

Alan R. Ostergren
Muscatine County Attorney
420 E. Third St.
Muscatine, Iowa 52761

January 3, 2018

Re: January 2, 2018 statement regarding CBD

Mr. Ostergren,

I am an attorney based on Asheville, NC. I represent clients in the hemp and cannabidiol (CBD) industry throughout the US and the world. I am writing you in response to your January 2 statement regarding the sale of CBD products in Muscatine County, IA. I represent at least one, and possibly several, producers of products that were recently confiscated by law enforcement in Muscatine County. Due to your present stance I am not at liberty to disclose my client's identity; however, I am writing this as both a representative of my client and of the CBD industry as a whole. Your time is limited and this letter will be brief. I hope that you will take it into consideration as you forge your policy regarding CBD.

Hemp and CBD law is complex and rapidly evolving. Case and statutory law are scant and any thorough analysis must necessarily take into consideration issues of federalism. I will start by stating that this letter is not about the Farm Act. I hope that you will take the time to read my recent article in the Cannabis Law Journal, "*The Legal Status of Cannabidiol, Other Cannabinoids, and Terpenes Derived From Industrial Hemp*". I have enclosed the article with this letter. It discusses industrial hemp in great detail and also fleshes out the matters I summarize in this letter. You stated, "*The farm bill authorized certain experimental programs involving industrial hemp.*" I agree with you on this point. Congress did not legalize hemp across the country when it passed the 2014 Farm Act. Rather, it authorized individual states to enact industrial hemp pilot programs and for hemp products to be transported, sold, processed, and used in states where it is lawful to do so. Since Iowa has not enacted an industrial hemp program industrial hemp products are not currently lawful within the state.

The point of this letter is to clarify that there exist indisputable circumstances in which CBD is not “marijuana” as you allege and is, in fact, lawful at both the federal and state level throughout the country, including Iowa. CBD is not a controlled substance in and of itself. Its legality is based on its source, which in the industry we call the “source theory”. As you infer in your statement, CBD derived from marijuana is, in fact, illegal “marijuana”. However, when CBD is derived from a source other than marijuana it is lawful. Aside from CBD sourced from industrial hemp cultivated pursuant to the 2014 Farm Act, in which it is lawful at both the federal level and state level in most states, there are at least two circumstances when CBD is lawful throughout the US: (1) when the CBD is derived from the “mature stalk” of the cannabis plant, and (2) when the CBD is derived from “non-psychoactive” hemp lawfully cultivated outside the US.

1. CBD is lawful when it is derived from the mature stalks of the cannabis plant. The “mature stalks” of the cannabis plant are excepted from the definition of “marijuana” under both federal law¹ and Iowa state law². In other words, the mature stalks are lawful and CBD derived from them is not illegal. On March 14, 2017, the DEA issued the following statement: *“If a product consisted solely of parts of the cannabis plant excluded from the CSA definition of marijuana, such product would not be included in the new drug code (7350) or in the drug code for marijuana (7360).”*³ The DEA’s formal position is that CBD cannot be derived from the stalks. Although it is true that deriving CBD from the stalks is much more difficult than obtaining it from the leafy parts of the cannabis plant, it is possible. In fact, due to the nature of the current laws, some companies have created business models out of deriving CBD from the stalks. The cannabis industry is evolving at breakneck pace in all directions. Extraction technology is well beyond where it was even a few short years ago. The DEA’s position is that, if CBD could be sourced from the mature stalks, it is lawful. The DEA simply contends that it is technically impossible. The DEA is incorrect on this point, which is factual, rather than legal. The important point is that CBD derived from the stalks is unqualifiedly lawful at both the federal and state levels.

2. CBD is lawful when it is derived from “non-psychoactive” hemp lawfully cultivated outside the US. In striking down a DEA rule regarding importation of hemp and hemp products, the 9th Circuit Court of Appeals ruled in 2004 that “non-psychoactive” hemp

¹ 21 USC § 802(16)

² Iowa Code § 124.101(19)

³ Clarification of the New Drug Code (7350) for Marijuana Extract.

was lawful to import, even if it contained "trace amounts" of naturally occurring THC.⁴ CBD derived from "non-psychoactive" hemp lawfully cultivated outside the US is lawful.

I cannot speak for all of the products that were seized in Muscatine County. My particular client's products contain CBD that was derived from the mature stalks of non-psychoactive hemp lawfully cultivated in Europe. My client's products are therefore "doubly-legal", by which I mean that they are lawful under either/both of the above analyses. Even if all of the other seized products contain CBD from marijuana or hemp which is unlawful in Iowa, I know for a fact that at least one of the seized products is lawful. Thus, your statement is inaccurate to the extent that it contends that all CBD is illegal. Therefore, I ask that you retract or modify your statement, which will have an enormously chilling effect on my client's business revenues and the revenues of similarly situated CBD companies.

I appreciate your decision not to prosecute. Certainly, and aside from the above, it would be an unwise use of limited resources to prosecute for the possession and sale of products that the World Health Organization (WHO) recently found to have no potential for abuse, no psychoactive effect, no risk of addiction, and which provide a wide array of medical benefits. I have enclosed a copy of the WHO preliminary report with this letter.

Thank you for your time and attention to this letter. I would be happy to discuss these matters further with you, either in person or by phone. My hope is that you will reconsider your position and retract or modify your statement.

Sincerely,

Rod Kight

⁴ *Hemp Industries Association, et al, v. Drug Enforcement Administration*, 357 F.3d 1012 (9th Cir. 2004)