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February 21, 2019

Stuart M. Lederman, Esquire  
Riker Danzig  
Headquarters Plaza  
One Speedwell Avenue  
Morristown, New Jersey 07962-1981

Re: Bloom Medicinals of PA's Request for  
a Stay of the Department of Health's  
Final Agency Decisions for Alternative  
Treatment Centers

Dear Mr. Lederman:

On February 11, 2019, I received Bloom Medicinals of PA's (Bloom) 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 pages 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, Central 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. Bloom submitted applications in all three regions.

The Department then assembled a six-member review committee, which reviewed and scored all the applications, including Bloom'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.

Prior to beginning the scoring process, the committee members attended a workshop, which trained them on diversity and implicit bias, gave them an overview of the MMP and its goals and mission, and provided them with guidance on scoring the applications. Thereafter, 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:

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

<b>Region</b>	<b>Demand Factor</b>	<b>Supply Factor</b>	<b>Supply/Demand</b>	<b>Rank</b>
<b>North</b>	0.344833492	0.176704015	<b>0.512432867</b>	1
<b>South</b>	0.281884843	0.325163399	<b>1.153532751</b>	2
<b>Central</b>	0.373281665	0.498132586	<b>1.334468401</b>	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; Verano NJ, LLC; and JG New Jersey, LLC were selected to proceed with the ATC permitting process for their respective regions.

Bloom submitted applications for all three regions. However, it received a score of only 894.8333 for each of its applications. Consequently, Bloom was not selected for any region. The Department issued final agency decisions to the selected

applicants on December 17, 2018. The Department also issued final agency decisions to Bloom on December 17, 2018, advising that its applications were 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, Bloom appealed the denial of its application to the Superior Court of New Jersey, Appellate Division. Bloom 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 Bloom's application, I find that it fails to meet the requirements for injunctive relief.

To succeed in its application for a stay, Bloom 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 Bloom to demonstrate entitlement to the relief requested by satisfying each of the applicable criteria. I find that Bloom did not establish any of these criteria.

First, I find that Bloom has not shown that it is reasonably



likely to succeed on the merits of its appeal. To be successful in its appeal, Bloom 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 members also attended a training workshop on diversity, implicit bias, scoring guidelines and MMP background to equip them with the necessary tools to perform an effective evaluation of each application. The chosen members were also vetted to ensure that they had no financial or personal stake in any of the applicants. This 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. Finally, the Department selected two applicants for the Central region. While Bloom submitted applications for all three regions, its composite score for each region were lower than the selected applicants. Thus, Bloom was not selected for any region. This process provided a fair, reasonable and unbiased review of what each applicant, including Bloom, had to offer.

In its moving papers, Bloom appears to contend that it is likely to succeed on the merits of its appeal because the Department has not yet fulfilled its Open Public Records Act (OPRA) request for the winning applicants' applications, which renders the Department's final agency decision arbitrary, capricious and unreasonable. I find this argument unavailing.

The status of responses to OPRA requests does not transform the Department's final agency decision into one that is 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 Bloom'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.

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

I also find that Bloom 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, Bloom failed to articulate the "irreparable harm" that will befall it if the stay is not granted. Instead, Bloom asserts that the Department and the public will not

be harmed if the final agency decisions are stayed because there are currently six permitted ATCs operating in New Jersey that are meeting MMP patients' needs for medical marijuana. I disagree.

If the final agency decisions were stayed, then 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 Bloom 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 Bloom'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 Bloom's self-motivated interests in becoming an ATC in New Jersey.

For these reasons, I find that Bloom 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, Bloom may appeal this decision to the Superior Court of New Jersey, Appellate Division.

Sincerely,



Shereef M. Elnahal, MD, MBA  
Commissioner

cc: Arnon Vered, NETA NJ, LLC  
Devra Karlebach, GTI New Jersey, LLC  
Dana Klein, Verano New Jersey, LLC  
Jamil Taylor, JG New Jersey, LLC  
Elizabeth Stavola, MPX New Jersey  
Nicholas K. Vita, Columbia Care New Jersey, LLC