

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of

CARMINE FIORE, et al

Petitioner(s)

DECISION & ORDER

-against-

Index No.: 907282-23

**NEW YORK STATE
CANNABIS CONTROL BOARD, et. al**

Respondent(s).

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

Appearances:

Petitioner:

Patrick Joseph Smith
Brian Thomas Burns
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Attorneys for Carmine Fiore, William Norgard, Steve Mejia, and Dominic Spaccio

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Respondent:

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New York State Office of Cannabis Management, Tremaine Wright, Chris Alexander
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Non-Parties:

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Bryant, K.:

On or about August 2, 2023, an Order to Show Cause and Verified Complaint was filed by Carmine Fiore, William Norgard, Steve Mejia and Dominic Spaccio (hereinafter referred to as “Petitioners”), individuals who are service-disabled veterans as defined in Article 17-B of the New York State Executive Law who planned and intend to pursue adult-use dispensary licenses pursuant to the Marijuana Regulation and Taxation Act (hereinafter referred to as “MRTA”), requesting, *inter-alia*, that this Court grant a temporary restraining order and preliminary injunction against the New York State Cannabis Control Board and New York State Office of Cannabis Management (hereinafter referred to as “Defendants”) until such time as this Court adjudicates dispositive motions in the related matter of Coalition for Access to Regulated & Safe Cannabis v. New York State Cannabis Control Board (hereinafter “Coalition”)¹; and

This Court having heard oral arguments on the application on August 11, 2023, and having received written submissions from counsel on August 15, 2023.

NOW, after consideration of the facts and circumstances, the arguments presented and the applicable law, it is hereby ORDERED that the motion for a preliminary injunction is hereby granted in part as outlined below².

¹ Albany County Supreme Court Index 902390-23

² In determining this application, 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 as related to this specific application.

Since oral argument, the Court is in receipt of ten additional Orders to Show Cause seeking intervenor status that are currently being served and processed, including an application filed by the New York Social Equity Cannabis Investment Fund, L.P. (hereinafter referred to as the “Fund Group”).

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.

Article 4. Sections 68-75 of the MRTA outlines eleven types of adult-use licenses covering the production and retail sales of Marijuana. Section 87 requires that Defendants create and develop a social and economic equity plan to “promote diversity in commerce, ownership and employment, and social and economic equity in the adult-use cannabis industry” and that “[a] goal shall be established to award fifty percent of adult-use cannabis licenses to social and economic equity applicants and ensure the inclusion of individuals from communities disproportionately impacted by the enforcement of cannabis prohibition: (b) minority-owned businesses; (c) women owned businesses; (d) minority and women owned businesses . . . ; (e) distressed farmers; and (f) service related veterans”.

These additional submissions are not part of the record with-regard-to this fully submitted application and have not been considered by this Court in reaching this decision.

Of-particular-note, the affirmation submitted in support of the Fund Group's application includes detailed information regarding the social equity fund's involvement with and funding of the licensing process for CAURD applicants and the alleged economic harm cited by Defendant and the Intervenor. information which, for some reason, was not placed before this Court with-regard-to this application. As addressed on the record, this detailed information about the process and the funding available for CAURD applications would have been helpful to this Court in determining the proper scope of the injunction and this Court would urge counsel to incorporate this information in the-course-of compliance with the instructions set forth in the decretal sections of this decision.

Finally, section 10(9) requires Defendants to “approve the opening of new licensing application periods, and when new or additional licenses are made available pursuant to this chapter **the initial adult-use cannabis retail application program period shall be opened for all applicants at the same time**” (emphasis supplied).

There is no dispute that despite this language, while licenses have been accepted and processed for “Conditional Adult Use Recreational Licenses”, Defendants have not accepted applications for other retail licenses specifically delineated in sections 68-75. There is no dispute that these eleven listed categories of licenses do not include a “Conditional Adult Use Recreational License” (hereinafter referred to as “CAURD”) and this additional category was later created by Defendants and never incorporated into the MRTA by amendment.

The MRTA also created the Office of Cannabis Management (hereinafter referred to as OCM”) and the Cannabis Control Board (hereinafter referred to as “CCB”) and charged OCM with regulatory oversight and management of the adult use and medical marijuana market. The broad powers of OCM are outlined in Article 2 of the MRTA. While Defendants argue herein that these broad powers include the creation of new licensing classes, Article 2 does not specifically authorize this power, the legislation does not mention or outline any process for the administrative creation of additional license categories and neither the phrase “Conditional Adult Use Recreation License”, nor the term “CAURD” appear anywhere in the MRTA.

