ROBERT D. McCALLUM, JR.
Assistant Attorney General
DAVID W. SHAPIRO
United States Attorney
ARTHUR R. GOLDBERG (D.C. BN 180661)
MARK T. QUINLIVAN (D.C. BN 442782)
U.S. Department of Justice
Civil Division; Room 1048
901 E Street, N.W.
Washington, D.C. 20530
Telephone: (202) 514-3346

Attorneys for Plaintiff

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 RELATED C 98-0086 CRB C 98-0087 CRB C 98-0088 CRB C 98-0245 CRB PLAINTIFF'S RESPONSE TO THE OCBC DEFENDANTS' SEPARATE STATEMENT OF OBJECTIONS Date: April 19, 2002 Time: 10:00 a.m. Courtroom: 8 Hon. Charles R. Breyer

STATEMENT

Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones ("OCBC Defendants") have filed a Separate Statement of Objections in Support of Motion to Dissolve and in Opposition to the Government's Motion for Summary Judgment and Permanent Injunctive Relief ("Separate Statement"). In particular, the OCBC Defendants object to the declarations of Mark T. Quinlivan and Drug Enforcement Administration ("DEA") Special Agents Brian Nehring, Carolyn Porras, Deborah Muusers, Mark Nelson, and Bill Nyfeler submitted on January 9, 1998, in support of the

government's motion for a preliminary injunction. As we now demonstrate, none of these evidentiary objections should be sustained.

A. General Objections

1. Declaration of Mark T. Quinlivan: The OCBC Defendants challenge the declaration of Mark T. Quinlivan on the ground that it allegedly "is merely a compilation of brochures, newsletters, and web site excerpts that do not cite any specific instance of an alleged violation of the [Controlled Substances Act]." Separate Statement at 1. On the contrary, the OCBC's own world wide web site expressly stated that the OCBC "provides medical cannabis and other services to over 1,300 members." Declaration of Mark T. Quinlivan ("Quinlivan Dec.") ¶ 2 & Exhibit 1. Similarly, a pamphlet obtained from the OCBC states that the OCBC provides members with "[a] safe and secure location to purchase cannabis for medicinal use," as well as "[o]ur Cannabis Grow Center, offering the Medi-Grow System to cultivate your own medical marijuana * * *." Id. ¶ 3 & Exhibit 2. Finally, the OCBC newsletter includes a column by defendant Jeffrey Jones in which he states that the club sells "high-grade" marijuana for $50-$60 for one-eighth ounce, and that the club was "restocked" with "B-Mex" and "House Special" marijuana. Id. ¶ 4 & Exhibit 3.

The OCBC Defendants also allege that the declaration contains hearsay and is not based on that personal knowledge; and that the three exhibits to the declaration were not properly authenticated. Separate Statement at 1. On the contrary, all three of the exhibits attached to the Quinlivan Declaration constitute admissions of a party-opponent, see Fed. R. Evid. 801(d)(2), insofar as they either are materials that appeared on the OCBC's own world wide web site, see Declaration of Mark T. Quinlivan ("Quinlivan Dec.") ¶ 2 & Exhibit 1, or materials that were published by and obtained from the OCBC. Id. ¶¶ 3-4 & Exhibits 2-3.

The OCBC Defendants further assert that the three exhibits were not properly authenticated. However, each of the three exhibits are self-authenticating under Fed. R. Evid. 902(7) insofar as they contain the trade inscriptions of the OCBC. See Falise v. American Tobacco Co., No. 99-7392, 2000 WL 1804542, at *1 (E.D.N.Y. 2000) (Weinstein, J.) (foundation for documents may be established

through self-authentication by way of trade inscription or label under Fed. R. Evid. 902(7)). But see Whitted v. General Motors Corp., 58 F.3d 1200, 1204 (7th Cir.1995) (automobile owner's manual inadmissible because not self-authenticating under Fed. R. Evid. 902(7)).

