PILLSBURY MADISON & SUTRO LLP
THOMAS V. LORAN III #95255
MARGARET S. SCHROEDER #178586
235 Montgomery Street
Post Office Box 7880
San Francisco, CA 94120-7880
Telephone: (415) 983-1000

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. CANNABIS CULTIVATOR'S CLUB, et al., Defendants. AND RELATED ACTIONS	Nos. C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB

MOTION FOR ENTRY OF PARTIAL JUDGMENT

PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(B)

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT THEREOF

Date: July 16, 1999
Time: 10:00 AM
Room: 8
The Hon. Charles R. Breyer

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Codes

Rules and Regulations

Other Authorities

PLEASE TAKE NOTICE that at 10:00 a.m. on July 16, 1999, in the Courtroom of the Honorable Charles R. Breyer, located at 450 Golden Gate Avenue, San Francisco, California, 94102, defendants and counterclaimants-in-intervention, EDWARD NEIL BRUNDRIDGE, IMA CARTER, REBECCA NIKKEL and LUCIA Y. VIER (the "Members"), will and do hereby move this Court for an order pursuant to Federal Rule of Civil Procedure 54(b), expressly determining that there is no just reason for delay and expressly directing the entry of judgment on the Members' counterclaims pursuant to the memorandum and order entered on February 25, 1999 (the "February Order"), and awarding such further relief as the Court may find appropriate.[1] The Members further request that the Court make its order retroactive to apply to the Members' April 26, 1999 notices of appeal.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT.

The Members intervened in this action on September 3, 1998 to defend against plaintiff United States of America's (the "Government's") attempts to close the defendant cannabis cooperatives and to assert a counterclaim against the Government. The counterclaim alleges that the Members have a fundamental right to be free from governmental interdiction of their personal, self-funded medical decisions, in consultation with personal physicians, to take the only effective legal medication available to relieve their pain and suffering. The Court dismissed these constitutional claims without leave to amend on the ground that they failed to state a claim upon which relief can be granted. The Government's claims technically remain pending, but there is no activity in the district court and no trial or pretrial schedule dates set.

The Members wish to pursue these constitutional claims on appeal and seek the Court's permission to do so by requesting Rule 54(b) certification of the order

---

1 This motion is based upon the attached memorandum of points and authorities, and all of the records and files in these actions.

dismissing their claims. The Members suffer chronic and debilitating pain as a result of serious illnesses. By their Counterclaim, the Members sought to relieve this pain. Thus, the Members would like to pursue the legal viability of their claims now.

The order dismissing the counterclaim plainly satisfies the threshold requirements of Rule 54(b) because these actions each involve multiple parties and claims, and the order dismissing the counterclaim was final. The Members' request also satisfies the factors a district court considers when exercising its discretion to certify an order pursuant to Rule 54(b): There are sound practical reasons for certifying the dismissal order, including that it will relieve the Members from being forced to wait until final disposition of the Government's claims to seek an appellate ruling on the viability of their constitutional claims, it will result in efficient judicial administration of these matters, and it will confine the issues for trial.

In these circumstances, there is no just reason for delay, and the Court should in its sound discretion issue an order certifying its February 25, 1999 order as final. The Members should not be prevented from pursuing their constitutional claims until final disposition of these matters, particularly where at this time there is little activity in the trial court and significant issues are on appeal.

II. FACTUAL BACKGROUND.

A. The Government's multiple claims against multiple defendants.

In January 1998, the Government filed six separate lawsuits against six cooperative associations and individuals ("defendant cooperatives"), seeking, among other things, a preliminary and permanent injunction under the Controlled Substances Act (see 21 U.S.C. § 882) (the "Act") to prevent the defendant cooperatives from distributing cannabis. See Complaints, filed January 8, 1998 (the "Complaints") (Prayer). In January 1998, the Court issued an order relating the six lawsuits. Each complaint named more than one defendant. For example, the complaint against the Oakland Cannabis Buyers' Cooperative also named Jeffrey Jones as a defendant. In addition, each complaint asserted three counts: (1) defendants violated the Act by

engaging in the manufacture and distribution of marijuana with the intent to manufacture and distribute marijuana, (2) defendants violated the Act by maintaining a location for the purpose of manufacturing and distributing marijuana and (3) defendants conspired to violate the Act. See Complaints, ¶¶ 23-31.

B. The defendant cooperatives' appeals.

The defendant cooperatives are in the process of appealing several rulings. The rulings relate to the preliminary injunction that the Court issued in May 1998 enjoining the defendant cooperatives from engaging in the manufacture, distribution or possession of marijuana in violation of section 841(a)(1) of the Act. See U.S. v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1106 (N.D. Cal. 1998).

