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.

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For the Northern District of California

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 3, 2002

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

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UNITED STATES OF AMERICA,

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v.

CANNABIS CULTIVATOR'S CLUB, et al.,

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AND RELATED ACTIONS

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Nos. C 98-00085 CRB
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MEMORANDUM AND ORDER

By Order dated May 3, 2000, the Court granted the government's motion for summary judgment on the ground that it is undisputed that defendants violated the Controlled Substances Act in 1997. Having determined that the government is entitled to judgment, the Court must now determine what remedy, if any, should be imposed. The government seeks a permanent injunction on the same terms as the preliminary injunction.

Standard For A Permanent Injunction

To be entitled to a permanent injunction a plaintiff must actually succeed on the merits. See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987). As the Court previously ruled, the government is entitled to summary judgment on its claim

that the clubs distributed marijuana in violation of the Controlled Substances Act.

The government must also show that it has no adequate legal remedy. See Continental Airlines v. Intra Brokers, Inc., 24 F.3d 1099, 1102 (9th Cir. 1994). Irreparable injury is one basis for showing the inadequacy of the legal remedy. See id. The Ninth Circuit has held that in statutory enforcement actions, such as this, irreparable injury is presumed. See Miller v. California Pacific Medical Center, 19 F.3d 449, 459 (9th Cir. 1994) (en banc); see also 5 F.Supp.2d at 1103 (same). If there is no threat of future wrongful conduct, however, a legal remedy will be adequate. To put it another way, the purpose of a permanent injunction is not punishment but rather deterrence of future behavior. See Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 564 (9th Cir. 1990) ("Permanent injunctive relief is warranted where . . . defendant's past and present misconduct indicates a strong likelihood of future violations.").

That the government has succeeded on the merits and is entitled to a presumption of an inadequate legal remedy does not require the Court to enter a permanent injunction. When the United States Supreme Court reviewed the preliminary injunction order in this case, it held that "[b]ecause the District Court's use of equitable power is not textually required by any 'clear and valid legislative command,' the court did not have to issue an injunction." 121 S.Ct. at 1721. The Court explained further that

> the mere fact that the District Court had discretion does not suggest that the District Court, when evaluating the motion to modify the injunction, could consider any and all factors that might relate to the public interest or the conveniences of the parties, including the medical needs of the Cooperative's patients. . . . A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. . . . Their choice . . . is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all. Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of "employing the extraordinary remedy of injunction." . . . To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.

Id. at 1721-22. The Supreme Court thus held that this Court cannot decline to enter an injunction pursuant to 21 U.S.C. section 882(d) because the Court believes seriously ill

individuals should be permitted to legally obtain marijuana from the clubs. The Court can decline to enter a permanent injunction only if enforcement by some other means, here, criminal prosecution, is more appropriate than the requested equitable relief.

DISCUSSION

The first issue is whether the government has demonstrated a threat of future unlawful conduct. If not, there is no need for the Court to exercise its extraordinary equitable powers for there is no conduct to deter. The government has met its burden. The clubs are still in existence and their very purpose is to distribute marijuana to seriously ill patients.

At the beginning of this case, one of the defendant clubs, Flower Therapy, voluntarily closed its doors and agreed to stop distributing marijuana. In light of its conduct and its representation to the Court, the club no longer posed a threat of future unlawful conduct. Accordingly, the Court dismissed the government's case against this club. In connection with the motion for a permanent injunction, the Court gave all of the remaining defendant clubs the opportunity to present evidence that they, too, do not pose a threat of future unlawful conduct, that is, distribution of marijuana. None of the clubs came forward with such evidence or even the suggestion that they would not distribute marijuana in the absence of an injunction. After considering all the evidence presented by the government, the Court finds that in the absence of an injunction, the defendants are likely to resume distributing marijuana in violation of the Controlled Substances Act.

The critical issue then is whether, in light of the available criminal enforcement remedy, the Court should decline to enter a permanent injunction. The government first argues that because it has chosen to proceed by means of civil enforcement, the Court does not have discretion to not impose the injunction; in other words, for the Court to decline to issue the injunction in favor of criminal prosecution would be tantamount to declining to enforce the statute at all since the government has not initiated criminal proceedings. If the government is correct, however, the government--not the district court--would ultimately exercise the discretion as to whether to issue the injunction; the government could limit the district court's discretion by simply not initiating criminal proceedings. The Supreme Court,

however, specifically rejected this outcome: "the District Court in this case had discretion." Oakland Cannabis Buyer's Cooperative, 531 U.S. at 496. "[W]ith respect to the Controlled Substances Act, criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. Congress' resolution of the policy issues can be (and usually is) upheld without an injunction." Id. at 497.

