UNITED STATES DEPARTMENT OF JUSTICE

Drug Enforcement Administration

In the Matter of **Schedules of Controlled Substances: Proposed Rescheduling of Marijuana**	**DEA Docket No. 1362** **Hearing Docket No. 24-44**

ORDER REGARDING JOINT *EX PARTE* MOTION

These are hearing proceedings instituted in connection with a notice of proposed rulemaking (NPRM) seeking to reschedule marijuana from Schedule I of the Controlled Substances Act (CSA) to Schedule III. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 44597, 44597 (2024). The NPRM was issued by the Department of Justice (the Department), signed by the Attorney General on May 16, 2024, and published in the Federal Register on May 21, 2024. *Id.* at 44622. Although the NPRM originated with the Department, on August 29, 2024, the Drug Enforcement Administration (DEA) Administrator issued and published a subsequent notice (General Notice of Hearing or GNoH) related to the proposed rescheduling in the Federal Register, which, *inter alia*, determined that a hearing was appropriate and fixed a December 2, 2024 commencement date at the DEA Hearing Facility. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 70148, 70148-49 (2024). The Administrator sent a letter to the undersigned on October 29, 2024 designating the persons and organizations she ruled would be permitted to participate in these proceedings (Designated Participants or DPs).[1] On November 19, 2024, this tribunal issued an order (the Standing Order) regarding standing considerations concerning the DPs.

On November 18, 2024, Hemp for Victory and Village Farms International, Inc. (collectively, the Movants), both of whom are DPs, jointly filed a motion with this tribunal bearing the caption "Joint Motion Requesting Supplementation of the Record and Disqualification and Removal of DEA from the Role of Proponent of the Rule in these

[1] It appears that the DPs were notified of their selection via some manner of email communication. This forum has not been supplied with any such communications or any documentation from the pool of those selected and unselected, and is unaware of the criteria employed.

Proceedings" (the *Ex Parte* Motion or EPM). The *Ex Parte* Motion alleges, *inter alia*, that there have been improper *ex parte* communications between Dr. Kevin Sabet, President and CEO of Smart Approaches to Marijuana (SAM), also a DP, and officials at the Drug Enforcement Administration. EPM at 7-11, 22-23. Purported social media posts from Dr. Sabet are embedded into the *Ex Parte* Motion and proffered by HFV and VFI as his admissions that these communications took place. *Id.* at 7-9. Based on these allegations, the EPM seeks an order from this tribunal unilaterally removing the DEA and its Administrator as the sponsor and proponent of the proposed rescheduling action. *Id.* at 22. Other relief regarding supplementation of the record and orders directing some other specified Designated Participants to preserve some unspecified records are also included in the relief sought by the Movants.[2] *Id.* at 18, 22-23.

It is helpful to acknowledge that the authority of an Administrative Law Judge (ALJ) in an administrative hearing is authorized and circumscribed by the Administrative Procedure Act (APA). 5 U.S.C. § 556(c). The authority and enumerated powers vested by the APA in the Administrative Law Judge flow "without the necessity of express agency delegation [and] an agency is without power to withhold such powers from [the ALJ]." *Attorney General's Manual on the Administrative Procedure Act* 7(b) (1947). The APA affords the ALJ at an administrative hearing plenary control over the course of the hearing and specified prehearing procedures, as well as authority to "take other action authorized by agency rule consistent with this subchapter." 5 U.S.C § 556(c)(11).

There is no question that the allegations raised by the EPM are distasteful and arguably unhelpful to the public's perception that the proceedings will be transparent. That said, this tribunal is without authority to grant the supplementation and removal relief sought (the only relief sought) by the Movants. Accordingly, the Movant's *Ex Parte* Motion must be, and herein is, **DENIED**.

However, in view of the nature of the allegations, the denial of the EPM does not finish the job. The Government and the Designated Participant (SAM) accused of engaging in, facilitating, and/or countenancing the *ex parte* communications at issue here were provided by this tribunal with the opportunity to answer the *ex parte* allegations. Both availed themselves of that opportunity and timely filed their respective oppositions.

[2] No authority or vehicles to support this relief were suggested or requested in the EPM.

As a starting point, the APA provides that "no . . . employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding[.]" 5 U.S.C. § 557(d)(1)(B). Congress has further directed that any employee involved in the adjudication process, "who receives, or who makes or knowingly causes to be made" such an improper *ex parte* communication is required to place on the public record of the proceeding:

> (i) all such written communications; (ii) memoranda stating the substance of such oral communications; and (iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph[.]

Id. at § 557(d)(1)(C). The implementing regulations of the Controlled Substances Act similarly provide the following directive:

> [i]f any official of the Administration is contacted by any individual in private or public life concerning any substantive matter which is the subject of any hearing, at any time after the date on which the proceedings commence, the official who is contacted shall prepare a memorandum setting forth the substance of the conversation and shall file this memorandum in the appropriate public docket file.

