SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

NEW YORK CANNABIS INDUSTRY ASSOCIATION, INC.

Plaintiff-Petitioner,

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules

-against-

NEW YORK STATE DEPARTMENT OF HEALTH, and HOWARD A. ZUCKER, M.D., J.D., in his official capacity as the Commissioner of the New York Department of Health,

Defendants-Respondents.

Index No. 2848-2017

June 9, 2017

(Unassigned)

MEMORANDUM OF LAW IN OPPOSITION TO THE ARTICLE 78 PETITION AND IN SUPPORT OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE DECLARATORY JUDGMENT CLAIMS

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PRELIMINARY STATEMENT

On April 28, 2017 via Order to Show Cause ("OTSC") seeking a Temporary Restraining Order ("TRO"), Plaintiff-Petitioner New York State Cannabis Industry Association, Inc.[1] ("Petitioner") initiated this proceeding against the State of New York Department of Health ("DOH" or the "Department") and Howard A. Zucker (collectively "Respondents"). This matter is a combination CPLR Article 78 and a plenary constitutional action in the nature of declaratory judgment, both challenging DOH's interpretation of Title V-A of Art. 33 of the Public Health Law, commonly known as the Compassionate Care Act ("CCA" or the "Act"). See Verified Complaint and Article 78 Petition ("Petition", for citation "Pet."). By Order dated April 28, 2017, the Honorable Richard Platkin denied Petitioner's TRO application, and executed the OTSC setting a return in this matter. Affirmation of C. Harris Dague ("Dague Aff.") Ex. 1.

At its core the Petition challenges the Department's recent application of PHL § 3365(9) to add five (5) additional Registered Organizations ("ROs") for the manufacturing and dispensing of medical marijuana in New York State. Petitioner, through its strained interpretation of PHL § 3365(9), is essentially seeking a Court-imposed monopoly over the State's medical cannabis market that limits the market to the five initially certified ROs, regardless of any changes in demand, growth in patient population or geographic access needs. Petitioner rests this extraordinary request upon a self-serving reading of PHL § 3365(9) that disregards the plain meaning of the law, eschews the clear intention of the Legislature, and ignores the public's interest

1 Petitioner purports to serve "the interests of the five entities registered in 2015 by the DOH for the manufacture and dispensing of medical cannabis in the State of New York". Pet. ¶1. It should be noted, however, that not all of Petitioner's five member organizations support Petitioner's position in this matter. One of its members, Columbia Care New York, has affirmatively disavowed any role in this litigation. See Affidavit of Nicole Quackenbush ("Quackenbush Aff.") Ex. 6 ("[N]either Columbia Care New York, nor any of its affiliates are a party to any litigation against the State of New York, in particular, the ongoing action that was initiated by other RO's/the industry association").

in an expanded, competitive, open-market.

Beyond its self-interested statutory interpretation claim, Petitioner also challenges Respondents' methodology in determining the need for additional ROs and the selection criteria that DOH implemented to choose the five new ROs. DOH's justification for expanding the number of ROs and the criteria it applied to choose the new ROs are rationally based and neither arbitrary, capricious nor affected by error of law. Moreover, Petitioner lacks the requisite standing necessary to challenge the Department's RO selection criteria.

Respondents submit this Memorandum of Law in support of both their Verified Answer to the Petition and their motion for Summary Judgment pursuant to CPLR §3212. For the reasons set forth below, and in the accompanying Affidavit of Nicole Quackenbush ("Quackenbush Aff."), DOH's recent action of issuing contingent approvals for new ROs and its chosen methodologies in affecting this action are neither *ultra vires* nor arbitrary/capricious, but rather represent a rational, harmonized, common sense construction of PHL § 3365(9) that should not be disturbed based upon Petitioner's self-serving interpretation.

Accordingly, the Petition and Complaint should be dismissed in its entirety.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

As this matter primarily contemplates an issue of statutory interpretation, the relevant facts are neither complex nor in dispute. In the interest of judicial economy and avoidance of redundancy, the relevant factual and procedural background is set forth in the accompanying Affidavit of Nicole Quakenbush and Affirmation of C. Harris Dague.

ARGUMENT

POINT I

THE DEPARTMENT'S ACTION IN CERTIFYING ADDITIONAL ROs WAS NEITHER *ULTRA VIRES* NOR ARBITRARY AND CAPRICOUS

The central inquiry at the heart of this proceeding is exceedingly straightforward as it turns exclusively on a matter of statutory interpretation. By its first and second causes of action Petitioner asserts a challenge to an agency determination under CPLR Art. 7803(2) and 7803(3), respectively[2]. Petitioner argues that the Department's registration of additional ROs is both *ultra vires* and arbitrary and capricious because PHL § 3365(9) "limits the Respondents from registering more than five [ROs]". Pet. ¶¶ 83-97. For the reasons set forth herein, Petitioner's reading of the statute disregards the plain meaning of the text, creates an absurd result, and contravenes both the legislative intent and the public's interest.

A. Applicable Legal Standards

Before turning to the ultimate issue of statutory construction it is important to keep in mind the steep burden Petitioner bears on its Article 78 challenges. To prevail on its claims under either CPLR 7803(2) or (3), Petitioner must demonstrate that the challenged agency action was irrational, arbitrary, or otherwise unlawful, to overcome the "presumption of regularity shielding agency actions". AT&T Info. Syst. V. Donohue, 68 NY2d 821 (NY 1986). In such cases, the reviewing court is charged "not to substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law". Thomas v. King, Index. No. 5981-14 at 5 (Albany County, 2015) (Elliott, J.). The terms "arbitrary" and "capricious" mean "willful and unreasoning

2 While the Petition actually cites to CPLR 7804(2) and 7804(3) as the legal basis for the First and Second causes of action (Pet. at pgs. 18 and 20), Respondents assume this is a typographical error and that the causes of action actually fall under CPLR 7803(2) and 7803(3).

action without consideration of or in disregard of the facts or without determining principle." NY State AFL-CIO v. Stimmel, 105 Misc. 2d 545, 546 (Albany County, 1980) (Kahn, J.).

Moreover, in cases where a petitioner challenges an agency's application or interpretation of a specific statute or regulation, the standard of review is more stringent. An agency's "interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness." Island Waste Services Ltd v. Tax Appeals Tribunal of the State of New York, 77 A.D.3d 1080, 1082 (3rd Dept. 2010). In order to maintain the limited nature of this review, "it is incumbent upon the court to defer to the agency's construction of statutes and regulations that it administers so long as that construction is not irrational or unreasonable". Thomas, Index. No. 5981-14 (Albany County, 2015) (Elliott, J.); See also, Pitman v. Daines, 90 A.D.3d 421, 422 (1st Dept. 2011) ("The agency's determination is entitled to deference because it involves the agency's interpretation of its own regulations and the legislation under which it functions"); Snyder v. New York State Bd. of Regents, 31 Misc. 3d 556, 568 (Albany County 2010) ("The practical construction that is given to a law by those charged with the duty of enforcing it...takes on almost the force of judicial interpretation").

While courts do not generally defer to agencies in matters of "pure statutory interpretation", in cases such as this one where "the question is one of specific application of a broad statutory term", deference to the agency is appropriate. Cohen v. Bloomberg, 24 Misc. 3d 740, 743 (New York County, 2009) (deference paid to agency's interpretation of statutory terms "license", "privilege" and "personal advantage"); See also Matter of O'Brien v. Spitzer, 7 NY3d 239, 242 (N.Y. 2006) (deference paid to agency's interpretation of statutory terms "employee" and "independent contractor").

B. Statutory Construction of PHL § 3365(9)

As described above, the primary inquiry in this matter revolves around two disparate constructions of PHL § 3365(9). The disputed sub-division at issue states:

> The commissioner shall register no more than five registered organizations that manufacture medical marihuana with no more than four dispensing sites wholly owned and operated by such registered organizations. The commissioner shall ensure that such registered organizations and dispensing sites are geographically distributed across the state. The commission may register additional registered organizations.

