UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-71366
03-71603

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

PETITIONER'S 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, Petitioner Hemp Industries Association ("HIA") hereby respectfully moves 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, the 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 enforcing the Final Rules, in violation of this Court's injunction. For those reasons, DEA should be ordered to show cause why it should not be held in contempt of this Court; and ordered to take actions to remedy its violation of the injunction.

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 the United States, 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

[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, authorized cultivation of industrial hemp under agricultural pilot research programs authorized by state law, "[n]otwithstanding the Controlled Substances Act. . .or any other Federal law. . . ." P.L. No. 113-79, §7606, codified at 7 U.S.C. §5940(a). 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.

United States from foreign countries for many decades. The express language of 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 cannabinoids, including 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. (Exhibit 1 hereto).

At the same time, DEA issued the Final Exemption Rule (attached hereto as Exhibit 2), 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 ruled that:

> The DEA asserts that natural, as well as synthetic, THC is included in Schedule I of the Controlled Substances Act ("CSA"). We have previously held that the definition of "THC" in Schedule I refers only to synthetic THC, and that any THC occurring naturally within Cannabis is banned only if it falls within the Schedule I definition of "marijuana." We reiterate that ruling here: in accordance with Schedule I, the DEA's relevant rules and regulations may be enforced only insofar as they ban the presence of marijuana or synthetic THC.

357 F.3d at 1013. 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*. at 1017. 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 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. 03-71366, Dkt. #72). The DEA did not petition the Supreme Court for a writ of *certiorari*, nor has it ever sought modification of the injunction. Accordingly, the Court's order in *HIA v. DEA II* enjoins DEA from enforcing the Final Rules throughout the nation.

III. DEA HAS VIOLATED THE INJUNCTION

A. DEA Has Retained the Enjoined Regulation in the Code of Federal Regulations for More than Twelve Years

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). Further, the accompanying "Final Exemption Rule," 21 C.F.R. §1308.35, remains in the Code of Federal Regulations to this day—more than twelve years after this Court's decision—even though that regulation was invalidated *in its entirety* by the Court's decision.[2] Sections 1308.11(d) (31) and 1308.35 of the DEA's regulations, taken together, *as currently in effect*, clearly continue to regulate, as THC, non-psychoactive hemp plant parts and products derived therefrom in violation of the Court's injunction entered in *HIA v. DEA II*.

B. DEA Has Advised State Officials That Shipment of Non-Psychoactive Industrial Hemp Is Still Subject to Regulation by the DEA, Effectively Enforcing the Final Rules

As noted above, 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 and research programs authorized by state law. P.L. No. 113-79, §7606, codified at 7 U.S.C. §5940. One of the states that has authorized such programs is North Dakota. In October 2016, the North Dakota Department of Agriculture ("NDDA") wrote to DEA stating that NDDA had

[2] Indeed, DEA continues to display the announcement of the adoption of the enjoined Final Rules on its website, to this date. https:www.dea.gov/pubs/pressrel/pr100901.html (last visited Jan. 26, 2017).

authorized agricultural research, resulting in production of hemp seed; that the hemp seed had been "fully de-vitalized," *i.e*., sterilized, "through processes such as milling and food grade oil extraction;" and that NDDA now wanted to export the sterilized hempseed out of the U.S. and was requesting DEA's approval to do so. (Letter from Thomas Bodine, NDDA, to John Partridge, DEA, Oct. 11, 2016, Declaration of Eric Steenstra, filed herewith ("Steenstra Decl.") Ex. A).

Sterilized seed is one of the parts of the cannabis plant excluded from the definition of "Marihuana" in the CSA. 21 U.S.C. §802(16); *see, HIA v. DEA II*, 357 F.3d at 1014. By virtue of this Court's order in *HIA v. DEA II*, DEA is enjoined from treating such sterilized seed as being a controlled substance under Schedule I of the CSA—meaning that DEA is enjoined from treating this non-psychoactive hemp product as a controlled substance *at all*, because it does not appear on any other schedule of the CSA. Thus, DEA should have simply advised NDDA that no DEA approval is required to export or transport sterilized hemp seed, anywhere.

Instead, on December 5, 2016, the Assistant Administrator of DEA for Diversion Control—the senior DEA official responsible for industrial hemp issues—responded to NDDA, posing a series of questions that DEA claimed needed to be answered in order to respond to NDDA's request for approval. (Letter from Louis Milione, DEA to T. Bodine, Dec. 5, 2016, Steenstra Decl. Ex. B.)

