UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE CURALEAF HOLDINGS, INC. SECURITIES LITIGATION	:	**MEMORANDUM DECISION AND ORDER** 19-cv-4486 (BMC)

COGAN, District Judge.

This securities action is before me on defendants' motion to dismiss. Plaintiffs allege that defendants misled investors about the legality of their cannabidiol ("CBD") products, causing loss when the truth was revealed. Because plaintiffs' claims are premised on the nondisclosure of information that was actually disclosed and further amendment to the complaint would be futile, the motion is granted and the case dismissed.

BACKGROUND[1]

I. Regulation of cannabis products

CBD is a chemical compound derived from plants in the cannabscae family. Both marijuana and hemp contain CBD and can be used to make CBD products, such as oils. Marijuana has a higher delta-9-tetrahydrocannabinol ("THC") content (up to 30%) and can come from both the *cannabis indicia* and *cannabis sativa* families of plants; hemp is derived only from the latter family and has a lower THC content (less than 0.3%).

CBD has been incorporated into a variety of products – beverages, lotions, supplements, vape pens, bath bombs, pet treats, and more. Retailers claim that it provides various health benefits, ranging from treatment of pain and anxiety to cancer and Alzheimer's disease, but the

[1] Unless otherwise noted, the below facts are taken from plaintiffs' Amended Complaint and assumed to be true for purposes of this motion. See Kolbasyuk v. Capital Mgmt. Servs., LP, 918 F.3d 236, 239 (2d Cir. 2019).

FDA has warned that there is little to no scientific evidence supporting such claims. Further, the FDA has warned that CBD has the potential to cause liver injury, male reproductive toxicity, and changes in alertness and mood, among other harm and side effects.

There is a conflict between state and federal regulation of cannabis and cannabis-based products. Marijuana is listed in Schedule I of the Controlled Substances Act ("CSA"), meaning it is categorized as a drug with no currently accepted medical use and a high potential for abuse. But 33 states and Washington D.C. have legalized the use of medical marijuana, 11 of those states and Washington D.C. have legalized recreational marijuana, and 17 states have legalized the use and possession of CBD, although "legalization" means different things in different states. Most states also regulate hemp.

On August 29, 2013, U.S. Attorney General James M. Cole issued a memorandum advising the federal government to exercise prosecutorial discretion in enforcing federal marijuana laws. This memorandum was rescinded on January 4, 2018 by the issuance of a new memorandum from U.S. Attorney General Jeff Sessions, who similarly instructed prosecutors to weigh relevant considerations in deciding whether to prosecute marijuana offenses. On December 20, 2018, the Agriculture Improvement Act of 2018 ("Farm Act") was enacted. The Farm Act amended the CSA by removing hemp from the definition of marijuana and thus from Schedule I of the CSA, allowing hemp to be grown under federal law in some circumstances.

That same day, the FDA issued a statement confirming that it retained the authority to regulate cannabis or cannabis-derived compounds, including CBD products. The FDA explained that such compounds are "subject to the same authorities and requirements as FDA-regulated products containing any other substance." The FDA further explained that it:

> continue[s] to be concerned at the number of drug claims being made about products not approved by the FDA that claim to contain CBD . . . . [T]he FDA

> requires a cannabis product (hemp-derived or otherwise) that is marketed with a claim of therapeutic benefit, or with any other disease claim, to be approved by the FDA for its intended use before it may be introduced into interstate commerce. . . . Cannabis and cannabis-derived products claiming in their marketing and promotional materials that they're intended for use in the diagnosis, cure, mitigation, treatment, or prevention of diseases . . . are considered new drugs or new animal drugs and must go through the FDA drug approval process for human or animal use before they are marketed in the U.S.

The FDA's website, referred to in the statement, states its position that "[s]elling unapproved [CBD] products with unsubstantiated therapeutic claims is not only a violation of the law, but also can put patients at risk, as these products have not been proven to be safe or effective." It also notes that the FDA has approved only one drug containing CBD (Epidiolex, for the treatment of seizures). The website further explains that CBD products cannot be sold as dietary supplements and that it is illegal to sell a food (including any animal food) to which CBD has been added.

II. Defendants' products and disclosures

Curaleaf Holdings, Inc. ("Curaleaf Holdings" or the "Company") was created in a reverse takeover between the Canadian company Lead Ventures, Inc. (renamed Curaleaf Holdings, Inc.) and the Delaware corporation PalliaTech, Inc. (renamed Curaleaf, Inc. ("Curaleaf")). This action is brought on behalf of purchasers or acquirers of Curaleaf Holdings securities on the OTCQX, a United States market for companies already listed on a qualified international stock exchange. Curaleaf Holdings is listed on the Canadian Stock Exchange ("CSE").

