STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of the Application of

LEAFLY HOLDINGS, INC., et. al

Petitioner(s),

-against-

AMENDED
DECISION & ORDER
Index No.: 908706-23

NEW YORK STATE OFFICE OF CANNABIS MANAGMENT, et. al,

Respondent(s)

Supreme Court, Albany County
Present: Hon. Kevin R. Bryant, J.S.C.

Appearances:

Petitioner(s):
Craig R. Bucki
Mitchell Paul Snyder
Attorneys for Leafly Holdings, Inc., Stage One Cannabis, LLC, d/b/a Stage One Dispensary and Rosanna St. John
PHILLIPS LYTLE LLP
125 Main St.
Buffalo, NY 14203

Respondent(s):
Thomas Andrew Cullen
Attorney for NEW YORK STATE OFFICE OF CANNABIS MANAGEMENT, CHRIS ALEXANDER, in his official capacity as Executive Director of the New York State Office of Cannabis Management, NEW YORK STATE CANNABIS CONTROL BOARD, and TREMAINE S. WRIGHT, in her official capacity as Chairwoman of the New York State Cannabis Control Board
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
The Capitol
Albany, NY 12224

Bryant, K.:

On September 18, 2023, a Notice of Petition was filed by Leafly Holdings, Inc. and others (hereinafter referred to as "Petitioners") pursuant to Article 78 of the CPLR requesting, *inter-alia*, that this Court declare actions of the Cannabis Control Board to be null and void as arbitrary and capricious and violative of Petitioners rights under the New York Constitution; and

Affirmations, exhibits and Memoranda of Law having been filed by counsel for the Office of Cannabis Management (hereinafter referred to as "OCM") and New York State Cannabis Control Board (hereinafter referred to as "CCB") (collectively referred to as "Respondents"); and

Further submissions having been received, reviewed and considered by this Court.

NOW, it is hereby ORDERED that the Petition is hereby granted insofar as the regulations contested by Petitioners are hereby declared to be null and void for the reasons set forth below[1].

Findings of Fact

The MRTA was enacted on March 31, 2021. According to MRTA §2, the intent of the Cannabis Law is:

> [t]o regulate, control, and tax marijuana, heretofore known as cannabis, generate significant new revenue, make substantial investments in communities and people most impacted by cannabis criminalization to address the collateral consequences of such criminalization, prevent access to cannabis by those under the age of twenty-one years, reduce the illegal drug market and reduce violent crime, reduce participation of otherwise law abiding citizens in the illicit market, end the racially disparate impact of existing cannabis laws, create new industries, protect the environment, improve the state's resiliency to climate change, protect the public health, safety and welfare of the people of the state, increase employment and strengthen New York's agriculture sector.

[1] In determining this motion, this Court has considered documents filed on NYSCEF as cited herein as well as all other filings in this matter that have been electronically filed with the Court.

On December 14, 2022, Respondents published an initial draft of proposed regulations for the adult-use recreational market. Included therein are significant restrictions on retail dispensaries "paying for marketing or promotion through a third-party platform, marketplace, or aggregator that lists cannabis products for sale" and additional regulations that significantly limit retailer's ability to advertise their product lines and pricing on third-party platforms like Petitioners''[2]. Petitioners argue that the regulations effectively prevent licensed dispensaries from paying for any kind of promotion on a third-party website and harm consumers by "making it more difficult for them to obtain information about legal dispensaries and make informed purchasing decisions"[3]. Petitioners argue that the challenged regulations violate Article I, Section 8 of the New York State Constitution as they "prohibit Petitioners from engaging in lawful, non-misleading commercial speech by banning paid marketing and accurate pricing information" and that neither the third-party marketing ban nor the pricing ban advance a substantial government interest. They further argue that the third-party marketing ban and the pricing ban are more extensive than necessary to serve any substantial government interest"[4]

Petitioner Leafly (hereinafter referred to as "Leafly") is a Delaware corporation that maintains its principal place of business in Seattle. According to the petition "[f]or over a decade, Leafly has provided a platform for consumers to research and make informed purchasing decisions regarding cannabis . . . [and] operates similarly to third-party aggregators such as Open-Table. Specifically, Leafly provides a centralized location where consumers can obtain information (e.g., available cannabis products, prices, dispensary business hours, etc.) and connect with businesses in the cannabis industry"[5]. Petitioner Stage One "is a New York limited

