In the United States Court of Appeals for the Ninth Circuit

EDWARD NEIL BRUNDRIDGE and IMA CARTER, Defendants-Appellants, vs. UNITED STATES OF AMERICA, Plaintiff-Appellee.	No. 99-15838
REBECCA NIKKEL, Defendant-Appellant, vs. UNITED STATES OF AMERICA, Plaintiff-Appellee.	No. 99-15844
LUCIA Y. VIER, Defendant-Appellant, vs. UNITED STATES OF AMERICA, Plaintiff-Appellee.	No. 99-15879

On Appeal from the United States District Court for the Northern District of California San Francisco Division
Charles R. Breyer, Judge

DECLARATION OF MARGARET S. SCHROEDER IN SUPPORT OF APPELLANTS' RESPONSE TO JUNE 2, 1999 ORDER TO SHOW CAUSE WHY APPEAL SHOULD NOT BE DISMISSED

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DECLARATION OF MARGARET S. SCHROEDER IN SUPPORT OF APPELLANTS' RESPONSE TO JUNE 2, 1999 ORDER TO SHOW CAUSE WHY APPEAL SHOULD NOT BE DISMISSED

I, MARGARET S. SCHROEDER, declare as follows:

1. I am a member in good standing of the State Bar of California and an associate with the law firm of Pillsbury Madison & Sutro LLP. I am counsel to the appellants, EDWARD NEIL BRUNDRIDGE, IMA CARTER, REBECCA NIKKEL and LUCIA Y. VIER ("appellants"), in this litigation. I submit this declaration in support of appellants' response to the Court's June 2, 1999 order to show cause why this appeal should not be dismissed.

2. The facts set forth in this declaration are known to me personally and I have first hand knowledge of them. If called as a witness I could and would testify competently to these facts.

3. In July 1998, plaintiff and appellee, United States of America (the "Government"), moved for an order to show cause why certain of the defendant cooperatives should not be held in contempt for failing to comply with the district court's May 1998 preliminary injunction and for summary judgment. Attached hereto as Exhibit A are true and correct copies of the Government's moving papers in this regard filed on or about July 6, 1998 in Case Nos. C 98-00086 CRB, C 98-00087 CRB and C 98-00088 CRB.

4. Attached hereto as Exhibit B are true and correct copies of the district court's orders to show cause, filed on or about September 3, 1998, in district court Case Nos. 98-00086 CRB and 98-00088 CRB. At the request of the Government, the Court later vacated its order to show cause as to the Marin defendants by order filed December 23, 1998 in Case No. C 98-00086.

5. On September 3, 1998, the district court denied the Government's request for an order to show cause as to the Ukiah defendants in Case No. C 98-00087 CRB. A true and correct copy of that order is attached hereto as Exhibit C.

6. In October 1998, the district court found the Oakland and Marin cooperatives in contempt of court and modified its May 1998 preliminary injunction to permit the United States Marshal to enforce the injunction. Attached hereto as Exhibit D are true and correct copies of the district court's memorandum and orders in this regard, filed in the district court on October 13, 1998.

7. On October 2, 1998, appellants filed answers to the Government's complaints, in Case Nos. C 98-00085, C 98-00086 and C 98-00087 and their Counterclaim-in-Intervention for Declaratory and Injunctive Relief ("Counterclaim") in the consolidated cases below. Attached hereto as Exhibit E is a true and correct copy of the Counterclaim.

8. On or about December 4, 1998, the Government filed a motion to dismiss the Counterclaim. The district court granted the Government's motion to dismiss after hearing on February 5, 1999. Attached hereto as Exhibit F is a true and correct copy of the district court's Memorandum and Order in this regard, filed February 25, 1999.

9. On or about March 1, 1999, I received a notice from the United States Court of Appeals for the Ninth Circuit indicating that hearing on the matter of USA v. Oakland Cannabis Buyers' Cooperative, et al., was scheduled for Tuesday, April 13, 1999 (case nos. 98-16950, 98-17044 and 98-17137).

10. On June 11, 1999, on behalf of appellants, this firm filed in the district court a motion for entry of partial judgment under Federal Rule of Civil Procedure 54(b) on the district court's February 25, 1999 order, with notice that the hearing on that motion is to take place on July 16, 1999, the first regularly available hearing date. Appellants also asked the district court to enter partial judgment retroactively to apply to the appeal filed April 26, 1999.

11. During the week of June 7, 1999, I reviewed the docket sheets for district court Case Nos. C 98-00085, C 98-00086 and C 98-00087, and those docket sheets did not reflect either a status conference or a trial date set. In addition, on or about June 14, 1999, I spoke to Christine Kirk-Kazhe, counsel for defendants, the Oakland Cannabis Buyers' Cooperative

EXHIBIT A

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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

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES iii

NOTICE 1

PRELIMINARY STATEMENT 1

FACTS AND PROCEEDINGS 2

1. Defendants OCBC and Jeffrey Jones 4

2. Defendants Marin Alliance and Lynnette Shaw 6

3. Defendants UCBC; Cherrie Lovett; Marvin Lehrman; and Mildred Lehrman 7

ARGUMENT 9

I. STANDARDS FOR CIVIL CONTEMPT 9

II. THE NON-COMPLIANT DEFENDANTS ARE IN CIVIL CONTEMPT OF THIS COURT'S MAY 19, 1998, PRELIMINARY INJUNCTION ORDERS 10

III. THE NON-COMPLIANT DEFENDANTS SHOULD BE FOUND IN CIVIL CONTEMPT AS A MATTER OF LAW 11

A. The Court Has Authority To Hold The Non-Compliant Defendants In Civil Contempt As A Matter Of Law 11

B. The Non-Compliant Defendants' Anticipated Legal Defense Fails As A Matter Of Law 12

1. Medical Necessity Is Not A Defense To Civil Contempt 13

2. Congress Precluded The Defense of Medical Necessity For Schedule I Controlled Substances 14

3. The Defense Of Medical Necessity Was Never Intended To Allow Ongoing Maintenance Of A Building For The Purpose Of Distributing Marijuana 17

4. The Non-Compliant Defendants Have Not Availed Themselves Of Legal, Reasonable Alternatives 19

5. Even When Allowed, Medical Necessity Has Only Been Permitted To Be A Defense To A Charge of Possession, Not Distribution 20

C. The United States Is Entitled To Summary Judgment 21

IV. RELIEF REQUESTED 22

CONCLUSION 23

TABLE OF AUTHORITIES

CASES | PAGES

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 12

Balla v. Idaho State Bd. of Corrections,
869 F.2d 461 (9th Cir. 1989)) 9

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 12

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 22

Commodity Futures Trading Comm'n v. Premex, Inc.,
655 F.2d 779 (7th Cir. 1981) 11

Commonwealth v. Brogan,
415 Mass. 169, 612 N.E.2d 656 (1993) 14, 20

General Signal Corp. v. Donallco, Inc.,
787 F.2d 1376 (9th Cir. 1986) 9

Gompers v. Buck's Stove & Range Co.,
221 U.S. 418 (1911) 22

In re Grand Jury Proceedings,
894 F.2d 881 (7th Cir. 1990) 14

Lance v. Plummer,
353 F.2d 585 (5th Cir. 1965), cert. denied,
384 U.S. 929 (1966) 23

Local 28 of the Sheet Metal Workers' Int'l Ass'n v.
Equal Employment Opportunity Comm'n,
478 U.S. 421 (1986) 13

Jenks v. State,
582 So.2d 676 (Fla. Dist. Ct. App.), review denied,
589 So.2d 292 (Fla. 1991) 16

Kaufmann v. State,
620 So.2d 90 (Ala. Crim. App. 1992) 16

Lovell v. Evergreen Resources, Inc.
No. C 88-3467 DLJ, 1995 WL 761269 (N.D. Cal. Dec. 15, 1995) 9-10, 22

Maggio v. Zeitz,
333 U.S. 56 (1948) 13

Matsushita Elec. Ind. Co. v. Zenith Radio,
475 U.S. 574 (1986) 11

McComb v. Jacksonville Paper Co.,
336 U.S. 187 (1949) 9, 20, 22, 23

Mercer v. Mitchell,
908 F.2d 763, 769 (11th Cir. 1990) 11, 12

Miller v. California Pacific Medical Center,
19 F.3d 449 (9th Cir. 1994) (en banc) 23

Morales-Feliciano v. Parole Bd.,
887 F.2d 1 (1st Cir. 1989), cert. denied,
494 U.S. 1046 (1990) 11

Morgan v. Foretich,
546 A.2d 407 (D.C. 1988), cert. denied,
488 U.S. 1007 (1989) 13-14

New York State Nat'l Org. for Women v. Terry,
697 F. Supp. 1324 (S.D.N.Y. 1988) 11

Parker Pen Co. v. Greenglass,
206 F. Supp. 796 (S.D.N.Y. 1962) 11

Sekaquaptewa v. McDonald,
544 F.2d 396 (9th Cir. 1976), cert. denied
430 U.S. 931 (1977) 9, 10, 19

State v. Cramer,
174 Ariz. 522, 851 P.2d 147 (1992) 16

State v. Diana,
24 Wash. App. 908, 604 P.2d 1312 (1979) 21

State v. Hanson,
468 N.W.2d 77 (Minn. Ct. App. 1991) 16

State v. Tate,
102 N.J. 64, 505 A.2d 941 (1986) 16, 21

State v. Tate,
198 N.J. Super. 285, 486 A.2d 1281 (1984), rev'd,
102 N.J. 64, 505 A.2d 941 (1986) 18-19

United States v. Bailey,
444 U.S. 394 (1980) ..... *passim*

United States v. Belknap,
985 F.2d 554, 1993 WL 30375 (4th Cir. 1993) (Mem.) 12-13

United States v. Burton,
894 F.2d 188 (6th Cir. 1990); cert. denied,
498 U.S. 857 (1990) 12-13, 17

United States v. Fogarty,
692 F.2d 542 (8th Cir. 1982), cert. denied,
460 U.S. 1040 (1983) 17

United States v. Fry,
787 F.2d 903 (4th Cir.), cert. denied,
479 U.S. 861 (1986) 17

United States v. Greene,
892 F.2d 453 (6th Cir. 1989), cert. denied,
495 U.S. 955 (1990) 17

United States v. Kiffer,
477 F.2d 349 (2d Cir. 1972), cert. denied,
414 U.S. 831 (1973) 17

United States v. Middleton,
690 F.2d 820 (11th Cir. 1982), cert. denied,
460 U.S. 1051 (1983) 17

United States v. Nutri-Cology, Inc.,
982 F.2d 394 (9th Cir. 1992) 23

United States v. Odessa Union Warehouse Co-op,
833 F.2d 172 (9th Cir. 1987) 23

United States v. United Mine Workers of America,
330 U.S. 258 (1947) 9, 13, 22

United States v. Wables,
731 F.2d 440 (7th Cir. 1984) 17

Walker v. City of Birmingham,
388 U.S. 307 (1967) 13

STATUTES AND REGULATIONS

21 U.S.C. § 811(a) 15, 17

21 U.S.C. § 812(b)(1) 15

21 U.S.C. § 812 Schedule I(c)(10)) 15

21 U.S.C. § 823(f) 15

21 U.S.C. § 829(a) - (c) 15

21 U.S.C. § 841(a)(1) .... *passim*

21 U.S.C. § 846 .... *passim*

21 U.S.C. § 856(a)(1) .... *passim*

21 U.S.C. § 877) 15

21 U.S.C. § 882(b) 12

28 U.S.C. § 1292(a)(1) 19

Fed. R. Civ. P. 60(b) 19

21 C.F.R. § 1308.44(a) 15

LEGISLATIVE MATERIAL

H.R. 1782, 105th Cong., 1st Sess. (1997) 16

H.R. 2618, 104th Cong., 1st Sess. (1995) 16

H.R. 2232, 99th Cong., 1st Sess. (1985) 16

H.R. 2282, 98th Cong., 1st Sess. (1983) 16

H.R. 4498, 97th Cong., 1st Sess. (1981) 16

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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."