In 2022, the MRTA was amended to create a “conditional adult-use cannabis **cultivator** license” and a “conditional adult-use cannabis **processor**” license³. At the time of these amendments, it is alleged by Plaintiffs, and not denied by Defendants, that a proposal was placed before the legislature to also amend the statute to authorize the CAURD dispensary license

³ See N.Y. Senate Bill 8084-A

program and the legislature declined to amend the statute to include such conditional licenses for dispensaries. On April 22, 2022, the Governor signed the New York State Budget wherein the Legislature amended the State Finance Law and the Public Authorities Law and, according to Defendants' argument "acknowledged the conditional adult-use retail dispensaries program". While the State Finance Law and the Public Authorities Law were amended to "acknowledge" the CAURD license program, Article 4 of the MRTA was not amended to authorize this additional class of license. Thereafter, the Governor issued a number of press-releases outlining "major progress toward advancing equity in Cannabis" and the New York Social Equity Fund was created and funding secured to facilitate the leasing and equipping of dispensaries by the Dormitory Authority of the State of New York for the "social equity licensees"⁴.

On September 26, 2022, an action was filed by Variscite NY One in the United States District Court for the Northern District of New York challenging the CAURD program under the dormant commerce clause. Plaintiffs requested that the Federal Court issue an injunction barring Defendants from issuing any cannabis licenses under the CAURD application program⁵. In granting the injunction, the Federal Court found that Variscite met the standard for an injunction under the standard applicable in Federal proceedings. The Federal Court further found that Variscite established a likelihood of success on the merits, that Plaintiffs would suffer irreparable harm if the injunction was not granted, that the balancing of the hardships favored the granting of the injunction, and the injunction served the public interest.

Defendant subsequently moved for reconsideration of the injunction and, in a written decision dated January 31, 2023, the Court denied the application and found that Plaintiffs' alleged concrete injury was "the disadvantage it faces in obtaining a license due to the allegedly

⁴ NYSCEF doc. 35, para 6

⁵ Index 1:22-cv-1013

unconstitutional licensing scheme” (Variscite NY One, Inc. v. New York, 2023 U.S. Dist. LEXIS 15705 (U.S. Dist. Court, Northern District, 2023)). Defendants appealed the injunction and, on or about March 28, 2023, the Circuit Court of Appeals amended the injunction to apply only to the Finger Lakes region of New York State. The injunction remained in place until June 2023 when, by stipulation, the matter was resolved without a finding on the underlying claim that the provisions of the MRTA violated the dormant commerce clause. Upon the entry of the settlement, the injunction was vacated, and Defendant resumed the processing of CAURD licenses at what can only be described as an expanded and accelerated rate.

Prior to the time the injunction was lifted, an Article 78 proceeding was filed in the Supreme Court, Albany County by the Coalition alleging, *inter-alia*, that the CAURD program was unconstitutional insofar as it violated the separation of powers article of the New York Constitution⁶. The Coalition further argued that the decisions of the Defendant were arbitrary and capricious. The action also requested declaratory relief related to specific actions taken or allegedly neglected by Defendants with- regard-to the implementation of the MRTA. The Coalition did not request temporary relief. The Coalition matter was referred to this Court and cross-motions for Summary Judgment were filed. As of this writing, those motions are not fully submitted, and the motions remain pending before this Court. Despite-the-fact that the dormant commerce clause claims remained unresolved by this stipulation entered in Federal Court, and the pendency of the Coalition lawsuit before this Court, OCM made the decision to immediately and dramatically expand the CAURD program and the number of licenses available to one particular group identified in MRTA to the exclusion of all other identified classes⁷.

⁶ Albany County Supreme Court Docket 902390-23

⁷ This expansion and acceleration of the processing of CAURD licenses so soon after the injunction was vacated and while the Coalition matter remained before this Court has also been considered by this Court as part of its “balancing of the equities”.

On August 2, 2023, the instant action was filed requesting injunctive relief. This Court granted a temporary restraining order on August 7, 2023, and scheduled the matter for submissions and oral argument. Counsel for the Coalition moved by Order to Show Cause for a joint trial on the actions pursuant to CPLR § 602(a) and, prior to oral argument on the request for temporary relief, this Court granted the motion. In addition, CONBUD, LLC, 82-J, LLC, Kush Culture Industry, LLC and Summit Canna LLC (hereinafter collectively referred to as “Intervenors”) moved by Order to Show Cause to intervene in these proceedings. The motion to intervene was also granted prior to oral argument on the requested injunction. The Court heard oral argument from Plaintiff, Defendant, the Coalition and the intervenor on August 11, 2023, and received written post-argument submissions on August 15, 2023.

