SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** 60M

Justice

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STEPHEN ASHEKIAN,

Plaintiff,

- v -

CRESCO LABS LLC,CRESCO LABS INC.

Defendant.

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INDEX NO. 656112/2021

DECISION AFTER BENCH TRIAL

Melissa A. Crane, JSC

This case presents a cautionary tale for what can happen when parties tie particular financial outcomes to legislative particulars that fail to materialize. The dispute here arises out of a failed Escrow Agreement that was entered into by Plaintiff—Stephen Ashekian (Ashekian)—and Defendants—Cresco Labs LLC. (individually, "CLL") and Cresco Labs Inc. (individually "CLI,"" but together with CLL "Cresco"). Specifically, Plaintiff asserts Cresco breached both the Merger and Escrow Agreements by failing to direct the Escrow Agent to disburse certain shares pursuant to Section 3.2 of the Escrow Agreement.

Plaintiff is the equity representative for the former members of Gloucester Street Capital, LLC ("Gloucester"), that in turn was the sole member of Valley Agriceuticals ("Valley"), a medical marijuana organization registered with the New York State Department of Health ("NYDOH") as of 2017.

Defendant Cresco Labs, LLC, is an Illinois limited liability company doing business in New York. Defendant, Cresco Labs Inc., is a British Columbia corporation with a principal place of business in Chicago, Illinois. In 2018, in anticipation that New York would soon legalize

recreational adult use marijuana, Cresco sought a merger with Gloucester to acquire use of Valley's medical marijuana license. Cresco effectuated this merger pursuant to an October 24, 2018 merger agreement that left Gloucester as the surviving entity with Cresco as the sole shareholder (PX-10 [Merger Agreement], NYSCEF Doc. No. 41, § 1.1). Cresco has already paid plaintiff $100 million in cash, stock, and warrants for the Valley License pursuant to the Merger Agreement to acquire Valley's license (Trial Transcript "TT" at 20:19–22).

In connection with the Merger Agreement, the parties entered into the Escrow Agreement, that states, upon the closing of the merger, the parties would deposit with an Escrow Agent 23,960 shares of Cresco that the Escrow Agent would hold and then either: (1) disburse as post-merger consideration or (2) return to Cresco for cancellation because particular conditions were not satisfied. In particular, Section 3 of the Escrow Agreement directs the Escrow Agent to disburse to the Gloucester Equityholders or cancel two different classes of contingent shares: "Dispensary Shares" and "Rec Shares."

Under Section 3.1 of the Escrow Agreement, up to 13,333.335 Dispensary Shares would be allocated for release to the Gloucester Equityholders "based on whether and how many additional dispensaries are awarded to Valley Agriceuticals, LLC ('VA') . . . by the New York State Department of Health ('NYDOH') before December 31, 2021 (the 'Deadline Date')" (Escrow Agreement, § 3.1). Pursuant to Section 3.1.1, "[f]or each of the first four dispensary licenses awarded to VA before the Deadline Date, 3,333,335 Dispensary Shares [would] be released from Escrow to the Gloucester Equityholders for each such dispensary license awarded to VA" (PX-18 [Escrow Agreement], § 3.1.1). Under Section 3.1.2, any shares not released before the Deadline Date would be forfeited and returned to Cresco for cancellation (Escrow Agreement, § 3.1.2).

However, at summary judgment, the Court dismissed that part of Plaintiff's case seeking release of the Dispensary Shares [See decision and order dated January 9, 2023 [EDOC 110] at pg. 8 ["Because it is undisputed that the state never issued additional dispensary licenses to Defendants, the express condition for releasing the shares never occurred"]. The Appellate Division, First Department affirmed (*Ashekian v. Cresco Labs LLC,* 231 A.D.3d 464 [1st Dep't 2024]).

Under Section 3.2, up to 13,333.335 Rec Shares would be allocated for release "based on whether Recreational Approval is obtained prior to the Deadline Date" (Escrow Agreement, § 3.2). It is undisputed that the Deadline date was December 31, 2021.

The Escrow Agreement defines "Recreational Approval" as:

> the State of New York (the "State") legalizing adult sales of cannabis, with the then-serving Governor of the State signing the applicable **legislation** into law before the Deadline Date, provided, that such legislation must provide **commercially reasonable access** to the State's adult use program to VA or the entity then holding the NY Cannabis License (as defined in the Merger Agreement) subject **only** to a **non-competitive application or approval process,** including, **without limitation,** if (A) existing registered organizations are given a preference in securing a recreational license or (B) there is an expedited process for which VA can receive a recreational License

(Escrow Agreement, § 3.2 [emphasis added]).

