UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

NO. 98-16950

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Appellants/Defendants,

v.

UNITED STATES OF AMERICA

Appellee/Plaintiff.

Appeal from Order Denying Motion to Modify Preliminary Injunction
Appeal From Order Modifying Injunction by the United States District Court
for the Northern District of California
Case No. C 98-0088 CRB
entered on October 13, 1998, by Judge Charles R. Breyer.

EXCERPTS OF RECORD
VOLUME IV

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON,

Defendants.

AND RELATED ACTIONS

Nos. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE WHY NON-COMPLIANT DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT, AND FOR SUMMARY JUDGMENT IN CASES NO. C 98-0086 CRB; NO. C 98-0087 CRB; AND NO. C 98-0088 CRB

Date: August 14, 1998
Time: 10:00 a.m.
Courtroom of the Hon. Charles R. Breyer

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NOTICE

PLEASE TAKE NOTICE that on August 14, 1998, at 10:00 a.m., in the United States Courthouse at 450 Golden Gate Avenue, San Francisco, California, in the courtroom normally occupied by the Hon. Charles R. Breyer, plaintiff, the United States of America, will move this Honorable Court for an order to show cause why defendants Oakland Cannabis Buyer's Cooperative ("OCBC") and Jeffrey Jones in Case No. C 98-0088 CRB; defendants Marin Alliance for Medical Marijuana ("Marin Alliance") and Lynnette Shaw in Case No. C 98-0086 CRB; and defendants Ukiah Cannabis Buyer's Club ("UCBC"), Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman in Case No. C 98-0087 CRB (collectively the "non-compliant defendants") should not be held in civil contempt of this Court's May 19, 1998, Preliminary Injunction Orders. This motion for an order to show cause is based on the non-compliant defendants' open, public, and flagrant defiance of the Court's May 19, 1998, Preliminary Injunction Orders. The United States will further move this Honorable Court for summary judgment on its claims that the non-compliant defendants are in civil contempt.

PRELIMINARY STATEMENT

On May 19, 1998, this Court entered Preliminary Injunctions and Orders in these related actions, enjoining six cannabis dispensaries and several individuals associated with those dispensaries from engaging in the distribution or manufacture of marijuana, or the possession of marijuana with the intent to distribute or manufacture the substance, in violation of the Controlled Substances Act, 21 U.S.C. § 841(a)(1). The Court further enjoined these defendants from using the premises which house the dispensaries for the distribution or manufacture of marijuana, in violation of 21 U.S.C. § 856(a)(1), and enjoined the named individual defendants from conspiring to violate the Controlled Substances Act by engaging in the distribution or manufacture of marijuana, in violation of 21 U.S.C. § 846.

Each of the non-compliant defendants is in blatant contempt of the May 19, 1998, Preliminary Injunction Orders. Defendants Jeffrey Jones, Lynnette Shaw, and Marvin Lehrman

have publicly declared that, notwithstanding the Court's Preliminary Injunction Orders, the OCBC, Marin Alliance, and UCBC, respectively, are continuing to engage in the distribution of marijuana. Undercover agents of the Drug Enforcement Administration ("DEA") have confirmed that these defendants are continuing to engage in the distribution of marijuana. This Court, therefore, should enter an order to show cause why the non-compliant defendants should not be held in civil contempt. Moreover, because there is no factual dispute that the non-compliant defendants are violating the Preliminary Injunction Orders, the Court should find these defendants in civil contempt as a matter of law.[1]

FACTS AND PROCEEDINGS

The procedural background of these related lawsuits is amply set forth in the Court's March 13, 1998, Memorandum and Order ("Mem. Op. & Order"). We summarize.

On January 9, 1998, the United States filed separate lawsuits against six independent cannabis dispensaries, or "clubs," and numerous individuals associated with those clubs, alleging that these defendants' cultivation and distribution of marijuana, and related activities, constituted ongoing violations of the Controlled Substances Act. See 21 U.S.C. §§ 841(a)(1); 846; 856(a)(1). On the same date, the United States moved for a preliminary and permanent injunction, and for summary judgment, to enjoin the defendants' unlawful conduct.[2]

On May 13, 1998, after full briefing and a hearing on the merits, this Court entered a Memorandum and Order granting the United States' motions for preliminary injunctions in all six related actions. In pertinent part, the Court determined that the United States "has established that it was likely to succeed on the merits of its claim that defendants are in violation of federal law."

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[1] For these same reasons, and because the non-compliant defendants' continuing distribution of marijuana, and related activities, also constitute ongoing and independent violations of the Controlled Substances Act, 21 U.S.C. §§ 841(a)(1); 846; 856(a)(1), the United States, in an accompanying motion, is seeking to modify the Preliminary Injunction Orders so as to authorize the United States Marshal to enforce these decrees.

[2] On January 22, 1998, all six lawsuits were reassigned to this Court as related cases pursuant to Local Rule 3-12(e).

Mem. Op. & Order at 23. The Court further concluded that, because the United States had established that it was likely to succeed on the merits, and because these cases were statutory enforcement actions brought by the federal government, "irreparable injury is presumed and the injunction must be granted." Id.

On May 19, 1998, the Court entered six Preliminary Injunction Orders which enjoined the defendants from engaging in the manufacture of distribution or marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1). The Preliminary Injunction Orders further enjoined the defendants from using the premises of the buildings which house the defendant cannabis dispensaries for the purposes of engaging in the manufacture and distribution of marijuana, in violation of 21 U.S.C. § 856(a)(1). Finally, the Preliminary Injunction Orders enjoined the defendants from conspiring to violate 21 U.S.C. § 841(a)(1). The Preliminary Injunction Orders were served upon the non-compliant defendants shortly after their entry.[3]

As described below, following entry of the Preliminary Injunction Orders, the defendants in three of the related actions have continued to engage in the distribution of marijuana in flagrant defiance of these orders.[4]

1. Defendants OCBC and Jeffrey Jones

On May 20, 1998, one day after this Court entered its May 19, 1998, Preliminary Injunction Order, defendants OCBC and Jeffrey Jones issued a press release entitled "Oakland

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[3] Defendants OCBC and Jeffrey Jones were served with the Preliminary Injunction Order in Case No. C 98-0088 CRB on May 29, 1998. Defendants Marin Alliance and Lynnette Shaw were served with the Preliminary Injunction Order in Case No. C 98-0086 CRB on May 25, 1998. Defendants UCBC, Marvin Lehrman, and Mildred Lehrman were served with the Preliminary Injunction Order in Case No. C 98-0086 CRB on May 27, 1998.

[4] A fourth set of defendants, the Cannabis Cultivators Cooperative and Dennis Peron in Case No. C 98-0085 CRB, also have made public statements that that cannabis dispensary would violate the May 19, 1998, Preliminary Injunction Order. However, because the successor to the Cannabis Cultivators Cooperative has since been shut down by state and local officials, the United States is not seeking civil contempt against these defendants at this time.

Cooperative to Openly Dispense Medical Marijuana for First Time Since Preliminary Injunction - U.S. Attorney to be Notified: HIV, Multiple Sclerosis and Other Seriously Ill Patients to Receive Pot at 11:00 a.m., Thursday May 21, Oakland Buyers Cannabis Cooperative, 1755 Broadway, Oakland." See Exhibit 1 to Declaration of Mark T. Quinlivan ("Quinlivan Dec."). The press release states, in pertinent part, as follows:

> **Oakland, CA** — Just hours after Federal Judge Charles Breyer signs into law a preliminary injunction against six California medical marijuana clubs, Jeff Jones, Director of the Oakland Cannabis Buyers Cooperative announced that he will openly dispense marijuana to four seriously ill patients at 11:00 a.m. on Thursday May 21. U.S. Attorney Michael Yamaguchi will be notified of the cooperative's actions, Jones said.
>
> "For these four patients, and others like them, medical marijuana is a medical necessity," said Jones. "To deny them access would be unjust and inhumane."
>
> Violation of the preliminary injunction could initiate Contempt of Court proceedings against the Oakland Cooperative. A Contempt case, during which a medical necessity argument would likely be made by attorneys for the cooperative, would be heard by a jury who would have to reach a unanimous verdict.
>
> "I'd trust a jury of Californians before federal bureaucrats," said Jones. "All the evidence shows that marijuana has medical qualities and should be re-scheduled. Voters in two states have already endorsed medical marijuana, and others look set to follow. Yet the federal government refuses to consider the facts and instead is hell-bent upon enforcing outdated marijuana laws."

Id. Defendant Jeffrey Jones faxed the press release to United States Attorney Michael Yamaguchi. Id.

Similarly, on May 22, 1998, in an article entitled "*Marijuana Clubs Defy Judge's Order* by Karyn Hunt, which appeared on *AP Online*, defendant Jeffrey Jones is quoted as stating, "We are not closing down. We feel what we are doing is legal and a medical necessity and we're going to take it to a jury to prove that." Exhibit 2 to Quinlivan Dec. The article further reported that, notwithstanding the preliminary injunction entered against it, defendant Jones had stated the OCBC had opened on time at 11:00 a.m., and had served 40 to 50 clients in the first half hour. Id.

These public pronouncements have been confirmed by agents of the DEA. On May 21, 1998, Special Agent Peter Ott, in an undercover capacity, entered the OCBC and observed an individual who identified himself as defendant Jeffrey Jones distribute marijuana to four individuals, in front of several news cameras. Declaration of Special Agent Peter Ott ("Ott Dec.") ¶¶ 3-4.

Special Agent Ott further observed ten additional over-the-counter sales of marijuana by the OCBC to different individuals. Id. ¶ 4.

On May 27, 1998, Special Agent Bill Nyfeler placed a recorded telephone call to the OCBC, at (510) 832-5346, to confirm that the club was continuing to distribute marijuana. Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶ 5. The individual who answered the phone informed Special Agent Nyfeler that the OCBC was still open for business, and told Special Agent Nyfeler the club's business hours. Id.

On June 16, 1998, Special Agent Dean Arnold placed a recorded telephone call to the OCBC, at (510) 843-5346, to again confirm that the club was still distributing marijuana. Declaration of Special Agent Dean Arnold ("Arnold Dec.") ¶ 3. An unidentified male answered the telephone and informed Special Agent Arnold that the OCBC was open for business and was accepting new members. The unidentified male further informed Special Agent Arnold about the requirements of becoming an OCBC member, the hours that the club was open (11 a.m. - 1 p.m., and 5 p.m. - 7 p.m.), and the location of the OCBC, at 1755 Broadway Avenue, in Oakland. Id.

The World Wide Web site of the OCBC, which indicates that it was updated on June 1, 1998, also states: "*Currently*, we are providing medical cannabis and other services to over 1,300 members." Exhibit 3 to Quinlivan Dec. (emphasis supplied). The Web site also includes links to this Court's May 19, 1998, Preliminary Injunction Order and May 13, 1998, Memorandum and Order. Id.

Finally, a summary of the "Consortium Meeting of California Medical Marijuana Dispensaries" (held on June 27, 1998, in Oakland, California), which was published in the *Portland NORML News* on June 30, 1998, states that, "[t]he three remaining CBCs are still open. Ukiah, Marin Alliance & Oakland." Exhibit 4 to Quinlivan Dec. The summary further states that: "The Oakland CBC needs help financing the legal defense fund, recommendations are that the clubs attach a surcharge on each transaction & give it to the defense fund. Second that the growers knock off $100.00 per pound to be fed to the defense fund." Id.

2. Defendants Marin Alliance and Lynnette Shaw

Notwithstanding the Court's May 19, 1998, Preliminary Injunction Orders, defendant Lynnette Shaw, in an article entitled *Federal Shutdown: Pot clinic could close its doors to sick and dying*, by Bill Meagher and Peter Seidman, which appeared in the June 3-9 edition of the *Pacific Sun*, is quoted as stating: "We have moved all the patients' files already, and we are still open seven days a week." Exhibit 5 to Quinlivan Dec. Defendant Shaw also is quoted as stating: "Give me a jury, please give me a jury. We have our patients lining up waiting to testify. * * * Show me a jury who will look at our patients and not understand the idea of medical marijuana being a necessity for these people." Id. Finally, defendant Shaw is quoted as stating that, if the Marin Alliance is closed, she will nonetheless continue to engage in the distribution of marijuana. "We have a Plan B lined up that will allow us to continue to serve our patients, but we will have to operate underground * * * *." Id.

These public pronouncements have been confirmed by agents of the DEA. On May 27, 1998, Special Agent Bill Nyfeler observed 14 individuals enter the Marin Alliance over a two and one-half hour period. Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶ 3. Special Agent Nyfeler further observed that several of these individuals, upon exiting the Marin Alliance, would roll what appeared to be marijuana cigarettes and smoke them in the area directly outside the Marin Alliance. Id.

On the same day, at approximately 3:15 p.m., Special Agent Nyfeler placed a recorded telephone call to the Marin Alliance, at (415) 256-9328, to confirm that the club was continuing to engage in the distribution of marijuana. Id. ¶ 6. A pre-recorded message stated that the caller had reached the Marin Alliance, and that the club was still open under the "medical necessity defense." Id.

On June 16, 1998, Special Agent Arnold placed a recorded telephone call to the Marin Alliance at (415) 256-9328, to again confirm that the Marin Alliance was still distributing marijuana. Arnold Dec. ¶ 4. An unidentified female answered the telephone by stating, "Marin Alliance," and further informed Special Agent Arnold about the requirements of becoming a new member of the Marin Alliance, and that the club was open that day until "five." Id.

The minutes of the Monthly Meeting of California Medical Marijuana Dispensaries (held on May 30, 1998, in Oakland, California), which was published in the *Portland NORML News*, on May 31, 1998, also reflects that the Marin Alliance remains in business, stating: "MARIN UPDATE: Lynnette Shaw says she's laid off all but 1 other person to help her run her operation." Exhibit 6 to Quinlivan Dec. Finally, as set forth above, a summary of the "Consortium Meeting of California Medical Marijuana Dispensaries" (held on June 27, 1998, in Oakland, California), which was published in the *Portland NORML News* on June 30, 1998, states that, "[t]he three remaining CBCs are still open. Ukiah, Marin Alliance & Oakland." Exhibit 4 to Quinlivan Dec.

3. Defendants UCBC; Cherrie Lovett; Marvin Lehrman; and Mildred Lehrman

A May 30, 1998, article entitled *Lake County struggles with pot grant use - Ukiah pot club eviction withdrawn*, by Jennifer Poole, which appeared in the *Ukiah Daily Journal*, states that, notwithstanding the Court's May 19, 1998, Preliminary Injunction Orders, the UCBC is still open, and has no plans to close, and quotes defendant Marvin Lehrman as saying, "We're continuing and fulfilling our mission. I don't know what's next." Exhibit 7 to Quinlivan Dec. The article further notes that defendants UCBC and Lehrman had been officially served with this Court's Preliminary Injunction Order on Wednesday, May 27, 1998. Id.

Similarly, in a June 17, 1998, article entitled *Board begins Prop 215 process - But backs away from resolution proposed by Supervisor Peterson*, by Jennifer Poole, which appeared in the *Ukiah Daily Journal*, defendant Lehrman is quoted as saying, "And that's why we're here, to supply medical marijuana to those people who need it now and who may not be alive by the time the boards of supervisors and others get it together." Exhibit 8 to Quinlivan Dec.

These public pronouncements have been confirmed by agents of the DEA. On May 27, 1998, Special Agent Nyfeler placed a recorded telephone call to the UCBC, at (707) 462-0691, to confirm that the club was continuing to distribute marijuana. Nyfeler Dec. ¶ 4. An individual who identified himself as "Marvin" answered the phone and stated that, although the UCBC was in

receipt of an injunction, the club was still open for business. Id. "Marvin" further informed Special Agent Nyfeler of the UCBC's business hours. Id.[5]

On June 16, 1998, Special Agent Arnold placed a recorded telephone call to the UCBC, at (707) 462-0691, to again confirm that the club was still distributing marijuana. Arnold Dec. ¶ 5. An unidentified male answered the telephone and stated, "UCBC." Id. Special Agent Arnold asked whether the UCBC was still open for business, to which the unidentified male asked if Special Agent Arnold was a member. Id. Special Agent Arnold stated that he was not a member, to which the unidentified male responded, "We are officially closed." Id. Special Agent Arnold then asked if the UCBC was accepting new members, to which the unidentified male responded, "Why don't you come in and show me what you have, medical papers?" Id.

Finally, as set forth above, a summary of the "Consortium Meeting of California Medical Marijuana Dispensaries" (held on June 27, 1998, in Oakland, California), which was published in the *Portland NORML News* on June 30, 1998, states that, "[t]he three remaining CBCs are still open. Ukiah, Marin Alliance & Oakland." Exhibit 4 to Quinlivan Dec.

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[5] On May 26, 1998, Special Agent Peter Ott, in an undercover capacity, also walked through an open field adjacent to the UCBC's location at 40A Pallini Lane, in Ukiah, and observed approximately 10 marijuana plants, each approximately 6 inches in height, being cultivated in black plastic bags filled with soil. Ott Dec. ¶ 5.

ARGUMENT

As evidenced by their public statements and confirmed by agents of the DEA, the non-compliant defendants are continuing to distribute marijuana, in flagrant violation of the May 19, 1998, Preliminary Injunction Orders. Under these circumstances, the Court should enter an order to show cause why these defendants should not be held in civil contempt forthwith. Moreover, because, as we demonstrate below, there is no factual dispute that the non-compliant defendants are violating the Preliminary Injunction Orders, and because their anticipated defense of medical necessity has no merit, the Court should find these defendants in civil contempt as a matter of law.

I. STANDARDS FOR CIVIL CONTEMPT

The United States is moving for civil contempt against the non-compliant defendants. A contempt sanction is civil in nature if it either "coerce[s] the defendant into compliance with the court's order, [or] * * * compensate[s] the complainant for losses sustained." United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947).

"[C]ivil contempt is appropriate when a party fails to comply with a specific and definite court order." Balla v. Idaho State Bd. of Corrections, 869 F.2d 461, 466 (9th Cir. 1989). Two elements are necessary in order for civil contempt to be established. First, there must be a valid court order that is clear in its commands. Id. at 465. Second, the party (or other person or entity bound by Rule 65(d)) must have failed to comply with the court's order. Id.; General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1380 (9th Cir. 1986). Failure to comply consists of not taking "all the reasonable steps within [one's] power to insure compliance with the order[]." Sekaquaptewa v. McDonald, 544 F.2d 396, 406 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

The federal courts have wide discretion in the choice of remedies for civil contempt. "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949). As one judge of this Court has held, a court "has discretion in its choice of remedies for a civil contempt" and,

to effectuate full remedial relief, a court "can take *whatever* action is necessary to remedy the contempt." Lovell v. Evergreen Resources, Inc., No. C 88-3467 DLJ, 1995 WL 761269, *3 (N.D. Cal. Dec. 15, 1995) (Jensen, J.) (emphasis supplied) (citing McComb, 336 U.S. at 193).

II. THE NON-COMPLIANT DEFENDANTS ARE IN CONTEMPT OF THIS COURT'S MAY 19, 1998, PRELIMINARY INJUNCTION ORDERS

Each of the elements necessary for a finding of civil contempt is present. First, this Court's May 19, 1998, Preliminary Injunction Orders constitute valid orders that are clear in their commands. In pertinent part, the Preliminary Injunction Orders provide:

> 1. Defendants [respective cannabis club and operator] are hereby preliminarily enjoined, pending further order of the Court, from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1); and
>
> 2. Defendants [respective cannabis club and operator] are hereby preliminarily enjoined from using the premises of [building which houses respective club] for the purposes of engaging in the manufacture and distribution of marijuana; and
>
> 3. Defendant [respective operator] is hereby preliminarily enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana.

The terms of these respective Preliminary Injunction Orders, therefore, are plain and clear.

Second, as set forth above, there is *no* factual dispute in these actions that the non-compliant defendants are engaged in ongoing violations of the Court's Preliminary Injunction Orders. Defendants Jeffrey Jones, Lynnette Shaw, and Marvin Lehrman each have publicly stated that their respective cannabis dispensaries are continuing to engage in the distribution of marijuana despite the Preliminary Injunction Orders, see Quinlivan Dec. ¶¶ 1-8, and these statements have been confirmed by agents of the DEA. See Ott Dec. ¶¶ 3-5; Nyfeler Dec. ¶¶ 3-6; Arnold Dec. ¶¶ 3-5.

Under these circumstances, the United States has more than established a prima facie case that the non-compliant defendants are in civil contempt of this Court's Preliminary Injunction Orders. Indeed, not only have the non-compliant defendants failed to take "all the reasonable steps within [their] power to insure compliance with the orders," Sekaquaptewa, 544 F.2d at 406, these

defendants have, obviously, failed to take *any* steps to comply with these orders. This Court, therefore, should issue an order to show cause why the non-compliant defendants should not be held in civil contempt.

III. THE NON-COMPLIANT DEFENDANTS SHOULD BE FOUND IN CIVIL CONTEMPT AS A MATTER OF LAW

A. The Court Has Authority To Hold The Non-Compliant Defendants In Civil Contempt As A Matter Of Law.

In its May 13, 1998, Memorandum Opinion and Order, the Court noted that, if it issued an injunction, "defendants have a right to a jury in any proceeding in which it is alleged that they have violated the injunction." Mem. Op. & Order at 20. The Court allowed, however, that the federal government might be able to move for summary judgment in a contempt proceeding, if there were no material issues of fact in dispute and if "no reasonable jury could find for the nonmoving party." Id. at 20 (citing Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986)).

The non-compliant defendants' actions present this very situation. As demonstrated above, there is no factual dispute that the non-compliant defendants are violating the Court's Preliminary Injunction Orders and, indeed, the non-compliant defendants openly concede that they are continuing to engage in the distribution of marijuana in defiance of this Court's decrees. See Quinlivan Dec. ¶¶ 1-8; Ott Dec. ¶¶ 3-5; Nyfeler Dec. ¶¶ 3-6; Arnold Dec. ¶¶ 3-5.

Under such circumstances, where there are no material issues of fact in dispute, the federal courts have uniformly held that an evidentiary hearing is not required in a contempt proceeding. See, e.g., Mercer v. Mitchell, 908 F.2d 763, 769 n.11 (11th Cir. 1990); Morales-Feliciano v. Parole Bd., 887 F.2d 1, 6-7 (1st Cir. 1989), cert. denied, 494 U.S. 1046 (1990); Commodity Futures Trading Comm'n v. Premex, Inc., 655 F.2d 779, 782 n.2 (7th Cir. 1981); New York State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324, 1330 n.6 (S.D.N.Y. 1988); Parker Pen Co. v. Greenglass, 206 F. Supp. 796, 797 (S.D.N.Y. 1962); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2960, at 378 (2d ed. 1995). As the Eleventh Circuit stated in Mercer, "when there are no disputed factual matters that require an

evidentiary hearing, the court might properly dispense with the hearing prior to finding the defendant in contempt and sanctioning him." 908 F.2d at 769 n.11 (citing Morales-Feliciano, 887 F.2d at 6-7).

Nor is section 882(b) to the contrary. This statute provides that, "[i]n case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury *in accordance with the Federal Rules of Civil Procedure*." 21 U.S.C. § 882(b) (emphasis supplied). Under the Federal Rules of Civil Procedure, of course, where "there is no genuine issue of material fact * * * the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 323-27, (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Hence, when read in conjunction with the Federal Rules of Civil Procedure, as it must be, section 882(b) allows a court to find a party in contempt without a trial when there are no material issues of fact in dispute.

Accordingly, because there are no material issues of fact in dispute, the United States is entitled to summary judgment on its claim that the non-compliant defendants are in civil contempt of the May 19, 1998, Preliminary Injunction Orders.

B. The Non-Compliant Defendants' Anticipated Legal Defense Fails As A Matter Of Law

Nor would the anticipated defense of medical necessity in any way change this analysis. As we demonstrate below, such a defense fails as a matter of law.[6] See United States v. Bailey,

[6] Only one federal court (besides this Court) has considered the defense of medical necessity, in a published opinion, in a case involving marijuana. In United States v. Burton, 894 F.2d 188 (6th Cir.), cert. denied, 498 U.S. 857 (1990), the Sixth Circuit rejected the claim that the trial court had erred in refusing to allow a defendant to present evidence regarding his asserted defense of necessity for glaucoma treatment. In pertinent part, the court held that, because a government program to study the effects of marijuana on glaucoma sufferers was then in existence, a reasonable legal alternative existed for the defendant which he failed to utilize. Id. at 191. We note that in United States v. Belknap, 985 F.2d 554, 1993 WL 30375 (4th Cir. 1993) (Mem.), the Fourth Circuit, in an unpublished memorandum, also rejected application of the defense of medical necessity to a charge of manufacturing marijuana because the defendant had refused to try alternative, legal treatments. 1993 WL 30375, *2.

444 U.S. 394, 412 n.9 (1980) ("In a civil action, the question whether a particular affirmative defense is sufficiently supported by testimony to go to the jury may often be resolved on a motion for summary judgment * * * *.").

1. Medical Necessity is Not a Defense to Civil Contempt

As a preliminary matter, even if it were a defense to the underlying crimes of distributing and cultivating marijuana in violation of the Controlled Substances Act, medical necessity, as a matter of law, cannot operate as a defense to civil contempt in these actions. The only proper inquiry for the Court in these proceedings is whether the non-compliant defendants have actually violated the Preliminary Injunction Orders. To hold otherwise would undermine the very legitimacy of those orders. As the Supreme Court stated in Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421 (1986), "a 'contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy.'" Id. at 441 (quoting Maggio v. Zeitz, 333 U.S. 56, 69 (1948). See also Walker v. City of Birmingham, 388 U.S. 307, 315-20 (1967) (holding that a person charged with contempt for violating a court order or decree may not, upon appealing the contempt conviction, challenge the constitutional validity of that order unless order is "transparently invalid"); Mine Workers, 330 U.S. at ___ (lack of wilfulness no defense to charge of civil contempt). As the Maggio Court made clear, "[t]he procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience." 333 U.S. at 69. Here, any attempt to relitigate the medical necessity issue in the context of a contempt proceeding would contravene Maggio.

Moreover, several courts have rejected the defense of necessity in contempt proceedings. In Morgan v. Foretich, 546 A.2d 407 (D.C. 1988), cert. denied, 488 U.S. 1007 (1989), for example, a case in which a party attempted to raise the defense of necessity in response to a charge of civil contempt, the D.C. Court of Appeals held that:

> [T]he situation here is far different from that facing one who violates a criminal law. Here there was a specific court order, requiring specific conduct tailored to a specific fact situation—an order which we on appeal had refused to stay. Civil contempt could become meaningless if a lawful defense could rest on the ground that a party took a different view, however reasonable, of the potential harm in compliance.

Id. at 411. To the same effect is Commonwealth v. Brogan, 415 Mass. 169, 612 N.E.2d 656 (1993), in which the Supreme Judicial Court of Massachusetts held that "[i]t would be paradoxical for the law to recognize justified necessity in a defendant's violation of a court order that forbade the very conduct that the defendant now claims was necessary. The defendant's avenue of relief is to challenge or seek to modify the court order, not to violate it." Id. at 176, 612 N.E.2d at 660. But cf. In re Grand Jury Proceedings, 894 F.2d 881, 882-83 (7th Cir. 1990) (assuming, without deciding, that witness had right to present testimony on claim of duress in civil contempt proceeding). Similarly here, if the defense of necessity were allowed to justify the very conduct which this Court enjoined, the doctrine of civil contempt would have little meaning.

2. Congress Precluded the Defense of Medical Necessity for Schedule I Controlled Substances

The defense of medical necessity also is legally unavailable to the non-compliant defendants because it is precluded by the Controlled Substances Act. The defense of necessity, whether medical or otherwise, is a common law defense. As such, it may be abrogated by statute. "The defense of necessity is available only in situations wherein the legislature has not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs." 1 Walter LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.4, at 631 (1986).

When it passed the Controlled Substances Act in 1970, Congress placed marijuana in Schedule I,[7] which, by definition, means that the substance has "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision." Id. § 812(b)(1). Section 812, therefore, establishes a binding legislative determination that marijuana has no medical value or use in the United States. See also id. §§ 829(a)-(c) (allowing practitioners to prescribe controlled substances in Schedules II-V, but not Schedule I).

Likewise, while Congress allowed for research with controlled substances in Schedule I, it delineated strict procedures for those who wish to conduct such research, and provided that "[t]he Secretary [of Health and Human Services], in determining the merits of each research protocol, shall consult with the Attorney General as to effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use." 21 U.S.C. § 823(f). Congress thereby indicated that the ***only*** legitimate medical or scientific use for a substance in Schedule I is in the context of a controlled research project approved by the Secretary of Health and Human Services and registered with the DEA under and authorized under section 823(f).

Finally, Congress enacted specific procedures for the rescheduling of controlled substances. See 21 U.S.C. § 811(a). A proceeding to reschedule a controlled substance may be initiated by the Attorney General, acting through the DEA Administrator: "(1) on his own motion, (2) at the request of the Secretary [of Health and Human Services], or (3) at the petition of any interested party." Id. The implementing regulations to the Controlled Substances Act thus allow "[a]ny interested person to submit a petition" asking the DEA Administrator to initiate a rulemaking proceeding to reschedule a controlled substance. 21 C.F.R. §§ 1308.44(a). Any person aggrieved by a final DEA rescheduling decision may seek review in a court of appeals. See 21 U.S.C. § 877.

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[7] See 21 U.S.C. § 812 Schedule I(c)(10).

Accordingly, Congress expressly considered and rejected the possible medical uses of marijuana (or any other Schedule I controlled substance) when it enacted the Controlled Substances Act.[8] This conclusion is only bolstered by the fact that, since the passage of the Controlled Substances Act, Congress has declined to enact legislation that would have specifically allowed for the medical use of marijuana in certain specified circumstances on four separate occasions.[9]

A conclusion by this Court that the defense of medical necessity is available for the use and distribution of a Schedule I controlled substance would dramatically undermine the comprehensive statutory scheme enacted by Congress; result in the Court substituting its judgment in place of the statutorily assigned roles of the Secretary of Health and Human Services and the Drug Enforcement Administration in determining whether marijuana has a medical value; and would conflict with the unanimous view of the courts of appeals that the question whether marijuana should be reclassified must be presented first to the Administrator of the DEA in the context of a

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[8] Four state courts have reached this very conclusion upon analyzing nearly identical provisions of their respective state codes. The leading case is State v. Tate, 102 N.J. 64, 505 A.2d 941 (1986), in which the New Jersey Supreme Court held that several provisions of the New Jersey Code "compel the conclusion that [the defendant] is precluded from arguing the defense that he seeks to assert." 102 N.J. at 70, 505 A.2d at 944. In particular, the court pointed to N.J.S.A. 24:21-5(a), where the legislature had classified marijuana as a Schedule I controlled dangerous substance. Noting that this denomination reflected the legislature's determination that marijuana had "no accepted medical use in treatment" and lacked "accepted safety for use in treatment under medical supervision," the Tate court concluded that "[t]he possibility of medical use of marijuana was thus specifically contemplated and specifically rejected." Id. Accord State v. Cramer, 174 Ariz. 522, 524, 851 P.2d 147, 149 (1992); State v. Hanson, 468 N.W.2d 77, 78-79 (Minn. Ct. App. 1991); Kauffman v. State, 620 So.2d 90, 92 (Ala. Crim. App. 1992). But see Jenks v. State, 582 So.2d 676 (Fla. Dist. Ct. App.), review denied, 589 So.2d 292 (Fla. 1991).

[9] See H.R. 2618, 104th Cong., 1st Sess. (1995); H.R. 2232, 99th Cong., 1st Sess. (1985); H.R. 2282, 98th Cong., 1st Sess. (1983); H.R. 4498, 97th Cong., 1st Sess. (1981). A similar bill is currently pending in the House of Representatives. See H.R. 1782, 105th Cong., 1st Sess. (1997).

rescheduling petition under 21 U.S.C. § 811(a).[10] The Court should reject this entreaty. As the Sixth Circuit has held, a section 811 petition, "and not the judiciary, is the appropriate means by which defendant should challenge Congress's classification of marijuana as a Schedule I drug." Greene, 892 F.2d at 456.

3. The Defense Of Medical Necessity Was Never Intended To Allow Ongoing Maintenance Of A Building For The Purpose Of Distributing Marijuana

Any assertion of the medical necessity defense by the non-compliant defendants also fails because they cannot meet the standard established by the Supreme Court in Bailey. In that case, in which a prison escapee had raised the defenses of duress and necessity in attempting to justify his escape, the Court held that:

> [I]n order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his *continued absence from custody* as well as his initial departure and that an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody *as soon as the claimed duress or necessity has lost its coercive force*.

444 U.S. at 412-13 (emphasis supplied) (internal footnote omitted). The Court determined that such a requirement was necessary because the crime of escape from federal custody "is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure." Id. at 413. In then applying this standard, the Court held that the district court had properly refused to give a necessity instruction to the jury because the evidence was "not even close" that the defendants had "either surrendered or offered to surrender at their earliest possible opportunity." Id. at 415.

Similarly here, each of the non-compliant defendants has been charged with a continuing offense under the Controlled Substances Act; namely, violation of section 856(a)(1), which makes

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[10] See, e.g., Burton, 894 F.2d at 192; United States v. Greene, 892 F.2d 453, 455-45 (6th Cir. 1989); United States v. Fry, 787 F.2d 903, 905 (4th Cir.), cert. denied, 479 U.S. 861 (1986); United States v. Wables, 731 F.2d 440, 450 (7th Cir. 1984); United States v. Fogarty, 692 F.2d 542, 548 & n.4 (8th Cir. 1982); United States v. Middleton, 690 F.2d 820, 823 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); United States v. Kiffer, 477 F.2d 349, 356-57 (2d Cir. 1972), cert. denied, 414 U.S. 831 (1973).

it unlawful to "knowingly open *or maintain* any place for the purpose of manufacturing, distributing, or using any controlled substance." 21 U.S.C. § 856(a)(1) (emphasis supplied). Under Bailey, these defendants therefore must demonstrate that they have made a bona fide effort to comply with section 856(a)(1) "as soon as the claimed duress or necessity has lost its coercive force." 444 U.S. at 413.

The non-compliant defendants fail to meet this requirement. These are not cases involving the maintenance of the three defendant cannabis dispensaries for a limited period of time to avert an imminent harm. Rather, the non-compliant defendants are maintaining these cannabis dispensaries on an ongoing basis so that they can continue to distribute marijuana (including making sales to new or future customers), under the theory that all such sales will avert "imminent" harms. Indeed, the non-compliant defendants, apparently, have failed to make any effort whatsoever, let alone a bona fide effort as Bailey requires, to comply with section 856(a)(1). This is precisely the type of ongoing conduct which the Supreme Court in Bailey stated would not justify a jury instruction on necessity. See also Mem. Op. & Order at 20 ("[T]he defense of necessity has never been allowed to exempt a defendant from the criminal laws on a blanket basis.").

There are sound reasons for keeping any necessity defense narrowly circumscribed, and these reasons have special force in the "medical marijuana" context.

> If the [medical necessity] defense prevails it serves not only to exculpate defendant of unlawfully using marihuana, but also as an invitation to him and to others to commit a wide range of possessory infractions without hindrance in the future. The amnesty granted is not only for possession immediately incidental to use, but for possession at all other times as well. This follows because the need for therapeutic administration cannot be forecast and defendant would have to have it available at all times for use when the need arises. Furthermore, it would be left to defendant's unsupervised judgment to decide when, under what circumstances and in what dosages it should be used. As the trial judge himself recognized, the substance may not be prescribed for use and it would therefore be impossible for defendant to obtain professional guidance when actually medicating.
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> * * * *
>
> [T]he defense of necessity * * * should not be available where the alleged necessity is regularly recurrent and the violation evidences a calculated intention to disregard the

statutory prohibition. If there is to be a change in the legal status of his drug it should be made by the legislature and not by the courts.

State v. Tate, 198 N.J. Super. 285, 288-89, 486 A.2d 1281, 1283-84 (1984) (Antell, P.J.A.D., dissenting), rev'd, 102 N.J. 64, 505 A.2d 941 (1986). This Court should adopt this persuasive reasoning. The very existence and continuing maintenance of the three defendant cannabis dispensaries, in violation of section 856(a)(1), utterly ignores Bailey's requirement of imminent harm and immediate abatement.

4. The Non-Compliant Defendants Have Not Availed Themselves Of Legal, Reasonable Alternatives

The defense of medical necessity also fails in this context because the non-compliant defendants have failed to undertake any of several reasonable, legal alternatives to violating the Preliminary Injunction Orders and the Controlled Substances Act. See Bailey, 444 U.S. at 410 (under any theory of necessity, "one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses will fail."). If the non-compliant defendants disagreed with this Court's Preliminary Injunction Orders, they had the right, of course, to appeal these rulings. See 28 U.S.C. § 1292(a)(1). Alternatively, if these defendants believed that extenuating circumstances would justify the distribution of marijuana in a particular instance, they could have moved to modify the Preliminary Injunction Orders accordingly. See Fed. R. Civ. P. 60(b).[11] And if these defendants believed an emergency was present, they could have sought expedited relief from the Court under the Local Rules. See Local Rule 7-10 (allowing for expedited motions); Local Rule 7-11 (allowing for ex parte motions).

The non-compliant defendants, however, made to effort to satisfy their obligations to take "all the reasonable steps within [one's] power to insure compliance with the orders." Sekaquaptewa, 544 F.2d at 406. To the contrary, they are simply continuing to distribute

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[11] The United States does not concede, of course, that any such modification of the Preliminary Injunction Orders would be allowed under the Controlled Substances Act.

marijuana in blatant defiance of the Preliminary Injunction Orders. Under these circumstances, the defense of medical necessity is unavailable to them. See, e.g., Bailey, 444 U.S. at 410. As the Supreme Judicial Court of Massachusetts aptly stated in Brogan, "[t]he defendant's avenue of relief is to challenge or seek to modify the court order, not to violate it." 415 Mass. at 176, 612 N.E.2d at 660.

This conclusion is strongly supported by the Supreme Court's decision in McComb. There, the Court rejected the argument that civil contempt would not lie for violation of a general injunction on the ground that the specific conduct in question had not been enjoined. In pertinent part, the Court noted that, if the non-compliant party believed it could not comply with the injunction, it could take an appeal or, "if there were extenuating circumstances or if the decree was too burdensome in operation, there was a method of relief apart from an appeal. Respondents could have petitioned the District Court for a modification, clarification or construction of the order." 336 U.S. at 192. But the Court condemned the practice of simply violating an injunction without taking any of these available steps, stating that such practices "would give tremendous impetus to the program of experimentation with disobedience of the law * * * *." Id.

Similarly here, to allow the non-compliant defendants to violate the Preliminary Injunction Orders when they have sought no relief from this Court would undermine the rule of law, to say nothing of the authority of this Court.

5. Even When Allowed, Medical Necessity Has Only Been Found to be a Defense to a Charge of Possession, Not Distribution

Finally, even if the defense of medical necessity were allowed for controlled substances in Schedule I, the only person who might have standing to raise a defense of medical necessity would be an individual customer seeking to obtain and use marijuana for allegedly medical purposes. But even if the Court were to conclude otherwise, any defense of medical necessity by the non-compliant defendants fails because they are engaged in the *distribution*, not merely the *possession*,

of marijuana.[12] Even those courts which have allowed for the possibility of a medical necessity defense for marijuana have done so only in cases involving possession. See, e.g., State v. Diana, 24 Wash. App. 908, 916, 604 P.2d 1312, 1316 (1979) ("[W]e emphasize that medical necessity, *as a defense to possession*, exists only under very limited circumstances not present in the routine case involving controlled substances."). The government is aware of no case in which the defense of medical necessity has been allowed for a charge of distribution.

And for good reason. A defense of medical necessity in the context of distribution would drive a gaping hole in the Controlled Substances Act, allowing any defendant charged with cultivating or distributing marijuana to argue that he or she was compelled to engage in these activities for the benefit of third parties in medical need. As the New Jersey Supreme Court recognized in Tate, "it is inconceivable that the legislature intended to sanction this activity by conferring a blessing on the use of the illicit drug." 102 N.J. at 73, 505 A.2d at 945.[13]

C. The United States Is Entitled To Summary Judgment

Accordingly, because there are no material issues of fact in dispute, and because the non-compliant defendants' anticipated defense of medical necessity fails as a matter of law, the United States is entitled to summary judgment on its claim that these defendants are in civil contempt of the May 19, 1998, Preliminary Injunction Orders. Indeed, to hold otherwise in these circumstances, where the non-compliant defendants are openly proclaiming their defiance of the Preliminary Injunction Orders, would be to allow them to continue to blatantly violate these decrees, to say nothing of the Controlled Substances Act, for weeks or months.

IV. RELIEF REQUESTED

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[12] Indeed, by their own admissions, the non-compliant defendants are distributing marijuana to hundreds, if not thousands of individuals. See, e.g., Exhibit 3 to Quinlivan Dec. (OCBC Website stating that: "Currently, we are providing medical cannabis and other services to over 1,300 members.").

[13] In these circumstances, any evidence offered by the non-compliant defendants regarding the medical conditions of the customers of their dispensaries would therefore also be irrelevant to a determination of civil contempt.

Federal courts have wide latitude in determining an appropriate remedy for civil contempt. "A primary aspect of [the court's inherent] discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). Stated differently, "[t]he measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief," McComb, 336 U.S. at 193, and a court "can take *whatever action is necessary to remedy the contempt*." Lovell, 1995 WL 761269, *3 (emphasis supplied). See also 11A Wright Miller & Kane § 2960, at 372-73 ("A federal court's discretion includes the power to frame a sanction to fit the violation.").

Remedies for civil contempt often include incarceration, civil fines, and/or the payment of attorney's fees, court costs, and discovery costs to an injured party. Lovell, 1995 WL 761269, *3. Each of these remedies is imposed, either individually or collectively, to coerce the non-compliant party to comply with the court's orders or to compensate the complainant for losses sustained. See, e.g., Mine Workers, 330 U.S. at 303-04. As the Supreme Court stated in Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911), a civil contemnor "holds the keys of his prison in his own pocket." Id. at 442 (internal quotation omitted)).

