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8
9 **UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 **SAN JOSE DIVISION**

11 COUNTY OF SANTA CRUZ, et al.,)
12 Plaintiffs,)
13 v.)
14 ALBERTO GONZALES, Attorney General)
of the United States; KAREN P. TANDY,)
15 Administrator of the Drug Enforcement)
Administration; JOHN P. WALTERS,)
16 Director of the Office of National Drug)
Control Policy; and 30 UNKNOWN)
17 DRUG ENFORCEMENT)
ADMINISTRATION AGENTS,)
18 Defendants.)
19 _____)

Nos. C 03-1802 JF **CONSOLIDATED**
MC 02-7012 JF

NOTICE OF MOTION AND
DEFENDANTS' MOTION TO DISMISS
PLAINTIFFS' FIFTH CAUSE OF ACTION

Date: June 23, 2006
Time: 9:00 a.m.
Courtroom 3, 5th Floor
The Hon. Jeremy Fogel

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on June 23, 2006, at 9:00 a.m., in the United States
3 Courthouse at 280 South First Street, San Jose, California, in the courtroom normally occupied by
4 the Honorable Jeremy Fogel, defendants Alberto Gonzales, Attorney General of the United States;
5 Karen P. Tandy, Administrator of the Drug Enforcement Administration; and John P. Walters,
6 Director of the Office of National Drug Control Policy (collectively the “Official-Capacity
7 Defendants”) will move to dismiss the Fifth Cause of Action in plaintiffs’ First Amended Complaint
8 for Permanent Injunctive Relief, Declaratory Relief, and Damages (“First Amended Complaint”),
9 for the reason that plaintiffs Fifth Cause of Action is time barred.

10 **FACTS AND PROCEEDINGS**

11 On April 23, 2003, plaintiffs County of Santa Cruz, California; City of Santa Cruz,
12 California; Valerie Corral; Eladio V. Acosta; James Daniel Baehr; Michael Cheslosky; Jennifer Lee
13 Hentz; Dorothy Gibbs; Harold F. Margolin; and the Wo/Men's Alliance for Medical Marijuana,
14 filed the instant action against the Attorney General of the United States, the Administrator of the
15 Drug Enforcement (“DEA”), the Director of the Office of National Drug Control Policy, and 30
16 Unknown DEA Agents (“30 Unknown Agents”), and moved for a preliminary injunction that sought
17 to enjoin defendants from enforcing the provisions of the Controlled Substances Act against them.
18 With respect to the 30 Unknown Agents of the DEA, plaintiffs’ Sixth Cause of Action alleged that
19 the 30 Unknown Agents had violated the plaintiffs’ constitutional rights, and sought damages under
20 Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). See Complaint for Preliminary and
21 Permanent Injunctive Relief, Declaratory Relief, and Damages ¶¶ 125-138.

22 On July 2, 2003, this Court granted plaintiffs’ motion for an extension of time to serve the
23 30 Unknown Agents, and ordered that plaintiffs shall have until November 19, 2003, to effect
24 service of process on the unknown defendants.

25 On July 2, 2003, plaintiffs moved to conduct early limited discovery to learn the identities
26 of the 30 Unknown Agents. On August 8, 2003, Magistrate Judge Trumbull granted plaintiffs’
27 motion for leave to conduct early limited discovery. Defendants provided a response to the
28 interrogatory propounded by the plaintiffs on or about September 9, 2003.

1 On October 8, 2003, this Court granted plaintiffs' motion for a further extension of time to
2 serve the 30 Unknown Agents, and ordered that plaintiffs shall have until 30 days after the Ninth
3 Circuit issues a ruling in Wo/Men's Alliance for Medical Marijuana v. United States, No. 03-15062,
4 to effect service of process on the 30 Unknown Agents.

5 On June 18, 2004, the Ninth Circuit, in a per curiam ruling, ruled that the issues in Raich v.
6 Ashcroft, 352 F.3d 1222 (9th Cir.2003), petition for cert. filed, (U.S. April 20, 2004) (No. 03-1454),
7 "may control the outcome in this case," and therefore remanded "for the district court to reconsider
8 after the Supreme Court has completed its action in Raich." Wo/Men's Alliance for Medical
9 Marijuana v. United States, 372 F.3d 1041, 1041 (9th Cir. 2004). The mandate of the Ninth Circuit
10 issued on August 10, 2004.

