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 DENYING MOTION TO RECONSIDER (DocApp)

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).

On November 19, 2024, this tribunal issued an order (Standing Order) which found, *inter alia*, that The Doc App, Inc., d/b/a My Florida Green (DocApp) had not sufficiently demonstrated that it had standing under the Administrative Procedure Act (APA) or noticed sufficiently relevant and material evidence to continue in these hearing proceedings as an independent participant. Standing Ord. at 28-30. On November 20, 2024, DocApp filed a motion (Motion to Reconsider or MTR) seeking reconsideration of those determinations. For the reasons that follow, that Motion to Reconsider is **DENIED**.

Some procedural background is a helpful starting place. On May 21, 2024, the Department of Justice published the above-described NPRM in the Federal Register seeking to reschedule marijuana. 89 Fed. Reg. at 44597. The NPRM provided, *inter alia*, guidance for the public about how to request a hearing in this proposed rescheduling action. *Id.* at 44598. Approximately three months later, the Drug Enforcement Administration (DEA) published its own order in the Federal Register (General Notice of Hearing or GNoH) which provided public notice of its intention to conduct an APA hearing on the NPRM and provided instructions to the public on how to apply to participate. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 70148, 70148-49 (2024). About three months following publication of the General Notice of Hearing, the DEA Administrator (apparently by some form of email communication that has not been furnished to this tribunal) notified a subset of those who

applied in response to the NPRM or the GNoH that they were designated by her to participate (Designated Participants or DPs). I was designated by the Administrator to preside over the hearing proceedings in a hand-delivered letter (which I served on the Designated Participants), but was not involved in or apprised of the process utilized to select the DPs. I subsequently issued an order (the Preliminary Order) which directed the DPs, *inter alia*, to comply with a series of procedural and logistical directives.

In the Standing Order, based on the respective submissions by the DPs in response to the Preliminary Order (Preliminary Order Responses or PORs), I made determinations regarding standing and inclusion in these proceedings by applying the statutory and regulatory guideposts supplied by Congress and the CSA and its implementing regulations. As explained in the Standing Order, the overwhelming majority of DPs maintained their status as participants, but standing assessments were reached regarding a future discretionary decision as to the potential weight to be assigned in the recommended decision. DocApp was found ineligible to independently[1] continue due to both a lack of standing and lack of relevant and material evidence to the hearing proceedings. Standing Ord. at 30. Now, in an aggressive filing, DocApp seeks a reconsideration of that decision. Regrettably, aggression is an inadequate substitute for sound legal reasoning, and DocApp's MTR fails for many of the same reasons its Preliminary Order Response was unsuccessful.

Although the Preliminary Order directed the DPs to provide a basis for how they would be adversely affected or aggrieved by the promulgation of the NPRM, DocApp devoted the whole of its POR (and equally regrettably, its MTR) to subjects that were unrelated to the task at hand. It would not be hyperbolic to characterize the tenor of DocApp's POR as less of an argument for standing, but instead, as more akin in many ways to an infomercial for marijuana-related tax relief and its proprietary DocApp platform. Legalization of marijuana is well beyond the scope of this NPRM, as are any aspects of the nation's tax laws. It would be as confusing for the public for this tribunal to issue findings on these subjects as it would be for this tribunal to take extensive testimony and receive evidence about these issues in this hearing. 5 U.S.C. §

[1] DocApp was not precluded from consolidating with any party in these proceedings that has been permitted to independently continue and was encouraged to consolidate with a DP that shares all or some of its interests in the outcome of the NPRM. It is worth remembering that the recommendation tendered to the Administrator in this case will be made based on a careful review of the strength of the evidence and the correctness of the legal analysis offered by the participants. In short, this is not a shouting competition where the side of the issue who musters the most shouters in the courtroom wins the day.

556(c)(3); 21 C.F.R. § 1316.52(b). This begs the question as to why such evidence would be received; a question which stands unanswered in DocApp's POR or its MTR.

As discussed in the Standing Order, DocApp's proposal that patients self-regulate prescription decisions runs contrary to prescribing standards in the implementing regulations of the Controlled Substances Act. Standing Ord. at 29; 21 C.F.R. § 1306.04(a). Rescheduling marijuana to Schedule III would not alter that model and is well beyond the scope of the NPRM. Similarly, DocApp's insistence that this recommended decision propose that the DEA's regulations be amended to dictate the manner in which prescriber's prescribe, is not only beyond the scope of the NPRM, but also demonstrates a fundamental misunderstanding of the prescribing model and would violate the authority of states under their police powers to regulate the practice of medicine. *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006). Promulgation of such an *ultra vires* regulation would not survive any level of judicial scrutiny. Likewise, devoting testimonial hours to include the virtues of the DocApp platform would divert time from the weighty matters that actually do require discussion, and would not be a suitable area for the resolution of the issues set forth in the NPRM. No amount of aggression in the DocApp's MTR (including the specious accusation that the Standing Order was part of a nefarious plan by DEA to favor big pharma interests and—inconsistently—pander to those who DocApp intemperately disparages as "prohibitionists") bears any capacity to alter that reality. Any opportunity the DocApp might have had to use its MTR as an opportunity to reframe its position on standing to something that bears some relation to the applicable standards under the APA was squandered by the angry document it filed, which doubled-down on a host of irrelevant issues coupled with baseless accusations and motivations. To the extent that DocApp has a basis for a relevant contribution to these proceedings, it may have been tactically ill-served by its filings in this case. In fact, the MTR in some ways actually validates the determination DocApp seeks to revisit in the Standing Order.

To be sure, wide latitude has long and consistently been afforded to triers of fact in their ability to exercise discretion over motions to reconsider interlocutory rulings. Here, this MTR filed by DocApp, irrespective of its other shortcomings, did not demonstrate a clear error of law, newly discovered evidence, or a need to prevent manifest injustice. *Intera Corp. v. Henerson*, 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, DocApp's Motion to Reconsider is herein **DENIED**.

Dated: November 25, 2024

JOHN J. MULROONEY, II
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned, on November 25, 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, via email at AKline@perkinscoie.com; and Abdul Kallon, Esq., Counsel for Hemp for Victory, via email at and AKallon@perkinscoie.com; (7) Shanetha Lewis for Veterans Initiative 22, via email at info@veteransinitiative22.com; (8) Kelly Fair, Esq., Counsel for The Commonwealth Project, via email at Kelly.Fair@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, Phillip Drum, 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) Stephanie E. Masker, Esq., Counsel for National Transportation Safety Board, via email at stephanie.masker@ntsb.gov; (13) 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; (14) Gene Voegtlin for International Association of Chiefs of Police, via email at voegtlin@theiacp.org; (15) Gregory J. Cherundolo for Drug Enforcement Association of Federal Narcotics Agents, via email at executive.director@afna.org and

afna.org@gmail.com; (16) 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; (17) Matthew Zorn, Esq., Counsel for the Connecticut Office of the Cannabis Ombudsman and Ellen Brown, via email at mzorn@yettercoleman.com; and (18) Jason K. Castro, Esq., Counsel for DocApp, via email at jasoncastro@myfloridagreen.com.

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Quinn Fox
Staff Assistant to the Chief Judge
Office of Administrative Law Judges