DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112 **Plaintiff** QUINCY HAEBERLE v. **Defendants** LAURA LOWDEN, and BLUE SKY CARE CONNECTION, LLC	 **▲COURT USE ONLY▲** Case Number: 2011CV709 Div.: 402

ORDER

THIS MATTER is before the Court on claims by Quincy Haeberle (hereinafter "Plaintiff") alleging breach of contract by Laura Lowden and Blue Sky Care Connection, LLC (hereinafter "Defendants"). After a trial to the Court, further briefing by the parties and based on a preponderance of the evidence, the Court makes findings, reaches conclusions, and orders as follows:

I. STATEMENT OF CASE

Plaintiff was engaged in the cultivation and sale of medical marijuana, and Defendant was engaged in the business of retail medical marijuana sales. Plaintiff argues that he had a valid contract with Defendants, which Defendants dispute. Plaintiff claims that he delivered approximately $40,000 worth of medical marijuana products to Defendants between approximately June 23, 2010, and October 28, 2010. Plaintiff asserts that Defendants promised to pay for the products in cash or in the form of a share in a potential business partnership. Plaintiff claims that he never received any compensation. A trial was held on April 4, 2012. On May 10, 2012, the Court ordered Plaintiff and Defendants to file briefs explaining why this Court should not declare the purported contract void as against public policy.

II. EXISTENCE OF A CONTRACT

The first issue is whether the parties had entered into a contract.

A contract is an "agreement between two or more persons" and "consists of an offer and an acceptance of that offer, and must be supported by consideration." Colo. Jury Instr., Civil 30:1 (4th ed.). Contracts require "mutual assent to an exchange, between competent parties, with regard to a certain subject matter, for legal consideration." *Indus. Prod.'s Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983, 988 (Colo. App. 1997) (citing *Denver Truck Exch. v. Perryman*, 307 P.2d 805 (Colo. 1957)). An offer is a "manifestation by one party of a willingness to enter into a bargain," and an acceptance is a "manifestation of assent to the terms of the offer and, unless otherwise specified in the offer, the offeree may accept by promising to perform or by performing." *Indus. Prod.'s*, 962 P.2d at 988 (citing Restatement (Second) of Contracts §§ 24, 32 (1979)).

Here, after reviewing the evidence presented at trial, the Court finds that Plaintiff offered to sell marijuana products to Defendant. Defendant accepted Plaintiff's offer by promising to compensate Plaintiff with cash or share in a potential business partnership. Therefore, Plaintiff and Defendants mutually assented to an exchange with regard to the subject matter of medical marijuana products. Cash or a share in the business provided the legal consideration. Consequently, the Court finds that Plaintiff and Defendants entered into a contract under Colorado law. The Court also finds that Defendants breached that contract by failing to pay Plaintiff for the marijuana products delivered to Defendants.

III. WHETHER THE DISPUTED CONTRACT IS VOID AND UNENFORCEABLE BECAUSE IT IS IN CONTRAVENTION OF PUBLIC POLICY

Although the Court finds that a contract exists and that Defendants have failed to perform under that contract, the subject matter of that contract must be addressed by the Court.

A. Contracts in Contravention of Public Policy are Void and Unenforceable.

It is well-established Colorado law that "contracts in contravention of public policy are void and unenforceable." *Pierce v. St. Vrain Valley School Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999). Parties to illegal contracts generally cannot recover damages for breach of contract. *Bd. of Cnty. Comm'rs of Pitkin Cnty. v. Pfeifer*, 546 P.2d 946, 950 (Colo. 1976). Although parties have the freedom to agree to "whatever terms they see fit," such terms cannot violate statutory prohibitions affecting public policy of the state. *Fox v. I-10 Ltd.*, 957 P.2d 1018, 1022 (Colo. 1998); *see also City of Colorado Springs v. Mountain View Electric Ass'n, Inc.*, 925 P.2d 1378, 1386 (Colo. App. 1995) ("It is a fundamental principle of contract law that parties cannot by private contract abrogate the statutory requirements or conditions affecting the public policy of the state.") Above all else, "no one can lawfully do that which tends to injury the public, or is detrimental to the public good." *Russell v. Courier Printing & Publ'g Co.*, 95 P. 936 (Colo. 1908). As a result, a defendant may not be forced to perform on a contract to which he agreed and received a benefit. *See id.* However, "it is not for his sake, or for his protection, that the objection is allowed, but for the protection of the public." *Id.*

