UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
PORTLAND

NPG, LLC d/b/a WELLNESS CONNECTION, and HIGH STREET CAPITAL PARTNERS, LLC, Plaintiffs, v. CITY OF PORTLAND, Defendant.	)	CIVIL ACTION NO. 2:20-cv-00208

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Regardless of this Court's decision, and regardless of the outcome of the City's licensing process, Plaintiff NPG, LLC d/b/a Wellness Connection, and High Street Capital Partners, LLC (together, "Wellness") will be selling marijuana in the City of Portland (the "City") even after the adult use marijuana market in Maine opens. The only outstanding question is whether it will continue its current lucrative medical business or will receive one of the City's 20 licenses and convert to adult use sales. In light of this, it is clear that Wellness does not have standing, nor is this case ripe for decision.

Even more importantly, however, Wellness has failed to state a claim for any interest that is protected by the federal Constitution. Despite the desperate attempts by Wellness to paint their business venture as entirely above board and legal, marijuana remains illegal at the federal level. This, alone, defeats any claim by Wellness that it enjoys Commerce Clause protections. Thus, this case should be dismissed with prejudice.

I. Because Portland's Ordinance Does Not Impact Interstate Commerce, The Commerce Clause Offers Wellness No Protection.

Opposition I.b.

In Section I.b of Plaintiffs' Reply in Support of Preliminary Injunction and Opposition to the City's Motion to Dismiss ("Opposition"), Wellness acknowledges that, "the challenged ordinance does not regulate interstate commerce in marijuana," and that Wellness's business "would not result in a single marijuana leaf crossing a single state line." *Opposition* pp. 4-5. The Commerce Clause applies only to industries affecting interstate commerce, and the CSA specifically regulates marijuana trafficked in both intra- and inter-state commerce. Therefore, Wellness cannot rely on the Commerce Clause, regardless of its position: either Wellness's business trafficks in contraband, or its business is legal because it is wholly within the borders of the State of Maine and not subject to federal regulation. Regardless, it does not fall within the protections of the Commerce Clause.

II. The Controlled Substances Act Removes Wellness's Activities From Commerce Clause Protection.

Opposition I.a.

Wellness has not cited to a single case where any court has found Constitutional protections for a marijuana (or any other illegal) business.[1] This is because there are none. Similarly, there are no cases that either party has found addressing how the Constitution applies to an entire industry that is illegal at the federal level, but which states have taken upon themselves to legalize. Therefore, this Court, and the parties, are left to cobble together precedent.

Given this situation, Wellness's attempts to distinguish the cases cited by the City regarding contraband are unhelpful – of course the situations are not identical. Instead, this Court must look to the underlying reasoning behind the dormant Commerce Clause. As the Supreme Court stated,

[1] The myriad of cases that Wellness has cited, both in its Motion for Preliminary Injunction and in its Opposition, that hold marijuana businesses to the standards of other state and federal laws are not relevant. Those cases all hold that marijuana businesses are not *themselves* immune from other federal regulations, simply because they are already engaging in an illegal enterprise. *See Siva Enterprises v. Ott*, 2018 WL 6844714 (C.D. Cal. Nov 5, 2018), *citing Greenwood v. Green Leaf Lab LLC,* No. 3:17-CV-00415PK, 2017 U.S. Dist. LEXIS 125143, at *2-3 (D. Or. July 13, 2017) ("just because [a marijuana business] is violating one federal law, does not give it license to violate another."). These cases address the statutory obligations for marijuana businesses but not any Constitutional protections for those businesses.

"There has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." *S. Pac. Co. v. Arizona*, 325 U.S. 761, 770 (1945). Here, the national concern is not protecting marijuana businesses, and the "free flow" of marijuana across state lines is certainly prohibited. Instead, the national concern here is prohibiting marijuana in all forms, as stated in the Controlled Substances Act. Portland's matrix that awards points for an in-state entity does not conflict with that goal.

III. Marijuana Is Absolutely Contraband Under Federal Law.

Opposition I.b.

