

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THAR PROCESS, INC.,

Plaintiff/Counter-Defendant,

v.

SOUND WELLNESS, LLC,

Defendant/Counterclaimant/Third-
Party Plaintiff,

v.

PLANT SCIENCE LABORATORIES, LLC, AND
MICHAEL BARNHART,

Third-Party Defendants.

DECISION AND ORDER

21-CV-422S

I. INTRODUCTION

This is a case about hemp that was processed into low-quality and unmarketable CBD¹ oil. Plaintiff Thar Process, Inc. (“Thar”), a hemp processor, brought breach-of-contract claims against Defendant Sound Wellness, LLC, (“Sound Wellness”) when Sound Wellness refused to pay for CBD oil that Thar had processed. Sound Wellness, in turn, brought counterclaims against Thar, alleging that Thar committed fraud and breached the parties’ contract when it failed to inform Sound Wellness that the oil it processed would be of unmarketably low potency and then supplied Sound Wellness with

¹ CBD oil, or cannabidiol, is an oil made from cannabinoid hemp. “Cannabinoid hemp is any product processed or derived from hemp, that is used for human consumption including for topical application for its cannabinoid content, that does not contain more than 0.3% THC. Cannabidiol or ‘CBD’ products are an example of cannabinoid hemp products and can come in a variety of different forms including but not limited to tinctures (CBD oil), pills, capsules, balms, lotions and food or beverage products.” “What is Cannabinoid Hemp?” <https://health.ny.gov/regulations/hemp/faqs.htm>, accessed 1/10/2022 at 12:48 p.m.

that low-quality oil. Sound Wellness also brought third-party claims against the original sellers of the hemp—Third-Party Defendants Plant Science Laboratories, LLC, and Michael Barnhart (collectively “PSL”)—alleging that they fraudulently induced Sound Wellness to buy low-potency hemp, among other things.

Presently before this Court are PSL’s and Thar’s motions to dismiss Sound Wellness’s third-party claims and counterclaims, respectively, pursuant to Rules 12 (b)(6) and (b)(9) of the Federal Rules of Civil Procedure. (Docket Nos. 64, 66.) For the following reasons, PSL’s motion will be denied in part and granted in part, and Thar’s motion will be granted.

II. BACKGROUND

This Court assumes the truth of the following factual allegations contained in Sound Wellness’s amended counterclaims and amended third-party complaint. (Docket Nos. 23, 40.) See Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 740, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976); see also Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll., 128 F.3d 59, 63 (2d Cir. 1997). This Court also considers documents Sound Wellness attached to its counterclaims against Thar: a certificate of analysis of the Biomass done on October 19, 2018 (Docket No. 23-2) (the “NY COA”); the purchase agreement between Sound Wellness and PSL (Docket No. 23-3) (“the PSL Agreement”); the contract between Sound Wellness and Thar (Docket No. 23-5) (“the Thar Agreement”); and a certificate of analysis of the Biomass done on June 10, 2019. (Docket No. 23-6.)²

² In determining whether dismissal is warranted, a court may consider: “(1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents ‘integral’ to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant’s motion papers if plaintiff has knowledge or possession of the material

A. Facts

Sound Wellness is a New York limited liability company with offices in Florida. (Amended Third-Party Complaint, Docket No. 40, ¶ 6.) The sole member of Sound Wellness is Sound Wellness Holdings, Inc., a Delaware corporation. (Docket No. 7 at p. 1.)³ Thar is a Pennsylvania corporation with a principal place of business in Pennsylvania. (Id., ¶ 14.)⁴ PSL is a New York limited liability company whose sole member, Michael Barnhart, is a resident of Buffalo, New York. (Id., ¶ 10.)⁵ At all times described in Sound Wellness’s pleadings, Thar and PSL were “engaged in a joint venture arrangement,” in which Thar held a 60% interest and PSL held a 40% interest. (Id., ¶¶ 13, 44.)

1. Sound Wellness negotiates with PSL and Barnhart

In November 2018, Sound Wellness and its parent company Jushi entered into negotiations with Michael Barnhart, the CEO of PSL, to buy hemp biomass and finished CBD products from PSL. (Id., ¶¶ 22, 30.) Barnhart also facilitated meetings between Sound Wellness and other sellers of biomass who were affiliated with PSL, namely Be Well NY, LLC and Donald Spoth Farm. (Id., ¶¶ 24-32.) The biomass that Sound Wellness ultimately bought from all three sellers (collectively referred to as “the Biomass”) was

and relied on it in framing the complaint, ..., and [4] facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence.” Healthnow New York Inc. v. Catholic Health Sys., Inc., No. 14-CV-986S, 2015 WL 5673123, at *2–3 (W.D.N.Y. Sept. 25, 2015) (Skretny, J.) (citing In re Merrill Lynch & Co., Inc., 273 F. Supp. 2d 351, 356–357 (S.D.N.Y. 2003) (footnotes omitted), aff’d 396 F.3d 161 (2d Cir. 2005), cert. denied, 546 U.S. 935, 126 S. Ct. 421, 163 L. Ed. 2d 321 (2005)).

