

# kightlaw

September 22, 2022

Sunfire Nutrition LLC  
DBA Secret Nature  
Attn. Michael Wasmer and Tyler William  
5933 NE Win Sivers Dr #205  
Portland, OR 97220

Sent via email: info@secretnaturecbd.com

*Re: Legal Status of THCa in Smokable Hemp Under Federal Law*

Dear Mr. Wasmer and Mr. Wiliam:

This letter is written at your request for my client, Sunfire Nutrition LLC DBA Secret Nature (Secret Nature), regarding the legal status of its hemp products, including smokable hemp, that contain tetrahydrocannabinolic acid (THCa) in concentrations that exceed 0.3% by dry weight. The specific question addressed is: **“Are hemp products, including “smokable hemp”, which contain THCa concentrations in excess of 0.3% by dry weight controlled substances under US federal law when their delta-9 tetrahydrocannabinol (D9 THC) concentrations do not exceed 0.3% by dry weight?”** As discussed in this letter, the answer to this question is **“No”**. Secret Nature’s hemp products do not contain delta-9 THC concentrations exceeding 0.3% and are not controlled substances under US federal law, regardless of the amount of THCa they contain.

The analysis and conclusions contained in this letter are based on the Agricultural Act of 2014 (2014 Farm Act)<sup>1</sup>, the Agricultural Improvement Act of 2018 (Farm Bill)<sup>2</sup>, the federal Controlled Substances Act (CSA)<sup>3</sup>, the Drug Enforcement Administration’s (DEA) recently published Interim Final Rule (IFR)<sup>4</sup>, the DEA’s recently issued letter to the Alabama Board of Pharmacy (Letter)<sup>5</sup>, a DEA letter regarding cannabis seeds and other cannabis materials<sup>6</sup>, and a recent opinion by the Ninth Circuit Court of Appeals<sup>7</sup>. This letter does not address any requirements under the federal Food, Drug & Cosmetic Act and associated regulations by the Food and Drug Administration (FDA). Additionally, this letter does not address the statutes and regulations of any state.

This letter is solely for Secret Nature, but I have been informed it may be shared with certain third parties. All third parties are specifically advised that this letter is not intended to be legal advice

<sup>1</sup> <https://www.govinfo.gov/content/pkg/BILLS-113hr2642enr/pdf/BILLS-113hr2642enr.pdf>

<sup>2</sup> <https://www.congress.gov/115/bills/hr2/BILLS-115hr2enr.pdf>

<sup>3</sup> 21 U.S. Code § 801 *et seq.*

<sup>4</sup> [https://www.deadiversion.usdoj.gov/fed\\_regs/rules/2020/fr0821.htm](https://www.deadiversion.usdoj.gov/fed_regs/rules/2020/fr0821.htm)

<sup>5</sup> <https://docs.google.com/viewerng/viewer?url=https://cannabusiness.law/wp-content/uploads/DEA-letter-re-D8-to-Alabama.pdf&hl>

<sup>6</sup> <https://s3.documentcloud.org/documents/21580238/21-7692-shane-pennington-cannabis-seeds-tissue-genetic-material-11-18-21-signed-1.pdf>

<sup>7</sup> *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682 (9th Cir. 2022)

for any party other than Secret Nature and should not be construed or relied upon as such. It is accurate as of the date above.

**PART 1- DISCUSSION OF THE ISSUE:  
THE CONCENTRATION OF DELTA-9, NOT THCA, IS THE SOLE FACTOR  
IN DETERMINING A CANNABIS PRODUCT'S CONTROLLED STATUS**

There are dozens of forms of the tetrahydrocannabinol (THC) molecule. These various forms are called isomers. An isomer is one of two or more compounds that contain the same number of atoms of the same elements but differ in structural arrangement and properties.<sup>8</sup> There are at least thirty THC isomers<sup>9</sup>, of which THCa and delta-9 THC are two of the most well-known. Additionally, delta-8 THC (D8-THC) and delta-10 THC (D10-THC) have recently gained more attention in the media and marketplace. As discussed below, the only THC isomer that is used to determine whether harvested hemp and hemp products are lawful under federal law is delta-9 THC. The quantity and concentration of other THC isomers, including THCa, are totally irrelevant with respect to the legal status of harvested hemp and hemp products.<sup>10</sup>

**PART 2- FEDERAL LAW:  
HEMP IS NOT A CONTROLLED SUBSTANCE**

Hemp initially became exempt from the CSA, and thus removed from the list of controlled substances, by virtue of the 2014 Farm Act when produced pursuant to a state's industrial hemp pilot program. The current Farm Bill, enacted at the end of 2018, removed both "hemp" and "THC in hemp" from the CSA.<sup>11</sup> Hemp is lawful throughout the United States (US).

The Farm Bill defines "hemp" expansively. The definition includes the hemp plant and "*any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis.*"<sup>12</sup> (*emphasis added*)

The sole distinction between lawful cannabis (hemp) and unlawful cannabis (marijuana) is the concentrations of delta-9 THC. Cannabis with delta-9 THC concentrations that do not exceed 0.3% is legal hemp. Cannabis with delta-9 THC concentrations that exceed 0.3% is illegal

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<sup>8</sup> <https://www.merriam-webster.com/dictionary/isomer>

<sup>9</sup> See, eg, this website: <https://cannabislifenet.com/amount-of-isomers-in-thc/>. See also, this website: <https://cannabusiness.law/thc-analogs-a-family-divided/>

<sup>10</sup> I note that, while the concentration of THCa is not relevant in determining the legal status of harvested hemp or hemp products, it is relevant in determining the legal status of hemp that has not been harvested. This is because USDA regulations require hemp to be tested for delta-9 THC using a "post-decarboxylation method" before it can be harvested. Because THCa converts to delta-9 THC when decarboxylated the THCa concentration of a pre-harvest hemp sample matters. However, and as discussed in this letter, this only applies to hemp that has not been harvested. It does not apply to harvested hemp and products made from it. Further reading on this issue, including testing standards, can be found at this website: <https://cannabusiness.law/total-thc-and-harvested-hemp/>

<sup>11</sup> 21 U.S.C. § 802(16)(B): "The term "marihuana" does not include— (i) hemp, as defined in section 1639o of title 7."

<sup>12</sup> 7 U.S.C. § 1639o(1)

marijuana. The concentrations of the other cannabinoids in cannabis, including THCa, are irrelevant with respect to its legal status. If the delta-9 THC concentration in a hemp product does not exceed 0.3% by dry weight, then it is not a controlled substance under federal law.

### **IT IS LAWFUL TO TRANSPORT HEMP AND HEMP-DERIVED PRODUCTS IN INTERSTATE COMMERCE**

The interstate transfer of hemp is authorized by 7 USC § 1621 subsection 10114(b), which states in relevant part: “No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (AMA) (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.”<sup>13</sup> Although state laws vary with respect to hemp and hemp products, it is absolutely clear that states and Indian tribes may not prohibit the transport of them through their borders.

### **HEMP AND HEMP PRODUCTS ARE LAWFUL ACCORDING TO THE DEA**

#### *I. The Interim Final Rule*

The DEA has expressly stated that hemp and hemp products are not controlled substances. On August 21, 2020, the DEA published its Interim Final Rule (IFR) in the federal register<sup>14</sup>. In its IFR, the DEA made it clear that:

In order to meet the definition of “hemp”, and thus qualify for the exemption from [S]chedule I, the derivative must not exceed the 0.3% delta-9 THC limit. The definition of “marihuana” continues to state that “all parts of the plant Cannabis sativa L.” and “every compound manufacture, salt, derivative, mixture, or preparation of such plant,” are [S]chedule I controlled substances unless they meet the definition of “hemp” (by falling below the 0.3% delta-9 THC limit on a dry weight basis)...” (Emphasis added).<sup>15</sup>

The DEA’s IFR continues by stating that the listing for “tetrahydrocannabinols” (ie, “THC”) under 21 U.S.C. 812(c) “does not include tetrahydrocannabinols in hemp”.<sup>16</sup>

The DEA’s IFR confirms that hemp products, including the ones distributed by Secret Nature, which contain no more than 0.3% delta-9 THC on a dry weight basis, are not controlled substances in the US.

#### *II. DEA Public Statements*

In addition to the IFR, the DEA has indicated in three recent public statements that cannabinoids and other cannabis materials are not controlled substances when their delta-9 THC concentrations do not exceed 0.3% on a dry weight basis.

<sup>13</sup> <https://uscode.house.gov/statviewer.htm?volume=132&page=4914#>

<sup>14</sup> “Implementation of the Agriculture Improvement Act of 2018”, Federal Register Volume 85, Number 163 (Friday, August 21, 2020).

<sup>15</sup> <https://www.govinfo.gov/content/pkg/FR-2020-08-21/html/2020-17356.htm>

<sup>16</sup> See footnote 9.

### 1. DEA's First Public Statement- Town Hall Meeting

The DEA's first public statement is in the form of a video webinar called a "Town Hall with USDA and DEA" conducted by the Florida Department of Agriculture and Consumer Services (FLDACS) on June 24, 2021. In the Town Hall webinar, the DEA representative stated the following:

*"[W]hat I want to say, and I'll be very, very deliberate and clear. At this time, I repeat again, at this time, per the Farm Bill, the only thing that is a controlled substance is delta-9 THC greater than 0.3% on a dry-weight basis." (emphasis added)<sup>17</sup>*

### 2. DEA's Second Public Statement- Letter to the Alabama Board of Pharmacy

The DEA publicly addressed the legal status of the various forms of THC in hemp again in the form of a response letter to the Alabama Board of Pharmacy (ABOP) dated September 15, 2021. In this letter, Terrence L. Boos, Ph.D., Chief of the DEA's Drug and Chemical Evaluation Section of the Diversion Control Division, responds to the ABOP's request for the controlled status of delta-8 THC. After differentiating between the legal status of marijuana and hemp, both of which are botanically "cannabis sativa L", the DEA states:

*"[C]annabinoids extracted from the cannabis plant that have a delta-9 THC concentration of not more than 0.3 percent on a dry weight basis meet the definition of "hemp" and thus are not controlled under the CSA."*

Additionally, the DEA states the following in a footnote:

*"The Agricultural Improvement Act of 2018 (AIA), Pub. L. 115-334, § 12619, amended the CSA to remove "tetrahydrocannabinols in hemp" from control. See 21 U.S.C. § 812, Schedule I(c)(17). As noted, however, "hemp" is defined to "mean the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." 7 U.S.C. 1639o. Thus, only tetrahydrocannabinol in or derived from the cannabis plant—not synthetic tetrahydrocannabinol—is subject to being excluded from control as a "tetrahydrocannabinol[] in hemp." (emphasis added)<sup>18</sup>*

### 3. DEA's Third Public Statement- Response Letter Regarding Seeds and Cannabis Materials

In response to an inquiry regarding the DEA's interpretation of its implementing regulations regarding cannabis the DEA stated in a letter dated January 6, 2022: "[M]aterial that is derived or extracted from the cannabis plant such as tissue culture and any other genetic material that has a

<sup>17</sup> The pertinent portions of the webinar can be viewed at this website: <https://cannabusiness.law/is-d8-from-hemp-a-controlled-substance-dea-says-no/>

<sup>18</sup> Ibid.

*delta-9-tetrahydrocannabinol* concentration of not more than 0.3 percent on a dry weight basis meets the definition of “hemp” and thus is not controlled under the CSA.” (*emphasis added*)<sup>19</sup>

These public statements by the DEA all clearly indicate that products containing less than 0.3% delta-9 THC on a dry weight basis are lawful. Since Secret Nature’s products do not contain more than 0.3% delta-9 THC on a dry-weight basis, they are not controlled substances under US federal law and conform to the Farm Bill, the CSA, and the IFR.

**NINTH CIRCUIT COURT OF APPEALS CONFIRMS THAT  
HEMP PRODUCTS ARE NOT CONTROLLED SUBSTANCES**

The federal Court of Appeals for the Ninth Circuit recently issued an opinion regarding hemp products, specifically products containing delta-8 THC, in the context of a trademark dispute. In its opinion, the Ninth Circuit noted that “*the only statutory metric for distinguishing controlled marijuana from legal hemp is the delta-9 THC concentration level.*” (*emphasis added*)<sup>20</sup>

**CONCLUSION**

Based on the above, it is clear that Secret Nature’s hemp products, including smokable hemp, which contain delta-9 THC concentrations not exceeding 0.3% are not controlled substances under US federal law, regardless of the amount of THCa that they contain.

Sincerely,



Rod Kight,  
Attorney

<sup>19</sup> <https://s3.documentcloud.org/documents/21580238/21-7692-shane-pennington-cannabis-seeds-tissue-genetic-material-11-18-21-signed-1.pdf>

<sup>20</sup> *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682 (9th Cir. 2022)