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ROBERT A. RAICH (State Bar No. 147515)
1970 Broadway, Suite 1200
Oakland, California 94612
Telephone: (510) 338-0700

GERALD F. UELMEN (State Bar No. 39909)
Santa Clara University
School of Law
Santa Clara, California 95053
Telephone: (408) 554-5729

JAMES J. BROSNAHAN (State Bar No. 34555)
ANNETTE P. CARNEGIE (State Bar No. 118624)
ANDREW A. STECKLER (State Bar No. 163390)
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CANNABIS CULTIVATOR'S CLUB, et al.,

Defendants.

AND RELATED ACTIONS.

No. C 98-00085 CRB
C 98-00086 CRB
C 98-00087 CRB
C 98-00088 CRB
C 98 00089 CRB
C 98 00245 CRB

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO SHOW CAUSE, AND FOR SUMMARY JUDGMENT IN CASES NO. C 98-0086 CRB; NO. C 98-0087 CRB; AND NO. C 98-0088 CRB

Date: August 31, 1998
Time: 2:30 p.m.
Courtroom: 8
Hon. Charles R. Breyer

INTRODUCTION

By its motion, the government asks this Court to take the extraordinary step of summarily determining, without evidence, a hearing, or a jury, that defendants are guilty of violating the Court's Preliminary Injunction Order. The Constitution requires more, however. Before the government can obtain a show cause hearing, much less a finding of contempt, it must present a prima facie case, based at least upon clear and convincing evidence, of acts which constitute contempt. The government has failed to do so, and this Court should decline to issue an order to show cause.

The Court need not reach the issues raised by the government's motions, however. On July 29, 1998, the Oakland City Council passed an ordinance pertaining to medical cannabis. As discussed in the Motion to Dismiss filed with this response, this ordinance provides immunity to defendants Jones and the Oakland Cannabis Buyers' Cooperative from federal civil or criminal liability. The case against these defendants is moot and should dismissed.

If, however, the Court deems it appropriate to set this matter for a show cause hearing, the defendants are entitled to a jury trial. The Court already has stated, and the government does not dispute, that a contempt trial should be by jury. Seeking to avoid that jury, the government now claims that there are no disputed issues of material fact concerning defendants' alleged contempt. Given this Court's explicit recognition that the "specific facts and circumstances" surrounding the alleged distribution of medical cannabis to patient-members must be examined, a summary determination of contempt cannot be made. Defendants are entitled to present their case to a jury. For this reason, the government's summary judgment motion must be denied.

Defendants believe that they have taken all reasonable steps to comply with this Court's Preliminary Injunction Order. This Court specifically recognized, and defendants sincerely believe, that the alleged distribution of medical cannabis to particular patients under particular sets of circumstances is subject to several defenses. Defendants thus are entitled to a hearing where a jury

may determine for itself whether defendants have disobeyed this Court's Preliminary Injunction Order.[1]

STATEMENT OF FACTS AND PROCEEDINGS

On May 19, 1998, this Court issued a Preliminary Injunction Order (the "Order") enjoining defendants from engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, from using the premises at 1755 Broadway in Oakland for these purposes, and from conspiring to do the same—in violation of 21 U.S.C. §§ 841(a)(1), 846, and 856. Order at ¶¶ 1-3.

This Court's Memorandum and Order explicitly contemplated a jury trial to determine the validity of any subsequent allegations that the injunction had been violated. The Court stated that, "[i]f the Court issues an injunction, *defendants have a right to a jury in any proceeding in which it is alleged that they have violated the injunction.*" Memorandum and Order dated May 13, 1998 ("Mem. Op. & Order") at 24 (emphasis added).

This Court specifically stated that the defendants may raise, at a jury trial, several defenses to any possible future allegations of contempt—including the medical necessity defense, a substantive due process defense, and the joint users defense. As to medical necessity, the Court stated:

> The Court is not ruling, however, that the defense of necessity is wholly inapplicable to these lawsuits. If a preliminary or permanent injunction is granted, and the federal government alleges that defendants have violated the injunction, *there will be specific facts and circumstances before the Court* from which the Court can determine if the jury should be given a necessity instruction as a defense to the alleged violation of the injunction. As such facts are not presently before the Court, it is premature for the Court to decide whether such a defense is available.

Id. at 21 (emphasis added). This Court further recognized that a substantive due process defense might be available "in a contempt proceeding where the trier of fact is presented with *a particular transaction to a particular patient under a particular set of facts.*" *Id.* at 23 (emphasis added).

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[1] For the reasons stated in this memorandum and also in their separately filed Memorandum In Opposition To Plaintiff's Ex Parte Motion To Modify May 19, 1998 Preliminary Injunction Orders, defendants also request that the government's motion to modify the Preliminary Injunction be denied.

Finally, the Court specifically cautioned "that it is not ruling that defendants are not entitled to [a joint users] defense at trial or in a contempt proceeding for violation of a preliminary or permanent injunction or that defendants could not as a matter of law defeat a motion for summary judgment with evidence of mere possession." *Id.* at 18-19.

The government's current motions seek a summary finding of contempt. The government has failed to allege, however, the evidence of "specific facts and circumstances" and "a particular transaction to a particular patient under a particular set of facts" contemplated by this Court. Instead, in a series of conclusory affidavits, completely lacking in factual support, the government alleges that the following circumstances are sufficient to support a summary finding of contempt.[2] These allegations are fatally deficient and cannot be relied upon to initiate contempt proceedings.

