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December 23, 2010 10:58 AM
TRACEY CORDES, CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
BY: ald / SCANNED BY: ALD / 12-23

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

No.

vs.

Hon.

1:10-mc-109
Gordon J Quist
U.S. District Judge

MICHIGAN DEPARTMENT OF
COMMUNITY HEALTH,

Respondent.

_____ /

PETITION TO ENFORCE DRUG ENFORCEMENT ADMINISTRATION SUBPOENA

Now comes the United States of America by its attorneys, Donald A. Davis, United States Attorney for the Western District of Michigan, and John C. Bruha, Assistant United States Attorney, and hereby petitions the Court as follows:

1. This is a proceeding brought pursuant to 21 U.S.C. § 876(c) to judicially enforce a Drug Enforcement Administration (DEA) subpoena issued under the authority of 21 U.S.C. § 876(a).
2. This Court has jurisdiction pursuant to 21 U.S.C. § 876(c) and 28 U.S.C. § 1345.
3. Chris S. Scott is a special agent of the Drug Enforcement Administration, United States Department of Justice. He is assigned to the Lansing, Michigan, office of the DEA. He is authorized to serve DEA subpoenas issued pursuant to 21 U.S.C. § 876. The Lansing DEA office is supervised by Michael Yasenachak, resident agent in charge of the Grand Rapids, Michigan, DEA office, who is authorized to issue DEA subpoenas pursuant to 21 U.S.C. § 876 and 21 C.R.R. 0.104, Appendix to Subpart R, Section 4.

4. The respondent in this matter is the Michigan Department of Community Health, 611 W. Ottawa, Lansing, Michigan.

5. As set forth in the attached declaration, Special Agent Chris S. Scott is conducting an investigation concerning possible violations of the federal Controlled Substances Act, 21 U.S.C. § 801 et seq., by various individuals in the Lansing, Michigan area.

6. Upon information and belief, the respondent, Michigan Department of Community Health, is in possession and control of records that are relevant to that investigation.

7. On June 4, 2010, Resident Agent in Charge Michael Yasenchak issued DEA subpoena number IC-10-486990 pursuant to 21 U.S.C. § 876 to the Michigan Department of Community Health in Lansing, Michigan, to provide “copies of any and all documents, records, applications, payment method of any application for Medical Marijuana Patient Cards and Medical Marijuana Caregiver cards and copies of front and back of any cards located for” seven individuals named in the subpoena. A copy of the subpoena is attached to the declaration of Chris S. Scott filed in support of this petition. The names, dates of birth and addresses of the subjects have been redacted from the copy filed with the Court.

8. On June 6, 2010, Special Agent Chris S. Scott personally served a copy of the subpoena on the Michigan Department of Community Health. The compliance date of the subpoena was June 15, 2010.

9. As of this date, the Michigan Department of Community Health has not complied with the subpoena. The DEA has been informed, through the Michigan Office of Attorney General, counsel for the Michigan Department of Community Health, that due to potential civil and criminal penalties for violation of the confidentiality provisions of the Michigan medical

marijuana law, the Michigan Department of Community Health is reluctant to comply with the subpoena in the absence of a court order, but will do so if ordered by this Court.


WHEREFORE, the Petitioner respectfully prays:

1. That this Court enter an order directing the respondent to comply with the DEA subpoena, in its entirety, forthwith;
2. That any order granting relief sought herein be served on the respondent or its counsel by the DEA, and;
3. For such other relief as is just and proper.

Respectfully submitted,

DONALD A. DAVIS
United States Attorney

Dated: December 22, 2010



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UNITED STATES OF AMERICA,

Petitioner, No.

vs. Hon.

MICHIGAN DEPARTMENT OF
COMMUNITY HEALTH,

Respondent.

