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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. 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

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS

COUNTERCLAIM-IN-INTERVENTION

Date: No hearing scheduled
Time: N/A
Room: 8
The Hon. Charles R. Breyer

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendants and counterclaimants-in-intervention EDWARD NEIL BRUNDRIDGE, IMA CARTER, REBECCA NIKKEL and LUCIA Y. VIER (the "Members") hereby submit this supplemental memorandum of points and authorities in opposition to plaintiff United States of America's (the "Government's") motion to dismiss the Members' counterclaim for failure to state a claim upon which relief can be granted on the following issue: whether the Administrative Procedures Act, 5 U.S.C. § 551 et seq. and § 701 et seq. (the "APA"), applies to the Members' counterclaim.[1]

I. PRELIMINARY STATEMENT.

The Members' claims are within this Court's subject matter jurisdiction, and the APA does not bar the Court from hearing these claims. The APA applies only to agency rulemaking and adjudication. In contrast, the Members seek relief from the consequences of a court-ordered injunction in lawsuits initiated by the Government. Hence, the Members' claims do not implicate agency rulemaking or adjudication.

Moreover, even if the Court were to decide that the APA does apply to the Members' constitutional claims, this case would present an exception to the APA's requirement that a claimant exhaust his administrative remedies. Likewise, this matter is ripe for this Court's review.

By their Counterclaim, the Members are seeking recognition of a fundamental right. Although this right admittedly has not as yet been recognized in reported case law, this does not mandate dismissal of the Counterclaim by the district court. The Members should be given an opportunity to create a record and offer evidence to support their claimed fundamental right and the declaratory and injunctive relief they seek. Hence, the Government's motion to dismiss should be denied.

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1 On October 2, 1998, the Members filed answers to the Government's complaints and their Counterclaim-in-Intervention for Declaratory and Injunctive Relief ("Counterclaim" or "Cntrclm.").

II. ARGUMENT.

A. The *Carnohan* decision does not apply to the Members' claims.

This supplemental memorandum addresses the issue of whether the APA requires that the Members' claims be dismissed for lack of jurisdiction.[2] The issue of the APA's applicability to this Counterclaim arose at the February 5, 1999 hearing on the Government's motion to dismiss. Specifically, the Court inquired whether the APA required dismissal of the Members' claims in the context of discussion at the hearing of Carnohan v. United States, 616 F.2d 1120 (9th Cir. 1980). In Carnohan, the court dismissed the complaint as premature, finding that it lacked jurisdiction because the plaintiff had failed to exhaust his administrative remedies. Id. at 1122. The court held that certain federal and state agencies had "primary jurisdiction" over the controversy in that case. Id. For at least two reasons, this holding does not compel dismissal of the Counterclaim.

First, the Members claim a very different constitutional right from that asserted in Carnohan. In Carnohan, the plaintiff brought a declaratory proceeding "to secure the right to obtain and use laetrile in a nutritional program for the prevention of cancer."[3] Id. at 1121. The relief sought (a declaration that laetrile was not a "new drug" as defined by the Federal Food, Drug and Cosmetic Act (the "Act")) fell squarely within the authority of the Food and Drug Administration ("FDA"). The court rejected this claim and refused to afford a judicial forum for the plaintiff, ruling that he first must file a new drug application with the FDA. Id. at 1122.

The plaintiff in Carnohan claimed that "the state and federal regulatory schemes which require [filing a new drug application with the FDA] are so burdensome when applied to private individuals as to infringe upon constitutional

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2 On February 8, 1999, the Members asked the Court for an opportunity to file a supplemental brief on this issue. The Court granted the request.

3 It is not clear from the decision whether the program was government-sponsored or not.

rights." Id. at 1122. In contrast, the Members allege that they have a right to be free from governmental interdiction of their personal, self-funded medical decision, in consultation with their personal physician, to alleviate their suffering through the only effective treatment available for them. Cntrclm. ¶ 2. Importantly, the Carnohan court relied on the decision in Rutherford v. United States, 616 F.2d 455 (10th Cir. 1980), which recognized a constitutional right that supports the Members' claims here. The Rutherford court held that "the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." Id. at 457 (emphasis added).

