UNITED STATES DEPARTMENT OF JUSTICE

DRUG ENFORCEMENT ADMINISTRATION

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

**GOVERNMENT OPPOSITION TO VILLAGE FARMS INTERNATIONAL, HEMP FOR VICTORY, AND OCO'S JOINT REQUEST FOR RECONSIDERATION IN LIGHT OF NEW EVIDENCE**

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), Village Farms International (VFI), and OCO *et al*.'s (collectively, the Movants) Joint Request for Reconsideration in Light of New Evidence (Request). DEA respectfully requests the Chief Administrative Law Judge deny the Request.

## 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 (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 (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 HFV and VFI 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, they 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). They 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, they 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. Briefing Ord., at 3.

On November 25, 2024, DEA filed an opposition to the motion, denying the allegations of *ex parte* communications and that DEA is compromised and should not be allowed to serve as proponent of the rule.

On November 27, 2024, this Tribunal issued an order denying the motion, explaining that it lacks authority to grant the removal relief sought. *Ex Parte* Ord., at 2.

On January 6, 2025, the Movants[1] filed a Request for Reconsideration in Light of New Evidence. Movants now request that this Tribunal (1) order DEA and all designated parties to immediately disclose any *ex parte* communications relevant to the merits of these proceedings; (2) grant a brief continuance of the merits hearing to permit the parties and this Tribunal to investigate relevant *ex parte* communications; (3) schedule and hold an evidentiary hearing to determine the effect of any *ex parte* contacts; (4) to the extent necessary, permit Movants to conduct limited and targeted discovery regarding *ex parte* communications; (5) make all *ex parte* communications part of the record in these proceedings; (6) direct DEA to declare whether it

[1] OCO *et al.* was not part of the original *ex parte* motion, but has now joined the Movants in the Request for Reconsideration.

supports or opposes the proposed transfer of marijuana from schedule I to schedule III; and (7) if the previously mentioned requests are denied, permit Movants to pursue an immediate interlocutory appeal. (Request at 43). Additionally, Movants request that this Tribunal (8) exclude "DEA's January 2 Exhibit" from the record; (9) remove DEA from its role as proponent of the rule; (10) disqualify DEA under 5 U.S.C. § 556(b); and (11) stay these proceedings until DEA and DOJ address Dr. Harloe's affidavit. (Request at 43-44).

## ARGUMENT

### A. Movants are Again Seeking Relief that Cannot be Granted

This Tribunal explained in its *Ex Parte* Order that it is "without authority to grant the supplementation and removal relief sought (the only relief sought) by the Movants." *Ex Parte* Ord. at 2. Nonetheless, Movants have renewed their request, and now seek the additional relief of various discovery requests, exclusion of evidence noticed by DEA, a continuance, a stay of proceedings, and potentially leave to file an interlocutory appeal. (Request at 43-44). For the same reasons explained in the previous order, this Tribunal should deny Movants' request for reconsideration. To the extent that Movants seek relief not previously requested, this Tribunal should deny the motion for failing to demonstrate good cause for being filed out of time.

### B. Movants have not Demonstrated Good Cause

In its December 4, 2024, Prehearing Ruling, this Tribunal stated that "any further motions must be accompanied by a request to file out of time and supported by a demonstration of good cause that is likely to be narrowly construed." Prehearing Ord. at 8. Movants argue that this Tribunal should reconsider their original request in light of newly discovered evidence. (Request at 4). They also argue that their request, even if considered a new motion, is based on new evidence and satisfies the good cause standard. (Request at 3 n.2). However, the evidence

identified by Movants is either not new and was available to them before they filed the original *ex parte* motion on November 18, 2024, or is otherwise irrelevant to their renewed request.[2]

