In the United States Court of Appeals for the Ninth Circuit

EDWARD NEIL BRUNDRIDGE and IMA CARTER, Defendants-Appellants, vs. UNITED STATES OF AMERICA, Plaintiff-Appellee.	No. 99-15838
REBECCA NIKKEL, Defendant-Appellant, vs. UNITED STATES OF AMERICA, Plaintiff-Appellee.	No. 99-15844
LUCIA Y. VIER, Defendant-Appellant, vs. UNITED STATES OF AMERICA, Plaintiff-Appellee.	No. 99-15879

On Appeal from the United States District Court for the Northern District of California San Francisco Division
Charles R. Breyer, Judge

APPELLANTS' RESPONSE TO JUNE 2, 1999 ORDER TO SHOW CAUSE WHY APPEAL SHOULD NOT BE DISMISSED

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Appellants, Edward Neil Brundridge, Ima Carter, Rebecca Nikkel and Lucia Y. Vier, hereby respectfully submit this response to the Court's June 2, 1999 order directing that appellants either move for voluntary dismissal of this appeal or show cause why it should not be dismissed for lack of jurisdiction.[1]

INTRODUCTION

This Court has jurisdiction to hear this appeal. Under 28 U.S.C. § 1292(a)(1), the Court has jurisdiction to review interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions[.]" This appeal concerns the district court's February 25, 1999 order, which is an order "refusing" an injunction. By its February 25, 1999 order, the district court dismissed appellants' counterclaim, which sought declaratory and preliminary and permanent injunctive relief. Accordingly, this Court has jurisdiction pursuant to section 1292(a)(1) to hear this appeal.

Moreover, there may soon be an alternative basis for jurisdiction. Since receiving the Court's June 2, 1999 order, appellants have filed a motion for entry of partial judgment under Federal Rule of Civil Procedure 54(b) on the district court's February 25, 1999 order. Appellants have asked that the district court retroactively enter partial judgment of the order of which appellants seek review. That motion is set for hearing on July 16, 1999. Appellants respectfully request that the Court stay its decision on its order to show cause and continue to suspend the briefing schedule on this appeal pending the district court's ruling on that motion so that jurisdiction may also be maintained on this alternative basis.

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1 Appellants filed three notices of appeal on April 26, 1999, appeal numbers 99-15838, 99-15844 and 99-15879. The Court's June 2, 1999 order consolidated these appeals.

DISCUSSION

I. Background.

In January 1998, appellee, the United States of America (plaintiff in the district court actions) (the "Government"), filed six separate lawsuits against six cooperative associations and individuals ("defendant cooperatives"), seeking, among other things, preliminary and permanent injunctive relief under the Controlled Substances Act (see 21 U.S.C. § 882) to prevent the defendant cooperatives from distributing cannabis. In May 1998, the district court issued an order enjoining the defendant cooperatives from engaging in the manufacture, distribution or possession of marijuana in violation of section 841(a)(1) of the Act. See U.S. v. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1106 (N.D. Cal. 1998).

Appellants intervened in the district court actions in September 1998 to defend against the Government's attempts to close the defendant cooperatives and to assert a counterclaim against the Government. On October 2, 1998, appellants filed answers to the Government's complaints (in case numbers C 98-00085, C 98-00086 and C 98-00087) and their Counterclaim-in-Intervention for Declaratory and Injunctive Relief ("Counterclaim"). See Declaration of Margaret S. Schroeder in Support of Response to Order to Show Cause, filed and served herewith ("Schroeder Decl."), ¶ 7, Ex. E.

As set forth in the Counterclaim, each appellant is in danger of imminent harm due to serious illness, and each uses cannabis for medical purposes on the recommendation of his or her personal physician. Counterclaim, ¶ 10. Each appellant is a member of one of the defendant cooperatives. See id. ¶¶ 4-7. Appellants have tried traditional, conventional medicines, none of which proved effective, and each has found cannabis to be the only effective treatment for his or her condition. Id. Since the cooperatives are prevented from distributing cannabis, appellants cannot obtain cannabis that is safe and affordable pursuant to state law. Id. ¶ 16. By virtue of the governmental intrusion, appellants are unable not only to speak freely with their doctors about their conditions and medical needs, but to act on their doctors' advice as to the only medication that effectively alleviates their pain or stimulates

their appetite: cannabis. Id. ¶¶ 18(c), 19. Their privacy and doctor relationships thus have been harmed and will continue to be harmed as a result of the Government's attempts to obtain and enforce the preliminary injunction in these actions.