Relying on Rutherford, the Carnohan court denied the plaintiff's constitutional claims because he sought to select laetrile as the particular treatment of his choice. Despite the Government's speculation to the contrary, nothing in the Carnohan decision indicates that laetrile was the only effective treatment for the plaintiff or that he sought to use laetrile on the recommendation of his personal physician. In light of the rights recognized in Rutherford and in Conant v. McCaffrey, 172 F.R.D. 681, 694 (N.D.Cal. 1997) (holding that the physician-patient relationship is a protected one), these differences are not insignificant and are, in fact, fatal to the Government's motion.

Here, the Members have declared that cannabis is the only effective treatment for them. On another motion before this Court, one of the Members' personal physicians had an opportunity to provide additional factual support for the Members' claims:

> It is my medical opinion that for Ms. Vier her use of cannabis has been and is a medical necessity. . . . [I]t has been the only treatment that effectively relieves her nausea and stimulates her appetite. . . . [¶] Cannabis is the only drug that has allowed us to give her the treatment she requires.

See Declaration of Helen Collins, M.D., filed September 13, 1998, ¶¶ 4, 5 (emphasis added). For purposes of this motion, the Members' allegation must be accepted as

true that cannabis is the only effective treatment for their illnesses. Hence, to permit the Government to interfere with the Members' use of cannabis is to deny them the right recognized by the Rutherford court: the right to decide whether or not to have medical treatment.

The second reason Carnohan does not mandate dismissal of the Members' claims is jurisdictional and relates to the applicability of the APA. In Carnohan, the court did not dismiss the plaintiff's complaint on the merits for failure to state a claim, as the Government seeks here. Instead, the Carnohan court dismissed the complaint without prejudice on the ground that it was premature, ruling that the court lacked jurisdiction because the plaintiff had failed to exhaust his administrative remedies. Id. at 1122. The Carnohan plaintiff sought declaratory relief squarely within the FDA's authority--that laetrile was not a "new drug" as defined by the Act--and the Carnohan court held that administrative agencies had "primary jurisdiction to determine whether persons may traffic in new drugs." Id.

Unlike the Carnohan plaintiff, the Members do not seek a declaration requiring a federal or state agency to do anything. The Members do not seek an order that cannabis is not a Schedule I drug under the Controlled Substances Act, nor do they seek review of the government's decision to classify cannabis as a Schedule I drug.[4] Instead, the Members seek an order recognizing their fundamental liberty interest to be free from governmental interdiction of their personal, self-funded medical decision, in consultation with their personal physician, to alleviate their suffering through the only effective treatment available for them. In addition, the Members seek an order enjoining the Government from interfering with this fundamental liberty interest.

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4 Although the Members do not seek an order requiring the Government to re-classify cannabis, we reiterate the Members' view that the Government has no factual basis for its decision to classify cannabis as a Schedule I substance.

B. The APA does not require that the Members exhaust administrative remedies.

1. As a threshold matter, the APA does not require dismissal of the Members' claims because they are seeking relief from the consequences of a government lawsuit.

As a threshold matter, the APA does not apply to the Members' claims because they are not seeking review of an agency decision. The government action here--suing for an injunction against the defendant cooperatives--is not agency adjudication or agency rulemaking. It involves judicial proceedings. This situation is analogous to when the government issues and enforces a subpoena. In such a case, a defendant who asserts that his constitutional rights have been violated by the government's exercise of its subpoena power is not barred by the APA from seeking relief in district court. Such a defendant would necessarily assert his constitutional claims in a judicial proceeding. Moreover, by filing its complaint, the Government conferred jurisdiction over this matter on the Court. See, e.g., Complaint for Declaratory Relief, and Preliminary and Permanent Injunction, filed January 9, 1998 in Case No. C•98-0088 (the "Complaint" or "Compl."), ¶ 2 ("Jurisdiction is conferred on this Court pursuant to sections 512(a) of the Act, 21 U.S.C. § 882(a); and 28 U.S.C. §§ 1331, 1345 and 1355(a)").[5]

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5 Section 877 of the Controlled Substance Act (see generally 21 U.S.C. § 801 et seq.) provides that "[a]ll final determinations, findings, and conclusions of the Attorney General under this title shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located . . . ." This section is inapplicable to the Counterclaim because the Government waived this provision by conferring jurisdiction on this Court in the Complaint and because the Counterclaim seeks recognition of a fundamental right, not review of a final determination, finding or conclusion of the Attorney General.

