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 VILLAGE FARMS INTERNATIONAL, HEMP FOR VICTORY, AND OCO, *ET AL.*'S MOTION TO RECONSIDER

On January 6, 2025, Village Farms International, Hemp for Victory, and OCO, *et al.* (collectively, the Movants), filed a motion (Motion to Reconsider or MTR) seeking, *inter alia*, reconsideration of tribunal's November 27, 2024 order (*Ex Parte* Order or EPO) regarding alleged *ex parte* communications related to the above-captioned matter.[1] MTR at 5-7, 40-43. The Government timely filed its opposition (Opposition).

When assessing a motion to reconsider interlocutory decisions that are not case dispositive, a trier of fact must assess whether there has been a clear error of law, newly discovered evidence,[2] or a need to prevent manifest injustice. *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005), *cert. denied*, 547 U.S. 1070 (2006); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *EEOC v. Lockheed Martin Corp.*, 116 F.3d 110, 112 (4th Cir. 1997); *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, 956 F.2d 1245, 1255 (2d Cir. 1992), *cert. denied*, 506 U.S. 820 (1992).

Accordingly, inasmuch as the Movants' Motion to Reconsider sufficiently establishes none of these regulatory prerequisites, it is herein **DENIED**.

In its MTR, the Movants have requested that in the event the relief they seek is denied, that they be granted leave to file an interlocutory appeal. MTR at 43. Under the DEA

[1] The MTR also seeks preemptive summary exclusion of one of the Government's proposed exhibits. MTR at 27. This issue will be reserved if/until the document is offered into the record.

[2] Any evidence purported to be newly discovered, even to the extent conceded as accurate, would not change the analysis or result in the EPO. That said, I will assume without deciding that the discovery of these new factual bases upon which to seek relief constitute at least sufficient cause to support the Movants' petition to file out of time based on new evidence. Accordingly, that aspect of the Movants' motion is herein **GRANTED**.

regulations, in most circumstances, an interlocutory appeal requires the consent of the presiding administrative law judge. 21 C.F.R. § 1316.62. Specifically, consent requires my certification that such an interlocutory review "is clearly necessary to prevent exceptional delay, expense or prejudice to any party, or substantial detriment to the public interest."[3] *Id.* As discussed in the EPO, the Movants have not met their burden on the issue of whether an *ex parte* hearing should be conducted,[4] and to the extent that they seek an order from me relieving the Administrator from her proper procedural role as the proponent of the notice of proposed rulemaking (NPRM),

[3] There is no specific regulatory requirement that I find that the attendant legal issues are not specious, or that they constitute a sound litigation strategy.

[4] Inasmuch as the factual underpinnings of the EPM and the MTR have been assumed as accurate for the purposes of a disposition of this issue, an extensive hearing on the issue would serve no purpose. Further, the cases the Movants principally rely upon involve inapplicable facts. In *Professional Air Traffic Controllers Organization (PATCO) v. Federal Labor Relations Authority (FLRA)*, 672 F.2d 109, 110-11 (D.C. Cir. 1982) (*PATCO I*) and *PATCO v. FLRA*, 685 F.2d 547, 574-75 (D.C. Cir. 1982) (*PATCO II*), the court addressed allegations that actual decisionmakers in the process had participated in *ex parte* communications. There are no like allegations in the attendant proceedings. In *PATCO II*, the court held that no disturbance of the agency's decision was warranted because no taint to the ultimate decision was demonstrated. *PATCO II*, 685 F.2d at 575. The *PATCO II* court conceded that the agency's "handling of the case has [not] been a paragon of administrative procedure," but affirmed the decision notwithstanding. *Id.* at 574. The provision of the Administrative Procedure Act (APA) (5 U.S.C. § 556(b)) relied upon by the Movants pertains to challenges raising "personal bias or other disqualification of a[n ALJ] or participating employee." MTR at 4-5. There has been no allegation related to me or to any employee to be tasked with deciding the case or participating in that decision. Accordingly, this provision appears to be inapposite. Further, in contrast to *ex parte* communication claims, any claims founded exclusively on the DEA's continuing work with advocacy groups, such as the Community Anti-Drug Coalitions of America (CADCA) or Smart Approaches to Marijuana (SAM), whether recently or in the past, are wholly unpersuasive. The DEA has worked with a multitude of citizens groups over the years in furtherance of its public safety mission, and to disqualify any of these groups would be as ill-advised as precluding participation by those who have advocated before the Agency (formally and/or informally) for a change in marijuana laws.

they have requested relief well beyond my authority to grant.[5] The original *Ex Parte Motion* (*Ex Parte* Motion or EPM) allegations (as well as some new ones raised in the MTR), even if