Continuing its insistence that marijuana is not *really* illegal under federal law, Wellness cites to a case from the District of Colorado. However, that court was addressing a situation where an insurer was trying to get out of its agreed-upon obligations by asserting that the insured's business was illegal; a fact which the insurer was well aware of up front:

> More fundamentally, it is undisputed that, before entering into the contract of insurance, Atain knew that Green Earth was operating a medical marijuana business. It is also undisputed that Atain knew — or very well should have known — that federal law nominally prohibited such a business. Notwithstanding that knowledge, Atain nevertheless elected to issue a policy to Green Earth, and that policy unambiguously extended coverage for Green Earth's inventory of saleable marijuana.

Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co., 163 F. Supp. 3d 821, 833 (D. Colo. 2016). The Bankruptcy Court for the District of Colorado further limited that decision, stating,

> Taken together, *Green Earth Wellness* and *Ginsburg* stand for the proposition contracts that can be performed without violating the CSA are likely enforceable even if the transaction's subject matter involves CSA violations. In both cases, the underlying contracts would require no more than the payment of money, which is not per se illegal under federal law."

In re Malul, 614 B.R. 699, 709 (Bankr. D. Colo. 2020). While Wellness has found one case where a court would not let a private party escape the consequences of its well-informed deal, that certainly

does not change the fact that marijuana remains illegal under the CSA and, in fact, the federal government continues to prosecute cases for illegal drug trafficking involving marijuana in Maine.

IV. The Undeniable Power To Prohibit Marijuana Includes The Lesser Power To Regulate It As The City Sees Fit.

Opposition I.b.

Wellness openly acknowledges that "Portland is free to ban marijuana altogether within its borders," but then argues that the City cannot regulate marijuana in the manner that it sees fit. *Opposition* at pp. 6-7. However, the limits that Wellness attempts to place on the City's authority are not borne out by precedent. Instead, the Supreme Court has acknowledged repeatedly, in the context of regulating liquor, that the power to absolutely prohibit an item or business also includes the lesser power to regulate it. In the case of *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939), the Supreme Court addressed a Kentucky statute that was challenged on Commerce Clause grounds. The Supreme Court stated, "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less." *Id.* at 138, *citing Seaboard Air Line Ry. v. North Carolina,* 245 U.S. 298, 304 (1917). Nothing in the Constitution prohibits Portland from regulating marijuana as it sees fit, that right is simply one subset of its right to prohibit the sale of marijuana altogether.

V. Wellness Still Has Not Alleged An Injury Sufficient To Confer Standing.

Opposition IV.a.

To get around the fact that it has never been denied a license – and may never be denied a license – Wellness claims that its injury is instead, "the inability to compete on an equal footing, whether or not the application is ultimately denied." *Opposition* p. 12. In making this argument, Wellness relies on cases that fall into one of three categories: cases where the applicant had *actually*

been denied the government benefit they sought (unlike Wellness); cases where the benefit was *certain* to be denied based on the ordinance language (unlike the City ordinance at issue); and cases that simply do not apply. Quoting phrases from court decisions out of context does not make those decisions relevant in this matter.

Gratz v. Bollinger, 539 U.S. 244 (2003), exemplifies the first category of irrelevant cases that Wellness cites – those where an applicant had actually been denied the benefit that they sought before bringing suit. *Gratz* was a class action lawsuit challenging a university's admission policy that gave some preference to racial minorities. *Id.* at 252. However, all plaintiffs in *Gratz* had actually been denied the university admissions spot they sought. In fact, the plaintiff class in that case was limited to "those individuals who *applied for and were not granted* admission" to the defendant university. *Id.* (emphasis added). Similarly, in *Conservation Force v. Manning*, 301 F.3d 985 (9th Cir. 2002), the plaintiffs had all applied for elk hunting tags, but had never received those tags. *Id.* at 990. In *MGM Resorts Int'l Global Gaming Dev., LLC v. Malloy*, 861 F.3d 40 (2nd Cir. 2017), the Second Circuit did not even reach the issue of whether an applicant has to first receive a denial because the plaintiff there had not even applied for the license in question or expressed a sufficiently concrete intention to do so. *Id.* at 47-48. These cases perfectly align with the City's position – that Wellness must apply for and be denied (if they are denied) a license before challenging the licensing ordinance.

