UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-71336
03-71603

Hemp Industries Association, et al.,	)
	)
Petitioners	)
	)
v.	)
	)
Drug Enforcement Administration, et al.,	)
	)
	)
Respondents	)
	)

PETITIONERS' MOTION FOR ORDER TO SHOW CAUSE WHY RESPONDENT DRUG ENFORCEMENT ADMINISTRATION SHOULD NOT BE FOUND IN CONTEMPT OF COURT FOR FAILURE TO COMPLY WITH THIS COURT'S INJUNCTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 27-1, Petitioners Hemp Industries Association ("HIA") *et al*. hereby respectfully move the Court for an order directing Respondent Drug Enforcement Administration ("DEA") to show cause why it should not be held in contempt of Court for failure to comply with the injunction issued by the Court in this case on February 6, 2004. *Hemp Industries Ass'n v. Drug Enforcement Administratio*n, 357 F.3d 1012 (9th Cir. 2004) ("*HIA v. DEA II*"). In that opinion and order, this Court granted Petitioners' Petition for Review of two DEA final rules that would

have classified as Schedule I controlled substances parts of the Cannabis plant that were exempted by statute, non-psychoactive parts of the plant commonly known as hemp: the stalk, fiber, sterilized seed and seed oil. DEA, Clarification of Listing of "Tetrahydrocannabinols" in Schedule I, 68 Fed. Reg. 14114-01 (March 21, 2003) ("Final Clarification Rule") (attached hereto as Exhibit 1); "Final Rule—Exemption from Control of Certain Industrial Products and Materials Derived from the Cannabis Plant," 68 Fed. Reg. 14119 (March 21, 2003) ("Final Exemption Rule") (attached hereto as Exhibit 2) (collectively, the "Final Rules"). This Court permanently enjoined "enforcement of the Final Rules with respect to non-psychoactive hemp or products containing it." *HIA v. DEA II*, 357 F.3d at 1018. The DEA has, however, recently taken actions effectively enforcing the Final Rules, in violation of this Court's injunction, and has made clear its intention to continue doing so. For those reasons, DEA should be ordered to show cause why it should not be held in contempt of this Court.

I. PROCEDURAL AND FACTUAL BACKGROUND

Petitioners include companies that manufacture, distribute and/or sell, in the United States, processed edible hemp seed or oil, food and beverage products containing processed hemp seed or oil, or which use hemp oil in the U.S. manufacture of other products such as personal care items (soap, shampoos, lotions, etc.); and HIA, the trade association to which these companies belong.

Petitioner companies have been lawfully importing and distributing seed and oil, and/or manufacturing and selling food, beverage and personal care products made from such seed and oil, for many years.

Industrial hemp is a commonly used term for non-psychoactive varieties of the species Cannabis sativa L. that are cultivated for industrial rather than drug purposes. CONGRESSIONAL RESEARCH SERVICE, HEMP AS AN AGRICULTURAL COMMODITY (July 24, 2013). Industrial hemp plants grown in Canada and Europe are bred to contain less than three-tenths of one percent (0.3%) by weight of THC (the psychoactive element) in the upper portion of the flowering plant, respectively, while marijuana varieties average about 10% THC, and range upward to much higher levels. *Id.* at 2.

The hemp plant—although useless as drug marijuana—is the same species as the marijuana plant, Cannabis Sativa L. [1] Industrial hemp products made from non-controlled parts of the Cannabis plant have been legally imported into the United States from foreign countries for many decades. The express language of

[1] For this reason, it has been unlawful to cultivate the hemp plant itself within the United States. However, in the federal Agricultural Act of 2014, P.L. No. 113-79 (commonly known as the "2014 Farm Bill"), Congress specifically, and for the first time since enactment of the CSA, exempted from the CSA cultivation of industrial hemp under agricultural pilot programs authorized by state law. P.L. No. 113-79, §7606, codified at 7 U.S.C. §5940. Although this Farm Bill provision had not been enacted at the time this Court entered its injunction, the provision further underscores Congress' intent to protect the legitimate hemp industry from regulation by DEA.

