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13 **UNITED STATES DISTRICT COURT**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15 **SAN JOSE DIVISION**

16 COUNTY OF SANTA CRUZ, CALIFORNIA;  
17 CITY OF SANTA CRUZ, CALIFORNIA;  
VALERIE CORRAL; ELADIO V. ACOSTA;  
18 JAMES DANIEL BAEHR; MICHAEL  
CHESLOSKY; JENNIFER LEE HENTZ;  
19 DOROTHY GIBBS; HAROLD F. MARGOLIN;  
and WO/MEN’S ALLIANCE FOR MEDICAL  
20 MARIJUANA

21 Plaintiffs,

22 v.

23 JOHN ASHCROFT, Attorney General of the  
United States; KAREN P. TANDY,  
Administrator of the Drug Enforcement  
24 Administration; JOHN P. WALTERS, Director of  
the Office of National Drug Control Policy; and  
25 30 UNKNOWN DRUG ENFORCEMENT  
ADMINISTRATIONS AGENTS,  
26

27 Defendants.

Case No.: 03-CV-1802 JF

**PLAINTIFFS’ OPPOSITION TO  
OFFICIAL CAPACITY  
DEFENDANTS’ EX PARTE MOTION  
FOR STAY PENDING APPEAL**

Date: None Set  
Time: None Set  
Place: Courtroom 3  
Judge: Hon. Jeremy Fogel

1 **I. INTRODUCTION**

2 The Government's unwarranted *ex parte* motion to stay the preliminary injunction  
 3 issued on June 21, 2004 should be denied. The motion (1) flouts the express, signed agreement  
 4 between the parties and disregards the Case Management Order this Court entered pursuant to that  
 5 agreement, (2) is procedurally improper and attempts to end-run the requirements of a motion for  
 6 reconsideration, and (3) is wholly lacking in merit in any event. This Court should respect the  
 7 agreement of the parties, uphold its Case Management Order, and deny the Government's *ex*  
 8 *parte* motion for stay pending appeal.

9 **II. ARGUMENT**

10 **A. The Parties Agreed, And This Court Ordered, That The Preliminary**  
 11 **Injunction Would Remain In Effect Notwithstanding Any Appeals.**

12 The Government's motion ignores the unambiguous language that the parties  
 13 agreed to in their Further Joint Case Management Conference Statement and that this Court  
 14 adopted in its Further Case Management Order.<sup>1</sup> The parties' May 3, 2004 Further Joint Case  
 15 Management Statement states that "[U]nless this Court's April 21, 2004 Order is reversed on  
 16 appeal, the preliminary injunction . . . shall remain in effect notwithstanding any stay of  
 17 discovery or proceedings in this matter, or any appeal of the Court's April 21, 2004 Order."  
 18 Ex. A at 3. Pursuant to that agreement, the Court's May 10, 2004 Case Management Order  
 19 mandates that "*unless this Court's April 21, 2004 Order is reversed on appeal, the preliminary*  
 20 *injunction to be entered by this Court pursuant to its April 21, 2004 Order shall remain in*  
 21 *effect notwithstanding any stay of discovery or proceedings in this matter, or any appeal of the*  
 22 *Court's April 21, 2004 Order.*" Ex. A at 5. Simply stated, unless and until a higher court  
 23 actually *reverses* this Court's April 21, 2004 Order or June 21, 2004 Preliminary Injunction  
 24 Order, the parties agreed and this Court ordered that the preliminary injunction shall remain in  
 25 effect.

26  
 27 \_\_\_\_\_  
 28 <sup>1</sup> A copy of the May 10, 2004 Further Joint Case Management Statement and Case  
 Management Order is attached as Exhibit A.

1           The Government provides no basis for overriding either its own stipulation or the  
2 Court's Order and chooses simply to ignore them both. Moreover, the Government's request  
3 ignores language in the June 21, 2004 Preliminary Injunction Order which the parties spent  
4 several weeks jointly drafting. That Order states that the preliminary injunction shall remain in  
5 effect "during the pendency of this action, and until this Court makes a ruling on the merits." *See*  
6 June 21, 2004 Order at 1. If the Court were to grant the Government's motion, it would allow the  
7 Government to circumvent its own binding agreement and would eviscerate both the Court's  
8 May 10, 2004 Case Management Order and its June 21, 2004 Preliminary Injunction Order.

9           WAMM relied on the Government's representations and stipulation that the  
10 preliminary injunction would "remain in effect notwithstanding . . . any appeal of the Court's  
11 April 21, 2004 Order." Ex. A at 3. Based on this agreement, WAMM has resumed its activities  
12 and its patient-members once again have access to their medicine. Staying the injunction and  
13 opening the door for the Government to possibly raid WAMM once again would fly in the face of  
14 current Ninth Circuit law and this Court's Preliminary Injunction Order. The Government should  
15 not be permitted to disregard its agreement and the Orders of the Court.

16           **B.     The Government's "Ex Parte" Motion Is Procedurally Improper.**

17           The Government attempts to move *ex parte* and thus violates the Northern District  
18 Local Rule that allows *ex parte* motions only where a specific "statute, Federal Rule, local rule or  
19 Standing Order" authorizes its filing. Civil L.R. 7-10(a). Federal Rule of Civil Procedure 62(c),  
20 the rule under which the Government brings its motion, does not provide any basis for filing on an  
21 *ex parte* basis, nor did the Government receive permission from the Court to do so. In the  
22 absence of a properly-noticed motion, the Court should not even entertain the "merits" of the  
23 Government's arguments.