A. The Government's Contempt Allegations Against the Oakland Cannabis Buyers' Cooperative and Jeffrey Jones.

The government alleges that a May 20, 1998 press release quoted Jeff Jones as making statements concerning his intent to furnish medical cannabis to seriously ill patients on May 21, 1998. Declaration of Mark T. Quinlivan ("Quinlivan Decl.") at ¶ 2, Exhibit 1. The government further alleges that a May 22, 1998 article quoted Jeff Jones as having said, "We are not closing down. We feel what we are doing is legal and a medical necessity and we're going to take it to a jury to prove that." *Id.* at ¶ 3, Exhibit 2. In a conclusory affidavit, the government alleges that on May 21, Special Agent Peter Ott observed defendant Jeff Jones "distribute marijuana" to four individuals, and he further observed ten "over-the-counter" sales of what he thought was marijuana. Declaration of Peter Ott ("Ott Decl.") at ¶ 4. Special Agent Ott alleged that the distribution to four individuals was videotaped. Ott Decl. at ¶ 4. The government did not present the videotape of any alleged

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[2] Defendants have submitted concurrently herewith ~~its~~ their objections and motion to strike the affidavits supporting the government's motions for the order to show cause and for summary judgment.

transactions to the Court, did not describe the substance distributed, and did not obtain any of the substance for testing. [3]

The government further alleges that on May 27, 1998, Special Agent Bill Nyfeler telephoned (510) 843-5346. Someone answered and said that they were "open for business" and told Agent Nyfeler their business hours. Declaration of Bill Nyfeler ("Nyfeler Decl.") at ¶ 5. The government alleges that on June 16, 1998, Special Agent Dean Arnold telephoned (510) 832-5346, that an unidentified male answered and told him "they" were "open for business" and "accepting new members." Declaration of Dean Arnold ("Arnold Decl.") at ¶ 3.

The government further alleges that on June 1, 1998, a World Wide Web site entitled "Oakland Cannabis Buyers' Cooperative" claimed, "Currently, we are providing medical cannabis and other services to over 1,300 members." Quinlivan Decl. at ¶ 4, Exhibit 3. Finally, the government alleges that on June 30, 1998, a *Portland NORML News* article printed a summary of the June 27, 1998 "Consortium Meeting of California Medical Marijuana Dispensaries" which, in turn, stated that "[t]he three remaining CBC's are still open. Ukiah, Marin Alliance & Oakland." Quinlivan Decl. at ¶ 5, Exhibit 4.

B. The Government's Contempt Allegations Against the Marin Alliance and Lynnette Shaw.

The government alleges that in June 12, 1998, Lynnette Shaw was quoted in an article as saying, "We have moved all the patients' files already, and we are still open seven days a week." Quinlivan Decl. at ¶ 6, Exhibit 5. Ms. Shaw also was allegedly quoted as saying, "Give me a jury, please give me a jury. We have our patients lining up waiting to testify. . . . Show me a jury who will look at our patients and not understand the idea of medical marijuana being a necessity for these

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[3] Agent Ott apparently relied upon the press release (See Quinlivan Decl. Exh.__) rather than his personal observations for his conclusions. In fact, persons referred to in the press release were not even present and did not receive medical cannabis. See e.g. Sanders Decl., Carter Decl. Agent Ott's statements therefore are inherently unreliable.

people." *Id.* The government further alleges that Ms. Shaw has stated, "We have a Plan B lined up that will allow us to continue to serve our patients, but we will have to operate underground . . . ." *Id.*

Beyond the alleged statements, the government alleges that on May 27, 1998, Special Agent Bill Nyfeler observed fourteen people enter the Marin Alliance over a two and one-half hour period. Nyfeler Decl. at ¶ 3. He further allegedly observed "several of these individuals . . . roll *what appeared to be* marijuana cigarettes, and smoke the cigarettes directly outside the club." *Id.* (emphasis added).

Also on May 27, 1998, Agent Nyfeler dialed the telephone number (415) 256-9328; no one answered the phone, but a pre-recorded message stated that the Marin Alliance was still "open for business" under the "medical necessity defense." Nyfeler Decl. at ¶ 6. On June 16, 1998, Special Agent Arnold placed a telephone call to (415) 256-9328; an unidentified woman allegedly answered the telephone stating "Marin Alliance," informed the special agent of the requirements for becoming a new member, and stated that the cooperative was open until "five." Arnold Decl. at ¶ 4.

The government alleges that the minutes of the Monthly Meeting of California Medical Marijuana Dispensaries held on May 30, 1998 stated: "MARIN UPDATE: Lynnette Shaw says she's laid off all but 1 other person to help her run her operation." Quinlivan Decl. at ¶ 7, Exhibit 6. Finally, the government alleges that a summary of the "Consortium Meeting of California Medical Marijuana Dispensaries" on June 27, 1998, as reported in a *Portland NORML News* article, stated that "[t]he three remaining CBC's are still open. Ukiah, Marin Alliance & Oakland." Quinlivan Decl. at ¶ 5, Exhibit 4.

C. The Government's Contempt Allegations Against the Ukiah Cannabis Buyers' Cooperative, Cherrie Lovett, Marvin Lehrman, and Mildred Lehrman.

The government has alleged that a May 30, 1998 article stated that the Ukiah Cannabis Buyers' Cooperative ("UCBC") is still open, and has no plans to close . . . ." Plaintiff's Motion For An Order To Show Cause Why Defendants Should Not Be Held In Contempt, And For Summary Judgment In Cases No. C98-0086 CRB, No. C98-0087 CRB, and No. C98-0088 CRB ("Gov't 's. Mot.") at 7. This same article allegedly quoted Marvin Lehrman as saying, "We're continuing and fulfilling our mission. I don't know what's next." Quinlivan Decl. at ¶ 8, Exhibit 7.

The government further alleges that a June 17, 1998 article quoted Marvin Lehrman saying, "And that's why we're here, to supply medical marijuana to those people who need it now and who may not be alive by the time the boards of supervisors and others get it together." Quinlivan Decl. at ¶ 9, Exhibit 8. On May 27, 1998, Special Agent Nyfeler dialed the telephone number (707) 462-0691; a person named "Marvin" stated that the club was still "open for business." Nyfeler Decl. at ¶ 4. On June 16, 1998, Special Agent Arnold also telephoned (707) 462-0691, and an unidentified male answered by stating "UCBC." Arnold Decl. at ¶ 5. When Agent Arnold asked whether they were open for business, the male asked whether he was a member. *Id.* When the special agent said no, the male stated, "We are officially closed." *Id.* When Special Agent Arnold asked whether the UCBC was accepting new members, the male is alleged to have responded, "Why don't you come in and show me what you have, medical papers?" *Id.*. Finally, the government alleges that a summary of the "Consortium Meeting of California Medical Marijuana Dispensaries" on June 27, 1998, as reported in a *Portland NORML News* article, stated that "[t]he three remaining CBC's are still open. Ukiah, Marin Alliance & Oakland." Quinlivan Decl. at ¶ 5, Exhibit 4.