2. Declarations of DEA Special Agents Nehring, Porras, Muusers, Nelson, and Nyfeler:

The OCBC Defendants contend that the declarations submitted by these DEA Special Agents are "generally deficient" because they "detail the results of the government's fraudulent conduct that resulted in the illegal entrapment of defendants," insofar as "[d]efendants were not predisposed to providing cannabis to persons without the proper authorization." Separate Statement at 2. The OCBC Defendants also contend that the "Defendants' mistake of law should lead the Court to exclude the evidence in these declarations," because "Defendants relied in good faith upon valid credentials that permitted a legal distribution of cannabis under California law at the time." Id.

Both of these defenses are foreclosed to the OCBC Defendants as a matter of law. "A defense of entrapment is established if the defendant was (1) induced to commit the crime by a government agent and (2) not otherwise predisposed to commit the crime." United States v. Kessee, 992 F.2d 1001, 1003 (9th Cir. 1993). The OCBC Defendants have not made (and cannot make) either showing. In particular, the OCBC Defendants' argument that they "were not predisposed to providing cannabis to persons without the proper authorization," Separate Statement at 2, is irrelevant to the issues before the Court because the Controlled Substances Act makes it unlawful to distribute marijuana whether or not a customer has a proper authorization. As this Court has previously ruled, "[a] state law which purports to legalize the distribution of marijuana for any purpose * * * directly conflicts with federal law, 21 U.S.C. § 841(a)(1). Section 841 prohibits the distribution of marijuana except for use in an approved research project. It does not exempt the distribution of marijuana to seriously ill patients for their personal medical use." United States v. Cannabis Cultivators Club, 5 F. Supp.2d 1086, 1100 (N.D. Cal. 1998). See also United States v. Rosenberg, 515 F.2d 190, 198 n.14 (9th Cir.) ("The question of whether *federal* criminal laws have been violated is a *federal* issue to be determined in *federal* courts." (emphasis supplied)), *cert. denied*, 423 U.S. 1031 (1975).

Nor may the OCBC Defendants avail themselves of the mistake of law defense. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system," Cheek v. United States, 498 U.S. 192, 199 (1991), and the Ninth Circuit has precluded invocation of this defense where it is premised on the assertion that the defendant did not know that his or her conduct violated federal law. See United States v. de Cruz, 82 F.3d 856, 867 (9th Cir. 1996).

The OCBC Defendants also complain that the declarations of the Special Agents are "vague, ambiguous, and conclusory" because "[t]he declarant fails to identify the individuals involved in the alleged distribution of cannabis." Separate Statement at 2. This contention is spurious. It does not matter *which* OCBC employee distributed marijuana to the DEA Special Agents, it only matters that one or more OCBC employee did, in fact, engage in the distribution of marijuana. Importantly, the OCBC Defendants have never specifically contested the uncontradicted evidence that distributed marijuana on six separate occasions to DEA Special Agents,[1] and their attempt to muddle this issue by complaining that they don't know which of their employees engaged in the specific transactions at issue is frivolous.

B. Specific Objections

1. Declaration of Mark T. Quinlivan: The OCBC Defendants object to each of the three exhibits attached to the Quinlivan Declaration on the ground that they are "vague, conclusory, and lack[] foundation, as this declarant has no personal knowledge of the purported contents." Separate Statement at 3. As set forth above, however, all three of the exhibits attached to the Quinlivan Declaration constitute admissions of a party-opponent, see Fed. R. Evid. 801(d)(2), insofar as they either are materials that appeared on the OCBC's own world wide web site, see Quinlivan Dec. ¶ 2

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[1] See Declaration of Special Agent Brian Nehring ("Nehring Dec.") ¶¶ 4-13 (purchase of marijuana for $40); Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶¶ 4-32 (three separate purchases of marijuana for $7, $15, and $45); Declaration of Special Agent Carolyn Porras ("Porras Dec.") ¶¶ 4-15 (purchase of marijuana for $25); Declaration of Special Agent Deborah Muusers ("Muusers Dec.") ¶¶ 4-13 (purchase of marijuana for $60); Declaration of Phyllis E. Quinn ("Quinn Dec.") ¶¶ 4-9 (chemist analysis confirming presence of marijuana from OCBC sales).

