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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATORS CLUB, et al.,

Defendants.
_____/

AND RELATED ACTIONS
_____/

No. C 98-0085 CRB
C 98-0086 CRB
C 98-0087 CRB
C 98-0088 CRB
C 98-0245 CRB

ORDER TO SHOW CAUSE IN CASE NO. 98-0088 CRB

This matter comes before the Court on plaintiff's Motion to Hold Non-Compliant Defendants in Civil Contempt. The United States seeks an order to show cause why the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones, defendants in Case No. C 98-0088 CRB, should not be held in contempt of this Court's May 19, 1998 Preliminary Injunction Order, which provides, in pertinent part:

> 1. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined, pending further order of the Court, from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1); and
>
> 2. Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby preliminarily enjoined from using the premises of 1755 Broadway, Oakland, California for the purposes of engaging in the manufacture and distribution of marijuana; and

3. Defendant Jeffrey Jones is hereby preliminarily enjoined from conspiring to violate the Controlled Substances Act, 21 U.S.C. § 841(a)(1) with respect to the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana

The United States has submitted the following evidence in support of its motion for an order to show cause:[1]

(1) On May 20, 1998, one day after the Court entered the Preliminary Injunction Orders, defendants OCBC and Jeffrey Jones issued a press release entitled "Oakland Cooperative to Openly Dispense Medical Marijuana for First Time Since Preliminary Injunction - U.S. Attorney to be Notified: HIV, Multiple Sclerosis and Other Seriously Ill Patients to Receive Pot at 11:00 a.m., Thursday May 21, Oakland Buyers Cannabis Cooperative, 1755 Broadway, Oakland." See Exhibit 1 to July 6, 1998 Declaration of Mark T. Quinlivan ("7/6 Quinlivan Dec."), which stated, in pertinent part:

> **Oakland, CA** — Just hours after Federal Judge Charles Breyer signs into law a preliminary injunction against six California medical marijuana clubs, Jeff Jones, Director of the Oakland Cannabis Buyers Cooperative announced that he will openly dispense marijuana to four seriously ill patients at 11:00 a.m. on Thursday May 21. U.S. Attorney Michael Yamaguchi will be notified of the cooperative's actions, Jones said.
>
> "For these four patients, and others like them, medical marijuana is a medical necessity," said Jones. "To deny them access would be unjust and inhumane."
>
> Violation of the preliminary injunction could initiate Contempt of Court proceedings against the Oakland Cooperative. A Contempt case, during which a medical necessity argument would likely be made by attorneys for the cooperative, would be heard by a jury who would have to reach a unanimous verdict.
>
> "I'd trust a jury of Californians before federal bureaucrats," said Jones. "All the evidence shows that marijuana has medical qualities and should be re-scheduled. Voters in two states have already endorsed medical marijuana, and others look set to follow. Yet the federal government refuses to consider the facts and instead is hell-bent upon enforcing outdated marijuana laws."

Id. Defendant Jeffrey Jones faxed the press release to United States Attorney Michael Yamaguchi. Id.

(2) On May 21, 1998, Special Agent Peter Ott, in an undercover capacity, entered the OCBC and observed approximately fourteen sales or distributions of what appeared to be

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[1] The evidence provided by the United States was contained in sworn declarations submitted to the Court and to the defendants.

marijuana by persons associated with the OCBC, including Jeffrey Jones, several of which were made in front of news cameras. Declaration of Special Agent Peter Ott ("Ott Dec.") ¶¶ 3-4.

(3) The World Wide Web site of the OCBC, which indicates that it was updated on June 1 and August 12, 1998, states: "*Currently*, we are providing medical cannabis and other services to over 1,300 members." Exhibit 3 to 7/6 Quinlivan Dec. (emphasis supplied); Exhibit 1 to August 24, 1998 Declaration of Mark T. Quinlivan ("8/24 Quinlivan Dec."). The Web site also includes links to this Court's May 19, 1998, Preliminary Injunction Order and May 13, 1998, Memorandum and Order, demonstrating that defendants OCBC and Jones were and are aware of the Preliminary Injunction Order. See Exhibit 3 to 7/6 Quinlivan Dec.

(4) On May 27, 1998, Special Agent Bill Nyfeler placed a recorded telephone call to the OCBC, at (510) 832-5346, to confirm that the club was continuing to distribute marijuana. Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶ 5. The individual who answered the phone informed Special Agent Nyfeler that the OCBC was still open for business, and told Special Agent Nyfeler the club's business hours. Id.

(5) On June 16, 1998, Special Agent Dean Arnold placed a recorded telephone call to the OCBC, at (510) 843-5346, to again confirm that the club was still distributing marijuana. Declaration of Special Agent Dean Arnold ("Arnold Dec.") ¶ 3. An unidentified male answered the telephone and informed Special Agent Arnold that the OCBC was open for business and was accepting new members. The unidentified male further informed Special Agent Arnold about the requirements of becoming an OCBC member, the hours that the club was open (11 a.m. - 1 p.m., and 5 p.m. - 7 p.m.), and the location of the OCBC, at 1755 Broadway Avenue, in Oakland. Id.