Wellness also cites to cases where – unlike here – the applicant was certain to be denied the governmental benefit sought based solely on the challenged law itself. For example, in *Portland Pipe Line Corp. v. South Portland, Maine*, 164 F.Supp. 3d 157 (D. Me. 2016) and *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 2017 WL 1021296(M.D. Tenn. Mar. 16, 2017), the challenged laws were *certain* to result in a denial of the plaintiff's ability to do business or obtain a license. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas,* 139 S. Ct. 2449, 2457 (2019) (non-residents barred entirely from applying for retail liquor license); *Portland Pipe Line Corp.*, 164 F. Supp. at 174-75 ("there is no dispute among the parties

that the South Portland Ordinance at issue effectively abrogates PPLC's right" to engage in its desired business); *see also Northeastern Fla. Ch. of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656 (1993) (contractors absolutely barred from certain percentage of city contracts); *Illinois Coal Act Alliance for Clean Coal v. Miller*, 44 F.3d 591, 595 (7th Cir. 1995) (statute imposed automatic additional cost of doing business to protect in-state interests). Here, there is absolutely no certainty that Wellness will be denied a license, which is exactly the reason why standing is absent in this case.

Finally, the decision in *Northeastern Florida Chapter of Associated General Contractors of America* does not apply here because it addresses a very different question than the one at issue. In that case, the Supreme Court specifically identified the standing question as hinging on the principal that, "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier *need not allege that he would have obtained the benefit but for the barrier in order to establish standing."* 508 U.S. at 666. That principal is the exact opposite of the principal being debated in this case. Here, the City's position is not that Wellness must show that it would obtain a license but for the City's ordinance, but that Wellness must show that it will *not* obtain a license at all.

Wellness's Opposition offers nothing to change the fact that it lacks standing to bring the present case.

VI. This Case Is Not Ripe Because It Is Not Fit For Review.

Opposition IV.b.i.

Citing to *Riva v. Commonwealth of Massachusetts*, 61 F.3d 1003 (1st Cir. 1995), Wellness next sets forth three factors for this Court to consider in determining a case's fitness for review, relying heavily on the factors that do not focus on the harm to the Plaintiff. However, the *Riva* court explained that the "critical component" was "whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." *Id.* at 1009. To get around the fact that it may not

ever be denied a license at all, Wellness goes back to *Gratz* in an attempt to argue that the harm is the reduced chance of obtaining a license, not the loss of a license itself. As discussed at length above, *Gratz* does not help Wellness, and this case absolutely involves the "uncertain and contingent events" that the *Riva* court warns about.

VII. This Case Is Not Ripe Because There Is No Hardship To Wellness To Waiting For Licenses To Be Issued.

Opposition IV.b.ii.

Regardless of the outcome of the City's weighted lottery to distribute the 20 new marijuana retail licenses, Wellness will still have a license to sell marijuana in Portland. The only unknown is whether Wellness will be the 21st license, and keep its lucrative medical retail store, or whether it will get one of the 20 new licenses that can be either adult use or medical, at the option of the business. While Wellness feigns concern for the City's 20-license regulatory scheme, that ordinance specifically allows for at least 23 retail stores, including the three pre-existing medical stores.[2] Here, there is no "direct and immediate dilemma" for Wellness. Wellness will apply for a license – and will either be denied one or not – and will continue to operate a marijuana retail store in the City of Portland. There is no immediate hardship sufficient to confer ripeness on this case.

Dated: August 3, 2020

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[2] In this section of its brief, Wellness cites to *Ernst & Young v. Depositors Economic Protection Corporation*, 45 F.3d 530, 536 (1st Cir. 1995) for the proposition that, "if the operation of a challenged statute is inevitable, ripeness is not defeated by the existence of a time delay before the statute takes effect." Wellness does not explain how the operation of the City's licensing ordinance is "inevitable," and cannot do so because the outcome is far from decided.

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