

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

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Case No:

2:20-cv-42

Newton Hill Labs, LLC,)
)
Plaintiff,)
)
v.)
)
Bay Water Greens, LLC, Baywater)
Farms, LLC and Kush Tourism, LLC,)
)
Defendants.)
_____)

COMPLAINT

NOW COMES Plaintiff Newton Hill Labs, LLC by and through its counsel, MSK Attorneys, and hereby complains against Defendants Bay Water Greens, LLC, Baywater Farms, LLC and Kush Tourism, LLC as follows:

Parties, Jurisdiction and Venue

1. Plaintiff Newton Hill Labs, LLC (“Newton Hill”) is a Vermont limited liability corporation. Newton Hill operates a Cannabidiol (“CBD”) processing business in Milton, Vermont.
2. Newtown Hill obtains hemp, called “biomass” in the industry, and processes that biomass into CBD oil and Terpenes (another biomass extract) in Milton, Vermont.
3. Defendant Bay Water Greens, LLC and Defendant Baywater Farms, LLC are related entities. Upon information and belief Bay Water Greens, LLC owns and operates “Baywater Farms.” Collectively herein they are called “Baywater.” Baywater grows hemp.

4. Defendant Bay Water Greens, LLC and Defendant Baywater Farms, LLC are Maryland corporations with an address of 27616 Little Lane, Salisbury, Maryland. Baywater operates hemp farming operations on the eastern shore of Maryland.

5. Kush Tourism, LLC (“Kush”) is a Washington company that brokers hemp sales between producers of CBD oil, like Newton Hill, and growers like Baywater.

6. In October 2019, representatives of Kush reached out to Newton Hill and offered to procure biomass to meet Newton Hill’s needs.

7. Shortly thereafter, Kush and Newton Hill discussed Newton Hill’s biomass needs and requirements. Newton Hill informed Kush that its biomass needed to be pesticide and herbicide free. Kush understood and promised to procure such biomass.

8. Shortly thereafter, Kush solicited offers to supply Newton Hill on Newton Hill’s behalf.

9. Baywater responded to the solicitation.

10. Baywater offered to supply Newton Hill, in Vermont, by delivering 5,000lbs of biomass to Vermont in exchange for \$132,500.00.

11. Kush and Baywater represented to Newton Hill that Baywater’s biomass was pesticide-free and provided testing results from what it called a representative sample of its product to establish that the biomass was pesticide-free.

12. Newton Hill relied on these representations and executed the purchase in October 2019.

13. Baywater caused the biomass to be delivered to Vermont.

14. Upon processing into CBD, Newton Hill determined that the biomass was not pesticide-free, rather, testing showed elevated levels of two pesticides.

15. As a result, Newton Hill did not get the biomass it paid for. Further, Newton Hill cannot sell the CBD or Terpenes it created. Set purchase orders have been cancelled resulting in substantial lost profits.

16. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §1332. The parties are diverse and no defendant is a resident of Vermont. As indicated below, the amount in controversy exceeds \$75,000.00.

17. This Court also has personal jurisdiction over defendants. Both Defendants intentionally marketed and sold their products and services to a Vermont company in Vermont. They arranged for and brokered a sale of biomass to a Vermont company and caused the biomass to be delivered to Vermont. Fundamentally, they availed themselves of the Vermont jurisdiction.

18. Venue is proper pursuant to 28 U.S.C. §1391(b)(1)-(2). The biomass in question is in Vermont, as is the processed CBD that shows the elevated levels of pesticides.

19. Further, both defendants purposefully availed themselves of Vermont thereby establishing this Court as the proper venue.

Factual Background

20. In early October 2019 Kush's representatives reached out to Newton Hill to offer to provide Newton Hill with biomass.

21. On October 4, 2019, Kush wrote to Newton Hill and stated that it wanted to visit Newton Hill in Vermont and was seeking to expand their partnership. Kush wanted to grow its Northeast business.

22. In its initial communications with Newton Hill, Kush explained that it could find suppliers to meet Newton Hill's needs and would facilitate seamless supply agreements.

23. On October 7, 2019 Kush and Newton Hill discussed procuring biomass over the phone. In that conversation, Newton Hill expressed their need to Kush that biomass needed to be organic and pesticide/herbicide free.

24. Kush, through its director of business operations Michel Navedo, indicated that it understood this need. Kush then placed advertisements to their network of suppliers for such biomass.

25. Kush promised to vet the suppliers to ensure that their customer's needs (in this case, the need for the product to be organic) are met.

26. The reason Newton Hill needed its biomass to be organic and be pesticide-free is that buyers of CBD require that the oil be pesticide-free and able to be certified as organic.

27. On October 14, Kush (through Navedo) indicated that it had received a bid from a farm in Maryland to supply Newton Hill. Kush recommended that Newton Hill use this farm.

28. This farm was Baywater.

29. On October 15, 2019 Tim Fields of Baywater emailed Michel Navedo of Kush and Cliff Chevalier of Newton Hill to discuss Baywater's offer to Newton Hill.

30. In that email Mr. Fields stated that Baywater's product was pesticide-free and that tests (COAs) Baywater would provide from the University of Maryland would show this, and were a representation of the biomass Newton Hill would get from Baywater. Mr. Fields email is attached as Exhibit 1.

31. The COAs were sent by Baywater on October 15, 2019. The COAs are attached as Exhibit 2.

32. These COAs showed that there were no pesticides in the tested biomass.

33. Newton Hill reviewed these COAs and relied on them.

34. Mr. Fields and Mr. Navedo asserted that the tests were representative of the Baywater farm's product that Newton Hill would receive.

35. Newton Hill had no reason to doubt these assertions and relied on them.

36. In subsequent discussions, on October 16, 2019 and October 23, 2019 with Mr. Fields and Mr. Navedo, Newton Hill directly expressed to these persons that the product it was purchasing must be organic and have zero herbicides/pesticides.

37. In those conversations, Mr. Fields and Mr. Navedo both represented that the Baywater product would be pesticide/herbicide free. They both referred to the COAs as proof of this.

38. Baywater also represented that it would deliver the biomass itself to Newton Hill in Vermont. This was important to Newton Hill as it would ensure that the product sent to Vermont was direct from Baywater and no mix-up would occur in transit.

39. In the October 23, 2019 call, Newton Hill confirmed that, based on the COAs, and representations by Kush and Baywater, it wanted to move forward with the purchase of 5000lbs of biomass.

40. Because Kush and Baywater presented the COAs and indicated they were representative of the product Newton Hill would be getting, Newton Hill did not need to test the biomass for pesticides upon receipt. It only had to test the biomass for CBD potency.

41. This was confirmed on the October 23, 2019 call. Baywater and Kush both stated that the product as shown in the COAs was pesticide-free and organic.

42. On October 25, 2019 Newton wired \$132,500.00 to Baywater for the biomass. A copy of the invoice for the payment is attached hereto as Exhibit 3.

43. Kush received an unknown commission from this transaction.

44. Newton Hill executed this purchase expressly on the representations from Kush and Baywater that the product was pesticide-free and that the COAs establish that the purchased biomass would be pesticide-free.

45. Newton Hill received the product and commenced extracting the CBD oil.

46. Newton Hill spent three months extracting CBD from the biomass. In total, Newton Hill spent approximately \$60,000 to extract the CDB from the biomass.

47. Upon extraction, Newton Hill had the refined, winterized crude CBD tested.

48. These tests were performed by Green Scientific Labs.

49. These tests showed elevated and unacceptable levels of Azoxystrobin and Propiconazole in the distillate. These test results are attached as Exhibit 4.

50. These are pesticides.

51. These pesticides could only come from the biomass procured from Baywater through Kush. Newton Hill had no other biomass in its facility.

52. Newton Hill had an additional round of testing done by a separate independent lab, Green Leaf Labs, to check the accuracy of the Green Scientific Labs results.

53. The Green Leaf Labs tests also showed elevated and unacceptable levels of Azoxystrobin and Propiconazole in the CBD. These test results are attached as Exhibit 5.

54. Both rounds of testing were performed with all proper scientific standards and safeguards in place and a chain of custody exists to establish the samples tested were from Newton Hill.

55. There is no chance of cross-contamination with this test. As noted, the only biomass Newton Hill has is biomass it bought from Baywater through Kush.

56. With the elevated and unacceptable levels of Azoxystrobin and Propiconazole in the refined, winterized crude CBD, it and the Terpenes are not organic and cannot be sold.

57. Newton Hill had a buyer lined up to buy the CBD. They demanded organic product free of pesticides.

58. When Newton Hill informed them that the CBD oil had tested positive for Azoxystrobin and Propiconazole and provided testing information, the buyer cancelled the Purchase Order.

59. The purchase order was for 250 liters of CBD oil at \$2525.00 per liter for a total of \$631,250.00.

60. Including the cost of procuring the biomass and the costs to process it into oil, this sale would have netted Newton Hill a pre-tax profit of \$431,745.05.