(6) In an article entitled "*Marijuana Clubs Defy Judge's Order* by Karyn Hunt, which appeared on May 22, 1998, in *AP Online*, defendant Jeffrey Jones is quoted as stating, "We are not closing down. We feel what we are doing is legal and a medical necessity and we're going to take it to a jury to prove that." Exhibit 2 to 7/6 Quinlivan Dec.

In reviewing this evidence, the Court notes that admissions of a party-opponent are admissible under Rule 801(d)(2) of the Federal Rules of Evidence "'for whatever inferences the trial judge [can] reasonably draw.'" United States v. Warren, 25 F.3d 890, 895 (9th Cir. 1994) (quoting United States v. Matlock, 415 U.S. 164, 172 (1974)). See also United States v. Singleterry, 29 F.3d 733, 736 (1st Cir. 1994) ("[A] defendant's own statements are never considered to be hearsay when offered by the government; they are treated as admissions, competent as evidence of guilt without any special guarantee of their trustworthiness.").

Accordingly, upon consideration of the moving papers, the opposition and reply thereto, argument in open court, and the entire record herein, this Court concludes that, based on the totality of circumstances, the United States has made a prima facie case that defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones have distributed marijuana, and have used the premises of 1755 Broadway Avenue, Oakland, California, for the purpose of distributing marijuana, both in violation of the Court's May 19, 1998 Preliminary Injunction Order.

Accordingly, defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones are hereby

ORDERED to 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 1755 Broadway Avenue, Oakland, California, for the purpose of distributing marijuana, on May 21, 1998; and it is hereby further

ORDERED that defendants shall have until 12:00 p.m. (Pacific Daylight Time), September 14, 1998, in which to file their response to this Show Cause Order. Defendants' response shall include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer in response to this Show Cause Order; and it is hereby further

ORDERED that the United States shall have until 12:00 p.m. (Pacific Daylight Time), September 21, 1998, in which to file a motion in limine regarding any defenses or evidence which the defendants might raise in their response; and it is hereby further

ORDERED that the defendants shall have until 12:00 p.m. (Pacific Daylight Time), September 25, 1998, in which to file an opposition to the United States' motion in limine; and it is hereby further

ORDERED that the parties shall appear before the Court on September 28, 1998, at 2:30 p.m., for a hearing on the government's motion in limine; and it is hereby further

ORDERED that service by all parties shall be accomplished by overnight delivery and facsimile transmission; and it is hereby further

ORDERED that plaintiff shall produce to defendants by September 9, 1998, copies of all documentary evidence plaintiff intends to introduce into evidence during the contempt proceeding, as well as any reports relating to the alleged violations of the Court's May 19, 1998 injunction. Plaintiff shall produce only those reports prepared by percipient witnesses to the alleged violations.

IT IS SO ORDERED.

Dated: September 3, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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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

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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 8, 1998

CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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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

idea of medical marijuana being a necessity for these people."

The Court's show cause order specifically advised defendants that their response to the order should include sworn declarations outlining the factual basis for any affirmative defenses which they wish to offer.

In response to the show cause order, defendants argue (1) that plaintiff has not made a prima facie showing that defendants violated the Court's injunction, (2) that in light of the evidence submitted by defendants, plaintiff has not proved by clear and convincing evidence that defendants violated the Court's injunction, and (3) in the alternative, that defendants have submitted evidence sufficient to support their affirmative defenses of "joint user," "necessity," and "substantive due process." Defendants submit the declarations of Lynette Shaw and Christopher P. M. Conrad, as well as a copy of Agent Nyfeler's report of his May 27, 1998 surveillance of the Marin Alliance. They also incorporate declarations previously submitted in this matter as well as the evidence submitted by co-defendant Oakland Cannabis Buyers' Cooperative.

To demonstrate that there is a factual dispute as to defendants' alleged contempt, Ms. Shaw attests that although Agent Nyfeler claims in his report to have observed individuals coming in and out of the Marin Alliance located at 6 Old School Street Plaza, Suite 210, in Fairfax California, the Marin Alliance is located at 6 School Street Plaza, Suite 215. She further declares that the building in which the Marin Alliance is located is two stories and houses at least eight different tenants, and that at least four other businesses are located on the fourth floor with the defendant Marin Alliance. She states that because smoking is banned in the building, persons on the second floor who desire to smoke cigarettes usually do so at an outdoor mezzanine located approximately twelve feet north of the Marin Alliance's front door, but that no cannabis smoking is permitted anywhere in the vicinity of the building.

Defendants also offered new evidence to support their affirmative defenses. Ms. Shaw testifies generally about the requirements for membership in the Marin Alliance. Mr. Conrad has authored a book entitled Hemp for Health. He declares that based upon his

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 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