UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

David Monson **-and-** **Wayne Hauge,** **Plaintiffs,** **v.** **Drug Enforcement Administration** **-and-** **United States Department of Justice,** **Defendants.**	**Civ. No. 4:07-cv-00042 (DLH/CSM)** **Plaintiffs' Response to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment**

Plaintiffs hereby respond to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment ("DEA Oppo. Br.") filed October 19, 2007.

I. 21 U.S.C. § 877 Does Not Bar Plaintiffs' Claims

Contrary to the contention of Defendant Drug Enforcement Administration ("DEA") (see DEA Oppo Br. at 3) Plaintiffs are clearly not challenging a specific DEA decision about their particular case. To be sure, DEA has made clear its general position that the Agency considers the cultivation of industrial hemp to be a violation of the Controlled Substances Act ("CSA"). But that is hardly a "final decision" of DEA about Plaintiffs' case, within the meaning of CSA Section 877.

What it does mean is that Plaintiffs are faced with the choice of risking criminal prosecution for manufacture of a Schedule I controlled substance, or seeking a declaration in court that the law is inapplicable to their planned cultivation of hemp.

Since there is no DEA decision being appealed here, this is the only Court in which such a declaration could be sought. By contrast, *Doe v. DEA*, 484 F.3d 561 (D.C. Cir. 2007), on which the DEA heavily relies, involved DEA's denial of an application for a permit to import a drug. And in holding that Section 877 conferred exclusive jurisdiction on the Court of Appeals, the D.C. Circuit was careful to distinguish a situation—like this one—in which "meaningful judicial review would have been entirely foreclosed." *Id.* at 569. Section 877 does not bar Plaintiffs from seeking relief in this Court.

II. Plaintiffs Have Standing to Pursue Their Claims

DEA has not cited a case, in or outside of the First Amendment context, in which Plantiffs have actually been required to incur criminal prosecution before being held to have standing to challenge a statute. Indeed, in the leading case of *Doe v. Bolton*, 410 U.S. 179 (1973), which did not involve a First Amendment issue, the court found that physicians had standing to challenge a law making their performance of abortions a criminal act

> despite the fact that the record does not disclose that any one of them has been prosecuted or threatened with prosecution ... The physician-appellants ... should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.

Id. at 188. And in the case cited by DEA in its opening brief (at 12) for the proposition that standing is limited to the First Amendment context, the court actually held that gun manufacturers and distributors had standing to challenge a gun law on Commerce Clause and Equal Protection grounds without waiting for criminal prosecution. *Nat'l Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 285-88 (6th Cir. 1997).

Further, the unpublished Eighth Circuit decision cited by the DEA,[1] *United States v. White Plume*, No. 03-1074 (8th Cir., Feb. 27, 2004), did not involve the standing of a prospective producer of hemp but of an *attorney* for such producers who had simply been advising them. Plaintiff farmers here surely have standing in this case to challenge the application of the CSA to their proposed cultivation of industrial hemp, without risking criminal prosecution.

III. Plaintiffs' Claims Are Ripe for Adjudication

As noted below, DEA has failed to create a genuine triable issue as to the material facts put forward by Plaintiffs. Accordingly, DEA is correct that "the issues presented in this case are purely legal ..." (DEA Oppo. Br. at 6), making them fit for judicial review.

With respect to the "hardship" prong of the ripeness test under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the reality is that DEA would never act on Plaintiffs' applications for a DEA registration to cultivate hemp. DEA calls that proposition "speculative" and "unsupported " (DEA Oppo Br. at 5-6 n.2), but does not deny it. That NDSU is still waiting for DEA to act on its research application after eight years amply demonstrates that DEA is unlikely ever to act on Plaintiffs' applications. Awaiting completion of the "administrative process", as DEA would have it, is therefore simply not an alternative for these Plaintiffs. Their claims are ripe for adjudication by this Court.

IV. There Are No Genuine Issues of Material Fact

In its Opposition to Plaintiffs' Statement of Material Facts ("DEA Oppo. Material Facts"), the DEA variously characterizes the material facts set forth by Plaintiffs as

[1] Eighth Circuit decisions prior to January 1, 2007 should not be cited as precedent. Eighth Circuit Local Rule 32.1A.