"Although the Federal Rules of Evidence do not govern DEA administrative hearings, they can provide useful guidance 'where they do not conflict with agency regulations.'" *Houston Maintenance Clinic*, 83 Fed. Reg. 42144, 42159, n.60 (2018) (quoting *Rosalind A. Cropper, M.D.*, 66 Fed. Reg. 41040, 41041 (2001)). Per Federal Rule of Civil Procedure 60(b)(2), a party may seek relief from a final judgment, order, or proceeding based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." "Where a party seeks Rule 59(e) relief to submit additional evidence, the movant must show either that the evidence is newly discovered or if the evidence was available at the time of the decision being challenged, that counsel made a diligent yet unsuccessful effort to discover the evidence." *FDIC v. Arciero*, 741 F.3d 1111, 1117 (2013). Furthermore, "[t]he same standard applies to motions on the ground of newly discovered evidence whether they are made under Rule 59 or Rule 60(b)(2)" *Id.* (quoting 11 Charles A. Wright, et al., Federal Practice and Procedure § 2859, at 387 (2012)). In short, Movants must demonstrate that the evidence they now put forward was not available to them when they filed the first *ex parte* motion despite their diligent efforts to discover it. Here they fail.

Movants point to information contained in the Tennessee Bureau of Investigation (TBI) Notice of Appearance, which was filed on November 12, 2024, to argue that DEA engaged in *ex parte* communication with TBI. However, as Movants acknowledge, this information was

[2] Movants belief that the attachment of an affidavit from Dr. John Harloe provides good cause for their motion is mistaken. (Request at 4-5). Contrary to Movants' assertion, 5 U.S.C. § 556(b) addresses the ability of a presiding employee to file an affidavit of bias when disqualifying himself, not the ability of an individual to allege bias on the part of an agency. *See* 5 U.S.C. § 556(b) ("A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.").

disclosed in TBI's November 12, 2024 filing, six days before the original *ex parte* motion was filed. (Request at 32). Indeed, Movants admit that it was only after this Tribunal denied the original *ex parte* motion that they "reviewed various filings submitted by DPs in these proceedings more closely" and discovered this evidence. (Request at 11). Because this evidence had been provided to Movants before they filed the original *ex parte* motion it is insufficient to justify this out of time filing.

Movants also point to "recently published" documents from DEA that purport to demonstrate DEA's "undisclosed conflicts of interest" related to the Community Anti-Drug Coalitions of America (CADCA). (Request at 12). While this evidence fails to support Movants' argument, discussed *infra*, Movants also fail to demonstrate that this evidence satisfies the standard for newly discovered evidence and make no claims that these publications were unavailable at the time of the first *ex parte* motion. Nor does the December 12, 2024 blog post by CADCA about the 2024 National Family Summit on Fentanyl demonstrate a conflict of interest for DEA in this proceeding. (Request at 13). Moreover, while the blog post cited by Movants was published on December 12, 2024, the blog cited makes clear that the Summit took place on November 14-15, 2024, before the original *ex parte* motion was filed. Movants are thus unable to rely on the December blog post as new evidence without demonstrating that despite their diligent efforts they were unable to discover a publicized summit dedicated to helping families affected by the fentanyl crisis before filing the first *ex parte* motion.

Movants have failed to demonstrate good cause for filing their request out of time because they have failed to demonstrate that the newly discovered evidence was unavailable to them at the time they filed their original *ex parte* motion despite their diligent efforts to discover it. Thus, Movants' request for reconsideration should be denied.

### C. Movants *Ex Parte* Allegations Lack Merit

Movants argue that "DEA has engaged in extensive improper *ex parte* communications." (Request at 13). Specifically, Movants point to a filing from TBI that references a letter sent from DEA Deputy Assistant Administrator Matthew Strait requesting that TBI supplement its request to participate in the present hearing. (Request at 11). As explained *supra*, this evidence is not sufficient to justify this request for reconsideration. Moreover, Movants' argument lacks merit and fails to establish that the letter in question constitutes prohibited *ex parte* communication.