11 On June 6, 2005, the Supreme Court vacated and remanded the Ninth Circuit's decision in
12 Raich. See Gonzales v. Raich, 125 S. Ct. 2195 (2005).

13 On January 30, 2006, plaintiffs filed their First Amended Complaint, again naming the 30
14 Unknown Agents as defendants. With respect to the 30 Unknown Agents, plaintiffs' Fifth Cause
15 of Action alleged that the 30 Unknown Agents had violated the plaintiffs' constitutional rights, and
16 sought damages under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). See First
17 Amended Complaint ¶¶ 113-117. On February 27, 2006, the Official-Capacity Defendants moved
18 to dismiss plaintiffs' First, Second, Third, Fourth, and Sixth Causes of Action.

19 **ARGUMENT**

20 Plaintiffs' Fifth Cause of Action is time-barred. Plaintiffs have failed to serve the 30
21 Unknown Agents within the time required by the Federal Rules of Civil Procedure; by this Court's
22 Order of October 8, 2003; or by California law.

23 1. Under the Federal Rules of Civil Procedure, replacing a "John Doe" defendant with a
24 party's real name amounts to the changing of a party or the naming of a party under Rule 15(c), and
25 thus the amended complaint will relate back only if the three conditions specified in that rule are
26 satisfied. Rule 15(c) provides, in pertinent part:

1 **(c) Relation Back of Amendments.** An amendment of a pleading relates back to the
2 date of the original pleading when

3 (1) relation back is permitted by the law that provides the statute of
4 limitations applicable to the action, or

5 (2) the claim or defense asserted in the amended pleading arose out
6 of the conduct, transaction, or occurrence set forth or attempted to be
7 set forth in the original pleading, or

8 (3) the amendment changes the party or the naming of the party
9 against whom a claim is asserted if the foregoing provision (2) is
10 satisfied and, within the period provided by Rule 4(m) for service of
11 the summons and complaint, the party to be brought in by amendment
12 (A) has received such notice of the institution of the action that the
13 party will not be prejudiced in maintaining a defense on the merits,
14 and (B) knew or should have known that, but for a mistake
15 concerning the identity of the proper party, the action would have
16 been brought against the party.

17 Fed. R. Civ. P. 15(c). Fed. R. Civ. P. 4(m), which is cross-referenced in Fed. R. Civ. P. 15(c)(3),
18 in turn, provides, in pertinent part that:

19 If service of the summons and complaint is not made upon a defendant within 120
20 days after the filing of the complaint, the court, upon motion or on its own initiative
21 after notice to the plaintiff, shall dismiss the action without prejudice or direct that
22 service be effected within a specific time; provided that, if the plaintiff shows good
23 cause for the failure, the court shall extend the time for service for an appropriate
24 period.

25 Fed. R. Civ. P. 4(m).

26 In this case, plaintiffs did not serve the summons and complaint upon the 30 Unknown
27 Agents within 120 days after filing of the complaint. Instead, and consistent with Rule 4(m) they
28 obtained orders from this Court extending the time to serve the 30 Unknown Agents. Specifically,
on July 2, 2003, this Court granted plaintiffs' motion for an extension of time to serve the 30
Unknown Agents, and ordered that plaintiffs shall have until November 19, 2003, to effect service
of process on the unknown defendants. Thereafter, on October 8, 2003, this Court granted plaintiffs'
motion for a further extension of time to serve the 30 Unknown Agents, and ordered that plaintiffs
shall have until 30 days after the Ninth Circuit issues a ruling in Wo/Men's Alliance for Medical
Marijuana v. United States, No. 03-15062, to effect service of process on the 30 Unknown Agents.

On June 18, 2004, the Ninth Circuit issued its decision in Wo/Men's Alliance for Medical
Marijuana v. United States, 372 F.3d 1041 (9th Cir. 2004), and, on August 10, 2004, the mandate

1 issued. Hence, under the Federal Rules of Civil Procedure and this Court's Order of October 8,
2 2003, the plaintiffs had until September 9, 2004, or 30 days after August 10, 2004, to effect service
3 of process on the 30 Unknown Agents. They failed to do so. Indeed, to this date, plaintiffs have
4 failed to effect service of process on any of the 30 Unknown Agents. Consequently, under the
5 Federal Rules of Civil Procedure and this Court's Order of October 8, 2003, their Fifth Cause of
6 Action is time barred.

