

1 ROBERT D. McCALLUM, JR.
 Assistant Attorney General
 2 DAVID W. SHAPIRO
 United States Attorney
 3 ARTHUR R. GOLDBERG (D.C. BN 180661)
 MARK T. QUINLIVAN (D.C. BN 442782)
 4 U.S. Department of Justice
 Civil Division; Room 1048
 5 901 E Street, N.W.
 Washington, D.C. 20530
 6 Telephone: (202) 514-3346

7 Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO HEADQUARTERS

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UNITED STATES OF AMERICA,)	Nos. C 98-0085 CRB	<u>RELATED</u>
)	C 98-0086 CRB	
Plaintiff,)	C 98-0087 CRB	
)	C 98-0088 CRB	
v.)	C 98-0245 CRB	

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CANNABIS CULTIVATOR'S CLUB;)	PLAINTIFF'S RESPONSE TO THE
and DENNIS PERON,)	OCBC DEFENDANTS' SEPARATE
)	STATEMENT OF OBJECTIONS
Defendants.)	

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Date: April 19, 2002
 Time: 10:00 a.m.
 Courtroom: 8
 Hon. Charles R. Breyer

17

AND RELATED ACTIONS

18

19

STATEMENT

20

Defendants Oakland Cannabis Buyers' Cooperative and Jeffrey Jones ("OCBC Defendants")
 21 have filed a Separate Statement of Objections in Support of Motion to Dissolve and in Opposition
 22 to the Government's Motion for Summary Judgment and Permanent Injunctive Relief ("Separate
 23 Statement"). In particular, the OCBC Defendants object to the declarations of Mark T. Quinlivan and
 24 Drug Enforcement Administration ("DEA") Special Agents Brian Nehring, Carolyn Porras, Deborah
 25 Muusers, Mark Nelson, and Bill Nyfeler submitted on January 9, 1998, in support of the

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1 government's motion for a preliminary injunction. As we now demonstrate, none of these evidentiary
2 objections should be sustained.

3 **A. General Objections**

4 1. Declaration of Mark T. Quinlivan: The OCBC Defendants challenge the declaration
5 of Mark T. Quinlivan on the ground that it allegedly "is merely a compilation of brochures,
6 newsletters, and web site excerpts that do not cite any specific instance of an alleged violation of the
7 [Controlled Substances Act]." Separate Statement at 1. On the contrary, the OCBC's own world
8 wide web site expressly stated that the OCBC "provides medical cannabis and other services to over
9 1,300 members." Declaration of Mark T. Quinlivan ("Quinlivan Dec.") ¶ 2 & Exhibit 1. Similarly,
10 a pamphlet obtained from the OCBC states that the OCBC provides members with "[a] safe and
11 secure location to purchase cannabis for medicinal use," as well as "[o]ur Cannabis Grow Center,
12 offering the Medi-Grow System to cultivate your own medical marijuana * * *." Id. ¶ 3 & Exhibit
13 2. Finally, the OCBC newsletter includes a column by defendant Jeffrey Jones in which he states that
14 the club sells "high-grade" marijuana for \$50-\$60 for one-eighth ounce, and that the club was
15 "restocked" with "B-Mex" and "House Special" marijuana. Id. ¶ 4 & Exhibit 3.

16 The OCBC Defendants also allege that the declaration contains hearsay and is not based on
17 that personal knowledge; and that the three exhibits to the declaration were not properly
18 authenticated. Separate Statement at 1. On the contrary, all three of the exhibits attached to the
19 Quinlivan Declaration constitute admissions of a party-opponent, see Fed. R. Evid. 801(d)(2), insofar
20 as they either are materials that appeared on the OCBC's own world wide web site, see Declaration
21 of Mark T. Quinlivan ("Quinlivan Dec.") ¶ 2 & Exhibit 1, or materials that were published by and
22 obtained from the OCBC. Id. ¶¶ 3-4 & Exhibits 2-3.

23 The OCBC Defendants further assert that the three exhibits were not properly authenticated.
24 However, each of the three exhibits are self-authenticating under Fed. R. Evid. 902(7) insofar as they
25 contain the trade inscriptions of the OCBC. See Falise v. American Tobacco Co., No. 99-7392, 2000
26 WL 1804542, at *1 (E.D.N.Y. 2000) (Weinstein, J.) (foundation for documents may be established
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1 through self-authentication by way of trade inscription or label under Fed. R. Evid. 902(7)). But see
2 Whitted v. General Motors Corp., 58 F.3d 1200, 1204 (7th Cir.1995) (automobile owner's manual
3 inadmissible because not self-authenticating under Fed. R. Evid. 902(7)).

4 2. Declarations of DEA Special Agents Nehring, Porras, Muusers, Nelson, and Nyfeler:

5 The OCBC Defendants contend that the declarations submitted by these DEA Special Agents
6 are “generally deficient” because they “detail the results of the government’s fraudulent conduct that
7 resulted in the illegal entrapment of defendants,” insofar as “[d]efendants were not predisposed to
8 providing cannabis to persons without the proper authorization.” Separate Statement at 2. The
9 OCBC Defendants also contend that the “Defendants’ mistake of law should lead the Court to exclude
10 the evidence in these declarations,” because “Defendants relied in good faith upon valid credentials
11 that permitted a legal distribution of cannabis under California law at the time.” Id.

12 Both of these defenses are foreclosed to the OCBC Defendants as a matter of law. "A defense
13 of entrapment is established if the defendant was (1) induced to commit the crime by a government
14 agent and (2) not otherwise predisposed to commit the crime." United States v. Kessee, 992 F.2d
15 1001, 1003 (9th Cir. 1993). The OCBC Defendants have not made (and cannot make) either
16 showing. In particular, the OCBC Defendants’ argument that they “were not predisposed to providing
17 cannabis to persons without the proper authorization," Separate Statement at 2, is irrelevant to the
18 issues before the Court because the Controlled Substances Act makes it unlawful to distribute
19 marijuana whether or not a customer has a proper authorization. As this Court has previously ruled,
20 “[a] state law which purports to legalize the distribution of marijuana for any purpose * * * directly
21 conflicts with federal law, 21 U.S.C. § 841(a)(1). Section 841 prohibits the distribution of marijuana
22 except for use in an approved research project. It does not exempt the distribution of marijuana to
23 seriously ill patients for their personal medical use.” United States v. Cannabis Cultivators Club, 5
24 F. Supp.2d 1086, 1100 (N.D. Cal. 1998). See also United States v. Rosenberg, 515 F.2d 190, 198
25 n.14 (9th Cir.) (“The question of whether *federal* criminal laws have been violated is a *federal* issue
26 to be determined in *federal* courts.” (emphasis supplied)), *cert. denied*, 423 U.S. 1031 (1975).

1 Nor may the OCBC Defendants avail themselves of the mistake of law defense. "The general
2 rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply
3 rooted in the American legal system," Cheek v. United States, 498 U.S. 192, 199 (1991), and the
4 Ninth Circuit has precluded invocation of this defense where it is premised on the assertion that the
5 defendant did not know that his or her conduct violated federal law. See United States v. de Cruz,
6 82 F.3d 856, 867 (9th Cir. 1996).

