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SANTA BARBARA SUPERIOR COURT
ANACAPA DIVISION
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

ARROYO VERDE FARMS, INC.

Claimant.

Case No: 20-CV-00590
Assigned Judge: Hon. T. Anderle
SPECIAL PROCEEDING

**NOTICE OF ENTRY OF ORDER TO
SANTA BARBARA SHERIFF'S OFFICE
TO RELEASE PROCAN'S SEIZED
CANNABIS OIL TO PROCAN**

[PENAL CODE. § 1536]

EAGLE BAY ENTERPRISES, INC. d.b.a.
PROCAN LABS,

Petitioner,

Versus

THE PEOPLE OF THE STATE OF CALIFORNIA

RESPONDENT.

Date: May 15, 2020
Time: 8:30 a.m.
Dept.: 11

Action Filed: 1-31-2020

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1 **NOTICE OF ENTRY OF ORDER**

2 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE, that on May 15, 2020, in the above-entitled case, the Honorable Thomas P.
4 Anderle, Judge of the Superior Court, upon a showing of GOOD CAUSE entered the attached ORDER, which
5 GRANTED Petitioner Eagle Bay Enterprises, Inc. d.b.a. as ProCan Labs’ Motion for the Return of Its Cannabis Oil,
6 after reviewing all the pleadings, papers, documents, and evidence, including, without limitation, live witness
7 testimony, and after ensuring all parties presented all evidence on the issues before the Court, and after all parties
8 completed all arguments and made all points regarding their respective positions, the Court entered the attached
9 ORDER, a true and correct copy of which is attached as EXHIBIT "A," which ORDER directs, among other things,
10 the Santa Barbara Sheriff’s Office to release 323 jars of Eagle Bay Enterprises, Inc. d.b.a. as ProCan
11 Labs’ (“Procan”) cannabis oil to be picked up by Procan or its agent by 6:00pm at the Santa Maria Sheriff’s
12 Substation.

13 ***IT WAS SO ORDERED, ADJUDGED, AND DECREED.***

14 Respectfully submitted,
15 **HORWITZ + ARMSTRONG, APC**

16 DATED: May 15, 2020

17 *John Armstrong*
18 John R. Armstrong,
19 attorneys for Petitioner Procan Labs, Inc.
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Exhibit "A"

The People of the State of California

v.

*Six Hundred Twenty Thousand Nine Hundred Ninety Eight Dollars
(\$620,998.00) U.S. Currency and 1800 Pounds of Concentrated Cannabis*

Case No. 20CV00590

HEARING DATE: May 15, 2020 at 8:30am

MATTERS:

1. Motion by Property Owner for Return of Seized Property
2. The request and argument made by the People that probable cause exists to believe the concentrated cannabis is forfeitable and Interested Party Procan's motion for return of property should be denied

ATTORNEYS:

Lee R. Carter and Anthony Davis for The People of the State of California
John R. Armstrong for Claimant Eagle Bay Enterprises, Inc. dba Procan Labs
Eric D. Shevin for Claimants Arroyo Verde Farms, Inc. and Barry Brand

RULINGS AFTER HEARING ALL THE ARGUMENT AND TESTIMONY:

1. **The alleged corrected transcript lodged on or about May 13, 2020, by counsel for Procan is inappropriate and is disregarded.**
2. **The request and argument made by the People that probable cause exists to believe the concentrated cannabis is forfeitable and Interested Party Procan's motion for return of property should be denied is rejected. The record here shows that a California licensed cannabis operator committed no crime, much less intentionally committed a crime. The CUCSA was and does not apply to duly licensed cannabis businesses engaged in permitted commercial cannabis activities in the legal market. There is no evidence that Procan sold or attempted to sell or conspired to sell its oil illegally.**
3. **The motion by claimant Procan Labs for return of its 323 bottles of cannabis oil with Procan's RFID tag on it is granted.**
4. **The Sheriff's Department is ordered to release and return the 323 bottles of cannabis oil with Procan's RFID back to Procan Labs on May 15, 2020, by 6pm, provided the Sheriff's Department may take such videos and pictures as they deem necessary or appropriate, provided it is done prior to 6pm on May 15, 2020.**

Acknowledgements

This is important litigation. The Court acknowledges and appreciates the professional work done by counsel in the case.¹ The case has been contentious and at times even acrimonious. But counsel, to their credit, have persevered and presented their case with appropriate civility.