21 C.F.R. § 1316.51(c).

The *ex parte* contact prohibitions temporally apply as follows:

> [B]eginning 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) (emphasis supplied). The APA further directs that:

> [N]o interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency … or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding[.]

Id. at § 557(d)(1)(A). An "'ex parte communication' means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by [the APA]." *Id.* at § 551(14).

The Government's response (Government EPM Response or GEPMR) to the *Ex Parte* Motion contains bold declarations that the "DEA has not engaged in any *ex parte* communications" and that it "unequivocally denies any and all allegations of *ex parte* communications." GEPMR at 3, 5. Regrettably, these seemingly courageous proclamations are quickly all but eviscerated by the Government's surprising qualification that this proclamation of innocence extends only to the "DEA counsel of record"[3] at the time the GEPMR was filed, none of whom apparently had any contact with the matter at the time of the alleged *ex parte* communications.[4] *Id.* at 2. Thus, the Government defended against an allegation that was never actually leveled, and never dealt with the true gravamen of the factual allegations of the EPM. Stated differently, the Government responded to an allegation that it created, not the one that was in issue.

As discussed, *supra*, the applicable APA provisions are not so slender or lacking in common sense as to limit their applicability to a Government trial team who was never alleged to have made the communication in the first place. In its peculiar, semi-blanket denial, the Government did not happen to address staff members who actually may have made the purported communication, or those who may have been advising the Administrator at the time she was making decisions about whether there would be a rescheduling action, and who (if anyone) would sign the NPRM. The APA *ex parte* prohibitions are sufficiently robust to extend to any "employee who is or may reasonably be expected to be involved in the decisional process of the proceeding[s.]" 5 U.S.C. § 557(d)(1)(A)-(C). The applicable time period covers the earliest of when proceedings are noticed (here May 21, 2024) or when the communicator had knowledge that it would be noticed. *Id.* at § 557(d)(1)(E). It would be disingenuous to suggest that the decision to issue the NPRM was made on the date it was signed by the Attorney General, with no input from DEA, the subordinate agency that is the repository of all the authority to act under the Controlled Substances Act.

The Government also highlighted weaknesses it perceives in the drafting of the *Ex Parte* Motion. The Government proffers that the Movants have not sufficiently alleged that the alleged communications related to the merits of the proceeding and/or whether Dr. Sabet's (apparently

[3] GEPMR at 5.
[4] As acknowledged by the Government in its GEPMR, Government counsel did not file a notice of appearance until November 12, 2024. GEPMR at 2. Yesterday, the Government filed another notice of appearance expanding the litigation team assigned to this matter.

reliable inside source) was a person involved in the Agency adjudication. GEPMR at 5-6. Secrecy and deniability are doubtless advantages to *ex parte* communications when they occur. While the EPM may have weaknesses in this regard, there is likewise no indication in its GEPMR that the Government has made even the mildest attempt to ascertain the truth and disclose it to the public and this tribunal.

SAM also timely filed a response (SAM Opposition). On multiple occasions throughout its Opposition, SAM argues that the earliest date the *ex parte* prohibitions could possibly apply would be the date of NPRM's publication in the Federal Register. SAM Opp. at 3-5, 11. Not so. This argument misleadingly omits from its analysis that portion of the relevant APA section that incorporates the critical qualifier "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); *see* SAM Opp. at 4. As discussed, *supra*, it would defy reason to suggest that Dr. Sabet and whoever in the DEA he may have spoken to were not aware that decisions in this matter were imminent. Such decisions would include not only whether the DEA Administrator intended to sign and support the goal of the NPRM, but also, who would be ultimately identified as a Designated Participant (or at least, what criteria would be used in reaching that determination).

SAM also argues that the obligations set forth in the CSA's implementing regulations regarding *ex parte* communications have no application because they allegedly occurred prior to "the date on which the proceedings commence." SAM Opp. at 6 (citing 21 C.F.R. § 1316.51(c)). By SAM's reckoning even if a prospective party to a rulemaking proceeding were to spend hours advocating its position to the decider on the day before publication in the Federal Register, that public servant (who would clearly have had knowledge of the publication[5]) would have no obligation to reveal that to a soul; not to the public, not to the parties who were not invited, not to the administrative record, and certainly not to any reviewing courts. This indeed would be a very restrictive view of the ethical obligations of a public servant, and perhaps less transparency than the public might expect from its government.[6]

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[5] 5 U.S.C. § 557(d)(1)(E).