[2] NYSCEF doc. 1, page 15, 16
[3] NYSCEF doc. 37, page 20
[4] NYSCEF doc. 37, page 23
[5] NYSCEF doc. 37, page 16, 17

liability company that owns and operates a licensed cannabis dispensary". Stage One has attempted to enter into a contractual agreement with Leafly to promote their dispensary. Petitioner Rosanna St. John is identified as a consumer of product who utilizes Leafly "to make informed purchasing decisions"[6].

On February 7, 2023, Leafly submitted comments to OCM outlining their concerns regarding the challenged regulations. Thereafter, on June 14, 2023, Respondents published a revised version of the rules without addressing any of the concerns raised by Leafly. Leafly subsequently submitted further written comments. Thereafter, on September 12, 2023, OCM adopted Parts 118 through 121, 123 through 125, and 131 of Chapter II of Title 9 of the Official Compilation of Codes, Rules and Regulations governing the adult-use cannabis market. According to Petitioners, "[a]s of the date of this Petition, OCM has not published an "Assessment of Public Comment" for the comments submitted [and] OCM has not publicly addressed any of the concerns presented in Leafly's supplemental comments".

Respondents have submitted what purports to be an administrative record[7]. The majority of the "record" submitted by counsel for Respondents consist of studies and reports prepared by outside entities and there is no indication that any of these reports were entered into the record of the administrative proceedings nor considered by the Board. A number of these reports were prepared long before the enactment of the MRTA[8] and many were entered after the action on review[9]. The- majority-of the articles pertain to topics that are of questionable relevance to the

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[6] Id., para. 11, 12

[7]

[8] See, NYSCEF doc. 65, writing published Feb. 2017; NYSCEF doc. 66: FDA News Release dated July 23, 2019; NYSCEF doc. 67: FDA News Release dated Nov. 1, 2017; NYSCEF doc. 70: HGS Public Access manuscript dated December, 2016

[9] See, NYSCEF doc. 68: allbud.com article dated Sept. 5, 2023; NYSCEF doc. 95: Cannabis Research Article "That's Pot Culture, dated July 5, 2023; NYSCEF doc.99: American Marketing Association, Journal of Marketing, 2023, Vol. 87(2).

issue before the Board including, but not limited to, an article from the Yale Law Journal entitled "Did Ticketmaster's Market Dominance Fuel the Chaos for Swifties"[10]; an article from "Data & Society" entitled "Amazon's Trickle Down Monopoly"[11]; and an article from the "Mission Local" entitled "Restaurants left on their own after SF nixed delivery fee cap"[12]. Notably, there is no foundation in the record for any of these articles nor is there any basis for this Court to pass on the accuracy of the information or the reasonableness of the conclusions set forth therein.

With-regard-to actual actions of the CCB, Respondent has submitted resolution 2022-48 dated November 21, 2000, which provides in relevant part that "the Board directs the Office to file with the New York State Department of State for adoption the proposed adult-use cannabis regulations currently before the Board as may be amended for changes in accordance with the State Administrative Procedure Act"[13]. While the resolution includes three formulaic "whereas" clauses, it contains no substantive information about evidence considered by the Board during the deliberative process or findings made by the Board to support its action. Similarly, Resolutions 2023-16 dated May 11, 2023[14] is silent regarding specific evidence considered by the Board during the deliberative process and 2023-32 dated Sept. 12, 2023[15] merely states that "the public comments were received by the Office in relation to the proposed rules, an assessment of the public comments was conducted, and the Board determined that no substantive changes to the revised rules were necessary".

[10] NYSCEF doc. 105
[11] NYSCEF doc. 62
[12] NYSCEF doc. 60
[13] NYSCEF doc. 71
[14] NYSCEF doc. 73
[15] NYSCEF doc. 75

Respondents have failed to submit any actual transcripts of meetings of the CCB or other documentation regarding the development of the challenged regulations or the presentation of the proposed regulations to the CCB. They have also failed to submit any transcripts or meaningful minutes of CCB meetings that would enable this Court to determine the factual basis or the reasoning supporting their decision to adopt the regulations.

