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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)

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Hearing Date: January 31, 2013
Hearing Time: 10:00 a.m.
Courtroom: B

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTRODUCTION

Plaintiff the City of Oakland has brought this case under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, in an attempt to make an end run around the requirements for contesting the United States' initiation of forfeiture proceedings against real property in a separate lawsuit pursuant to federal forfeiture law. *Cf. United States v. Real Property and Improvements Located at 1840 Embarcadero, Oakland, California* ("*1840 Embarcadero*"), No. CV 12-3567 (N.D. Cal.). Plaintiff seeks to assert claims that not only are meritless but can only be asserted within the forfeiture action by a party with a property interest at stake. Plaintiff's ultimate goal is no more and no less than a forfeiture claimant in the forfeiture action itself could conceivably obtain – halting the forfeiture of the property at issue, at 1840 Embarcadero, so that the current tenant, Harborside Health Center, can continue to distribute marijuana at that location. Defendants have explained that Plaintiff's effort is misguided, and this case is subject to dismissal on multiple grounds.

In its opposition to Defendants' Motion to Dismiss, Plaintiff attempts to justify its use of the APA as a tool of circumvention, but its arguments only highlight why this case is improper. Under Plaintiff's theory, a city (or anyone else, for that matter) could seek to stop in its tracks any lawsuit that the federal government brings. Thus, the girlfriend of an alleged murderer could file an APA claim seeking to set aside the government's decision to indict that individual on criminal charges. A stockholder could file an APA claim seeking to halt an antitrust action against a company in which he invests. But the APA itself precludes such claims. In this case, Plaintiff cannot assert an APA claim when the very same remedy that Plaintiff seeks to obtain is available under the federal forfeiture scheme. While Plaintiff emphasizes that it could not file a claim in the forfeiture action against the Harborside property, that fact should not allow Plaintiff to avoid all the restrictions that apply to claimants in a forfeiture case. Under Plaintiff's theory, a person with a property interest must file a claim in the forfeiture case within the limitations period set by forfeiture law while an entity such as Plaintiff with no such interest may bring the same claim in a separate lawsuit whenever it chooses. Again, the limitations on APA review prevent such an anomalous result. Whether it is because the forfeiture statute provides an

adequate remedy, because the government's filing of a lawsuit does not qualify as a "final agency action," because the forfeiture scheme impliedly forbids those without a property interest from halting forfeiture of the property, or all of the above, the Court lacks subject matter jurisdiction over Plaintiff's claims.

Plaintiff's opposition is equally unavailing on the merits. With respect to its statute of limitations claim, Plaintiff relies on the tactic of simply ignoring the plain language of the Controlled Substances Act ("CSA"), 21 U.S.C. § 841, which defines every act of manufacture, distribution, dispensing, or possession with intent to manufacture, distribute, or dispense, as an offense. But there is no ambiguity in the application of 21 U.S.C. § 841 here. Every sale of marijuana at Harborside is a separate offense under the CSA, and there is no dispute that such sales have occurred within the five years before the forfeiture action was filed.

With respect to its equitable estoppel claim, Plaintiff again misses the mark. Plaintiff's ability to recite factual differences in various cases does not amount to a basis for discounting several enduring themes that emerge from those cases. Among them is the principle that the government does not engage in "affirmative misconduct" (a prerequisite for any estoppel claim against the government) when it simply adjusts its enforcement priorities and focuses its resources on certain entities that are indisputably in violation of federal law. The government has a high degree of discretion to enforce federal law as it deems appropriate. After all, priorities may change in response to changing circumstances, but the government does not have to provide justification for every determination that enforcement action should be taken at a particular time. Here, Plaintiff cites no government misrepresentation of the fact that marijuana sales at dispensaries violate the CSA. Indeed, Plaintiff established its dispensary licensing scheme before any of the statements that Plaintiff claims to have relied on were ever made. And Plaintiff cannot prevail in its estoppel claim simply by asserting that marijuana has medical value; indeed, the D.C. Circuit has now upheld the DEA's recent rejection of a petition to change marijuana's classification as a Schedule I controlled substance. Thus, even assuming as true Plaintiff's contention that the government changed its enforcement policy, such an allegation fails to state a claim of equitable estoppel against the government. Because this Court lacks jurisdiction over

Plaintiff's claims, and because those claims are otherwise without merit, this action should be dismissed.