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). 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). Movants fail to articulate how a letter from DEA seeking supplemental information regarding a request to participate in a hearing constitutes an impermissible *ex parte* communication. While the letter may satisfy the interested person and timing elements of an *ex parte* communication, there is no allegation that the letter in question addressed the merits of the proceeding. 5 U.S.C. 557(d)(1)(B). Instead, it addressed only the information needed by the Administrator to determine whether a party requesting a hearing should be allowed to participate. Movants point to no rule forbidding the Administrator from requesting clarification from a party seeking permission to participate in the hearing. Instead, Movants argue a definition of the *ex parte* rule that is so broad it would prohibit even a request to participate in a hearing. *See* Request at 18 (describing all requests to participate and response from DEA as "prohibited *ex parte* communications"). This Tribunal should reject such an unbounded reading of the rule and deny Movants' request.

Moreover, in an instance where DEA is unable to make a determination because the request submitted to the Agency is too vague or is incomplete, DEA is not prohibited from requesting additional information from the person seeking action. Thus, DEA may send a letter to a hearing requester asking for additional information as necessary to allow for the determination. Were this not the case, DEA's only option would be to deny all requests that fail, in their initial submission, to fully articulate a complete rationale – an unnecessarily severe result. This approach is consistent with Agency practice in similar contexts. *See, e.g.*, 21 CFR 1308.43 (allowing Administrator to not accept a petition that is not easily understood and allowing the Petitioner to amend the petition that was not accepted).

### D. Movants Argument to Exclude DEA's Noticed Evidence is Imprecise, Improper, and Lacks Merit

The Movants further argue that DEA's "improper January 2 Exhibit should be excluded from the record." (Request at 27). First, Movants mistakenly claim that "DEA has offered" the exhibit in question into evidence. (Request at 27). However, at this point in the proceedings the exhibit has not been offered into evidence but has simply been served on the other parties in accordance with this Tribunal's direction. *See* Prehearing Ord. at 3 (directing all parties to deliver their proposed evidence to all other designated parties). Furthermore, Movants fail to specify which of the five exhibits noticed by DEA on January 2, 2024, they are seeking to exclude.

Movants' request is thus best characterized as a motion *in limine* to exclude DEA's noticed evidence and this Tribunal has made clear that "the time for seeking relief through motion practice has reasonable passed." Prehearing Ord. at 8. For these reasons, Movants' motion to exclude DEA's exhibit should be denied.

### E. Movants Fail to Demonstrate that DEA Cannot Serve as Proponent of the Proposed Rule

Movants argue that "DEA's improper occupation of the proponent's role despite its steadfast opposition to the Proposed Rule has caused significant prejudice to Movants' procedural rights." (Request at 29). In casting these aspersions, Movants argue that DEA suffers from various conflicts of interest (Request at 12) and does not support the proposed rule (Request at 7).

This Tribunal has made clear that it lacks authority to remove DEA from its role as proponent of the rule. *Ex Parte* Ord. at 2. Nevertheless, Movants fail to prove that DEA suffers an actual conflict of interest that would prevent it from fulfilling its role as proponent of the rule

in this case. Movants point to a purported "partnership" with CADCA, a designated party in these proceedings advocating against rescheduling, but their evidence simply shows that DEA worked with CADCA to host a summit dedicated to providing support to families affected by the fentanyl crisis. (Request at 13). Movants also point to two DEA publications addressing marijuana, *Preventing Cannabis Use Among Youth and Young Adults* (Request at 12 n.22) and *Drugs of Abuse* (Request at 12 n.23) to demonstrate that DEA lists CADCA as a resource and reference for information about marijuana. (Request at 12). In short, none of this evidence proves that DEA has a conflict of interest in this proceeding. Marijuana is presently a schedule I controlled substance and DEA continues to treat it as such. DEA's mandate to enforce the law, *see* 21 U.S.C. § 801, *et seq,* and reduce illicit drug use does not bar DEA from serving as proponent of the proposed rule. Indeed, if that were the case, DEA would never be able to propose de-scheduling a controlled substance without first abandoning its duty to enforce the law.

