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LITIGATION BUREAU

December 28, 2023

By ECF

Honorable David N. Hurd
United States District Judge
Alexander Pirnie Federal Bldg. and U.S. Courthouse
10 Broad Street
Utica, New York 13501

Re: *Variscite NY Four, et al. v. New York State Cannabis Control Board, et al.*
1:23-CV-1599 (DNH)(CFH)

Dear Judge Hurd:

I write on behalf of Defendants New York State Cannabis Control Board (“the Board”), New York State Office of Cannabis Management, Tremaine Wright, in her official capacity as Chair of the Cannabis Control Board and Chris Alexander, in his official capacity as Executive Officer of the New York Office of Cannabis Management (collectively “Defendants”) in opposition to Plaintiffs’ motion for a temporary restraining order and preliminary injunction. ECF Nos. 10-13. Plaintiffs seek a temporary restraining order enjoining Defendants from issuing any adult use cannabis dispensary licenses pending a hearing on Plaintiff’s request for a preliminary injunction. Defendants request an opportunity to be heard on Plaintiff’s request for a temporary restraining order and submit that Plaintiff’s request must be denied. This letter opposition addresses only Plaintiff’s request for a temporary restraining order pending a full hearing on the preliminary injunction. Defendants intend to oppose Plaintiff’s application for a preliminary injunction on a full record should the Court execute the Order to Show Cause.

Prioritization of Applicants for Adult-Use Licenses under the Cannabis Law

The New York Cannabis Law legalizes adult-use cannabis and regulates the production, manufacturing, distribution, and sale of cannabis within the State. N.Y. Canbs. §§ 3, 61-89. The law creates a system for licensing cultivators, processors, distributors, and retailers of adult-use cannabis, among other license types. *See id.* Section 72 of the Cannabis Law authorizes the licensing of adult-use retail dispensaries. Further, Section 87 of the Cannabis Law requires the New York Cannabis Control Board (“the Board”) to “create and implement a social and economic equity plan and actively promote applicants from communities disproportionately impacted by cannabis prohibition . . . by prioritizing consideration of applications by applicants who are from

communities disproportionately impacted by the enforcement of cannabis prohibition or who qualify as a minority or women-owned business, distressed farmers, or service-disabled veterans.” N.Y. Canbs. § 87(1).

Consistent with Section 87 of the Cannabis Law, the Board promulgated regulations prioritizing applicants who are “from a community disproportionately impacted by the enforcement of cannabis prohibition as described in [9 NYCRR 121.1(d)]. Applicants seeking such priority must show: (1) ownership and sole control over the applicant by one or more individuals from communities disproportionately impacted; and (2) one or more individuals that have an ownership interest in the business have resided in a community disproportionately impacted for an aggregate of five of the first 18 years of their life or an aggregate of seven years of their life. 9 NYCRR 121.1(d).

Further, an individual from a community disproportionately impacted by the enforcement of cannabis prohibition may receive *extra priority* if: (1) they have an income lower than 80 percent of the median income of the county in which the applicant resides; and (2) they were convicted of a marijuana-related offense prior to the effective date of the Marijuana Regulation and Taxation Act, or had a parent, guardian, child, spouse, or dependent, or was a dependent of an individual who, prior to the effective date of the Marijuana Regulation and Taxation Act, was convicted of a marijuana-related offense.” *Id.* at ¶ 121.1(k).

Plaintiffs’ Request for a Temporary Restraining Order Must Be Denied

The Court should deny Plaintiffs extraordinary request for an injunction, which will halt Defendants’ issuance of cannabis licenses. Injunctive relief, such as the temporary restraining order sought by Plaintiffs here, is “an extraordinary remedy *never* awarded as of right.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (emphasis added). Plaintiffs must prove, by clear and convincing evidence, that (a) they are likely to succeed on the merits; (b) they are likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in their favor; and (d) an injunction is in the public interest. *See Winter*, 555 U.S. at 20.

Plaintiffs meet none of these stringent requirements and their motion must be denied.

A. Plaintiffs Cannot Demonstrate Likelihood of Success on the Merits

Plaintiffs argue that the licensing requirements discriminate against interstate commerce by affording extra priority only to those applicants who can prove they have been convicted of a marijuana-related offense in New York State. ECF No. 1 at ¶ 50. The Commerce Clause of the U.S. Constitution provides Congress with the power to regulate commerce “among the several States.” U.S. Const. art. I, § 8, cl. 3. The Clause contains a “negative aspect” that “prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.” *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). If a state law clearly discriminates against out-of-state goods or economic actors, the law can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose. *Id.* at 2461. A law may be “clearly discriminatory” against out-of-state economic actors in three ways: (1) by discriminating against interstate commerce on its face, (2) by having a discriminatory purpose, or (3) by discriminating in effect. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 48 (2d Cir.

