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 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0245 CRB

ORDER RE: MOTION TO DISMISS IN CASE NO. 98-0088 CRB

By this lawsuit plaintiff the United States of America seeks a permanent injunction enjoining defendants from distributing marijuana for use by seriously ill persons upon a physician's recommendation. By order dated May 19, 1998, the Court issued a preliminary injunction pursuant to 21 U.S.C. § 882(a) enjoining defendants from violating 21 U.S.C. § 841 of the Controlled Substances Act. Now before the Court is the motion to dismiss of defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones in Case No. 98-00088. Defendants contend that the complaint should be dismissed on substantive due process grounds and because they are entitled to immunity under 21 U.S.C. § 885(d). After carefully considering the papers submitted by the parties, including the memorandum of amicus curiae City of Oakland, and having had the benefit of oral argument on August 31, 1998, the motion to dismiss is DENIED.

A. Substantive Due Process.

The Court declines to dismiss the complaint on substantive due process grounds for the reasons stated in the Court's Memorandum and Order of May 14, 1998.

B. 21 U.S.C. § 885(d) Immunity.

The Court takes judicial notice of the fact that on July 28, 1998, the Oakland City Council adopted Ordinance No. 12076 which added Chapter 8.42 to the Oakland Municipal Code. Chapter 8.42 establishes a "Medical Cannabis Distribution Program" and provides that the City Manager shall designate one or more entities as a medical cannabis provider association which shall "enforce the provisions of this Chapter, including enforcing its purpose of insuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes." Chapter 8.42, section 3. The Ordinance deems the agents, employees and directors of a designated medical cannabis provider association to be officers of the City of Oakland. The Court also takes judicial notice of the fact that the City of Oakland designated defendant Oakland Cannabis Buyers' Cooperative as a Chapter 8.42 medical cannabis provider association.

The Oakland Cannabis Buyers' Cooperative and Jones contend that in light of the adoption of Chapter 8.42, and their subsequent status as City of Oakland officials, they are entitled to immunity from this lawsuit under 21 U.S.C. § 885(d). That section provides in relevant part as follows:

> no civil or criminal liability shall be imposed by virtue of this subchapter . . . upon any duly authorized officer of any State, territory, political subdivision thereof, . . ., who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

Defendants contend that they distribute marijuana to enforce Chapter 8.42 -- a law relating to controlled substances -- and therefore, under 21 U.S.C. § 885(d), they are entitled to immunity. Accordingly, they contend that the federal government's complaint against them must be dismissed. In other words, defendants argue that since they are violating the federal Controlled Substances Act while enforcing a municipal ordinance relating to controlled substances, they are entitled to section 885(d) immunity.

The Court is not persuaded that section 885(d) applies to defendants' conduct for two

reasons. First, to be entitled to section 885(d) immunity, defendants must be "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." Defendants correctly observe that "lawfully" does not mean that their conduct cannot violate the federal Controlled Substances Act since section 885(d), by its nature, provides immunity for violations of that Act. For example, a state agent who participates in a drug purchase as part of an undercover operation in order to enforce state controlled substances laws would be immune from civil and criminal liability under the federal Controlled Substances Act even though his conduct -- participation in the drug sale -- literally violates the federal law.

To be entitled to immunity, however, the law "relating to controlled substances" which the official is enforcing must itself be lawful under federal law, including the federal Controlled Substances Act. Ordinance 12076 states that defendants, as a designated medical cannabis provider association and its agents, are enforcing Chapter 8.42 by distributing medical marijuana. Chapter 8.42, however, to the extent it provides for the distribution of marijuana -- for any purpose -- violates the Controlled Substances Act. As the Court stated in its Memorandum and Order of May 14, 1998, "[a] state law which purports to legalize the distribution of marijuana for any purpose, even a laudable one, nonetheless directly conflicts with federal law, 21 U.S.C. § 841(a)." Memorandum and Order at 17. Since Chapter 8.42 provides for the distribution of marijuana, it and the Controlled Substances Act are in "positive conflict." See 21 U.S.C. § 903. The Court, therefore, denies defendants' motion to dismiss, not because defendants' violated the Controlled Substances Act while enforcing Chapter 8.42, but because Chapter 8.42 itself violates the Controlled Substances Act.[1]