Applicable Law

“A party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger or irreparable injury in the absence of an injunction and a balance of equities in its favor” (Petry v. Gillon, 199 A.D.3d 1277 (3rd Dept., 2021))⁸. See also, Nobu Next Door, LLC v. Fine Arts Hous. Inc., 4 NY3d 840 (2005); Yeldin v. Lieberman, 102 A.D.3d 769 (2nd Dept., 2013)). Generally, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (Sarker v. Das, ____ A.D.3d ____, 2022 NY Slip Op. 01826 (2nd Dept., 2022)). “To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts” (Advanced Digital Sec. Solutions v. Samsung Techwin Co., Ltd., 53 A.D.3d 612 (2nd Dept., 2008)).

⁸ Internal quotations, citations and punctuation omitted from all case quotations herein.

While the Federal Court decision in Variscite NY One v. Defendants, ___ F. Supp. 3d ___, 2022 U.S. Dist. LEXIS 217255 (Northern District of New York, 2022) was based on a slightly different standard for injunctive relief in Federal Court, and it addressed a different alleged constitutional deficit in MRTA, the Court’s analysis of the alleged irreparable harm is instructive herein. After hearing many of the same arguments placed before this Court by Defendants, the Court granted a preliminary injunction and explained that “[i]rreparable harm is that injury which is so serious that a monetary award cannot adequately compensate the injured party . . . In the second circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm”. The Court further found that the Plaintiff established irreparable harm “due to their risk of being excluded, to some degree, from the market”. See also, Lowe v. City of Detroit, 544 F.Supp.3d 804, 816 wherein, with-regard-to alleged irreparable harm, the Court found that “Plaintiff has demonstrated that she will suffer irreparable injury absent an injunction, as she would, at best, be significantly disadvantaged in applying for a recreational marijuana license . . . and at worst, be entirely eliminated from consideration of such a license”⁹.

Plaintiffs’ argument herein is primarily based on the separation of powers doctrine which “is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions . . . A typical point of dispute in this area is the legislature’s delegation to an agency of the authority to administer by rule a statute as enacted by the legislature” (Matter of NYC C.L.A.S.H., Inc. v. NYS Office of Parks, Recreation & Historic Preservation, 27 N.Y.3d 174

⁹ See also, Variscite v. City of L.A., ___ F. Supp. ___, 2023 U.S. Dist. LEXIS 88856 (Central Dist., Ca., 2023); Brinkmeter v. Wash. State Liquor & Cannabis Bd., ___ F. Supp. ___, 2023 U.S. Dist. LEXIS 20564 (West. District, Wash., 2023); Viridis Labs., LLC. v. Kluytman, ___ F. Supp. ___, 2023 U.S. Dist. LEXIS 132385 (Western District, Michigan, 2023); Finch v. Treto, 606 F. Supp. 3d 811 (Northern Dist., Ill., 2022); Arden v. City of Detroit, ___ F. Supp. 3d ___, 2022 U.S. Dist. LEXIS 182863 (Eastern District, Michigan, 2022); Northeast Patients Grp. V. Me. Dept. of Admin. And Fin. Servs., 554 F. Supp. 3d 177 (District Court of Maine, 2021)) wherein Federal Courts addressed similar issues regarding marijuana legalization legislation in other states.

(2016)). “However facially broad, a legislative grant of authority must be construed, whenever possible, so that it is no broader than that which the separation of power doctrine permits . . .

Even under the broadest and most open ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives” (Boreali v. Axelrod, 71 N.Y.2d 1 (1987)). “A governmental agency exceeds the scope of its delegated authority in promulgating a regulation when it engages in impermissible “legislative policy-making” as opposed to permissible “administrative rule making” (Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v. NYS Dept. of Fin. Servs., 39 N.Y.3d 56 (2022)).

In determining this application, this Court must follow the well-accepted rules of statutory construction. In this regard, it is well accepted that as “the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving plain meaning to the **plain meaning thereof** . . . Additionally, where a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (Matter of Raynor v. Landmark Chrysler, 18 N.Y.3d 48 (2011)). See also, Alonzo M. v. NYC Dept. of Probation, 72 N.Y.2d 662 (1988)). As explained by the Court of Appeals in Boreali v. Axelrod, supra., 71 N.Y.2d 1, an additional indicator that an administrative board exceeded its authority is when the board takes action “in an area in which the legislature tried – and failed – to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions” and “the repeated failures of the legislature to arrive at such an agreement do not automatically entitle an administrative agency to take it upon itself to fill the vacuum and impose a solution of its own”.