The preliminary injunction was followed by contempt proceedings in July 1998 when the Government moved for an order to show cause why the defendant cooperatives should not be held in contempt for failing to comply with the preliminary injunction and for summary judgment. The Oakland defendants moved to modify the preliminary injunction and to dismiss the Government's complaint on the ground that it failed to state a claim upon which relief can be granted.

In September 1998, the Court issued an order to show cause as to the Oakland and Marin defendants. See Orders to Show Cause, filed September 3, 1998. The Court denied the Government's request for an order to show cause as to the Ukiah defendants and, at the request of the Government, later vacated its order to show cause as to the Marin defendants. See Order in Case No. 98-00086, filed December 23, 1998. The Court denied the Oakland defendants' motions to modify the injunction and to dismiss the complaint. See Orders, filed September 3, 1998. After further proceedings, the Court held the Oakland defendants in contempt and modified its injunction to permit enforcement against the Oakland cooperative.[2]

---

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

The Oakland defendants have appealed the orders denying their motion to dismiss, denying their motion to modify the preliminary injunction and granting the Government's motion to modify the preliminary injunction, and their appeals remain pending. See Notices of Appeal, filed October 8, 16 and 27, 1998. They argued their appeals on April 13, 1999.

C. The Members' claims.

At the Members' request, the Court granted the Members permission to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. See Order re: Motion to Intervene, filed on or about September 3, 1998. On October 2, 1998, the Members filed answers to the Government's complaints (in case numbers C 98-0085, C 98-0086 and C 98-0087) and their Counterclaim-in-Intervention for Declaratory and Injunctive Relief ("Counterclaim" or "Cntrclm.").

As set forth in the Counterclaim, each of the Members is in danger of imminent harm due to serious illness, and each uses cannabis for medical purposes. See Cntrclm. ¶ 10. In each case, such use has been deemed appropriate and recommended by the Member's physician. Id. Each of the Members is a member of one of the defendant cooperatives. See id. ¶¶ 4-7. The Members have tried traditional, conventional medicines, none of which proved effective, and each has found cannabis to be the only effective treatment for his or her condition. Id.

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

Government's attempts to obtain and enforce the preliminary injunction in these actions.

For these reasons, the Members brought the Counterclaim. By it, the Members seek declaratory and injunctive relief to exercise their fundamental right under the Fifth Amendment to be free from governmental interdiction of their personal, self-funded medical decisions to take the only effective legal medication available to relieve their own pain and suffering, to obtain their personal physicians' recommendations for appropriate medical care for serious illnesses and injuries, and to take advantage of available medications for such conditions as recommended by their personal physicians. Cntrclm. at 9-10.

D. The Government's motion to dismiss the Counterclaim.

In December 1998, the Government moved to dismiss the Counterclaim for failure to state a claim upon which relief can be granted. See Plaintiff's Motion to Dismiss Counterclaim-in-Intervention for Declaratory and Injunctive Relief, filed December 4, 1998. After a hearing in February, the Court dismissed the Counterclaim without leave to amend. See Memorandum and Order, filed February 25, 1999. The Members filed notices of appeal April 26, 1999 pursuant to 28 U.S.C. § 1292(a)(1).

III. ARGUMENT.

A. The Court should direct entry of final judgment on the February Order.

The Court should direct entry of judgment on its February Order dismissing the Members' Counterclaim because there is no just reason to delay entry of this order. Federal Rule of Civil Procedure 54(b) allows a district court dealing with multiple claims or multiple parties to direct the entry of final judgment as to fewer than all of the claims or parties. Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 3 (1980). To do so, "the court must make an express determination that there is no just reason for delay." Id. In making a determination under Rule 54(b), a court must first determine that it is dealing with a "final judgment." Id. at 7. "Once having found

finality, the district court must go on to determine whether there is any just reason for delay." Id. at 8. The February Order satisfies all the requirements of Rule 54(b): the actions each involve multiple parties and claims, the February Order is a "final judgment," and there is no just reason for delay.

1. Each of the actions involves more than one claim for relief and multiple parties.

The Federal Rules specifically contemplate entry of partial judgment with respect to an order adjudicating a counterclaim. See Fed. R. Civ. P. 54(b) (identifying "counterclaim"). See also Cold Metal Process Co. v. United Eng'g & Foundry Co., 351 U.S. 445, 452 (1956) (holding that Rule 54(b) treats counterclaims, whether compulsory or permissive, like other multiple claims and affirming Rule 54(b) certification with unadjudicated counterclaim still pending). Each of these actions involves multiple parties (the Government, at least two defendants and the Members) and multiple claims (the three counts in the Government's complaints and the Counterclaim). Moreover, intervention will automatically convert a case to a "multiparty" action for purposes of Rule 54(b). See Johnson v. Levy Org. Dev. Co., Inc., 789 F.2d 601, 606 (7th Cir. 1986) (finding that permission to intervene to interplead funds "converted this case into a multiparty action"). Accordingly, these actions involve multiple claims and parties and satisfy the threshold requirement of Rule 54(b).

