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DEPARTMENT OF HEALTH

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February 14, 2019

Maeve E. Cannon, Esquire
Stevens & Lee
100 Lenox Drive
Suite 200
Lawrenceville, New Jersey 08648

Re: Harvest of New Jersey's Request for a
Stay of the Department of Health's Final
Agency Decision for Alternative
Treatment Centers

Dear Ms. Cannon:

I am in receipt of Harvest of New Jersey's February 4, 2019 request for a stay of the Department of Health's December 17, 2018 final agency decisions issued to six applicants selected to proceed with the alternative treatment center (ATC) permitting process. For the reasons set forth below, your request for a stay pending appeal is denied.

THE RFA PROCESS

The Department is charged with the responsibility of implementing the State's Medicinal Marijuana Program (MMP), including establishing a registry of qualifying patients and primary care givers and processing applications for permits to operate ATCs. To qualify as an MMP patient, an individual must

suffer from one of the debilitating medical conditions listed in the Act or from any condition the Department establishes as debilitating. N.J.S.A. 24:6I-3.

In March 2018, the Department added five new medical conditions to the list of debilitating medical conditions that qualify for treatment with medical marijuana: (1) chronic pain related to musculoskeletal disorders; (2) chronic pain conditions of a visceral origin; (3) Tourette Syndrome; (4) migraine; and (5) anxiety. Since then, there has been a surge of new patients registering with the MMP. Between March 2018 and July 2018, 7,000 new patients were registered with the MMP, bringing the patient count to over 25,000. Due to this significant expansion of the patient population served by the MMP and because New Jersey has only six ATCs to serve all these patients, the Department determined that additional ATCs were necessary to meet the needs of MMP patients. As such, the Department began the permitting process for new ATCs under its rules, N.J.A.C. 8:64-1.1 to -13.11.

As set forth in N.J.A.C. 8:64-6.1, the Department's selection of ATCs is accomplished through a competitive application process. The Department issued a Request for Applications (RFA) on or about July 16, 2018, and applications were to be submitted by August 31, 2018. The ten-page RFA provided applicants with detailed review criteria. The criteria included but was not limited to:

Criterion 1: Measure 1: Past experience in all

three aspects of the medicinal marijuana supply chain: cultivation, manufacturing and dispensing.

Criterion 1: Measure 4: Estimate of time needed to produce first full crop of medicinal marijuana, including the projected size of that crop and the reasoning for the estimates.

Criterion 1: Measure 5: Record of past business taxes paid to federal, state and local governments

Criterion 2: Measure 3: Any certifications or designations proving the business is women-owned, minority-owned, or veteran-owned.

[RFA at 6-10]

The RFA further advised that the Department would select up to six new vertically integrated ATCs with up to two in each of the three New Jersey regions, which are designated as the North, Center and South.

In response to the RFA, the Department received 146 timely applications submitted by 103 applicants, with several applicants submitting applications to operate ATCs in multiple regions. Harvest of New Jersey submitted an application for the Southern region.

The Department then assembled a six-member review committee, which reviewed and scored all the applications, including Harvest's. The six-member committee was comprised of four employees from the Department of Health, one employee from the Department of Agriculture and one employee from the Department of

Treasury. The diversity in the committee provided MMP programmatic, plant science, diversity, and financial expertise to the review process. The members, each of whom signed a certification stating that he or she had no financial or personal interest in any of the applicants, independently scored and evaluated each application based on the criteria set forth in the RFA. Each member could award a maximum of 1000 points to each application. The composite scores generated by the review committee for each applicant ranged from the highest composite score of 958.1666 points to the lowest composite score of 223.6666 points.

The Department also crafted a selection methodology to guide its selection determinations from among the scored applications. The Department first concluded that choosing the same applicant in multiple regions would lead to an overly concentrated market and, given the size and strength of the applicant pool, was unnecessary for this RFA. Additionally, the Department determined that having a more diverse set of ATCs across the State would benefit MMP patients because it would lead to a greater variety of products, thereby leading to greater access and choice. A more diverse set of ATCs would also mitigate negative impacts if one were to fail; such failure would impact only one facility. Therefore, pursuant to this RFA, the Department determined that no one applicant should operate more than one ATC.