2. The government action at issue is ripe for review.

In fact, the APA supports judicial review of the Members' claims. In Carnohan, the court dismissed the complaint for lack of jurisdiction: the plaintiff's claims were "premature" because he failed to exhaust his administrative remedies. This holding was in accord with the principle that courts may decline to review agency action because the action is not final or ripe or because the claimant did not exhaust available administrative remedies. See K.C. Davis & R.J. Pierce, Jr., Administrative Law Treatise, Vol. II, § 15.1 (1994). "In many circumstances, these doctrines are difficult to distinguish." Id.

The exhaustion requirement is not applicable here because the Members are not seeking review of any agency action or decision. Moreover, if exhaustion were required, it would be excused. See, e.g., American-Arab Anti-Discrimination v. Reno, 70 F.3d 1045, 1058 (9th Cir. 1995) ("we customarily decline to apply the prudential ripeness doctrine when exhaustion would be a futile attempt to challenge a fixed agency position"). See also Skubel v. Fuoroli, 113 F.3d 330, 334 (2d Cir. 1997) (exhaustion not required where letters from agency declaring its position demonstrated that it would have been futile to petition agency for rulemaking).

The Counterclaim also meets the standard for finality. Courts employ a flexible and pragmatic test to ascertain the finality of an administrative action. See Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967). See also Assiniboine and Sioux Tribes v Bd. of Oil and Gas, 792 F.2d 782, 789 (9th Cir. 1986) (finding district court erred in dismissing complaint for failure to state a claim upon which relief can be granted). They look to numerous factors, including: whether the action is a definitive statement of any agency's position, whether the action has an effect on the day-to-day business of the complaining parties, and whether the agency expects immediate compliance. See Conant, 172 F.R.D. at 689.

Each of these factors is present here. First, the Government's complaints must be construed as a definitive statement of its position. Second, the injunctions have a

serious and detrimental effect on the day-to-day business of the Members.[6] They must live with the consequences of the Government-requested injunctions and go without the only effective treatment for themselves, resulting in chronic pain and for Ms. Vier death, or they must try to obtain expensive, unsafe and illegal cannabis elsewhere. Finally, the Government plainly expects immediate compliance as demonstrated by its request for preliminary injunctions against the defendant cooperatives and the contempt proceedings it initiated.

Lastly, the Members' claims are ripe for review because the government action at issue is final. The "ripeness" inquiry focuses on two elements, "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Abbott Labs. at 149. A controversy is ripe if the challenged administrative decision is final within the meaning of section 704 of the APA.[7] The APA defines agency action as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Id. at 149 (quoting 5 U.S.C. §§ 551(4), 551(13)) (internal quotations omitted). Assuming for purposes of argument that the APA applies to the Counterclaim, the instant litigation represents the Government's efforts to "implement" its consideration of how the Controlled Substance Act should be applied in California.[8]

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6 See, e.g., Cntrclm. ¶ 16 ("The defendant cooperatives have served as the Members' source of legal, safe and affordable cannabis upon the recommendation of each Member's physician. . . . If the defendant cooperatives are closed, the Members will be irreparably harmed in that they will not be able to obtain cannabis when it is the only effective medical treatment for them").

7 Section 704 provides, in relevant part, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

8 For example, the Government action at issue here has been brought by the highest ranking official in the United States Attorney's office in the State of California. See, e.g., Compl.

The Members also satisfy the second requirement of the ripeness doctrine. Claimants challenging a statute, regulation or policy must demonstrate a realistic possibility of sustaining an injury as a result of its enforcement. See Conant, 172 F.R.D. at 689. "If injury is certainly impending, that is enough." Pennsylvania v. West Virginia, 262 U.S. 553, 593 (1923). Moreover, claimants contesting criminal statutes do not have to expose themselves to "actual arrest or prosecution" prior to challenging the constitutionality of a statute." Steffel v. Thompson, 415 U.S. 452, 459 (1974). The Members have alleged that they will suffer irreparable harm as a result of the Government's actions in these lawsuits. See Cntrclm. ¶ 16. They have also sufficiently challenged the constitutionality of the Controlled Substances Act as applied to them because they need not expose themselves to "actual arrest or prosecution."

