IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

MONICA ACERRA et al.,

Plaintiff,

v.

CONSOLIDATED
CASE NO. 4:20cv186-RH-MJF

TRULIEVE CANNABIS CORP. et al.,

Defendants.

_____/

ORDER DISMISSING THE AMENDED COMPLAINT AND GRANTING LEAVE TO AMEND FURTHER

This is a proposed class action under the Private Securities Litigation Reform Act. The plaintiffs are individuals who purchased Trulieve Cannabis Corp. securities that are publicly traded on the Canadian Securities Exchange and on an over-the-counter market. The defendants are Trulieve, its chief executive officer Kim Rivers, and its former chief financial officer Mohan Srinivasan.

In the amended complaint, the plaintiffs allege the defendants made material misstatements or omissions in public filings about the quality of the defendants' marijuana growing facilities and about related-party transactions. The plaintiffs further allege that once these misstatements or omissions were revealed, Trulieve's

stock price dropped. The defendants have moved to dismiss. This order dismisses the amended complaint but grants leave to amend further.

I

Trulieve is a vertically integrated medical-marjuana company. It grows, cultivates, processes, and distributes medical marijuana and marijuana products in Florida. Trulieve's common stock trades on the Canadian Securities Exchange and on an over-the-counter market known as the OTCQX.

The plaintiffs allege that climate control, specifically control of humidity, is important to growing quality marijuana. Excess humidity can cause mold to grow on marijuana flowers. Consumption of moldy marijuana can be sickening for anyone and deadly for those with a weak immune system or respiratory problems.

The plaintiffs say Trulieve made this false or misleading statement in filings with the Canadian Securities Exchange: "Trulieve grows in enclosed structures operating both indoor and greenhouse style grows." *See* Am. Compl., ECF No. 27 at 21-25 ¶¶ 50, 53, 55, 58, 60, 62. The plaintiffs assert Trulieve actually uses low-quality hoop houses that are not "greenhouse style." The plaintiffs say hoop houses are "rudimentary greenhouse like structures." *See id.* at 12 ¶ 36. The plaintiffs say that hoop houses, unlike true greenhouses, lack climate control.

In addition, the plaintiffs claim Trulieve failed to properly disclose, in filings with the Canadian Securities Exchange, that two transactions involved parties who

were related to Trulieve. The first was a $6 million loan from Track V, LLC to Trulieve. The filings treated Track V as unreleated to Trulieve. But corporate records show that Virginia Hines had a relationship to both companies. She was a director and registered agent of Track V, and, from May 2017 to May 2019, she was Trulieve's in-house counsel. The plaintiffs say this makes Track V and Trulieve related.

The second allegedly undisclosed relationship involved a $2 million loan from Vandergraff One LLC to Trulieve. Vandergraff has the same corporate address as Track V—an address directly next door to Trulieve-owned property. The plaintiffs say this makes Vandergraff and Trulieve related.

In December 2019, an investment firm, Grizzly Research, published a report revealing Trulieve's use of hoop houses and the allegedly related-party transactions. After the Grizzly report came out, the value of Trulieve shares fell more than 12%. The plaintiffs filed this lawsuit asserting claims under 15 U.S.C. § 78j(b) (count one) and under 15 U.S.C. § 78t(a) (count two). They seek to represent a class of all individuals or entities who purchased Trulieve securities between September 25, 2018 and December 17, 2019.

II

To survive a motion to dismiss for failure to state a claim, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that

the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). For purposes of a motion to dismiss, the complaint's factual allegations, though not its legal conclusions, must be accepted as true. *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In addition, for a securities fraud claim, a plaintiff must satisfy Federal Rule of Civil Procedure 9(b) and the pleading standard imposed by the Private Securities Litigation Reform Act. *See Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1317-18 (11th Cir. 2019).

Rule 9(b) requires a plaintiff to "state with particularly the circumstances constituting fraud or mistake." *See Carvelli*, 934 F.3d at 1317-18. In the securities context, this requires a plaintiff to allege what statements or omissions were made, in what documents, when, where, by whom, how the statement was misleading, and what the defendant received from the fraud. *Id.*; *see also Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1262 (11th Cir. 2006). Under the Private Securities Litigation Reform Act, a plaintiff must identify each statement alleged to have been misleading, indicate why it was misleading, and "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Carvelli*, 934 F.3d at 1318 (quoting 15 U.S.C. § 78u-4(b)(2)(A)).

III

Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to "use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b). The SEC's Rule 10b-5 makes it unlawful, in connection with the purchase or sale of a security, to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." 17 C.F.R. § 240.10b-5(b). Securities Exchange Act § 20(a) imposes liability on controlling persons absent a showing that they did not induce a violation and that they acted in good faith. *See* 15 U.S.C. § 78t(a).

