



The Leaflet

A Newsletter by



An Introduction to Feuerstein Kulick and The Leaflet

Feuerstein Kulick LLP was founded by David Feuerstein and Mitchell Kulick in April 2016. The pair met in 2010, in a pick-up basketball game in their shared hometown. The two quickly became friends and soon thereafter began working together as Dave represented the hedge fund for which Mitch was serving as the General Counsel. In 2013, Mitch left his hedge fund to become the General Counsel of Steep Hill Labs in Oakland, the first commercial testing lab in the legal cannabis space. Although no longer working together, Mitch and Dave kept tabs on each other and often discussed the need for the West Coast-based cannabis movement to meet East Coast professionalism and capital. So, in 2016, they decided to form the firm in New York City to represent entrepreneurs, companies, investors, funds, and other parties participating in the burgeoning legal cannabis industry.

At the time, only a handful of states allowed for the sale of recreational marijuana – but the “movement” was showing signs of unlimited potential. The opportunity to be at the forefront of the burgeoning cannabis industry and to bet on themselves was something that Mitch and Dave just could not pass up. So,

the two friends decided to roll the dice: Dave said goodbye to his “Big Law” job, Mitch resettled in New York, and they set up shop in a 150 square foot WeWork office. The rest, as they say, is history.

Along the way, we have worked hard, made lots of great friends, and have had a lot of fun building a firm that now has 23 lawyers focused on the legal cannabis industry. Our efforts and successes have not gone entirely unnoticed. Last year we were named as one of the top seven cannabis firms in the country. And we were fortunate to partner with several Wall Street veterans who, together with the firm’s partners, formed FocusGrowth Capital Partners, a Private Equity fund dedicated to providing capital and advisory services to companies in the industry.

Today, five years after making that fateful leap, we are on the precipice of the formerly unimaginable – legal adult use marijuana in New York State. With that as a backdrop, we are proud to bring you the inaugural edition of The Leaflet – a monthly newsletter dedicated to chronicling the latest business, industry and legal developments in the cannabis industry, as well as updates on the evolution of our firm and our clients. We hope you enjoy it.



High Points

Feuerstein Kulick Client Wins Coveted West Virginia

Cannabis Licenses

West Virginia's Office of Medical Cannabis (OMC) recently announced the winners of the State's highly coveted cannabis dispensary, cultivation and processing licenses. Feuerstein Kulick helped the West Virginia affiliate of its client, Holistic Industries, secure one of the 10 cultivation licenses, and one of the 10 processing licenses, and 10 of 100 dispensary licenses awarded by the State.

West Virginia's application process was highly competitive, with nearly 300 applications submitted for cultivation, processing and dispensary licenses. With this "clean sweep" of 10% of all licenses available in the state, Holistic is now poised to be the market leader in West Virginia.

This is the fourth time in the past twelve months that Feuerstein Kulick secured licenses for its clients in a highly competitive, limited-license application process. In addition to West Virginia, Feuerstein Kulick won three cultivation licenses (all three of which scored in the top 10 out of 544 applications submitted), two manufacturing licenses and four dispensary licenses in Missouri; a highly-coveted dispensary and consumption lounge license for its client in West Hollywood, CA (earning the second highest score out of hundreds of applicants); and received the highest score in a competitive application process for a vertical license in Madison Heights, Michigan.

The firm's Application Team is also hard at work digesting the proposed licensing programs in New Jersey and New York and gearing up to win more licenses in two of the most exciting markets in the country. For more information, contact Justin@dfmklaw.com Nancy@dfmklaw.com, and Bkorngold@dfmklaw.com.



Feuerstein Kulick Leads the Charge in Two

Cannabis Debt Deals

Feuerstein Kulick kicked off the new year by closing two large, cannabis-industry debt deals. In one, the firm represented certain lenders providing a \$50 million secured revolving credit facility to Curaleaf Holdings, Inc. Curaleaf is a leading U.S. provider of consumer cannabis products, and the proceeds of the loan are expected to fund capital expenditures to support the company's growth initiatives. In the other, the firm guided the completion of an \$18 million credit facility to support the growth of a Maryland cannabis cultivation operation.

Debt financing hit its stride in the cannabis industry in 2020 given the valuation declines that many cannabis companies suffered from when the "Green bubble" burst in 2019. That trend shows no signs of slowing in 2021. The SAFE Banking Act, which passed the House of Representatives in September 2019, could be reintroduced into Congress and, if so, would likely provide a boost for additional debt-based financing deals.