ARGUMENT

I. THIS COURT LACKS JURSIDCTION OVER PLAINTIFF'S ASSERTED APA CAUSE OF ACTION

Plaintiff fails to establish that the APA waives sovereign immunity for its challenge to the government's forfeiture action when the very same challenge would clearly be barred if brought within the forfeiture action itself. The APA's sovereign immunity waiver, set forth in 5 U.S.C. § 702, applies generally to actions "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." However, the Ninth Circuit recognizes that this waiver does not apply when another statute "expressly or impliedly forbids the relief which is sought." *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (quoting 5 U.S.C. § 702). Nor does it apply – in those cases where the cause of action is under the APA itself rather than another statute – when an "adequate remedy" for a challenged "final agency action" is available elsewhere. *Id.* (quoting 5 U.S.C. § 704).[1] Under Ninth Circuit law, both the "no adequate remedy" requirement and the "final agency action" requirement of § 704 constitute limitations on the sovereign immunity waiver in § 702 and are in any event jurisdictional limitations on judicial review. *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1103-04 (9th Cir. 2007) (discussing § 704 as limitation on § 702 and concluding that "[a]bsent final agency action, there was no jurisdiction in the district court to review the NEPA claim"); *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) ("the APA's waiver of sovereign immunity

[1] Neither the "final agency action" limitation nor the "other adequate remedy" limitation applies when an agency action is "made reviewable by [a] statute" other than the APA. *See* 5 U.S.C. § 704. In other words, where a statute other than the APA expressly provides for a private right of action against the United States, § 704 indicates that judicial review of "agency action" is available. However, when no other statute provides a private right of action against the government, and a plaintiff may only invoke the cause of action set forth in the APA, 5 U.S.C. § 706, § 704 indicates that judicial review is available only when there is a "final agency action for which there is no other adequate remedy in a court." *See La Jolla Friends of the Seals v. NOAA*, 630 F. Supp. 2d 1222, 1229 (S.D. Cal. 2009) (citing *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871, 882 (1990)).

contains several limitations. Of relevance here is § 704. . . ."); *La Jolla Friends of the Seals*, 630 F. Supp. 2d at 1229 (citing *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 594 (D.C. Cir. 2001) for principle that final agency action requirement is jurisdictional); *cf. Backcountry Against Dumps v. Abbott*, No. 11-56121, 2012 WL 3091041, at *2 (9th Cir. July 31, 2012) (lack of final agency action precluded district court's jurisdiction).

Plaintiff's Complaint invokes the APA cause of action set forth in 5 U.S.C. § 706. Compl. ¶ 7. And indeed, no other private right of action is identifiable or conceivable based on Plaintiff's pleading. Thus, the "final agency action" and "no other adequate remedy" requirements indisputably apply, and this Court lacks subject matter jurisdiction unless they are satisfied.

While Plaintiff contests that notion in passing, its argument is unpersuasive and irrelevant to the case at hand. Contrary to Plaintiff's suggestion, there is no "presumption" that sovereign immunity is waived; rather, waivers must be express, and any ambiguity is construed in favor of immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996). And the few cases that Plaintiff cites on the issue lend no credence to the notion that the requirements of § 704 do not apply in this case. Instead, those cases address the narrow circumstance where a plaintiff seeks to raise a claim directly under the Constitution, or some other nonstatutory cause of action, rather than under the APA's cause of action in § 706. *See Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 400, 406-13 (3d Cir. 2012) (addressing states' claims under the Tenth Amendment and under state unclaimed property statutes); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 776 (7th Cir. 2011) (addressing state's claim under federal common law of public nuisance). While those courts' analyses may be disputed, here it is not necessary to resolve any such dispute because here, again, the Plaintiff's only asserted cause of action is that set forth in § 706. Thus, even if the Ninth Circuit authority cited above were disregarded, there is no way to escape the applicability of the "final agency action" and "no other adequate remedy" requirements in this case. Under Ninth Circuit precedent, cited above, those requirements are jurisdictional, and neither of them is satisfied here.