3. It would not be practical or reasonable to require the Members to pursue administrative remedies.

Moreover, as the Court noted in the context of analyzing the defendant cooperatives' medical necessity defense, it would not be practical or reasonable to require the Members to pursue administrative remedies. A rescheduling petition is not a reasonable alternative for the Members, who are seriously ill patients and whose physicians have recommended marijuana for their conditions:

> For example, such a petition was filed in 1972 and did not receive a final ruling from the Administrator of the Drug Enforcement Agency until 1992, and a final decision on appeal until 1994. Needless to say, it hardly seems reasonable to require an AIDS, glaucoma, or cancer patient to wait twenty years if the patient requires marijuana to alleviate a current medical problem.

U.S. v. Cannabis Cultivators Club, 5 F.Supp.2d 1086, 1102 (N.D.Cal. 1998) (citations omitted).

Unlike the plaintiff in Carnohan, the Members did not initiate litigation against the Government. The Members seek judicial relief only as a result of the Government's lawsuits against the defendant cooperatives, which have interfered with

the Members' use of cannabis. The Members have no practical or reasonable forum for relief other than this Court. As the Court noted in Cannabis Cultivators, supra, a rescheduling petition for cannabis is not reasonable given the Government's demonstrated delay. See, e.g., Houseton v. Nimmo, 670 F.2d 1375 (9th Cir. 1982) (court may compel agency to act within reasonable time and may also find agency inaction equivalent of dismissal or denial when delay is unreasonable and results in serious prejudice to one of the parties).

In addition, the Government has effectively foreclosed the Members from pursuing any other avenues of relief. On January 28, 1999, the Government rejected a federal judge's request to expand the Investigative New Drug program, which is currently distributing cannabis for medical purposes to eight people.[9] See Cannabis Cultivators, 5 F.Supp.2d at 1104-05 (generally discussing program). Moreover, throughout the instant actions, the Court has requested updates from the Government on a petition for reclassification that was filed and that the Drug Enforcement Agency referred to the Secretary of Health and Human Services on December 17, 1997. This Court remarked that "[o]ne would expect the Secretary to act expeditiously on the petition in light of the expressed concerns of the citizens of California." Id. at 1105. Nevertheless, the Government has not demonstrated any progress on this petition.

Accordingly, it would be inequitable for the Government to urge that the Members have no immediate right to seek judicial redress for their legal injury. The Members are being adversely affected by the Government's action: the Government's

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9 Attached hereto as Exhibit A is a true and correct copy of a NORML Foundation news release concerning the Government's refusal to expand the federal program currently distributing medicinal cannabis to eight patients. Pursuant to Rule 201 of the Federal Rules of Evidence, the Members request that the Court take judicial notice of this fact. See Mullis v. United States Bankruptcy Court, 828 F.2d 1385, 1388, fn. 9 (9th Cir. 1987) (holding court may take judicial notice of pleadings, orders and other papers on file in another action). If the Court would like verification of this fact, the Members respectfully request an opportunity to obtain certified copies of the appropriate pleadings. In any event, the Members doubt that the Government will deny that it refused to expand the program.

actions have interfered with the Members' personal, self-funded medical decision, in consultation with their personal physician, to alleviate their suffering through the only effective treatment available for them. The Members have, in fact, been denied their protected right to decide whether or not to avail themselves of the only effective treatment available for them. See Rutherford, 616 F.2d at 457. The Government expects immediate compliance with its policy to enforce the Controlled Substances Act without regard to the rights of the Members. Accordingly, to afford even-handed treatment to the Members, this Court should exercise its subject matter jurisdiction to adjudicate their claims.

III. CONCLUSION.

For the foregoing reasons, the Court should deny the Government's motion to dismiss.

Dated: February 16, 1999.

