UNITED STATES DEPARTMENT OF JUSTICE

DRUG ENFORCEMENT ADMINISTRATION

In the Matter of **Scheduling of Controlled Substances: Proposed Rescheduling of Marijuana**	**DEA Docket No. 1362** **Hearing Docket No. 24-44** CHIEF ADMINISTRATIVE LAW JUDGE JOHN J. MULROONEY, II

GOVERNMENT OPPOSITION TO HEMP FOR VICTORY AND VILLAGE FARMS INTERNATIONAL'S JOINT MOTION REQUESTING SUPPLEMENTATION OF THE RECORD AND DISQUALIFICATION AND REMOVAL OF DEA FROM THE ROLE OF PROPONENT OF THE RULE IN THESE PROCEEDINGS

The United States Department of Justice (DOJ), Drug Enforcement Administration (Government or DEA), by and through the undersigned attorney, hereby responds to Hemp for Victory (HFV) and Village Farms International's (VFI) (collectively, the Movants) Joint Motion Requesting Supplementation of the Record and Disqualification and Removal of DEA from the Role of Proponent of the Rule in These Proceedings (Motion). DEA respectfully requests the Chief Administrative Law Judge deny the Motion.

PROCEDURAL BACKGROUND

On May 21, 2024, DOJ through the DEA issued a Notice of Proposed Rulemaking (NPRM) in the Federal Register proposing to transfer marijuana from schedule I of the Controlled Substances Act (CSA) to schedule III of the CSA. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 44597, 44597 (2024). In the NPRM, the Attorney General specified that "[t]he decision whether an in-person hearing will be needed to address such matters of fact and law in the rulemaking will be made by the Administrator of

DEA. Upon the Administrator's determination to grant an in-person hearing, DEA will publish a notice of hearing on the proposed rulemaking in the Federal Register." *Id.* at 44598.

On August 29, 2024, DEA issued a General Notice of Hearing (GNoH) in the Federal Register regarding the marijuana NPRM, instructing interested persons desiring to participate in the hearing to provide written notice on or before September 30, 2024. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 70148, 70148 (2024). The DEA Administrator specified in the GNoH that after requests to participate were received she would "assess the notices submitted and make a determination of participants." *Id.* at 70149.

On October 29, 2024, two letters from the DEA Administrator were delivered to the DEA Office of Administrative Law Judges. Prelim. Ord., at 2. The first letter (the Participant Letter or PL) designated a list of twenty-five participants for the marijuana scheduling hearing. *Id.* The second letter (the Livestream Letter or LSL) directed the utilization of livestreaming throughout the hearing process. Prelim. Ord., at 2.

On October 31, 2024, this tribunal issued a Preliminary Order directing the Government to file a notice of appearance for its counsel of record and to disclose any known conflicts of interest by 2:00 P.M. on November 12, 2024. Prelim. Ord. at 3-4.

On November 12, 2024, DEA filed a notice of appearance identifying James J. Schwartz, Jarrett T. Lonich, and S. Taylor Johnston as counsel of record and affirming that there are no known conflicts of interest requiring disclosure.

On November 18, 2024, the Movants filed a Motion requesting supplementation of the record and disqualification and removal of the DEA from the role of Proponent of the Rule in these proceedings. In their Motion, the Movants alleged that the Administrator's designation of participants was unlawful (Motion at 13), that DEA engaged in unlawful communications with

designated party Smart Approaches to Marijuana (SAM) (Motion at 16), that the DEA may not serve as the proponent of the rule in this proceeding (Motion at 19), and that the DEA is compromised and should be barred from further participation in this proceeding (Motion at 22). The Movants specifically requested that DOJ or the Movants replace DEA as the proponent of the NPRM, and that the record include all requests for hearing and/or participation in these proceedings filed with DEA, a record of the decisions made by the Administrator regarding why certain parties were designated as participants and others were not, and any *ex parte* communications between DEA and third parties. (Motion at 22-23). Finally, the Movants asked that this tribunal order SAM and DEA to preserve all records.

On November 20, 2024, this tribunal issued an order directing the DEA to respond to the Motion and its integral allegations, if it chooses to do so, no later than 2:00 P.M. EST on November 25, 2024. Briefing Order, at 3.

ARGUMENT

A. DEA has not engaged in any *ex parte* communications

Movants argue that DEA has engaged in unlawful communications with SAM that require disclosure. (Motion at 16). Specifically, Movants cite social media posts appearing to be made by President and CEO of SAM, Dr. Kevin Sabet, in which Dr. Sabet claims that his personal confidential sources inside DEA and sources outside DEA informed him that the Attorney General signed the NPRM instead of the DEA Administrator. (Motion at 7). The cited posts appear to be authored on May 6, 2024, and May 16, 2024. (Motion at 7). In light of this, and other arguments, Movants have requested this tribunal not allow DEA to serve as the proponent of the rule.

I. Legal Standard

These proceedings are governed by the Rules of the Attorney General in accordance with the Administrative Procedures Act (APA). 21 U.S.C. § 811(a). As acknowledged by the Court in its Briefing Order, allegations of *ex parte* communications are serious. Briefing Ord. at 2. However, to merit a legitimate inquiry, the alleged communication must actually be an *ex parte* communication. Despite the interesting story told by Movants in their motion, nothing contained therein merits inquiry.

The APA prohibits any *ex parte* communication between any "interested person" and "any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding." 5 U.S.C. § 557(d)(1)(A). In order to constitute a prohibited *ex parte* communication, the communication must be "relevant to the merits of the proceeding." *Id.*

> [T]the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

5 U.S.C. 557(d)(1)(E). Additionally, the participants in a hearing under these rules must conduct themselves "in accordance with judicial standards of practice and ethics and the directions of the presiding office." 21 C.F.R. § 1316.51(b). Any *ex parte* communications "concerning any substantive matter which is the subject of a hearing" made to an official of the Administration "at any time after the date on which the proceedings commence" is required to be disclosed. *Id.* at 1316.51(c).