The parties' interpretation of this three-sentence provision vary sharply, however.

On the one hand, Petitioner endorses an imaginative reading that perpetually caps the number of ROs permitted in the statewide market at any one time at five, and prohibits the registration of any new ROs until one of the original five are either terminated or not renewed. Pet. ¶¶ 11-13. On the other hand, Respondents construe the sub-section as mandating DOH's registration of an initial five ROs at the commencement of the program, while permitting the registration of "additional" ROs at DOH's discretion in the future.

For the reasons detailed below, DOH's rational interpretation, which observes the plain meaning of the sub-division's language, harmonizes conflicting provisions, and achieves a common sense result, is vastly preferable to Petitioner's self-serving interpretation that disregards the text's plain meaning, relies on assumptions created out of whole cloth, and creates irreconcilable illogicalities that, unsurprisingly, benefit no one but the Petitioner's members.

i. The Sub-Division's Plain Meaning Supports Respondents' Construction

Before undertaking any other means of statutory construction, this matter can be dispatched using the simplest and most primary construction tool at the Court's disposal – the plain meaning doctrine. This fundamental principal dictates that "where the statutory language is clear and

unambiguous, the court should construe it so as to give effect to the plain meaning of the words used". Raritan Dev. Corp. v. Silva, 91 N.Y.2d 98, 106-107 (N.Y. 1997) [internal citations omitted]; See also Shea v. Falk, 10 A.D.2d 142, 144 (3d Dep't 1960) ("where the words of a statute are free from ambiguity and express plainly, clearly and distinctly the sense of the framers, resort may not be had to other means of interpretation"). Under this doctrine, "the court is obliged to construe statutory language literally where it expresses the intent of the legislature". Butler v. New York City Health & Hospitals Corp., 82 A.D.2d 136, 142-143 (1st Dep't 1981).

The challenged statutory provision, PHL §3365(9), contains the unambiguous third sentence stating that "the commission[3] may register additional registered organizations." Id. (emphasis added). There is simply no mistaking the plain meaning of this provision as it is clear and unequivocal. Literally construed the text grants the Department's Commissioner the discretion to register "additional" ROs, after the initial five are registered as mandated by the first sentence of the subdivision.

The use of the term "additional" in this third sentence unmistakably indicates the Legislature's intent to bestow authority on the Commissioner to add more ROs than the initially mandated five. The term "additional" is defined to mean[4] "added, extra or supplementary to what is already present or available" [oxford dictionary: www.en.oxforddictionaries.com/definition/additional (last accessed May 11, 2017)][5]. Thus, in

3 The reference to "commission" appears to be a typographical error, and it is presumed that the Legislature meant "commissioner", as utilized throughout PHL § 3360, et seq.

4 Respondents ask the Court to take judicial notice of the common, dictionary definition of the word "additional". Judicial notice of the definition of words is proper. News 12 Co. v Hempstead Pub. Schs. Bd. of Educ., 52 Misc. 3d 479, 484 (Nassau County 2016)

5 "Added, more, or supplementary" [dictionary.com: www.dictionary.com/browse/additional?s=t (last accessed May 11, 2017)]; "more than is usual or expected" [merriam-webster:www.merriam-webster.com/dictionary/additional (last accessed May 11, 2017)].

this context "additional" ROs can only mean more than those already existing. That is, use of the term "additional" clearly modifies the first sentence of the sub-division that mandates DOH to register an initial five ROs, by granting the Department the ability to add more ROs. Any other reading of the last sentence of PHL §3365(9) requires a complete disregard of the plain, literal meaning of the text.

Petitioner contends that the last sentence only grants DOH the authority to replace the initially registered five ROs, in the event that one is terminated or is not renewed. Pet. ¶ 11. Thus, in Petitioner's logic, there can only ever be five ROs operating at any given time. Id. In so arguing, Petitioner completely fails to explain the Legislature's use of the term "additional". For Petitioner's construction to work either the Court must completely disregard the presence of the word "additional", or it must endorse an incorrect definition of the word so as to mean "replace" or "substitute". Neither of these options are tenable under the most basic canons of statutory construction. See, Maron v. Silver, 58 A.D.3d 102, 125 (3d Dep't 2008) ("[C]ourts must give effect to every word of a statute"); see also Matter of Riches v. New York City Council, 75 A.D.3d 33, 44 (1st Dep't 2010) ("It is a fundamental tenet of statutory construction that every word in a statute is to be given effect).

Simply put, had the Legislature intended the third sentence of PHL § 3365(9) as merely granting DOH the ability to replace one of the initial five ROs – it would not have employed the word "additional" to accomplish this direction, as the word unequivocally contemplates the addition of more ROs not the replacement of existing ones. There is no support in the text of the statute for Petitioner's strained interpretation restricting DOH to the replacement of ROs only. Conversely, a plain reading of the text of PHL §3365(9) dictates a finding that by codifying the third sentence of PHL § 3365(9) the Legislature contemplated "additional" ROs being added to

the five initially mandated. To this end, in his Sponsor Memorandum in Support of the Legislation, New York State Assemblyman Gottfried summarized the disputed provision to mean that "the Commissioner would be able to register up to five organizations [ROs] that each operate four dispensaries, and would be able to allow additional [ROs] and dispensaries"[6]. Dague Aff. Ex. 2 at 000016 (emphasis added).

In light of the plain language of PHL § 3365(9) Petitioner's claims that DOH's registration of five additional ROs was *ultra vires* [Art. 7803(2)] and arbitrary and capricious [Art. 7803(3)] fail. As such, the first and second causes of action must be dismissed.

ii. Respondents' Construction Harmonizes Potentially Conflicting Provisions While Petitioner Employs a Narrow Interpretation

While Respondents maintain that the plain meaning of the third sentence of PHL §3365(9) resolves the statutory construction issue as a matter of law, they do acknowledge some potential ambiguity between the first and third sentences of the sub-division. The ambiguity, of course, extends from the first sentence's mandate that "the commissioner shall register no more than five [ROs]" as compared to the third sentence's clear grant of discretion to DOH to "register additional [ROs]". PHL §3365(9). In circumstances where such internal conflicts exist within a statute, the Court's mandate is to harmonize conflicting provisions and reconcile apparent contradictions so as to give effect to each and every part of statute. See Van Wie Chevrolet, Inc. v General Motors, LLC, 145 A.D.3d 1, 9 (4th Dep't 2016); see also Carter v. Board of Supervisors, 31 A.D.2d 945, 946 (2d Dep't 1969) ("[T]he court must assume that every provision in the statute was designed

6 Assembly sponsor of the CCA, Richard Gottfried, also noted in a recent published statement that "The law [CCA] does not limit the program permanently to five registered organizations,...It authorized the commissioner to initially register five organizations with four dispensing sites each but allows the commissioner to then register additional organizations." Crain's Health Pulse, Tuesday May 2, 2017.

to serve a useful purpose and must, in construing statutes, aim to reconcile apparent contradictions and give effect, if possible, to every part of the enactment so as to achieve a harmonious reconciliation between the interrelated provisions."); McKinney's Cons. Laws of N.Y., Book 1, § 98, p. 220. Harmonizing the statute here decisively favors Respondents' construction.

a. Respondents' Construction

Respondents' interpretation of the sub-division proposes a contextualized reading that gives force and effect to both the first and third sentences, subverts potential conflicts, and harmonizes the entire paragraph with itself and other provisions of the CCA.

Specifically, Respondents construe the three sentences of PHL §3365(9) as a natural progression which build off one another. Thus, the first sentence of PHL § 3365(9) mandates DOH to initially register "no more than five [ROs]" to commence the program in New York State. The second sentence of the sub-division tasks the commissioner with ensuring that the initial five ROs provide adequate geographic distribution across the state. Finally, the third sentence, modifies the first two sentences by permitting the registration of "additional" ROs after the certification of the initial five, as a mechanism to assist DOH's mandate to ensure the proper geographic distribution across the state and overall success of the program.

