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

11 UNITED STATES OF AMERICA,)
12)
Plaintiff,)
13)
v.)
14)
CANNABIS CULTIVATOR'S CLUB;)
15 and DENNIS PERON,)
16)
Defendants.)
17)
AND RELATED ACTIONS)
18)

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

PLAINTIFF'S RESPONSE TO
DEFENDANTS' SUBMISSIONS
PURSUANT TO THE COURT'S MAY 3,
2002 MEMORANDUM AND ORDER

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20 On May 3, 2002, this Court granted the United States' motion for summary judgment,
21 concluding that the uncontradicted record established that "there is no genuine issue of material dispute
22 that defendants violated the [Controlled Substances Act] several times in 1997 by distributing marijuana
23 and possessing marijuana with the intent to distribute." May 2, 2002 Memorandum and Order at 12.
24 Upon turning to consideration of the appropriate remedy, and the United States' request that the
25 preliminary injunctions entered on May 19, 1998, be made permanent, the Court afforded defendants
26 the opportunity "to file further submissions with the Court concerning the likelihood of future violations

27 Plaintiff's Response to Defendants' Submissions
Pursuant to the Court's May 3, 2002 Mem. and Order
28 Case Nos. C 98-0085 CRB and related actions

1 of the Act, and in particular, whether there is a threat that defendants, or any of them, will resume their
2 distribution activity if the Court does not enter a permanent injunction." Id.

3 In response to the opportunity afforded by the Court, each of the defendants declined to offer
4 any assurances that, in the absence of permanent injunctive relief, they would not resume the distribution
5 of marijuana and related activities in violation of federal law. In particular, defendants Oakland Cannabis
6 Buyers' Cooperative and Jeffrey Jones ("OCBC Defendants") in Case No. C 98-0088 CRB, objected
7 to the procedure set forth in the Court's Order, and stated that they therefore would "file no submission."
8 OCBC Defendants' Submission Re May 3, 2002 Memorandum and Order at 2. Defendants Marin
9 Alliance for Medical Marijuana and Lynnette Shaw ("Marin Defendants") in Case No. C 98-0086
10 CRB, objected to and "decline[d] the court's invitation to file a submission concerning future intents
11 and/or activities." Submission of Defendants Lynnette Shaw and Marin Alliance for Medical Marijuana
12 Pursuant to Court's Order of May 3, 2002 at 1. Defendant Lynnette Shaw requested, however, that "if
13 the court issues a permanent injunction, said injunction should affirmatively state that it does not enjoin
14 SHAW from cultivating and/or possessing cannabis for her personal use." Id. at 2. Finally, defendants
15 Cannabis Cultivators and Dennis Peron in Case No. C 98-0085 CRB, defendants Ukiah Cannabis
16 Buyer's Club, Cherrie Lovett, and Marvin and Mildred Lehrman in Case No. C 98-0087 CRB, and
17 defendant Santa Cruz Cannabis Buyers Club in Case No. C 98-0245 CRB, apparently declined to file
18 any submission in response to the opportunity afforded by the Court.

19 As we now demonstrate, the defendants' failure to offer any assurances that, in the absence of
20 permanent injunctive relief, they would not engage in future violations of the Controlled Substances Act
21 is an appropriate factor for this Court to consider in determining whether permanent injunctive relief is
22 necessary, and counsels strongly in favor of the government's request that the preliminary injunctions
23 entered on May 19, 1998, be made permanent.

1 **ARGUMENT**

2 It has long been settled that, "[i]n exercising its equitable jurisdiction, '[a] federal court has broad
3 power to restrain acts which are of the same type or class as unlawful acts which the court has found to
4 have been committed or whose commission in the future unless enjoined, may fairly be anticipated from
5 the defendant's conduct in the past.'" Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100,
6 132 (1969) (quoting N.L.R.B. v. Express Publishing Co., 312 U.S. 426, 435 (1941)). Consistent with
7 this principle, the Ninth Circuit has held that "a statutory injunction may be imposed when a violation of a
8 statute has been or is about to be committed." United States v. Laerdal Mfg. Corp., 73 F.3d 852, 855
9 (9th Cir. 1995) (citing Burlington Northern R.R. Co. v. Dept. of Revenue of the State of Washington,
10 934 F.2d 1064, 1074-75 (9th Cir. 1991)). The Ninth Circuit also has identified several factors which a
11 court may consider in predicting the likelihood of future violations, including (1) the degree of scienter
12 involved; (2) the isolated or recurrent nature of the infraction; (3) the defendants' recognition of the
13 wrongful nature of their conduct; (4) the likelihood, because of defendants' professional occupations,
14 that future violations might occur; and (5) *the sincerity of any assurances against future violations*.
15 See Laerdal Mfg. Corp., 73 F.3d at 855; S.E.C. v. Murphy, 626 F.2d 633, 655 (9th Cir. 1980). See
16 also Brock v. Big Bear Market No. 3, 825 F.2d 1381, 1383 (9th Cir. 1987) ("In deciding whether to
17 grant injunctive relief, a district court must weigh the finding of violations against factors that indicate a
18 reasonable likelihood that the violations will not recur. A dependable, bona fide intent to comply, or
19 good faith coupled with extraordinary efforts to prevent recurrence, are such appropriate factors.").

