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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
REAL PROPERTY AND  
IMPROVEMENTS LOCATED AT 2366  
SAN PABLO AVENUE, BERKELEY,  
CALIFORNIA,  
Defendant.

Case No. [13-cv-02027-JST](#) (MEJ)

**ORDER RE: DISCOVERY LETTERS**

Re: Dkt. Nos. 78, 79, 80

**BACKGROUND**

This is an in rem action for forfeiture of real property pursuant to 21 U.S.C. § 881(a)(7), brought by Plaintiff United States of America (the “Government”) against the defendant real property located at 2366 San Pablo Avenue, in Berkeley, California (the “Property”), on May 2, 2013. Compl., Dkt. No. 1. Claimant Berkeley Patients Group (“BPG”) is a licensed medical cannabis dispensary that has operated in the City of Berkeley since 1999. Jt. Ltr. at 3 (“Inter. Ltr.”), Dkt. No. 78. BPG currently operates a medical cannabis dispensary at the Property.

The Government first commenced its efforts to force closure of BPG in late 2011 or early 2012, by sending a “landlord letter” to BPG’s former landlord at its former location at 2747 San Pablo Ave., Berkeley. Inter. Ltr. at 3. The former landlord was represented by attorneys Ramsey & Ehrlich. *Id.* Representations were made at that time that a primary reason for the Government’s actions was the proximity of BPG to schools in Berkeley. *Id.* In May 2012, BPG agreed to close its former location as a result of the Government’s pressure and its representations.

1 *Id.* In November 2012, BPG reopened at its present location at the Property, but only after  
2 extensive vetting by Berkeley officials to ensure it was located outside the vicinity of any schools.  
3 *Id.*

4 On April 30, 2013, the Government commenced this action seeking to forfeit BPG’s new  
5 location, alleging that BPG was located within 1000 feet of Nia House Learning Center and Color  
6 Me Children Preschool, which BPG contends are daycare facilities for toddlers and preschoolers,  
7 not schools. *Id.* BPG has filed claims asserting a leasehold interest in the property and contests  
8 foreclosure of its interest via the forfeiture action. *Id.*

9 BPG asserted sixteen affirmative defenses to the forfeiture action. These defenses include:  
10 (1) failure to state a claim; (2) statute of limitations; (3) laches; (4) estoppel; (5) unclean hands; (6)  
11 waiver; (7) excessive fines; (8) vindictive prosecution; (9) selective prosecution; (10  
12 unconscionable police conduct; (11) violation of due process; (12) violation of equal protection;  
13 (13) another action pending; (14) unconstitutional taking; (15) violation of the Tenth Amendment;  
14 and (16) other unknown defenses. Answer, Dkt. No. 42.

15 On November 27, 2013, BPG served the Government with Interrogatories, Requests for  
16 Admissions (“RFA”), and Requests for Production (“RFP”) relating to each of its affirmative  
17 defenses, and on January 29, 2014, the parties filed three joint discovery letters regarding the  
18 Government’s responses. Dkt. Nos. 78-80. The Court will consider each in turn.

19 **DISCUSSION**

20 **A. Dkt. No. 78: Interrogatories Nos. 1-20**

21 On November 27, 2013, BPG served a set of 20 interrogatories aimed at discovering  
22 information relevant to the 16 affirmative defenses it asserted to the forfeiture action. Inter. Ltr.,  
23 Ex. 1. The Government objected to the entire set of Interrogatories on the basis of relevance,  
24 arguing that it need not provide discovery related to affirmative defenses that are insufficient as a  
25 matter of law. Inter. Ltr. at 7. The Government further maintains that in order to overcome its  
26 objection, BPG must prove that the requested discovery is relevant by making a plausible showing  
27 that it can prove each defense, which BPG cannot do. *Id.* BPG maintains that the Government’s  
28 relevance objection is improper because the discovery it seeks pertains to its affirmative defenses.

1 *Id.* at 5.

