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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 98-00245 CRB

MEMORANDUM OF POINTS AND AUTHORITIES

IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS

COUNTERCLAIM-IN-INTERVENTION

Date: February 5, 1999
Time: 10:00 a.m.
Room: 8
The Hon. Charles R. Breyer

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SUMMARY OF ARGUMENT

Dismissal of the Counterclaim at the pleading stage is premature. On a Rule 12(b)(6) motion, the Court should construe the Counterclaim in the light most favorable to the Members (Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980)), and accept as true all material allegations and reasonable inferences (NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)). Moreover, motions to dismiss are disfavored. U.S. v. White, 893 F.Supp. 1423, 1428 (C.D. Cal. 1995).

The Members claim a fundamental liberty interest to be free from governmental interdiction of their personal, self-funded medical decision, in consultation with their personal physician, to alleviate their suffering through the only effective treatment available for them. The Members should be allowed to go forward to develop a full record under the Supreme Court's substantive due-process analysis to demonstrate that their asserted fundamental liberty interest is deeply rooted in this Nation's history, legal traditions, and practices. Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258, 2268 (1997).

The Government erroneously contends that the Counterclaim should be dismissed because it is foreclosed by "binding authority," but its authorities are inapplicable to the right claimed here and do not support a motion to dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants and counterclaimants-in-intervention EDWARD NEIL BRUNDRIDGE, IMA CARTER, REBECCA NIKKEL and LUCIA Y. VIER (the "Members") hereby submit this memorandum of points and authorities in opposition to plaintiff United States of America's (the "Government's") motion to dismiss the Members' counterclaim for failure to state a claim upon which relief can be granted.

I. PRELIMINARY STATEMENT.

The Members suffer and endure chronic pain that seriously diminishes their quality of life. Under the Fifth Amendment of the United States Constitution, no person may be deprived of life, liberty, or property, without due process of law. By seeking the closure of the cannabis cooperatives to which the Members belong, the Government is depriving the Members of their life and liberty interests under the Fifth Amendment by interfering with the Members' decision to obtain the only effective medical treatment available for them.

This case is about "the most comprehensive of rights and the most valued by civilized men," namely, "the right to be let alone." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The Members seek to be free from governmental interdiction of their personal, self-funded medical decision, in consultation with their personal physician, to alleviate their suffering through the only effective treatment available for them.

The authority on which the Government relies for dismissal is not controlling. The Government's arguments ignore that the Members claim relief based on a right to the only effective legal treatment available to them, a treatment recommended by their personal physicians. In these circumstances, to deny the Members relief is to deny them their protected right to decide whether to have a treatment or not. Accordingly, the motion to dismiss must be denied.

The Government seeks dismissal of these claims at the pleading stage. The Members claim a fundamental liberty interest rooted in this nation's history, traditions

and practices, it is dangerous to dismiss their claims on a minimal record. Because such a claim can only be evaluated on a full record, the Government's motion also is premature. For these reasons, the Government's motion to dismiss should be denied.

II. FACTUAL BACKGROUND.

A. This litigation.

In January 1998, the Government filed six separate lawsuits against six cooperative associations and individuals, seeking, among other things, an injunction under the Controlled Substances Act (see 21 U.S.C. § 882) to prevent the defendants from distributing cannabis. See Complaints, filed January 9, 1998 (Prayer). On the same day it filed its lawsuits, the Government filed motions for a preliminary injunction, permanent injunction and summary judgment in each action. See, e.g., Plaintiff's Motion and Memorandum in Support of Motion for Preliminary and Permanent Injunction, and for Summary Judgment, filed on or about January 9, 1998 in Case No. C•98-0088. In opposing the Government's motion, defendant cooperatives asserted, among other things, that they maintained a fundamental liberty interest in physician recommended treatment to alleviate physical pain in the face of governmental restraint. See Defendants' Joint Memorandum of Points and Authorities in Opposition to Plaintiff's Motions for Preliminary Injunction, filed on or about February 27, 1998, at 6-12. See also Defendants' Supplemental Joint Memorandum of Points and Authorities in Opposition, Etc., filed on or about April 16, 1998, at 9. Accordingly, the defendant cooperatives argued that the Government's motion should be denied because enforcement of the Controlled Substances Act in the manner sought violated a fundamental liberty interest.