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 265-67, 273 (2010), the Supreme Court held that § 10(b) does not apply extraterritorially. The Court said § 10(b) applies only to "transactions in securities listed on domestic exchanges" and "domestic transactions in other securities." *Id.* at 267. Thus § 10(b) reaches "the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any security in the United States." *Id.* at 273.

The analysis focuses "not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* at 266.

A

The plaintiffs have not adequately alleged Trulieve securities are listed on a domestic stock exchange. The plaintiffs allege only that Trulieve securities are listed on the Canadian Securities Exchange and are traded on an over-the-counter market, the OTCQX. An over-the-counter market is a "market for securities that are not traded on an organized exchange." *See Over-the-counter market*, *Black's Law Dictionary* (11th ed. 2019).

The Securities Exchange Act of 1934 defines the term "exchange" broadly. *See* 15 U.S.C. § 78c(a)(1); *see also* 17 C.F.R. § 240.3b-16(a)(1)-(2). There are registration requirements that national securities exchanges must satisfy. *See* 15 U.S.C. § 78f. But the SEC may exempt a person, security, transaction, or group from the exchange requirements. *See id.* § 78mm(a)(1). The SEC has exercised this power to exempt alternative trading systems from the definition of "exchange" under the Act. *See* 17 C.F.R. § 240.3a1-1(a)(2) (stating that an alternative trading system is exempted from the definition of the term "exchange.").

Many—if not all—over-the-counter markets are registered with the SEC as alternative trading systems. *See, e.g.*, *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 946-47 (9th Cir. 2018) (addressing over-the-counter markets registered with the SEC as

alternative trading systems); *see also* U.S. Sec. & Exch. Comm'n, *Alternative Trading System ("ATS") List*, https://www.sec.gov/files/data/alternative-trading-system-ats-list/atslist123120.pdf (last visited March 17, 2021) (SEC's listing of registered alternative trading systems including various over-the-counter markets). Because over-the-counter markets are treated by the SEC as alternative trading systems, they do not typically qualify as exchanges. *See Stoyas*, 896 F.3d at 946-47 (holding that because an over-the-counter market is treated as an alternative trading system, it cannot be an exchange that satisfies the *Morrison* domestic-exchange requirement). The plaintiffs have not alleged facts about the OTCQX that would support treating it differently than other over-the-counter markets.

In asserting the OTCQX is an exchange, the plaintiffs rely on *United States v. Isaacson*, 752 F.3d 1291 (11th Cir. 2014). There the defendant was convicted of conspiracy to commit securities fraud in connection with securities sold on an over-the-counter market. On appeal, the defendant asserted this violated *Morrison*, but the Eleventh Circuit disagreed. The court said the evidence supported a finding that the securities were purchased in the United States, thus satisfying *Morrison*'s "requirements for a U.S. nexus." *Id.* at 1299.

Isaacson does not hold that an over-the-counter market is a domestic exchange for *Morrison* purposes. Instead, the decision recognizes that a purchase and sale of securities on an over-the-counter market is a domestic transaction if it

occurs in the United States. Because the complaint does not allege facts showing that the OTCQX is a domestic exchange, the first *Morrison* category—domestic exchange—is not met.

B

Under *Morrison*, a § 10(b) claim may proceed even absent a domestic exchange if the purchase or sale of the security at issue occurred in the United States. *Morrison* did not define what it means for a purchase or sale to occur in the United States.

In *Quail Cruises Ship Management Ltd. v. Agencia de Viagens CVC Tur Limitada*, 645 F.3d 1307 (11th Cir. 2011), the Eleventh Circuit denied a motion to dismiss a complaint alleging that the parties closed the sale of a security—and title was transferred—in the United States. The Second Circuit has held that to adequately allege a domestic transaction, a plaintiff must plead facts concerning the formation of contracts to buy or sell securities, the placement of purchase orders, the passing of titles, or exchanges of money, within the United States. *See Absolute Activist Value Fund Ltd. v. Ficeto*, 677 F.3d 60, 70 (2d Cir. 2012); *see also Stoyas*, 896 F.3d at 948-49 (adopting the Second Circuit's test).

In this case, the plaintiffs have not alleged facts showing a domestic transaction—that the purchase or sale of Trulieve securities occurred in the United States—as required by *Morrison*. The plaintiffs generally allege a connection to

United States commerce, but that is insufficient. Similarly, the plaintiffs allege the defendants sell marijuana in the United States, hold licenses to do so in Florida, and that the subject of the allegedly fraudulent representations—the use of hoop houses and the related-party transactions—occurred in Florida. But what matters under *Morrison* is not where the fraud occurred, but where the purchase or sale of securities occurred.