2 The Federal Rules generally allow for broad discovery in civil actions: “Parties may obtain  
3 discovery regarding any matter, not privileged, that is relevant to the claim or defense of any  
4 party.... Relevant information need not be admissible at trial if the discovery appears reasonably  
5 calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). This  
6 provision is liberally construed to provide wide-ranging discovery of information necessary for  
7 parties to evaluate and resolve their dispute. *Flintkote Co. v. General Acc. Assur. Co. of Canada*,  
8 2009 WL 1457974, at \*2 (N.D. Cal. May 26, 2009) (citing *Oakes v. Halvorsen Marine Ltd.*, 179  
9 F.R.D. 281, 283 (C.D. Cal. 1995)). “The party who resists discovery has the burden to show that  
10 discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its  
11 objections.” *Oakes*, 179 F.R.D. at 283.

12 Here, the Government argues that BPG is not entitled to discovery because it will not be  
13 able to establish any of its affirmative defenses at trial. However, BPG’s ability to prove its  
14 defenses is not the standard against which relevance is determined. A relevant matter is “any  
15 matter that bears on, or that reasonably could lead to other matters that could bear on, any issue  
16 that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).  
17 Accordingly, the Court finds that BPG has made a sufficient showing that the discovery it seeks is  
18 relevant, as it pertains to each of its affirmative defenses, and is thus entitled to relief. *See*  
19 *Oppenheimer Fund*, 437 U.S. at 351-52; Fed. R. Civ. P. 26(b)(1). These affirmative defenses  
20 pertain to the core issues in the case and represent BPG’s only avenue to challenge the forfeiture  
21 action. Given the importance of these issues to BPG’s ability to maintain a defense, and  
22 considering the lack of any burden to the Government<sup>1</sup>, the Court GRANTS BPG’s request to  
23 compel responses to these interrogatories.

24 **B. Dkt. No. 79: RFAs Nos. 6-9**

25 RFAs Nos. 6-9 seek admissions regarding whether the Government received any

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27 <sup>1</sup> The Government objected to each Interrogatory on the grounds it was “burdensome,” but did not  
28 elaborate on this objection in its Joint Letter. Ex.2 to Jt. Ltr., Dkt. No. 78. Based on the  
information sought by these Interrogatories, an objection based on burden would likely be entitled  
to little weight.

1 complaints from parents or administrators of the Color Me Children Preschool or Nia House  
2 Learning Center about the location of BPG in relation to their facilities. Dkt. No. 79 (“RFA Ltr.”),  
3 Ex. 2. The Government objected to these requests as “immaterial to the forfeiture of the defendant  
4 real property or the asserted affirmative defenses and not likely to lead to the discovery of  
5 admissible evidence in this matter. RFA Ltr. at 7. Specifically, the Government argues that these  
6 requests are not relevant because they relate only to the issue of harm, which is not an element of a  
7 complaint for forfeiture based on violations of 21 U.S.C. §§ 841<sup>2</sup> and 856<sup>3</sup>. *Id.* Nor is harm an  
8 element to prove a violation of 21 U.S.C. § 860<sup>4</sup>, because there is an irrebuttable presumption that  
9 drug sales harm children. *Id.* (citing *United States v. Nieves*, 608 F. Supp. 1147, 1149 (S.D.N.Y.  
10 1985)). Based on this narrow interpretation, the Government contends that BPG has failed to  
11 establish that these requests could relate to any other affirmative defense, and on this basis refuse  
12 to answer. *Id.* at 7.

13 BPG argues that the Government’s objections are improper because BPG is entitled to  
14 discovery that is relevant to its affirmative defenses, regardless of whether the Government  
15 believes these defenses have merit. *Id.* at 6. The Court agrees that BPG has advanced a number of

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17 <sup>2</sup> 21 U.S.C. § 841 provides that it is “...unlawful for any person knowingly or intentionally: (1) to  
18 manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense,  
19 a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute  
20 or dispense, a counterfeit substance.”

21 <sup>3</sup> 21 U.S.C. § 856 provides that it is unlawful to:

22 (1) knowingly open, lease, rent, use, or maintain any place, whether  
23 permanently or temporarily, for the purpose of manufacturing,  
24 distributing, or using any controlled substance;

25 (2) manage or control any place, whether permanently or  
26 temporarily, either as an owner, lessee, agent, employee, occupant,  
27 or mortgagee, and knowingly and intentionally rent, lease, profit  
28 from, or make available for use, with or without compensation, the  
place for the purpose of unlawfully manufacturing, storing,  
distributing, or using a controlled substance.

29 <sup>4</sup> 21 U.S.C. § 860 provides that a person may violate section 841(a)(1) or section 856 by:  
“distributing, possessing with intent to distribute, or manufacturing a controlled substance in or  
on, or within one thousand feet of, the real property comprising a public or private elementary,  
vocational, or secondary school or a public or private college, junior college, or university, or a  
playground, or housing facility owned by a public housing authority, or within 100 feet of a public  
or private youth center, public swimming pool, or video arcade facility.”

1 other issues and defenses to which this information is relevant, such as whether these two facilities  
2 are actually “schools” as defined by 21 U.S.C. § 860. At a minimum, an admission that the  
3 Government did not consider these facilities to be “schools” within the meaning of 21 U.S.C. §  
4 860 would tend to establish that BPG did not violate this section. Accordingly, the Court  
5 disagrees with the Government’s narrow interpretation of the information sought by these  
6 requests. The admissions sought by BPG may lead to the discovery or evidence relevant to other  
7 defenses, for instance whether BPG actually operated its dispensary within 1,000 feet of a school.  
8 Accordingly, the Court GRANTS BPG’s motion to compel responses to RFAs Nos. 6-9.

9 **C. Dkt. No. 80: RFPs Nos. 6-15 and 17-29**

10 BPG served a set of 30 RFPs on the Government, seeking production of a number of  
11 documents regarding medicinal cannabis dispensary policies, including: communications with law  
12 enforcement, policies and investigations of dispensaries within the Northern District California  
13 (RFPs Nos. 6-10); any files or information regarding criminal charges or evidence against BPG  
14 (RFPs Nos. 11-15); any information relating to the Government’s interpretation of the definition  
15 of “school” as set forth in 21 U.S.C. § 860 or documents relating to those two facilities (RFPs  
16 Nos. 17-23); manuals, interviews or statements regarding medicinal cannabis dispensary policies  
17 since 2009 (RFPs Nos. 24-26); references to the Cole Memorandum (RFPs Nos. 27-29). Dkt. No.  
18 80 (“RFP Ltr.”), Ex. 1. BPG also requested the production of documents specific to the  
19 Government’s prosecution of this forfeiture action, including: communications between the  
20 Government and BPG’s landlord (RFPs Nos. 1-3); communications with the landlord’s counsel  
21 (RFP No. 4); and any property occupied by BPG (RFP No. 5). *Id.*

22 The Government asserted general objections based on attorney-client privilege and  
23 attorney work product privilege to the entire set of requests, as well as specific objections to each  
24 request based on law enforcement privilege and deliberative process privilege. *Id.* The  
25 Government also objected to RFPs Nos. 1-3 on the basis that they were privileged settlement  
26 agreements pursuant to Rule Federal Rule of Evidence (“FRE”) 408(a). *Id.* In the parties’ letter,  
27 the Government argues that RFPs Nos. 18-19 and 22-23 are not relevant to any viable defense  
28 because they relate only to the issue of harm, which is not an element of a complaint for forfeiture

1 based on violations of 21 U.S.C. §§ 841 and 856. RFP Ltr. at 7.