61. This is Newton Hill's lost profit due the biomass having pesticides.

62. No other buyers have been willing to purchase the CBD oil.

63. Newton Hill is also left with hundreds of thousands of dollars' worth of unsellable Terpenes.

64. Newton Hill's expected profit on the Terpenes would be high. The current market price for Terpenes is approximately \$100,000 per liter. Newton Hill has approximately 7 liters of Terpenes available for sale.

65. Newton Hill reasonably expected to make a profit of approximately \$500,000 on the sale of Terpenes.

Count I (Breach of Contract)

66. Newton Hill repeats and re-alleges the foregoing numbered paragraphs as if fully set forth herein.

67. Kush promised to procure biomass that met Newton Hill's needs.

68. Newton Hill expressed that a core need was that its biomass was free from pesticides.

69. Kush committed to procuring such biomass for Newton Hill.

70. Baywater responded to Kush's solicitation and agreed to provide the biomass needed by Newton Hill.

71. Newton Hill told Baywater that it needed pesticide-free biomass.

72. Baywater agreed to provide pesticide-free biomass.

73. Baywater and Kush indicated that COAs showing no pesticides in the biomass were representative of the biomass Newton Hill was going to get from Baywater.

74. Newton Hill agreed to pay \$132,500.00 for organic, pesticide-free biomass as represented by the COAs.

75. The parties agreed to a binding agreement: Newton Hill would pay the \$132,500.00 and Baywater would supply the pesticide-free biomass and Kush, which brokered the deal, was procuring the biomass needed by Newton Hill.

76. Newton Hill made its payment in October 2019, and in exchange, 5000lbs of biomass that was supposed to be pesticide-free was delivered to Newton Hill.

77. The biomass delivered was not pesticide-free as contracted.

78. These failures constitute a breach of the parties' agreement. Baywater did not deliver, and Kush did not procure, the pesticide-free material promised.

79. As a direct result of said breach, Newton Hill did not get the benefit of its bargain. Newton Hill spent \$132,500.00 to acquire pesticide-free biomass and did not acquire it.

80. It also spent over \$60,000.00 to extract CBD and Terpenes from the biomass under the understanding it was pesticide-free. These costs are lost now.

81. Further, because the biomass is not pesticide-free, Newton Hill cannot sell its extracted CBD and Terpenes.

82. Newtown Hill had a reasonable expectation that it would be able to receive \$431,745.05 in profits from the sale of the CBD and several hundred thousand dollars in profits from the sale of Terpenes.

83. Newton Hill had purchase orders in place for these products that have now been cancelled as the product is not pesticide-free and/or organic.

84. These damages are caused by Kush and Baywater's failure to provide the pesticide-free biomass that they promised to deliver to Newton Hill.

WHEREFORE Plaintiff seeks a judgment from this Court in an amount to be determined at trial, but not less than \$431,745.05, along with Newton Hill's costs and attorney's fees to compensate Plaintiff for Defendants' breach of contract. This sum places Newton Hill in the place it would have been had the contract been performed as required.

Count II (Fraud)

85. Newton Hill repeats and re-alleges the foregoing numbered paragraphs as if fully set forth herein.

86. Baywater, through Tim Fields, affirmatively represented that its product was pesticide-free in phone calls of October 16, October 17 and October 23, 2019.

87. Baywater presented COAs on October 15, 2019 from the University of Maryland to support this affirmation.

88. Baywater, through Mr. Fields, stated on October 16, October 17 and October 23, 2019 that the COAs were representative of the product to be delivered to Newton Hill.

89. Kush stated on October 16 and October 23, 2019 that the COAs were representative of the product to be delivered to Newton Hill.

90. Kush stated on these dates that Newton Hill would be receiving pesticide-free biomass from Baywater.

91. These statements were false.

92. These statements were known to be false when made.

93. Baywater knew it could not deliver pesticide-free biomass and/or that the samples tested as shown in the COAs were not representative of the product to be delivered to Newton Hill.

94. Kush knew that Baywater could not deliver pesticide-free biomass and/or that the samples tested as shown in the COAs were not representative of the product to be delivered to Newton Hill.

95. Baywater and Kush made these false statements to induce Newton Hill to enter into a contract.

96. Newtown Hill relied on these statements to enter into the transaction.

97. Baywater and Kush intended that Newton Hill rely on their statements.

98. As a result of Baywater and Kush's fraud, Newton Hill has been damaged. It spent over \$200,000.00 to acquire product and process that product into oil it cannot sell.

99. As a result of Baywater and Kush's fraud, Newton Hill has lost substantial sales and profits and is sitting on hundreds of thousands of dollars of unsellable biomass.