[6] It is not necessary to resolve this issue in this order, but SAM's argument that by its terms, 21 C.F.R. § 1316.51(c) has no application to the issues presented here because it occurred before the publication of the NPRM may be asking too much of that regulation. If the responding parties do not deny that such a communication took place (which they apparently do not), the purported chatty employee(s) would have borne the obligation to prepare a memorandum about the event if the conversation occurred within the relevant timeframe. The issue is when the

Like the Government, in its Opposition, SAM also claims that even if the purported communications did occur, they would be immune from consequences because it cannot be discerned whether those communications related to the merits. SAM Opp. at 7-8. To be sure, in fashioning the APA, Congress set its sights on communications that could affect the way a given case is decided, and specifically (and reasonably) excluded were requests for status reports. *Raz Inland Navigation Co., Inc. v. ICC*, 625 F.2d 258, 260-61 (9th Cir. 1980). The courts have found no prejudice in cases where the evidence reveals that the *ex parte* communications in question did not relate to the merits. *Louisiana Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1111 (D.C. Cir. 1982); *PATCO v. FLRA*, 685 F.2d 547, 600 (D.C. Cir. 1982). That said, as is often the case with secret communications, by design the act of shielding the contents from others inhibits the ability to discover their contents. There is no context as to the conversation surrounding Dr. Sabet's social media announcements regarding his "two confidential sources inside [the] DEA," or why those sources would be close enough to the Administrator to render their obvious violations of her confidence to be deemed reliable. EPM at 7. It is also challenging to interpret the comments Dr. Sabet allegedly posted as a status check. Likewise requiring some level of creativity is reconciling SAM's argument that rescheduling proceedings had not commenced with its current position that Dr. Sabet was performing a status check. Stated differently, if there were no proceedings yet in existence, what would Dr. Sabet have been checking the status of? SAM dismisses the allegation essentially on the basis that others (including some who publicly favor the NPRM) were equally loquacious on social media. SAM Opp. at 8-11. An inescapable point here is that (unlike SAM) none of those others are DPs in this case, and based on the motion practice to date, many of those not selected to participate do not seem to have an understanding as to why that is true.[7]

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relevant timeframe commences. The language of this provision is broad and even extends the duty to report contacts beyond those involved in the decisionmaking process (something the Agency could do by regulation). The expansive opening language of that provision dictates that it applies to "any official of the Administration [who] is contacted by any individual in private or public life concerning any substantive matter which is the subject of any hearing." *Id.* It would be a heavier lift to argue that the Agency, by the mere promulgation of a regulation, had the authority to constrict the applicability of Congress's determination that the relevant timeframe for prohibited contacts commences when the communicants have "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). Contracting the breadth of Congress's relevant timeframe is perhaps something a regulation could not do. In any event, no memorialization memo has been introduced or referenced, and (more importantly) a disposition of the current issue does not require a determination in this regard.

[7] 5 U.S.C. § 555(e); *Attorney General's Manual on the Administrative Procedure Act* § 6(d).

The Movants did not ask for SAM to be excluded from the proceedings. EPM at 22-23. Thus, the sole remaining issue here is whether to *sua sponte* issue a show cause order to SAM and the Government in accordance with 5 U.S.C. § 557(d)(1)(D). As unappetizing as this whole misadventure appears, the remedy test for improper *ex parte* communications is whether the communication materially affected or will affect the way a given case is or has yet been decided.[8] *Raz Inland Navigation*, 625 F.2d at 260-62. Dr. Sabet (for whatever his reasons were) elected to alert the world through social media that he was receiving privileged information from those close to Agency leadership. When he told the world, he also told the Movants. The Movants knew about Dr. Sabet's online bragging before these proceedings began. At this juncture, this question hinges on "whether, as a result of improper *ex parte* communications, the agency's decisionmaking process [has been or would be] irrevocably tainted so as to make the *ultimate judgment* of the agency unfair, either to an innocent party or to the public interest that the agency [is] obligated to protect." *PATCO*, 685 F.2d at 564-65 (emphasis supplied). Here, because I have concluded that, at least based on the papers I have, there is insufficient basis to support such a conclusion, even if every fact alleged in the EPM were assumed *arguendo*[9] to be accurate, no order to show cause will issue.

Dated: November 27, 2024

JOHN J. MULROONEY, II
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on November 27, 2024 caused a copy of the foregoing to be delivered to the following recipients: (1) Julie L. Hamilton, Esq., Counsel for the Government, via email at julie.l.hamilton@dea.gov; James J. Schwartz, Esq., Counsel for the Government, via email at james.j.schwartz@dea.gov; Jarrett T. Lonich, Esq., Counsel for the Government, via email at jarrett.t.lonich@dea.gov; and S. Taylor Johnston, Esq., Counsel for the Government, via email at stephen.t.johnston@dea.gov; (2) the DEA Government Mailbox, via email at dea.registration.litigation@dea.gov; (3) Shane Pennington, Esq., Counsel for Village

[8] These guideposts have also been applied in evaluations of *ex parte* communications in informal rulemaking proceedings. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977); *Sangamon Val. Television Corp. v. United States*, 269 F.2d 221, 224-25 (D.C. Cir. 1959).

[9] It is noteworthy that neither of the responding parties denied that the purported *ex parte* communications took place, and neither provided the record (or the public) with the identities of the Government side of the equation or any details that would have at least aided in achieving some level of transparency regarding this issue.

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