On 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

U.S. v. Cannabis Cultivators Club, 5 F.Supp.2d 1086, 1106 (N.D. Cal. 1998).[1] In issuing the preliminary injunctions, the Court stated that it was not ruling as a matter of law that the fundamental right asserted by defendants did not exist. Id. at 1103. The Court held only that the Government was "likely to prevail at trial on the issue of whether defendants have a fundamental right to medical marijuana." Id. (emphasis added). The Court further held that "on the record presently before the Court, defendants have not established that the right to such treatment is 'so rooted in the traditions and conscience of our people as to be ranked fundamental.'" Id. (emphasis added) (citations omitted).[2]

B. 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 Cal. 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, were 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

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1 The Court found that the Government's motions for summary judgment against the defendant cooperatives were premature because they were filed the same day as the lawsuits. Cannabis Cultivators, 5 F.Supp.2d at 1098 (citing Federal Rule of Civil Procedure 56(a), which provides that summary judgment motions may not be filed until 20 days after commencement of the action).

2 In its decision granting the Government's preliminary injunction, the Court stated that defendants had not "established that they have standing to assert such a defense [that there is a fundamental right to medical marijuana] as to their distribution of marijuana to seriously ill persons other than themselves." Cannabis Cultivators, 5 F.Supp.2d at 1103. There is no such standing issue with respect to the Members, and the Government has conceded this issue by not asserting any challenge to the Members' standing in its motion to dismiss.

Oakland Cannabis Buyers' Cooperative "from sometime early in 1997 to the present . . . [has] been engaged in the sale or distribution of marijuana").

C. The Motion to Intervene.

In August 1998, the Members sought to intervene (see Motion for Leave to Intervene, Etc., filed August 14, 1998 ("Mot. to Intervene")) pursuant to Rule 24(a) of the Federal Rules of Civil Procedure:

> 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.

Id. at 9. The Members argued that the fundamental right that they asserted, while admittedly not yet recognized in reported case law, was in accord with the principles and teaching of the United States Supreme Court. Id.[3]

The Court granted the Members' motion to intervene. See Order re: Motion to Intervene, filed on or about September 3, 1998. On October 2, 1998, the Members filed answers to the Government's complaints and their Counterclaim-in-Intervention for Declaratory and Injunctive Relief ("Counterclaim or "Cntrclm.").

D. The Members and their claims.

Each of the Members is in danger of imminent harm due to serious illness, and each uses cannabis for medical purposes. See Cntrclm. ¶ 10. In each case, such use

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3 The Members cited the following authorities to demonstrate that their fundamental right is in accord with United States Supreme Court precedent: 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). See Mot. to Intervene at 9-10.

has been deemed appropriate and recommended by the Member's physician. Id. Each of the Members is a member of one of the defendant cooperatives. See id. ¶¶ 4-7.

The Members suffer from painful and serious illnesses and conditions. Mr. Brundridge suffers from severe arthritis in the knee, which causes him extreme pain and difficulty in walking. Cntrclm. ¶ 11. Ms. Nikkel has fibromyalgia and multiple sclerosis. Id. ¶ 12. As a result, Ms. Nikkel experiences severe and painful muscle spasms. Id. Ms. Carter also suffers chronic and severe pain. She has congenital scoliosis, fibromyalgia and cervical nerve damage. Id. ¶ 13. These conditions cause massive pain in her head and back. Id. Finally, Ms. Vier has been diagnosed with squamous cell cancer that her doctors consider terminal, even with radiation and chemotherapy treatments. Id. ¶ 14. Ms. Vier has suffered a loss of appetite in connection with her cancer and treatment. Id. Without the use of cannabis, Ms. Vier would not want to or be able to eat enough to stay alive. Id.

The Members, upon the recommendation of their physicians, use cannabis to treat these conditions. Cntrclm. ¶¶ 11-15. The Members have tried traditional, conventional medicines, none of which proved effective. Id. Each of the Members has found cannabis to be the only effective treatment for his or her condition. Id.

If the cooperatives are prevented from distributing cannabis, the Members will not be able legally to obtain cannabis that is safe and affordable. Cntrclm. ¶ 16. The Members are suffering a special harm as result of the relief the Government seeks. Id. ¶¶ 21-22. By virtue of the governmental intrusion, the Members are unable not only to speak freely with their doctors about their conditions and medical needs, but to act on their doctors' advice as to the only medication that effectively alleviates their pain or stimulates their appetite: cannabis. Id. ¶¶ 18(c), 19. Their privacy and doctor relationships thus 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.