20 As these cases make clear, this Court may appropriately consider whether the defendants in
21 these related actions have offered any assurances against future violations of federal law in determining
22 whether permanent injunctive relief is warranted. But, here, the defendants have declined to offer *any*
23 assurances against future violations of the Controlled Substances Act, even afforded the opportunity to
24 do so by the Court. The defendants' choice not to offer any such assurances weighs strongly in favor of
25 the entry of permanent injunctive relief. See, e.g., New York State Nat'l Organization for Women v.
26 Terry, 159 F.3d 86, 92 (2d Cir. 1998) (holding that "it is by no means absolutely clear that defendants'

1 violations of the district court's orders could not reasonably be expected to recur" because "[t]he record
2 offers no assurance that, if sanctions were lifted, the defendants would not return to [their] old ways' of
3 violating the court's orders" (internal quotations omitted)), *cert. denied*, 527 U.S. 1003 (1999);
4 Weigand v. Village of Tinley Park, 129 F. Supp.2d 1170, 1173 (N.D. Ill. 2001) (permanent injunctive
5 relief warranted based, in significant part, on fact that "the defendants refuse to offer any assurance
6 against future violations. * * * They did not offer to me, either at the hearing or in their written
7 submissions to the court, any such statement or assurance.").¹

8 Consideration of the other factors identified by the Ninth Circuit relevant to the determination
9 whether permanent injunctive relief is warranted also weigh in favor of the entry of permanent injunctive
10 relief. First, as this Court has found, the record in these related actions is undisputed that each of the
11 defendant clubs distributed marijuana to undercover agents of the Drug Enforcement Administration on
12 six separate occasions, and that the OCBC Defendants distributed marijuana to numerous persons
13 following the Court's issuance of a preliminary injunction enjoining such conduct. See May 3, 2002
14 Memorandum and Order at 2-5. The defendants also have made no showing that their distribution of
15 marijuana in violation of federal law was unintentional, or inadvertent.² Under these circumstances, the
16 recurrent nature of the unlawful activity at issue, and the degree of scienter involved, weigh strongly in
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19 ¹ There is no merit to the OCBC Defendants' suggestion that the opportunity afforded by the
20 Court in its May 3, 2002 Memorandum and Order infringes upon defendant Jeffrey Jones' Fifth
21 Amendment privilege against self-incrimination. "A defendant has no absolute right not to be forced to
22 choose between testifying in a civil matter and asserting his Fifth Amendment privilege," and it is
23 "permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment
24 in a civil proceeding." Keating v. Office of Thrift Supervision, 45 F.3d 322, 326 (9th Cir.) (citing
25 Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)), *cert. denied*, 516 U.S. 827 (1995).

26 ² Although the OCBC Defendants have previously alleged that they were not predisposed to
27 providing cannabis to persons without the proper authorization, this Court has correctly ruled that,
28 "[s]ince the Supreme Court has unanimously and definitively ruled that it is unlawful to distribute
marijuana regardless of the medical need of the recipient, any 'proper authorization' is irrelevant. With
or without medical authorization the distribution of marijuana is illegal under federal law." May 3, 2002
Memorandum and Order at 6 (emphasis supplied).

1 favor of the entry of permanent injunctive relief. See Orantes-Hernandez v. Thornburgh, 919 F.2d 549,
2 564 (9th Cir. 1990) ("Permanent injunctive relief is warranted where, as here, the defendant's past and
3 present misconduct indicates a strong likelihood of future violations.").