---

[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.

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

6 **Oakland, CA** — Just hours after Federal Judge Charles Breyer signs into law a preliminary injunction against six California medical marijuana clubs, Jeff Jones, Director
7 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
8 Michael Yamaguchi will be notified of the cooperative's actions, Jones said.

9 "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."

10

Violation of the preliminary injunction could initiate Contempt of Court proceedings
11 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
12 who would have to reach a unanimous verdict.

13 "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
14 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
15 outdated marijuana laws."

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

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

24 These public pronouncements have been confirmed by agents of the DEA. On May 21,
25 1998, Special Agent Peter Ott, in an undercover capacity, entered the OCBC and observed an
26 individual who identified himself as defendant Jeffrey Jones distribute marijuana to four
27 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

1 Alliance," and further informed Special Agent Arnold about the requirements of becoming a new
2 member of the Marin Alliance, and that the club was open that day until "five." Id.

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

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

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

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

24 These public pronouncements have been confirmed by agents of the DEA. On May 27,
25 1998, Special Agent Nyfeler placed a recorded telephone call to the UCBC, at (707) 462-0691, to
26 confirm that the club was continuing to distribute marijuana. Nyfeler Dec. ¶ 4. An individual who
27

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 303 (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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> * * * *
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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

[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.

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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.

IV. RELIEF REQUESTED

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

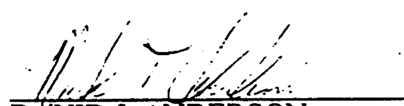
For the reasons set forth above, the Court should enter an order to show cause why the non-compliant defendants should not be held in civil contempt of the May 19, 1998, Preliminary Injunction Orders, and hold these defendants in civil contempt as a matter of law.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

MICHAEL J. YAMAGUCHI
United States Attorney



DAVID J. ANDERSON
ARTHUR R. GOLDBERG
MARK T. QUINLIVAN
U.S. Department of Justice
Civil Division, Room 1048
901 E St., N.W.
Washington, D.C. 20530
Tel: (202) 514-3346

Attorneys for Plaintiff
UNITED STATES OF AMERICA

Dated: July 6, 1998

1 **CERTIFICATE OF SERVICE**

2 I, Mark T. Quinlivan, hereby certify that on this 6th day of July, 1998, I served a copy of
3 the foregoing Plaintiff's Motion for an Order to Show Cause Why Non-Compliant Defendants
4 Should Not Be Held in Contempt, and for Summary Judgment, in Cases Nos. C 98-0086 CRB; C
5 98-0087 CRB; and C 98-0088 CRB; the accompanying [Proposed] Order, and the accompanying
6 declarations, by overnight delivery, upon the following counsel specially appearing for
7 defendants:

8 Oakland Cannabis Buyer's Cooperative; Jeffrey Jones
Marin Alliance for Medical Marijuana; Lynnette Shaw
9
10
William G. Panzer
370 Grand Avenue, Suite 3
Oakland, CA 94610

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612

James M. Silva
1607 Penmar Ave., No. 3
Venice, CA 90291

11
12 Cannabis Cultivators Club; Dennis Peron

13
14
15
J. Tony Serra
Brendan R. Cummings
Serra, Lichter, Daar, Bustamante, Michael & Wilson
Pier 5 North
The Embarcadero
San Francisco, CA 94111

16 Flower Therapy Medical Marijuana Club; John Hudson; Mary Palmer; Barbara Sweeney

17
18
Carl Shapiro
Helen Shapiro
404 San Anselmo Ave.
San Anselmo, CA 94960

19
20 Ukiah Cannabis Buyer's Club; Cherrie Lovett; Marvin Lehrman; Mildred Lehrman

21
Susan B. Jordan
515 South School Street
Ukiah, CA 95482

David Nelson
106 North School Street
Ukiah, CA 95482

22
23
24
25
26
27
28

1 Santa Cruz Cannabis Buyers Club

2 Gerald F. Uelman
Santa Clara University
3 School of Law
Santa Clara, CA 95053

Kate Wells
201 Maple Street
Santa Cruz, CA 95060

4

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6

7 MARK T. QUINLIVAN

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EXHIBIT B

ORIGINAL
FILED
SEP 03 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.
_______________________________/

and Related Cases.
_______________________________/

No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

ORDER TO SHOW CAUSE IN CASE NO. 98-00086

This matter comes before the Court on Plaintiff's Motion to Hold Non-Compliant Defendants in Civil Contempt. The United States seeks an order to show cause why the Marin Alliance for Medical Marijuana and Lynnette Shaw, defendants in Case No. C 98-0086 CRB, should not be held in contempt of this Court's May 19, 1998 Preliminary Injunction Order, which provides, in pertinent part:

> 1. Defendants Marin Alliance for Medical Marijuana and Lynnette Shaw 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 Marin Alliance for Medical Marijuana and Lynnette Shaw are hereby preliminarily enjoined from using the premises of Suite 210, School Street Plaza, Fairfax, California for the purposes of engaging in the manufacture and distribution of marijuana; and
>
> 3. Defendant Lynnette Shaw 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 United States has submitted the following evidence in support of its motion for an order to show cause:[1]

(1) On May 27, 1998, Special Agent Bill Nyfeler of the Drug Enforcement Administration ("DEA") observed 14 individuals enter the Marin Alliance, located at 6 School Street Plaza, in Fairfax, California, 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.

(2) On May 27, 1998, 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. 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. ¶ 6.

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

(4) As of August 21, 1998, the Marin Alliance maintained an Internet web site which indicated that the club was engaged in activities related to "medical marijuana." Exhibit 2 to August 24, 1998 Declaration of Mark T. Quinlivan.

(5) Defendant Lynnette Shaw has publicly stated that, notwithstanding the May 19, 1998 Preliminary Injunction Order, "[w]e are still open seven days a week," and that "[s]how

[1] The evidence provided by the United States was contained in sworn declarations submitted to the Court and to the defendants.

United States District Court
For the Northern District of California

me a jury who will look at our patients and not understand the idea of medical marijuana being a necessity for these people." Bill Meagher and Peter Seidman, *Federal Shutdown: Pot clinic could close its doors to sick and dying*, June 3-9 *Pacific Sun*.

In reviewing this evidence, the Court notes that admissions of a party-opponent are admissible under Rule 801(d)(2) of the Federal Rules of Evidence "'for whatever inferences the trial judge [can] reasonably draw.'" United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994) (quoting United States v. Matlock, 415 U.S. 164, 172 (1974)). See also United States v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994) ("[A] defendant's own statements are never considered to be hearsay when offered by the government; they are treated as admissions, competent as evidence of guilt without any special guarantee of their trustworthiness.").

Accordingly, upon consideration of the moving papers, the opposition and reply thereto, argument in open court, and the entire record herein, this Court concludes that, based on the totality of circumstances, the United States has made a prima facie case that defendants Marin Alliance for Medical Marijuana and Lynnette Shaw have distributed marijuana, and have used the premises of 6 School Street Plaza, Fairfax, California, for the purpose of distributing marijuana, both in violation of the Court's May 19, 1998 Preliminary Injunction Order.

Accordingly, defendants Marin Alliance for Medical Marijuana and Lynnette Shaw are hereby

ORDERED to show cause why they should not be held in civil contempt of the Court's May 19, 1998 Preliminary Injunction Order by distributing marijuana and by using the premises of 6 School Street Plaza, Fairfax, California, for the purpose of distributing marijuana, on May 27, 1998; and it is hereby further

ORDERED that defendants shall have until 12:00 p.m. (Pacific Daylight Time), September 14, 1998, in which to file their response to this Show Cause Order. Defendants' response shall include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer in response to this Show Cause Order; and it is hereby further

United States District Court
For the Northern District of California

ORDERED that the United States shall have until 12:00 p.m. (Pacific Daylight Time), September 21, 1998, in which to file a motion in limine regarding any defenses which the defendants might raise in their response; and it is hereby further

ORDERED that the defendants shall have until 12:00 p.m. (Pacific Daylight Time), September 25, 1998, in which to file an opposition to the United States' motion in limine; and it is hereby further

ORDERED that parties shall appear before the Court on September 28, 1998, at 2:30 p.m., for a hearing on the government's motion in limine; and it is hereby further

ORDERED that service by all parties shall be accomplished by overnight delivery and facsimile transmission; and it is further

ORDERED that plaintiff shall produce to defendants by September 9, 1998, copies of all documentary evidence plaintiff intends to introduce into evidence during the contempt proceeding, as well as any reports relating to the alleged violations of the Court's May 19, 1998 injunction. Plaintiff shall produce only those reports prepared by percipient witnesses to the alleged violations.

IT IS SO ORDERED.

Dated: September 5, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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ORIGINAL
FILED
SEP 03 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATORS 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 98-0245 CRB

ORDER TO SHOW CAUSE IN CASE NO. 98-0088 CRB

This matter comes before the Court on plaintiff's Motion to Hold Non-Compliant Defendants in Civil Contempt. The United States seeks an order to show cause why the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, defendants in Case No. C 98-0088 CRB, should not be held in contempt of this Court's May 19, 1998 Preliminary Injunction Order, which provides, in pertinent part:

1. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones 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 Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined from using the premises of 1755 Broadway, Oakland, California for the purposes of engaging in the manufacture and distribution of marijuana; and

3. Defendant Jeffrey Jones 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 United States has submitted the following evidence in support of its motion for an order to show cause:[1]

(1) On May 20, 1998, one day after the Court entered the Preliminary Injunction Orders, defendants OCBC and Jeffrey Jones issued a press release entitled "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." See Exhibit 1 to July 6, 1998 Declaration of Mark T. Quinlivan ("7/6 Quinlivan Dec."), which stated, in pertinent part:

> **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.

(2) On May 21, 1998, Special Agent Peter Ott, in an undercover capacity, entered the OCBC and observed approximately fourteen sales or distributions of what appeared to be

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[1] The evidence provided by the United States was contained in sworn declarations submitted to the Court and to the defendants.

1 marijuana by persons associated with the OCBC, including Jeffrey Jones, severa
2 were made in front of news cameras. Declaration of Special Agent Peter Ott ("Ott Dec.
3 3-4.

4 (3) The World Wide Web site of the OCBC, which indicates that it was updated on
5 June 1 and August 12, 1998, states: "*Currently*, we are providing medical cannabis and other
6 services to over 1,300 members." Exhibit 3 to 7/6 Quinlivan Dec. (emphasis supplied);
7 Exhibit 1 to August 24, 1998 Declaration of Mark T. Quinlivan ("8/24 Quinlivan Dec.").
8 The Web site also includes links to this Court's May 19, 1998, Preliminary Injunction Order
9 and May 13, 1998, Memorandum and Order, demonstrating that defendants OCBC and
10 Jones were and are aware of the Preliminary Injunction Order. See Exhibit 3 to 7/6
11 Quinlivan Dec.

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

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

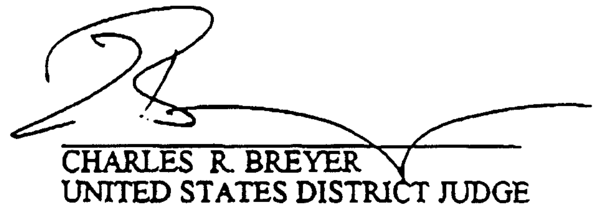
25 (6) In an article entitled "*Marijuana Clubs Defy Judge's Order* by Karyn Hunt, which
26 appeared on May 22, 1998, in *AP Online*, defendant Jeffrey Jones is quoted as stating, "We
27 are not closing down. We feel what we are doing is legal and a medical necessity and we're
28 going to take it to a jury to prove that." Exhibit 2 to 7/6 Quinlivan Dec.

