"); *MAMM v. Holder* ["*MAMM II*"], No. 11-5349, 2012 WL 2862608, at *11 (N.D. Cal. July 11, 2012) (dismissing equitable estoppel claim for the same reasons); *Alternative Cmty. Health Care Co-op., Inc. v. Holder*, No. 11-2585, 2012 WL 707154 (S.D. Cal. Mar. 5, 2012) (plaintiff marijuana dispensaries "could not have reasonably believed their conduct was sanctioned by the [federal] government"); *Sacramento Nonprofit Collective v. Holder*, 855 F. Supp. 2d 1100, 1112 (E.D. Cal. 2012) (dismissing equitable estoppel claim because plaintiffs failed to show requisite "affirmative misrepresentation").[2]

Plaintiff offers nothing to support a different result in this case. As an initial matter, as a member of this Court recognized in the recent *MAMM* case, "the Government may not be estopped on the same terms as any other litigant." *MAMM I*, 866 F. Supp. 2d at 1153 (quoting *Heckler v. Cmty. Health Servs., Inc.*, 467 U.S. 51, 60 (1984)), particularly where estoppel "'would compromise a governmental interest in enforcing the law,'" *id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001)). Indeed, in the Ninth Circuit, a plaintiff seeking to estop the government must establish that "the government engaged in 'affirmative misconduct,' and that the government's conduct has caused 'a serious injustice.'" *United States v. Bell*, 602 F.3d 1074, 1082 (9th Cir. 2010) (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir.1989) (en banc)). Estoppel is inappropriate where the government's position has shifted due to "a change in public policy" or in governing law. *New Hampshire*, 532 U.S. at 755 (internal quotation omitted). Thus, the court in *Bell* soundly rejected an estoppel claim similar to the one Plaintiff seeks to raise here, based on the plaintiff's purported "reli[ance] on the

[2] All three cases are currently on appeal. *See* Nos. 12-16710 (9th Cir. *appeal docketed* Aug. 8, 2012) 12-55775 (9th Cir. *appeal docketed* Apr. 27, 2012) 12-15991 (9th Cir. *appeal docketed* Apr. 27, 2012).

government's statements decades ago that it would not enforce" a particular provision, holding that "simple non-enforcement" certainly did not rise" to the level of "affirmative misrepresentation or affirmative concealment of a material fact" that would be required. *Bell*, 602 F.3d at 1082 (internal quotation omitted).

Plaintiff similarly cannot succeed under this standard. Even accepting as true Plaintiff's contention that the *1840 Embarcadero* forfeiture action – against a property whose tenant claims to be "the largest retailer of marijuana on the planet," whose gross revenues exceed $20 million, Compl.¶¶ 16-17, *1840 Embarcadero* – represents a change in the government's enforcement policy,[3] such a change cannot properly be characterized as misconduct or misrepresentation.

Moreover, Plaintiff itself does not claim to face forfeiture or prosecution under the CSA. It is therefore even further removed from an "entrapment-by-estoppel" claim than the plaintiff dispensaries in *MAMM*, where the Court noted that the doctrine had no application in the absence of a criminal proceeding against the plaintiffs. *MAMM I*, 866 F. Supp. 2d at 1156. In addition, in order to establish the government's "affirmative misconduct," as would be necessary for an entrapment claim, Plaintiff would have to establish that an authorized representative of the United States "affirmatively told" it that "the proscribed conduct was permissible," that it "relied on the false information," and that the "reliance was reasonable." *United States v. Schafer*, 625 F.3d 629, 637 (9th Cir. 2010) (rejecting entrapment-by-estoppel defense where defendants "were aware that marijuana [possession] was illegal under federal law").

Again, Plaintiff cannot satisfy this standard. As the Court observed in *MAMM*, the Ogden memo was directed at U.S. Attorneys, not at dispensaries or municipalities, and "nothing in the Ogden memo affirmatively informs medical marijuana growers and distributors that their conduct is legal." *MAMM I*, 866 F. Supp. 2d at 1155. To the contrary, the memo by its own terms "d[id] not alter in any way the Department's authority to enforce federal law," "d[id] not

[3] Letters sent from the United States Attorney for the Northern District of California in February 2011 and the District Attorney of Alameda County to the City of Oakland in December 2010 suggest that the City should have been aware, more than a year before forfeiture proceedings were initiated, that the United States was likely to enforce the CSA against large-scale dispensaries such as Harborside, and that such operations do not fall within the definition of "caregiver" under California state law. *See* Exhibits A & B, attached hereto.