the Controlled Substances Act ("CSA") provides that hemp stalk, fiber, oil and sterilized seed are not controlled as marijuana. The definition of "Marihuana" specifically excludes "the mature stalks of such [cannabis] plant, any other compound, manufacture, salt, derivative, mixture or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of such plant…." 21 U.S.C. §802(16) (emphasis added). Thus, an express exclusion of hemp stalk, fiber, oil and sterilized seed was adopted by Congress more than 75 years ago, in order to make clear that its intention was only to regulate drug-cannabis and that it did not intend to interfere with the legitimate hemp industry. Such seed, oil or products, however, may contain non-psychoactive miniscule trace amounts of residual resin containing naturally occurring tetrahydrocannabinols ("THC").

On October 9, 2001, with no opportunity for notice and comment, DEA published an "Interpretive Rule" purporting to "interpret" the CSA and DEA's own regulations to mean that "any product that contains *any* amount of THC is a schedule I controlled substance. . .." 66 Fed. Reg. 51530 at 51533 (Oct. 9, 2001) (emphasis added). This "Interpretive Rule," made effective immediately upon publication, would have had the effect of instantly transforming Petitioners' long-standing business activities into a criminal offense. Simultaneous with its publication of the "Interpretive Rule," DEA published a "Proposed Rule and

Request for Comments," 66 Fed. Reg. 51535 (Oct. 9, 2001) ("Proposed Rule"). The "Proposed Rule" would have amended the language of DEA's regulations, 21 C.F.R. §1308.11, to have exactly the same effect as the "Interpretive Rule." Thus, DEA initiated a notice and comment rulemaking on a "proposed" rule identical to its "Interpretive Rule." DEA also published, on the same date, an "Interim Rule" exempting from the "Interpretive Rule" products that are not used or intended for human consumption. 66 Fed. Reg. 51539, 51543 (Oct. 9, 2001).

On October 19, 2001, HIA, certain of the Petitioners and other companies filed a Petition for Review of the "Interpretive Rule" and an Urgent Motion for Stay Pending Review of the "Interpretive Rule." *Hemp Industries Ass'n v. Drug Enforcement Administration*, No. 01-71662 (9th Cir., filed Oct. 19, 2001). On February 6, 2002 petitioners in No. 01-71662 filed an Emergency Motion for Stay. On March 7, 2002, the Court issued an Order granting the Emergency Motion for Stay pending review.

In the meanwhile, DEA proceeded with its rulemaking under the October 2001 Proposed Rule (identical to the "Interpretive Rule"), affording opportunity for public comment. Petitioner HIA and a number of its member companies timely submitted comments on the Proposed Rule.

On March 21, 2003, DEA published the Final Clarification Rule, amending its regulations, 21 C.F.R. §1308.11(d) (27), to add "naturally contained" THC to its

regulatory definition of THC. The sole effect of the Final Clarification Rule was to add to Schedule I of the CSA hemp stalk, seed and oil which may contain any amount whatsoever of non-psychoactive miniscule trace amounts of residual resin containing naturally occurring THC. 68 Fed. Reg. 14114-01 (March 21, 2003) (Exhibit 1 hereto).

At the same time, DEA issued a "Final Rule—Exemption from Control of Certain Industrial Products and Materials Derived from the Cannabis Plant," 68 Fed. Reg. 14119 (March 21, 2003) ("Final Exemption Rule)," making final its earlier "Interim Rule"—that is, exempting from control trace THC-containing hemp fiber, hemp seed and hemp seed oil products as long as they are not intended for human consumption. Because Petitioners' food and beverage products are used for human consumption, Petitioners' products were not covered by this exemption. Further, although personal care products made with hemp oil were exempted under some circumstances, the hemp oil imported for use in the U.S. for manufacture of such products was not exempted. Thus, the importation, U.S. manufacture and/or sale in the U.S. of Petitioners' hemp seed and oil products was rendered unlawful by the Final Clarification Rule.

On March 28, 2003, Petitioners filed with this Court a Petition for Review of the Final Clarification Rule and Final Exemption Rule and an Urgent Motion for

Stay Pending Review. The Motion for Stay was granted on April 16, 2003. (No. 03-71366, Dkt. #7).

On June 30, 2003, this Court issued its decision on the "Interpretive Rule," granting the Petition for Review, and holding that the purported "Interpretive Rule" was a legislative rule, issued without notice and comment in violation of the Administrative Procedure Act, and therefore invalid and unenforceable. *Hemp Industries Ass'n v. Drug Enforcement Administration*, 333 F.3d 1082 (9th Cir. 2003) ("*HIA v. DEA I*").

On February 6, 2004, this Court issued its decision in *HIA v. DEA II*, summarized below.

II. DECISION IN *HIA v. DEA II*

In *HIA v. DEA II*, the Court found that the definition of THC under the CSA includes only synthetic THC, not naturally occurring THC. 357 F.3d at 1017. The Court further found that the "non-psychoactive hemp in Appellants' products was derived from the 'mature' stalks or is 'oil and cake made from the seeds' of the Cannabis plant, and therefore fits within the plainly stated exception to the CSA definition of marijuana." *Id*. The Court determined that "the DEA's action is not a mere clarification of its THC regulations; it improperly renders naturally-occurring

non-psychoactive hemp illegal for the first time." 357 F.3d at 1017. The Court held that:

> Congress was aware of the presence of trace amounts of psychoactive agents (later identified as THC) in the resin of non-psychoactive hemp when it passed the 1937 "Marihuana Tax Act," and when it adopted the Tax Act marijuana definition in the CSA. . . . Congress knew what it was doing and its intent to exclude non-psychoactive hemp from regulation is entirely clear. The DEA's Final Rules are inconsistent with the unambiguous meaning of the CSA definitions of marijuana and THC, and the DEA did not use the appropriate scheduling procedures to add non-psychoactive hemp to the list of controlled substances. . . The Final Rules therefore may not be enforced with respect to THC that is found within the parts of the Cannabis plants that are excluded from the CSA's definition of "marijuana" or that is not synthetic.

Id. at 1018. The Court concluded, "We grant Appellants' petition and ***permanently enjoin enforcement of the Final Rules with respect to non-psychoactive hemp or products containing it***." *Id*. at 1019 (emphasis added).

The Court denied DEA's petition for rehearing *en banc* (No. 03-71336, Dkt. #72). The DEA did not petition the Supreme Court for a writ of *certiorari*, nor has it ever sought modification of the injunction.

III. DEA HAS VIOLATED THE INJUNCTION AND INDICATED ITS INTENT TO CONTINUE DOING SO

Despite issuance of the permanent injunction, DEA has never amended the listing for "Tetrahydrocannabinols" in Schedule I in DEA's regulations to remove the language "naturally occurring." 21 C.F.R. §1308.11(d) (27) (2016). In fact, DEA continues to display the announcement of the adoption of the 2003 Final

Rule on DEA's website. DEA, "DEA Clarifies Status of Hemp in the Federal Register," Oct. 9, 2001, https://www.dea.gov/pubs/pressrel/pr100901.html (last visited February 4, 2017; screenshot attached hereto as Exhibit 3). In effect, DEA has simply refused to accept the Court's ruling over a decade ago as governing law.

Recently, the North Dakota Department of Agriculture indicated to an HIA member farmer and producer of hemp products that its intended shipment of hempseed oil out of North Dakota would require a DEA registration. A copy of the letter to the producer, Healthy Oilseeds, LLC, is attached hereto as Exhibit 4. This producer had been granted a license to cultivate industrial hemp by the North Dakota Department of Agriculture ("NDDA") as part of a research pilot program sponsored by the NDDA pursuant to section 7606 of the Agricultural Act of 2014, 7 U.S.C. §5940. It then separated and processed the hempseed into roasted hempseed, protein powder and hempseed oil, and sought to ship these products to customers in other states, and to export markets. In its letter to the producer, NDDA indicated its understanding, from DEA, that such shipment would require a DEA registration—which is only required for possession, distribution of transportation of controlled substances. 21 U.S.C. §822.

The possession, sale and shipment of sterilized hempseed and seed oil clearly does not and could not require any DEA registration because such items are

exempt from the definition of "marijuana" under the CSA and thus are exempt from control under the CSA. That is precisely what this Court held in *HIA v DEA II*. DEA's imposition of a registration requirement, which could only be based on classification of the seed as THC based on the miniscule naturally occurring trace amounts, is a direct violation of the injunction issued by the Court of Appeals in this case—an injunction that forbids enforcement of the Final Rules "with respect to non-psychoactive hemp or products containing it." 357 F.3d at 1019.

The violation of this Court's injunction reflected in the position taken by DEA with the North Dakota Department of Agriculture appears to be based on a view of the law that is clearly contrary to the Court's ruling—and indicates DEA's intent to continue to act in violation of the injunction. On January 13, 2017, the online publication The Cannabist quoted DEA spokesperson Russ Baer as stating that:

> DEA cannot provide an exhaustive list of "hemp" products that are exempted from control. Nonetheless, in order to provide clarity to your question, the following are some of the more common "hemp" products that are exempted (non-controlled), *provided they are not used, or intended for use, for human consumption*: paper, rope and clothing made form fiber derived from cannabis stalks, industrial solvents made with oils from cannabis seeds, and bird seed containing sterilized cannabis seed mixed with seeds from other plants (or other ingredients not derived from the cannabis plant). Personal care products (such as lotions or shampoos) made with oil from cannabis seeds are also generally exempted.

The Cannabist, Jan. 13, 2017, located at http://www.thecannabist.co/2017/01/13/hemp-dea-extracts-marijuana-cbd-judicial-review/71387/ (last visited February 1, 2017) (emphasis added).

The statement that hemp products (stalk, fiber, sterilized seed, oil and products derived therefrom) are subject to control if they are intended or used for human consumption, and the suggestion that not all personal care product made with oil from cannabis seed may be exempted, are both directly contrary to the ruling of this Court. It was precisely because the Final Rules would have outlawed hemp food and beverage products—made from hempseed and oil and possibly containing trace amounts of naturally occurring THC—that the HIA brought the case in the first instance. And the Final Rules, as the Court noted, "would ban the sale or possession of such items even if they contain only non-psychoactive trace amounts of tetrahydrocannabinols. . .." 357 F.3d at 1013. Thus, through its spokesperson, DEA has clearly indicated its intent to continue to violate the injunction.

IV. A MOTION TO SHOW CAUSE SHOULD ISSUE

"[A] court may impose civil contempt sanctions to (1) compel or coerce obedience to a court order, and/or (2) compensate the contemnor's adversary for injuries resulting from the contemnor's noncompliance." *Ahearn ex rel. Nat'l Labor Relations Board v. Int'l Longshore & Warehouse Union*, Locals 21 & 4, 721

F.3d 1122, 1131 (9th Cir. 2013) (citing *Whittaker Corp. v. Execuair Corp*., 953 F.2d 510, 517 (9th Cir. 1992)). In this case, DEA has already violated the injunction and, through its spokesperson, indicated its intent to continue doing so. The Court, accordingly, should issue an order to DEA to show cause why it should not be held in civil contempt for violating the injunction.

Pursuant to Circuit Rule 27-1 and Advisory Note 5 to that Rule, Petitioners notified the DEA by letter sent on January 26, 2017 that they intended to file this Motion and requested DEA's position. A copy of the letter is attached hereto as Exhibit 5. DEA did not respond to the letter.

CONCLUSION

For the reasons set forth above, Petitioners' Motion for an Order to Show Cause should be granted.

Respectfully submitted,

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Dated: February 6, 2017 Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2017, I served a true and correct copy of the foregoing Motion for Order to Show Cause Why Respondent Drug Enforcement Administration Should Not Be Found In Contempt of Court for Failure to Comply With This Court's Injunction—

By facsimile and first-class mail, postage prepaid, upon:

Ellen Harrison, Esq.
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and by first class mail, postage prepaid, upon:

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