In these cases, stringent coercive remedies are in order. The non-compliant defendants have not engaged in an isolated, particularized violation of the Preliminary Injunction Orders, but rather have engaged in repeated and continuing violations of these decrees. Indeed, these defendants are continuing to maintain the premises of their respective cannabis dispensaries for the purposes of distributing marijuana, including to new and future customers, in the apparent anticipation that ***all*** such sales will constitute alleged medical necessities. Thus, even assuming these defendants had standing to assert such a defense, "the defense of necessity has never been allowed to exempt a defendant from the criminal laws on a blanket basis." Mem. Op. & Order at 20.

Moreover, the non-compliant defendants' ongoing distribution of marijuana also are independent violations of the Controlled Substances Act, see 21 U.S.C. §§ 841(a)(1); 846;

856(a)(1), which, by definition, constitutes irreparable injury to the United States. See Mem. Op. & Order at 15-16, 26 (citing Miller v. California Pacific Medical Center, 19 F.3d 449, 459 (9th Cir. 1994) (en banc); United States v. Nutri-Cology, Inc., 982 F.2d 394, 398 (9th Cir. 1992); and United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 175 (9th Cir. 1987)). The United States therefore has moved ex parte, in an accompanying motion, to modify the Preliminary Injunction Orders to authorize the United States Marshal to enforce these decrees by entering the premises of the non-compliant cannabis dispensaries, evicting any and all tenants, inventorying the premises, and padlocking the doors, until such time as the non-compliant defendants can "satisfy [the Court] that [they are] no longer in violation of the injunctive order and that [they] would in good faith thereafter comply with the terms of the order." Lance v. Plummer, 353 F.2d 585, 592 (5th Cir. 1965), cert. denied, 384 U.S. 929 (1966).

This proposed modification, at a minimum, will compel compliance with the Preliminary Injunction Orders' requirement that the non-compliant defendants cease maintaining their respective cannabis dispensaries for the distribution and cultivation of marijuana. The Court also may institute civil fines to coerce the non-compliant defendants into complying with the Preliminary Injunction Orders. Anything short of this relief "would give tremendous impetus to the program of experimentation with disobedience of the law" that is being undertaken by the non-compliant defendants, in total disregard of the rule of law. See McComb, 336 U.S. at 192.

CONCLUSION

For the reasons set forth above, the Court should enter an order to show cause why the non-compliant defendants should not be held in civil contempt of the May 19, 1998, Preliminary Injunction Orders, and hold these defendants in civil contempt as a matter of law.

Respectfully submitted,

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Attorneys for Plaintiff
UNITED STATES OF AMERICA

Dated: July 6, 1998

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, hereby certify that on this 6th day of July, 1998, I served a copy of the foregoing Plaintiff's Motion for an Order to Show Cause Why Non-Compliant Defendants Should Not Be Held In Civil Contempt and for Summary Judgment Cases Nos. C 98-0086 CRB; C 98-0087 CRB; and C 98-0088 CRB; and the accompanying declarations and [Proposed] Order, by overnight delivery, upon the following counsel specially appearing for defendants:

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS	Nos. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB DECLARATION OF MARK T. QUINLIVAN Hon. Charles R. Breyer

I, MARK T. QUINLIVAN, do hereby declare and say as follows:

1. I am currently employed as a Trial Attorney in the Federal Programs Branch, Civil Division, United States Department of Justice, and am counsel of record in the above-captioned cases. I make this declaration based on personal knowledge, and on information made available to me in the course of my official duties.

2. Attached hereto as Exhibit 1 is a true and correct copy of a May 21, 1998 press release entitled *Oakland Cooperative to Openly Dispense Medical Marijuana For First Time Since*

Preliminary Injunction - U.S. Attorney to be Notified, which was issued by the Oakland Cannabis Buyers' Cooperative, and faxed to Michael Yamaguchi, the United States Attorney.

3. Attached hereto as Exhibit 2 is a true and correct copy of a May 22, 1998, article entitled "*Marijuana Clubs Defy Judge's Order*, by Karyn Hunt, which appeared on *AP Online*.

4. Attached hereto as Exhibit 3 is a true and correct copy of the World Wide Web home page of the Oakland Cannabis Buyers' Cooperative, at http://www.rxcbc.org.

5. Attached hereto as Exhibit 4 is a true and correct copy of excerpts from the *Portland NORML News - Tuesday, June 30, 1998*, at http://www.pdxnorml.org.

6. Attached hereto as Exhibit 5 is a true and correct copy of an article entitled *Federal Shutdown: Pot clinic could close its doors to sick and dying*, by Bill Meagher and Peter Seidman, which appeared in the June 3-9 edition of the *Pacific Sun*.

7. Attached hereto as Exhibit 6 is a true and correct copy of excerpts from the *Portland NORML News - Tuesday, June 30, 1998*, at http://www.pdxnorml.org.

8. Attached hereto as Exhibit 7 is a true and correct copy of a May 30, 1998, article entitled *Lake County struggles with pot grant use - Ukiah pot club eviction withdrawn*, by Jennifer Poole, which appeared in the *Ukiah Daily Journal*.

9. Attached hereto as Exhibit 8 is a true and correct copy of a June 17, 1998, article entitled *Board begins Prop 215 process - But backs away from resolution proposed by Supervisor Peterson*, by Jennifer Poole, which appeared in the *Ukiah Daily Journal*.

I declare under penalty of perjury that the foregoing is true and correct.

MARK T. QUINLIVAN

Executed this 2nd day of July 1998

EMBARGO UNTIL: 11:00 A.M. P.D.T, Thursday May 21, 1998
Contact: Rachel Swain, Rebecca Tarner, 415-255-1946

Oakland Cooperative to Openly Dispense Medical Marijuana For First Time Since Preliminary Injunction - U.S. Attorney to be Notified

HIV, Multiple Sclerosis and Other Seriously Ill Patients to Receive Pot at 11:00 a.m., Thursday May 21, Oakland Buyers Cannabis Cooperative, 1755 Broadway, Oakland

11:00 a.m. Press Conference with:

- Jeff Jones, Director, Oakland Cannabis Buyers Cooperative
- Gerald Uelman, Professor of Law, former Dean, Santa Clara University School of Law
- David Sanders, HIV and chronic pain patient, 43
- Yvonne Westbrook, Multiple Sclerosis patient, 45
- Ken Estes, Quadriplegic patient, 40
- Ima Carter, Congential Scoliosis - Diverticlusis patient, 55

Oakland, CA -- Just hours after Federal Judge Charles Breyer signs into law a preliminary injunction against six California medical marijuana clubs, Jeff Jones, Director of the Oakland Cannabis Buyers Cooperative announced that he will openly dispense medical marijuana to four seriously ill patients at 11:00 a.m. on Thursday May 21. U.S. Attorney Michael Yamaguchi will be notified in advance of the cooperative's actions, Jones said.

"For these four patients, and others like them, medical marijuana is a medical necessity," said Jones. "To deny them access would be unjust and inhumane."

Violation of the preliminary injunction could initiate Contempt of Court proceedings against the Oakland Cooperative. A Contempt case, during which a medical necessity argument would likely be made by attorneys for the cooperative, would be heard by a jury who would have to reach a unanimous verdict.

"I'd trust a jury of Californians before federal beaurocrats," said Jones. "All the evidence shows that marijuana has medicinal qualities and should be re-scheduled. Voters in two states have already endorsed medical marijuana, and others look set to follow. Yet the federal government refuses to consider the facts and instead is hell-bent upon enforcing outdated marijuana laws."

Ken Estes, 40, a Quadriplegic patient who uses medical marijuana from the OCBC to relieve chronic pain and control muscle spasms, says he fears for his safety should the club be closed. "I feel that my only alternative would be to go out on the street to find the medicine that helps me," he said.

###

Oakland Cannabis Buyers' Cooperative
Fax Transmittal Sheet

To: Michael Yamaguchi

Company: United States Attorney

Fax Number: (415) 436-7234

From: Jeff W. Jones

NUMBER OF PAGES INCLUDING COVER SHEET 2
FORPROBLEMS IN RECEIVING CALL (510) 832-5346

Message F.Y.I.

Oakland Cannabis Buyers' Cooperative, P.O. Box 70401,
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1998 WL 6669508
(Publication page references are not available for this document.)

AP Online

Friday, May 22, 1998

Marijuana Clubs Defy Judge's Order

KARYN HUNT

OAKLAND, Calif. (AP) - If anything, the medical marijuana debate in California has heated up.

Marijuana clubs throughout Northern California - in Oakland, San Francisco, Ukiah, Fairfax - and in West Hollywood defied U.S. District Judge Charles Breyer's order to close Thursday.

Marijuana burned freely at the Cannabis Buyers Cooperative in Oakland.

"We are not closing down," Jeff Jones, the emporium's executive director. "We feel what we are doing is legal and a medical necessity and we're going to take it to a jury to prove that."

Hazel Rodgers, the 79-year-old director of the Cannabis Healing Center in San Francisco, said she had on comfortable shoes and was packed and ready to go in case she was hauled off to jail.

"Our members are so supportive," she said. "They say that if I'm sent to jail, they'll go, too."

In a preliminary ruling May 13, Breyer said Proposition 215, the November 1996 initiative that legalized medical marijuana, did not and could not override the federal ban on the drug.

He reiterated the argument in releasing the official ruling this week, saying even a "laudable" reason to distribute marijuana conflicts with federal law.

He rejected arguments that the clubs should be entitled to furnish the drug because customers find it hard to survive without marijuana to ease the pain and side effects of cancer and AIDS therapy.

Despite the strong wording, the Oakland club opened on time at 11 a.m. and had served 40 to 50 clients in the first half hour, Jones said. Members selected from 15 different grades of pot displayed in

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(Publication page references are not available for this document.)

glass cases, ranging in price from $5 to $16 a gram.

There were marijuana-laced brownies, banana muffins and cereal treats for those who don't like to smoke.

Among those buying was Rodney Wilson, 51, who lost 57 pounds in one year after he was diagnosed with AIDS in 1995. He said the drug helps his appetite and reduces the stress of dealing with the disease.

"If this club is closed down, we'll have to deal with the criminal element to get our medicine," he said. "This way, you're not dealing with the underground, you're not spoon-feeding criminals."

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Oakland Cannabis Buyers' Cooperative

Mission Statement

Announcements/ News

Services/ Calendar

Membership

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Medical Marijuana

E-mail

Welcome to the OCBC.

We are a California Consumer Cooperative Corporation, organized by members, for medical-marijuana patients protected by Proposition 215. The Oakland CBC operates on a not-for-profit basis with the assistance of member volunteers. Currently we are providing medical cannabis and other services to over 1,300 members.

Oakland Cannabis Buyers' Cooperative
P.O. Box 70401
Oakland, CA 94612-0401
Office (510) 832-5346
Fax (510) 986-0534
ocbc@rxcbc.org

Please See it our Way

Please remember the Oakland Cannabis Buyers Cooperative is a **health organization.** Our services are for those who **suffer from serious illnesses and disabilities.** Any other inquiries for cannabis will neither be tolerated nor appreciated.

We do not send, mail or ship cannabis.

This site provides information for patients who use cannabis with a doctor's recommendation. This site exists because the voters of California have said yes to providing cannabis for medical use. Please don't test the law by trying to establish illegal transactions via this site.

FREE SPEECH ONLINE RIBBON CAMPAIGN

Join the Blue Ribbon Online Free Speech Campaign!

These pages look best . . . when viewed through our software on our computer. If they don't look so good on your system, you're probably not the only one. Please let us know about any problems - we're committed to making our site accessible, useful and fun.

Our immutable thanks to Chameleon Productions for this site's initial graphical elements and HTML.

This site is dedicated to the memory of Russell Anthony Caldwell, an active member of the cooperative who first launched the OCBC Web site in early 1996.

Last updated: June 1

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Portland NORML News - Tuesday, June 30, 1998

Update On The Consortium Meeting In Oakland (Bay Area Activist Ralph Sherrow Summarizes The Meeting Saturday Among The Few Remaining California Medical Marijuana Dispensaries - And Shares More Original News)

From: "ralph sherrow" (ralphkat@hotmail.com)
To: ralphkat@hotmail.com
Subject: Update of the Consortium meeting in Oakland 6-27-98
Date: Tue, 30 Jun 1998 00:15:40 PDT

From the Information Center in Hayward
Ralph Sherrow

Update of the Consortium Meeting June 27 1998

Defense Fund: The Oakland CBC needs help financing the legal defense fund, recommendations are that the clubs attach a surcharge on each transaction & give it to the defense fund. Second that the growers knock off $100.00 per pound to be fed to the defense fund.

Federal Lawsuit: The defense denied all allegations & has filed 19 affirmative defenses. The government has not responded. The three remaining CBCs are still open. Ukiah, Marin Alliance & Oakland.

Passed the hat for the defense fund.

Fremont Cannabis Coop joined a class action suit against the government to reschedule marijuana.

Bill Simpage needs volunteers without assets to sue Lungren. In case they lose they don't have assets to lose. I don't know how to contact him, but call around & you'll find him.

July 7 1998: City Council meeting to vote on the limits patients can posses. The meeting is at the Oakland City Hall & starts at 7pm. It will go about 1 1/2 hours. If you come be sure to wear clean clothes. no tie dies.

There will be a meeting at the San Francisco Medical Society located at 1409 Sutter Street @ Franklin. The name of the meeting is Common Sense Drug Policy. July 16 1998 5 to 7pm. For more info & to reserve your seats call 415 921-4987.

Ed Rosenthal: According to an article in HERBALGRAM the FDA has been promulgating the use of herbs. (Marijuana is an herb). The publisher is american botanical council.

In the news: Richard "HEMP" Davis (sold pot at the super bowl in Arizona with marijuana tax stamps) was given probation.

The Los Angeles chapter of Americans for Medical Rights, headed by David Ries, has asked to be put on the email list of the info center.

Marvin Chavez has been finally freed on bail. They still owe the bondsman $6,000.00 plus they borrowed $3,000.00 from the bank. They need donations to help pay off this debt. For more info or to donate call Bill Britt 562-421-9027 or Jack Shachter 714-537-4880.

San Jose City Council Meeting update: June 23 1998 1pm. Dr. Dennis Augustine thanked the city attorneys office for setting up a meeting with the heads of city government in San Jose. Then Jesse Garcia showed

up at the last minute & asked to be at that meeting, sat down, got up & told the Council that he was against the ordinance. Outside, Dr. Augustine explained to Jesse what the change to the ordinance was & Jesse said, ok I like that. Jesse & Peter had threatened to show up at that meeting & the Consortium meeting on the 27th in Oakland & disrupt the meetings. Jesse says they don't want any clubs to open up in San Jose because it will not look good for Peter. He did not show at the Consortium meeting Saturday.

The Info center may be getting funded by the Mens Wearhouse in August.

Mike Barnhart from East Bay medical Cannabis was stopped in Danville, California last week. Two ounces of Medicine was confiscated. The Police said that there ain't no prop 215 in Danville. I recommended him to Rob Raich & Bill Panzer.

Todd McCormick who was arrested for growing 4,116 plants in his BelAire home, talked me into emailing him my list of Providers & Associates & asked to be put on the info centers email list. The Providers list went thru & immediately all other email was returned. I called & asked him why, but he just said he would call me when to send more email. I haven't heard a word from him since & that's been a couple weeks ago. I've left messages but haven't got any return calls. I guess he was only interested in the Providers list of addresses, email & phone numbers. I don't like what he's done. If anybody talks to him ask him, for me, what the F___?

Southern California Update: Sunday 6-28-98 I called Dr. Dalton's office at noon to speak on the speaker phone with their Consortium group. We exchanged info. Marvin Chavez, Bill Britt & Jack Shachter were all there. They've been working on implementing a new program whereas the patient members pay monthly dues of $100.00 & all their medicine is given to them for free, at the rate of 1 ounce per week, maximum. I filled them in on Senator Vasconcellos's bill to make dispensaries immune to federal prosecution. They got excited about that. I pointed out that they should have Lawyer (s) at their meetings & referred James Silva, Which some of them knew already & liked. I will be calling back each last Sunday of every month to share & exchange info & I will pass it on to you.

Gene Weeks is in a wheel chair now, due to degrading spinal problems.

The next meeting of the Consortium in Oakland will be held July 25 1998 1 pm. See you there Ralph

"The Welfare of the Children is always the Alibi of Tyrants" Ralph

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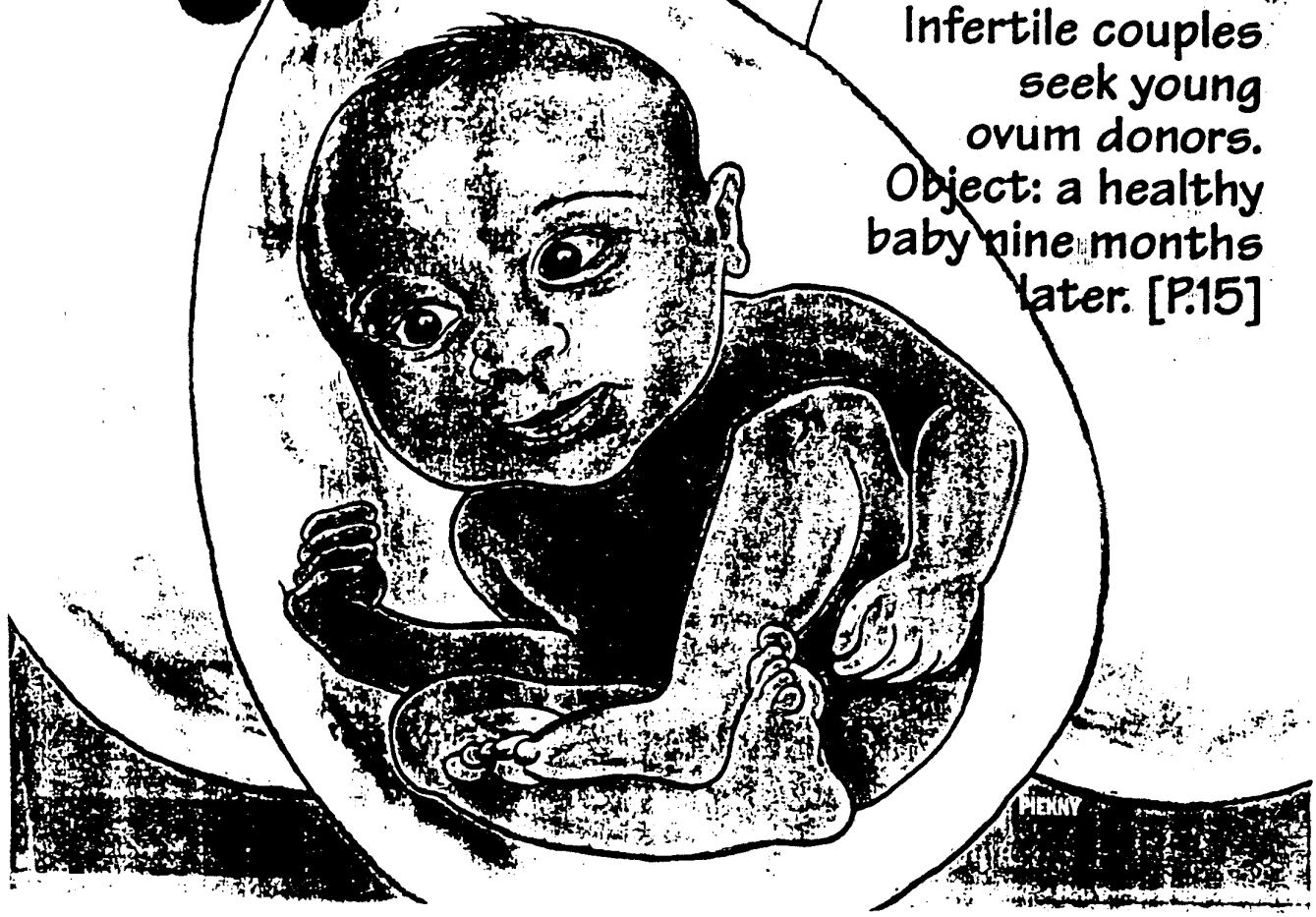
Doonesbury (Garry Trudeau's Syndicated Cartoon Again Makes Fun Of Prohibitionist Hyperbole In The Medical Marijuana Debate)

PacificSun
THE NORTH BAY'S BEST EVERY WEEK
JUNE 3 – JUNE 9, 1998

Pot Shop Showdown
Feds poised to close local medical marijuana clinic [P.5]

Eggs for Sale

Infertile couples seek young ovum donors. Object: a healthy baby nine months later. [P.15]



UpFront

Federal shutdown

Pot clinic could close its doors to sick and dying

BY BILL MEAGHER AND PETER SEIDMAN

One day in the not too distant future, chances are good that federal marshals will show up in Fairfax and padlock the doors of the Marin Alliance, the county's principal distributor of medical marijuana. As a matter of fact, founder Lynette Shaw is counting on it.

The feds already stopped by very quietly on May 25 with a preliminary order to shut the bare-bones office, says Shaw. "Just one marshal came, and he was very cool. He was in shirt sleeves, no badge showing, and he was here for maybe 30 seconds. Very polite."

Because Shaw refused to pack up the office and close the doors, the Alliance is now in contempt of court.

The Alliance, along with five other similar operations across the state, was ordered to close after U.S. District Court Judge Charles Breyer ruled on a suit brought by the federal government. The feds argued that the medical marijuana operations in California violate federal drug laws. The court agreed.

The suit also alleged that the Fairfax operation specifically violated provisions in California's Prop 215, the state law that legalized the distribution of marijuana for legitimate medical reasons. The suit alleged that Marin Alliance sold pot to undercover agents who had no medical reason for using the marijuana.

Shaw says she intends to stay open, in part to force the court to slap her with a contempt-of-court charge that would lead to a jury trial. "Give me a jury, please give me a jury," Shaw says, as a steady rain pounds on the roof of her office. "We have our patients lining up waiting to testify. We have people who are dying and need their medicine. Show me a jury who will look at our patients and not understand the idea of medical marijuana being a necessity for these people."

Shaw isn't just the executive director of the alliance; she also is one of its 160 active patients. Clinically depressed as well as a victim of myriad allergies, Shaw cannot take conventional medications because they only aggravate her conditions. She says marijuana has been the only medication that has allowed her to participate in a normal life. "I was suicidal before I found a doctor who said, 'How come you are on all these medicines that make you sick? Let's try something else.'"

By defying the court order to shut down, Shaw is risking a mandatory federal sentence if the government decides to prosecute her under criminal statute and is successful. The lawsuit originally filed by the feds was a civil action, but because she has remained open, they still have the option of filing criminal narcotics charges against Shaw. She already has a felony marijuana conviction on her record, stemming from an East Bay marijuana possession arrest in 1990. If she is arrested on marijuana possession charges again and found guilty, she would face a prison sentence of between 10 and 20 years.

"Obviously I hope they stay with the civil charges and give us a jury trial, but, yeah, I'm taking a personal chance by staying open," Shaw says. "But I don't really have a choice; these people need their medicine and I won't be the one to tell people dying of AIDS and cancer that they have to suffer."

Back in January, U.S. Attorney Michael Yamaguchi filed the federal civil suit that asked the court to shut down a total of six clubs in California. On May 15, Judge Breyer ruled that while Prop 215 is a laudable idea, the proposition that voters passed overwhelmingly in November 1996 is in violation of federal law. The judge also ruled that the medical marijuana clinics are violating federal

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Mike Peters

NEWSGRAMS

No hotel here, thanks

Hilton's planned 200-room hotel on the east side of Corte Madera was slammed around during a crowded meeting of the planning commission. Residents said the buildings of three and four stories are too bulky and would wreck the Mt. Tam views of neighbors. There were also complaints about parking and traffic. Corte Madera hopes to upgrade the stretch of San Clemente Drive which runs south from The Village.

$24 million is missing

The $216 billion transportation and pork bill passed by Congress included $8.8 million toward widening the Novato Narrows on Highway 101. However, for months the sum aimed at the Narrows was $33 million. Congresswoman Lynn Woolsey of Petaluma says Congressman Frank Riggs of Windsor let the money shrink to $8.8 million at the last minute. Riggs said he couldn't help it, but concedes that because he's a lame duck, his fellow Republicans might have felt it was OK to shrink that slice of the pie. The Narrows are out of Riggs's district, and anyway, he's moving to Virginia.

Prudent or uptight?

Santa Rosa High School officials announced they will search all graduates at commencement ceremonies for illegal beach balls, confetti, silly string, Frisbees and glow sticks. Contraband will be confiscated and it's even possible that guilty parties will be banned from the ceremony. Backers of the move say Santa Rosa High has grown a reputation for increasingly rowdy graduations. Others say that beach balls and the like are just good-natured fun.

Horse lovers skittish

The Golden Gate Recreation Area wants to phase out its three stables and build a spiffy new equestrian center in Tennessee Valley. The three targeted stables are Presidio Stables at Fort Cronkhite, Miwok Stables in Tennessee Valley and Golden Gate Dairy Stables at Muir Beach. Park officials say the horses at Muir Beach are contaminating the lagoon. Some horse lovers deny this is the case and want all three stables kept in business.

New trial in Italy

Prosecutors are trying a second time to convict two Italian gang members in the shooting death of 7-year-old Nicholas Green of Bodega Bay during a family vacation. The two were not convicted the first time, but new evidence has surfaced and in Italy there can be a second trial in an appeals court. Green's family galvanized the nation by donating Nicholas's organs to those needing transplants, until then a rare occurrence in Italy.

Shorts...

The Mill Valley Public Library will be closed from June 15 until Labor Day to accommodate the final phase of its expansion ... Delivery of a high-speed ferry for the Larkspur-San Francisco run has been delayed a second time, until October. —*Steve McNamara*

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PRINTING Paradise Post

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drug laws by continuing to dispense marijuana.

Shaw is quick to point out that state Attorney General Dan Lungren has encouraged the showdown with the federal authorities over the dispensation of Prop 215. "He is supposed to enforce the laws of the state, not just the ones he agrees with," she says. "He has encouraged the federal government to get involved and has [played a key role in calling for] raids in San Francisco."

Mill Valley criminal attorney Kim Kruglick, who frequently does legal battle with the federal government, says the legal problem facing the Alliance and the other marijuana clinics is pretty clear. "In a case where federal and state law conflict, state law can be more restrictive in terms of protecting citizens but not less restrictive," he says. "In this case, the federal law is more restrictive and says it is illegal to grow, possess or sell marijuana. The state can't simply say, No it isn't, and get away with it."

Steve Mayer, an attorney with the San Francisco law firm of Howard, Rice, Nemerovski, Canady, Falk and Rabkin, concurs with the assessment offered by Kruglick. "The primary problem facing Prop 215 is that federal law trumps state law," says Mayer, who is an expert in initiative law. "The initiative process is not a great way set public policy in general. It has become too costly, and instead of being a way to avoid special interest groups, the process has been taken over by special interest groups." According to many experts, it also has become the too-frequ tion of amateurs writing laws that later are overturned.

Regardless of the flaws of Prop 215, the town of Fairfax has supported the Alliance and its mission. The town issued a use permit allowing the organization to open its office, and police Chief Jim Anderson walked a fine line in allowing the organization to remain open. The Fairfax Police Department kept an eye on the Alliance to ensure it complied with the proposition, but otherwise it kept hands off, even while local authorities were fully aware that the state attorney general and the feds were interested in quashing the new law.

"We have followed the charge of the [town] council, and upheld the [state] law," Anderson says, clearly uncomfortable with the situation. "I don't think I would say we [the police] have been supportive, but the Alliance has been very cooperative in working with us."

Now that Shaw is expecting the feds to drop by any day for more than just a social call, the county has announced that starting in July, it will begin issuing cards that will identify eligible medical marijuana users. Although the move is somewhat pro forma, it nevertheless puts the county clearly on the side of the medical marijuana clinics. Theoretically, the county cards would prove the legitimacy of patients' need for medical marijuana. But with the clinics closed down, where would they obtain their medication?

"We have a Plan B lined up that will allow us to continue to serve our patients," Shaw says, "but we will have to operate underground and maybe go back to dealing with the gangsters and the hustlers."

Unless a bill that was introduced in Congress in June 1997 can successfully make it through a gauntlet of political hazards and become law, Congresswoman Lynn Woolsey (D-6th District) is one of the strongest supporters of the bill, HR 1782, which would prevent federal law from banning medical marijuana in states that allow it.

The bill currently is bottled up in a health and environment subcommittee, where, according to Woolsey staff member Tom Reed, it is growing whiskers without garnering much support. "It's a good bill that addresses what needs to happen," says Reed, "but you have to keep in mind that it would have to get through a place where Newt Gingrich is trying to make drug use a primary issue. Realistically, it is a long shot."

When and if the feds slam the doors on the Alliance, patients in Marin will have only two choices: go underground or seek help from Marin RX, a very quiet Point Reyes medical marijuana cooperative run by Darice McKay. "We have a hundred people on our books, but we have only 20 active patients," she says. "All of our people participate in either growing, cleaning, packaging or delivering our product, and we don't sell it. By being part of the cooperative and paying the overhead, our patients are entitled to a share."

Because Marin RX is not an over-the-counter storefront operation, the feds have paid no attention to it, at least not yet. "We

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want to remain quiet and low profile," McKay says.

The troubles that have dogged the Alliance have made a significant impact on McKay. "Because the feds went in undercover there, I have been much more careful in terms of screening our potential patients," she says. "I know everyone we work with now." She will have to keep her organization relatively small in order to maintain that tight rein on security. "If the Alliance ends up closed," she says, "patients in Marin will have a real problem."

Shaw vows to stay open as long as possible. "We have moved all the patients' files already, and we are still open seven days a week," she says, sounding a bit weary of the fight. "We survived underground before, and we will continue to get medicine to those who need it. It is just a shame that the government has chosen to make victims of people who are either very sick or dying."

Housing issues

Programs take Corte Madera to task over development

BY MIKE THOMAS

Unlike the shadowy authority figures in Joni Mitchell's famous lyric, Corte Madera town planners don't aim to pave Paradise (Shopping Center) and put up a parking lot.

But that's not welcome news to frustrated advocates and seekers of low-cost, workforce housing, in particular, employees who commute to hourly wage jobs at the town's cash-cow retail centers. Why? Because after years of false starts and official resistance to affordable projects at other sites, recently approved plans to rejuvenate the run-down Paradise location fail to address the town's longstanding low-income shelter needs. This time, a legal challenge looms.

The proposed development, approved nearly in its entirety by the planning commission on May 13, would involve construction of a 124-unit assisted living center for seniors and 12,000 square feet of retail space. Area residents, many of whom have long clamored for improvements on the property, solidly support the plan.

Many others do not. Citing Corte Madera's failure to comply with state law that requires local governments to plan ahead for reaching low- and very-low-income housing goals, Legal Aid of Marin is prepared to block the Paradise overhaul in court. The group represents Marin Family Action, a nonprofit focused on affordable housing issues.

"The town is way out of compliance," says Richard Marcantonio of Legal Aid. "They've needed to correct this for some time, and they know they've needed to do it." He refers to numerous deficiencies in the town's housing element, a planning document required under California law to ensure that land-use decisions are made in accordance with an area's affordable housing needs. Indeed, Corte Madera's most recent housing element, adopted in 1989, was so off target that state officials refused to certify it in 1990. With no valid document on file, Marcantonio calls for a residential building moratorium until changes are made.

For the period from 1990 to 1995, he explains, the Association of Bay Area Governments (ABAG) determined that Corte Madera's share of the regional need for new housing included 140 low- and very-low-income units. According to Legal Aid and Marin Family Action, not a single unit of very-low-income housing has been added since the discredited element's adoption in 1989.

Although often used generically, the term 'affordable housing' encompasses options available to three distinct income groups: Very-low-income families are defined as those making 50 percent or less of the county median. Low-income families earn from 50 to 80 percent of the same figure. At the top, moderate-income families bring in 80 to 150 percent. As of the 1990 census, Marin's annual median was a hair under $50,000. Today it hovers around $53,000 for a family of three.

It's not that opportunities didn't present themselves. Two attempts by the Ecumenical Association for Housing (EAH), a San Rafael-based nonprofit builder of affordable homes, have been thwarted in the last decade. An approximately 60-home project in the late 1980s stalled when the town enacted a development moratorium.

In 1993, EAH's bid to construct 50 or more units on the "Habitat" site near the Village shopping plaza was similarly derailed. (At the time, town policymakers cited a survey of homeowners that indicated little interest in the project.) To this day, the site remains an overflow parking lot, despite a town resolution expressly requiring that 65 housing units be built there.

Along with civic opposition, Legal Aid's Marcantonio continues, a major stumbling block is the incomplete housing element. Among other shortcomings, it neglects to adequately identify potential development sites. Notably absent from the site inventory rejected by the state in 1990 was the Paradise Shopping Center location. In addition, however meticulously derived, the ABAG requirements issued every five years carry no clout.

"The numbers are out there, but there's no enforcement. There's no teeth," admits Dawn Weisz, Marin Family Action's project coordinator. But where housing elements are out of compliance, notes an Oakland-based affordable housing advocate, people have the power.

"It's only toothless because there's no state-sponsored enforcement," says Mike Rawson of the California Affordable Housing Law Project. "The attorney general has never taken any steps other than sending letters. It falls to community groups and citizens to file a suit." Rawson

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his concerns is that he permanently will lose many members of what he considers to be the best overall jail staff he's worked with in his 28-year career.

Ladd also is dreading the breakup of her team, which has learned to work well together.

She knows that the inmates who remain will be the most dangerous of the lot and that they will understand how understaffed the jail will be.

"It's certainly going to be more hazardous," she said.

So July 31 will be a joyous day for inmates who had expected to spend this summer behind bars, but it will seem like a day of reckoning for many others.

"I think on that day it's going to be hard not to cry," Ladd said.

Davis, Harman Back Medical Marijuana (California NORML
Says Yesterday's 'San Francisco Examiner' Quoted Democratic
Gubernatorial Candidates Gray Davis And Jane Harman
Saying They Would Support City Officials Seeking To Provide
Medical Marijuana In San Francisco)

Date: Sun, 31 May 1998 22:15:53 -0800
To: dpfca@drugsense.org, aro@drugsense.org
From: canorml@igc.apc.org (Dale Gieringer)
Subject: DPFCA: Davis, Harman Back Med MJ
Reply-To: dpfca@drugsense.org

In a last-minute pitch for swing votes, California gubernatorial candidates Gray Davis and Jane Harman said they would support city officials seeking to provide medical marijuana in San Francisco, according to a report in the S.F Examiner, May 30.

"I'm not in favor of legalizing marijuana," explained the ever-cautious Davis, "On the other hand, I don't believe politics should interfere with medical judgments."

Rep. Harman said she would back San Francisco officials "taking whatever steps they think they need to take," although she wasn't sure that it was the right answer for the entire state.

***

Dale Gieringer (415) 563-5858 // canorml@igc.apc.org
2215-R Market St. #278, San Francisco CA 94114

Minutes Of The Consortium Meeting May 30 1998
(San Francisco Bay Area Activist Summarizes The Monthly Meeting
Of California Medical Marijuana Dispensaries Saturday In Oakland)

From: "ralph sherrow" (ralphkat@hotmail.com)
To: ralphkat@hotmail.com
Subject: Consortium Meeting May 30, 1998
Date: Sun, 31 May 1998 13:24:36 PDT

Minutes of the Consortium Meeting May 30 1998

SENATE HEARINGS UPDATE: Jeff Jones says the Feds say we're illegal.

Bob Ames says the California Medical Association, (CMA) & the Police

Officers Association, (POA) want to reschedule Marijuana to schedule 2. The Feds were invited but they didn't show up.

Dale Geiringer says at least they've stopped talking bad about MMJ. Now, when people talk about MMJ they talk favourable. This is good.

MARIN UPDATE: Lynnette Shaw says she's laid off all but 1 other person to help her run the operation. On June 2nd the town council will meet to re-afirm their support for the Marin Alliance & MMJ & declare their opposition to the Feds & their actions. Other supporters include The Police Chief & the District Attorney.

OAKLAND UPDATE: Jeff Jones says Oakland Police & the Co-op have agreed on the amount of MMJ a patient can be in possession of. The limits are 48 plants in the budding stage & 48 plants in the vegetative stage. This overlaps on a 3 month basis because it takes 3 months to grow & harvest. & because of the understanding that some plants could be male & some could die. Also the limits of dry MMJ a patient can possess is 1 1/2 lbs. (24 ounces). Also if a garden is discovered by the police you will have 48 hours to come forward with the documentation needed to show Patient Status before they turn it in to the proper channel. Once that is done, the case proceeds as a criminal case. This seems to be very fair.

Misc. John Odell says we ought to have a slogan saying "WHAT'S SO BAD ABOUT FEELING GOOD"

DENNIS PERON UPDATE: Since Dennis has been closed the other clubs are getting lots of extra Patients. Dennis is trying to get back into the building so he can continue running his Governor Campaign. CCU is in there too.

MISC: There is an 800 number to call to verify a doctors are real. They can also verify his or her address.

SAN JOSE UPDATE: Dr. Dennis Augustine says a co-operative structure like the one in Arcata might work in San Jose, notwithstanding the transportation issue. He has been working on this for quite some time now. Ralph Sherrow has volunteered to head this venture. He has the right qualifications for this job, first, he is a patient, second, he is a grower & third, he has run several of his own businesses along with his wife, who he has been married to for 37 years, since january of 1972. Ralph has the backing of the clubs & has an advisory board & lawyers in place to guide his movements in this endeavour. To quote Ralph, "It has never been about money". It is about providing MMJ to patients who can't, for one reason or another, grow their own MMJ in a "WHITE MARKET" atmosphere.

Next Meeting is scheduled for the last saturday in June. 6-27- 1998 @ 1pm. See you there.

Ralph

***

From: "ralph sherrow" (ralphkat@hotmail.com)
To: ralphkat@hotmail.com
Subject: Consortium meeting Correction
Date: Mon, 01 Jun 1998 14:16:02 PDT

Subject: Re: Consortium Meeting May 30, 1998
Date: Mon, 01 Jun 1998 12:47:49 -0700
At 01:25 PM 5/31/98 PDT, ralph sherrow wrote:
Minutes of the Consortium Meeting May 30 1998

*** Addition/Correction

OAKLAND UPDATE: Jeff Jones says Oakland Police & the Co-op have agreed lbs. (24 ounces). Also if a garden is discovered by the police you will have 48 hours to come forward with the documentation needed to show Patient Status before they turn it in to the proper channel. Once that is done, the case proceeds as a criminal case. This seems to be very fair. Unless you happen to be out of the area on vacation (such as gone camping or to a festival or seminar for a three-day-weekend), in the hospital for treatment, or otherwise out of touch. This is not totally fair, but it's fairly reasonable. The message is, don't leave your plants alone! The message to law enforcement is if you want to bust someone you know is legal, wait till they are gone to a seminar for three days, THEN bust the joint just as they are hitting the highway out of town.

-alan

CORRECTION RALPH SHERROW
MINUTES OF THE CONSORTIUM MEETING MAY 30- 1998

STATE SENATE HEARINGS: Jeff Jones says the FEDS say we're illegal.

Ralph Sherrow says on May 28th the bill to allow funding for Vasconcellos's bill passed the state senate.

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MISC.: John Odell says we ought to have a slogan saying "WHAT'S SO BAD ABOUT FEELING GOOD?"

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Ukiah Daily Journal MENDOCINO COUNTY'S LARGEST NEWSPAPER Online

Local News

Lake County struggles with pot grant too - Ukiah pot club eviction withdrawn

By JENNIFER POOLE/The Daily Journal

In Lake County, the Board of Supervisors - like the Mendocino board - voted 3-2 this year to accept the state marijuana eradication grant.

But the Lake County board members, like a majority of the Mendocino County board, do have misgivings about the program.

A May 26 letter from the Lake County board to each one of the county's state and federal representatives says the decision to OK the grant was made "with considerable doubt as to the effectiveness of the program."

The letter continues: "It is the feeling of this board that the most serious problem in our county is the manufacture, sale and use of hard drugs (methamphetamine, etc.), and that the funds currently dedicated to the Marijuana Eradication Program would be much better spent in attempting to control these hard drugs."

The letter concludes by asking Lake County's elected representatives to "seriously consider making those changes to current laws and regulations which would allow Lake County to use this grant money in a manner which would produce far more beneficial results, a decision that would be made with the advice and discussion with all units of our law enforcement system."

All five board members voted to approve this letter.

"This is the first time the board has written a letter like this," said Supervisor Carl Larson, who voted against accepting the grant.

"Probably it will have very little effect, but we feel somewhat good about expressing our opinion," he said.

"With no change from above, we might as well start making noises from down here."

Larson said that, unlike in Mendocino County, "nobody shows up to any extent," when the board considers the marijuana grant.

Nonetheless, he said, his colleagues are afraid of being tagged as "pro-drug" during their next election campaigns.

"It bugs me," he said. "It's one of those things where if you could have a secret ballot, we'd get a 5-0 to reject it."

"I'm too old to run again," he laughed. "I'm going to be 70 at the end of this term."

In a more serious tone of voice, Larson said: "Not too many people approve of the result of drugs, but I totally disapprove of wasting money the way we do.

"We have one deputy at least who's making better than $70,000 a year (with overtime due to marijuana eradication).

"I don't care where the money comes from - it's still all our taxpayer money, even if it comes from the state.

"We need to change our laws," he continued, "take the profit out of it as much as possible, and recognize that you can't ban it, and do the best you can.

"And at least tax the heck out of a lot of it, get some money for rehabilitation."

Larson said he also had problems with the general philosophy of funding local government by grants.

"It's just another instance where the state operates our county business by grant, with our property taxes that they took away from us.