4 The defendants also have failed to "recogni[ze] the wrongful nature of [their] conduct," but rather
5 have insisted that their distribution of marijuana is constitutionally or otherwise protected. While the
6 defendants have every right to advance such arguments, their refusal to acknowledge the unlawful nature
7 of their conduct nonetheless is a factor which this Court may appropriately take into account in
8 considering whether permanent injunctive relief is warranted. See, e.g., Laerdal, 73 F.3d at 856
9 ("Laerdal's repeated self-justification is sufficient to show a likelihood of future violations."); Federal
10 Election Comm'n v. Furgatch, 869 F.2d 1256, 1262 (9th Cir. 1989) ("A defendant's persistence in
11 claiming that (and acting as if) his conduct is blameless is an important factor in deciding whether future
12 violations are sufficiently likely to warrant an injunction."); Armster v. United States District Court, 806
13 F.2d 1347, 1359 (9th Cir. 1986) ("It has long been recognized that the likelihood of recurrence of
14 challenged activity is more substantial when the cessation is not based upon a recognition of the initial
15 illegality of that conduct."); Commodity Futures Trading Comm'n v. CO Petro Marketing Group, Inc.,
16 680 F.2d 573, 582 n.16 (9th Cir.1982) (concluding that "the district court correctly issued the
17 permanent injunction on a proper finding that there was a reasonable likelihood of future violations"
18 based, in part, on fact that "CO Petro consistently maintained that its conduct was blameless").

19 Finally, the defendants' "professional occupation" does not offer any assurances that future
20 violations are unlikely to recur. On the contrary, the defendants' own self-designations as "cannabis
21 buyer's clubs" or "cannabis buyers' cooperatives," plainly suggests an intent or inclination to engage in the
22 sale and distribution of marijuana.

23 In sum, because the defendants have refused to offer any assurances that, in the absence of
24 permanent injunctive relief, they will no longer sell or distribute marijuana, and because consideration of
25 the other factors relevant to the determination whether permanent injunctive relief is warranted all point
26

1 to the likelihood of future violations, the preliminary injunctions entered by the Court on May 19, 1998,
2 should be made permanent.

3 The United States also opposes the request of defendant Lynnette Shaw that, if the Court were
4 to issue a permanent injunction in Case No. C 98-0086 CRB, the injunction "should affirmatively state"
5 that it does not enjoin Ms. Shaw from cultivating and/or possessing cannabis for her personal use. Any
6 such provision would be improper because the manufacture and possession of marijuana, even for
7 personal use, remains unlawful under federal law. See 21 U.S.C. §§ 841(a)(1); 844. Moreover, it is
8 well established that courts should not pass on constitutional or statutory questions "in advance of the
9 necessity of deciding them." New York Transit Auth. v Beazer, 440 U.S. 568, 582 n.22 (1979)
10 (constitutional issues should not be decided"). Here, as Ms. Shaw candidly acknowledges, the question
11 whether she may cultivate and/or possess marijuana for her personal use was not specifically raised by
12 the United States in its request for injunctive and declaratory relief, and has not been briefed or argued
13 by the parties. Under these circumstances, it would be inappropriate for the Court to make any
14 statement regarding Ms. Shaw's personal cultivation and/or possession of marijuana. The Court should
15 therefore deny Ms. Shaw's request that any permanent injunction entered "affirmatively state" that it does
16 not enjoin Ms. Shaw from cultivating and/or possessing cannabis for her personal use, and simply
17 convert the preliminary injunction entered against the Marin Defendants on May 19, 1998, into a
18 permanent injunction.

19 CONCLUSION

20 For the foregoing reasons, and for the reasons set forth in the government's prior memoranda,
21 the United States respectfully requests that the Court convert the preliminary injunctions entered on May
22 19, 1998, against defendants in Case Nos. C 98-0085 CRB; C 98-0086 CRB; C 98-0087 CRB; C
23 98-0088 CRB; and C 98-0245 CRB, into permanent injunctions.

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Respectfully submitted,

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Dated: June 6, 2002

1 **CERTIFICATE OF SERVICE BY OVERNIGHT DELIVERY**

2 I, Mark T. Quinlivan, Senior Counsel, Civil Division, United States Department of Justice,
3 whose address is 901 E Street, N.W., Room 1048, Washington, D.C. 20530, hereby certify that on the
4 6th day of June, 2002, I caused to be served a copy of the following documents:

- 5 • Plaintiff's Response to Defendants' Submissions Pursuant to the Court's May 2, 2002
6 Memorandum and Order

7 by overnight delivery on the following counsel for the defendants, intervenors, and *amicus curiae*:

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27 Plaintiff's Response to Defendants' Submissions
28 Pursuant to the Court's May 3, 2002 Mem. and Order
Case Nos. C 98-0085 CRB and related actions

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