The Department also used a supply and demand factor in its selection method to ensure that the selections yielded an adequate supply of medical marijuana for MMP patients, which is a significant component of the purpose and intent of the Act. The Department used existing medical marijuana supply and demand to determine the regional order in which the Department would make its selections. Specifically, the Department utilized existing medical marijuana supply and demand to determine the regional order in which the Department would make its selections. In calculating supply and demand, the Department first established a medical marijuana demand factor for each region. The demand factor for each region was comprised of the following calculations: total population of the region divided by total statewide population (2017 American Community Survey 5-year estimates) and, utilizing the MMP's Patient Registry, the current medical marijuana patient population in the region divided by total statewide medical marijuana patient population. The two calculations were averaged to determine the demand factor.

The Department calculated a medical marijuana supply factor using data extracted from the inventory management systems of the current ATCs. The supply factor was the total current medical marijuana supply of the region in ounces divided by total statewide supply in ounces. These factors were then divided to determine the ratio of supply and demand in each region, with lower numbers

meaning demand was higher than supply and higher numbers meaning supply was keeping pace with demand. Based on this analysis, the following ranking was determined among the regions:

Region	Total population (ACS 5 Year)	Patient Population	Supply (Ounces)
Statewide	8,960,161	37,988	68,544
North	3,678,145	10,605	12,112
South	1,837,763	13,625	22,288
Central	3,444,253	13,758	34,144

Region	Demand Factor	Supply Factor	Supply/Demand	Rank
North	0.344833492	0.176704015	0.512432867	1
South	0.281884843	0.325163399	1.153532751	2
Central	0.373281665	0.498132586	1.334468401	3

Based upon the Department's selection methodology, the committee's review of the applications, and the composite scores generated by the review process, the Department selected those applicants who would proceed with the ATC permitting process.

Beginning with the Northern region, the Department selected NETA NJ, LLC (scoring 932.1667) and GTI New Jersey, LLC (scoring 927.3333) as they were the highest scoring applicants in the region. Next, the Department considered applicants for the Southern region. In making its selection for this region, the Department found that MPX New Jersey (scoring 958.1667) and NETA NJ, LLC (scoring 932.1667) had received the highest scores. However, because NETA's application was selected for the Northern

region, it was disqualified from selection in the Southern region under the Department's selection methodology. As such, the Department selected the next highest scoring applicant for the Southern region, Columbia Care New Jersey, LLC (scoring 929.0000). Thus, Columbia Care New Jersey, LLC and MPX New Jersey were the selected applicants for the Southern region.

In selecting the applicants for the Central Region, the top four scoring applicants for this region - MPX (scoring 958.1667), NETA (scoring 932.1667), Columbia Care New Jersey, LLC (scoring 929.000), and GTI (scoring 927.3333)- were already selected for other regions in the State. Consequently, the Department disqualified MPX, Columbia Care, GTI and NETA from consideration for the Central region. The Department then proceeded to select the next two highest ranking applications in this region, which were Verano NJ, LLC (scoring 920.6667) and JG New Jersey, LLC (scoring 913.3333). Therefore, NETA NJ, LLC; GTI New Jersey, LLC; MPX New Jersey; Columbia Care New Jersey, LLC; Verona NJ, LLC; and JG New Jersey, LLC were selected to proceed with the ATC permitting process for their respective regions.

Harvest, which had applied for the Southern region, received a score of only 911.1667 and was not selected to proceed with the ATC permitting process. The Department issued final agency decisions to the selected applicants on December 17, 2018. The Department also issued a final agency decision to Harvest on

December 17, 2018, advising that its application was denied. On January 31, 2019, the Department issued a notice of correction of the final agency decisions, which corrected two minor typographical errors.