"They've told us exactly what to do with it, how to spend it, and if you need money for anything else, tough luck - regardless of the $4.4 billion surplus."

Larson attended the private meeting on marijuana policy issues hosted by Mendocino County Supervisors Richard Shoemaker and Charles Peterson in Ukiah at the end of April.

Mendocino supervisors to talk pot again

In Mendocino County, the matter of the state's letter requesting changes in the Board of Supervisors' resolution accompanying the eradication grant application is formally on the agenda next week.

That resolution says eradication of marijuana "is not a reasonable and attainable goal, and that to attempt this is not a wise use of public funds."

Supervisor Shoemaker said he took advantage of a previously scheduled trip to Sacramento to meet with the Office of Criminal Justice Planning's James Roth, who wrote the letter.

But, he said, nothing conclusive came out of the meeting.

"I still think things are up in the air," he said. "No decisions have been made."

The supervisors are scheduled to discuss their response to the letter - which has been requested by June 4 - at 2:15 p.m. on Tuesday.

Cannabis Buyers Club may stay in place

The Ukiah Cannabis Buyers Club officially got served a preliminary injunction order Wednesday, Executive Director Marvin Lehrman said.

Two U.S. marshals served the order, which enjoins the club from "engaging in

the distribution of marijuana" and "conspiring to violate the Controlled Substances Act with respect to the manufacture and distribution of marijuana," among other things.

But, Lehrman said, the club is still open, and has no plans to close.

"We're continuing and fulfilling our mission," he said. "I don't know what's next."

If it stays open, the club won't have to move, according to Lehrman. He said that he had worked things out with landlord Joe Schwede, who has decided not to evict his tenants, after all.

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Ukiah Daily Journal MENDOCINO COUNTY'S LARGEST NEWSPAPER Online

Local News

Board begins Prop. 215 process - But backs away from resolution proposed by Supervisor Peterson

By JENNIFER POOLE/The Daily Journal

Eighteen months after Proposition 215 was passed by California voters, the Mendocino County Board of Supervisors has directed its Public Health Department to begin to "identify strategies" to address medical marijuana issues.

Tuesday's board resolution, passed 4-1, asks Public Health to "work cooperatively" with District Attorney Susan Massini and with County Counsel Peter Klein to convene a medical marijuana meeting.

The resolution, brought to the board by 5th District Supervisor Charles Peterson, was changed significantly during the course of Tuesday's discussion.

It originally stated that the board wanted to "facilitate implementation" of an effective medical marijuana distribution program through the Department of Public Health, working with a number of other local agencies and interested parties.

Public Health Administrator Carol Mordhorst told the board she wasn't opposed to holding such a meeting, but she wasn't sure it was "the best use of the county's resources."

"I don't think I'd be doing my job if I didn't tell you I don't think it's our highest priority," she said.

Mordhorst also said she didn't think that having Public Health actually operate any distribution system should be "a foregone conclusion."

"We're not a dispensary," she said. "We're not a pharmacy.

"Public Health is not in the acute care/urgent care business."

Mordhorst also told the board her department would need extra funding to put together such a meeting.

The supervisors' reactions to Peterson's proposal were mixed.

First District Supervisor Michael Delbar read from the court decision stating that cannabis buyers' clubs didn't qualify as primary caregivers under Prop. 215.

That proposition didn't decriminalize marijuana, Delbar said, and it's up to the

state Legislature or the people of California - by ballot initiative - to do so, not the county.

"I would not favor putting our county's limited resources into this effort that's changing daily," he said. "I'm not saying I won't support it on some later date, after things shake out on the federal or state front."

Delbar was the lone vote against the resolution.

Third District Supervisor John Pinches, a well-known advocate of legalizing marijuana, said he didn't want Public Health to be in the business of dispensing marijuana.

"To just go out there and start a distribution program and wait 'til the feds come in and bust us - I don't want no part of that," he said.

Pinches also said that since he was against spending taxpayers' money on the war on drugs, "starting another bureaucracy to sell it would be inconsistent with my position."

Pinches suggested several times that the counties needed "a united voice" to get the state and federal government to pay attention.

"Unless we start partnering with other counties that have similar issues, we're not going to get anywhere," he said.

Fourth District Supervisor Patti Campbell said she was worried about the board sending "mixed messages" about drug abuse by spending so much time talking about marijuana.

But, she said, she was willing to support setting up a meeting for an open-ended discussion.

Second District Supervisor Richard Shoemaker said he'd been looking into asking the California State Association of Counties to sponsor a workshop on medical marijuana at its annual meeting in November.

His colleagues supported that idea, and directed him to move forward with it.

After the vote, board members also directed Mordhorst to come back within 60 days with a report on how the meeting process was going.

Supervisor Peterson then withdrew a proposed letter on medical marijuana to Attorney General Dan Lungren, saying he felt the meetings were a "better route."

The board did vote 3-2, Delbar and Campbell opposed, to send a letter to the state Legislature, asking for oversight hearings on marijuana eradication programs in California.

After the meeting, Ukiah Cannabis Buyers Club Director Marvin Lehrman said that although he saluted the supervisors' efforts to set up the meetings, he was "kind of disappointed" with Tuesday's decision.

"They're still talking months and years away," he said. "I have to be concerned with today and tomorrow."

Lehrman said he suspects the federal government will soon be moving to close the three cannabis buyers' clubs left open in California, here in Ukiah, in Marin County and in Oakland.

"The Task Force has contacted the county's Building and Planning Department to get our floor plans," he said, as they have in Marin County.

That is standard procedure, Lehrman said, before a raid.

"They keep talking about 'implementing the proposition,'" he said, "but it's not happening. At least it's not happening for the immediate future.

"And that's why we're here, to supply medical marijuana to those people who need it now and who may not be alive by the time the boards of supervisors and the others get it together."

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS	Nos. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB DECLARATION OF SPECIAL AGENT PETER OTT

I, PETER OTT, do hereby declare and say as follows:

1. I am a Special Agent with the San Francisco Field Division of the Drug Enforcement Administration ("DEA"), United States Department of Justice, and have been so employed since September 1990.

2. As is set forth in my declarations of January 9, 1998, filed in connection with the government's motions for preliminary injunctions in these related actions, I have received training from the DEA and Federal Bureau of Investigation in specialized narcotic investigative matters including, but not limited to, the following: drug interdiction and detection, money laundering

techniques and schemes, drug identification, and asset identification and forfeiture. This training included specialized training in the preparation of narcotic and document search warrants for residences and businesses. I also have participated in numerous investigations specifically involving both the indoor and outdoor manufacture or cultivation of marijuana. In the course of these investigations, I have personally participated in the eradication of over 10,000 indoor and 25,000 outdoor marijuana plants, and the arrest of more than 300 individuals for violations of federal and state law regarding controlled substances. I also have received specialized training regarding the techniques used to grow marijuana. Based on my experience and training, I am familiar with the smell and appearance of growing and processed marijuana, as well as the smell of marijuana when it is burning. I also have participated in the obtaining and/or execution of over 100 federal and California state warrants to search a particular place or premises for controlled substances and/or related paraphernalia, indicia, and other evidence of the commission of state and/or federal felony violations of law.

3. On May 21, 1998, acting in an undercover capacity, I approached and entered a building located at 1755 Broadway Avenue, in Oakland, California, which houses the Oakland Cannabis Buyers' Cooperative ("OCBC"). After showing an undercover driver's license to a security guard on the first floor of this building, I was allowed to proceed to the third floor, where the OCBC is located.

4. Upon entering the OCBC, I observed approximately six television crew teams taking statements from OCBC club members, and videotaping the distribution of marijuana to four persons by an individual who identified himself as Jeffrey Jones, the director of the OCBC. In addition, I observed an additional ten over-the-counter sales of marijuana to individuals by other OCBC personnel.

5. On May 26, 1998, at approximately 7:00 p.m., I walked through an open field which was adjacent and to the north of 40A Pallini Lane, in Ukiah, California, the home of the Ukiah Cannabis Buyer's Club ("UCBC"). I observed at least 10 marijuana plants in this field, which

were approximately 6 inches in height and were being cultivated in black plastic bags filled with soil.

I declare under penalty of perjury that the foregoing is true and correct.

PETER OTT

Executed this 23 day of June 1998

FRANK W. HUNGER
Assistant Attorney General
MICHAEL J. YAMAGUCHI (Cal. SBN 84984)
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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON,

Defendants.

AND RELATED ACTIONS

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C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DECLARATION OF
SPECIAL AGENT BILL NYFELER

I, BILL NYFELER, do hereby declare and say as follows:

1. I am a Special Agent with the San Francisco Field Division of the Drug Enforcement Administration ("DEA"), United States Department of Justice, and have been so employed since October 1995.

2. As is set forth in my declarations of January 9, 1998, filed in connection with the government's motions for preliminary injunctions in these related actions, I have received training from the DEA, Federal Bureau of Investigation, and the California Narcotic Officers Association, in specialized narcotic investigative matters including, but not limited to, the following: drug

interdiction and detection, money laundering techniques and schemes, drug identification, and asset identification and forfeiture. This training included specialized training in the preparation of narcotic and document search warrants for residences and businesses. I also have participated in numerous investigations specifically involving both the indoor and outdoor manufacture or cultivation of marijuana. In the course of these investigations, I have personally participated in the eradication of over 500 indoor and 5,000 outdoor marijuana plants, and the arrest of more than 50 individuals for violations of federal and state law regarding controlled substances. I also have received specialized training regarding the techniques used to grow marijuana. Based on my experience and training, I am familiar with the smell and appearance of growing and processed marijuana, as well as the smell of marijuana when it is burning. I also have participated in the obtaining and/or execution of over 50 federal and California state warrants to search a particular place or premises for controlled substances and/or related paraphernalia, indicia, and other evidence of the commission of state and/or federal felony violations of law.

3. On May 27, 1998, at approximately 9:30 a.m., I established surveillance of the Marin Alliance for Medical Marijuana ("Marin Alliance"), located at 6 Old School Street Plaza, Suite 210, in Fairfax, California. During the next two and one-half hours, I observed 14 individuals enter the Marin Alliance. These persons varied in age from the late teens/early twenties to the elderly. I further observed that, upon exiting the Marin Alliance, several of these individuals would roll what appeared to be marijuana cigarettes, and smoke the cigarettes directly outside the club.

4. On May 27, 1998, at approximately 3:10 p.m., I placed a recorded telephone call to the Ukiah Cannabis Buyer's Club ("UCBC"), at (707) 462-0691, to confirm that the UCBC was continuing to engage in the distribution of marijuana. The person who answered the phone identified himself as "Marvin," and stated that, although the UCBC was in receipt of an injunction, the club was still open for business. "Marvin" also informed me of the business hours of the UCBC.

5. Thereafter, at approximately 3:12 p.m., I placed a recorded telephone call to the Oakland Cannabis Buyers' Cooperative ("OCBC"), at (510) 843-5346, to confirm that the OCBC was continuing to engage in the distribution of marijuana. The person who answered the phone informed me that the OCBC was still open for business, and told me the hours when the club was open.

6. Thereafter, at approximately 3:15 p.m., I placed a telephone call to the Marin Alliance at (415) 256-9328, to confirm that the Marin Alliance was still distributing marijuana. Noone answered the phone. However, a pre-recorded message stated that the Marin Alliance was still open for business under the "medical necessity defense." The message also indicated the club's business hours.

I declare under penalty of perjury that the foregoing is true and correct.

BILL NYFELER

Executed this 24th day of June 1998

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS	Nos. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB DECLARATION OF SPECIAL AGENT DEAN ARNOLD

I, DEAN ARNOLD, do hereby declare and say as follows:

1. I am a Special Agent with the San Francisco Field Division of the Drug Enforcement Administration ("DEA"), United States Department of Justice, and have been so employed since July 1996.

2. I have received training from the DEA in specialized narcotic investigative matters including, but not limited to, the following: drug interdiction and detection, money laundering techniques and schemes, drug identification, and asset identification and forfeiture. This training included specialized training in the preparation of narcotic and document search warrants for

residences and businesses. I also have participated in numerous investigations specifically involving both the indoor and outdoor manufacture or cultivation of marijuana. In the course of these investigations, I have personally participated in the eradication of over 8,000 indoor and 500 outdoor marijuana plants, and the arrest of more than 50 individuals for violations of federal and state law regarding controlled substances. I also have received specialized training regarding the techniques used to grow marijuana. Based on my experience and training, I am familiar with the smell and appearance of growing and processed marijuana, as well as the smell of marijuana when it is burning. I also have participated in the obtaining and/or execution of over 50 federal and California state warrants to search a particular place or premises for controlled substances and/or related paraphernalia, indicia, and other evidence of the commission of state and/or federal felony violations of law.

3. On June 16, 1997, acting in an undercover capacity, I placed a recorded telephone call to the Oakland Cannabis Buyers' Cooperative ("OCBC"), at (510) 843-5346, to confirm that the club was still distributing marijuana. An unidentified male answered the telephone and informed me that the OCBC was open for business and was accepting new members. The unidentified male also informed me about the requirements of becoming an OCBC members, the hours that the club was open (11 a.m. - 1 p.m., and 5 p.m. - 7 p.m.) on that date, and the location of the OCBC, at 1755 Broadway Avenue, in Oakland.

4. Thereafter, on the same day, I placed a recorded telephone call to the Marin Alliance for Medical Marijuana ("Marin Alliance"), at (415) 256-9328, to confirm that the Marin Alliance was still distributing marijuana. An unidentified female answered the telephone by stating, "Marin Alliance," and told me what the requirements of becoming a new member of the Marin Alliance were, and that the club was open that day until "five."

5. I then placed a recorded telephone call to the Ukiah Cannabis Buyer's Club ("UCBC"), at (707) 462-0691, to confirm that the club was still distributing marijuana. An unidentified male answered the telephone and stated, "UCBC." I asked whether the UCBC was still open for

business, to which the unidentified male asked me if I was a member. I responded that I was not a member, to which the unidentified male responded, "We are officially closed." I then asked if the UCBC was accepting new members, to which the unidentified male responded, "Why don't you come in and show me what you have, medical papers?" I took this to mean that this individual was "officially" stating that the UCBC was closed to new members over the telephone, but was suggesting that I could become a member if I went to the UCBC and presented medical documentation.

I declare under penalty of perjury that the foregoing is true and correct.

DEAN ARNOLD

Executed this 24th day of June 1998

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON,

Defendants.

AND RELATED ACTIONS

Nos. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

[PROPOSED] ORDER

Date: August 14, 1998
Time: 10:00 a.m.
Courtroom of the Hon. Charles R. Breyer

ORDER

This matter comes before the Court on Plaintiff's Motion for an Order To Show Cause Why Non-Compliant Defendants Should Not Be Held in Contempt, and for Summary Judgment, in Cases Nos. C 98-0086 CRB; C 98-0087 CRB; and C 98-0088 CRB. Upon consideration of the foregoing motion and the entire record herein, it is by the Court this ___ day of _____ 1998 hereby

ORDERED that plaintiff's motion be, and the same hereby is, GRANTED; and it is further

ORDERED that defendants Oakland Cannabis Buyer's Cooperative ("OCBC") and Jeffrey Jones in Case No. C 98-0088 CRB; defendants Marin Alliance for Medical Marijuana ("Marin Alliance") and Lynnette Shaw in Case No. C 98-0086 CRB; and defendants Ukiah Cannabis Buyer's Club ("UCBC"), Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman in Case No. C 98-0087 CRB (collectively the "non-compliant defendants"), shall show cause why they should not be held in civil contempt of the Court's May 19, 1998, Preliminary Injunction Orders.

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

COPY

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN CASE NO. C 98-0088 CRB FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED
[FED. R. CIV. P. 12(B)(6)]

Date: August 31, 1998
Time: 2:30 p.m.
Courtroom: 8
Hon. Charles R. Breyer

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INTRODUCTION

Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones submit this memorandum in support of their motion to dismiss the complaint. The motion is based on two grounds. First, effective August 12, 1998, defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones have been "duly authorized officer[s]" of the City of Oakland "lawfully engaged in the enforcement of" two laws relating to controlled substances — California Health and Safety Code section 11362.5 and Oakland Ordinance No. 12076 C.M.S. ("Ordinance No. 12076") These defendants are immune from liability pursuant to Section 885(d) of Title 21 of the United States Code. Therefore, this Court must dismiss the complaint against these defendants.

Second, defendants move to dismiss under the Ninth Amendment to the United States Constitution. The Ninth Amendment, individually and together with the Due Process Clause of the Fifth Amendment, protects from encroachment by the federal government the fundamental "liberty" and "life" interests of the defendant cooperatives and their patient-members. The State of California and the City of Oakland have determined that the right to receive cannabis for medical treatment is fundamental. Because the federal Controlled Substances Act, as applied to the particular facts here, infringes upon this fundamental right, and because the government cannot establish a compelling interest justifying this infringement, this Court should determine that the Controlled Substances Act is unconstitutional as applied to the Oakland defendants and dismiss the government's complaint against them.

STATEMENT OF FACTS

In November 1996, 56% of California voters who participated in the state-wide election voted in support of Proposition 215, the "Medical Use of Marijuana" initiative, known also as the "Compassionate Use Act of 1996" (the "Act"). This Act made it legal under California law for seriously ill patients and their primary caregivers to possess and cultivate marijuana for use by the seriously ill patient if the patient's physician recommends such treatment. Specifically, the Act exempts a seriously ill patient and the patient's primary caregiver from prosecution under California Health and Safety Code § 11357, relating to the possession of marijuana, and § 11358, relating to the cultivation of marijuana. *See* California Health & Safety Code § 11362.5(d). The Act expressly

states that "[t]he people of the State of California hereby find and declare that . . . seriously ill Californians have the right to obtain and use marijuana for medical purposes. . . ." California Health & Safety Code § 11362.5(b).

The City of Oakland recently expressed its desire to further the purposes of the Compassionate Use Act of 1996 and to protect the life and liberty interests of its citizens who need medical cannabis. On July 28, 1998, the City Council of the City of Oakland, California unanimously passed Ordinance No. 12076 — An Ordinance of the City of Oakland Adding Chapter 8.42 to the Oakland Municipal Code Pertaining to Medical Cannabis. (A copy of this Ordinance is attached as Exhibit A to Defendants' Request For Judicial Notice, filed herewith.) The City Council's express purpose in passing the Ordinance was to ensure that seriously ill persons and their primary caregivers who obtain and use marijuana for medical purposes, on a doctor's recommendation, are not criminally prosecuted.

> [S]eriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. . . . [P]atients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician [should not be] subject to criminal prosecution or sanction.

Ordinance No. 12076, Section 1.A. (quotations and citations omitted).

The Oakland Ordinance provides "immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code . . . ." Ordinance No. 12076, Section 1.D. Section 3 of the Oakland Ordinance provides that the City Manager shall designate one or more entities as medical cannabis provider associations as follows:

> The City of Oakland hereby establishes a Medical Cannabis Distribution Program. Such program shall be administered by medical cannabis provider associations. The City Manager shall designate one or more entities as a medical cannabis provider association. Any designated medical cannabis provider association shall enforce the provisions of this Chapter, including enforcing its purpose of insuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes. For the purposes of this Chapter only, a medical cannabis provider association, and its agents, employees and directors while acting within the scope of their duties on behalf of the association, shall be deemed officers of the City of Oakland.

Ordinance No. 12076, Section 3.

On August 12, 1998, the Oakland City Manager designated the Oakland Cannabis Buyers' Cooperative as a medical cannabis provider association pursuant to Section 3 of Ordinance No. 12076. (A copy of this designation is attached as Exhibit B to Defendants' Request For Judicial Notice, filed herewith.)

ARGUMENT

I. THIS COURT MUST DISMISS THE GOVERNMENT'S COMPLAINT AGAINST THE OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES BECAUSE THESE DEFENDANTS ARE STATUTORILY IMMUNE FROM CIVIL OR CRIMINAL LIABILITY.

The Oakland City Council recently passed a City Ordinance authorizing the Oakland City Manager to designate a medical cannabis provider association and its agents, employees, and directors as city officers duly authorized to enforce the City Ordinance and California Health and Safety Code Section 11362.5. On August 12, 1998, the Oakland City Manager so designated the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones. As a result, these defendants are immune from liability pursuant to 21 U.S.C. § 885(d). Their cases should therefore be dismissed. *See, e.g., Martinez v. Newport Beach City*, 125 F.3d 777, 780 (9th Cir. 1997) (affirming dismissal for failure to state a claim as a result of defendant's immunity); *Garcia v. Williams*, 704 F. Supp. 984, 1004, 1005 (N.D. Cal. 1988) (motion to dismiss for failure to state a claim lies where a complaint is brought against defendants who have immunity from liability).

The Federal Controlled Substances Act provides immunity to federal, state, and local officials from any civil or criminal liability as follows:

> no civil or criminal liability shall be imposed by virtue of this subchapter upon any . . . duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

21 U.S.C. § 885(d). On July 28, 1998, the Oakland City Council enacted an Ordinance to further the purposes of the Compassionate Use Act of 1996, codified at California Health and Safety Code

section 11362.5, and to provide immunity to designated medical cannabis providers pursuant to 21 U.S.C. § 885(d).[1] The Ordinance states that "[t]he City of Oakland supports the use of medical cannabis in accordance with the Compassionate Use Act of 1996." Ordinance No. 12076, Section 1.A. It further states that its purpose "is to recognize and protect the rights of qualified patients, their caregivers, physicians, and medical cannabis provider associations, and to ensure access to safe and affordable medical cannabis. . . ." Ordinance No. 12076, Section 1.C. Finally, the Ordinance specifies that "[a]n additional purpose of this Chapter is to provide immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code . . . ." Ordinance No. 12076, Section 1.D.

In order to further the purposes of the Compassionate Use Act, Section 3 of the Oakland Ordinance authorizes the City Manager to designate one or more entities as medical cannabis provider associations. Section 3 further provides that a designated medical cannabis provider association and its agents, employees and directors "shall be deemed officers of the City of Oakland" and "shall enforce the provisions of this Chapter, including enforcing its purpose of insuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes." Ordinance No. 12076, Section 3. Thus, an entity designated by the Oakland City Manager as a medical cannabis provider association is by definition "lawfully engaged in the enforcement of [a] law or municipal ordinance relating to controlled substances," 21 U.S.C. § 885(d)—indeed enforcing *both* section 11362.5 of the California Health & Safety Code and Oakland Ordinance No. 12076.[2] This same association and its director are therefore immune from liability pursuant to 21 U.S.C. § 885(d).

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[1] A Court deciding a motion to dismiss for failure to state a claim may consider the complaint and any matter that is properly the subject of judicial notice. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (court may take judicial notice of official records and reports without converting Rule 12(b)(6) motion into Rule 56 motion for summary judgment); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (same).

[2] "Enforcement" has been defined as "[t]he act of putting something such as a law into effect." *Black's Law Dictionary* 528 (6th ed. 1990).

On August 12, 1998, the Oakland City Manager designated the Oakland Cannabis Buyers' Cooperative as a medical cannabis provider association pursuant to Section 3 of Ordinance No. 12076. Accordingly, the Oakland Cannabis Buyers' Cooperative and its "agents, employees, and directors" have been duly authorized officers of the City of Oakland "lawfully engaged in the enforcement of" section 11362.5 of the California Health & Safety Code and Oakland Ordinance No. 12076 — both "law[s] . . . relating to controlled substances[,]" pursuant to 21 U.S.C. § 885(d). Thus, defendants Jeffrey Jones and the Oakland Cannabis Buyers' Cooperative are immune from civil or criminal liability. 21 U.S.C. § 885(d).

II. THE CONTROLLED SUBSTANCES ACT IS UNCONSTITUTIONAL UNDER THE FIFTH AND NINTH AMENDMENTS AS APPLIED TO THE OAKLAND DEFENDANTS.

Both the people of the State of California, through its legislative initiative process resulting in the enactment of Health and Safety Code Section 11362.5, and the people of the City of Oakland, through unanimous vote by its City Council resulting in the passage of City Ordinance No. 12076, have unequivocally identified a patient's right to medical cannabis as a "'fundamental right[] and liberty interest[ ].'" Memorandum and Order dated May 13, 1998 ("Mem. Op. & Order") at 21 (citing *Washington v. Glucksberg*, __ U.S. __, 117 S.Ct. 2258, 2267 (1997)). *See* California Health & Safety Code § 11362.5; Oakland Ordinance No. 12076, Section 1.A. As such, the Fifth and Ninth Amendments to the United States Constitution protect the right to medical cannabis for seriously ill patients from infringement by the federal government.

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const., Amdt. 5. All patient-members of the defendant cooperatives have a fundamental right to medical cannabis based upon the "liberty" interest specified in the Due Process Clause. Moreover, those patients whose lives depend on access to medical cannabis have the additional fundamental right based upon their right to "life" guaranteed by the same Clause. The Ninth Amendment guarantees these same rights to the patients.

A. Patient-Members Have A Fundamental Liberty Interest In Medical Cannabis.

As discussed more fully in Defendants' Memorandum In Opposition To Plaintiff's Motion To Show Cause, And For Summary Judgment, the government's application of the Controlled Substances Act to the distribution of medical cannabis violates the substantive due process rights of defendants' patient-members to be free from unnecessary pain, to receive palliative treatment for a painful medical condition, to care for oneself and to preserve one's own life. As this Court recognized, defendants are entitled to present evidence of this defense in a contempt trial. Mem. Op. & Order at 23.

The United States Supreme Court has established that individuals are protected under the Due Process clauses of the Fourteenth and Fifth Amendments from state or federal infringement upon their "fundamental liberty interests." As Justice Rehnquist recently described in *Washington v. Glucksberg*, ___ U.S. ___, 117 S. Ct. 2258 (1997).

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint . . . . The Clause also provides heightened protection against government interference with certain rights and liberty interests.

Glucksberg at 2267 (citations omitted). In applying substantive due process analysis, the Chief Justice in *Glucksberg* explained that where a fundamental liberty interest is involved, government action must be "narrowly tailored to serve a compelling [government] interest." *Id.* at 2268.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court recognized a woman's fundamental liberty interest to control her own body. The Court's description of this interest applies no less forcefully in the context of a patient's right to be free from pain and discomfort, and to maintain the ability to eat food or to retain vital medication without vomiting.

> We conclude, however, that the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to [derive a specific rule from a general standard in the Constitution.] Liberty must not be extinguished for want of a line that is clear. And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term.

Id. at 869. It is just this patient-member's right to "retain the ultimate control over her destiny and her body" that is "implicit in the meaning of liberty," and that therefore must be protected from infringement by the federal government absent a compelling state interest. *Id.*

The Ninth Amendment operates independently of the Due Process Clause to protect rights retained by the people from arbitrary encroachment by the federal government. It provides that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., Amdt. 9. While "[i]t is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution . . . [,] [the Supreme] Court has never accepted that view." *Casey*, 505 U.S. at 847. *See also Griswold v. Connecticut*, 381 U.S. 479, 488-96 (1965) (Goldberg, J., concurring). The Supreme Court continued in *Casey*:

> It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . .
>
> Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. See U.S. Const., Amdt. 9. As the second Justice Harlan recognized: "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

Id. at 847-48 (citing *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds). For the reasons set forth above and in Defendants' Memorandum In Opposition to Plaintiff's Motion To Show Cause, the "federal interference" with patients' proven rights to palliative treatment, to be free from pain, and to life-sustaining nutrients and medication

cannot survive such scrutiny.[3] Because the government cannot establish the necessary compelling governmental interest in prohibiting the use of medical cannabis, the Court should declare the Controlled Substances Act unconstitutional as applied to the Oakland defendants and dismiss the complaint.

B. Many Patient-Members Have A Fundamental Life Interest In Medical Cannabis.

The Due Process Clause of the Fifth Amendment, together with the Ninth Amendment, additionally protects the "life" of many of the patient-members of the defendant medical cannabis cooperatives, in addition to their "liberty," to the extent their very lives depend on availability of medical cannabis. "It cannot be disputed that the Due Process Clause protects an interest in life . . . ." *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 281 (1990). The Controlled Substances Act therefore is unconstitutional as applied to those patient-members of the Oakland Cooperative who, but for their access to medical cannabis, would die. Because defendants serve a vital function in preserving their patient-members' lives, this Court should find the Act unconstitutional as applied to the defendants and dismiss the complaint.

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[3] *See; e.g., Andrews v. Ballard*, 498 F. Supp. 1038, 1048 (S.D. Tex. 1980) ("the decision to obtain or reject medical treatment . . . is both personal and important enough to be encompassed by the right of privacy"); *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring) ("[T]he freedom to care for one's health and person" is constitutionally protected); *Washington v. Glucksberg*, __ U.S. __, 117 S. Ct. 2258, 2311 (1997) (Breyer, J., concurring) (recognizing core liberty interest in avoiding unnecessary and severe physical suffering).

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the government's complaint against the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones.

Dated: August 13, 1998

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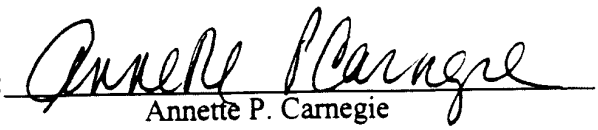
By: 
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OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98- 0089 CRB
C 98- 0245 CRB

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO SHOW CAUSE, AND FOR SUMMARY JUDGMENT IN CASES NO. C 98-0086 CRB; NO. C 98-0087 CRB; AND NO. C 98-0088 CRB

Date: August 31, 1998
Time: 2:30 p.m.
Courtroom: 8
Hon. Charles R. Breyer

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INTRODUCTION

By its motion, the government asks this Court to take the extraordinary step of summarily determining, without evidence, a hearing, or a jury, that defendants are guilty of violating the Court's Preliminary Injunction Order. The Constitution requires more, however. Before the government can obtain a show cause hearing, much less a finding of contempt, it must present a prima facie case, based at least upon clear and convincing evidence, of acts which constitute contempt. The government has failed to do so, and this Court should decline to issue an order to show cause.

The Court need not reach the issues raised by the government's motions, however. On July 28, 1998, the Oakland City Council passed an ordinance pertaining to medical cannabis. This ordinance provides immunity to defendants Jones and the Oakland Cannabis Buyers' Cooperative from federal civil or criminal liability. The case against these defendants is moot and should dismissed.

If, however, the Court deems it appropriate to set this matter for a show cause hearing, the defendants are entitled to a jury trial. The Court already has stated, and the government does not dispute, that a contempt trial should be by jury. Seeking to avoid that jury, the government now claims that there are no disputed issues of material fact concerning defendants' alleged contempt. Given this Court's explicit recognition that the "specific facts and circumstances" surrounding the alleged distribution of medical cannabis to patient-members must be examined, a summary determination of contempt cannot be made. Defendants are entitled to present their case to a jury. For this reason, the government's summary judgment motion must be denied.

Defendants believe that they have taken all reasonable steps to comply with this Court's Preliminary Injunction Order. This Court specifically recognized, and defendants sincerely believe, that the alleged distribution of medical cannabis to particular patients under particular sets of circumstances is subject to several defenses. Defendants thus are entitled to a hearing where a jury

may determine for itself whether defendants have disobeyed this Court's Preliminary Injunction Order.[1]

STATEMENT OF FACTS AND PROCEEDINGS

A. The Court's Order

On May 19, 1998, this Court issued a Preliminary Injunction Order ("Order"). The Order enjoined defendants from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, from using the premises for these purposes, and from conspiring to do the same—in violation of 21 U.S.C. §§ 841(a)(1), 846, and 856. Order at ¶¶ 1-3.

This Court's Memorandum and Order explicitly contemplated a jury trial to determine the validity of any subsequent allegations that the injunction had been violated. The Court stated: "[i]f the Court issues an injunction, *defendants have a right to a jury in any proceeding in which it is alleged that they have violated the injunction.*" Memorandum and Order dated May 13, 1998 ("Mem. Op. & Order") at 24 (emphasis added).

This Court specifically stated that the defendants may raise, at a jury trial, several defenses to any possible future allegations of contempt — including the medical necessity defense, a substantive due process defense, and the joint users defense. As to medical necessity, the Court stated:

> The Court is not ruling, however, that the defense of necessity is wholly inapplicable to these lawsuits. If a preliminary or permanent injunction is granted, and the federal government alleges that defendants have violated the injunction, *there will be specific facts and circumstances before the Court* from which the Court can determine if the jury should be given a necessity instruction as a defense to the alleged violation of the injunction. As such facts are not presently before the Court, it is premature for the Court to decide whether such a defense is available.

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[1] For the reasons stated in this memorandum and also in their separately filed Memorandum In Opposition To Plaintiff's Ex Parte Motion To Modify May 19, 1998 Preliminary Injunction Orders, defendants also request that the government's motion to modify the Preliminary Injunction be denied.

Id. at 21 (emphasis added). This Court further recognized that a substantive due process defense might be available "in a contempt proceeding where the trier of fact is presented with *a particular transaction to a particular patient under a particular set of facts.*" *Id.* at 23 (emphasis added). Finally, the Court cautioned "that it is not ruling that defendants are not entitled to [a joint users] defense at trial or in a contempt proceeding for violation of a preliminary or permanent injunction or that defendants could not as a matter of law defeat a motion for summary judgment with evidence of mere possession." *Id.* at 18-19.

B. The City of Oakland Ordinance

Since this Court's May 19, 1998 Order, the Oakland City Council has enacted an ordinance which renders the government's case against the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones moot. On July 28, 1998, the City Council of the City of Oakland unanimously passed "An Ordinance of the City of Oakland Adding Chapter 8.42 to the Oakland Municipal Code Pertaining to Medical Cannabis" ("Ordinance"). The Ordinance was passed to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes" and to "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes . . . are not subject to criminal prosecution or sanction." Ordinance, Section 1.A. The Ordinance also provides "immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code . . . ." Ordinance, Section 1.D.[2]

Pursuant to the Ordinance, the City of Oakland has established a Medical Cannabis Distribution Program. On August 12, 1998, the City Manager designated the Oakland Cannabis Buyers' Cooperative a "medical cannabis provider association" authorized to enforce the Ordinance. As such, the Oakland defendants are by definition "lawfully engaged in the enforcement of"

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[2] 21 U.S.C. § 885(d) provides:

> no civil or criminal liability shall be imposed by virtue of this subchapter upon any . . . duly authorized officer of any State, . . . political subdivision thereof, . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

California Health & Safety Code § 11362.5 and the Ordinance, "law[s] . . . relating to controlled substances[ ]". 21 U.S.C. § 885(d). They are immune from civil and criminal liability and their cases, therefore, should be dismissed.[3]

C. The Government's Contempt Allegations

The government's current motions seek a summary finding of contempt. The government has failed to allege, however, the evidence of "specific facts and circumstances" and "a particular transaction to a particular patient under a particular set of facts" contemplated by this Court. Instead, the government has submitted a series of conclusory affidavits, completely lacking in factual support, to support its request for a summary finding of contempt.[4] These allegations are fatally deficient and cannot be relied upon to initiate contempt proceedings.

ARGUMENT

I. THIS COURT SHOULD DENY THE GOVERNMENT'S REQUEST FOR AN ORDER TO SHOW CAUSE BECAUSE THE CONCLUSORY ALLEGATIONS OF CONTEMPT ARE FATALLY DEFICIENT.

To make a prima facie showing of contempt the government "must demonstrate that the alleged contemnor violated the court's order . . . ." *Go-Video, Inc. v. Motion Picture Ass'n of America*, 10 F.3d 693, 695 (9th Cir. 1993). In a civil contempt proceeding, this proof of contempt must be by clear and convincing evidence. *Id.* In a criminal contempt proceeding, the proof of contempt must be beyond a reasonable doubt. *United States v. Powers*, 629 F.2d 619, 626 n. 6 (9th Cir. 1980) Regardless of whether these proceedings are viewed as civil or criminal (See Section III *infra*) the government has failed to meet its burden of proof.

The government's moving papers fail to comply with the minimal procedural requirements for contempt proceedings set forth in Federal Rule of Criminal Procedure 42(b). *Powers*, 629 F.2d at

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[3] Defendants have filed a separate motion to dismiss concerning the immunity provided by the Ordinance. For the reasons stated in that motion, and incorporated by reference herein, the Court should dismiss the case as moot.

[4] Defendants have submitted concurrently herewith their objections and motion to strike the affidavits supporting the government's motions for the order to show cause and for summary judgment.

624. This Rule requires not only a reasonable time for the preparation of a defense, but also notice of the "essential facts constituting the criminal contempt charged. . . ." Fed. R. Crim. P. 42(b). "The purpose of notice is to inform the contemnor of the nature of the charge and enable the contemnor to prepare a defense." *Powers*, 629 F.2d at 625. Such notice is necessary in contempt proceedings because "reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence." *Taylor v. Hayes*, 418 U.S. 488, 498-99 (1974) (emphasis added) (requiring notice of "specific charges" in contempt proceedings). This Court itself noted that in any contempt proceeding in this case, the government would present "specific facts and circumstances." Mem. Op. & Order at 21.

The government's contempt allegations fail to satisfy the specificity and notice requirements of Rule 42(b) and this Court's Order. The government's only "evidence" consists of four conclusory and speculative declarations. For example, the Declaration of Mark T. Quinlivan does not cite any specific instance of an alleged violation of the Order. The Declaration of Peter Ott, Jr. opines without evidentiary foundation that he witnessed the distribution of marijuana. Neither Special Agent Nyfeler, nor Special Agent Arnold, who also submitted declarations, observed any alleged distribution or sale of anything at the defendant cooperatives.

Because the government's allegations are vague and conclusory, neither the Court nor the defendants know who is alleged to have purchased medical cannabis and when (other than the date) they are alleged to have done so. Defendants also are unable to rebut the government's vague and conclusory allegations for fear of criminal prosecution. Defendants thus cannot properly defend themselves against the government's charges. Because the government's declarations fail to comply with basic evidentiary standards, they cannot be relied upon, and do not provide a basis to issue an Order to Show Cause.

II. DEFENDANTS ARE IN GOOD FAITH AND SUBSTANTIAL COMPLIANCE WITH THE COURT'S ORDER.

In this Circuit, a party should not be held in contempt if its action "appears to be based on a good faith belief and reasonable interpretation of the [court's order]." *Go-Video, Inc.*, 10 F.3d at 695 (citations and quotations omitted). Moreover, "[s]ubstantial compliance with a court order . . . is

[also] a defense to an action for civil contempt." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986); *Go-Video*, 10 F.3d at 695. Defendants believe that the Oakland Ordinance also precludes a finding of contempt for the reasons stated in its separately filed Motion to Dismiss, and renders the government's case moot. If this Court finds, however, that the government has met its burden of establishing that defendants are in contempt of the Order, then defendants must be allowed to present detailed evidence that they are in good faith and substantial compliance with the Order. They rely on at least three defenses, *specifically left open by this Court*, to exempt themselves from liability for any acts alleged to violate 21 U.S.C. §§ 841, 846, and 856 and the Order. These defenses include medical necessity, substantive due process, and the joint users defenses.

A. Defendants Are Not In Contempt Because Any Cannabis They Distribute Is A Medical Necessity To Their Members.

The medical necessity defense includes the following elements: "(1) [defendants] were faced with a choice of evils and chose the lesser evil; (2) [defendants] acted to prevent imminent harm; (3) [defendants] reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) [defendants] had no legal alternatives to violating the law." *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991). The medical necessity defense is a specialized application of the common law defense of necessity available in federal prosecutions. 1 LaFave & Scott, *Substantive Criminal Law*, § 5.4(c)(7), pp. 631-33 (1986). Thus, contrary to the government's contention, medical necessity is available in prosecutions for marijuana distribution or possession as a corollary of the common law defense of necessity, and presents a factual question for the jury to determine in a particular case.

Defendants can establish each element of the medical necessity defense at trial. First, they are faced with a choice of evils. Cannabis cooperative members suffer from debilitating and deadly diseases, including cancer, AIDS, and glaucoma. *See* Declarations of Kenneth Estes, Yvonne Westbrook, David Sanders. Cannabis provides relief in numerous respects, including as a pain reliever, an anti-nauseant, and as an appetite stimulant. *See e.g.* Estes Declaration ¶ 7-10. For many patient-members, such as those experiencing debilitating pain, undergoing chemotherapy or

experiencing AIDS-related conditions, medical cannabis saves their lives. *See e.g.* Estes Declaration, Westbrook Declaration, Sanders Declaration.

Second, supplying cannabis to patient-members is necessary to avert severe pain, blindness, or imminent and life-threatening harm. Defendants believe that without medical cannabis, these members cannot survive their debilitating illnesses. *See e.g.* Estes Declaration, Westbrook Declaration, Sanders Declaration.

Third, there is clearly a direct causal relationship between defendants' supplying medical cannabis and the harm they seek to avert. Defendants can show that medical cannabis in fact alleviates the life-threatening symptoms of cooperative members. *See e.g.* Estes Declaration, Sanders Declaration, Westbrook Declaration.

Finally, defendants can show that there are no legal alternatives to the distribution of medical cannabis. Specifically, defendants can show that (1) their members have no legal or safe alternative to acquire medical cannabis from other sources; (2) other drugs do not work or they are not nearly as effective; and (3) a rescheduling petition already has been submitted to the relevant administrative agency; the Court has recognized the futility of awaiting a decision on that petition. Mem. Op. & Order at 20.

The government argues, however, that this Court should deny the defendants the right to present evidence concerning their medical necessity defense. In support of its argument, the government contends that (a) the medical necessity defense cannot be raised in contempt proceedings, (b) the Controlled Substances Act precludes the medical necessity defense, and (c) the medical necessity defense is inapplicable to the defendants' alleged conduct.

None of the government's arguments establish that the defendants are precluded from presenting at trial evidence of medical necessity. Moreover, because the defense requires an examination of sharply contested factual issues, the validity of the medical necessity defense cannot be determined in a summary proceeding and must be decided by a jury.