[5] These issues were exhaustively addressed in the *Ex Parte* Order. While the APA and the implementing regulations to the Controlled Substances Act (CSA) supply adequate authority to manage active litigation and prehearing proceedings, an administrative law judge's authority is not inherent, not unlimited, and must be strictly cabined by the parameters of those sources. In their Motion to Reconsider, the Movants argue the issue of ALJ authority on two planes. The first, is purportedly to *enlighten* the tribunal that it has (and always had) authority to conduct an inquiry on alleged *ex parte* communications. MTR at 26. This argument would possess increased gravitas had it not been the case that the EPO, citing the relevant provisions of the APA, actively analyzed and considered the allegations in full. The (still correct) EPO held that even if these communications were assumed as true, they would have no impact on how the case will be decided. EPO at 7 (*citing Raz Inland Navigation Co., Inc. v. ICC*, 625 F.2d 258, 260-62 (9th Cir. 1980)). *Ex parte* communications do not void an agency decision, but make it voidable if the "agency's decisionmaking process [is] 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] obliged to protect." *PATCO II*, 685 F.2d at 564. The MTR raises additional (admittedly equally appalling) allegations of *ex parte* communication to one side of the litigation equation by at least one high-level Agency official to an anti-NPRM entity, in an apparent effort by the former to enhance to latter's chance of selection as a designated participant above others who applied. This arguably disturbing and embarrassing revelation, even credited, still does not demonstrate an "irrevocable taint" that will affect the ultimate outcome of the proceedings. This is keenly so where the Movants have alleged that the DEA came to the table possessed of an "unalterably closed mind." MTR at 4, 40. If the Agency's mind was indeed "unalterably closed," it is difficult to imagine that any of the comments of Dr. Sabet would have changed that, or that the Agency would not have included the Tennessee Bureau of Investigation (TBI), even without revisions to its application. Foolishness does not always result in cognizable prejudice, and it has not done (and will not do) so here. I stand unaffected (and certainly unimpressed) by the Agency's actions in this regard, and in light of the results of the recent presidential election and the imminent replacement of the current Administrator (*see* n.5, *infra*), these developments (whether newly-discovered or otherwise) are unlikely to affect the outcome of these proceedings. The second plane persists in its insistence that the tribunal possesses the authority to remove the DEA Administrator (that is, the DEA Administrator who is soon to be replaced by the new administration and who assigned the ALJ to adjudicate this matter) from her role as the proponent of (and presumably in adjudicating) the NPRM. MTR at 39-41. This theory stands as unsupported and strange now as it did when first proposed in the EPM. I can no more remove or re-designate the Administrator than I can hold parties in contempt and fine them. The strangeness of this unsupported approach is amplified by the fact that the appointment of a new DEA Administrator by a different political party is imminent. Similarly, the concept that the Movants are somehow entitled to an agency head who is steadfastly convinced of the correctness of their position before the first witness has been sworn, is as peculiar as their insistence that the ALJ assigned to the case has some bizarre, inherent authority to remove the head of the Agency from its place as the proponent of the NPRM. In this regard, the MTR speaks without authority or common sense. If this aspect of the relief it seeks were to be (erroneously) granted, the results would be: (1) certain (correct), swift reversal by the Agency or the courts; and (2) a conversion of the proceedings from a timely, legally-correct hearing to a circus that would add nothing to the rescheduling cause the Movants purportedly espouse. The Movants are not entitled to a perpetual cheerleader-proponent who is forbidden from maintaining or evolving her position, and the public would arguably be ill-served by having one. Even to the extent that the (current) Administrator holds some reservations as to whether the proposed rescheduling adequately discharges her responsibilities under the CSA, the APA is unequivocal that "the proponent of a rule … has the burden of proof." 5 U.S.C. § 556(d). The Movants can (and should) avail themselves of the opportunity to present their best case to shoulder that burden. Even if the Agency has not noticed (and does not present) the quality and quantum of evidence the Movants subjectively believe it should, there is nothing preventing the Movants from doing so, compiling an unimpeachable record of proceedings, and prevailing. It is not the number of Designated Participants (DPs) that will carry the day, but the strength of the arguments and evidence presented. A contrary result could engender a perpetual evaluation of the strength and precision of the Agency's case throughout the proceedings, with the potential for reconsideration motions at every turn where the Movants find the skill of the Government's counsel wanting. Opposing sides of a litigation equation do not stand in the position of evaluating and critiquing the quality of the other side's case. That is my function and the function of those in the Agency and the courts who review my recommended decision. An evidentiary hearing does not lend itself well to an academic

conceded as having some factual basis, while unseemly and troubling,[6] would not (and will not) affect the outcome of this action. [7]

Notwithstanding the pleas of the Designated Participants that they are anxious for action on the proposed rescheduling of marijuana, the Movants (a subset of the pro-rescheduling DPs) are apparently eager to trade a timely disposition and recommended decision[8] for the dubious advantage of piling on more DPs.