United States District Court
For the Northern District of California

1 In reviewing this evidence, the Court notes that admissions of a party-opponent are
2 admissible under Rule 801(d)(2) of the Federal Rules of Evidence "'for whatever inferences
3 the trial judge [can] reasonably draw.'" United States v. Warren, 25 F.3d 890, 895 (9th Cir.
4 1994) (quoting United States v. Matlock, 415 U.S. 164, 172 (1974)). See also United States
5 v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994) ("[A] defendant's own statements are never
6 considered to be hearsay when offered by the government; they are treated as admissions,
7 competent as evidence of guilt without any special guarantee of their trustworthiness.").
8 Accordingly, upon consideration of the moving papers, the opposition and reply
9 thereto, argument in open court, and the entire record herein, this Court concludes that, based
10 on the totality of circumstances, the United States has made a prima facie case that
11 defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones have distributed
12 marijuana, and have used the premises of 1755 Broadway Avenue, Oakland, California, for
13 the purpose of distributing marijuana, both in violation of the Court's May 19, 1998
14 Preliminary Injunction Order.
15 Accordingly, defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are
16 hereby
17 ORDERED to show cause why they should not be held in civil contempt of the
18 Court's May 19, 1998 Preliminary Injunction Order by distributing marijuana and by using
19 the premises of 1755 Broadway Avenue, Oakland, California, for the purpose of distributing
20 marijuana, on May 21, 1998; and it is hereby further
21 ORDERED that defendants shall have until 12:00 p.m. (Pacific Daylight Time),
22 September 14, 1998, in which to file their response to this Show Cause Order. Defendants'
23 response shall include sworn declarations outlining the factual basis for any affirmative
24 defenses which they wish to offer in response to this Show Cause Order; and it is hereby
25 further
26 ORDERED that the United States shall have until 12:00 p.m. (Pacific Daylight Time),
27 September 21, 1998, in which to file a motion in limine regarding any defenses or evidence
28 which the defendants might raise in their response; and it is hereby further

United States District Court
For the Northern District of California

1 ORDERED that the defendants shall have until 12:00 p.m. (Pacific Daylight Time),
2 September 25, 1998, in which to file an opposition to the United States' motion in limine;
3 and it is hereby further
4 ORDERED that the parties shall appear before the Court on September 28, 1998, at
5 2:30 p.m., for a hearing on the government's motion in limine; and it is hereby further
6 ORDERED that service by all parties shall be accomplished by overnight delivery and
7 facsimile transmission; and it is hereby further
8 ORDERED that plaintiff shall produce to defendants by September 9, 1998, copies of
9 all documentary evidence plaintiff intends to introduce into evidence during the contempt
10 proceeding, as well as any reports relating to the alleged violations of the Court's May 19,
11 1998 injunction. Plaintiff shall produce only those reports prepared by percipient witnesses
12 to the alleged violations.
13 **IT IS SO ORDERED.**
14
15 Dated: September 3, 1998



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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United States District Court
For the Northern District of California

EXHIBIT C

ORIGINAL
FILED
SEP 03 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.

and Related Cases.

No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

ORDER DENYING MOTION FOR ORDER TO SHOW CAUSE IN CASE NO. 98-00087

This matter comes before the Court on plaintiff's Motion to Hold Non-Compliant Defendants in Civil Contempt. The United States seeks an order to show cause why the Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman, defendants in Case No. C 98-0087 CRB, should not be held in contempt of this Court's May 19, 1998 Preliminary Injunction Order, which provides, in pertinent part:

> 1. Defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman 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 Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman are hereby preliminarily enjoined from using the premises of 40A Pallini Lane, Ukiah, California for the purposes of engaging in the manufacture and distribution of marijuana; and
>
> 3. Defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman are hereby preliminarily enjoined from conspiring to violate the

1 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
2 manufacture and distribute marijuana

3 The United States has submitted the following evidence in support of its motion for an
4 order to show cause:[1]

5 (1) On May 27, 1998, Special Agent Bill Nyfeler placed a recorded telephone call to
6 the UCBC, at (707) 462-0691, to confirm that the club was continuing to distribute
7 marijuana. An individual who identified himself as "Marvin" answered the phone and stated
8 that, although the UCBC was in receipt of an injunction, the club was still open for business.
9 "Marvin" further informed Special Agent Nyfeler of the UCBC's business hours.
10 Declaration of Special Agent Bill Nyfeler Dec. ¶ 4.

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

20 (3) A May 30, 1998, article entitled *Lake County struggles with pot grant use - Ukiah*
21 *pot club eviction withdrawn*, by Jennifer Poole, which appeared in the *Ukiah Daily Journal*,
22 states that, notwithstanding the Court's May 19, 1998, Preliminary Injunction Orders, the
23 UCBC is still open, and has no plans to close, and quotes defendant Marvin Lehrman as
24 saying, "We're continuing and fulfilling our mission. I don't know what's next." The article
25 further notes that defendants UCBC and Lehrman had been officially served with this
26 Court's Preliminary Injunction Order on Wednesday, May 27, 1998. Exhibit 7 to July 6,
27

28 [1] The evidence provided by the United States was contained in sworn declarations submitted to the Court and to the defendants.

United States District Court
For the Northern District of California

1998 Declaration of Mark T. Quinlivan ("7/6 Quinlivan Dec.").

(4) 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*, quotes defendant Marvin Lehrman 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 7/6 Quinlivan Dec.

In reviewing this evidence, the Court notes that admissions of a party-opponent are admissible under Rule 801(d)(2) of the Federal Rules of Evidence "'for whatever inferences the trial judge [can] reasonably draw.'" United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994) (quoting United States v. Matlock, 415 U.S. 164, 172 (1974)). See also United States v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994) ("[A] defendant's own statements are never considered to be hearsay when offered by the government; they are treated as admissions, competent as evidence of guilt without any special guarantee of their trustworthiness.").

Upon consideration of the moving papers, the opposition and reply thereto, argument in open court, and the entire record herein, this Court finds that, based on the totality of circumstances, the United States has not made a prima facie case that defendants Ukiah Cannabis Buyer's Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman have distributed marijuana, and have used the premises of 40A Pallini Lane, Ukiah, California, for the purpose of distributing marijuana, both in violation of the Court's May 19, 1998 Preliminary Injunction Order. The evidence, at best, establishes that defendants intend to violate the Court's May 19, 1998 Order when the opportunity arises. Plaintiff has not produced evidence sufficient for a reasonable trier of fact to find that defendants have actually distributed marijuana, or used the premises of 40A Pallini Lane for the purpose of //

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United States District Court
For the Northern District of California

EXHIBIT D

ORIGINAL
FILED
OCT 13 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.

and Related Cases.

No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

MEMORANDUM AND ORDER RE: MOTIONS IN LIMINE AND ORDER TO SHOW CAUSE IN CASE NO. 98-00086 (Marin Alliance for Medical Marijuana)

Now before the Court are plaintiff's motions in limine to exclude defendants' affirmative defenses and the Court's Order to Show Cause why defendants are not in violation of the Court's May 19, 1998 order. After carefully considering the papers and evidence submitted by the parties, and having had the benefit of oral argument on October 5, 1998, plaintiff's motions are GRANTED. The Court further orders that a jury shall determine whether defendants violated the May 19, 1998 injunction.

BACKGROUND

On May 19, 1998, the Court issued an order preliminarily enjoining defendants Marin Alliance for Medical Marijuana ("Marin Alliance") and Lynnette Shaw from, among other things, "engaging in the manufacture or distribution of marijuana, or the possession of

marijuana with the intent to manufacture or distribute marijuana, in violation of 21 U.S.C. § 841(a)(1)," and "using the premises of Suite 210, School Street Plaza, Fairfax, California for the purposes of engaging in the manufacture and distribution of marijuana." The Court subsequently issued an order that defendants show cause "why they should not be held in civil contempt of the Court's May 19, 1998 Preliminary Injunction Order by distributing marijuana and by using the premises of 6 School Street Plaza, Fairfax, California, for the purpose of distributing marijuana, on May 27, 1998." The Court's show cause order was based upon evidence submitted by plaintiff as follows:

(1) A declaration from Special Agent Bill Nyfeler of the Drug Enforcement Administration ("DEA") in which he attests that on May 27, 1998 he observed 14 individuals enter the Marin Alliance, located at 6 School Street Plaza, in Fairfax, California. He 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. In addition, that same day at approximately 3:15 p.m., he placed a recorded telephone call to the Marin Alliance, at (415) 256-9328. A pre-recorded message stated that the caller had re~~ached the Marin Alliance, and~~ that the club was still open under the "medical necessity defense."

(2) A declaration from Special Agent Dean Arnold of the DEA that on June 16, 1998 he placed a recorded telephone call to the Marin Alliance at (415) 256-9328. An unidentified female answered the telephone by stating, "Marin Alliance," and further informed the DEA agent about the requirements of becoming a new member of the Marin Alliance, and that the club was open that day until "five."

(3) Documentary evidence that as of August 21, 1998, the Marin Alliance maintained an Internet web site which indicated that the club was engaged in activities related to "medical marijuana."

(4) Documentary evidence that defendant Lynnette Shaw has publicly stated that, notwithstanding the May 19, 1998 Preliminary Injunction Order, "[w]e are still open seven days a week," and "[s]how me a jury who will look at our patients and not understand the

idea of medical marijuana being a necessity for these people."

The Court's show cause order specifically advised defendants that their response to the order should include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer.

In response to the show cause order, defendants argue (1) that plaintiff has not made a prima facie showing that defendants violated the Court's injunction, (2) that in light of the evidence submitted by defendants, plaintiff has not proved by clear and convincing evidence that defendants violated the Court's injunction, and (3) in the alternative, that defendants have submitted evidence sufficient to support their affirmative defenses of "joint user," "necessity," and "substantive due process." Defendants submit the declarations of Lynette Shaw and Christopher P. M. Conrad, as well as a copy of Agent Nyfeler's report of his May 27, 1998 surveillance of the Marin Alliance. They also incorporate declarations previously submitted in this matter as well as the evidence submitted by co-defendant Oakland Cannabis Buyers' Cooperative.

To demonstrate that there is a factual dispute as to defendants' alleged contempt, Ms. Shaw attests that although Agent Nyfeler claims in his report to have observed individuals coming in and out of the Marin Alliance located at 6 Old School Street Plaza, Suite 210, in Fairfax California, the Marin Alliance is located at 6 School Street Plaza, Suite 215. She further declares that the building in which the Marin Alliance is located is two stories and houses at least eight different tenants, and that at least four other businesses are located on the fourth floor with the defendant Marin Alliance. She states that because smoking is banned in the building, persons on the second floor who desire to smoke cigarettes usually do so at an outdoor mezzanine located approximately twelve feet north of the Marin Alliance's front door, but that no cannabis smoking is permitted anywhere in the vicinity of the building.

Defendants also offered new evidence to support their affirmative defenses. Ms. Shaw testifies generally about the requirements for membership in the Marin Alliance. Mr. Conrad has authored a book entitled Hemp for Health. He declares that based upon his

United States District Court
For the Northern District of California

research and review of scientific studies and relevant evidence, "there is virtually no scientific basis for the placement of cannabis in Schedule I." Defendants have not submitted declarations from any Marin Alliance patients.

Plaintiff subsequently moved in limine to exclude defendants' affirmative defenses. The Court held a hearing on the plaintiff's motions in limine and the Order to Show Cause on October 5, 1998 and thereafter took the matter under submission.

DISCUSSION

I. THE MOTIONS IN LIMINE.

A. The Legal Standard.

A defendant is entitled to have the judge instruct the jury on his theory of defense only if it is "'supported by law and has some foundation in evidence.'" United States v. Gomez-Osorio, 957 F.2d 636, 642 (9th Cir. 1992). A district judge may preclude a party from offering evidence in support of a defense, including a necessity defense, by granting a motion in limine. See United States v. Aguilar, 883 F.2d 662, 692 (9th Cir. 1989); United States v. Dorrell, 758 F.2d 427, 430 (9th Cir. 1985). "The sole question presented in such situations is whether the evidence, as described in the offer of proof, is insufficient as a matter of law to support the proffered defense." Dorrell, 758 F.2d at 430. "If it is, then the trial court should exclude the defense and the evidence offered in support." Id.

B. The "Joint User" Defense.

In United States v. Swiderski, 548 F.2d 445 (2nd Cir. 1977), defendants, husband and wife, were charged with violating 21 U.S.C. § 841(a) by possessing cocaine with intent to distribute. See id. at 447. The Second Circuit held that "a statutory 'transfer' could not occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use." United States v. Wright, 593 F.2d 105, 107 (9th Cir. 1979) (discussing Swiderski). The court thus concluded that the trial judge erred by denying "the jury the opportunity to find that the defendants, who bought the drugs in each other's physical presence, intended merely to share the drugs" and thus, not to distribute them. Id.; Swiderski, 548 F.2d at 450.

Defendants here, unlike the defendants in Swiderski, have not offered any evidence of the joint purchase of the marijuana they are alleged to have distributed on May 27, 1998. Defendants contend nonetheless that because the Marin Alliance is run as a cooperative the marijuana is effectively purchased by all members simultaneously and thus they are entitled to a Swiderski instruction. The defendants made the same argument, based on a proffer of essentially the same facts, in opposition to plaintiff's motion for a preliminary injunction.

The Court declines to extend Swiderski to the facts as presented by defendants' proffer, namely a medical marijuana cooperative. As the Court has previously noted, Swiderski involved a simultaneous purchase by a husband and wife who testified they intended to use the controlled substance immediately. 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. See United States v. Cannabis Cultivators Club, 5 F.Supp.2d 1086, 1101 (N.D. Cal. 1998). In light of the fact that Swiderski has never been so extended, and in light of the fact that it has not been adopted by the Ninth Circuit, the Court concludes that such a defense is not available on the facts proffered by defendants as a matter of law. Accordingly, defendants are precluded from offering evidence and argument in support of a "joint user" defense at their contempt trial.

C. The Necessity Defense.

To be entitled to a jury instruction on the defense of necessity, defendants must offer evidence (1) that they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) that there were no legal alternatives to violating the law. See United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989). Defendants have produced evidence that marijuana has a medical benefit to many persons and that for some persons marijuana is the only drug that can alleviate their pain and other debilitating symptoms. They also have submitted evidence that they carefully screen their members to ensure that they have a physician's recommendation for marijuana use.

Defendants, however, have not produced any evidence that the particular persons to whom they distributed marijuana on May 27, 1998 (if, indeed, they did) had a legal necessity for marijuana.

Plaintiff argues that a necessity defense based upon a medical need for marijuana is never available under any circumstances as a defense to a violation of the Controlled Substances Act because Congress implicitly rejected such a defense by placing marijuana in Schedule I. The Court need not address this issue, however, because it concludes that defendants have failed to proffer sufficient evidence to support a defense of necessity as a matter of law.

In Aguilar, the Ninth Circuit considered a necessity defense offer of proof similar to that offered by defendants here. The Aguilar defendants were charged with violations of the immigration laws, arising from their providing sanctuary to Central American refugees. With respect to the specificity required of a necessity offer of proof, the court held:

> We also doubt the sufficiency of the proffer to establish imminent harm. The offer fails to specify that the particular aliens assisted were in danger of imminent harm. Instead, it refers to general atrocities committed by Salvadoran, Guatemalan, and Mexican authorities. The only indication that appellants intend~~ed to show that the aliens involved~~ in this action faced imminent harm was their proffer that they adopted a process to screen aliens in order to assure themselves that those helped actually were in danger. This allegation fails for lack of specificity.

Id. at 692 n.28 (emphasis added). Defendants' proffer here likewise fails to specify that the particular Marin Alliance members to whom defendants provided marijuana on May 27, 1998 were in danger of imminent harm. As the Court has previously held in this lawsuit, for the necessity defense to be available "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, for example, that no other legal drug could have reasonably averted the harm." United States v. Cannabis Cultivators Club, 5 F.Supp.2d 1086, 1102 (N.D. Cal. 1998) (emphasis added).

Defendants have not even attempted to offer such proof. Instead, defendants offer evidence that they carefully screen their members to ensure that each member has a legitimate medical need for marijuana. In Aguilar, however, the Ninth Circuit held that such

a proffer fails for lack of specificity because it does not prove that the particular persons whom defendants assisted were as a matter of fact in danger of imminent harm. See Aguilar, 883 F.2d at 692 n.28.

Defendants argue that they cannot make their proffer more specific because plaintiff failed to identify the specific persons to whom plaintiff alleges defendants distributed marijuana. The Order to Show Cause, however, was limited to a single day -- May 27, 1998 -- and plaintiff's evidence of a government agent's personal observation of persons entering and exiting the Marin Alliance was limited to a two-hour period during that day. Thus, there are particular transactions at issue -- at most, the marijuana distributions that occurred on May 27, 1998. If defendants did not distribute marijuana on that day they could offer evidence that they did not. If they did distribute, such distribution violated the Controlled Substances Act and the Court's May 19, 1998 order enjoining them from violating that Act. See Cannabis Cultivators Club, 5 F.Supp.2d at 1100 (holding that the Controlled Substances Act "does not exempt the distribution of marijuana to seriously ill persons for their personal medical use"). If they believe their violations of the injunction are excused by the defense of necessity, it is incumbent upon defendants to come forward with specific evidence to support their defense as to each and every distribution made on May 27, 1998.

At oral argument defendants' attorney represented that defendants could not identify the persons to whom they distributed marijuana on May 27 (without admitting that they had) because at that time defendants had removed the Marin Alliance's records from the premises because they feared a government raid. It cannot be the law, however, that a defendant's burden with respect to the specificity of the proffer required to support a defense of necessity is inversely related to the defendant's amount of knowledge of to whom and when it distributed marijuana. Necessity is an affirmative defense and defendants are required to come forward with the facts to support such a defense. They have not done so here with the required specificity. Accordingly, defendants are precluded from offering evidence and argument as to a necessity defense at their contempt trial.

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United States District Court
For the Northern District of California

D. **Substantive Due Process.**

Defendants contend that the Controlled Substances Act is unconstitutional as applied to the distribution of marijuana for medical purposes because there is no rational basis for classifying marijuana as a Schedule I drug under 21 U.S.C. § 812. In support of their argument, defendants submit evidence of the medical benefits of marijuana for many persons. As a preliminary matter, since defendants' rational basis argument is a challenge to the classification of marijuana as a whole, it is an argument defendants could have made in opposition to entry of the order they are now alleged to have violated. Nonetheless, the Court has considered defendants' argument and evidence and concludes that it does not have jurisdiction to decide if the classification of marijuana as a Schedule I substance is irrational.

As the Court has previously noted:

> [T]he Controlled Substances Act established a comprehensive regulatory scheme which placed controlled substances in one of five "Schedules" depending on each substance's potential for abuse, the extent to which each may lead to psychological or physical dependence, and whether each has a currently accepted medical use in the United States. See 21 U.S.C. § 812(b). Congress determined that "Schedule I" substances have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a lack of accepted "safety for use of the drug or substance under medical supervision." 21 U.S.C. § 812(b)(1). Schedule I substances are strictly regulated; no physician may dispense any Schedule I controlled substance to any patient outside of a strictly controlled research project registered with the DEA, and approved by the Secretary of Health and Human Services, acting through the Food and Drug Administration ("FDA"). See 21 U.S.C. § 823(f). Congress placed marijuana in Schedule I at the time it passed the Controlled Substances Act and its designation has not changed since then. See 21 U.S.C. § 812(c)(c)(10).

Cannabis Cultivators Club, 5 F.Supp.2d at 1092.

When it enacted the Controlled Substances Act, Congress also established a statutory framework under which controlled substances may be rescheduled or removed from the schedules all together. See 21 U.S.C. § 811(a). Under this statutory framework, the Attorney General may by rule transfer a substance between schedules or remove a substance from the schedules all together. See id. § 811(a). In addition, any interested party can file a petition with the Attorney General to have substance, including marijuana, rescheduled or removed from the schedules. See id. The petitioner may appeal a decision not to reschedule a substance to the courts of appeal. See 21 U.S.C. § 877; see also Alliance for Cannabis

United States District Court
For the Northern District of California

Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1137 (D.C. Cir. 1994) (upholding decision not to reschedule marijuana). Review of the Attorney General's decision as to the classification of a controlled substance is limited to the District of Columbia Court of Appeals or the circuit in which petitioner's place of business is located. See 21 U.S.C. § 877. A district court thus does not have jurisdiction to consider a challenge to an Attorney General's refusal to reschedule a controlled substance. See National Organization For The Reform Of Marijuana Laws (NORML) v. Bell, 488 F.Supp. 123, 141 n.43 (D.D.C. 1980). The findings of fact of the Attorney General are conclusive if supported by substantial evidence. See 21 U.S.C. § 877.

In light of the statutory framework described above, the Court concludes that it does not have jurisdiction to decide if there is a rational basis for the classification of marijuana as a Schedule I substance. Defendants do not challenge the procedure for rescheduling substances. Instead, defendants contend that their evidence shows that marijuana does not fit the requirements of a Schedule I substance and that therefore there is no rational basis for classifying marijuana as a Schedule I substance. Thus, their rational basis challenge is in effect an attack on the Attorney General's failure to reschedule marijuana. Congress has stated that the courts of appeal -- not district courts -- have exclusive jurisdiction to determine the propriety of the Attorney General's decision. Accordingly, this Court does not have jurisdiction to decide if there is a rational basis for classifying marijuana as a Schedule I substance. To hold otherwise would mean that in every prosecution under the Controlled Substances Act in which a defendant challenges the factual basis for the classification of the substance at issue, the district court would be required to consider evidence and resolve factual disputes as to whether a substance fits within the requirements of one schedule or another. Congress has stated that the Attorney General, and then the courts of appeal -- not the district courts -- are to make such determinations.

II. THE CONTEMPT PROCEEDINGS.

The Court preliminarily enjoined defendants from violating the Controlled Substances Act pursuant to 21 U.S.C. section 882(a). As this Court has previously noted, 21 U.S.C.

section 882(b) 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 jury in accordance with the Federal Rules of Civil Procedure." Plaintiff nonetheless argues that the Court should find defendants in contempt without a jury trial because plaintiff's evidence of defendants' violation of the Court's injunction is uncontroverted.

In the Ninth Circuit, a civil contempt proceeding is a trial within the meaning of Federal Rule of Civil Procedure 43(a), rather than a hearing on a motion within the meaning of Rule 43(e). See Hoffman v. Beer Drivers and Salesmen's Local Union No. 888, 536 F.2d 1268, 1277 (9th Cir. 1976). A trial with live testimony, however, is not always required before contempt sanctions may be issued. In Peterson v. Highland Music, Inc., 140 F.3d 1313 (9th Cir. 1998), petition for cert. filed 9/14/1998, for example, the district court commenced contempt proceedings by issuing an order to show cause. The court then had the parties file affidavits and extensively brief the relevant issues. The court did not, however, hold an evidentiary hearing (or trial) with live testimony. Instead, the district court issued its contempt sanctions at the end of the hearing on the order to show cause. See id. at 1324.

The Ninth Circuit ~~affirmed the imposition of the contempt~~ sanctions. The court held that while "ordinarily" a court should not impose contempt sanctions on the basis of affidavits, "'[a] trial court may in a contempt proceeding narrow the issues by requiring that affidavits on file be controverted by counter-affidavits and may thereafter treat as true the facts set forth in uncontroverted affidavits.'" Id. (quoting Hoffman, 536 F.2d at 1277). The court concluded that such procedures do not violate due process.

In this case defendants have submitted evidence to controvert plaintiff's declarations, even though the Court has precluded defendants' affirmative defenses. At a minimum, there is a dispute as to whether the government agent saw anyone enter or leave the Marin Alliance. The agent's report specifies that he observed people coming and going from the Marin Alliance located in Suite 210. The defendants have offered evidence that the Marin Alliance is located in Suite 215. Moreover, defendants have also offered evidence that no cannabis smoking is permitted anywhere in the vicinity of the building, and

that the area in which the agent observed persons smoking what appeared to be marijuana is the area where all persons on the second floor, including visitors and employees of other building tenants, smoke tobacco cigarettes since smoking is prohibited indoors.

Plaintiff cites Baxter v. Palmigiano, 425 U.S. 308, 319 (1976), for the proposition that defendants' failure to deny that they distributed marijuana or used the premises for the purpose of distributing marijuana amounts to an evidentiary admission that they violated the injunction. See also Watson v. Perry, 918 F.Supp. 1403, 1415-16 (W.D. Wash. 1996) (following the "well-recognized" principle that "adverse inferences may properly be drawn from silence in civil cases"), aff'd, 124 F.3d 1124 (9th Cir. 1997). These cases merely hold that it does not violate due process for a trier of fact to draw an adverse inference based upon a party's silence. That inference, however, is an inference which may be drawn by the trier of fact. Under 21 U.S.C. section 882(b), the trier of fact is a jury, not this Court.

CONCLUSION

For the foregoing reasons, plaintiff's motions to preclude defendants' affirmative defenses of "joint user," "necessity," and "substantive due process," are GRANTED. The Court further orders that a jury will decide whether defendants violated the Court's May 19, 1998 injunction by distributing marijuana or by using the premises of 6 School Street Plaza, Fairfax, California, for the purpose of distributing marijuana, on May 27, 1998. The parties are ordered to appear in Courtroom 8 on Wednesday, October 21, 1998 at 2:30 p.m. to set a trial date.

IT IS SO ORDERED.

Dated: October 8, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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FILED
OCT 13 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.

and Related Cases.

No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

MEMORANDUM AND ORDER RE: MOTIONS IN LIMINE AND ORDER TO SHOW CAUSE IN CASE NO. 98-00088 (Oakland Cannabis Buyers' Cooperative)

Now before the Court are plaintiff's motions in limine to exclude defendants' affirmative defenses and the Court's Order to Show Cause why defendants are not in contempt of the Court's May 19, 1998 order. After carefully considering the papers and evidence submitted by the parties, and having had the benefit of oral argument on October 5, 1998, plaintiff's motions are GRANTED. The Court further finds that defendants have not offered any evidence to controvert plaintiff's evidence that defendants' violated the May 19, 1998 preliminary injunction order. Thus, defendants are in contempt of the injunction.

BACKGROUND

On May 19, 1998, the Court issued an order preliminarily enjoining defendants Oakland Cannabis Buyers' Cooperative ("OCBC") and Jeffrey Jones, from, among other things, "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture or distribute marijuana, in violation of 21 U.S.C.

United States District Court
For the Northern District of California

§ 841(a)(1)," and "using the premises of 1755 Broadway, Oakland, California for the purposes of engaging in the manufacture and distribution of marijuana." Upon motion of the plaintiff, and after hearing oral argument and considering the papers submitted by the parties, the Court ordered defendants to show cause "why they should not be held in civil contempt of the Court's May 19, 1998 Preliminary Injunction Order by distributing marijuana and by using the premises of 1755 Broadway, Oakland, California, for the purpose of distributing marijuana, on May 27, 1998." The show cause order was based upon evidence submitted by plaintiff as follows:

(1) On May 20, 1998, one day after the Court entered the injunction, defendants OCBC and Jeffrey Jones issued a press release entitled "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."

(2) A declaration from Special Agent Peter Ott that on May 21, 1998, he entered the OCBC in an undercover capacity and observed approximately fourteen sales or distributions of what appeared to be marijuana by persons associated with the OCBC, including Jeffrey Jones, several of which were made in front of news cameras.

(3) Evidence that the World Wide Web site of the OCBC, which indicates that it was updated on June 1 and August 12, 1998, states: "Currently, we are providing medical cannabis and other services to over 1,300 members."

(4) A declaration from Special Agent Bill Nyfeler that on May 27, 1998 he placed a recorded telephone call to the OCBC, at (510) 832-5346. 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.

(5) A declaration from Special Agent Dean Arnold that on June 16, 1998 he placed a recorded telephone call to the OCBC, at (510) 843-5346. 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.

(6) Evidence that in an article entitled *Marijuana Clubs Defy Judge's Order* by Karyn Hunt, which appeared on May 22, 1998, in *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."

The Court's show cause order specifically advised defendants that their response to the order should include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer.

In response to the show cause order, defendants argue (1) that plaintiff has not made a prima facie showing that defendants violated the Court's injunction, and (2) in the alternative, that defendants have submitted evidence sufficient to support their affirmative defenses of "joint user," "necessity," and "substantive due process." Defendants incorporate all declarations previously filed in this case, and have submitted 12 new declarations, including declarations from eight OCBC patients. The patients testify as to their need for marijuana to alleviate the symptoms of their serious illnesses or disabilities. Of the eight patients, none states that he or she received marijuana from defendants on May 21, 1998, although four, Michael M. Alcalay, M.D., M.P.H., Albert Dunham, Kenneth Estes, and Yvonne Westbrook attest that they were present at the OCBC on that date. The other four do not declare that they were present at the OCBC on May 21.

Several of the declarants, including Dr. Alcalay, the OCBC Medical Director, Laura A. Galli, R.N., an OCBC patient and volunteer nurse, and James D. McClelland, the OCBC Chief Financial Officer and an OCBC board member, testify as to the OCBC's strict requirements for admission to the OCBC. In addition, defendants offer the expert testimony of Harvard physician Lester Grinspoon, M.D. and John P. Morgan, M.D., Professor of Pharmacology at City University of New York as to the medical benefits of marijuana and why other drugs, such as Marinol, are not a reasonable alternative for some patients. At

defendants' request, the Court also takes judicial notice of the physician declarations filed in Conant v. McCaffrey, 97-0139 FMS.

Plaintiff has moved in limine to exclude defendants' affirmative defenses and defendants have moved for an order granting use immunity to defendants Jeffrey Jones and other witnesses who are unwilling to testify in this action without such immunity. The Court heard oral argument on October 5, 1998, and thereafter took the matter under submission.

DISCUSSION

I. THE MOTIONS FOR IMMUNITY.

District courts generally do not have the authority to confer use immunity for defense witnesses who invoke the Fifth Amendment privilege against self-incrimination. See United States v. Baker, 10 F.3d 1374, 1414 (9th Cir. 1993). In Simmons v. United States, 390 U.S. 377 (1968), however, the Supreme Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." Id. at 394 ("we find it unconscionable that one constitutional right should have to be surrendered in order to assert another"). The Third Circuit subsequently extended Simmons to a criminal defendant confronted with the dilemma of whether to offer favorable testimony at his bail hearing, which testimony was required because of a presumption of dangerousness arising under the Bail Reform Act, or safeguard his Fifth Amendment right not to testify. See United States v. Perry, 788 F.2d 100, 115-16 (3d Cir. 1986). The Perry court held that the trial court should have granted the defendant use immunity because the defendant's testimony at the bail hearing was "necessary to vindicate the most fundamental of all constitutional rights, the right of liberty from civil incarceration." Id. at 116.

Defendant Jones argues that he, too, is being forced to choose between his Fifth Amendment privilege and his right of liberty since he might be fined or even jailed as a sanction if he is found in contempt. Plaintiff, however, has represented that it is not seeking fines or incarceration to compel Jones to comply with the Court's injunction and the Court

United States District Court
For the Northern District of California

1 will not consider such remedies. As Jones is not being forced to choose between competing
2 constitutional rights, Simmons and Perry are inapplicable even assuming they apply to
3 defendants in a civil contempt proceeding.

4 Defendants also argue that the Court can and should grant use immunity to
5 defendants' witnesses to protect defendants' right to due process and a fair trial. In United
6 States v. Lord, 711 F.2d 887, 890-92 (9th Cir. 1983), and United States v. Westerdahl, 945
7 F.2d 1083, 1085-87 (9th Cir. 1991), the Ninth Circuit recognized that a defendant may be
8 denied a fair trial as a result of the government's failure to provide use immunity to the
9 testimony of a defense witness. Lord and Westerdahl are inapplicable to these contempt
10 proceedings for two reasons.

11 First, both cases were criminal prosecutions where the defendant's right to liberty was
12 at stake. Defendants have not cited any cases, and the Court is aware of none, in which the
13 Lord and Westerdahl principle has been extended to civil cases.

14 Second, the Ninth Circuit requires some prima facie evidence of prosecutorial
15 misconduct before a grant of immunity may be given. See Baker, 10 F.3d at 1414;
16 Westerdahl, 945 F.2d at 1086; Lord, 711 F.2d at 892. In Westerdahl, for example, the
17 government had granted immunity to a key prosecution witness, but had refused to immunize
18 defendant's potentially exculpatory witness. The court held that the district court should
19 have held an evidentiary hearing to determine if the government "intentionally distorted the
20 facts." Id. at 1087. Defendants have not made such a prima facie showing here. At best, all
21 that defendants have shown is that plaintiff has refused to immunize defendants' witnesses,
22 forcing the witnesses to decide whether to testify in the contempt proceeding or potentially
23 incriminate themselves. Such a choice cannot in and of itself constitute misconduct since a
24 defendant "has no absolute right not to be forced to choose between testifying in a civil
25 matter and asserting his Fifth Amendment privilege." Keating v. Office of Thrift
26 Supervision, 45 F.3d 322, 326 (9th Cir. 1995).

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United States District Court
For the Northern District of California

United States District Court
For the Northern District of California

II. THE MOTIONS IN LIMINE.

A. The Legal Standard.

A defendant is entitled to have the judge instruct the jury on his theory of defense only if it is "'supported by law and has some foundation in evidence.'" United States v. Gomez-Osorio, 957 F.2d 636, 642 (9th Cir. 1992). A district judge may preclude a party from offering evidence in support of a defense, including a necessity defense, by granting a motion in limine. See United States v. Aguilar, 883 F.2d 662, 692 (9th Cir. 1989); United States v. Dorrell, 758 F.2d 427, 430 (9th Cir. 1985). "The sole question presented in such situations is whether the evidence, as described in the offer of proof, is insufficient as a matter of law to support the proffered defense." Dorrell, 758 F.2d at 430. "If it is, then the trial court should exclude the defense and the evidence offered in support." Id.

B. The "Joint User" Defense.

In United States v. Swiderski, 548 F.2d 445 (2nd Cir. 1977), defendants, husband and wife, were charged with violating 21 U.S.C. § 841(a) by possessing cocaine with intent to distribute. See id. at 447. The Second Circuit held that "a statutory 'transfer' could not occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use." United States v. Wright, 593 F.2d 105, 107 (9th Cir. 1979) (discussing Swiderski). The court thus concluded that the trial judge erred by denying "the jury the opportunity to find that the defendants, who bought the drugs in each other's physical presence, intended merely to share the drugs" and thus, not to distribute them. Id.; Swiderski, 548 F.2d at 450.

Defendants here, unlike the defendants in Swiderski, have not offered any evidence of the literal joint purchase of the marijuana they are alleged to have distributed on May 27, 1998. Defendants contend nonetheless that because the OCBC is operated as a cooperative, the marijuana is effectively purchased together by all its members and is consumed together by all its members since the marijuana is only distributed to members of the cooperative. Thus, defendants argue, they are entitled to a Swiderski instruction.

The Court declines to extend Swiderski to the facts as presented by defendants'

proffer, namely a medical marijuana cooperative. As the Court has previously noted, Swiderski involved a simultaneous purchase by a husband and wife who testified they intended to use the controlled substance immediately. 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. See United States v. Cannabis Cultivators Club, 5 F.Supp.2d 1086, 1101 (N.D. Cal. 1998). In light of the fact that Swiderski has never been so extended, and in light of the fact that it has not been adopted by the Ninth Circuit, the Court concludes that such a defense is not available on the facts proffered by defendants as a matter of law.

C. The Necessity Defense.

To be entitled to a jury instruction on the defense of necessity, defendants must offer evidence (1) that they were faced with a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) that there were no legal alternatives to violating the law. See United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989). Defendants have produced evidence that marijuana has a medical benefit to many persons and that for some persons marijuana is the only drug that can alleviate their pain and other debilitating symptoms. They also have submitted evidence that they carefully screen their members to ensure that they have a physician's recommendation for marijuana use. Further, the Court will assume, without deciding, that the four OCBC patients who have submitted declarations and admit to having been present at the OCBC on May 21, 1998, have submitted sufficient evidence as to their need for marijuana to permit a trier of fact to determine if they have a legal necessity for marijuana.

