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RICHARD W. WIEKING
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NORTHERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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United States District Court
For the Northern District of California

UNITED STATES OF AMERICA,

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

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

MEMORANDUM AND ORDER

Defendants.

AND RELATED ACTIONS

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.

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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

1 primarily of the affidavits of undercover agents who purchased marijuana from the
2 defendants in 1997. The evidence as to each of the clubs is summarized below.

3 1. CCC (98-0085)

4 The government has submitted the affidavits of Drug Enforcement Agency ("DEA")
5 agents who purchased marijuana from the CCC on May 21 1997, June 20, 1997, August 6,
6 1997, September 12, 1997, October 24, 1997, and November 5, 1997. For example, Special
7 Agent Brian Nehring declares that on May 21, 1997 he went to the Cannabis Cultivator's
8 Club located at 1444 Market Street in San Francisco, California. He brought with him a
9 falsified physician statement stating that he suffered from "Post Traumatic Stress Disorder."
10 At the Club he was asked to fill out a form, his physician statement was examined, and he
11 was issued a membership card. He was then directed to the third floor, which was a room
12 with two sales counters. One of the counters was staffed by 4-5 persons, and there were
13 several menu boards on the wall listing grades of marijuana with prices ranging from \$25 to
14 \$90 per one-eighth ounce. He paid \$25 for one-eighth ounce of what the Club identified as
15 Mexican-grown marijuana. Senior Forensic Chemist Phyllis E. Quinn has submitted an
16 affidavit attesting that the substances purchased by Nehring and the other undercover agents
17 are marijuana.

18 2. Ukiah Club (98-0087)

19 The government has submitted the affidavits of undercover agents who purchased
20 marijuana from the Ukiah Club on June 5, 1997, June 30, 1997, August 5, 1997, September
21 9, 1997, October 24, 1997, and November 14, 1997. For example, Special Agent Bill
22 Nyfeler attests that on June 30, 1997 he went to the Ukiah Club located at the Forks Theater,
23 40A Pallini Lane, Ukiah, California. He brought with him a Ukiah Club membership card
24 belonging to Special Agent Nehring, and a "Primary Caregiver" form. When he entered the
25 Club, an unidentified man examined the membership card and Nyfeler's identification and
26 noted that they did not match. Nyfeler explained he was a primary caregiver and provided
27 the man with the form. An adult female identified as "Cherri" then asked Nyfeler about his
28 membership status. Nyfeler again explained he was a primary caregiver. After Nyfeler

1 signed the membership card in Cherri's presence. Nyfeler went to the sales counter and paid
2 \$25 for what was identified as Mexican-grown marijuana. The government has again
3 submitted the affidavit of Senior Forensic Chemist, Phyllis E. Quinn who attests that the
4 substances purchased at the Club were marijuana.

5 3. OCBC (98-0088)

6 The government has submitted the affidavits of undercover agents who purchased
7 marijuana from the OCBC on May 19, 1997, June 23, 1997, August 8, 1997, and October 22,
8 1997. Senior Forensic Chemist, Phyllis E. Quinn examined the substances purchased at the
9 Club and confirms they were marijuana. The undercover agents also observed marijuana
10 plants being grown in the OCBC.

11 The government also relies on the evidence submitted in support of its motion for civil
12 contempt. After the Court issued its preliminary injunction, the OCBC held a press
13 conference at the Club during which it distributed marijuana in front of television cameras.
14 See October 13, 1998 Order of Contempt in 98-0088; see also Oakland Cannabis Buyers'
15 Cooperative, 532 U.S. at 487 ("The Cooperative did not appeal the injunction but instead
16 openly violated it by distributing marijuana to numerous persons.").

17 4. Marin Alliance (98-0086)

18 The government has submitted the affidavits of undercover agents who purchased
19 marijuana from the Marin Alliance on June 2, 1997, June 30, 1997, August 5, 1997,
20 September 9, 1997, and October 24, 1997. Senior Forensic Chemist Phyllis E. Quinn
21 examined the substances purchased at the Club and confirms they were marijuana.

