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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
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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
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5 I also transmitted courtesy copies to
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