In opposing the petition, Respondents argue that "the marketing and pricing regulations limit only the manner-in -which licensees may use TPPs. They do not regulate the content of a licensee's or TPP's speech. As such, they need only be rationally related to legitimate State interests, which they are". Counsel for Respondents continue that "[t]hey directly advance the State's interests in (a) favoring small businesses, (2) promoting the success of businesses owned by members of socially and economically disadvantaged groups, and (3) protecting public health and safety" [16]. Counsel offers no citation to any evidence or statements in the record in support of these conclusory assertions regarding the State's interests that the regulations purportedly advance. Counsel continues by arguing that "[i]n drafting and instituting the marketing and pricing regulations, Respondents sought to promote legitimate government interests to foster new industries and favor small businesses in the nascent cannabis industry, promote social and economic equity and protect the health, safety, and welfare of the people of the State of New York". Once again, counsel offers no citation to the record to support this conclusory assertion.

Rather, counsel cites to the affidavit prepared by John Kagia, the "current" Policy Director of OCM. Mr. Kagia's precise role with-regard-to the drafting of the contested regulations is unclear and, in point-of-fact, his affidavit does not specifically indicate that he was employed by OCM at the time of the drafting of the regulations. Most significantly for the

[16] NYSCEF doc. 90, page 7

purpose of this application, while Mr. Kagia outlines his own beliefs regarding the factual and policy issues before this Court, there is no indication in the record that he presented these opinions to the CCB during their deliberations regarding the regulations or that any of the studies that he references were made part of the record and considered by the CCB prior to their action to approve the contested regulations.

Counsel for Respondents continue by arguing that in the event this Court determines that the marketing and pricing regulations do, in fact, regulate content or subject matter, the actions must be reviewed according to the four-part test set forth by the Supreme Court in Central Hudson Gas & Electric, 447 U.S. 557 (1980). Counsel argues that the government interest at stake is, in fact, substantial and the challenged regulations directly advance the government interest asserted. Once again, counsel cites to Mr. Kagia's affidavit and argues that this affidavit provides "direct and concrete evidence" to satisfy this requirement. Again, counsel fails to cite to any specific evidence before OCM or CCB nor does counsel argue that the information set forth by Mr. Kagia, or the studies he relied upon, were before OCM or CCB prior to the drafting or approval of the contested regulations.

In their reply affirmation, Petitioners reiterate their argument that the pricing and third-party marketing bans are impermissible content-based restrictions rather that time, place and manner restrictions because they target specific forms of speech based on their content and further argue that "[t]he State cannot justify its speech restrictions based on a purported need to shield the public from accurate price information". Petitioners further argue that "because the State offers no concrete evidence of monopoly power in the advertising market", Respondents

cannot establish that the regulations ensure the ability of small businesses and businesses owned by unrepresented groups to compete in the market[17]".

Finally, Petitioners argue that there is no evidence in the record to support any of the conclusory arguments presented by Respondents. Specifically, Petitioners correctly argue that "[t]he State relies extensively on affidavits submitted by Mr. Kagia to support its contentions. Mr. Kagia's affidavits often are the only source offered to support broad, conclusory statements. Yet Mr. Kagia's assertions themselves are premised on vague generalities, unsupported assertions, and misrepresented sources"[18].

Applicable Law

As recently explained by the Court of Appeals in Matter of Brookdale Physicians v. Dept. of Finance, City of New York, ___ N.Y.3d ____, 2024 NY Slip Op 01593 (2024), "[i]n reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether is it arbitrary and capricious . . . Arbitrary action is without sound basis in reason and is generally taken without regard to the facts . . . If the reviewing court finds that the determination is supported by a rational basis, then it must sustain the determination even of the court concludes that it would have reached a different result than the one reached by the agency"[19]. See also, C.F. v. NYC Dept. of Health, 191 A.D.3d 52 (2nd Dept., 2022)). "An agency's decision to rely on the conclusions of its experts, rather than the conflicting conclusions of challengers' experts, does not render its determination arbitrary, capricious, or lacking in a rational basis" (C.F. v. NYC Dept. of Health, supra., 191 A.D.3d 52. See also, Matter of 278, LLC v. Zoning Board of E. Hampton, 159 A.D.3d 891 (2nd Dept., 2018).

