

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**

**BRIEFING ORDER REGARDING HEMP FOR VICTORY AND
VILLAGE FARMS INTERNATIONAL'S JOINT MOTION FOR AGENCY
DISQUALIFICATION AND RECORD SUPPLEMENTATION**

On November 18, 2024, Hemp for Victory (HFV) and Village Farms International, Inc. (VFI) (collectively, the Movants) 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 Proceedings” (the Motion or Mot.). The Motion was filed as part of the ongoing prehearing proceedings in this proposed marijuana rescheduling action initiated by the United States Department of Justice (DOJ) through the Drug Enforcement Administration (DEA or the Agency). *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 44597, 44597 (2024).

Through its Motion, the Movants petition generally for this tribunal to unilaterally remove the DEA, its counsels, and its Administrator from the Administrative Procedure Act (APA) rescheduling process, based on the proposition that the Agency (one or all of those listed parts) engaged in *ex parte* communications regarding the merits of the proposed rescheduling. Mot. at 1, 22-23. 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.¹ *Id.* at 18, 22-23.

As a starting point, it is worth reminding all concerned that the authority of an Administrative Law Judge at administrative hearings is authorized and circumscribed by the Administrative Procedure Act. 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

¹ No authority or vehicles to support this relief were suggested or requested in the Motion.

delegation [and] an agency is without power to withhold such powers from [the Administrative Law Judge]." *Attorney General's Manual on the Administrative Procedure Act* 7(b) (1947). The APA affords the presiding officer at an administrative hearing significant 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). Given that there is no specifically-enumerated authority to remove the Agency head and its attorneys from the process, it is likely (and not just a little likely) that any order from this seat purporting to do so would quickly (and correctly) be deemed *ultra vires*. That said, this tribunal does retain sufficient authority and independence to tender recommendations to the Administrator, no matter what discomfiture those recommendations may inflict upon the Agency or its Leadership.

While deciding nothing at this juncture, that aspect of the Motion's request that one of the Movants supplant the Agency as the proponent of the NPRM may arguably be vulnerable to a characterization of being unserious. The Motion propounds no hint of authority for such an unprecedented action, what control could or should be exercised over that Movant who replaces the Government, or (probably more importantly) what would happen next if this unique request was actually granted. Even if the underlying proposition were momentarily indulged *arguendo*, that the Agency may not (yet?) be convinced about the correctness of the proposed rescheduling action pending a review of the recommended decision, the hearing transcript, and the tens of thousands of comments, the efficacy of proposing a replacement Movant who is absolutely firmly entrenched in the one side of the issue (as opposed to one who may be agnostic on the issue) is not altogether clear from the Motion. But again, nothing is decided here.

On the other side of the coin, the allegations regarding alleged improper *ex parte* communications *are* serious, and the concomitant obligations to memorialize and report such communications set forth in the APA and the regulations are by no means couched in permissive language. 5 U.S.C. § 557(d)(1); 21 C.F.R. § 1316.51(c). Relatedly, the Preliminary Order, *inter alia*, directed the Government and the Designated Participants to disclose known conflicts of interest that may require disclosure. Prelim. Ord. at 3-4.

Accordingly, it is herein **ORDERED**, that should the Government (and only the Government) elect to respond to the Motion and its integral allegations, it may do so **no later than 2:00 P.M. Eastern Time on November 25, 2024.**²

Dated: November 20, 2024

JOHN J. MULROONEY, II
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on November 20, 2024 caused a copy of the foregoing to be delivered to the following recipients: (1) 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 Farms International, via email at spennington@porterwright.com; and Tristan Cavanaugh, Esq., Counsel for Village Farms International, via email at tcavanaugh@porterwright.com; (4) Nikolas S. Komyati, Esq., Counsel for National Cannabis Industry Association, via email at nkomyati@foxrothschild.com; William Bogot, Esq., Counsel for National Cannabis Industry Association, via email at wbogot@foxrothschild.com; and Khurshid Khoja, Esq., Counsel for National Cannabis Industry Association, via email at khurshid@greenbridgelaw.com; (5) John Jones and Dante Picazo for Cannabis Bioscience International Holdings, via email at ir@cbih.net; (6) Andrew J. Kline, Esq., Counsel for Hemp for Victory, AKline@perkinscoie.com; and Abdul Kallon, Esq., Counsel for Hemp for Victory, via email at and AKallon@perkinscoie.com; (7) Erin Gorman Kirk for the State of Connecticut, via email at erin.kirk@ct.gov; (8) Shanetha Lewis for Veterans Initiative 22, via email at info@veteransinitiative22.com; (9) Kelly Fair, Esq., Counsel for The Commonwealth Project, via email at Kelly.Fair@dentons.com; (10) Rafe Petersen, Esq., Counsel for Ari Kirshenbaum, via email at Rafe.Petersen@hkllaw.com; (11) David G. Evans, Esq., Counsel for Cannabis Industry Victims Educating Litigators, Community Anti-Drug Coalitions of America, Phillip Drum, Kenneth Finn, International Academy on the Science and Impacts of Cannabis, and

² The comparatively brief response time is in no small measure due to the timing combination of the Agency's (pithy) Designated Participant Letter (which was delivered to this tribunal fifteen (15) business days ago), juxtaposed against the December 2, 2024 hearing commencement date fixed by the Agency's General Notice of Hearing, which was published in the *Federal Register* on August 29, 2024.

National Drug and Alcohol Screening Association, via email at thinkon908@aol.com; (12) Patrick Philbin, Esq., Counsel for Smart Approaches to Marijuana, via email at pphilbin@torridonlaw.com; and Chase Harrington, Esq., Counsel for Smart Approaches to Marijuana, via email at charrington@torridonlaw.com; (13) Stephanie E. Masker, Esq., Counsel for National Transportation Safety Board, via email at stephanie.masker@ntsb.gov; (14) Eric Hamilton, Esq., Counsel for the State of Nebraska, via email at eric.hamilton@nebraska.gov; and Zachary Viglianco, Esq., for the State of Nebraska, via email at zachary.viglianco@nebraska.gov; (15) Gene Voegtlin for International Association of Chiefs of Police, via email at voegtlin@theiacp.org; (16) Gregory J. Cherundolo for Drug Enforcement Association of Federal Narcotics Agents, via email at executive.director@afna.org; and (17) Reed N. Smith, Esq., Counsel for the Tennessee Bureau of Investigation, via email at Reed.Smith@ag.tn.gov; and Jacob Durst, Esq., Counsel for Tennessee Bureau of Investigation, via email at Jacob.Durst@ag.tn.gov.

Quinn Fox
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