Any other interpretation of section 885(d) would mean that a state or municipality could exempt itself from the Controlled Substances Act. For example, a municipality could enact a law which provides for municipal officials to distribute marijuana to persons over the

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[1]At oral argument, defendants' counsel suggested that defendants are enforcing Proposition 215, California Health & Safety Code § 11362.5. Proposition 215, however, does not require any enforcement; it merely exempts certain conduct by certain persons from the California drug laws.

age of 18 who request the drug. According to defendants' interpretation of section 885(d), the municipal officials who distribute the drug would be immune from civil and criminal liability (and even injunctive relief) because by distributing the drug they are enforcing a municipal ordinance relating to controlled substances. The Court concludes that the phrase "lawfully engaged in the enforcement of" cannot reasonably be interpreted to apply to such a situation. It is undisputed that Congress never intended such a result. The fact that defendants here are distributing marijuana for medical purposes is immaterial; if defendants' interpretation of section 882(b) is correct all conduct enforcing any law related to a controlled substance is entitled to immunity, regardless of the lawfulness, or even reasonableness, of the law which the officials are purporting to enforce. The Court declines to read section 882(d) so broadly, and the word "lawfully" so narrowly, as to permit such a loophole in the Controlled Substances Act.

Defendants' motion to dismiss fails for a second, independent reason. Section 882(b), by its plain terms, provides an official with immunity from civil and criminal liability. In other words, it protects an official from paying compensation or being penalized for conduct in the past which violated the federal Controlled Substances Act. It does not purport to immunize officials from equitable relief enjoining their future conduct. For example, prosecutors enjoy absolute immunity from being held civilly liable under 42 U.S.C. § 1983. See Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976). That immunity, however, does not extend to equitable relief. See Roe v. City and County of San Francisco, 109 F.3d 578, 586 (9th Cir. 1997); Fry v. Melaragno, 939 F.2d 832, 839 (9th Cir. 1991).

Section 885(d) similarly does not immunize officials from lawsuits arising from their violation of the Controlled Substances Act, nor does it immunize officials from being subjected to equitable relief enjoining future conduct. It merely immunizes them from civil or criminal liability. As this lawsuit seeks a permanent injunction and does not seek civil or criminal liability, section 885(d) would not require dismissal of this lawsuit even if that section were to apply. Moreover, the immunity provided by section 885(d) does not extend to relief arising from a finding of civil contempt since such relief is not a "liability," but

rather is designed to compel a defendants' compliance with an injunction. If that were not the law, the fact that a prosecutor is not entitled to immunity from equitable actions under 42 U.S.C. § 1983 would be meaningless since a court could never enforce its injunctions.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss in 98-0088 is DENIED.

IT IS SO ORDERED.

Dated: September 3, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States trict 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 CULTIVATOR'S CLUB; and DENIS PERON, Defendants. _____/	Nos.C 98-00085 CRB C 98-00086 CRB C 98-00087 CRB C 98-00088 CRB C 98-00245 CRB **ORDER**

AND RELATED ACTIONS

_____/

Now before the Court are the motion for joinder and/or intervention and renewed motion for joinder and/or intervention of Pebbles Trippet and proposed-intervenor's motion to modify preliminary injunction. Proposed intervenor's motions do not comply with the requirements of Civil Local Rules 7-1, 7-2, and 7-4 and therefore no oppositions have been filed. The Court will nonetheless consider the motions for joinder/intervention on the merits.