For these reasons, the Counterclaim seeks the following relief:

(1) a declaration (i) of the Members' fundamental right under the Fifth Amendment to be free from governmental interdiction of their personal, self-funded medical decisions to take the only effective legal medication available to relieve their own pain and suffering, to obtain their personal physicians' recommendations for appropriate medical care for serious illnesses and injuries, and to take advantage of available medications for such conditions as recommended by their personal physicians; and (ii) that the United States cannot seek enforcement of the Controlled Substances Act against the Members or defendant cooperative in these related actions because it would thereby violate the Members' fundamental right; and

(2) for a preliminary and permanent injunction restraining the United States from: (i) interfering with the Members' exercise of their fundamental right as alleged in the Complaint; and (ii) hindering, preventing or attempting to enjoin the defendant cooperatives or any of the other defendants from providing the Members, or their primary care givers, with safe and affordable cannabis for personal medicinal use by the Member upon a physician's recommendation as permitted by the Compassionate Use Act of 1996.

Cntrclm. at 9-10.

E. The current status of the litigation.

In July 1998, the Government moved for an order to show cause why the Oakland, Marin and Ukiah defendant cooperatives should not be held in contempt for failing to comply with the preliminary injunction and for summary judgment. On September 3, 1998, the Court issued a show cause order as to the Oakland and Marin defendants. After hearings, the Court held the Oakland defendants in contempt and modified its injunction to permit enforcement against the Oakland cooperative.[4] The

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4 See Memoranda and Orders re: Motions in Limine, Etc. in Case Nos. 98-00086 and 98-00088, both filed October 13, 1998. See also Order Modifying Injunction in Case No. 98-00088, filed October 13, 1998.

Court ordered a jury trial for the Marin defendant on the contempt issue.[5] The Oakland defendants have appealed, and their appeals remain pending. See Notices of Appeal, filed October 8 and 16, 1998.[6]

III. ARGUMENT.

A. Motions to dismiss are disfavored.

In considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Counterclaim must be construed in the light most favorable to the Members. Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980).[7] Moreover, the Court must accept as true all material allegations of the Counterclaim as well as reasonable inferences to be drawn from them. NL Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

Motions to dismiss pursuant to Rule 12(b)(6) are disfavored. "[D]ismissal is only proper in 'extraordinary' cases." U.S. v. White, 893 F.Supp. 1423, 1428 (C.D. Cal. 1995). Even if the fact of the pleadings indicate that recovery is very remote, "the claimant is still entitled to offer evidence to support its claims." United States v.

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5 In the face of the jury trial order, the Government apparently discontinued prosecution of the contempt citation as to the Marin defendants. See Order in Case No. 98-00086, filed December 23, 1998.

6 In August 1998, defendant cooperatives filed a motion to dismiss the Government's complaint based, among other things, on the ground that the Government's application of the Controlled Substances Act to defendant cooperatives "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." See Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss, Etc., filed August 14, 1998, at 6. The Court denied the motion and the Marin defendants' motion for reconsideration concerning defendants' "rational basis" challenge to the Controlled Substances Act. See Order in Case No. 98-00086, filed December 3, 1998, at 1.

7 "A complaint cannot be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (emphasis added); accord Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989).

City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981) (reversing dismissal and stating that "it is only the extraordinary case in which dismissal is proper").

Finally, if a court grants a motion to dismiss pursuant to Rule 12(b)(6), leave to amend should be liberally granted. Schreiber Distributing v. Serv-Well Furniture Co., 806 F.2d 1393, 1399, 1401 (9th Cir. 1986) (holding court erred in denying leave to amend). See also Fed. R. Civ. P. 15(a) (leave to amend "shall be freely given when justice so requires").

B. The Members' claims are valid and should be evaluated on a full record.

The Members allege a valid claim that is not subject to dismissal. "The issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." De La Cruz v. Tormey, 582 F.2d 45, 48 (9th Cir. 1978); see also City of Redwood City, 640 F.2d at 966. In ruling on a motion to dismiss for failure to state a claim, a court must determine whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of a plaintiff's claims. De La Cruz, 582 F.2d at 48. In this case, there is a set of facts that might be proved to support the Members' claims, namely, that the right they assert is sufficiently rooted in this nation's history, tradition and practice to constitute a protected liberty interest.

