

EXHIBIT 3

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8 **SUPERIOR COURT OF ARIZONA**
9 **IN MARICOPA COUNTY**

10 WHITE MOUNTAIN HEALTH CENTER,
INC., an Arizona non-profit corporation,

11 Plaintiff,

12 v.

13 COUNTY OF MARICOPA; WILLIAM
14 MONTGOMERY, ESQ., Maricopa County
Attorney, in his official capacity;
15 ARIZONA DEPARTMENT OF HEALTH
SERVICES, as agency of the State of
16 Arizona; WILL HUMBLE, Director of the
Arizona Department of Health Services, in
17 his Official Capacity; and DOES I-X,

18 Defendants.

No. CV2012- 053585

**MOTION FOR SUMMARY
JUDGMENT**

(Assigned to the Hon. Michael D. Gordon)

19
20 The State of Arizona ex rel. Thomas C. Horne in his official capacity as the Attorney
21 General, by undersigned counsel, hereby moves this Court pursuant to Ariz. R. Civ. P. 56 for
22 entry of summary judgment in the form of a declaration that the relief Plaintiff has sought is

1 preempted by the laws of the United States. The grounds for this motion are fully stated in the
2 accompanying Memorandum of Points and Authorities, but may be briefly summarized as
3 follows.

4 Possession, distribution and cultivation of marijuana are all forbidden by federal law,
5 and state authorization of these activities is preempted. There is no dispute that the Plaintiff
6 has sought an order of this Court compelling the named Defendants to take certain steps
7 designed to authorize the Plaintiff to open a marijuana dispensary under the Arizona Medical
8 Marijuana Act. Since the relevant portions of the AMMA directly conflict with federal law,
9 they are preempted and thus of no legal force or effect. Operating the dispensary would
10 violate public policy, as it would be a federal crime. This Court should so declare and enter a
11 judgment dismissing the Plaintiff's claims as preempted by federal law.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **SUMMARY OF RELEVANT FACTS**

14 Plaintiff brought this action on or about June 20, 2012 seeking various declaratory and
15 injunctive relief under the "Arizona Medical Marijuana Act," which the Plaintiff refers to as
16 the "AMMA." Plaintiff forthrightly states the ultimate purpose of the action: "Plaintiff desires
17 to own and operate a nonprofit medical marijuana dispensary and cultivation site as defined in
18 the Arizona Medical Marijuana Act. . . . (Compl. ¶ 2.) Plaintiff's acknowledgement of the
19 goal of the action together with Plaintiff's request for affirmative injunctive relief are the only
20 facts necessary to this summary judgment motion. The remaining material is offered as
21 explanatory background.

22 **The Arizona Medical Marijuana Act**

On November 2, 2010, Arizona voters passed the AMMA as an initiative measure,
known as "Proposition 203." The purpose of Proposition 203 was "to protect patients with
debilitating medical conditions, as well as their physician and providers, from arrest and
prosecution, criminal and other penalties and property forfeiture if such patients engage in the

1 medical use of marijuana.” Prop. 203, § 2(G) (2010). Under the AMMA, qualifying patients
2 would be able to receive up to 2 ½ ounces of marijuana every two weeks from medical
3 marijuana dispensaries or to cultivate their own plants under certain conditions. Prop 203, § 3;
4 A.R.S. § 36-2801(1). After its passage, the AMMA was codified as A.R.S. § 36-2801 through
-2819.

5 The AMMA requires the Arizona Department of Health Services (“ADHS”) to be
6 responsible for implementing and overseeing the AMMA. Specifically, the AMMA provides
7 for the registration and certification by the ADHS of “nonprofit medical marijuana
8 dispensaries,” “nonprofit medical marijuana dispensary agents,” “qualifying patients,” and
9 “designated caregivers.” *Id.* The AMMA requires ADHS to adopt rules governing the
10 registration and certification process within 120 days after the effective date of the AMMA.
11 A.R.S. § 36-2803. Under the Act, the ADHS is required to adopt rules establishing the form
12 and content of applications, the manner in which applications will be considered, the amount
13 of application and renewal fees within certain maximum limits, and rules governing
14 dispensaries. *Id.* As required by the Act, the ADHS promulgated final rules that were filed
with the Secretary of State on April 13, 2011. Those rules were codified as Arizona
Administrative Code (“A.A.C.”) R9-17-101 through -323.

15 Several AMMA portions purport to immunize persons against legal consequences for
16 actions that violate federal law, or to authorize a person to act in violation of federal law. In
17 particular, A.R.S. § 36-2804.04(A)(7) requires registry identification cards to clearly state
18 “whether the cardholder has been authorized by this chapter to cultivate marijuana plants for
19 the qualifying patient’s medical use.” *See also* A.R.S. § 36-2801(1)(a)(ii) (stating that
20 “allowable amount of marijuana” includes up to twelve marijuana plants if the “qualifying
21 patient is authorized to cultivate marijuana”). A.R.S. § 36-2806(E) authorizes registered
22 dispensaries to cultivate marijuana, and A.R.S. § 36-2806(F) authorizes dispensaries to acquire
marijuana from patients and caregivers. A.R.S. § 36-2811(B) says that a qualifying patient or

1 registered caregiver “is not subject to arrest, prosecution or penalty in any manner, or denial of
2 any right or privilege,” for the possession, providing, offering or use of marijuana pursuant to
3 the AMMA. A.R.S. § 36-2811(E) states that a dispensary is not subject to prosecution, seizure
4 or penalty for acting pursuant to the AMMA in acquiring, possessing, cultivating,
5 manufacturing, delivering, transferring, transporting, supplying, selling or dispensing
6 marijuana. A.R.S. § 36-2811(F) extends the same protections to a registered nonprofit medical
7 marijuana dispensary agent.

