IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE CBD STORE OF FORT WAYNE, L.L.C.; INDIANA CBD WELLNESS INC.; C.Y. WHOLESALE INC.; INDY E CIGS LLC; 5 STAR MEDICINAL PRODUCTS, LLP; DREEM NUTRITION, INC; and EL ANAR, LLC	)	Case No.: 1:19-cv-02659-SEB-TAB
Plaintiffs,	)	
v.	)	
GOVERNOR ERIC HOLCOMB, in his official capacity, and THE STATE OF INDIANA	)	
Defendants.	)	

STATE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT

Defendants, Governor Eric Holcomb, in his official capacity, and the State of Indiana, by counsel, respectfully submit their response in opposition to Plaintiffs' Motion for Leave to Amend Complaint. ECF 45. In support, Defendants state as follows:

BACKGROUND

On September 13, 2019, this Court granted Plaintiffs' Motion for Preliminary Injunction and enjoined Defendants "from enforcing the portions of SEA 516 that criminalize the manufacture, financing, delivery, or possession of smokable hemp, which are codified at Indiana Code § 35-48-4-10.1 (criminal penalties for smokable hemp)." ECF 31. This Court concluded that this statute is preempted by the 2018

Farm Bill, which provides that no State "shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 [7 U.S.C. 1639*o et seq.*] . . . through the State . . . ." 7 U.S.C. § 1639*o* note.

Defendants appealed the order granting the preliminary injunction, and the Seventh Circuit issued its opinion on July 8, 2020. ECF 41. The Seventh Circuit held that the preliminary injunction was overly broad, and reversed this Court's order and remanded the matter for further proceedings. The Seventh Circuit concluded that the Farm Bill does *not* preempt States' ability to restrict the in-state manufacture, sale, or possession of smokable hemp. Of crucial importance, the Seventh Circuit concluded that the *only* thing the Farm Bill preempts is state prohibition of the interstate transportation of lawfully produced hemp: With respect to the Farm Bill's express preemption provision (Section 1639*o* note), it concluded that the 2018 Farm Bill "authorizes the states to continue to regulate the production of hemp, and its express preemption clause places no limitations on a state's right to prohibit the cultivation or production of industrial hemp," and does not "preclude[] a state from prohibiting the possession and sale of industrial hemp within the state." Slip op. at 9.

The Seventh Circuit also rejected Plaintiffs' implied preemption theory, explaining that "[d]espite legalizing industrial hemp on the federal level, the Farm Bill expressly permits the states to adopt rules regarding industrial hemp production that are 'more stringent' than the federal rules." Slip op. at 10 (quoting 7 U.S.C. § 1639p)). Accordingly, the Seventh Circuit saw "nothing in the 2018 Farm Law that

supports the inference that Congress was demanding that states legalize industrial hemp, apart from the specific provisions of the express preemption clause." Slip op. at 11.

And the Farm Bill's express preemption clause preempts one thing: State prohibitions on the interstate "transportation or shipment of hemp or hemp products" that are lawfully produced—*i.e.,* "produced in accordance with subtitle G of the Agricultural Marketing Act of 1946." 7 U.S.C. § 1639*o* note. The sole question the Seventh Circuit left unanswered is whether Indiana law does in fact prohibit the interstate transportation of lawfully produced hemp, and thus whether an injunction is necessary to "prevent[] Indiana from enforcing its law against those transporting smokable hemp through Indiana in interstate commerce." Slip op. at 12.

As the Seventh Circuit's opinion noted, Indiana amended the relevant statute following the issuance of the preliminary injunction in this matter but prior to the Seventh Circuit's decision. That amendment clarifies that the answer to the question the Seventh Circuit left unanswered is *no*: Indiana's prohibitions on the delivery and possession of smokable hemp "*do not apply* to the shipment of smokable hemp from a licensed producer in another state in continuous transit through Indiana to a licensed handler in any state." Ind. Code § 35-48-10-4-10.1(c) (emphasis added).

Moreover, the Seventh Circuit noted that Midwest Hemp Council, which is a non-profit advocacy group for the hemp industry, has withdrawn from this litigation. Midwest Hemp Council had been the only Plaintiff that was not a wholesaler or retailer of hemp products, according to the Complaint. ECF 1. Accordingly, the

Seventh Circuit's opinion suggested that the remaining Plaintiffs may not have standing to press this narrow question in any event. *See* slip op. at 13 ("On remand, the district court should take care to ensure that the remaining plaintiffs have standing to challenge the licensing provision.

LEGAL STANDARD

Under Rule 15(a)(2) of the Federal Rules of Civil Procedure, a party may amend its pleading if the opposing party consents to the amendment in writing. Fed. R. Civ. P. 15(a)(2). Because Defendants oppose this amendment, the application to amend may only be granted by leave of court. *Id.* Although Fed. R. Civ. P. 15(a)(2) states that a "court should freely give leave when justice requires," the right to amend under Rule 15 is not an absolute right and the court should consider certain factors that would preclude amendment, including futility and judicial economy. *Jafree v. Barber*, 689 F.2d 640, 644 (7th Cir. 1982) (citing *Foman v. Davis*, 371 U.S. 178 (1962), 182; *see also Verhein v. South Bend*, 598 F.2d 1061, 1063 (7th Cir. 1979) ("[T]he court may deny leave to amend where the proposed amendment fails to allege facts which would support a valid theory of liability, or where the party moving to amend has not shown that the proposed amendment has substantial merit." (internal citations omitted)); *Perrian v. O'Grady*, 958 F.2d 192, 195 (7th Cir. 1992) (justification for denying leave includes prejudice to judicial system and public's interest in prompt resolution of disputes, even if there is no prejudice to the opposing party).

ANALYSIS

With their Motion for Leave to Amend, Plaintiffs seek to reshape their complaint around two claims: "First, [Senate Enrolled Act] 516 violates the 2018 Farm Bill's prohibition on restricting the interstate transport of hemp products . . . . Second, . . . [t]he 2018 Farm Bill reaffirmed the legalization of all parts of the hemp plant while adding that states are not permitted to modify the federal definition of hemp. Thus, the criminalization of hemp bud and hemp flower in SEA 516 conflicts with the 2014 Farm Bill and 2018 Farm Bill." ECF 45 at 2–3.

As an initial matter, the Seventh Circuit squarely rejected Plaintiffs' second claim above (which Plaintiffs have already presented to this Court and the Seventh Circuit). *See* ECF 4 at 5–7; Appellees Br. at 19–25. The Seventh Circuit specifically held that Indiana's SEA 516 "brings Indiana's definition of industrial hemp into line with the 2018 federal definition." Slip op. at 3[1]. And it further concluded that, "[d]espite legalizing industrial hemp on the federal level, the Farm Bill expressly permits the states to adopt rules regarding industrial hemp production that are 'more stringent' than the federal rules." Slip op. at 10 (quoting 7 U.S.C. § 1639p). The Seventh Circuit thus clearly held that federal law permits Indiana to carve out a subset of industrial hemp subject to "more stringent[]" regulation than federal law would impose. *Id.*

Furthermore, even with respect to the only question the Seventh Circuit left open—whether Indiana law does in fact prohibit the interstate transportation of

[1] Both Indiana's SEA 516 and SEA 535 give hemp the same definition as the 2018 Farm Bill. *Compare* Ind. Code § 15-15-13-6 *with* 7 U.S.C. § 1639***o***(1).

lawfully produced hemp—Plaintiffs' proposed amendments are futile.

First, all parties that are currently Plaintiffs in this matter are Indiana "wholesalers or retailers of hemp products who wish to distribute and sell smokable hemp products declared legal under federal law." ECF 1 at 2–3. With their requested amendment, Plaintiffs seek to add a single out-of-state entity, Hemp Alliance of Tennessee, which is a "non-profit trade association whose mission is to provide support to state hemp farmers and businesses in the interest of developing a successful state industry, and which is comprised of members that are non-licensed producers and handlers that ship and receive hemp, including hemp bud and hemp flower, through Indiana to and from non-licensed handlers and producers in other states." ECF 45 at 4. Presumably, Plaintiffs seek to add this out-of-state entity in order to establish standing to challenge the state-law provision addressing interstate transportation. Plaintiffs, however, neither allege that this entity is itself seeking to transport hemp through Indiana, nor make any specific allegations regarding unlicensed production.

Second, even beyond standing, Plaintiffs cannot make a successful challenge to the provision of Indiana law exempting permitting "the shipment of smokable hemp from a licensed producer in another state in continuous transit through Indiana to a licensed handler in any state" Ind. Code § 35-48-4-10.1(c). Plaintiffs suggest that this provision's licensing requirements are not found in the 2018 Farm Bill, and that this provision is therefore preempted. Not so. The 2018 Farm Bill expressly provides that it is a violation for a hemp producer to fail to "obtain a license or other required

authorization from the State. . . ." 7 U.S.C. § 1639p(e)(2)(A)(ii). Likewise, it is unlawful for a producer to produce hemp in a state that lacks a state plan unless that producer has obtained a license issued by the federal government. 7 U.S.C. § 1639q(c)(1). Whether or not a state plan is in place, the Farm Bill *itself* requires a producer of hemp to have a license or equivalent authorization.

Similarly, the Farm Bill's express preemption provision is limited to the interstate transportation of "of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State." 7 U.S.C. § 1639*o* note. As the USDA General Counsel has explained, the "produced in accordance with" language means the Farm Bill's preemption provision applies *only* to hemp lawfully produced under federal law—and, as noted, as a practical matter that means hemp produced by an entity licensed under an approved state plan or by the federal government itself. ECF 1-5. The Farm Bill's preemption provision thus does *not* insulate from state regulation the transportation of hemp produced by *unlicensed* entities. Indiana's smokable hemp law thus tracks federal law exactly. As a result, Plaintiffs' proposed amendments are futile, and for that reason the Court should deny Plaintiffs' request for leave to amend their Complaint.

CONCLUSION

For the aforementioned reasons, and pursuant to Fed. R. Civ. P. 15(a)(2), Defendants respectfully request that the Court deny Plaintiffs' Motion for Leave to Amend Complaint.

Respectfully submitted,

OFFICE OF THE INDIANA ATTORNEY GENERAL

By: *Zachary D. Price*
Zachary D. Price
Robert A. Rowlett
Deputy Attorneys General

OFFICE OF THE INDIANA ATTORNEY GENERAL
302 West Washington Street, 5th Floor
Indiana Government Center South
Indianapolis, IN 46204
Telephone: (317) 232-0486
Fax: (317) 232-7979