22 For example, Special Agent Deborah Muusers attests that on October 24, 1997, she
23 went to the Marin Alliance located at 6 School Street Plaza, Suite 210, in Fairfax, California
24 and brought with her a phony physician statement which stated that Muuser suffered from
25 "menstrual cramps." A person who identified himself as Ken asked to see Muuser's
26 identification and physician's statement. He then asked her to fill out some forms. She
27 listed "menstrual cramps" as the reason she wished to purchase marijuana. After waiting
28 approximately 15 minutes, Muuser was advised that she had a provisional membership.

1 Muuser then entered a room where a person identified as "Rob" was seated. Rob
2 pointed to a menu board with various prices that ranged from \$40 for low grade and "Thai"
3 marijuana to \$54 for the various high grades. Muuser purchased one-eighth ounce of "82J"
4 for \$65.00.

5 5. Santa Cruz Club (98-0245)

6 The government has submitted the affidavits of undercover agents who purchased
7 marijuana from the Santa Cruz Club, located at 201 Maple Street, Santa Cruz, California, on
8 May 19, 1997, June 23, 1997, August 8, 1997, September 10, 1997, October 24, 1997, and
9 November 5, 1997. Senior Forensic Chemist, Phyllis E. Quinn examined the substances
10 purchased at the Club and confirms they were marijuana.

11 DISCUSSION

12 I. The Motion For Summary Judgment

13 A. Summary Judgment Standard

14 Summary judgment is proper when "the pleadings, depositions, answers to
15 interrogatories, and admissions on file, together with the affidavits, if any, show that there is
16 no genuine issue as to any material fact and that the moving party is entitled to a judgment as
17 a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is a sufficient
18 evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a
19 dispute is "material" only if it could affect the outcome of the suit under governing law. See
20 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A principal purpose of the
21 summary judgment procedure "is to isolate and dispose of factually unsupported claims."

22 Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "Where the record taken as a whole
23 could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine
24 issue for trial.'" Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

25 "In considering a motion for summary judgment, the court may not weigh the
26 evidence or make credibility determinations, and is required to draw all reasonable
27 inferences in a light most favorable to the non-moving party." Freeman v. Arpaio, 125 F.3d
28 732, 735 (9th Cir. 1997). An inference may be drawn in favor of the non-moving party,

1 however, only if the inference is “rational” or “reasonable” under the governing substantive
2 law. See Matsushita, 477 U.S. at 588.

3 B. Defendants’ Arguments

4 Defendants do not directly challenge the government’s evidence through submission
5 of their own evidence; that is, they do not offer any evidence suggesting that they did not
6 distribute marijuana on the dates alleged by the government. Instead, they make various
7 legal arguments, including a challenge to the sufficiency of the government’s evidence.

8 I. The sufficiency of the government’s evidence

9 Defendants first contend the government cannot base its motion for summary
10 judgment on evidence submitted in support of the motion for a preliminary injunction.

11 Defendants do not cite any case or rule which supports this proposition. This is unsurprising
12 as the federal rules do not require a party to re-submit evidence already filed in connection
13 with a motion for a preliminary injunction. See Air Line Pilots Ass’n., Inc. v. Alaska
14 Airlines, Inc., 898 F.2d 1393, 1397 n.4 (9th Cir. 1990) (“A district court might also convert a
15 decision on a preliminary injunction into a final disposition of the merits by granting
16 summary judgment on the basis of the factual record available at the preliminary injunction
17 stage.”).

18 They next argue the government agents’ affidavits are inadmissible and have
19 submitted a “Separate Statement Of Objections.” In sum, they claim the agents “entrapped”
20 defendants into distributing marijuana because defendants “were not predisposed to
21 providing cannabis to persons without the proper authorization.” Since the Supreme Court
22 has unanimously and definitively ruled that it is unlawful to distribute marijuana regardless
23 of the medical need of the recipient, see Oakland Cannabis Buyers’ Cooperative, 532 U.S. at
24 494-95, any “proper authorization” is irrelevant. With or without medical authorization the
25 distribution of marijuana is illegal under federal law. Defendants’ other objections are
26 equally without merit. The declarations were made on the basis of personal knowledge and
27 are admissible.

28 Finally, defendants move to continue the summary judgment motion pursuant to

1 Federal Rule of Civil Procedure Rule 56(f) to permit them to conduct discovery. They seek
2 to depose the agents as well as discover evidence of the government's "blocking" research
3 into the medical benefits of marijuana. "Federal Rule of Civil Procedure 56(f) provides that
4 if a party opposing summary judgment demonstrates a need for further discovery in order to
5 obtain facts essential to justify the party's opposition, the trial court may deny the motion for
6 summary judgment or continue the hearing to allow for such discovery. In making a Rule
7 56(f) motion, a party opposing summary judgment "must make clear what information is
8 sought and how it would preclude summary judgment." Margolis v. Ryan, 140 F.3d 850,
9 853 (9th Cir. 1998) (quoting Garrett v. City and County of San Francisco, 818 F.2d 1515,
10 1518 (9th Cir.1987)).

11 Defendants have not met their Rule 56(f) burden. If they did not sell marijuana, they
12 are in the possession of such evidence, namely, declarations stating that they did not sell any
13 marijuana to the undercover agents on the particular dates. Moreover, they have not offered
14 any explanation as to why the deposition of the agents would lead to evidence precluding
15 summary judgment; for example, they have not explained why the agents' personal
16 recollection of buying marijuana is suspect, especially given their failure to offer any
17 evidence suggesting that the agents did not in fact purchase marijuana from defendants. The
18 Court is also unpersuaded that discovery into the government's history with respect to
19 marijuana research will produce evidence legally relevant to the issues presented by the
20 government's motion for summary judgment.

21 **2. Defendants' legal defenses**

22 Most of the legal defenses raised by defendants were made in opposition to the
23 motion for preliminary injunction or in connection with other motions in these related
24 actions. The Court will address the merits of such defenses to the extent defendants offer
25 argument or evidence that was not previously rejected by the Court.

26 **a. 21 U.S.C. section 885(d) immunity**

27 Defendants repeat their contention that they are entitled to immunity under section
28 885(d), a statute intended to provide immunity for undercover law enforcement operations.

1 The Court previously rejected this argument, see Order Re: Motion To Dismiss In Case No.
2 98-0088 (Sep. 1998), and defendants offer nothing new.

3 b. The joint user and ultimate user defenses

4 Defendants renew their "joint user" defense under United States v. Swiderski, 548
5 F.2d 445 (2d Cir. 1977), and their related "ultimate user" defense. The Court previously
6 rejected these arguments, see Cannabis Cultivator's Club, 5 F.Supp.2d at 1100-01, and
7 defendants have not offered any new evidence or argument. Based on the evidence before
8 the Court, no reasonable trier of fact could find that defendants' sale of marijuana was legal
9 based on these defenses. The sale of marijuana to the undercover agents does not, under any
10 reasonable interpretation of the law, fall within the Swiderski exception to distribution.

11 c. Substantive due process

12 The Court previously rejected defendants' argument that the CSA as applied to their
13 distribution of medical marijuana violates their substantive due process rights. See Cannabis
14 Cultivator's Club, 5 F.Supp.2d at 1102-03. The Court concluded that defendants had not
15 established that they have a fundamental right to distribute medical marijuana. In their
16 opposition to summary judgment defendants still have not established such a fundamental
17 right; instead, they assert that the persons to whom they distribute marijuana have a
18 fundamental right to treat themselves with medical marijuana. Again, the Court previously
19 rejected this argument with respect to the intervener club members. See United States v.
20 Cannabis Cultivator's Club, 1999 WL 111893 (N.D. Cal. Feb. 25, 1999). Moreover,
21 defendants have not established that they have standing to assert that a judgment in the
22 government's favor against defendants would violate the fundamental rights of the non-
23 defendant club members, see 5 F.Supp.2d at 1103; indeed, in Oakland Cannabis Buyer's
24 Cooperative Justice Stevens noted that the clubs cannot assert a necessity defense based on
25 the club members' suffering because it is the club members, not the clubs themselves, that
26 face the choice of evils. Oakland Cannabis Buyer's Cooperative, 532 U.S. at 500 n.1
27 (Stevens, J., concurring).