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experiment where intellectually novel and curious issues are created and tested, just for the sake of doing so. This is particularly true here, where the American public and the true proponents and antagonists have waited so long, prepared their cases, and cleared their calendars.

[6] To be sure, the specter of officials at the highest level of Agency management selectively assisting and granting access to individuals and groups standing in opposition to the NPRM it purportedly supports as the proponent, carries no small measure of discomfiture. If true, viewed in the best light, these allegations demonstrate a puzzling and grotesque lack of understanding and poor judgment from high-level officials at a major federal agency with a wealth of prior experience with the APA. And that is a charitable perspective. But as discussed in the EPO, the true issue is not discomfiture, but whether the quality of the prior conduct of one or more of the Agency's functionaries will affect the outcome of the proceedings. I am certainly not influenced in any way helpful to the Government by these allegations, and the DPs have not been inhibited in their ability to produce the most persuasive evidence at their disposal (even including written materials or testimony from those whom the Administrator did not designate). Even beyond that, as discussed, *infra*, the appointment of a new DEA Administrator is imminent. In short, there is practically zero chance that the allegations, even if established by the requisite standard, would affect the fairness of the adjudication of the NPRM (whether that decision is ultimately for or against its promulgation). That is not to say that continued misadventures will come without consequences (now or on review by the courts), but on the present record, I have determined that the outcome of the proceedings will not be adversely affected by the facts as alleged in the EPM or the MTR. Stated differently, nothing in this order or the EPO should be read to countenance continued unwise, risky, or careless behavior on the part of the Government. Similarly, the Government should take heed that, to the extent that it becomes apparent that the actions of the Agency have "irrevocably tainted" the proceedings, this tribunal is not without viable options that actually are authorized under the law. *PATCO II*, 685 F.2d at 564-65. For example, there is nothing in the CSA, the APA, or the regulations that would preclude this tribunal from terminating hearing proceedings and transmitting a decision recommending a restart to the entire process and the issuance of a new NPRM. There are other draconian procedural options available as well. Stated differently, the conclusion that an irrevocable taint has not been demonstrated by the Movants is not coextensive with the conclusion that a duly-appointed ALJ is relegated to standing by as a passive observer without the ability to act. The Movants here have neither established the requisite level of cognizable prejudice to the ultimate outcome, nor sought a realistic remedy. By the same token, the Government's failure to acknowledge in any way the gravity of the highest levels of its organization allegedly reaching out to help one of the potential DPs fortify its application to ease the task of justifying its apparently pre-made determination for appeal (Opp. at 8) demonstrates an arrogant overconfidence that may not serve it well in the future. Likewise, the Government's dismissive assertion that all procedural anomalies, irrespective of severity or collective impact, should be directed to the appellate courts (Opp. at 10) suffers from the same defect. These are formal hearing proceedings, not a deposition.

[7] The Administrative Procedure Act and the DEA regulations authorize the identification, recognition and inclusion of material facts in the administrative record by the taking of official notice. 5 U.S.C. § 556(e); *Attorney General's Manual on the Administrative Procedure Act* 80 (1947); 21 C.F.R. § 1316.59(e). Accordingly, official notice is herein taken that in November 2024, a new president from a different political party was elected, and the new president is scheduled to be inaugurated on January 20, 2025. Official notice is also taken that the current Administrator has publicly signaled her intention to depart the Agency prior to the inauguration of the new president. To the extent either party seeks to challenge the factual predicate of the official notice taken in this matter it may file an appropriate motion no later than fifteen (15) days from the issuance of this order.

[8] Even an adverse decision efficiently rendered would move the ball forward.

Even factoring in the reality that sometimes litigants and their representatives should be mindful of what they wish for,[9] to the extent my analysis is found to be in error on review, I am willing to certify that the allowance of this interlocutory appeal could potentially avoid exceptional delay, expense or prejudice to the DPs and the Government by injecting appellate certainty into the equation at this stage of proceedings. Were my analysis to be reviewed on appeal and determined to constitute prejudicial error, a remand would clearly result in significant delay and expense to the Designated Participants and the process.

Accordingly, that aspect of the Movants' Motion to Reconsider that seeks leave to file an interlocutory appeal is **GRANTED**, the hearing on the merits that was scheduled to commence on January 21, 2025 is **CANCELLED**, and proceedings in this matter are **STAYED**, pending a resolution of the interlocutory appeal to the DEA Administrator.[10]

It is further **ORDERED** that the Movants and the Government provide this tribunal with a joint status update ninety (90) days from the issuance of this order, and every ninety (90) days thereafter. Either the Movants or the Government may file the status update, but one party must file one.