Although DEA had no authority to approve or disapprove the proposed export of exempt non-psychoactive hemp, NDDA continued to seek such approval and provided answers to DEA's questions in letters sent by NDDA to DEA on December 22, 2016 (Steenstra Decl. Ex. C) and January 4, 2017 (Steenstra Decl. Ex. D).

It appears that, for at least four and a half months, DEA never responded further, never provided the requested approval and, most critically, never advised NDDA that no such approval was required in the first place. As a result, the proposed export of the non-psychoactive hemp seed was effectively blocked.

Specifically, that seed, or some portion of it, was produced by an HIA member, Healthy Oilseeds, LLC. This producer had been granted a license to cultivate industrial hemp by NDDA as part of NDDA's agricultural research pilot program. (Declaration of Roger Gussiaas, attached hereto ("Gussiaas Decl.") ¶ 2). The producer 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. (*Id*. ¶3).

On December 23, 2016, NDDA wrote to that producer, Healthy Oilseeds, stating that "industrial hemp is a Schedule I controlled substance" and that the NDDA "is continuing to work with the DEA in order to obtain approval for you to sell and ship industrial hemp derived products both out of North Dakota and

internationally. . . . However, to date DEA approval has not yet been granted." (Letter from T. Bodine, NDDA, to R. Gussiaas, Healthy Oilseeds, Gussiaas Decl. Ex. A). The NDDA letter then advised Healthy Oilseeds that, in the absence of such DEA approval, "you are currently not authorized to sell or ship hemp products internationally or to states that do not have similar pilot industrial hemp research programs" and that such shipment "may result in the revocation of your industrial hemp license and you may be subject to state and federal administrative and criminal sanctions." (*Id*. at 2). Thus, the senior DEA responsible official misled the state agency into requiring DEA approval for non-psychoactive hemp that, by virtue of this Court's order, *cannot* be treated as a controlled substance—in direct violation of this Court's injunction. Healthy Oilseeds has advised HIA that, just last week, NDDA informed Healthy Oilseeds that now—after DEA had for more than four months blocked the company's export of the sterilized hempseed and hempseed oil products—the company is free to export those products.

In addition, DEA's failure and refusal to rescind the enjoined Final Exemption Rule has also led lower-level DEA officials unlawfully to impose such a requirement for DEA approval. In April 2016, a researcher at North Dakota State University wrote to a DEA investigator asking whether any DEA form would need to be filed in order to transport industrial hemp stalks, within North Dakota. (E-mail from B. Johnson to A. Bird, DEA Diversion Investigator, April 4, 2016,

Steenstra Decl. Ex. E). The DEA investigator, citing the enjoined Final Exemption Rule, 21 C.F.R. §1308.35, advised the researcher that "after reviewing the above link [to the enjoined Final Exemption Rule], it appears it's not an exempted product," and would therefore require a DEA registration, *i.e.*, a license. (E-mail from A. Bird to B. Johnson, Steenstra Decl. Ex. F).

DEA's de facto 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, ignores this Court's ruling that THC in the CSA refers only to synthetic not natural THC, and 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.

C. DEA Has Declined to Remedy Its Violation of the Injunction

On January 26, 2017, undersigned counsel for HIA wrote to DEA counsel, calling attention to, among other things, the North Dakota Department of Agriculture's action, based on DEA's advice, described above. (Letter from J. Sandler to E. Harrison, Jan. 26, 2017, attached hereto as Exhibit 3). The letter requested DEA, *inter alia*, to amend the Final Clarification Rule to conform to the Court's order and to advise state Departments of Agriculture that no DEA registration or permit is required in order to permit any person who possesses the

exempt non-psychoactive hemp products to possess, distribute or manufacture them. *Id.* [3]

On February 6, 2016, DEA responded, stating that DEA "has not enforced the regulation. . . with respect to products made solely from the parts of the cannabis plant excluded from the CSA definition. . .." (Letter from L. Milione to J. Sandler, Feb. 6, 2017, attached hereto as Exhibit 4). DEA did not respond to HIA's request that state Departments of Agriculture be advised that no permit or approval is required for the transportation of industrial hemp parts and products exempt from the CSA.