The substantive due process analysis has two primary features. First, a fundamental liberty interest must be "deeply rooted in this Nation's history and tradition," and "implicit in our concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 117 S.Ct. 2258, 2268 (1997) (citations and internal quotations omitted). The Supreme Court uses "[o]ur Nation's history, legal traditions, and practices" as guideposts for "responsible decisionmaking that direct and restrain [its] exposition of the Due Process

Clause." Id. (citations and internal quotations omitted). In addition, the "asserted fundamental liberty interest" must be carefully described. Id. (emphasis added).

The Members have satisfied both these requirements in making their claims. First, they alleged a fundamental right that is deeply rooted in this nation's history and tradition. Cntrclm. ¶ 18. The Members identified three sources of this claimed right that are recognized as being implicit in our constitutional scheme: (1) the fundamental right to privacy for personal and intimate decisions, (2) the fundamental right to bodily integrity and (3) the fundamental right to maintain the integrity of one's relationship with one's doctors. Cntrclm. ¶ 18.[8] Second, the Members have carefully described their fundamental liberty interest. It is the right "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." Id. ¶ 17.

Recognition of this fundamental right is consistent, moreover, with United States Supreme Court jurisprudence. The Court has held that the liberty interests protected by the Constitution have not been fully clarified and are "perhaps not capable of being fully clarified" and that the Constitution "forbids the government to infringe . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Washington, 117 S.Ct. at 2268 (citations and internal quotations omitted). Hence, the Counterclaim, at a minimum, alleges a colorable claim under the Constitution.

Therefore, dismissal of the Members' claims now would be premature. The Members should have an opportunity to develop a record to establish that the right claimed is deeply rooted in this nation's "history, legal traditions, and practices." This

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8 See, e.g., Conant v. McCaffrey, 172 F.R.D. 681, 694 (N.D.Cal. 1997) ("Although the Supreme Court has never held that the physician-patient relationship, as such, receives special First Amendment protection, its case law assumes, without so deciding, that the relationship is a protected one").

determination cannot be performed at the pleading stage: "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997).

C. The Government's authorities do not support dismissal.

The Government erroneously contends that the Counterclaim should be dismissed because it is foreclosed by "binding authority." See Plaintiff's Motion to Dismiss, Etc., filed on or about December 3, 1998 ("Dismiss"), at 2-3. The Government is wrong. Its motion to dismiss is premised upon a narrow and inaccurate interpretation of the Counterclaim and ignores both its express allegations and the inferences that must be drawn from them at this stage of the case. The "binding authority" cited by the Government is inapplicable to the Members' claims for several reasons. First, unlike the claims made in many of those cases, the Members do not seek to compel government action and are not asserting that they have a fundamental constitutional right to compel the Government to give them access to a particular medication. Rather, they claim a fundamental right to be left alone and to be free from federal governmental interference with rights recognized by the State of California. Second, the Members seek to use cannabis upon the recommendation of their personal physicians (again, as permitted by California law) to alleviate their suffering through the only effective treatment available for them.

The Government's authorities do not squarely address these circumstances. In particular, the Government relies on Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980). But in Carnohan, the plaintiff brought a declaratory relief action "to secure the right to obtain and use laetrile in a nutritional program for the prevention of cancer." Id. at 1121. Specifically, the claim in Carnohan was that the "state and federal regulatory schemes which require [filing a new drug application] are so burdensome when applied to private individuals as to infringe on constitutional rights."

Id. at 1122. The court dismissed this claim, finding that plaintiff was required to exhaust his administrative remedies to seek reclassification of the drug laetrile. Id.

In contrast to the facts alleged in Carnohan, the Members here do not seek reclassification of any drug and do not seek to compel the Government to give them access to any medication. The Members allege that their personal physicians recommended that they use cannabis to treat their illnesses and that cannabis is the only effective medication to treat their illnesses, key facts absent in Carnohan. For these reasons, Carnohan does not support the Government's argument that the Members have failed to state a claim upon which relief may be granted.

The decision in Rutherford v. United States, 616 F.2d 455 (10th Cir. 1980), does not dictate a contrary result. Although the laetrile litigation in Rutherford spawned several reported decisions, none involved a motion to dismiss the plaintiffs' claims for failure to state a claim. Moreover, the complex administrative and procedural history of Rutherford confirms that the case involved different facts and a different liberty interest than that claimed here.