³ Sound Wellness is therefore a citizen of both Florida and Delaware, the citizenship of its sole member. See Handelsman v. Bedford Vill. Assocs. Ltd. P’ship, 213 F.3d 48, 51-52 (2d Cir. 2000) (a limited liability company has the citizenship of each of its members).

⁴ Thar is therefore a citizen of Pennsylvania. See 28 U.S.C. § 1332(c)(1). (“a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business”).

⁵ Both PSL and Barnhart are therefore citizens of New York.

grown by Donald Spoth Farm. (Id., ¶ 33.)

In connection with these meetings, PSL provided the NY COA, which analyzed the CBD content of the portion of the Biomass that Sound Wellness was considering purchasing from Be Well. The NY COA showed that the relevant portion of the Biomass had a CBD content of 13.1%. (Id., ¶ 49.) Sound Wellness purchased the relevant portion of the Biomass from Be Well for \$65,000. (Id., ¶ 50.)

PSL also provided the NY COA in connection with the formation of a contract for Sound Wellness to buy a portion of the Biomass from PSL (Id., ¶¶ 56-61), and in connection with the formation of a contract for Sound Wellness to buy a portion of the Biomass from PSL and Donald Spoth Farms, LLC, as joint sellers. (Id., ¶ 71.)

Sound Wellness alleges that the NY COA analysis was not representative of the Biomass as a whole, but rather, was gleaned by PSL intentionally selecting only certain, high-potency, parts of the Biomass. (Id., ¶¶ 78-79.) Sound Wellness further alleges that PSL knew that the NY COA analysis was false but nevertheless provided it to Sound Wellness to induce it to enter the PSL Agreement and other purchase agreements. (Id., ¶¶ 80-82.) Sound Wellness alleges that Thar knew of this false representation, and knew throughout its relations with Sound Wellness that the Biomass had a low CBD content, due to its joint venture with PSL. (Docket No. 40, ¶ 52; Docket No. 23, ¶¶ 118-24.)

During negotiations in November 2018, Barnhart verbally represented to Sound Wellness that, while PSL's facility was not yet ready to process the Biomass, it would have equipment from Thar installed and be ready to begin processing by late December 2018 or early January 2019. (Docket No. 40, ¶ 34.) Barnhart also stated that by mid-January 2019, the PSL facility would be able to process 2,000 pounds of hemp per day.

(Id., ¶ 35.) Barnhart mentioned that PSL was in a joint venture with Thar. (Id., ¶ 36.) Sound Wellness alleges that Barnhart’s representations about its ability to timely process were untrue, that Barnhart knew that they were untrue when he said them, and that he said them to induce Sound Wellness to enter into the PSL Agreement. (Id., ¶ 65.)

Sound Wellness maintains that it relied on Barnhart’s representations in entering the PSL Agreement. (Id., ¶ 42.) The PSL Agreement provided that Sound Wellness would buy 2,000 pounds of hemp biomass and 30 kilograms of “50/50 crude” oil from PSL. (See PSL Agreement, Docket No. 23-3, pp. 2-17.) Sound Wellness also agreed to purchase an additional 15 kilograms of “50/50 crude” by January 31, 2019. PSL agreed to process the crude oil into a soft gel by February 7, 2019. (Id. at p. 2; see also Docket No. 40, ¶ 66.) The PSL Agreement guaranteed that the Biomass sold to Sound Wellness would have a CBD content of at least 10%. (Docket No. 40, ¶ 67.)

The “standard terms and conditions” of the PSL Agreement define “Products and Services” as including “Existing Crude, Additional Crude, mix for soft gels, tincture mix, Biomass, Biomass Extract and Finished Products.” (Docket No. 23-3 at p. 7.) Pursuant to the PSL Agreement, Sound Wellness was to have “reasonable access to all Products and a reasonable time to inspect and reject non-conforming Products.” (Id.) Sound Wellness further retained the right to “access all Products prior to delivering payment, and whether or not before third party or Seller testing results [were] available, to designate a qualified individual to obtain a sample of any Product and arrange” for a laboratory to perform analysis. (Id.) PSL warranted that the finished products would “be of merchantable quality” and would “meet or exceed the governing standards.” (Id. at p. 8.) Exhibit D to the PSL Agreement, titled “Biomass Extraction Services,” states that the potency range

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