[17] NYSCEF doc. 116, page 4
[18] Id., page 14
[19] Internal quotations, citations and punctuation omitted from all case quotations herein.

"In reviewing the subject resolution pursuant to CPLR article 78, the inquiry is limited to whether the resolution was made in violation of lawful procedure, was effected by an error of law or was arbitrary and capricious or an abuse of discretion" (Matter of East End Hangars v. Town of E. Hampton, N.Y., ____ A.D.3d ____, 2024 NY Slip Op 01708 (2nd Dept., 2024)).

"It is settled that a court's review of the propriety of an agency's determination is confined to the particular grounds invoked by the agency in support of its action . . . neither evidence nor arguments outside the administrative record may be considered" Matter of L&M Bus Corp. v. NYC Dept. of Education, 71 A.D.3d 127 (1st Dept., 2009)). See also, Matter of Yarbough, 95 N.Y.2d 342 (2000). "Judicial review of administrative determinations is limited to the facts adduced and the record made before the administrative agency" (Matter of Nur Ashki Jerahi Comm. v. NYC Loft Board, 80 A.D.3d 323 (1st Dept., 2010)).

"[A]n agency determination is arbitrary and capricious where the agency provides only a perfunctory recitation of relevant statutory factors or other required considerations as a basis for its conclusions . . . provides no reason whatsoever for its determination . . . or provides only a post hoc rationalization therefor" (Helm v. N.Y. State Div. of Hous. And Cmty. Renewal, ____ Misc.3d ____, 2023 NY Slip Op 34388(U) (Supreme Court, New York County, Dec. 13, 2023)). See also, Baychester Payment Ctr. V. N.Y.S. Dept. of Fin. Servs., ____ Misc.3d ____, 2023 NY Slip Op 34262(U) (Supreme Court, New York County, Dec. 7, 2023); Duarte v. Adams, ___ Misc.3d ____, 2023 NY Slip Op 30957(U) (Supreme Court, New York County, March 22, 2023)).

Discussion

In the instant matter, it is the finding of this Court that the administrative record and affidavits submitted in support of the agency's action constitute a post hoc rationalization of the

determinations of the agency rather than a necessary showing that the agency considered sufficient evidence prior to deciding to enact the challenged regulations and that their decision was rationally supported by that evidence (see, Assoc. Gen. Constrs. V. N.Y.S. Thruway Auth., 88 N.Y.2d 56 (1996)). This is not a situation where the agency seemingly considered data that was not placed before the Court as part of the administrative record nor is this a situation where the agency relied on its own experts rather than experts proffered by Petitioner. Here, there is no indication that any evidence was actually- placed before the administrative agency and there is no outline of the process that the agency followed when deliberating regarding the proposed regulations. Moreover, there is no indication as to which experts the agency relied upon and which they rejected. In this regard, this Court agrees with Petitioners assertion that "[t]he States opposition . . . fails for reliance upon numerous conclusory and unsupported assertions" and that "[e]ach of these conclusory statements is made without any evidentiary support and should be disregarded as a result"[20].

While Mr. Kagia outlines numerous meetings that OCM conducted with outside entities, there is no clarification regarding how these entities were selected to participate in the development of the policy, the precise roles these entities played, or the source of the information provided to OCM. There is also no indication as to whether Mr. Kagia participated in these meetings or the basis of his knowledge of what was presented by the entities to OCM. Finally, there is no indication either in Mr. Kagia's affidavit nor in the administrative record regarding whether the CCB considered the opinions of these entities, or the information shared at these meetings when they voted to approve the regulations.

[20] NYSCEF doc. 116, page 2

While Mr. Kagia refers to a number of the articles which were submitted as part of the administrative record and attempts to explain their relevance to the rationality of the CCB's decision, there is no indication that any of these articles were placed before the CCB or that the Board considered them in the-course-of deliberations. Moreover, there is no indication that Mr. Kagia testified or provided any type of data driven analysis of the controlling issues to OCM or CCB as part of their decision-making process.