On October 26, 2018, the same day that the Company announced the completion of the business combination, it filed its Listing Statement with the System for Electronic Document Analysis and Retrieval ("SEDAR"). SEDAR is the Canadian equivalent of the Electronic Data Gathering, Analysis, and Retrieval system ("EDGAR") in the United States – it is the filing system designed to facilitate the electronic filing of securities information and allow for the

public dissemination of Canadian securities information collected in the securities filing process.[2] The Listing Statement is a document that "must be used for all initial applications for Listing and for Issuers resulting from a fundamental change" and "contains comprehensive disclosure about the issuer."[3]

A. Disclosures and public statements

The October 26, 2018 Listing Statement – filed with SEDAR that day, with the CSE on November 2, 2018, and with the OTCQX on January 15, 2019 – included the following discussion about the cannabis industry:

> Curaleaf Holdings, Inc. will derive a substantial portion of its revenues from the cannabis industry in certain states of the United States, which industry is illegal under United States federal law. Curaleaf Holdings, Inc. will be directly involved (through its licensed subsidiaries) in the cannabis industry in the United States where local state laws permit such activities. . . .
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> The United States federal government regulates drugs through the Controlled Substances Act (21 U.S.C. § 811), which places controlled substances, including cannabis, in a schedule. Cannabis is classified as a Schedule I drug. Under United States federal law, a Schedule I drug or substance has a high potential for abuse, no accepted medical use in the United States, and a lack of accepted safety for the use of the drug under medical supervision. The United States Food and Drug Administration has not approved marijuana as a safe and effective drug for any indication.
>
> In the United States marijuana is largely regulated at the state level. State laws regulating cannabis are in direct conflict with the federal Controlled Substances Act, which makes cannabis use and possession federally illegal. Although certain states authorize medical or adult-use cannabis production and distribution by licensed or registered entities, under U.S. federal law, the possession, use, cultivation, and transfer of cannabis and any related drug paraphernalia is illegal and any such acts are criminal acts under federal law. The Supremacy Clause of the United States Constitution establishes that the United States Constitution and federal laws made pursuant to it are paramount and in case of conflict between federal and state law, the federal law shall apply. . . .

[2] Available at: www.sedar.com.

[3] Form 2A - Listing Statement, CSE (last visited Feb. 15, 2021), https://thecse.com/en/resources/form-2a-listing-statement#:~:text=The%20Listing%20Statement%20must%20be,comprehensive%20disclosure%20about%20the%20issuer.

> There is no guarantee that state laws legalizing and regulating the sale and use of cannabis will not be repealed or overturned, or that local governmental authorities will not limit the applicability of state laws within their respective jurisdictions. Unless and until the United States Congress amends the Controlled Substances Act with respect to medical and/or adult-use cannabis (and as to the timing or scope of any such potential amendments there can be no assurance), there is a risk that federal authorities may enforce current federal law. If the federal government begins to enforce federal laws relating to cannabis in states where the sale and use of cannabis is currently legal, or if existing applicable state laws are repealed or curtailed, Curaleaf Holdings, Inc.'s business, results of operations, financial condition and prospects would be materially adversely affected.

The Listing Statement further explained that "[v]iolations of any federal laws and regulations could result in significant fines, penalties, administrative sanctions, convictions or settlements arising from civil proceedings conducted by either the federal government or private citizens, or criminal charges, including, but not limited to, disgorgement of profits, cessation of business activities or divestiture." This could have a "material adverse effect" on the Company, including to its "reputation and ability to conduct business," its licenses, "the listing of its securities on the CSE, its financial position, operating results, profitability or liquidity or the market price of its publicly traded shares."

The Listing Statement provided additional disclosures specific to the Company's CBD products. The Company's products "are not approved by the [FDA] as 'drugs' or for the diagnosis, cure, mitigation, treatment, or prevention of any disease. Accordingly, the FDA may regard any promotion of the cannabis-based products as the promotion of an unapproved drug in violation of the [FDCA]." The Listing Statement proceeded to explain that the FDA has issued letters to a number of companies selling CBD products in recent years "warning them that the marketing of their products violates the FDCA." Any FDA enforcement against the company "could result in a number of negative consequences, including fines, disgorgement of profits, recalls or seizures of products, or a partial or total suspension of the [Company's] production or

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