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December 5, 2008

Honorable Owen Panner
United States District Court
James A. Redden U.S. Courthouse
310 West Sixth, Room 201
Medford, OR 97501

Re: *Church of the Holy Light of the Queen, et al. v. Mukasey, et al.*, Civ. 08-3095-PA

Dear Judge Panner:

I write to call to your attention two issues that we hope to resolve expeditiously in order to meet the Court's current deadlines. First, the Privacy Act Protective Order that was entered on November 26, 2008, Doc. # 49, covers the exchange of protected materials in the discovery process, but expressly reserved the issue of "using any Protected Materials at trial in this litigation *or in a public filing* with the Court." *Id.* at ¶ 8 (emphasis added). The government's position is that the Privacy Act permits the routine use at trial of otherwise covered Privacy Act materials. However, the parties have reached agreement in principle on a revised proposed order.¹ In order to publicly file our witness statements on Monday, December 8, we respectfully request that the Court either enter the forthcoming proposed order or give the parties the opportunity to address the Court on this issue.

Second, the parties have reached an impasse in the discovery process that unfortunately cannot be resolved without Court intervention. Through letter exchanges and teleconferences with Plaintiffs' counsel, we have narrowed the list of disputed topics, but two important issues remain that will have a substantial impact on the efficient resolution of this litigation. The remaining issues relate to (1) the existence of other groups, including Santo Daime affiliates, that may seek to be included in any relief Plaintiffs may obtain and (2) the scope of relief that Plaintiffs themselves seek (i.e., whether they are seeking an exemption from any Controlled Substances Act regulations that do not perforce constitute a ban on Plaintiffs' use of ayahuasca or "Daime"). Although these issues should not cause a delay in our filing of witness statements, certain witnesses may need to supplement their statements after the Court's ruling on these issues.

¹ At the request of Plaintiffs' counsel, the revised proposed order will also remove a restriction on where signatories to the agreement may view protected material.

1. **Santo Daime Affiliates and Other Groups that Consume Ayahuasca**

Through the discovery process, Defendants are seeking information about the existence of Santo Daime affiliates and other groups that consume ayahuasca. The following interrogatory and response were exchanged by the parties:

DEFENDANTS' INTERROGATORY NO. 11: Describe in detail any and all groups, including but not limited to groups that are recognized and/or registered by CHLQ and/or CEFLURIS, that import, distribute, process, use, and/or consume ayahuasca and describe in detail any and all differences and/or similarities among these groups, including but not limited to those groups' use of ayahuasca.

PLAINTIFFS' OBJECTION: Plaintiffs will not reveal any information regarding any persons or organization, if any, that might use the sacred Daime tea. See *NAACP v. Alabama xx*.

PLAINTIFFS' RESPONSE: **CHLQ does not "recognize" or "register" any "groups."** Furthermore, the only Churches that may use the sacred Daime tea in Oregon are the Oregon Churches mentioned in the Complaint. [bold in original]

A complete response to this interrogatory is critical for two primary reasons. First, Plaintiffs have discussed affiliated groups in depositions and have suggested that they may seek to include non-parties in any relief they may obtain in this lawsuit. If anyone other than the named Plaintiffs seek relief from this Court, then they too should respond to discovery and attempt to satisfy their prima facie case under the Religious Freedom Restoration Act. If Plaintiffs do not provide this information, then Defendants cannot reasonably be expected to respond with evidence of the government interests that would be implicated if Plaintiffs were seeking relief for unnamed affiliates and organizations. This is not a class action, and litigation by proxy for or on behalf of non-participating third parties is inappropriate. This issue should be resolved before trial, and not after it.

Second, the existence of other Santo Daime organizations throughout the United States and/or other groups that consume ayahuasca bears directly on the Drug Enforcement Administration's analysis of the risk of diversion of ayahuasca to unlawful use. For example, if a branch of the Santo Daime Church in Oregon obtains an exemption from the Controlled Substances Act, but other affiliated organizations do not, then the DEA might reasonably determine that there is a risk that ayahuasca will be diverted from Oregon to these affiliates.

Plaintiffs' sweeping invocation of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), which deals only with membership lists and the identity of specific individuals within an organization, misses the central point. Defendants are not seeking membership lists and have not threatened reprisal. Cf. *id.* at 466. This Court need not determine the precise scope of the holding in *NAACP v. Alabama*, however, because that case does not provide a legal basis for a few select Plaintiffs to obtain relief for a limitless universe of unknown and undefined affiliates

whose individual anonymity is not threatened in the least by the information sought by the government.

2. Whether DEA Regulations Are Alleged to Burden Plaintiffs' RFRA Rights

The second discovery issue concerns the intended scope of Plaintiffs' Complaint because it is not clear whether Plaintiffs are seeking relief from any regulations that do not, by themselves, constitute a ban on their use of ayahuasca. The following interrogatory and response were exchanged by the parties:

DEFENDANTS' INTERROGATORY NO. 12: State whether you contend that any statutory provision of the Controlled Substances Act, 21 U.S.C. §§ 801-971, or any regulation promulgated pursuant to the Controlled Substances Act, 21 C.F.R. §§ 1300-1316, that does not in and of itself explicitly ban Plaintiffs' use of ayahuasca nonetheless violates any statutory or constitutional rights of Plaintiffs, including but not limited to those rights conferred by the Religious Freedom Restoration Act. Your answer should include the identification of each and every statutory provision and/or regulation that you contend violates any statutory or constitutional right of Plaintiffs and a detailed description of the burden imposed by each and every individual statutory or regulatory provision.

PLAINTIFFS' OBJECTION: This is a contention interrogatory called for legal opinion and it is vague.

PLAINTIFFS' RESPONSE: Plaintiffs incorporate by reference Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction, which answers this inquiry. Plaintiffs have not alleged in the Complaint that the CSA violates their rights.

Plaintiffs repeatedly have asserted that their consumption of ayahuasca is "non-drug" use that is not prohibited by the CSA, and they have argued that the CSA regulations would not apply to them if they were to obtain relief. In Defendants' view, the central issue in this case is not whether Plaintiffs' engage in "drug use" or "non-drug use," but instead whether RFRA would or would not prohibit the potential application of the CSA and/or its regulations to Plaintiffs.

If Plaintiffs want relief from any regulations, then they must allege (and prove) that the regulation imposes a substantial burden that is not justified by the government's compelling interests. Defendants set forth their compelling interest in full compliance with the CSA regulatory scheme in their trial brief, but Plaintiffs have thus far ignored the issue in their witness statements and in the discovery process. Plaintiffs' refusal to address this issue guarantees that the upcoming trial will not resolve all of the disputes in this case and that additional litigation will be necessary if the Court denies Defendants' jurisdictional motion and rules in favor of Plaintiffs on the merits. Defendants respectfully urge the Court to ensure that significant issues are not being deferred until after the trial. It would be inappropriate for Plaintiffs to seek post-

trial relief from regulations that were neither specifically challenged in the Complaint nor specifically addressed during discovery and at trial.

Defendants respectfully request the opportunity to address the Court on these important issues.

Respectfully submitted,

A handwritten signature in black ink that reads "Eric J. Beane". The signature is written in a cursive style with a large initial "E".

Eric J. Beane

cc: Don Marmaduke (via ECF and electronic mail)