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Attorney for Defendant  
4 LUCAS A. THAYER

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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF ORANGE  
9

10 PEOPLE OF THE STATE OF CALIFORNIA, No. 05HF0314

11 Plaintiff,

NOTICE OF MOTION AND MOTION  
TO DISMISS COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES

12 v.

13 LUCAS A. THAYER

14 Defendant.

Date: July 8, 2005  
Time: 9:00 a.m.  
Dept: 92

15 \_\_\_\_\_/  
16 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT  
ATTORNEY FOR THE COUNTY OF ORANGE:

17 NOTICE IS HEREBY GIVEN that on the above date and time, or as  
18 soon thereafter as the matter may be heard, defendant Lucas A.  
19 Thayer, by and through Counsel Omar Figueroa, will and hereby does  
20 move to dismiss the complaint filed in this action. This motion  
21 will be made on the grounds that defendant's actions do not  
22 constitute a public offense. Mr. Thayer's status as a medical  
23 cannabis patient prohibits his criminal prosecution for alleged  
24 violations of Health and Safety Code section 11357, in accordance  
25 with the California Supreme Court's unanimous opinion in *People v.*  
26 *Mower* (2002) 28 Cal.4<sup>th</sup> 457. In light of Mr. Thayer's medical  
27 marijuana patient status and in accordance with the Compassionate  
28 Use Act of 1996 and the California Supreme Court's unanimous opinion

1 in *Mower*, the charges stated in the complaint do not constitute a  
2 public offense.

3 Defendant hereby requests an evidentiary hearing to present  
4 evidence and to resolve material issues in dispute as relate to his  
5 motion to dismiss.

6 This motion to dismiss is made pursuant to Health and Safety  
7 Code section 11362.5(d), *People v. Mower* (2002) 28 Cal.4th 457 and  
8 *People v. Spark* (2004) 121 Cal.App.4th 259. This motion to dismiss  
9 is predicated on the separately filed memorandum of points and  
10 authorities and exhibits, as well as all documents on file in this  
11 case.  
12

13 CONCLUSION

14 Defendant respectfully requests that the motion to dismiss be  
15 granted, that the Complaint be dismissed with prejudice.

16 Dated: June \_\_, 2005.

17 Respectfully submitted,

18 \_\_\_\_\_  
19 OMAR FIGUEROA  
20 Attorney for Defendant  
21 LUCAS A. THAYER

22  
23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 I.

25 CALIFORNIA'S HEALTH & SAFETY CODE §§ 11362.5 AND  
26 11362.765 PROVIDE IMMUNITY FROM PROSECUTION AND CREATE A  
27 BAR TO JURISDICTION.

28 Defendant's motion to dismiss is supported by the California  
Supreme Court's decision in *People v. Mower* (2002) 28 Cal.4<sup>th</sup> 457.

1 In that case the California Supreme Court held that the  
2 Compassionate Use Act of 1996 implicates issues that are  
3 jurisdictional in nature. "[T]he limited immunity from prosecution  
4 granted by section 11362.5(d) implicates jurisdiction in its less  
5 fundamental sense; it surely does not undermine a court's personal  
6 or subject matter jurisdiction." *Id.* The court was referring to the  
7 fact that there can be no criminal jurisdiction where no crime has  
8 been committed. This is precisely the case when a lawful medical  
9 marijuana patient is charged with possession of marijuana. Thus, it  
10 is imperative that this Court satisfy itself as to its jurisdiction  
11 to hear a complaint as soon as possible.  
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14 Defendant therefore moves to dismiss the complaint, on the  
15 grounds that Health and Safety Code section 11362.5 provides  
16 immunity from prosecution, which presents a barrier to this Court's  
17 jurisdiction over the complaint filed against Defendant.  
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19 II.

20 THE COURT MAY CONSIDER THE PHYSICIAN'S RECOMMENDATION AND  
21 OTHER DOCUMENTS IN RULING ON DEFENDANT'S MOTION TO DISMISS.

22 It is appropriate for the Court to look beyond "the four corners  
23 of the complaint" and take into consideration the physician's  
24 recommendation establishing Defendant's immunity. The California  
25 Supreme Court established this rule more than a century ago in the  
26 case of *People v. Wong Sam*. In that case, the defendant was accused  
27 of violating Penal Code section 470, (forgery), the defendant argued  
28 that an allegedly forged letter was not a paper or instrument that

1 could properly be the subject of a forgery under the statute. The  
2 trial court examined the subject letter and granted a demurrer. The  
3 Supreme Court of California upheld the same. *People v. Wong Sam*  
4 (1897) 117 Cal. 29, 48 P. 972. See also *Lewis v. Superior Court*  
5 (*People*) (1990) 217 Cal.App.3d 379, 388 (explaining and reaffirming  
6 *Wong Sam*). Thus, this Court should properly consider a related  
7 matter outside the "four corners of the complaint" such as a  
8 previously tendered physician's recommendation in ruling on the  
9 instant motion to dismiss.  
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12 III.

13 IN ORDER TO ESTABLISH A DEFENSE UNDER THE COMPASSIONATE  
14 USE ACT, DEFENDANT MUST MERELY RAISE A REASONABLE DOUBT  
15 AS TO THE FACTS UNDERLYING THE DEFENSE.

16 At issue in the seminal California Supreme Court opinion of  
17 *People v. Mower* (2002) 28 Cal.4th 457 was whether evidence of a  
18 defendant's status as a qualified patient could be raised prior to  
19 trial. Answering affirmatively, Our Supreme Court reasoned that  
20 because the "grant of limited immunity from prosecution in section  
21 11362.5(d) operates by decriminalizing conduct that otherwise would  
22 be criminal," a defendant may move under Penal Code section 995 to  
23 set aside an indictment or information on the ground that he or she  
24 was indicted or committed "'without reasonable or probable cause to  
25 believe' that he or she was guilty of possession or cultivation of  
26 marijuana in view of his or her status as a qualified patient." *Id.*  
27 at 473.  
28

1 With regard to the requisite burden of proof, the *Mower* court  
2 concluded that "as to the facts underlying the defense provided by  
3 section 11362.5(d), defendant is required merely to raise a  
4 reasonable doubt." *Id.* at 481. The Supreme Court analyzed the  
5 quantum of proof for analogous factual situations:  
6

7 Most similar is the defense of possession of  
8 a dangerous or restricted drug with a  
9 physician's prescription, against a charge  
10 of unlawful possession of such a drug. For  
11 that defense, a defendant need raise only a  
reasonable doubt as to his or her possession  
of the drug in question with a physician's  
prescription.

12 28 Cal.4<sup>th</sup> at 481. The court concluded that medical marijuana  
13 patients should have the same burden as patients who use  
14 prescription drugs. "As a result of the enactment of section  
15 11362.5(d), the possession and cultivation of marijuana is no more  
16 criminal -- so long as its conditions are satisfied -- than the  
17 possession and acquisition of any prescription drug with a  
18 physician's prescription." *Id.* at 482. Therefore, Mr. Thayer need  
19 raise only a reasonable doubt as to having the requisite "written or  
20 oral recommendation or approval or recommendation of a physician" in  
21 order to establish a medical marijuana patient defense under the  
22 Compassionate Use Act. See, Health & Safety Code § 11362.5(d) (all  
23 further statutory references are to Health and Safety Code unless  
24 otherwise noted).  
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1 In this case, there is no question that Mr. Thayer had the  
2 required "written or oral recommendation or approval or  
3 recommendation of a physician" on the date alleged in the Complaint.  
4 Specifically, Mr. Thayer has a doctor's recommendation from Jean  
5 Talleyrand, M.D., which he obtained on October 30, 2004. (Hereby  
6 attached and incorporated as Exhibit A) This document establishes a  
7 *prima facie* compliance with Proposition 215 and Senate Bill 420.  
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9 IV.

10 "CONCENTRATED CANNABIS," OR "HASHISH," IS INCLUDED WITHIN THE  
11 MEANING OF "MARIJUANA" AS USED IN SECTION 11362.5 AND  
12 POSSESSION OF EITHER IS NOT A VIOLATION OF SECTION 11357  
13 IF REQUIREMENTS OF 11362.5 ARE MET.

14 At issue in this case is whether Mr. Thayer has the right to  
15 possess medicinal concentrated cannabis under California law. There  
16 is no question that "concentrated cannabis," as specified in the  
17 Complaint, is included within the meaning of "marijuana" as used in  
18 Proposition 215, codified as Health & Safety Code section 11362.5.  
19 See, Opinion of Attorney General Bill Lockyer. "Concentrated  
20 cannabis or hashish is included within the meaning of 'marijuana' as  
21 that term is used in the Compassionate Use Act of 1996." 86  
22 Ops.Cal.Atty.Gen. 180 at 7 (2003).  
23

24 To reach this conclusion, the Attorney General looked to the  
25 structure of the California Uniform Controlled Substances Act  
26 (Health & Saf. Code §§ 11000-11651), which includes the  
27 Compassionate Use Act (section 11362.5), and contains the following  
28 definition of marijuana in section 11018:

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"Marijuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination.

By comparison, for purposes of the Uniform Controlled Substances Act, "concentrated cannabis" is defined in section 11006.5 as "the separated resin, whether crude or purified, obtained from marijuana."

The definition of marijuana set forth in section 11018 includes concentrated cannabis. "Concentrated cannabis is the 'separated resin. . .obtained from marijuana' (section 11006.5) and thus constitutes 'the resin extracted from any part of the plant' (section 11018)" 86 Ops.Cal.Atty.Gen. 180 at 6 (2003).

In 1991, Attorney General Daniel Lundgren noted that Health and Safety Code section 11379.6 (outlining penalties for the manufacture of controlled substances) was "directed to the chemical production of controlled substances and not their horticultural production" suggesting that the production of marijuana did not amount to the chemical production of a controlled substance. 74 Ops.Cal.Atty.Gen. 70 at 4 (1991[sghl]). Thus, the opinions of successive Attorneys

1 General of California conclude that THC resin, concentrated cannabis  
2 and/or hashish are all "marijuana" as defined in section 11018.

3 Possession of concentrated cannabis is not a violation of  
4 section 11357 if the requirements of section 11362.5(d) are met.

5 Section 11362.5(d) states in its entirety that:  
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7 Section 11357, relating to the possession of  
8 marijuana, and section 11358, relating to the  
9 cultivation of marijuana, shall not apply to the  
10 patient, or to the patient's primary caregiver, who  
11 possesses or cultivates marijuana for the personal  
12 medical purposes of the patient upon the written or oral  
13 recommendation or approval of a physician.

14 Section 11362.5(d). In circumstances where concentrated  
15 cannabis is intended to be distinguished from ordinary marijuana,  
16 section 11357 uses the phrase "other than concentrated cannabis."  
17 There is no language to similarly distinguish concentrated cannabis  
18 from ordinary marijuana in the Compassionate Use Act of 1996.  
19 "Where a statute on a particular subject omits a particular  
20 provision, the inclusion of such a provision in another statute  
21 concerning a related matter indicates an intent that the provision  
22 is not applicable to the statute from which it was omitted." *Marsh*  
23 *v. Edwards Theatres Circuit, Inc.* (1976) 64 Cal.App.3d 881, 891; see  
24 also *Traverso v. People ex rel. Dept. of Transportation* (1993) 6  
25 Cal.4th 1152, 1166 ("It is a well-settled principle of statutory  
26 construction that '[w]here a statute, with reference to one subject  
27 contains a given provision, the omission of such provision from a  
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1 similar statute concerning a related subject ... is significant to  
2 show that a different intention existed.'" (quoting *People v. Drake*  
3 (1977) 19 Cal.3d 749, 755)) ; *Holmes v. Jones* (2000) 83 Cal.App.4th  
4 882, 890 ("Where the Legislature applies a term or phrase in one  
5 statute. . . but excludes it in another. . . it should not be  
6 implied where excluded."); *People ex rel. Lungren v. Peron, supra*,  
7 59 Cal.App.4th at p. 1392 ("We may not infer exceptions to our  
8 criminal laws when legislation spells out the chosen exceptions with  
9 such precision and specificity" (quoting *People v. Trippet* (1997) 56  
10 Cal.App.4th at 1550.))

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13       Moreover, the provisions of section 11362.5(d) specifically  
14 render section 11357 inapplicable and it is section 11357 which  
15 defines the penalty for possession of concentrated cannabis. Thus,  
16 it is not appropriate to construe the use of 'marijuana' in section  
17 11362.5 as exclusive of concentrated cannabis or hashish.