8 **State Officials Sought a Formal Attorney General Opinion**

9 On August 6, 2012, as the result of a request by a member of the Legislature and
10 thirteen of Arizona’s fifteen county attorneys, the Attorney General issued a formal Opinion
11 (No. I12-001, R12-008) concluding that the AMMA is preempted in part by federal law. A
12 copy is attached as Exhibit 1. The Attorney General concluded that the provisions of AMMA
13 and related rules that pertain to the issuance of registry identification cards for patients and
14 caregivers are not preempted because they merely serve to identify those individuals for whom
15 the possession or use of marijuana has been decriminalized under State law, and they are
16 therefore not “authorizations” to violate federal law. However, all AMMA provisions and
17 related rules that authorize any cultivating, selling and dispensing of marijuana are preempted
18 by federal law, particularly the CSA.

19 **Two Recent Judicial Decisions Illustrate the Practical Importance of this Issue**

20 In the recent past, at least two courts have denied civil relief to private litigants on the
21 ground that the Controlled Substances Act preempts state laws providing for medical
22 marijuana. In *Haile v. Today's Health Care II*, Case No. CV2011-051310, another branch of
this Court dismissed an action to enforce a loan agreement because the loan was for 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. The contract

1 was void because it was for the purpose of growing and selling marijuana, which is a clear
2 violation of the laws of the United States. Thus, the plaintiffs were denied any recovery of the
3 monies they loaned to defendant, even restitution. A copy of the January 18, 2012 minute
4 entry is attached as Exhibit 2.

5 On August 8, 2012, the District Court for Arapahoe County, Colorado came to the same
6 conclusion in case where the plaintiff's name was redacted but the defendant was Laura
7 Lowden and Blue Sky Care Connection. A full copy of the case report is attached as Exhibit
8 3. According to the report, the plaintiff was in the business of cultivation and sale of medical
9 marijuana while the defendant was a retail seller of the same. Plaintiff alleged that under a
10 partnership agreement, he delivered \$40,000 worth of medical marijuana to defendant, but the
11 defendant never delivered either cash or other compensation. Finding that federal law
12 preempted the Colorado medical marijuana act, the court held that the contract was void as it
13 was against public policy. As a result the claims were dismissed.

14 In both instances, private parties who relied on State law to lend money to or conduct
15 medical marijuana businesses suffered considerable financial loss because their contracts were
16 void under the preemptive federal law. One of the purposes of seeking declaratory relief is to
17 prevent Arizona citizens from unknowingly putting themselves and their property at risk, by
18 believing that the AMMA trumps federal law criminalizing the possession, use and
19 distribution of marijuana.

20 **LEGAL AUTHORITY AND ARGUMENT**

21 The federal law on marijuana is easily summarized. Under the CSA, marijuana is a
22 Schedule I drug and as a result, "the manufacture, distribution, or possession of marijuana
became a criminal offense, with the sole exception being the use of the drug as part of a Food
and Drug Administration preapproved research study." *Gonzales v. Raich*, 545 U.S. 1, 14,
125 S.Ct. 2195, 2204 (2005).

1 Passage of a State medical marijuana law does not dilute this at all. In *Gonzales v.*
2 *Raich*, the Supreme Court held that California’s medical marijuana law did not prevent federal
3 agents from enforcing the Controlled Substances Act against persons who claimed their
4 cultivation, possession, use and distribution of marijuana was authorized by California law.
5 *Id.* at 7, 14, 29, 125 S.Ct. at 2200, 2204, 2212-13. Indeed, the Supreme Court held that the
6 CSA preempted any state law that was in conflict with the federal law, under the Supremacy
7 Clause of the Constitution. *Id.* at 29, 125 S.Ct at 2212-13.

8 As shown in the formal opinion, the Attorney General contends that there is an
9 important distinction to be made in this case. State laws that merely decriminalize certain
10 conduct for purposes of State law enforcement are not preempted, but any State law that
11 purports to authorize conduct that either violates federal law or presents an obstacle to the
12 purposes of federal law is preempted. *See, e.g. Emerald Steel Fabricators, Inc. v. Bureau of*
13 *Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010)(holding that since Oregon’s medical marijuana
14 program authorized conduct forbidden by the CSA, it was an obstacle to accomplishment and
15 execution of Congress’s goals, and therefore preempted

16 Since the formation and operation of a medical marijuana dispensary would violate
17 federal law from its very inception, the portions of the AMMA that purport to allow this are
18 preempted by federal law.

19 **The Court Must Deny Any Equitable Relief That Would Frustrate the CSA**

20 Plaintiff has requested that this Court enter injunctions to assist the Plaintiff in opening
21 and operating a marijuana dispensary. (Compl. ¶¶ 38-39.) Under A.R.S. § 12-1801(3), this
22 Court is authorized to issue such mandatory injunctive relief only when the applicant is
entitled to it “under the principles of equity.” Perhaps the most fundamental equitable
principle of all is that equity “will not be applied to frustrate the purpose of the laws or to
thwart public policy.” 30A C.J.S. Equity § 99 (2012). Plaintiff’s goal in this action is to use
the Court’s assistance to violate the law.

1 Arizona courts have applied this fundamental concept in many cases. For example, in
2 *Town of Gilbert Prosecutor's Office v. Downie*, 216 Ariz. 30, 162 P.2d 669 (App. 2007), *rev'd*
3 *on other grounds* 218 Ariz. 466, 189 P.3d 393 (2008), the defendant was convicted of
4 contracting without a license and ordered to pay restitution to victims of the full amount they
5 paid for his services, in accordance with a statute. *Id.* at 31-32, 162 P.2d at 671-72. Defendant
6 argued that this was inequitable, since the victims kept the benefit of his work as well as a full
7 refund. *Id.* at 34, 162 P.2d at 673. The court reasoned as follows: “[A]lthough the result may
8 be harsh in this case, it is nonetheless consistent with public policy. . . . We will not act in
9 equity in disregard of such policy merely to accommodate someone who has violated
10 Arizona’s statutory provisions.” *Id.* The Plaintiff in this case invokes the Court’s aid to
11 violate federal law rather than State statutes, but the equitable principle is the same.

12 Another example is *Canty v. Canty*, 178 Ariz. 443, 874 P.2d 1000 (App. 1994), where a
13 litigant invited the court to apply equitable estoppel principles to prevent the other party from
14 denying a modification agreement in a child custody case. *Id.* at 447-48, 874 P.2d at 1004-05.
15 The party thus asked the court to ignore an applicable statute, A.R.S. § 25-332, which required
16 a trial court to review any proposed modifications to confirm that they were in the best
17 interests of the children. *Id.* The court refused to do so, reasoning as follows: “Equity cannot
18 apply to invalidate the public policy behind this requirement of trial court review.” *Id.* at 448,
19 874 P.2d at 1005. Nor should equity apply in this case to invalidate the express federal public
20 policy that operating a marijuana dispensary is a federal crime.

21 The same equitable principle underlies the two trial court decisions described above.
22 *Supra* at 4-5. Courts routinely deny their assistance to any party when their underlying
contract is void as in violation of public policy. As an additional equitable consideration, the
Court should consider the plight of those who might engage in business with a dispensary,
only to learn that their contracts cannot be enforced in case of breach. Certainly, it would

1 thwart public policy for a court to assist the operation of a business that can breach contracts at
2 will because it operates in violation of federal statutes.

3 Since the Plaintiff cannot operate a dispensary without violating public policy,
4 traditional principles of equity require this Court to decline any injunctions or other aid of
5 Plaintiff's goal.

6 CONCLUSION

7 For all the foregoing reasons, the Court should enter summary judgment finding that
8 federal law preempts the AMMA in all respects relevant to this case, and dismissing Plaintiff's
9 complaint.

10 RESPECTFULLY SUBMITTED this 23rd day of August, 2012.

11 THOMAS C. HORNE
12 Attorney General

13 /s/ Charles A. Grube
14 Charles A. Grube
15 Senior Agency Counsel
16 Attorneys for the State ex rel.
17 Thomas C. Horne

18 This Brief was
19 electronically filed with the Court
20 and copies transmitted
21 by regular U.S. Mail
22 and email on this 23rd day of
August, 2012, as follows:

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6 the above attorneys via electronic
transmission this date.

7 /s/ Charles A. Grube

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EXHIBIT 1

STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION

by

THOMAS C. HORNE
ATTORNEY GENERAL

August 6, 2012

No. I12-001
(R12-008)

Re: Preemption of the Arizona Medical
Marijuana Act (Proposition 203)

To: The Honorable John Kavanaugh,
State Representative
Sheila Polk,
Yavapai County Attorney
Ken Angle,
Graham County Attorney
Brad Carlyon,
Navajo County Attorney
Daisy Flores,
Gila County Attorney
Barbara LaWall,
Pima County Attorney
Bill Montgomery,
Maricopa County Attorney
Ed Rheinheimer,
Cochise County Attorney
George Silva,
Santa Cruz County Attorney
Jon R. Smith,
Yuma County Attorney
Matt Smith,
Mohave County Attorney
James P. Walsh,
Pinal County Attorney
Michael Whiting,
Apache County Attorney
Derek Rapier,
Greenlee County Attorney

Question Presented

The following question has been presented to this Office by a member of the Legislature and thirteen of Arizona's fifteen county attorneys: Is the Arizona Medical Marijuana Act ("the AMMA") preempted by the federal Controlled Substances Act ("the CSA")?

Summary Answer

Yes, in part. The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2. Because of federal prohibitions, those AMMA provisions and related rules that authorize any cultivating, selling, and dispensing of marijuana are preempted. However, the AMMA provisions 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, therefore, are not authorizations to violate federal law.

Background

The AMMA was passed narrowly by voters in 2010 as Proposition 203. The purpose of the proposition, as explained by the Arizona Legislative Council's ballot measure analysis provided to all voters, was to "allow a 'qualifying patient' who has a 'debilitating medical condition' to obtain an 'allowable amount of marijuana' from a 'nonprofit medical marijuana dispensary' and to possess and use the marijuana to treat or alleviate the debilitating medical condition or symptoms associated with the condition." Ariz. Sec'y of State, Ariz. Ballot Prop. Guide, Gen. Election—Nov. 2, 2010, at 83 (quoting Ariz. Rev. Stat. ("A.R.S.") § 36-2801), *available at* <http://azsos.gov/election/2010/info/PubPamphlet/english/prop203.pdf>. In order to

facilitate its implementation, the AMMA requires that “[t]he Arizona Department of Health Services [“DHS”] . . . adopt and enforce a regulatory system for the distribution of marijuana for medical use, including a system for approving, renewing and revoking the registration of qualifying patients, designated caregivers, nonprofit dispensaries and dispensary agents.” *Id.*; *see also* A.R.S. § 36-2803. After the Act took effect, DHS promulgated rules related to its implementation. *See* Ariz. Admin. Code §§ R9-17-101 to R9-17-323 (2011).

Following the AMMA’s passage, the State brought questions relating to preemption to two different courts. In *Arizona v. United States*, No. 2:11-cv-01072-SRB (D. Ariz. 2011), the State expressed concern that while the “employees and officers of the State of Arizona have a mandatory duty to implement” the AMMA (subject to a legal action in mandamus), state officials “risk prosecution and penalties under federal criminal statutes if they faithfully comply with Arizona law.” *See* Compl. at 15, ¶ 81. The Complaint sought declaratory relief and asked the federal court to determine whether the AMMA was preempted by federal law or whether implementation of the AMMA was subject to a “safe harbor” by virtue of certain actions of the federal government. *See generally id.* The district court judge, however, concluded that the State had not met “the constitutional or prudential components of ripeness” and dismissed its complaint. Order, *Arizona v. United States*, No. 2:11-cv-01072-SRB at 10 (D. Ariz. January 4, 2012). Similar issues were raised in a mandamus action against DHS in Superior Court for Maricopa County. *See* Minute Entry, *Compassion First LLC v. State*, No CV 2011-011290 at 5 (January 17, 2012). In that case the superior court judge recognized “the State’s dilemma” explaining that “it is caught between the proverbial rock and hard place, between the AMMA and the CSA.” *Id.* Nevertheless, the court declined to “determine issues of preemption and federal criminal liability,” instead concluding that the “sole issue before [it was] whether the

State has discretion to put the implementation of the AMMA on hold while it” sought relief on those issues in federal court.¹ *Id.*

Analysis

The Supremacy Clause of the United States Constitution declares that the “Constitution, and the Laws of the United States . . . shall be the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. Const. art. VI, cl. 2. “Under this principle, Congress has the power to preempt state law.” *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). 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). Furthermore, Congress 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 controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.” *Id.* § 801(5). “The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug [under the Act], Congress expressly found that the drug has no acceptable medical uses.” *Gonzales v. Raich*, 545 U.S. 1, 27 (2005). Consequently, although the CSA “expressly contemplates that many drugs ‘have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people’ . . . it includes no exception at all for any medical use of marijuana.” *United States v. Oakland Cannabis Buyers’*

¹ Subsequent litigation in other matters has raised similar issues. *See, e.g., State v. Okun*, No. 1 CA-CV 12-0094 (App. Feb. 9, 2012), docket *available at* <http://apps.supremecourt.az.gov/aacc/appella/1CA%5CCV%5CCV120094.PDF>; Answer of County Defendants, *White Mountain Health Cntr., Inc. v. Cnty. of Maricopa*, CV2012-053585 (Ariz. Sup. Ct. June 19, 2012).

Coop., 532 U.S. 483, 493 (2001) (internal citation omitted) (rejecting medical necessity argument as defense to criminal prosecution).

This issue has been ruled on in two (2010, 2011) appellate court cases, one in California and one in Oregon. The legal analysis in these cases controls this opinion. *See* Mich. Op. Att’y Gen. No. 7262, 2011 WL 5848600, at *4 n.11 (2011) (concluding that the recent Oregon and California decisions render prior decisions related to medical marijuana “of questionable value”).

First, the Oregon Supreme Court concluded, in analyzing Oregon’s similar medical marijuana program, that those provisions of the Oregon law that authorized “a use that federal law prohibits stand[] as an obstacle to the implementation and execution of the full purposes and objectives of the [CSA].” *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010). That court explained that under U.S. Supreme Court precedent, where a state law authorizes “conduct that the federal Act forbids, ‘it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (quoting *Mich. Canners & Freezers Ass’n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 478 (1984)).

Similarly, the California Court of Appeals has held that where an ordinance creates an application process that permits it to operate a medical marijuana collective, the ordinance’s authorization “stands as an obstacle to the accomplishment of [the] purpose [of the CSA].” *Pack v. Superior Court*, 132 Cal. Rptr. 3d 633, 651 (App. 2011), *rev. granted*, 268 P.3d 1063 (2012).²

In contrast, a state’s decision concerning the decriminalization of certain conduct stands on a different footing because “[w]hen an act is prohibited by federal law, but neither prohibited

² In addition, “Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration.” Act of Oct. 21, 1998, Pub. L. No. 105-277, Div. F., 112 Stat. 2681-2761.

nor authorized by state law, there is no obstacle preemption.” *Id.*; accord *Emerald Steel*, 230 P.3d at 530 (“Congress lacks authority to require states to criminalize conduct that the states choose to leave unregulated, no matter how explicitly Congress directs the states to do so.”). Here, the AMMA decriminalizes the possession and use of marijuana of up to 2.5 ounces for those individuals (patients and caregivers) who have been issued certain identification cards. A.R.S. § 36-2811. But the language of the statute does not authorize anything. This provision, by the terms of the statute, is not preempted because it is beyond Congress’s power to dictate the parameters of state criminal conduct. However, to the extent that an identification card *purports to authorize* an individual to cultivate marijuana or otherwise violate federal law, such language is preempted.³

³ You have also asked whether state and other government employees face federal criminal sanctions for administering, implementing, or complying with the AMMA. I am unable to answer this question as it lies in the discretion of the U.S. Department of Justice. Under federal law it appears that state and other government employees could be subject to prosecution for actions required by the AMMA. For example, the most recent statement of the then-Acting U.S. Attorney for Arizona stated that “[c]ompliance with the AMMA and Arizona regulations will not provide a safe harbor or immunity from federal prosecution for anyone involved in the cultivation and distribution of marijuana . . . [a]s such, state employees who conduct activities authorized by the AMMA are not immune from liability under the CSA.” Letter of Acting U.S. Attorney Ann Birmingham Scheel to Governor Janice K. Brewer (Feb. 16, 2012).

Conclusion

In light of the legal principles outlined above, and the continuing concerns raised by the chief law enforcement officers of thirteen of Arizona's fifteen counties throughout the state, I must issue this opinion concluding that those provisions of the AMMA and related rules authorizing any cultivating, selling, and dispensing of marijuana are preempted. However, the AMMA provisions 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, therefore, are not authorizations to violate federal law.

Thomas C. Horne

Thomas C. Horne
Attorney General

EXHIBIT 2

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-051310

01/18/2012

HONORABLE MICHAEL R. MCVEY

CLERK OF THE COURT
R. Tomlinson
Deputy

MARK W HAILE

GREGORY P GILLIS

v.

TODAYS HEALTH CARE I I

MAURICE DANIEL EVANS

MINUTE ENTRY

The Court has considered Plaintiffs' Motion for Summary Judgment, Defendant's Response and Cross Motion for Summary Judgment, Plaintiffs' Reply in Support of their Motion for Summary Judgment and Response to Defendant's Cross Motion for Summary Judgment, and Defendant's Reply in Support of its Motion for Summary Judgment. The Court has further considered the Statements of Facts submitted by each party in support of their respective Motions for Summary Judgment, and oral argument of counsel for the parties.

On or about August 12, 2010, each of the Plaintiffs entered into separate loan agreements with the Defendant. Each Plaintiff loaned Defendant \$250,000.00 for the stated purpose of financing a "retail medical marijuana sales and grow center." Each loan was memorialized by a loan agreement and a promissory note. (The loan documents). These loan documents required Defendant to pay Plaintiffs interest at the rate of 12% per annum on the 12th day of each month. The agreement provided that in the event of a default, Defendant had five (5) days within which to cure its default. If Defendant failed to cure its default within five (5) days, Plaintiffs were entitled to repayment of the principal loan amount at a default interest rate of 21%, plus any costs and attorneys' fees associated with enforcement and collection.

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Defendant failed to timely pay interest on the loans by March 12, 2011. As of March 17, 2011, Defendant defaulted on its obligations under the loan obligation. These facts are not disputed.

The sole legal issue presented by both the Motion for Summary Judgment, as well as the Cross Motion for Summary Judgment is whether the loan documents are enforceable, or whether they are void and unenforceable due to illegality. As mentioned, both loan agreements specifically provide as follows:

“Borrower shall use the loan proceeds for a retail medical marijuana sales and grow center.”

The retail medical marijuana sales and grow center was located in Colorado. Colorado, like Arizona, has adopted a scheme by which patients may obtain amounts of marijuana for medicinal purposes with a prescription from a physician. However, the United States’ Controlled Substances Act (“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. The United States still categorizes marijuana as a Schedule I, controlled substance pursuant to the CSA and Federal Criminal Statutes. 21 U.S.C.A. § 812. It is unlawful to knowingly open, lease, rent, use or maintain property for the manufacturing, storing, or distribution of controlled substances. 21 U.S.C.A. § 856. Finally, under Federal Law, it is unlawful to aid and abet the commission of a Federal crime. 18 U.S.C.A. § 2.

In *Gonzales v. Raisch*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed. 2d. 1, (2005), the U.S. Supreme Court addressed the conflict between Federal Law, which continues to outlaw the possession and distribution of marijuana, and state medical marijuana laws. In that case, the Supreme Court held that prohibition of such 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 not withstanding.

An agreement is unenforceable if the acts to be performed would be illegal or would violate public policy. *White v. Maddox*, 127 Ariz. 181, 619 P.2d 9 (1980); *Mountain States Bolt, Nut & Screw v. Best-Way Transp.*, 116 Ariz. 123, 568 P.2d 430 (App 1977).

Plaintiffs argue the promissory notes are still enforceable despite the recitation of an illegal purpose in the Loan Agreement, because the promissory notes can be enforced without any proof of an illegal purpose. However, a contract which in itself is not unlawful either in what it promises or in the consideration for the promise may nevertheless be rendered void as

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against public policy as part of a general scheme to bring about an unlawful result. 8 Williston on Contracts section 19:11 (4th Ed.).

The explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States. As such, this contract is void and unenforceable. This Court recognizes the harsh result of this ruling. Although Plaintiffs did not plead any equitable right to recovery such as unjust enrichment, or restitution, this Court considered whether such relief may be available to these Plaintiffs. Equitable relief is not available when recovery at law is forbidden because the contract is void as against public policy. *Landi v. Arkules*, 172 Ariz. 126, 136, 835 P.2d 458, 468; DOBBS ON REMEDIES § 13.5, at 994-47. The rule is that a contract whose formation or performance is illegal is, subject to several exceptions, void and unenforceable. But this is not all, for one who enters into such a contract is not only denied enforcement of his bargain, he is also denied restitution for any benefits he has conferred under the contract. *Id.*

This Court finds that there are no genuine issues of material fact and that Defendant is entitled to judgment as a matter of law. Therefore,

IT IS ORDERED granting summary judgment on Defendant's Cross Motion for Summary Judgment and dismissing Plaintiffs' Complaint with prejudice.

IT IS FURTHER ORDERED denying Plaintiffs' Motion for Summary Judgment.

As the contracts are void as against public policy, no attorneys' fees are awarded to Defendant. However,

IT IS ORDERED awarding Defendant its taxable costs.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

EXHIBIT 3

**DISTRICT COURT, ARAPAHOE COUNTY,
STATE OF COLORADO**
7325 South Potomac Street
Centennial, Colorado 80112

FILED Document
CO Arapahoe County District Court 18th JD
Filing Date: Aug 08 2012 11:01AM MDT
Filing ID: 45786233
Review Clerk: N/A

Plaintiff

[REDACTED]

v.

Defendants

LAURA LOWDEN, and BLUE SKY CARE
CONNECTION, LLC

▲ COURT USE ONLY ▲

Case Number: [REDACTED]

Div.: [REDACTED]

ORDER

THIS MATTER is before the Court on claims by [REDACTED] (hereinafter "Plaintiff") alleging breach of contract by Laura Lowden and Blue Sky Care Connection, LLC (hereinafter "Defendants"). After a trial to the Court, further briefing by the parties and based on a preponderance of the evidence, the Court makes findings, reaches conclusions, and orders as follows:

I. STATEMENT OF CASE

Plaintiff was engaged in the cultivation and sale of medical marijuana, and Defendant was engaged in the business of retail medical marijuana sales. Plaintiff argues that he had a valid contract with Defendants, which Defendants dispute. Plaintiff claims that he delivered approximately \$40,000 worth of medical marijuana products to Defendants between approximately June 23, 2010, and October 28, 2010. Plaintiff asserts that Defendants promised to pay for the products in cash or in the form of a share in a potential business partnership. Plaintiff claims that he never received any compensation. A trial was held on April 4, 2012. On May 10, 2012, the Court ordered Plaintiff and Defendants to file briefs explaining why this Court should not declare the purported contract void as against public policy.

II. EXISTENCE OF A CONTRACT

The first issue is whether the parties had entered into a contract.

A contract is an “agreement between two or more persons” and “consists of an offer and an acceptance of that offer, and must be supported by consideration.” Colo. Jury Instr., Civil 30:1 (4th ed.). Contracts require “mutual assent to an exchange, between competent parties, with regard to a certain subject matter, for legal consideration.” *Indus. Prod.’s Int’l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983, 988 (Colo. App. 1997) (citing *Denver Truck Exch. v. Perryman*, 307 P.2d 805 (Colo. 1957)). An offer is a “manifestation by one party of a willingness to enter into a bargain,” and an acceptance is a “manifestation of assent to the terms of the offer and, unless otherwise specified in the offer, the offeree may accept by promising to perform or by performing.” *Indus. Prod.’s*, 962 P.2d at 988 (citing Restatement (Second) of Contracts §§ 24, 32 (1979)).

Here, after reviewing the evidence presented at trial, the Court finds that Plaintiff offered to sell marijuana products to Defendant. Defendant accepted Plaintiff’s offer by promising to compensate Plaintiff with cash or share in a potential business partnership. Therefore, Plaintiff and Defendants mutually assented to an exchange with regard to the subject matter of medical marijuana products. Cash or a share in the business provided the legal consideration. Consequently, the Court finds that Plaintiff and Defendants entered into a contract under Colorado law. The Court also finds that Defendants breached that contract by failing to pay Plaintiff for the marijuana products delivered to Defendants.

III. WHETHER THE DISPUTED CONTRACT IS VOID AND UNENFORCEABLE BECAUSE IT IS IN CONTRAVENTION OF PUBLIC POLICY

Although the Court finds that a contract exists and that Defendants have failed to perform under that contract, the subject matter of that contract must be addressed by the Court.

A. Contracts in Contravention of Public Policy are Void and Unenforceable.

It is well-established Colorado law that “contracts in contravention of public policy are void and unenforceable.” *Pierce v. St. Vrain Valley School Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999). Parties to illegal contracts generally cannot recover damages for breach of contract. *Bd. of Cnty. Comm’rs of Pitkin Cnty. v. Pfeifer*, 546 P.2d 946, 950 (Colo. 1976). Although parties have the freedom to agree to “whatever terms they see fit,” such terms cannot violate statutory prohibitions affecting public policy of the state. *Fox v. I-10 Ltd.*, 957 P.2d 1018, 1022 (Colo. 1998); *see also City of Colorado Springs v. Mountain View Electric Ass’n, Inc.*, 925 P.2d 1378, 1386 (Colo. App. 1995) (“It is a fundamental principle of contract law that parties cannot by private contract abrogate the statutory requirements or conditions affecting the public policy of the state.”) Above all else, “no one can lawfully do that which tends to injury the public, or is detrimental to the public good.” *Russell v. Courier Printing & Publ’g Co.*, 95 P. 936 (Colo. 1908). As a result, a defendant may not be forced to perform on a contract to which he agreed and received a benefit. *See id.* However, “it is not for his sake, or for his protection, that the objection is allowed, but for the protection of the public.” *Id.*

Furthermore, Colorado law does not suggest that a public policy analysis should be limited to violations of public policy only as defined by Colorado law. *See Pierce*, 981 P.2d at 604; *Fox*, 957 P.2d at 1022; *Pfeifer*, 546 P.2d at 950; *Mountain View*, 925 P.2d at 1386. Instead, the concept of public policy includes both the state of Colorado and the “state” as defined as a “politically organized body of people [usually] occupying a definite territory.” Webster’s Dictionary 1151 (9th ed. 1989). Colorado courts are responsible for upholding the public policy of the state of Colorado *and* the “state” of the nation. In *Russell*, the Supreme Court of Colorado held that a contract was void as against public policy because it violated a ruling by the United States Supreme Court declaring that agreements for government contracts are void as against public policy when “compensation is contingent upon the success of the promisee’s efforts.” 95 P. at 938. Therefore, if the disputed contract violates federal law, it would be against public policy and would be void and unenforceable.

Here, neither party raised the issue of illegality, but the issue was instead raised by the Court. The Court may review a contract *sua sponte* for public policy violation. *See Feiger, Collision & Kilmer v. Jones*, 926 P.2d 1244, 1252 (Colo. 1996). Where a contract is illegal, “neither law nor equity will aid either to

enforce, revoke, or rescind.” *Baker v. Couch*, 221 P. 1089, 1090 (Colo. 1923). It is irrelevant whether the parties raise the issue of illegality or the court ascertains illegality from pleadings and evidence. *See id.*

B. Is a Contract for the Sale of Marijuana Void Because it Contravenes Public Policy?

The Court ordered the parties to brief the issue of whether a contract for marijuana is void against public policy. Plaintiff argues that the Court must enforce the contract because it is valid under Colorado law and further argues that it would be beyond the scope of this case for the Court to address the federal drug issues. Defendants argue that the contract is void as against public policy because it violates federal law prohibiting the cultivation and use of marijuana. Defendants also assert that the contract is void as against public policy because Plaintiff violated state marijuana regulatory law. The Court addresses the parties’ arguments as follows:

1. Colorado State Law Does Not Create a Constitutional Right for Citizens to Use and Possess Medical Marijuana.

As an initial matter, Colorado law does not create a right to use and possess medical marijuana. Instead, the Medical Use of Marijuana Amendment creates an exception from state criminal laws for any patient who lawfully possesses a “registry identification card” to use medical marijuana. Colo. Const. art. XVIII, § 14 (2)(b); *People v. Watkins*, 2012 COA 15, ¶ 23, *cert denied*, No. 12SC179, 2012 WL 1940753 (Colo. May 29, 2012). The amendment authorizes physicians to provide patients with “written documentation...stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana.” Colo. Const. art. XVIII, § 14 (2)(b)(II); *Watkins*, 2012 COA at ¶ 24. The amendment does not authorize physicians to actually prescribe marijuana. *Watkins*, 2012 COA at ¶ 24. Consequently, the Colorado Court of Appeals has found that the amendment does not create a “broader constitutional right than exemption from prosecution.” *Benoir*, 262 P.3d 970 at 974. Accordingly, Colorado courts have consistently recognized that authorization to use medical marijuana is not limitless. *Id.* at 976 (citing *People v. Clendenin*, 232 P.3d 210, 212, 214 (Colo. App. 2009) (noting that the term “primary care-giver” does not

“encompass everyone who may supply medical marijuana) and *In re Marriage of Parr*, 240 P.3d 509, 511 (holding that “a prohibition in a parenting plan against using marijuana while exercising parenting time did not ‘constitute a restriction of parenting time’”).

2. Possession and use of marijuana remains illegal under federal law.

Marijuana remains an illegal substance under federal law. *Watkins*, 2012 COA at ¶ 20; *see also Benoir* 262 P.3d at 977. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act (hereinafter “CSA”) in the effort to “consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers.” 21 U.S.C.A. §§ 801-971 (West 2011); *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). The Act created a “comprehensive regime to combat the international and interstate traffic in illicit drugs.” *Gonzales*, 545 U.S. at 12. The legislation makes it unlawful to “manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.” *Gonzales*, 545 U.S. at 13 (citing 21 U.S.C.A. §§ 841(a)(1), 844(a)). Controlled substances are categorized into five schedules according to “accepted medical uses, the potential for abuse, and their psychological and physical effects on the body.” *Gonzales*, 545 U.S. at 13 (citing 21 U.S.C.A. §§ 811, 812). Congress classified marijuana as a Schedule I drug. *Gonzales*, 545 U.S. at 14 (citing 21 U.S.C.A. § 812(c)). Drugs are categorized under Schedule I because of “their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.” *Gonzales*, 545 U.S. at 14 (citing 21 U.S.C.A. § 812(b)(1)). When Congress categorized marijuana as a Schedule I drug, the manufacture, distribution, or possession of marijuana became a criminal offense. 545 U.S. at 14 (citing 21 U.S.C.A. §§ 823(f), 841(a)(1), 844(a)).

Nonetheless, numerous states have enacted medical marijuana laws in recent years, creating uncertainty regarding the status of marijuana’s legality. *See Gonzales*, 545 U.S. at 5. In response to a challenge relevant to California’s medical marijuana laws, the United States Supreme Court held that there is no medical necessity exception to the prohibitions contained within the CSA. *United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 483, 486, 494 (2001). Likewise, “Colorado’s medical marijuana provision may protect claimant from prosecution under Colorado’s criminal laws,” but the Amendment has no effect on federal laws. *Watkins*, 2012 COA at ¶ 20. In *Gonzales*, the United States Supreme

Court held that application of the CSA to intrastate growers and users of medical marijuana did not violate the Commerce Clause of the United States Constitution, thus affirming Congress's power to comprehensively regulate, and in some cases prohibit, intrastate and interstate drug activity. *See Gonzales*, 545 U.S. at 9. Additionally, the Colorado Court of Appeals has found that medical marijuana laws continue to violate federal public policy. *Benoir v. Indus. Claims Appeals Office*, 262 P.3d 970, 974 (Colo. App. 2011), *cert denied*, No. 11SC676, 2012 WL 1940833 (Colo. May 29, 2012) (citing the Office of National Drug Policy's notice mandating that enforcement of federal drug laws would remain in effect despite state passage of medical marijuana provisions).

3. Federal law regarding marijuana preempts state law because Colorado state law creates an obstacle to the full enforcement of federal law.

The Supremacy Clause of the United States Constitution provides that the Constitution and laws of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). It is fundamental to this "constitutional command that all conflicting state provisions be without effect." *Maryland*, 451 U.S. at 746.

However, a federal act cannot supersede the "States' historic police power" unless that is the clear purpose of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 471 (1996). Therefore, interpretation of a statute's preemptive scope must focus on the "fair understanding of Congressional purpose." *Id.* Congress may indicate its preemptive intent through explicit statutory language or implicitly through its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). A federal statute may implicitly supersede a state statute when a statute's scope "indicates that Congress intended federal law to occupy a field exclusively," or when the "state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

The CSA's central objective was to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales*, 545 U.S. at 12. Congress created a "comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" *Id.* at 24. Congress classified marijuana as a Schedule I drug partly for its "lack of any accepted medical use." *Id.* at 14. "Despite considerable efforts to reschedule marijuana," Congress has refused to classify marijuana under any lesser schedules.

Id. at 15. Further, the United States Supreme Court held that there is no medical necessity exemption available under the CSA, thus foreclosing any conclusion that Colorado's marijuana law can create any such exemption under federal drug law. *See Oakland Cannabis*, 532 U.S. at 483, 486, 494.

Since Congress has not indicated an intent to occupy the field of drug law exclusively, the Court must consider the existence of an actual conflict between state and federal law. Actual conflict may exist when it is physically impossible to comply with both state and federal law or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner*, 514 U.S. at 287. Historically, the Court has applied the physical impossibility standard very narrowly. *See Wyeth v. Levine*, 555 U.S. 555, 590 (2009). An example can be found in *Florida Lime & Avocado Growers, Inc. v. Paul* (373 U.S. 132, 134 (1963)). *Florida Lime* concerned the conflict between a California state law that prohibited the sale of avocados in California containing less than 8% oil, and a federal law that did not use oil content to measure avocado maturity. *Id.* Florida growers brought the action because the California law resulted in the exclusion of Florida avocados from the California markets that did not meet the 8% oil requirement but were considered mature under federal law. *Id.* The Court held that "despite the dissimilarity of the standards," the standard of physical impossibility was not satisfied because Florida growers could simply leave the fruit on the trees beyond the "earliest picking date" available under federal law. *Id.* at 143.

Here, it is not physically impossible to comply with both state and federal law because a person can simply refrain from using marijuana, medical or otherwise. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.* (230 P.3d 518, 528 (Or. 2010)), the Oregon Supreme Court applied similar reasoning and concluded that it is not physically impossible for Oregon residents to comply with both federal law and Oregon's medical marijuana law because residents can refrain from using marijuana altogether. Similarly, it is not physically impossible for Colorado residents to comply with both federal and state law; therefore the physical impossibility standard of preemption is not satisfied.

Finally, the Court must consider whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In *Michigan Cannery & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.* (467 U.S. 461, 478 (1984)), the United Supreme Court held that state law was preempted when state law authorized associations of farmers and other producers of agricultural commodities

to engage in conduct forbidden by federal law. The Court held that federal law preempted state law because it stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* In *Emerald*, the Oregon Supreme Court found that Oregon law “affirmatively authorizes the use of medical marijuana” whereas the CSA prohibits marijuana regardless of any medical purpose. 230 P.3d at 529. Similarly, Colorado law authorizes certain individuals to use marijuana for medical purposes, whereas federal law forbids any use of marijuana. 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. Similarly, in *Emerald*, the Oregon Supreme Court held that Oregon marijuana law is without effect because Oregon’s marijuana laws are preempted by federal law. 230 P.3d at 529.

C. It is not within the Court’s authority to reclassify marijuana under federal law.

Furthermore, the judiciary does not possess the authority to exempt the specific class of medical marijuana users from the CSA. *See Gonzales*, 545 U.S. at 26. It is not within the power of the judiciary to determine whether marijuana should remain a Schedule I drug. *Benoir*, 262 P.3d at 977. Proponents of federal marijuana law reform have access to two primary avenues to elicit such a change: the reclassification process and the democratic process. *Gonzales*, 545 U.S. at 14, 33. The CSA “provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules.” *Id.* at 14. Secondly, the democratic process remains available to citizens “in which the voices of voters allied with these respondents may one day be heard in the halls of Congress.” *Id.* at 33. However, under the law’s current state, the sale and use of marijuana, even for medical purposes, remains against the public policy of the United States.

D. Conclusion

Consequently, contracts for the sale of marijuana are void as they are against public policy. Accordingly, the contract here is void and unenforceable.

IV. PLAINTIFF'S REGULATORY COMPLIANCE

The Court, having decided the issue on other grounds, need not reach the issue of whether Plaintiff complied with the regulations set forth by Colorado's marijuana law regarding primary care givers. Additionally, since the Court did not consider the regulatory arguments presented by Defendants, Plaintiff's Motion to Strike is moot.

SO ORDERED THIS 8TH DAY OF AUGUST, 2012

BY THE COURT:

A handwritten signature in black ink, appearing to read 'C. M. Pratt', written over a horizontal line.

Charles M. Pratt
District Court Judge