& Exhibit 1, or materials that were published by and obtained from the OCBC. Id. ¶¶ 3-4 & Exhibits 2-3.

The OCBC Defendants also contend that the exhibits have not been properly authenticated and that this alleged failure "precludes the government from excluding the statements contained in the web site [and other exhibits] from the hearsay rule as an admission by party opponent, as the declarant cannot be properly identified as an agent of the OCBC." Separate Statement at 3-4. Besides the obvious fact that the United States desires to include, not exclude, the statements contained in the three exhibits into evidence, the OCBC Defendants' contention fails to acknowledge that each of the three exhibits contain the trade inscriptions of the OCBC, and therefore are self-authenticating under Fed. R. Evid. 902(7). See Falise v. American Tobacco Co., No. 99-7392, 2000 WL 1804542, at *1 (E.D.N.Y. 2000) (Weinstein, J.) (foundation for documents may be established through self-authentication by way of trade inscription or label under Fed. R. Evid. 902(7)). But see Whitted v. General Motors Corp., 58 F.3d 1200, 1204 (7th Cir.1995) (automobile owner's manual inadmissible because not self-authenticating under Fed. R. Evid. 902(7)).

2. Declaration of Brian Nehring:

Paragraph 4: The OCBC Defendants object to paragraph 4 of Special Agent Nehring's declaration by making the specious claim that "this declarant has no personal knowledge of any purported distribution of cannabis." Separate Statement at 4. On the contrary, Special Agent Nehring's declaration expressly states that he "purchase[d] of one-eighth ounce of marijuana with the brand name of "Northern Lights" for $40 from the Oakland Cannabis Buyer's Cooperative ("OCBC"), a marijuana distribution business located at 1755 Broadway Avenue, in Oakland, California." Nehring Dec. ¶ 12. Special Agent Nehring's declaration further makes clear that the bag of suspected marijuana which he purchased from the OCBC on May 19, 1997, was subsequently marked as Exhibit 11, and transferred to the DEA Western Regional Laboratory for analysis, Nehring Dec. ¶ 14, and a chemical analysis of the green, leafy substance contained what had been marked as Exhibit 11 identified the presence of marijuana. Quinn Dec. ¶ 4.

DEA Western Regional Laboratory for analysis, Muusers Dec. ¶ 13, and a chemical analysis of the green, leafy substance contained in the bag which had been marked as Exhibit 41 identified the presence of marijuana. Quinn Dec. ¶ 8.

Lastly, the OCBC Defendants object to the portions of paragraph 4 on the ground that it is "impermissible evidence illegally obtained by fraud and entrapment that would be unfairly prejudicial to defendants." Separate Statement at 9. As set forth above, the defenses of fraud, entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

Paragraphs 6-7: The OCBC Defendants complain that these paragraphs are "vague, ambiguous, and lack[] foundation." Separate Statement at 10. On the contrary, it is the OCBC Defendants' objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do not identify any specific aspects of these paragraphs that are objectionable, and there are none.

Paragraph 9: The OCBC Defendants object to any statements by others as being inadmissible hearsay. Special Agent Muusers' testimony regarding the actions and statements of "Shawn" provide a sufficient basis upon which to conclude that he was an agent of the OCBC speaking within the scope of that agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171, 1173-74 & n. 1 (5th Cir.1989).

