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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

WHITE MOUNTAIN HEALTH CENTER, INC., An Arizona non-profit corporation, Plaintiff, v. COUNTY OF MARICOPA; WILLIAM MONTGOMERY, ESQ., Maricopa County Attorney, in his official capacity; ARIZONA DEPARTMENT OF HEALTH SERVICES, an agency of the State of Arizona; WILL HUMBLE, Director of the Arizona Department of Health Services, in his Official Capacity; and DOES I-X, Defendants.	NO. CV2012-053585 **COUNTY DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT** (Assigned to the Honorable Michael Gordon) Oral Argument Requested

Defendants Maricopa County and William Montgomery, Esq. ("County Defendants"), by and through undersigned counsel, and pursuant to Rule 56, Arizona Rules of Civil Procedure, hereby move the Court for summary judgment on plaintiff White Mountain Health Center, Inc.'s ("White Mountain") complaint on the ground that the relief sought is preempted by the laws of the United States.[1] Moreover, the declaratory relief sought by White Mountain against the County Attorney essentially challenges the advice provided by a public lawyer to his client. The Arizona Supreme Court has made it clear that such mandatory relief to compel a certain legal opinion is not available under Arizona law. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 464, 160 P.3d 1216, 1222 (2007)

The mandatory injunction sought by White Mountain against Maricopa County would require county employees to subject themselves to the risk of criminal prosecution by the United States under the Controlled Substances Act (the "CSA) 84 Stat. 1242, 21 U.S.C. § 801 et seq. The CSA makes it illegal to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense a controlled substance. 21 U.S.C.A. § 841. Moreover, under Federal Law, it is unlawful to aid and abet the commission of a Federal crime. 18 U.S.C.A. § 2.

Employees of Maricopa County would thus be subject to federal prosecution under the CSA in connection with activities they are required to perform in order to

[1] The County Defendants recognize that White Mountain has filed a Motion to Amend the Complaint, to which neither defendant objected, and a Motion for Summary Judgment. Although the State (joined by the county) objected that the Plaintiff's Motion for Summary Judgment is premature, this motion assumes the court will grant the amendment, and is based on that Amended Complaint.

implement the Arizona Medical Marijuana Act ("AMMA"), A.R.S. §§ 36-2801, *et seq.* For example, the Maricopa County Planning and Development Department is charged with approving and issuing building permits and special use permits, and generally facilitating the opening and operation of any business seeking to locate within unincorporated Maricopa County. County employees who, by virtue of actions taken as required by the relief sought in this case, would facilitate the possession, manufacture and distribution of marijuana, all of which are illegal under the CSA, could be held liable as aiders or abettors under 18 U.S.C. § 2.

I. Facts

White Mountain wishes to own and operate a non-profit medical marijuana dispensary and cultivation site in the area of Sun City, Maricopa County, Arizona, pursuant to the terms of the AMMA, A.R.S. §§ 36-2801, *et seq*. *See* County Defendants' Separate Statement of Facts in support of Cross Motion for Summary Judgment ("SSOF"), ¶ 1. The AMMA purports to decriminalize marijuana under certain circumstances pertaining to medical use, and also authorizes, and thereby facilitates, the growth, manufacture, dispensation and possession of marijuana by, *e.g.*, approving and permitting medical marijuana distribution centers or allowing marijuana cultivation. SSOF ¶ 2.

Under federal law, marijuana is considered a dangerous drug under provisions of the CSA. 21 U.S.C. § 812. In passing the CSA, Congress recognized that "[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of

the American people." 21 U.S.C. § 801(2); *Gonzales v. Raich*, 545 U.S. 1 (2005). Congress also found that "[c]ontrolled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate" and concluded that it is not feasible to distinguish, in terms of controls, between the two. 21 U.S.C. § 801(5). Under the CSA, marijuana is a Schedule I drug, meaning it has a high potential for abuse, lacks any accepted medical use and cannot be used safely even under the supervision of a physician. 21 U.S.C. § 812. As such, the CSA does not recognize a "medical exception" for marijuana. *Id*. As a Schedule I drug, the manufacture, distribution or possession of marijuana is illegal. 21 U.S.C. §§ 823, 841 and 844. Accordingly, the CSA prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use to treat medical conditions. *See Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195 (2005); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 121 S.Ct. 1711 (2001).

The federal government's position regarding state medical marijuana laws is that growing, distributing and possessing marijuana *in any capacity*, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws that purport to permit such activities. SSOF ¶ 3. Based on this, the United States Attorney's Office for the District of Arizona has taken the position that it "will continue to vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distribution and marketing activity involving marijuana, even if such activities are permitted under state law." SSOF ¶ 4.

In addition, Deputy Attorney General James M. Cole released a memorandum to

United States Attorneys wherein he stated "persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA." SSOF ¶ 5.

The Arizona Attorney General issued a formal Opinion (No. I12-001, R12-008) concluding that the AMMA is preempted in part by federal law. SSOF ¶ 14. While the Attorney General concluded that the provisions of the AMMA and related rules that pertain to the issuance of registry identification cards for patients and caregivers are not preempted because they merely serve to identify those individuals for whom the possession or use of marijuana has been decriminalized under State law, and they are therefore not "authorizations" to violate federal law, SSOF ¶ 15, the initiative itself makes no such distinction. Nevertheless, all AMMA provisions and related rules that authorize any cultivating, selling and dispensing of marijuana are preempted by federal law, particularly the CSA. SSOF ¶ 16.

White Mountain claims that its application for a marijuana dispensary and cultivation site has been denied or delayed because it has been unable to "obtain documentation from Defendants Maricopa County and/or Montgomery stating that either there are no zoning restrictions for the dispensary's proposed location or that the dispensary's location is in compliance with any and all zoning restrictions." SSOF, ¶ 17.

The County Defendants have made it clear that the County is not able to issue, supply, or provide reasons for failing to supply, a sworn statement or other documentation pertaining to zoning compliance of a proposed marijuana dispensary because the distribution of marijuana is illegal under federal law. SSOF ¶ 18.

II. Legal Argument

A. The Controlled Substances Act Makes Possession and Distribution of Marijuana Illegal, Notwithstanding State Laws.

In *Gonzales v. Raisch*, 545 U.S. 1 (2005), the Supreme Court of the United States held that the prohibition of sales of marijuana is properly within Congress'authority under Art. I, Sec. 8 of the United States Constitution (The Commerce Clause). Thus, dispensation of marijuana, even for medicinal purposes, remains illegal – state law notwithstanding.

The Supreme Court also recently reiterated that the Supremacy Clause gives Congress the power to preempt state law. *Arizona v. United States*, 132 S.Ct. 2492 (2012). State laws are preempted by federal law where

(1) the federal statute contains an express preemption provision;

(2) the state law would regulate conduct in a framework of regulation that Congress "left no room for the States to supplement it" or where a "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"; or

(3) state law conflicts with federal law, including when they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 2495. To determine whether obstacle preemption exists, the Supreme Court has instructed the lower courts to employ their "judgment, to be informed by examining the federal statute as whole and identifying its purpose and intended effect." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). Schedule I drugs are categorized as such because of their high potential for abuse, their lack of any accepted medical use, and the absence of any accepted safety for their use in medically supervised treatment. 21 U.S.C. § 812(b)(1). By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. 21 U.S.C. §§ 823(f), 841(a)(1), 844(a). Thus, "the CSA designates marijuana as contraband for any purpose" and "Congress expressly found that the drug has no acceptable medical uses." *Gonzales v. Raich*, 545 U.S. 1, 27, (2005).

Similarly, in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, the Supreme Court held that California's medical marijuana law did not prevent federal agents from enforcing the CSA against persons who claimed their cultivation, possession, use and distribution of marijuana was authorized by California law. The Court held that "there is no medical necessity exception to the Controlled Substances Act's prohibitions on manufacturing and distributing marijuana." 532 U.S. at 483. Lower courts are in accord. *See Montana Caregivers Association, LLC v. United States*, 841 F.Supp.2d 1147, 1151 (2012) (whether the plaintiffs' conduct was legal under

Montana law is of little significance here, since the alleged conduct clearly violates federal law).

The Oregon Supreme Court has acknowledged the principles of the foregoing Supreme Court cases and has concluded that the Oregon Medical Marijuana Act was *preempted by* the CSA. This led to the Court's conclusion that an employee's use of "medical" marijuana under Oregon's medical marijuana law actually constituted an "illegal use of drugs." *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 230 P.3d 518 (Or. 2010). In so concluding, the Oregon Supreme Court held that any law that affirmatively authorizes "a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act." *Id.* at 529. Ultimately, the Oregon Court held that "to the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it 'without effect.'" *Id.*

Similarly, The California Court of Appeal has held that an ordinance requiring permits for medical marijuana collectives was preempted by the CSA. *Pack v. Superior Court*, 132 Cal.Rptr.3d 633 (App. 2011), *rev. granted* 268 P.3d 1063 (2012). Applying obstacle preemption, the court explained that "if the federal act's operation would be frustrated and its provisions refused their natural effect by the operation of the state or local law, the latter must yield." *Id*. at 650. The court went on to note that "as far as Congress is concerned, there is no such thing as medical marijuana" and that "to Congress, *all* use of marijuana is recreational drug use, the combating of which is admittedly the core purpose of the federal CSA." *Id*. at 651 (emphasis in original). The

Pack court agreed with the conclusion reached by the Oregon Supreme Court in *Emerald Steel* that "the law was preempted by the federal CSA, under obstacle preemption, to the extent that it authorized the use of medical marijuana rather than merely decriminalizing its use under state law." *Id.* at 652.

Two recent trial court decisions, although not binding precedent before this Court, are instructive in the application of the preemption of state medical marijuana laws by the federal CSA. In *Haile v. Todays Health Care II*, Case No. CV2011-051310, the Maricopa County Superior Court dismissed an action to enforce a loan agreement because the loan was for the operation of a medical marijuana sales and cultivation center in Colorado, under Colorado's very similar medical marijuana law. The defendant had failed to repay the loan amount as agreed. Though the court found that the defendant had defaulted, the court dismissed the case. Citing to the provisions of the CSA that make it illegal to manufacture, distribute or possess marijuana, and to the Supreme Court's decision in *Gonzales v. Raich*, the Superior Court held that the contract was void because it was for the purpose of growing and selling marijuana, which is a clear violation of the CSA.

The District Court for Arapahoe County, Colorado in *Haeberle v. Lowden* came to the same conclusion under Colorado's similar medical marijuana laws in a case involving the sale of $40,000 worth of medical marijuana. The court denied contractual relief, finding that the contract was illegal and, therefore, void as against public policy. Significantly, the court also specifically found that "ultimately, the CSA prohibits the 'manufacture, distribution, or possession of marijuana,' and any state authorization to

engage in the manufacture, distribution, or possession of marijuana creates an obstacle to the full execution of federal law. Therefore, Colorado's marijuana laws are preempted by federal marijuana law." SSOF 25.

Applying the clear directive of the Supreme Court of the United States and the cases interpreting its mandate, there can be no doubt that the provisions of the AMMA that purport to authorize the acquisition, possession, cultivation, manufacture, delivery, transfer, transport, supply, sale or dispensation of marijuana are preempted by the CSA, whether in the guise of a dispensary or via the actions of an individual. *See, e.g.*, A.R.S. §§ 36-2801(11), 36-2804.04(A)(7), 36-2806(E) and 36-2806(F). The manufacture, distribution or possession of marijuana is a federal crime under the CSA. The AMMA, which not only authorizes but establishes a process by which individuals and businesses may engage in the manufacture, cultivation, distribution and possession of marijuana, clearly stands as an obstacle to the implementation and execution of the full purposes and objectives of the CSA, policies regarding enforcement by any federal administration notwithstanding. Further, the case law that has addressed the issue has uniformly come to the conclusion that state medical marijuana laws that authorize activity that is illegal under the CSA are preempted by federal law.

Like Oregon's medical marijuana law, which the Oregon Supreme Court held was preempted by the CSA, the AMMA directs state employees to issue marijuana cards to "patients" who receive recommendations from doctors. The card then authorizes the "patient" to engage in using "medical" marijuana and provides an affirmative defense to charges of criminal liability under state statutes. Under this law, the Oregon Supreme

Court concluded that an employee's use of "medical" marijuana constituted an "illegal use of drugs" because the authorization to use marijuana was preempted by the CSA. The Court noted that its state law stood "as an obstacle to the accomplishment of the full purposes of the federal law."

Similarly, the provisions of the AMMA authorizing the use by patients of "medical" marijuana are in direct conflict with the CSA and are null and void. Indeed, the AMMA goes even further than Oregon's medical marijuana law in that it not only authorizes use by patients, but also authorizes cultivation of marijuana by patients, cultivation and distribution by "caregivers" and even large-scale cultivation and distribution of marijuana by dispensary owners. In fact, dispensary owners are authorized to grow and distribute unlimited quantities of marijuana. There could be no more patent obstacle to the accomplishment of the full purpose of the federal law and therefore no more blatant conflict with the CSA.

B. The Relief Sought in White Mountain's Amended Complaint Would Subject Maricopa County Employees to the Risk of Federal Prosecution

The Amended Complaint, at 15-16, seeks a broad writ of mandamus requiring the County Defendants to provide a sworn statement declaring either that the County has not adopted any restrictions upon the location of medical marijuana dispensaries or that White Mountain's proposed location complies with all Maricopa County requirements for opening a medical marijuana dispensary and cultivation. But this relief would necessarily subject Maricopa County's employees to the risk of federal prosecution pursuant to the CSA.

The United States Attorney's Office for the District of Arizona has stated publicly that it "will continue to vigorously prosecute individuals and organizations that participate in unlawful manufacturing, distribution and marketing activity involving marijuana, even if such activities are permitted under state law." Importantly, the U.S. Attorney wrote that "compliance with Arizona laws and regulations does not provide a safe harbor, nor immunity from Federal prosecution." *See* May 2, 2011 letter from United States Attorney Dennis K. Burke to DHS Director Will Humble, SSOF 15.

To further solidify the point, on June 29, 2011, Deputy Attorney General James M. Cole released a memorandum to United States Attorneys wherein he stated "persons who are in the business of cultivating, selling or distributing marijuana, and those who *knowingly facilitate such activities*, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA" (emphasis added). See SSOF 16.

Although White Mountain may argue that the current enforcement policies of the U.S. Attorney do not place medical marijuana patients and facilitators as a top priority, such enforcement priorities do not create an immunity from prosecution. Even if no federal prosecution has been initiated thus far against the County Defendants, the threat of prosecution is a realistic possibility given statements made by law enforcement officials and County employees should not be compelled to break the law in order to see

if the federal prosecutors are serious. *See New Hampshire Hemp Council, Inc. v. Marshall*, 203 F.3d 1, 5 (1st Cir. 2000).

The employees of the Maricopa County Defendants would be subject to criminal prosecution if the mandamus relief requested by White Mountain in its Amended Complaint were granted. The Maricopa County Defendants and their employees would find themselves in a dilemma, forced to choose between complying with this Court's mandamus order and risking federal prosecution under CSA or deliberately defy a state court's order. *See Minnesota Citizens Concerned for Life v. Federal Election Commission*, 113 F.3d 129, 131 (8th Cir. 1997); *Yniguez v. Arizonans for Official English,* 69 F.3d 920, 924-25 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997) (State employee who failed to obey an arguably unconstitutional state law could be subject to employment sanctions). Putting anyone in such a position is simply improper.

C. The Remedy of Mandamus Under Arizona Law Does Not Extend to a Purely Discretionary Act – Legal Advice by a Public Lawyer to a Public Client.

The Amended Complaint (as well as the original complaint) at ¶ 3 alleges that County Attorney Montgomery is responsible for advising the County Board of Supervisors about the adoption and enforcement of laws, pertaining to medical marijuana, among other things. The Amended Complaint at ¶¶ 24-26 disagrees with Mr. Montgomery's advice. Thus, the Amended Complaint, at pages 15-16, seeks an order from this Court in mandamus compelling Mr. Montgomery to change his advice to the County.

"Mandamus is an extraordinary remedy issued by a court to compel a public officer to perform an act which the law specifically imposes as a duty." *Board of Educ. v. Scottsdale Educ. Ass'n*, 109 Ariz. 342, 344, 509 P.2d 612, 614 (1973). Mandamus "does not lie if the public officer is not specifically required by law to perform the act." *Id.* Because a mandamus action is designed to compel performance of an act the law requires, "[t]he general rule is that if the action of a public officer is discretionary that discretion may not be controlled by mandamus." *Collins v. Krucker*, 56 Ariz. 6, 13, 104 P.2d 176, 179 (1940). In addition, the Arizona Supreme Court has long held that mandamus will lie only "to require public officers to perform their official duties when they refuse to act," and not "to restrain a public official from doing an act." *Smoker v. Bolin*, 85 Ariz. 171, 173, 333 P.2d 977, 978 (1958).

Pursuant to statute, the County Attorney's powers and duties include giving legal advice, including written opinions, to County Officers and/or the Board of Supervisors. *See* A.R.S. §§ 11-532(7) and (9). The County Attorney is not a decisional officer on County zoning issues, except that the County Attorney may provide advice at the request of the Board of Supervisors or County Officers on such issues. If White Mountain argues that the County's decisions regarding zoning issues relating to medical marijuana dispensaries are the result of Defendant Montgomery's advice to the Board or other County Officers, that argument in support of mandamus relief is unavailing as well.

Arizona law is clear that the remedy of mandamus does not lie to compel a public lawyer to provide certain advice to that lawyer's public client. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 464 (2007). In *Yes on Prop 200*, the Arizona Supreme Court

stated:

> If, as Plaintiffs suggest, a mandamus action could be brought to challenge the opinions of the Attorney General, upon such challenges, courts would effectively become direct legal advisors to the government. The courts would be compelled to decide previously unsettled legal questions as a necessary preliminary to determining whether the Attorney General's opinion on various matters were an abuse of discretion.
>
> This would be an inappropriate usurpation by the courts of responsibility assigned to the Attorney General and, in our view, a violation of the separation of powers. Our system of government prohibits one branch of the government from exercising the powers granted to another branch of the government.

Id. In that case, the public officer in question was the Arizona Attorney General, but the same result obtains with respect to the Maricopa County Attorney. Plaintiff cannot obtain mandamus relief against Montgomery for providing opinions to the County, even if Plaintiff believes those opinions were erroneous. *Id.*

Here, as in *Yes on Prop 200*, Mr. Montgomery, as the County Attorney, was performing a discretionary role in providing legal advice to the County. Mandamus relief is not available to address such discretionary acts. Furthermore, given the clear conflict between the AMMA and the CSA, Mr. Montgomery could have given no other advice in acting with fidelity to his oath of office and the dictates of the ethical performance of his duties as a lawyer.

III. Conclusion

The Arizona Medical Marijuana Act is preempted by the federal Controlled Substances Act. White Mountain's requested declaratory and mandatory injunctive relief

against the County and the County Attorney would subject county employees to the risk of prosecution under federal law. General statements of enforcement policy by the U.S. Department of Justice do not eliminate that risk and are no more permanent than the next election cycle. In the case of the County Attorney, mandamus relief does not lie to challenge his advice to his public client. The Court should grant summary judgment dismissing the claims against the County and the County Attorney in this case.

RESPECTFULLY SUBMITTED this 23rd day of August 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on August 23rd, 2012, I caused the foregoing document to be electronically transmitted to the Clerk's Office:

COPIES electronically sent this
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