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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF CALIFORNIA

9 UNITED STATES OF AMERICA,) Case No. 2:11-CR-449-KJM
)
10 Plaintiff,) JOINT STATEMENT REGARDING
) EVIDENTIARY HEARING
11 v.)
) Date: August 18, 2014
12 BRYAN SCHWEDER, et al.,) Time: 9:00 am
) Judge: Hon. Kimberly J. Mueller
13 Defendants.)
)
14)
15)

16 Pursuant to this Court’s May 23, 2014, Order (Dkt. No. 294), the parties hereby submit this
17 joint statement in advance of the August 18, 2014, pre-evidentiary hearing confirmation
18 proceeding.¹

19 **I. Scope of Hearing**

20 As described below, the parties disagree on the scope of the hearing, and ask the Court to
21 resolve this issue at the scheduled pre-evidentiary confirmation hearing.

22 **A. Plaintiff’s Position:**

23 In the Court’s April 22, 2014, Order (Dkt. No. 271) the Court stated that there was
24 scientific and medical information raising contested issues of fact regarding whether the
25 continued inclusion of marijuana as a Schedule I controlled substance in Title 21 of the
26 federal statutes passes constitutional muster. The evidentiary hearing is granted to
probe the scientific and medical information.

27
28 ¹ The United States continues to protest the evidentiary hearing on the grounds that the Court lacks jurisdiction to
proceed (*see* 21 U.S.C. § 877) and that Defendants lack standing to raise these arguments for the reasons set forth in
the United States’ previous briefing in this matter.

1 *Id.* at 3:10-14. It is the United States' position, therefore, that the evidentiary hearing is limited to the
2 medical and scientific information regarding Marijuana's continued status as a Schedule I controlled
3 substance. Otherwise, the United States believes that this hearing will be unmanageable and that, absent
4 clear direction from this Court, valuable witness time will be lost to frequent objection and argument as
5 the parties and the Court grapple with, and argue over, the purpose and scope of the hearing.

6 **B. Defendants' Position:**

7 The defense understands that the evidentiary hearing was granted as to all proffered evidence
8 which tends to prove that the classification of marijuana as a schedule I controlled substance has no
9 rational basis, and violates Equal Protection and/or equal sovereignty principles. The defense further
10 understands that this Court has tentatively ruled that it does not see the need for live testimony on the
11 equal sovereignty questions; however, it will consider any proffers on this issue. (Dkt. 295 page 10
12 and 13-14). This understanding is predicated on the Court's order granting the request for an
13 evidentiary hearing on both the Equal Protection and Equal Sovereignty grounds on March 19, 2014,
14 (Dkt. # 258, p. 14 lines 10-18), the Court's denial of the United States' Motion for Reconsideration on
15 April 16, 2014, (Dkt #275) and tentative rulings made by this Court at the May 21, 2014 hearing (Dkt.
16 #295). The defense believes this issue will be resolved by rulings made by this Court on the motions
17 in limine, and separate briefing on the issue is not necessary.

18 **II. The Time Each Side Requests to Present Evidence**

19 Each party has filed "declarations that will serve as direct testimony." (Dkt. No. 294 at 1:22-24).

20 The defense has offered seven witnesses. Jennie Storms (mother of a child with seizure
21 disorder) and Ryan Begin (injured Iraqi war veteran) are not offered as expert witnesses. Five
22 defense witnesses are offered as experts under Rule 702: Dr. Philip A. Denney, M.D., Gregory
23 Carter, M.D., Carl Hart, Ph.D, Christopher Conrad, and James Nolan III, Ph.D. The United plans to
24 move to exclude Stormes, Begin, Conrad, and Nolan. In the event they are not excluded, the United
25 States does not plan to cross-examine Stormes, Begin, or Conrad. Thus, the parties suggest that 16
26 hours (approximately two days) should be sufficient for cross-examination, any re-direct, and any re-
27 cross examination of Defendant's four experts.

