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**IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF LANE**

THE STATE OF OREGON,  
  
  Plaintiff,  
  
  vs.  
  
RICHARD HANS NORLAND,  
  
  Defendant.

Case No. 2005 12434  
  
SUPPLEMENT TO MOTION IN  
ARREST OF JUDGMENT  
  
(Additional Oral Argument Requested  
– Estimated Time 30 Minutes Total)

Comes now defendant, by and through counsel, who supplements his motion in arrest of judgment as follows.

**Points and Authorities**

**1**

The State Board of Pharmacy exceeded its authority by altering the definition of “controlled substances” from the statutory definition of the same term.

ORS 475.005(6) defines “controlled substances” as follows:

“a drug or its immediate precursor classified in Schedules I through V under the federal Controlled Substances Act, 21 U.S.C. 811 to 812, as modified under ORS 475.035. The use of the term “precursor” in this subsection does not control and is not controlled by the use of the term “precursor” in ORS 475.940 to 475.999.”

1 OAR 855-080-0021, on the other hand, purports to enlarge the set of substances that  
2 are “controlled substances” from “a drug” to “the drugs and other substances” on its schedule  
3 I.

4 “855-080-0021  
5 “Schedule I

6 “Schedule I consists of the drugs and other substances, by whatever official, common,  
7 usual, chemical, or brand name designated, listed in this rule:”

8 The State Board of Pharmacy can no more expand the definition or reach of the term  
9 “controlled substance” than the Department of Revenue could limit a tax exemption for the  
10 non-profit University of Oregon Bookstore.

11 *University of Oregon Co-Operative Store v. Department of Revenue*, 273 Or 539, 542  
12 P2d 900 (1975).

13 “This court has consistently held that an administrative agency may not, by its rules,  
14 amend, alter, enlarge or limit the terms of a legislative enactment. In *Gouge v. David*  
15 *et al*, 185 Or 437, 459, 202 P2d 489 (1949), we said:

16 “\*\*\*A statute which creates an administrative agency and invests it with its  
17 powers restricts it to the powers granted. The agency has no powers except  
18 those mentioned in the statute. It is the statute, not the agency, which directs  
19 what shall be done. The statute is not a mere outline of policy which the  
20 agency is at liberty to disregard or put into effect according to its own ideas of  
21 the public welfare.\*\*\*”

22 “ORS 314.815 gives the Department of Revenue authority to make regulations as  
23 necessary to enforce the income tax laws, but by its own terms limits such regulations  
24 to those ‘not inconsistent with legislative enactments.’ We think regulation 150-  
25 317.080(4) is obviously inconsistent with ORS 317.080(4). As said by the Oregon  
26 Tax Court in *Ore.-Wash. Plywood v. Commission*, 2 OTR 108,110:

“ORS 314.815 allows the State Tax Commission to make regulations “not  
inconsistent with legislative enactments.” The regulation in this case, 7.260, is  
completely inconsistent with the statute. The statute allows a deduction of the  
interest paid in this case and the regulation denies it. The regulation does  
much more than add meaning to the “bare bones” of the statute. *U.S. Nat’l*  
*Bank v. Tax Commission*, 233 Or 478, 484, 378 P2d 989 (1963). The plaintiff  
is entitled to deduct the interest paid.’

“See, also, *Bailey v. Commission*, 2 OTR 399, 407.

“The Department of Revenue cannot rewrite the law, it can only fill in the interstices  
in the legislation to aid in the accomplishment of the statute’s purposes. *Van Ripper v.*

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*Liquor Cont. Com.*, 228 Or 581, 591, 365 P2d 109 (1961). The exemption given by ORS 317.080(4) cannot be eliminated in effect by an administrative regulation. The Department of Revenue has exceeded its authority in adopting and applying this regulation.”

*University of Oregon*, 273 Or 550-551.

To the extent that OAR 855-080-0021 purports to include gamma-hydroxybutyric acid and gamma-butyrolactone to the Pharmacy Board’s Schedule I, it has exceeded its authority because neither substance is a drug as that term is defined by ORS 475.005(13). Neither gamma-hydroxybutyric acid nor gamma-butyrolactone is legally or properly a controlled substance.

DATED: December 9, 2005.

James E. Leuenberger OSB 89154  
Attorney for defendant

**Certificate of Delivery**

I handed a true copy of this document to David Vills or his associate, Lane County District Attorney's Office, 125 E 8th Ave Rm 400, Eugene, OR 97401 when he or she appeared in court this day.

James E. Leuenberger