24           Moreover, although the Government's motion is dressed up as a request to stay the  
25 preliminary injunction entered on June 21, 2004, it is – plainly – an improper request for  
26 reconsideration of the Court's April 21, 2004 Order on which the preliminary injunction is based.  
27 Such a request, however, requires leave of Court. *See* Fed. R. Civ. P. 60(b). Absent leave of  
28 Court and a properly noticed motion and hearing date with sufficient time for briefing by both

1 sides, the Government’s motion should not be heard on the merits.

2 **C. Even If The Government’s Motion Were Proper, It Still Fails To**  
 3 **Meet The Requisite Standard.**

4 Even assuming that the Government’s motion were proper – despite the  
 5 Government’s lack of authority to file it and the prior stipulation of the parties and Orders of this  
 6 Court disallowing it – the Government fails to meet the standard for staying a preliminary  
 7 injunction. As the Government itself states, “[t]he standard for granting a stay pending appeal  
 8 ‘is similar to that employed by district courts in deciding whether to grant a preliminary  
 9 injunction.’” *See Official-Capacity Defendants’ Ex Parte Motion For Stay Pending Appeal*,  
 10 filed June 23, 2004, at 2 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)). This  
 11 Court already has applied Ninth Circuit law to the facts of this case and issued an Order finding  
 12 that *Plaintiffs* met the standard for granting a preliminary injunction. The Government provides  
 13 no new grounds for reconsidering that decision.

14 Because a district court hearing a motion to stay a preliminary injunction has  
 15 necessarily resolved the same issues *against* the movant by granting the injunction in the first  
 16 place, stays are rarely granted. *See, e.g., Miller v. Carlson*, 768 F. Supp. 1341, 1342 (N.D. Cal.  
 17 1991) (denying stay of preliminary injunction pending appeal where the court had already  
 18 “carefully considered the likelihood of success on the merits and the balance of the equities in  
 19 ruling on the motion for preliminary injunction”); *Miller v. Healy*, 1992 U.S. Dist. LEXIS 4605,  
 20 at \*12 (N.D. Cal. Mar. 25, 1992) (denying stay of permanent injunction pending appeal where  
 21 state defendants “simply rehash[ed] their old arguments,” which had “previously been  
 22 considered and rejected by the court”); *Bodylines, Inc. v. E. Mishnan & Sons, Inc.*, 1997 U.S.  
 23 Dist. LEXIS 23125, at \*3 (N.D. Cal. June 13, 1997) (denying stay of preliminary injunction  
 24 pending appeal where the “court already considered most of the arguments now advanced by the  
 25 defendant in connection with plaintiff’s original motion”); *cf. United States v. Judicial Watch*,  
 26 *Inc.*, 241 F. Supp. 2d 15, 16 (D.D.C. 2003) (“[A] stay is an extraordinary remedy and the moving  
 27 party must satisfy stringent standards to justify a stay pending appeal”) (internal citations  
 28 omitted); *Schwartz v. Dolan*, 159 F.R.D. 380, 384 (N.D.N.Y. 1995) (“[M]ere repetition of

1 arguments previously considered and rejected cannot be considered as a ‘strong showing’” of  
 2 likely success on the merits.), *vacated in part on other grounds*, 86 F.3d 315, 318 (2d Cir. 1996)  
 3 (denying stay pending appeal).

4 The case is no different here. Based on the law of this Circuit and extensive  
 5 briefing and arguments by the parties over the past year, this Court found that “Plaintiffs have  
 6 demonstrated irreparable injury and a likelihood of success with respect to their argument that,  
 7 on the facts of this case and the controlling case law in this circuit, the CSA as applied to  
 8 Plaintiffs is an unconstitutional exercise of Congress’s Commerce Clause power.” *County of*  
 9 *Santa Cruz, et al. v. Ashcroft, et al.*, 314 F. Supp. 2d 1000, 1009 (N.D. Cal. 2004) (“*County of*  
 10 *Santa Cruz II*”). The Government’s arguments in its current motion merely retread its prior  
 11 briefing. For example, the Government again rehearses its unsupported assertions that WAMM  
 12 is engaged in commercial activity despite this Court’s findings in both its August 28, 2003 Order  
 13 and its April 21, 2004 Order that Plaintiffs “do not *purchase*, sell, or otherwise *distribute*  
 14 marijuana” and that, while “WAMM is supported by *voluntary* contributions, [] its members are  
 15 *not charged* for their use of marijuana.” *County of Santa Cruz, et al. v. Ashcroft, et al.*, 279 F.  
 16 Supp. 2d 1192, 1196 (N.D. Cal. 2003) (emphasis added); *see also County of Santa Cruz II*, 314  
 17 F. Supp. 2d at 1001. The Government’s attempt to rehash all the arguments leading to the  
 18 Court’s findings – without any change in law or in the equitable factors weighing in Plaintiffs’  
 19 favor – is futile. Even if it were proper, the Government’s motion is meritless.

### 20 III. CONCLUSION

21 For the foregoing reasons, this Court should deny the Government’s *ex parte*  
 22 motion.

23 DATED: June 25, 2004

24 BINGHAM McCUTCHEN LLP

25  
 26 By: \_\_\_\_\_ /S/  
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