This Court agrees with Petitioners argument with-regard-to Respondents reliance on the contents and opinions set forth in Mr. Kagia's affidavits. Specifically, this Court agrees that while "Mr. Kagia suggests OCM does have expertise based on the experiences of its staff", "Mr. Kagia fails to identify any of these staffers or the positions that they hold, except for discussing OCM's Chief of Staff. Mr. Kagia's discussion is replete with hearsay, and therefore lacks evidentiary value. He neither identifies any of the individuals referenced, nor specifies their credentials"[21].

In point-of-fact, there is nothing in the record to establish precisely how OCM developed the regulations, which staff members participated in the process or how they addressed the litany of issues that were raised not only by Petitioners but by the other individuals who submitted comments. For these reasons, there is no legal basis for this Court to consider the staff's purported "expertise", the meetings referenced in Mr. Kagia's affirmation, nor the litany of documentation and studies submitted, when determining whether the challenged regulations as approved by the Board were consistent with the policy goals of the MRTA.

The Court has considered the memorandum, affidavits and exhibits submitted by counsel for Respondents. It is the finding of this Court that while the submissions attempt to justify the

[21] NYSCEF doc. 116, page 25

actions of the CCB, it is not counsel's role to develop and outline a rational argument in favor of the regulations after the fact. Moreover, in presenting its argument, counsel for Respondents is essentially asking this Court to do precisely what it is precluded from doing in an Article 78.

As outlined above, the issue before this Court is whether the reasoning of OCM and CCB had a rational basis. If the record establishes such a rational basis, this Court is obliged to defer to the administrative agency. This Court will not decide whether it agrees or disagrees with the decisions of the CCB. It is the finding of this Court that the administrative record before the Court contains nothing to rebut the arguments presented by Petitioner and nothing to establish the rationale or reasoning behind the OCM and CCB decisions. Given the absence of any evidence of the process by which these regulations were developed and approved, this Court must find that the conclusions were arbitrary and capricious and that there is no sound and substantial basis in the record to support Respondents actions.

With-regard-to the constitutional arguments raised, once again, insofar as the record contains nothing to establish the evidentiary basis for the determinations, this Court is also constrained to find that the regulations are an unconstitutional violation of Petitioners' free speech rights as set forth in the New York State Constitution. For the reasons outlined by Petitioners, it is the further finding of this Court that the contested regulations are unconstitutionally vague. Petitioners have clearly articulated their arguments regarding this claim in its pleadings and Respondents have failed to cite to any evidentiary support in the administrative record to contradict Petitioners claims regarding the ambiguity of the regulations.

With-regard-to both constitutional claims, this Court has considered the standards set forth by the Supreme Court in Central Hudson Gas & Electric and its progeny. While there is some disagreement between the parties regarding the precise standard that this Court must apply,

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it is the finding of the Court that given the complete lack of justification for the action in the record, there is no basis or need for this Court to conduct a detailed analysis of the applicable factors. Even under a less stringent standard as advanced by Respondents, the actions cannot sustain constitutional scrutiny.

For the foregoing reasons, the petition is granted, and the following sections are hereby declared null and void as arbitrary and capricious; The Third-Party Marketing Ban, Parts 9 N.Y.C.R.R. §§123.10(g)(21) and 124.5(a); the Pricing Ban, 9 N.Y.C.R.R. §124.1(b)(5)(ii) the Third-Party Order Ban, 9 N.Y.C.R.R. §123.10(g)(23); the Third-Party All-Licensee Listing Mandate, 9 N.Y.C.R.R. §124.1(b)(2); and the Third-Party Distributor Listing Mandate, 9 N.Y.C.R.R. §124.1(c)(1)-(2). Moreover, insofar as argued by Petitioners, based on the record before the court, it is the finding of this Court that the aforementioned regulations constitute impermissible restrictions on Petitioners right to free speech and that they are unconstitutionally vague.

This Court has considered Petitioner's request that this Court award counsel fees pursuant to 42 U.S.C. §1988 and finds that under the circumstances, an award of counsel fees is not warranted.

This shall constitute the Decision and Order of the Court.

The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

Dated: April 4, 2024
Kingston, New York

ENTER,

Kevin R Bryant

HON. KEVIN R. BRYANT, J.S.C.