7 The OCBC Defendants also complain that the declarations of the Special Agents are "vague,
8 ambiguous, and conclusory" because "[t]he declarant fails to identify the individuals involved in the
9 alleged distribution of cannabis." Separate Statement at 2. This contention is spurious. It does not
10 matter *which* OCBC employee distributed marijuana to the DEA Special Agents, it only matters that
11 one or more OCBC employee did, in fact, engage in the distribution of marijuana. Importantly, the
12 OCBC Defendants have never specifically contested the uncontradicted evidence that distributed
13 marijuana on six separate occasions to DEA Special Agents,¹ and their attempt to muddle this issue
14 by complaining that they don't know which of their employees engaged in the specific transactions
15 at issue is frivolous.

16 **B. Specific Objections**

17 1. Declaration of Mark T. Quinlivan: The OCBC Defendants object to each of the three
18 exhibits attached to the Quinlivan Declaration on the ground that they are "vague, conclusory, and
19 lack[] foundation, as this declarant has no personal knowledge of the purported contents." Separate
20 Statement at 3. As set forth above, however, all three of the exhibits attached to the Quinlivan
21 Declaration constitute admissions of a party-opponent, see Fed. R. Evid. 801(d)(2), insofar as they
22 either are materials that appeared on the OCBC's own world wide web site, see Quinlivan Dec. ¶ 2

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24 ¹ See Declaration of Special Agent Brian Nehring ("Nehring Dec.") ¶¶ 4-13 (purchase of
25 marijuana for \$40); Declaration of Special Agent Bill Nyfeler ("Nyfeler Dec.") ¶¶ 4-32 (three
26 separate purchases of marijuana for \$7, \$15, and \$45); Declaration of Special Agent Carolyn Porras
27 ("Porras Dec.") ¶¶ 4-15 (purchase of marijuana for \$25); Declaration of Special Agent Deborah
Muusers ("Muusers Dec.") ¶¶ 4-13 (purchase of marijuana for \$60); Declaration of Phyllis E. Quinn
("Quinn Dec.") ¶¶ 4-9 (chemist analysis confirming presence of marijuana from OCBC sales).

1 & Exhibit 1, or materials that were published by and obtained from the OCBC. Id. ¶¶ 3-4 & Exhibits
2 2-3.

3 The OCBC Defendants also contend that the exhibits have not been properly authenticated
4 and that this alleged failure “precludes the government from excluding the statements contained in
5 the web site [and other exhibits] from the hearsay rule as an admission by party opponent, as the
6 declarant cannot be properly identified as an agent of the OCBC.” Separate Statement at 3-4. Besides
7 the obvious fact that the United States desires to include, not exclude, the statements contained in the
8 three exhibits into evidence, the OCBC Defendants’ contention fails to acknowledge that each of the
9 three exhibits contain the trade inscriptions of the OCBC, and therefore are self-authenticating under
10 Fed. R. Evid. 902(7). See Falise v. American Tobacco Co., No. 99-7392, 2000 WL 1804542, at *1.
11 (E.D.N.Y. 2000) (Weinstein, J.) (foundation for documents may be established through self-
12 authentication by way of trade inscription or label under Fed. R. Evid. 902(7)). But see Whitted v.
13 General Motors Corp., 58 F.3d 1200, 1204 (7th Cir.1995) (automobile owner's manual inadmissible
14 because not self-authenticating under Fed. R. Evid. 902(7)).

15 2. Declaration of Brian Nehring:

16 Paragraph 4: The OCBC Defendants object to paragraph 4 of Special Agent Nehring’s
17 declaration by making the specious claim that “this declarant has no personal knowledge of any
18 purported distribution of cannabis.” Separate Statement at 4. On the contrary, Special Agent
19 Nehring’s declaration expressly states that he “purchase[d] of one-eighth ounce of marijuana with the
20 brand name of “Northern Lights” for \$40 from the Oakland Cannabis Buyer's Cooperative (“OCBC”),
21 a marijuana distribution business located at 1755 Broadway Avenue, in Oakland, California.”
22 Nehring Dec. ¶ 12. Special Agent Nehring’s declaration further makes clear that the bag of suspected
23 marijuana which he purchased from the OCBC on May 19, 1997, was subsequently marked as Exhibit
24 11, and transferred to the DEA Western Regional Laboratory for analysis, Nehring Dec. ¶ 14, and a
25 chemical analysis of the green, leafy substance contained what had been marked as Exhibit 11
26 identified the presence of marijuana. Quinn Dec. ¶ 4.

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1 The OCBC Defendants also object that Special Agent Nehring's testimony constitutes
2 "improper opinion testimony and impermissible legal conclusions as to whether OCBC was in fact
3 'a marijuana distribution business.'" Separate Statement at 4. This assertion also is without
4 foundation.

5 Special Agent Nehring has been employed as a DEA Special Agent since September 1991.
6 Nehring Dec. ¶ 1. In that capacity, he has received training from the DEA and Federal Bureau of
7 Investigation in specialized narcotic investigative matters including, but not limited to, the following:
8 drug interdiction and detection, money laundering techniques and schemes, drug identification, and
9 asset identification and forfeiture, including specialized training in the preparation of narcotic and
10 document search warrants for residences and businesses. Id. ¶ 2. Special Agent Nehring also has
11 participated in numerous investigations specifically involving both the indoor and outdoor
12 manufacture or cultivation of marijuana, including personally participating in the eradication of over
13 1,000 indoor and 10 outdoor marijuana plants, and the arrest of more than 100 individuals for
14 violations of federal and state law regarding controlled substances. Id. Special Agent Nehring also
15 has received specialized training regarding the techniques used to grow marijuana and, based on this
16 experience and training, is familiar with the smell and appearance of growing and processed
17 marijuana, as well as the smell of marijuana when it is burning. Id. Finally, Special Agent Nehring
18 has participated in the obtaining and/or execution of over 100 federal and California state warrants
19 to search a particular place or premises for controlled substances and/or related paraphernalia, indicia,
20 and other evidence of the commission of state and/or federal felony violations of law. Id.

21 In view of Special Agent Nehring's extensive law enforcement background in controlled
22 substances, particularly with relation to marijuana, his observation that the OCBC was a "marijuana
23 distribution business," id. ¶ 4, satisfies Fed. R. Evid. 701(a), which allows opinions or inferences
24 which are "rationally based on the perception of the witness," as well as Fed. R. Evid. 702, which
25 allows expert opinions based on knowledge, skill, experience, and training.

