IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

_____/

AND RELATED ACTIONS

_____/

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

MEMORANDUM AND ORDER

In February 1998, the government filed the above-related lawsuits alleging that defendants manufacture and distribute marijuana in violation of 21 U.S.C. section 841(a)(1), among other statutes. The government seeks an injunction pursuant to 21 U.S.C. section 882(a) permanently enjoining defendants' conduct. Now before the Court is the government's motion for summary judgment and entry of the permanent injunction. Defendants move to dissolve the preliminary injunction. This Memorandum and Order addresses the government's motion for summary judgment. The issue is whether there is a genuine dispute as to defendants' violation of the Controlled Substances Act ("CSA") in 1997.

PROCEDURAL HISTORY

The government originally filed suit against six marijuana distribution clubs and various individuals associated with those clubs. One of the clubs, Flower Therapy Medical Marijuana Club, voluntarily ceased operations. Accordingly, the Court dismissed that case (98-0089) without prejudice.

The Court subsequently granted the government's motion for a preliminary injunction in the remaining cases on the ground the government had demonstrated a likelihood of success on the merits and irreparable harm. See United States v. Cannabis Cultivator's Club, 5 F.Supp.2d 1086 (N.D. Cal. 1998). Defendants unsuccessfully moved the Court to modify the preliminary injunction to exclude distributions of marijuana that are medically necessary. After the Ninth Circuit ruled that the medical necessity defense is legally cognizable and should have been considered in the district court, the Supreme Court granted certiorari. The Supreme Court reversed and held that medical necessity is not a defense to manufacturing and distributing marijuana. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 494-95 (2001).

The government now moves for summary judgment in the remaining cases: 98-0085 (Cannabis Cultivator's Club and Dennis Peron ("CCC"); 98-0086 (Marin Alliance for Medical Marijuana and Lynette Shaw) ("Marin Alliance"); 98-0087(Ukiah Cannabis Club, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman) ("Ukiah Club"), 98-0088 (Oakland Cannabis Buyers' Cooperative and Jeffrey Jones) ("OCBC"), and 98-245 (Santa Cruz Buyers' Club) ("Santa Cruz Club"). The OCBC defendants filed a written opposition to the government's motion, in which the Marin Alliance, Ukiah Club and CCC defendants joined. The Santa Cruz Club has not filed an opposition to the government's motion nor joined in the OCBC's opposition.

THE GOVERNMENT'S EVIDENCE

In support of its motion for summary judgment, the government relies on the evidence it submitted in support of its motion for a preliminary injunction. This evidence consists

primarily of the affidavits of undercover agents who purchased marijuana from the defendants in 1997. The evidence as to each of the clubs is summarized below.

1. CCC (98-0085)

The government has submitted the affidavits of Drug Enforcement Agency ("DEA") agents who purchased marijuana from the CCC on May 21 1997, June 20, 1997, August 6, 1997, September 12, 1997, October 24, 1997, and November 5, 1997. For example, Special Agent Brian Nehring declares that on May 21, 1997 he went to the Cannabis Cultivator's Club located at 1444 Market Street in San Francisco, California. He brought with him a falsified physician statement stating that he suffered from "Post Traumatic Stress Disorder." At the Club he was asked to fill out a form, his physician statement was examined, and he was issued a membership card. He was then directed to the third floor, which was a room with two sales counters. One of the counters was staffed by 4-5 persons, and there were several menu boards on the wall listing grades of marijuana with prices ranging from $25 to $90 per one-eighth ounce. He paid $25 for one-eighth ounce of what the Club identified as Mexican-grown marijuana. Senior Forensic Chemist Phyllis E. Quinn has submitted an affidavit attesting that the substances purchased by Nehring and the other undercover agents are marijuana.

2. Ukiah Club (98-0087)

The government has submitted the affidavits of undercover agents who purchased marijuana from the Ukiah Club on June 5, 1997, June 30, 1997, August 5, 1997, September 9, 1997, October 24, 1997, and November 14, 1997. For example, Special Agent Bill Nyfeler attests that on June 30, 1997 he went to the Ukiah Club located at the Forks Theater, 40A Pallini Lane, Ukiah, California. He brought with him a Ukiah Club membership card belonging to Special Agent Nehring, and a "Primary Caregiver" form. When he entered the Club, an unidentified man examined the membership card and Nyfeler's identification and noted that they did not match. Nyfeler explained he was a primary caregiver and provided the man with the form. An adult female identified as "Cherri" then asked Nyfeler about his membership status. Nyfeler again explained he was a primary caregiver. After Nyfeler

signed the membership card in Cherri's presence, Nyfeler went to the sales counter and paid $25 for what was identified as Mexican-grown marijuana. The government has again submitted the affidavit of Senior Forensic Chemist, Phyllis E. Quinn who attests that the substances purchased at the Club were marijuana.

3. OCBC (98-0088)

The government has submitted the affidavits of undercover agents who purchased marijuana from the OCBC on May 19, 1997, June 23, 1997, August 8, 1997, and October 22, 1997. Senior Forensic Chemist, Phyllis E. Quinn examined the substances purchased at the Club and confirms they were marijuana. The undercover agents also observed marijuana plants being grown in the OCBC.

The government also relies on the evidence submitted in support of its motion for civil contempt. After the Court issued its preliminary injunction, the OCBC held a press conference at the Club during which it distributed marijuana in front of television cameras. See October 13, 1998 Order of Contempt in 98-0088; see also Oakland Cannabis Buyers' Cooperative, 532 U.S. at 487 ("The Cooperative did not appeal the injunction but instead openly violated it by distributing marijuana to numerous persons.").

4. Marin Alliance (98-0086)

The government has submitted the affidavits of undercover agents who purchased marijuana from the Marin Alliance on June 2, 1997, June 30, 1997, August 5, 1997, September 9, 1997, and October 24, 1997. Senior Forensic Chemist Phyllis E. Quinn examined the substances purchased at the Club and confirms they were marijuana.

For example, Special Agent Deborah Muusers attests that on October 24, 1997, she went to the Marin Alliance located at 6 School Street Plaza, Suite 210, in Fairfax, California and brought with her a phony physician statement which stated that Muuser suffered from "menstrual cramps." A person who identified himself as Ken asked to see Muuser's identification and physician's statement. He then asked her to fill out some forms. She listed "menstrual cramps" as the reason she wished to purchase marijuana. After waiting approximately 15 minutes, Muuser was advised that she had a provisional membership.

Muuser then entered a room where a person identified as "Rob" was seated. Rob pointed to a menu board with various prices that ranged from $40 for low grade and "Thai" marijuana to $54 for the various high grades. Muuser purchased one-eighth ounce of "82J" for $65.00.

5. Santa Cruz Club (98-0245)

The government has submitted the affidavits of undercover agents who purchased marijuana from the Santa Cruz Club, located at 201 Maple Street, Santa Cruz, California, on May 19, 1997, June 23, 1997, August 8, 1997, September 10, 1997, October 24, 1997, and November 5, 1997. Senior Forensic Chemist, Phyllis E. Quinn examined the substances purchased at the Club and confirms they were marijuana.

DISCUSSION

I. The Motion For Summary Judgment

A. Summary Judgment Standard

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A principal purpose of the summary judgment procedure "is to isolate and dispose of factually unsupported claims." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

"In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all reasonable inferences in a light most favorable to the non-moving party." Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997). An inference may be drawn in favor of the non-moving party,

however, only if the inference is "rational" or "reasonable" under the governing substantive law. See Matsushita, 477 U.S. at 588.

B. Defendants' Arguments

Defendants do not directly challenge the government's evidence through submission of their own evidence; that is, they do not offer any evidence suggesting that they did not distribute marijuana on the dates alleged by the government. Instead, they make various legal arguments, including a challenge to the sufficiency of the government's evidence.

1. The sufficiency of the government's evidence

Defendants first contend the government cannot base its motion for summary judgment on evidence submitted in support of the motion for a preliminary injunction. Defendants do not cite any case or rule which supports this proposition. This is unsurprising as the federal rules do not require a party to re-submit evidence already filed in connection with a motion for a preliminary injunction. See Air Line Pilots Ass'n., Inc. v. Alaska Airlines, Inc., 898 F.2d 1393, 1397 n.4 (9th Cir. 1990) ("A district court might also convert a decision on a preliminary injunction into a final disposition of the merits by granting summary judgment on the basis of the factual record available at the preliminary injunction stage.").

They next argue the government agents' affidavits are inadmissible and have submitted a "Separate Statement Of Objections." In sum, they claim the agents "entrapped" defendants into distributing marijuana because defendants "were not predisposed to providing cannabis to persons without the proper authorization." Since the Supreme Court has unanimously and definitively ruled that it is unlawful to distribute marijuana regardless of the medical need of the recipient, see Oakland Cannabis Buyers' Cooperative, 532 U.S. at 494-95, any "proper authorization" is irrelevant. With or without medical authorization the distribution of marijuana is illegal under federal law. Defendants' other objections are equally without merit. The declarations were made on the basis of personal knowledge and are admissible.

Finally, defendants move to continue the summary judgment motion pursuant to

Federal Rule of Civil Procedure Rule 56(f) to permit them to conduct discovery. They seek to depose the agents as well as discover evidence of the government's "blocking" research into the medical benefits of marijuana. "Federal Rule of Civil Procedure 56(f) provides that if a party opposing summary judgment demonstrates a need for further discovery in order to obtain facts essential to justify the party's opposition, the trial court may deny the motion for summary judgment or continue the hearing to allow for such discovery. In making a Rule 56(f) motion, a party opposing summary judgment "must make clear what information is sought and how it would preclude summary judgment." Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998) (quoting Garrett v. City and County of San Francisco, 818 F.2d 1515, 1518 (9th Cir.1987)).

Defendants have not met their Rule 56(f) burden. If they did not sell marijuana, they are in the possession of such evidence, namely, declarations stating that they did not sell any marijuana to the undercover agents on the particular dates. Moreover, they have not offered any explanation as to why the deposition of the agents would lead to evidence precluding summary judgment; for example, they have not explained why the agents' personal recollection of buying marijuana is suspect, especially given their failure to offer any evidence suggesting that the agents did not in fact purchase marijuana from defendants. The Court is also unpersuaded that discovery into the government's history with respect to marijuana research will produce evidence legally relevant to the issues presented by the government's motion for summary judgment.

2. Defendants' legal defenses

Most of the legal defenses raised by defendants were made in opposition to the motion for preliminary injunction or in connection with other motions in these related actions. The Court will address the merits of such defenses to the extent defendants offer argument or evidence that was not previously rejected by the Court.

a. 21 U.S.C. section 885(d) immunity

Defendants repeat their contention that they are entitled to immunity under section 885(d), a statute intended to provide immunity for undercover law enforcement operations.

The Court previously rejected this argument, see Order Re: Motion To Dismiss In Case No. 98-0088 (Sep. 1998), and defendants offer nothing new.

b. The joint user and ultimate user defenses

Defendants renew their "joint user" defense under United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977), and their related "ultimate user" defense. The Court previously rejected these arguments, see Cannabis Cultivator's Club, 5 F.Supp.2d at 1100-01, and defendants have not offered any new evidence or argument. Based on the evidence before the Court, no reasonable trier of fact could find that defendants' sale of marijuana was legal based on these defenses. The sale of marijuana to the undercover agents does not, under any reasonable interpretation of the law, fall within the Swiderski exception to distribution.

c. Substantive due process

The Court previously rejected defendants' argument that the CSA as applied to their distribution of medical marijuana violates their substantive due process rights. See Cannabis Cultivator's Club, 5 F.Supp.2d at 1102-03. The Court concluded that defendants had not established that they have a fundamental right to distribute medical marijuana. In their opposition to summary judgment defendants still have not established such a fundamental right; instead, they assert that the persons to whom they distribute marijuana have a fundamental right to treat themselves with medical marijuana. Again, the Court previously rejected this argument with respect to the intervener club members. See United States v. Cannabis Cultivator's Club, 1999 WL 111893 (N.D. Cal. Feb. 25, 1999). Moreover, defendants have not established that they have standing to assert that a judgment in the government's favor against defendants would violate the fundamental rights of the non-defendant club members, see 5 F.Supp.2d at 1103; indeed, in Oakland Cannabis Buyer's Cooperative Justice Stevens noted that the clubs cannot assert a necessity defense based on the club members' suffering because it is the club members, not the clubs themselves, that face the choice of evils. Oakland Cannabis Buyer's Cooperative, 532 U.S. at 500 n.1 (Stevens, J., concurring).

Defendants' contention that the CSA as applied to them violates their Due Process

rights under a rational-basis review also does not defeat summary judgment. Under rational-basis review, the Court must presume the statute is valid and uphold it "if it is rationally related to a legitimate government interest." Rodriguez v. Cook, 169 F.3d 1176, 1181 (9th Cir. 1999).

The statute at issue here--the CSA--places drugs into five schedules, which impose different restrictions on access to the drugs. Congress placed marijuana in Schedule I, the most restrictive schedule. A Schedule I drug (1) has a high potential for abuse, (2) has no currently accepted medical use in treatment in the United States, and (3) has a lack of accepted safety for use of the drug . . . under medical supervision. See 21 U.S.C. § 812(b)(1). The CSA permits the Attorney General "to reschedule a drug if he finds that it does not meet the criteria for the schedule to which it has been assigned." Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994) (citing 21 U.S.C. § 811(a)). The Attorney General has delegated this authority to the Administrator of the DEA, who in turn has adopted guidelines for determining if a drug has currently accepted medical use in the United States. Members of the public may petition the Administrator to reschedule a particular drug, including marijuana. See, e.g., Alliance for Cannabis Therapeutics, 15 F.3d at 1133.

The Court must consider this entire statutory scheme in determining whether there is a rational basis for the CSA's prohibition on the manufacture and distribution of marijuana for any purpose. In light of the available statutory procedure for reviewing the appropriateness of the current classification of marijuana, the Court cannot conclude that the CSA's prohibition on the distribution of marijuana is not rationally related to a legitimate government purpose, namely, to limit the distribution of drugs with a high potential for abuse. Defendants' challenge to the appropriateness of the classification of marijuana must be made to the DEA Administrator, not this district court. To hold otherwise would allow defendants and others to make an "end run" around the process Congress implemented to ensure that drugs are properly classified.

C. Evidentiary hearing

Defendants complain that before they are permanently enjoined from distributing marijuana they should be given an evidentiary hearing on the merits of their defenses. They claim that "in the two cases where Section 882 was used to enjoin criminal activity under the CSA, the defendants were at least given a hearing at which they could challenge the government's evidence and present their own. See United States v. Barbacoff, 416 F.Supp. 606, 607 (D.D.C. 1976); United States v. Williams, 416 F.Supp. 611 (D.D.C. 1976). They assert that the evidentiary hearings in those cases were held before the court granted partial summary judgment in favor of the government.

Defendants' reliance on these cases is misplaced. Both cases involved whether the defendant pharmacists were knowingly filling forged prescriptions for controlled substances. Thus, presumably there was a factual dispute as to defendants' knowledge, and a trial-like hearing was necessary to resolve that dispute. Moreover, defendants misrepresent the procedural posture of the cases. In both cases the hearing with cross-examination was held *after* the court granted partial summary judgment; indeed, in one of the cases, the court expressly states the purpose of the hearing was to determine the penalty, that is, how much the defendant would pay. Williams, 416 F.Supp. 612. Defendants have not offered any evidence from which a reasonable trier of fact could conclude defendants did not distribute marijuana; accordingly, no evidentiary hearing or trial is needed to resolve disputed issues of fact.

II. Commerce Clause

"Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution." United States v. Morrison, 529 U.S. 598, 607 (2000). Defendants contend neither the Commerce Clause nor any other Constitutional provision gives Congress the power to prohibit their intrastate manufacture and distribution of medical marijuana. Although defendants do not raise this issue as a defense to the government's motion for summary judgment, the Court will address the argument in this Memorandum.

In connection with the preliminary injunction motion, the Court held that Congress could regulate the wholly-intrastate manufacture and distribution of marijuana under the

Commerce Clause. See 5 F.Supp.2d at 1096-97. Since the Court's ruling, the Supreme Court held that Congress did not have Commerce Clause authority to enact the civil remedy provision of the Violence Against Women Act ("VAWA"). See Morrison, 529 U.S. at 617-18. Defendants claim that under Morrison federal regulation of the purely intrastate manufacture and distribution of medical marijuana cannot emanate from the Commerce Clause.

Morrison does not support defendants' argument. The civil remedy provisions of the VAWA did not involve the regulation of intrastate commerce; instead, Congress attempted to justify the law on the basis of the interstate commerce effects of intrastate violence against women. In reaching its decision, the Morrison Court observed that "in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor." 529 U.S. at 611. It then concluded that the civil remedy provisions of VAWA could not be enacted pursuant to the Commerce Clause because

> [g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Id. at 613.

Unlike violence, the manufacture and distribution of marijuana is economic activity; indeed, the Ninth Circuit has specifically held that "drug trafficking is a commercial activity which substantially affects interstate commerce." United States v. Staples, 85 F.3d 461, 463 (9th Cir. 1996); see also United States v. Tisor, 96 F.3d 370, 375 (9th Cir. 1996) (noting that the Ninth Circuit has adopted the Eighth Circuit's reasoning that intrastate drug activity affects interstate commerce . . . ; that Congress may regulate both interstate and intrastate drug trafficking under the Commerce Clause, . . . and that section 841(a)(1) is a valid exercise of Congress's Commerce Clause power.") (internal quotations omitted). The Court is bound by these rulings in the absence of a subsequent Supreme Court case casting the Ninth Circuit's holdings in doubt. As Morrision did not involve intrastate commerce, it is

not such a case.

//

CONCLUSION

For the foregoing reasons, the Court concludes that based on the record before the Court there is no genuine material dispute that defendants violated the CSA several times in 1997 by distributing marijuana and possessing marijuana with the intent to distribute. Accordingly, the government's motion for summary judgment is GRANTED.

Having granted the government's motion, the Court must decide what remedy, if any, is appropriate. The government seeks entry of a permanent injunction on the same terms as the preliminary injunction. At oral argument the Court advised the parties that should the Court grant the government's motion for summary judgment, it would give defendants the opportunity to file further submissions with the Court concerning the likelihood of future violations of the Act, and in particular, whether there is a threat that defendants, or any of them, will resume their distribution activity if the Court does not enter a permanent injunction. All such submissions, if any, shall be filed by May 24, 2002 and the government's response, if any, shall be filed by June 7, 2002. The Court will take the matter of the remedy to be imposed under submission at that time.

IT IS SO ORDERED.

Dated: May 3, 2002

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California