For these reasons, appellants brought the Counterclaim. By it, appellants seek declaratory and preliminary and permanent injunctive relief to exercise their fundamental right under the Fifth Amendment to be free from governmental interdiction of their personal, self-funded medical decisions to take the only effective legal medication available to relieve their own pain and suffering, to obtain their personal physicians' recommendations for appropriate medical care for serious illnesses and injuries, and to take advantage of available medications for such conditions as recommended by their personal physicians. Counterclaim ¶¶ 9-10.

In December 1998, the Government moved to dismiss the Counterclaim for failure to state a claim upon which relief can be granted. Schroeder Decl. ¶ 8. After a hearing in February, the district court dismissed the Counterclaim without leave to amend. Schroeder Decl. Ex. F. Appellants filed notices of appeal on April 26, 1999 pursuant to 28 U.S.C. § 1292(a)(1).

The defendant cooperatives are also in the process of appealing several rulings. The rulings relate to the district court's May 1998 preliminary injunction. The preliminary injunction was followed by contempt proceedings in July 1998 when the Government moved (1) for an order to show cause why the defendant cooperatives should not be held in contempt for failing to comply with the preliminary injunction and (2) for summary judgment. See Schroeder Decl. Ex. A. The Oakland defendants moved to modify the preliminary injunction and to dismiss the Government's complaint on the ground that it failed to state a claim upon which relief can be granted. In September 1998, the Court issued an order to show cause as to the Oakland and Marin defendants. See Schroeder Decl. Ex. B.[2] The district court denied the Oakland defendants' motions to modify the injunction and to dismiss the complaint.

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2 The district court denied the Government's request for an order to show cause as to the Ukiah defendants and, at the request of the Government, later vacated its order to show cause as to the Marin defendants. See Schroeder Decl. ¶¶ 4-5, Ex. C.

After further proceedings, the district court held the Oakland defendants in contempt and modified its injunction to permit enforcement against the Oakland cooperative. See Schroeder Decl. Ex. D.

The Oakland defendants have appealed the orders denying their motion to dismiss, denying their motion to modify the preliminary injunction and granting the Government's motion to modify the preliminary injunction, and their appeals remain pending (appeal nos. 98-16950, 98-17044 and 98-17137). They argued their appeals on April 13, 1999. Schroeder Decl. ¶ 9.

The matters in the trial court are, as a practical matter, stayed. These actions do not have a trial date, and do not even have a status conference date presently scheduled. Schroeder Decl. ¶ 11. The only matter on calendar is appellants' motion for Rule 54(b) certification set for hearing on July 16, 1999. Id., ¶¶ 10-11.

II. The Court has jurisdiction to hear appellants' appeal pursuant to 28 U.S.C. § 1292(a)(1).

The Court has jurisdiction of appellants' appeal because they are appealing an order that effectively denied them the injunctive relief they seek. Courts of appeals have jurisdiction of appeals from interlocutory orders of the district courts "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.]" 28 U.S.C. § 1292(a)(1). An order specifically granting or denying a motion for injunctive relief is immediately reviewable pursuant to section 1292(a)(1). No further showing is required. Shee Atika v. Sealaska Corp., 39 F.3d 247, 249 (9th Cir. 1994) (holding appellant need not satisfy requirement of showing irreparable injury to pursue appeal from explicit grant or denial of injunction). Where, however, the order only implicitly grants or denies an injunction, courts look to the practical effect of the order rather than the classification or label given by the district court. Oregon Natural Resources Council, Inc. v. Kantor, 99 F.3d 334, 337-338 (9th

Cir. 1996) (holding that an order which itself does not grant or deny injunctive relief is nevertheless appealable under § 1292(a)(1) as set forth in Carson (discussed immediately below)).

Where the practical effect of the order is to deny or grant an injunction, the order is appealable if the appellant demonstrates that (1) the order might have serious, perhaps irreparable consequences and (2) an immediate appeal is the only way to challenge the order effectively. See Carson v. American Brands, Inc., 450 U.S. 79, 83 (1981). See also, Oregon Natural Resources, 99 F.3d at 337 (applying Carson and finding appellate jurisdiction). The district court's February 25, 1999 order had the practical effect of denying an injunction. The order dismissed appellants' Counterclaim in its entirety without leave to amend, and the Counterclaim sought declaratory and preliminary and permanent injunctive relief. Counterclaim, ¶¶ 9-10. If appellants are not permitted to file this appeal, they will lose their opportunity to "effectively challenge" an interlocutory order that denies them injunctive relief and that plainly has a "serious, perhaps irreparable, consequence." Carson, 450 U.S. at 86.

Both the Carson factors are present in this appeal. Like the plaintiffs in Carson, 450 U.S. at 89, who were permitted to pursue their appeal, appellants have asserted that they will suffer irreparable injury unless they obtain preliminary and permanent injunctive relief. Counterclaim, ¶¶ 24-26. Accordingly, the order dismissing the Counterclaim might have serious, perhaps irreparable consequences, because appellants might lose their opportunity to pursue their constitutional claims in the trial court, and appellants are seriously ill individuals who seek, by the Counterclaim, to prevent the Government from interfering with their right to use the only effective medication for them.[3]

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3 Some courts have held that where an appellant has not sought temporary relief, "imminent irreparable injury is presumptively absent." See Hutchinson v. Pfeil, 105 F.3d 566, 570 (10th Cir. 1997). This principle does not apply to the instant appeal because, unlike the appellant in Hutchinson whose claims were pending for more than two years, the Members' claims have only been pending since October 1998 and have not survived the pleading stage. Moreover, the appellant in Hutchinson did not allege that the order appealed from would cause serious irreparable injury. Id.

As discussed above, appellants suffer from serious illnesses and, as a result, are each in danger of imminent harm. Counterclaim, ¶ 10. Appellants have tried conventional medicines, which have proved to be ineffective. Id. On the recommendations of their personal physicians, appellants use cannabis because cannabis is the only medication that relieves their pain or stimulates their appetites. Id. While the cooperatives are prevented from distributing cannabis, appellants cannot obtain cannabis that is safe and affordable pursuant to state law. Id. ¶ 16. As a result, appellants are suffering a special harm as result of the relief the Government seeks in the district court actions. Id. ¶¶ 21-22. Appellants will continue to suffer this harm indefinitely (and possibly without relief) unless they are permitted to pursue the validity of their constitutional claims now.

In addition, this appeal satisfies the second factor required by Carson because this appeal is the only method available for appellants to challenge the order effectively. The case, now seventeen months old, is not scheduled for trial (Schroeder Decl. ¶ 11) and is not likely ever to be set for trial if the Government prevails in the pending appeals. The entire litigation, except for appellants' claims, would be effectively resolved by the affirmance of the district court preliminary injunction and contempt orders. As a practical matter, the cooperatives will be forced to simply close their doors and their controversy with the Government will be over, thereby rendering moot appellants' claims. Even if the Government does not succeed on appeal and elects to pursue further proceedings in the district court, appellants will be harmed by not being allowed to have their Counterclaim adjudicated in connection with those further proceedings. For these reasons, if an appeal is not allowed, "it is likely that the order would not be reviewed at all" and appellants' challenge to the district court's preliminary injunction closing the defendant cooperatives would be moot. See Oregon Natural Resources, 99 F.3d at 337-38 (holding that immediate appeal was only effective way to challenge order because order would otherwise become moot and not likely be challenged).

III. Alternatively, appellants request that the Court stay its decision on jurisdiction and continue to suspend the briefing schedule on this appeal pending the district court's ruling on appellants' motion for entry of partial judgment.

Appellants respectfully request that the Court stay its decision on jurisdiction and continue to suspend the briefing schedule on this appeal pending the district court's ruling on appellants' motion for certification of its February 25, 1999 order pursuant to Federal Rule of Civil Procedure 54(b). Notice of appeal was filed on April 26, 1999. Appellants filed their motion for Rule 54(b) certification on June 11, 1999, and a hearing is scheduled for July 16, 1999, the earliest regularly available hearing date. Schroeder Decl. ¶ 10.

If the district court grants appellants' motion for certification pursuant to Rule 54(b), the Court will have an alternative basis upon which to exercise jurisdiction over this appeal. A Rule 54(b) certification is sufficient to validate a prematurely filed notice of appeal if neither party is prejudiced. Aguirre v. S.S. Sohio Intrepid, 801 F.2d 1185, 1189 (9th Cir. 1986) (district court directed entry of judgment retroactive to notice of appeal filed four months earlier). Because the issues raised by appellants' April 26, 1999 notice of appeal are identical to those raised by the district court's February 25, 1999 order, the Government will not be prejudiced if the district court makes its Rule 54(b) certification retroactive.

CONCLUSION

For the foregoing reasons, appellants respectfully request that the Court find that it has jurisdiction to hear appellants' appeal or, in the alternative, that the Court stay its decision on jurisdiction and continue to suspend the briefing schedule on this appeal pending the district court's decision on appellants' motion for entry of partial judgment.

Dated: June 16, 1999.

Respectfully submitted.

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Case Nos. 99-15838
99-15844
99-15879

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 June 16, 1999, in the city where I am employed, I served a true copy of the attached document, titled exactly APPELLANTS' RESPONSE TO JUNE 2, 1999 ORDER TO SHOW CAUSE WHY APPEAL SHOULD NOT BE DISMISSED, 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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I declare under penalty of perjury that the foregoing is true and correct.

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

Doreen M. Griffin