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13
14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA

16
17 UNITED STATES OF AMERICA,

18 Plaintiff,

19 v.

20 CANNABIS CULTIVATOR'S CLUB, et al.,

21 Defendants.

22
23
24
25 AND RELATED ACTIONS.
26
27

No. C 98-00088 CRB

**DEFENDANTS' EX PARTE
APPLICATION TO STAY ORDER
MODIFYING INJUNCTION PENDING
APPEAL AND MOTION TO MODIFY
PRELIMINARY INJUNCTION ORDER
TO PERMIT DISTRIBUTION OF
CANNABIS ONLY TO PATIENTS
WITH A MEDICAL NECESSITY**

(Fed. R. Civ. P. 62, Local Rule 7-11)

Date:
Time:
Courtroom: 8
Hon. Charles R. Breyer

1 **TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:**

2 Pursuant to Federal Rule of Civil Procedure 62 and Local Rule 7-11, defendants Jeffrey Jones
3 and the Oakland Cannabis Buyers' Cooperative ("defendants") bring this *ex parte* application to stay
4 modification of the preliminary injunction order originally dated May 19, 1998 ("Preliminary
5 Injunction Order") pending appeal to the Ninth Circuit Court of Appeals. Alternatively, defendants
6 request this Court to stay imposition of the modification until such time as defendants can submit,
7 and obtain a hearing on, an emergency request for a stay by the Court of Appeals. Defendants also
8 bring this *ex parte* motion to modify the Preliminary Injunction Order to permit distribution of
9 cannabis only to those patients who have a medical necessity for cannabis.

10 **STATEMENT OF FACTS**

11 On October 13, 1998, this Court granted the government's motions in limine to exclude
12 Oakland defendants' defenses and evidence at trial, and it found the Oakland defendants in contempt
13 of the Preliminary Injunction Order. Memorandum and Order Re: Motions In Limine and Order To
14 Show Cause In Case No. 98-00088 (Oakland Cannabis Buyers' Cooperative) ("Mem. Op. & Order")
15 at 13. The Court also granted the government's request to modify the language of the Preliminary
16 Injunction Order as follows:

17 The United States Marshal is empowered to enforce this Preliminary
18 Injunction. In particular, the United States Marshal is authorized to
19 enter the premises of the Oakland Cannabis Buyers' Cooperative at
20 1755 Broadway, Oakland, California, at any time of the day or night,
21 evict any and all tenants, inventory the premises, and padlock the
22 doors, until such time that defendants can satisfy the Court that they are
23 no longer in violation of the injunctive order and that they would in
24 good faith thereafter comply with the terms of the order.

25 *Id.* at 13. The Court stayed imposition of the modification until 5:00 p.m. on October 16, 1998, "to
26 give defendants the opportunity to seek interim appellate relief." *Id.*

27 [insert facts re: necessity portion of judge's Mem. Op.]

28 On October 14, 1998, counsel for Oakland defendants Andrew Steckler telephoned Mark
Quinlivan and notified him of the Oakland defendants' intention to file this *ex parte* motion.
(Declaration of Andrew A. Steckler in Support of Defendants' *Ex Parte* Motion ("Steckler Decl."),

1 filed herewith, at ¶ __.) Mr. Quinlivan indicated that the government opposes [does not oppose] the
2 defendants' request for a stay of imposition of the modification pending appeal. [Is this necessary?]

3 ARGUMENT

4 I. THIS COURT SHOULD STAY IMPOSITION OF THE 5 MODIFICATION OF THE PRELIMINARY INJUNCTION ORDER 6 PENDING APPEAL, OR ALTERNATIVELY, UNTIL THE COURT OF 7 APPEAL RULES ON AN EMERGENCY MOTION FOR A STAY.