ARGUMENT

I. THE COURT SHOULD DISMISS, AS MOOT THE CASE AGAINST THE OAKLAND CANNABIS BUYERS COOPERATIVE AND JEFFREY JONES IN LIGHT OF THE OAKLAND CITY COUNCIL'S JULY 29, 1998 UNANIMOUS PASSAGE OF A CITY ORDINANCE PERTAINING TO MEDICAL CANNABIS.

On July 29, 1998, the City Council of the City of Oakland unanimously passed "An Ordinance of the City of Oakland Adding Chapter 8.42 to the Oakland Municipal Code Pertaining to Medical Cannabis" ("the Ordinance"). (A copy of the Ordinance is attached to the Defendants' Request for Judicial Notice as Exhibit A.) The purposes for passage of the Ordinance include:

> ensur[ing] that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief and to ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

Ordinance ___, Section 1.A. (quotations and citations omitted).

Another express purpose of the Ordinance is "to provide immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code . . . ." Ordinance __, Section 1.D. Section 885(d) provides that:

> no civil or criminal liability shall be imposed by virtue of this subchapter upon any . . . duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

21 U.S.C. § 885(d). Section 3 of the Ordinance authorizes the City Manager to designate one or more entities as medical cannabis provider associations as follows:

> The City of Oakland hereby establishes a Medical Cannabis Distribution Program. Such program shall be administered by medical cannabis provider associations. The City Manager shall designate one or more entities as a medical cannabis provider association. Any designated medical cannabis provider association shall enforce the provisions of this Chapter, including enforcing its purpose of insuring that seriously ill Californians have the right to obtain and use marijuana for medical purposes. For the purposes of this Chapter only, a medical cannabis provider association, and its agents, employees and directors while acting within the scope of their duties on behalf of the association, shall be deemed officers of the City of Oakland.

Thus, when the Oakland City Manager designates an entity as a medical cannabis provider association, such entity is by definition thereafter "lawfully engaged in the enforcement of" both Section 11362.5 of the California Health & Safety Code and the Ordinance. Because Section 11362.5 and the Ordinance are "law[s] . . . relating to controlled substances[,]" 21 U.S.C. § 885(d), this ~~same~~ designated entity is immune from liability under 21 U.S.C. §§ 841, 846, and 856.

On August ___, 1998, the Oakland City Manager designated the Oakland Cannabis Buyers' Cooperative as a medical cannabis provider association pursuant to Section 3 of the Ordinance. Thus, under federal law, defendants Jeffrey Jones and the Oakland Cannabis Buyers' Cooperative are immune from civil or criminal liability. 21 U.S.C. § 885(d). Their cases, therefore, should be dismissed.

II. THIS COURT SHOULD DENY THE GOVERNMENT'S REQUEST FOR AN ORDER TO SHOW CAUSE BECAUSE THE CONCLUSORY ALLEGATIONS OF CONTEMPT ARE FATALLY DEFICIENT.

"To make a prima facie showing of contempt . . . the government [must prove] that the defendant has failed to comply with a valid court order." *United States v. Rylander*, 656 F.2d 1313, 1318 (9th Cir. 1981). In a civil contempt proceeding, this proof of contempt must be by clear and

convincing evidence. *Id.* In a criminal contempt proceeding, the proof of contempt must be beyond a reasonable doubt. *United States v. Powers*, 629 F.2d 619, 626 n. 6 (9th Cir. 1980) Regardless of whether these proceedings are viewed as civil or criminal (See Section IV *infra*) the government has failed to meet its burden of proof.

The government's moving papers fail to comply with the minimal procedural requirements for contempt proceedings set forth in Federal Rule of Criminal Procedure 42(b). *United States v. Powers*, 629 F.2d 619, 624 (9th Cir. 1980). This Rule requires not only a reasonable time for the preparation of a defense, but also the concomitant notice of the "essential facts constituting the criminal contempt charged. . . ." Fed. R. Crim. P. 42(b). "The purpose of notice is to inform the contemnor of the nature of the charge and enable the contemnor to prepare a defense." *Powers*, 629 F.2d at 625. As the Supreme Court has stated in the context of an attorney's alleged contempt during court proceedings, "before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of *the specific charges* and an opportunity to be heard in his own behalf . . ." because "reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence." *Taylor v. Hayes*, 418 U.S. 488, 498-99 (1974) (emphasis added). This Court itself noted that in any contempt proceeding in this case, the government would present "specific facts and circumstances." Mem. Op. & Order at 21.

The government's contempt allegations fail to satisfy the specificity and notice requirements of Rule 42(b) and this Court's Order. The government's only "evidence" consists of four conclusory and speculative declarations. For example, the Declaration of Mark T. Quinlivan does not cite any specific instance of an alleged violation of the Order. The Declaration of Peter Ott, Jr. states without evidentiary foundation that he witnessed the distribution of marijuana. Neither Special Agent Nyfeler. Nor Special Agent Arnold, who also submitted declarations, observed any alleged distribution or sale of anything at the defendant cooperatives.

Because the government's allegations are vague and conclusory, neither the Court nor the defendants know who is alleged to have purchased medical cannabis and when (other than the date) they are alleged to have done so. Defendants also are unable to rebut the government's conclusory

allegations for fear of criminal prosecution. Defendants thus cannot properly defend themselves against the government's charges. Because the declarations fail to comply with basic evidentiary standards, they cannot be relied upon, and do not provide a basis to issue an Order to Show Cause.