2007). However, if a law only “incidentally burdens interstate commerce,” it is subject to a permissive balancing test “and will be struck down if the burden imposed on interstate commerce clearly exceeds the putative local gains.” *Id.* at 47; *see also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

As an initial matter, it is not clear that the Dormant Commerce Clause applies *at all* to the circumstances at bar because distribution of marihuana remains illegal at the federal level, and there is no lawful national market or interstate commerce related to cannabis products, which is an industry required to be closely regulated to, among other things, remain strictly within the confines of a state. *See Brinkmeyer v. Wash. State Liquor & Cannabis Bd.*, 2023 WL 1798173, at *10-*11 (W.D. Wash. Feb. 7, 2023) (concluding that the dormant Commerce Clause is inapplicable because there is no national market for marihuana); *Shelton v. Liquor & Cannabis Bd.*, 2022 WL 2651617, at *5 (W.D. Wash. July 8, 2022) (declining to issue declaratory relief because a federal court “cannot order activity that remains federally illegal”); *but see Ne. Patients Grp. v. United Cannabis Patients & Caregivers of Me.*, 45 F.4th 542, 547-48 (1st Cir. 2022) (concluding that an illicit interstate market for marihuana exists and warrants application of the dormant Commerce Clause).

Even if the Dormant Commerce Clause applies, Defendants’ licensing requirements do not violate it. First, the extra priority requirements do not discriminate against out-of-state economic actors either on their face or in effect. The extra priority requirements do not require that anyone associated with an applicant be a resident of New York, only that an owner or their relative have a marihuana conviction under New York law. 9 NYCRR 121.1(k)(1)(ii). An individual need not be a current or former resident of New York to have a marihuana-related conviction under State law. Indeed, an applicant’s relative could have a marihuana-related arrest while merely traveling through New York without the application ever having any connection to New York. Further, Defendant’s licensing requirements do not have a discriminatory purpose. Rather, the purpose of requiring a New York conviction is to ameliorate the harm done by *New York’s* prior laws criminalizing marihuana and the collateral consequences such as incarceration and lack of employment opportunities caused by a criminal marihuana conviction. N.Y. Canbs. § 2.

The requirements do not discriminate because they do not apply “differential treatment” to “in-state and out-of-state economic interests that benefit the former.” *Town of Southold*, 477 F.3d at 47 (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality*, 511 U.S. 93, 99 (1994)). Under the *Pike* balancing test, the justice-involved requirement is constitutional because any incidental burden on interstate commerce does not clearly exceed local benefits. It is not clear that there is *any* incidental burden on interstate commerce. An incidental burden on interstate commerce is one that “exceed[s] the burden on intrastate commerce,” and, at a minimum, the challenged law “must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce.” *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 50 (2d Cir. 2007) (citations omitted). Any such incidental burden, even if it existed, clearly does not exceed the local public benefit of addressing the severe collateral consequences of New York’s prior marihuana laws.

Finally, Plaintiffs assert that the application process fails to provide applicants who reside in counties outside of New York the opportunity to prove that their majority owner lived in an area disproportionately impacted by cannabis prohibition. ECF No. 1 at ¶ 51. This claim is incorrect. OCM’s application process allows applicants who resided out-of-state the ability to prove that they

resided in an area disproportionately impacted by cannabis prohibition. Plaintiffs' Exhibit 3 to the Attorney Affirmation in Support of Plaintiffs' Order to Show Cause [ECF No. 12-3] misrepresents OCM's application system. OCM's application process allows applicants who resided out-of-state the ability to prove that they resided in an area disproportionately impacted by cannabis prohibition. Attached hereto as Exhibit A is an accurate representation of the portion of the application for the disproportionately impacted area which demonstrates that a state other than New York can be chosen and that a New York county in that instance is not required to be selected.

Consistent therewith, OCM does in fact consider applicants who resided in out-of-state areas that were disproportionately impacted by cannabis prohibitions. *See* 9 NYCRR 121.1(d). Further, OCM published responses to "Frequently Asked Questions" on its website which explicitly state "[r]esidents of *any* state are eligible to apply" for [social and economic equity] status." *See General Licensing Application Frequently Asked Questions*, General Questions, No. 74, available at: <https://cannabis.ny.gov/system/files/documents/2023/12/current-public-universal-app-faq-12-5.pdf>. (emphasis added).

B. *Plaintiffs Fail to Demonstrate Irreparable Harm*

Plaintiffs argue that the alleged violation of the Dormant Commerce clause is *per se* irreparable harm. ECF No. 11 at 15. However, as discussed above, Plaintiffs claim under the Dormant Commerce Clause is meritless. As such, Plaintiffs cannot show irreparable harm based on merely the alleged constitutional violation. Moreover, none of the authorities the cited by Plaintiffs support the proposition that an alleged violation of the Dormant Commerce Clause is *per se* irreparable harm.

Plaintiffs also fail to show that they will suffer "actual and imminent" harm absent the requested temporary restraining order. *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). Plaintiffs' alleged harms suppose that they would otherwise be granted a license. However, this is the sort of "remote and speculative" allegation of harm that does not justify a temporary restraining order. Indeed, Plaintiffs' failure to demonstrate that any alleged harm is "fairly traceable" to the challenged licensing requirements deprives of them standing in this action.