1. Defendants Are Entitled To Assert The Medical Necessity Defense In These Contempt Proceedings.

This Court already has recognized that the defense of medical necessity would be available in any proceedings alleging a violation of the Court's order:

> If a preliminary or permanent injunction is granted, and the federal government alleges that defendants have violated the injunction, there will be specific facts and circumstances before the Court from which the Court can determine if the jury should be given a necessity instruction as a defense to the alleged violation of the injunction.

Mem. Op. & Order at 21. The government has conveniently ignored this aspect of the Court's Order and now contends that defendants cannot raise the medical necessity defense in these proceedings. Gov't's Mot. at 13.

None of the government's cited cases hold that the medical necessity defense is unavailable in contempt proceedings. Gov't's Mot. at 13 (citing *Local 28 of the Sheet Metal Workers' Intern. Assoc. v. Equal Employment Opportunity Comm.*, 478 U.S. 421, 441 (1986)); *Walker v. City of Birmingham*, 388 U.S. 307, 315-20 (1967); *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948); *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947). These cases simply recognize the principle that a contempt proceeding does not open for reconsideration the legal or factual basis of the order alleged to have been disobeyed. *Maggio*, 333 U.S. at 69 citing *Mine Workers*; *Local 28*, 478 U.S. at 441 citing *Maggio* and *Walker*. None of these cases address the issue here, which is whether defendants are *in fact* in contempt for violation of the Order.[5]

The government also ignores the numerous decisions that recognize the availability of the medical necessity defense in prosecutions concerning marijuana. *United States v. Burton*, 894 F.2d 188 (6th Cir. 1990), the only published federal case to consider the defense of medical necessity in connection with the use of marijuana, did not question the applicability of the defense. Rather, the

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[5] The other cases cited by the government do not question the applicability of the necessity defense in contempt proceedings, but rather hold that the defense had not been established. *Morgan v. Foretich*, 546 A.2d 407, 411 (D.C. 1988), *cert. denied*, 488 U.S. 1007 (1989) (appellant failed to establish potential harm from compliance with court order) and *Commonwealth v. Brogan*, 415 Mass. 169, 175, 612 N.E.2d 656 (1993) (insufficient evidence to warrant submission of necessity defense to jury).

Court concluded that defendant had failed to establish one element of the defense. *Id.* at 191. *See also United States v. Randall*, 104 Daily Wash.L.Rptr. 2249, 2252 (D.C. Super. 1976) (glaucoma patient successfully asserted medical necessity defense to a charge of marijuana possession); *State v. Hastings*, 801 P.2d 563, 565 (Idaho 1990) (defendant presented a legitimate defense of medical necessity in marijuana prosecution; trier of fact would determine whether the elements had been met); *State v. Diana*, 604 P.2d 1312, 1316-17 (Wash. App. 1979) (medical necessity is encompassed in the common law defense of necessity and applies in the context of possession of marijuana; case remanded to allow trier of fact to determine whether defense established); *State v. Bachman*, 595 P.2d 287, 288 (Hawaii 1979) (medical necessity could be asserted as a defense to a marijuana charge in a proper case); *Jenks v. State of Florida*, 582 So.2d 676, 677 (Fla. Dist. Ct. App.), *review denied*, 589 So.2d 292 (Fla. 1991) (medical necessity defense applied to charge of possession of marijuana and was established by defendants); and *People v. Trippet*, 56 Cal. App. 4th 1532, 1538, *review denied*, 1997 Cal. LEXIS 8225 (1997) (assumed validity of medical necessity defense).

2. The Controlled Substances Act Does Not Preclude The Defense Of Medical Necessity.

It is well established that common-law defenses may be raised as defenses to a statutory crime. *United States v. Newcomb*, 6 F.3d 1129, 1134 (6th Cir. 1993) (holding necessity defense available to defendant charged with violations of federal firearm possession statutes). As the *Newcomb* court explained:

> [*United States v. Bailey*, 444 U.S. 394 (1980),] teaches that Congress's failure to provide specifically for a common-law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense. This conclusion is unassailable; statutes rarely enumerate the defenses to the crimes they describe. . . .

Newcomb, 6 F.3d at 1134.

State courts also have held, consistent with *Newcomb* and *Bailey*, that the defense of medical necessity in cannabis possession cases is not precluded by the fact that the state legislature may have placed cannabis in a category analogous to Schedule I of section 812 of the Federal Controlled Substances Act. For example, in *Jenks*, the court of appeal reversed a lower court decision to

preclude the defense of medical necessity in a case involving marijuana cultivation and possession of drug paraphernalia. The *Jenks* court ruled that the defense should have been allowed even though the Florida legislature had placed marijuana on its Schedule I, which is analogous to Schedule I of section 812. The court concluded: "the defense [of medical necessity] was recognized at common law and that there has been no clearly expressed legislative rejection of such defense." *Id.* at 678. The court continued, "It is well-established that a statute should not be construed as abrogating the common law unless it speaks unequivocally, and should not be interpreted to displace common law more than is necessary." *Id.* at 67.[6]

This Court has recognized that, consistent with the rule permitting such defenses, defendants are entitled to present at trial a common law defense to the government's charges. The government argues, however, that the provisions of the Controlled Substances Act require a departure from this general rule. Nothing in the Controlled Substances Act prohibits the medical necessity defense.

The government's argument confuses a determination on a petition to reschedule a controlled substance pursuant to 21 U.S.C. §811 with a party's ability to present a common law necessity defense to a statutory crime. The cases relied upon by the government simply hold that a court should not determine whether marijuana should be reclassified pursuant to § 811(a). *See* Gov't's Mot. at 16-17 and note 10. Indeed, the case upon which the government principally relies, *United States v. Burton*, 894 F.2d 188 (6th Cir. 1990), implicitly recognized the validity of the medical necessity defense. Although the *Burton* court stated that "*reclassification* is clearly a task for the

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[6] The government also relies upon state court cases interpreting state legislation, not the federal Controlled Substances Act, to support its argument that Congress precluded common law defenses to controlled substances violations. These state cases are distinguishable, however, because, unlike Congress, the state legislatures had expressly considered the applicability of defenses to marijuana possession or distribution. See e.g. *State v. Tate,* 102 N.J. 64, 71, 505 A.2d 941 (1986) (medical necessity defense unavailable where defendant did not have statutorily required valid prescription). See also *State v. Cramer* 174 Ariz. 147, 149, 851 P.2d 522, 524, 534 (Ct. App. 1992) (medical necessity defense not available to defendant where "Legislature has addressed exceptions and exemptions [to its criminal possession laws] in detail by statute... and concluded[d] that unlawful possession of marijuana does not fall within those protected categories"); *Kauffman v. State,* 620 So.2d 90, 92 (Ala. Crim. App. 1992) (defendant's quadriplegia did not fall within enumerated exceptions).

legislature and the attorney general and not a judicial one[,]" it did *not* hold that Congress precluded the medical necessity defense in the context of medical cannabis. *Id.* at 192 (emphasis added). To the contrary, the *Burton* court held that the defense was unavailable on the facts because the defendant could have enrolled himself in a government program to study the effects of marijuana on glaucoma sufferers. *Id.* at 191. The remaining federal courts of appeals cases the government cites in this context are similarly inapposite. *See* Gov't's Mot. at 16-17 and note 10.

3. The Defense Of Medical Necessity Applies To Distribution Of Medical Cannabis By Cannabis Cooperatives.

This Court's Order implicitly recognizes that a medical necessity defense must be available to entities such as the defendant cooperatives. The government asserts, however, that as a matter of law the medical necessity defense is not available to the defendants because they distribute, rather than possess, marijuana. This argument is senseless. Distribution is the necessary antecedent to possession. If possession is legally justified as to a person for whom medical cannabis is a necessity, then so too is distribution to this person. "The 'right to obtain' marijuana is, of course, meaningless if it cannot legally be satisfied." *Lungren v. Peron*, 59 Cal. App. 4th 1383, 1401 (1997) (Kline, J., concurring), *review denied*, 1998 Cal. LEXIS 1321 (1998).

The necessity defense necessarily embodies the principle that otherwise unlawful conduct may be justified when undertaken to prevent harm to a third party. See *Aguilar*, 883 F.2d at 693 (necessity defense applies when defendant chose lesser evil); *see also United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984) ("The defense of necessity is usually invoked when the defendant acted in the interest of the general welfare"); *United States v. Simpson*, 460 F.2d 515, 517-18 (9th Cir. 1972) ("[t]he theoretical basis of the justification defenses is the proposition that, in many instances, society benefits when one acts to prevent another from intentionally or negligently causing injury to people or property"). Thus, the act of distributing medical cannabis to prevent imminent harm to a third party clearly falls within the parameters of the necessity defense.

The government also argues that in order to make out a medical necessity defense, under *United States v. Bailey*, 444 U.S. 394 (1980), the defendants "must demonstrate that they have made a bona fide effort to comply with section 856(a)(1) 'as soon as the claimed duress or necessity has

lost its coercive force[,]'" Gov't's Mot. at 18 (citing *Bailey*, 444 U.S. at 413). This argument makes no sense in the context of medical necessity.

Bailey, a prison escapee case, is inapposite. *Bailey* requires that, in order to establish a necessity defense, a prison escapee must introduce evidence of having made a "bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." *Bailey*, 444 U.S. at 413. Assuming *arguendo* that this element applies to the non-prison escapee case, defendants have no trouble establishing this element of the defense. The declarations submitted herewith establish that patient-members with a *current* medical necessity receive cannabis. *See, e.g.*, Estes Declaration, Sanders Declaration. Conditions such as cancer, HIV, glaucoma, and quadriplegia do not subside readily, if ever. For most patients, these conditions never lose their "coercive force," the way a prisoner's conditions may change. *Id.* And even if the medical condition were mercifully to subside for one patient on a given day, even *Bailey* would not require the defendant cooperatives to close their doors to all other patient-members who still medically require the cannabis.

4. There Are No Reasonably Available Alternatives To Defendants' Distribution Of Medical Cannabis.

The government has posited various procedural alternatives to continuing to provide medical cannabis to patients in need. The defendants have not pursued these theoretical avenues, however, for the simple reason that they believe they are in compliance with this Court's Preliminary Injunction Order (as explained in the Court's Memorandum and Opinion). While the government asserts that "'[t]he defendant's avenue of relief is to challenge or seek to modify the court order, not to violate it[,]'" Gov't's Mot. at 20, the defendants herein, who do not believe they violated any Court order, have had no reason to seek the relief suggested by the government.

Moreover, defendants are entitled to show in any contempt proceedings that there were no viable alternatives to their alleged conduct. Defendants are entitled to submit evidence that for most patient-members no other medicine provides the same effective relief in such a safe and reliable manner. Alternative medications either do not work or they have such significant adverse side effects that patients cannot use them. Moreover, no drug works as expeditiously as medical cannabis. For

some patient-members, medical cannabis saved their lives when it is doubtful any other drug would have.

B. Defendants Are Not In Contempt Because Application Of The Controlled Substances Act Violates Their Patient-Members' Substantive Due Process Rights.

The United States Supreme Court has established that individuals are protected under the Due Process clauses of the Fourteenth and Fifth Amendments from state or federal infringement upon their "fundamental liberty interests." As Justice Rehnquist recently described in *Washington v. Glucksberg*, ___ U.S. ___, 117 S. Ct. 2258 (1997):

> The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint . . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.

Glucksberg at 2267 (citations omitted). In applying substantive due process analysis, the Chief Justice in *Glucksberg* explained that where a fundamental liberty interest is involved, government action must be "narrowly tailored to serve a compelling [government] interest." *Id.* at 2268.

The government's application of the Controlled Substances Act to the distribution of medical cannabis violates the substantive due process rights of defendants' patient-members to be free from unnecessary pain, to receive palliative treatment for a painful medical condition, to care for oneself and to preserve one's own life. As this Court recognized, defendants are entitled to present evidence of this defense in a contempt trial.[7]

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[7] Defendants clearly have standing to assert the due process rights of their patient- members. *See Singleton v. Wulff*, 428 U.S. 106, 114, 115-116, 96 S. Ct. 2868 (1976) (recognizing physician's right to assert privacy rights of female patients in abortion case because of closeness of relationship and obstacles faced by women in asserting right).

1. Defendants' Patient-Members Have A Substantive Due Process Interest In Receiving Medical Cannabis.

Defendants assert Constitutional protection from the federal government's interference with patient-members' right legally to obtain medical cannabis, with a doctor's recommendation, for treatment of painful and life-threatening medical conditions. Defendants can show that their patient-members have medical conditions for which a physician has recommended treatment with cannabis. Without the treatment some will suffer pain, some will risk blindness, and others will die by wasting away. The only barrier to this treatment is the broad federal proscription against the distribution of marijuana. For three separate and independent reasons, the interests asserted by defendants are fundamental rights that are protected by the Constitution.

First, there is no liberty more firmly established than the fundamental interest to be free from physical pain imposed by the government for arbitrary and capricious reasons. The Supreme Court has continuously and persistently measured and evaluated substantive due process claims in terms of the physical pain imposed upon the individual by government restraints. *See e.g. Furman v. Georgia*, 408 U.S. 238 (1972) (substantive due process implicated where death penalty imposed under a method inflicting "unnecessary pain"); *Cruzan v. Director, MDH*, 497 U.S. 261 (1990) (pain suffered by patient in persistent vegetative state relevant to inquiry of fundamental interest to deprive oneself of nutrition and hydration); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) ("anxieties," "physical constraints," and "pain" of women carrying child to term basis of substantive due process right to elect abortion); and *Washington v. Glucksberg*, ___ U.S. ___, 117 S. Ct. 2258 (1997) (terminally ill patient rights to palliative treatment implicate substantive due process).

The concurring opinions in *Glucksberg* also suggest that substantive due process protects an individual's right to obtain medical treatment to alleviate unnecessary pain. Justice O'Connor's opinion makes clear that suffering patients are presumed to have access to any palliative medication that would alleviate pain even where such medication might hasten death. "[A] patient who is suffering from a terminal illness and who is experiencing great pain has *no legal barriers* to obtaining medication, from qualified physicians." *Glucksberg*, at 2303 (emphasis added).

Similarly, Justice Breyer's concurrence suggested that a "right to die with dignity" would include a right to "the avoidance of unnecessary and severe physical suffering." *Glucksberg* at 2311 (J. Breyer, concurring). "This liberty interest in bodily integrity was phrased . . . by [Justice] Cardozo when he said, '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body' in relation to his medical needs." *Glucksberg* at 2288 (Souter, J., concurring).

Justice Stevens asserted with regard to the protected "sphere of substantive liberty":

> Whatever the outer limits of the concept may be, it definitely includes protection for matters "central to personal dignity and autonomy." It includes, "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition.

Glucksberg, at 2307 (Stevens, J., concurring) (citation omitted) (emphasis supplied).

Finally, Justice Stevens observed that "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'" *Glucksberg* at 2307 (quoting *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 851 (1992).

Second, defendants' patient-members have an established fundamental interest in *the right to provide care for oneself.* The Supreme Court has found due process interests in preserving life and caring for oneself. *Deshaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189, 200 (1989). Although this right is usually implicated where an individual is incarcerated and does not have access to necessary medical treatment, the argument is equally applicable to a situation where the government denies medical treatment by enacting laws proscribing such treatment:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other *similar restraint of personal liberty*—which is the "deprivation of liberty" triggering the protections of the Due Process Clause.

Deshaney, 489 U.S. at 200 (citation omitted) (emphasis supplied).

The government's restraint on the distribution of cannabis prevents patient-members from obtaining medical care for themselves. This restraint is particularly egregious where the treatment sought is that to alleviate pain.

Third, patient-members have a an unquestionable and firmly rooted liberty interest in preserving their lives. As the Supreme Court explained in *Cruzan*, *supra*, "[i]t cannot be disputed that the Due Process Clause protects an interest in life." *Cruzan*, at 281. Defendants can show that many patient-members would find their lives needlessly placed in jeopardy were they denied the right to the medical use of cannabis. For example, many chemotherapy patients and AIDS patients are so plagued with nausea and discomfort that they are unable to eat. Without basic nourishment, their conditions are aggravated and they are essentially at risk of starving to death.

For all of these reasons, the government's actions plainly infringe upon the well-established fundamental rights of defendants' patient-members. Accordingly, the government bears the heavy burden of justifying these restrictions. As discussed below, the government cannot meet this burden.

2. The Broad Federal Proscription Against Distribution And Use Of Medical Cannabis Is Not Narrowly Tailored To Meet A Compelling Government Interest.

Where fundamental liberty interests have been demonstrated, any restraint on those interests must be narrowly tailored to serve a compelling state interest. *Glucksberg* at 2268. The federal proscription against the possession and distribution of medical cannabis is unnecessarily overbroad and arbitrary where it restrains the terminally ill and others in chronic pain from obtaining an essential medication to alleviate their pain and in some cases contribute to the preservation of life. *See Andrews v. Ballard*, 498 F. Supp. 1038, 1044-1051, 1052, 1056 (S.D. Tx. 1980) (recognizing constitutional right to obtain medical treatment for pain and holding that state restriction on availability of acupuncture was not narrowly drawn to further compelling state interest).[8]

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[8] Even if the patient-members' rights are not deemed fundamental (*see Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980)), the government still cannot meet its burden of justifying its arbitrary restriction on this life-saving medication.

The government has a legitimate interest both in assuring that appropriate medicines are made available, and in stemming the abuse of controlled substances. The government cannot show, however, that a blanket prohibition, disregarding the medical needs of seriously ill persons, furthers any legitimate interest. In the case of numerous other substances, the government has acted to provide for medical use while limiting abuse. In the case of medical cannabis, however, the means employed by the government abysmally fail to accomplish the government's purposes and are therefore an affront to the concept of substantive due process.

C. Defendants Are Not In Contempt Because Their Patient-Members Are Joint Users Of Medical Cannabis.

The government cannot obtain a summary finding of contempt or summary judgment because defendants are entitled to present to a jury evidence concerning the joint users defense. This Court has recognized that the joint users defense may be asserted in contempt proceedings and may defeat a motion for summary judgment:

> The Court cautions, however, that it is not ruling that defendants are not entitled to such a defense at trial or in a contempt proceeding for violation of a preliminary or permanent injunction, or that defendants could not as a matter of law defeat a motion for summary judgment with evidence of mere possession. The Court's ruling is narrow.

Mem. Op. & Order at 18-19.

The Preliminary Injunction prohibits the unlawful distribution of cannabis by the defendants, not its mere possession, however unlawful. In *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), the Court held that defendants who jointly purchase drugs and share them among themselves are not engaged in "distribution" within the meaning of the Controlled Substances Act. The *Swiderski* court applied the defense to the simultaneous purchase and immediate consumption by a husband and wife.

Swiderski's rationale applies with equal force to the use of medical cannabis in compliance with state and local laws. Judicial resistance to expansion of the *Swiderski* doctrine clearly has been based on concerns about its possible use as a "cover" for illicit drugs. Those concerns are not present in this context, however. Just as in *Swiderski*, no one other than the copurchasers is involved in the use of the medical cannabis. The members are not drawn into drug use through the defendants;

rather, they seek the cannabis to alleviate their serious medical conditions, and receive a doctor's approval to do so. These individuals are not using cannabis for recreational purposes. They are merely attempting to alleviate their painful ailments. No "distribution" takes place because the cooperatives and their patient-members jointly acquire the cannabis for medical purposes to be shared among themselves and not with anyone else.

The Oakland defendants can establish that when the use of medical cannabis is shared by members of the Oakland Cannabis Buyers' Cooperative, the participants agree to the following statement of conditions:

> The Oakland Cannabis Buyers' Cooperative would like to assure all Members that the Cooperative will continue to operate in the good faith belief that it is not engaging in the distribution of cannabis in violation of law. Federal law excludes from the definition of "distribution" the joint purchase and sharing of controlled substances by users. As a Member of the Oakland Cannabis Buyers' Cooperative, you are a joint participant in a cooperative effort to obtain and share medical cannabis. Each transaction in which you participate is not a "sale" or "distribution," but a sharing of jointly obtained medical cannabis. If you make a payment to the Cooperative, such payment is a reimbursement for administrative expenses and operations, which all Members who utilize the services of the Cooperative agree to share.

Oakland Cannabis Buyers' Cooperative Statement of Conditions.

The Oakland defendants can further establish that the sharing of jointly purchased medical cannabis is conducted in complete conformity with state law requiring medical approval, and with local regulations that govern the use of medical cannabis. Immediate consumption in each other's presence is precluded by a prohibition of consumption of cannabis on the premises of a cannabis dispensary.

The Oakland defendants can demonstrate that no third persons are involved other than "primary caregivers," and that no one else is brought into a "web" of drug use. Evidence will establish that the joint users are bound together by a shared commitment to the alleviation of each other's pain and compassion for each other's suffering.

Thus, all of the circumstances that led the *Swiderski* court to recognize the joint user defense can be established by the evidence, and all elements of the defense can be proven to a jury's satisfaction. The jury should be instructed that the Order does *not* preclude mere possession of

medical cannabis, even if unlawful, and that the joint use of medical cannabis under the heavily regulated and controlled circumstances of this case is simple possession of the substance, not distribution.

III. IF THIS COURT ISSUES AN ORDER TO SHOW CAUSE, THE CONTEMPT TRIAL MUST BE BY JURY.

A. Defendants Are Entitled To A Jury Trial In These Quasi-Criminal Proceedings.

The government 's assertion that it seeks civil sanctions in civil contempt proceeding is a transparent attempt to deprive defendants of their right to a jury trial. The government's reasoning is flawed however. The contempt here is charged under criminal statutes authorizing criminal penalties of up to 25 years in prison and $250,000 to $1,000,000 in fines. 21 U.S.C. § 841(b)(1)(D) Thus, regardless of the self-serving label that the government ascribes to these proceedings, defendants are entitled to a trial by jury. *See, e.g., Powers*, 629 F. 2d at 627 (no distinct line can be drawn between civil and criminal contempt); *Whittaker Corp. v. Execuair Corp.*, 953 F. 2d 510, 518 (9th Cir. 1992) (sanctions reviewed under procedural requirements for criminal contempt where elements of both criminal and civil contempt are present).[9]

This case represents one of the rare situations in which the federal government has sought an injunction to enforce federal *criminal* laws under 21 U.S.C. 882(b). *See* Mem. Op. & Order at 23 ("The Court has located only five published opinions in which the federal government sought relief based on the statute"). In this unique situation, regardless of what punishment the government seeks or the Court may impose, the defendants have a Sixth Amendment a right to a jury trial on the contempt charges. As the Court stated in *United States v. Rylander*, 714 F.2d 996 (9th Cir. 1983) "[i]f the contempt is charged under a statute that authorizes a maximum penalty greater than $500 or six months' imprisonment, there is a right to a jury trial *regardless of the penalty actually imposed.*"

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[9] The government in fact appears to be seeking criminal contempt, noting that "[t]he federal courts have wide discretion in the choice of remedies for civil contempt[,]" (Gov't's Motion at 9) and it appears to call for criminal punishment for past acts, claiming that "stringent coercive remedies are in order." *Id.* at 22. The Court therefore should also require that the government prove contempt beyond a reasonable doubt.

Rylander, 714 F.2d at 1005 (emphasis added); *see also Bloom v. Illinois*, 391 U.S. 194, 211 (1968) (sixth and fourteenth amendments require jury trial for prosecutions for criminal contempt punishable by more than $500 or six months' imprisonment). The Supreme Court in *Bloom* reasoned, "[i]f the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases." *Bloom*, 391 U.S. at 208. Since the federal criminal statutes at issue here authorize maximum penalties far greater than $500 and six months' imprisonment, a jury trial is required should this Court issue an order to show cause.[10]

B. Defendants Are Entitled To A Jury Trial Even In A "Civil" Contempt Proceeding.

This Court stated throughout its Memorandum and Order that a jury would be the trier of fact in any future contempt proceedings: "In *any* contempt proceeding, the Court will determine the appropriate number of jurors, up to twelve, which still must return a unanimous verdict. . . ." Order at 24 (emphasis added). This statement is entirely consistent with the law of this circuit: "[I]n this circuit the procedural safeguards available in criminal contempt proceedings under Fed. R. Crim. P. 42(b) apply also to civil contempt proceedings." *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 495 (9th Cir. 1983); *see also Powers*, 629 F.2d at 624 (same). Fed. Rule Crim. Pr. 42(b) provides in pertinent part that a defendant in contempt proceedings "is entitled to a trial by jury in any case in which an act of Congress so provides." Fed. R. Crim. P 42(b). The act of Congress which governs these proceedings provides that "[i]n case of an alleged violation of an injunction or restraining order issued under this section, *trial shall*, upon the demand of the accused, *be by jury* in accordance with the Federal Rules of Civil Procedure." 21 U.S.C. § 882(b) (emphasis added). This Ninth Circuit rule ensuring a jury trial to an alleged contemnor charged under an act of Congress

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[10] *International Union, UMWA v. Bagwell*, 512 U.S. 821, 833-34 (1994) is not inconsistent with this conclusion. While that case held that neither a jury trial nor proof beyond a reasonable doubt are required in civil contempt proceedings, it also stated that "[c]ontempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable fact-finding[;] . . . [u]nder these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." *Id.* at 833-34.

which so provides is straightforward and unambiguous and requires that defendants receive a trial by jury.

IV. THE COURT SHOULD DENY THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT.

For the reasons stated in defendants' separately filed Motion to Dismiss, and incorporated by reference herein, defendants believe that the government's case should be dismissed. Accordingly, the Court need not reach the issues raised by the government's request for summary judgment. In any event, the recent enactment of the Oakland Ordinance precludes the entry of summary judgment on the government's vague and conclusory allegations of contempt.

The threshold inquiry in summary judgment motions is "determining whether there is the need for a trial - whether, in other words, there are any factual issues that can be properly resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Defendants have identified a multitude of facts, based on the defenses expressly left open by this Court, that illustrate the presence of genuine issues requiring a trial. Thus, the government's assertion that summary judgment is appropriate here should be rejected by this Court.

Summary judgment is particularly inappropriate in contempt proceedings. The Supreme Court has declared that: "[s]ummary adjudication of indirect [i.e., out of court] contempts is prohibited . . . ." *International Union, UMWA v. Bagwell*, 512 U.S. 821, 833 (1994). Indeed, the *only* circumstance under which this Court envisioned it might consider the government's motion for summary judgment in a contempt proceeding would be if there were *no* material issues of fact and if "*no* reasonable jury could find for the nonmoving party." Mem. Op. & Order. at 24 (citing *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)) (emphasis added).[11] That circumstance does not exist here.

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[11] The other cases cited by the government are inapposite because they too are limited to circumstances where no material issues of fact are in dispute. *See, e.g., Morales-Feliciano v. Parole Bd.*, 887 F.2d 1, 6-7 (1st Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990) (no disputed factual matters);

(Footnote continues on following page.)

As demonstrated in Section II *supra*, there are many material issues of fact in dispute concerning each and every element of the defenses specifically left open by this Court. The issue here is not simply whether defendants have distributed medical cannabis; it is whether and, if so, *under what circumstances and to whom* defendants have distributed medical cannabis. The government has conveniently overlooked these sharply contested factual issues.

CONCLUSION

Defendants are in good faith and substantial compliance with the Court's Order. The recently enacted Oakland Ordinance provides immunity to the Oakland defendants and requires dismissal of the government's case against them. The conclusory allegations offered by the government simply do not provide a basis for the issuance of an order to show cause. Even if the Court concludes that the government's allegations are sufficient, defendants are entitled to a jury's determination of the specific facts and circumstances concerning their alleged contempt, and of the applicability of any defenses to those charges.

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(Footnote continued from previous page.)

Commodity Futures Trading Comm'n v. Premex, Inc., 655 F.2d 779, 782 n. 2 (7th Cir. 1981) (alleged contemnors "failed to demand [a show cause hearing] . . . and did not present any arguments which created any material issue of fact"); *New York State Nat'l Org. for Women v. Terry*, 697 F. Supp. 1324, 1330, 1330 n. 6 (S.D.N.Y. 1988) (parties stipulated to facts); *Parker Pen Co. v. Greenglass*, 206 F. Supp. 796, 797 (S.D.N.Y. 1962) (alleged contemnor did not main factual contention).

For these reasons, defendants respectfully request that the Court grant defendants' motion to dismiss, and deny the government's motion for an order to show cause, for summary judgment, and for modification of the Preliminary Injunction Order.

Dated: August 13, 1998

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SIGNATURE PAGE

The undersigned counsel, on behalf of UKIAH CANNABIS BUYER'S CLUB, CHERRIE LOVETT, MARVIN LEHRMAN, and MILDRED LEHRMAN, hereby submits the foregoing DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO SHOW CAUSE, AND FOR SUMMARY JUDGMENT IN CASES NO. C 98-0086 CRB; NO. C 98-0087 CRB; AND NO. C 98-0088 CRB.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. AND RELATED ACTIONS.	No. C 98-0085 CRB C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S EX PARTE MOTION TO MODIFY MAY 19, 1998, PRELIMINARY INJUNCTION ORDERS IN CASES NO. C 98-0086 CRB; NO. C 98-0087 CRB; AND NO. C 98-0088 CRB** Date: August 31, 1998 Time: 2:30 p.m. Courtroom: 8 Hon. Charles R. Breyer

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By its *ex parte* motion, the government asks this Court to ignore the well-established contempt process and to relinquish to law enforcement officers the Court's power to determine whether defendants are in contempt of its Preliminary Injunction Order. This Court previously has denied the government's request to modify the Order. Because the government fails to allege any change in circumstances since its last request, the government's motion should be denied.

As is set forth more fully in Defendants' Memorandum In Opposition To Plaintiff's Motion To Show Cause, And For Summary Judgment, all defendants categorically deny the alleged violations of the Preliminary Injunction Order. In fact, the government has failed to satisfy its burden of presenting evidence to this Court of any violation of the Preliminary Injunction Order. If and when the government presents a prima facie case of contempt, the defendants would be entitled to a jury trial to determine whether they are in contempt of the Order. At trial, defendants would be entitled to present evidence on all defenses specifically left open by this Court in its Memorandum and Order of May 13, 1998. Only if a contempt finding is made would it become appropriate to consider the issue of enforcement of the injunction. Yet, with this motion the government seeks enforcement for something it has not appropriately alleged, much less proven at trial.

STATEMENT OF FACTS AND PROCEEDINGS

On May 13, 1998, this Court issued a Memorandum and Order in which it granted the government's request for a preliminary injunction enjoining defendants' activities. Memorandum and Order dated May 13, 1998 ("Mem. Op. & Order") at 26-27. The Court invited the parties "to file a written submission" with the Court with any comments or revisions "as to the form of the [proposed preliminary injunction] order." Mem. Op. & Order at 27. On May 18, 1998, both parties submitted written responses. *See* Defendants' Submission Re: Proposed Order for Preliminary Injunction, dated May 18, 1998, and Plaintiff's Response to Memorandum Opinion and Order, dated May 18, 1998, ("Plntf's Resp. Mem. Op. & Order). In its response, the government requested the Court to include the following language in the Preliminary Injunction Order:

> Disobedience of the Preliminary Injunction or resistance to this Court's order may subject any Defendant or person within the scope of this Preliminary Injunction to prosecution for contempt of Court and the

> imposition of such sanctions as the Court deems proper. The United States Marshal is empowered to enforce this Preliminary Injunction including, but not limited to, effectuating closure of the defendant cannabis clubs.

Plntf's Resp. Mem. Op. & Order at 3. On May 19, 1998, the Court issued its Preliminary Injunction Order, rejecting the government's request to include the language above.

On July 6, 1998, the government filed the current Plaintiff's *Ex Parte* Motion to Modify May 19, 1998, Preliminary Injunction Orders in Cases No. C98-0086 CRB, No. C98-0087 CRB, And No. C98-0088 CRB ("Government's *Ex Parte* Motion") seeking the same relief requested on May 18, 1998. By its motion, the government again requests this Court to modify the Preliminary Injunction Order to authorize the United States Marshals to "enter the [defendants'] premises . . . at any time of day or night, evict any and all tenants, inventory the premises, and padlock the doors, until such time as the defendants can 'satisfy [the Court] that [they are] no longer in violation of the injunctive order .' . . ." Government's *Ex Parte* Motion at 5.

ARGUMENT

I. THIS COURT'S CONTEMPT POWERS SHOULD NOT BE RELINQUISHED TO LAW ENFORCEMENT OFFICERS.

As this Court is aware, injunctions are enforced through the district court's civil contempt power. *See, e.g., In Re Grand Jury Proceedings*, 142 F.3d 1416, 1998 U.S. App. LEXIS 12629, *21 (11th Cir. 1998). While "[t]he inherent power of the courts to punish contempt of their authority and to coerce compliance with orders is not disputed[,]" the court's powers "are defined by statute and limited by the requirements of due process." *United States v. Powers*, 629 F.2d 619, 624 (9th Cir. 1980). A plaintiff seeking to obtain a defendant's compliance with the provisions of an injunction must "move[] the court to issue an order requiring the defendant to show cause why [it] should not be held in contempt and sanctioned for . . . noncompliance." *In Re Grand Jury Proceedings*, 1998 U.S. App. LEXIS at *21. Thereafter, if the court is satisfied that "the plaintiff has made out a case for an order to show cause," it issues such an order. *Id.* at 21-22. After the defendant files a response, the dispute is resolved at a show cause hearing. *Id.* at 22. At the hearing, the plaintiff is required to

present evidence of contempt by at least clear and convincing evidence before the court may find a defendant in contempt. *Powers*, 629 F.2d at 626 n.6.

The government seeks to put the cart before the horse when it asks this Court by this *ex parte* motion to find summarily that the defendants are *in fact* violating the Preliminary Injunction Order and to empower the United States Marshals to evict defendants from their premises and to padlock their doors. Due process of law does not, however, permit such summary sanctions for disobeying an injunction absent a finding of contempt.

> Due process of law . . . in the prosecution of contempt . . . requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation . . . includ[ing] the assistance of counsel . . . and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.

Cooke v. United States, 267 U.S. 517, 537 (1925); *see also United States v. Alter*, 482 F.2d 1016, 1023 (9th Cir. 1973) (alleged contemnor has a "paramount due process right . . . to have adequate notice and a fair opportunity to defend himself").

The government asserts no extraordinary circumstances that would compel this Court to summarily sidestep the due process protections of a show cause hearing. Indeed, not one case cited by the government supports the proposition that the Court's contempt power should be ceded to law enforcement authorities. In fact, the authorities the government cites suggest that a contempt hearing is *required* before the Court should consider such a drastic modification of its Order.

For example, the government indiscriminately borrows the language for its proposed modification from *Lance v. Plummer*, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966), without any reference to its facts or to its specific legal holding. *Plummer* involved an appeal of a judgment of civil contempt *after a civil contempt hearing*, and an appeal of the underlying injunction. *Id.* at 587. *Plummer* did not address empowering United States Marshals to enforce an injunction. Nor did either party in *Plummer* request the court to modify its original injunction. The Fifth Circuit upheld both the injunction and the contempt sanction as within the civil powers of the court, stating:

> [S]ince sanctions imposed in civil contempt proceedings must always give to the alleged contemnor the opportunity to bring himself into compliance, the sanction cannot be one that does not come to an end when he repents his past conduct and purges himself. . . . The [contempt sanction] . . . should last only until [the alleged contemnor] should satisfy the trial court that he was no longer in violation of the injunctive order and that he would in good faith thereafter comply with the terms of the order.

Id. at 592. Thus, *Plummer* supports the defendants' position that, provided the government can present a prima facie case of noncompliance, a contempt trial is required before enforcement options should even be considered. If, and only if, a contempt sanction is issued, would it then become the duty of the contemnor to "satisfy the trial court that he was no longer in violation of the injunctive order" before relief from the sanction would be granted. *Id.*

The government also seeks support for its modification request from two cases concerning the application of the Freedom of Access to Clinic Entrances Act ("FACE")[1] to facts very different from those in the case at bar. In *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995), the government sought a preliminary injunction against the director and certain members of Operation Rescue from using force or threats of force to interfere with or intimidate a reproductive health doctor (who performed abortions) or his wife. *Id.* at 1424. In 1989, those same defendants had previously been found in contempt for violating another similar preliminary injunction, and had previously been convicted of resisting arrest. *Id.* at 1430-31. The Court recognized the many past acts of violence

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[1] Congress enacted the Freedom of Access to Clinic Entrances Act in 1993 to protect women's abilities to exercise their rights of abortion and to protect a person's right of religious freedom and access to places of religious worship. 18 USCS § 248 (1998). Because of the violent nature of some groups' opposition to the exercise of a woman's right to choose and the importance of the constitutional rights of privacy and of the free exercise of religion, FACE specifically authorizes courts to award "appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages" to any person aggrieved under any subsection of the act. *Id.*

against abortion providers,[2] and the Court made specific factual findings based on testimony and documents of numerous acts of violence and threatened violence against the doctor and his wife. *Id.* at 1430-32. Moreover, the Court found that local law enforcement had limited resources to devote to this problem, *id.* at 1432, and that the doctor and his wife lived in a rural and remote area where the defendants and others had gathered to demonstrate and harass the doctor most Friday mornings at 7:00 a.m. *Id.* at 1431. As part of its preliminary injunction prohibiting certain contact with the doctor or his wife, the Court stated that "*[d]ue to the remoteness of Dr. Morris' residence*, the Court hereby empowers both the United States Marshals and the San Bernardino Sheriff's Department with the authority to enforce this preliminary injunction and arrest violators for willful violations. . . ." *Id.* at 1440 (emphasis added). In this case, by contrast, this Court is presented neither with any violence or threats of violence, nor with a remote locale, nor with local law enforcement's strained resources.

The government's reliance upon *United States v. Roach*, 947 F. Supp. 872 (E.D. Pa. 1996), another case applying FACE, is similarly misplaced. When it issued its preliminary injunction,[3] the *Roach* Court specifically limited the Marshals' powers only (1) to communicate the terms of the Court's order to potential violators, (2) to *immediately report to the Court and plaintiff's counsel* events and circumstances showing a violation, (3) to keep good records of any violations, and (4) *if ordered by the Court*, and authorized by law, to detain for purposes of identification and investigation, and for purposes of transporting them to be brought before the Court, those persons *determined by the Court based upon good cause shown*, to have violated any term of the Order. *Id.* at 878. The Court in *Roach*, therefore, expressly maintained its authority to make any ultimate

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[2] These included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder between 1977 and 1993. *White*, 893 F. Supp. at 1426.

[3] Unlike here, neither *Roach* nor *White* involved a request to modify a preliminary injunction, but rather the original preliminary injunction itself.

contempt finding. Thus, neither *Roach* nor any case cited by the government supports the government's request that this Court relinquish its contempt power to law enforcement officers.

The clear purpose of the government's request to modify the injunction is to punish defendants' "[d]isobedience of the Preliminary Injunction or resistance to this Court's order" by calling in the United States Marshals. Government's *Ex Parte* Motion at 2. The government's complaint concerns as yet unsubstantiated allegations of violations of the Court's Preliminary Injunction Order. The complaint does not concern any defect in the original Order. Accordingly, the only lawful means at its disposal is to institute a contempt of court proceeding.[4] A motion to modify the injunction, under these circumstances, therefore, is inappropriate and should be denied.[5]

II. THE GOVERNMENT HAS FAILED TO DEMONSTRATE THAT CHANGED CIRCUMSTANCES REQUIRE MODIFICATION OF THE PRELIMINARY INJUNCTION.

It is well established that a court should modify an injunction only where there is "some change in the circumstances or an element of 'unforeseeness' surrounding the enjoined activity[.]" *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 911 F.2d 363, 367 (9th Cir. 1990) (modification request denied where movant had not seriously alleged changed circumstance in law or fact); *see also System Federation No. 91, Ry. Employees' Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961) (judicial discretion allows modification of the terms of an injunctive decree if circumstances of law or

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[4] As set forth fully in their accompanying Memorandum In Opposition To Plaintiff's Motion To Show Cause, And For Summary Judgment, all defendants categorically deny all allegations of contempt.

[5] The government mistakenly equates the fact the Court may presume irreparable injury to the United States in the context of the preliminary injunction standard with actual evidence of its unsubstantiated assertion that defendants have in fact violated this Court's order. *See* Government's *Ex Parte* Motion at 3 (citing Mem. Op. & Order at 15-16); *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 459 (9th Cir. 1994) (en banc); *United States v. Nutri-Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992); and *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987). The Court's opinion and these cases, however, only apply a legal presumption in the context of the preliminary injunction standard — a presumption applicable only if the government establishes a probability of success on the merits. *See* Mem. Op. & Order at 15; *Miller*, 19 F.3d at 459; *Nutri-Cology*, 982 F.2d at 398. Irreparable injury cannot be presumed here because the government has not established any violation of the relevant statutes.

fact have changed). The government has failed to demonstrate that any such changed circumstances exist. Instead, the government purports to invoke the authority of this Court to modify the Preliminary Injunction Order to impose more stringent terms on the defendant because it alleges "the original purposes of the injunction are not being fulfilled in any material respect." Government's *Ex Parte* Motion at 3-4 (citation and quotation omitted). The government's claims are unfounded.

First, the government has not demonstrated that the defendants have violated the injunction. Second, the government has neither alleged nor established the existence of any changed circumstances. Finally, none of the cases cited by the government in support of its request to modify the injunction authorize the relief the government seeks here. These cases permit modifications either to relieve or to increase a defendant's duties or responsibilities as a result of changed circumstances — *not* to coerce defendants to do what was already required by the original injunction. *See, e.g., System Federation No. 91*, 364 U.S. 642, 651-53 (1961) (modification of injunction to allow enjoined party to avail itself of newly granted statutory privilege was appropriate); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 251-52 (1968) (modification of injunction *after ten years* was appropriate because the injunction had not achieved its intended effect of restoring competition to market); *Exxon Corp. v. Texas Motor Exchange, Inc.*, 628 F.2d 500, 503 (5th Cir. 1980) (modification appropriate only if plaintiff can establish defendant's *new* trademarks *also* infringe plaintiff's rights).