THE STAY APPLICATION

On January 31, 2019, Harvest appealed the denial of its application to the Superior Court of New Jersey, Appellate Division. Harvest requests that I stay the Department's final agency decisions issued to the six applicants selected to proceed with the ATC permitting process under the RFA. After reviewing Harvest's application, I find that it fails to meet the requirements for injunctive relief.¹

To succeed in its application for a stay, Harvest must establish (1) that irreparable injury will result if the relief sought is withheld; (2) a reasonable likelihood of success on the merits of the underlying claim; (3) that the legal right underlying the request for relief is well settled; and (4) that the relative hardship of the parties is balanced in its favor. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). The burden is on Harvest to demonstrate entitlement to the relief requested by satisfying each

¹ On February 6, 2019, the Department received notice from GGB New Jersey, which applied to operate an ATC in the Northern Region and was not selected because it received a composite score of only 823.6667, that it joined in Harvest's motion for a stay of the final agency decisions.

of the applicable criteria. I find that Harvest did not establish any of these criteria.

First, I find that Harvest has not shown that it is reasonably likely to succeed on the merits of its appeal. To be successful in its appeal, Harvest must demonstrate that the final agency decisions were arbitrary, capricious, unreasonable or inconsistent with the governing law. Matter of Musick, 143 N.J. 206, 216 (1996); Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). As explained above, the Department undertook a painstaking evaluation of the applications under the governing statutes and regulations.

The Compassionate Use of Medical Marijuana Act, and the regulations promulgated thereunder, afford the Department broad discretion to evaluate ATC permit applications and select those entities to receive permits to operate ATCs. Through the exercise of its discretion, the Department developed a comprehensive process for accepting, reviewing and selecting entities to receive ATC permits. See N.J.A.C. 8:64-6.1, et seq.

The process at issue here began with a comprehensive RFA. The RFA contained three criteria, each with subsections setting forth specific measures, addressing all aspects of establishing and operating an ATC. The RFA also included a scoring system which assigned a certain number of points for each criterion and measure outlined in the RFA. The Department designed each criterion and

measure, as well as the scoring system itself, to further the purpose and intent of the Act -- to ensure that an adequate supply of medical marijuana is made available to qualifying individuals and that the entities producing and dispensing the medical marijuana are financially viable, law-abiding, well-organized and physically secure.

The Department assembled a six-member review committee to consider and evaluate the applications submitted in response to the RFA. The committee members were carefully chosen to infuse the review process with expertise in the areas of the MMP, plant science, finance, and diversity. The chosen members were also vetted to ensure that they did not have any financial or personal stake in any of the applicants. This selection process resulted in a committee staffed with qualified, unbiased reviewers.

The committee members then reviewed the applications against the criteria set forth in the RFA and allocated scores based on the points assigned to each of the criteria and measures referenced in the RFA. The review process yielded composite scores for each applicant.

The Department then developed a selection methodology for the selection of six applicants for ATC permits. The selection method provided that no one applicant should operate more than one ATC and used existing medical marijuana supply and demand to determine the regional order in which the selections would be made.

The Department first selected two applicants for the Northern region as this was the region with the greatest need for medical marijuana, as demonstrated by the supply and demand calculations. The Department then selected two applicants for the southern region. While Harvest submitted an application for this region, its composite score of 911.1667 was lower than the two applicants selected for the region, who received scores of 958.1667 and 929.0000. Thus, Harvest was not chosen. Finally, the Department selected two applicants for the Central region. This process provided a fair, reasonable and unbiased review of what each applicant, including Harvest, had to offer.

In its papers, Harvest contends that it is likely to succeed on the merits of its appeal because the Department's final agency decision denying its application to operate an ATC was arbitrary, capricious and unreasonable because 1) the Department failed to develop a record for the Appellate Division by not affording it an administrative hearing on its denied application, 2) the Department has not yet fulfilled its Open Public Records Act (OPRA) request for the winning applicants' applications, and 3) there were scoring irregularities with its application. I find Harvest's claims unavailing.

Harvest's first claim lacks merit because, under N.J.S.A. 24:6I-7, the denial of an application to operate an ATC "shall be considered a final agency decision, subject to review by the

Appellate Division of the Superior Court.” As such, the Department informed applicants that they could appeal their denied applications to operate an ATC to the Appellate Division of the Superior Court, rather than affording them an administrative hearing.