Respectfully submitted,

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EXHIBIT A

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News Release

January 28, 1999

Justice Department Rejects Judge's Request To Expand Medical Marijuana Distribution Program

January 28, 1999, Philadelphia, PA: Justice Department lawyers rejected a federal judge's request to expand a government program that presently provides medical marijuana to eight patients. U.S. District Judge Marvin Katz asked federal officials to consider re-opening the program to new applicants as a way to settle a class action suit brought by Philadelphia attorney Lawrence Hirsch on behalf of more than 100 patients who find medical relief from marijuana.

NORML Executive Director R. Keith Stroup, Esq. said he was not surprised by the government's decision. "The federal government has made it clear they care more about maintaining marijuana prohibition than aiding the sick and dying," he said.

The federal Compassionate Investigational New Drug (IND) program began distributing marijuana cigarettes to select patients in 1978. The program ceased accepting new applicants in 1992, but continues to supply 300 marijuana cigarettes monthly to eight patients suffering from diseases such as glaucoma and epilepsy. Similar statewide programs also distributed medical marijuana to approximately 1,000 patients in the 1980s, but are no longer active.

The brief filed by the Justice Department states that federal officials discontinued the program because "It became clear that the potential widespread use of marijuana for 'medical' purposes under the program ... was bad public policy."

"Is it better public policy to allow patients who could benefit from medical marijuana to suffer under the law?" Stroup asked.

The DOJ brief also alleges that officials decided to close the IND program because new "altemative medicines such as Marinol -- a synthetic form of marijuana's active ingredient -- were becoming available." In fact, however, the FDA approved Marinol in 1985, seven years prior to the program's closure. Many patients who use Marinol state that the drug only provides limited relief, particularly when compared to whole smoked marijuana.

Hirsch's suit asserts that the federal drug laws prohibiting marijuana for medical purposes are legally arbitrary and unconstitutional. Hirsch further argues that citizens have no equal protection of the law when the government supplies medical marijuana to eight patients and not to others who may be eligible.

Hirsch said he will file a motion for summary judgment shortly.

For more information, please contact either Keith Stroup or Litigation Director Tanya Kangas of The NORML Foundation @ (202) 483-8751.

Minnesota Pins Agriculture Hopes On Hemp

January 28, 1999, St. Paul, MN: Legislation introduced by Sen. Roger Moe seeks to establish a regulated hemp industry in Minnesota. The bill would authorize licensed farmers to cultivate hemp for commercial purposes.

Senate File 122 finds that "The development and use of industrial hemp [is] in the best interests of the state economy and agriculture and that the production of industrial hemp can be regulated so as not to interfere with the strict control on controlled substances."

At least 29 nations, including Canada, France, England, Germany, Japan, and Australia allow farmers to grow non-psychoactive hemp for its fiber content. This fall, authors of a University of North Dakota

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C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

PROOF OF SERVICE BY OVERNIGHT COURIER

I, Doreen M. Griffin, hereby declare:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Madison & Sutro LLP in San Francisco, California.

2. My business address is 235 Montgomery Street, San Francisco, California 94104. My mailing address is P.O. Box 7880, San Francisco, CA 94120-7880.

3. On February 16, 1999, in the city where I am employed, I served a true copy of the attached document, titled exactly SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM-IN-INTERVENTION, by depositing it in a box or other facility regularly maintained by Federal Express, an express service carrier providing overnight delivery, or delivering it to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier, with overnight delivery fees paid or provided for, clearly labeled to identify the person being served at the address shown below:

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901 E. Street, N.W.
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Attorneys for Plaintiff
United States of America

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of February, 1999, at San Francisco, California.

Doreen M. Griffin

Docket No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98-00245 CRB

PROOF OF SERVICE BY MAIL

I, Doreen M. Griffin, hereby declare:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Madison & Sutro LLP in San Francisco, California.

2. My business address is 235 Montgomery Street, San Francisco, California 94104. My mailing address is P.O. Box 7880, San Francisco, CA 94120-7880.

3. On February 16, 1999, I served a true copy of the attached document titled exactly SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM-IN-INTERVENTION by placing it in a sealed envelope and depositing it in the United States mail, first class postage fully prepaid, addressed to the following:

[See Attached Service List]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of February, 1999, at San Francisco, California.

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