Nothing has changed since the government first requested that this Court modify its proposed Order to include virtually the same language requested in this *Ex Parte* Motion. In the absence of new facts or conditions occurring since that time, this Court, having denied this request once, should deny it again. *See, e.g., Allergan Sales, Inc. v. Pharmacia & Upjohn, Inc.*, 1996 U.S. Dist. LEXIS 21048 *2 (S.D. Cal. 1996) (Court summarily denied defendant's request to amend preliminary injunction after having already denied similar earlier request).

CONCLUSION

In short, because the government seeks to coerce defendants to do what is *already* required by the existing Preliminary Injunction Order, this is a premature *enforcement* request and not an appropriate request for modification. The government's unilateral assertion that the defendants have

"openly and flagrantly violated" this Court's Order, Government's *Ex Parte* Motion at 2, is insufficient to support a modification. This Court has not yet made that determination. Therefore, the government's request for a modification of the Preliminary Injunction Order is improper and should be denied.

Dated: August 13, 1998

JAMES J. BROSNAHAN
ANNETTE P. CARNEGIE
ANDREW A. STECKLER
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SIGNATURE PAGE

The undersigned counsel, on behalf of UKIAH CANNABIS BUYER'S CLUB, CHERRIE LOVETT, MARVIN LEHRMAN, and MILDRED LEHRMAN, hereby submits the foregoing DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S EX PARTE MOTION TO MODIFY MAY 19, 1998, PRELIMINARY INJUNCTION ORDERS IN CASES NO. C 98-0086 CRB; NO. C 98-0087 CRB; AND NO. C 98-0088 CRB.

Dated: August 13, 1998

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DEFENDANTS' OBJECTIONS AND MOTION TO STRIKE THE DECLARATIONS OF MARK QUINLIVAN, BILL NYFELER, DEAN ARNOLD AND PETER OTT

Date: August 31, 1998
Time: 2:30 p.m.
Courtroom: 8
Hon. Charles R. Breyer

Defendants Oakland Cannabis Buyer's Cooperative ("OCBC") and Jeffrey Jones; defendants Marin Alliance for Medical Marijuana ("Marin Alliance") and Lynnette Shaw; and defendants Ukiah Cannabis Buyer's Club ("UCBC"), Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman (collectively the "defendants") hereby object to and move to strike the declarations of Mark T. Quinlivan, Bill Nyfeler, Dean Arnold and Peter Ott submitted in support of plaintiff's motion to show cause and for summary judgment.

Each of these declarations submitted by the government violates the requirements of Rule 56(e) that "affidavits shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein." Fed. R. Civ. P. 56(e). They are also replete with hearsay, conclusory statements, and the declarant's speculation as to factual matters.

The Declaration of Mark T. Quinlivan and the accompanying exhibits are insufficient to establish a violation of the Preliminary Injunction. Instead, they are a compilation of press releases, articles and web site excerpts which do not cite any specific instance of an alleged violation of the Preliminary Injunction Order. At most, these exhibits are alleged admissions of intent to do an act, which of course, is not evidence of any act itself. *Mitchell v. Sharon*, 59 F. 980, 983 (1894) ("Words which merely impute a criminal intention, not yet put into action, are not actionable. Guilty thoughts are not a crime.") Furthermore, this declaration should be stricken in its entirety because it contains hearsay and is not based upon personal knowledge. Fed. R. Evid. 602, 801, 802. In addition, as set forth in detail below, much of the Quinlivan declaration consists of improper opinion testimony, and impermissible legal conclusions as to whether defendants were in fact in violation of the Preliminary Injunction Order. Fed. R. Evid. 701, 702; *see Maffei v. Northern Ins. Co.*, 12 F.3d 892, 898-99 (9th Cir. 1993) (declaration with unsupported legal conclusions rejected). Accordingly, the declaration should be stricken in its entirety.

The Declarations of Bill Nyfeler, Dean Arnold and Peter Ott are similarly deficient. None of these declarants identify the individuals involved in the alleged distribution or sale of marijuana nor do they claim personal knowledge that medical marijuana was in fact distributed to anyone. These declarations are vague, ambiguous, and conclusory. Fed. R. Evid. 602, 701, 702; *See Lujan v.*

National Wildlife Fed'n, 497 U.S. 871, 889 (1990) (conclusory, non-specific statements in affidavits insufficient); *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (conclusory, self-serving affidavit lacking detailed facts insufficient). Likewise, the phone calls regarding club business hours are also improper on the grounds that they are irrelevant, hearsay, conclusory and constitute improper opinion testimony as to whether defendants have in fact violated the Preliminary Injunction Order and thus do not comply with the Northern District Local Rules or with the Federal Rules of Evidence. *See* Civil L.R. 7-5(b), Fed. R. Evid. 602, 801, 802.

Declaration of Mark T. Quinlivan

Specifically, the following paragraphs of, and exhibits to, the Declaration of Mark T. Quinlivan should be stricken:

1. **Paragraph 2 and Exhibit 1:** Defendants object to this press release on the grounds that it is vague, conclusory and lacks foundation as this declarant has no personal knowledge of the purported contents. Fed. R. Evid. 602. Defendants object to this exhibit on the grounds that it constitutes hearsay to the extent it relies on statements of others. Fed. R. Evid. 801. Any alleged admission by a party-opponent contained therein is inadmissible as a result of the first-level hearsay. Fed. R. Evid. 802. Defendants further object to this exhibit as irrelevant as a statement of intent is not evidence the defendants have in fact violated the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

2. **Paragraph 3 and Exhibit 2:** Defendants object to this article on the grounds that it is vague, conclusory and lacks foundation as this declarant has no personal knowledge of the purported contents. Fed. R. Evid. 602. Defendants further object to this exhibit on the grounds that it constitutes hearsay to the extent it relies on statements of others. Fed. R. Evid. 801, 802. Defendants further object to this exhibit as irrelevant as a statement of intent is not evidence the defendants have in fact violated the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

3. **Paragraph 4 and Exhibit 3:** Defendants object to Exhibit 3 as irrelevant as to whether defendants are in violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402. Defendants object to this exhibit on the grounds that it constitutes hearsay to the extent it relies on the statements of others.

4. **Paragraph 5 and Exhibit 4:** Defendants object to these excerpts on the grounds that it is vague, conclusory and lacks foundation as this declarant has no personal knowledge of the purported contents. Fed. R. Evid. 602. Defendants object to this exhibit on the grounds that it constitutes hearsay to the extent it relies on statements of others. Fed. R. Evid. 801, 802. Defendants further object to this exhibit on the ground that it is irrelevant, argumentative, and speculative. Fed. R. Evid. 401, 402.

5. **Paragraph 6 and Exhibit 5:** Defendants object to this article on the grounds that it is vague, conclusory and lacks foundation as this declarant has no personal knowledge of the purported contents. Fed. R. Evid. 602. Defendants object to this exhibit on the grounds that it constitutes hearsay to the extent it relies on statements of others. Fed. R. Evid. 801, 802. Defendants further object to this exhibit on the ground that it is irrelevant, argumentative, and speculative. Fed. R. Evid. 401, 402.

6. **Paragraph 7 and Exhibit 6:** Defendants object to this excerpt on the grounds that it is vague, conclusory and lacks foundation as this declarant has no personal knowledge of the purported contents. Fed. R. Evid. 602. Defendants object to this exhibit on the grounds that it constitutes hearsay to the extent it relies on statements of others. Fed. R. Evid. 801, 802. Defendants further object to this exhibit on the ground that it is irrelevant, argumentative, and speculative. Fed. R. Evid. 401, 402.

7. **Paragraph 8 and Exhibit 7:** Defendants object to this article on the grounds that it is vague, conclusory and lacks foundation as this declarant has no personal knowledge of the purported contents. Fed. R. Evid. 602. Defendants object to this exhibit on the grounds that it constitutes hearsay to the extent it relies on statements of others. Fed. R. Evid. 801, 802. Defendants further object to this exhibit on the ground that it is irrelevant and speculative. Fed. R. Evid. 401, 402.

8. **Paragraph 9 and Exhibit 8:** Defendants object to this article on the grounds that it is vague, conclusory and lacks foundation as this declarant has no personal knowledge of the purported contents. Fed. R. Evid. 602. Defendants object to this exhibit on the grounds that it constitutes hearsay to the extent it relies on statements of others. Fed. R. Evid. 801, 802. Defendants further object to this exhibit on the ground that it is irrelevant and speculative. Fed. R. Evid. 401, 402.

Declaration of Bill Nyfeler

Specifically, the following paragraphs of the Declaration of Bill Nyfeler should be stricken:

1. **Paragraph 3:** Defendants object to paragraph 3, lines 15-20, on the grounds that it is vague, ambiguous and lacks foundation as this declarant has no personal knowledge as to who the "14 individuals" or "several of these individuals" are. Fed. R. Evid. 602. Furthermore, declarant has no personal knowledge as to what "these individuals" did upon entering Marin Alliance thus it is irrelevant what they allegedly did or had upon exiting. Fed. R. Evid. 401, 402, 602. Defendants further object to this declaration on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether "what appeared to be marijuana" was in fact marijuana. Fed. R. Evid. 701, 702.

2. **Paragraph 4:** Defendants object to paragraph 4, lines 21-26, on the grounds that it is vague, ambiguous and lacks foundation as this declarant has no personal knowledge of any purported distribution of marijuana. Fed. R. Evid. 602. Defendants object to this testimony on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether UCBC was in fact "continuing to engage in distribution of marijuana." Fed. R. Evid. 701, 702. Defendants object to this testimony on the grounds that it constitutes hearsay to the extent it relies on the statements of others. Fed. R. Evid. 801, 802. Defendants further object to this testimony on the grounds that it is irrelevant that the "club was open for business;" this statement does not constitute evidence of a violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

3. **Paragraph 5:** Defendants object to paragraph 5, lines 1-5, on the grounds that it is vague, ambiguous and lacks foundation as this declarant has no personal knowledge of any purported distribution of marijuana. Fed. R. Evid. 602. Defendants object to this testimony on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether OCBC was in fact "continuing to engage in distribution of marijuana." Fed. R. Evid. 701, 702. Defendants object to this testimony on the grounds that it constitutes hearsay to the extent it relies on the statements of others. Fed. R. Evid. 801, 802. Defendants further object to this testimony on the grounds that it is irrelevant that the "club was open for business;" this statements does not constitute evidence of a violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

4. **Paragraph 6:** Defendants object to paragraph 6, lines 6-10, on the grounds that it is vague, ambiguous and lacks foundation as this declarant has no personal knowledge of any purported distribution of marijuana. Fed. R. Evid. 602. Defendants object to this testimony on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether Marin Alliance was in fact "continuing to engage in distribution of marijuana." Fed. R. Evid. 701, 702. Defendants object to this testimony on the grounds that it constitutes hearsay to the extent it relies on the statements of others. Fed. R. Evid. 801, 802. Defendants further object to this testimony on the grounds that it is irrelevant that the club was "still open for business under the 'medical necessity defense' "; these statements do not constitute evidence of a violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

Declaration of Dean Arnold

Specifically, the following paragraphs of the Declaration of Dean Arnold should be stricken:

1. **Paragraph 3:** Defendants object to paragraph 3, lines 12-18, on the grounds that it is vague, ambiguous and lacks foundation as this declarant has no personal knowledge of any purported distribution of marijuana. Fed. R. Evid. 602. Defendants object to this testimony on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether OCBC was in fact "still distributing marijuana." Fed. R. Evid. 701, 702. Defendants object to this testimony on the grounds that it constitutes hearsay to the extent it relies on the statements of others. Fed. R. Evid. 801, 802. Defendants further object to this testimony on the grounds that it is irrelevant when the club was open and what the requirements were for membership; such statements do not constitute evidence of a violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

2. **Paragraph 4:** Defendants object to paragraph 4, lines 19-23, on the grounds that it is vague, ambiguous and lacks foundation as this declarant has no personal knowledge of any purported distribution of marijuana. Fed. R. Evid. 602. Defendants object to this testimony on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether Marin Alliance was in fact "still distributing marijuana." Fed. R. Evid. 701, 702. Defendants object to this testimony on the grounds that it constitutes hearsay to the extent it relies on the statements of others. Fed. R. Evid. 801, 802. Defendants further object to this testimony on the grounds that it is irrelevant

when the club was open and what the requirements were for membership; such statements do not constitute evidence of a violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

3. **Paragraph 5:** Defendants object to paragraph 5, p.2 line 24-p.3 line 7, on the grounds that it is vague, ambiguous and lacks foundation as this declarant has no personal knowledge of any purported distribution of marijuana. Fed. R. Evid. 602. Defendants object to this testimony on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether UCBC was in fact "still distributing marijuana." Fed. R. Evid. 701, 702. Defendants object to this testimony on the grounds that it constitutes hearsay to the extent it relies on the statements of others. Fed. R. Evid. 801, 802. Defendants object to this testimony on the grounds that it is irrelevant when the club was open and what the requirements were for membership; such statements do not constitute evidence of a violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402. Defendants further object to the testimony "I took this to mean" as irrelevant, conclusory, argumentative and speculative. Fed. R. Evid 401, 402, Civil L.R. 7-5(b).

Declaration of Peter Ott

Specifically, the following paragraphs of the Declaration of Peter Ott should be stricken:

1. **Paragraph 4:** Defendants object to paragraph 4, lines 19-23, on the grounds that it is vague, ambiguous and lacks foundation as this declarant has no personal knowledge as to who the "four persons" are or as to the other "individuals" and "OCBC personnel." Fed. R. Evid. 602. Defendants object to this testimony on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether any substance was in fact marijuana and whether OCBC was in fact involved in the distribution or sale of marijuana. Fed. R. Evid. 701, 702. Defendants object to this testimony on the grounds that it constitutes hearsay to the extent it relies on the statements of others. Fed. R. Evid. 801, 802. Defendants further object to this testimony on the grounds that it is irrelevant, as it does not constitute evidence of a violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

2. **Paragraph 5:** Defendants object to page 2 paragraph 5, line 24 through page 3 line 2, on the grounds that it is vague, ambiguous and lacks foundation as this declarant lacks personal knowledge as to the ownership of the alleged "open field". Fed. R. Evid. 602. Defendants object to

this testimony on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether any substance was in fact marijuana, or was in fact located on premises belonging to UCBC. Fed. R. Evid. 701, 702. Defendants further object to this testimony on the grounds that it is irrelevant, as it does not constitute evidence of a violation of the Preliminary Injunction Order. Fed. R. Evid. 401, 402.

Conclusion

For all the foregoing reasons, and for the reasons cited in Defendants' Memorandum In Opposition to Plaintiff's Motion to Show Cause and For Summary Judgment, defendants hereby object to and request that the identified portions of the declarations of Mark T. Quinlivan, Bill Nyfeler, Dean Arnold and Peter Ott be stricken.

Dated: August 13, 1998

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UNITED STATES OF AMERICA,

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CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DEFENDANTS' REQUEST FOR JUDICIAL NOTICE
[FED. R. EVID. 201]

Date: August 31, 1998
Time: 2:30 p.m.
Courtroom: 8
Hon. Charles R. Breyer

Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones hereby request the Court to take judicial notice pursuant to Federal Rule of Evidence 201 of the following:

1. On July 29, 1998, the City Council of the City of Oakland, California unanimously passed Ordinance No. 12076 C.M.S.—An Ordinance of the City of Oakland Adding Chapter 8.42 to the Oakland Municipal Code Pertaining to Medical Cannabis, a copy of which is attached hereto as Exhibit A. It is appropriate for a court to take judicial notice of a City ordinance. Fed. R. Evid. 201; *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1503-04 (10th Cir.), *cert. denied*, 118 S.Ct. 365 (1997) (judicial notice of city ordinance appropriate in context of motion to dismiss); *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995) (same).

2. On August 12, 1998, the Oakland City Manager designated the Oakland Cannabis Buyers' Cooperative and its agents, directors, and employees as a medical cannabis provider association pursuant to Ordinance No. 12076 C.M.S. (*See* Exhibit B). Matters of public record are appropriate for judicial notice. Fed. R. Evid. 201; *MGIC Indem. Corp. v. Weisman, et al.*, 803 F.2d 500, 504 (9th Cir. 1986).

Dated: August 13, 1998

JAMES J. BROSNAHAN
ANNETTE P. CARNEGIE
ANDREW A. STECKLER
CHRISTINA KIRK-KAZHE
MORRISON & FOERSTER LLP

By: _____
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE AND JEFFREY JONES

EXHIBIT A

INTRODUCED BY COUNCILMEMBER _____

APPROVED AS TO FORM

CITY ATTORNEY

ORDINANCE NO. 12076 C.M.S.

AN ORDINANCE OF THE CITY OF OAKLAND ADDING CHAPTER 8.42 TO THE OAKLAND MUNICIPAL CODE PERTAINING TO MEDICAL CANNABIS

The City Council of the City of Oakland does ordain as follows:

Article 1. Chapter 8.42 is hereby added to the Oakland Municipal Code to read as follows:

MEDICAL CANNABIS

Section 1. Findings and Purposes

A. On November 5, 1996, the voters of the State of California adopted by initiative the Compassionate Use Act of 1996, codified at Health and Safety Code Section 11362.5, pertaining to medical use of marijuana. As stated therein, the purposes of the Compassionate Use Act of 1996 are in part to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief" and 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." The City of Oakland supports the use of medical cannabis in accordance with the Compassionate Use Act of 1996. The purposes of the compassionate Use Act of 1996 are herewith also made purposes of this Chapter.

B. Long before the passage of the Compassionate Use Act of 1996, the City of Oakland was on record as being in support of medical cannabis and in support of Oakland medical cannabis providers, as exemplified by unanimously passed Oakland City Council Resolutions numbered 72379 C.M.S. and 72516 C.M.S.

C. The purpose of this Chapter is to recognize and protect the rights of qualified patients, their caregivers, physicians, and medical cannabis provider associations, and to ensure access to safe and affordable medical cannabis pursuant to the Compassionate Use Act of 1996. In support of this purpose, the City of Oakland recognizes that a medical cannabis provider association, as defined herein, may

provide educational information concerning access to safe, affordable, and lawful medical cannabis, and may also distribute safe and affordable medical cannabis in a consistent, reliable, and legal fashion.

D. An additional purpose of this Chapter is to provide immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code, which provides that no liability shall be imposed under the federal Controlled Substance Act upon any duly authorized officer of a political subdivision of a state lawfully engaged in the enforcement of any municipal ordinance relating to controlled substances.

Section 2. Definitions

The following words and phrases, whenever used in this Chapter, shall be construed as herein defined.

A. Qualified Patient: "Qualified patient" means a person who obtains a written or oral recommendation or approval from a physician to use cannabis for personal medical purposes.

B. Primary Caregiver: "Primary caregiver" means the person or persons designated by a qualified patient who have consistently assumed responsibility for the housing, health, or safety of that qualified patient.

C. Cannabis: "Cannabis" means marijuana and all parts of the plant Cannabis, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seeds of the plant that are incapable of germination.

D. Medical Cannabis Provider Association: "Medical cannabis provider association" means a cooperative, affiliation, association, or collective of persons who are qualified patients or primary caregivers, the main purposes of which are to provide education, referral, or network services, and to facilitate or assist in the lawful production, acquisition, and distribution of medical cannabis. An entity may function as a medical cannabis provider association only if designated as such by the City of Oakland pursuant to Section 3 of this Chapter.

E. Officer: "Officer" means designee and shall not have the meaning of that term as used in Section 400 of the Oakland City Charter.

Section 3. Medical Cannabis Distribution Program

The City of Oakland hereby establishes a Medical Cannabis Distribution Program. Such program shall be administered by medical cannabis provider

associations. The City Manager shall designate one or more entities as a medical cannabis provider association. Any designated medical cannabis provider association shall enforce the provisions of this Chapter, including enforcing its purpose of insuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes. For the purposes of this Chapter only, a medical cannabis provider association, and its agents, employees and directors while acting within the scope of their duties on behalf of the association, shall be deemed officers of the City of Oakland.

Section 4. No Liability

To the fullest extent permitted by law, the City of Oakland shall assume no liability whatsoever, and expressly does not waive sovereign immunity, with respect to the Medical Cannabis Distribution Program established herein, or for the activities of any medical cannabis provider association. Each medical cannabis provider association designated by the City shall (1) indemnify the City of Oakland; (2) carry insurance in the amounts and of the types that are acceptable to the City's Risk Manager; and (3) name the City as an additional insured.

Section 5. Qualified Patients, Primary Caregivers, and Medical Cannabis Provider Associations

In order to ensure that qualified patients and primary caregivers are not subject to criminal prosecution or sanction, and to ensure that only qualified patients and primary caregivers have access to medical cannabis, the City of Oakland, or medical cannabis provider associations on behalf of the City of Oakland, may issue valid identification cards to qualified patients and primary caregivers upon receipt of a physician's recommendation or approval for medical cannabis.

Section 6. Physician-Patient Confidentiality

Certification processes conducted pursuant to this Chapter shall preserve to the maximum extent possible all legal protections and privileges, consistent with reasonably verifying the qualifications and status of qualified patients and primary caregivers. Disclosure of any patient information to assert facts in support of a qualified status shall not be deemed a waiver of confidentiality of that information under any provision of law.

Section 7. Transportation of Medical Cannabis

All activities entailing the transportation of medical cannabis, in accordance with this Chapter, shall be lawful when conducted by qualified patients, primary caregivers, or medical cannabis provider associations where the quantity transported and the method, timing, and distance of the transportation are reasonably related to the medical needs of qualified patients.

Section 8. Miscellaneous Applications

Possession and use of the following items shall be lawful when used in accordance with the Compassionate Use Act of 1996 or this Chapter:

A. Pipes, papers, water pipes, vaporizers, and other related paraphernalia;

B. Cannabis products, such as baked goods, tinctures, concentrated cannabis, infusions, oils, salves, and any other cannabis derivatives.

Section 9. Violations and Penalties

A violation of any provision of this Chapter shall be a misdemeanor.

Article 2. Severability

If any provision of this Chapter, or the application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any other provision or application of this Chapter that can be given effect without the invalid provision or application; and to this end, the provisions or applications of this Chapter are severable.

I certify that the foregoing is a full, true and correct copy of an Ordinance passed by the City Council of the City of Oakland, California on July 28, 1998

CEDA FLOYD
City Clerk and Clerk of the Council

Per _____ *Deputy*

EXHIBIT B

CITY OF OAKLAND

CITY HALL • ONE CITY HALL PLAZA • OAKLAND, CALIFORNIA 94612

Office of City Manager
Robert C. Bobb
City Manager

(510) 238-3301
FAX (510) 238-2223
TTY/TDD (510) 238-3724

August 11, 1998

Mr. Jeff Jones
Executive Director
Oakland Cannabis Buyers' Cooperative
1755 Broadway, Suite 300
Oakland, CA 94612

Dear Mr. Jones:

Pursuant to Chapter 8.42 of the Oakland Municipal Code, the City hereby designates the Oakland Cannabis Buyers Club to administer the City's Medical Cannabis Distribution Program. The designation is subject to the cooperative's agreement to comply with the terms and conditions attached hereto as Exhibit A which hereby are incorporated by reference in this letter as if set forth in full herein.

The designation shall be effective upon the Oakland Cannabis Buyers' Cooperative's acceptance and agreement to the terms and conditions in Exhibit A. Please confirm the Oakland Cannabis Buyers' Cooperative's agreement to comply with the terms and conditions in Exhibit A by signing below.

Very truly yours,

Robert C. Bobb
City Manager

SO AGREED:

Date: 8/12/98

Jeff Jones
Executive Director
Oakland Cannabis Buyers' Cooperative

ER0793

COPY

ROBERT A. RAICH (State Bar #147515)
1970 Broadway, Suite 1200
Oakland, California 94612
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JAMES J. BROSNAHAN (State Bar #34555)
ANDREW A. STECKLER (State Bar #163390)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: (415) 268-7000

Attorneys for Defendants
OAKLAND CANNABIS BUYERS'
COOPERATIVE and JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. AND RELATED ACTIONS.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00089 CRB C 98-00245 CRB DECLARATION OF DAVID SANDERS

I, DAVID SANDERS, declare as follows:

1. My name is David C. Sanders. I am over the age of 21, am of sound mind, and am competent to testify to the matters stated herein.

2. I am a member of the Oakland Cannabis Buyers' Cooperative. I have AIDS. My physician has recommended that I use medical cannabis. It works when nothing else does work at alleviating some of my symptoms.

3. I was not present at any press conference on May 21, 1998. Although I was scheduled to be at the Cooperative's offices that day to appear at a press conference, I suffer from a serious life-threatening illness, complications from which prevented me attending the event.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 11th day of August, 1998, in Oakland, California.

David C. Sanders

David Sanders

COPY

AUG 14 1998

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

DECLARATION OF JOHN P. MORGAN, M.D.

I, JOHN P. MORGAN, declare:

1. I am a medical doctor and Professor of Pharmacology at the City University of New York Medical School. I have personal knowledge of the facts stated herein, and if called as a witness, I could and would testify competently as to them.

2. I am co-author of the book entitled "Marijuana Myths, Marijuana Facts—A Review of the Scientific Evidence," published in 1997.

3. Marijuana, also known as cannabis, has many proven medical uses. Medical cannabis reduces nausea and vomiting induced by cancer chemotherapy, stimulates appetite and promotes weight gain in AIDS patients, reduces intraocular pressure in people suffering from glaucoma, reduces muscle spasticity in patients with neurological disorders, spinal cord injuries, and multiple sclerosis. Furthermore, patients and physicians have reported that smoked marijuana also provides relief from migraine headaches, depression, seizures, and pain.

4. Recent studies have shown that cannabinoids may also be useful for other neurological disorders, such as stroke.

5. There are no reasonable legal alternatives to medical cannabis for many patients. Delta-9-THC is the main active ingredient in marijuana. While synthetic THC is available in capsule form, it is not nearly as effective as smoked marijuana for many patients. For people suffering from nausea and vomiting, who are unable to swallow and hold down a pill, smoking marijuana is often the only reliable way to deliver THC to the body. Smoking marijuana delivers THC quickly, providing relief in a few minutes, compared to an hour or more when THC is swallowed.

6. Smoking marijuana not only delivers THC to the bloodstream more quickly than swallowing synthetic THC, but smoking delivers most of the THC inhaled. When synthetic THC is swallowed, 90 percent or more of it never reaches sites of activity in the body as a result of the body's extensive metabolism of swallowed THC.

7. Another problem with swallowed THC is that its effects vary considerably, both from one person to another and in the same person from one episode of use to another. Further, because the onset of effect is an hour or more, patients using synthetic THC have difficulty achieving just the effective dose. Moreover, when THC is swallowed, the effects last longer (up to six hours) compared

to one or two hours when marijuana is smoked. Thus, smoking marijuana is a more flexible route of administration than swallowing because smoking allows patients to adjust their dose to coincide with the rise and fall of symptoms. For people suffering from nausea and vomiting from AIDS or cancer chemotherapy, smoked marijuana provides rapid relief with lower overall doses of THC.

8. The psychoactive side effects of swallowed synthetic THC may be more intense than those that occur from smoking, thereby increasing the likelihood of adverse psychological reactions. This occurs because the liver actually produces, in high concentration, an active metabolite.

9. Smoking is a highly unusual way to administer a drug. Many drugs could be smoked, but there is no good reason to do so because oral preparations produce adequate blood concentrations. This is not the case with THC. Inhaling is a better route of administration than swallowing. Inhaling is about equal in efficiency to intravenous injection, and considerably more practical.

10. "Cannabis buyers' cooperatives" are the best and safest way for patients to obtain medical cannabis. Patients who rely on the criminal street markets to obtain marijuana necessarily acquire cannabis of unknown potency and purity. For example, marijuana purchased from a street dealer may contain fungal spores, which may be deadly for AIDS patients who have suppressed immune systems. As a result of the dangers of obtaining marijuana from the criminal market, some patients who need the drug may choose to forego their medication.

11. The Drug Enforcement Administration's own administrative law judge, Francis L. Young, concluded not only that marijuana's medical utility had been adequately demonstrated by the evidence, but that marijuana had been shown to be "one of the safest therapeutically active substances known to man." The DEA administrator ignored this opinion when he decided to maintain marijuana as a Schedule I drug.

12. For many patients medical cannabis is necessary to avert imminent and often life-threatening harm. For many patients, such as those undergoing intensive chemotherapy or experiencing AIDS-related "wasting syndrome," medical cannabis saves their lives. For patients

suffering from glaucoma, medical cannabis may save their vision. For patients suffering neurological disorders resulting from spinal cord injuries and multiple sclerosis, medical cannabis may enable them to physically cope in society, to go on with their lives and to endure pain.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 13th day of August at New York, New York.

John P. Morgan, M.D.

COPY

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Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

Nos. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00089 CRB
C 98-00245 CRB

DECLARATION OF YVONNE WESTBROOK

I, YVONNE WESTBROOK, declare as follows:

1. My name is Yvonne Renee Westbrook. I am 45 years of age, am of sound mind, and am competent to testify to the matters stated herein.

2. I am a member of the Oakland Cannabis Buyers' Cooperative.

3. I was diagnosed with multiple sclerosis in 1979. Because of my condition, I am confined to a wheelchair. Cannabis helps me cope with many of the conditions brought on by my illness. True and correct copies from my medical record are attached as "Exhibit A."

4. Spasticity is one of my symptoms caused by multiple sclerosis -- my legs will jump uncontrollably. My doctor has prescribed Valium for the spasticity, but it does not work as well as cannabis. It takes Valium approximately one hour to take effect, and during that hour, my legs continue to jump around. After the Valium does take effect, I just want to fall asleep, and cannot function well. In contrast, after I take just a few puffs of cannabis, the spasticity immediately subsides, and I can go about my normal activities. Cannabis makes it possible for me to live a fulfilling life: Currently, my primary endeavor is working as a peer counselor for other people with multiple sclerosis.

5. Chronic pain is another condition from which I suffer -- my feet and legs experience throbbing aching. My doctor prescribed pain relievers, which help some at night, but during the day, cannabis is the one and only medicine that helps me cope with the pain.

6. I suffer from terrible headaches. Cannabis helps me cope with that pain as well. My doctor prescribed Vicodin for my headaches, but I try not to use it because it can be addictive and can cause liver problems. Lord knows, I don't want liver problems along with multiple sclerosis.

7. Multiple sclerosis also makes it hard for me to sleep. Cannabis is effective at helping me sleep, and the next morning I feel rested and refreshed. Other medications my doctor prescribed for sleeping, such as Restoral, have side effects: The next morning I felt lethargic, without energy, and not like myself. The prescription drugs rob me of energy, which is low anyway because multiple of sclerosis.

8. Being disabled can make me depressed, and I suffer from mood swings, but cannabis improves my attitude. For example, I sometimes suffer from depression because of my

condition, or I can become angry at my inability to perform simple daily tasks. In those circumstances, I can medicate with cannabis and it quickly improves my mental outlook. Being depressed aggravates the headaches and fatigue I experience, which are symptoms of multiple sclerosis, whereas having a good mental attitude alleviates those symptoms and improves my condition.

9. My doctor is very supportive of my use of cannabis. He is glad I have a medicine that helps me in so many ways. In the hospital, at various times, the nurses have seen me medicating with cannabis. They, too, have been very supportive of me.

10. I only use cannabis for medical purposes, not recreationally. I am 45 years old -- I have neither the time nor the inclination to use drugs recreationally. Because I smoke several cannabis cigarettes every day, it does not have a psychoactive effect on me.

11. The Oakland Cannabis Buyers' Cooperative provides a safe, clean, and comfortable place to obtain cannabis. That is important to me because, being in a wheelchair, I do not want to go to seedy places, or to parks or to the streets, in search of medicine. The elements I would have to endure in order to get medicine there are dangerous, and it would be stressful. I am afraid of the guns, neighborhoods, and unsavory people I would need to interact with in order to obtain cannabis on the black market.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 11th day of August, 1998, in Oakland, California.

Y. R Westbrook

Yvonne Westbrook

EXHIBIT A

GARY L. CHAN, M.D.
Board Certified Internal Medicine

1199 Bush Street, Suite 400
San Francisco, CA 94109
Telephone: (415) 474-7900

August 16, 1996

To Whom It May Concern,

I am writing this letter to confirm that my patient, Ms. Yvonne Westbrook does have Multiple Sclerosis. If you have any questions or concerns, please feel free to call my office. Thank you.

Sincerely,

Gary L. Chan, M.D.

Exhibit A

446

OAKLAND CANNABIS BUYERS CLUB

PHYSICIAN STATEMENT

My patient, Yvonne Westbrook, is being treated for Multiple Sclerosis.

We have discussed the medical benefits and risks of marijuana use as a treatment for this condition. I would consider prescribing marijuana for this patient's condition if I were legally able to do so. If my patient chooses to use marijuana therapeutically, I will continue to monitor his/her condition and provide advice on his/her progress.

Gary L. Chanard '96

Physician's Signature

GARY L CHANARD Marked in file

Physician's Name (printed)

1199 BUSH ST #400

Address

S.F, CA 94109

City, State and Zip Code

(415) 474-7900

Phone Number

Oakland Cannabis Buyers' Club

(510) 832-5346

ER0805

COPY

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ANDREW A. STECKLER (State Bar #163390)
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Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. AND RELATED ACTIONS.	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00089 CRB C 98-00245 CRB DECLARATION OF KENNETH ESTES

I, KENNETH ESTES, declare as follows:

1. My name is Kenneth Wayne Estes. I am 40 years of age, am of sound mind, and am competent to testify to the matters stated herein.

2. I am a member of the Oakland Cannabis Buyers' Cooperative.

3. I am a quadriplegic. I am either confined to a wheelchair or bedridden. I use cannabis for pain relief, appetite stimulation, and sleep.

4. I was injured in a motorcycle accident when I was 18 years old. I broke my neck at cervical five and six. At first, all four of my limbs were paralyzed, but about two years after the accident I regained some use of my arms, hands, and fingers. True and correct copies from my medical record are attached as "Exhibit A."

5. I live with constant pain. Sometimes it is a "tingling" that will not stop, almost as if you hit your funnybone. Other times, such as when I get spasms or back problems, the pain becomes intense, powerful, and overwhelming. Without cannabis the pain would be excruciating Even after I medicate with cannabis, the pain is still there -- it never goes away -- but cannabis makes the pain bearable. Cannabis makes it possible for me to function in society and to deal with other people because it alleviates the pain I experience.

6. Before I discovered medical cannabis, the pain in my back was so bad that it drove me insane, and I wanted to kill myself. Having to live with the constant pain made me suicidal. I wanted the pain to end at any cost.

7. I was wasting away. I could not eat and I could not sleep. I was dying.

8. In my suffering, a hospital orderly who held a marijuana pipe to my lips allowed me to medicate with cannabis for the first time. It worked.

9. The pain went down. I was able to sleep through the night. The next morning, I finished breakfast. The nurse even brought in the doctors to show them that I ate the whole meal.

10. I am thankful that there is an herb I can turn to to alleviate my pain, because now I want to live, not die. With the three ingredients of rest, food, and my spirits raised, I can conquer anything, including conquering this illness. Cannabis saved my life.

11. I have tried many prescription drugs, sometimes several medicines per day. For

example, I have tried Valium, Motrin, codeine, Vicadin, Darvocet, and many others. They either did not work, or had side effects that made me not want to use them. The pharmaceutical pills gave me stomach pain, other stomach problems, and constipation. They also made me emotionally unstable: They made me want to cry, they made me angry at my condition, or they made me frustrated.

12. The pills made my cognitive thinking defective and my mind blurred. I couldn't hold thoughts together, couldn't have conversations, and couldn't communicate with other people. It is hard to deal with paralysis -- all I have left are my words. When I couldn't communicate with other people through words, it only made my condition worse.

13. The pharmaceuticals merely added to my discomfort. They gave me new pain (stomach pain) and made me self-conscious about not being able to speak, which detrimentally affected my eating and sleeping. Cannabis, by comparison, gives me no pain, helps me eat, helps me sleep, and makes me more sociable with other people.

14. Some of the prescription sleeping pills I used to take lost their effectiveness after a while, making me need to take more and more of them. The next morning I would feel "hung over" and "cloudy," and I still had the stomach pain. If I use cannabis to help me sleep, I feel better the next morning, I feel refreshed after a good night's sleep, and I have no stomach pain.

15. Pills can take 60 to 90 minutes to take effect. In contrast, the immediate effect of smoked cannabis is one of its great attributes. Medicating with cannabis allows access to sleep or hunger when I need it, either because it is nighttime and time to sleep or because a meal is ready.

16. Pharmaceuticals may work for some people, but they do not work for me. I know, because I have tried them. Cannabis, however, does work for me. It actually relieves my pain, and it does not have the physical and emotional side effects of the prescription medications.

///

///

///

///

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 12 day of August, 1998, in Oakland, California.

Kenneth Estes

EXHIBIT A

Monica Ruiz-Durant, M.D.
THE PERMANENTE MEDICAL GROUP, INC.

3400 DELTA FAIR BLVD.
ANTIOCH, CA 94509-4098 PHONE: 779-5090

NAME Estes, Kenneth.

ADDRESS

PHONE DATE 5/16/12

PLEASE ✓ BOX WHEN PATIENT IS. ☐ INDUSTRIAL ☐ TPL

One (1) Prescription Per Blank for Refill Authorization Request

℞ Mr Estes
Klonopin micrograms.
for pain relief from the
neuropathy that he
experiences from
chronic quadriplegia.

REFILL 0 · 1 · 2 · 3 · 4 · 5 · 6 Monica Ruiz-Durant, M.D.

☐ NURSE PRACTITIONER ☐ COVERING M.D.

☐ CHECK BOX FOR REFILL AUTHORIZATION REQUEST FORM (MINIMUM 2 REFILLS)

CAL. LIC. NO. G64187 DEA NO. BR2245587

RESOURCE NO. 4523059

☐ LABEL: MAY CAUSE DROWSINESS

UNLESS CHECKED BELOW AUTHORIZATION IS GIVEN TO:

☐ DISPENSE NON-PROPRIETARY (GENERIC) NAME ☐ DISPENSE BY NEAREST STANDARD SIZE

SPECIFY MAJOR DRUG ALLERGIES TO BE ENTERED INTO PHARMACY SYSTEM

4523059 (5-96)

Exhibit A

COPY

ROBERT A. RAICH (State Bar #147515)
1970 Broadway, Suite 1200
Oakland, California 94612
Telephone: (510) 338-0700

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ANDREW A. STECKLER (State Bar #163390)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: (415) 268-7000

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

Nos. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00089 CRB
C 98-00245 CRB

DECLARATION OF IMA CARTER

I, IMA CARTER, declare as follows:

1. My name is Ima Jean Carter. I am over the age of 21, am of sound mind, and am competent to testify to the matters stated herein.

2. I am a member of the Oakland Cannabis Buyers' Cooperative. I was present at a press conference held at the Cooperative's offices on May 21, 1998; however, I did not obtain any medical cannabis at the press conference. At that press conference, I conducted interviews with representatives of the media.

3. I have never obtained medical cannabis from Jeffrey Jones.

4. During the press conference, I left briefly to put money in the parking meter. On my way back, I rode up in the elevator with a man I learned was a Drug Enforcement Administration agent attempting to infiltrate our Cooperative.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 11th day of August, 1998, in Oakland, California.

Ima Carter

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. AND RELATED ACTIONS	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00089 CRB C 98-00245 CRB

MOTION FOR LEAVE TO INTERVENE

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT THEREOF

Date:
Time:
Room: 8
The Hon. Charles R. Breyer

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PLEASE TAKE NOTICE that, at _____A.M. on _____, 1998, in the Courtroom of the Honorable Charles R. Breyer, located at 450 Golden Gate Avenue, San Francisco, California, 94102, proposed defendants and counterclaimants-in-intervention, EDWARD NEIL BRUNDRIDGE, IMA CARTER, REBECCA NIKKEL and LUCIA Y. VIER (the "Members"), will and do hereby move this Court for an order granting the Members leave to intervene as of right as defendants and counterclaimants-in-intervention pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, or, in the alternative, to intervene as defendants and counterclaimants-in-intervention permissibly pursuant to Rule 24(b) of the Federal Rules of Civil Procedure in Case Nos. C•98-00086 CRB (Rebecca Nikkel), C•98-00087 CRB (Lucia Y. Vier), and C•98-00088 (Edward Neil Brundridge and Ima Carter), by filing answers and a counterclaim-in-intervention in substantially the form attached to this application as Exhibits "A" through "D" and, incorporated herein by this reference ("Answers and Counterclaim-in-Intervention").[1]

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1 This motion is based upon the attached memorandum of points and authorities, the concurrently filed declarations of the Members and the Members' *ex parte* application for an order shortening time and supporting papers filed on August 14, 1998, and all of the records and files in these actions.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT.

The Members are seriously ill individuals who have a fundamental right guaranteed by the Fifth Amendment of the United States Constitution (the "Fifth Amendment") to be free from governmental interdiction of their personal, self-funded medical choice, made in consultation with their personal physician, to alleviate their suffering through the only effective treatment available for them. The Members use cannabis because it is the only drug which effectively alleviates their pain or otherwise treats the Members' chronic medical conditions.

Each of the Members is a member of one of the cooperatives named as a defendant in these three actions. The defendant cooperatives have served as the Members' source of legal, safe and affordable cannabis upon the recommendation of each Member's physician. In these actions, plaintiff and counter-defendant United States of America (the "Government") seeks to enjoin the defendant cooperatives from, among other things, distributing cannabis to their members. The Members, however, have a fundamental right and a liberty interest in obtaining and using cannabis for medicinal purposes that is guaranteed by the Fifth Amendment.

There is no question that the Members have an interest in the transactions which are the subject matter of this action. The Members would inevitably be on the other side of some of the very transactions the Government seeks to enjoin. The Members should be permitted to intervene because they are uniquely situated to assert both the medical necessity defense and a counterclaim based on the their fundamental right guaranteed by the Fifth Amendment.