28 The United States offers one expert: Bertha Madras, Ph.D. The parties did not reach

1 agreement on the time for examining the United States' expert. The United States prefers one day of
2 testimony consisting of five hours of cross and the remainder as redirect/re-cross. The defense
3 prefers two days of testimony consisting of cross and the remainder as redirect/re-cross.

4 In addition, the United States does not believe that it is appropriate to have live testimony
5 from the witnesses who have been designated by Defendants but whom the United States is not
6 going to cross-examine (Stormes, Begin, and Conrad). Their direct testimony has already been
7 offered and, without cross-examination, there is no need for re-direct or further testimony.
8 Defendants wish to have such witnesses offer limited live testimony, sufficient to enable this Court
9 to evaluate the credibility of these witnesses based on all relevant factors, including demeanor (*See*
10 *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985); *see also* 9th Circuit Criminal
11 Jury Instruction 1.7).

12 **III. The Exhibits Each Side Proposes to Introduce**

13 The parties are still preparing further exhibits to introduce at the evidentiary hearing. Exhibits
14 will likely consist mostly of government documents, the majority of which have been submitted as
15 exhibits to the various pleadings already filed in this matter. Defendants may also introduce scientific
16 studies, depending on the cross-examination of the United States' witness. Depending on the
17 information Defendants introduce, the United States may offer the entire Administrative Record from
18 the Drug Enforcement Administration's 2011 decision to deny a petition to re-schedule marijuana, as
19 well as selected other studies.

20 **IV. Any Stipulations**

21 The parties have reached the following stipulations:

22 1. Statements contained within the experts' declarations which are phrased as factual,
23 are predicated on the witness' opinion, and therefore, are subject to challenge without the need to file
24 a *Daubert* or other *in limine* motion as to each such statement. No party waives any right to
25 challenge any such statement.

26 2. The parties stipulate to authenticity and foundation for official government
27 documents and official Congressional hearing transcripts, but reserve all other objections including
28 but not limited to relevance and hearsay.

1 3. Witnesses need not be excluded from the courtroom during the hearing.

2 **V. Proposed Dates for the Hearing**

3 After coordinating dates with the Court's Clerk, the parties suggest cross-examination of the
4 Defendants' witnesses on October 14 and 27, 2014 and cross-examination of the United States'
5 witness on October 28, 2014. The United States' expert is available on each of these days. Defense
6 counsel has confirmed availability of five of their seven witnesses (Denney, Hart, Nolan, Conrad,
7 and Begin), and is awaiting confirmation from the other two (Carter and Stormes).

8 Defendants do not believe that three days will be sufficient. If these dates are unavailable or
9 insufficient to complete testimony, Defense counsel is scheduled to begin a trial November 10, 2014,
10 in the District of Minnesota, and the trial is expected to take at least two weeks.

11 **VI. Other Matters**

12 **A. Motions to Exclude/Strike Witnesses Declarations and Testimony**

13 Prior to the scheduled status conference, the United States will be filing motions to strike
14 some or all of three of the defense declarations and to exclude several of the defense witnesses. The
15 analysis of those motions depends, in part, on how the Court defines the scope of the hearing. It
16 would be useful for planning and preparation purposes to have the Court's rulings on those motions
17 well in advance of the evidentiary hearing.

18 The defense will also be moving to strike portions of the United States' expert witness
19 testimony.

20 **B. Pre-Hearing Briefing**

21 The parties believe that it would assist the Court and counsel for each side to provide an
22 evidentiary hearing statement addressing anticipated evidentiary and legal issues, similar to a trial
23 brief, 14 days prior to beginning of the evidentiary hearing.

24 DATED: August 8, 2013

BENJAMIN B. WAGNER
United States Attorney

26 By: /s/ Gregory T. Broderick
27 GREGORY T. BRODERICK
Assistant United States Attorney

28 DATED: August 8, 2013

By: /s/ Zenia K. Gilg

ZENIA K. GILG
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