ROBERT A. RAICH (State Bar No. 147515)
1970 Broadway, Suite 1200
Oakland, California 94612
Telephone: (510) 338-0700
Facsimile: (510) 338-0600

GERALD F. UELMEN (State Bar No. 39909)
Santa Clara University School of Law
Santa Clara, California 95053
Telephone: (408) 554-5729
Facsimile: (408) 554-4426

RANDY BARNETT
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
Telephone: (617) 353-3099
Facsimile: (617) 353-3077
(Admitted *Pro Hac Vice*)

ANNETTE P. CARNEGIE (State Bar No. 118624)
HEATHER A. MOSER (State Bar No. 212686)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and
JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Defendants.

AND RELATED ACTIONS.

No. C 98-0088 CRB

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR ENTRY OF PARTIAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(B) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 9, 2002
Time: 10:00 a.m.

Honorable Charles R. Breyer

TO PLAINTIFF AND ITS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones ("Defendants") will and hereby do move the Court to enter an order expressly directing entry of judgment under Rule 54(b) of the Federal Rules of Civil Procedure. Defendants request that the Court act on this motion without a hearing. In the event a hearing is required, as set forth in the accompanying Ex Parte Application, Defendants request that the hearing be held on or before July 26, 2002. Pursuant to Local Rule Rule 7-2, however, Defendants' motion will be heard in Courtroom 8 of the United States District Court for the Northern District of California on August 9, 2002 at 10:00 a.m, or at such other date and time as the Court may order. This motion is based upon this notice and the following memorandum.

INTRODUCTION

On June 10, 2002, this Court issued a permanent injunction (after granting summary judgment a month earlier) resolving all of the government's claims against Oakland Cannabis Buyers' Cooperative and Jeffrey Jones ("Defendants"). The counterclaim-in-intervention remains unadjudicated by these orders. Accordingly, Defendants now move the Court to enter an order directing the entry of judgment pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure. Such an order would permit Defendants to appeal the Court's grant of summary judgment for the government and the permanent injunction preventing Defendants from resuming operations. There is "no just reason for delay" in this case, especially in light of the serious health risks posed to patient-members due to the deprivation of medical cannabis under the Court's present orders. For these reasons, and the reasons set forth below, the Court should enter an order directing the entry of partial final judgment as to Defendants in this case.

PROCEDURAL HISTORY

In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996 (Proposition 215), to permit seriously ill patients and their primary caregivers to possess and cultivate cannabis with the approval or recommendation of a physician. To implement the will of California voters, Defendants organized a Cooperative to provide seriously ill patients with a safe and reliable source of medical cannabis. The Cooperative, a not-for-profit organization,

operates in downtown Oakland, in cooperation with the City of Oakland and its police department. On July 28, 1998, the City of Oakland adopted, by ordinance, a Medical Cannabis Distribution Program, and on August 11, 1998, officially designated the Cooperative to administer the City's program.

On January 9, 1998, the United States sued in the United States District Court for the Northern District of California, seeking to enjoin Defendants from distributing cannabis to patient-members. On May 19, 1998, the district court issued a preliminary injunction enjoining Defendants 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)."

On August 14, 1998, four patient-members, Edward Neil Brundridge, Ima Carter, Rebecca Nikkel, and Lucy Y. Vier ("Intervenors") filed a motion to intervene pursuant to Federal Rule of Civil Procedure 24. They sought injunctive and declaratory relief against the government. On September 3, 1998, this Court granted the motion to intervene. On October 2, 1998, Intervenors answered the government's complaints (in case numbers C 98-0085, C 98-0086, and C 98-0087) and filed the counterclaim-in-intervention for injunctive and declaratory relief.

On October 13, 1998, this Court held Defendants in contempt of the preliminary injunction and modified the injunction to permit the U.S. Marshal to seize Defendants' offices. Defendants informed this Court that they would comply with the injunction. Defendants also requested that the injunction be modified to permit distribution of cannabis to the limited number of patients who could demonstrate necessity under the standard set forth in *United States v. Aguilar*, 883 F. 2d 662 (9th Cir. 1989), and submitted numerous declarations in support of this request. This Court denied that motion.

On December 4, 1998, the government moved to dismiss Intervenors' counterclaim-in-intervention for failure to state a claim upon which relief can be granted. After a hearing in February of 1999, this Court dismissed the counterclaim-in-intervention without leave to amend. In June of 1999, this Court granted partial final judgment as to Intervenors' claims. Intervenors appealed the dismissal to the Ninth Circuit.

On September 13, 1999, the Ninth Circuit reversed the denial of the motion to modify and remanded the case, holding that (1) the court could take into account a legally cognizable defense of necessity in considering the proposed modification (*Oakland Cannabis Buyers' Coop.*, 190 F. 3d 1109, 1114 (9th Cir. 1999)), (2) in exercising its equitable discretion, the court must expressly consider the public interest in the availability of a doctor-prescribed treatment that would help ameliorate the condition and relieve the pain and suffering of persons with serious or fatal illnesses, and (3) the record before the district court justified the proposed modification. *Id.* at 1114-15.