1 The OCBC Defendants further complain that paragraph 4 constitutes “improper opinion
2 testimony and impermissible legal conclusions as to whether the ‘one-eighth ounce of marijuana with
3 the brand name ‘Northern Lights’ was in fact marijuana.” Separate Statement at 4. Special Agent
4 Nehring’s declaration makes clear, however, that the bag of suspected marijuana which he purchased
5 from the OCBC on May 19, 1997, was subsequently marked as Exhibit 11, and transferred to the
6 DEA Western Regional Laboratory for analysis, Nehring Dec. ¶ 14, and a chemical analysis of the
7 green, leafy substance contained in what had been marked as Exhibit 11 identified the presence of
8 marijuana. Quinn Dec. ¶ 4. The OCBC Defendants’ objection is meritless.

9 Lastly, the OCBC Defendants object to the portions of paragraph 4 on the ground that it is
10 “impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to
11 defendants.” Separate Statement at 4. As set forth above, the defenses of fraud, entrapment, or
12 mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

13 Paragraph 6-7: The OCBC Defendants complain that these paragraphs are “vague,
14 ambiguous, and lack[] foundation.” Separate Statement at 4. On the contrary, it is the OCBC
15 Defendants’ objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do
16 not identify any specific aspects of these paragraphs that are objectionable, and there are none.

17 Paragraph 8: The OCBC Defendants object to paragraph 8 on the ground that the
18 alleged presence of “two small children” is irrelevant, speculative, and prejudicial. This objection
19 reveals the inconsistency of the OCBC Defendants’ position in this case. On the one hand, the OCBC
20 Defendants contend that this Court should consider their actions in view of their supposed compliance
21 with state law. See Separate Statement at 2 (defendants “were not predisposed to providing cannabis
22 to persons without the proper authorization”). Yet, when evidence is presented that may indicate
23 noncompliance with federal law, the OCBC Defendants contend the evidence is irrelevant.

24 The United States, on the other hand, has steadfastly maintained throughout this case that the
25 *only* relevant inquiry is whether defendants distributed marijuana in violation of the Controlled
26 Substances Act. Hence, Special Agent's Nehring's observation that two small children were present
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1 in the OCBC is merely that -- an observation -- and is not submitted to establish the OCBC
2 Defendants' failure to comply with federal law. Indeed, the United States has not relied upon this
3 paragraph in any of its pleadings in this matter.

4 We take no position on the question of whether this paragraph is unfairly prejudicial to the
5 OCBC Defendants.

6 Paragraph 9: The OCBC Defendants object to this paragraph on the ground that the
7 United States has not "positively identif[ied] 'Jim' as an agent and/or employee of the OCBC," and
8 that this alleged failure precludes the government from contending that his statements constitute
9 admissions of a party-opponent under Fed. R. Evid. 801(d)(2). The failure to specifically identify
10 an agent of a party does not necessarily render that person's testimony inadmissible. Rather, some
11 courts have admitted statements of an unidentified agent of a party where the witness has provided
12 a sufficient basis for concluding the declarant was an agent of the party speaking within the scope of
13 that agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171,
14 1173-74 & n. 1 (5th Cir.1989). Here, Special Agent Nehring's testimony regarding the actions and
15 statements of "Jim" provide a sufficient basis upon which to conclude that he was an agent of the
16 OCBC speaking within the scope of that agency.

17 Paragraph 10: The OCBC Defendants object to this paragraph on the ground that
18 Special Agent Nehring did not have "personal knowledge of the purported contents," and that this
19 paragraph contains improper opinion testimony and impermissible legal conclusions regarding
20 whether the alleged "samples of marijuana," the "smell of burning marijuana," the "two large growing
21 marijuana plants under lights," and/or the "several large marijuana plants growing in a Mylar-lined
22 display case" were in fact marijuana. Separate Statement at 5. This objection fails for the reasons
23 set forth above. In view of Special Agent Nehring's extensive law enforcement background in
24 controlled substances, particularly with relation to marijuana, his observations in paragraph 10 pass
25 muster under Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based
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1 on the perception of the witness," or under Fed. R. Evid.702, which allows expert opinions based on
2 knowledge, skill, experience, and training.

3 Paragraph 11: The OCBC Defendants object to this paragraph on the ground that
4 Special Agent Nehring had "no personal knowledge of the purported contents," and that this
5 paragraph contains improper opinion testimony and impermissible legal conclusions regarding
6 whether the alleged "seven kinds of marijuana displayed and/or the alleged "Mexican-grown
7 marijuana" were in fact marijuana or were in fact grown in Mexico. This objection fails for the
8 reasons set forth above. In view of Special Agent Nehring's extensive law enforcement background
9 in controlled substances, particularly with relation to marijuana, his observations in paragraph 11 pass
10 muster under Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based
11 on the perception of the witness," or under Fed. R. Evid.702, which allows expert opinions based on
12 knowledge, skill, experience, and training.

13 The OCBC Defendants further object to any statement by "Jim" on the ground that he is
14 unidentified but, as set forth above, Special Agent Nehring's testimony regarding the actions and
15 statements of "Jim" provide a sufficient basis upon which to conclude that he was an agent of the
16 OCBC speaking within the scope of that agency. See Davis v. Mobil Oil Exploration & Producing,
17 Southeast, Inc., 864 F.2d 1171, 1173-74 & n. 1 (5th Cir.1989).

18 Paragraph 12: The OCBC Defendants object to this paragraph on the ground that
19 Special Agent Nehring had "no personal knowledge of the purported contents," and that this
20 paragraph contains improper opinion testimony and impermissible legal conclusions regarding
21 whether the alleged "marijuana with the 'brand name of "'Northern Lights'" was in fact marijuana.
22 Separate Statement at 6. Special Agent Nehring's declaration makes clear that the bag of suspected
23 marijuana which he purchased from the OCBC on May 19, 1997, was subsequently marked as Exhibit
24 11, and transferred to the DEA Western Regional Laboratory for analysis, Nehring Dec. ¶ 14, and a
25 chemical analysis of the green, leafy substance contained in two clear plastic bags what had been
26 marked as Exhibit 11 identified the presence of marijuana. Quinn Dec. ¶ 4.

1 The OCBC Defendants further object to the reference to the "alleged purchase of marijuana
2 card [sic] obtained using a phony physician statement" as being "impermissible evidence illegally
3 obtained by fraud and entrapment that would be unfairly prejudicial to defendants." Separate
4 Statement at 6. As set forth above, the defenses of fraud and entrapment based on the OCBC's
5 purported reliance on state law are foreclosed as a matter of law.

6 Paragraph 13: The OCBC Defendants object to this paragraph on the ground that it
7 contains improper opinion testimony and impermissible legal conclusions regarding whether the
8 alleged "bag of suspected marijuana" was in fact marijuana. Separate Statement at 6. This objection
9 fails for the reasons set forth above. Special Agent Nehring's declaration makes clear that the bag
10 of suspected marijuana which he purchased from the OCBC on May 19, 1997, was subsequently
11 marked as Exhibit 11, and transferred to the DEA Western Regional Laboratory for analysis, Nehring
12 Dec. ¶ 14, and a chemical analysis of the green, leafy substance contained in two clear plastic bags
13 what had been marked as Exhibit 11 identified the presence of marijuana. Quinn Dec. ¶ 4.