Furthermore, Colorado law does not suggest that a public policy analysis should be limited to violations of public policy only as defined by Colorado law. See *Pierce*, 981 P.2d at 604; *Fox*, 957 P.2d at 1022; *Pfeifer*, 546 P.2d at 950; *Mountain View*, 925 P.2d at 1386. Instead, the concept of public policy includes both the state of Colorado and the "state" as defined as a "politically organized body of people [usually] occupying a definite territory." Webster's Dictionary 1151 (9th ed. 1989). Colorado courts are responsible for upholding the public policy of the state of Colorado *and* the "state" of the nation. In *Russell*, the Supreme Court of Colorado held that a contract was void as against public policy because it violated a ruling by the United States Supreme Court declaring that agreements for government contracts are void as against public policy when "compensation is contingent upon the success of the promisee's efforts." 95 P. at 938. Therefore, if the disputed contract violates federal law, it would be against public policy and would be void and unenforceable.

Here, neither party raised the issue of illegality, but the issue was instead raised by the Court. The Court may review a contract *sua sponte* for public policy violation. *See Feiger, Collision & Kilmer v. Jones*, 926 P.2d 1244, 1252 (Colo. 1996). Where a contract is illegal, "neither law nor equity will aid either to

enforce, revoke, or rescind." *Baker v. Couch*, 221 P. 1089, 1090 (Colo. 1923). It is irrelevant whether the parties raise the issue of illegality or the court ascertains illegality from pleadings and evidence. *See id.*

B. Is a Contract for the Sale of Marijuana Void Because it Contravenes Public Policy?

The Court ordered the parties to brief the issue of whether a contract for marijuana is void against public policy. Plaintiff argues that the Court must enforce the contract because it is valid under Colorado law and further argues that it would be beyond the scope of this case for the Court to address the federal drug issues. Defendants argue that the contract is void as against public policy because it violates federal law prohibiting the cultivation and use of marijuana. Defendants also assert that the contract is void as against public policy because Plaintiff violated state marijuana regulatory law. The Court addresses the parties' arguments as follows:

1. Colorado State Law Does Not Create a Constitutional Right for Citizens to Use and Possess Medical Marijuana.

As an initial matter, Colorado law does not create a right to use and possess medical marijuana. Instead, the Medical Use of Marijuana Amendment creates an exception from state criminal laws for any patient who lawfully possesses a "registry identification card" to use medical marijuana. Colo. Const. art. XVIII, § 14 (2)(b); *People v. Watkins*, 2012 COA 15, ¶ 23, *cert denied*, No. 12SC179, 2012 WL 1940753 (Colo. May 29, 2012). The amendment authorizes physicians to provide patients with "written documentation…stating that the patient has a debilitating medical condition and might benefit from the medical use of marijuana." Colo. Const. art. XVIII, § 14 (2)(b)(II); *Watkins*, 2012 COA at ¶ 24. The amendment does not authorize physicians to actually prescribe marijuana. *Watkins*, 2012 COA at ¶ 24. Consequently, the Colorado Court of Appeals has found that the amendment does not create a "broader constitutional right than exemption from prosecution." *Benoir*, 262 P.3d 970 at 974. Accordingly, Colorado courts have consistently recognized that authorization to use medical marijuana is not limitless. *Id.* at 976 (citing *People v. Clendenin*, 232 P.3d 210, 212, 214 (Colo. App. 2009) (noting that the term "primary care-giver" does not

"encompass everyone who may supply medical marijuana) and *In re Marriage of Parr*, 240 P.3d 509, 511 (holding that "a prohibition in a parenting plan against using marijuana while exercising parenting time did not 'constitute a restriction of parenting time'").

2. Possession and use of marijuana remains illegal under federal law.

Marijuana remains an illegal substance under federal law. *Watkins*, 2012 COA at ¶ 20; *see also Benoir* 262 P.3d at 977. In 1970, Congress enacted the Comprehensive Drug Abuse Prevention and Control Act (hereinafter "CSA") in the effort to "consolidate the growing number of piecemeal drug laws and to enhance federal drug enforcement powers." 21 U.S.C.A. §§ 801-971 (West 2011); *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). The Act created a "comprehensive regime to combat the international and interstate traffic in illicit drugs." *Gonzales*, 545 U.S. at 12. The legislation makes it unlawful to "manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Gonzales*, 545 U.S. at 13 (citing 21 U.S.C.A. §§ 841(a)(1), 844(a)). Controlled substances are categorized into five schedules according to "accepted medical uses, the potential for abuse, and their psychological and physical effects on the body." *Gonzales*, 545 U.S. at 13 (citing 21 U.S.C.A. §§ 811, 812). Congress classified marijuana as a Schedule I drug. *Gonzales*, 545 U.S. at 14 (citing 21 U.S.C.A. § 812(c)). Drugs are categorized under Schedule I because of "their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment." *Gonzales*, 545 U.S. at 14 (citing 21 U.S.C.A. § 812(b)(1)). When Congress categorized marijuana as a Schedule I drug, the manufacture, distribution, or possession of marijuana became a criminal offense. 545 U.S. at 14 (citing 21 U.S.C.A. §§ 823(f), 841(a)(1), 844(a)).

Nonetheless, numerous states have enacted medical marijuana laws in recent years, creating uncertainty regarding the status of marijuana's legality. *See Gonzales*, 545 U.S. at 5. In response to a challenge relevant to California's medical marijuana laws, the United States Supreme Court held that there is no medical necessity exception to the prohibitions contained within the CSA. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 486, 494 (2001). Likewise, "Colorado's medical marijuana provision may protect claimant from prosecution under Colorado's criminal laws," but the Amendment has no effect on federal laws. *Watkins*, 2012 COA at ¶ 20. In *Gonzales*, the United States Supreme

Court held that application of the CSA to intrastate growers and users of medical marijuana did not violate the Commerce Clause of the United States Constitution, thus affirming Congress's power to comprehensively regulate, and in some cases prohibit, intrastate and interstate drug activity. *See Gonzales*, 545 U.S. at 9. Additionally, the Colorado Court of Appeals has found that medical marijuana laws continue to violate federal public policy. *Benoir v. Indus. Claims Appeals Office*, 262 P.3d 970, 974 (Colo. App. 2011), *cert denied*, No. 11SC676, 2012 WL 1940833 (Colo. May 29, 2012) (citing the Office of National Drug Policy's notice mandating that enforcement of federal drug laws would remain in effect despite state passage of medical marijuana provisions).

3. Federal law regarding marijuana preempts state law because Colorado state law creates an obstacle to the full enforcement of federal law.

The Supremacy Clause of the United States Constitution provides that the Constitution and laws of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). It is fundamental to this "constitutional command that all conflicting state provisions be without effect." *Maryland*, 451 U.S. at 746.

However, a federal act cannot supersede the "States' historic police power" unless that is the clear purpose of Congress. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 471 (1996). Therefore, interpretation of a statute's preemptive scope must focus on the "fair understanding of Congressional purpose." *Id.* Congress may indicate its preemptive intent through explicit statutory language or implicitly through its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). A federal statute may implicitly supersede a state statute when a statute's scope "indicates that Congress intended federal law to occupy a field exclusively," or when the "state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

The CSA's central objective was to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Gonzales*, 545 U.S. at 12. Congress created a "comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'" *Id.* at 24. Congress classified marijuana as a Schedule I drug partly for its "lack of any accepted medical use." *Id.* at 14. "Despite considerable efforts to reschedule marijuana," Congress has refused to classify marijuana under any lesser schedules.

Id. at 15. Further, the United States Supreme Court held that there is no medical necessity exemption available under the CSA, thus foreclosing any conclusion that Colorado's marijuana law can create any such exemption under federal drug law. *See Oakland Cannabis*, 532 U.S. at 483, 486, 494.

Since Congress has not indicated an intent to occupy the field of drug law exclusively, the Court must consider the existence of an actual conflict between state and federal law. Actual conflict may exist when it is physically impossible to comply with both state and federal law or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner*, 514 U.S. at 287. Historically, the Court has applied the physical impossibility standard very narrowly. *See Wyeth v. Levine*, 555 U.S. 555, 590 (2009). An example can be found in *Florida Lime & Avocado Growers, Inc. v. Paul* (373 U.S. 132, 134 (1963)). *Florida Lime* concerned the conflict between a California state law that prohibited the sale of avocados in California containing less than 8% oil, and a federal law that did not use oil content to measure avocado maturity. *Id.* Florida growers brought the action because the California law resulted in the exclusion of Florida avocados from the California markets that did not meet the 8% oil requirement but were considered mature under federal law. *Id.* The Court held that "despite the dissimilarity of the standards," the standard of physical impossibility was not satisfied because Florida growers could simply leave the fruit on the trees beyond the "earliest picking date" available under federal law. *Id.* at 143.

Here, it is not physically impossible to comply with both state and federal law because a person can simply refrain from using marijuana, medical or otherwise. In *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*(230 P.3d 518, 528 (Or. 2010)), the Oregon Supreme Court applied similar reasoning and concluded that it is not physically impossible for Oregon residents to comply with both federal law and Oregon's medical marijuana law because residents can refrain from using marijuana altogether. Similarly, it is not physically impossible for Colorado residents to comply with both federal and state law; therefore the physical impossibility standard of preemption is not satisfied.

Finally, the Court must consider whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In *Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd.* (467 U.S. 461, 478 (1984)), the United Supreme Court held that state law was preempted when state law authorized associations of farmers and other producers of agricultural commodities

to engage in conduct forbidden by federal law. The Court held that federal law preempted state law because it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* In *Emerald*, the Oregon Supreme Court found that Oregon law "affirmatively authorizes the use of medical marijuana" whereas the CSA prohibits marijuana regardless of any medical purpose. 230 P.3d at 529. Similarly, Colorado law authorizes certain individuals to use marijuana for medical purposes, whereas federal law forbids any use of marijuana. Ultimately, the CSA prohibits the "manufacture, distribution, or possession of marijuana," and any state authorization to engage in the manufacture, distribution, or possession of marijuana creates an obstacle to the full execution of federal law. Therefore, Colorado's marijuana laws are preempted by federal marijuana law. Similarly, in *Emerald*, the Oregon Supreme Court held that Oregon marijuana law is without effect because Oregon's marijuana laws are preempted by federal law. 230 P.3d at 529.

C. It is not within the Court's authority to reclassify marijuana under federal law.

Furthermore, the judiciary does not possess the authority to exempt the specific class of medical marijuana users from the CSA. *See Gonzales*, 545 U.S. at 26. It is not within the power of the judiciary to determine whether marijuana should remain a Schedule I drug. *Benoir*, 262 P.3d at 977. Proponents of federal marijuana law reform have access to two primary avenues to elicit such a change: the reclassification process and the democratic process. *Gonzales*, 545 U.S. at 14, 33. The CSA "provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules." *Id.* at 14. Secondly, the democratic process remains available to citizens "in which the voices of voters allied with these respondents may one day be heard in the halls of Congress." *Id.* at 33. However, under the law's current state, the sale and use of marijuana, even for medical purposes, remains against the public policy of the United States.

D. Conclusion

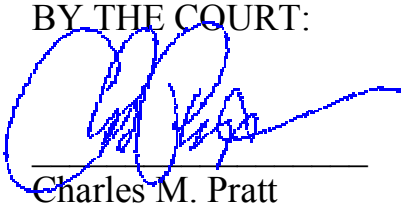
Consequently, contracts for the sale of marijuana are void as they are against public policy. Accordingly, the contract here is void and unenforceable**.**

IV. PLAINTIFF'S REGULATORY COMPLIANCE

The Court, having decided the issue on other grounds, need not reach the issue of whether Plaintiff complied with the regulations set forth by Colorado's marijuana law regarding primary care givers. Additionally, since the Court did not consider the regulatory arguments presented by Defendants, Plaintiff's Motion to Strike is moot.

SO ORDERED THIS 8TH DAY OF AUGUST, 2012

BY THE COURT:



Charles M. Pratt
District Court Judge