28 Defendants' contention that the CSA as applied to them violates their Due Process

1 rights under a rational-basis review also does not defeat summary judgment. Under rational-
2 basis review, the Court must presume the statute is valid and uphold it “if it is rationally
3 related to a legitimate government interest.” Rodriguez v. Cook, 169 F.3d 1176, 1181 (9th
4 Cir. 1999).

5 The statute at issue here--the CSA--places drugs into five schedules, which impose
6 different restrictions on access to the drugs. Congress placed marijuana in Schedule I, the
7 most restrictive schedule. A Schedule I drug (1) has a high potential for abuse, (2) has
8 no currently accepted medical use in treatment in the United States, and (3) has a lack of
9 accepted safety for use of the drug . . . under medical supervision. See 21 U.S.C. §
10 812(b)(1). The CSA permits the Attorney General “to reschedule a drug if he finds that it
11 does not meet the criteria for the schedule to which it has been assigned.” Alliance for
12 Cannabis Therapeutics v. DEA, 15 F.3d 1131, 1133 (D.C. Cir. 1994) (citing 21 U.S.C.
13 § 811(a)). The Attorney General has delegated this authority to the Administrator of the
14 DEA, who in turn has adopted guidelines for determining if a drug has currently accepted
15 medical use in the United States. Members of the public may petition the Administrator to
16 reschedule a particular drug, including marijuana. See, e.g., Alliance for Cannabis
17 Therapeutics, 15 F.3d at 1133.

18 The Court must consider this entire statutory scheme in determining whether there is a
19 rational basis for the CSA’s prohibition on the manufacture and distribution of marijuana for
20 any purpose. In light of the available statutory procedure for reviewing the appropriateness
21 of the current classification of marijuana, the Court cannot conclude that the CSA’s
22 prohibition on the distribution of marijuana is not rationally related to a legitimate
23 government purpose, namely, to limit the distribution of drugs with a high potential for
24 abuse. Defendants’ challenge to the appropriateness of the classification of marijuana must
25 be made to the DEA Administrator, not this district court. To hold otherwise would allow
26 defendants and others to make an “end run” around the process Congress implemented to
27 ensure that drugs are properly classified.

28 C. Evidentiary hearing

1 Defendants complain that before they are permanently enjoined from distributing
2 marijuana they should be given an evidentiary hearing on the merits of their defenses. They
3 claim that “in the two cases where Section 882 was used to enjoin criminal activity under the
4 CSA, the defendants were at least given a hearing at which they could challenge the
5 government’s evidence and present their own. See United States v. Barbacoff, 416 F.Supp.
6 606, 607 (D.D.C. 1976); United States v. Williams, 416 F.Supp. 611 (D.D.C. 1976). They
7 assert that the evidentiary hearings in those cases were held before the court granted partial
8 summary judgment in favor of the government.

9 Defendants’ reliance on these cases is misplaced. Both cases involved whether the
10 defendant pharmacists were knowingly filling forged prescriptions for controlled substances.
11 Thus, presumably there was a factual dispute as to defendants’ knowledge, and a trial-like
12 hearing was necessary to resolve that dispute. Moreover, defendants misrepresent the
13 procedural posture of the cases. In both cases the hearing with cross-examination was held
14 *after* the court granted partial summary judgment; indeed, in one of the cases, the court
15 expressly states the purpose of the hearing was to determine the penalty, that is, how much
16 the defendant would pay. Williams, 416 F.Supp. 612. Defendants have not offered any
17 evidence from which a reasonable trier of fact could conclude defendants did not distribute
18 marijuana; accordingly, no evidentiary hearing or trial is needed to resolve disputed issues of
19 fact.