14 Paragraph 14: The OCBC Defendants object to this paragraph on the ground that it
15 contains improper opinion testimony and impermissible legal conclusions regarding whether the
16 alleged "bag of suspected marijuana" was in fact marijuana. Separate Statement at 6. This objection
17 fails for the reasons set forth above. Special Agent Nehring's declaration makes clear that the bag
18 of suspected marijuana which he purchased from the OCBC on May 19, 1997, was subsequently
19 marked as Exhibit 11, and transferred to the DEA Western Regional Laboratory for analysis, Nehring
20 Dec. ¶ 14, and a chemical analysis of the green, leafy substance contained in two clear plastic bags
21 what had been marked as Exhibit 11 identified the presence of marijuana. Quinn Dec. ¶ 4.

22 The OCBC Defendants further object to the reference to the "alleged purchase of marijuana
23 card [sic] obtained using a phony physician statement" as being "impermissible evidence illegally
24 obtained by fraud and entrapment that would be unfairly prejudicial to defendants." Separate
25 Statement at 6. As set forth above, the defenses of fraud and entrapment based on the OCBC's
26 purported reliance on state law are foreclosed as a matter of law.

1 Paragraph 15: The OCBC Defendants object to this paragraph on the ground that it
2 contains improper opinion testimony and impermissible legal conclusions regarding whether the
3 alleged "distribution of marijuana" was in fact marijuana. Separate Statement at 6. This objection
4 fails for the reasons set forth above. Special Agent Nehring's declaration makes clear that the bag
5 of suspected marijuana which he purchased from the OCBC on May 19, 1997, was subsequently
6 marked as Exhibit 11, and transferred to the DEA Western Regional Laboratory for analysis, Nehring
7 Dec. ¶ 14, and a chemical analysis of the green, leafy substance contained in what had been marked
8 as Exhibit 11 identified the presence of marijuana. Quinn Dec. ¶ 4.

9 3. Declaration of Carolyn Porras: Paragraph 4: The OCBC Defendants object to paragraph
10 4 of Special Agent Porras' declaration by making the specious claim that "this declarant has no
11 personal knowledge of any purported distribution of cannabis." Separate Statement at 7. On the
12 contrary, Special Agent Porras' declaration expressly states that she "purchased one-eighth ounce of
13 [what] the OCBC identified as Mexican-grown marijuana for \$25." Porras Dec. ¶ 12. Special Agent
14 Porras' declaration makes clear that the bag of suspected marijuana which she purchased from the
15 OCBC on August 5, 1997, was subsequently marked as Exhibit 33, and transferred to the DEA
16 Western Regional Laboratory for analysis, Porras Dec. ¶ 15, and a chemical analysis of the green,
17 leafy substance contained in the bag which had been marked as Exhibit 33 identified the presence of
18 marijuana. Quinn Dec. ¶ 6. The OCBC Defendants' objection is meritless.

19 The OCBC Defendants also object that Special Agent Porras' testimony constitutes "improper
20 opinion testimony and impermissible legal conclusions as to whether OCBC was in fact 'a marijuana
21 distribution business.'" Separate Statement at 7. This assertion also is without foundation.

22 Special Agent Porras has been employed as a DEA Special Agent since August 1995. Porras
23 Dec. ¶ 1. In that capacity, she has received training from the DEA and Federal Bureau of
24 Investigation in specialized narcotic investigative matters including, but not limited to, the following:
25 drug interdiction and detection, money laundering techniques and schemes, drug identification, and
26 asset identification and forfeiture, including specialized training in the preparation of narcotic and
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1 document search warrants for residences and businesses. Id. ¶ 2. Special Agent Porras also has
2 participated in numerous investigations specifically involving both the indoor and outdoor
3 manufacture or cultivation of marijuana, including personally examining approximately 15 indoor
4 and outdoor marijuana plants, and the arrest of more than 30 individuals for violations of federal and
5 state law regarding controlled substances. Id. ¶ 3. Special Agent Porras also has received specialized
6 training regarding the techniques used to grow marijuana and, based on this experience and training,
7 is familiar with the smell and appearance of growing and processed marijuana, as well as the smell
8 of marijuana when it is burning. Id. Finally, Special Agent Porras has participated in the obtaining
9 and/or execution of over five federal and California state warrants to search a particular place or
10 premises for controlled substances and/or related paraphernalia, indicia, and other evidence of the
11 commission of state and/or federal felony violations of law. Id.

12 In view of Special Agent Porras' extensive law enforcement background in controlled
13 substances, particularly with relation to marijuana, her observation that the OCBC was a "marijuana
14 distribution business," id. ¶ 4, satisfies Fed. R. Evid. 701(a), which allows opinions or inferences
15 which are "rationally based on the perception of the witness," as well as Fed. R. Evid. 702, which
16 allows expert opinions based on knowledge, skill, experience, and training.

17 The OCBC Defendants further complain that paragraph 4 constitutes "improper opinion
18 testimony and impermissible legal conclusions as to whether the 'one-eighth ounce of marijuana' was
19 in fact marijuana." Separate Statement at 4. Special Agent Porras' declaration makes clear, however,
20 that the bag of suspected marijuana which she purchased from the OCBC on August 5, 1997, was
21 subsequently marked as Exhibit 33, and transferred to the DEA Western Regional Laboratory for
22 analysis, Porras Dec. ¶ 15, and a chemical analysis of the green, leafy substance contained in the bag
23 which had been marked as Exhibit 33 identified the presence of marijuana. Quinn Dec. ¶ 6. The
24 OCBC Defendants' objection is meritless.

25 Lastly, the OCBC Defendants object to the portions of paragraph 4 on the ground that it is
26 "impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to
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1 defendants." Separate Statement at 7. As set forth above, the defenses of fraud, entrapment, or
2 mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

3 Paragraph 9: The OCBC Defendants object to any statement by "UF1" on the ground
4 that the United States has not "positively identif[ied] 'UF1' as an agent and/or employee of the
5 OCBC," and that this alleged failure precludes the government from contending that his statements
6 constitute admissions of a party-opponent under Fed. R. Evid. 801(d)(2). But, as set forth above,
7 Special Agent Porras' testimony regarding the actions and statements of "UF1" provide a sufficient
8 basis upon which to conclude that she was an agent of the OCBC speaking within the scope of that
9 agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171, 1173-74
10 & n. 1 (5th Cir.1989).

11 Paragraph 10: The OCBC Defendants object to this paragraph on the ground that it
12 contains improper opinion testimony and impermissible legal conclusions regarding whether the
13 alleged "burning smell of marijuana and/or the "fifteen marijuana plants being grown" were in fact
14 marijuana. Separate Statement at 8. This objection fails for the reasons set forth above. In view of
15 Special Agent Porras' extensive law enforcement background in controlled substances, particularly
16 with relation to marijuana, her observations in paragraph 10 pass muster under Fed. R. Evid. 701(a),
17 which allows opinions or inferences which are "rationally based on the perception of the witness,"
18 or under Fed. R. Evid.702, which allows expert opinions based on knowledge, skill, experience, and
19 training.