III. DEFENDANTS ARE IN GOOD FAITH AND SUBSTANTIAL COMPLIANCE WITH THE COURT'S ORDER.

In this Circuit, a party should not be held in contempt if its action "appears to be based on a good faith belief and reasonable interpretation of the [court's order]." *Go-Video, Inc. v. Motion Picture Ass'n of America*, 10 F.3d 693, 695 (9th Cir. 1993) (citations and quotations omitted). Moreover, "[s]ubstantial compliance with a court order . . . is [also] a defense to an action for civil contempt." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986); *Go-Video*, 10 F.3d at 695. If this Court finds that the government has met its burden of establishing that defendants are in contempt of the Order, then defendants must be allowed to present detailed evidence that they are in good faith and substantial compliance with the Order. They rely on at least three defenses, *specifically left open by this Court*, to exempt themselves from liability for any specific acts alleged to violate 21 U.S.C. §§ 841, 846, and 856 and the Order. These defenses include medical necessity, substantive due process, and the joint users defenses.

A. Defendants Are Not In Contempt Because Any Cannabis They Distribute is a Medical Necessity to Their Members.

The medical necessity defense includes the following elements: "(1) [defendants] were faced with a choice of evils and chose the lesser evil; (2) [defendants] acted to prevent imminent harm; (3) [defendants] reasonably anticipated a direct causal relationship between their conduct and the harm to be averted; and (4) [defendants] had no legal alternatives to violating the law." *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046, (1991). The medical necessity defense is simply a specialized application of the common law defense of necessity available in federal prosecutions. 1 LaFave & Scott, *Substantive Criminal Law*, § 5.4(c)(7), pp. 631-33 (1986). Thus, contrary to the government's contention, medical necessity is available in prosecutions for marijuana distribution or possession as a corollary of the common law defense of necessity, and presents a factual question for the jury to determine in a particular case.

Defendants can establish each element of the medical necessity defense at trial. First, they are faced with a choice of evils. Cannabis cooperative members suffer from debilitating and deadly diseases, including cancer, AIDS, and glaucoma. _____ Decl. ¶ ___. Cannabis provides relief in numerous respects, including as a pain reliever, an anti-nauseant, and as an appetite stimulant. *Id.* ¶ ___. For many patient-members, such as those undergoing chemotherapy or experiencing AIDS-related "wasting syndrome," medical cannabis saves their lives. *Id.* ¶ ___.

Second, supplying cannabis to patient-members is necessary to avert severe pain, blindness, or imminent and life threatening harm. Defendants believe that without medical cannabis, these members cannot survive their debilitating illnesses. *Id.* ¶ ___.

Third, there is clearly a direct causal relationship between defendants' supplying medical cannabis and the harm they seek to avert. *Id.* ¶ ___. Defendants will show that medical cannabis in fact alleviates the life-threatening symptoms of cooperative members.

Finally, defendants ~~will~~ (CR) show that there are no legal alternatives to the distribution of medical cannabis. Specifically, defendants ~~will~~ (CR) show that (1) their members have no legal or safe alternative to acquire medical cannabis from other sources; (2) other drugs do not work or they are not nearly as effective; and (3) a rescheduling petition already has been submitted to the relevant administrative agency; the Court has recognized the futility of awaiting a decision on that petition. Mem. Op. & Order at 20.

The government argues, however, that this Court should deny the defendants the right to present evidence concerning their medical necessity defense. In support of its argument, the government contends that (a) the medical necessity defense cannot be raised in contempt proceedings, (b) the Controlled Substances Act precludes the medical necessity defense, and (c) the medical necessity defense is inapplicable to the defendants' alleged conduct.

As demonstrated below, none of the government's arguments establish that the defendants are precluded from presenting at trial evidence of medical necessity. Moreover, because the defense requires an examination of sharply contested factual issues, the validity of the medical necessity defense cannot be determined in a summary proceeding and must be decided by a jury.

1. Defendants Are Entitled to Assert the Medical Necessity Defense in these Contempt Proceedings.

This Court already has recognized that the defense of medical necessity would be available in any proceedings alleging a violation of the Court's order:

> If a preliminary or permanent injunction is granted, and the federal government alleges that defendants have violated the injunction, there will be specific facts and circumstances before the Court from which the Court can determine if the jury should be given a necessity instruction as a defense to the alleged violation of the injunction.

Mem. Op. & Order at 21. The government has conveniently ignored this Court's Order and now contends that defendants cannot raise the medical necessity defense in these proceedings: Gov't's Mot. at 13.

None of the government's cited cases hold that the medical necessity defense is unavailable in contempt proceedings. Gov't's Mot. at 13 (citing *Local 28 of the Sheet Metal Workers' Intern. Assoc. v. Equal Employment Opportunity Comm.*, 478 U.S. 421, 441 (1986)); *Walker v. City of Birmingham*, 388 U.S. 307, 315-20 (1967); *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948); *Mine Workers*, 330 U.S. at 303. These cases simply recognize the principle that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed. *Maggio*, 333 U.S. at 69 citing *Mine Workers*; *Local 28*, 478 U.S. at 441 citing *Maggio* and *Walker*. None of these cases address the issue here, which is whether defendants are *in fact* in contempt for violation of the Order. As this Court has correctly indicated, a contempt proceeding is the proper forum for asserting all defenses, including medical necessity, that defendants may have to a charge of contempt.[4]

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[4] The other cases cited by the government do not question the applicability of the necessity defense in contempt proceedings, but rather hold that the defense had not been established. *Morgan v. Foretich*, 546 A.2d 407, 411 (D.C. 1988), *cert. denied*, 488 U.S. 1007 (1989) (appellant failed to establish the potential harm if complied with court order) and *Commonwealth v. Brogan*, 415 Mass. 169, 175, 612 N.E.2d 656 (1993) (insufficient evidence to warrant submission of necessity defense to jury).