A. An Adequate Remedy for Plaintiff's Claim Seeking to Enjoin a Federal Forfeiture Action Is Available Under Federal Forfeiture Law

As explained in Defendants' opening brief, federal forfeiture law sets forth the conditions under which a potential claimant may contest a forfeiture action. *See* Def. Mem. at 5-6. Specifically, such a claimant must file a claim in the forfeiture action itself, within the specified time period. 18 U.S.C. § 983(a)(4)(A); Rule G(5)(a)(i) of the Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Claims. Courts have recognized that this is the exclusive means of challenging a federal forfeiture action and that the APA does not provide an alternative cause of action to challenge a forfeiture. Def. Mem. at 5-6.

Plaintiff argues that the mechanism set forth in forfeiture law does not qualify as an "adequate remedy" for purposes of § 704 because Plaintiff admittedly has no property interest in the 1840 Embarcadero property. Any claim that Plaintiff filed in the forfeiture action would therefore be subject to dismissal for lack of standing. *United States v. $133,420 in U.S. Currency*, 672 F.3d 629, 637-38 (9th Cir. 2012). However, Plaintiff cannot possibly be correct that the very characteristics that would doom its attempt to assert a claim within the forfeiture action somehow vest it with an independent right to assert the very same claim in a separate lawsuit, under the APA.

Under Plaintiff's theory, the forfeiture scheme's limitation of claims to those with a property interest in the property at issue would become meaningless. Anyone who could assert that the forfeiture of a particular property would have a negative impact on them (a mother, for example, who faced the prospect of her son moving back into her home if his house were subject to forfeiture) could file a lawsuit seeking to halt the forfeiture action. Indeed, those without property interests would stand at an advantage because they – unlike those with a property interest – would not be bound by the time limit for filing a claim in the forfeiture action. That incongruity is exemplified here since Plaintiff filed this lawsuit well after the deadline for filing a claim in the *1840 Embarcadero* forfeiture case. *See* Def. Mem. at 3.

Thankfully, neither the statutory text of § 704 nor the cases that Plaintiff cites requires this Court to reach the absurd result that Plaintiff proposes. Section 704 refers to a "final agency

action" having another "adequate remedy in a court." The statute does not say that the particular plaintiff in a case must be able to obtain that remedy, or even that the plaintiff must meet all prerequisites – such as standing – to seek the remedy. Where courts have considered a proposed alternative remedy inadequate for purposes of § 704, it has been because the remedy provided damages but the plaintiff sought injunctive relief (as was the case in *Doe v. Hagee*, 473 F. Supp. 2d 989, 1000 (N.D. Cal. 2007), cited by Plaintiff), or because the remedy was not available for the particular claim that the plaintiff sought to assert (as was the case in *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. Dep't of Health & Human Servs*., 396 F.3d 1265, 1267, 1272 (D.C. Cir. 2005)). But neither of those situations applies here. Here, Plaintiff seeks the very same remedy – a halt to the forfeiture of the 1840 Embarcadero property – that is available within the forfeiture action itself. And here Plaintiff seeks to raise the very same arguments – that the forfeiture action is invalid under the applicable statute of limitations, and that it is barred under a theory of equitable estoppel – that claimants in the forfeiture action may raise. This point is vividly illustrated by the fact that, if any claimant in the forfeiture action were to prevail, Plaintiff's claims in this case would be moot; and vice versa. The remedy available through the forfeiture scheme is plainly adequate when it is the exact same remedy that Plaintiff seeks in this case. Plaintiff's attempt to circumvent the forfeiture scheme's requirements for filing a claim is therefore barred by the "adequate remedy" limitation of § 704.