That said, there is plenty of room in this sandbox and equity-based investment deals have recently awoken from their slumber. In fact, several multi-state cannabis operators or "MSOs" completed large private offerings in January. With Democrats regaining control of the Presidency and winning a Senate majority as a result of the Georgia special elections, cannabis stocks are no longer facing the headwinds of a Republican-controlled Senate (that wouldn't even let the innocuous and public-safety promoting SAFE Banking Act reach the floor for a vote) and have hit new highs.

Whether from debt or equity, cannabis deal activity is expected to be strong in 2021, as Feuerstein Kulick Partner Samantha Gleit noted in a recent interview with Law 360 (<https://www.law360.com/articles/1303379/pot-capital-crunch-shows-signs-of-easing-with-big-deals>). For more information, contact Samantha@dfmklaw.com, Todd@dfmklaw.com, Fitz@dfmklaw.com, Mosborne@dfmklaw.com.

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Helping to Right a Historic Wrong:

A Pro Bono Initiative To Help Victims of the War on Drugs

As a trailblazer and one of the top firms in the cannabis industry, Feuerstein Kulick is uniquely positioned to help the people and communities disproportionately impacted by the failed “War on Drugs”. As such, Feuerstein Kulick has embarked on a pro bono initiative to help people with cannabis-related convictions reduce their sentences and expunge their records in New York and elsewhere. Although the cannabis industry is booming, there are still approximately 40,000 people incarcerated for cannabis-related crimes. This is an unacceptable reality. We feel a profound professional obligation to help these individuals any way we can.

To that end, the firm is working with the Glass House Group and cannabis-advocate Cheri Sicard to help reduce sentences and the records of people serving **life sentences** for federal marijuana-related crimes. With New Jersey and New York proposing and enacting their Adult-Use cannabis programs, the firm is also partnering with local law schools to set up expungement clinics for people with cannabis-related offenses on their records.

Feuerstein Kulick is committed to assisting those who have been disproportionately impacted by the War on Drugs through this new pro bono initiative. For more information, contact Mitch@dfmklaw.com and Julia@dfmklaw.com.

"The firm is working with the Glass House Group and cannabis-advocate Cheri Sicard to help reduce sentences and the records of people serving *life sentences* for federal marijuana-related crimes."



Cannabis Nerd Alert



Did you think you were going to make it through a Feuerstein Kulick newsletter without an intoxicating discussion on the ever-changing legal landscape of the cannabis industry? Don't say we didn't warn you...

The Not-So-Dormant Commerce Clause

As President Joe Biden said during his inauguration, “We are all Americans.” The so-called “Dormant Commerce Clause” is the Constitution’s attempt to ensure that Americans and their businesses can compete with one another on a level playing field. Over the years, it has been cited by the Supreme Court as grounds for striking down protectionist state and local laws and regulations that favor in-state residents over their out of state competitors – and it’s now making its presence felt in the cannabis industry.

On August 14, 2020, a U.S. District Court in Maine declared the City of Portland’s adult-use licensing criteria unconstitutional to the extent it awarded upwards of a 25 percent bonus to applicants that resided in Maine for at least 5 years, or who had previous business ties within the State. In NPG, LLC v. Portland, the Plaintiff – High Street Capital Partners – filed a motion to enjoin the City from utilizing a licensing scoring system that awarded 5 of a possible 34 points to adult-use licensing applicants if they were “at least 51% owned by individual(s) who have been a Maine resident for at least 5 years.” 2020 WL4741913, *2 (D. Me. 2020). The system awarded an additional four points to individuals that had been previously licensed for a non-cannabis related business in Maine. Id. Combined, these residency-related scoring criteria accounted for more than 25 percent of the total available points

In assessing the constitutionality of the City’s scoring criteria, the District Court summarized decades of Supreme Court jurisprudence on the Dormant Commerce Clause – the “negative aspect” of the constitutional provision granting Congress the power to regulate interstate commerce. Id. at *8. By implication, the Dormant Commerce Clause “prohibits state regulation designed to benefit in state economic interests by burdening out-of-state competitors.” Id. As the District Court wrote, the “Dormant Commerce Clause is intended to effectuate the Framers’ purpose to prevent a state from retreating into economic isolation,” and invalidates laws and regulations that discriminate against out of state competitors unless (1) Congress has explicitly permitted the State to restrict the flow of interstate commerce in such a manner, or (2) the law or regulation furthers a “legitimate local objective that cannot be served by reasonable, non-discriminatory means.” Id.