This interpretation is not only internally consistent but also harmonizes with the enacting regulations which call for DOH to "initially register up to five [ROs]" [10 NYCRR §1004.6(b), emphasis added], and prior drafts of the Act that proposed a limited number of ROs only during the initial two years of the program. Sleight Aff. Exs. 3-7. Importantly, 10 NYCRR §1004.6, which sets out DOH's interpretation, was adopted prior to DOH's acceptance of RO applications. Quackenbush Aff. Ex. 4 at p. 1. Thus, Petitioner's members were well aware of DOH's

interpretation of PHL § 3365(9) prior to deciding to apply as ROs[7].

Moreover, Respondents' interpretation vesting discretion to add extra ROs with the Department's Commissioner is also consistent with other portions of the Act wherein the Legislature gave the Commissioner discretion to make other significant changes to the program. For example, the Act limits the provision of medical marijuana to individuals suffering from a list of serious medical conditions. PHL § 3360(7). The Legislature expressly permits the DOH Commissioner to expand this list in his own discretion. PHL § 3360(7)(a)(i). Similarly, the CCA gives the Commissioner authority to expand the types of providers who can prescribe the drug to include nurse practitioners "based upon considerations including access and availability". PHL § 3360(12). Permitting the Commissioner authority to add medical conditions for which medical marijuana can be prescribed, and the types of medical personnel who can so prescribe it, is consistent with permitting the Commissioner discretion to add more ROs.

The CCA also vests the Commissioner with considerable and wide discretion over ROs generally. Under the Act the Commissioner has authority to regulate the qualifications of ROs [PHL § 3365(1)], along with the discretion to initially grant applicant approval [PHL § 3365(3)], renew ROs [PHL § 3365(5)(d)] and terminate ROs [PHL § 3365(7)]. Granting the Commissioner such wide discretion on the approval and retention of ROs is consistent with Respondents' interpretation of §3365(9), which vests discretion over the number of ROs in the Commissioner.

Additionally, Respondent's reading of the first sentence of PHL §3365(9) as concerning

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7 Additionally, DOH's guidance made available to RO candidates prior to their applications on the Department's public website cross-referenced the enacting regulations which contain DOH's position regarding initially registering five ROs. Quackenbush Aff. Ex. 1 at p. 2 ("An applicant that is issued a registration to operate as [an RO] shall be subject to and operate in accordance with...10 NYCRR Part 1004). Moreover, DOH guidance regarding the application process also contains a clear statement of Department's position that "the law...allows the Commissioner to register additional organizations in the future". Quackenbush Aff. Ex. 2 at p. 1.

only the initial registration of ROs is consistent with the Legislature's clear intent to commence the program without delay. PHL § 3365(8) directs DOH to begin issuing registrations "as soon as practicable", while PHL § 3365-a codifies a mechanism for expedited RO registration "during the period of full implementation of the program", in cases "of patients whose serious condition is progressive and degenerative or is such that delay in the patient's medical use of marihuana poses a serious risk to the patient's life or health." Id at §3365-a(1). In a letter to the Governor's office from the Assembly and Senate bill sponsors dated June 26, 2014 regarding the status of the bill, the sponsors noted the exigency of the matter, and stated "it is important that the legislation be implemented as quickly as possible". Dague Affirmation Ex. 3 at 000008. When read in conjunction with these provisions, Respondent's construction of §3365(9)'s first sentence as only limiting the initial roll out of ROs to five makes sense, as the Legislature wanted to streamline the process and get the first crop of ROs operational, before permitting the Department to add more ROs as market and geographic distribution needs dictated.

Respondents' interpretation gives meaning to and harmonizes all three sentences together and with the rest of the CCA in a consistent, logical manner, while simultaneously advancing the general intent of the CCA to relieve the pain and suffering of New Yorkers with serious medical needs statewide. Importantly, this construction allows the first and third sentences to co-exist and completely alleviates any conflict between them. Such a harmonized construction that obviates contradiction and remains consistent with the overall statutory intent is favored at law. New York State Rest. Assn., Inc. v. Commissioner of Labor, 45 A.D.3d 1133, 1135 (3d Dep't 2007) ("[A]ll parts of an enactment shall be harmonized with each other as well as with the general intent of the whole enactment").

b. Petitioner's Construction

Conversely, rather than harmonizing the sub-division among itself and the rest of the CCA, Petitioner's proffered interpretation fosters inconsistency and functions only by rendering one portion of the sub-division completely meaningless. As set forth above, Petitioner maintains that the first sentence of PHL §3365(9) caps "the number of entities that DOH may register for the manufacture and dispensing of medical marijuana in the State" at five. Pet. ¶11. It claims that this cap cannot be exceeded – so that the statewide medical marijuana market can only ever be run by just five ROs. Id. With respect to the third sentence of PHL §3365(9) – which unambiguously provides DOH authority to add "additional" ROs without express limitation – Petitioner argues that this provision "allows DOH to register additional [ROs] only in the event the number of [ROs] drops below the statutory cap of five…". Pet. MOL at 1.

Petitioner's construction relies on a complete disregard of the third sentence of the sub-division. That is, because it cannot otherwise justify the Legislature's inclusion of the word "additional", Petitioner simply ignores its presence all together and invents a convoluted system whereby DOH may only replace a registrant when one of the existing ROs is terminated or not renewed. This reading renders the third sentence and the word "additional" completely futile. It is, of course, "axiomatic that in interpreting a statute [a court]" must not "construe one portion …in such a manner as to render another portion thereof meaningless". R.A. Bronson, Inc. v. Franklin Correctional Facility, 255 A.D.2d 723, 724 (N.Y. App. Div. 3d Dep't 1998).

Further belying Petitioner's contention that the third sentence should be read as limiting DOH to the replacement of ROs only, is the fact that the text of the statute itself simply does not mention this concept. That is, PHL § 3365(9) does not discuss the replacement or substitution of ROs who have been terminated or otherwise dismissed from the program, while it does specifically

discuss adding "additional" ROs. PHL §3365(9). Presumably, if the Legislature intended to limit DOH's authority exclusively to replacement of ROs, it stands to reason that it would have specifically stated that within the sub-division. See Matter of Hroncich v. Con Edison, 21 N.Y.3d 636, 646 (N.Y. 2013) (If Legislature intended plaintiff's proposed reading of Workers' Compensation Law "it would have said so"); see also Hudson Deepwater Dev., Inc. v. City of Troy, 299 A.D.2d 801, 803 (3d Dep't 2002) (Rejecting a plaintiff's attempt to expand a construction beyond the plain meaning of a phrase on a finding that "if the Legislature intended such an expansive construction, it would have said so"); McKinney's Cons. Laws of N.Y., Book 1, § 74, p. 158-159 ("If the legislature had intended the statute to include the matter in question, it would have been easy for them to have said so and to have expressly included it…[this concept] is especially forceful when a party claims a construction which makes a radical innovation in the law").

Moreover, Petitioner finds no support for its invented reading anywhere in the text of the CCA. In fact, tellingly where the Legislature directly discusses DOH's right to suspend or terminate an RO [PHL §3365(6) and (7)], there is no discussion of replacing the terminated or suspended RO. In neither these sub-divisions nor in the rest of § 3365 did the Legislature mention the replacement of ROs, as suggested by Petitioner's proposed construction. It is reasonable to assume that had the Legislature intended Petitioner's paradigm, where the ROs were firmly capped at five and DOH is only able to replace one of the existing, they would have made reference to replacement mechanics in the sub-division discussing the suspension/termination procedures.

iii. Respondents' Construction Promotes Common Sense and the Public Interest While Avoiding Absurdities and Unreasonableness

Respondents' proposed construction of PHL §3365(9) is correct for another reason, as well.