B. Plaintiff Has Failed to Identify a Final Agency Action that Could Form the Basis for Its Asserted APA Claim

Plaintiff recognizes that, under § 704, the APA claims that it seeks to assert in this case require a predicate "final agency action." *See* Pl. Opp. at 12-13.[2] But Plaintiff's attempt to identify a "final agency action" at issue here falls flat. Plaintiff suggests that the government's decision to file a complaint in court in the *1840 Embarcadero* case qualifies as a "final agency action" for purposes of APA review. Again, Plaintiff's suggestion is supported by neither logic

[2] Plaintiff asserts that Defendants have not raised the argument that there is no "final agency action" at issue here. *See id.* & n.5. However, Defendants asserted that Plaintiff's claims are barred under 5 U.S.C. § 704, and Plaintiff has addressed the "final agency action" argument in its opposition brief. There is no reason that the Court should not address this jurisdictional issue.

nor law.

Under Plaintiff's theory, every decision by the United States to initiate a criminal case or to bring an affirmative civil action could in turn be challenged through a separate lawsuit raising an APA claim under § 706. Thus, the courts could soon be busy considering suits by friends and relatives of alleged murderers, rapists, and child pornographers, and by business associates of those facing antitrust or civil fraud actions.

Congress could never have intended such a result when enacting the APA, and again, the plain language of the APA precludes it. The Supreme Court has explained that the term "agency action" in § 704 is limited to the administrative activities specified in 5 U.S.C. § 551(13), which defines "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Norton v. SUWA*, 542 U.S. 55, 62 (2004); *see also La Jolla Friends of the Seals*, 630 F. Supp. 2d at 1229-30. Significantly, every action in this list is an *administrative* activity, not a court filing. The Supreme Court has held that an agency's issuance of an *administrative* complaint, in a case to be heard before an Administrative Law Judge, qualified as an "agency action" under § 551(13), but that it was not "final" for purposes of § 704 because by itself, a complaint had no "legal force or practical effect." *See FTC v. Standard Oil Co.*, 449 U.S. 232, 239, 243 (1980); *see also Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990); *Pub. Lands for the People, Inc. v. U.S. Dep't of Agric.*, 733 F. Supp. 2d 1172, 1190 (E.D. Cal. 2010). Plaintiff similarly cites *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983), which again addressed an agency's filing of an *administrative* complaint.

Plaintiff fails to cite a single case where a court has held that the filing of a civil action in court qualifies as an "agency action," much less a "final agency action."[3] This case is therefore

[3] The Supreme Court held in one case that an agency's decision *not* to file suit could be reviewed under § 706(2)(A), but the Court did not address the applicability of the definition of agency action in 5 U.S.C. § 551(13). *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975), *overruled in part on other grounds by Local No. 82 v. Crowley*, 467 U.S. 526 (1984). Since then, most challenges to an agency's failure to bring an enforcement action have been dismissed due to the lack of meaningful standards by which to evaluate the agency's decision. *See Sierra Club v. Jackson*, 724 F. Supp. 2d 33, 37 (D.D.C. 2010). Even if an agency's decision to file suit were an "agency action," it would not be a final action that determined the rights and obligations of the parties

subject to dismissal on that basis as well.

C. The Federal Forfeiture Scheme Provides the Exclusive Mechanism for Challenging a Forfeiture

As explained in Defendant's opening brief, cases have recognized that a claim within a forfeiture action is the exclusive means of challenging the forfeiture of the property at issue. *See* Def. Mem. at 5-6. Plaintiff simply discounts this authority. However, various provisions of the APA have led courts to this same conclusion, and these provisions again do not provide an exception for "non-claimants." In *Sarit v. DEA*, 987 F.2d 10 (1st Cir. 1993), the court held that the forfeiture statute and its implementing regulations "constitute a statute precluding review within the meaning of [5 U.S.C.] § 701(a)(1)," and that the sovereign immunity waiver in § 702 therefore did not apply. *Id.* at 17. In *Wright v. United States*, 902 F. Supp. 486 (S.D.N.Y. 1995), the court held that because Congress had "provided a specific mechanism for addressing" forfeiture claims through the forfeiture statute, and that remedy was "exclusive," 5 U.S.C. § 703 operated to preclude the sovereign immunity waiver of § 702. *Id.* at 488. Recent Supreme Court authority suggests that another reason Plaintiff's suit is barred is that the forfeiture statute "expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