C. *The Balance of the Equities Favors Defendants and the Requested Injunction is Not in the Public Interest*

Plaintiffs' eleventh-hour request is inequitable to the many existing applicants who are lawfully pursuing licenses and is contrary to the public interest. As Plaintiffs concede, Plaintiffs have been aware of the challenged licensing requirements and prior litigation over those requirements over the past year. In fact, Plaintiffs' counsel Jeffery Jensen is a 49% owner of Variscite One, an entity that nearly a year ago brought a constitutional challenge to OCM's licensing requirements under the Dormant Commerce Clause. *See Variscite NY One, Inc. v. State of New York, et al.*, 2022 U.S. Dist. LEXIS 15705 (N.D.N.Y. Jan. 31, 2023). Mr. Jensen is also a 49% owner of both Plaintiffs in the present action.

However, despite this background, Plaintiffs delayed until the close of the application period on December 18, 2023 to pursue this emergency application. Any purported "emergency"

is entirely of Plaintiffs own creation and the Court should not countenance Plaintiffs' tactics. Indeed, Plaintiffs' members have attempted similar challenges in other state social equity programs using the same litigation tactics. Courts considering similar TRO motions brought by Plaintiffs' members have rejected them. *Peridot Tree WA, Inc. v. Washington State Liquor and Cannabis Control Board, et al.*, No. 23-06111 (W.D. Wa. Dec. 4, 2023), Dkt Entry 23; *Variscite, Inc. v. City of Los Angeles, et al.*, No. 22-cv-08685-SPG-SK, 2023 WL 3493557, at *15-16 (C.D.Ca. April 11, 2023).

Finally, the requested injunction is not in the public interest as it would place the many applicants who have lawfully pursued licenses in an indefinite limbo and wreak havoc in New York's nascent adult-use cannabis industry. Such an outcome, in the name of allowing Plaintiffs to litigate a meritless constitutional theory, should not be permitted.

In conclusion, for all of the reasons detailed above, the Court must deny Plaintiffs' request for a temporary restraining order, and request a briefing schedule for the pending motion for a preliminary injunction.

Respectfully submitted,

s/ Ryan W. Hickey

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cc: All counsel of record (via ECF)

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 - Social and Economic Equity (SEE)
 - Ownership & Sole Control (Individual from a community disproportionately impacted by the enforcement of cannabis prohibition)
 - Communities Disproportionately Impacted (Individual)**
- Ready to Submit

Communities Disproportionately Impacted (Individual)

Name: Lisa J Terry II
Address: 0 Shareholder Ln
Albany, NY 12226
Albany
United States (US)
Phone Number: 1-888-999-9999

Select the applicable residency requirement

The owner listed above resided in a community disproportionately impacted by the enforcement of cannabis prohibition

- an aggregate of five of the first 18 years of their life
- an aggregate of seven years at any point in their life

Upload proof of the above-named owner's date of birth*

Choose a File Browse

Total Records: 0

FROM	TO	CHECK THE TYPE OF PROOF BEING UPLOADED:
There are no rows to display.		

Extra priority shall be given to SEE applicants that demonstrate that an individual who, prior to March 31, 2021, was convicted of a cannabis-related offense prior to the effective date of the law that prohibits the sale of cannabis to an individual who, prior to March 31, 2021, was convicted of a cannabis-related offense

- Is a member of a community disproportionately impacted by the enforcement of cannabis prohibition
- Has an income lower than eighty percent of the median income of the community
- Was convicted of a cannabis-related offense prior to the effective date of the law that prohibits the sale of cannabis to an individual who, prior to March 31, 2021, was convicted of a cannabis-related offense

Is the above named owner applying for extra priority?*

Yes No

Add Record

Enter the year of residency

From* To*

YYYY YYYY

Address Line 1*

Address Line 2

City*

State*

New York

Zip Code*

County*

- Select One -

Check the type of proof being uploaded:*

- NYS Driver License
- NYS Non-Driver
- IDNYC Card
- NYS Learner Permit issued by NYS DMV
- State or federal tax filing or return, with proof of filing, including e-filing acknowledgements from DTF or IRS
- Utility Bill (e.g. electric, gas, internet, cable, water, trash/recycling)

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Yes No

Add Record

Enter the year of residency

From* To*

YYYY YYYY

Address Line 1*

Address Line 2

City*

State*

Alabama

Zip Code*

Check the type of proof being uploaded:*

- NYS Driver License
- NYS Non-Driver
- IDNYC Card
- NYS Learner Permit issued by NYS DMV
- State or federal tax filing or return, with proof of filing, including e-filing acknowledgements from DTF or IRS
- Utility Bill (e.g. electric, gas, internet, cable, water, trash/recycling)
- Bank or Credit Card Statement
- Letter From a public housing authority addressed to applicant (can be recent from letter)

Save Cancel