Respondents' interpretation is a common sense reading of the CCA, which advances the public's interest in greater access to medical marijuana, more diverse geographic distribution, and market competition. Petitioner's reading, on the other hand, imposes an absurd market restriction, which only advances Petitioner's insular fiscal interests to the detriment of statewide patients. The canons of construction overwhelmingly favor interpretations born from common sense and rationality. See McKinney's Cons. Laws of N.Y., Book 1, § 96, p. 207. ("[A] statute should be given a rational interpretation consistent with achieving its purpose and with justice and common sense"); see also §143, p. 286 ("The Legislature in enacting an statute is assumed to find basis for the law in common sense and statutes must be construed in the light of common sense"). Moreover, constructions that sacrifice or prejudice the public interest or welfare are disfavored at law. Id. §152.

a. Common Sense Versus Absurdity

As it makes clear throughout its papers, Petitioner insists on a construction of PHL §3365(9) that imposes a rigid cap on the number of ROs permitted to operate in New York State, and restrains DOH from adding additional ROs beyond the initial five for any reason. Pet. ¶¶ 11-13. This interpretation strains common sense for at least four separate reasons.

First, it is simply not reasonable to assume that the Legislature would introduce a brand new, statewide medical marijuana program for which exact parameters of the market and patient populations could not be precisely predicted, while also limiting statewide distribution and sales

to only five ROs for the entire tenure of the program[8]. With so many potential unknowns, capping the number of ROs right out of the gate, as Petitioner advocates, would be illogical. By way of analogy, Petitioner's construction is tantamount to opening a first of its kind car dealership in a busy city, but limiting the number of cars you will sell during the entire lifespan of the dealership no matter how many customers or how much demand ultimately materializes. Comparatively, Respondents' interpretation permitting DOH to add more ROs in response to market factors makes much more sense. Clearly the Legislature would have considered potential growth of the program in its analysis, and thus allowed for future expansion of ROs to address patient needs or access considerations, if necessary.

Second, Petitioner's interpretation is illogical as inconsistent with the overarching purpose of the CCA. As Petitioner itself articulated, the objective of the CCA is to relieve "the pain and suffering of those individuals with serious medical conditions". Pet ¶ 10. As such, capping the number of ROs who can serve New York's entire patient population, before anyone knew or fully understood the extent of the population, its capacity for growth, or its geographic distribution, simply makes no sense. If the purpose of the Act is to provide medical care to as many qualified New Yorkers in need, arbitrarily handcuffing the State to just five providers with no mechanism to add more in response to market growth would be irrational. In fact, current market conditions best illustrate this point. As patient populations continue to grow on a monthly basis, with recent data showing an 18 percent increase in overall patients, the Legislature's prescience in granting

8 By way of comparison, other States that are operating similar medical cannabis programs have more ROs for fewer patients. For example, in Maryland, where there are 6,500 patients who applied to consume medical marijuana, and the Maryland Medical Cannabis Commission pre-approved 15 companies to manufacture medical marijuana. www.mmcc.maryland.gov/pages/industry.aspx [last accessed May 25, 2017]. Similarly, Illinois, which has about 19,000 registered patients, has granted 21 cultivation licenses.
www.illinois.gov/gov/mcpp/Pages/update05032017.aspx [last accessed May 25, 2017]. Currently in New York, there are more than 20,000 certified patients, serviced by the five initial ROs and the five newly added conditional ROs. www.health.ny.gov/regulations/medical_marijuana/ [last accessed Mary 26, 2017].

DOH authority to add more ROs to address demand is understandable. Quackenbush Aff. ¶ 37, Table 1. In fact, the total number of registered patients recently eclipsed the 20,000 mark. www.health.ny.gov/regulations/medical_marijuana/ [last accessed May 26, 2017].

Third, in a similar vein, it is patently illogical that the Legislature would empower the Department to expand aspects of the program that directly impact patient numbers, but not grant the Commissioner authority to add ROs to address these expansions. As mentioned above, the CCA expressly permits the Department's Commissioner the ability to expand the types of "serious conditions" for which medical marijuana is available to treat, and the types of providers who can prescribe the drug. See PHL §3360(7)(a)(i) (providing a list of qualifying serious conditions and permitting expansion "as added by the Commissioner"); see also PHL § 3360(12) (permitting Commissioner to add nurse practitioner as prescribing source). In fact, the Commissioner recently exercised these authorities when he added chronic pain as a stand-alone condition to the list of serious conditions and authorized Nurse Practitioners to prescribe. Quackenbush ¶ 33. These changes have already resulted in marked patient increases. Id. ¶¶ 37-38, Table 1.

Yet, under Petitioner's construction the Commissioner cannot add additional ROs to service the new patients he has created through his other administrative changes. It is plainly absurd to think that the Legislature would grant the Commissioner the power to vastly expand the number of qualified patients in New York, while simultaneously limiting his ability to provide medication to the new patients by imposing a cap on the number of ROs. Under Respondent's interpretation the Commissioner not only has the authority to increase patients, but he also has the ability to increase the number of ROs in response.

Fourth, Petitioner's interpretation capping the number of ROs is illogical as it implies that the Legislature would intentionally create a state sanctioned, five-way monopoly in the medical

marijuana market. While such a result favors the Petitioner's members' business interests, "the courts will not ascribe an intention to the Legislature contrary to general and well-established rules of justice and fairness". McKinney's Cons. Laws of N.Y., Book 1, § 151, p. 329 ("The courts will not by statutory construction impute an intent to act in bad faith to the Legislature").

For all of these reasons, Petitioner's proposed interpretation would create an absurd result, whereunder: (1) the State would be constrained to only five ROs from the inception of the program to its completion no matter how the market expands or changes over time; (2) The Commissioner, while vested with statutory authority to significantly expand the program to reach more patients, would be powerless to address market demand issues if his changes impacted the marketplace, and; (3) the Legislature would be responsible for having created a monopoly for five ROs who would control the entire statewide market. Statutory constructions that create absurd results are disfavored. See R.A. Bronson, Inc., 255 A.D.2d at 724 (3d Dep't 1998) ("It is axiomatic that in interpreting a statute, we should not do so in such a way as to reach an absurd result"); see also McKinney's Cons. Laws of NY, Book 1, § 145, p. 294 ("[A]n absurd or frivolous purpose is not to be attributed to the Legislature, and if a construction sought to be placed on a statute produces an absurdity it is, as a general rule, to be discarded").

b. Public Interest

Finally, in addition to Respondents' construction promoting common sense and the intent behind the CCA (while Petitioner's courts absurdity), it also safeguards the public interest. It has been routinely observed that the public bears an interest in open competition which discourages "favoritism, improvidence, extravagance, fraud and corruption". Diamond Asphalt Corp. v. Sander, 92 N.Y.2d 244, 256 (1998); see also Acme Bus Corp. v. Board of Educ., 91 N.Y.2d 51, 55 (1997) ("[T]he complete public interest is ultimately promoted by fostering honest

competition"). Respondents' construction of PHL § 3365(9) and their recent administrative action of conditionally registering five more ROs creates a more diverse, robust and presumably competitive market, while allowing for expansion in light of the growing patient base.

Conversely, Petitioner advocates for a closed market limited to just five ROs with no mechanism to grow or add new ROs. Pet. ¶¶ 10-13. This stagnancy serves no one's interest except the Petitioner's members, who have a fiscal interest in maintaining their exclusivity over the market. Generally, "a construction of a statute which tends to sacrifice or prejudice the public interests or welfare in not favored and should be avoided if possible." McKinney's Cons. Laws of N.Y., Book 1, § 152, p. 330; see also Statewide Roofing v. Eastern Suffolk Bd. of Coop. Educ. Servs., 173 Misc. 2d 514 (N.Y. Sup. Ct. 1997); Senior v. New York C. R. Co., 111 A.D. 39, 46 (1st Dept 1906) (Clark, J., dissenting) (internal citations omitted) ("The statute imposes a duty to the public on corporations which derive all their powers and privileges from the people of the State, and should be liberally construed in the public interest. When either of two constructions of a statute is possible, the interpretation must be adopted which is most favorable to the State.").