Because the Escrow Agreement failed to define the terms "commercially reasonable access" or "noncompetitive application or approval process," the Court denied summary judgment to Defendants (see EDOC 110 at 11]. Consequently, the case went to trial over the meaning of these terms, and whether the conditions those terms embody, were met.

DISCUSSION

The Marijuana Regulation and Taxation Act ("MRTA") legalized adult-use recreational marijuana and established an Office of Cannabis Management (OCM) (DX-001 [the MRTA], at

p.3 ¶¶ 10-13) and Cannabis Control Board (CCB) (*id.* at p. 4, ¶¶ 1-2). The MRTA did not however define the terms and conditions of the access that the Registered Organizations ("ROs"),[1] like Cresco, would have to the adult-use market (*id.* at p. 33, ¶¶8-13). Rather, it specifically delegated that authority to the OCM and CCB (*id.*) These regulatory bodies were given the authority to design what adult use would look like, who could be involved in it, and under what conditions they would be allowed to participate (*id.* at p. 11, ¶¶ 36-46).

Cresco asserts that it was not obligated to release the Rec Shares because the MRTA did not provide Cresco with access to the adult-use market subject only to a non-competitive application or approval process. Nor did the MRTA provide Cresco with 'commercially reasonable' access to the adult-use market by the Deadline Date.

A. "Commercially Reasonable Access"

Plaintiff argues that "commercially reasonable access" is not synonymous with "automatic." No one disputes this. Rather, the parties appear to agree that they understood 'commercially reasonable access' to mean, as Mr. Ashekian testified, "an attractive opportunity, were there participants that would want to be part of it? [Mr. Ashekian (TT) at 166)[2], or a "pathway" that was worth pursuing (TT 174), an "opportunity to be successful" (TT 200).

Ashekian (citing Bachtell's testimony at TT 46-50) argues that originally the legislators were going to exclude medical operators from the adult use program. Ashekian then equates the

[1] Having already acquired a medical marijuana license from Valley meant Cresco was a "Registered Organization" (RO) under MRTA: "the registered organizations registered with the department of health."

[2] The Banner Labels that appear across the top of each page within the Trial Transcript of Proceedings do not always accurately reflect which witness is testifying.

fact that the ROs were not excluded from the MRTA entirely with "commercially reasonable access."

This does not add up. First, just because an entity is not excluded does not mean what access they have is "commercially reasonable." More important, the MRTA—which according to the Escrow Agreement was the "applicable legislation"—did not provide access at all, much less "commercially reasonable" access.

Instead, the MRTA punted entirely the issue of who could participate to the regulators. Specifically, Article 4 of the MRTA directs that **the CCB "shall develop"** the rules for use "in determining whether or not an applicant should be granted the privilege of an initial adult-use cannabis license, based on, but not limited to, [certain] criteria[.]" (MRTA at p. 37, ¶¶ 13-16).

The MRTA gave the board the "Sole discretion to limit, or not to limit, the number of registrations, licenses and permits of each class to be issued. . .in a manner that prioritizes social and economic equity applicants with the goal of fifty percent awarded to such applicants, [i.e. not Cresco], and avoid market dominance in sectors of the industry." (*id.* at p.10, ¶¶ 24-29).

Then, MRTA provided that "[t]he board shall have the authority to grant **some or all** of the **registered organizations** registered with the department of health and currently registered and in good standing with the office, the ability to obtain adult-use licenses. (DX-001, [New York's MRTA] at p. 33, ¶¶ 8-13):

> The board shall have the authority to grant **some or all** of the registered organizations registered with the department of health and currently registered and in good standing with the office, the ability to obtain adult-use cannabis licenses pursuant to article four of this chapter subject to any fees, rules or conditions prescribed by the board in regulation.
> (MRTA § 39)

Plaintiff appears to argue that the MRTA grandfathered in the ROs and that this grandfathering was commercially reasonable access. However, it is impossible for ROs to be

grandfathered in when the MRTA gave the board the authority to grant "some or all" of the ROs the ability to obtain adult-use licenses. Thus, although the MRTA did not EXCLUDE the ROs, it punted to the regulators on how to allow for their access. By giving complete discretion to the regulators to allow "some or all" of the ROs to participate in the adult use market, the MRTA anticipates the possibility of a competitive application process.