2 BPG asks the Court to strike the Government’s general objections to the requests, overrule  
3 the relevance objections, require the Government to submit a privilege log to test its claims of  
4 privilege, and order the Government to produce all documents responsive to RFPs Nos. 1-3, 18-  
5 19, and 22-23. *Id.* at 4-5. Specifically, BPG contends that the Government may not impose a  
6 blanket privilege objection, but must respond to each RFP. *Id.* at 4. Moreover, BPG contends that  
7 the Government has not met its burden of establishing privilege in any of its specific objections.  
8 *Id.* at 5 Further, BPG contends that the Government’s relevance objections are insufficient  
9 because BPG need not make a factual showing that it can establish its affirmative defenses in  
10 order to obtain discovery. *Id.*

11 With respect to RFPs Nos. 1-3, the Court finds that the Government’s claim of privilege is  
12 not adequately supported. FRE 408(a) provides that evidence of settlement negotiations is not  
13 admissible to “prove or disprove the validity or amount of a disputed claim or to impeach by a  
14 prior inconsistent statement or a contradiction.” However, subdivision (b) of the rule provides that  
15 “[t]his rule does not require exclusion if the evidence is offered for purposes not prohibited by  
16 subdivision (a).” Accordingly, correspondence regarding settlement negotiations between the  
17 landlord and the Government is discoverable, notwithstanding the provisions of FRE 408(a), if it  
18 is reasonably calculated to lead to the discovery of relevant, admissible evidence, subject to any  
19 claim of privilege. *Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A.*, 254 F.R.D. 568, 581-82  
20 (N.D. Cal. 2008). As the Court found with respect to the Government’s identical argument  
21 regarding BPG’s Requests for Admissions, these requests may lead to the discovery of evidence  
22 relevant to other issues or defenses, for instance whether BPG actually operated its dispensary  
23 within 1,000 feet of a school in violation of 21 U.S.C. § 860. Accordingly, the Court GRANTS  
24 the motion to compel further responses to these RFPs.

25 As to the Government’s relevance objections, the Court finds, as it did above, that these  
26 RFPs are relevant to BPG’s affirmative defenses. BPG need not make an additional showing of a  
27 prima facie defense in order to be entitled to discovery. Specifically, the Court finds that BPG has  
28 met the burden of establishing that RFPs Nos. 1-3, which request documents relating to

1 communications between the Government and BPG’s former landlord, are relevant to BPG’s  
2 affirmative defenses, such as vindictive or selective prosecution, because BPG will have to  
3 establish that others similarly situated have not been prosecuted and that the allegedly  
4 discriminatory prosecution was based on an impermissible motive. *United States v. One 1985*  
5 *Mercedes*, 917 F.2d 415, 420 (9th Cir. 1990). The Court also finds that BPG has met its burden of  
6 establishing that RFPs Nos. 18-19 and 22-23, which request documents relating to whether Nia  
7 House Learning Center and Color Me Children Preschool are “schools” within the meaning of 21  
8 U.S.C. § 860, are relevant. Accordingly, the Court GRANTS BPG’s motion to compel responses  
9 to RFPs Nos. 1-3, 18-19, and 22-23, subject to any claims of privilege the Government may assert.

10 Finally, with respect to the Government’s assertion of privilege in response to RFPs Nos.  
11 5-17, 20-21, and 24-29, the Court ORDERS the Government to produce a privilege log within 15  
12 days of this Order to enable BPG to evaluate the applicability of the claimed privilege or  
13 protection. Fed. R. Civ. P. 26(b)(5); *see also Caudle v. District of Columbia*, 263 F.R.D 29, 35  
14 (D.D.C. 2009). If the parties are unable to resolve their dispute after review of the privilege log,  
15 they shall meet and confer in compliance with the undersigned’s Discovery Standing Order.

16 **CONCLUSION**

17 Based on the analysis above, the Court: (1) GRANTS BPG’s Motion to Compel responses  
18 to Interrogatories Nos. 1-20; (2) GRANTS BPG’s Motion to Compel responses to RFAs Nos. 6-9;  
19 and (3) GRANTS BPG’s Motion to Compel responses to RFPs Nos. 1-3; 18-19, and 22-23. The  
20 Government shall provide further responses by June 12, 2014. To the extent that the Government  
21 objects to RFPs Nos. 5-17, 20-21, and 24-29 based on privilege, it shall specifically object to each  
22 RFP, and provide a privilege log describing each document and the basis for the claim of  
23 privilege.

24 **IT IS SO ORDERED.**

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26 Dated: May 22, 2014

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MARIA-ELENA JAMES  
United States Magistrate Judge

United States District Court  
Northern District of California

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