In sum, as Petitioner's proposed interpretation would create an absurd outcome that would oppose the public interest, it is disfavored as a matter of well-established law. Respondents' construction of PHL §3365(9) should be adopted by the Court and the Petitioner's CPLR Article 7803(2) and 7803(3) claims denied.

iv. Respondents' Construction is Consistent with the Legislative History

Based upon the plain language of §3365(9) and the harmonized, common sense approach inherent within Respondents' construction, further analysis of the legislative intent through legislative history is not necessary. Griffin v Sirva, Inc., 2017 N.Y. LEXIS 1244, 24-25 (May 4, 2017) (This Court has consistently held that legislative history should only be consulted where

"the plain intent and purpose of a statute would otherwise be defeated" based on the "literal language of a statute"). However, in the event the Court wishes to countenance Petitioner's legislative history argument, it too is unavailing.

Petitioner contends that the legislative history of the CCA supports its reading of the Act as implementing a hard cap on ROs at five and divesting DOH of discretion to add more ROs. A review of the Acts' legislative history, however, illustrates the exact opposite proposition. Specifically, the legislative history demonstrates that the Legislature always intended to vest DOH with authority to determine appropriate number of ROs necessary to service the entire state, a position that did not change from the first to the final version of the bill.

Petitioner cites to (7) seven prior versions of the Act, purportedly in support of its claim that the final version differs as having struck the commissioner's authority to decide upon the proper number of ROs. Sleight Aff. ¶¶ 14-20, Exs. 1-8. This position is curious, however, as the final version of PHL §3365(9) does not strike the authority in the commissioner to dictate the appropriate number of ROs – in fact, it expressly maintains this grant of authority by stating "[t]he commission[er] may register additional registered organizations". PHL § 3365(9). While Petitioner desires to overlook the plain language of this phrase, as discussed above in Point I(B)(i), it clearly contemplates discretion in the Department to set the number of ROs through its power to add ROs.

Each of the seven prior versions of the Act cited by Petitioner vest with the commissioner authority to determine the appropriate number of ROs. Sleight Aff. Exs. 1-7. The early Assembly versions maintain that the commissioner has discretion to approve or deny RO applications, and to decide whether the number of ROs was adequate or excessive to serve a particular area. Id. Ex. 1, 2. The first draft of the CCA gave the Commissioner authority to "determine the appropriate

number of [ROs]". Id. Ex. 3. The second and third drafts grant the commissioner authority to decide, but limit the number of ROs in the first two years to (10) ten. Id. Exs. 4-5. The fourth and fifth drafts grant the very same discretion, but limit the number of ROs in the first two years at (20) twenty. Id. Exs. 6-7.

What these prior drafts demonstrate is that the Legislature consistently desired to vest DOH with the power to determine the proper number of ROs necessary to implement the program on a statewide basis, but could not decide on a proper number of ROs to initiate the program in its first two years. Moreover, the number of ROs that the Legislature was contemplating operating in the first two years illustrates just how absurd the Petitioner's perpetual cap of five really is. The Legislature moved from permitting (10) ten, to permitting (20) twenty such ROs for the first two years, before vesting the Commissioner with complete discretion to add ROs. Id. Exs. 4-7. Despite the legislative history contemplating decidedly more ROs in just the first two years of the program, Petitioner absurdly cites to it as authority for its position that the Legislature ultimately decided to cap ROs at only 5 for the entire life of the program and give DOH no mechanism to add more.

The legislative debate surrounding the Act further supports Respondents' position that PHL §3365(9) permits the Department authority to add more ROs after registration of the initial five. To wit, the Assembly debate on the bill from June 9, 2014 included the following discourse:

> Mr. Walter: Is there any provision in here [the CCA] to expand the number of [ROs] from the initial five?
>
> Mr. Gottfried: Yes. The Commissioner of Health would have authority to increase the number of [ROs] if he find [sic] that there is a need for that.
>
> Mr. Walter: Is there any sort of time limit on that or if the demand is overwhelming within the first couple of years, can he just go ahead and do that?
>
> Mr. Gottfried: He could do it whenever he wants.

Mr. Walter: That's good. . . Dague Aff. Ex. 4 at pg. 314.

The legislative history of the Act supports Respondents' statutory construction. Every previous iteration of the bill contained provisions granting DOH authority to choose the appropriate number of ROs to run the program statewide. The legislative debate demonstrates that DOH's ability to add more ROs after the initial five was contemplated by the Legislature. Dague Aff. Ex. 4. This history, and numerous other sub-sections of the CCA granting DOH discretion over the program [PHL §3360(7)(a)(i); PHL §3360(12)), unquestionably evince the Legislature's interest in empowering the Department to operate the program within its sound discretion. The Legislature maintained this interest through the codification of the final bill by its inclusion of the phrase "[t]he commissioner may register additional registered organizations". Far from a removal of DOH's authority, the final version embraces the same level of agency discretion as prior drafts, and, as such, firmly supports Respondents' construction.

The plain meaning doctrine, Respondents' harmonized, common sense application, the absurdity of Petitioner's construction, and the legislative history underscore the rationality of Respondents' construction of PHL §3365(9). As a consequence, Petitioner's self-serving interpretation must be rejected, and its first (ultra vires) and second (arbitrary and capricious) causes of action dismissed.

POINT II

DOH'S METHODOLOGY IN DETERMINING A NEED FOR ADDITIONAL ROs AND ITS SELECTION CRITERIA WERE NOT ARBITRARY OR CAPRICIOUS

In the alternative to its statutory construction claims Petitioner asserts two additional Article 78 challenges. Namely, Petitioner claims that even if DOH has statutory authority to add additional ROs under PHL § 3365(9), its justification for doing so and the criteria it applied to

select the additional five ROs was arbitrary and capricious. Pet. §§ 98-104. For the reasons discussed below neither of these claims have any merit, as DOH's determinations on both of these fronts were rationally based and consistent with the agency's regulatory mandate.

A. Respondents' Justification for Adding Five Additional ROs Was Rational

In its statutorily mandated Two-Year Report to the Governor and Legislature dated August 18, 2016 ("Two-Year Report"), DOH provided an overview of program activities through June of 2016. Quackenbush Aff. Ex. 4. The Two-Year Report included a section with (12) twelve "Recommendations and Next Steps" that the agency hoped to implement in order to further the impact and effectiveness of the program. Id. Included among these "Next Steps" was the agency's determination that the registration of "five additional [ROs] was necessary "to meet additional patient demand and increase access to medical marijuana throughout New York State". Id. at 13. On May 26, 2017 the Department conditionally certified RO numbers 6-10, and anticipates they will obtain full registration within the next thirty days. Quackenbush Aff. ¶ 47.

Petitioner asserts this determination was arbitrary, capricious and constitutes an abuse of agency discretion as it disregarded Petitioner's version of the "facts". Pet's MOL at 14-17. At its core, this argument is nothing more than Petitioner disagreeing with the Department's sound interpretation of certain market factors, based on its belief that its own, self-interested market research and prognostications should be given more weight.

To succeed on such a claim, Petitioner bears the heavy burden of demonstrating that the agency's determination was "irrational, arbitrary, or otherwise unlawful, to overcome the presumption of regularity that attaches to official action". Hunts Point Terminal Produce Co-Op Ass'n, Inc. v. New York City, 13 Misc 3d 988, 1002 (Bronx County 2006). It is not the function of a court in reviewing an agency's determination to "substitute its judgment for an intelligent and

conscientious judgment" of the agency. Id. at 1002. Even, "[w]here the record shows reasonable and fair ground for different conclusions by administrative officials, their determination must stand, even though the court may differ as to whether they made the wisest determination and may reach a different conclusion." Id.; See Riverkeeper, Inc. v. Planning Bd. of Town of Southeast 9 N.Y.3d 219, 231-232 (NY 2007) ("While judicial review must be meaningful, the courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives").

As such, it is simply not enough for Petitioner to articulate potential alternative market interpretations; the existence of alternatives does not render an administrative determination irrational or arbitrary. See Save Coney Island, Inc. v. City of New York, 27 Misc. 3d 1221, at *8 (N.Y. Sup. 2010) ("An agency need not discuss every conceivable alternative; so long as the agency considers a reasonable range of alternatives that is enough....").

The basis for the Commissioner's determination to expand the market to include five additional ROs is multi-faceted, and reflects the reasonableness and diversity of his decision. All of the factors contemplated by the Commissioner revolve around the underlying goals of strengthening the program and increasing access, distribution and affordability to patients. Quackenbush Aff. ¶¶ 31, 35-46. To this end, the Commissioner determined that increasing the total number of ROs in the market to (10) ten would address the following seven considerations and benefit the program.

First, the Commissioner considered the fact that the number of certified patients receiving medical marijuana through the program continues to grow at a considerable pace. Quackenbush Aff. ¶ 37, Table 1. As demonstrated in the Two-Year Report, the number of certified patients saw a steady increase in the first five and half months of the program through June 15, 2016. Id. Ex 4

At p. 7 (Figure 3). Moreover, increases to the patient population have only accelerated since the issuance of the report. Id. Recent figures illustrate that in only the last forty-five days, since the addition of chronic pain as a stand-alone "serious condition", the average number of new patients certified per week has gone up from 337.72 certifications/week to 581.33 certifications/week, an increase of 72.13%. Id. ¶¶37-38, Table 1. This represents an overall increase of 18% in the total number of new patients. Id. Certainly expanding access to in response to increased demand is inarguably rational.

Second, the Commissioner contemplated the prospect of even more growth to the patient population as a result of continued expansion in the number of practitioners that are certified to prescribe medical marijuana. Id. ¶ 39. As set forth in the Two-Year Report, the number of practitioner registrations saw near constant growth through the first five and half months of the program. Id. Ex. 4 at 6 (Figure 2). Moreover, with the Commissioner's recent inclusion of Nurse Practitioners to the class of individuals that can prescribe the product, considerable continued growth to this category is anticipated. Id. ¶ 39. It stands to sound reason that as the number of individuals certified to prescribe medical cannabis grows, there will be proportionate growth in the number of registered patients and accordingly an increase in market demand necessitating more ROs. Id.

Third, the Commissioner considered the advantages of broader geographic distribution coverage as a factor in deeming a need for more ROs. Id. ¶¶ 40-41. The five initial ROs' distribution coverage is illustrated in the Two-Year Report. Id. Ex. 4 at 3 (Figure 1). These five ROs provided distribution to (13) thirteen counties. Id. The inclusion of five additional ROs, conditionally certified on May 25, 2017, will increase the geographic footprint of the program to include an additional (6) six counties. Id. In light of the overall intent of the CCA to provide

access to medical cannabis to all qualifying New Yorkers' in need, the Commissioner's emphasis on broad geographic coverage is rational.

Fourth, in rendering the decision to expand ROs, the Commissioner contemplated the programmatic benefits of increased access to different medical marijuana brands in the marketplace. Id. ¶ 42. In this context the term "brand" means the specific chemical compound of the marijuana. 10 NYCRR §1004.11. The Act requires ROs to produce certain specific brands with defined ratios of tetrahydrocannabinol ("THC") and cannabidiol ("CBD"), and also permits them leave to offer brands with varying rations of THC to CBD. Id. As noted throughout the Two-Year Report, the Department considers the development and availability of new brands of medical marijuana essential to the effectiveness of the program. Quackenbush Aff. Ex. 4 at pgs. 4 and 13. It is projected that the infusion of new ROs into the market will result in diversity of brands and more efficiencies in achieving the statutory mandated brands. Id. ¶ 42. These advancements will benefit the patients, and therefore advance the overall intent of the CCA – making consideration of these factors by the Commissioner per se rational.

Fifth, in rendering his decision the Commissioner considered the overall positive effect that more ROs in the marketplace will have on the success of the program. Id. ¶¶ 43-44. In addition to their role in producing and distributing the medical cannabis to existing patients, the ROs also serve as the de facto outreach ambassadors for the program. Id. ROs are highly knowledgeable about the program, the products, medical indications, and necessity. Id. They provide education and outreach regarding the CCA to potential patients and practitioners – in the same way that pharmaceutical company representatives do in representing pharmaceutical companies to physicians. Id. The Commissioner considers this type of outreach essential to the growth and expansion of the program going forward. Id. In deciding to add more ROs, he

considered the impact that an additional five ROs with diverse brands and geographic distribution areas may have on program outreach and concluded that the expansion would have a positive impact on programmatic growth. Id.

Sixth, the Commissioner also contemplated the impact that prospective administrative changes may have on the growth of the program, including increases to the number of patients and demand, as a result of these changes. Id. ¶45. Specifically, the Commissioner factored in: (1) On-going administrative enhancements that have already decreased the average time from practitioner certification of a patient to patient registration by more than 50% (from 11.27 days to just 5.4 days as of June 2016) [Id. Ex. 4 at p. 9 (Figure 4)]; (2) Forthcoming practitioner certification streamline processes that should be rolled out soon Id. ¶ 45, and; (3) The potential addition of more qualifying serious medical conditions pursuant to the Commissioner's authority under PHL §3360(7). Id. It is projected by the Commissioner that these changes could markedly increase the already growing patient population, resulting in the need for more ROs to match demand.

Finally, the Commissioner factored in the prospect of making medical marijuana products more affordable for patients through the introduction of new competition into the market. Id. ¶ 46. It is theorized that more ROs will increase drive for efficiencies, lower prices and increase competition – which would all inure to the benefit of New York's patient population. Id.

Petitioner's objection to Respondents' determination merely advances a speculative, pessimistic alternate view of the market, designed to protect its members' current exclusivity[9].

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9 Throughout its argument Petitioner appears to claim that the Department's Two-Year Report is the source of the challenged determination. Pet's MOL at 13 ("The purpose of DOH's Two-Year Report ..."), 14 ("The Two-Year Report contained no analysis..."; 15 ("The [Two-Year] Report provides no factual basis whatsoever"). To the extent Petitioner is challenging an agency determination that it believes was rendered by the Two-Year Report, Petitioner's cause of action is untimely under the controlling statute of limitations. The Two-Year Report was issued on August 18, 2016. Quackenbush Aff Ex. 4. The statute of limitations to challenge an agency action under CPLR Article 7803 is four months. CPLR § 217(1). Thus, if the Petitioner is challenging an agency determination rendered in the Two-Year Report this action is over five months delayed, and should be dismissed as untimely.

Petitioner dismisses the Commissioner's projections, the data regarding patient and practitioner growth set forth in the Two-Year Report, and concerns regarding geographic distribution as not "relevant", and maintains that only Petitioner's market projections and data should be considered[10]. Pet. MOL at 14-17.

What Petitioner articulates is, at the very best, one purely speculative, alternative rationale for analyzing the need for RO expansion. What Petitioner does not do, however, is establish that the Commissioner's applied methodology in rendering his determination was irrational, arbitrary or capricious. To the contrary, the Commissioner undertook a multifaceted, well-rounded, adequately supported analysis and rendered a rationale determination. Petitioner fails to recognize that any one of the Commissioner's (7) seven justifications is sufficient to demonstrate the rationality of his decision. Merely articulating a possible alternative methodology is insufficient to disturb an agency's determination and does not satisfy Petitioner's steep burden and in this Article 7803(3) challenge. See supra Riverkeeper, Inc. 9 N.Y.3d at 231-232. As a result, Petitioner's second cause of action challenging Respondents' determination to expand the number of ROs should be denied and dismissed in its entirety.

B. Respondents' Methodology in Selecting the Five Additional ROs was Rational and Petitioner Lacks Standing to Levy Such a Challenge

By its final Article 78 claim Petitioner takes aim at the methodology and criteria that Respondents used to select ROs 6-10. In sum, Petitioner argues that DOH failed to "open the application process to the public" and "pre-selected Applicants 6-10...based on outdated data and

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10 Tellingly, not even all of Petitioner's five RO member organizations appear to agree with Petitioner's dire predictions about the market and its unfounded postulations about the impact of five additional ROs. Columbia Care New York, one of the five initially registered ROs, has disavowed any role in this action. Quackenbush Aff. Ex. 6.

information". Pet's MOL at 17. Petitioner avers that this selection methodology lacks a rational basis, and must be set aside. Id. In short, Petitioner does not have legal standing to challenge DOH's selection criteria, but regardless, the selection process was consistent with the CCA and its enacting regulations and wholly rational.

i. Petitioner Lacks Standing to Challenge DOH's Selection Criteria

As a threshold matter Petitioner lacks the requisite standing necessary to challenge the Department's criteria in selecting additional ROs. To obtain relief under CPLR article 78 a petitioner must demonstrate "standing as an aggrieved" party. Opusunju v. Giuliani, 175 Misc. 2d 541, 548 (N.Y. Sup. Ct. 1997). In determining whether a party is truly "aggrieved" by an agency determination "courts look to whether the petitioning party suffered injury in fact and whether that injury falls within the zone of interests to be protected by the statute challenged." Patrolmen's Benevolent Assn. of the City of New York, Inc. v New York City Off. of Collective Bargaining, 31 Misc. 3d 1244, 1244A (N.Y. Sup. Ct. 2011), citing Hunts Point Terminal Produce Co-op Ass'n, Inc. v. New York City Economic Development Corp., 36 AD3d 234, 245 (1st Dept. 2006). The Court of Appeals has defined "injury in fact" to mean "an actual legal stake in the matter being adjudicated." Id.

By this claim Petitioner challenges DOH's selection criteria for choosing the next five ROs. But, Petitioner, the trade organization for the five previously registered ROs, has not suffered any injury related to the selection criteria of new ROs. That is, an existing RO cannot establish injury based on the agency's method of choosing new ROs. The only party with conceivable standing for this type of claim would be an applicant who was not selected by DOH under the applied criteria, because they alone could argue injury related to being unselected. Neither Petitioner nor its members are this party, as they were previously registered.

It is anticipated that Petitioner will try to rebut its lack of injury by pointing to its purported harm from losing market share due to the addition of new ROs. But that is not injury related to the criteria selection claim. That alleged injury relates only to Petitioner's separate Article 78 claim challenging DOH's decision to add new ROs – which is different from its claim related to the selection criteria.

In sum, Petitioner is not "aggrieved" in any manner by the criteria DOH utilized to select new ROs. Petitioner was not passed over for selection or unable to apply based on the selection methodology utilized. And Petitioner's general claim of harm from a further populated RO marketplace, is not an injury related to DOH's selection criteria. As such, Petitioner's Article 7803(3) claim challenging the manner in which DOH selected ROs 6-10 must be dismissed for lack of standing.

ii. DOH's Selection Criteria Was Rational

Even if the Court finds that Petitioner has standing to challenge DOH's selection criteria, the claim still fails as the criteria applied by DOH in choosing ROs 6-10 was rational and fully consistent with the CCA and published regulations.

Respondents' obligations in selecting ROs for registration are set forth by 10 NYCRR § 1004.6. These regulations state the criteria the Department "shall consider" in deciding whether to grant an RO's application. Id. The criteria under § 1004.6 dovetail with the application requirements for ROs, set forth in 10 NYCRR § 1004.5.

DOH began accepting applications for initial registration on April 27, 2015. Quackenbush Aff. ¶ 14. Ultimately the Department received (43) forty-three initial applications. Id. ¶16. The 43 applicants were all evaluated based upon the criteria set forth in NYCRR §§ 1004.5 and 1004.6. Id. ¶¶ 17-18. The Department assigned different weights to the various criteria, with Quality

Assurance, Geographic Distribution and Financial Standing being the most heavily weighted factors. Id. ¶ 19 Each applicant was ultimately provided a weighted score based upon these criteria. Id. ¶ 21. The weighted scoring was out of a possible 125 points. Id. Each of the initial applicants were ultimately ranked 1 to 43 based upon their score out of 125 points. Id. (Table). As a result of this evaluation the ROs ranked 1 to 5 were selected to become the initial ROs in the program. Id. ¶ 22.

When the Commissioner decided to add an additional five ROs based on the factors discussed above [Point II(A)], the Department began its consideration of applicants 6-10, as they were the next five highest ranked ROs based upon the initial application scoring evaluation. Quakenbush Aff. ¶ 48. Petitioner, of course, did not challenge the reasonableness of this process after it resulted in the selection of its five members as the initial ROs. Id. ¶ 23. Now that the process has resulted in the addition of new ROs to the marketplace, Petitioner challenges the procedure as arbitrary and capricious.

Importantly, despite Petitioner's objection otherwise, neither the regulations nor the CCA itself require DOH to make ROs who applied for initial registration, re-apply for de novo consideration after their initial application. There is no legislative support anywhere for Petitioner's contention that the Department was required to scrap its prior exhaustive methodology in ranking the 43 applicants and start over. As such, DOH was well within its regulatory mandate to consider applicants 6-10, based upon it's prior rankings from the initial application process.

Furthermore, contrary to Petitioner's misinformed contention here [Pet's MOL at 17], DOH did not simply endorse applicants 6-10 based on "outdated data and information submitted … nearly two years ago". In fact, in January of 2017 DOH required applicants 6-10 to submit a "Plan of Entry" that included updates to information required under 10 NYCRR 1004.5.

Quakenbush Aff. Ex. 5. Specifically, the request required applicants 6-10 to update information related to, inter alia, ownership and management information, staffing plans, operating plans, financial statements, registration activities, and geographic preferences. Id. The updated information coupled with the prior evaluation process taking into account all of the required criteria represents a wholly rational selection methodology that should not be disturbed by the Court.

Petitioner raises one final objection to the selection methodology applied by the Department, claiming that the process lacked "transparency". Pet's MOL at 19. This claim is especially absurd in light of the fact that the entire evaluation process is described in exacting detail, including description of the weighted scoring system, the ultimate rankings and even posting of every application submitted, on the Department's publically accessible website. www.health.ny.gov/regulations/medical_marijuana/application/evaluation_process.htm.

Here again, Petitioner has at most attempted to articulate an ill-developed, alternative approach that the Department could have taken to identify the new five ROs. Of course, simply cherry-picking a potential alternative approach is not proper grounds for a Court to overturn an agency's well-reasoned methodology. See Save Coney Island, Inc. v. City of New York, 27 Misc. 3d 1221, at *8 (N.Y. Sup. 2010). As such, Petitioner's CPLR Article 7803(3) claim challenging DOH's criteria in selecting new ROs must be denied.

POINT III

PETITIONER'S CONSTITUTIONAL CLAIMS MUST BE DISMISSED

In addition to its various Article 78 causes of action, Petitioner raises two constitutional claims seeking a grant of declaratory relief. The first sounds under the Fourteenth Amendment substantive due process clause and alleges that DOH's addition of five new ROs "exceeds the

Commission's [sic] legal authority" so as to infringe on Petitioner's members "vested property rights" in a "highly regulated, price controlled market". Pet. ¶¶108-118; Pet's MOL at 20. The second claim is pursuant to the Fifth Amendment and alleges that Respondents' decision to add additional RO constitutes a regulatory taking of Petitioner's "market share" and "reasonable expectations of return on their substantial investments". Pet. ¶¶ 110-127.

For a court to grant a motion for summary judgment pursuant to CPLR § 3212 "it must clearly appear that no material and triable issue of fact is presented." Crowley's Milk Co. v. Klein, 24 A.D.2d 920 (3rd Dep't 1965). Summary judgment is "designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law." Andre v. Pomeroy, 35 N.Y.2d 361, 364 (NY 1974). Summary dismissal under the rule cannot be granted "where there is any doubt as to the existence of such issues...or where the issue is arguable." Crowley's Milk Co., supra 24 A.D.2d at 920. Where, however, "there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny the other litigants the right to have their claims promptly adjudicated." Andre, 35 N.Y.2d at 264.

For the reasons discussed below both of these claims should be dismissed pursuant to Respondent's motion for summary judgment pursuant to CPLR § 3212.