On May 10, 2000, the Ninth Circuit vacated and remanded this Court's dismissal of the Intervenors' counterclaim-in-intervention. In a separate concurrence, Judge Reinhardt suggested that, "on remand the district judge [should] consider whether the constitutional claim should be resolved on summary judgment, rather than on a motion to dismiss . . . ." 2000 U.S. App. LEXIS 9963, at *3 (9th Cir. 2000). No further action was taken with respect to Intervenors.

On remand to this Court on May 30, 2000, Defendants renewed their motion to modify the preliminary injunction, submitting more declarations to establish that patient-members could meet all of the *Aguilar* requirements for a claim of necessity.

On July 25, 2000, the government noticed an appeal from the order modifying the injunction. On November 27, 2000, the Supreme Court granted the government's petition for writ of *certiorari* to review the Ninth Circuit's September 13, 1999, opinion. The Ninth Circuit suspended proceedings to await the Supreme Court's ruling. On May 15, 2001, the United States Supreme Court reversed this Court's decision and remanded the case for further proceedings.

On December 4, 2001, the Ninth Circuit remanded the case to this Court for "proceedings consistent with the Supreme Court's opinion." On January 7, 2002, defendants moved after remand to dissolve or modify the preliminary injunction order. On January 25, 2002, the government moved for summary judgment and permanent injunctive relief against Defendants only. The government did not move for summary judgment against the Intervenors).

On May 3, 2002, this Court granted the government's motion for summary judgment and requested that Defendants file further submissions with the Court "concerning the likelihood of future violations of the Act, and in particular, whether there is a threat that defendants, or any of them, will

resume their distribution activity if the Court does not enter a permanent injunction." (Order of May 3, 2002.) On May 22, 2002, Defendants filed a submission objecting to the procedure on the grounds of invasion of the attorney-client privilege and the violation of Jeffery Jones's Fifth Amendment privilege against self-incrimination. On June 10, 2002, this Court permanently enjoined Defendants from possessing with intent to distribute, manufacturing or distributing cannabis. Neither of the orders mentions Intervenors. Defendants now seek to appeal the summary judgment and permanent injunction as a partial final judgment under Federal Rule of Civil Procedure 54(b), as well as all other interlocutory orders.

ANALYSIS

I. THE COURT SHOULD DIRECT ENTRY OF FINAL JUDGMENT AS TO DEFENDANTS OCBC AND JEFFREY JONES.

A. The Action Involves Multiple Claims and Multiple Parties.

Rule 54(b) allows a district court dealing with multiple claims and/or multiple parties to direct the entry of final judgment as to fewer than all of the claims and/or parties. *See* FED. R. CIV. P. 54(b). As the Supreme Court of the United States declared: "It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 10 (1980).

In the present case, there has been no judgment entered as to the Intervenors' claims. Where there are pending claims by intervenors, partial entry of judgment under Rule 54(b) is appropriate. *See Transit Mgmt. of Southeast La, Inc. v. Group Ins. Admin.*, 226 F. 3d 376, 382 fn. 7 (5th Cir. 2000) ("Because Rule 54(b) certification is jurisdictional, an appeal from a judgment that does not address an intervenor's claim resolves less than all of the claims asserted and without the certification, the appeal must be dismissed."). Intervenors remain in the action due to the pending counterclaim-in-intervention against the government. In February of 1999, this Court dismissed Intervenors' counterclaim-in-intervention without leave to amend. Intervenors appealed this judgment to the Ninth Circuit, which vacated the order and remanded to this Court. In a separate concurrence, Judge Reinhardt suggested that, "on remand the district judge consider [should] whether the [intervenors']

constitutional claim should be resolved on summary judgment, rather than on a motion to dismiss . . . ." 2000 U.S. App. LEXIS 9963, at *3 (9th Cir. 2000). Summary judgment and a permanent injunction were sought and granted only against Defendants. Insofar as the counterclaim-in-intervention has not been dismissed on summary judgment, Intervenors remain as parties with separate claims in this litigation. Therefore, the Court can enter final judgment only as to the Defendants.

B. The Orders Granting Summary Judgment and Issuing a Permanent Injunction are "Final Judgments" Against Defendants for the Purposes of Rule 54(b).