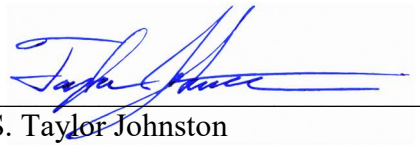
Ultimately, Movants appear to be concerned with the validity of these proceedings under the APA. As before, to the extent that the Movants are raising an APA challenge to the way these proceedings are being conducted, or to final decisions made by the Agency, they have once again sought relief from the wrong forum. *See* 21 U.S.C. § 877 (providing judicial review of final agency actions); 5 U.S.C. § 702, *et seq.*

## CONCLUSION

**WHEREFORE**, the Government respectfully requests that the Tribunal deny Hemp for Victory, Village Farms International, and OCO *et al.*'s Request for Reconsideration in Light of New Evidence.

Dated: January 13, 2025

Respectfully Submitted,



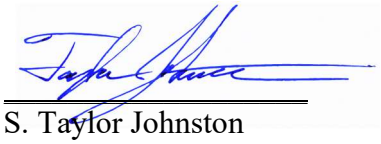
S. Taylor Johnston
Attorney | Diversion Section
Drug Enforcement Administration
Office of Chief Counsel
8701 Morrissette Drive
Springfield, VA 22152
Stephen.T.Johnston@dea.gov

James J. Schwartz
Deputy Section Chief
Drug Enforcement Administration
Office of Chief Counsel
8701 Morrissette Drive
Springfield, VA 22152
James.J.Schwartz@dea.gov

Jarrett T. Lonich
Attorney | Diversion Section
Drug Enforcement Administration
Office of Chief Counsel
8701 Morrissette Drive
Springfield, VA 22152
Jarrett.T.Lonich@dea.gov

## 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: (1) 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; (2) 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; (3) Matthew Zorn, Esq., Counsel for the Connecticut Office of the Cannabis Ombudsman, Ellen Brown, and TheDocApp via email at mzorn@yettercoleman.com; and Jason Castro, Esq., Counsel for TheDocApp, via email at jasoncastro@myfloridagreen.com; (4) John Jones and Dante Picazo for Cannabis Bioscience International Holdings, via email at ir@cbih.net; (5) Andrew J. Kline, Esq., Counsel for Hemp for Victory, via email at AKline@perkinscoie.com; and Abdul Kallon, Esq., Counsel for Hemp for Victory, via email at AKallon@perkinscoie.com; (6) Scheril Murray Powell, Esq., Counsel for Veterans Initiative 22, via email at smpesquire@outlook.com; David C. Holland, Esq., Counsel for Veterans Initative 22, via email at DCH@hollandlitigation.com; Timothy D. Swain, Esq., Counsel for Veterans Initiative 22, via email at t.swain@vincentellp.com; and Shawn Hauser, Esq., Counsel for Veterans Initiative 22, via email at s.hauser@vicentellp.com; (7) Kelly Fair, Esq., Counsel for The Commonwealth Project, via email at Kelly.Fair@dentons.com; Lauren M. Estevez, Esq., Counsel for the Commonwealth Project, via email at lauren.estevez@dentons.com; Joanne Caceres, Esq., Counsel for the Commonwealth Project, via email at joanne.caceres@dentons.com; (8) Rafe Petersen, Esq., Counsel for Ari Kirshenbaum, via email at Rafe.Petersen@hklaw.com; (9) David G. Evans, Esq., Counsel for Cannabis Industry Victims Educating Litigators, Community Anti-Drug Coalitions of America, Kenneth Finn, Phillip Drum, International Academy on the Science and Impacts of Cannabis, Drug Enforcement Association of Federal Narcotics Agents, and National Drug and Alcohol Screening Association, via email at thinkon908@aol.com; (10) 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; (11) Eric Hamilton, Esq., Counsel for the State of Nebraska, via email at eric.hamilton@nebraska.gov; and Zachary Viglianco, Esq., Counsel for the State of Nebraska, via email at zachary.viglianco@nebraska.gov; (12) Gene Voegtlin for International Association of Chiefs of Police, via email at voegtlin@theiacp.org; and (13) 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.



Dated: January 13, 2025

S. Taylor Johnston