2. The February Order is a "final judgment" for purposes of Rule 54(b) certification.

The Court's dismissal of the Counterclaim on the ground that it failed to state a claim upon which relief can be granted is a "final" judgment for purposes of Rule 54(b). Under the Supreme Court's analysis in Curtiss-Wright, a court making a determination under Rule 54(b) must determine if it is dealing with a "final judgment." 446 U.S. at 7. The Court explained: "It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is

'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" Id. (citations omitted). "Rule 54 requires a certifiable judgment finally to resolve at least one claim in a multiple claim action or finally to adjudicate the position of at least one party to a multiple-party action." Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1524 (9th Cir. 1987).

The February Order finally resolved the Members' claims adversely to the Members. The Court's decision pursuant to Rule 12(b)(6) to dismiss the Counterclaim in its entirety without leave to amend is a final adjudication of their claims. A dismissal for failure to state a claim under Rule 12(b)(6) bars further litigation on the particular claim pleaded. See Fed. R. Civ. P. 41(b) (dismissal, except for lack of jurisdiction, is adjudication on the merits). See also, Cannon v. Loyola Univ. of Chicago, 784 F.2d 777, 780 (7th Cir. 1986) (Rule 12(b)(6) dismissal bars further litigation on claim). In addition, where the claims of an intervenor have been adjudicated, Rule 54(b) certification is particularly appropriate. If the court finally adjudicates all of an intervenor's claims, judgment may be entered under Rule 54(b), despite the pendency of the main claims for later adjudication. See 10 *Moore's Federal Practice*, § 54.29[5] (Matthew Bender 3d ed. 1999).

3. There is no just reason for delay.

The equities of these actions and the requirements of efficient judicial administration demonstrate there is no just reason for delay in certifying the February Order as a final judgment. In deciding there is no just reason for delay, courts should be pragmatic, and they should focus on severability and efficient judicial administration. Continental Airlines, 819 F.2d at 1524.

One paramount factor that the Court should take into account is the equities involved. Curtiss-Wright, 446 U.S. at 8; Continental Airlines, 819 F.2d at 1524. Fundamentally, it is not fair to prevent the Members, who suffer from serious and chronic pain, from pursuing their constitutional claim to establish their right to be free from governmental intrusion in obtaining the only medication, as recommended by

their personal physicians, which relieves their pain. Rule 54(b) certification would permit the Members to appeal their constitutional claims now rather than requiring them to wait until final disposition of the Government's statutory claims (which at this time are not even set for trial).

Another factor is the relationship of the adjudicated claims to the unadjudicated claims. Cold Metal Process, 351 U.S. at 452. In Cold Metal Process, the Supreme Court held that a district court may certify a final order on claims which arise out of the same transaction and occurrence as an unadjudicated, pending counterclaim. Id. at 908-09. Likewise, in Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 797 (9th Cir. 1991), the Court held that Rule 54(b) claims do not have to be separate from and independent from the remaining claims. The Counterclaim raises separate legal issues from the Government's Complaints, although the parties' claims may arise out of related transactions and occurrences. Nevertheless, the Counterclaim asserts that the Members have a fundamental right to use cannabis. This claim is legally distinct and separate from the Government's claims that the defendant cooperatives allegedly violated the Controlled Substances Act.

There is no sound reason to force the Members to wait to resolve on appeal the viability of their claims, particularly since other appeals are already pending and otherwise there is little activity being conducted in the case in the district court. These actions do not have a trial date--they do not even have a status conference date presently scheduled--and for health and fairness reasons the Members should not be made to wait to pursue their claims until final disposition of the entire case. While matters in the trial court are practically stayed, the Members need to pursue the legal viability of their claims so that if the Court of Appeals revives them, they may be tried with the unadjudicated claims pending in these actions. Without Rule 54(b) certification, the Members are prevented from litigating their constitutional claims and seeking relief pursuant to the Counterclaim.

It will also benefit the judicial administration of these actions if the Members are permitted now to appeal the dismissal of the Counterclaim. In Curtiss-Wright, the district court properly certified a partial summary judgment after considering, among other things, that "the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals." Curtiss-Wright, 446 U.S. at 8. No other party to these actions will appeal the same issues as those raised by the Counterclaim because the other parties are not asserting similar claims and are not seeking similar relief.

Moreover, Rule 54(b) certification is proper if it will aid "expeditious decision" of the case by confining or streamlining issues for trial. In Texaco, the Court of Appeals for the Ninth Circuit affirmed the district court's Rule 54(b) certification because "the legal issues now appealed will streamline the ensuing litigation." Texaco, 939 F.2d at 798. Rule 54(b) certification is proper where it efficiently separates the legal from the factual questions. Id. By dismissing the Members' claims pursuant to Rule 12(b)(6), the Court separated the legal from the factual issues raised by the Counterclaim. It is on such an order that Rule 54(b) certification is proper.

For each of these reasons, there is no just reason that the Members should not be permitted at this time to pursue their constitutional claims on appeal.

B. The Court should retroactively certify the February Order.

The Members respectfully request that the Court direct entry of judgment of the February Order and make the order retroactive to apply to the Members' April 26, 1999 notices of appeal. A Rule 54(b) certification is sufficient to validate a prematurely filed notice of appeal if neither party is prejudiced. Aguirre v. S.S. Sohio Intrepid, 801 F.2d 1185, 1189 (9th Cir. 1986) (district court directed entry of judgment retroactive to notice of appeal filed four months earlier). The Members filed their notices of appeal pursuant to section 1292(a)(1) of Title 28 of the United States Code. Recently, the Court of Appeals issued an order consolidating the appeals and

requesting that the Members voluntarily dismiss the appeals or show cause why they should not be dismissed for lack of jurisdiction.

In response, the Members will argue that jurisdiction exists under section 1292(a)(1), but the Members would like to offer the Court of Appeals an alternative basis for exercising jurisdiction and accordingly hereby seek retroactive application of the Court's Rule 54(b) certification, should the Court decide to grant the Members' request for certification. Because the issues raised by the Members' April 26, 1999 notices of appeal are identical to those raised by the February Order, the Government will not be prejudiced if the Court makes its order retroactive.

IV. CONCLUSION.

For the foregoing reasons, the Court should enter an order expressly determining that there is no just reason for delay and expressly and retroactively direct entry of judgment as to its February 25, 1999 order dismissing the Counterclaim.

Dated: June 10, 1999.

Respectfully submitted,

PILLSBURY MADISON & SUTRO LLP
THOMAS V. LORAN III
MARGARET S. SCHROEDER
235 Montgomery Street
Post Office Box 7880
San Francisco, CA 94120-7880

By Margaret S. Schroeder

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

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

PROOF OF SERVICE BY MAIL

I, Doreen M. Griffin, hereby declare:

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

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

3. On June 11, 1999, I served a true copy of the attached document titled exactly MOTION FOR ENTRY OF PARTIAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(B) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF by placing it in a sealed envelope and depositing it in the United States mail, first class postage fully prepaid, addressed to the following:

[See Attached Service List]

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

Executed this 11th day of June, 1999, at San Francisco, California.

Doreen M. Griffin

Service List

William G. Panzer, Esq.
370 Grand Avenue, Suite 3
Oakland, California 94610
(510) 834-1892 Telephone
(510) 834-0418 Facsimile

Attorneys for Defendants
Marin Alliance for Medical Marijuana, et al.

Susan B. Jordan, Esq.
515 South School Street
Ukiah, California 95482
(707) 462-2151 Telephone
(707) 462-2194 Facsimile

David Nelson, Esq.
Nelson and Riemenschneider
106 North School Street
Ukiah, California 95482
(707) 462-1351 Telephone
(707) 468-8098 Facsimile

Attorneys for Defendants
Ukiah Cannabis Buyer's Club, et al.

J. Tony Serra, Esq.
Brendan R. Cummings, Esq.
Pier 5 North
San Francisco, California 94111
(415) 986-5591 Telephone
(415) 421-1331 Facsimile

Attorneys for Defendants
Cannabis Cultivator's Club, et al.

Helen Shapiro, Esq.
Carl Shapiro, Esq.
Shapiro & Shapiro
404 San Anselmo Avenue
San Anselmo, California 94960
(415) 453-7611 Telephone
(415) 453-2829 Facsimile

Attorneys for Defendants
Flower Therapy Medical Marijuana Club, et al.

Gerald F. Uelmen, Esq.
Santa Clara University
School of Law
Santa Clara, California 95053
(408) 554-5729 Telephone
(408) 253-0885 Facsimile

Robert A. Raich, Esq.
1970 Broadway, Suite 1200
Oakland, California 94612
(510) 338-0700 Telephone
(510) 338-0600 Facsimile

James J. Brosnahan, Esq.
Annette P. Carnegie, Esq.
Christina A. Kirk-Kazhe, Esq.
Morrison & Foerster LLP
425 Market Street
San Francisco, California 94105-2482
(415) 268-7000 Telephone
(415) 268-7522 Facsimile

Attorneys for Defendants
Oakland Cannabis Buyers Cooperative, et al.

Mark T. Quinlivan, Esq.
U.S. Department of Justice
Civil Division, Room 1048
901 E. Street, N.W.
Washington, D.C. 20530
(202) 514-3346 Telephone
(202) 616-8470 Fax

Attorneys for Plaintiff-Appellee
United States of America