II. FACTUAL BACKGROUND.

A. The instant federal lawsuits.

In January 1998, the Government filed six separate lawsuits against six cooperative associations and individuals, seeking, among other things, a preliminary and permanent injunction under the Controlled Substances Act (see 21 U.S.C. § 882) to prevent these cooperative associations from distributing cannabis. See Complaints, filed January 8, 1998 (Prayer). On or about May 19, 1998, the Court issued a preliminary injunction as to each defendant enjoining it from engaging in the manufacture, distribution or possession of marijuana in violation of section 841(a)(1) of the Controlled Substances Act. See United States of America v. Cannabis Cultivators Club, 1998 WL 257103, *19 (N.D. Cal. 1998).

In July 1998, the Government moved for an order to show cause why defendants should not be held in contempt for failing to comply with the preliminary injunction and for summary judgment. The hearing on the Government's motion is scheduled for August 31, 1998. See Order, filed July 27, 1998. The Government's initiation of this contempt proceeding demonstrates that it will seek to prevent the defendant cooperatives from distributing cannabis to anyone, including those who, like the Members, assert a medical necessity defense or, as we explain below, a fundamental right guaranteed by the Fifth Amendment.

B. The Defendants and Counterclaimants-in-Intervention.

On the recommendation of their doctors, seriously ill Californians have gone to the defendant cooperatives to obtain cannabis that was safe and affordable. For example, Rebecca Nikkel used cannabis on the recommendation of her physician. See Declaration of Rebecca Nikkel in Support of Motion for Leave to Intervene, filed and served herewith ("Nikkel Decl."), ¶ 6. Ms. Nikkel is a member of the Marin Alliance for Medical Marijuana. Id. ¶ 1. She has been a member since December 1997, and she visits the Marin Alliance approximately every ten (10) days. Id. ¶ 8.

Ms. Nikkel suffers from severe and painful muscle spasms that are not treatable by conventional medicines. She has fibromyalgia and multiple sclerosis. Id. ¶ 2. Ms. Nikkel tried many conventional treatments and medicines, and only cannabis effectively relieved the pain she experienced from muscle spasms. Nikkel Decl., ¶¶ 4, 6. One conventional medicine, baclofen, caused Ms. Nikkel to be unable to walk. Id. ¶ 4. Another nearly caused her to die when she experienced a severe allergic reaction which progressed to anaphylactic shock. Id. On the recommendation of her doctor, Ms. Nikkel used cannabis to relieve the pain caused by the muscle spasms. Id. ¶ 6. "The cannabis is the only medicine which effectively and safely alleviates the pain caused by the muscle spasms. The use of cannabis is a medical necessity" for Ms. Nikkel. Id. No other conventional medicine effectively manages the pain she experiences. Id.

Other Californians also suffer severe pain from conditions such as arthritis and cervical nerve damage which are not effectively treated by conventional medicines. For many, cannabis is the only effective treatment for this pain and these conditions. See Declaration of Edward Neil Brundridge in Support of Motion for Leave to Intervene, filed and served herewith ("Brundridge Decl."), ¶ 4; Declaration of Ima Carter in Support of Motion for Leave to Intervene, filed and served herewith ("Carter Decl."), ¶ 10. For others, cannabis is the only medicine which maintains their health and keeps them alive by stimulating their appetites. See Brundridge Decl., ¶¶ 7, 8; Declaration of Lucia Y. Vier in Support of Motion for Leave to Intervene, filed and served herewith ("Vier Decl."), ¶ 3.

Each of the Members uses cannabis on the recommendation of his or her doctor. Nikkel Decl., ¶ 6; Brundridge Decl., ¶ 10; Carter Decl., ¶ 8; Vier Decl., ¶ 3. Each of the Members has tried conventional medicines and found that cannabis is the only medicine which effectively alleviates their pain, stimulates their appetite or otherwise treats a chronic, medical condition. Nikkel Decl., ¶¶ 4-6; Brundridge Decl.,

¶¶ 3-8; Carter Decl., ¶¶ 3-7, 10. Likewise, each of the Members visits one of the defendant cooperatives and will suffer immediate and irreparable harm if it is closed. Nikkel Decl., ¶¶ 1, 8; Brundridge Decl., ¶¶ 1, 7, 11; Carter Decl., ¶¶ 1, 7, 9, 10; Vier Decl., ¶¶ 1, 5. If the cooperatives are prevented from distributing cannabis, the Members will not be able legally to obtain cannabis that is safe and affordable. Id.

The Members are suffering a special harm as result of the relief the Government seeks. In addition, the Members are not able to speak freely with their doctors about their conditions and medical needs. Carter Decl., ¶ 8; Nikkel Decl., ¶ 7; Brundridge Decl., ¶ 10. More importantly, the Members are not able to discuss with their doctors the only medication which effectively alleviates their pain or stimulates their appetite: cannabis. Id. Their privacy and relationships with their doctors have been harmed and will continue to be harmed as a result of the Government's attempts to obtain and enforce the preliminary injunction in these actions.

C. The Compassionate Use Act of 1996.

In 1996, the voters of the State of California passed a ballot initiative that became known as the "Compassionate Use Act of 1996." See Calif. Health & Safety Code § 11362.5. This initiative, now law, sought to ensure that seriously ill Californians "have the right to obtain and use marijuana for medical purposes . . ." upon the recommendation of their physicians. Id. Following passage of this act, cooperative associations, including defendants, formed to provide "safe and affordable distribution of marijuana to all patients in need of marijuana." Id.; see also Complaint for Declaratory Relief, and Preliminary and Permanent Injunctive Relief, filed January 9, 1998 in Case No. C•98-00088, ¶¶ 17-22 (alleging that defendant Oakland Cannabis Buyers' Cooperative "from sometime early in 1997 to the present . . . [has] been engaged in the sale or distribution of marijuana").

D. Changed circumstances in the instant litigation.

In July 1998, there was a change in the interests implicated in the instant actions when the Government moved for an order to show cause why defendants should not be held in contempt for allegedly not complying with the Court's preliminary injunction and for summary judgment in the contempt proceeding. See Plaintiff's Motion for An Order to Show Cause, etc., filed on or about July 6, 1998. This order to show cause challenged the defendant cooperatives' medical necessity defense that, despite the preliminary injunction, they could continue to provide cannabis to members whose personal physicians had determined that they had no other medical alternative to alleviate their serious medical conditions.

The Members' intervention in this litigation is necessary to facilitate the Court's having a proper record upon which to evaluate and decide the Constitutional and statutory issues implicated by the order to show cause re: contempt and the Government's related motion for an order granting a summary judgment of civil contempt (collectively, the "August 31 Proceedings"). See Declaration of Margaret S. Schroeder in Support of *Ex Parte* Application, etc., filed and served herewith ("Schroeder Decl."), ¶ 5. The Members' rights and interests will likely be affected by the issues raised at the August 31 Proceedings. Id.

Since July 1998, when the Government filed the motions which are the subject of the August 31 Proceedings, counsel for the Members have diligently attempted to bring on this motion for leave to intervene to represent the unique position of the Members. Id. Counsel's efforts were complicated by the defendant cooperatives members' secrecy, fears and physical conditions. Id. It took a significant period of time just to identify, interview and obtain sworn statements from the Members, who were among a larger group of potential intervenors. In fact, that process was not complete itself until August 10. Accordingly, the motion is timely filed. Id.

III. ARGUMENT.

A. The Members should be permitted to intervene "of right".

The Members should be permitted to intervene as a matter of right. On a timely application anyone shall be permitted to intervene in an action when the applicant "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a); see also Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527 (9th Cir. 1983) (reversing order denying intervention of right).

"Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action." Federal Sav. & Loan v. Falls Chase SP. Taxing Dist., 983 F.2d 211, 216 (11th Cir. 1993). Rule 24 has traditionally received "a liberal construction in favor of applicants for intervention." Washington State Bldg. & Const. Trades v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982) (allowing public interest group that sponsored initiative being challenged to intervene as a matter of right); see also Sierra Club v. U.S. E.P.A., 995 F.2d 1478, 1481 (9th Cir. 1993) (reversing order denying intervention as of right).

As set forth below, the Members meet all the requirements of intervention as a matter of right.

1. The motion to intervene is timely.

The Members have timely applied for leave to intervene. Whether a motion to intervene is timely is determined by analyzing the following factors: (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and the length of the delay. See Officers for Justice v. Civil Service Com'n, 934 F.2d 1092, 1095 (9th Cir. 1991). In Officers for Justice, the

court reversed an order denying intervention on the ground that the applicant's motion was untimely. The court held that the district court erroneously focused on the amount of time that had passed since the commencement of the litigation sixteen years earlier. Id. The proper focus is on the date the person attempting to intervene "should have been aware his interests would no longer be protected adequately by the parties, rather than the date the person learned of the litigation." Id. (internal quotations omitted).

In this case, the Members learned in July 1998 that their interests would no longer be adequately protected by the parties when the Government moved for its order to show cause challenging the defendant cooperatives' reliance on the medical necessity defense to provide cannabis to members who had a doctor's recommendation. See Schroeder Decl., ¶¶ 5-6. Moreover, to be timely, an intervenor does not have to move to intervene immediately. See S.E.C. v. Navin, 166 F.R.D. 435, 439 (N.D. Cal. 1995) (granting motion to intervene). In Navin, the applicant moved to intervene after the court issued both a preliminary and permanent injunction enjoining the defendants from violating the federal securities laws by making false and misleading representations in connection with the sale of unregistered securities. The court nevertheless permitted the applicant to intervene and file a complaint. In addition, the timeliness requirement for intervention as of right should be treated more leniently than for permissive intervention because of the likelihood of more serious harm. United States v. State of Or., 745 F.2d 550, 552 (9th Cir. 1984) (reversing order denying intervention as of right where applicant filed motion to intervene one week before court entered order affecting applicant's interest).

There will be no prejudice to the other parties if the Members are permitted to intervene. If the Government complains of prejudice, its concerns can have little to do with timeliness. The Government cannot suggest that its problems are materially different now than they would have been several weeks ago had the Members sought

to intervene then. See, e.g. id. at 553. The proceedings are at an early stage. No trial date has been set, no discovery has been taken, no dispositive motions have been heard and only a preliminary injunction has been issued.

The Members' motion is also timely because they only became aware last month that their interests would not be adequately protected by defendants, and the Members have worked diligently since then to bring on this motion. See Officers for Justice, 934 F.2d at 1095; see also Schroeder Decl., ¶ 6. The Members are intervening to assert a medical necessity defense and to file a counterclaim asserting their fundamental right described below (see § III.A.2., infra). No party will be prejudiced by this intervention. The Members have taken several weeks to file this motion because of complications by the defendant cooperative members' secrecy, fears of criminal prosecution and physical conditions and disabilities. Schroeder Decl., ¶ 6.

2. The Members have an interest in the transaction.

The Members should be permitted to intervene because they have an interest in being able legally to obtain cannabis that is safe and affordable: the Members have a fundamental right guaranteed by the Fifth Amendment to be free from governmental interdiction of their personal, self-funded medical choice, in consultation with their personal physician, to alleviate their suffering through the only effective treatment available for them. This fundamental right admittedly has not as yet been recognized in reported case law. However, it is in accord with the principles and teaching of the United States Supreme Court in Roe v. Wade, 410 U.S. 113, 154 (1973) (recognizing a fundamental right to abortion), Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (recognizing a fundamental right to contraception), Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing a fundamental right to marriage), Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (recognizing a fundamental right to marital privacy), Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (recognizing a fundamental right

to procreate), and Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (recognizing a fundamental right to child rearing and education).

An applicant shall be permitted to intervene when "it claims an interest relating to the property or transaction which is the subject of the action . . . ." Fed. R. Civ. P. 24(a)(2). In the instant actions, the Government seeks to enjoin the defendant cooperatives from distributing cannabis. See Complaints, filed January 9, 1998, (Prayer). By the contempt proceedings, the Government further seeks to prevent the defendant cooperatives from distributing cannabis to anyone, including those with a medical necessity defense or fundamental right.

The Members have a legal interest in obtaining cannabis. See Ex. D (Counterclaim-in-Intervention for Declaratory and Injunctive Relief, ¶ 17); see also Calif. Health & Safety Code § 11362.5(b)(1)(B) ("To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician . . ."). To intervene, an applicant must have a "protectable interest." Sierra Club, 995 F.2d at 1481. In Sierra Club, the court of appeal reversed an order denying the City of Phoenix's motion to intervene as of right and permissively in an action by the Sierra Club against the Environmental Protection Agency. The court found that the City had a right to intervene as a defendant in the action. "Our adversary process requires that we hear from both sides before the interests of one side are impaired by a judgment." Id. at 1483.

Each of the Members has found that cannabis is the only effective medicine to alleviate their pain or to stimulate their appetite to keep them alive. See Nikkel Decl., ¶ 6; Brundridge Decl., ¶¶ 4, 6, 8; Carter Decl., ¶ 10; Vier ¶ 3. Likewise, each of the Members uses cannabis on the recommendation of his or her doctor. Nikkel ¶ 6; Brundridge Decl., ¶ 10; Carter Decl., ¶ 8; Vier Decl., ¶ 3. The Members are the beneficiaries of the Compassionate Use Act and the defendant cooperatives' operations

which the Government seeks to enjoin. When injunctive relief will have "direct, immediate, and harmful effects upon a third party's legally protectable interests, that party satisfies the 'interest' test of Fed. R. Civ. P. 24(a)(2): he has a significantly protectable interest that relates to the property or transaction that is the subject of the action." Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1494 (9th Cir. 1995) (reversing order denying intervention of right).

The "interest test" is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Navin, 166 F.R.D. at 440 (citations omitted). There is no question that the Members satisfy this test.

3. Disposition of these actions will as a practical matter impair the Members' ability to protect the right to obtain cannabis.

If the Government's requested relief is granted, as a practical matter, the Members' ability to obtain cannabis legally, that is safe and affordable, will be severely impaired. Intervention of right shall be granted if the applicant "is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest . . . ." Fed. R. Civ. P. 24(a)(2); see also Sagebrush Rebellion, 713 F.2d at 528 (holding that adverse decision in suit would impair the intervenor-society's interest in the preservation of birds and their habitats).

As discussed above, the Members have a protectable interest in obtaining cannabis. If the defendant cooperatives are closed, the Members will not be able to obtain cannabis legally. Nikkel Decl., ¶ 8; Brundridge Decl., ¶ 11; Carter Decl., ¶ 10; Vier Decl., ¶ 5. The practical effect of the Government's obtaining a permanent injunction is closure of the defendant cooperatives. An adverse decision in these actions would plainly impair the Members' interest to legally obtain cannabis that is safe and affordable. "This conclusion is fully in accord with our past decisions recognizing practical limitations on the ability of intervention applicants to protect

interests in the subject litigation after court-ordered equitable remedies are in place." See U.S. v. State of Or., 839 F.2d 635, 639 (9th Cir. 1988) (reversing order denying intervention of right) (emphasis added). In addition, the Members can demonstrate that the injunction sought by the Government poses a "tangible threat" to their protectable interest because the Government has included in its prayer "those persons in active concert or participation with [defendants] who receive actual notice of the order," and the Members "could be legally bound by the court's decree." Forest Conservation Counsel, 66 F.3d at 1496. Decisions in the instant actions may also, under the principles of *stare decisis*, bar the Members from relitigating certain facts or legal issues.

Although the Members' right to obtain and use cannabis does not arise under the Controlled Substances Act, it is enough "that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." Sierra Club, 995 F.2d at 1484. The Members satisfy this requirement.

4. The Members' interest may not be adequately represented by the parties.

The Members satisfy the last prong of the intervention of right rule. Their interests are not adequately represented by existing parties. See Fed. R. Civ. P. 24(a)(2). "The proposed intervenors' burden to show that their interests *may be* inadequately represented is minimal." Federal Sav. & Loan, 983 F.2d at 216 (original emphasis); see also, Sagebrush Rebellion, 713 F.2d at 528 (same). In Sagebrush Rebellion, the court of appeals found that the intervenor satisfied this minimal showing for several reasons, including that the intervenor "offers a perspective which differs materially from that of the present parties to this litigation." Id.

Here, the Members are the "seriously ill Californians" who need to use cannabis because it is the only effective treatment for their pain or other chronic

conditions. The Members seek to intervene to file a counterclaim seeking declaratory and injunctive relief concerning their fundamental right guaranteed by the Fifth Amendment. No other party may be able to assert this claim. The Government brought this action against individuals and the defendant cooperatives, and challenges, as we understand it, whether these defendants having standing to assert adequately the constitutional defenses and claims of their members. Hence, if granted intervention, the Members will be able to insure that a proper record exists upon which to assert such claims and defenses.

Moreover, the Members have suffered an "injury in fact." The Members seek to assert constitutional rights, for which they have standing. They have suffered an "actual or imminent" "injury in fact" as a result of the threat of being prohibited from obtaining legal, safe and affordable cannabis. Hence, the injunction has caused or will cause the injury in fact, and court intervention would redress their harm. See, e.g. Bennett v. Spear, 117 S. Ct. 1154, 1163 (1997). For these reasons, the Members satisfy the minimal burden of showing that the representation of their interests in this action "may be" inadequate.

B. In the alternative, the Members should be granted permissive intervention.

If the Members are not permitted to intervene as of right, they should be granted permissive intervention. "Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). A court may grant permissive intervention under Rule 24(b) if three conditions are met: (1) the movant must show an independent ground for jurisdiction, (2) the motion must be timely, and (3) the movant's claim or defense and the main action must have a question of law and fact in common. Venegas v. Skaggs, 867 F.2d 527, 529 (9th Cir.

1989) (reversing order denying permissive intervention).[2] See also Bureerong v. Uvawas, 167 F.R.D. 83, 85 (C.D. Cal. 1996) (granting government's *ex parte* motion to intervene). If these conditions are met, "then the question of whether a party will be allowed to intervene is within the sound discretion of the trial court." Id. The Members meet all the requirements for permissive intervention.

Because the Members' claims are against the federal government and involve a question of federal law, there are independent grounds for the Court's exercise of subject matter jurisdiction. See 28 U.S.C. §§ 1331, 1346(a).

The Members' motion is also timely. See, § III.A.1, supra. In addition, the parties to these actions will not be prejudiced if the Members are granted permissive intervention. As discussed above, the proceedings have not proceeded to such a point that the Government would be prejudiced by the Members' intervention: no trial date has been set, no discovery has been taken, no dispositive motions have been heard and only a preliminary injunction has issued. See, e.g. Bureerong, 167 F.R.D. at 86, n. 7 (finding no prejudice and that arguments against intervention went to merits of movant's purposes for intervening rather than delay and prejudice).

Finally, the Members' defense of medical necessity and their proposed counterclaim plainly have numerous questions of law and fact in common with the instant actions. The existence of a "common question" is liberally construed. Id. at 85; see also Venegas, 867 F.2d at 530 (finding common questions of law and fact and that "all of the considerations which guide the exercise of judicial discretion clearly weighed in favor of permissive intervention").

---

2 The Venegas court also held that in deciding whether to permit permissive intervention, a court should consider "whether the movant's 'interests are adequately represented by existing parties.'" Venegas, 867 F.2d at 530 (citations omitted). As previously discussed, the Members interests are not adequately represented by existing parties. See, § III.A.4, supra.

Some of the common questions of fact and law are: (1) whether cannabis was distributed in violation of the preliminary injunction, (2) whether cannabis was distributed in violation of the Controlled Substances Act, (3) whether the medical necessity defense applies, and (4) whether the injunction the Government seeks violates the Members' fundamental right guaranteed by the Fifth Amendment to be free from governmental interdiction of in their personal, self-funded medical choice, in consultation with their personal physician, to alleviate their suffering through the only effective treatment available for them. The facts and questions of law plainly arise out of the same transactions alleged in the complaints and in support of the Government's motions.

For these reasons, the Members should be granted permissive intervention.

IV. CONCLUSION.

For the foregoing reasons, the Court should permit the Members to intervene as of right. In the alternative, the Court should grant the Members permissive intervention in these actions.

Dated: August 14, 1998.

Respectfully submitted,

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EXHIBIT A

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. MARIN ALLIANCE FOR MEDICAL MARIJUANA; and LYNETTE SHAW, Defendants.	No. C 98-00086 CRB ANSWER TO COMPLAINT OF INTERVENOR-DEFENDANT AND REQUEST FOR JURY TRIAL

Defendant in intervention REBECCA NIKKEL ("Nikkel") responds to plaintiff's Complaint for Declaratory Relief, and Preliminary and Permanent Injunctive Relief against defendants Marin Alliance for Medical Marijuana and Lynette Shaw, (the "Complaint") as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

ER0834

SECOND DEFENSE

Nikkel answers the allegations of the numbered paragraphs of the Complaint using the same paragraph numbers:

1. Nikkel is without knowledge or information sufficient to enable her to form a belief as to the truth or falsity of plaintiff's averments concerning its intent and state of mind. Answering the remaining allegation of paragraph 1, Nikkel avers that the Complaint speaks for itself and that provisions of the Controlled Substances Act (the "Act"), 21 U.S.C. § 801 et seq., are conclusions of law, which speak for themselves. Except as so averred, Nikkel denies the allegations of paragraph 1.

2. Nikkel avers that section 512(a) of the Act, 21 U.S.C. § 882(a), is a matter of law that speaks for itself and further avers upon information and belief that this Court has jurisdiction over the claims alleged pursuant to 28 U.S.C. §§ 1331 and 1345 and that venue lies in this district. Except as so averred, Nikkel denies the allegations of paragraph 2.

3. Nikkel admits the allegations of paragraph 3 upon information and belief.

4. Nikkel avers upon information and belief that the Marin Alliance is an unincorporated association located at 6 School Street Plaza, Suite 210, Fairfax, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Except as so averred, Nikkel denies the allegations of paragraph 4.

5. Nikkel avers upon information and belief that Lynette Shaw ("Shaw") is the director of the Marin Alliance. Except as so averred, Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 5.

6. Nikkel avers that 21 U.S.C. § 801 et seq. is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 6.

7. Nikkel avers that section 501(a) of the Act, 21 U.S.C. § 871(a), is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 7.

8. Nikkel avers that section 101 of the Act, 21 U.S.C. § 801, is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 8 to the extent the quoted language is taken out of context. Nikkel specifically denies that the findings excerpted in paragraph 8 represent all of the Congressional findings in 21 U.S.C. § 801 that are pertinent to this action.

9. Nikkel avers that section 102(6) of the Act, 21 U.S.C. § 802(6), is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 9.

10. Nikkel avers that section 202(b) of the Act, 21 U.S.C. § 812(b), is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 10.

11. Nikkel avers that section 202(c) of the Act, 21 U.S.C. § 812(c), is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 11.

12. Nikkel avers that section 401(a) of the Act, 21 U.S.C. § 841(a)(1), is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 12.

13. Nikkel avers that section 102(15) of the Act, 21 U.S.C. § 802(15), is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 13.

14. Nikkel avers that section 416(a) of the Act, 21 U.S.C. § 856(a)(1), is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 14.

15. Nikkel avers that section 406 of the Act, 21 U.S.C. § 846, is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 15.

16. Nikkel avers that section 512(a) of the Act, 21 U.S.C. § 882(a), is a matter of law that speaks for itself. Except as so averred, Nikkel denies the allegations of paragraph 16.

17. Nikkel avers upon information and belief that the Marin Alliance is an unincorporated association located at 6 School Street Plaza, Suite 210, Fairfax, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Nikkel further avers upon information and belief that Shaw is the director of the Marin Alliance. Except as so averred, Nikkel denies the allegations of paragraph 17.

18. Nikkel avers upon information and belief that the Marin Alliance is an unincorporated association located at 6 School Street Plaza, Suite 210, Fairfax, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Nikkel further avers upon information and belief that Shaw is the director of the Marin Alliance. Except as so averred, Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 18.

19. Nikkel avers upon information and belief that the Marin Alliance is an unincorporated association located at 6 School Street Plaza, Suite 210, Fairfax, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Nikkel further avers upon information and belief that Shaw is the director of the Marin Alliance. Except as so averred, Nikkel is without knowledge or

information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 19.

20. Nikkel avers upon information and belief that the Marin Alliance is an unincorporated association located at 6 School Street Plaza, Suite 210, Fairfax, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Nikkel further avers upon information and belief that Shaw is the director of the Marin Alliance. Except as so averred, Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 20.

21. Nikkel avers upon information and belief that the Marin Alliance is an unincorporated association located at 6 School Street Plaza, Suite 210, Fairfax, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Nikkel further avers upon information and belief that Shaw is the director of the Marin Alliance. Except as so averred, Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 21.

22. Nikkel refers to and incorporates by reference herein as if fully set forth her answers to paragraphs 1 through 21 of the Complaint.

23. Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 23.

24. Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 24.

25. Nikkel refers to and incorporates by reference herein as if fully set forth her answers to paragraphs 1 through 24 of the Complaint.

26. Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 26.

27. Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 27.

28. Nikkel refers to and incorporates by reference herein as if fully set forth her answers to paragraphs 1 through 27 of the Complaint.

29. Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 29.

30. Nikkel is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 30.

THIRD DEFENSE

Plaintiff's claims are barred by the doctrine of unclean hands.

FOURTH DEFENSE

Nikkel is informed and believes, and on that basis alleges, that at all times relevant to the matters alleged in the Complaint, plaintiff was informed of any rights and claims which it may have had against Nikkel. Having such knowledge, plaintiff intentionally conducted itself in such a way as to lead Nikkel to believe plaintiff intentionally relinquished the rights and claims which it may have had against Nikkel. Plaintiff is therefore estopped from seeking damages and any other relief based on the allegations of the Complaint.

FIFTH DEFENSE

Nikkel is informed and believes, and on that basis alleges, that plaintiff knowingly and unreasonably delayed in asserting the claims contained in the Complaint, without good cause and under circumstances permitting and requiring diligence, and thereby prejudiced Nikkel. For that reason, the Complaint and each purported cause of action therein are barred by the doctrine of laches.

SIXTH DEFENSE

Nikkel is informed and believes, and on that basis alleges, that at all times relevant to the matters alleged in the Complaint, plaintiff was fully informed of the alleged rights it now asserts in its Complaint. Having such knowledge, plaintiff intentionally conducted itself in a manner inconsistent with the assertion of those rights and caused Nikkel to believe that it had relinquished said rights. As a result, plaintiff has waived the rights it now claims to assert.

SEVENTH DEFENSE

Nikkel's actions are lawful under the doctrine of necessity.

EIGHTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate the Commerce Clause of the United States Constitution.

NINTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate the substantive due process rights of life, privacy, freedom from government interference to use the most effective medication, bodily integrity and the doctor-patient relationship and privilege as recognized by the United States Constitution.

TENTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate Nikkel's rights as recognized by the Fourth, Fifth and Sixth Amendments to the United States Constitution.

ELEVENTH DEFENSE

Nikkel's actions are not unlawful purchase, but rather constitute joint possession or joint use.

TWELFTH DEFENSE

Nikkel's actions are lawful as activities of an ultimate user.

THIRTEENTH DEFENSE

Nikkel's actions about which plaintiff complains are the result of entrapment.

FOURTEENTH DEFENSE

Nikkel's actions have caused no irreparable injury.

FIFTEENTH DEFENSE

The balancing of hardships weighs in favor of Nikkel's actions.

SIXTEENTH DEFENSE

Nikkel's actions are lawful as consistent with the public interest.

SEVENTEENTH DEFENSE

Nikkel's actions lawfully constitute an exercise of power retained by the State of California, and by the people of the State of California, under the Tenth Amendment to the United States Constitution.

EIGHTEENTH DEFENSE

Any alleged act or omission giving rise to this action was committed or omitted without knowledge of Nikkel.

NINETEENTH DEFENSE

Any alleged act or omission giving rise to this action was committed or omitted without consent of Nikkel.

WHEREFORE, Nikkel prays for judgment on the Complaint in her favor and against plaintiff as follows:

(a) That plaintiff take nothing by reason of its Complaint;

(b) That the Complaint be dismissed with prejudice;

(c) That no declaration issue finding that Nikkel has violated the Controlled Substances Act;

(d) That no permanent injunction issue;

(e) That Nikkel be awarded her costs of suit and attorneys' fees incurred herein; and

(f) For such other relief as the Court may deem just and proper.

Dated: August __, 1998.

PILLSBURY MADISON & SUTRO LLP
THOMAS V. LORAN III
MARGARET S. SCHROEDER
235 Montgomery Street
Post Office Box 7880
San Francisco, CA 94120-7880

By _____

Attorneys for Proposed Defendant and Counterclaimant-in-Intervention Rebecca Nikkel

ER0842

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Nikkel demands a trial by jury of all issues properly tried to a jury.

Dated: August __, 1998.

PILLSBURY MADISON & SUTRO LLP
THOMAS V. LORAN III
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235 Montgomery Street
Post Office Box 7880
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By _____

Attorneys for Proposed Defendant and Counterclaimant-in-Intervention Rebecca Nikkel

EXHIBIT B

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Attorneys for Proposed
Defendant and Counterclaimant-
in-Intervention Lucia Y. Vier

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. UKIAH CANNABIS BUYER'S CLUB; CHERRIE LOVETT; MARVIN LEHRMAN; and MILDRED LEHRMAN, Defendants.	No. C 98-00087 CRB ANSWER TO COMPLAINT OF INTERVENOR-DEFENDANT AND REQUEST FOR JURY TRIAL

Defendant in intervention LUCIA Y. VIER ("Vier") responds to plaintiff's Complaint for Declaratory Relief, and Preliminary and Permanent Injunctive Relief against defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman, (the "Complaint") as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

Vier answers the allegations of the numbered paragraphs of the Complaint using the same paragraph numbers:

1. Vier is without knowledge or information sufficient to enable her to form a belief as to the truth or falsity of plaintiff's averments concerning its intent and state of mind. Answering the remaining allegation of paragraph 1, Vier avers that the Complaint speaks for itself and that provisions of the Controlled Substances Act (the "Act"), 21 U.S.C. § 801 et seq., are conclusions of law, which speak for themselves. Except as so averred, Vier denies the allegations of paragraph 1.

2. Vier avers that section 512(a) of the Act, 21 U.S.C. § 882(a), is a matter of law that speaks for itself and further avers upon information and belief that this Court has jurisdiction over the claims alleged pursuant to 28 U.S.C. §§ 1331 and 1345 and that venue lies in this district. Except as so averred, Vier denies the allegations of paragraph 2.

3. Vier admits the allegations of paragraph 3 upon information and belief.

4. Vier avers upon information and belief that the Ukiah Coop is an unincorporated association located at 40A Pallini Lane, Ukiah, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Except as so averred, Vier denies the allegations of paragraph 4.

5. Vier avers upon information and belief that Cherrie Lovett ("Lovett") is the director of the Ukiah Coop. Except as so averred, Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 5.

6. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 6.

7. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 7.

8. Vier avers that 21 U.S.C. § 801 et seq. is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 8.

9. Vier avers that section 501(a) of the Act, 21 U.S.C. § 871(a), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 9.

10. Vier avers that section 101 of the Act, 21 U.S.C. § 801, is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 10 to the extent the quoted language is taken out of context. Vier specifically denies that the findings excerpted in paragraph 10 represent all of the Congressional findings in 21 U.S.C. § 801 that are pertinent to this action.

11. Vier avers that section 102(6) of the Act, 21 U.S.C. § 802(6), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 11.

12. Vier avers that section 202(b) of the Act, 21 U.S.C. § 812(b), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 12.

13. Vier avers that section 202(c) of the Act, 21 U.S.C. § 812(c), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 13.

14. Vier avers that section 401(a) of the Act, 21 U.S.C. § 841(a)(1), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 14.

15. Vier avers that section 102(15) of the Act, 21 U.S.C. § 802(15), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 15.

16. Vier avers that section 416(a) of the Act, 21 U.S.C. § 856(a)(1), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 16.

17. Vier avers that section 416(a) of the Act, 21 U.S.C. § 856(a)(2), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 17.

18. Vier avers that section 406 of the Act, 21 U.S.C. § 846, is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 18.

19. Vier avers that section 512(a) of the Act, 21 U.S.C. § 882(a), is a matter of law that speaks for itself. Except as so averred, Vier denies the allegations of paragraph 19.

20. Vier avers upon information and belief that the Ukiah Coop is an unincorporated association located at 40A Pallini Lane, Ukiah, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Vier further avers upon information and belief that Lovett is the director of the Ukiah Coop. Except as so averred, Vier denies the allegations of paragraph 20.

21. Vier avers upon information and belief that the Ukiah Coop is an unincorporated association located at 40A Pallini Lane, Ukiah, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Vier further avers upon information and belief that Lovett is the director of the Ukiah Coop. Except as so averred, Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 21.

22. Vier avers upon information and belief that the Ukiah Coop is an unincorporated association located at 40A Pallini Lane, Ukiah, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Vier further avers upon information and belief that Lovett is the director of the Ukiah

Coop. Except as so averred, Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 22.

23. Vier avers upon information and belief that the Ukiah Coop is an unincorporated association located at 40A Pallini Lane, Ukiah, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Vier further avers upon information and belief that Lovett is the director of the Ukiah Coop. Except as so averred, Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 23.

24. Vier avers upon information and belief that the Ukiah Coop is an unincorporated association located at 40A Pallini Lane, Ukiah, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Vier further avers upon information and belief that Lovett is the director of the Ukiah Coop. Except as so averred, Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 24.

25. Vier avers upon information and belief that the Ukiah Coop is an unincorporated association located at 40A Pallini Lane, Ukiah, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Vier further avers upon information and belief that Lovett is the director of the Ukiah Coop. Except as so averred, Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 25.

26. Vier refers to and incorporates by reference herein as if fully set forth her answers to paragraphs 1 through 25 of the Complaint.

27. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 27.

28. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 28.

29. Vier refers to and incorporates by reference herein as if fully set forth her answers to paragraphs 1 through 28 of the Complaint.

30. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 30.

31. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 31.

32. Vier refers to and incorporates by reference herein as if fully set forth her answers to paragraphs 1 through 31 of the Complaint.

33. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 33.

34. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 34.

35. Vier refers to and incorporates by reference herein as if fully set forth her answers to paragraphs 1 through 34 of the Complaint.

36. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 36.

37. Vier is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 37.

THIRD DEFENSE

Plaintiff's claims are barred by the doctrine of unclean hands.

FOURTH DEFENSE

Vier is informed and believes, and on that basis alleges, that at all times relevant to the matters alleged in the Complaint, plaintiff was informed of any rights and claims which it may have had against Vier. Having such knowledge, plaintiff

intentionally conducted itself in such a way as to lead Vier to believe plaintiff intentionally relinquished the rights and claims which it may have had against Vier. Plaintiff is therefore estopped from seeking damages and any other relief based on the allegations of the Complaint.

FIFTH DEFENSE

Vier is informed and believes, and on that basis alleges, that plaintiff knowingly and unreasonably delayed in asserting the claims contained in the Complaint, without good cause and under circumstances permitting and requiring diligence, and thereby prejudiced Vier. For that reason, the Complaint and each purported cause of action therein are barred by the doctrine of laches.

SIXTH DEFENSE

Vier is informed and believes, and on that basis alleges, that at all times relevant to the matters alleged in the Complaint, plaintiff was fully informed of the alleged rights it now asserts in its Complaint. Having such knowledge, plaintiff intentionally conducted itself in a manner inconsistent with the assertion of those rights and caused Vier to believe that it had relinquished said rights. As a result, plaintiff has waived the rights it now claims to assert.

SEVENTH DEFENSE

Vier's actions are lawful under the doctrine of necessity.

EIGHTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate the Commerce Clause of the United States Constitution.

NINTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate the substantive due process rights of life, privacy, freedom from government interference to use the most effective medication, bodily integrity and the doctor-patient relationship and privilege as recognized by the United States Constitution.

TENTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate Vier's rights as recognized by the Fourth, Fifth and Sixth Amendments to the United States Constitution.

ELEVENTH DEFENSE

Vier's actions are not unlawful purchase, but rather constitute joint possession or joint use.

TWELFTH DEFENSE

Vier's actions are lawful as activities of an ultimate user.

THIRTEENTH DEFENSE

Vier's actions about which plaintiff complains are the result of entrapment.

FOURTEENTH DEFENSE

Vier's actions have caused no irreparable injury.

FIFTEENTH DEFENSE

The balancing of hardships weighs in favor of Vier's actions.

SIXTEENTH DEFENSE

Vier's actions are lawful as consistent with the public interest.

SEVENTEENTH DEFENSE

Vier's actions lawfully constitute an exercise of power retained by the State of California, and by the people of the State of California, under the Tenth Amendment to the United States Constitution.

EIGHTEENTH DEFENSE

Any alleged act or omission giving rise to this action was committed or omitted without knowledge of Vier.

NINETEENTH DEFENSE

Any alleged act or omission giving rise to this action was committed or omitted without consent of Vier.

WHEREFORE, Vier prays for judgment on the Complaint in her favor and against plaintiff as follows:

(a) That plaintiff take nothing by reason of its Complaint;

(b) That the Complaint be dismissed with prejudice;

(c) That no declaration issue finding that Vier has violated the Controlled Substances Act;

(d) That no permanent injunction issue;

(e) That Vier be awarded her costs of suit and attorneys' fees incurred herein; and

(f) For such other relief as the Court may deem just and proper.

Dated: August __, 1998.

PILLSBURY MADISON & SUTRO LLP
THOMAS V. LORAN III
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235 Montgomery Street
Post Office Box 7880
San Francisco, CA 94120-7880

By _____

Attorneys for Proposed Defendant and Counterclaimant-in-Intervention Lucia Y. Vier

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Vier demands a trial by jury of all issues properly tried to a jury.

Dated: August __, 1998.

PILLSBURY MADISON & SUTRO LLP
THOMAS V. LORAN III
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By _____

Attorneys for Proposed Defendant and Counterclaimant-in-Intervention Lucia Y. Vier

EXHIBIT C

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Attorneys for Proposed Defendants and Counterclaimants-in-Intervention Edward Neil Brundridge and Ima Carter

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. OAKLAND CANNABIS BUYERS' COOPERATIVE, and JEFFREY JONES, Defendants.	No. C 98-00088 CRB ANSWER TO COMPLAINT OF INTERVENOR-DEFENDANTS AND REQUEST FOR JURY TRIAL

Defendants in intervention EDWARD NEIL BRUNDRIDGE and IMA CARTER (the "Members") respond to plaintiff's Complaint for Declaratory Relief, and Preliminary and Permanent Injunctive Relief against defendants Oakland Cannabis Buyers' Cooperative, and Jeffrey Jones, (the "Complaint") as follows:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

ER0856

SECOND DEFENSE

The Members answer the allegations of the numbered paragraphs of the Complaint using the same paragraph numbers:

1. The Members are without knowledge or information sufficient to enable them to form a belief as to the truth or falsity of plaintiff's averments concerning its intent and state of mind. Answering the remaining allegation of paragraph 1, the Members aver that the Complaint speaks for itself and that provisions of the Controlled Substances Act (the "Act"), 21 U.S.C. § 801 et seq., are conclusions of law, which speak for themselves. Except as so averred, the Members deny the allegations of paragraph 1.

2. The Members aver that section 512(a) of the Act, 21 U.S.C. § 882(a), is a matter of law that speaks for itself and further aver upon information and belief that this Court has jurisdiction over the claims alleged pursuant to 28 U.S.C. §§ 1331 and 1345 and that venue lies in this district. Except as so averred, the Members deny the allegations of paragraph 2.

3. The Members admit the allegations of paragraph 3 upon information and belief.

4. The Members aver upon information and belief that the Oakland Coop is an unincorporated cooperative association located at 1755 Broadway Avenue in Oakland, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. Except as so averred, the Members deny the allegations of paragraph 4.

5. The Members aver upon information and belief that Jeffrey Jones ("Jones") is the director of the Oakland Coop. Except as so averred, the Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 5.

6. The Members aver that 21 U.S.C. § 801 et seq. is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 6.

7. The Members aver that section 501(a) of the Act, 21 U.S.C. § 871(a), is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 7.

8. The Members aver that section 101 of the Act, 21 U.S.C. § 801, is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 8 to the extent the quoted language is taken out of context. The Members specifically deny that the findings excerpted in paragraph 8 represent all of the Congressional findings in 21 U.S.C. § 801 that are pertinent to this action.

9. The Members aver that section 102(6) of the Act, 21 U.S.C. § 802(6), is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 9.

10. The Members aver that section 202(b) of the Act, 21 U.S.C. § 812(b), is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 10.

11. The Members aver that section 202(c) of the Act, 21 U.S.C. § 812(c), is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 11.

12. The Members aver that section 401(a) of the Act, 21 U.S.C. § 841(a)(1), is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 12.

13. The Members aver that section 102(15) of the Act, 21 U.S.C. § 802(15), is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 13.

14. The Members aver that section 416(a) of the Act, 21 U.S.C. § 856(a)(1), is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 14.

15. The Members aver that section 406 of the Act, 21 U.S.C. § 846, is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 15.

16. The Members aver that section 512(a) of the Act, 21 U.S.C. § 882(a), is a matter of law that speaks for itself. Except as so averred, the Members deny the allegations of paragraph 16.

17. The Members aver upon information and belief that the Oakland Coop is an unincorporated cooperative association located at 1755 Broadway Avenue in Oakland, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. The Members further aver upon information and belief that Jones is the director of the Oakland Coop. Except as so averred, the Members deny the allegations of paragraph 17.

18. The Members aver upon information and belief that the Oakland Coop is an unincorporated cooperative association located at 1755 Broadway Avenue in Oakland, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. The Members further aver upon information and belief that Jones is the director of the Oakland Coop. Except as so averred, the Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 18.

19. The Members aver upon information and belief that the Oakland Coop is an unincorporated cooperative association located at 1755 Broadway Avenue in Oakland, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine

for members who need it. The Members further aver upon information and belief that Jones is the director of the Oakland Coop. Except as so averred, the Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 19.