On February 8, 2017, HIA counsel again wrote to DEA, pointing out that the enjoined Final Exemption Rule is still included in the Code of Federal Regulations and that the continued inclusion of naturally-occurring THC in the DEA regulations listing THC as a controlled substance is inconsistent with this Court's holding in *HIA v. DEA II* "that the listing of THC in Schedule I, …. applied only to synthetically-created THC." 357 F.3d at 1014. (Letter from J. Sandler to E. Harrison, Feb. 8, 2017, attached hereto as Exhibit 5). HIA's letter requested that (i) DEA confirm that the "naturally contained" language in the DEA listing (based on

[3] Pursuant to Circuit Rule 27-1 and Advisory Note 5 to that rule, the letter also advised DEA that unless DEA provided the requested confirmations, HIA would file a motion to show cause why the agency should not be held in contempt for violation of this Court's injunction.

the Final Clarification Rule) is no longer in effect and will be removed; (ii) DEA commit to remove the enjoined Final Exemption Rule, 21 C.F.R. §1308.35, from the Code of Federal Regulation; and (iii) DEA confirm that no registration or permit from DEA is required to distribute sterilized hemp seed or seed oil. (*Id*.).

DEA counsel responded by letter dated February 17, 2017. (Letter from E. Harrison to J. Sandler, Feb. 17, 2017, attached hereto as Exhibit 6). Regarding DEA's decision to continue to include the enjoined Final Exemption Rule in the Code of Federal Regulations for more than twelve years after issuance of this Court's injunction, DEA took the position that the injunction only requires DEA to refrain from enforcing the regulation and that an agency does not "enforce" a regulation "simply by failing to de-publish it." (*Id*. at 1). The letter did confirm that "because sterilized cannabis seeds and oil from the seeds are excluded from the CSA definition of marijuana, DEA (adhering to the *Hemp II* injunction) does not require a registration to import or distribute such materials." (*Id*. at 2). DEA's letter, however, does not reference or correct DEA's directly contrary advice to the North Dakota Department of Agriculture that such a registration *is* required, nor did DEA commit to advise state Departments of Agriculture accurately about the effect of this Court's injunction.

Rather, DEA's letter implies that there may actually be a different scope of "permissible activity under" the Farm Bill provision allowing for cultivation of

industrial hemp for agricultural pilot projects authorized by state law. (*Id*.) In that regard, DEA's letter refers to a "Statement of Principles on Industrial Hemp" published by USDA jointly with DEA and the Food and Drug Administration. 81 Fed. Reg. 53395 (Aug. 12, 2016) (attached hereto as Exhibit 7). That "Statement of Principles" states, among other things, that "Industrial hemp plants and seeds may not be transported across state lines," even though *sterilized* hemp seed is one of the non-psychoactive hemp parts that this Court held is *not* subject to regulation by DEA at all.

Further confusing the situation are statements made in correspondence from USDA, dated January 18, 2017 endorsed by DEA and attached to DEA's letter to HIA of February 6, 2017 (Exhibit 4 hereto). That USDA letter states that while it was "not the intent of [USDA, DEA and FDA] … to somehow restrict activities involving industrial hemp that are permissible under federal law… but outside the boundaries of the agricultural pilot programs authorized by" the 2014 Farm Bill, the "Statement of Principles" "applies to industrial hemp grown for research purposes within the bounds of the agricultural pilot programs. . .." *Id*. And as noted, that Statement of Principles declares unlawful the distribution across state lines, of hemp seed, without distinguishing between viable and sterilized seed. Thus it appears DEA has taken the position that exempt, non-psychoactive hemp

stalk, fiber, seed and oil produced from hemp cultivated in the U.S. pursuant to the Farm Bill somehow has become *re*-regulated despite this Court's injunction.

The Farm Bill provision, 7 U.S.C. §5940, legalizes, in specified circumstances, the cultivation of industrial hemp plants that would otherwise be unlawful under the CSA. It does not modify the definition of "Marihuana" in the CSA or otherwise purport to render unlawful the sale or distribution of non-psychoactive hemp stalk, fiber, sterilized seed and oil within or outside any State.[4] This Court held that such stalk, fiber seed and oil cannot be treated by DEA as a controlled substance, under the CSA at least in the absence of a new scheduling proceeding under 21 U.S.C. §811. To the extent that DEA is requiring that the distribution of any sterilized hemp seed or product made from it requires a DEA license or approval, that requirement is a clear violation of this Court's injunction entered in *HIA v. DEA II*.

[4] If anything, the Farm Bill provision would make all of this activity lawful in any event, even in the absence of the CSA exemption, if conducted pursuant to an agricultural research pilot program authorized by the statute. It should be noted that DEA has thus, apart from the violations of this Court's injunction addressed by this Motion, violated the Farm Bill provision by requiring a DEA license for importation of hempseed or cultivation of industrial hemp that is authorized by that provision. Congressional intent in that regard was reinforced by section 763 of the Consolidated Appropriations Act, 2016, P.L. No. 114-113, which prohibits the use of any federal funds "in contravention of" the Farm Bill provision or "to prohibit the transportation, processing, sale or use of industrial hemp that is grown or cultivated in accordance with" that provision, "within or outside the State in which the industrial hemp is grown or cultivated."

IV. AN ORDER 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 by requiring, through its advice to the North Dakota Department of Agriculture, that DEA approval be obtained for the export or distribution of sterilized hemp seeds.

Further, in the circumstances of this case, DEA's refusal to remove the enjoined Final Exemption Rule, 21 C.F.R. §1308.35, from the Code of Federal Regulations is itself a violation of the injunction because it has misled DEA's own employees into requiring DEA licenses for activities that, under this Court's injunction, cannot be regulated by DEA. In its letter of February 17 to HIA (Exhibit 6 hereto), DEA actually agreed that the enjoined Final Exemption Rule "is not utilized by DEA because, under the *Hemp II* injunction, the materials that are the subject of this exemption provision. . .may be distributed, sold and possessed without any regulation by DEA." Nevertheless, DEA takes the position in this letter that it has no obligation to remove the regulation from the CFR, citing

Platinum Sports Ltd. v. Snyder, 715 F. 3d 615 617 (6th Cir. 2013) for the proposition that a plaintiff lacks standing to challenge an invalidated statute that remains on the books where there is an injunction preventing its enforcement. (Ex. 6 at 1).

The issue here, however, is not standing but the misleading of the public and DEA's own employees by the continued presence of the unenforceable regulation in the CFR and its contradictory press release for more than twelve years after this Court's order. By law, only those agency regulations "having general applicability and legal effect" and "relied upon by the agency as authority for… the discharge of, its activities or functions," may be included in the CFR. 44 U.S.C. §1510(a). In *National Federation of Federal Employees v. Devine*, 591 F. Supp. 166 (D.D.C 1984), the Court held that the publication of regulations by a federal agency violated an order holding the regulations invalid and that plaintiff had standing to challenge that publication:

> The harm here is the mistaken reliance by individual users of Title 5 of the Code of Federal Regulations, which will occur as the volumes of the Code are distributed. . . . Individual federal employees will rely upon these volumes of the Code in making critical decision. . . Mistakes will be made because the volumes of the Code identified as being current. . .contain regulations which never came into effect.

591 F. Supp. at 168-69. Here, too, the continued presence of the invalidated regulation in the CFR has led one of DEA's own employees to misapply the law in a way that caused the agency to violate this Court's injunction.

CONCLUSION

For the reasons set forth above, Petitioners' Motion for an Order to Show Cause should be granted; and DEA should be ordered to (i) remove the invalidated Final Exemption Rule from the Code of Federal Regulations ; (ii) amend the listing for "Tetrahydrocannabinols" in Schedule I in DEA's regulations to remove the language "naturally occurring"; and (iii) advise state Departments of Agriculture that no DEA approval or permit is required for the distribution, anywhere, of non-psychoactive industrial hemp that this Court held is not a controlled substance, and therefore cannot be regulated by DEA.

Respectfully submitted,

/s/ Patrick D. Goggin

Patrick D. Goggin SBN# 182218
Law Offices of Patrick D. Goggin
Flood Building
870 Market Street, Suite 1148
San Francisco, CA 94102
Telephone: 415.981.9290
patrickdgoggin@gmail.com

/s/ Joseph E. Sandler

Joseph E. Sandler (Admitted to Bar of this Court)
Sandler Reiff Lamb Rosenstein & Birkenstock PC
1025 Vermont Ave., N.W. Suite 300

Washington, D.C. 20005
Telephone: (202) 479-1111
sandler@sandlerreiff.com

Dated: March 1, 2017 Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 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 e-mail and first-class mail, postage prepaid, upon:

Ellen Harrison, Esq.
Senior Attorney-Civil Litigation Section
Drug Enforcement Administration
2401 Jefferson Davis Highway
Alexandria, VA 22301-1055
Ellen.Harrison@usdoj.gov

and by first class mail, postage prepaid, upon:

Mark B. Stern, Esq.
U.S. Department of Justice
Civil Division—Appellate Staff
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

s/Joseph E. Sandler