The government also ignores the numerous decisions that recognize the availability of the medical necessity defense in prosecutions concerning marijuana. *United States v. Burton*, 894 F.2d 188, (6th Cir. 1990), the only published federal case to consider the defense of medical necessity in connection with the use of marijuana did not question the applicability of the defense. Rather, the Court concluded that defendant had failed to establish one element of the defense. *Id.* at 191. *See also United States v. Randall*, 104 Daily Wash.L.Rptr. 2249, 2252 (D.C. Super. 1976) (glaucoma patient successfully asserted medical necessity defense to a charge of marijuana possession); *State v. Hastings*, 801 P.2d 563, 565 (Idaho 1990) (defendant presented a legitimate defense of medical necessity in marijuana prosecution; trier of fact would determine whether the elements had been met); *State v. Diana*, 604 P.2d 1312, 1316-17 (Wash. App. 1979) (medical necessity is encompassed in the common law defense of necessity and applies in the context of possession of marijuana; case remanded to allow trier of fact to determine whether defense established); *State v. Bachman*, 595 P.2d 287, 288 (Hawaii 1979) (medical necessity could be asserted as a defense to a marijuana charge in a proper case); *Jenks v. State of Florida*, 582 So.2d 676 (Fla. Dist. Ct. App.) review denied, 589 So.2d 292 (Fla. 1991) (medical necessity defense applied to charge of possession of marijuana and was established by defendants)); and *People v. Trippet*, 56 Cal. App. 4th 1532, 1538 (1997) (assumed validity of medical necessity defense).

2. The Controlled Substances Act Does Not Preclude the Defense of Medical Necessity.

It is well established that common-law defenses may be employed as defenses to a statutory crime. *United States v. Newcomb*, 6 F.3d 1129, 1134 (6th Cir. 1993) (holding necessity defense available to defendant charged with violations of federal firearm possession statutes). As the *Newcomb* court explained:

> [*United States v. Bailey*, 444 U.S. 394 (1980),] teaches that Congress's failure to provide specifically for a common-law defense in drafting a criminal statute does not necessarily preclude a defendant charged with violating that statute from relying on such a defense. This conclusion is unassailable; statutes rarely enumerate the defenses to the crimes they describe. . . .
>
> We therefore conclude that a justification defense may be available to a defendant charged with violating either of these [firearm possession] statutes.

Newcomb, 6 F.3d at 1134.

State courts also have held, consistent with *Newcomb* and *Bailey*, that the defense of medical necessity in cannabis possession cases is not precluded by the fact that the state legislature may have placed cannabis in a category analogous to Schedule I of section 812 of the federal Controlled Substances Act. For example, in *Jenks v. Florida*, 582 So.2d 676 (Fla. 1991), the court of appeal reversed a lower court decision to preclude the defense of medical necessity in a case involving marijuana cultivation and possession of drug paraphernalia. The *Jenks* court ruled that the defense should have been allowed even though the Florida legislature had placed marijuana on its Schedule I, which is analogous to Schedule I of section 812. The court concluded that "the defense [of medical necessity] was recognized at common law and that there has been no clearly expressed legislative rejection of such defense." *Id.* at 678. The court continued, "It is well-established that a statute should not be construed as abrogating the common law unless it speaks unequivocally, and should not be interpreted to displace common law more than is necessary." *Id.* at 67.[5]

This Court has recognized that, consistent with the rule permitting such defenses, defendants are entitled to present at trial common law defenses to the government's charges.the evidence. The government argues, however, that the provisions of the Controlled Substances Act require a departure from this general rule. Nothing in the Controlled Substances Act prohibits the medical necessity defense.

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[5] The government also relies upon state court cases interpreting state legislation, not the Controlled Substances Act, to support its argument that Congress precluded common law defenses to controlled substances violations. These state cases are distinguishable, however, because, unlike Congress, the state legislatures had expressly considered the applicability of defenses to marijuana possession or distribution. See e.g. *State v. Tate*, 102 J.J. 64, 71, 505 A.2d 941 (1986) (medical necessity defense unavailable where defendant did not have statutorily required valid prescription). See also *State v. Cramer* 174 Ariz. 522, 524, 534, 851 P.2d 147, 147 (1992) (medical necessity defense not available to defendant possessing ten pounds of marijuana and claiming it was medically necessary to relieve pain caused by automobile accident; court concluded that the Arizona "Legislature has addressed exceptions and exemptions [to its criminal possession laws] in detail by statute... and concluded[d] that unlawful possession of marijuana does not fall within those protected categories"); *Kauffman v. State*, 620 So.2d 90, 92 (Ala. Crim. app. 1992) (the Alabama Legislature specifically "authorize[d] specially certified physicians to dispense cannabis under certain circumstances to cancer patients receiving chemotherapy treatments and to glaucoma patients" only; defendant's quadriplegic condition did not qualify him for the defense).

The government's argument confuses a determination on a petition to reschedule a controlled substance pursuant to 21 U.S.C. §811 with a party's ability to present a common law necessity defense to a statutory crime. The cases relied upon by the government simply hold that a court should not determine whether marijuana should be reclassified pursuant to §811(a) (Gov't's Mot. at 16-17 and note 10). Indeed, the case upon which the government principally relies, *United States v. Burton*, 894 F.2d 188 (6th Cir. 1990), implicitly recognized the validity of the medical necessity defense. Although the *Burton* court states that "*reclassification* is clearly a task for the legislature and the attorney general and not a judicial one[,]" it did *not* hold therefore that Congress precluded the medical necessity defense in the context of medical cannabis. *Id.* at 192 (emphasis added). To the contrary, the *Burton* court held that this particular defense was not available on the facts[6] only because the defendant could have enrolled himself in a government program to study the effects of marijuana on glaucoma sufferers. *Id.* at 191.[7]

3. The Defense of Medical Necessity Applies to Cannabis ~~Club Distribution of Cannabis~~ by the Defendants.

This Court's Order implicitly recognizes that a medical necessity defense must be available to entities such as the defendant cooperatives. The government asserts, however, that as a matter of law the medical necessity defense is not available to the defendants because they distribute, rather than possess, marijuana. This argument is senseless. Distribution is the necessary antecedent to

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[6] The defendant in *Burton* had been found in possession of several marijuana plants in his yard and in his barn, and processed marijuana was discovered inside his house along with several firearms. *Burton*, 894 F.2d at 189. This defendant claimed he needed the marijuana to relieve his symptoms resulting from glaucoma. *Id.* at 190.

[7] The remaining federal courts of appeals cases the government cites in this context are similarly inapposite. *See* Gov't's Mot. at 17 n. 10, citing *United States v. Greene*, 892 F.2d 453, 455-56 (6th Cir. 1989) (holding that judiciary not the appropriate means by which defendant should challenge Congress' classification of marijuana as Schedule I drug); *United States v. Fry*, 787 F.2d 903, 905 (4th Cir.), *cert. denied*, 479 U.S. 861 (1986) (same); *United States v. Wables*, 731 F.2d 440, 450 (7th Cir. 1984) (same); *United States v. Fogarty*, 692 F.2d 542, 548 & n.4 (8th Cir. 1982) (same); *United States v. Middleton*, 690 F.2d 820, 823 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) (same); *United States v. Kiffer*, 477 F.2d 349, 346-57 (2d Cir. 1972), *cert. denied*, 414 U.S. 831 (1973) (same).

possession. If possession is legally justified as to a person for whom medical cannabis is a necessity, then so too is distribution to this person. "The 'right to obtain' marijuana is, of course, meaningless if it cannot legally be satisfied." *Lungren v. Peron*, 59 Cal. App. 4th 1383, 1401 (1997) (Kline, J., concurring).

The government cites no authority for its illogical claim that the medical necessity defense is inapplicable to the alleged distribution of medical cannabis. The necessity defense necessarily embodies the principle that otherwise unlawful conduct may be justified when undertaken to prevent harm to a third party. See *Aguilar*, 883 F.2d at 693 (necessity defense applies when defendant chose lesser evil); *see also United States v. Contento-Pachon*, 723 F.2d 691, 695 (9th Cir. 1984) ("The defense of necessity is usually invoked when the defendant acted in the interest of the general welfare"); *United States v. Simpson*, 460 F.2d 515, 517-18 (9th Cir. 1972) ("[t]he theoretical basis of the justification defenses is the proposition that, in many instances, society benefits when one acts to prevent another from intentionally or negligently causing injury to people or property"). Thus, the act of distributing medical cannabis to prevent imminent harm to a third party clearly falls within the parameters of the necessity defense.

The government also argues that in order to make out a medical necessity defense, under *United States v. Bailey*, 444 U.S. 394 (1980), the defendants "must demonstrate that they have made a bona fide effort to comply with section 856(a)(1) 'as soon as the claimed duress or necessity [has] lost its coercive force[,]'" Gov't's Mot. at 18 (citing *Bailey*, 444 U.S. at 413). This argument makes no sense in the context of medical necessity.

The government's attempt to apply *Bailey*, a prison escapee case, to the particular facts of this case and the law of 21 U.S.C. § 856(a)(1) is like trying to fit a square peg into a round hole. *Bailey* requires that, in order to establish a necessity defense, a prison escapee must introduce evidence of having made a "bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force." *Bailey*, 444 U.S. at 413. Assuming *arguendo* that this element applies to the non-prison escapee case, defendants have no trouble establishing this element of the defense. The declarations submitted herewith establish that defendants provide medical cannabis to those member-patients with a *current* medical necessity. Conditions such as cancer, HIV, glaucoma,

and quadriplegia (to name a few) do not subside readily, if ever. For most patients, these conditions never lose their "coercive force." *Id.* And even if the medical condition were mercifully to subside for one patient on a given day, even *Bailey* would not require the defendant cooperatives to close their doors to all other patient-members who still medically require the cannabis. Yet this seems to be the government's argument. The facts here establish that the harm ~~which~~ that defendants seek to avoid for their patient-members is imminent, and this harm does not lose its coercive force the way a prison's conditions may change.[8]

4. There Are No Reasonable Available Alternatives to Defendants' Distribution of Medical Cannabis.

The government has cited various procedural alternatives to continuing to provide medical cannabis to patients in need. The defendants have not pursued any of these avenues, however, for the simple reason that they believe they are in compliance with this Court's Preliminary Injunction Order (as explained in the Court's Memorandum and Opinion). While the government asserts that "'[t]he defendant's avenue of relief is to challenge or seek to modify the court order, not to violate it[.]'" Government's Motion at 20 (citing *Commonwealth v. Brogan*, 415 Mass. 169, 612 N.E.2d 656 (1993)), the defendants herein, who do not believe they violated any Court order, have had no reason to seek the relief posited by the government. Similarly, defendants have seen no need for any "modification, clarification or construction of the order." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949).

Moreover, defendants are entitled to show in any contempt proceedings that there were no viable alternatives to their alleged conduct. Defendants are entitled to submit evidence that for most

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[8] Defendants recognize that this Court has stated that "the defense of necessity has never been allowed to exempt a defendant from the criminal laws on a blanket basis." Mem. Op. & Order at 20. However, this Court also has stated that in any future contempt proceeding "specific facts and circumstances" would be before the Court so that it would be able to determine whether the jury would be instructed on the necessity defense. *Id.* at 21. The defendants do not seek a "blanket basis" exemption, but rather a determination of the applicability of each defense on particular facts and circumstances brought before the Court. Despite the government's argument, even an allegation of a violation of 21 U.S.C. 856 must be based on specific facts and circumstances, as this Court has already recognized.

patient-members no other medicine provides the same effective relief in such a safe and reliable manner. Alternative medications ~~such as marinol~~ either do not work or they have such significant adverse side effects that patients cannot use them. Moreover, no drug works as expeditiously as medical cannabis. For some patient-members, medical cannabis saved their lives when it is doubtful any other drug would have.

B. Defendants Are Not in Contempt Because Their Patient-Members Have a Substantive Due Process Right to Medical Cannabis.

[insert Bill Panzer section]

C. Defendants Are Not in Contempt Because Their Patient-Members are Joint Users of Medical Cannabis.

The government cannot obtain a summary finding of contempt or summary judgment because defendants are entitled to present to a jury evidence concerning the joint users defense. This Court has recognized that the joint users defense may be asserted in contempt proceedings and may defeat a motion for summary judgment:

> The Court cautions, however, that it is not ruling that defendants are not entitled to such a defense at trial or in a contempt proceeding for violation of a preliminary or permanent injunction, or that defendants could not as a matter of law defeat a motion for summary judgment with evidence of mere possession. The Court's ruling is narrow.

