

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

CIVIL ACTION NO. \_\_\_\_\_

*Electronically Filed*

KENTUCKY DEPARTMENT OF AGRICULTURE

PLAINTIFF

v.

U.S. DRUG ENFORCEMENT AGENCY, and  
U.S. CUSTOMS AND BORDER PROTECTION, and  
U.S. DEPARTMENT OF JUSTICE, and  
ERIC HOLDER

DEFENDANTS

MOTION FOR TEMPORARY RESTRAINING ORDER  
AND/OR PRELIMINARY INJUNCTION

Comes the Plaintiff, Kentucky Department of Agriculture (“KDA”), by counsel, pursuant to Fed.R.Civ.P. 65(b) and 65(a), and hereby moves the Court for a Motion for Temporary Restraining Order and/or Preliminary Injunction against the Defendants, U.S. Drug Enforcement Agency (“DEA”), U.S. Customs and Border Protection (“CBP”) and U.S. Department of Justice (“DOJ”). KDA further relies upon the attached Memorandum of Law in support of its Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of the foregoing was served via facsimile and U.S. Mail on May 15, 2014, to the following:

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ERIC HOLDER**

**DEFENDANTS**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

Comes the Plaintiff, Kentucky Department of Agriculture (“KDA”), by counsel, and tenders this Memorandum of Law in support of its Motion for Temporary Restraining Order pursuant to Fed.R.Civ.P. 65(b) and Motion for Preliminary Injunction pursuant to Fed.R.Civ.P. 65(a) against the Defendants U.S. Drug Enforcement Agency (“DEA”), U.S. Customs and Border Protection (“CBP”), U.S. Department of Justice (“DOJ”), and Eric Holder the U.S. Attorney General as follows:

**FACTUAL BACKGROUND**

Plaintiffs incorporate by reference the allegations in the underlying Verified Complaint giving rise to the present action and the allegations contained therein. Briefly (and without waiving or amending any allegations in the Complaint), Plaintiff KDA is authorized under the federal Agricultural Act of 2014 (Public Law No: 113-79, not yet codified) (“Farm Bill”) to grow or cultivate industrial hemp so long as it is for research purposes, and the state legislature has approved the cultivation of industrial hemp. Plaintiff KDA is also authorized under Kentucky 2013 Senate Bill 50 (now codified in various sections of the Kentucky Revised

Statutes, “Kentucky Industrial Hemp Law”) to grow or cultivate industrial hemp for research purposes.

As authorized by federal and state law, the KDA, in conjunction with the Kentucky Industrial Hemp Commission and multiple Kentucky universities, designed and planned eight pilot projects to investigate and study industrial hemp's potential as a crop, including studies of methods to grow hemp and hemp's potential uses. The KDA and the universities committed considerable financial and other resources to develop, plan, and carry out these projects.

To initiate the industrial hemp pilot program, the KDA made arrangements to import a shipment of industrial hemp seeds from outside of the United States. The Kentucky Industrial Hemp Commission purchased and paid consideration for the hemp seeds. The hemp seeds were transported via United Parcel Service (“UPS”). Defendant CBP was made aware of the shipment of hemp seeds and their purpose. Defendant CBP allowed the hemp seeds' entry into the U.S. at Chicago and their transportation to Louisville, Kentucky.

From Louisville, the hemp seeds were to be distributed to legally permitted sites in Kentucky for use for agricultural purposes approved in the Farm Bill and Kentucky industrial hemp bill. As of May 14, 2014, one or more of Defendants blocked further shipment and distribution of the hemp seeds. No official reason or justification for this action was communicated to the KDA at that time. Upon information and belief, the hemp seeds remain in the hands of UPS at its air shipment facility in Louisville.

The KDA transmitted a letter on May 12, 2014 to the Acting Port Director of CBP, requesting the prompt and orderly release of the seeds. The KDA met with officials of Defendant DOJ on May 13, 2014. The KDA was initially advised that, despite federal and state legislation that expressly exempts industrial hemp cultivation from the Controlled Substances Act under

these circumstances. Subsequently, in a following telephone conversation, with a representative of the Defendant DEA led KDA staff to believe an agreement had been reached whereby the DEA had revised its position and would authorize KDA to distribute the seeds to institutions of higher education and to sites certified and registered by the KDA. However, that understanding was shaken when a different DEA official sent a letter to KDA counsel at approximately 9 p.m. EDT, announcing that the DEA is continuing to require the seed to be listed as a Schedule 1 controlled substance subject to the Controlled Substances Import and Export Act (“CSIEA”) and also that it prohibit the KDA from distributing hemp seeds to duly authorized participants in KDA-administered pilot programs.

Based upon the KDA’s extensive recent studies of industrial hemp, these seeds should be planted from late March to not later than early June to take advantage of the optimum growing season in Kentucky. The hemp seeds must be planted in the near future, on or before June 1, 2014, in order to produce a viable crop. Every day that passes without the pilot projects being initiated is likely to reduce the probability of a viable industrial hemp crop being produced.

Upon information and belief, other states and/or universities are actively moving forward with industrial hemp pilot projects. Commercial hemp production is likely to become a competitive industry, and the KDA does not intend to allow other states to gain a competitive edge over Kentucky by moving forward more quickly.

### **ARGUMENT**

Plaintiff KDA has moved for injunctive relief in the form of a temporary restraining order and preliminary injunction to remedy the immediate and irreparable harm being caused by the Defendants’ actions.

Fed.R.Civ.P. 65(b) states:

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claims that notice should not be required.

Here, Plaintiff KDA does not seek *ex parte* relief; the Defendants have been advised that Plaintiff KDA intends to seek injunctive relief and have been served with notice of Plaintiff KDA's motions. However, to the extent that each day of delay causes additional risk of irreparable harm, Plaintiff KDA does seek immediate relief. In the event that the Court sets a hearing in the future, the passage of time will cause immediate irreparable harm. In that event, Plaintiff KDA requests entry of a temporary restraining order pending the hearing that will immediately restrain the Defendants from their continued wrongful interference with the delivery of the hemp seeds to KDA and KDA's distribution of the hemp seeds to its authorized university research partners.

In determining whether to issue a preliminary injunction under Fed. R. Civ. P., 65(b) or a temporary restraining order under Fed. R. Civ. P. 65(a), the Court must examine four factors: (1) whether movant has shown a strong likelihood of success on the merits; (2) whether movant will suffer irreparable injury if the injunction is not issued; (3) whether the issuance of injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of injunction; and these factors are not prerequisites, but are factors that are to be balanced against each other. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566 (6<sup>th</sup> Cir. 2002).

Each of the elements necessary to support the issuance of either a temporary restraining order or a preliminary injunction is present. This Court should issue the order.

**I. Likelihood of success on the merits.**

Defendant DEA and/or other Defendants are violating the provisions of the Farm Bill by engrafting upon it additional regulatory and bureaucratic requirements that were not contemplated or enacted by the U.S. Congress. There is no provision in the Farm Bill or in any regulation in furtherance of the Farm Bill allowing Defendant DEA and/or other Defendants to impose additional requirements, restrictions, or prohibitions upon an institution of higher education or a state department of agriculture that is engaged in industrial hemp cultivation as contemplated by the Farm Bill. Upon information and belief, Defendant DEA has in the past issued rulings that non-psychoactive industrial hemp and hemp seeds are not Schedule 1 drugs and are not subject to the Controlled Substances Act. The actions of Defendant DEA and/or other Defendants in stopping delivery of the hemp seeds, in the face of clear guidance from Congress, are arbitrary, capricious, not supported by any reasonable governmental or public interest, and not rationally related to carrying out any legitimate governmental purpose.

Plaintiff KDA's rights under the Farm Bill and the Kentucky Industrial Hemp Law are being and will continue to be violated by the actions of Defendants in, without limitation: (a) causing delivery of the hemp seeds to be interrupted and stopped without legal justification; (b) requiring the KDA and each of the participating universities to obtain Schedule 1 research registration; requiring that industrial hemp be grown only on KDA-owned property; and prohibiting the KDA from distributing hemp seeds to duly authorized participants in KDA-administered pilot programs, all of which requirements are not authorized by the Farm Bill, without legal justification; (c) refusing to expedite the issuance of the improper and unauthorized

Schedule 1 research registration; (d) causing the KDA and its partner organizations to miss the appropriate growing season for industrial hemp, thereby causing, among other things, waste of public resources; and (e) acting in an arbitrary and capricious manner.

**II. Immediate, irreparable injury.**

A plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566 (6<sup>th</sup> Cir. 2002).

Plaintiffs' ability to obtain complete relief will be irreparably harmed if the Defendants are allowed to delay the delivery of the hemp seeds until after the appropriate planting time. The pilot projects operated by the KDA must be able to replicate growing conditions that a commercial farmer would utilize. If the hemp seeds are not distributed and planted within the normal time frame of the growing season, the researchers will not be able to generate real-world data about how the crop responds to growing conditions. Planting hemp seeds later in the summer is unlikely to accurately replicate a commercially produced industrial hemp crop.

The KDA, the Kentucky Industrial Hemp Commission, the partner Kentucky universities, and the citizens of the Commonwealth of Kentucky are suffering and will continue to suffer immediate, irreparable harm if the Defendants continue to cause the hemp seeds to be detained and prevent their delivery to the sites of the approved and authorized pilot projects. The KDA is aware of no alternative source of hemp seeds that would not be subject to the arbitrary and capricious stoppage that has occurred in this case. The KDA has no intention of arranging for the illegal, surreptitious, or black market purchase of hemp seeds. Accordingly, in order to carry out the pilot projects, Plaintiff KDA must obtain delivery of the hemp seeds being improperly delayed by the Defendants.



Damages for the inability to investigate study a product that is likely to materially contribute to the economic growth of Kentucky are not susceptible of being accurately determined. In part, Plaintiff KDA acts in a public capacity in this action, to protect the interests of unknown Kentucky farmers and/or manufacturers who are likely to benefit in the future from the development of industrial hemp as a crop and product of the Commonwealth. Under these circumstances, monetary damages would not fully compensate the harm to Plaintiff KDA from being blocked from engaging in the industrial hemp pilot projects.

**III. Injunctive relief will create no risk of harm to others.**

Both the Farm Bill and the Kentucky Industrial Hemp Law are premised on the undisputed fact that industrial hemp contains little or no concentration of the psychoactive components of its botanical cousin, marijuana. Industrial hemp is a fiber plant that has no potential for abuse. The seeds at issue herein are certified to have less than 0.3 percent of delta-9 tetrahydrocannabinol (“THC”) on a dry weight basis. Defendant DEA has in the past issued rulings that non-psychoactive industrial hemp and hemp seeds are not Schedule 1 drugs and are not subject to the Controlled Substances Act. *See*, FR 03-6805, a copy of which is attached hereto as **Exhibit 1**. However, even if that were not the case, the U.S. Congress has found that industrial hemp cultivation under the circumstances here is lawful, “notwithstanding the Controlled Substances Act (21 U.S.C. 801 et seq.), the Safe and Drug-Free Schools and Communities Act (20 U.S.C. 7101 et seq.), chapter 81 of title 41, United States Code, **or any other federal law. . . .**” (Farm Bill, emphasis added).

Congress expressly carved out from the Controlled Substances Act the exact type of industrial hemp cultivation by state departments of agriculture and research universities that Plaintiff KDA is undertaking here. For reasons unknown, Defendants have taken it upon

themselves to thwart the will of Congress and establish unauthorized roadblocks to this lawful activity; but such unauthorized conduct does nothing to change the fact that industrial hemp is not psychoactive, that it poses zero risk of abuse, and that its cultivation under the limited and controlled system established by the Farm Act presents no risk of harm to anyone.

**IV. The public interest will be served by issuance of the injunction.**

Plaintiffs seek to maintain the status quo: the cultivation of industrial hemp in conformity federal and state statutes is lawful. The public interest is served by allowing the KDA and Kentucky research universities to investigate the use of industrial hemp as a cash crop in Kentucky. The public interest is not served by allowing unaccountable federal agencies to exercise arbitrary and capricious powers, not rationally related to carrying out any legitimate governmental purpose, in contravention of the legislative findings and determinations of the elected U.S. Congress and Kentucky legislature.

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court enter a Temporary Restraining Order and Preliminary Injunction pursuant to Fed.R.Civ.P. 65, prohibiting Defendants from, without limitation: (a) continuing to arbitrarily and capriciously block delivery and distribution of the hemp seeds; (b) imposing additional requirements, restrictions, and prohibitions upon the KDA beyond the requirements of the Farm Bill, including but not limited to requiring the KDA and each of the participating universities to obtain Schedule 1 research registration; requiring that industrial hemp be grown only on KDA-owned property; and prohibiting the KDA from distributing hemp seeds to duly authorized participants in KDA-administered pilot programs; (c) blocking the implementation of the pilot projects designed and

planned by KDA and its partner organizations; and (d) placing Kentucky at a competitive disadvantage to other states pursuing industrial hemp pilot projects .

Respectfully submitted,

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ERIC HOLDER

DEFENDANTS

**ORDER**

This matter having come before the Court on the Motion of the Plaintiff, Kentucky Department of Agriculture (“KDA”), for Temporary Restraining Order and Preliminary Injunction, the Court having reviewed Memoranda of counsel and being otherwise sufficiently advised:

**IT IS HEREBY ORDERED AND ADJUDGED** that KDA’s Motion for Temporary Restraining Order and Preliminary Injunction is **GRANTED**. Defendants, U.S. Drug Enforcement Agency (“DEA”), U.S. Customs and Border Protection (“CBP”) and U.S. Department of Justice (“DOJ”), are hereby prohibited, without limitation, from: (a) continuing to arbitrarily and capriciously block delivery and distribution of the hemp seeds at issue in this matter; (b) imposing additional requirements, restrictions, and prohibitions upon the KDA beyond the requirements of the Farm Bill, including but not limited to requiring the KDA and each of the participating universities to obtain Schedule 1 research registration; requiring that industrial hemp be grown only on KDA-owned property; and prohibiting the KDA from distributing hemp seeds to duly authorized participants in KDA-administered pilot programs; (c)

blocking the implementation of the pilot programs designed and planned by KDA and its partner organizations; and (d) placing Kentucky at a competitive disadvantage to other states pursuing industrial hemp pilot programs.

Dated: