STEVENS & LEE

100 Lenox Drive, Suite 200
Lawrenceville, NJ 08648
(609) 243-9111 Fax (609) 243-9333
www.stevenslee.com

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TO	Shereef M. Elnahal, M.D. MBA, Commissioner	State of NJ. Dept. of Health		(609) 292-0053

MESSAGE

ACCOUNT NO.: 113076-00001
FROM: Maeve E. Cannon, Esq.
TOTAL NUMBER OF PAGES INCLUDING COVER: 6
DATE: February 4, 2019

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STEVENS & LEE

100 Lenox Drive, Suite 200
Lawrenceville, NJ 08648
(609) 243-9111 Fax (609) 243-9333
www.stevenslee.com

Direct Dial: (609) 243-6423
Email: meca@stevenslee.com
Direct Fax: (610) 371-7903

February 4, 2019

BY FACSIMILE 609-292-0053
Shereef M. Elnahal, M.D. MBA, Commissioner
State of New Jersey
Department of Health
P.O. Box 360
Trenton, NJ 08625-0360

Re: Harvest of New Jersey, LLC Request for Stay of Issuance and Processing of Licenses to Operate Medical Marijuana Alternative Treatment Center Pending Appeal

Dear Commissioner Elnahal:

This firm is counsel to Harvest of New Jersey, LLC ("Harvest") in connection with its application to operate a medicinal marijuana alternative treatment center in the southern New Jersey region. On January 31, 2109, Harvest appealed your December 17, 2018 letter advising that Harvest's application was not selected to proceed with the permitting process for the southern region. It is Harvest's understanding that a number of other unsuccessful applicants have also filed appeals. Pursuant to New Jersey Court Rule 2:9-7, application is hereby made to the Department of Health ("DOH") for a stay of any further administrative agency processes with respect to the award of medicinal marijuana alternative treatment center licenses pending this appeal. It is requested that your office respond to this request not later than Wednesday, February 6, 2019 so further review can be sought from the Appellate Division as to a stay of the permitting process for the successful applicants, if necessary.

In this instance, a stay of the decision below is appropriate to ensure that no party is prejudiced by the appeal process. With a stay of any further proceedings, the rights of all parties are preserved pending the appeal process and the *status quo* maintained, which is also in the public interest. A stay of further proceedings is warranted under the four factors for injunctive relief set forth in the New Jersey Supreme Court decision of *Crowe v. DeGioia*, 90 N.J. 126,

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132-34 (1982). Under *Crowe*, a party seeking a stay must demonstrate: (1) danger of immediate or irreparable harm if the request is not granted, (2) a clear likelihood of success on the merits, (3) the balancing of the relative hardships reveals that greater harm would occur if the stay is not granted than if it were, and (4) consideration of public interest militates in favor of the stay. *Ibid.* The Appellate Division has recently held, in the bidding context, but equally applicable here, that "A court may take a less rigid view of the *Crowe* factors and the general rule that all factors favor injunctive relief" when the "injunction is merely designed to preserve the status quo." *Waste Management of New Jersey v. Morris County Municipal Utilities Authority*, 433 N.J. Super 445. 453 (App Div 2013) (quoting *Waste Management of New Jersey, Inc. v. Union County Utilities Authority* 399 N J Super. 508, 520 (App. Div. 2008)).

Clearly a "less rigid" analysis is also warranted where the public interest is implicated, such as here, where this important program, which serves the needs of numerous sick and suffering New Jerseyans, will be potentially impacted by the award of these licenses and the implementation of this program Further, where no harm is occasioned by a short delay to review this matter on appeal, but a failure to stay the awards potentially may leave the intended awardees in limbo with unrecoverable economic losses and the movant with potentially no remedy the balancing of the hardships favors the Movant. In other words, the absence of stay may well result in irreparable damages to the applicant, as well as the intended awardees. In sum. Harvest can satisfy each of the four (4) factors of the *Crowe* test and a stay is clearly warranted on this record pending the appeal.