¹ The Court apologizes for any grammatical and typographical errors in this decision.

Background

This is a forfeiture action. On January 22, 2020, the Santa Barbara County Sheriff's Department seized \$620,998.00 in cash and 1,800 pounds of cannabis oil from Arroyo Verde Farms, Inc. ("Arroyo Verde"), a licensed cannabis grower and transporter located at 5360 Foothill Road, Carpinteria, California. Eagle Bay Enterprises, Inc. dba Procan Labs ("Procan") is a licensed cannabis processor that converts cannabis biomass into oil, which it then sells to licensed cannabis distributors. The cannabis oil seized by the Sheriff's Department allegedly belongs to Procan and has a wholesale value of about \$1,000,000. The cannabis oil was being stored at Arroyo Verde for later resale to Kanna Kingdom, LLC ("Kanna"), a licensed cannabis distributor. The cannabis oil and cash were seized because Arroyo Verde allegedly does not have a proper license to store processed cannabis oil at its facility.

On March 16, 2020, the People filed a petition for forfeiture of the currency, *The People of the State of California v. Six Hundred Twenty Thousand Nine Hundred Ninety Eight Dollars (\$620,998.00) U.S. Currency*, Case No. 20CV00590. Arroyo Verde and its owner, Barry Brand ("Brand"), were named as "interested parties" in the action and filed a claim opposing forfeiture. Although the forfeiture action only concerned the currency that was seized, Procan on April 10, 2020, filed a motion to compel the Sheriff's Department to return the cannabis oil. The People opposed Procan's motion, arguing that Procan lacked standing to assert a claim because the forfeiture action only concerned the currency that was seized and Procan was not claiming any interest in the currency. The People also argued that the cannabis oil should not be returned to Procan because it was being held by the Sheriff's Department as evidence in a pending criminal case involving Arroyo Verde and Brand.

On April 16, 2020, the People filed an amended petition for forfeiture, seeking forfeiture of both the currency and the 1,800 pounds of cannabis oil seized in the raid. In the amended forfeiture action, Arroyo Verde, Brand, and Procan are all named as "interested parties." On April 27, 2020, Procan filed a claim opposing forfeiture of the cannabis oil. Procan now renews its motion for an order compelling the Sheriff's Department to return the cannabis oil. The People oppose the motion.

The Hearing Brief Submitted by the People on 5/14/20, for "Return of Property," the Joint Stipulation filed on 5/14/20, Procan's Hearing Brief re Forfeiture under H&S Code submitted on 5/14/20, and the declaration of Kaila Fayne dated 5/14/20 of the Bureau of Cannabis Control, and the enclosed records, [2 of 2 emails] have all been read and considered.

Testimony was presented at the hearing; it was extensive.

Ruben Cintron testified; he was a credible witness; the Court has considered his testimony. The Court did not find it persuasive in support of the People's theory of the case.

Kristina Perkins was called as a witness; she was a credible witness; the Court did not find her testimony persuasive in support of the People’s theory of the case.

Mark Unterbach testified; he was a credible witness. The Court found his testimony persuasive in support of Procan’s theory of the case.

ANALYSIS

Request for Judicial Notice

Procan has requested that the court take judicial notice of Proposition 64, the Adult Use of Marijuana Act approved by the voters of California in 2016, the rules and regulations known at the Medicinal and Adult Use of Cannabis Regulation and Safety Act (“MAUCRSA”), which govern both medical and non-medical cannabis activities (*Bus & Prof. Code* §26000 et seq.), and the California Bureau of Cannabis Control’s official regulations relating to cannabis production and licensing. Judicial notice may be taken of the “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” *Evid. Code* §452, subd. (c). Accordingly, the court will take judicial notice of the requested items.

Evidentiary Objections

The People objected to portions of the declarations of Mark Unterbach and Max Unterbach submitted in support of Procan’s motion for return of property, while Procan objected to portions of the declarations of Sheriff’s Detective Ruben Cintron and Deputy Frank J. Vasquez submitted in support of the People’s opposition. Most of the objected to statements played no part in the court’s ruling and therefore the court declines to rule on those particular objections. The objection to Detective Cintron’s declaration at page 7, lines 11-24 will be overruled. While the statement is based on a conversation with Special Investigator Blake Williams of the Bureau of Cannabis Control, Detective Cintron is competent to testify as to what he learned regarding the status of Brand’s C13 Distributor/Transport License. The objections to Mark Unterbach’s declaration will likewise be overruled. Unterbach is competent to testify about Procan’s business and licensing history, the METRC tracking system, and the circumstances surrounding the delivery of the cannabis oil to Arroyo Verde.

Motion for Return of Seized Property

The trial court is empowered to entertain a motion for return of property seized pursuant to a warrant. *Penal Code* Section 1536 provides:

“All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable.”

Section 1536 was enacted in order to provide controls over those officials in possession of property seized pursuant to a search warrant, pending resolution of the disposition of the property, including through an order granting a motion for release of the property. *People v. Von Villas* (1992) 10 Cal.App.4th 201, 239. Thus, under California law, the trial court possesses the power, both by statute and pursuant to its inherent power to control and prevent the abuse of its process, to conduct summary proceedings and issue orders regarding property seized pursuant to a warrant issued by the court. *Ensoniq Corporation v. Superior Court* (1998) 65 Cal.App.4th 1537, 1547. Where good cause is shown, the court has a duty to return seized property to its owner if the owner has the right to possess it. *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355, 388-389 (ordering return of medical marijuana seized from defendant during traffic stop). Indeed, continued official retention of property where no criminal action is pending or contemplated violates the owner's due process rights. *People v. Lamonte* (1997) 53 Cal.App.4th 544, 549.

In *City of Garden Grove*, the police seized a plastic bag containing marijuana from the defendant during a traffic stop. The defendant explained that he used the drug because he suffers from severe pain and that he had a doctor's referral to use marijuana, which he showed the officers. The officers nonetheless seized the marijuana and cited the defendant for unlawful possession while driving. After the prosecutor dismissed the drug charge for lack of evidence, the defendant petitioned the court for return of the seized marijuana. The trial court granted the petition and ordered the city's police department to return the marijuana. The city challenged the order through a petition for writ of mandate, but the petition was denied. The court held that due process and fundamental fairness compelled the return of the lawfully possessed property:

“[City] fails to recognize the police cannot retain a person's property without running afoul of basic constitutional considerations. Particularly, the Fourteenth Amendment to the United States Constitution provides that no state shall ‘deprive any person of life, liberty, or property, without due process of law.’ (U.S. Const., 14th Amend., § 1; see also Cal. Const., art. I, § 15.) It is beyond dispute that ‘[t]he right to regain possession of one's property is a substantial right. . . .’ [Citation.] Continued official retention of legal property with no further criminal action pending violates the owner's due process rights. [Citation.]” *Id.*, at 386-387.

Other courts have similarly invoked due process principles to ensure the return of lawfully possessed property. See, e.g., *Ensoniq Corporation v. Superior Court*, *supra*, 65 Cal.App.4th 1537, 1549 (due process required court to grant claimant's motion for return of intellectual property where circumstances indicated claimant acquired the property lawfully); *People v. Superior Court of Orange County* (1972) 28 Cal.App.3d 600, 614-615 (continued police retention of legally protected adult films would constitute a “patent denial of due process”); *Franklin v. Municipal Court* (1972) 26 Cal.App.3d 884, 896-897 (consistent with due process principles, defendant was entitled to the return of a revolver he was lawfully entitled to possess).

In the present case, the Sheriff's Department is holding 1,800 pounds (323 jars) of cannabis oil, along with \$620,998 in cash, seized on January 22, 2020, from Arroyo Verde's premises located at 5360 Foothill Road, Carpinteria, California. (Amended Petition for Forfeiture, filed 4-16-20, p. 2:13-24.) Procan alleges that it is the lawful owner of the cannabis oil and requests that the Sheriff's Department be ordered to return the product to the company. The People oppose Procan's motion and claim that the cannabis oil sought by the company should not be returned, now or ever. First, the People argue that Procan does not have standing to assert its claim for return of the cannabis oil. Second, even if the court finds that Procan does have standing in the matter, the property cannot be returned to Procan because the cannabis oil is being held by the Sheriff's Department as evidence in a pending criminal investigation. Third, the cannabis oil has been "adulterated" within the meaning of *Business and Professions Code* Section 26131, subdivisions (a), (b), and (d), and cannot be possessed or placed back into the stream of commerce.

The People's argument that Procan lacks standing to assert its claim to the cannabis oil is without merit. "To have standing to seek [relief], a party must be beneficially interested [Citation], i.e., have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." *Associated Builders and Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal.4th 352, 361-362. This is equivalent to "the injury in fact" test, which requires a party to prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Ibid.* Here, as detailed in the moving papers, Procan is a licensed cannabis oil manufacturer, California License No. CDPH-1000331, and has been processing cannabis since 2017 under Proposition 64. (Mark Unterbach Dec., ¶3, Ex. D.) For more than two years, Procan has been doing business with Arroyo Verde, a licensed cannabis cultivator and transporter, and during that time Procan has received approximately 118,000 pounds of legal cannabis bio mass from Arroyo Verde for processing into oil. (Mark Unterbach Dec., ¶1.)

In December 2019, Procan learned that Kanna, one of its licensed cannabis distributors, was interested in buying additional amounts of cannabis oil. After Kanna placed an order for additional product, Procan loaded the purchased oil into trucks for delivery to Arroyo Verde's facility in Carpinteria to hold for Kanna. All of the cannabis oil transferred to Arroyo Verde was logged into California's mandatory "seed-to-sell" cannabis tracking system known as "METRC," which ensures that the transaction is handled by licensed cannabis businesses and that all taxes are paid. (Mark Unterbach Dec., ¶4.) The METRC manifests show that 281 jars of cannabis oil were transferred from Procan to Arroyo Verde on the following dates:

- Manifest No. 204130 (41 jars), December 18, 2019
- Manifest No. 222985 (51 jars), December 30, 2019
- Manifest No. 223071 (83 jars), December 30, 2019

- Manifest No. 246748 (63 jars), January 10, 2020
- Manifest No. 249161 (20 jars), January 13, 2020
- Manifest No. 251649 (23 jars), January 14, 2020

(Mark Unterbach Dec., ¶5, Ex. B.)

An additional 42 jars (for a total of 323 jars) were shipped to Arroyo Verde between January 7, 2020 and January 21, 2020, with METRC Manifest Nos. 235400, 254073, 254932, 265684, and 268801. (Mark Unterbach Dec., ¶6, Ex. C.) A METRC identification tag was affixed to each of the 323 jars. (*Ibid.*) On January 22, 2020, the 323 jars were seized by the Sheriff’s Department. (Perkins Dec., p. 2:11-13.) Given that Procan manufactured the cannabis oil at issue and delivered the product to Arroyo Verde to hold for Kanna, the ultimate distributor, Procan clearly has standing to assert its claim for return of its property.

The People next argue that Procan’s motion should be denied because both Arroyo Verde and Procan engaged in illegal activity related to the cannabis oil. *Health and Safety Code* Section 11470 provides:

“The following are subject to forfeiture:

“(a) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this division.

“(b) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this division.”

Cannabis is listed as a Schedule I controlled substance. *Health & Saf. Code* §11054, subd. (d)(13). While the passage of Proposition 64 legalized the non-medical use of marijuana by adults, distinct licenses are required for different commercial cannabis activities. Here, the 1,800 pounds of cannabis oil that were seized by Sheriff’s Deputies had been stored and/or possessed by Arroyo Verde in violation of the licensing laws. Arroyo Verde’s owner, Brand, has a cannabis cultivation license, which allows him to grow cannabis, and a transportation license, which allows him to transport raw product from one licensed manufacturer or distributor to another, but he does not have a license to store or sell processed cannabis oil, also known as “cannabis concentrate.” (Cintron Dec., p. 7:11-24.) The California Code of Regulations specifically provide that a transport licensee “[s]hall not engage in the wholesale packaging, labeling, or storing of cannabis goods.” Cal. Code Regs. §5315, subd. (f)(2).

The People contend that Procan knew that Brand intended to store the cannabis oil at his facility until Kanna or another distributor purchased the product, but Procan denies this.

(Mark Unterbach Dec., ¶10.) Regardless, the court sees no compelling reason for the People to retain custody of the cannabis oil even if criminal charges are brought against Arroyo Verde, Brand, and/or Procan (currently, no criminal charges are pending against any of the parties), since the 323 jars of cannabis oil are not necessary to prove that the product was seized on January 22, 2020. Neither Arroyo Verde nor Brand disputes that the Sheriff's Department seized the cannabis oil from their facility, nor do they dispute the amount seized. (Shevin Dec., ¶3.)