Thus, the fact that the government has not chosen to proceed criminally does not require the Court to enter a permanent injunction; rather, the Court should consider the advantages and disadvantages of "employing the extraordinary remedy of injunction," and "[t]o the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms," namely, criminal prosecution. Id. at 497-98.

Defendants contend that the Court should not proceed with civil enforcement because the procedural protections are not as great as in a criminal prosecution. For example, if the government charges a defendant with violating the injunction, the defendant does not have a right to a jury trial in the absence of a genuine dispute of fact, and the burden of proof is less exacting; the government need only prove the violation by a preponderance of the evidence rather than beyond a reasonable doubt.

The reduced procedural protections available in a civil proceeding might be a reason to decline civil enforcement in certain circumstances. For example, if there is a genuine dispute as to whether a defendant is in fact violating the law, a court might decide that criminal enforcement--with its more vigorous burden of proof--is a more appropriate method of enforcement. But those are not the circumstances here. Defendants do not deny that they distributed marijuana; there is no genuine factual dispute as to their violation of the law. Defendants simply disagree with the law.

Moreover, the reduced procedural protections available in a civil case reflect the far less serious consequences of a judgment in favor of a plaintiff in a civil proceeding. The result of the government prevailing here is that the clubs will be enjoined from distributing

marijuana. In a criminal case the clubs may still be shut down, but in addition, the individual defendants may lose their liberty. Given the amount of marijuana distributed by the clubs, the potential prison time faced by the individual defendants under the United States Sentencing Guidelines is significant.[1] Furthermore, the fact that defendants were distributing marijuana to seriously ill patients is not a defense. See Oakland Cannabis Buyer's Cooperative, 532 U.S. at 494-95. It is thus unsurprising that at oral argument counsel for defendants Marin Alliance for Medical Marijuana and Lynette Shaw stated that these defendants prefer that the Court and the government proceed with a civil injunction rather than criminal prosecution.

Defendants also argue that a civil injunction interferes with the rights of seriously ill patients. A criminal prosecution of the clubs and its leaders, however, would do the same. This Court cannot decline to issue the injunction in favor of non-enforcement of the statute. See Oakland Cannabis Buyer's Cooperative 531 U.S. at 498 ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. Their choice . . . is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all.").

CONCLUSION

In light of the serious penalties faced by the individual defendants in a criminal proceeding and the unavailability of a medical necessity defense, the Court concludes in its discretion that civil enforcement of the Controlled Substances Act in the circumstances of these related cases is appropriate. Accordingly, the Court will issue permanent injunctions in

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[1]For example, assuming an individual defendant does not have any prior criminal history, and is convicted of distributing, or aiding and abetting the distribution of, 10 kilograms of marijuana, he would fall within a sentencing range of 21 to 27 months. U.S.S.G. § 2D1.1(c). A conviction involving 80 kilograms of marijuana would result in a sentence of almost five years. Id. Moreover, under the Controlled Substances Act certain mandatory minimum sentences apply: a conviction involving 100 or more marijuana plants regardless of weight carries a five-year minimum sentence, 21 U.S.C. § 841(b)(1)(B)(vii), and a conviction involving 1000 such plants requires a 10-year minimum sentence. 21 U.S.C. § 841(b)(1)(A)(vii).

these related actions enjoining defendants from the distribution of marijuana in violation of the Controlled Substances Act.[2]

IT IS SO ORDERED.

Dated: June 6, 2002

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

[2]Plaintiff filed these related actions to enjoin the distribution of marijuana, not possession for personal use. The issue of personal use is not before the Court and the Court declines to reach that issue.

bae

United States District Court
for the
Northern District of California
June 12, 2002

* * CERTIFICATE OF SERVICE * *

Case Number:3:98-cv-00088

USA

vs

Oakland Cannabis

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on June 12, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

266

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

/

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

MEMORANDUM AND ORDER

AND RELATED ACTIONS

/

By Order dated May 3, 2000, the Court granted the government's motion for summary judgment on the ground that it is undisputed that defendants violated the Controlled Substances Act in 1997. Having determined that the government is entitled to judgment, the Court must now determine what remedy, if any, should be imposed. The government seeks a permanent injunction on the same terms as the preliminary injunction.

Standard For A Permanent Injunction

To be entitled to a permanent injunction a plaintiff must actually succeed on the merits. See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987). As the Court previously ruled, the government is entitled to summary judgment on its claim

that the clubs distributed marijuana in violation of the Controlled Substances Act.