20 Paragraph 11: The OCBC Defendants object to any statement by "UF1" on the ground
21 that the United States has not "positively identif[ied] 'UF1' as an agent and/or employee of the
22 OCBC," and that this alleged failure precludes the government from contending that his statements
23 constitute admissions of a party-opponent under Fed. R. Evid. 801(d)(2). But, as set forth above,
24 Special Agent Porras' testimony regarding the actions and statements of "UF1" provide a sufficient
25 basis upon which to conclude that she was an agent of the OCBC speaking within the scope of that
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1 agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171, 1173-74
2 & n. 1 (5th Cir.1989).

3 Paragraph 12: The OCBC Defendants object to this paragraph on the ground that
4 Special Agent Porras had "no personal knowledge of the purported contents," and that this paragraph
5 contains improper opinion testimony and impermissible legal conclusions regarding whether the
6 alleged "marijuana with the "brand name of ""Northern Lights"" was in fact marijuana. Separate
7 Statement at 6. Special Agent Porras' declaration makes clear that the bag of suspected marijuana
8 which he purchased from the OCBC on August 5, 1997, was subsequently marked as Exhibit 33, and
9 transferred to the DEA Western Regional Laboratory for analysis, Porras Dec. ¶ 15, and a chemical
10 analysis of the green, leafy substance contained in the bag which had been marked as Exhibit 33
11 identified the presence of marijuana. Quinn Dec. ¶ 6.

12 The OCBC Defendants further object to the reference to the "alleged purchase of marijuana
13 card obtained using a phony physician statement" as being "impermissible evidence illegally obtained
14 by fraud and entrapment that would be unfairly prejudicial to defendants." Separate Statement at 8.
15 As set forth above, the defenses of fraud and entrapment based on the OCBC's purported reliance on
16 state law are foreclosed as a matter of law.

17 Paragraph 13: The OCBC Defendants object to this paragraph on the ground that it
18 is "vague, ambiguous, and lacks foundation as this declarant has no personal knowledge of any
19 'customers,'" and "constitutes improper opinion testimony and impermissible legal conclusions as to
20 whether the 5-10 other people standing in line were in fact 'customers.'" Separate Statement at 9.
21 This objection fails for the reasons set forth above. In view of Special Agent Porras' extensive law
22 enforcement background in controlled substances, particularly with relation to marijuana, her
23 observations in paragraph 10 pass muster under Fed. R. Evid. 701(a), which allows opinions or
24 inferences which are "rationally based on the perception of the witness," or under Fed. R. Evid.702,
25 which allows expert opinions based on knowledge, skill, experience, and training.

1 The OCBC Defendants further object to this paragraph on the ground that it contains improper
2 opinion testimony and impermissible legal conclusions regarding whether the alleged "marijuana"
3 was in fact marijuana. Special Agent Porras' declaration makes clear, however, that the 5-10
4 customers were standing in line "apparently to purchase marijuana from the OCBC," and does not
5 identify any specific marijuana.

6 Paragraph 14-16: The OCBC Defendants object to these paragraphs on the ground that
7 Special Agent Porras had it contains improper opinion testimony and impermissible legal conclusions
8 regarding whether the alleged "bag of marijuana" or "distribution of marijuana" was in fact marijuana.
9 Separate Statement at 9. Special Agent Porras' declaration makes clear that the bag of suspected
10 marijuana which he purchased from the OCBC on August 5, 1997, was subsequently marked as
11 Exhibit 33, and transferred to the DEA Western Regional Laboratory for analysis, Porras Dec. ¶ 15,
12 and a chemical analysis of the green, leafy substance contained in the bag which had been marked as
13 Exhibit 33 identified the presence of marijuana. Quinn Dec. ¶ 6.

14 4. Declaration of Deborah Muusers: The OCBC Defendants object to paragraph 4 of Special
15 Agent Muusers' declaration by making the specious claim that "this declarant has no personal
16 knowledge of any purported distribution of cannabis." Separate Statement at 9. On the contrary,
17 Special Agent Muusers declaration expressly states that she " chose one of the baggies" identified by
18 the OCBC as marijuana, and paid \$60 for this bag. Muusers Dec. ¶ 11. Special Agent Muusers'
19 declaration further makes clear that the bag of suspected marijuana which she purchased from the
20 OCBC on October 22, 1997, was subsequently marked as Exhibit 41, and transferred to the DEA
21 Western Regional Laboratory for analysis, Muusers Dec. ¶ 13, and a chemical analysis of the green,
22 leafy substance contained in the bag which had been marked as Exhibit 41 identified the presence of
23 marijuana. Quinn Dec. ¶ 8. The OCBC Defendants' objection is meritless.

24 The OCBC Defendants also object that Special Agent Muusers' testimony constitutes
25 "improper opinion testimony and impermissible legal conclusions as to whether OCBC was in fact
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1 'a marijuana distribution business.'" Separate Statement at 7. This assertion also is without
2 foundation.

3 Special Agent Muusers has been employed as a DEA Special Agent since July 1991. Muusers
4 Dec. ¶ 1. In that capacity, she has received training from the DEA in specialized narcotic
5 investigative matters including, but not limited to, the following: drug interdiction and detection,
6 money laundering techniques and schemes, drug identification, and asset identification and forfeiture.
7 Id. ¶ 2. Special Agent Porras also has participated in numerous investigations specifically involving
8 both the indoor and outdoor manufacture or cultivation of marijuana, including personally examining
9 approximately 250 indoor and outdoor marijuana plants, and the arrest of more than 100 individuals
10 for violations of federal and state law regarding controlled substances. Id. ¶ 3. Special Agent Muusers
11 also has received specialized training regarding the techniques used to grow marijuana and, based on
12 this experience and training, is familiar with the smell and appearance of growing and processed
13 marijuana, as well as the smell of marijuana when it is burning. Id. Finally, Special Agent Porras has
14 participated in the obtaining and/or execution of over 100 federal and California state warrants to
15 search a particular place or premises for controlled substances and/or related paraphernalia, indicia,
16 and other evidence of the commission of state and/or federal felony violations of law. Id.

17 In view of Special Agent Muusers' extensive law enforcement background in controlled
18 substances, particularly with relation to marijuana, her observation that the OCBC was a "marijuana
19 distribution business," id. ¶ 4, satisfies Fed. R. Evid. 701(a), which allows opinions or inferences
20 which are "rationally based on the perception of the witness," as well as Fed. R. Evid.702, which
21 allows expert opinions based on knowledge, skill, experience, and training.

22 The OCBC Defendants further complain that paragraph 4 constitutes "improper opinion
23 testimony and impermissible legal conclusions as to whether the 'one-eighth ounce of marijuana with
24 the brand name "That's Purdy"' was in fact marijuana." Separate Statement at 9. Special Agent
25 Muusers' declaration makes clear, however, that the bag of suspected marijuana which she purchased
26 from the OCBC on October 22, 1997, was subsequently marked as Exhibit 41, and transferred to the
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1 DEA Western Regional Laboratory for analysis, Muusers Dec. ¶ 13, and a chemical analysis of the
2 green, leafy substance contained in the bag which had been marked as Exhibit 41 identified the
3 presence of marijuana. Quinn Dec. ¶ 8.