Ultimately, this case is nothing other than an attempt by Plaintiff to "exploit[] the APA's waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2204-05 (2012). In *Patchak*, the Court recognized that Congress did not intend the APA to provide such a blatant means to circumvent other statutory restrictions. In considering an individual's attempt to challenge the government's decision to take land into trust, the Court reasoned that if the individual were seeking title to the property – the very same relief potentially available under the Quiet Title Act – his APA claim would be precluded because the Quiet Title Act would impliedly forbid the relief that he sought. *Id.* at 2209. The Court hypothesized an imaginary requirement in the Quiet Title Act (ownership for 10 years) that the plaintiff failed to meet, and reasoned that, "in our imaginary statute,

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(much less of a third party such as Plaintiff). Once suit has been filed, the rights and obligations of the parties are subject to determination by the Court, not by the agency.

Congress delineated the class of persons who could bring a quiet title suit, and that judgment would preclude others from doing so." *Id.*

By seeking to use the APA to obtain the very same relief a forfeiture claimant would receive, but without meeting the "property interest" requirement, Plaintiff here is doing exactly what the Supreme Court held the imaginary claimant in *Patchak* could not do. In the end, there are so many reasons that the § 702 sovereign immunity waiver does not apply, or that judicial review under the APA is otherwise unavailable, that they overlap and to some extent duplicate each other. Whether the reason is identified as § 701(a)(1), the "impliedly forbids" limitation in § 702, § 703, or the "no other adequate remedy" or "final agency action" requirements of § 704, the one inevitable conclusion is that Plaintiff's claims in this APA lawsuit are jurisdictionally barred.[4]

II. PLAINTIFF'S STATUTE OF LIMITATIONS CLAIM IS MERITLESS

Even if the Court had jurisdiction to consider Plaintiff's claims, Plaintiff has failed to overcome the defects in those claims that Defendants have identified. As explained in Defendants' opening brief, Plaintiff's statute of limitations argument is meritless. The violations of the CSA that form the basis for the forfeiture action by the United States include violations that are defined by reference to single, discrete events, even if those events have happened hundreds, thousands, or hundreds of thousands of times. Specifically, under the CSA, every sale of marijuana or act of manufacturing, distributing, or dispensing marijuana, or possessing marijuana with intent to manufacture, distribute, or dispense, is a new offense, independent and separate from any sales or acts that have occurred in the past. *See* 21 U.S.C. § 841(a)(1). There is no dispute that numerous such sales and acts have occurred within the five-year statutory limitations period. Thus, while Plaintiff is wrong to suggest that the government concedes that it "knew or should have known" that Harborside was engaging in illegal activities over five years

[4] Plaintiff contends that Defendants do not dispute that the City of Oakland has standing to bring this action. *See* Pl. Opp. at 9 n.2. Defendants do not concede that Plaintiff has standing. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004); *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1044 (9th Cir. 1979). However, this Court need not reach the issue of standing because Plaintiff's claims are jurisdictionally barred for other reasons.

before the forfeiture action was initiated, it ultimately makes no difference because, for each separate act of manufacturing, distributing, dispensing, or possessing that occurs, the five-year period begins (at the earliest) from the time of its occurrence.

Plaintiff does not deny that acts of manufacture, distribution, dispensing, and possession of marijuana occur at Harborside nearly every day, if not every day. Yet Plaintiff attempts to save its statute of limitations argument by selectively quoting 21 U.S.C. § 841(a)(1) to omit entirely any reference to manufacturing, distributing, or dispensing. Plaintiff instead quotes only the reference to "possession with the intent to . . . distribute or dispense," which Plaintiff presumably believes sounds more like it might take place over an extended period of time.

Much as Plaintiff might like to erase the inconvenient references to manufacturing, distributing, and dispensing in § 841(a)(1), however, it cannot do so. Plaintiff cannot plausibly argue that the multiple and repeated offenses that have occurred at Harborside in violation of § 841(a)(1) qualify as a "single, continuing offense." *See United States v. 5443 Suffield Terrace*, 607 F.3d 504, 508 (7th Cir. 2010). And Plaintiff admits that these offenses have occurred because otherwise it could not assert that it had received $1 million in taxes from Harborside's sales of marijuana. Compl. ¶ 31. Plaintiff is simply wrong in its reliance on the gambling statute at issue in *United States v. $515,060.42 in United States Currency*, 152 F.3d 491 (6th Cir. 1998). As the Seventh Circuit recognized, it was the *statute itself* that defined the offense at issue as "the operation of a gambling business – a single, continuing offense." *5443 Suffield Terrace*, 607 F.3d at 508. Plaintiff's suggestion that either the United States, through the allegations in its complaint, or Plaintiff, through its selective quotation of § 841, can somehow change the definitions of offenses under the CSA should be rejected out of hand. And while Plaintiff argues that "[t]o allow the government to initiate forfeiture now would make a mockery of the purpose of a statute of limitations," the real travesty would be to force the government to stand by forever helpless while new violations of the CSA occur at Harborside again and again every day. The "purpose" of a statute of limitations, after all, is to preclude prosecution of an act that occurred in the sufficiently distant past, not to enjoin the government's efforts to halt present and future criminal activity. Plaintiff's statute of limitations argument thus fails to state a claim upon which

relief can be granted.

III. PLAINTIFF'S EQUITABLE ESTOPPEL CLAIM IS MERITLESS

Plaintiff's equitable estoppel claim is equally groundless, and Plaintiff again offers nothing that could justify the permanent injunction that it seeks against the government's enforcement of a criminal statute – a statute that has never been repealed or held invalid as a general matter, nor has it ever been deemed inapplicable to the marijuana sales occurring at Harborside.

Plaintiff acknowledges that, in order to assert an equitable estoppel claim, it bears the burden to establish that the government has engaged in "affirmative misconduct." Pl. Opp. at 20. Plaintiff contends that it can meet this burden because it has "sufficiently pled a 'pattern of false promises'" and because the government's alleged "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." *Id.* However, Plaintiff is wrong.

Nothing that Plaintiff has alleged comes close to the level of egregiousness that has been deemed to qualify as "affirmative misconduct." Plaintiff does not even succeed in identifying a "pattern of false promises." Indeed, nothing that Plaintiff cites could be regarded as a "promise," much less a "false promise." Plaintiff cites no statement, for example, asserting that the government would "never" take a particular enforcement action. The cited statements are more in the nature of explaining general guidelines – and again, are primarily focused on explaining the same policy regarding the allocation of prosecutorial resources that is set forth in the Ogden memo itself. The memo contains numerous qualifications that make clear it is not intended to serve as a "promise" of nonenforcement. And there is no indication in any statement cited by Plaintiff that the individual making the statement intended to remove any of those qualifications. Nor do any of these statements address dispensaries in a way that would suggest they were viewed in the same way as sick individuals. Given that state law is subject to change, it would not be reasonable to interpret any of these statements as forever immunizing marijuana dispensaries in alleged compliance with state law from forfeiture actions. Most significantly, none of these statements provide any reason to doubt that individuals and entities distributing

marijuana through dispensaries act in violation of the CSA.

Plaintiff fails to distinguish *United States v. Bell*, 602 F.3d 1074 (9th Cir. 2010), which is the case most similar to the one at hand. There, the plaintiff claimed to have relied on a government representation that it would not enforce a particular law. *Id.* at 1082. Yet the Ninth Circuit rejected the plaintiff's estoppel claim, recognizing that "simple non-enforcement" was not the equivalent of an "affirmative misrepresentation." *Id.* The plaintiff in that case, like Plaintiff here, had never been told that an activity was legal when in fact it was not. As in *Bell*, here "nothing in the Ogden memo," or in any other statement that Plaintiff cites, "affirmatively informs medical marijuana growers and distributors that their conduct is legal." *MAMM v. Holder* ("*MAMM I*"), 866 F. Supp. 2d 1142, 1155 (N.D. Cal. 2011). Plaintiff suggests that *Bell* is somehow different because the government's statements in that case had been made longer ago, but the court rejected the claims of reliance in *Bell* even though the reliance at issue there would have continued for decades – a significantly longer period than the two or three years at issue here.

While Plaintiff relies on *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989), and *LC U-Bake LLC v. United States*, No. 2:12-CV-49, 2012 WL 1379048 (D. Or. Apr. 20, 2012), this case is not like *Watkins* or *LC U-Bake*. In both of those cases, the court concluded that the agency had acted contrary to its own regulations. *Watkins*, 875 F.2d. at 707-08; *LC U-Bake*, 2012 WL 1379048, at *10-11. Here, the failure of the United States to take immediate enforcement action against every marijuana dispensary as soon as it opened did not violate any federal regulation. To the contrary, it is well established that the government has a great deal of discretion when it comes to enforcement decisions. *Cf. Esmail v. Macrane*, 53 F.3d 176, 178-79 (7th Cir.1995) (recognizing that while "simply failing to prosecute all known lawbreakers, whether because of ineptitude or (more commonly) because of lack of adequate resources," may result in a "pattern of nonenforcement," and unequal treatment of those who are equally in violation of the law, such selective prosecution "has no standing in equal protection law"); *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.").

Not only does Plaintiff fail to establish affirmative misconduct but Defendant has already explained that Plaintiff's claims of detrimental reliance do not hold water. Def. Mem. at 12-13. Any reliance on the statements that Plaintiff cites as representing a promise by the federal government never to enforce the CSA against the Harborside marijuana dispensary would not be reasonable. And the Court may take judicial notice of the fact that Oakland first established its marijuana dispensary licensing scheme in 2004, well before any of the statements by current or future federal officials cited in Plaintiff's filings, and with full knowledge that the acts of manufacturing and distributing marijuana that would take place at these dispensaries would violate federal law. *See* City of Oakland, Office of the City Clerk, Legistar website (file # 10-0751) (containing Report and Supplemental Report describing history of Oakland's ordinance), *available at* http://oakland.legistar.com/LegislationDetail.aspx?ID=920934&GUID=93EFB834-DBA0-4EC4-A403-BE6C3536A19F&Options=&Search= ; *see* City of Oakland, Agenda Report (July 12, 2011), at 12 (proposing regulation amendment including warning that cultivation, possession, distribution, and sale of marijuana were illegal under federal law), *available as* Report.pdf on the Legistar website. Any suggestion by Plaintiff that its dispensary licensing scheme resulted from the 2009 Ogden memo or any similar statements is not plausible and is certainly no basis for denying Defendants' Motion to Dismiss.

While Plaintiff attempts to offer factual assertions regarding the medical efficacy of marijuana, it fails to explain how these assertions are relevant to any issue in this case. Again, the Supreme Court's decision in *Oakland Cannabis*, that under the CSA, "marijuana has 'no currently accepted medical use,'" precludes any argument based on such assertions. *See MAMM I*, 866 F. Supp. 2d at 1160 (quoting *United States v. Oakland Cannabis Buyers' Co-op*., 532 U.S. 483, 491 (2001)). Moreover, Plaintiff does not claim to be challenging the classification of marijuana as a Schedule I controlled substance through this action, nor could it; rather, any such challenge would have to go through the administrative petition and judicial review procedures set forth in the CSA. *See* 21 U.S.C. §§ 811(a), 877; 21 C.F.R. § 1308.43. The D.C. Circuit has

rejected such a challenge on this very day. *See* Opinion, *Americans for Safe Access v. DEA*, No. 11-1265 (D.C. Cir. Jan. 22, 2013), attached hereto.[5] Plaintiff's equitable estoppel argument therefore fails to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' opening brief, Defendants respectfully request that the Court dismiss this action.

Dated: January 22, 2013

Respectfully submitted,

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[5] Because Plaintiff's factual assertions on this point are irrelevant, Plaintiff's Request for Judicial Notice of various studies of the medical efficacy of marijuana should be denied.