In concluding that the City of Portland’s licensing criteria violated the Dormant Commerce Clause, the District Court found that the Controlled Substances Act – and cannabis’ status as a Schedule I substance – did not amount to a Congressional grant of authority to the State of Maine to burden interstate commerce by discriminating against non-resident licensing applicants. The District Court also found that the City had failed to offer any valid justification for the discriminatory point-scoring system and noted that the City’s elected officials had clearly stated the protectionist purpose of the residency requirement. Id. at *10-11. In denying the City’s motion to dismiss the action in its entirety, the District Court rejected the City’s arguments that the Plaintiff’s claim was not ripe for adjudication and that the Plaintiff had suffered no injury because, the Court concluded, the Plaintiff’s real “injury” was the inability to compete on equal footing with the other applicants. Id. *6-7.

The decision in NPG, LLC v. Portland has the potential to send shockwaves through the cannabis industry, as residency requirements and other provisions favoring local businesses (a fixture of many state and local cannabis laws) may be unconstitutional. This could mark the start of a new era in cannabis licensing application criteria.

For more information, contact David@dfmklaw.com and Rich@dfmklaw.com.



We Know It's Illegal, But Come On

They say no good deed goes unpunished, but there is certainly a growing trend of bad deeds going unpunished in the cannabis industry. On January 12, 2021, a federal judge in Colorado dismissed fraud and other securities-related claims against the proprietors of a failed cannabis business because they ran afoul of the Controlled Substances Act. Sensoria, LLC v. Kaweske, et al., Civil Action No. 20-cv-00942, ECF No. 150 (D. Co. 2021). While the decision is not the first of its kind, it serves as a stark reminder of the unique challenges faced by cannabis industry participants in adjudicating otherwise routine commercial disputes while cannabis remains a Schedule I substance under federal law.

The dispute arose from a failed cannabis-related business venture known as Clover Top Holdings, Inc. – a company created to grow and sell cannabis products in Colorado and elsewhere. The Plaintiffs alleged that they were fraudulently induced to invest hundreds of thousands of dollars in the company based on the purported misrepresentations and omissions of its founders. When the company failed, and Plaintiffs' investments had been lost, they brought suit against Defendants in Colorado federal court. Among other things, Defendants asserted an illegality defense. That is, they argued that because a judgment would require them to pay monetary damages, the Court would be sanctioning illegal conduct in violation of the Controlled Substances Act.

The Magistrate Judge agreed with the Defendants, concluding that “a federal

court may not compel performance of an illegal contract” and that investing money for an equity stake in a cannabis business “may violate the [Controlled Substances Act] if it allows the investor to profit from the cultivation, possession, and sale of marijuana.” And while the Magistrate Judge noted that “the simple fact that marijuana is involved does not mean Plaintiffs’ claims must be dismissed automatically,” he nevertheless recommended the dismissal of Plaintiffs’ claims (without prejudice) because “Plaintiffs do not explain how relief could be fashioned here that would not endorse or require illegal activity.”

The Magistrate Judge’s conclusion provides a salient reminder of the paradox facing potential plaintiffs with claims arising from a cannabis-related business venture. The Court still noted that Plaintiffs may have valid claims for real damages, but unless they can craft a potential remedy that does not run afoul of the Controlled Substances Act (e.g., that the money invested is a loan), their claims are at risk for dismissal, especially in federal court.

For more information, contact David@dfmklaw.com and Gabbi@dfmklaw.com.

Cannabis Chatter

Holistic Industries Named Fastest Growing Company of 2020

FK client Holistic Industries was ranked number 1 on the Washington Business Journal’s list of fastest growing companies in 2020. Holistic was powered to the top of the list by its explosive 447% growth in revenue over the past three years, it’s track record for winning licenses in highly competitive states, and by a series of headline-grabbing capital raises since 2016 totaling over \$100 million to build out operations and stand up those licenses. The company continues to deliver on its motto as “the best place to work, shop and invest in cannabis.”

For more information, contact Mitch@dfmkaw.com and Justin@dfmklaw.com.

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