Paragraph 10: The OCBC Defendants object to this paragraph on the ground that Special Agent Muusers did not have "personal knowledge of the purported contents," and that this paragraph contains improper opinion testimony and impermissible legal conclusions regarding whether the alleged marijuana plants and "food items purported to contain marijuana" and the "smell of burning marijuana" were in fact marijuana, and whether the "drug paraphernalia" was in fact drug paraphernalia. The OCBC Defendants further object to this paragraph on the ground that it "constitutes improper opinion testimony and impermissible legal conclusions as to whether the 5-6 other people standing in line were in fact 'customers.'" Separate Statement at 10. This objection fails for the reasons set forth above. In view of Special Agent Muusers' extensive law enforcement background in controlled substances, particularly with relation to marijuana, her observations in

paragraph 10 pass muster under Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based on the perception of the witness," or under Fed. R. Evid.702, which allows expert opinions based on knowledge, skill, experience, and training.

Paragraph 11: The OCBC Defendants object to any statements by "UM1" on the ground that the United States has not "positively identif[ied] 'UM1' as an agent and/or employee of the OCBC," and that this alleged failure precludes the government from contending that his statements constitute admissions of a party-opponent under Fed. R. Evid. 801(d)(2). But, as set forth above, Special Agent Muusers' testimony regarding the actions and statements of "UM1" provide a sufficient basis upon which to conclude that he was an agent of the OCBC speaking within the scope of that agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171, 1173-74 & n. 1 (5th Cir.1989).

The OCBC Defendants further object to the reference to the "alleged purchase of marijuana using a card obtained using a phony physician statement" as being "impermissible evidence illegally obtained by fraud and entrapment that would be unfairly prejudicial to defendants." Separate Statement at 11. As set forth above, the defenses of fraud and entrapment based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

Paragraph 12-13, 15-16: The OCBC Defendants object to these paragraphs on the ground that the testimony constitutes improper opinion testimony and impermissible legal conclusions as to whether the "bag of suspected marijuana," "undercover purchase of marijuana," and "distribution of marijuana" was in fact marijuana. Separate Statement at 11. Special Agent Muusers' declaration makes clear, however, that the bag of suspected marijuana which she purchased from the OCBC on October 22, 1997, was subsequently marked as Exhibit 41, and transferred to the DEA Western Regional Laboratory for analysis, Muusers Dec. ¶ 13, and a chemical analysis of the green, leafy substance contained in the bag which had been marked as Exhibit 41 identified the presence of marijuana. Quinn Dec. ¶ 8.

The OCBC Defendants further object to paragraphs 13 and 15 on the ground that the "alleged purchase of marijuana using a card obtained using a phony physician statement" as being "impermissible evidence illegally obtained by fraud and entrapment that would be unfairly prejudicial to defendants." Separate Statement at 11. As set forth above, the defenses of fraud and entrapment based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

5. Declaration of Special Agent Bill Nyfeler: Paragraph 4: The OCBC Defendants object to paragraph 4 of Special Agent Nyfeler's declaration by making the specious claim that "this declarant has no personal knowledge of any purported distribution of cannabis." Separate Statement at 12. On the contrary, Special Agent Nyfeler's declaration expressly states that made three separate purchases of marijuana from the OCBC. Nyfeler Dec. ¶¶ 10, 21, 30. Special Agent Nyfeler's declaration also makes clear that the bags of suspected marijuana which he purchased from the OCBC on June 23, September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and 55, and transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23, 32, and a chemical analysis of the green, leafy substance contained in the bags which had been marked as Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9. The OCBC Defendants' objection is meritless.

The OCBC Defendants also object that Special Agent Porras' testimony constitutes "improper opinion testimony and impermissible legal conclusions as to whether OCBC was in fact 'a marijuana distribution business.'" Separate Statement at 7. This assertion also is without foundation.

Special Agent Nyfeler has been employed as a DEA Special Agent since October 1995. Nyfeler Dec. ¶ 1. In that capacity, he has received training from the DEA, Federal Bureau of Investigation, and California Narcotics Officers Association in specialized narcotic investigative matters including, but not limited to, the following: drug interdiction and detection, money laundering techniques and schemes, drug identification, and asset identification and forfeiture. Id. ¶ 2. Special Agent Nyfeler also has participated in numerous investigations specifically involving both the indoor and outdoor manufacture or cultivation of marijuana, including personally participating in the

eradication of over 500 indoor and 5,000 outdoor marijuana plants, and the arrest of more than 50 individuals for violations of federal and state law regarding controlled substances. Id. ¶ 3. Special Agent Nyfeler also has received specialized training regarding the techniques used to grow marijuana and, based on this experience and training, is familiar with the smell and appearance of growing and processed marijuana, as well as the smell of marijuana when it is burning. Id. Finally, Special Agent Porras has participated in the obtaining and/or execution of over 50 federal and California state warrants to search a particular place or premises for controlled substances and/or related paraphernalia, indicia, and other evidence of the commission of state and/or federal felony violations of law. Id.

In view of Special Agent Nyfeler's extensive law enforcement background in controlled substances, particularly with relation to marijuana, his observation that the OCBC was a "marijuana distribution business," id. ¶ 4, satisfies Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based on the perception of the witness," as well as Fed. R. Evid.702, which allows expert opinions based on knowledge, skill, experience, and training.

The OCBC Defendants further object to paragraph 4 on the ground that it constitutes improper opinion testimony and impermissible legal conclusions as to whether the "Mexican-grown marijuana" was in fact marijuana. Separate Statement at 12. Special Agent Nyfeler's declaration makes clear, however, that the bags of suspected marijuana which he purchased from the OCBC on June 23, September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and 55, and transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23, 32, and a chemical analysis of the green, leafy substance contained in the bags which had been marked as Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9.

Lastly, the OCBC Defendants object to the portions of paragraph 4 on the ground that it is "impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to defendants." Separate Statement at 12. As set forth above, the defenses of fraud, entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

Paragraph 6: The OCBC Defendants object to this paragraph on the ground that any conduct by the security guard is inadmissible on the ground that nonverbal conduct cannot be taken as an assertion that Special Agent Nyfeler could enter the OCBC without identification. Because Special Agent Nyfeler nowhere made such an assertion, this objection is meritless.

Paragraphs 7-8: The OCBC Defendants complain that these paragraphs are "vague, ambiguous, and lack[] foundation." Separate Statement at 13. On the contrary, it is the OCBC Defendants' objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do not identify any specific aspects of these paragraphs that are objectionable, and there are none.

The OCBC Defendants also object to paragraph 8 on the ground that Special Agent Nyfeler did not have "personal knowledge of the purported contents," and that this paragraph contains improper opinion testimony and impermissible legal conclusions regarding whether the alleged marijuana plants were in fact marijuana. The OCBC Defendants further object to this paragraph on the ground that it "constitutes improper opinion testimony and impermissible legal conclusions as to whether the 5-6 other people standing in line were in fact 'customers.'" Separate Statement at 13. This objection fails for the reasons set forth above. In view of Special Agent Nyfeler's extensive law enforcement background in controlled substances, particularly with relation to marijuana, his observations in paragraph 8 pass muster under Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based on the perception of the witness," or under Fed. R. Evid.702, which allows expert opinions based on knowledge, skill, experience, and training.

Paragraph 10: The OCBC Defendants object to this paragraph on the ground that "the testimony implies the purchase of marijuana using a card obtained in reliance upon a phony physician statement as impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to defendants." Separate Statement at 13. As set forth above, the defenses of fraud, entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

Paragraph 11-15: The OCBC Defendants object to these paragraphs on the ground that the testimony constitutes improper opinion testimony and impermissible legal conclusions as to whether the "bag of suspected marijuana," "undercover purchase of marijuana," and "distribution of marijuana" was in fact marijuana. Separate Statement at 13-14. Special Agent Nyfeler's declaration makes clear, however, that the bags of suspected marijuana which he purchased from the OCBC on June 23, September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and 55, and transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23, 32, and a chemical analysis of the green, leafy substance contained in the bags which had been marked as Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9.