8 A district court has the discretion to stay the modification of an injunction order during the
9 pendency of an appeal “as it considers proper for the security of the rights of the adverse party.”
10 Fed. R. Civ. P. 62(c); *see also* Fed. R. App. P. 8(a). This rule “codifies the inherent power of courts
11 to make whatever order is deemed necessary to preserve the status quo and to ensure the
12 effectiveness of the eventual judgment.” *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th
13 Cir. 1988) (quoting C. Wright & A. Miller, 11 Federal Practice and Procedure, § 2904 at 315 (1973)).
14 The factors regulating the issuance of a stay include: (1) whether the stay applicant has made a
15 strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably
16 injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties
17 interested in the proceeding; and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S.
18 770, 776 (1987). The Supreme Court has stated that “the formula cannot be reduced to a set of rigid
19 rules.” *Id.* at 777. In determining whether to stay an injunction, courts in this circuit apply the same
20 standard used when considering a motion for preliminary injunction. *Tribal Village*, 859 F.2d 662 at
21 663. Under this standard, the moving party must demonstrate either (1) a combination of probable
22 success on the merits and the possibility of irreparable injury or (2) that serious questions are raised
23 and the balance of hardships tips sharply in its favor. *Id.* In this circuit, the Court may also consider
24 the public interest in certain cases. *Id.*

25 To obtain a stay, the movant need not show that the court's initial ruling was incorrect; it need
26 only show that the appeal raises serious questions of law. *See* Schwarzer, Tashima & Wagstaffe,
27 *California Practice Guide: Federal Civil Procedure Before Trial* § 13:222.1 (1998). As the court
28 stated in *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 897 F.2d 511, 512 (Fed. Cir.

1 1990), each factor need not be given equal weight and likelihood of success in the appeal is not a
2 rigid concept. . . .” (See also *Washington Metro. Area Transit Comm’n v. Holiday Tours*, 559 F.2d
3 841, 844 (D.C. Cir. 1977) (movant need not show “mathematic probability of success”). Indeed,
4 Judge Conti granted a stay even where the court was “doubtful as to the strength of defendants’
5 showing of likely success on appeal,” where the movant’s showing on other factors of balance of
6 hardships, irreparable injury, and public interest was strong. *In re Hayes Microcomputer Products,*
7 *Inc. Patent Litig.*, 766 F. Supp. 818, 823 (N.D. Cal. 1991) (granting stay of injunction pending appeal
8 even after full jury trial concluded in finding of patent infringement).

9 This Court should exercise its discretion to enter a stay pending appeal here because several
10 factors weigh strongly in favor of a stay and none weigh against it. First, just like the movants in
11 *In re Hayes*, defendants here “have presented the court with persuasive evidence of the severe
12 hardship they will suffer if the [modification of the] injunction is not stayed pending appeal.” *In re*
13 *Hayes*, 766 F. Supp. at 823. Indeed, the Court itself has recognized “the human suffering that will be
14 caused by plaintiff’s success in closing down the OCBC.” Mem. Op. & Order at 13. Defendants
15 have submitted detailed and specific evidence which shows that *at least* four patient-members who
16 visited the Cooperative on May 21 have a medical necessity for cannabis, and they have submitted
17 additional evidence that many other patient-members also have a medical necessity. Moreover,
18 defendants have submitted detailed and specific evidence that cannabis has kept *at least* some
19 patient-members alive. The government, by contrast, has submitted absolutely no evidence that even
20 suggests any hardship it would suffer were the stay pending appeal to be granted. In sum, if ever the
21 balance of hardships tips sharply in a party’s favor this is that case. The death or physical suffering
22 of a patient-member of the Cooperative clearly constitutes “irreparable injury” requiring a stay.

23 Second, this Court is aware that serious legal questions are raised by this appeal. Defendants
24 believe they are likely to succeed on the merits on appeal based in part upon certain fundamental
25 legal and factual errors underlying the Court’s Memorandum and Order. But, as discussed above, to
26 grant a stay this Court need not agree with defendants as to their likelihood of success on the merits
27 on appeal given that the balance of hardships tips strongly in defendants’ favor. See, e.g., *In re*

1 *Hayes*, 766 F. Supp. at 823. In fact, the mere fact that the appeal raises serious legal questions is
2 sufficient reason for this Court to grant the stay. Schwarzer at 13:222.1.