Harvest’s second claim concerning its outstanding OPRA request lacks merit because the status of the response to the OPRA request does not render the Department’s final agency decision arbitrary, capricious or reasonable. To date, the Department has received over 100 OPRA requests for materials associated with the RFA process, including applications submitted under the RFA, that comprise over 40,000 pages of documents. Due to the enormous number of OPRA requests it received and the voluminous nature of the materials that must be reviewed prior to production, the Department needed extensions of time to respond to the OPRA requests it received, including Harvest’s. While the winning applications are part of the record on appeal for this matter, the fact that the Department required an extension of time to produce these applications does not render its final agency decision arbitrary and capricious.

Harvest’s third claim alleging that scoring irregularities with its application resulted in an arbitrary final agency decision is equally unavailing. Specifically, Harvest claims that for certain criterion measures it received high scores from some of

the selection committee members while receiving lower scores from other members for the same criterion measure. Thus, Harvest claims that the entire review process was arbitrary and capricious. I disagree.

As explained above, the Department populated the selection review committee with six individuals from three agencies who brought to the review process knowledge and expertise in the areas of the MMP, plant science, finance, and diversity. As each member brought a different set of skills and expertise to the review process, it is not only anticipated but expected that the scores given to an applicant by each member would vary and not be identical. Indeed, the fact that Harvest received different scores from each committee member for the same criteria measure demonstrates that each member applied his or her unique expertise to the scoring process, thereby ensuring that the applications were vetted and viewed from all reasonable and relevant vantage points. Thus, I reject Harvest's last claim of error.

Based upon the above, I find that Harvest has not established a reasonable likelihood of success on the merits of its appeal. For the same reasons, I find that Harvest has not established that the legal right underlying the request for relief is well settled.

I also find that Harvest has not shown it will suffer irreparable injury. Harm is generally considered "irreparable" if it cannot adequately be addressed by the payment of monetary

damages. Thus, it has been defined as "substantial injury to a material degree coupled with the inadequacy of monetary damages." Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976). In addition, the movant must establish "that the harm to him if the injunction is denied will be greater than the harm to the opposing party if the injunction is granted." Ispahani v. Allied Domecq Retailing USA, 320 N.J. Super. 494, 498 (App. Div. 1999).

In its moving papers, Harvest claims that "irreparable harm" will befall the successful applicants in that they will experience a significant economic loss if the Appellate Division reverses the final agency decisions. Setting aside the fact that Harvest failed to articulate the "irreparable harm" that it would experience if its stay was not granted, the only impact that will come to selected applicants if the final agency decisions are not stayed and the court later invalidates the process is purely economic. Financial loss is not irreparable harm.

In contrast, if the final agency decisions were stayed, the MMP patients would suffer irreparable harm. As outlined above, the Department's recent addition of five new debilitating medical conditions to the MMP resulted in a drastic increase in the number of patients on the registry. In February 2018, the MMP had approximately 18,000 patients registered. Today, the MMP has over 40,000 registered patients and is averaging 2800 new patients per

month. With this amount of growth, the Department expects that the number of registered patients will reach between 60,000 and 70,000 by January of 2020. Because the MMP patient population is expanding rapidly, the demand for medical marijuana is growing as fast. With only six ATCs in the State, the cultivation and dispensing of medical marijuana simply cannot keep pace with the growing demand. As such, I cannot halt the ATC permitting process necessary to increase production of medical marijuana, as harm will come to the very patients the Department is charged with serving. Therefore, I find that Harvest has not established that it will suffer irreparable harm if a stay of the final agency decisions is not entered.

Finally, the relative hardships of the parties do not balance in Harvest's favor. The public's interest in ensuring that there are a sufficient number of ATCs in the State to provide individuals suffering from debilitating medical conditions with medical marijuana to alleviate their suffering outweighs Harvest's self-motivated interests in becoming an ATC in New Jersey.

For these reasons, I find that Harvest has not satisfied any of the requirements for a stay, and its request for a stay pending appeal is denied.

Pursuant to Court Rule 2:9-7, Harvest may appeal this decision to the Superior Court of New Jersey, Appellate Division.

Sincerely,



Shereef M. Elnahal, MD, MBA
Commissioner

cc: Joshua S. Bauchner, Esquire, counsel for GGB New Jersey
Arnon Vered, NETA NJ, LLC
Devra Karlebach, GTI New Jersey, LLC
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