II. Argument

As an initial matter, undersigned counsel unequivocally denies any and all allegations of *ex parte* communications. DEA counsel of record have not engaged in any *ex parte* communications with any interested person about the merits of the present proceeding.

Looking at the substance of Movants' claims, even when taken at face value, the Movants' own evidence fails to demonstrate that any unlawful *ex parte* communication took place. First, the posts cited by Movants do not claim communication from or with anyone "who is or may reasonably expected to be involved in the decisional process of the proceeding." 5 U.S.C. § 557(d)(1)(B). Second, the alleged communications demonstrate only that Dr. Sabet apparently knew the DEA Administrator was not signing the NPRM. Accepting *arguendo* that someone disclosed that information to Dr. Sabet, that information is not "relevant to the merits of the proceeding." 5 U.S.C. 557(d)(1)(B). Third, Movants have offered no evidence that DEA counsel have engaged in any *ex parte* communication regarding this proceeding.

The Movants would have this tribunal embark on a fishing expedition in search of evidence to support these sweeping, unsupported claims, which at best can be categorized as gossip, not *ex parte* communications. (Motion at 18, 22-23). The tribunal correctly questions the seriousness of the remedies sought by the Movants and as such, should deny the motion.

B. The Movants Arguments that the Administrator's Designation of Participants was unlawful, that the DEA is compromised and may not serve as proponent of the rule, and that the DEA should be barred from further participation in these proceedings are completely without merit

The Movants further argue that the DEA Administrator's designation of participants for this proceeding was unlawful. (Motion at 13), that the DEA may not serve as the proponent of the rule in this proceeding (Motion at 19), and that the DEA is compromised and should be barred from further participation in this proceeding (Motion at 22). The tribunal correctly

questions whether these arguments and the remedies sought may be characterized as "unserious." Briefing Ord. at 2. The Movants fail to identify any precedent that would support removing an agency from its own rulemaking process. In fact, neither 5 U.S.C. § 556(c) nor 21 C.F.R. § 1316.52 give the Tribunal the authority to disqualify the DEA. The only authority cited by the Movants on this point simply supports the notion that specific individuals may be removed from the proceeding under the appropriate circumstances. *See, e.g., Alaska Factory Trawler Asso. v. Baldridge*, 831 F.2d 1456, 1467 (9th Cir. 1987) (in which the plaintiffs challenged the participation of a specific individual in the review process). To the extent that the Movants are challenging the decisions of the DEA Administrator, they either lack standing to do so or have asserted their claims in the wrong forum. *See* 21 U.S.C. § 877 (providing judicial review of final agency actions); 5 U.S.C. § 701, *et. seq.*

In short, the Movants' arguments are completely without merit.

CONCLUSION

WHEREFORE, the Government respectfully requests that the tribunal deny Hemp for Victory and Village Farms International's Joint Motion requesting supplementation of the record and disqualification and removal of DEA from the role of Proponent of the Rule in these proceedings.

Dated: November 25, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2024, I electronically submitted the foregoing Government's Notice of Appearance to the DEA Office of Administrative Law Judges via the DEA Judicial Mailbox, at ECF-DEA@dea.gov, and to caused a copy to be delivered to the following recipients: Shane Pennington for Village Farms International, via email at spennington@porterwright.com; Aaron Smith for National Cannabis Industry Association, via email at aaron@thecannabisindustry.org and michelle@thecannabisindustry.org; John Jones for Cannabis Bioscience International Holdings, via email at ir@cbih.net; Robert Head for Hemp for Victory, via email at robert@bluecordfarms.com; Erin Gorman Kirk for the State of Connecticut, via email at erin.kirk@ct.gov; mzorn@yettercoleman.com; Ellen Brown for Massachusetts Cannabis Advisory Board, via email at ellen@greenpathtraining.com; Shanetha Lewis for Veterans Initiative 22, via email at info@veteransinitiative22.com; Jason Castro for The Doc App. Dba, My Florida Green, via email at jasoncastro@myfloridagreen.com; Katy Green for The Commonwealth Project, via email at kag@platinumadvisors.com; Ari Kirshenbaum for Saint Michael's College, via email at mslade@cannabispublicpolicyconsulting.com; Jo McGuire for National Drug and Alcohol Screening Association, via email at jomcguire@ndasa.com; Patrick Philbin for Smart Approaches to Marijuana, via email at pphilbin@torridonlaw.com; Roneet Lev for International Academy on the Science and Impact of Cannabis, via email at roneetlev@gmail.com; David Evans for Cannabis Industry Victims Educating Litigators, via email at thinkon908@aol.com; Kenneth Finn, via email at kfinn@springsrehab.net; Jennifer Homendy for National Transportation Safety Board, via email at executivesecretariat@ntsb.gov and correspondence@ntsb.gov; Phillip Drum, via email at phillipdrum@comcast.net; Attorney General Mike Hilgers for the State of Nebraska, via email at zachary.viglianco@nebraska.gov; International Association of Chiefs of Police, via email at voegtlin@theiacp.org; Drug Enforcement Association of Federal Narcotics Agents, via email at marshallfisher@rocketmail.com; Sue Thau for Community Anti-Drug Coalitions of America, via email at cdoarn@cadca.org; Tennessee Bureau of Investigation, via email at kim.litman@tbi.tn.gov.

James J. Schwartz

Dated: November 25, 2024 James J. Schwartz