3 Finally, this Court should consider the public interest in this case in its determination whether
4 to grant a stay pending appeal. The public interest in this case weighs heavily in favor of granting a
5 stay. The public interest is manifested in many different respects, including: the City of Oakland's
6 amicus brief previously filed in this case; the counterclaim in intervention filed by the patient-
7 intervenors on _____; and the will of citizens of the State of California with the passage of
8 Proposition 215 in 1996. More specifically, the public interest will be served by maintaining the
9 lives and health of the Cooperative patient-members who have no alternative to cannabis to treat their
10 conditions.

11 Should the Court deny defendants' request for a stay pending appeal, defendants request, in
12 the alternative, that the Court stay the imposition of the modification of the injunction for a brief
13 period in order to allow defendants an opportunity to seek an emergency stay from the Court of
14 Appeals, and in order to enable the Court of Appeals to rule on an emergency motion for a stay.
15 Given the requirement that defendants first seek a stay from this Court, defendants do not believe that
16 the Court's present stay until October 16, 1998 provides sufficient time to seek the necessary relief.

17 **II. THIS COURT SHOULD MODIFY THE PRELIMINARY INJUNCTION**
18 **ORDER TO PERMIT PATIENTS WITH A MEDICAL NECESSITY TO**
19 **OBTAIN CANNABIS FROM DEFENDANTS.**

20 This Court has the power to modify a preliminary injunction order during the pendency of
21 appeal from an earlier order granting or modifying a preliminary injunction "as it considers proper for
22 the security of the right of the adverse party." Fed. R. Civ. P. 62(c). It may also modify the order
23 pursuant to Federal Rule of Civil Procedure 60(b)(6).

24 As this Court has recognized, the necessity defense applies to defendants and patients who
25 offer evidence that (1) they were faced with a choice of evils and chose the lesser evil; (2) they acted
26 to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between their
27 conduct and the harm to be averted; and (4) there were no legal alternatives to violating the law. *See*
28 *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989). The Court also recognized that this

1 defense applies to at least some of the Cooperative’s members. Therefore, and in light of the dire
2 need of some patients for the only medicine that can help them, defendants propose the following
3 modification of the Preliminary Injunction Order:

4 Notwithstanding the foregoing, the Oakland Cannabis Buyers’
5 Cooperative patient-members who fit the following description may
6 obtain cannabis from the Cooperative to alleviate and/or treat a serious
7 medical condition: patients with a doctor’s recommendation for
8 cannabis who (1) face a choice between suffering a serious medical
9 condition and/or death and violating federal law; (2) act to prevent
10 imminent harm; (3) reasonably anticipate a direct causal relationship
11 between their conduct and the harm to be averted; and (4) have no legal
12 alternatives to violating federal law.

13 This Court assumed without deciding “that the four OCBC patients who have submitted
14 declarations and admit to having been present at the OCBC on May 21, 1998, have submitted
15 sufficient evidence as to their need for marijuana to permit a trier of fact to determine if they have a
16 legal necessity for marijuana.” Mem. Op. & Order at 7. Moreover, this Court stated that it
17 “understands defendants’ argument that in this action the Court is sitting in equity and therefore must
18 consider the human suffering that will be caused by plaintiff’s success in closing down the OCBC.”
19 Mem. Op. & Order at 13. By entering the defendants’ proposed modification to the Preliminary
20 Injunction Order, the Court would avert, within the parameters of federal law, the “human suffering”
21 it has recognized will be caused by the government’s success.

22 Defendants respectfully request that this Court either grant their request to modify the
23 Preliminary Injunction Order as specified above, or order that a hearing be conducted on this request
24 as soon as is practicable.

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CONCLUSION

28 For the foregoing reasons, the Oakland defendants respectfully request this Court grant their
request for a stay pending appeal. Alternatively, defendants request that the stay be continued in
effect at least until such time as the defendants can submit, and obtain a hearing on, an emergency

1 request for a stay by the Court of Appeals. Finally, defendants respectfully request this Court to enter
2 their proposed modification of the Preliminary Injunction Order, or to provide for a hearing on same.

3 Dated: October 15, 1998

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