Proposed intervenor alleges that he is a migraine patient with a medical need for marijuana. He states that he "has no basis for claiming marijuana is the *only* effective drug" for his condition, but that he is unwilling to try the new migraine drugs on the market. He claims that the defendant clubs do not have standing to raise issues related to his situation

and that the intervenor club members will not adequately protect his interests because they alleged that marijuana is the only effective treatment for their medical conditions.

Federal Rule of Civil Procedure 24(a) provides for intervention-of-right

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Assuming, without deciding, that proposed intervenor has an interest in the property at issue in this lawsuit, the Court concludes that intervention is nonetheless unwarranted because the proposed-intervenor's interests are adequately represented by existing parties. The defendant clubs and their agents are ably represented and will adequately represent proposed-intervenor's interests with respect to the operation of the clubs. Second, the intervenor club members will adequately represent proposed-intervenor's interests with respect to any substantive due process argument. The Court concludes that permissive intervention, see Fed.R.Civ.P. 24(b), in inappropriate for the same reason. Accordingly, the motion to intervene and the renewed motion to intervene are DENIED and the motion to modify the preliminary injunction is DISMISSED.

Dated: September ____, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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 reached 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

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 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 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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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

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 13, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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

ORDER IN CASE NO. 98-00086 (Marin Alliance for Medical Marijuana)

Now before the Court is defendants' motion for reconsideration of the Court's October 13, 1998 Order denying defendants' motion to dismiss. In particular, defendants ask the Court to reconsider its decision denying defendants' "rational basis" challenge to the Controlled Substances Act's prohibition on the manufacture and distribution of marijuana on the ground that the Court does not have jurisdiction to hear such a challenge. After carefully considering the papers submitted by the parties, the motion for reconsideration is DENIED.

To the extent the Court has jurisdiction to hear defendants' rational basis challenge, the Court must nevertheless reject defendants' argument because the Ninth Circuit has previously determined that the Controlled Substances Act's restrictions on the manufacture and distribution of marijuana are rational. See United States v. Miroyan, 577 F.2d 489, 495

(9th Cir. 1978). Indeed, the Mirovan court stated that it "need not again engage in the task of passing judgment on Congress' legislative assessment of marijuana. As we recently declared, '[t]he constitutionality of the marijuana laws has been settled adversely to [the defendant] in this circuit.'" Id.

Since the Ninth Circuit, and indeed every Circuit that has addressed the issue, has held that the classification of marijuana as a Schedule I Controlled Substance is rational and therefore constitutional, defendants' proffered evidence on the medical benefits of marijuana is an argument that in light of the scientific evidence available today, the continuing classification of marijuana as a Schedule I drug is irrational; that is, that the government does not presently have a legitimate interest in prohibiting the medical use of marijuana.

No matter how defendants frame their argument, however, it is in essence an argument that this Court should reclassify marijuana because there is no substantial evidence to support its current classification. As the Court stated in its October 13, 1998 Order, when Congress enacted the Controlled Substances Act it

> 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 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.

October 13 Order at 8-9. Thus, Congress gave the Attorney General the exclusive authority to determine the reclassification of marijuana in the first instance, with appeal to the Court of Appeals. As the Seventh Circuit has held, "[t]he Act authorizes the Attorney General to reclassify a drug if presented with new scientific evidence. . . . We agree that this mechanism, and not the judiciary, is the appropriate means by which defendant should challenge Congress' classification of marijuana as a Schedule I drug." United States v. Greene, 892 F.2d 453, 455 (7th Cir. 1989); see also United States v. Burton, 894 F.2d 188,

191 (6th Cir. 1990) ("it has been repeatedly determined, and correctly so, that reclassification is clearly a task for the legislature and the attorney general and not a judicial one"); United States v. Wables, 731 F.2d 440, 450 ("we hold that the proper statutory classification of marijuana is an issue that is reserved to the judgment of Congress and to the discretion of the Attorney General"). Accordingly, defendants' motion for reconsideration is DENIED.

IT IS SO ORDERED.

Dated: December 3, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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.

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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 8, 2002

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California