The summary judgment and permanent injunction orders constitute "final judgment" for the purposes of Rule 54(b). "A ruling is final, and therefore appealable, 'if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment' *as to that party or claim*." *Angoss II Partnership v. Trifox, Inc.*, 2000 U.S. Dist. LEXIS 3165 (N.D. Cal. March 10, 2000) (citations omitted) (emphasis added) (Illston, J.). Any simultaneous grant of summary judgment and permanent injunction would settle all claims as to all Defendants (excluding Intervenors), constituting "final judgment." *See, e.g., United States v. Vogler*, 859 F.2d 638 (9th Cir. 1988) (reviewing grant of summary judgment and permanent injunction on Rule 54(b) appeal); *Bushie v. Stenocord Corp.*, 460 F.2d 116, 118 n.2 (9th Cir. 1972) (reviewing district court's grant of summary judgment certified for appeal pursuant to Rule 54(b)); *SEC v. Hickey*, 2000 U.S. Dist. LEXIS 2361 (N.D. Cal. 2000) (granting summary judgment, retaining jurisdiction over permanent injunctions against defendants, and entering final judgment under Rule 54(b)); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1334 (E.D. Pa. 1981) (summary judgment); *cf. Big Horn Cty. Elec. Coop. v. Adams*, 219 F. 3d 944, 947 (9th Cir. 2000) (reviewing on appeal under section 1291 district court's grant of summary judgment and issuance of permanent injunction). There can be no question that the summary judgment ruling in combination with the issuance of a permanent injunction against Defendants leaves nothing to do but to execute the judgment. Therefore, the orders are appropriate for appeal under Rule 54(b).

C. There is No Just Reason for Delay.

Pursuant to its authority under Rule 54(b), this Court should exercise its discretion to direct the entry of final judgment based on an express determination that there is "no just reason for delay." Fed. R. Civ. P. 54(b); *see Sears, Roebuck & Co v. Mackey*, 351 U.S. 427 (1956). "This power is largely discretionary, to be exercised in light of 'judicial administrative interests as well as the equities involved,' and giving due weight to 'the historic federal policy against piecemeal appeals.'" *Reiter v. Cooper*, 507 U.S. 258, 265 (1993) (quoting *Curtiss-Wright*, 446 U.S. at 10) (internal citations omitted); *see also Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1518, 1525 (9th Cir. 1987) ("[T]he solution for Rule 54(b) purposes lies in a more pragmatic approach focusing on severability and efficient judicial administration.").

The equities argue strongly for certification. Defendants seek resolution of the issue of the propriety of distributing cannabis to seriously and terminally ill patients. Numerous patient-members suffer from AIDS, cancer, glaucoma, and other serious illnesses for which cannabis is the only operative treatment for pain and such conditions as loss of appetite that could otherwise lead to death, blindness, or other permanent debilitation. Thee health and, in some cases, the lives of the patient-members is an overpowering equitable consideration that compels the conclusion that there is "no just reason for delay" of an appeal. Additionally, the issues to be raised in the appeal are of national importance and deserve to be resolved promptly.

Furthermore, an immediate appeal of the summary judgment and permanent injunction orders would serve judicial efficiency interests as well. The legal issues presented by Defendants' appeal and Intervenors' counterclaims-in-intervention are separable and distinct even though they arise from the same transaction or occurrence. *See Texaco, Inc. v. Ponsoldt*, 939 F. 2d 794, 797 (9th Cir. 1991) (holding that Rule 54(b) claims do not need to be separate from and independent from the remaining claims as long as the remaining claim raises a separate legal issue); *Sheehan v. Atlanta Int'l Ins. Co.*, 812 F. 2d 465, 468 (9th Cir. 1987) ("The Rule 54(b) claims do not have to be separate from and independent of the remaining claims."). Intervenors' claims are related to the right to use cannabis, not the right to distribute it. Furthermore, the Supreme Court has allowed certification of a final

order on claims that arise out of the same transaction or occurrence as the pending counterclaim. *See Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445, 452 (1956).

Also, a determination on appeal of Defendants' right to distribute cannabis is will "streamline the ensuing litigation." *Ponsoldt*, 939 F. 2d at 797-98; *see also Continental Airlines*, 819 F. 2d at 1525 (adopting "pragmatic approach" to the question of whether certification will serve efficient judicial administration). As in *Ponsoldt*, *Continental Airlines*, and numerous other cases in this Circuit, if entry of final judgment will eliminate certain theories of recovery, thus limiting the issues to be tried, an appeal pursuant to Rule 54(b) is appropriate. *See Ponsoldt* 939 F. 2d at 797-98 (allowing certification where unadjudicated counterclaims arose from same underlying contract, and entry of judgment would limit issues to be tried); *Continental Airlines*, 819 F. 2d at 1525 (where entry of judgment would narrow issues for trial, Rule 54(b) certification proper even though movant might yet fully recover on remaining unadjudicated claims); *see also Core-Vent Corp. v. Nobel Inds. AB*, 11 F. 3d 1482, 1484 (9th Cir. 1993) (entry of final judgment proper where appeal of motion to dismiss "may obviate the need for a second trial, and thus aids expeditious decision of the case"). For example, on appeal, a determination that the Controlled Substances Act is unconstitutionally overbroad under the commerce clause would moot Intervenors' complaint-in-intervention, even though it addresses distinct legal issues. Rule 54(b) certification will expedite the passage of this case through the courts and should therefore be granted in the exercise of this Court's discretion. *Ponsoldt*, 939 F. 2d at 797.

II. CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to enter judgment final judgment under Federal Rule of Civil Procedure 54(b) on the grounds that there is "no just reason for delay".

Dated: July 3, 2002

ANNETTE P. CARNEGIE
HEATHER A. MOSER
MORRISON & FOERSTER LLP

By: 
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES