UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CARL OLSEN, Plaintiff, v. MICHAEL MUKASEY, Attorney General of the United States, MICHELE LEONHART, Acting Administrator, United States Drug Enforcement Administration, and CONDOLEEZZA RICE, United States Secretary of State. Defendants.	)	Civil File No. 4:08-cv-00370 (RWP/RAW)

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

On November 17, 2008, Defendants filed a motion to dismiss Plaintiff's complaint, based in part on the fact that Plaintiff had not exhausted his administrative remedies with the Drug Enforcement Administration ("DEA"). Plaintiff has now demonstrated that he has exhausted his administrative remedies, as he received a response from the DEA with respect to his petition to remove marijuana from Schedule I of the Controlled Substances Act ("CSA"). See Pl.'s Mot. for Judicial Notice Pursuant to Fed. R. Evid. 201 [Doc. No. 22]. Plaintiff's exhaustion of administrative remedies alters some of the arguments that Defendants made in their Motion to Dismiss.

FACTUAL BACKGROUND

On May 12, 2008, Plaintiff petitioned the DEA to remove marijuana from Schedule I of

the CSA, asserting that marijuana should be rescheduled because it has a "currently accepted medical use." On September 15, 2008, Plaintiff also filed suit in this Court, raising the same claim and requesting the same relief as in his administrative petition. Defendants filed a motion to dismiss the complaint arguing, among other things, that Plaintiff's lawsuit should be dismissed because Plaintiff had not exhausted his administrative remedies. After Defendants' motion to dismiss was fully briefed, on December 19, 2008, the DEA issued a decision with respect to Plaintiff's petition to remove marijuana from Schedule I of the CSA. *See* Ex. 1 to Pl.'s Mot. for Judicial Notice [Doc. No. 22]. The DEA rejected Plaintiff's administrative petition, explaining in detail why it was rejecting each of Plaintiff's grounds in his petition. *Id.* Notably, the DEA was not persuaded by Plaintiff's argument that certain state laws allow for the medical use of marijuana. The DEA explained that "the CSA plainly does not assign to the state the authority to make findings relevant to CSA rescheduling determinations." *Id.* at 4. Moreover, the DEA found that the factors for the Attorney General to consider in rescheduling controlled substances do not include state law. *Id.* at 5.

ARGUMENT

Because Plaintiff has exhausted his administrative remedies, that portion of Defendants' motion to dismiss based on lack of administrative exhaustion is moot. The fact Plaintiff has received a decision from DEA on his petition, however, raises another obstacle to this Court's jurisdiction regarding Plaintiff's claim to remove marijuana from Schedule I of the CSA. Because Plaintiff has now exhausted his administrative remedies, he is entitled to federal court review of the administrative decision. Review of administrative decisions under the CSA, however, lies exclusively with the courts of appeals. The CSA provides courts of appeals with

exclusive jurisdiction over final agency decisions arising under it:

> All final determinations, findings, and conclusions of the Attorney General under this subchapter shall be final and conclusive decisions of the matters involved, except that any person aggrieved by a final decision of the Attorney General may obtain review of the decision in the United States Court of Appeals for the District of Columbia or for the circuit in which his principal place of business is located upon petition filed with the court and delivered to the Attorney General within thirty days after notice of the decision. Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.

21 U.S.C. § 877. Courts have recognized the exclusive jurisdiction of the courts of appeals over disputes arising under the CSA. *See Oregon v. Ashcroft*, 368 F.3d 1118, 1120 (9th Cir. 2004) (finding it had original jurisdiction over challenge to interpretive rule issued by Attorney General), *aff'd sub nom Gonzales v. Oregon*, 546 U.S. 243 (2006); *Steckman v. DEA*, No. Civ. A.H-97-1334, 1997 WL 588871 at *1-2 (S.D. Tex. Sept. 16, 1997) (finding that it had no subject matter jurisdiction over CSA-related claim because the only proper forum was in the court of appeals). The District Court of the District of Columbia performed a lengthy analysis of Section 877 and concluded that "Section 877 . . . seems to explicitly vest exclusive jurisdiction in the courts of appeals over any CSA-based agency determination that could properly be before a federal court." *Doe v. Gonzalez [sic]*, No. 06-966, 2006 WL 1805685 at *22 (D.D.C. June 29, 2006), *aff'd sub nom. Doe v. Drug Enforcement Admin.*, 484 F.3d 56 (D.C. Cir. 2007).

Because Plaintiff's claim to remove marijuana from Schedule I of the CSA arises under the CSA, because Plaintiff has received a final administrative decision on this claim, and because the exclusive jurisdiction over final agency decisions under the CSA rests exclusively with the courts of appeals, this Court lacks jurisdiction to hear Plaintiff's claim to remove marijuana from

Schedule I of the CSA.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiff's rescheduling claim for lack of jurisdiction.

Dated: January 13, 2009

Respectfully submitted,

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