It is further **ORDERED** that a briefing schedule will be fixed by the Office of the Administrator, but all correspondence related to the interlocutory appeal will travel through the

[9] As must have been anticipated by the Movants, an interlocutory appeal returns jurisdiction of the matter to the full control of DEA Agency leadership in all respects. 21 C.F.R. § 1316.62. The matter is on stay here, and the Administrator will issue a briefing schedule, entertain oral argument if he/she desires, and issue a binding, written decision on this tribunal. *Id.* It may be worth considering, however, that in this case, notwithstanding the plain language of the regulations, that the definition of an "interested person" includes only "any person *adversely affected or aggrieved* by any rule or proposed rule issuable pursuant to [21 U.S.C. § 811]" (21 C.F.R. § 1300.01 (emphasis supplied)), the Standing Order (currently law of the case) balanced a significant level of federal precedent to render a more nuanced, four-factor view that included persons who actually support the NPRM. That is, persons are currently included in the litigation that have alleged neither adverse affect nor aggrievement by NPRM. Stated differently, an interpretation that applies the plain language of the regulation and excludes supporters of the proposed rescheduling is certainly a perfectly defensible (and some might argue, advisable) legal position for the Agency to embrace or evolve to. Even now. Naturally, this would be likewise true about an Agency decision to restart or even withdraw the NPRM. Ironically, had the Administrator elected at the outset to narrow the scope of participants within the strict parameters of the regulations (that is, to limit inclusion to only those adversely affected or aggrieved), without any of the unpalatable noise associated with the alleged *ex parte* communications, it is likely that such decision would have been easily sustained on review and the Movants would not have the voice they currently enjoy in these proceedings. Thus, the Administrator's election to extend a participation invitation beyond the parameters of the regulation (a decision which is not subject to my review) could conceivably be viewed as an act of administrative grace aimed at an increased level of inclusivity, but hardly an irreversible one.

[10] While the Movants contemplate that an affidavit they intend to file will be reviewed by both the DEA and the DOJ (MTR at 5, 41, 44) they have supplied no authority or mechanism that would authorize any action beyond a review by the DEA Administrator. 21 C.F.R. § 1316.62. In short, there is no indication of how the Movants expect any affidavit or review would ever be tendered to the Attorney General.

DEA Judicial Mailbox to be forwarded to that office.

Dated: January 13, 2025

JOHN MULROONEY

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JOHN J. MULROONEY, II
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on January 13, 2025, 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 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) Dante Picazo for Cannabis Bioscience International Holdings, via email at ir@cbih.net; (6) 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 and AKallon@perkinscoie.com; (7) Timothy Swain, Esq., Counsel for Veterans Initiative 22, via email at t.swain@vicentellp.com; Shawn Hauser, Esq., Counsel for Veterans Initiative 22, via email at s.hauser@vicentellp.com; and Scheril Murray Powell, Esq., Counsel for Veteran's Initiative 22, via email at smpesquire@outlook.com; (8) Kelly Fair, Esq., Counsel for The Commonwealth Project, via email at Kelly.Fair@dentons.com; Joanne Caceres, Esq., Counsel for The Commonwealth Project, via email at joanne.caceres@dentons.com; and Lauren M. Estevez, Esq., Counsel for The Commonwealth Project, via email at lauren.estevez@dentons.com; (9) Rafe Petersen, Esq., Counsel for Ari Kirshenbaum, via email at Rafe.Petersen@hklaw.com; (10) David G. Evans, Esq., Counsel for Cannabis Industry Victims Educating Litigators, Community Anti-Drug Coalitions of America, Kenneth Finn, International Academy on the Science and Impacts of Cannabis, and National Drug and Alcohol Screening Association, via email at thinkon908@aol.com; (11) 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; (12) 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; (13) Gene Voegtlin for International Association of Chiefs of Police, via email at voegtlin@theiacp.org; (14) Patrick Kenneally, Esq. Counsel for Drug Enforcement Association

of Federal Narcotics Agents, via email at pdkenneally78@gmail.com; (15) 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; and (16) Matthew Zorn, Esq., Counsel for OCO *et al*., via email at mzorn@yettercoleman.com.

TAYONNA EUBANKS (Affiliate)
Digitally signed by TAYONNA EUBANKS (Affiliate)
Date: 2025.01.13 16:48:58 -05'00'

Tayonna Eubanks
Secretary (CTR)
Office of Administrative Law Judges