There is nothing in the MRTA that indicates any ability even to evaluate whether there was commercially reasonable access. For example, the MRTA did not discuss fees. Rather, once again, the MRTA punts to the regulators. Article 4, Section 63.1 of MRTA states that "The board shall have the authority to charge applicants for licensure." Importantly, the MRTA allowed for the board to assess a "one-time special licensing fee" applicable only to incumbent medical operators, like Cresco, seeking to enter the adult-use space. As will be discussed later, it turned out that the fee the regulators would have assessed would be $20 million dollars.

The MRTA did not discuss how many other licenses could be issued (it just vaguely says "some or all"). There is no explicit application or approval process specified in the MRTA. Instead, the MRTA granted CCB "the authority to limit, by canopy, plant count, square footage or other means, the amount of [adult use] cannabis allowed to be grown, processed, distributed or sold by a licensee" (§ 65.4)

By the MRTA vesting such broad discretion with the regulators, the ROs did not have access to the adult-use program until the regulators established the rules. But, the CCB did not promulgate regulations until after the Deadline Date had passed. Therefore, commercially reasonable access did not exist by the Deadline Date and Cresco need not release the Rec Shares to Plaintiff.

Other aspects of MRTA did limit regulator discretion. For example, with respect to medical marijuana, the legislature directed that the CCB "shall grant a registration or amendment to a registration" again if certain criterial were met (id. Art 3, § 35.3(a)(ii). Clearly, the legislature limited agency discretion when it wanted to do so.

B. Subject Only To A Non-Competitive Application Or Approval Process.

Nor did the MRTA provide a non-competitive application process. The Escrow Agreement's provision provides examples of what the parties considered a non-competitive process:

> "including, **without limitation,** if (A) existing registered organizations are given a preference in securing a recreational license or (B) there is an expedited process for which VA can receive a recreational License"

For starters, the MRTA did not give existing ROs a preference in securing a recreational license. Instead, the MRTA expressly gave priority to a different class of applicants: the social equity operators. (See MRTA at Art. 4, § 87.3 ["extra priority shall be given to [social equity] applications"]; § 87.2 ["A goal shall be established to award fifty percent of adult-use cannabis licenses to social and economic equity applicants[.]"]

In addition, the MRTA authorized a "one-time special licensing fee" exclusive to ROs seeking licensure for adult use. (Art 4. § 63.1-a). This "participation" fee was imposed on no other class and wound up being $20 million dollars. Thus, ROs were not "subject to only" a non-competitive application process.

In sum, the ROs like Cresco were not subject only to a non-competitive application or approval process. They were subject to: (1) a hefty fee to participate in the adult use field, (2) special priority was given to social equity applicants of which they were not, and (3) the regulators had broad discretion not to approve their application.

Plaintiff argues that, at the time the MRTA was enacted, there were only ten ROs and that these ROs had exclusive access to vertically integrated license classes unavailable to other participants in the adult use program. Plaintiff then attempts to argue that this vertical integration makes the application process non-competitive (See Pl. rebuttal brief [EDOC 168] at 11).

Not so. Despite the fancy verbiage inherent in the term "vertical integration," all this means is that the ROs could have two different license classes: medical and adult-use recreational. This has nothing to do with whether or not there was a competitive process to be able to participate in the adult use market. "Vertical integration" also has nothing to do with the situation the MRTA created by granting the regulators broad discretion to keep the ROs out of the adult-use market.

Ashekian highlights Cresco's statements following the enactment of the MRTA as evidence that Cresco believed it had commercially reasonable access. First, Plaintiff relies on an email exchange between John Sullivan and Bachtell on March 28, 2021, that demonstrated Cresco had advance access to the final language that would be included in the MRTA (EDOC. 79, pp. 2-3; PX 28;). This correspondence included dialog between Mr. Sullivan and Mr. Bachtell wherein Sullivan highlighted that there were "no surprises" (*id.*). Sullivan also included amongst these highlights the "ROs ability to remain vertically integrated in AU market **upon payment of a 'one time special licensing fee'** TBD by board . . ." (*id.*) (emphasis added).

Plaintiff then turns to Cresco's press release on March 31, 2021 (PX-32), in an effort to bolster their position that Cresco had commercially reasonable access by the deadline date .

Specifically, Plaintiff highlights that in this press release, Cresco stated:

- "We are thrilled with the inclusive framework put forward by the New York State government as we firmly believe that responsible regulations create respectable programs that lead to robust marketplaces."
- "Cresco Labs is one of the ten operators licensed for vertical operations in New York and we look forward to deepening our position in the state ahead of adult-use sales commencing."
- "This balanced approach to creating a competitive market with a strong emphasis on social equity, and prioritizing diversity of ownership, reiterates a trend that states are following as they transition to adult-use programs, while normalizing and professionalizing the U.S. cannabis industry along the way."
- "We expect that hundreds of new dispensaries will be authorized under the program."

(EDOC. 61, [Press Release from Business Wire]), PX-32).

Cresco's supposed elation over not being excluded entirely does not equate to commercially reasonable access or a non-competitive process. This is especially so when the parties do not dispute that the legislators initially sought to exclude ROs completely from adult-use participation. Mr. Bachtell testified that, originally, "the legislators did not want for the ROs [to] be able to have access to the adult-use program, for the MRTA to include the opportunity for ROs to participate and they also did not want vertically integrated operators at all, again, for the MRTA to provide the opportunity to stay vertically integrated, there was opportunity there." (TT: at pp. 47-48, ¶¶ 24-25, ¶¶1-4); (see *id.* at p. 46, ¶¶ 5-6 (Mr. Bachtell testifying, "In the original days of discussions, they were going to exclude medical operators from participating;";

see also PX 28 at p. 3 in which Bachtell writes: "all things considered—it wasn't that long ago that incumbents were not going to be able to participate in adult use").

Given that the ROs could have been excluded altogether, Mr. Bachtell credibly testified that the version of the MRTA that passed in March 2021 was "the best version of a structure that had been contemplated at that point in time" (TT 54:16-17); see also Sullivan TT 124: 15-18 "Like I said, I was relived, excited, they didn't specifically rule us out of participating in the adult-use program and ready to get to work on trying to figure out what the regulation would look like").

Although Cresco expressed satisfaction that at least incumbents were included, the process by which incumbents could obtain licenses was still unknown as of the Deadline Date, as were the fees, rules or conditions to which they would be subject. Moreover, a mere six days after the MRTA passed, Mr. Bachtell suggested to Mr. Ashekian that the statutory reality defeated the share earnout provision (See DX-26 (Apr. 6, 2021 email: "we were cognizant that it needed to be relatively seamless (not an application process) and I think we considered the impact of a fee (if we have to stroke a $50M check to participate, it impacts the earnout)").

Mr. Ashekian did not dispute Bachtell's interpretation. Rather, in response, he simply asked whether that $50 million fee was in discussion, to which Mr. Bachtell replied: "Not sure—there are a bunch of numbers being thrown around. Same with canopy caps." (*id.*). Again, Mr. Ashekian did not dispute the interpretation, simply replying: "Brutal…." (*id.*). Thus, Mr. Ashekian contemporaneously acknowledged that the conditions for the share earnout had not been satisfied.

Plaintiff points to the "tens of millions of dollars" in investments that Cresco spent while preparing to participate in the adult-use market as evidence that it had commercially reasonable

access. However, Plaintiff does not address Cresco's reason for doing so. Cresco had already spent a fortune to enter the adult use market. Defendant remained in discussions post-MRTA with regulators to try and define reasonable parameters around industry participation (see TT 48:5-10); (see also *id.* at 125:8-16 (Sullivan testifying that he coordinated with regulators "to ensure we did not have a competitive application process, to ensure that we understood what the fees would be and that they'd be reasonable, to figure out what the canopy cap would be"). As such, Cresco's actions simply demonstrate its attempt to refine its real estate and operational plans while it hoped to participate in the industry. Certainly, Plaintiff could not have reasonably expected Defendant to stand by idly, and not make proactive efforts to capitalize on an opportunity for which it had just paid Plaintiff $100 million. Cresco's efforts do not equate to the MRTA having bestowed "commercially reasonable access" that was "subject only to a non-competitive application or approval process" by the deadline date of December 31, 2021. Thus, Plaintiff has failed to carry its burden by a preponderance of the evidence.

The Court finds Plaintiff's remaining contentions to be unavailing.

Accordingly, it is

ADJUDGED, DECREED AND DECLARED that Defendant need not release the Rec Shares Pursuant to Section 3.2 of the Escrow Agreement and it is further

ORDERED that the Escrow Agent is directed to return the Rec Shares to Cresco, and it is further

ORDERED that the clerk is directed to mark this matter disposed.

DATE: 3/18/2025 **MELISSA A. CRANE, JSC**

Check One: [X] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [X] **Other (Specify DECISION AND ORDER AFTER BENCH TRIAL)**