UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CARL OLSEN,	)	
Plaintiff,	)	
v.	)	No. 4:08-cv-00370
	)	
MICHAEL MUKASEY, et al.,	)	
Defendants.	)	

REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

Defendants claim that the Plaintiff has exhausted an administrative remedy because the Plaintiff received a letter from the Drug Enforcement Administration ("DEA") on January 5, 2009 rejecting his petition notifying the DEA of its failure to obey federal law by removing marijuana from Schedule I of the Controlled Substances Act ("CSA") because marijuana no longer meets the findings required by Congress for inclusion in that schedule. The letter from the DEA does not say there has been a "FINAL ORDER" on a petition. The letter simply interprets the statutory language of 21 U.S.C. § 812(b)(1)(B) to mean that Congress did not intend a role for the States in determining the meaning of "accepted medical use in treatment in the United States" as used in the statute. This Court is qualified to authoritatively interpret statutory language, not the DEA.

FACTUAL BACKGROUND

The Plaintiff is not an attorney. The Plaintiff considered how to go about notifying the DEA that it was in violation of federal law for failing to remove marijuana from Schedule I, 21 C.F.R. 1308.11, when California enacted the first state law accepting the medical use of marijuana in 1996. The Plaintiff decided that a petition to the DEA would give the DEA the opportunity to correct its error without judicial intervention. Because the DEA's error has been ongoing for 13 years, the Plaintiff waited for about 30 days and then sent the DEA a notice to cease and desist the unlawful enforcement of its fraudulent regulation maintaining marijuana in Schedule I of the CSA, clearly telling the DEA that an injunction would be sought in a federal district court within 30 days if the DEA did not comply with the notice. The DEA now characterizes the petition and notice as a petition to initiate scheduling proceedings, which was clearly not the intent of the petition and notice to cease and desist. Perhaps the Plaintiff should have filed a civil complaint in this Court instead of giving the agency the opportunity to correct its own error, but the Plaintiff is not a trained attorney and did the best he could to let the DEA know what he expected them to do. Plaintiff clearly did not request the DEA to move marijuana to some other schedule, but simply to remove it from Schedule I. What the DEA does after it removes marijuana from Schedule I is clearly something the DEA will have to determine.

The Defendants are using administrative procedures which Congress established so that drugs could be approved for medical use in the absence of any

state law accepting them for medical use. Prior petitions to reschedule marijuana were filed before state laws were enacted accepting the medical use of marijuana. The last petition to reschedule marijuana mentioned in the DEA's letter was filed in 1995 (see page 2, n. 1). The first state to enact a law accepting the medical use of marijuana was California, in 1996.

ARGUMENT

While Plaintiff appreciates that the Defendants now admit the Plaintiff is entitled to judicial review, the Plaintiff is entitled to have this Court make a ruling on the interpretation of the statutory language in 21 U.S.C. §812(b)(1)(B) ("accepted medical use in treatment in the United States") prior to any appeal to the United States Court of Appeals.

In ***Gonzales v. Oregon***, 546 U.S. 243, 258 (2006), the Supreme Court held: "The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law."

In ***Doe v. DEA***, 484 F.3d 56 (D.C. Cir. 2007), the DEA refused to permit Doe to import a Schedule I substance into the United States. There was no evidence that any state had accepted the medical use of the substance Doe was trying to import.

The case this Court should be looking to for guidance is ***Monson v. DEA***, 522 F.Supp.2d 1188, 1194 (D.N.D. 2007):

> The DEA contends that this Court lacks subject matter jurisdiction because the Controlled Substances Act confers exclusive jurisdiction on

> the United States Court of Appeals to review any "final decision" of that agency. See 21 U.S.C. § 877. However, the plaintiffs are not challenging a "final decision" of the DEA, such as the denial of a license application or promulgation of a rule. Rather, the plaintiffs are seeking a declaration that the Controlled Substances Act does not apply to their planned cultivation of industrial hemp pursuant to North Dakota state law and, as a result, that they cannot be prosecuted under the Act. Thus, no "final decision" of the DEA is at issue and the Court finds that 21 U.S.C. § 877 does not bar the plaintiffs from seeking relief in this Court.

In this case, the Plaintiff seeks a declaration that the Controlled Substances Act does not apply to the Plaintiff's planned use of marijuana because it is misclassified.

According to the Defendants, marijuana has no accepted medical use. According to Congress, marijuana has accepted medical use in treatment in the United States. ***United States v. Oakland Cannabis Buyers' Cooperative***, 532 U.S. 483, 492 (2001) ("Under the statute, the Attorney General could not put marijuana into schedule I if marijuana had any accepted medical use."

The Defendants cannot put marijuana in schedules II through V because under their interpretation of the statute, marijuana has no accepted medical use. Under Congress' interpretation of the statute, the Defendants cannot put marijuana in Schedule I. Therefore, marijuana is not in any schedule.

CONCLUSION

If the Court for any reason decides that this matter should have been filed in the United States Court of Appeals pursuant to 21 U.S.C. 877, Plaintiff requests that the matter be transferred to the United States Court of Appeals pursuant to 28 U.S.C. § 1631:

> Whenever a civil action is filed in a court as defined in section 610 of this title [28 U.S.C. § 610] or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that

court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Dated: January 13, 2009.

/s/ Carl Olsen

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13th, 2009 I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

CHRISTOPHER D. HAGEN, Assistant U.S. Attorney

TAMARA ULRICH, U.S. Department of Justice, Civil Division

Filed Electronically

/s/ Carl Olsen

CARL OLSEN