The government must also show that it has no adequate legal remedy. See Continental Airlines v. Intra Brokers, Inc., 24 F.3d 1099, 1102 (9th Cir. 1994). Irreparable injury is one basis for showing the inadequacy of the legal remedy. See id. The Ninth Circuit has held that in statutory enforcement actions, such as this, irreparable injury is presumed. See Miller v. California Pacific Medical Center, 19 F.3d 449, 459 (9th Cir. 1994) (en banc); see also 5 F.Supp.2d at 1103 (same). If there is no threat of future wrongful conduct, however, a legal remedy will be adequate. To put it another way, the purpose of a permanent injunction is not punishment but rather deterrence of future behavior. See Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 564 (9th Cir. 1990) ("Permanent injunctive relief is warranted where . . . defendant's past and present misconduct indicates a strong likelihood of future violations.").

That the government has succeeded on the merits and is entitled to a presumption of an inadequate legal remedy does not require the Court to enter a permanent injunction. When the United States Supreme Court reviewed the preliminary injunction order in this case, it held that "[b]ecause the District Court's use of equitable power is not textually required by any 'clear and valid legislative command,' the court did not have to issue an injunction." 121 S.Ct. at 1721. The Court explained further that

> the mere fact that the District Court had discretion does not suggest that the District Court, when evaluating the motion to modify the injunction, could consider any and all factors that might relate to the public interest or the conveniences of the parties, including the medical needs of the Cooperative's patients. . . . A district court cannot, for example, override Congress' policy choice, articulated in a statute, as to what behavior should be prohibited. . . . Their choice . . . is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all. Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of "employing the extraordinary remedy of injunction." . . . To the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.

Id. at 1721-22. The Supreme Court thus held that this Court cannot decline to enter an injunction pursuant to 21 U.S.C. section 882(d) because the Court believes seriously ill

individuals should be permitted to legally obtain marijuana from the clubs. The Court can decline to enter a permanent injunction only if enforcement by some other means, here, criminal prosecution, is more appropriate than the requested equitable relief.

DISCUSSION

The first issue is whether the government has demonstrated a threat of future unlawful conduct. If not, there is no need for the Court to exercise its extraordinary equitable powers for there is no conduct to deter. The government has met its burden. The clubs are still in existence and their very purpose is to distribute marijuana to seriously ill patients.

At the beginning of this case, one of the defendant clubs, Flower Therapy, voluntarily closed its doors and agreed to stop distributing marijuana. In light of its conduct and its representation to the Court, the club no longer posed a threat of future unlawful conduct. Accordingly, the Court dismissed the government's case against this club. In connection with the motion for a permanent injunction, the Court gave all of the remaining defendant clubs the opportunity to present evidence that they, too, do not pose a threat of future unlawful conduct, that is, distribution of marijuana. None of the clubs came forward with such evidence or even the suggestion that they would not distribute marijuana in the absence of an injunction. After considering all the evidence presented by the government, the Court finds that in the absence of an injunction, the defendants are likely to resume distributing marijuana in violation of the Controlled Substances Act

The critical issue then is whether, in light of the available criminal enforcement remedy, the Court should decline to enter a permanent injunction. The government first argues that because it has chosen to proceed by means of civil enforcement, the Court does not have discretion to not impose the injunction; in other words, for the Court to decline to issue the injunction in favor of criminal prosecution would be tantamount to declining to enforce the statute at all since the government has not initiated criminal proceedings. If the government is correct, however, the government--not the district court--would ultimately exercise the discretion as to whether to issue the injunction; the government could limit the district court's discretion by simply not initiating criminal proceedings. The Supreme Court,

however, specifically rejected this outcome: "the District Court in this case had discretion." Oakland Cannabis Buyer's Cooperative, 531 U.S. at 496. "[W]ith respect to the Controlled Substances Act, criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. Congress' resolution of the policy issues can be (and usually is) upheld without an injunction." Id. at 497.

Thus, the fact that the government has not chosen to proceed criminally does not require the Court to enter a permanent injunction; rather, the Court should consider the advantages and disadvantages of "employing the extraordinary remedy of injunction," and "[t]o the extent the district court considers the public interest and the conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms," namely, criminal prosecution. Id. at 497-98.

Defendants contend that the Court should not proceed with civil enforcement because the procedural protections are not as great as in a criminal prosecution. For example, if the government charges a defendant with violating the injunction, the defendant does not have a right to a jury trial in the absence of a genuine dispute of fact, and the burden of proof is less exacting; the government need only prove the violation by a preponderance of the evidence rather than beyond a reasonable doubt.

The reduced procedural protections available in a civil proceeding might be a reason to decline civil enforcement in certain circumstances. For example, if there is a genuine dispute as to whether a defendant is in fact violating the law, a court might decide that criminal enforcement--with its more vigorous burden of proof--is a more appropriate method of enforcement. But those are not the circumstances here. Defendants do not deny that they distributed marijuana; there is no genuine factual dispute as to their violation of the law. Defendants simply disagree with the law.

Moreover, the reduced procedural protections available in a civil case reflect the far less serious consequences of a judgment in favor of a plaintiff in a civil proceeding. The result of the government prevailing here is that the clubs will be enjoined from distributing

marijuana. In a criminal case the clubs may still be shut down, but in addition, the individual defendants may lose their liberty. Given the amount of marijuana distributed by the clubs, the potential prison time faced by the individual defendants under the United States Sentencing Guidelines is significant.[1] Furthermore, the fact that defendants were distributing marijuana to seriously ill patients is not a defense. See Oakland Cannabis Buyer's Cooperative, 532 U.S. at 494-95. It is thus unsurprising that at oral argument counsel for defendants Marin Alliance for Medical Marijuana and Lynette Shaw stated that these defendants prefer that the Court and the government proceed with a civil injunction rather than criminal prosecution.

Defendants also argue that a civil injunction interferes with the rights of seriously ill patients. A criminal prosecution of the clubs and its leaders, however, would do the same. This Court cannot decline to issue the injunction in favor of non-enforcement of the statute. See Oakland Cannabis Buyer's Cooperative 531 U.S. at 498 ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute. Their choice . . . is simply whether a particular means of enforcing the statute should be chosen over another permissible means: their choice is not whether enforcement is preferable to no enforcement at all.")

CONCLUSION

In light of the serious penalties faced by the individual defendants in a criminal proceeding and the unavailability of a medical necessity defense, the Court concludes in its discretion that civil enforcement of the Controlled Substances Act in the circumstances of these related cases is appropriate. Accordingly, the Court will issue permanent injunctions in

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[1]For example, assuming an individual defendant does not have any prior criminal history, and is convicted of distributing, or aiding and abetting the distribution of, 10 kilograms of marijuana, he would fall within a sentencing range of 21 to 27 months. U.S.S.G. § 2D1.1(c). A conviction involving 80 kilograms of marijuana would result in a sentence of almost five years. Id. Moreover, under the Controlled Substances Act certain mandatory minimum sentences apply: a conviction involving 100 or more marijuana plants regardless of weight carries a five-year minimum sentence, 21 U.S.C. § 841(b)(1)(B)(vii), and a conviction involving 1000 such plants requires a 10-year minimum sentence. 21 U.S.C. § 841(b)(1)(A)(vii).

these related actions enjoining defendants from the distribution of marijuana in violation of the Controlled Substances Act.[2]

IT IS SO ORDERED.

Dated: June 19, 2002

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

[2] Plaintiff filed these related actions to enjoin the distribution of marijuana, not possession for personal use. The issue of personal use is not before the Court and the Court declines to reach that issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,

Defendants.
/

No. C 98-00088 CRB

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL JUDGMENT

Now before the Court is defendants' motion for partial separate judgment pursuant to Federal Rule of Civil Procedure 54(b). As the government does not oppose the motion, and the Court concludes that all the claims against defendants have been finally adjudicated, such claims are severable from the claims remaining in the litigation, and there is no just reason to delay entry of the judgment, defendants' motion is GRANTED..

IT IS SO ORDERED.

Dated: July 29, 2002

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

bae

United States District Court
for the
Northern District of California
July 29, 2002

* * CERTIFICATE OF SERVICE * *

Case Number:3:98-cv-00088

USA

vs

Oakland Cannabis

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on July 29, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARIN ALLIANCE FOR MEDICAL MARIJUANA, and LYNETTE SHAW,

Defendants.
_____/

AND RELATED CASES
_____/

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

ORDER

Before issuing an opinion on the merits of defendants' consolidated appeals, the Ninth Circuit remanded these related actions to this Court for reconsideration after the United States Supreme Court issues its decision in Gonzales v. Raich, cert. granted, 524 U.S. 936 (2004). United States v. Marin Alliance for Medical Marijuana, 372 F.3d 1047 (9th Cir. 2004). Raich is a Commerce Cause challenge to federal regulation of intrastate noncommercial cultivation and use of marijuana. In light of the Supreme Court's opinion issued today, Gonzales v. Raich, __ S.Ct.__, 2005 WL 1321358 (June 6, 2005), the Court declines to reconsider its earlier rulings.

IT IS SO ORDERED.

Dated: June 6, 2005

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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