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19       Attorney General Lockyer found no indication in the ballot  
20 materials for Proposition 215 that the voters intended to  
21 differentiate between concentrated cannabis and ordinary marijuana  
22 when either is used for medical purposes. 86 Ops.Cal.Atty.Gen. 180  
23 at 7 (2003). "Proposition 215 was approved by the voters without  
24 specificity as to the strength, quality, or quantity of marijuana to  
25 be used for medical purposes as long as the use is reasonably  
26 related to the patient's current medical needs and was recommended  
27 or approved by a physician." (See *People v. Mower, supra*, 28 Cal.4th  
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1 at pp. 471-474; *People v. Galambos, supra*, 104 Cal.App.4th at pp.  
2 1161-1162, 1165-1168; *People v. Rigo, supra*, 69 Cal.App.4th at pp.  
3 413, 415; *People ex rel. Lungren v. Peron*, 59 Cal.App.4th at p.  
4 1394; *People v. Trippet, supra*, 56 Cal.App.4th at pp.1545-1549.) *Id.*

5  
6 V.

7 UNDER SECTION 11362.5(D), LEGAL POSSESSION OF  
8 MEDICAL MARIJUANA IS PREDICATED SOLELY UPON THE VALID  
9 RECOMMENDATION OR APPROVAL OF A PHYSICIAN.

10 The clear meaning of section 11362.5 is that the presence of a  
11 valid recommendation or approval for the medical use of marijuana is  
12 sufficient to establish a defendant's legal possession. Moreover, a  
13 defendant does not bear the burden of proving that he or she is  
14 seriously ill.

15 The appellant in *People v. Spark* was found guilty after raising  
16 a medical use defense. He then argued that the jury instruction was  
17 erroneous because it required a finding that the defendant was  
18 seriously ill as one of the elements of the defense. *People v.*  
19 *Spark* (2004) 121 Cal.App.4th 259 at 262. The Court of Appeal in  
20 *Spark* held that the critical factor in a compassionate use of  
21 marijuana defense under the Compassionate Use Act of 1996 was  
22 approval of a physician, not a jury's determination of the severity  
23 of illness. *Id.* at 268. The appropriateness of the medical use of  
24 marijuana is a medical issue and, as such, is not to be second-  
25 guessed or otherwise impugned by jurors who may not find a patients  
26 condition to be sufficiently serious. *Id.*

1           It was the intent of the electorate in passing the  
2 Compassionate Use Act to allow for the medicinal use of marijuana  
3 upon the recommendation of a physician. As the electorate adopted  
4 the law at issue through a ballot initiative, the court looks first  
5 to the words of the statute as indicia of the electorate's intent.  
6 *Id* at 267; *People v. Hernandez* (2003) 30 Cal.4th 835, 865-867.

8           Section 11362.5(b) (1) (A) states in relevant part that  
9 "seriously ill Californians have the right to obtain and use  
10 marijuana for medical purposes where that medical use is deemed  
11 appropriate and has been recommended by a physician who has  
12 determined that the person's health would benefit..." The following  
13 subdivision, (b) (1) (B), states another purpose of section 11362.5 as  
14 being "to ensure that patients and their primary caregivers who  
15 obtain and use marijuana for medical purposes upon the  
16 recommendation of a physician are not subject to criminal  
17 prosecution or sanction." *Id.* at 268.

20           As to the relevance of the degree of seriousness of a patient's  
21 illness, the court in *Spark* noted that the phrase "seriously ill"  
22 only appears in the prefatory, or purpose statement, of the Act. *Id.*  
23 at 267. That phrase is conspicuous only in its absence from section  
24 11362.5(d) which sets forth the inapplicability of section 11357 to  
25 persons acting upon the written or oral recommendation or approval  
26 of a physician.  
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1 Further, the court[sg2] in *Spark* observed that none of the  
2 published opinions addressing the Act assumed or suggested that the  
3 compassionate use defense included the state of being "seriously  
4 ill" as one of the facts underlying the defense. *Id.* at 268.

5  
6 The Court of Appeal noted that this language was absent in:  
7 *People v. Jones* (2003) 112 Cal.App.4th 341 (defendant's testimony  
8 that his doctor told him that use of marijuana for migraine  
9 headaches "might help, go ahead" was sufficient evidence to raise  
10 reasonable doubt over fact of doctor's approval); *People v. Galambos*  
11 (2002) 104 Cal.App.4th 1147("[section 11362.5] grants a limited  
12 immunity from prosecution for the cultivation or possession of  
13 marijuana by either a patient or the patient's primary caregiver who  
14 possesses or cultivates marijuana for the personal medical purposes  
15 of the patient upon the written or oral recommendation or approval  
16 of a physician"); *People v. Fisher* (2002) 96 Cal.App.4th 1147;  
17  
18 *People v. Bianco* (2001) 93 Cal.App.4th 748; *People v. Rigo* (1999) 69  
19 Cal.App.4th 409; *People ex rel. Lungren v. Peron* (1997) 59  
20 Cal.App.4th 1383; and *People v. Trippet* (1997) 56 Cal.App.4th  
21 1532[sg3].  
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24 VI.

25 THE RECOMMENDATION OR APPROVAL OF A PHYSICIAN IS SUFFICIENT TO  
26 ESTABLISH THAT SECTION 11357 DOES NOT APPLY TO MR. THAYER.

27 At issue is whether Mr. Thayer's status as a qualified patient  
28 with the approval of a physician is sufficient to establish his

1 right to possess concentrated medicinal cannabis under section  
2 11362.5. The court in *Spark* explicitly followed the court in *Mower*,  
3 noting that court's reference to the defense of compassionate use as  
4 "the section 11362.5(d) defense" and "the defense provided by  
5 section 11362.5(d)". *Spark* at 268; see *Mower, supra*, at 464, 476.  
6 If section 11362.5(d) was intended to allow for possession for  
7 personal medical purposes only in the presence of both (1) the  
8 written or oral recommendation or approval of a physician, and (2)  
9 the presence of serious illness, it would certainly say so. Thus,  
10 the Court of Appeal held in *Spark* that not only is the  
11 recommendation or approval of a physician sufficient for the  
12 purposes of section 11362.5(d), but serious illness is not one of  
13 the facts underlying the section 11362.5(d) defense. Moreover, the  
14 court in *Spark* held the mere mention of the seriousness of illness  
15 in a jury instruction to be prejudicial and fatally erroneous. *Id.*  
16 at 269.

20 Defendant's possession of marijuana cannot be more criminal  
21 than the possession of any prescription drug with a physician's  
22 prescription, to paraphrase the *Mower* court. At the outset, the  
23 grant of limited immunity created by section 11362.5 creates a bar  
24 to this Court's jurisdiction over the complaint. As found by the  
25 Office of the Attorney General, Concentrated cannabis is included in  
26 the meaning of marijuana and is not intended to be distinguished  
27 from it for the purposes of section 11362.5. Furthermore, as held  
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1 by the court in *Spark*, it is the plain meaning of section 11362.5  
2 that that legal possession of marijuana under the statute depends  
3 upon the valid recommendation or approval of a physician and is not  
4 limited to those patients deemed by a jury to be seriously ill.  
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6 Under *People v. Wong Sam*, this Court may consider material  
7 related to the issue at hand but "outside the four corners of the  
8 complaint." Mr. Thayer is a qualified patient, acting upon the  
9 written recommendation and approval of a physician as established by  
10 Exhibit A. Therefore, defendant respectfully requests that the  
11 Court follow the spirit and letter of Proposition 215 (codified as  
12 Health & Safety Code § 11362.5) and Senate Bill 420 (codified as  
13 Health & Safety Code §§ 11362.7-11362.83) by dismissing the  
14 complaint forthwith so that he is freed from criminal prosecution.  
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#### 20 CONCLUSION

21 Defendant respectfully requests that the motion to dismiss the  
22 complaint be sustained and that any Complaint alleging the  
23 aforementioned charges be dismissed without leave to amend.  
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25 Dated: June \_\_\_, 2005.

Respectfully submitted,

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OMAR FIGUEROA  
Attorney for Defendant  
LUCAS A. THAYER

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PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is 506 Broadway, San Francisco, California 94133. I am over the age of eighteen years and not a party to the within action.

On the date set forth below, I caused a true copy of the within

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT,

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AND MEMORANDUM OF POINTS AND AUTHORITIES

to be served on the following parties in the following manner:

Orange District Attorney  
4601 Jamboree Blvd.  
Newport Beach, CA 92663  
Phone: (949) 476-4650

VIA PERSONAL SERVICE

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on \_\_\_\_\_, June\_\_\_\_, 2005, at San Francisco, California.

\_\_\_\_\_  
OMAR FIGUEROA