The OCBC Defendants further object to paragraphs 13, 14, and 15 on the ground that the testimony constitutes " impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to defendants." Separate Statement at 13. As set forth above, the defenses of fraud, entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

Paragraphs 17-18: The OCBC Defendants complain that these paragraphs are "vague, ambiguous, and lack[] foundation." Separate Statement at 15. On the contrary, it is the OCBC Defendants' objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do not identify any specific aspects of these paragraphs that are objectionable, and there are none.

Paragraph 19-20: The OCBC Defendants object to this paragraph on the ground that Special Agent Nyfeler did not have "personal knowledge of the purported contents," and that this paragraph contains improper opinion testimony and impermissible legal conclusions regarding whether the alleged "10 growing marijuana plants" were in fact marijuana. Separate Statement at 15. The OCBC Defendants further object to this paragraph on the ground that "this declarant has no personal knowledge of any 'customers.'" This objection fails for the reasons set forth above. In view of Special Agent Nyfeler's extensive law enforcement background in controlled substances, particularly with relation to marijuana, his observations in paragraphs 19 and 20 pass muster under

Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based on the perception of the witness," or under Fed. R. Evid.702, which allows expert opinions based on knowledge, skill, experience, and training.

The OCBC Defendants object to any statements by "UM2" on the ground that the United States has not "positively identif[ied] 'UM2' as an agent and/or employee of the OCBC," and that this alleged failure precludes the government from contending that his statements constitute admissions of a party-opponent under Fed. R. Evid. 801(d)(2). But, as set forth above, Special Agent Nyfeler's' testimony regarding the actions and statements of "UM2" provide a sufficient basis upon which to conclude that he was an agent of the OCBC speaking within the scope of that agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171, 1173-74 & n. 1 (5th Cir.1989).

Paragraph 21: The OCBC Defendants object to this paragraph on the ground that "the testimony implies the purchase of marijuana using a card obtained in reliance upon a phony physician statement as impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to defendants." Separate Statement at 13. As set forth above, the defenses of fraud, entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

Paragraphs 22-25: The OCBC Defendants object to these paragraphs on the ground that the testimony constitutes improper opinion testimony and impermissible legal conclusions as to whether the "bag of suspected marijuana," "undercover purchase of marijuana," and "distribution of marijuana" was in fact marijuana. Separate Statement at 16-17. Special Agent Nyfeler's declaration makes clear, however, that the bags of suspected marijuana which he purchased from the OCBC on June 23, September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and 55, and transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23, 32, and a chemical analysis of the green, leafy substance contained in the bags which had been marked as Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9.

The OCBC Defendants further object to paragraphs 24 and 25 on the ground that the testimony constitutes " impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to defendants." Separate Statement at 17. As set forth above, the defenses of fraud, entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

Paragraphs 27-28: The OCBC Defendants complain that these paragraphs are "vague, ambiguous, and lack[] foundation." Separate Statement at 17. On the contrary, it is the OCBC Defendants' objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do not identify any specific aspects of these paragraphs that are objectionable, and there are none.

Paragraph 29: The OCBC Defendants object to this paragraph on the ground that Special Agent Nyfeler did not have "personal knowledge of the purported contents," and that this paragraph contains improper opinion testimony and impermissible legal conclusions regarding whether the alleged "Small Has Oil," "Large Has Oil," "Afghani Hash," or "live marijuana plants" were in fact marijuana. Separate Statement at 17. This objection fails for the reasons set forth above. In view of Special Agent Nyfeler's extensive law enforcement background in controlled substances, particularly with relation to marijuana, his observations in paragraphs 19 and 20 pass muster under Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based on the perception of the witness," or under Fed. R. Evid.702, which allows expert opinions based on knowledge, skill, experience, and training.