The amended complaint alleges Trulieve securities were listed on the Canadian Securities Exchange and sold on the OTCQX market. The amended complaint includes no other details about the OTCQX market, where the plaintiffs took title to the securities, where the plaintiffs became obligated to buy them, or where the defendants became obligated to sell them. The amended complaint includes very little information about the actual purchase and sale of the securities. The amended complaint thus fails to state a claim on which relief can be granted.

IV

The plaintiffs have failed to adequately allege a § 10(b) and Rule 10b-5 violation in another respect as well. To state a § 10(b) claim, a plaintiff must allege: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation. *See Mizarro v. Home Depot*, 544 F.3d 1230, 1236-37 (11th

Cir. 2008); *see also Carvelli v Ocwen Fin. Corp.*, 934 F.3d 1307, 1317 (11th Cir. 2019).

A misrepresentation or omission is material if "in the light of the facts existing at the time a reasonable investor, in the exercise of due care, would have been misled by it." *Carvelli*, 934 F.3d at 1317 (internal citations and quotation marks omitted). The assessment of whether a statement is a material misrepresentation is often a question for the trier of fact. *Id.* at 1320, 1329. "[W]hen considering a motion to dismiss a securities-fraud action, a court shouldn't grant unless the alleged misrepresentations—puffery or otherwise—are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *Id.* at 1320 (internal citations and quotation marks omitted).

But puffery and opinion are generally not material misrepresentations. *See id.* at 1318. Moreover, if no reasonable juror could find a statement false or misleading, dismissal is proper. *See Salters v. Beam Suntory, Inc.*, No. 4:14-cv-659-RH, 2015 WL 2124939 (N.D. Fla. May 1, 2015); *see also Pye v. Fifth Generation, Inc.*, No. 4:14-cv-493-RH (N.D. Fla. Sept. 23, 2015).

A

The plaintiffs say the defendants misled investors by claiming Trulieve operated "greenhouse style" facilities when it actually operated low-quality, non-

climate-controlled hoop houses. The plaintiffs allege the use of hoop houses in Florida's humid climate causes moldy marijuana that is harmful to consumers and that this led to a recall on one occasion. The defendants respond that "greenhouse style" is an accurate description of their facilities.

The amended complaint does not adequately allege that the defendants' statement that its operation included "greenhouse style" facilities was a material misrepresentation. This is so for two reasons. First, the amended complaint does not allege facts suggesting a reasonable investor would believe a structure must be climate-controlled to qualify as a greenhouse. *See Carvelli*, 934 F.3d at 1317 (stating that a misrepresentation is material if a "reasonable investor" would be misled by it). More importantly, Trulieve's filings said it used "greenhouse style" facilities—plainly not an attempt to meet any specific or formal definition of a greenhouse. The plaintiffs have themselves said the hoop houses are "greenhouse like." *See* Am. Compl., ECF No. 27 at 12 ¶ 36.

In any event, the plaintiffs say Trulieve's statements were misleading in context. *See Carvelli*, 934 F.3d at 1320 (requiring a court to examine the context of a statement in determining whether it was a material misstatement). The plaintiffs assert Trulieve made other statements—for example, that climate monitoring was essential to creating high quality marijuana—that made the "greenhouse style" reference misleading. But climate *monitoring* is different from climate *control*.

Putting the statement in context, the amended complaint still falls short. And simply boasting of high-quality products borders on puffery. This order grants the motion to dismiss but gives the plaintiffs another opportunity to adequately allege a material misrepresentation or omission related to the quality of the marijuana facilities.

An additional note about this is in order. In the motion to dismiss and the response, the parties join issue on whether the defendants' failure to publicly disclose the recall of moldy marijuana was an actionable omission. But it is not at all clear that the amended complaint alleges this was an actionable omission—this may be included merely as support for the "greenhouse style" claim. If the plaintiffs intend the former, they should make this clear in any amended complaint. Moreover, the plaintiffs must allege adequate facts showing that the mold-recall issue was not just an "anecdotal report" but was "[s]omething more." *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011). The plaintiffs may show "[s]omething more" based on statistical significance or based on the source, content, and context of the issue. *Id.* at 43-44.

B

The plaintiffs also allege Trulieve failed to disclose that it was related to two of its lenders, Track V and Vandergraff.

Omissions are actionable under § 10(b) only when there is a legal duty to disclose. *See Carvelli*, 934 F.3d at 1317; *see also In re Galectin Therapeutics, Inc. Sec. Litig.*, 843 F.3d 1257, 1274 (11th Cir. 2016). Even absent a duty to speak, when a party makes disclosures on a subject, the party assumes a duty to speak fully and truthfully on that subject. *See In re Galectin*, 843 F.3d at 1275. The Eleventh Circuit has expressed skepticism that violations of accounting rules without any other legal duty necessarily give rise to securities liability. *See Carvelli*, 934F.3d at 1332.