A. FOURTEENTH AMENDMENT DUE PROCESS

Petitioner's Fourteenth Amendment substantive due process claim is premised on the theory that DOH acted beyond its statutory authority in adding additional ROs. Pet. ¶¶ 113-114. As set forth in the statutory construction discussion above, this premise is plainly erroneous. See Point I(B). DOH has express statutory discretion to "register additional [ROs]" under the plain

language of the Act, and an appropriate harmonized, common sense construction of the CCA demonstrates that permitting such additions was the intent of the Legislature. Id. Upon a finding by this Court that the Department's action was statutorily permissible under the CCA, Petitioner's Due Process claim premised on a purportedly unauthorized act fails as a matter of law.

Additionally, Petitioner's Due Process claim fails as Petitioner lacks a viable property interest. West Farms Assoc. v. State Traffic Com., 951 F.2d 469, 472 (2d Cir. 1991) ("a plaintiff may not successfully claim a deprivation of property without due process absent the identification of a protected property interest."). As a matter of well-established federal law Petitioner possesses no recognized "vested property rights" in a specified share of an open, competitive market. See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675 (1999) (noting that "business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense"); see also Dean v. Town of Hamden, 164 F. Supp. 3d 293, 303 (D. Conn. 2016) (Neither the general ability to do business free from regulation nor the ability to make a profit is a property right subject to protection from deprivation under the Due Process Clause); Tuchman v. Conn., 185 F. Supp.2d 169, 174 (D. Conn. 2002) (harm to general "ability to conduct business" not a deprivation of a property right); West Farms Assoc. v. State Traffic Com., 951 F.2d 469, 473 (2d Cir. 1991) ("It may be that the West Farms Mall will lose business if Wilmorite is permitted to build Plainville Mall," but "Connecticut has not established protection from competition as a property right").

This argument, advanced by Petitioner to justify their purported Due Process right, is symptomatic of the fundamental misconception rampant throughout the Petition. The very premise of this entire action is founded on Petitioner's apparent fallacy that their member ROs are somehow guaranteed a measure of fiscal success by their entry into New York's medical cannabis

program. There exists no statutory, regulatory, contractual or precedential authority related to the CCA that assures an RO of success, or that indemnifies it against the realities of free-enterprise. To imply that an RO has a vested property interest in profitability [Pet. ¶ 112] misapprehends not only the CCA but fundamental principles of competition and capitalism.

For both of these reasons Petitioner's Fourteenth Amendment Due Process claim fails as a matter of law.

B. FIFTH AMENDMENT TAKINGS CLAUSE

Petitioner also avers a claim under the Takings Clause of the Fifth Amendment. Pet. ¶¶ 119-127. This cause of action operates from the same faulty premise as Petitioner's due process claim – namely, Petitioner alleges that expansion of ROs will infringe property interest in "market share" and profitability, and therefore constitutes a regulatory taking. Id. Petitioner's Takings Clause claim must be dismissed for the same exact reasons Petitioner's Fourteenth Amendment substantive due process claim fails – specifically: (1) The CCA authorizes the RO expansion and (2) Petitioner has no vested property right in business success.

POINT IV

INJUNCTIVE RELIEF SHOULD BE DENIED

By this proceeding Petitioner seeks a permanent injunction "enjoining and restraining Respondents and their representatives from issues registrations under [the CCA]…in excess of the statutory cap of five set forth in [PHL] of the statutory cap of five set forth in [PHL] 365(9)". Pet. Wherefore Cl. ¶ E. Petitioner's application for a TRO seeking preliminary injunctive relief was denied by Judge Richard Platkin on April 28, 2017, following argument in chambers. Dague Aff. Ex. 1. For the reasons set forth below and throughout this Memorandum, Petitioner's application for an injunction must be denied.

Injunctive relief is "a drastic remedy and should be granted with caution, and only when required by urgent situations or grave necessity, and then upon the clearest evidence." People v Croters Props. LLC, 33 Misc. 3d 1204(A), 1204A (N.Y. City Ct. 2011); See also Welcher v. Sobol, 222 A.D.2d 1001, 1002 (3d Dept. 1995) ("drastic remedy and should be used sparingly"). To obtain permanent injunctive relief an applicant must: (1) Actually succeed on the merits of the case; (2) Demonstrate that it will be irreparably injured if the injunctive relief is not granted and; (3) Establish that the equities balance in its favor. See Reich v Hale, 2017 N.Y. Misc. LEXIS 330 (N.Y. Sup. Ct. 2017) ("The standard for granting a permanent injunction is essentially the same as that for a preliminary injunction, except that Plaintiff must demonstrate actual, rather than likely, success on the merits of his claim."); Doe v. Axelrod, 73 N.Y. 2d 749, 750 (1988); See also Armitage v. Carey, 49 A.D.2d 496, 498 (3d Dept. 1973) (setting forth preliminary injunction standards). Where a party fails to establish all three elements the injunctive relief is properly denied. See Up-Grade Educational Services, Inc. v. Rappaport, 136 A.D.2d 628, 629 (2d Dept. 1988).

A. Petitioner Cannot Demonstrate Actual or Likely Success on the Merits

For all of the reason set forth in detail throughout this Memorandum of Law, Petitioner will not succeed on the merits, and therefore is not entitled to a permanent injunction.

B. Irreparable Harm

Petitioner cannot demonstrate the potential of irreparable harm for a number of reasons. First, Petitioner has not asserted any actual or imminent injury suffered, but instead relies upon conclusory allegations of potential future harm, based upon its own self-serving, doomsday market prognostications about industry "collapse" and unreasonable returns on investment. [Pet's MOL at 23]. While Petitioner opines about potential future harm to their business [Pet's MOL at 23, 25]

and speculates regarding negative impacts on patients [Pet's MOL at 26-27], it does not provide any evidence of definite, impending injury. Golden v. Steam Heat, Inc., 216 A.D.2d 440, 442 (2d Dept 1995) ("irreparable harm must be shown by the moving party to be imminent, not remote or speculative").

Further demonstrating the speculative nature of Petitioner's alleged harm, is the fact that despite being contingently registered, ROs 6-10 will not immediately join the market as they will need to undertake further regulatory steps before even growing and manufacture their product for entry on the market. Quackenbush Aff. ¶ 52. Conservative estimates figure ROs 6-10 will not begin selling products until early 2018. Id.

Second, even Petitioner's unfounded speculations about future harm do not satisfy the irreparable harm requirement as these claims could be adequately redressed by a remedy at law and fully compensated by monetary damages. In re Walsh v. Design Concepts, Ltd, 221 A.D.2d 454 (1995) (New York law is clear "that irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient"); see also Family-Friendly Media, Inc. v. Recorder Television Network, 74 A.D.3d 738, 739 (2d Dept 2010) ("Economic loss, which is compensable by money damages, does not constitute irreparable harm").

Third, Petitioner's purported measure of harm does not factor in recent changes to the program that are anticipated to expand the number of patients and thus market demand. As detailed in Point II(A) above, a host of changes and additions to the program, including adding chronic pain as a stand-alone "serious condition" and adding Nurse Practitioners to the list of registered practitioners, are anticipated to grown the number of registered patients. Petitioner does not contemplate market growth in its recitation of potential future harm.

C. Balance of the Equities

For all of the reasons detailed in Point I(B)(iii)(b) above, the public interest is advanced through the addition of more ROs into the marketplace by way of more competition, extended access and more diverse products. Conversely, Petitioner's proposed injunction would stifle the number of ROs on the market in perpetuity and inhibit growth, competition and diversity. As such a balance of the equities favors Respondents.

Petitioner is unable to satisfy any elements of the tripartite test for permanent injunction. As such, the demand to permanently enjoin the addition ROs 6-10 must be denied.

CONCLUSION

For the foregoing reasons Petitioner's CPLR Article 78 claims must be dismissed, Respondent's CPLR §3221 Motion for Summary Judgment as to the declaratory judgment claims must be granted, and Petitioner's request for a permanent injunction must be declined.

Dated: Albany, New York
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