1:10-mc-109
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U.S. District Judge

BRIEF IN SUPPORT OF PETITION TO ENFORCE
DRUG ENFORCEMENT ADMINISTRATION SUBPOENA

On June 4, 2010, DEA Resident Agent in Charge Michael Yasenchak issued DEA subpoena number IC-10-486990, pursuant to 21 U.S.C. § 876, to the Michigan Department of Community Health (DCH) in Lansing, Michigan, to provide “copies of any and all documents, records, applications, payment method of any application for Medical Marijuana Patient Cards and Medical Marijuana Caregiver cards and copies of front and back of any cards located for seven named individuals. The subpoena was served on the DCH on June 6, 2010, and the compliance date was June 15, 2010. To date, the Michigan Department of Community Health has not complied with the subpoena. The DEA has been advised, through the Michigan Office of Attorney General, counsel for the DCH, that due to potential civil and criminal penalties for violation of the confidentiality provisions of the Michigan medical marijuana law, the Michigan Department of Community Health is reluctant to comply with the subpoena in the absence of a court order, but will do so if ordered by this Court.

On November 4, 2008, the Michigan Medical Marihuana Act (MMMA), MCL 333.26421

et seq., was passed by referendum and took effect on December 4, 2008. The Preamble to the Act states that the Act was intended to “allow under state law the medical use of marihuana; to provide protections for the medical use of marihuana; to provide for a system of registry identification cards for qualifying patients and primary caregivers, to impose a fee for registry application and renewal; to provide for the promulgation of rules, to provide for the administration of this act; to provide for enforcement of this act; to provide for affirmative defenses’ and to provide for penalties for violations of this act.” Section 4(a) of the Act, MCL 333.26424(a), provides that “[a] qualifying patient who has been issued and possesses a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act....” Section 6, MCL 333.26426, governs issuance of registry identification cards to “qualifying patients” by the Michigan Department of Community Health (DCH). Section 5, MCL 333.26425, requires the DCH to promulgate administrative rules to implement the act. Section 6(h), MCL 333.26426(h), establishes confidentiality rules for administration of the Act. Specifically, that section provides that:

(1) Applications and supporting information submitted by qualifying patients, including information regarding their primary caregivers and physicians, are confidential.

(2) The department shall maintain a confidential list of the persons to whom the department has issued registry identification cards. Individual names and other identifying information on the list is confidential and is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(3) The department shall verify to law enforcement personnel whether a registry identification card is valid, without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card.

(4) A person, including an employee or official of the department or another state agency or local unit of government, who discloses confidential information in violation of this act is guilty of a misdemeanor, punishable by imprisonment for not more than 6 months, or a fine of not more than \$1,000.00, or both. Notwithstanding this provision, department employees may notify law enforcement about falsified or fraudulent information submitted to the department.

The DCH has also promulgated administrative rules to implement the confidentiality provisions of the Act. R 333.121. Those rules provide that except as provided in subrules 2 and 3 of that rule, “Michigan medical marihuana program information shall be confidential and not subject to disclosure in any form or manner.” R 333.121(1). Program information includes “applications and supporting information submitted by qualifying patients,” “names and other identifying information of registry identification cardholders,” and “names and other identifying information of pending applicants and their primary caregivers,” among other things. R 333.121(1)(a), (c), and (d). Subrule (2) provides that “names and other identifying information made confidential under subrule (1) of this rule may only be accessed or released to authorized employees of the department as necessary to perform official duties of the department pursuant to the act,” and subrule (3) provides that “the department shall verify upon a request by law enforcement personnel whether a registry identification card is valid, without disclosing more information than is reasonably necessary to verify the authenticity of the registry identification card.” The rule further provides that: “Violation of these confidentiality rules may subject an individual to the penalties provided for under section 6(h)(4) of the act,” which makes it a misdemeanor to violate disclosure provisions of the Act.

The MMMA notwithstanding, the cultivation, possession and distribution of marijuana remains illegal under federal law. 21 U.S.C. §§ 841(a)(1), 844; *Gonzalez v. Raich*, 545 U.S. 1

(2005). “State medical-marijuana laws do not, and cannot, supercede federal laws that criminalize the possession of marijuana.” *United States v. Hicks*, ___ F.Supp.2d ___, 2010 WL 2724286 *3 (E.D. Mich. 2010) (citing *Gonzalez*). “[T]he MMMA specifically acknowledges that it does not supercede or alter federal law.” *Id.* Nothing in the MMMA affects federal law. *Id.* at *4; *People v. Redden*, ___ Mich.App. ___, 2010 WL 3611716 (Mich. App. 2010) (J. O’Connell, concurring).

Article VI, clause 2 of the United States Constitution provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This provision is commonly referred to as the “Supremacy Clause,” and has been interpreted to preclude state law from interfering with the enforcement of federal law. “Where enforcement of ... state law would handicap efforts to carry out the plans of the United States, the state enactment must give way.” *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 103-04 (1940). Likewise, “[w]here there is a conflict between federal law which mandates an action and state law which prohibits that action such that compliance with both laws is impossible, then, pursuant to the Supremacy Clause, the state law is considered a nullity and the federal law governs.”

Hillsborough County, Florida v. Automated Medical Laboratories, 471 U.S. 707, 712-13 (1985).

This applies to state confidentiality laws that interfere with enforcement of lawful federal subpoenas. See *In re Grand Jury Proceedings*, 607 F.Supp.2d 803, 807 (W.D. Tex. 2009) (citing cases). This also includes federal administrative subpoenas. For example, in *United States v. Wettstein*, 733 F.Supp. 1212 (C.D. Ill. 1990), the court held that the subpoena powers of the

Internal Revenue Service pre-empted a state psychologist-patient privilege, and ordered compliance with an IRS summons seeking an appointment book containing the names of patients treated by a psychologist who had been employed by the owner of a clinic who was under tax investigation. “[T]he Supremacy Clause dictates that the state-created privacy right must yield in the face of the expansive, congressionally-bestowed summons power of the IRS.” *Id.* at 1214. Similarly, in *Massanari v. Northwest Community Mental Health Center*, 2001 WL 1518137 (W.D.N.Y. 2001), a Social Security administrative law judge issued a subpoena duces tecum to a community mental health center for the medical records of a disability claimant. The mental health center declined to produce the records in light of a New York confidentiality statute limiting disclosure of such records. The court held that, in light of the Supremacy Clause, the mental health clinic could not, on the basis of the state law, “withhold mental health records properly subpoenaed by the Social Security Administration pursuant to federal law,” and ordered compliance with the subpoena. *Id.* at *2-3.

Here, as in the above cases, a federal agency (DEA) is seeking enforcement of a lawful subpoena for records relevant to a matter within the agency’s jurisdiction (here, enforcement of the federal drug laws). Any state-created confidentiality provision that interferes with the enforcement of such a subpoena must yield to the enforcement power of the federal agency. The only reluctance on the part of the state agency to comply with the DEA subpoena is the penalties provided for violation of the confidentiality provisions of the MMMA. An order from this Court directing compliance with the subpoena will preclude any state penalties for compliance with the subpoena. *See In re Grand Jury Subpoena*, 198 F.Supp.2d 1113, 1117 (D. Alaska 2002) (“the Supremacy Clause protects state employees from prosecution for honoring federal grand jury

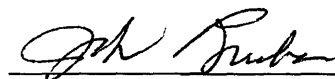
subpoenas” even without a court order); *In re Grand Jury Proceedings*, 607 F.Supp.2d at 807 (holding that the Supremacy Clause protects the respondent from civil or disciplinary action for compliance with the subpoena, with or without a court order).

Wherefore, an order should issue directing the Michigan Department of Community Health to forthwith comply with the DEA administrative subpoena issued to that department on June 16, 2010, a copy of which is attached to the declaration of Special Agent Chris S. Scott.

Respectfully submitted,

DONALD A. DAVIS
United States Attorney

Dated: December 22, 2010



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