7 **2.** Plaintiffs' Fifth Cause of Action also is time barred under California law. Under
8 California law, when a defendant is sued by a fictitious name, plaintiffs have an additional three
9 years to serve the unknown defendant(s). See Cal.Civ.Proc.Code §§ 474 & 583.210(a); Norgart v.
10 Upjohn Co., 21 Cal.4th 383, 398, 981 P.2d 79, 89, 87 Cal.Rptr.2d 453, 464 (1999); Motley v. Parks,
11 198 F.R.D. 532, 534-35 (C.D. Cal. 2000). The Ninth Circuit has, on occasion, applied California
12 substantive law in a Bivens action to abrogate the requirements of Fed.R.Civ.P. 15(c). See Kreines
13 v. United States, 959 F.2d 834, 837 (9th Cir. 1992) ("We have approved the use of the substitution
14 rule [§ 474] in a § 1983 suit. A Bivens suit differs from a § 1983 suit only in that a federal, rather
15 than a state, defendant is sued. We will therefore apply § 474 if Kreines has met the requirements
16 of the statute.") (internal citations omitted).

17 Specifically, section 474 provides that, "[w]hen the plaintiff is ignorant of the name of a
18 defendant, he must state that fact in the complaint, * * * and such defendant may be designated in
19 any pleading by any name, and when his true name is discovered, the pleading or proceeding must
20 be amended accordingly * * *." Cal. Civ. Prac. Code § 474. Section 583.210(a), in turn, provides
21 that, "[t]he summons and complaint shall be served upon a defendant within three years after the
22 action is commenced against the defendant. For the purpose of this subdivision, an action is
23 commenced at the time the complaint is filed." Cal. Civ. Prac. Code § 583.210(a). Section 583.210
24 "applies to a defendant sued by a fictitious name from the time the complaint is filed * * *." Id.
25 Legislative Committee Comment, 2006 Electronic Update; see Silverman & Associates v. Drai, 659
26 F. Supp. 741, 744 (C.D. Cal. 1987); Brennan v. Lermer Corp., 626 F. Supp. 926, 934 (N.D. Cal.
27 1986).

1 In this case, and as set forth above, plaintiffs filed their Complaint on April 23, 2003.
2 Consequently, plaintiffs had until April 24, 2006,¹ in which to identify the 30 Unknown Agents and
3 effect service of process upon them. They failed to do so. Consequently, even under California law,
4 their Fifth Cause of Action is time barred. See Beck v. City of Newark, 1998 WL 404544, at **2-3
5 (N.D. Cal. July 15, 1998) (“As set forth above, the incident giving rise to this litigation occurred on
6 February 20, 1994, and plaintiff filed her complaint on February 17, 1995, more than three years
7 prior to plaintiff’s having sought leave to identify Officers Hutchinson and Olmstead as doe
8 defendants. Under Section 474, however, plaintiff was required to identify any unknown defendant
9 and effect service of the complaint on all parties within three years. Since it is undisputed that more
10 than three years have passed since the filing of plaintiff’s original complaint and that Officers
11 Hutchinson and Olmstead have never been served with a copy of the complaint and summons, the
12 Court finds that Section 474 does not permit plaintiff to identify Officers Hutchinson and Olmstead
13 at this late date. Accordingly, plaintiff’s motion for leave to amend her complaint to identify Officers
14 Hutchinson and Olmstead as doe defendants is DENIED.”) (copy attached), aff’d, 185 F.3d 865 (9th
15 Cir. 1999) (Mem.).

16 Accordingly, because plaintiffs have failed to serve the 30 Unknown Agents within the time
17 required by the Federal Rules of Civil Procedure; by this Court’s Order of October 8, 2003; or by
18 California law, their Fifth Cause of Action should be dismissed with prejudice.

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¹ Because April 23, 2006, fell on a Sunday, plaintiffs had until the following day, April 24, 2006, to effect service on the 30 Unknown Agents. See Ystrom v. Handel, 205 Cal. App. 3d 144, 147-48, 252 Cal. Rptr. 110, 111-12 (Cal. Ct. App. 1988).

CONCLUSION

For the foregoing reasons, plaintiffs' Fifth Cause of Action should be dismissed.

Respectfully submitted,

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