Paragraph 30: The OCBC Defendants object to any statements by "UM2" on the ground that the United States has not "positively identif[ied] 'UM1' as an agent and/or employee of the OCBC," and that this alleged failure precludes the government from contending that his statements constitute admissions of a party-opponent under Fed. R. Evid. 801(d)(2). But, as set forth above, Special Agent Nyfeler's' testimony regarding the actions and statements of "UM1" provide a sufficient basis upon which to conclude that he was an agent of the OCBC speaking within the scope

of that agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171, 1173-74 & n. 1 (5th Cir.1989).

Paragraphs 31-33: The OCBC Defendants object to these paragraphs on the ground that the testimony constitutes improper opinion testimony and impermissible legal conclusions as to whether the "bag of suspected marijuana," "undercover purchase of marijuana," and "distribution of marijuana" was in fact marijuana. Separate Statement at 18. Special Agent Nyfeler's declaration makes clear, however, that the bags of suspected marijuana which he purchased from the OCBC on June 23, September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and 55, and transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23, 32, and a chemical analysis of the green, leafy substance contained in the bags which had been marked as Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9.

The OCBC Defendants further object to paragraphs 32 and 33 on the ground that the testimony constitutes " impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to defendants." Separate Statement at 18. As set forth above, the defenses of fraud, entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General

DAVID W. SHAPIRO
United States Attorney

ARTHUR R. GOLDBERG
Assistant Branch Director

MARK T. QUINLIVAN
Senior Counsel
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: April 5, 2002

CERTIFICATE OF SERVICE BY OVERNIGHT DELIVERY

I, Mark T. Quinlivan, Senior Counsel, Civil Division, United States Department of Justice, whose address is 901 E Street, N.W., Room 1048, Washington, D.C. 20530, hereby certify that on the 5th day of April, 2002, I caused to be served a copy of the following documents:

- Plaintiff's Response to the OCBC Defendants' Separate Statement of Objections

by overnight deliver on the following counsel for the OCBC defendants:

Oakland Cannabis Buyer's Cooperative, *et al.*

Annette P. Carnegie
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

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

Gerald F. Uelmen
Santa Clara University
School of Law
Santa Clara, CA 95053

Randy Barnett
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215

and by first-class mail, postage prepaid, upon the following counsel:

Marin Alliance for Medical Marijuana, *et al.*

William G. Panzer
370 Grand Avenue, Suite 3
Oakland, CA 94610

Cannabis Cultivators Club, *et al.*

J. Tony Serra
Serra, Lichter, Daar, Bustamante, Michael & Wilson
506 Broadway
San Francisco, CA 94133

Ukiah Cannabis Buyer's Club, *et al.*

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

David Nelson
Nelson & Riemenschneider
106 North School Street
Ukiah, CA 95482

Santa Cruz Cannabis Buyers Club

Kate Wells
2600 Fresno Street
Santa Cruz, CA 95062

Intervenors

Thomas V. Loran, III
Margaret S. Schroeder
Pillsbury Winthrop LLP
50 Fremont Street, 5th Floor
San Francisco, CA 94105

Amicus Curiae State of California

Taylor S. Carey
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814

Richard E. Winnie
Alameda County Counsel
1221 Oak Street, #450
Oakland, CA 94612

John A. Russo
City Attorney
Barbara J. Parker
Chief Assistant City Attorney
City of Oakland
One Frank H. Ogawa Plaza, 6th Floor
Oakland, CA 94612

Amicus Curiae American Civil Liberties Union

Graham A. Boyd
American Civil Liberties Union Foundation
85 Willow Street
New Haven, CT 06511

Ann Brick
American Civil Liberties Union
Foundation of Northern California, Inc.
1663 Mission Street
San Francisco, CA 94103

Jordan C. Budd
American Civil Liberties Union
Foundation of San Diego & Imperial Counties, Inc.
110 West C Street, Suite 901
San Diego, CA 92101

Peter Eliasberg
American Civil Liberties Union
Foundation of Southern California, Inc.
1616 Beverly Blvd.
Los Angeles, CA 90026

MARK T. QUINLIVAN