WHEREFORE Plaintiff seeks a judgment from this Court in an amount to be determined at trial, but not less than \$431,745.05, along with Newton Hill's costs and attorney's fees to compensate Plaintiff for Defendants' fraud. In addition, Newton Hill seeks punitive damages of not less than three times the damages proven at trial as allowed by law.

Count III (Breach of Warranty)

100. Newton Hill repeats and re-alleges the foregoing numbered paragraphs as if fully set forth herein.

101. Through affirmative statements, Kush and Baywater represented that the biomass being supplied to Newton Hill would be fit for Newton Hill's needs. Specifically, they both stated that the biomass would be pesticide-free.

102. The COAs provided by Baywater were represented by both Kush and Baywater to be proof that the biomass to be delivered would be pesticide-free.

103. These statements and actions were a basis for the bargain between Kush, Baywater and Newton Hill. They created an express warranty as to the nature of the biomass.

104. Kush did not procure, and Baywater did not supply, biomass in line with the express warranty that it would be pesticide-free.

105. They supplied biomass that had pesticides and was not organic.

106. This is a breach of the express warranty made.

107. As a result of said breach, Newton Hill spent considerable sums to procure and process incorrect biomass and has lost hundreds of thousands of dollars in lost profits.

WHEREFORE Plaintiff seeks a judgment from this Court in an amount to be determined at trial, but not less than \$431,745.05, along with Newton Hill's costs and attorney's fees to compensate Plaintiff for Defendants' breach of warranty.

Count IV (Consumer Fraud)

108. Newton Hill repeats and re-alleges the foregoing numbered paragraphs as if fully set forth herein.

109. Vermont's Consumer Protection Act states that it is a violation of law for a party to engage in unfair and/or deceptive trade practices in commerce.

110. Further, the Vermont Consumer Protection Act states that the failure to sell any good not in the manner and nature advertised creates a rebuttable presumption of an intent to violate the Consumer Protection Act.

111. Kush stated that it would procure pesticide-free biomass for Newton Hill.

112. Kush stated that the Baywater product would be pesticide-free and that the COAs were representative of the product to be delivered.

113. Baywater stated that it would provide pesticide-free biomass to Newton Hill.

114. Baywater stated that the COAs were representative of the product to be sent to Newton Hill.

115. Kush did not procure the biomass promised and Baywater did not provide the biomass promised.

116. Kush and Baywater's statements were false, misleading and fraudulent representations made to induce Newton Hill to contract with Kush and Baywater.

117. Newton Hill relied on these statements.

118. As a result, Newton Hill has been damaged. It spent approximately \$200,000.00 to procure and process the biomass and has lost hundreds of thousands of dollars in sales.

WHEREFORE Newton Hill seeks a judgment pursuant to the Vermont Consumer Protection Act in an amount not less than \$200,000 and exemplary damages of not less than three times the value of the direct damages awarded as permitted by 9 V.S.A 2461(b), along with an award of Plaintiff's costs and attorney's fees.

Count V (Negligent Misrepresentation)

119. Newton Hill repeats and re-alleges the foregoing numbered paragraphs as if fully set forth herein.

120. Baywater and Kush promised and agreed to deliver Plaintiff pesticide-free biomass. They did not so deliver.

121. Baywater and Kush stated that the COAs upon which Plaintiff relied were a reasonable representation of the biomass that Plaintiff was going to receive.

122. This was a false statement. The COAs were not representative of the biomass sent to Plaintiff.

123. Baywater and Kush thus supplied false information for the guidance of Plaintiff as part of this transaction.

124. Baywater and Kush had a duty to be honest and forthcoming in their representations as part of the transaction.

125. Baywater and Kush failed to exercise reasonable care or competence in obtaining or communicating information about the biomass to Newton Hill.

126. Baywater and Kush breached their duty because their statements that the COAs were representative was not true. As were their statements that Baywater's biomass was pesticide free.

127. Plaintiff reasonably and justifiably relied on the false information supplied by Defendants.

128. As a result of Defendants' breach of their duty, Newton Hill has been damaged.

129. Newton Hill expended substantial sums to acquire and process the biomass.

130. Newton Hill also lost sales because of the breach.

WHEREFORE Plaintiff seeks an award in an amount to be proved a trial but not less than \$431,745.05 as a result of Defendants' negligent misrepresentations along with an award of Plaintiff's costs and attorney's fees.

DATED at Burlington, Vermont this 17th day of March 2020.

MSK ATTORNEYS



Alexander LaRosa, Esq.
275 College Street, PO Box 4485
Burlington, VT 05406-4485
Phone: 802-861-7000
Email: ajlarosa@mskvt.com

Attorneys for Plaintiff