Mem. Op. & Order at 18-19.

The Preliminary Injunction prohibits the unlawful distribution of cannabis by the defendants, not its mere possession, however unlawful. In *United States v. Swiderski*, 548 F.2d 445 (2nd Cir. 1977), the Court held that defendants who jointly purchase drugs and share them among themselves are not engaged in "distribution" within the meaning of the Controlled Substances Act. The *Swiderski* court applied the defense to the simultaneous purchase and immediate consumption by a husband and wife.

Swiderski's rationale applies with equal force to the use of medical cannabis in compliance with state and local laws. Judicial resistance to expansion of the *Swiderski* doctrine clearly has been based on concerns about its possible use as a "cover" for illicit drugs. Those concerns are not present in this context, however. Just as in *Swiderski*, no one other than the copurchasers are involved in the

use of the medical cannabis. The members are not drawn into drug use through the defendants; rather, they seek the cannabis to alleviate their serious medical conditions, and receive a doctor's approval. These individuals are not using cannabis for recreational purposes. They are merely attempting to alleviate their painful ailments. No "distribution" takes place because the cooperatives and their patient-members jointly acquire the cannabis for medical purposes to be shared among themselves and not with anyone else.

The defendants will establish that on every occasion where the use of medical cannabis is shared by members of the Oakland Cannabis Buyers' Cooperative, the participants agree to the following statement of conditions:

> The Oakland Cannabis Buyers' Cooperative would like to assure all Members that the Cooperative will continue to operate in the good faith belief that it is not engaging in the distribution of cannabis in violation of law. Federal law excludes from the definition of "distribution" the joint purchase and sharing of controlled substances by users. As a Member of the Oakland Cannabis Buyers' Cooperative, you are a joint participant in a cooperative effort to obtain and share medical cannabis. Each transaction in which you participate is not a "sale" or "distribution," but a sharing of jointly obtained medical cannabis. If you make a payment to the Cooperative, such payment is a reimbursement for administrative expenses and operations, which all Members who utilize the services of the Cooperative agree to share.

The Oakland ~~Cannabis Buyers' Cooperative~~ defendants will further establish that the sharing of jointly purchased medical cannabis is conducted in complete conformity with state law requiring medical approval, and with local regulations that govern the use of the medical cannabis. Immediate consumption in each other's presence is precluded by a prohibition of consumption of cannabis on the premises of a cannabis dispensary.

The Oakland ~~Cannabis Buyer's Cooperative~~ defendants will demonstrate that no third persons are involved other than "primary caregivers," and that no one else is brought into a "web" of drug use. Evidence will establish that the joint users are bound together by a shared commitment to the alleviation of each other's pain and compassion for each other's suffering.

Thus, all of the circumstances that led the *Swiderski* court to recognize the joint user defense will be established by the evidence, and all elements of the defense will be proven to the jury's satisfaction. The jury should be instructed that the Preliminary Injunction does *not* preclude mere possession of medical cannabis, even if unlawful, and that the joint use of medical cannabis under the

heavily regulated and controlled circumstances of this case is simple possession of the substance, not distribution.

IV. IF THIS COURT ISSUES AN ORDER TO SHOW CAUSE, THE CONTEMPT TRIAL MUST BE BY JURY.

The government has declared that "[t]he United States is moving for civil contempt against the . . . defendants[,]" as opposed to criminal contempt, because it seeks only civil sanctions. Government's Motion at 9.[9] But as the Supreme Court has recognized, "the stated purposes of a contempt sanction alone cannot be determinative" as to whether the proceedings are civil or criminal. *International Union, UMWA v. Bagwell*, 512 U.S. 821, 828 (1994). Thus, whether any contempt proceedings herein would be civil or criminal in nature does not depend on the self-serving label the government ascribes to them. In fact, regardless whether the proceedings will be deemed civil or criminal, because the contempt here is charged under criminal statutes authorizing criminal penalties up to 25 years in prison and $250,000 to $1,000,000 in fines, the defendants are entitled to a trial by jury. 21 U.S.C. § 841(b)(1)(D)

A. Defendants Are Entitled to a Jury Trial in these Quasi-Criminal Proceedings.

Generally, courts look to the intended effects of the court's punishment to distinguish whether the contempt proceedings are criminal or civil. *See, e.g., Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 517 (9th Cir. 1992); *United States v. Rylander*, 714 F.2d 996, 1001 (9th Cir. 1983). Punishment for civil contempt is intended to be either coercive or compensatory, whereas the purpose of criminal contempt punishment is punitive. *Whittaker* Corp, 953 F.2d at 517. Taking this view, so

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[9] While defendants take some solace in the fact that the government has elected not to proceed criminally, the government's motives therefor appear to be to attempt to avoid having to present this case to a jury. In any event, the government itself notes that "[t]he federal courts have wide discretion in the choice of remedies for civil contempt[,]" Government's Motion at 9, and it appears to call for criminal punishment for past acts, claiming that "stringent coercive remedies are in order." *Id.* at 22. The Court therefore must also require the government to prove contempt beyond a reasonable doubt.

long as this Court does not impose any punishment for past acts after any finding of contempt, then the proceedings are civil.

However, as the Ninth Circuit has stated, "[t]he difference between criminal and civil contempt is not always clear. The same conduct may result in citations for both civil and criminal contempt." *Rylander*, 714 F.2d at 1001. In *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), the Court explained: "The Supreme Court has abandoned the idea that actions or proceedings must be wholly civil or wholly criminal and that the choice of one label inexorably sets the case on a single procedural or constitutional track." *Id.* at 1022; *see also Powers*, 629 F.2d at 627 (no distinct line can be drawn between civil and criminal contempt because each shares the other's attributes). In *Alter*, the Court held that the district court had abused its discretion when it refused to afford the alleged contemnor notice and a reasonable time to prepare a defense as prescribed by Rule of Criminal Procedure 42(b). Finally, "where the elements of both civil and criminal are mixed, the sanctions are reviewed under the procedural requirements of criminal contempt." *Whittaker*, 953 F.2d at 518.