Plaintiff argues that a necessity defense based upon a medical need for marijuana is never available under any circumstances as a defense to a violation of the Controlled Substances Act because Congress implicitly rejected such a defense by placing marijuana in Schedule I. The Court need not address this issue, however, because it concludes that defendants have not produced sufficient evidence in their offer of proof to permit a defense

of necessity to the charge that they violated the injunction.

In Aguilar, the Ninth Circuit considered a necessity defense offer of proof similar to that offered by defendants here. The Aguilar defendants were charged with violations of the immigration laws, arising from their providing sanctuary to Central American refugees. With respect to the specificity required of a necessity offer of proof, the court held:

> We also doubt the sufficiency of the proffer to establish imminent harm. The offer fails to specify that the particular aliens assisted were in danger of imminent harm. Instead, it refers to general atrocities committed by Salvadoran, Guatemalan, and Mexican authorities. The only indication that appellants intended to show that the aliens involved in this action faced imminent harm was their proffer that they adopted a process to screen aliens in order to assure themselves that those helped actually were in danger. This allegation fails for lack of specificity.

Id. at 692 n.28 (emphasis added). Defendants' proffer here likewise fails to identify evidence that demonstrates that each of the particular persons to whom they distributed marijuana on May 21, 1998 was in danger of imminent harm.

Plaintiff has submitted the declaration of a Special Agent Ott who testifies that he personally witnessed fourteen marijuana transactions on May 21, 1998. Moreover, defendants' evidence suggests that they may have distributed marijuana to as many as 191 "visitors" to the OCBC on May 21, 1998. Defendants, however, have proffered evidence as to only four patients who admit to visiting the OCBC on May 21. Assuming that these four patients obtained marijuana from the OCBC on May 21, defendants have, at best, offered a necessity defense to only four of the fourteen transactions identified by plaintiff, putting aside the fact that defendants' own evidence suggests there were as many as 191 marijuana transactions that day. Such a proffer does not meet the specificity requirements of Aguilar, namely, that defendants proffer evidence that the particular persons to whom they distributed marijuana were as a matter of fact in danger of imminent harm. As the Court stated before the injunction was issued, "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 in imminent harm; that the cannabis will alleviate the harm for that particular patient; and that the patient had no other alternatives, for example, that no other legal drug could have reasonably averted the harm." Cannabis Cultivators Club, 5 F.Supp.2d at 1102 (emphasis

added). Defendants have not done so in response to the show cause order, and they have not offered that they could do so at a jury trial.

Moreover, under Aguilar, defendants' evidence as to the OCBC's stringent admission requirements and their evidence as to the medical benefits of marijuana generally, rather than to the particular persons to whom defendants distributed marijuana on May 21, is immaterial as a matter of law. The defendants must show that each person to whom they distributed marijuana was actually in danger of imminent harm. It is not sufficient that defendants reasonably believed each person to be in such danger.

Defendants contend that a jury should be allowed to consider their necessity defense because their evidence demonstrates that on May 21, 1998 they were in substantial compliance with the Court's injunction. Under defendants' reasoning, however, a defendant would be excused from complying with the Controlled Substances Act because some, but not all, of the people to whom they distributed marijuana had a legal necessity. No case of which this Court is aware has ever allowed such a blanket exemption to the criminal laws.

Defendants argue in the alternative that their proffer could not be more specific because plaintiff failed to identify the specific persons to whom plaintiff alleges defendants distributed marijuana. The Order to Show Cause, however, was limited to a single day and the plaintiff's evidence as to the government agent's personal observation of fourteen marijuana transactions in the OCBC -- transactions which the defendants announced publicly in advance and invited the public, including the United States Attorney for the Northern District of California, to witness -- occurred during a fifteen to twenty minute period. Plaintiff's evidence thus places particular transactions at issue. If defendants did not distribute marijuana on May 21, 1998, they could offer evidence that they did not. If they did distribute marijuana that day, such distribution violated the injunction. See Cannabis Cultivators Club, 5 F.Supp.2d at 1100 (holding that the Controlled Substances Act "does not exempt the distribution of marijuana to seriously ill persons for their personal medical use"). If they believe their violations of the injunction are excused by the defense of necessity, it is incumbent upon defendants to come forward with the evidence to support their defense as to

United States District Court
For the Northern District of California

each violation. They have not done so for all, or even most, of the transactions at issue. Accordingly, their defense of necessity fails as a matter of law.

D. Substantive Due Process.

Defendants contend that they are not in contempt because the OCBC members have a fundamental right to "a demonstrated and effective treatment as recommended by their physician that can alleviate their agony, preserve their sight, and save their lives." Assuming, without deciding, that such a fundamental right exists, the defense fails for the same reason their necessity defense fails; defendants have failed to proffer evidence that each and every person to whom they distributed marijuana needed the marijuana to protect such a fundamental right. See Cannabis Cultivators Club, 5 F.Supp.2d at 1103. To hold otherwise would mean that because defendants have a substantive due process defense to some of the marijuana distributions in which they engaged, they are excused from all of their violations of the injunction. Defendants have not cited any case law or legal principles that would permit such an exemption from the federal laws.

II. THE CONTEMPT PROCEEDINGS.

A. Whether Defendants Are In Contempt.

The Court preliminarily enjoined defendants from violating the Controlled Substances Act pursuant to 21 U.S.C. section 882(a). As this Court has previously noted, 21 U.S.C. section 882(b) 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 jury in accordance with the Federal Rules of Civil Procedure." The plaintiff nonetheless argues that the Court should find defendants in contempt without a jury trial because plaintiff's evidence of defendants' violation of the Court's injunction is uncontroverted.

In the Ninth Circuit, a civil contempt proceeding is a trial within the meaning of Federal Rule of Civil Procedure 43(a), rather than a hearing on a motion within the meaning of Rule 43(e). See Hoffman v. Beer Drivers and Salesmen's Local Union No. 888, 536 F.2d 1268, 1277 (9th Cir. 1976). A trial with live testimony, however, is not always required before contempt sanctions may be issued. In Peterson v. Highland Music, Inc., 140 F.3d

United States District Court
For the Northern District of California

1313 (9th Cir. 1998), cert. pet. filed Sep. 14, 1998, for example, the district court commenced contempt proceedings by issuing an order to show cause. The court then had the parties file affidavits and extensively brief the relevant issues. The court did not, however, hold an evidentiary hearing (or trial) with live testimony. Instead, the district court issued its contempt sanctions at the end of the hearing on the order to show cause. See id. at 1324.

The Ninth Circuit affirmed the imposition of the contempt sanctions. The court held that while "ordinarily" a court should not impose contempt sanctions on the basis of affidavits, "'[a] trial court may in a contempt proceeding narrow the issues by requiring that affidavits on file be controverted by counter-affidavits and may thereafter treat as true the facts set forth in uncontroverted affidavits.'" Id. (quoting Hoffman, 536 F.2d at 1277). The court concluded that such procedures do not violate due process.

Defendants contend that the Court must grant them a jury trial on the issue of contempt because "[f]actfinding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law." United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984). Defendants also urge that a court should exclude evidence of a defense only if the evidence is insufficient as a matter of law to support the defense. See id. The Court agrees. Here, however, the Court has ruled that the evidence submitted by defendants is insufficient as a matter of law to support the defenses of "joint user," "necessity," and "substantive due process." The question presented is thus whether there are any "facts" for a jury to decide. Defendants have offered no facts whatsoever to controvert plaintiff's evidence that defendants distributed marijuana at the OCBC on May 21, 1998. Nor have they identified any evidence that they could present to a jury that they have not already presented that would create a dispute of fact. If there are no facts to be decided by a jury, there is no reason to have a jury trial.

The Court has reviewed the statute conferring the right to a jury trial and concludes that its decision that defendants are entitled to a jury trial only if there is a material dispute of fact is not inconsistent with the statute. Congress provided defendants with a right to a jury trial "in accordance with the Federal Rules of Civil Procedure." 21 U.S.C. § 882(b). Thus,

this is not a criminal proceeding in which a defendant is entitled to a jury trial even if there are no disputes of fact. Compare 21 U.S.C. § 882(b) with 18 U.S.C. § 3691 ("Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases") (emphasis added). Moreover, since the trial is to be conducted in accordance with the Rules of Civil Procedure, Rule 50 with respect to "Judgment as a Matter of Law" applies. If the question of whether defendants violated the Court's order on May 21, 1998 were tried to a jury, the Court would be obligated to grant judgment in accordance with Rule 50 since there is no dispute that defendants violated the injunction and the Court has concluded that defendants do not have a defense to their violations as a matter of law.

Defendants also argue that plaintiff's evidence is insufficient to support a finding of contempt by clear and convincing evidence, even without considering defendants' affirmative defenses. The Court disagrees. Plaintiff submitted uncontroverted evidence that defendants issued a press release announcing that they were going to distribute marijuana at the OCBC on May 21, 1998. Plaintiffs also produced uncontroverted evidence that a government agent visited the OCBC at the time defendants announced they were going to distribute marijuana and that the agent personally witnessed fourteen marijuana transactions. This uncontroverted evidence is clear and convincing evidence that defendants violated the injunction and thus are in contempt of May 19, 1998 order.

B. The Remedy For Defendants' Contempt.

Plaintiff asks the Court to compel defendants to comply with the injunction by modifying the May 19, 1998 order to empower the United States Marshal to enforce the injunction. Plaintiff does not ask the Court to fine defendants or to incarcerate defendant Jeffrey Jones to compel compliance and the Court will not do so. The Court concludes that

1 the remedy proposed by plaintiff is reasonable and designed to enforce compliance.

2 The Court understands defendants' argument that in this action the Court is sitting in
3 equity and therefore must consider the human suffering that will be caused by plaintiff's
4 success in closing down the OCBC. While the Court is sitting in equity, however, its
5 equitable powers do not permit it to ignore federal law. Federal law prohibits the
6 distribution of marijuana to seriously ill persons for their personal medical use. See
7 Cannabis Cultivators Club, 5 F.Supp.2d at 1100. The Court accordingly proposes to modify
8 its May 19, 1998 preliminary injunction in 98-00088 to provide as follows:

9 The United States Marshal is empowered to enforce this Preliminary
10 Injunction. In particular, the United States Marshal is authorized to enter the premises of the Oakland Cannabis Buyers' Cooperative at 1755 Broadway,
11 Oakland, California, at any time of the day or night, evict any and all tenants, inventory the premises, and padlock the doors, until such time that defendants
12 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.

13 The Court will stay the imposition of the modification to the injunction until 5:00 p.m. on
14 Friday, October 16, 1998 to give defendants the opportunity to seek interim appellate relief.

15 **CONCLUSION**

16 For the foregoing reasons, plaintiff's motions to preclude defendants' affirmative
17 defenses of "joint user," "necessity," and "substantive due process," are GRANTED. The
18 Court concludes further that defendants have not offered any evidence to controvert
19 plaintiff's evidence that defendants' distributed marijuana at the OCBC on May 21, 1998 in
20 violation of the Court's May 19, 1998 preliminary injunction order and therefore that there
21 are no factual disputes to be tried to a jury. The Court accordingly finds defendants in
22 contempt of its May 19, 1998 order. In order to compel defendants to comply with the
23 injunction, the Court will modify the injunction to empower the United States Marshal to
24 enforce the injunction order.

25 **IT IS SO ORDERED.**

26

27 Dated: October 13, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

28

United States District Court
For the Northern District of California

ORIGINAL
FILED
OCT 13 1998
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.

and Related Cases.