“A fundamental rule of statutory construction is that the Legislature is presumed to mean what it says and when the language of a statute is unambiguous, it is to be construed according to its natural and most obvious sense without resorting to an artificial or forced construction . . . Stated otherwise, when a statute is free of ambiguity, a court should so construe it so as to give effect to its plain meaning” (Matter of Giello v. Providence Fire Dist., 57 A.D.3d 1294 (3rd Dept., 2008)). Finally, “[c]anons of statutory construction require that apparently conflicting statutory provisions . . . be harmonized in order to give effect to all of their parts” (Brooklyn Union Gas Co. v. Commissioner of the Dept. of Finance, 67 N.Y.2d 1036 (1986)).

This Court must interpret the applicable statute by applying the rules of statutory construction and it is not the role of this Court to “pass on its fairness or wisdom” (Morales v. County of Nassau, 94 N.Y.2d 224 (1999)). As explained by the Court of Appeals in People v. Graham, 55 N.Y.2d 144 (1982) “[w]hen the Legislature enacted the statutes and when the Governor signed them into law, they stood for what their words manifested and not the inner thoughts of a draftsman or advisor. After all, it was the words, not the thought which were to influence the conduct of others”.

Finally, with-regard-to Defendants argument that during the budget process, the legislature “acknowledged” the CAURD program by providing funding, or its related argument that the program was somehow impliedly authorized by the aforementioned amendments to the State Finance Law and the Public Authorities Law, this Court finds, as a preliminary matter, that Defendants have not cited any persuasive authority for this theory despite specific inquiry from this Court during oral argument.

Discussion/Conclusions

In consideration of the applicable standards and considerations outlined above, the circumstances before the Court and the arguments presented by counsel both at oral argument and in writing, it is the finding of this Court that a preliminary injunction is appropriate and necessary. Specifically, it is the finding of this Court that Plaintiffs have established a likelihood of success on the merits by articulating meritorious constitutional arguments regarding the actions and decisions of Defendants. These arguments are outlined at length in the submissions before the Court and Plaintiffs have presented the Court with what appears to be binding precedent in support of their arguments.

For the purpose of this preliminary application, it is the finding of this Court that the arguments presented by Plaintiffs are in accord with basic rules related to the separation of powers, the relative authority of administrative boards with regard to the drafting and adoption of regulations and their limited authority to act on matters of policy. This Court also finds that, for the purpose of this application, Plaintiffs have presented persuasive and compelling authority in support of their argument that Defendants failed to follow the clear language of the applicable legislation. Again, Plaintiffs' argument appears fully consistent with well-established rules of statutory construction that preclude the Court from attempting to discern the intent of the legislature when the controlling words that appear in the MRTA are clear and unambiguous.

Plaintiffs' argument is also in accord with the above cases that hold that when there are potential inconsistencies between controlling sections of applicable legislation, the sections at issue must be read in a way as to give meaning to all sections. Here, at least as a preliminary matter, this Court finds that it is unlikely that Defendant will prevail on the merits with-regard-to their arguments. Specifically, there is a significant likelihood that Defendants will not prevail on

their argument that the Board had some general authority under Article 2 of the MRTA to establish new classes of licenses as such authority would render meaningless the relevant language in Article 4 outlining specific classes of license and the requirement that applications be open to all applicants at the same time.

This Court has considered the arguments presented by Defendant and the intervenor with-regard-to the likelihood of success and finds that they are not persuasive. Specifically, this Court is not persuaded by the argument that the legislature recognized the CRUAD program by including funding in a budget bill and that this funding determination is the functional equivalent of specific statutory authority for the program. Based on the limited record, and lack of persuasive authority, it is likely that Defendants will not prevail on this argument, particularly given that the legislation acted to amend the license section of the MRTA after the creation of the CAURD program but did not take the opportunity to create an equivalent license category.

This Court further finds that Plaintiffs have sufficiently established that they would suffer irreparable harm in the temporary relief is not granted. In this regard, while the Federal Court decision in Variscite is based on a slightly different standard, as outlined above, the holding clearly articulates and recognizes the controlling harm before this Court. On this record, it is the finding of this Court that by failing to open the application process for all identified classes at the same time pursuant to MRTA §10(19), Defendants deprived Plaintiffs of the opportunity to participate in the initial stages of a potentially lucrative market of a newly introduced product.

This Court has further considered the additional arguments presented by Defendants and the intervenor including, but not limited to, their laches argument. With-regard-to the laches argument, this Court again notes the pendency of the Variscite matter and the injunction that was in effect for much of the time between the introduction of the program and the filing of this

application. This Court also notes that it was Defendant that decided to move forward and accelerate the CAURD program in the face of unresolved litigation and they were undeniably on notice of the alleged constitutional defects at issue. Despite this notice, Defendants encouraged potential licensees to incur significant expenses in reliance on a program that Defendants knew was at issue in pending litigation. In this regard, there certainly is merit to the argument that Defendants created much of the very harm that they now assert in support of their arguments.