'legalize' marijuana or provide a legal defense to a violation of federal law," and did not "create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter." Ogden Mem., at 2. Any reliance on the Ogden memo – or on any of the media statements that Plaintiff references in its Complaint, none of which suggest that large marijuana dispensaries such as Harborside were in compliance with federal law – is certainly not reasonable. *See MAMM I*, 866 F. Supp. 2d at 1156; *see also United States v. Stacy*, 734 F. Supp. 2d 1074, 1079-80 (S.D. Cal. 2010) (rejecting entrapment-by-estoppel defense based on the Ogden memo); *United States v. Hicks*, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) ("The Department of Justice's discretionary decision to direct its resources elsewhere does not mean that the federal government now lacks the power to prosecute those who possess marijuana."). And here, Plaintiff's claim regarding a "policy of nonenforcement" is particularly difficult to credit when the United States Attorney told Plaintiff in express terms, in early 2011, that "prosecution of business enterprises that unlawfully market and sell marijuana" was a "core priority of the Department [of Justice]," and that the industrial operations that Oakland's ordinance purported to authorize would violate federal law. *See* Ex. A.

Moreover, Plaintiff's claim of detrimental reliance falls flat. To the contrary, according to Plaintiff's own allegations, it has received a windfall of millions of dollars in business and sales tax revenues as a result of the illegal marijuana distribution activities of the Harborside dispensary and other similar dispensaries over the past six years. *See* Compl. ¶¶ 53-54 (projecting $1.4 million in business tax revenue from four dispensaries for 2012). Indeed, this amount appears ample to cover the cost of a "new auditor" and some training provided to five employees, and Plaintiff admits that the amount of revenue generated from marijuana dispensaries was sufficient to fund many other activities as well. *Id.* ¶¶ 54, 59. The fact that Plaintiff would not receive such high tax revenues in the future if Harborside were to cease these activities can hardly qualify as "detrimental reliance." Thus, on no account is Plaintiff's estoppel claim at all likely to succeed.

III. PLAINTIFF'S ASSERTION OF HARM DOES NOT WARRANT ITS REQUESTED STAY

Plaintiff claims that stays in the forfeiture actions are warranted because Plaintiff and its residents would suffer "substantial harm" if the illegal use of the properties in question were enjoined, and that a stay would be in the public interest. However, Plaintiff's arguments are flawed on both counts. First, the harms that Plaintiff identifies cannot justify a stay. The notion that the same legal issues that Plaintiff wishes to raise might be raised and decided first in another proceeding, which was filed before this action, certainly does not justify Plaintiff in staying the earlier-filed action in favor of its own. Moreover, to the extent Plaintiff argues that an injunction against the illegal use of the 1840 Embarcadero property would harm "patients in need of medical cannabis," Pl. Mem. 8, that is not a harm that this Court can appropriately take into account. As the Court held in *MAMM*, the Supreme Court's decision in *Oakland Cannabis*, that under the CSA, "marijuana has 'no currently accepted medical use,'" poses an "insurmountable challenge" to such a "medical necessity" argument. *See MAMM I*, 866 F. Supp. 2d at 1160 (quoting *Oakland Cannabis*, 532 U.S. at 491). As stated in that decision, "'a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation,'" and this Court is therefore "bound by 'the balance that Congress has struck in the [CSA].'" *Id.* (quoting *Oakland Cannabis*, 532 U.S. at 497-98). The Court in *MAMM* thus concluded that Supreme Court precedent "legally nullif[ies]" a plaintiff's claim of harm based on medical need for marijuana. *Id.* at 1161.

Second, Plaintiff is also wrong in suggesting that the United States faces no harm as a result of a stay. Plaintiff's proposed stay would certainly harm "the federal Government's interest in ensuring enforcement of its laws." *Id.* (citing *Heckler*, 467 U.S. at 60). Moreover, while "the public has a general interest in having access to doctor-recommended treatments," it "also has a corresponding interest in being protected from treatments that either have not been sanctioned by the requisite authorities or are explicitly proscribed because of any number of harms." *Id.* Significantly, "[t]he public interest may be declared in the form of a statute." *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008)

(internal quotation omitted). And Congress, through the CSA, has "clearly and unequivocally concluded . . . that there is no public interest in the use of marijuana for medical reasons." Id. (citing *Oakland Cannabis*, 532 U.S. at 497).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion to Stay.

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Respectfully submitted,

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