4 Lastly, the OCBC Defendants object to the portions of paragraph 4 on the ground that it is
5 “impermissible evidence illegally obtained by fraud and entrapment that would be unfairly prejudicial
6 to defendants.” Separate Statement at 9. As set forth above, the defenses of fraud, entrapment, or
7 mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

8 Paragraphs 6-7: The OCBC Defendants complain that these paragraphs are “vague,
9 ambiguous, and lack[] foundation.” Separate Statement at 10. On the contrary, it is the OCBC
10 Defendants’ objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do
11 not identify any specific aspects of these paragraphs that are objectionable, and there are none.

12 Paragraph 9: The OCBC Defendants object to any statements by others as being
13 inadmissible hearsay. Special Agent Muusers' testimony regarding the actions and statements of
14 "Shawn" provide a sufficient basis upon which to conclude that he was an agent of the OCBC
15 speaking within the scope of that agency. See Davis v. Mobil Oil Exploration & Producing,
16 Southeast, Inc., 864 F.2d 1171, 1173-74 & n. 1 (5th Cir.1989).

17 Paragraph 10: The OCBC Defendants object to this paragraph on the ground that
18 Special Agent Muusers did not have "personal knowledge of the purported contents," and that this
19 paragraph contains improper opinion testimony and impermissible legal conclusions regarding
20 whether the alleged marijuana plants and "food items purported to contain marijuana" and the "smell
21 of burning marijuana" were in fact marijuana, and whether the "drug paraphernalia" was in fact drug
22 paraphernalia. The OCBC Defendants further object to this paragraph on the ground that it
23 "constitutes improper opinion testimony and impermissible legal conclusions as to whether the 5-6
24 other people standing in line were in fact 'customers.'" Separate Statement at 10. This objection fails
25 for the reasons set forth above. In view of Special Agent Muusers' extensive law enforcement
26 background in controlled substances, particularly with relation to marijuana, her observations in
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1 paragraph 10 pass muster under Fed. R. Evid. 701(a), which allows opinions or inferences which are
2 "rationally based on the perception of the witness," or under Fed. R. Evid. 702, which allows expert
3 opinions based on knowledge, skill, experience, and training.

4 Paragraph 11: The OCBC Defendants object to any statements by "UM1" on the
5 ground that the United States has not "positively identif[ied] 'UM1' as an agent and/or employee of
6 the OCBC," and that this alleged failure precludes the government from contending that his
7 statements constitute admissions of a party-opponent under Fed. R. Evid. 801(d)(2). But, as set forth
8 above, Special Agent Muusers' testimony regarding the actions and statements of "UM1" provide a
9 sufficient basis upon which to conclude that he was an agent of the OCBC speaking within the scope
10 of that agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171,
11 1173-74 & n. 1 (5th Cir.1989).

12 The OCBC Defendants further object to the reference to the "alleged purchase of marijuana
13 using a card obtained using a phony physician statement" as being "impermissible evidence illegally
14 obtained by fraud and entrapment that would be unfairly prejudicial to defendants." Separate
15 Statement at 11. As set forth above, the defenses of fraud and entrapment based on the OCBC's
16 purported reliance on state law are foreclosed as a matter of law.

17 Paragraph 12-13, 15-16: The OCBC Defendants object to these paragraphs on the
18 ground that the testimony constitutes improper opinion testimony and impermissible legal conclusions
19 as to whether the "bag of suspected marijuana," "undercover purchase of marijuana," and "distribution
20 of marijuana" was in fact marijuana. Separate Statement at 11. Special Agent Muusers' declaration
21 makes clear, however, that the bag of suspected marijuana which she purchased from the OCBC on
22 October 22, 1997, was subsequently marked as Exhibit 41, and transferred to the DEA Western
23 Regional Laboratory for analysis, Muusers Dec. ¶ 13, and a chemical analysis of the green, leafy
24 substance contained in the bag which had been marked as Exhibit 41 identified the presence of
25 marijuana. Quinn Dec. ¶ 8.

1 The OCBC Defendants further object to paragraphs 13 and 15 on the ground that the "alleged
2 purchase of marijuana using a card obtained using a phony physician statement" as being
3 "impermissible evidence illegally obtained by fraud and entrapment that would be unfairly prejudicial
4 to defendants." Separate Statement at 11. As set forth above, the defenses of fraud and entrapment
5 based on the OCBC's purported reliance on state law are foreclosed as a matter of law.

6 5. Declaration of Special Agent Bill Nyfeler: Paragraph 4: The OCBC Defendants object to
7 paragraph 4 of Special Agent Nyfeler's declaration by making the specious claim that "this declarant
8 has no personal knowledge of any purported distribution of cannabis." Separate Statement at 12. On
9 the contrary, Special Agent Nyfeler's declaration expressly states that made three separate purchases
10 of marijuana from the OCBC. Nyfeler Dec. ¶¶ 10, 21, 30. Special Agent Nyfeler's declaration also
11 makes clear that the bags of suspected marijuana which he purchased from the OCBC on June 23,
12 September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and 55, and
13 transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23, 32, and
14 a chemical analysis of the green, leafy substance contained in the bags which had been marked as
15 Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9. The OCBC
16 Defendants' objection is meritless.

17 The OCBC Defendants also object that Special Agent Porras' testimony constitutes "improper
18 opinion testimony and impermissible legal conclusions as to whether OCBC was in fact 'a marijuana
19 distribution business.'" Separate Statement at 7. This assertion also is without foundation.

20 Special Agent Nyfeler has been employed as a DEA Special Agent since October 1995.
21 Nyfeler Dec. ¶ 1. In that capacity, he has received training from the DEA, Federal Bureau of
22 Investigation, and California Narcotics Officers Association in specialized narcotic investigative
23 matters including, but not limited to, the following: drug interdiction and detection, money laundering
24 techniques and schemes, drug identification, and asset identification and forfeiture. *Id.* ¶ 2. Special
25 Agent Nyfeler also has participated in numerous investigations specifically involving both the indoor
26 and outdoor manufacture or cultivation of marijuana, including personally participating in the
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1 eradication of over 500 indoor and 5,000 outdoor marijuana plants, and the arrest of more than 50
2 individuals for violations of federal and state law regarding controlled substances. Id. ¶ 3. Special
3 Agent Nyfeler also has received specialized training regarding the techniques used to grow marijuana
4 and, based on this experience and training, is familiar with the smell and appearance of growing and
5 processed marijuana, as well as the smell of marijuana when it is burning. Id. Finally, Special Agent
6 Porras has participated in the obtaining and/or execution of over 50 federal and California state
7 warrants to search a particular place or premises for controlled substances and/or related
8 paraphernalia, indicia, and other evidence of the commission of state and/or federal felony violations
9 of law. Id.

10 In view of Special Agent Nyfeler's extensive law enforcement background in controlled
11 substances, particularly with relation to marijuana, his observation that the OCBC was a "marijuana
12 distribution business," id. ¶ 4, satisfies Fed. R. Evid. 701(a), which allows opinions or inferences
13 which are "rationally based on the perception of the witness," as well as Fed. R. Evid. 702, which
14 allows expert opinions based on knowledge, skill, experience, and training.

15 The OCBC Defendants further object to paragraph 4 on the ground that it constitutes improper
16 opinion testimony and impermissible legal conclusions as to whether the "Mexican-grown marijuana"
17 was in fact marijuana. Separate Statement at 12. Special Agent Nyfeler's declaration makes clear,
18 however, that the bags of suspected marijuana which he purchased from the OCBC on June 23,
19 September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and 55, and
20 transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23, 32, and
21 a chemical analysis of the green, leafy substance contained in the bags which had been marked as
22 Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9.

23 Lastly, the OCBC Defendants object to the portions of paragraph 4 on the ground that it is
24 "impermissible evidence illegally obtained by fraud and entrapment that would be prejudicial to
25 defendants." Separate Statement at 12. As set forth above, the defenses of fraud, entrapment, or
26 mistake of law based on the OCBC's purported reliance on state law are foreclosed as a matter of law.
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1 Paragraph 6: The OCBC Defendants object to this paragraph on the ground that any
2 conduct by the security guard is inadmissible on the ground that nonverbal conduct cannot be taken
3 as an assertion that Special Agent Nyfeler could enter the OCBC without identification. Because
4 Special Agent Nyfeler nowhere made such an assertion, this objection is meritless.

5 Paragraphs 7-8: The OCBC Defendants complain that these paragraphs are “vague,
6 ambiguous, and lack[] foundation.” Separate Statement at 13. On the contrary, it is the OCBC
7 Defendants’ objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do
8 not identify any specific aspects of these paragraphs that are objectionable, and there are none.

9 The OCBC Defendants also object to paragraph 8 on the ground that Special Agent Nyfeler
10 did not have "personal knowledge of the purported contents," and that this paragraph contains
11 improper opinion testimony and impermissible legal conclusions regarding whether the alleged
12 marijuana plants were in fact marijuana. The OCBC Defendants further object to this paragraph on
13 the ground that it "constitutes improper opinion testimony and impermissible legal conclusions as to
14 whether the 5-6 other people standing in line were in fact 'customers.'" Separate Statement at 13.
15 This objection fails for the reasons set forth above. In view of Special Agent Nyfeler's extensive law
16 enforcement background in controlled substances, particularly with relation to marijuana, his
17 observations in paragraph 8 pass muster under Fed. R. Evid. 701(a), which allows opinions or
18 inferences which are “rationally based on the perception of the witness,” or under Fed. R. Evid.702,
19 which allows expert opinions based on knowledge, skill, experience, and training.

20 Paragraph 10: The OCBC Defendants object to this paragraph on the ground that "the
21 testimony implies the purchase of marijuana using a card obtained in reliance upon a phony physician
22 statement as impermissible evidence illegally obtained by fraud and entrapment that would be
23 prejudicial to defendants." Separate Statement at 13. As set forth above, the defenses of fraud,
24 entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed
25 as a matter of law.

1 Paragraph 11-15: The OCBC Defendants object to these paragraphs on the ground that
2 the testimony constitutes improper opinion testimony and impermissible legal conclusions as to
3 whether the "bag of suspected marijuana," "undercover purchase of marijuana," and "distribution of
4 marijuana" was in fact marijuana. Separate Statement at 13-14. Special Agent Nyfeler's declaration
5 makes clear, however, that the bags of suspected marijuana which he purchased from the OCBC on
6 June 23, September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and
7 55, and transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23,
8 32, and a chemical analysis of the green, leafy substance contained in the bags which had been
9 marked as Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9.

10 The OCBC Defendants further object to paragraphs 13, 14, and 15 on the ground that the
11 testimony constitutes "impermissible evidence illegally obtained by fraud and entrapment that would
12 be prejudicial to defendants." Separate Statement at 13. As set forth above, the defenses of fraud,
13 entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed
14 as a matter of law.

15 Paragraphs 17-18: The OCBC Defendants complain that these paragraphs are "vague,
16 ambiguous, and lack[] foundation." Separate Statement at 15. On the contrary, it is the OCBC
17 Defendants' objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do
18 not identify any specific aspects of these paragraphs that are objectionable, and there are none.

19 Paragraph 19-20: The OCBC Defendants object to this paragraph on the ground that
20 Special Agent Nyfeler did not have "personal knowledge of the purported contents," and that this
21 paragraph contains improper opinion testimony and impermissible legal conclusions regarding
22 whether the alleged "10 growing marijuana plants" were in fact marijuana. Separate Statement at 15.
23 The OCBC Defendants further object to this paragraph on the ground that "this declarant has no
24 personal knowledge of any 'customers.'" This objection fails for the reasons set forth above. In view
25 of Special Agent Nyfeler's extensive law enforcement background in controlled substances,
26 particularly with relation to marijuana, his observations in paragraphs 19 and 20 pass muster under
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1 Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based on the
2 perception of the witness," or under Fed. R. Evid.702, which allows expert opinions based on
3 knowledge, skill, experience, and training.

4 The OCBC Defendants object to any statements by "UM2" on the ground that the United
5 States has not "positively identif[ied] 'UM2' as an agent and/or employee of the OCBC," and that this
6 alleged failure precludes the government from contending that his statements constitute admissions
7 of a party-opponent under Fed. R. Evid. 801(d)(2). But, as set forth above, Special Agent Nyfeler's
8 testimony regarding the actions and statements of "UM2" provide a sufficient basis upon which to
9 conclude that he was an agent of the OCBC speaking within the scope of that agency. See Davis v.
10 Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171, 1173-74 & n. 1 (5th Cir.1989).

11 Paragraph 21: The OCBC Defendants object to this paragraph on the ground that "the
12 testimony implies the purchase of marijuana using a card obtained in reliance upon a phony physician
13 statement as impermissible evidence illegally obtained by fraud and entrapment that would be
14 prejudicial to defendants." Separate Statement at 13. As set forth above, the defenses of fraud,
15 entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed
16 as a matter of law.

17 Paragraphs 22-25: The OCBC Defendants object to these paragraphs on the ground
18 that the testimony constitutes improper opinion testimony and impermissible legal conclusions as to
19 whether the "bag of suspected marijuana," "undercover purchase of marijuana," and "distribution of
20 marijuana" was in fact marijuana. Separate Statement at 16-17. Special Agent Nyfeler's declaration
21 makes clear, however, that the bags of suspected marijuana which he purchased from the OCBC on
22 June 23, September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and
23 55, and transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23,
24 32, and a chemical analysis of the green, leafy substance contained in the bags which had been
25 marked as Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9.

1 The OCBC Defendants further object to paragraphs 24 and 25 on the ground that the
2 testimony constitutes "impermissible evidence illegally obtained by fraud and entrapment that would
3 be prejudicial to defendants." Separate Statement at 17. As set forth above, the defenses of fraud,
4 entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed
5 as a matter of law.

6 Paragraphs 27-28: The OCBC Defendants complain that these paragraphs are "vague,
7 ambiguous, and lack[] foundation." Separate Statement at 17. On the contrary, it is the OCBC
8 Defendants' objections that are vague, ambiguous, and lack foundation. The OCBC Defendants do
9 not identify any specific aspects of these paragraphs that are objectionable, and there are none.

10 Paragraph 29: The OCBC Defendants object to this paragraph on the ground that
11 Special Agent Nyfeler did not have "personal knowledge of the purported contents," and that this
12 paragraph contains improper opinion testimony and impermissible legal conclusions regarding
13 whether the alleged "Small Has Oil," "Large Has Oil," "Afghani Hash," or "live marijuana plants"
14 were in fact marijuana. Separate Statement at 17. This objection fails for the reasons set forth above.
15 In view of Special Agent Nyfeler's extensive law enforcement background in controlled substances,
16 particularly with relation to marijuana, his observations in paragraphs 19 and 20 pass muster under
17 Fed. R. Evid. 701(a), which allows opinions or inferences which are "rationally based on the
18 perception of the witness," or under Fed. R. Evid.702, which allows expert opinions based on
19 knowledge, skill, experience, and training.

20 Paragraph 30: The OCBC Defendants object to any statements by "UM2" on the
21 ground that the United States has not "positively identif[ied] 'UM1' as an agent and/or employee of
22 the OCBC," and that this alleged failure precludes the government from contending that his
23 statements constitute admissions of a party-opponent under Fed. R. Evid. 801(d)(2). But, as set forth
24 above, Special Agent Nyfeler's' testimony regarding the actions and statements of "UM1" provide a
25 sufficient basis upon which to conclude that he was an agent of the OCBC speaking within the scope
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1 of that agency. See Davis v. Mobil Oil Exploration & Producing, Southeast, Inc., 864 F.2d 1171,
2 1173-74 & n. 1 (5th Cir.1989).

3 Paragraphs 31-33: The OCBC Defendants object to these paragraphs on the ground
4 that the testimony constitutes improper opinion testimony and impermissible legal conclusions as to
5 whether the "bag of suspected marijuana," "undercover purchase of marijuana," and "distribution of
6 marijuana" was in fact marijuana. Separate Statement at 18. Special Agent Nyfeler's declaration
7 makes clear, however, that the bags of suspected marijuana which he purchased from the OCBC on
8 June 23, September 10, and November 14, 1997, were subsequently marked as Exhibits 23, 37, and
9 55, and transferred to the DEA Western Regional Laboratory for analysis, Nyfeler Dec. ¶¶ 12, 23,
10 32, and a chemical analysis of the green, leafy substance contained in the bags which had been
11 marked as Exhibit 23, 37, and 55 identified the presence of marijuana. Quinn Dec. ¶¶ 5, 7, 9.

12 The OCBC Defendants further object to paragraphs 32 and 33 on the ground that the
13 testimony constitutes "impermissible evidence illegally obtained by fraud and entrapment that would
14 be prejudicial to defendants." Separate Statement at 18. As set forth above, the defenses of fraud,
15 entrapment, or mistake of law based on the OCBC's purported reliance on state law are foreclosed
16 as a matter of law.

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18 Respectfully submitted,
19 ROBERT D. McCALLUM, JR.
20 Assistant Attorney General
21 DAVID W. SHAPIRO
22 United States Attorney
23 ARTHUR R. GOLDBERG
24 Assistant Branch Director
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MARK T. QUINLIVAN
Senior Counsel
U.S. Department of Justice
Civil Division, Room 1048
901 E St., N.W.
Washington, D.C. 20530
Tel: (202) 514-3346

Attorneys for Plaintiff
UNITED STATES OF AMERICA

Dated: April 5, 2002

1 **CERTIFICATE OF SERVICE BY OVERNIGHT DELIVERY**

2 I, Mark T. Quinlivan, Senior Counsel, Civil Division, United States Department of Justice,
3 whose address is 901 E Street, N.W., Room 1048, Washington, D.C. 20530, hereby certify that on
4 the 5th day of April, 2002, I caused to be served a copy of the following documents:

5 • Plaintiff's Response to the OCBC Defendants' Separate Statement of Objections
6 by overnight deliver on the following counsel for the OCBC defendants:

7 Oakland Cannabis Buyer's Cooperative, et al.

8 Annette P. Carnegie
9 Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

Robert A. Raich
1970 Broadway, Suite 1200
Oakland, CA 94612

10 Gerald F. Uelmen
11 Santa Clara University
School of Law
Santa Clara, CA 95053

Randy Barnett
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215

12 and by first-class mail, postage prepaid, upon the following counsel:

13 Marin Alliance for Medical Marijuana, et al.

14 William G. Panzer
15 370 Grand Avenue, Suite 3
Oakland, CA 94610

Cannabis Cultivators Club, et al.

J. Tony Serra
Serra, Lichter, Daar, Bustamante,
Michael & Wilson
506 Broadway
San Francisco, CA 94133

17 Ukiah Cannabis Buyer's Club, et al.

18 Susan B. Jordan
19 515 South School Street
Ukiah, CA 95482

David Nelson
Nelson & Riemenschneider
106 North School Street
Ukiah, CA 95482

21 Santa Cruz Cannabis Buyers Club

22 Kate Wells
2600 Fresno Street
Santa Cruz, CA 95062

Intervenors

Thomas V. Loran, III
Margaret S. Schroeder
Pillsbury Winthrop LLP
50 Fremont Street, 5th Floor
San Francisco, CA 94105

1 Amicus Curiae State of California

2 Taylor S. Carey
3 Special Assistant Attorney General
4 1300 I Street
5 Sacramento, CA 95814

Richard E. Winnie
Alameda County Counsel
1221 Oak Street, #450
Oakland, CA 94612

6 John A. Russo
7 City Attorney
8 Barbara J. Parker
9 Chief Assistant City Attorney
10 City of Oakland
11 One Frank H. Ogawa Plaza, 6th Floor
12 Oakland, CA 94612


13 Amicus Curiae American Civil Liberties Union

14 Graham A. Boyd
15 American Civil Liberties Union Foundation
16 85 Willow Street
17 New Haven, CT 06511

Ann Brick
American Civil Liberties Union
Foundation of Northern California, Inc.
1663 Mission Street
San Francisco, CA 94103

18 Jordan C. Budd
19 American Civil Liberties Union
20 Foundation of San Diego & Imperial Counties, Inc.
21 110 West C Street, Suite 901
22 San Diego, CA 92101

Peter Eliasberg
American Civil Liberties Union
Foundation of Southern California, Inc.
1616 Beverly Blvd.
Los Angeles, CA 90026

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24
25
26
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MARK T. QUINLIVAN