No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

ORDER MODIFYING INJUNCTION IN CASE NO. 98-00088 (Oakland Cannabis Buyers' Cooperative)

The preliminary injunction issued on May 19, 1998 in the above action is HEREBY MODIFIED to provide 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 Oakland Cannabis Buyers' Cooperative at 1755 Broadway, Oakland, California, at any time of the day or night, evict any and all tenants, inventory the premises, and padlock the doors, until such time that 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.

The Court will stay the imposition of the modification to the injunction until 5:00 p.m. on

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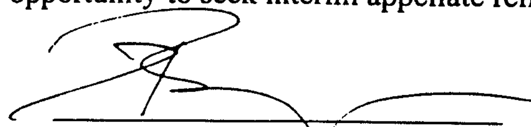
United States District Court
For the Northern District of California

Friday, October 16, 1998 to give defendants the opportunity to seek interim appellate relief.

IT IS SO ORDERED.

Dated: October 13, 1998



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

EXHIBIT E

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6 Ima Carter, Rebecca Nikkel and Lucia Y. Vier

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FILED
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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

7

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

10

11 UNITED STATES OF AMERICA, 12 Plaintiff, 13 vs. 14 15 CANNABIS CULTIVATOR'S CLUB, et al., 16 Defendants. 17 18 AND RELATED ACTIONS	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB <u>COUNTERCLAIM-IN-INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF</u> <u>DEMAND FOR JURY TRIAL</u>

19

20 As and by way of a counterclaim against plaintiff United States of America,

21 defendants and counterclaimants-in-intervention <u>EDWARD NEIL BRUNDRIDGE</u>,

22 <u>IMA CARTER</u>, <u>REBECCA NIKKEL</u> and <u>LUCIA Y. VIER</u> (collectively, the

23 "Members"), allege as follows:

24

25 <u>BACKGROUND</u>

26 1. By these related actions, plaintiff and counter-defendant United States of

27 America seeks to preliminarily and permanently enjoin the Oakland Coop, the Marin

28 Alliance, the Ukiah Coop (as those terms are hereinafter defined) and others from

1 allegedly using a facility for the purpose of manufacturing and distributing marijuana
2 in violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970
3 (the "Controlled Substances Act") and from allegedly engaging in other violations of
4 the Controlled Substances Act.

5 2. By their counterclaim-in-intervention, the Members seek to obtain a
6 judicial declaration of their fundamental right guaranteed under the Fifth Amendment
7 of the United States Constitution (the "Fifth Amendment") to be free from
8 governmental interdiction of their personal, self-funded medical choice, in consultation
9 with their personal physician, to alleviate their suffering through the only effective
10 treatment available for them. The Members also seek to obtain a preliminary and
11 permanent injunction restraining and enjoining the United States of America, and its
12 agents and employees and all persons acting in concert with any of them, from
13 interfering with the Members' exercise of this fundamental right and from hindering,
14 obstructing, preventing or attempting to enjoin the Oakland Coop, the Marin Alliance,
15 the Ukiah Coop or any of the other defendants from providing the Members, or their
16 primary care givers, with safe and affordable cannabis for personal medicinal use by
17 the Member upon a physician's recommendation as permitted by Proposition 215, the
18 Compassionate Use Act of 1996 (codified at California Health and Safety Code
19 § 11362.5).
20
21 JURISDICTION

22 3. The jurisdiction of this Court over the subject matter of this
23 counterclaim is based on 28 U.S.C. §§1331, 1346(a)(2), 2201(a) and the principles of
24 ancillary jurisdiction.
25
26
27
28

PARTIES

4. Defendant and counterclaimant-in-intervention Edward Neil Brundridge ("Brundridge") is a natural person, a resident of the City and County of San Francisco, State of California and a member of the Oakland Cannabis Buyers' Cooperative (the "Oakland Coop").

5. Defendant and counterclaimant-in-intervention Ima Carter ("Carter") is a natural person, a resident of the City of Richmond, County of Contra Costa, State of California and a member of the Oakland Coop.

6. Defendant and counterclaimant-in-intervention Rebecca Nikkel ("Nikkel") is a natural person, a resident of the City of Santa Rosa, County of Sonoma, State of California and a member of the Marin Alliance for Medical Marijuana (the "Marin Alliance").

7. Defendant and counterclaimant-in-intervention Lucia Y. Vier is a natural person, a resident of the City of Santa Rosa, County of Sonoma, State of California and a member of the Ukiah Cannabis Buyer's Club (the "Ukiah Coop").

8. The Members name plaintiff United States of America ("United States") as a counter-defendant.

FIRST CLAIM

(Violation of Substantive Due Process Rights)

9. The Members reallege and incorporate herein by reference as if fully set forth the allegations of paragraphs 1-8 hereof.

10. Each of the Members is a Californian in danger of imminent harm due to serious illness. Each uses cannabis for medical purposes. In each case, such use has been deemed appropriate and recommended by a physician who has determined it to be beneficial to the Member's health.

11. Edward Neil Brundridge suffers from severe arthritis in the right knee, which causes him extreme pain and difficulty in walking. In an effort to alleviate this

1 pain, Brundridge tried many traditional medicines, which were either ineffective or
2 caused him to experience an allergic reaction. Brundridge's doctor recommended
3 cannabis as a legal medical alternative to relieve his pain caused by the swelling in his
4 knee. His doctor's recommendation conformed with the Compassionate Use Act
5 (codified at California Health and Safety Code § 11362.5). Cannabis provides
6 Brundridge relief unavailable from any other medical treatment.
7 12. Rebecca Nikkel has fibromyalgia and multiple sclerosis. Both of these
8 conditions cause her to experience severe muscle spasms which are very painful.
9 Nikkel has tried many traditional medicines to alleviate this pain, but the traditional
10 medicines were either ineffective or caused her to experience an allergic reaction. For
11 example, upon the recommendation of her doctor, Nikkel tried baclofen, which caused
12 her legs to become so weak that she could not walk. Nikkel's doctor recommended
13 cannabis as a legal medical alternative to relieve the pain caused by her muscle
14 spasms. Nikkel's doctor's recommendation conformed with the Compassionate Use
15 Act (codified at California Health and Safety Code § 11362.5). Cannabis provides
16 Nikkel relief unavailable from any other medical treatment.
17 13. Ima Carter has congenital scoliosis, fibromyalgia and cervical nerve
18 damage. These conditions cause her enormous pain in her back and her head. Carter
19 has tried many traditional medicines to alleviate the pain caused by the muscle
20 spasms, but none of these traditional medicines has worked effectively. For example,
21 Carter tried steroids and anti-inflammatory drugs, but they caused her to bleed
22 internally. She also tried rhizotomy treatments and breast reduction surgery, neither of
23 which relieved all of her pain. Carter's doctor recommended cannabis as a legal
24 medical alternative to relieve the pain caused by her muscle spasms. Carter's doctor's
25 recommendation conformed with the Compassionate Use Act (codified at California
26 Health and Safety Code § 11362.5). Cannabis provides Carter relief unavailable from
27 any other medical treatment.
28

1 14. Lucia Y. Vier was diagnosed with squamous cell cancer in March 1998.
2 Her doctors have indicated that with radiation and chemotherapy treatments she may
3 live a year to a year and a half. Vier uses cannabis on the recommendation of her
4 doctor to stimulate her appetite. Without cannabis, Vier would not want to or be able
5 to eat a sufficient amount to stay alive. Vier's doctor recommended that she use
6 cannabis as a legal medical drug to stimulate her appetite and calm her. Vier's
7 doctor's recommendation conformed with the Compassionate Use Act (codified at
8 California Health and Safety Code § 11362.5). Cannabis provides Vier relief
9 unavailable from any other medical treatment.

10 15. The Members use cannabis as the only effective medical treatment for
11 their medical conditions described above. Each of the Members consulted with his or
12 her personal physician, who has recommended that the Member use cannabis based
13 upon the physician's determination that it is beneficial to the Member's health. The
14 Members have tried traditional, conventional medicines, none of which was effective
15 in treating their conditions. Each of the Members has tried cannabis and found it to
16 be the only effective treatment for his or her condition.

17 16. Each of the Members is a member of one of the cooperatives named as
18 a defendant in each of these three actions. The defendant cooperatives have served as
19 the Members' source of legal, safe and affordable cannabis upon the recommendation
20 of each Member's physician. As such, the Members are able to obtain safe, affordable
21 and legal cannabis from the defendant cooperatives during regular business hours
22 pursuant to their doctors' recommendations. If the defendant cooperatives are closed,
23 the Members will be irreparably harmed in that they will not be able to obtain
24 cannabis when it is the only effective medical treatment for them.

25 17. The Members have a fundamental right and liberty interest under the
26 Fifth Amendment to be free from governmental interdiction of their personal, self-
27 funded medical choice, in consultation with their personal physician, to alleviate their
28 suffering through the only effective treatment available for them.

18. The Members' fundamental right in this regard is deeply rooted in this nation's histories and traditions:

(a) The Members have a fundamental right to privacy for personal and intimate decisions. These privacy rights extend to the most personal and intimate decisions about life such that an individual has a right to use cannabis free of governmental interdiction when such use is the only effective treatment for his or her pain or disease, and no other effective alternatives are available;

(b) The Members have a fundamental right to bodily integrity. The right to maintain one's bodily integrity extends to an individual's right to control whether he or she receives medical care and the related tradition of preventing governmental interference with medical care that he or she needs to control his or her body, and specifically includes the right to be free from governmental interdiction of the self-funded medicinal use of cannabis when it is the only effective treatment for an individual's pain or disease, and no other effective alternatives are available for them;

(c) The Members have a fundamental right to maintain the integrity of their relationship with their doctors. The doctor-patient relationship historically is rooted in trust and confidence. The right to maintain the integrity of one's relationship with one's doctor without governmental interference includes the right to speak freely with one's doctor, including both the right to discuss the option of using cannabis as a medical treatment without fear of governmental prosecution and the related right to be treated with cannabis when it is the only effective treatment for an individual's pain or disease and no other effective alternatives are available.

19. The Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, as it is sought to be enforced in these related actions, violates the Fifth Amendment, in that it would impermissibly burden the Members' fundamental rights to be free of 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 recommended by their personal physicians. The federal government's interference with this right is not supported by sufficiently compelling state interests to justify such an intrusion on privacy, bodily integrity, and the traditional confidences and the sanctity of the doctor-patient relationship, nor is it narrowly tailored to effectuate any government interest which may exist. In the alternative, there is no rational relationship between any legitimate governmental purpose and the means chosen to achieve this purpose in these related actions.

20. The Controlled Substances Act and the injunction against defendants entered in these related actions on May 19, 1998 is overbroad in that it does not distinguish between citizens using cannabis for medical necessity when no other effective medication is available and citizens using cannabis for other purposes. As construed by the United States, the statute thus purports to reach self-financed life-saving medical treatment, in violation of the fundamental right of privacy and the fundamental right to bodily integrity. In failing to make the distinction between unprotected recreational acts and the government's forcing a patient involuntarily to forgo life-saving medical treatment, the statute and injunction are over-inclusive and therefore unconstitutional.

21. An actual controversy has arisen and now exists between the Members, on the one hand, and the United States, on the other hand, concerning their respective rights under the Controlled Substances Act and the Members' fundamental rights and liberty interests under the Fifth Amendment. In this regard, the Members contend that:

a. The Members have, and at all times have had, a fundamental right guaranteed under the Fifth Amendment to be free from governmental interdiction of their personal, self-funded medical decisions to take the only

1 effective legal medication available to relieve their own pain and suffering, to
2 obtain their personal physicians' recommendations for appropriate medical care
3 for serious illnesses and injuries, and to take advantage of available
4 medications for such conditions as recommended by their personal physicians;
5 and

6 b. The United States cannot seek enforcement or application of the
7 Controlled Substances Act against the Members or the Oakland Coop, the
8 Marin Alliance and/or the Ukiah Coop in these related actions without violating
9 the Members' fundamental right guaranteed under the Fifth Amendment.

10 22. The Members are informed and believe and on that basis allege that the
11 United States disputes and denies the foregoing contentions and contends that the
12 Members do not have a fundamental right cognizable under the Fifth Amendment as
13 alleged and that the United States is entitled to enforce the Controlled Substances Act
14 against the Members or the Oakland Coop, the Marin Alliance and/or the Ukiah Coop
15 in these related actions.