"immaterial"; purports to dispute those facts; and at the same time and asks for discovery in order to develop information needed to determine whether they *can* be disputed. But Plaintiffs have already made a showing of the absence of genuine issue as to the material facts. Under the established principles governing consideration of a summary judgment motion, "[s]uch a showing shifts to the non-movant the burden to go beyond the pleadings and present affirmative evidence showing that a genuine issue of material fact exists." *Federer v. State of North Dakota*, 447 F. Supp. 2d 1053, 1063 (D.N.D. 2006), *quoting Uhiren v. Brostol-Myers Squibb Co.*, 346 F.3d 824, 827 (8th Cir. 2003).

What has happened here is that Defendant DEA, the federal government agency most expert about illegal drugs, the agency charged with enforcing the nation's drug laws for the last 34 years, and an agency that has had plenty of time to review the issue specifically via the license application submitted over eight years ago by NDSU, has actually *failed* to come forward with sufficient evidence to create a genuine issue as to the basic factual proposition central to this case: that industrial hemp with a THC content of less than three-tenths of one percent (0.3%) has no practical potential as a marijuana substitute for recreational drug use and, thus, that the growth of industrial hemp by Plaintiffs will have no effect on the trade in or price of illegal marijuana because industrial hemp is not fungible with drug marijuana. Indeed, DEA claims it *cannot* adduce such evidence without undertaking discovery.[2]

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[2] *See* Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Summary Judgment and, In the Alternative, for Relief Pursuant to Rule 56, filed Oct. 19, 2007 at 4-5. Pursuant to Local Rule 7.2(a), Plaintiffs will file a separate brief in response to that Motion on or before November 2, 2007. As will be demonstrated in that brief in more detail, DEA's attempt to create various factual issues, such as citing a USDA study issued seven years ago to dispute the fact that hemp seed and fiber markets have been expanding rapidly in recent years, has not only failed but does not provide any basis for allowing discovery before ruling on Plaintiffs' summary judgment motion.

DEA has attempted to counter with three 35-year old studies purporting to show that slight psychoactive effects (not a recreational "high") can be produced in low-THC grades of cannabis. (DEA Oppo. Material Facts at 5 & Exhibits A, B, & C). In fact, *not a single one* of those studies actually purported to show, or remotely did show, that any psychoactive effect could result from cannabis with THC concentration as low as 0.3%. The cannabis used in the study attached to DEA's Statement as Exhibit A was found by the supplier, the National Institute of Mental Health, to contain an average of *1.2*% THC. (Ex. A at 2) . The extent of the effects the researchers observed as a result of smoking cannabis with an assumed 1.2% THC content—*four times* that allowed by North Dakota law-- is consistent with findings from other studies surveyed by Gero Leson and his colleagues; *see* Gero Leson Declaration (Ex. D to Plaintiffs' Motion) ¶ 8. The study attached by DEA as Exhibit B used drug marijuana in which the "unextracted plant material contained *0.9%*" THC—*three times* what is allowed under North Dakota law. (23 PHARM. REVIEW at 360, Ex. B. at 3 (emphasis added)). Again, in the third study, "[t]he plant material [actually used in the experiment to produce a high] contained *0.9%*" THC. 191 ANNALS. OF NY ACAD OF SCI. at 157, Ex. C at 4).

Implicitly contradicting its own contention that non-psychoactive industrial hemp flowers are themselves usable as a drug, DEA then suggests that drug hashish oil can be produced by repeated extractions from low-THC Cannabis plant material. (DEA Oppo. Material Facts at 6). But neither the study attached by DEA as Exhibit D nor the case of *United States v. Ticchiarelli*, 943 F. Supp. 77 (D. Me. 1996), cited by DEA, in any way suggest that hashish can be practically manufactured from industrial hemp containing at most 0.3% THC. By analogy, gold can hypothetically and has in some instances been

extracted from seawater, but the minimal concentration makes it technically and economically inefficient and commercially non-viable to do so; for that reason, seawater obviously does not have "substantial impact" on the interstate market for gold. And as previously noted by Dr. Leson, the effectiveness of THC in industrial hemp, even if the resin is hypothetically concentrated, would be counteracted by non-psychoactive CBD, a compound the concentration of which outweighs that of THC in industrial hemp but not in drug varieties of cannabis. Leson Dec. ¶ 8(b).

Finally, in its effort to dispute the fact that industrial hemp with 0.3% or less THC is not fungible with drug marijuana, DEA cites a few cases in which "ditchweed"—feral hemp—has been used a "filler" to boost the weight of real marijuana. (DEA Oppo. Br. at 12 n.3; DEA Oppo. Material Facts at 6). That a substance may be used as "filler" of course does not suggest that the substance itself is in any way fungible with the drug it is being mixed with. That is certainly true of the oregano that is commonly mixed with drug marijuana as "filler" and of talcum and other legal white powders that are used to "cut", *i.e.*, as filler for, cocaine and heroin. That DEA itself refers to feral hemp as "ditchweed" rather than "marijuana" is ample testimony to that critical distinction. The issues before the Court, then, are purely ones of law.

V. Plaintiffs' Proposed Cultivation of Industrial Hemp Is Outside the Reach of the CSA

Contrary to DEA's suggestions, Plaintiffs do *not* contend that Plaintiffs' proposed cultivation of industrial hemp is outside the scope of the CSA merely because North Dakota "has adequately regulated" such cultivation. (DEA Oppo. Br. at 9). Rather, the CSA does not reach this proposed cultivation for two reasons. First, the "unambiguous" language of the CSA on which DEA relies so heavily explicitly exempts hemp stalk,

fiber, seed and oil from regulation. It makes no sense to conclude that the same Congress—the Congress that enacted the CSA—that took pains to keep trade in hemp fiber, stalk, seed and oil completely legal would have intended to outlaw a state-regulated regime of non-drug hemp cultivation in which only those parts of the plant that Congress decided *not to regulate* would enter commerce. The significance of state regulation is *not* that state regulation supplants federal regulation of drug marijuana. It is simply that this particular state regulatory regime ensures the result that nothing but the exempt parts of the plant enter commerce, produced solely from non-drug industrial hemp cultivars.

Second, DEA's enforcement of the drug laws so as to outlaw such a regime would be inconsistent with the Commerce Clause. In this regard, DEA misperceives the critical distinction between this case and *Gonzalez v. Raich*, 545 U.S. 1 (2005). *Raich* involved drug marijuana. The drug marijuana cultivated for home consumption, for medical use, in that case was indisputably fungible with all other drug marijuana. But it is undisputed in *this* case that the state-regulated industrial hemp at issue here is *not* so fungible.

DEA's response is that the state-regulated industrial hemp is *legally* "fungible" with marijuana because they both belong to the same species, Cannabis sativa L, which is defined and covered by the CSA. (DEA Oppo Br. at 11). DEA cannot deny however, that hemp with less than 0.3% THC is *not* functionally or economically fungible[3] with marijuana—because such hemp simply has no practical potential to be used as an illicit drug. For that reason, Plaintiffs' proposed cultivation cannot affect the market for

[3] DEA's use of the term "fungible" is incorrect, as fungibility inheres in the actual functional interchangeability of the commodities themselves in the market, and does not mean functionally different commodities covered under the same statutory definition. Drug marijuana versus state-regulated non-drug hemp plants, seeds and flowers are not fungible commodities in the interstate illicit drug market, because such hemp plants, seeds and flowers do not have functional practical drug value.

intrastate *or* interstate drug marijuana—what Congress intended to regulate. DEA's regulation of purely intrastate state-regulated hemp cultivation would, therefore, not only extend the CSA beyond its intended reach but beyond what the Commerce Clause allows.

Accordingly, Plaintiffs are entitled to summary judgment in their favor.

Dated: October 26, 2007.

/s/ Timothy Q. Purdon (ID 05392)
Vogel Law Firm
200 North 3rd Street, Suite 201
P.O. Box 2097
Bismarck, ND 58502-2097
(701) 258-7899
tpurdon@vogellaw.com

Of counsel:

Joseph E. Sandler
Sandler, Reiff & Young PC
50 E Street, S.E. # 300
Washington, D.C. 20003
Tel: (202) 479-1111
Fax: (202) 479-1115
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Response to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

Joseph E Sandler
Sandler Reiff & Young PC
sandler@sandlerreiff.com

Wendy M Ertmer, Trial Attorney
Federal Programs Branch
US Dept of Justice, Civil Division
wendy.ertmer@usdoj.gov

I further certify that copy of the foregoing documents will be mailed by first class mail, postage paid, to the following non-ECF participants:

Dated: October 26, 2007

/s/ Timothy Q. Purdon (ID 05392)
Vogel Law Firm
200 North 3rd Street, Suite 201
P.O. Box 2097
Bismarck, ND 58502-2097
(701) 258-7899
tpurdon@vogellaw.com

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