This Court has also considered the argument that Plaintiffs only allege potential economic injury. This Court rejects this argument as it wholly misrepresents the alleged harm that Plaintiffs claim that they would suffer, a harm which cannot be characterized as being solely economic in nature. This Court has also considered Defendants and the Intervenors arguments regarding the potential irreparable harm they would suffer if the injunction continues and appreciates the concerns that have been raised. While this Court is not persuaded by their arguments, in crafting the limited injunction set forth below, this Court has provided a process whereby individual licensees can establish that they should be exempt from the injunction based upon their unique circumstances.

This Court also notes its concern that, in many respects, the denial of the injunction and the continued processing of licenses in the face of the pending challenges could potentially cause irreparable harm to the potential licensees, the development of the market and the community at large. In-this-regard, the limited record has disclosed numerous potential defects in the process followed by Defendants and those potential defects have already resulted in numerous constitutional challenges to the actions. It is certainly conceivable that a successful challenge to the CAURD program could result in a finding that the licenses are invalid. In this light, a denial

of the injunction would be a tacit endorsement from this Court of further expenditures in reliance on a program that is potentially in legal jeopardy.

This Court's balancing of the equities analysis is intertwined with the irreparable harm analysis above. In addition, this Court has considered the broad and extremely inclusive generic language in the MRTA regarding the legislative intent, the social justice goals set forth therein and the potential impact on the public if this potentially lucrative market is not launched in a constitutionally permissible way that protects all stakeholders, including, but not limited to those who are before this Court. This Court also must be mindful of the constitutional balance that is integral to the functioning of our government, the attendant limits on the authority of the different branches of government and the limits of the authority of non-elected administrative boards like Defendant. It is the finding of this Court that the complex and intertwined equities favor the granting of a limited injunction that is narrowly tailored to the unique circumstances before the Court. In crafting the injunction, this Court must attempt to protect the interests of the individuals before the Court and all groups that are potentially impacted and are intended to benefit from the provisions of the MRTA. The injunction has also been crafted so-as-to not interfere with Defendants continuing to perform their authorized tasks with-regard-to the adoption of regulations that are necessary to fully open the adult use program.

For the foregoing reasons, and in the exercise of this Court's discretion, the Motion for an Injunction is hereby granted to the following extent:

It is Hereby ORDERED, that pending further Order of this Court, Defendants are hereby enjoined from further processing, approving or investigating pending applications for CAURD licenses; and it is hereby

ORDERED, that this injunction does not apply to any licensees who, prior to August 7, 2023, met all requirements for licensing, including but not limited to site plan approval from the CCB and, where applicable, from local municipalities; and it is further

ORDERED that Defendants submit to this Court, on notice, by the close of business on August 22, 2023, a list of all licensees who have met all requirements for licensing; and it is further

ORDERED, that any objections to those identified licensees being deemed exempt from this injunction shall be filed with the Court on or before August 24, 2023. Final determination on any disputed objections shall be rendered by this Court following the next scheduled appearance on August 25, 2023; and it is further

ORDERED that Defendants convene a meeting of the Board forthwith to begin finalizing applicable regulations for Adult Use Cannabis Licenses as set forth in Article 4 of the MRTA; and it is further

ORDERED, that further exceptions to this injunction may be requested by Order to Show Cause or Motion, filed by Defendants, and will be determined on a case-by-case basis; and it is further

ORDERED, that any such application for an injunction must be made on notice with documentation of actual expenses incurred and supporting affirmations from counsel for the Defendants regarding the outstanding steps that must be taken to finalize the application.

These requests will be evaluated by the Court based on a number of factors, including, but not limited to, the extent of the potential licensee's reasonable reliance on OCM policy with regard to the CAURD program and applicable regulations, the precise timing of the actions and expenses in relation to the pending litigation and the extent to which the expenses at issue would

be necessary in order for the potential CAURD licensee to submit an application for an adult use license once Defendants finalize applicable regulations.

Given the representations by Counsel for Defendants regarding the expected imminent approval of regulations and the Board opening an application process for all identified groups set forth in the MRTA, this Court will continue to require regular appearances from counsel before the Court to provide updates and to ensure that appropriate progress is being made to ameliorate whatever impediments exist to the approval of a process that arguably will make these proceedings moot.

This shall constitute the Decision and Order of the Court.

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: August 18, 2023
Kingston, New York

ENTER,


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