16 23. A judicial determination of the respective rights of the Members, and
17 the Oakland Coop, the Marin Alliance and/or the Ukiah Coop, on the one hand, and
18 the United States, on the other hand, under the Controlled Substances Act is necessary
19 and proper at this time.

20 24. Pending issuance of a permanent injunction restraining enforcement of
21 the Controlled Substances Act against the Members, the Oakland Coop, the Marin
22 Alliance and/or the Ukiah Coop, there is a serious and palpable threat that the United
23 States will obstruct or attempt to hinder, prevent or seek to enjoin the Members from
24 exercising their fundamental right guaranteed under the Fifth Amendment to be free of
25 governmental interdiction of their personal, self-funded medical decisions to take the
26 only effective legal medication available to relieve their own pain and suffering, to
27 obtain their personal physicians' recommendation for appropriate medical care for
28

serious illnesses and injuries, and to take advantage of available medications for such conditions as recommended by their personal physicians.

25. As a direct and proximate result of any such threatened interference in the Members' exercise of such fundamental rights guaranteed under the Fifth Amendment, the United States, unless restrained by this Court, will cause the Members irreparable injury.

26. Accordingly, the Members are entitled to a preliminary injunction, and a permanent injunction thereafter, restraining and enjoining the United States and its agents and employees and all persons acting in concert with any of them, from interfering with the Members' exercise of this fundament right and from hindering, obstructing, preventing or attempting to enjoin the Oakland Coop, the Marin Alliance, the Ukiah Coop 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 Proposition 215, the Compassionate Use Act of 1996 (codified at California Health and Safety Code § 11362.5).

WHEREFORE, the Members pray for judgment in their favor and against the United States as follows:

(a) For a declaration: (i) of the Members' fundamental right guaranteed 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 or application of the Controlled Substances Act against the Members or the Oakland Coop, the Marin Alliance and/or the Ukiah Coop in these related actions because it

would thereby violate the Members' fundamental right guaranteed under the Fifth Amendment;

(b) For a preliminary and permanent injunction restraining and enjoining the United States, and its agents and employees and all persons acting in concert with any of them, from: (i) interfering with the Members' exercise of their fundamental right guaranteed 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) hindering, obstructing, preventing or attempting to enjoin the Oakland Coop, the Marin Alliance, the Ukiah Coop 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 Proposition 215, the Compassionate Use Act of 1996 (codified at California Health and Safety Code § 11362.5);

(c) For the Members' costs of suit incurred herein, including reasonable attorneys' fees; and

(d) For such other relief as the Court may deem just and proper.

Dated: October 1, 1998.

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Attorneys for Defendants and Counterclaimants-in-Intervention Edward Neil Brundridge, Ima Carter, Rebecca Nikkel and Lucia Y. Vier

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, the Member counterclaimants demand a trial by jury of all issues properly tried to a jury.

Dated: October 1, 1998.

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EXHIBIT F

ORIGINAL
FILED
FEB 25 1999
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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 98-00085 CRB
No. C 98-00086 CRB
No. C 98-00087 CRB
No. C 98-00088 CRB
No. C 98-00245 CRB

MEMORANDUM AND ORDER

Now before the Court is plaintiff's motion to dismiss the complaint-in-intervention in its entirety. After carefully considering the papers submitted by the parties, and having had the benefit of oral argument on February 5, 1999, the motion to dismiss is GRANTED.

BACKGROUND

In early 1998, plaintiff filed separate lawsuits against six medical cannabis cooperatives and several individuals associated with those cooperatives, alleging that the defendants' distribution of marijuana violated the Controlled Substances Act, 21 U.S.C. § 841(a)(1), and that their illegal conduct should be enjoined pursuant to 21 U.S.C. § 882(a). In May 1998, the Court granted a preliminary injunction enjoining all defendants from engaging in the distribution of marijuana in violation of 21 U.S.C. § 841(a)(1).

United States District Court
For the Northern District of California

Several months later, the Court granted the motion of four individuals, Edward Neil Brundridge, Ima Carter, Rebecca Nikkel, and Lucia Y. Vier ("Intervenors"), to intervene as defendants in the government's action pursuant to Federal Rule of Civil Procedure 24(b). The Intervenors are members of the defendant Oakland, Marin or Ukiah medical cannabis cooperatives. They seek a judicial declaration that they have a fundamental right "to be free from governmental interdiction of their personal, self-funded medical choice, in consultation with their personal physician, to alleviate suffering through the only effective treatment available for them." They also seek an order enjoining the United States from interfering with the Intervenors' exercise of this fundamental right, and in particular, they seek to enjoin the United States from prohibiting the cooperatives from distributing marijuana to the Intervenors.

Plaintiff subsequently moved to dismiss the Intervenors' complaint in its entirety.

DISCUSSION

Plaintiff contends that under the Ninth Circuit's decision in Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980), the Intervenors' complaint fails as a matter of law. In Carnohan, the plaintiff brought a declaratory proceeding to secure the right to obtain and use laetrile in a nutritional program for the prevention of cancer. The court held that since the Food and Drug Administration ("FDA") had determined that laetrile was a new drug, and laetrile did not meet the standards for distribution of a new drug, the plaintiff had to bring an Administrative Procedure Act ("APA") action to challenge the FDA's decision. The plaintiff argued further that the FDA's regulatory scheme is so burdensome as applied to individuals that it infringes upon constitutional rights. The Ninth Circuit responded:

> We need not decide whether Carnohan has a constitutional right to treat himself with home remedies of his own confection. Constitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of government police power.

Id. at 1121 (emphasis added).

Carnohan disposes of the Intervenors' claims. Regardless of whether the Intervenors have a right to treat themselves with marijuana which they themselves grow (a remedy of their own confection), the Ninth Circuit has held that they do not have a constitutional right

to obtain marijuana from the medical cannabis cooperatives free of government police power. To hold otherwise would directly contradict the Carnohan holding.

The Intervenors attempt to distinguish Carnohan and the other cases cited by plaintiff on the grounds that the Intervenors (1) do not seek to compel government action and are not asserting that they have a fundamental constitutional right to obtain a particular medication, and (2) seek to use cannabis upon the recommendation of their personal physicians to alleviate their suffering through the only effective treatment available for them. Neither of these alleged distinctions persuades the Court than Carnohan is not controlling here.

First, the Intervenors' characterization of their complaint as not seeking a declaration of a right to obtain a particular medication is belied by the plain language of their complaint and their arguments in support of their motion to intervene. If the issue before the Court were whether the Intervenors have a right to use marijuana which they have grown themselves, the Court would not have granted them leave to intervene since such a claim is not related to the claims raised by the United States' lawsuits. By their complaint, however, the Intervenors seek an order enjoining the United States from enforcing the Controlled Substances Act against the medical cannabis cooperatives in which they are members. Complaint in Intervention at ¶ ¶ 19-21. Indeed, in their motion to intervene, they emphasized that their complaint alleges that they have a "protectable interest in obtaining cannabis." Motion to Intervene at 11 (emphasis added); see also id. at 5 ("If the cooperatives are prevented from distributing cannabis, the [Intervenors] will not be able to legally obtain cannabis that is safe and effective."). Thus, the Intervenors' complaint seeks an order that they have a fundamental right to obtain to a particular medication, marijuana, from a particular source, the medical cannabis cooperatives. Carnohan, however, holds that there is no constitutional right to obtain medication free from the lawful exercise of the government's police powers.

The fact that California law does not prohibit the distribution of medical marijuana under certain circumstances is not relevant as to whether the Intervenors have a fundamental right. If that were the case, whether one had a fundamental right to treat oneself with

United States District Court
For the Northern District of California

marijuana would depend on whether the state in which one lived prohibited such conduct.

Second, that the Intervenors' personal physicians recommended marijuana is not a material distinction. If one does not have a right to obtain medication free from government regulation, there is no reason one would have that right upon a physician's recommendation. In Kulsar v. Ambach, 598 F.Supp. 1124 (W.D.N.Y. 1984), for example, medical patients alleged that New York laws that prohibited their personal physician from administering a particular treatment for their hypoglycemic disorders were unconstitutional. The court dismissed their constitutional claim on the ground that the "constitutional right of privacy does not give individuals the right to obtain a particular medical treatment 'free of the lawful exercise of government police power.'" Id. at 1126 (citing Carnohan, 616 F.2d 1120).

The Intervenors' argument that marijuana is the only effective treatment for their symptoms is also not persuasive. In Rutherford v. United States, 616 F.2d 455 (10th Cir. 1980), a case relied upon by the Carnohan court, terminally ill cancer patients brought suit to enjoin the United States from interfering with interstate shipments of the sale of laetrile. The trial court had held that the cancer patients had a right "to be let alone," or "a constitutional right of privacy to permit them, as terminally ill cancer patients, to take whatever treatment they wished regardless of whether the FDA regarded the medication as 'effective' or 'safe.'" Id. at 456. The Tenth Circuit reversed:

> It is apparent in the context with which we are here concerned 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. The premarketing requirement of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 355, is an exercise of Congressional authority to limit the patient's choice of medication.

Id. at 457. The Rutherford plaintiffs had no other treatment alternative. They believed that without the laetrile they would die. The Tenth Circuit nonetheless held that the Rutherford plaintiffs did not have a constitutional right to obtain laetrile. See also Smith v. Shalala, 954 F.Supp. 1, 3 (D.D.C. 1996) ("While there are decisions recognizing that competent adults have a fundamental right to refuse medical treatment, Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990), and to determine the time and manner of their death, free from

United States District Court
For the Northern District of California

governmental interference, . . . nothing in those decisions suggests that the government has an affirmative obligation to set aside its regulations in order to provide dying patients access to experimental medical treatments").

Here, the plaintiffs similarly believe, and on a motion to dismiss the Court must assume they could prove, that marijuana is the only effective treatment for their symptoms. Congress and the FDA disagree. If the Intervenors believe the FDA and Congress are wrong, they should challenge the legal prohibition on the distribution of marijuana through an APA or similar action. Carnohan and Rutherford hold, however, that there is no fundamental right to obtain the medication of choice. Accordingly, the Intervenors' claim that they do have such a right, and that the United States should be enjoined from interfering with that right, will be dismissed without leave to amend.

As is set forth above, the Court does not interpret the Intervenors' complaint as alleging a fundamental right to treat themselves with cannabis which they themselves have grown. The Intervenors' motion to intervene was based on their assertion that if the cooperatives are closed, they will not be able to treat their symptoms with cannabis. Nonetheless, to the extent the complaint does make such claim, such claim does not raise a question of fact or law in common with the claims or defenses in these related lawsuits. See Fed.R.Civ.P. 24(b)(2). Accordingly, to the extent the complaint-in-intervention makes such a claim, it shall be dismissed without prejudice.

CONCLUSION

For the foregoing reasons, plaintiff's motion to dismiss is GRANTED. Intervenors' claims for a declaration that they have a fundamental right to obtain marijuana for their personal, medical use without interference from the United States, and their claims seeking to enjoin the United States' efforts to close the cooperatives, are DISMISSED without leave to amend. Intervenors' claims seeking an order that they have a fundamental right to treat

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United States District Court
For the Northern District of California

themselves with marijuana which they themselves have grown, to the extent the Intervenors' complaint makes such claims, are DISMISSED without prejudice.

IT IS SO ORDERED.

Dated: February 25, 1999

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

Case Nos. 99-15838
99-15844
99-15879

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 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 June 16, 1999, in the city where I am employed, I served a true copy of the attached document, titled exactly DECLARATION OF MARGARET S. SCHROEDER IN SUPPORT OF APPELLANTS' RESPONSE TO JUNE 2, 1999 ORDER TO SHOW CAUSE WHY APPEAL SHOULD NOT BE DISMISSED, 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:

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Civil Division, Room 1048
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United States of America

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

Executed this 16th day of June, 1999, at San Francisco, California.

Doreen M. Griffin