There is a likelihood of success on the merits based on the facts here. Although DOH's December 17 2018 final agency decisions provide the Committee's composite scores for the six (6) highest ranked applicants for each of the three (3) New Jersey regions, it failed to provide Harvest and the other interested applicants and taxpayers with the underlying administrative record For example, DHS has yet to provide the applications of the winning applicants or any

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other part of the evaluation record. The scores of the individual applicants were only provided on the day appeals were due. Despite the fact that DOH stated that the score sheets and the applications would be available, the applications have not been provided; further, and more troublingly, DOH also failed to provide applicants any type of review of this process. Instead, DOH's final agency decisions instructed bidders that they should file an appeal directly with the Appellate Division. Applicants, such as Harvest, were not provided an opportunity to contest scoring errors or otherwise provide facts or law supporting a challenge to DOH's permit approvals. DOH likewise failed to develop a record or otherwise make findings so that the Appellate Division may engage in a meaningful appellate review.

Aside from these procedural irregularities, there were a number of scoring irregularities that, on their face, are demonstrative of an arbitrary and capricious scoring model and evaluative process. For instance, Harvest's scoring sheets shows that for four (4) separate categories of evaluation criteria, Harvest received the highest possible score from several reviewers, and a zero in that same category from other reviewers. The evaluation categories with this wildly disparate scoring include the provision of certified financial statements, record of past business taxes paid to federal, state and local governments, collective bargaining agreements and certifications or designations establishing the business is woman or minority owned. These evaluation criteria were categorical in nature and did not lend themselves to such a disparate range of scoring from different reviewers. The fact that Harvest could receive ***both the highest score and no score at all*** in those same categories from different evaluators is indicative of a process that is at a minimum capable of abuse and misapplication, arbitrary and capricious in practice and at worst, demonstrative of a gross abuse of discretion in its utilization.

If these awards continue to be processed pending appeal, in the event that the Appellate Division throws out this arbitrary process or remands for rescoring or revising of the process, the existing awardees may have expended considerable sums in obtaining zoning and planning

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approvals, acquiring property, exercising options, and engaging in other permitting and siting endeavors that will ultimately result in uncompensated economic loss, a hallmark of irreparable harm. Likewise, Harvest may be subject to arguments that it has no remedy because the process has already proceeded A balancing of the potential harm to be realized without a stay with the lack of harm by maintaining the *status quo* during a short appellate process militates in favor of the entry of a stay pending appeal. Finally, absent a stay, the public interest is harmed by the processing of these licenses where Appellate review may reveal that a better or more appropriate process should have been utilized to obtain the best candidates to fulfill this important program. Further, public confidence in this program may be undermined by a process that is not transparent, does not provide an opportunity for review and for which the record has been withheld from the remaining applicants. The public interest demands that a stay be entered to ensure that this does not happen.

Finally, on a balancing of the equities, maintenance of the *status quo* benefits all parties while the appeal is pending No vendors will necessarily expend effort or funds in furtherance of their application under the specter of appellate review. None of the pending appellants will be harmed or run the risk of their appeal being rendered moot by the expenditure of funds by successful applicants. Accordingly, all parties' interests are preserved by the *status quo* and none harmed by the *status quo* By contrast, a failure to maintain the *status quo* is likely to result in irreparable harm to both the parties to the appeal and the proposed awardees. For all these reasons, Harvest respectfully requests that the December 17, 2018 decisions to permit certain awardees to proceed with the ATC permitting process be stayed pending appeal to maintain the *status quo*

Further, with respect to the development of the record on appeal, by letter to you on January 24, 2019 we reiterated Harvest's outstanding Open Public Records Act ("OPRA") request dated January 23 2019 for the scoring sheets of the evaluation and the applications of the

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successful applicants. In our January 24 request we also included a new request for correspondence between the Department and the successful applicants as well as any evaluation reports that had been prepared. At this time, we also ask, pursuant to OPRA and the common law, that all versions of the scoring sheets used by the evaluation committee be produced as well as any other evaluation materials, including any documents used by the committee in developing the evaluation criteria or instructions provided to the evaluators as to the application and use of the scoring methodology.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to call.

Very truly yours,

STEVENS & LEE
Attorneys for Harvest of New Jersey, LLC

Maeve E. Cannon
Patrick D. Kennedy

MECA:aml
cc Melissa H. Raksa, DAG (via email)
Columbia Care New Jersey, LLC C/O Nicholas K. Vita (by Federal Express)
GTI New Jersey, LLC C/O Devra Karlebach (by Federal Express)
JG New Jersey, LLC C/O Jamil Taylor (by Federal Express)
MPX NEW JERSEY LLC C/O Elizabeth Stavola (by Federal Express)
NETA NJ, LLC C/O Amon Vered (by Federal Express)
Verano NJ, LLC C/O Dana Klein (by Federal Express)