In Rutherford, the plaintiffs sought to enjoin the government from "interfering with interstate shipment and sale of laetrile, a drug not approved for distribution under the [Federal Food, Drug and Cosmetic] Act." See United States v. Rutherford, 442 U.S. 544, 548 (1978). However, the Rutherford plaintiffs, unlike the Members, did not claim that laetrile was the only effective treatment available for them. Moreover, it was not claimed in Rutherford that governmental action (as opposed to inaction) was interfering with the private relationship between patient and physician. The decision by the Supreme Court in Rutherford did not reach the constitutional issue but merely held that there was no implied exemption from the Federal Food, Drug and Cosmetic Act for terminally ill patients. Rutherford, 442 U.S. at 554-55. Hence, Rutherford is not authority for dismissal of the Counterclaim at the pleading stage.

Moreover, Andrews v. Ballard, 498 F.Supp. 1038 (S.D.Tex. 1980), has criticized the Rutherford decision for its holding that "the decision by the patient

whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." Rutherford, 616 F.2d at 457. The district court in Andrews v. Ballard criticized this distinction as being a difficult one to support, "particularly where, as with laetrile, to deny the particular treatment involved may be to deny the decision to have the treatment." Andrews, 498 F.Supp. at 1049, n. 34 (emphasis added).

The same reasoning applies to the Government's motion to dismiss here. The Members have claimed a protected right that the Rutherford court recognized. Because cannabis is the only effective treatment for the Members, to deny them its use is to interfere with the protected right of "the decision by the patient whether to have a treatment or not."

All of the other cases cited by the Government are make-weight and are not persuasive, much less dispositive, authority supporting dismissal. Both Smith v. Shalala, 954 F.Supp. 1 (D.D.C. 1996), and Jacob v. Curt, 721 F.Supp. 1536 (D.R.I. 1989), involved claims, either directly or indirectly, that special constitutional standards apply to treatment for dying patients. Thus, the plaintiff in Smith sought an injunction restraining the FDA from prohibiting his doctor from treating him with Antineoplastins, an experimental anti-cancer agent. In Jacob, the plaintiff brought a 42 U.S.C. § 1983 claim against a doctor and a wrongful death claim against the American Cancer Society arising out of the Bahamanian government's closure of a clinic. In both Smith and Jacob, the claim was founded on the alleged fundamental right of a dying patient to compel the government to allow the patient access to the medical treatment of his or her choice. See Smith, 954 F.Supp. at 955; Jacob, 721 F.Supp. at 1537.

Unlike the plaintiffs in Smith and Jacob, the Members are not asserting that "the government has an affirmative obligation to set aside its regulations in order to provide dying patients access to experimental medical treatments." Smith, 954 F.Supp.

at 3.[9] Nor are the Members seeking damages based on an alleged governmental obligation to "provide the medication of choice." Jacob, 721 F.Supp. at 1539. Instead, the Members claim a fundamental right 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. Cntrclm. ¶ 17.

The remaining cases cited in support of the Government's motion are even farther off the mark. In three of them, the plaintiffs alleged that state licensing requirements violated rights claimed to be fundamental. Sammon v. New Jersey Bd. of Medical Examiners, 66 F.3d 639, 644-45 (3d Cir. 1995), concerned midwifery practices; Mitchell v. Clayton, 995 F.2d 772, 775-76 (7th Cir. 1993), related to licensing requirements for acupuncture; Kulsar v. Ambach, 598 F.Supp. 1124, 1125 (W.D.N.Y. 1984), involved the removal of plaintiffs' physician's license to practice medicine based on the State of New York's ban on certain types of "nutritional-hormonal" treatments for hypoglycemia. State licensing requirements have no relation to the Members' claims. Moreover, none of the plaintiffs in Sammon, Mitchell and Kulsar claimed that a physician had recommended a midwife, acupuncture or a specific nutritional-hormonal treatment as the only effective legal treatment available. Hence, the determination in each of these cases that the claimed rights were not fundamental does not undermine the Members' claim here to be free from the Government's interference with their personal, self-funded medical decision, in

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9 There are other key distinctions between Smith and the case at bar. In Smith, there was no allegation or showing that the drug sought by the plaintiff was the only effective treatment. Moreover, the plaintiff's doctor was prohibited from administering the drug to plaintiff without FDA approval due to a condition of the doctor's pretrial release after conviction on several charges of distributing unapproved drugs. 954 F.Supp. at 2. None of the Members' doctors is under any such criminal law restraint.

consultation with their personal physicians, to alleviate their suffering through the only effective treatment for them. Cntrclm. ¶ 2.[10]

D. The Government has not properly moved against the Members' request for injunctive relief.

Finally, the Government erroneously moves pursuant to Rule 12(b)(6) to "dismiss" the Members' claim for injunctive relief. See Dismiss at 4. The Complaint alleges a single claim and prays for both declaratory and injunctive relief. A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) applies only to "claims," not to prayers for relief. Asher v. Reliance Ins. Company, 308 F.Supp. 847, 851 (N.D.Cal. 1970). An attack on an improper demand or prayer may be reached by a motion to strike pursuant to Rule 12(f). E.g., Tarpley v. Lockwood Green Engineers, Inc., 502 F.2d 559 (8th Cir. 1974).

The Government, however, has not moved pursuant to subdivision (f). Thus, it has waived the objection to the prayer for purposes of a motion under Rule 12. Fed. R. Civ. Proc. 12(g); Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909-10 (5th Cir. 1993). Moreover, injunctive relief is a proper remedy in a substantive due process claim. See, e.g., Planned Parenthood of Southeastern PA. v.

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10 The Government also cites Sifre v. Robles, 917 F.Supp. 133 (D.P.R. 1996), but it is likewise inapplicable. The plaintiff in Sifre did not claim that any constitutional rights had been violated. The Government also invokes U.S. v. Vital Health Products, Ltd., 786 F.Supp. 761 (E.D.Wis. 1992), but, again, the claim in Vital Health Products was very different from the Members'. In that case, the defendants sought by counterclaim to force the FDA by mandatory injunction to issue a regulatory letter compelling all drug manufacturers to provide a warning on adverse reactions to drugs (id. at 768) and argued, in opposing the government's motion for summary judgment, that the Ninth Amendment gives citizens a right to choose their own medical treatment. Id. at 777. The court rejected this argument, holding that "the right to receive any medicine or treatment is not a constitutional right." Id. at 778.

Casey, 505 U.S. 833, 845, 901 (1992). Hence, the motion to "dismiss" the Members' prayer for injunctive relief must be denied.[11]

IV. CONCLUSION.

For the foregoing reasons, the Court should deny the Government's motion to dismiss.

Dated: January 15, 1999.

Respectfully submitted,

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11 In addition, the Government's argument based on and citing to congressional public laws should be disregarded. See Dismiss at 5-6 (citing portion of emergency appropriation act of 1998). The Congressional "views" expressed in the act do not diminish the Members' rights under the Constitution. In addition, the Government's argument that a claim to enjoin prospectively the operation of a federal statute is "extraordinary" is without merit. As the Government has cited no authority for this proposition (see Dismiss at 5), it should be ignored.

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PROOF OF SERVICE BY OVERNIGHT COURIER

I, Doreen M. Griffin, hereby declare:

1. I am over the age of 18 years and am not a party to the within cause. I am emplcyed by Pillsbury Madison & Sutro LLP in San Francisco, California.

2. My business address is 235 Montgomery Street, San Francisco, California 94104. My mailing address is P.O. Box 7880, San Francisco, CA 94120-7880.

3. On January 15, 1999, in the city where I am employed, I served a true copy of the attached document, titled exactly MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM-IN-INTERVENTION, by depositing it in a box or other facility regularly maintained by Federal Express, an express service carrier providing overnight delivery, or delivering it to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier, with overnight delivery fees paid or provided for, clearly labeled to identify the person being served at the address shown below:

Mark T. Quinlivan, Esq.
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Attorneys for Plaintiff
United States of America

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

Executed this 15th day of January, 1999, at San Francisco, California.

Doreen M. Griffin

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PROOF OF SERVICE BY MAIL

I, Doreen M. Griffin, hereby declare:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Madison & Sutro LLP in San Francisco, California.

2. My business address is 235 Montgomery Street, San Francisco, California 94104. My mailing address is P.O. Box 7880, San Francisco, CA 94120-7880.

3. On January 15, 1999, I served a true copy of the attached document titled exactly MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM-IN-INTERVENTION by placing it in a sealed envelope and depositing it in the United States mail, first class postage fully prepaid, addressed to the following:

[See Attached Service List]

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

Executed this 15th day of January, 1999, at San Francisco, California.

Doreen M. Griffin

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