20. The Members aver upon information and belief that the Oakland Coop is an unincorporated cooperative association located at 1755 Broadway Avenue in Oakland, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. The Members further aver upon information and belief that Jones is the director of the Oakland Coop. Except as so averred, the Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 20.

21. The Members aver upon information and belief that the Oakland Coop is an unincorporated cooperative association located at 1755 Broadway Avenue in Oakland, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. The Members further aver upon information and belief that Jones is the director of the Oakland Coop. Except as so averred, the Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 21.

22. The Members aver upon information and belief that the Oakland Coop is an unincorporated cooperative association located at 1755 Broadway Avenue in Oakland, California that operates as a not for profit organization pursuant to and in accordance with the statewide mandate of Proposition 215 to help provide medicine for members who need it. The Members further aver upon information and belief that Jones is the director of the Oakland Coop. Except as so averred, the Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 22.

23. The Members refer to and incorporate by reference herein as if fully set forth their answers to paragraphs 1 through 22 of the Complaint.

24. The Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 24.

25. The Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 25.

26. The Members refer to and incorporate by reference herein as if fully set forth their answers to paragraphs 1 through 25 of the Complaint.

27. The Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 27.

28. The Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 28.

29. The Members refer to and incorporate by reference herein as if fully set forth their answers to paragraphs 1 through 28 of the Complaint.

30. The Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 30.

31. The Members are without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 31.

THIRD DEFENSE

Plaintiff's claims are barred by the doctrine of unclean hands.

FOURTH DEFENSE

The Members are informed and believe, and on that basis allege, that at all times relevant to the matters alleged in the Complaint, plaintiff was informed of any rights and claims which it may have had against the Members. Having such knowledge, plaintiff intentionally conducted itself in such a way as to lead the Members to believe plaintiff intentionally relinquished the rights and claims which it

may have had against the Members. Plaintiff is therefore estopped from seeking damages and any other relief based on the allegations of the Complaint.

FIFTH DEFENSE

The Members are informed and believe, and on that basis allege, that plaintiff knowingly and unreasonably delayed in asserting the claims contained in the Complaint, without good cause and under circumstances permitting and requiring diligence, and thereby prejudiced the Members. For that reason, the Complaint and each purported cause of action therein are barred by the doctrine of laches.

SIXTH DEFENSE

The Members are informed and believe, and on that basis allege, that at all times relevant to the matters alleged in the Complaint, plaintiff was fully informed of the alleged rights it now asserts in its Complaint. Having such knowledge, plaintiff intentionally conducted itself in a manner inconsistent with the assertion of those rights and caused the Members to believe that it had relinquished said rights. As a result, plaintiff has waived the rights it now claims to assert.

SEVENTH DEFENSE

The Members' actions are lawful under the doctrine of necessity.

EIGHTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate the Commerce Clause of the United States Constitution.

NINTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate the substantive due process rights of life, privacy, freedom from government

interference to use the most effective medication, bodily integrity and the doctor-patient relationship and privilege as recognized by the United States Constitution.

TENTH DEFENSE

The statutes and regulations upon which plaintiff relies, as applied herein, violate the Members' rights as recognized by the Fourth, Fifth and Sixth Amendments to the United States Constitution.

ELEVENTH DEFENSE

The Members' actions are not unlawful purchase, but rather constitute joint possession or joint use.

TWELFTH DEFENSE

The Members' actions are lawful as activities of ultimate users.

THIRTEENTH DEFENSE

The Members' actions about which plaintiff complains are the result of entrapment.

FOURTEENTH DEFENSE

The Members' actions have caused no irreparable injury.

FIFTEENTH DEFENSE

The balancing of hardships weighs in favor of the Members' actions.

SIXTEENTH DEFENSE

The Members' actions are lawful as consistent with the public interest.

SEVENTEENTH DEFENSE

The Members' actions lawfully constitute an exercise of power retained by the State of California, and by the people of the State of California, under the Tenth Amendment to the United States Constitution.

EIGHTEENTH DEFENSE

Any alleged act or omission giving rise to this action was committed or omitted without knowledge of the Members.

NINETEENTH DEFENSE

Any alleged act or omission giving rise to this action was committed or omitted without consent of the Members.

WHEREFORE, the Members pray for judgment on the Complaint in their favor and against plaintiff as follows:

(a) That plaintiff take nothing by reason of its Complaint;

(b) That the Complaint be dismissed with prejudice;

(c) That no declaration issue finding that the Members have violated the Controlled Substances Act;

(d) That no permanent injunction issue;

(e) That the Members be awarded their costs of suit and attorneys' fees incurred herein; and

(f) For such other relief as the Court may deem just and proper.

Dated: August __, 1998.

PILLSBURY MADISON & SUTRO LLP
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MARGARET S. SCHROEDER
235 Montgomery Street
Post Office Box 7880
San Francisco, CA 94120-7880

By _____

Attorneys for Proposed Defendants and Counterclaimants -in-Intervention Edward Neil Brundridge and Ima Carter

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, the Members demand a trial by jury of all issues properly tried to a jury.

Dated: August __, 1998.

PILLSBURY MADISON & SUTRO LLP
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. OAKLAND CANNABIS BUYERS' COOPERATIVE, and JEFFREY JONES, Defendants. AND RELATED ACTIONS	No. C 98-00088 CRB DECLARATION OF IMA CARTER IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE Date: Time: Courtroom of the Hon. Charles R. Breyer

I, IMA CARTER, declare as follows:

1. I am a member of the Oakland Cannabis Buyers' Cooperative in Oakland, California (the "Oakland Club"). I am submitting this declaration in support of the motion for leave to intervene in this action. Except where stated on information and belief, I have personal knowledge of the

matters set forth in this declaration and could and would testify competently to them if called on by the Court to do so.

2. I am 55 years old. I suffer from several different conditions and injuries which cause me significant and constant pain. I use cannabis for several of these conditions: congenital scoliosis, fibromyalgia and cervical nerve damage which I suffered as a result of being involved in several car accidents in which I was rear-ended. These conditions which include cervical nerve damage in C4 through C7 of my spine, cause me enormous pain in my back. This pain is marked by frequent muscle spasms, and a recurring shooting pain in my head. Cannabis is the only drug in my experience that has effectively treated this pain.

3. I have tried numerous traditional medicines for these conditions, none of which was effective. For example, I took steroids and anti-inflammatory drugs. These drugs have caused me to bleed internally.

4. I have also tried rhizotomy, which is a laser treatment. During this treatment, a laser beam was burned into the cervical nerves to create scar tissue. The treatment required that I be awake during it and it was excruciatingly painful. It is my understanding that physicians have now discontinued prescribing rhizotomy treatments because they are unbearably painful and useless. The rhizotomy treatments did not relieve my back pain. This pain feels like a hot burning pain going down my left arm into my hand.

5. In addition, I underwent breast reduction surgery to relieve the scoliosis pain in my back. I also tried many different forms of physical therapy, including various exercises, ultrasound, ice packs, jacuzzi treatments and others. None of these even touched the recurring shooting pain I experience in my head.

6. I also have a therapeutic electrical neuro-stimulator (a "TENS") unit that controls some of my pain from the cervical nerve damage and scoliosis. However, the TENS unit does not stop or dull in any way the shooting pain that occurs in my head at frequent intervals. I am presently taking morphine as prescribed by my doctor, but it--like the TENS unit--does not stop or dull in any way the frequent pain in my head.

7. I first tried cannabis on the recommendation of my nutritionist, and it is the only drug that I have used that has dulled or stopped the pain. I was once forced to go without cannabis. During this period of time, the pain was completely disabling and prevented me from being able to function. During this time, I could not leave my bedroom due to the pain that recurred every few minutes, and therefore I could not do any of my regular daily activities, such as answering the phone, doing the dishes, running errands, watching television, reading and taking care of my finances.

8. I was afraid to ask my doctor for a recommendation for cannabis. I was afraid of alienating him by asking him for a drug which I understood the government was threatening to prosecute doctors for prescribing. When I asked him, I

was nervous and upset. Nevertheless, I asked my doctor to give me a written recommendation for cannabis and he agreed. My doctor monitors my use of cannabis by seeing me frequently and discussing my treatment. In addition, he renews my letter of referral every few months. I feel that my private relationship with my doctor is endangered because of the government's threat of prosecution. The fear it has caused me makes me unable to speak freely with my doctor about my condition and my medical needs when a nurse or assistant is present. Because of this fear, I had been reluctant to discuss openly and extensively with my doctor the possibility of using cannabis to treat my condition.

9. In addition, I feel that my privacy rights have been violated as a result of plaintiff's action to close the Oakland Club and the other defendant clubs to prevent the medicinal use of cannabis. I live in constant fear that I will be prosecuted for my use of cannabis and that my doctor will be prosecuted for recommending that I use cannabis. I also fear that my private conversations with my physician and my medical records will be made public as a result of the relief sought by plaintiff. If the Oakland Club is closed, I will not be able legally to obtain cannabis, which is the only effective treatment available to alleviate my pain and frequent muscle spasms associated with congenital scoliosis, fibromyalgia and nerve damage.

10. As described above, I have previously gone without using cannabis. If the Oakland Club and other defendant

clubs are shut down or I am in some other way prohibited from obtaining cannabis, I will suffer immediate harm. Using cannabis is a medical necessity for me. When I am not using cannabis, I am completely incapacitated and cannot leave my room. Without cannabis, I experience intense intervals of pain in my head that occur every few minutes. There is no drug other than cannabis that alleviates these shooting pains. I have tried many traditional drugs, including morphine, steroids, rhizotomy treatments and breast reduction surgery, none of which has alleviated the shooting pains.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of August, 1998 at Oakland, California.

Ima Carter

Ima Carter

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. OAKLAND CANNABIS BUYERS' COOPERATIVE, and JEFFREY JONES, Defendants. AND RELATED ACTIONS	No. C 98-00088 CRB DECLARATION OF EDWARD NEIL BRUNDRIDGE IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE Date: Time: Courtroom of the Hon. Charles R. Breyer

I, EDWARD NEIL BRUNDRIDGE, declare as follows:

1. I am a member of the Oakland Cannabis Buyers' Cooperative in Oakland, California (the "Oakland Club"). I am submitting this declaration in support of the motion for leave to intervene in this action. Except where stated on information and belief, I have personal knowledge of the

matters set forth in this declaration and could and would testify competently to them if called on by the Court to do so.

2. I am 58 years old. I had Hepatitis C which caused damage to my liver. As a result, I am not able to take many traditional medications.

3. I have severe arthritis in my right knee. The arthritis is so extensive that I have had to use a cane for the past year. My doctor wanted to prescribe ibuprofen to relieve the swelling caused by the arthritis, but I am allergic to ibuprofen. I understand that ibuprofen is what my doctor generally recommends to alleviate the swelling associated with arthritis. To alleviate the pain caused by the arthritis, I have tried other traditional medicines. These medicines were not effective in relieving that pain. I was either allergic to the traditional medications or they did not alleviate my pain.

4. I have successfully used cannabis, however, to alleviate this pain. In addition, cannabis also allows me to be alert, which many of the traditional medicines do not. Cannabis is the only medicine I have used which effectively alleviates the pain caused by the arthritis.

5. The traditional medicines I have tried either do not work or are so strong that I cannot participate in the activities that I need to do every day. These necessary daily activities include driving, taking my dog out for walks, shopping, talking to other people, taking

care of my finances, riding public transportation, doing the dishes, cleaning my house, reading and answering the telephone. Cannabis, however, alleviates the pain without preventing me from functioning in my daily life.

6. I also suffer from insomnia. The cannabis helps me sleep and relieves my anxiety. Without cannabis, I would not be able to sleep. Conventional sleeping pills are highly addictive, and, for that reason, I am not able to take them. I cannot handle conventional sleeping medications and my doctor will not prescribe them for me.

7. My doctor told me that I will need to enter the liver institute very soon, which will put me in line for a liver transplant in the next several years. This news has caused me to suffer from anxiety and extreme depression. I am presently seeing a therapist for treatment for these conditions. As a result of my anxiety and depression, I no longer had an appetite. I use cannabis to relieve the stress of my depression and to give me an appetite. I once went without cannabis, and I lost 30 pounds in three weeks. I am presently taking Prozac, which helps alleviate my anxiety and depression, but it does nothing to stimulate my appetite.

8. Cannabis is the only drug that effectively gives me an appetite. Without using cannabis, I believe I would not be alive today. For this reason, the use of cannabis is a medical necessity for me. There is no drug other than cannabis that alleviates my pain and

depression and gives me the appetite I need to stay alive. I have tried many traditional drugs, none of which is effective in alleviating my pain and stimulating my appetite. Many of these traditional drugs were not effective because I was allergic to them.

9. There is another reason that I cannot take many traditional medicines. I am a recovering drug abuser and alcoholic. I cannot take many traditional pain relievers because of these addictions. I become easily addicted to traditional pain killers.

10. My doctor recommended that I use cannabis, but he was afraid to give me a written recommendation for fear of prosecution by the government and therefore would not give me a written recommendation for cannabis. Nevertheless, he telephoned the Oakland Club and gave it an oral recommendation for cannabis for me. I feel that my private relationship with my doctor has been damaged because of the government's threat of prosecution and the fear it has caused in my doctor to treat me with the only effective medicine for alleviating my pain and stimulating my appetite: cannabis. Because of this fear, I feel that my doctor has been reluctant to discuss cannabis as a possible treatment and he has been reluctant to prescribe it.

11. In addition, I feel that my privacy rights have been violated as a result of plaintiff's action to close the Oakland Club and the other defendant clubs to prevent the

medicinal use of cannabis. I live in constant fear that I will be prosecuted concerning my use of cannabis and that my doctor will be prosecuted for recommending that I use cannabis. I also fear that my private conversations with my physician and my medical records will be made public as a result of the relief sought by plaintiff. If the Oakland Club and the other defendant clubs are closed, I will suffer immediate harm since I will not be able legally to obtain cannabis, which is the only effective treatment available to alleviate my pain and stimulate my appetite.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of August, 1998 at San Francisco, California.

Edward Neil Brundridge

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON,

Defendants.

AND RELATED ACTIONS

Nos. C 98-0085 CRB RELATED
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

PLAINTIFF'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

Date: August 31, 1998
Time: 2:30 p.m.
Courtroom of the Hon. Charles R. Breyer

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PRELIMINARY STATEMENT

More than seven months after these actions commenced; almost five months after the March 24, 1998 hearing on the United States' motions for preliminary injunction; nearly three months after the Court issued its May 13, 1998 Memorandum Opinion and Order and May 19, 1998 Preliminary Injunction Orders; and more than one month after the United States moved to hold three groups of non-compliant defendants[1] in civil contempt and to modify the Preliminary Injunction Orders, Edward Neil Brundrige, Ima Carter, Rebecca Nikkel, and Lucia Y. Vier (collectively the "Members") move to intervene in these actions. The Members' motion should be denied. It is far too late in the game for the Members to intervene in these actions, particularly now, in the context of civil contempt proceedings. Indeed, courts have uniformly held that intervention is inappropriate in the context of contempt proceedings. Intervention by the Members also might prejudice to the United States by delaying resolution of the government's motions to hold the non-compliant defendants in civil contempt and to modify the Preliminary Injunction Orders. Nor do the Members deny that they have been aware of these actions since they were commenced, and none of the Members' excuses for delay is persuasive. Finally, the Members do not have a protectable interest in obtaining marijuana, for it is unlawful under the Controlled Substances Act, 21 U.S.C. § 844, and the Members' interests appear to be adequately represented by the existing parties. For all these reasons, the Members' motion to intervene should be denied.

[1] The non-compliant defendants are the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, defendants in Case No. C 98-0088 CRB; the Marin Alliance for Medical Marijuana and Lynnette Shaw, defendants in Case No. C 98-0086 CRB; and the Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman, defendants in Case No. C 98-0087 CRB.

ARGUMENT

I. THE MEMBERS' MOTION TO INTERVENE AS OF RIGHT SHOULD BE DENIED BECAUSE IT IS UNTIMELY; WOULD PREJUDICE THE UNITED STATES; AND BECAUSE THE MEMBERS ARE ADEQUATELY REPRESENTED BY EXISTING PARTIES

Intervention in the federal courts is governed by Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a), which governs intervention of right, provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The Members seek to intervene pursuant to subsection (2) of Rule 24(a). The Ninth Circuit has adopted four requirements for granting intervention of right under Rule 24(a)(2):

> (1) the application for intervention must be timely; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the transaction; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties in the lawsuit.

Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 836 (9th Cir. 1996) (citations omitted).

In these actions, the Members' motion to intervene should be denied because it is untimely, because the Members' do not have a protectable interest in obtaining marijuana under the Controlled Substances Act, and because the Members appear to be adequately represented by existing parties.

A. The Members' Motion to Intervene is Untimely

As the language of Rule 24(a) makes clear, in considering a motion for intervention, "the court where the action is pending must first be satisfied as to timeliness." NAACP v. New York, 413 U.S. 345, 365 (1973). Indeed, "[t]imeliness is 'the threshold requirement' for intervention as of right." League of United Latin American Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997) (quoting United States v. Oregon, 913 F.2d 576, 588 (9th Cir. 1990)). If a court decides

that a motion to intervene was not timely, it "need not reach any of the remaining elements of Rule 24." United States v. Washington, 86 F.3d 1499, 1503 (9th Cir. 1996).

In the Ninth Circuit, courts generally look to three factors in determining whether a motion to intervene is timely: "(1) the stage of the proceeding at which the applicant seeks to intervene, (2) the prejudice to other parties; and (3) the reason for and length of the delay." League of United Latin American Citizens, 131 F.3d at 1302 (internal quotation omitted). In considering these factors, a court must be mindful that "any substantial lapse of time weighs heavily against intervention." Washington, 86 F.3d at 1503. See also United States v. Blue Chip Stamp Co., 272 F. Supp. 432, 436 (C.D. Cal. 1967) ("[T]he courts do not look with favor upon one who, fully aware of what has transpired, fails to act on his rights and is unreasonably tardy in filing a petition for intervention."), affirmed, 389 U.S. 580 (1968). The determination of timeliness should be made in each case in light of the circumstances of the litigation. As the Supreme Court has indicated, "[t]imeliness is to be determined from all the circumstances." NAACP v. New York, 413 U.S. at 366.

Under any of the factors set forth in League of United Latin American Citizens, the Member's Motion to Intervene must be denied as untimely. First, these actions have reached a stage of proceedings in which intervention is inappropriate. On May 13, 1998, the Court rendered its decision on the United States' motions for preliminary injunctions, and entered six preliminary injunctions requested by the United States on May 19, 1998. Based on the open and notorious violations of the Preliminary Injunction Orders by the non-compliant defendants, the United States moved to hold these defendants in civil contempt on July 6, 1998, and to modify the Injunction Orders to authorize the United States Marshal to close the defendant cannabis clubs. The hearing on this matter is scheduled to be heard on August 31, 1998.

In these circumstances, the federal courts, including the Ninth Circuit, have consistently denied motions for intervention where the motion was first raised in the context of contempt proceedings. In United States v. Fitch, 472 F.2d 548 (9th Cir.) (per curiam), cert. denied, 412

U.S. 954 (1973), the Ninth Circuit affirmed the denial of a motion to intervene, brought by a third party who had been indicted by a federal grand jury, who had sought to intervene in a civil contempt proceeding against two witnesses who had refused to testify before the same grand jury. The Ninth Circuit "agree[d] with the district court that [the witness], as a matter of right was not entitled to intervene." Id. at 549-50. Although noting that Fed. R. Crim. P. 12 might permit a protective order under appropriate circumstances, the Ninth Circuit held that the third party nonetheless was not entitled "to make himself a party to a civil contempt proceeding before the district court." Id. at 550.

This same conclusion was reached by the Tenth Circuit in NLRB v. Shurtenda Steaks, Inc., 424 F.2d 192 (10th Cir. 1970). In that case, a union had moved to intervene in a civil contempt proceeding brought by the National Labor Relations Board. The Tenth Circuit denied the petition to intervene because "the union could have intervened in the enforcement proceeding, but failed to do so," instead waiting until the Board had initiated contempt proceedings. Id. at 194. In pertinent part, the court concluded that "[w]e believe that, absent extraordinary and unusual circumstances, intervention, by a party who did not participate in the litigation giving rise to the judgment claimed to be violated, should not be permitted." Id.

To the same effect is Preston v. Thompson, 589 F.2d 300 (7th Cir. 1978). In that case, a prisoner class action, the Seventh Circuit affirmed the district court's denial of a motion to intervene where the complaint had been filed on August 31, 1978, the court had issued a preliminary injunction on November 3, 1978, but the intervenors "did not present its motion until November 28, over three weeks after the preliminary relief was granted." Id. at 194. Noting that the proposed intervenors "were aware of the litigation," but "did nothing until three weeks after the State received an adverse decision," the Seventh Circuit held that the district court's order denying the motion to intervene was proper. Id.

Likewise, the Ninth Circuit has also affirmed the denial of a motion to intervene after the entry of preliminary injunctive relief, but before contempt proceedings had been initiated. In

League of United Latin American Citizens, a foundation involved in immigration issues sought to intervene in the litigation challenging Proposition 187 in California. Noting that the district court had already issue a temporary restraining order and a subsequent preliminary injunction, the Ninth Circuit concluded that "the fact that the district court has substantively -- and substantially -- engaged the issues in this case weighs heavily against allowing intervention as of right under Rule 24(a)(2)." 131 F.3d at 1303.

This uniform line of authority demonstrates that these related actions have reached a stage of proceedings in which intervention by the Members would be inappropriate.

Second, intervention by the Members would prejudice the United States by possibly causing delay to the Court's consideration of the government's motions to hold the non-compliant defendants in civil contempt, and to modify the Preliminary Injunction Orders. Courts in the Ninth Circuit have consistently found prejudice to existing parties when a proposed intervention could have the effect of prolonging the litigation. See, e.g., League of United Latin American Citizens, 131 F.3d 1304 (intervention by foundation "will have the inevitable effect of prolonging the litigation to some degree," and that this "counsels against granting [the foundation] motion."); Washington, 86 F.3d at 1504 (district court did not abuse discretion in determining that "other parties would be prejudiced by the requested intervention, because intervention would complicate the issues and prolong the litigation"); Associated General Contractors v. Secretary of Commerce, 77 F.R.D. 31, 39 (C.D. Cal. 1977) ("The concept of prejudice to the original parties * * * encompasses prejudice not only to the original parties' substantive legal rights, but also to their right to proceed without delay.").

Similarly, courts have found prejudice to existing parties when a motion to intervene has been raised in the context of contempt proceedings. In Sierra Club v. U.S. Army Corp. of Engineers, 709 F.2d 175 (2d Cir. 1983), for example, the Second Circuit affirmed the denial of motion to intervene raised in a civil contempt proceeding, holding that "[t]o expand the number of litigants * * * might unduly delay the contempt proceeding," and that "[i]n a case of this nature,

irrespective of the outcome, it is important that the district court proceed expeditiously * * * *." Id. at 177. See also Wilder v. Bernstein, No. 78-CIV-957 (RJW), 1994 WL 30480, at * 4 (S.D.N.Y. Jan. 28, 1994) ("Unless restricted, granting intervention could conceivably permit applicants to delay adjudication of the contempt proceeding and, hence, prejudice existing parties to the case.").

Similarly here, where the Members are asking the Court to hear their motion to intervene on the same date and time as the hearing on the government's motions to hold the non-compliant defendants in civil contempt and to modify the Preliminary Injunction Orders, allowing intervention might extend the Court's deliberations on the contempt issue, thereby prejudicing the United States' interest in an expeditious resolution of these contempt matters.

Third, and finally, the Members' explanation for their delay in seeking intervention is unpersuasive. The Members do not deny that they have been aware of these related actions since their inception. Rather, they assert that they only became aware that "their interests would no longer be adequately protected by the parties when the Government moved for its order to show cause challenging the defendant cooperatives' reliance on the medical necessity defense to provide cannabis to members who had a doctor's recommendation." Motion for Leave to Intervene at 8. This explanation, quite simply, is unreasonable. From the very outset of these related actions, the United States has sought to enjoin the defendants from distributing, cultivating, or possessing with the intent to distribute or cultivate marijuana for any reason at all, including those in which the defendants have alleged a medical necessity defense. Consequently, the Members' contention that it was not until the United States initiated contempt proceedings that they realized their interests were not adequately protected is simply incorrect.

B. The Members Do Not Have a Protectable Interest in Obtaining Marijuana

The Members' motion to intervene also fails to satisfy the Ninth Circuit's requirement that a party seeking intervention demonstrate it has a significantly protectable interest relating to the property or transaction at issue. Here, the proffered interest the Members seek to protect -- the right to continue obtaining marijuana from the three non-compliant cannabis clubs -- is not a protectable interest because the Members have no right to obtain marijuana under the Controlled Substances Act, 21 U.S.C. § 844. Nor does the passage of Proposition 215 change this conclusion. As this Court recognized in the context of distribution, "[a] state law which purports to legalize the distribution of marijuana for any purpose * * * nonetheless directly conflicts with federal law, 21 U.S.C. § 841(a)(1)." May 13, 1998 Memorandum and Order at 17. Similarly, Proposition 215 in no way undermines the Controlled Substances Act's prohibition on the possession of marijuana. Hence, the Members' do not have a protectable interest in obtaining the drug.

C. The Interests of the Members are Adequately Represented by the Non-Compliant Defendants

Finally, the Members' motion to intervene should be denied because their interests are adequately represented by existing parties. "In determining whether an applicant's interest is adequately represented by the parties, we consider (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect." Northwest Forest Resource Council, 82 F.3d at 838. In establishing the adequacy of representation, "[t]he prospective intervenor bears the burden of demonstrating that existing parties do not adequately represent its interests." Id. (citing Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983)). In addition, "[u]nder well-settled precedent in this circuit, [w]here an applicant for intervention and an existing party have the same *ultimate objective*, a presumption of adequacy of

representation arises." League of United Latin American Citizens, 131 F.3d at 1297 (emphasis supplied) (internal quotation omitted)).

In these related actions, the non-compliant defendants seek exactly the same objective as the Members; namely, to continue the operations of the three non-compliant cannabis clubs. Because there can be no doubt that the non-compliant defendants have, and will continue to vigorously pursue this ultimate objective, the interests of the Members are adequately represented by these defendants.[2]

II. THE COURT ALSO SHOULD DENY THE MEMBERS' MOTION FOR PERMISSIVE INTERVENTION

The Members' request that the Court grant them leave to intervene permissively should also be denied. Rule 24(b), which governs permissive intervention, provides:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the Ninth Circuit, the three prerequisites for granting a motion for permissive intervention are: "(1) an independent grounds for jurisdiction exists; (2) the motion is timely; and (3) the applicants's claim or defense and the main action have a question of law or a question of fact in common." Northwest Forest Resource Council, 82 F.3d at 839.

In these related actions, the Members request for permissive intervention is both untimely and would cause prejudice to the United States, for the reasons described above. In determining

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[2] The Members also contend that their interests are not adequately represented by the non-compliant defendants because the United States has challenged these parties standing to raise the defenses of medical necessity and substantive due process on behalf of their customers. Because the Members and non-compliant defendants share the same ultimate objectives, however, the fact that the government has raised this issue of standing is insufficient to overcome the "presumption of adequacy of representation" between them. Id. at 1297.

timeliness under Rule 24(b)(2) permissive intervention, the Ninth Circuit has indicated that a court should consider "precisely the same three factors" -- the stage of the proceedings, the prejudice to existing parties, and the length of and reason for delay -- as are considered in determining timeliness under Rule 24(a)(2) intervention of right. See League of United Latin American Citizens, 131 F.3d at 1308. The Ninth Circuit has made clear, however, that "in the context of permissive intervention * * * .we analyze the timeliness element more strictly than we do with intervention as of right." Id. Thus, in League of United Latin American Citizens, the court of appeals affirmed the denial of a motion for permissive intervention, holding that "*[a] fortiorari*, our previous conclusion that [the foundation's] intervention motion was untimely is controlling." Id.

In these related actions, for the same reasons set forth above, see *supra* Part I.A., the Members' motion for permissive intervention should be denied as untimely.

In addition, the Court's decision on a motion for permissive intervention is committed to its discretion, and it may deny intervention even if the prerequisites of Rule 24(b) are met. See 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1913 (2d ed. 1986) ("It is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though * * * there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the Court may refuse to allow intervention."). Here, the Members have waited through the extensive briefing and argument on the United States' motion for preliminary injunctive relief, the Court's Memorandum Opinion and Order and entry of the Preliminary Injunction Orders, and the government's motions for civil contempt and to modify the Injunction Orders, before finally moving to enter this litigation a mere 17 days before the hearing on these motions, which is scheduled for August 31, 1998. The Members entrance into the case now will only prolong the litigation and prejudice the United States as it prepares for the August 31 hearing and for the further disposition of this case. Moreover, the Members will add no new or unique arguments to the briefing already before the Court, as the current defendants are raising the

very issues and defenses that the Members would assert. Given these circumstances, even if the Court finds that the Members have met the prerequisites of Rule 24(b), the equities of the current situation should lead the Court to exercise its discretion and deny the motion for permissive intervention.

CONCLUSION

For the foregoing reasons, the Members' Motion for Leave to Intervene, both of right and permissively, should be denied.

Respectfully submitted,

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Dated: August 24, 1998

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, hereby certify that on this 24th day of August, 1998, I caused to be served a copy of the foregoing Plaintiff's Opposition to Motion to Intervene, and the accompanying [Proposed] Order, by facsimile transmission, and by overnight deliver, upon counsel:

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON,

Defendants.

AND RELATED ACTIONS

Nos. C 98-0085 CRB RELATED
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0089 CRB
C 98-0245 CRB

PLAINTIFF'S CONSOLIDATED REPLIES IN SUPPORT OF MOTION TO SHOW CAUSE WHY NON-COMPLIANT DEFENDANTS SHOULD NOT BE HELD CONTEMPT, AND FOR SUMMARY JUDGMENT, AND EX PARTE MOTION TO MODIFY MAY 19, 1998 PRELIMINARY INJUNCTION ORDERS, IN CASES NO. C 98-0086 CRB; NO. C 98-0087 CRB; AND NO. C 98-0088 CRB; AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS IN CASE NO. C 98-0088 CRB

Date: August 31, 1998
Time: 2:30 p.m.
Courtroom of the Hon. Charles R. Breyer

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PRELIMINARY STATEMENT

"[A] contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." Maggio v. Zeitz, 333 U.S. 56, 69 (1948). Yet this is precisely what the non-compliant defendants[1] are attempting to do here. Rather than present any specific evidence justifying their non-compliance with this Court's May 19, 1998 Preliminary Injunction Orders, to say nothing of their ongoing violations of the Controlled Substances Act, 21 U.S.C. §§ 841(a)(1); 846; 856(a)(1), the non-compliant defendants merely assert that they are entitled to a jury trial, and that they will eventually present evidence in support of their alleged defenses at that time.

This Court should no longer tolerate the non-compliant defendants' open and notorious defiance of the May 19, 1998 Preliminary Injunction Orders. The Supreme Court has admonished that "[t]he procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience." Maggio, 333 U.S. at 69. The non-compliant defendants' flagrant violations of the Preliminary Injunction Orders not only are causing irreparable injury to the United States, but also are calling into question the authority of the Court and the rule of law. This should go on no longer.

The uncontroverted facts in these cases establish that the non-compliant defendants are in flagrant violation of this Court's Preliminary Injunction Orders. Virtually since the entry of these Injunction Orders on May 19, 1998, these defendants have announced to the world that they will continue to distribute marijuana (and have, in fact, continued such distribution), in violation of both this Court's specific Injunction Orders and federal law. This Court, therefore, should grant the United States' motion for summary judgment to hold them in civil contempt. For these same reasons, the Court should grant the United States' motion for modification of the Preliminary

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[1] The non-compliant defendants are the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, in Case No. C 98-0088 CRB; the Marin Alliance for Medical Marijuana and Lynnette Shaw, in Case No. C 98-0086 CRB; and the Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman, in Case No. C 98-0087 CRB.

Injunction Orders authorizing the United States Marshal to forcibly close those clubs being operated and maintained by the non-compliant defendants.

In addition, defendants Oakland Cannabis Buyers' Cooperative and Jeffery Jones' ("OCBC Defendants") motion to dismiss should be denied because their proffered interpretation of 21 U.S.C. § 885(d) is both unsupportable and illogical. The OCBC Defendants' argument not only does violence to the plain language of the Controlled Substances Act, but also to the unmistakable intent of that law, which is to provide the means to "combat" the distribution of illegal drugs, not to immunize those who engage in such actions.

ARGUMENT

I. THE UNITED STATES HAS ESTABLISHED A PRIMA FACIE CASE THAT THE NON-COMPLIANT DEFENDANTS ARE IN CONTEMPT OF THE MAY 19, 1998 PRELIMINARY INJUNCTION ORDERS

The non-compliant defendants' first contention, that the United States has not made a prima facie showing of contempt, see Defendants' Memorandum in Opposition to Plaintiff's Motion to Show Cause, and for Summary Judgment ("Show Cause Opp.") at 4-5, cannot be taken seriously. The defendants do not deny that they are currently engaged in the distribution of marijuana, or that they are using the premises of the buildings which house the defendant cannabis clubs for the purposes of distributing marijuana. Nor do they take factual issue with any of the evidence produced by the United States. Instead, they offer up wholly insubstantial evidentiary objections to this evidence, which smack more of gamesmanship than serious legal analysis. Indeed, the Supreme Court has specifically cautioned that civil contempt proceedings are not be "'treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase.'" United States v. Rylander, 460 U.S. 752, 762 (1983) (quoting United States v. Bryan, 338 U.S. 323, 331 (1950)). Because this is precisely what the non-compliant defendants are attempting to do here, and because the United States has more than made a prima facie showing that each of the non-compliant defendants is in contempt of the

Court's Preliminary Injunction Orders, the defendants' contention that the government has not established a prima facie case of civil contempt must be rejected.[2]

The United States has produced individualized evidence of actual violations with respect to each group of non-compliant defendants. With respect to defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones ("OCBC Defendants"), the United States produced the OCBC's own World Wide Web page, which states that: "*Currently*, we are providing medical cannabis and other services to over 1,300 members," Exhibit 3 July 6, 1998 Declaration of Mark T. Quinlivan ("Quinlivan Dec."),[3] and a facsimile transmission from defendant Jones to the United States Attorney which announced that, on May 21, 1998, the OCBC would engage in the distribution of marijuana on May 21, 1998. Id. Exhibit 1. The United States also produced the eyewitness testimony of a DEA Special Agent, Peter Ott, who, on May 21, 1998, two days after this Court had entered the Preliminary Injunction Orders, personally observed an individual who identified himself as defendant Jones distribute marijuana to several individuals in front of news cameras, and further observed ten additional over-the-counter sales of marijuana by the employees of the OCBC. Declaration of Special Agent Peter Ott ("Ott Dec.") ¶¶ 3-4. And the United States produced evidence of two telephone calls made to the OCBC Defendants by undercover DEA agents, again following entry of the Preliminary Injunction Orders, which confirmed that the OCBC was nonetheless open for business and accepting new members. Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶ 5; Declaration of Special Agent Dean Arnold ("Arnold Dec.") ¶ 3.

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[2] Indeed, the arguments advanced by the OCBC Defendants in their Motion to Dismiss, see *infra* Parts IV-V, would not make any sense if the OCBC was not continuing to distribute marijuana.

[3] The OCBC's current Web page, which indicates that it was updated on August 12, 1998, makes the very same statement. See Exhibit 1 to August 24, 1998 Declaration of Mark T. Quinlivan. Moreover, the Web page also lists the "Bud Bar hours" as being from "11 am through 7 pm Mondays and Fridays, 11 am until 1 pm Tuesdays through Thursdays, and 1-4 pm Saturdays." Id.

The evidence regarding the other two groups of defendants is similar. With respect to the defendants Marin Alliance for Medical Marijuana and Lynnette Shaw ("Marin Defendants"), the United States produced evidence that defendant Shaw had stated that the Marin Alliance was remaining open for business, and that she would continue to distribute marijuana even if the Marin Alliance was closed. Exhibit 5 to Quinlivan Dec. The United States also produced eyewitness testimony from a DEA Special Agent, Bill Nyfeler, who, on May 27, 1998, personally observed 14 individuals enter the Marin Alliance over a two and one-half hour period, several of whom, upon exiting the Marin Alliance, would roll what appeared to be marijuana cigarettes and smoke them in the area directly outside the Marin Alliance. Nyfeler ("Nyfeler Dec.") ¶ 3. And the United States produced evidence of two telephone calls made to the Marin Defendants by undercover DEA agents, following entry of the Preliminary Injunction Orders, which confirmed that the Marin Alliance was open for business and accepting new members. Id. ¶ 6; Arnold Dec. ¶ 4.[4] Finally,

With respect to the Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman ("Ukiah Defendants"), the United States produced evidence that defendant Marvin Lehrman had publicly stated that the UCBC was there to supply medical marijuana to its customers. Exhibits 7 & 8 to Quinlivan Dec. The United States also produced evidence of two telephone calls made to the Ukiah Defendants by undercover DEA agents, following entry of the Preliminary Injunction Orders, which confirmed that the UCBC was open for business and accepting new members. Nyfeler Dec. ¶ 4; Arnold Dec. ¶ 5.

This evidence constitutes clear and convincing evidence that the non-compliant defendants are continuing to engage in the distribution of marijuana and are continuing to use the premises of the buildings which house the respective clubs for the purpose of distributing marijuana, both in violation of the Court's Preliminary Injunction Orders. See Transamerica Computer Co. v.

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[4] The Marin Alliance's Web page also provides "information on how to become a member of the Cannabis Buyers Club, and what documentation is required." Exhibit 2 to August 24, 1998 Declaration of Mark T. Quinlivan.

International Business Machines Corp., 698 F.2d 1377, 1388 (9th Cir.) (clear and convincing evidence means "that it is highly probably true"), cert. denied, 464 U.S. 955 (1983). Nor is there any merit to the defendants' evidentiary objections. The statements made by defendants Jones, Shaw, and Lehrman, along with the facsimile transmission sent to the U.S. Attorney by the OCBC, and the OCBC and Marin Alliance Web sites, all constitute admissions of a party-opponent, which are admissible under Fed. R. Evid. 801(d)(2).[5] Likewise, counsel for the United States has attested that the Web pages of the OCBC and Marin Alliance, and the facsimile transmission sent to the U.S. Attorney by the OCBC, are "true and correct copies" of these admissions. Accordingly, the United States has made a prima facie case by clear and convincing evidence that the non-compliant defendants are in violation of (and are continuing to violate) the Court's Preliminary Injunction Orders.

II. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM THAT THE NON-COMPLIANT DEFENDANTS ARE IN CIVIL CONTEMPT

The non-compliant defendants have failed to carry their burden of production in responding to the United States' motion for summary judgment that they are in civil contempt. Rather than presenting "specific facts" or "detailed factual allegations" regarding each and every person to whom the three non-compliant cannabis clubs distributed marijuana following entry of the May 19, 1998 Preliminary Injunction Orders, these defendants instead assert that they are entitled to present their alleged defenses of medical necessity, substantive due process, and joint users to a jury, and that they will submit evidence in support of these defenses only at that time.

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[5] To be sure, in Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991), the Ninth Circuit held that quotations of a party that appear in a newspaper article did not meet the best evidence requirement of Fed. R. Evid. 803(24), because testimony from the reporters themselves would be the best evidence available. Id. at 643-44. At least one court has subsequently ruled, however, that, if there is more than one source of evidence that corroborates the newspaper quotations, testimony from the reporter who authored the newspaper article in which the quotes appeared would not be necessary. In re Columbia Securities Litigation, 155 F.R.D. 466, 478-79 (S.D.N.Y. 1994). Here, in view of the substantial additional evidence regarding the non-compliant defendants' violations of the Court's Preliminary Injunction Orders, the newspaper articles which quote defendants Jones, Shaw, and Lehrman should be deemed admissible under Rule 803(24).

See Show Cause Opp. at 6 ("If the Court finds * * * that the government has met its burden of establishing that defendants are in contempt of the Order, then defendants must be allowed to present detailed evidence that they are in good faith and substantial compliance with the Order."). This argument fundamentally misapprehends both the summary judgment requirements of the Federal Rules of Civil Procedure and this Court's May 13, 1998 Memorandum and Order, as we demonstrate below.

A. Summary Judgment Is Procedurally Proper Under 21 U.S.C. § 882(b)

As a preliminary matter, there is no merit to the non-compliant defendants' assertion that section 882(b) prohibits the United States from seeking summary judgment for civil contempt. The statutory language provides that, "[i]n case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury *in accordance with the Federal Rules of Civil Procedure*." 21 U.S.C. § 882(b) (emphasis supplied). Rule 1 of the Federal Rules provides that, "[t]hese rules govern the procedure in the United States district courts in *all* suits of a civil nature whether cognizable as cases at law or in equity * * * *." Fed. R. Civ. P. 1 (emphasis supplied). And Rule 56(a) of the Federal Rules in turn provides that "[a] party seeking to recover upon a claim * * * or to obtain a declaratory judgment may, *at any time* after the expiration of 20 days from the commencement of the action * * * move with or without supporting affidavits for a summary judgment in the party's favor upon all or *any* part thereof." Fed. R. Civ. P. 56(a).

Hence, the United States' motion for summary judgment is entirely consistent with the language of section 882(b), read in conjunction with the Federal Rules of Civil Procedure. See Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole * * * *."). As the Supreme Court recognized in United States v. Bailey, 444 U.S. 394 (1980), "[i]n a civil action, the question whether a particular affirmative defense is sufficiently supported by testimony to go to the jury may often be resolved on a motion for summary judgment * * * *." Id. at 412 n.9. Indeed, any contrary reading of section 882(b) would require a

jury trial, upon demand of the accused, even where there are no genuine issues of material fact in dispute.

The defendants also quote United States v. Powers, 629 F.2d 619 (9th Cir. 1980), for the proposition that "procedural safeguards of Rule 42 [of the Federal Rules of Criminal Procedure] apply equally to civil contempt proceedings." Id. at 624. A cursory review of Ninth Circuit case law, however, reveals a substantial body of precedent holding to the contrary. In Alexander v. United States, 173 F.2d 865 (9th Cir. 1949), decided prior to Powers, the Ninth Circuit stated that: "The Federal Rules of Criminal Procedure apply to criminal proceedings. One of them (Rule 42) applies to criminal contempt proceedings. *None of them applies to civil contempt proceedings.*" Id. at 866-67 (emphasis supplied). Likewise, in United States v. Westinghouse Elec. Corp., 648 F.2d 642 (9th Cir. 1981), decided after Powers, the Ninth Circuit held that "[t]he district court need not follow the procedures set out in Fed. R. Civ. P. 42(b) before levying a civil contempt fine." Id. at 652. See also United States v. Rylander, 714 F.2d 996, 1004 (9th Cir. 1983) ("There are many safeguards applicable in a criminal contempt proceeding, such as the right to a jury trial in some cases, the right to counsel, the right not to take the witness stand, and the 'beyond a reasonable doubt' burden of proof, which do not apply in a civil contempt proceeding."), cert. denied, 467 U.S. 1209 (1984). The continuing viability of this statement in Powers, therefore, is subject to serious question.

In any event, even if Fed. R. Crim. P. 42(b) were to be applied to this civil contempt proceeding, the result would not change. In pertinent part, Rule 42(b) provides that a defendant "is entitled to a trial by jury in any case in which an act of Congress so provides." Here, again, section 882(b) provides that a defendant is entitled to a jury trial "in accordance with the Federal Rules of Civil Procedure," 21 U.S.C. § 882(b), which allow for summary judgment motions in all civil actions. See Celotex Corp., 477 U.S. at 327. Hence, the defendants' argument that Rule 42(b) requires a jury trial in all cases of civil contempt is not well-taken, and in no way undermines Bailey's clear guidance that whether an affirmative defense "is sufficiently supported

by testimony to go to the jury may often be resolved on a motion for summary judgment * * * *." 444 U.S. at 412 n.9.

The non-compliant defendants' argument that they are entitled to a jury trial because the underlying criminal statutes authorize criminal penalties of up to 25 years in prison and $250,00 to $1,000,000 in fines, also is mistaken. The United States' motion for summary judgment is premised upon the non-compliant defendants' violations of 21 U.S.C. § 882(a), not the underlying criminal provisions. Thus, there is no merit to their assertion that these contempt proceedings must be deemed criminal in nature.[6] Moreover, the remedy proposed by the United States is as follows:

> The United States Marshal is empowered to enforce this Preliminary Injunction. In particular, the United States Marshal is authorized to enter the premises of the [respective defendant cannabis club], at any time of day or night, evict any and all tenants, inventory the premises, and padlock the doors, *until such time as the defendants can "satisfy [the Court] that [they are] no longer in violation of the injunctive order and that [they] would in good faith thereafter comply with the terms of the order."* Lance v. Plummer, 353 F.2d 585, 592 (5th Cir. 1965), cert. denied, 384 U.S. 929 (1966).

Because this proposed remedy allows the non-compliant defendants the opportunity to abate the proposed sanction through compliance, these contempt proceedings are civil in nature. See International Union, United States Mine Workers v. Bagwell, 512 U.S. 821, 829 (1994).[7]

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[6] The non-compliant defendants' contention that, "regardless of what punishment the government seeks or the Court may impose, the defendants have a Sixth Amendment a right [sic] to a jury trial on the contempt charges," Show Cause Opp. at 19, also is plainly wrong. Because the Controlled Substances Act expressly allows the government to seek civil injunctive relief for violations of the Act, see 21 U.S.C. § 882(a), there is no merit to the suggestion that a motion to enforce any such injunction must be deemed criminal in nature. Moreover, the discussions of the right to a jury trial in Bloom v. Illinois, 391 U.S. 194 (1968), and Rylander, 714 F.2d 996, were entirely in the context of sanctions for criminal, as opposed to civil, contempt.

[7] The non-compliant defendants' citation to Bagwell's discussion of "[c]ontempts involving out-of-court disobedience to complex injunctions," Show Cause Opp. at 20 n.10, is inapposite. The Preliminary Injunction Orders entered by the Court are not complex; they simply require the defendants to refrain from distributing or manufacturing marijuana, as well as other related activities. In such circumstances, the Bagwell Court held that "indirect contempts involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment,

(continued...)

B. The Non-Compliant Defendants Have Failed to Meet the Requirements Both of Rule 56(e) and This Court's May 13, 1998 Memorandum and Order

Rule 56(e) of the Federal Rules of Civil Procedure provides that:

> When a motion for summary judgment is made and supported as provided by [Rule 56(c)], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set fort *specific facts showing that there is a genuine issue for trial.* If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e) (emphasis supplied). In other words, the party opposing a motion for summary judgment "must present affirmative evidence to defeat a properly supported motion for summary judgment," even where "the evidence is likely to be in the possession of the [moving party]." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). See also THI-Hawaii, Inc. v. First Commerce Financial Corp., 627 F.2d 991, 994 (9th Cir. 1980) ("Once the moving party has met the initial burden of going forward, the opposing party may not defeat summary judgment in the absence of any significant probative evidence tending to support his or her theory."). As the Sixth Circuit colorfully noted, in the aftermath of the Supreme Court's decisions in Anderson v. Liberty Lobby and Celotex Corp., a party who has been served with a motion for summary judgment must "put up or shut up." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1478 (6th Cir. 1989).

The non-compliant defendants have failed to "put up." The United States has made a prima facie showing that each of the three non-compliant cannabis clubs is violating the Court's May 19, 1998 Preliminary Injunction Orders, and has moved for summary judgment that these defendants are therefore in civil contempt of the Preliminary Injunction Orders. Rule 56(e), therefore, obligates the non-compliant defendants to present "specific facts" which either controverts the evidence submitted by the United States or supports their alleged defenses of medical necessity, substantive due process, and joint users with respect to ***each and every***

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[7](...continued)
properly may be adjudicated through civil proceedings since the need for extensive, impartial factfinding is less pressing." 512 U.S. at 833.

individual to whom they distributed marijuana after May 19, 1998. This is because each and every such distribution of marijuana presumptively constitutes a violation of the Preliminary Injunction Orders, as does the ongoing use of the premises of the buildings which house the defendant clubs for the purpose of distributing marijuana.

Indeed, this was the very process that the Court contemplated in its May 13, 1998 Memorandum and Order. In pertinent part, the Court determined that, if the United States alleged that the defendants had violated an injunction, "there will be specific facts and circumstances before the Court from which the Court can determine if the jury should be given a necessity instruction as a defense to the alleged violation of the injunction." May 13, 1998 Memorandum Order at 21. Such a showing was necessary, the Court ruled, because, otherwise, "for the defense [of necessity] to be available here, defendants would have to prove that *each and every patient* to whom it provides cannabis is in danger of imminent harm; that the cannabis will alleviate the harm for that particular patient; and that the patient had no other alternatives * * * *." May 13, 1998 Memorandum and Order at 20 (emphasis supplied). Likewise, with respect to substantive due process, the Court determined that this defense would be available only where "the trier of fact is presented with a particular transaction to a particular patient under a particular set of facts," because, otherwise, "the Court would have to find that the substantive due process right of *each and every* patient to whom the defendants will dispense marijuana in the future will be violated if the government prevents defendants from doing so." Id. at 23 (emphasis supplied).

The non-compliant defendants have failed to meet this burden. Despite being on notice that the government was moving for summary judgment for civil contempt, the non-compliant defendants have once again failed to offer any "specific facts" in support of their alleged defenses, as required by Rule 56(e). Indeed, these defendants have failed to identify a single person whom to they distributed marijuana after May 19, 1998; have failed to establish the medical condition which allegedly would have justified the sale of marijuana to that individual; and have failed to

introduce any other evidence regarding their alleged defenses.[8] Nor may the non-compliant defendants defeat summary judgment merely by asserting, without factual support, that they have "identified a multitude of facts, based on the defenses expressly left open by this Court, that illustrate the presence of genuine issues requiring a trial," Show Cause Opp. at 21, or that "all defendants categorically deny the alleged violations of the Preliminary Injunction Order." Modify Opp. at 1. As the Ninth Circuit has repeatedly made clear, "legal memoranda and oral argument are not evidence, and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists." British Airways Bd. v. The Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). See also Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data.").

In any event, the "multitude of facts" which the non-compliant defendants allege they would prove at trial appear to be identical to those offered at the preliminary injunction stage of these actions, and which the Court rejected as being legally insufficient. In pertinent part, the defendants assert they would show that:

> "For ***many*** patient members, such as those experience debilitating pain, undergoing chemotherapy or experiencing AIDS-related conditions, medical cannabis saves their lives." Show Cause Opp. at 6-7 (emphasis supplied);
>
> "[F]or ***most*** patient-members no other medicine provides the same effective relief in such a safe and reliable manner." Id. at 12 (emphasis supplied);
>
> "For ***some*** patient members, medical cannabis saved their lives when it is ***doubtful*** any other drug would have." Id. at 12-13 (emphasis supplied);
>
> "Without [marijuana] ***some*** will suffer pain, ***some*** will risk blindness, and ***others*** will die by wasting away." Id. at 14 (emphasis supplied); and

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[8] The declarations submitted by Kenneth Estes, Yvonne Westbrook, Ima Carter, David Sanders, and John P. Morgan, M.D., all are irrelevant to the issue of civil contempt. None of the "patient" declarants states that one of the three non-compliant cannabis clubs distributed marijuana to them after May 19, 1998. Nor does Dr. Morgan attest that he is treating a patient who was provided marijuana by one of these three clubs after May 19, 1998. Accordingly, all five declarations are irrelevant to the issue before the Court. See Fed. R. Evid. 402.

> "Defendants can show that ***many*** patient-members would find their lives needlessly placed in jeopardy were they denied the right to the medical use of cannabis." Id. at 16 (emphasis supplied).

In its Memorandum and Order, this Court found that similar offers of proof made at the preliminary injunction stage are "not the same as saying that for each or every person to whom [the defendants] provide, and will provide marijuana, legal drugs are not effective such that marijuana is a necessity." May 13, 1998 Memorandum and Order at 21. This is because, as the Court ruled, "the defense of necessity has never been allowed to exempt a defendant from the criminal laws on a blanket basis." Id. at 20. See also id. at 23 (defendants' substantive due process defense "is not available * * * to exempt generally the distribution of marijuana from the federal drug laws."). The defendants' "multitude of facts" suffer from the same defect here.

The non-compliant defendants' remaining arguments in no way undermine this conclusion. Their complaint that "neither the Court nor the defendants know who is alleged to have purchased medical cannabis and when (other than the date) they are alleged to have done so," Show Cause Opp. at 5, is rather breathtaking in its disingenuity. This is not a situation in which the relevant evidence is in the possession of the opposing party. The non-compliant defendants know full well to whom they distributed marijuana after May 19, 1998. They also know full well that the United States contends that each and every such distribution constitutes a violation of the Preliminary Injunction Orders (not to mention the Controlled Substances Act, 21 U.S.C. §§ 841(a)(1); 856(a)(1)).[9] Hence, their assertion that they have not been given notice as to which of these several distributions of marijuana constitute violations of the Preliminary Injunction Orders is very wide of the mark.

Nor does the defendants' assertion that they "are unable to rebut the government's vague and conclusory allegations for fear of criminal prosecution," Show Cause Opp. at 5, provide them any refuge. "A defendant has no absolute right not to be forced to choose between testifying in a

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[9] The non-compliant defendants also are presumably aware of the medical conditions of all persons to whom they distributed marijuana after May 19, 1998, for, if they were not so aware, it would further undermine their alleged defenses of medical necessity and substantive due process.

civil matter and asserting his Fifth Amendment privilege." Keating v. Office of Thrift Supervision, 45 F.3d 322, 326 (9th Cir.), cert. denied, 516 U.S. 827 (1995). Indeed, "[n]ot only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding." Id. (citing Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)). The defendants' alleged fear of criminal prosecution, therefore, is no impediment whatsoever to the Court's consideration of the United States' summary judgment motion.

The Ninth Circuit has held that, "[i]n the absence of specific facts, as opposed to allegations, showing the existence of a genuine issue for trial, a properly supported summary judgment motion should be granted." Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1545 (9th Cir. 1988). Because this is precisely the situation here, the Court should grant the United States' motion for summary judgment that the non-compliant defendants are in civil contempt of the May 19, 1998 Preliminary Injunction Orders.

C. The Defenses of Medical Necessity, Substantive Due Process, and Joint Users Fail as a Matter of Law

That the non-compliant defendants are continuing to engage in the distribution of marijuana is simply a non-issue in this proceeding, leaving only the legal validity of their defenses to be determined. Yet even if the non-compliant defendants had introduced evidence sufficient to maintain their alleged defenses of medical necessity, substantive due process, and joint users, which they have not, the defenses advanced by the defendants nonetheless are unavailable to them as a matter of law and, consequently, should never be allowed to be presented to a jury.

1. Medical Necessity

The defendants' arguments in support of their alleged defense of medical necessity have no legal substance. We respond briefly to each of the points they make.

First, although the defendants attempt to minimize the holding of Maggio v. Zeitz, the Court's admonition that "[a] contempt proceeding does not open to reconsideration the legal or

factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy," and that "[t]he procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience," 333 U.S. at 69, is particularly apt here. Indeed, these motions embody the very concerns raised by the Maggio Court. The non-compliant defendants do not appear to have changed their practices one whit in response to the Court's Preliminary Injunction Orders. Instead, they raise the same generalized defenses that this Court rejected in its May 13, 1998 Memorandum Opinion and Order. In these circumstances, the D.C. Court of Appeal's admonition that "[c]ivil contempt could become meaningless if a lawful defense could rest on the ground that a party took a different view, however reasonable, of the potential harm in compliance," Morgan v. Foretich, 546 A.2d 407, 411 (D.C. 1988), cert. denied, 488 U.S. 1007 (1989), is particularly prescient.

This Court therefore should follow the lead of the Supreme Judicial Court of Massachusetts, which held that, even in cases in which a defense of necessity is being raised, a "defendant's avenue of relief is to challenge or seek to modify the court order, not to violate it." Commonwealth v. Brogan, 415 Mass. 169, 176, 612 N.E.2d 656, 660 (1993). Here, of course, the non-compliant defendants could have appealed the Preliminary Injunction Orders, see 28 U.S.C. § 1292(a)(1); moved to modify the Injunction Orders to allow the distribution of marijuana in cases in which they believed a necessity existed, . see Fed. R. Civ. P. 60(b);[10] and sought expedited relief from the Court under the Local Rules. See Local Rule 7-10 (allowing for expedited motions); Local Rule 7-11 (allowing for ex parte motions). Having failed to avail themselves of any of these legal, reasonable alternatives, the non-compliant defendants are foreclosed from arguing medical necessity as a general legal defense to these contempt motions. Bailey, 444 U.S. at 410 ("[I]f there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defenses [of necessity] will

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[10] Again, the United States does not concede that any such modification of the Preliminary Injunction Orders would be allowed under the Controlled Substances Act.

fail."); Sekaquaptewa v. McDonald, 544 F.2d 396, 406 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977) (party must take "all the reasonable steps within [one's] power to insure compliance with the orders.").

Second, the non-compliant defendants offer no real response to the government's showing that the defense of medical necessity is legally unavailable to them as a result of Congress's placement of marijuana in Schedule I,[11] which establishes -- as a matter of law -- that the substance has "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use * * * under medical supervision." 21 U.S.C. § 812(b)(1). Congress further prevented practitioners from prescribing substances in Schedule I, id. §§ 829(a)-(c); and indicated that the only legitimate medical or scientific use for a substance in Schedule I is in the context of a controlled research project approved by the Secretary of Health and Human Services and registered with the DEA. Id. § 823(f). Under these circumstances, Congress has made a binding legislative determination that marijuana has no medical value, which precludes any possibility of a defense of medical necessity here. See 1 Walter LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.4, at 631 (1986).[12]

Third, there is no merit to the non-compliant defendants' argument that, although those courts which have allowed a medical necessity defense for marijuana have done so only in cases involving possession, "[d]istribution is the necessary antecedent to possession. If possession is legally justified as to a person for whom medical cannabis is a necessity, then so too is distribution to this person." Show Cause Opp. at 11. If this were the law, the entire marijuana cultivation and distribution network could claim the defense of necessity as a "necessary

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[11] See 21 U.S.C. § 812 Schedule I(c)(10).

[12] Four of five state courts to have considered this question have held that the placement of marijuana on schedule I by their respective state legislatures precludes the defense of medical necessity for the substance. See State v. Tate, 102 N.J. 64, 70, 505 A.2d 941, 944 (1986); State v. Cramer, 174 Ariz. 522, 524, 851 P.2d 147, 149 (1992); State v. Hanson, 468 N.W.2d 77, 78-79 (Minn. Ct. App. 1991); Kauffman v. State, 620 So.2d 90, 92 (Ala. Crim. App. 1992). But see Jenks v. State, 582 So.2d 676 (Fla. Dist. Ct. App.), review denied, 589 So.2d 292 (Fla. 1991).

antecedent" to possession. It therefore comes as no surprise that the only authority the defendants muster in support of this proposition is a concurring opinion in People v. Peron, 59 Cal. App. 4th 1383, 70 Cal. Rptr. 2d 20 (1997), review denied (Feb. 25, 1998), in which the concurring judge stated that he found it "unnecessary in this case to determine whether the sale and furnishing of marijuana remain absolutely prohibited after the enactment of Proposition 215." Id. at 1401, 70 Cal. Rptr. 2d at 32 (Kline, J., concurring). Moreover, the defendants fail to note that the majority in Peron expressly rejected any notion that distribution is a "necessary antecedent" to possession. Id. at 1390-1396, 70 Cal. Rptr. 2d at 25-28 (holding that sale or distribution of marijuana remains illegal under California law even following the passage of Proposition 215). This same result should be reached here.

Fourth, the non-compliant defendants' attempt to distinguish Bailey's requirement of imminent harm and immediate abatement where there are continuing offenses is singularly unconvincing. The defendants argue that, because their patients' illnesses "never lose their 'coercive force,'" they are not required to abate their unlawful conduct when a patient leaves, even though their ongoing violation of section 856(a)(1) constitutes a continuing offense. Yet the defendants' argument here is precisely that which was advanced by Justice Blackmun in his dissent in Bailey. In pertinent part, Justice Blackmun argued that:

> The conditions that led to respondents' initial departure from the D.C. jail continue unabated. If departure was justified -- and on the record before us that issue, I feel, is for the jury to resolve as a matter of fact in the light of the evidence, and not for this Court to determine as a matter of law -- it seems too much to demand that respondents, in order to preserve their legal defenses, return forthwith to the hell * * * that compelled their leaving in the first instance.

444 U.S. at 419-420 (Blackmun, J., dissenting). The majority rejected this argument, however, determining that, because prison escape constitutes a continuing offense, "an escapee can be held liable for failure to return to custody as well as for his initial departure," and that the evidence was "not even close" that the defendants had "either surrendered or offered to surrender at their earliest possible opportunity." Id. at 413, 415.

Similarly here, because each of the non-compliant defendants has been charged with a continuing offense under the Controlled Substances Act -- violating 856(a)(1), which makes it unlawful for anyone from "knowingly open[ing] or maintain[ing] any place for the purpose of * * * distributing * * * any controlled substance" -- these defendants must demonstrate that they have made a bona fide effort to comply with section 856(a)(1) "as soon as the claimed duress or necessity has lost its coercive force." 444 U.S. at 413. In other words, as soon as the individual to whom one of the defendant clubs had distributed marijuana had left the premises, the club would have to close in order to comply with section 856(a)(1). Because the non-compliant defendants cannot come close to making this showing, this failure offers yet another reason why the defense of medical necessity is unavailable to these defendants as a matter of law.

2. Substantive Due Process

In their Show Cause Opposition, the non-compliant defendants do not offer anything new with respect to their alleged defense of substantive due process, but instead simply repeat (often verbatim) the argument made in their opposition to the government's motion for preliminary injunctions. Show Cause Opp. at 13-17. Remarkably, however, the defendants fail to even address the governing Ninth Circuit authority on this issue, Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980), or the substantial body of case law holding that no person has a constitutional right to any particular medication.[13] As we have demonstrated previously, in Carnohan, a case involving laetrile, the Ninth Circuit held that the constitutional rights of privacy and personal liberty did not give anyone the right to any particular form of medication free from the lawful exercise of the government's police power. Id. at 1122 (citing Rutherford v. United States, 616 F.2d 455 (10th Cir.), cert. denied, 449 U.S. 937 (1980)). In any event, it is doubtful that the non-compliant defendants have standing to raise any such defense on behalf of their customers. See, e.g., Warth v. Seldin, 422 U.S. 490, 499 (1975) (a party "must assert his own

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[13] Indeed, the Court specifically raised this issue with defendants during the March 24, 1998 hearing. Transcript of March 24, 1998 Proceedings ("Transcript") at 40, 83-84.

legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). Accordingly, there is no merit to the non-compliant defendants' defense of substantive due process.

3. Joint User

Finally, the non-compliant defendants' reiteration of the alleged joint user defense, based on the Second Circuit's decision in United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977), must be rejected once again. As this Court has recognized, "Swiderski involved a simultaneous purchase by a husband and wife who testified that they intended to use the controlled substance together. Applying Swiderski to a medical marijuana cooperative would extend Swiderski to a situation in which the controlled substance is not literally purchased simultaneously for immediate consumption." May 13, 1998 Memorandum Opinion and Order at 18. Under these circumstances, and in view of the fact that Swiderski has not been adopted by the Ninth Circuit, see United States v. Wright, 593 F.2d 105, 108 (9th Cir. 1979) (expressing no opinion as to whether Swiderski is good law), the Court should reject the joint user defense as a matter of law.

* * *

Because the basic facts are undisputed, and because the defendants' legal defenses, in any event, fails as a matter of law, the United States is entitled to summary judgment on its claim that the non-compliant defendants are in civil contempt of the May 19, 1998 Preliminary Injunction Orders.

III. THE UNITED STATES ALSO IS ENTITLED TO MODIFICATION OF THE PRELIMINARY INJUNCTION ORDERS

The United States also has moved for modification of the Preliminary Injunction Orders, as discussed *supra* Part II, based on the open and notorious nature of the defendants' defiance of this Court's Preliminary Injunction Orders. The non-compliant defendants raise four objections to modification of the Preliminary Injunction Orders. First, the non-compliant defendants argue that it is "well established" that the Court may only modify the injunction when there is a change in the underlying factual circumstances. Defendants' Memorandum in Opposition to Plaintiff's Ex Parte

Motion to Modify May 19, 1998, Preliminary Injunction Orders ("Modify Opp.") at 6. This notion was laid to rest by Judge Friendly in King-Seeley Thermos Co. v. Alladin Indus., 418 F.2d 31 (2d Cir. 1969), in which the court stated that "[w]hile changes in fact or in law afford the clearest bases for altering an injunction, the power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes." Id. at 35. See also System Federation v. Wright, 364 U.S. 642, 647 (1961) ("The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a *continuing willingness to apply its power and processes on behalf of the party who obtained equitable relief.*") (emphasis supplied)). Here, the non-compliant defendants' open and notorious violations of the Preliminary Injunction Orders clearly fall within the framework outlined in King-Seeley.

The defendants' related suggestion that, because the Court rejected similar language when it entered the Preliminary Injunction Orders, it should decline to modify the Injunction Orders now on the same ground, Modify Opp. at 1-2, also is meritless. The language proposed by the United States on May 18, 1998, was based on several public statements made by some of the defendants that they *would* violate any injunction that was entered by the Court. In contrast, the modification proposed by the United States here is based on the demonstrated violations of the Preliminary Injunction Orders by the defendants.

Second, the non-compliant defendants complain that the Court is relinquishing its contempt power to the United States Marshal. Modify Opp. at 2. This is not the case. If the Court enters the proposed modification, it would be making its own determination of the need for further relief and simply direct United States Marshal to enforce the Injunction Orders by forcibly closing the clubs. Such duties are consistent with Congress's express statutory authorization to the U.S. Marshal to enforce orders issued by the federal courts. See 28 U.S.C. §§ 566(a), (c). Hence,

contrary to the defendants' suggestion, this Court would not be relinquishing its contempt power to the Marshal, or requiring the Marshal to maintain a supervisory role over the clubs.

Third, the non-compliant defendants strive mightily to distinguish United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); and United States v. Roach, 947 F. Supp. 872 (E.D. Pa. 1996), on the ground that (according to them) there are serious factual differences between those cases and the instant actions. This argument is too simplistic. Almost every case could be distinguished on the ground that the underlying facts between the cases are different. The central similarity between the instant related actions and White and Roach is that those courts (like this Court now) were confronted with intransigent parties who stated their intention to violate any and all injunctions entered by the courts. Under such circumstances, the courts empowered the United States Marshal, consistent with its statutory authorization, to assist the courts in enforcing the injunctions in place, and that is exactly what this Court should do here.

IV. OAKLAND ORDINANCE NO. 12706 DOES NOT IMMUNIZE DEFENDANTS FROM VIOLATING THE CONTROLLED SUBSTANCES ACT, NOR DOES IT PROTECT THEM FROM BEING HELD IN CONTEMPT

The OCBC Defendants move to dismiss the lawsuit against them on the ground that they have been designated "duly authorized officer[s]" of the City of Oakland to enforce California Health & Safety Code § 11362.5 and Oakland Ordinance No. 12076 C.M.S. In particular, the OCBC Defendants contend that, following their designation as a medical cannabis provider by the City Manager of Oakland on August 12, 1998, they are now immune from suit under 21 U.S.C. § 885(d). Motion to Dismiss at 3-5. This argument does not deserve to be taken seriously.

21 U.S.C. § 885(d) provides:

> Except as provided in sections 2234 and 2235 of title 18, United States Code, no civil or criminal liability shall be imposed by virtue of this title upon any duly authorized Federal officer lawfully engaged in the enforcement of this title, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

Hence, in order to be protected by section 885(d), an "officer" must be "lawfully engaged" in the enforcement of "any law or municipal ordinance relating to controlled substances." The OCBC

Defendants do not satisfy this statutory requirement. Section 841(a)(1) of the Controlled Substances Act prohibits anyone from engaging in the distribution of marijuana, and this Court has determined that "[a] state law which purports to legalize the distribution of marijuana for any purpose * * * nonetheless directly conflicts with federal law, 21 U.S.C. § 841(a)(1)." May 13, 1998 Memorandum and Order at 17. Hence, notwithstanding the Oakland ordinance, the OCBC Defendants cannot be said to be "lawfully engaged" in the enforcement of a law relating to controlled substances.

Moreover, it is an "elementary rule of construction that the act cannot be held to destroy itself," Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 20 (1995) (quotation omitted), and that a court is obligated "to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section * * * *." United States v. Menasche, 348 U.S. 528, 538-39 (1955). The OCBC Defendants construction of section 885(d) would violate these cardinal principles of statutory construction, and lead to an absurd result. According to the OCBC Defendants, any state, city, or local subdivision could determine that it would become engaged in the distribution of controlled substances, designate an agency or private party to engage in the distribution of the controlled substance, and thereby immunize that agency or private party from criminal or civil liability under the Controlled Substances Act. The City and County of San Francisco could effectively legalize heroin, for example, the City of San Jose could legalize crack, or the City of Los Angeles could legalize LSD or PCP, and (according to the OCBC Defendants) the federal government would be powerless to take any enforcement action. Any such construction of section 885(d) is plainly absurd, which the courts are obligated to avoid. See, e.g., Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope." (internal quotation omitted)).

Indeed, the OCBC Defendants' construction of section 885(d) would have the effect of destroying section 841(a)(1)'s prohibition on the distribution and manufacture of controlled

substances; section 856(a)(1)'s prohibition on the maintenance of any facility for the purposes of distributing or manufacturing controlled substances, as well as numerous other sections of the Controlled Substances Act, in derogation of the Supreme Court's commands in Citizens Bank of Maryland and Menasche. Moreover, any such reading of section 885(d) would run contrary to Congress's finding that the distribution of controlled substances, even if wholly intrastate, "ha[s] a substantial and direct effect upon interstate commerce.," 21 U.S.C. § 801(3), as well as Congress's specific findings that the intrastate manufacture, distribution, and possession of controlled substances "have a substantial and direct effect upon interstate commerce," id. § 801(3), including findings that the intrastate traffic in controlled substances "contribute[s] to swelling the interstate traffic in such substances," id. § 801(4); "cannot be differentiated from controlled substances manufactured and distributed interstate," 801(5); and that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." Id. § 801(6).

Accordingly, because the OCBC Defendants' construction of section 885(d) would lead to absurd results, and would run contrary to the very purpose of the Controlled Substances Act, which is to provide the means to "combat" the distribution of illegal drugs, not to immunize those who engage in such actions, their contention that section 885(d) provides them with immunity from federal prosecution or enforcement actions is spurious.

Moreover, an examination of the statutory language of section 885(d), when read in conjunction with the rest of the Controlled Substances Act, demonstrates that Congress intended section 885(d)'s grant of immunity to be limited to federal, state, or local law enforcement officers engaged in police or adjudicative functions in connection with the enforcement of the controlled substance laws. First, any interpretation of section 885(d) must take into account the qualifying clause of this provision, which exempts from its reach anyone who violates 18 U.S.C. §§ 2234

and 2235.[14] Section 2234 provides that, "[w]hoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year." 18 U.S.C. § 2234. Section 2235, in turn, provides that, "[w]hoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined not more than $1,000 or imprisoned not more than one year." 18 U.S.C. § 2235. In other words, both sections involve actions by law enforcement officials acting in a police or adjudicative function and who are engaged in the enforcement of the criminal laws. These provisions thus strongly support the reading of "officer" in section 885(d) as referring to a law enforcement officer engaged in police functions in the enforcement of the controlled substance laws. See Reno v. Koray, 515 U.S. 50, 56 (1995) ("[I]t is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" (quoting Deal v. United States, 508 U.S. 129, 132 (1993)).

Second, any construction of the terms "officer" and "enforcement" in section 885(d) is constrained by a sister provision of the Act, section 848(e)(2), which provides that, "[a]s used in paragraph (1)(b) [of section 848(e)], the term 'law enforcement officer' means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution, or adjudication of an offense, and includes those engaged in corrections, probation, or parole functions." 21 U.S.C. § 848(e)(2).[15] This sister provision of section 885(d) further attests that the construction of the terms "officer" engaged in the

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[14] "A bedrock principle of statutory construction requires us to find meaning in [a] qualifying clause * * * 'It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section.'" Estate of Reynolds v. Martin, 985 F.2d 470, 473 (9th Cir. 1993) (quoting Menasche, 348 U.S. at 538-39).

[15] It is well settled that, "[t]he 'normal rule of statutory construction' [is] that 'identical words used in different parts of the same act are intended to have the same meaning.'" Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995) (quotation omitted)).

"enforcement" of the controlled substance laws must be limited to a law enforcement officer acting in a police or adjudicative function in the enforcement of the controlled substance laws.[16]

For all these reasons, the OCBC Defendants motion to dismiss should be denied.

V. THE OCBC'S NINTH AMENDMENT ARGUMENT IS FRIVOLOUS

In a last-gasp effort, the OCBC Defendants also argue that Congress's prohibition on the distribution of marijuana violates their Ninth Amendment rights. This argument is wholly insubstantial. The Ninth Circuit has consistently held that the Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992). It therefore comes as no surprise that the defendants fail to cite any case in which a court has found a Ninth Amendment right to smoke marijuana, and there is none.

In addition, the OCBC Defendants' contention that, because the people of California and Oakland have authorized the possession and (in the case of Oakland) the distribution of marijuana for purposes of state and local law, these interests are now protected by the Fifth and Ninth Amendments to the United States Constitution, see Motion to Dismiss at 5, is plainly wrong. Federal constitutional rights have never been subject to the political vagaries of an individual state legislature or local municipality, nor are they now.

The OCBC Defendants' Fifth and Ninth Amendment claims, therefore, must be rejected.

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[16] That 885(d) was intended to facilitate the prevention, investigation, prosecution, and/or adjudication of offenses relating to controlled substances, rather than the construction offered by the OCBC Defendants, is further bolstered by an examination of the regulations implementing the Controlled Substances Act. See 21 C.F.R. § 1301.24.

CONCLUSION

For the reasons set forth above, the Court should hold the non-compliant defendants in civil contempt as a matter of law, and enter the relief and modification proposed by the United States.

Respectfully submitted,

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UNITED STATES OF AMERICA

Dated: August 24, 1998

CERTIFICATE OF SERVICE

I, Mark T. Quinlivan, hereby certify that on this 24th day of August, 1998, I caused to be served a copy of the foregoing Plaintiff's Consolidated Replies in Support of Motion for an Order to Show Cause Why Non-Compliant Defendants Should Not Be Held in Contempt, and for Summary Judgment; and Ex Parte Motion to Modify May 19, 1998 Preliminary Injunction Orders, in Cases No. C 98-0086 CRB; C 98-0087 CRB; and C 98-0088 CRB; and Opposition to Defendant's Motion to Dismiss in Case No. C 98-0088 CRB, upon counsel for the defendants, by the following means:

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

UNITED STATES OF AMERICA, Plaintiff, v. CANNABIS CULTIVATOR'S CLUB; and DENNIS PERON, Defendants. AND RELATED ACTIONS	Nos. C 98-0085 CRB RELATED C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0089 CRB C 98-0245 CRB DECLARATION OF MARK T. QUINLIVAN Date: August 31, 1998 Time: 2:30 p.m. Courtroom of the Hon. Charles R. Breyer

I, MARK T. QUINLIVAN, do hereby declare and say as follows:

1. I am currently employed as a Trial Attorney in the Federal Programs Branch, Civil Division, United States Department of Justice, and am counsel of record in the above-captioned cases. I make this declaration based on personal knowledge, and on information made available to me in the course of my official duties.

2. Attached hereto as Exhibit 1 is a true and correct copy of the home page and services page from the World Wide Web Internet site of the Oakland Cannabis Buyers' Cooperative, at http://www.rxcbc.org., which were downloaded on August 19, 1998.

3. Attached hereto as Exhibit 2 is a true and correct copy of the home page and membership information page from the World Wide Web Internet site of the Marin Alliance for Medical Marijuana, at http://www.westcoastweb.com/mamm, which were downloaded on August 19, 1998.

I declare under penalty of perjury that the foregoing is true and correct.

MARK T. QUINLIVAN

Executed this 22 day of August 1998

EXHIBIT 1

Oakland Cannabis Buyers' Cooperative

Mission Statement

Announcements/ News

Services/ Calendar

Membership

Related Sites and Organizations

Medical Marijuana

E-mail

Welcome to the OCBC. We are a California Consumer Cooperative Corporation, organized by members, for medical-marijuana patients protected by Proposition 215. The Oakland CBC operates on a not-for-profit basis with the assistance of member volunteers. Currently we are providing medical cannabis and other services to over 1,300 members.

Oakland Cannabis Buyers' Cooperative
P.O. Box 70401
Oakland, CA 94612-0401
Office (510) 832-5346
Fax (510) 986-0534
ocbc@rxcbc.org

Please See it our Way

Please remember the Oakland Cannabis Buyers Cooperative is a **health organization.** Our services are for those who **suffer from serious illnesses and disabilities.** Any other inquiries for cannabis will neither be tolerated nor appreciated.

We do not send, mail or ship cannabis.

This site provides information for patients who use cannabis with a doctor's recommendation. This site exists because the voters of California have said yes to providing cannabis for medical use. Please don't test the law by trying to establish illegal transactions via this site.

FREE SPEECH ONLINE RIBBON CAMPAIGN

Join the Blue Ribbon Online Free Speech Campaign!

These pages look best . . . when viewed through our software on our computer. If they don't look so good on your system, you're probably not the only one. Please let us know about any problems - we're committed to making our site accessible, useful and fun.

Our immutable thanks to Chameleon Productions for this site's initial graphical elements and HTML.

ER0930

This site is dedicated to the memory of Russell Anthony Caldwell, an active member of the cooperative who first launched the OCBC Web site in early 1996.

Last updated: August 12, 1998

As of May 10, 1998,
you are visitor no.

LE FastCounter

This URL: http://www.rxcbc.org/

ER0931

Oakland Cannabis Buyers' Cooperative

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Medical Marijuana

E-mail

Visa, MasterCard, Discover and ATM cards are now accepted at the Bud Bar!

Bud Bar hours: 11 am through 7 pm Mondays and Fridays, 11 am until 1 pm Tuesdays through Thursdays, and 1-4 pm Saturdays. Closed Sundays and holidays. We are located in downtown Oakland, California - members and others who need to know can call (510) 832-5346 for our street address. (A BART station is within one block and the OCBC offices are completely accessible to people using wheelchairs. However, please remember that no smoking is allowed on the premises or in the immediate vicinity of the club.)

Calendar

Except as noted,
events listed below
take place at the cooperative.

Massage Therapy, 11 am-1 pm Thursday, Aug. 13, by appointment.

HIV Support Group, 1-2 pm Thursday, Aug. 13.

Fruit Friday, 11 am-7 pm Aug. 14. Relax and enjoy a variety of fresh fruit!

Massage Therapy, 1-4 pm Friday, Aug. 14, by appointment.

Movie Saturday, 1 pm Saturday, August 15.

Softball Practice, 3 pm Sunday, Aug. 16, Raymondi Field.

Massage Therapy, 11 am-4 pm Monday, Aug. 17, by appointment.

Massage Therapy, 11 am-1 pm & 5-7 pm Tuesday, Aug. 18, by appointment.

Massage Therapy, 11 am-1 pm Wednesday, Aug. 19, by appointment.

Massage Therapy, 11 am-1 pm Thursday, Aug. 20, by appointment.

HIV Support Group, 1-2 pm Thursday, Aug. 20.

Fruit Friday, 11 am-7 pm Aug. 21. Relax and enjoy a variety of fresh fruit!

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Massage Therapy, 1-4 pm Friday, Aug. 21, by appointment.

Movie Saturday, 1 pm Saturday, August 22.

Softball Practice, 3 pm Sunday, Aug. 23, Raymondi Field.

Massage Therapy, 11 am-4 pm Monday, Aug. 24, by appointment.

Massage Therapy, 11 am-1 pm & 5-7 pm Tuesday, Aug. 25, by appointment.

Massage Therapy, 11 am-1 pm Wednesday, Aug. 26, by appointment.

Cultivation Meeting, 5 pm Wednesday, Aug. 26.

Massage Therapy, 11 am-1 pm Thursday, Aug. 27, by appointment.

HIV Support Group, 1-2 pm Thursday, Aug. 27.

Fruit Friday, 11 am-7 pm Aug. 28. Relax and enjoy a variety of fresh fruit!

Massage Therapy, 1-4 pm Friday, Aug. 28, by appointment.

Movie Saturday, 1 pm Saturday, August 29.

Softball Practice, 3 pm Sunday, Aug. 30, Raymondi Field.

Massage Therapy, 11 am-4 pm Monday, Aug. 31, by appointment.

Federal Court, San Francisco, 2 pm Monday, Aug. 31.

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This URL: http://www.rxcbc.org/services.html

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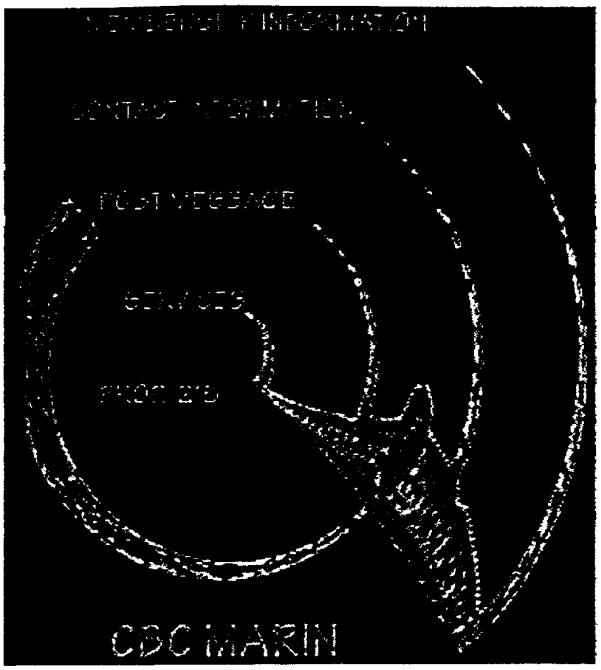
EXHIBIT 2

CBC MARIN



Welcome to the Marin Alliance for Medical Marijuana.
Here you will find information on how to become a member of the Cannabis Buyers Club, and what documentation is required.
Also, you will find information on Proposition 215 and how it affects your rights as a citizen of California.
Please leave a message on our bulletin board, or contact us via e-mail.
Please bookmark this site and return often as this site will be updated frequently. Thank you for supporting medical marijuana and Prop. 215!

Lynnette Shaw
Director of the Marin Alliance for Medical Marijuana

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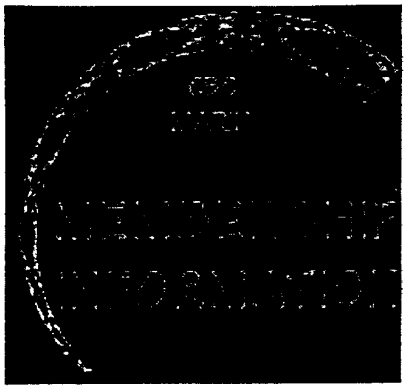

Welcome to the membership area of the Cannabis Buyers Club of Marin. Here you will find what you need to become a member with the Marin Alliance for Medical Marijuana.

There are three forms that must be completed to attain membership.

These are the following forms, you may print and use these forms for your own use:

- Physicians Statement
- Membership and Informed Consent Form
- Waiver Form For Confidential Medical Records Audit

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