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 INTERVENE (MedPharm)

On May 21, 2024, the United States Department of Justice through the Drug Enforcement Administration (DEA or Agency) issued a notice of proposed rulemaking (NPRM) proposing to transfer 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). Following the publication of the NPRM, the DEA Administrator determined that in-person hearing proceedings would be appropriate, and in an order dated August 29, 2024, fixed a December 2, 2024 commencement date. *Schedules of Controlled Substances: Rescheduling of Marijuana*, 89 Fed. Reg. 70148, 70148-49 (2024). Subsequently, the Administrator designated a subset of twenty-five (25) individuals and organizations (evidently culled from a larger group of requestors) to participate in the hearing (Designated Participants or DPs). The DPs were evidently each notified of their participation status by a separate email.

I was designated by the Administrator[1] to preside over the hearing proceedings, but was not involved in or apprised of the process utilized to select the DPs. In an order dated November 19, 2024 (the Standing Order), based on submissions by the DPs, 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. In the Standing Order, the overwhelming majority of DPs maintained their status as participants, but standing assessments were reached regarding any future discretionary decisions as to the potential weight to be assigned in the recommended decision.

[1] 21 C.F.R. § 1316.52.

On November 12, 2024, MedPharm, a DEA registrant (by its own representation), filed a motion bearing the caption "Motion to Intervene" (Motion to Intervene or MTI) seeking an order from this tribunal authorizing its inclusion among the DPs, notwithstanding the fact that it has not been designated as a Designated Participant by the DEA Administrator. MTI at 1-3.

In its MTI, MedPharm expends considerable effort into outlining some positive attributes of its mission, outlining ways in which it would seek to establish standing under the Administrative Procedure Act (APA), and pointing out how any marijuana rescheduling hearing would greatly benefit from its participation. However, as explained in more detail in the Standing Order issued by this tribunal, potential, meaningful input, and even arguable APA standing is not the full extent of the inquiry. *City of San Antonio v. Civil Aeronautics Board*, 374 F.2d 326, 329 (D.C. Cir. 1967) ("No principle [of] administrative law is more firmly established than that of agency control of its own calendar."). The Agency is endowed with the right to place reasonable limits on the number of participants in a given APA hearing. *Id.* Which is, when reduced to its essence, precisely what the Administrator did in exercising her discretion in determining the number and nature of participants. To be sure, thousands upon thousands of individuals and entities across the country could add value to the issues to be decided here, but they cannot all be included.

Regarding the Administrator's decision not to extend a participation invitation to MedPharm, it is useful to view the current dynamic in the backdrop of the APA and the CSA's implementing regulations. The authority of a DEA Administrative Law Judge (ALJ) and the duration of that authority is circumscribed by the regulations. Per the regulations, an ALJ is designated to handle a case by the DEA Administrator.[2] 21 C.F.R. § 1316.52. The ALJ's "functions … commence upon his designation and terminate upon the certification of the record to the Administrator." *Id.* Thus, the time the DPs were selected by the Administrator preceded my authority to act on the case. Even more importantly, in the APA, Congress decreed that "[o]n appeal from or review of the [ALJ's recommended decision] the agency has all the powers which it would have in making the [recommended decision] … except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). Appeals flow *from the ALJ to the Administrator,* not the other way around. I have not been designated to review the Administrator's prehearing actions

[2] Actually, in most cases, the case is forwarded to the DEA Office of Administrative Law Judges, and assigned by the DEA Chief Judge. Here, the Administrator made the designation herself.

on this matter or the manner in which her DP decisions were reached, issued, or not issued.[3] The Administrator exercised her discretion to fix the number of DPs to be included, and to expand that number would effectively overrule her decision and exceed the proper and logical role of the ALJ under the APA and the CSA.[4] Accordingly, no action can or will be taken on MedPharm's Motion to Intervene.

Dated: November 22, 2024

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 November 22, 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) 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) Abdul Kallon, Esq., Counsel for Hemp for Victory, via email at 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

[3] *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). As I have discussed in other orders, while the decision to include or exclude a party arguably bears the hallmarks of a final agency action (5 U.S.C. § 702; 21 U.S.C. § 877), at least one Circuit Court is not altogether convinced that anything is really final and reviewable until the whole adjudication has run its course. *Miami-Luken, Inc. v. DEA*, 900 F.3d 738, 743 (6th Cir. 2018) (The court held that a subpoena decision is not rendered final merely because the agency's highest authority issued the decision prior to an ultimate disposition of the case.).

[4] Admittedly, had the standing determination been deferred to await the action of the ALJ, matters would have been procedurally different and the Administrator could have exercised her unquestioned authority to review my ruling on the matter. But that is not the way the matter progressed.

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; (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; and (17) Matthew Zorn, Esq., Counsel for Erin Gorman Kirk for the State of Connecticut and Counsel for Ellen Brown, via email at mzorn@yettercoleman.com; and (18) Andrew Kline, Esq., Counsel for MedPharm and Hemp for Victory, via email at akline@perkinscoie.com; and Shane Pennington, Esq., Counsel for MedPharm and Village Farms International, via email at spennington@porterwright.com.

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