20 II. Commerce Clause

21 “Every law enacted by Congress must be based on one or more of its powers
22 enumerated in the Constitution.” United States v. Morrison, 529 U.S. 598, 607 (2000).
23 Defendants contend neither the Commerce Clause nor any other Constitutional provision
24 gives Congress the power to prohibit their intrastate manufacture and distribution of medical
25 marijuana. Although defendants do not raise this issue as a defense to the government’s
26 motion for summary judgment, the Court will address the argument in this Memorandum.

27 In connection with the preliminary injunction motion, the Court held that Congress
28 could regulate the wholly-intrastate manufacture and distribution of marijuana under the

1 Commerce Clause. See 5 F.Supp.2d at 1096-97. Since the Court's ruling, the Supreme
2 Court held that Congress did not have Commerce Clause authority to enact the civil remedy
3 provision of the Violence Against Women Act ("VAWA"). See Morrison, 529 U.S. at 617-
4 18. Defendants claim that under Morrison federal regulation of the purely intrastate
5 manufacture and distribution of medical marijuana cannot emanate from the Commerce
6 Clause.

7 Morrison does not support defendants' argument. The civil remedy provisions of the
8 VAWA did not involve the regulation of intrastate commerce; instead, Congress attempted to
9 justify the law on the basis of the interstate commerce effects of intrastate violence against
10 women. In reaching its decision, the Morrison Court observed that "in those cases where we
11 have sustained federal regulation of intrastate activity based upon the activity's substantial
12 effects on interstate commerce, the activity in question has been some sort of economic
13 endeavor." 529 U.S. at 611. It then concluded that the civil remedy provisions of VAWA
14 could not be enacted pursuant to the Commerce Clause because

15 [g]ender-motivated crimes of violence are not, in any sense of the phrase,
16 economic activity. While we need not adopt a categorical rule against
17 aggregating the effects of any noneconomic activity in order to decide these
18 cases, thus far in our Nation's history our cases have upheld Commerce Clause
19 regulation of intrastate activity only where that activity is economic in nature.

18 Id. at 613.

19 Unlike violence, the manufacture and distribution of marijuana is economic activity;
20 indeed, the Ninth Circuit has specifically held that "drug trafficking is a commercial activity
21 which substantially affects interstate commerce." United States v. Staples, 85 F.3d 461, 463
22 (9th Cir. 1996); see also United States v. Tisor, 96 F.3d 370, 375 (9th Cir. 1996) (noting that
23 the Ninth Circuit has adopted the Eighth Circuit's reasoning that intrastate drug activity
24 affects interstate commerce . . . ; that Congress may regulate both interstate and intrastate
25 drug trafficking under the Commerce Clause, . . . and that section 841(a)(1) is a valid
26 exercise of Congress's Commerce Clause power.") (internal quotations omitted). The Court
27 is bound by these rulings in the absence of a subsequent Supreme Court case casting the
28 Ninth Circuit's holdings in doubt. As Morrison did not involve intrastate commerce, it is

1 not such a case.

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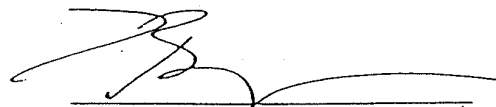
3 CONCLUSION

4 For the foregoing reasons, the Court concludes that based on the record before the
5 Court there is no genuine material dispute that defendants violated the CSA several times in
6 1997 by distributing marijuana and possessing marijuana with the intent to distribute.
7 Accordingly, the government's motion for summary judgment is GRANTED.

8 Having granted the government's motion, the Court must decide what remedy, if any,
9 is appropriate. The government seeks entry of a permanent injunction on the same terms as
10 the preliminary injunction. At oral argument the Court advised the parties that should the
11 Court grant the government's motion for summary judgment, it would give defendants the
12 opportunity to file further submissions with the Court concerning the likelihood of future
13 violations of the Act, and in particular, whether there is a threat that defendants, or any of
14 them, will resume their distribution activity if the Court does not enter a permanent
15 injunction. All such submissions, if any, shall be filed by May 24, 2002 and the
16 government's response, if any, shall be filed by June 7, 2002. The Court will take the matter
17 of the remedy to be imposed under submission at that time.

18 IT IS SO ORDERED.

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20 Dated: May 3, 2002


CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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