Trulieve made disclosures to the Canadian Securities Exchange about some related-party transactions. So even absent a separate duty under the SEC rules, Trulieve may have assumed a duty to speak fully and truthfully on related-party transactions more generally. An omission of the fact that other transactions were with related parties could be actionable.

For this claim the plaintiffs rely on two loans allegedly from related parties—the loans from Track V and Vandergraff. For Track V, the plaintiffs' only basis for claiming this is a related-party transaction is that Ms. Hines, Trulieve's former in-house counsel, is a director and registered agent of Track V. This without more does not establish that Track V and Trulieve are related parties.

The Vandergraff allegation is even more attenuated. The second amended complaint alleges only that Vandergraff has the same address as Track V and is

next door to a Trulieve-owned property. This without more does not establish that Vandergraff and Trulieve are related parties.

The amended complaint's related-party allegations thus fail to state a claim on which relief can be granted. This order dismisses the claim but grants leave to amend.

C

The defendants also assert the plaintiffs have failed to adequately plead scienter. Under the Private Securities Litigation Reform Act, scienter cannot be pled generally. *See Brophy v. Jiangbo Pharms., Inc.*, 781 F.3d 1296, 1306 (11th Cir. 2015); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). Instead "§ 10(b) and Rule 10b-5 require a showing of either an intent to deceive, manipulate or defraud or severe recklessness." *Brophy*, 781 F.3d at 1302 (internal citation and quotation marks omitted); *see also Matrixx Initiatives, Inc.*, 563 U.S. at 48.

The complaint must state with particularity facts "giving rise to a strong inference that the defendant acted with the requisite state of mind." *Brophy*, 781 F.3d at 1302. A complaint will survive a motion to dismiss "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* The court must draw reasonable inferences from the face of the complaint in the investors' favor

but must also look to "plausible, nonculpable explanations for the defendant's conduct in evaluating an inference of scienter." *Id.* (quoting *Tellabs*, 551 U.S. at 324). Scienter must be evaluated "for each defendant with respect to each violation." *Mizarro*, 544 F.3d at 1238. Allegations of motive and opportunity are relevant but not sufficient to allege scienter. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1285 (11th Cir. 1999).

The plaintiffs have not adequately pled scienter in this case. The only scienter allegation for Mr. Srinivasan as to marijuana growing facilities is that he was Trulieve's CFO. But a CFO position, standing alone, is not sufficient. *See, e.g.*, *Brophy*, 781 F.3d at 1302-06. The amended complaint alleges that Ms. Rivers, the CEO, had a motive to lie about the facilities to justify buying land from her husband at a high price. But the amended complaint does include facts indicating Mr. Rivers knew or had reason to believe "greenhouse style" was inaccurate. *See, e.g.*, *Mizzaro*, 544 F.3d at 1247 (holding no scienter where no emails, letters, or other allegations showed individuals knew about or ordered the improper practice). For Trulieve, the scienter allegations include the importance of the growing facilities to its operation and how obvious the fraud was. But no allegations indicate anyone from Trulieve believed the term "greenhouse style" was false or misleading.

The analysis is similar for the related-party transactions. There are insufficient allegations that Ms. Rivers, Mr. Srinivasan, or anyone else from Trulieve knew these were related-party transactions.

V

Section 20(a) of the Securities Exchange Act imposes joint and several liability on "every person who, directly or indirectly, controls any person liable" for violations of securities laws. 15 U.S.C. § 78t(a). "Control person liability is secondary only and cannot exist in the absence of a primary violation." *In re Galectin*, 843 F.3d at 1276. For control-person liability, a plaintiff must allege: (1) a primary violation of federal securities law and (2) that the defendant exercised actual power or control over the primary violator. *Id.* Because a primary violation of the securities law is an essential element of a § 20(a) derivative claim "a plaintiff adequately pleads a § 20(a) claim only if the primary violation is pleaded." *Mizzaro*, 544 F.3d at 1237. Because the plaintiffs have not adequately alleged a § 10(b) or Rule 10b-5 violation, they also have not adequately pled a § 20(a) violation.

VI

The plaintiffs have not adequately alleged the sale or purchase of Trulieve securities occurred on a domestic exchange or in the United States as required by

Morrison. Additionally, the plaintiffs have failed to adequately plead a material misrepresentation or omission and scienter.

For these reasons,

IT IS ORDERED:

1. The defendant's motion to dismiss, ECF No. 30, is granted. The amended complaint is dismissed.

2. The plaintiff may file a second amended complaint by April 8, 2021.

3. I do *not* direct the entry of judgment under Federal Rule of Civil Procedure 54(b).

SO ORDERED on March 18, 2021.

s/Robert L. Hinkle
United States District Judge