The case of *Buker v. Superior Court* (1972) 25 Cal.App.3d 1085 is instructive. In *Buker*, the defendants were charged with possession of marijuana for sale, cultivating marijuana, and possessing restricted dangerous drugs. When the defendants were arrested, the items seized from their residence included marijuana and \$6,424.00 in currency. Following their preliminary hearing, the defendants filed a motion to have the \$6,424.00 in currency returned to them, arguing that the funds were not necessary to prove guilt and were not contraband. The defendants even agreed to stipulate to the amount of currency found in their residence. The trial court denied the motion on the ground that there was "some color" on which the currency could be admitted as evidence of proof of intent to sell marijuana. *Id.*, at 1088.

On the defendants' petition for writ of mandamus, the court addressed two issues. The first issue was whether a court in possession of property legally seized under a search warrant has authority to direct delivery to the owner of the property on a showing of good cause. The court held that the trial court has such authority, stating:

"Authority to release such is within the express power conferred by Penal Code section 1536, which provides all property taken under a search warrant is subject to the order of the court 'in which the offense in respect to which the property . . . taken is triable.' Furthermore, such authority is within the scope of the inherent power of the court to control and prevent the abuse of its process." *Id.*, at 1089.

The second issue was whether, under the circumstances of the case, the trial court abused its discretion in refusing to order delivery of the seized currency to the defendants. After emphasizing that the defendants' petition did not seek review by mandamus of a ruling on the admissibility of evidence, but review of an order of the trial court refusing to deliver to the defendants property allegedly belonging to them upon the claim that the property was admissible evidence, the court held that denial of the defendants' motion was an abuse of discretion. The court stated:

"In ruling the seized currency should not be released because there was 'some color' on which it could be admitted in evidence, the trial court overlooked the fact [that] proof of defendants' intention to sell the marijuana allegedly in their possession, premised on their alleged possession of a large sum of money, would not be supplied by exhibiting the seized currency to the trier of fact, a judge or jury, but only by testimony [that] currency in the amount seized was found in a residence owned or occupied by defendants. . . . The trial court also overlooked defendants' stipulation [that] currency in the amount seized was found in and taken from the residence by the officers executing the search warrant,

which eliminated the need of any evidence to prove the stipulated fact. We [therefore] conclude denial of the motion upon the ground the seized currency should be retained in custody because there was some ‘color’ upon which it could be admitted in evidence, constituted an abuse of discretion as a matter of law.” *Id.*, at 1089-1090.

In this case, the fact that 323 jars of cannabis oil were seized at Arroyo Verde’s facility can be proved at trial by the deputies who actually took possession of the oil, as well as by any photographs that were taken. Exhibiting 1,800 pounds (323 jars) of cannabis oil to the jury is not necessary to prove the fact. The People argue that *Buker* is distinguishable because *Buker* involved currency whereas this case involves “contraband,” but that is a distinction without a difference. The currency in *Buker* and the cannabis oil in this case were both seized pursuant to a warrant and both were/are evidence of alleged illegal activity. In neither case, however, is the physical evidence itself necessary to establish the elements of the alleged offenses.

The court finds that Procan will be irreparably harmed if its property is not returned to it promptly. Procan is a licensed cannabis oil manufacturer. (Mark Unterbach Dec., ¶3, Ex. D.) The cannabis oil being held by the Sheriff’s Department represents approximately 65% of the company’s inventory. (Mark Unterbach Dec., ¶16.) Due to the seizure of its product, Procan has been forced to reduce its staff by 40%, all prior to the COVID-19 outbreak. (*Ibid.*) Unless the seized cannabis oil is returned to Procan expeditiously, the company will likely be forced to close its business. (*Ibid.*) In contrast to the People’s claimed need of a portion of Procan’s cannabis oil as evidence, the oil represents most of Procan’s saleable inventory.

Lastly, the People argue that the seized cannabis oil has been “adulterated” and cannot be sold because the chain of possession has been broken. However, this is not a matter for the court to decide as part of the present motion. Once the product is released to Procan, it will be up to its owners, along with the regulatory authorities, to determine whether Procan can lawfully sell it.

Based on the foregoing, the court will grant Procan’s motion for return of its seized property. The Sheriff’s Department is ordered to immediately release and return the seized cannabis oil back to Procan. Procan’s duplicative motion for return of property, noticed for June 3, 2020, is moot and ordered off calendar.

Thomas P. Anderle
Judge

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