This case represents one of the rare situations in which the federal government has sought an injunction to enforce federal *criminal* laws under 21 U.S.C. 882(b). *See* Mem. Op. & Order at 23 ("The Court has located only five published opinions in which the federal government sought relief based on the statute"). In this unique situation, regardless of what punishment the government seeks or the Court may impose, the defendants have a Sixth Amendment a right to a jury trial on the contempt charges if the Court issues an order to show cause. As the Court stated in *Rylander*, "[i]f the contempt is charged under a statute that authorizes a maximum penalty greater than $500 or six months' imprisonment, there is a right to a jury trial *regardless of the penalty actually imposed.*" *Rylander*, 714 F.2d at 1005 (emphasis added); *see also Bloom v. Illinois*, 391 U.S. 194, 211 (1968) (sixth and fourteenth amendments require jury trial for prosecutions for criminal contempt punishable by more than $500 or six months' imprisonment). The Supreme Court in *Bloom* reasoned, "[i]f the right to jury trial is a fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases." *Bloom*, 391 U.S. at 208. Since the federal criminal statutes at

issue here authorize maximum penalties far greater than $500 and six months' imprisonment, a jury trial is required should this Court issue an order to show cause.[10]

B. Defendants Are Entitled to a Jury Trial Even in a "Civil" Contempt Proceeding.

This Court stated throughout its Memorandum and Order of May 13 that a jury would be the trier of fact in any future contempt proceedings: "In *any* contempt proceeding, the Court will determine the appropriate number of jurors, up to twelve, which still must return a unanimous verdict. . . ." Order at 24 (emphasis added). This statement is entirely consistent with the law of this circuit: "[I]n this circuit the procedural safeguards available in criminal contempt proceedings under Fed. R. Crim. P. 42(b) apply also to civil contempt proceedings." *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 495 (9th Cir. 1983); *see also Powers*, 629 F.2d at 624 (same). Rule 42(b) of the Federal Rules of Criminal Procedure provides in pertinent part that a defendant in contempt proceedings "is entitled to a trial by jury in any case in which an act of Congress so provides." Fed. R. Crim. P. 42(b). The act of Congress which governs these proceedings provides that "[i]n case of an alleged violation of an injunction or restraining order issued under this section, *trial shall*, upon the demand of the accused, *be by jury* in accordance with the Federal Rules of Civil Procedure." 21 U.S.C. § 882(b) (emphasis added). This Ninth Circuit rule ensuring a jury trial to an alleged contemnor charged under an act of Congress which so provides is straightforward and unambiguous.

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[10] The Supreme Court's holding in *International Union, UMWA v. Bagwell*, 512 U.S. at 833-34 is not inconsistent with this conclusion. While that court stated that neither a jury trial nor proof beyond a reasonable doubt are required in civil contempt proceedings, it also stated that "[c]ontempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable fact-finding[;] . . . [u]nder these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." *Id.* at 833-34.

V. THE COURT SHOULD DENY GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT.

The government does not dispute that the defendants would be entitled to a jury if there were any disputed issues of material fact; the government merely claims that it is entitled to summary judgment because there are no disputed fact issues. The threshold inquiry in summary judgment motions is "determining whether there is the need for a trial - whether, in other words, there are any factual issues that can be properly resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Defendants have identified a multitude of facts, based on the defenses expressly left open by this Court, that illustrate the presence of genuine issues requiring a trial.

Summary judgment is particularly inappropriate in contempt proceedings. The Supreme Court has declared that, "[s]ummary adjudication of indirect [i.e., out of court] contempts is prohibited . . . ." *Bagwell*, 512 U.S. at 833. Indeed, the *only* circumstance this Court envisioned where it might consider the government's motion for summary judgment in a contempt proceeding would be if there were *no* material issues of fact and if "*no* reasonable jury could find for the nonmoving party." Mem. Op. & Order. at 24 (citing *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986)) (emphasis added).[11]

As demonstrated in Section IV *supra*, there are many material issues of fact in dispute concerning each and every element of the defenses specifically left open by this Court. The issue here is not simply whether defendants have distributed medical cannabis; it is whether and *under*

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[11] The other authorities the government cites in support of summary judgment are equally unavailing since they too are limited to circumstances where no material issues of fact are in dispute. *See, e.g., Morales-Feliciano v. Parole Bd.*, 887 F.2d 1, 6-7 (1st Cir. 1989), *cert. denied*, 494 U.S. 1046 (1990) (alleged contempt not "point[ed] to no disputed factual matters that required an oral proceeding . . .[n]or [did] it claim that it asked the court for such a hearing"); *Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 782 n. 2 (7th Cir. 1981) (alleged contemnors "failed to demand [a show cause hearing] . . . and did not present any arguments which created any material issue of fact"); *New York State Nat'l Org. for Women v. Terry*, 697 F. Supp. 1324, 1330, 1330 n. 6 (S.D.N.Y. 1988) (evidence of alleged contemnor's disobedience of court's order was uncontroverted and the parties stipulated to this disobedience); *Parker Pen Co. v. Greenglass*, 206 F. Supp. 796, 797 (S.D.N.Y. 1962) (alleged contemnor did not dispute main factual contention).

what circumstances and to whom defendants have distributed medical cannabis. These are sharply contested factual issues that the government conveniently overlooks.

CONCLUSION

Defendants are in good faith and substantial compliance with the Court's Order. The conclusory allegations offered by the government simply do not provide a basis for the issuance of an order to show cause. Even if the Court determined that the government's allegations are sufficient, defendants are entitled to a jury's determination of the specific facts and circumstances concerning their alleged contempt, and of the applicability of any defenses to those charges.

For these reasons, defendants respectfully request that the Court deny the government's motion for an order to show cause, for summary judgment, and for modification of the Preliminary Injunction Order.

Dated: August 14, 1998

JAMES J. BROSNAHAN
ANNETTE P. CARNEGIE
ANDREW A. STECKLER
MORRISON & FOERSTER LLP

By: _____
Annette P. Carnegie

Attorneys for Defendants
OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES