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January 17, 2020

Via ECF

Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Attention: Tynetta Wilder, Case Manager

Re: *Washington, et al. v. Barr, et al.*, Docket No. 18-859-cv (2d. Cir.)

Dear Ms. Wilder:

We are *pro bono* counsel for Plaintiffs in the above-entitled action. At the request of your office, we write to provide a brief update to the Court relative to our intentions moving forward with respect to this action.

As the Court is aware, this action arises out of claims by Plaintiffs to obtain a declaration that the Controlled Substances Act ("CSA"), as it pertains to the mis-classification of cannabis, is unconstitutional under, *inter alia*, the Commerce Clause of, and the First, Fifth, and Fourteenth Amendments to, the Constitution of the United States. In connection with their request for relief, Plaintiffs demanded an injunction against enforcement of the CSA as it pertains to cannabis -- a remedy which, if it had been granted, would have had the effect of a de-scheduling. Regrettably, the District Court dismissed the action, ruling that Plaintiffs, should they seek to de-schedule cannabis, are required under the CSA to file a petition with the DEA for such relief ("District Court Ruling"). On May 30, 2019, this Court affirmed the District Court Ruling ("Second Circuit Decision"). In particular, this Court ruled that:

> It cannot be seriously argued that this remedy [de-scheduling] is not available through the administrative process.

See Dkt. 103-1 at 18-19. However, this Court, in recognition of the extensive delays which historically have plagued the administrative review process under the CSA: (i) declined to dismiss this action outright; (ii) granted Plaintiffs six months within which to file a petition with the DEA; and (iii) directed the latter to decide it with "deliberate speed" (*Id.* at 26). "In other words, [the

Court] retained jurisdiction exclusively for the purpose of inducing the [DEA] to act promptly" (*Id.*).

As we undertook to prepare the petition contemplated by the Second Circuit Decision (the "Petition"), we came across decisions of the DEA that leave no doubt that, notwithstanding the language quoted above in the Second Circuit Decision, it is the DEA's position that a petition demanding the de-scheduling of cannabis *cannot be granted* in the context of an administrative challenge under the CSA. Instead, according to the DEA, the only course of action available to those seeking to file a petition with respect to cannabis would be to request its reclassification under *Schedule II*. In particular, the DEA ruled:

> [i]t has been established in prior marijuana rescheduling proceedings that placement of marijuana in either schedule I or schedule II of the CSA is necessary as well as sufficient to satisfy our international obligations under the Single Convention. CFR Chapter II and Part 1301, Fed. Register, Vol. 156, 53688, Aug. 12, 2016 (quotation omitted).

The DEA proceeded to explain that:

> several requirements imposed by the Single Convention would not be met if cannabis and cannabis resin were placed in CSA schedule III, IV, or V. *Therefore, in accordance with [the CSA], DEA must place marijuana in either schedule I or schedule II*. *Id.* at 53688-89.

As reflected in prior correspondence to this Court, reclassification of cannabis under Schedule II would actually exacerbate the conditions afflicting our clients; would instantly throw thousands of cannabis businesses out of business; and would disrupt the lives of tens of thousands, if not millions, of Americans who rely upon cannabis daily to sustain their health, wellness, and lives (Dkt. Nos. 115 and 124). Furthermore, reclassifying cannabis under Schedule II is not the relief that Plaintiffs requested in the Complaint, insofar as, in the context of such reclassification, enforcement of the CSA as it pertains to cannabis would *continue* rather than being *enjoined*. Consequently, filing the Petition with the DEA would not afford Plaintiffs the relief they requested. And lastly, were the DEA to reclassify cannabis under Schedule II (which, as with the Schedule I mis-classification, would wrongly presuppose that cannabis is inherently dangerous), Plaintiffs would eventually find themselves right back in Court again with similar claims to those referenced in the Complaint herein -- specifically, that the mis-classification under Schedule *II* violates the Commerce Clause and the First, Fifth and Fourteenth Amendments. In other words, filing the Petition would expose Plaintiffs (and thousands, if not millions, of others) to needless potential harm, while not providing any of the relief Plaintiffs requested.

Regardless, because the DEA's position (that cannabis *cannot* be de-scheduled) conflicts

with the Second Circuit Decision (in which the Court ruled that cannabis *can* be de-scheduled), we requested an extension of time within which to file the Petition to afford us the opportunity to file a declaratory judgment action against the DEA, challenging its stated-position that the only remedy available under the CSA relative to cannabis would be to reclassify it under Schedule II (Dkt. No. 129). On January 3, 2020, this Court denied the motion (Dkt. No. 141).

Because the petitioning and administrative process under the CSA threatens to harm our clients without affording them the opportunity to achieve the benefits the lawsuit was designed to achieve, we are *not* going to file the Petition with the DEA. We expect that, in view of the Second Circuit Decision, this action will be remitted and dismissed. After judgment is entered, we will file a petition for a *writ of certiorari* with the United States Supreme Court in the hope that Plaintiffs may finally be afforded the opportunity to prove at trial, their claims that the mis-classification of cannabis under the CSA violates their rights under the United States Constitution.*

If you have any additional questions, please do not hesitate to contact us.

Respectfully submitted,

Michael S. Hiller (MH 9871)

MSH:me
c: Benjamin H. Torrance, Esq.
Samuel Dolinger, Esq.
Joseph A. Bondy, Esq.

*Notably, the District Court, on September 8, 2019, initially: (i) granted our request for a prompt trial on Plaintiffs' claims that the mis-classification of cannabis violates the U.S. Constitution, prioritizing the resolution of this action over all the District Court Judge's other cases, including criminal matters (Tr. at 61, Ex. 1); and (ii) denied defendants' motion to dismiss (Tr. at 57, Ex. 1). However, the District Court subsequently reversed itself on both issues.

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MARVIN WASHINGTON,

Plaintiff,

v.

JEFFERSON BEAUREGARD SESSIONS, III, *et al.*,

Defendants.

----------x

New York, N.Y.

17 Civ. 5625 (AKH)

September 8, 2017
12:10 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

evidence or empirical data, Beach Communications v. FCC, a Supreme Court case, and instead the burden is on the plaintiff to present all of the necessary evidence to attack the legislative arrangement to negative --

THE COURT: The plaintiff has done that amply. There is a need now to cross-examine and examine on all the issues that are relevant and to understand better the context of which things are done.

MR. DOLINGER: May we have the opportunity to brief?

THE COURT: What?

MR. DOLINGER: To send letter briefs to the Court on this issue, your Honor?

THE COURT: No. We are going to go into the facts. We are going to develop a record. This case will go up to the Second Circuit and the Second Circuit is entitled to a full record on the matter.

MR. DOLINGER: Respectfully, your Honor, we believe that the only record that is required is the allegations of the complaint which will be accepted as true for purposes of the Rule 12 motion.

THE COURT: Your motion is denied.

MR. DOLINGER: Thank you, your Honor.

MR. HILLER: If I may -- may I confer with opposing counsel, briefly, just on the issue of discovery? Because we talked about it previously and defendants were not willing to

protective order, aren't you?

MR. DOLINGER: If your Honor will permit I guess we will, your Honor.

THE COURT: Well, I don't have any choice. It is your decision to make. If you think that some of the witnesses that the plaintiff wants are not appropriate to be witnesses, you will make a motion for protective order.

MR. DOLINGER: Thank you, your Honor.

THE COURT: Or what may be more efficacious, you present your respective views in a letter addressed to me under Rule 2E and I will give you a ruling which will cut down, enormously, on the time.

MR. DOLINGER: We will, your Honor. Thank you.

THE COURT: It may be our ambition to have this done in months will not be able to be satisfied. I will give you time and my prioritized attention so there will no delay in the point of view of the Court. Rule 65 requires me to give this priority over all other matters except like matters and I have no like matters at the time, so you take priority even over criminal cases.

MR. DOLINGER: Thank you, your Honor.

THE COURT: All right.

Anything else? So, you give me a letter on Monday, if you can. If not, you will tell me. If not, you have to call up somebody and say we need another couple days.