Quinn Emanuel Cannabis Litigation Practice Alert

I. Courts Continue to Stay CBD Class Actions Pending FDA Rulemaking

Motions to stay based on the primary jurisdiction doctrine continue to be effective in combating class action lawsuits filed against CBD companies for allegedly misrepresenting the amount of CBD in their products and illegally selling CBD as an unapproved drug. Most recently, on March 3, 2021, Judge Dolly Gee of the Central District of California issued a pair of orders staying two class action suits against Infinite Product Company LLC and cbdMD Inc. *Dasilva v. Infinite Prod. Co.*, No. 2:19-cv-10148 (C.D. Cal. Mar. 3, 2021); *Davis v. cbdMD, Inc.*, No. 2:19-cv-10241 (C.D. Cal. Mar. 3, 2021). In her rulings, Judge Gee cited the primary jurisdiction doctrine as the basis for granting both companies indefinite stays until "the FDA completes its rulemaking and/or Congress passes legislation regarding the definitions, marketing, and labeling of CBD products." *Dasilva*, slip op. at 4; *Davis*, slip op. at 3. Specifically, Judge Gee noted greater clarity was needed on whether CBD products are drugs, dietary supplements, or food products, and what standards apply to these products. *Dasilva*, slip op. at 3; *Davis*, slip op. at 3.

By way of background, the primary jurisdiction doctrine allows courts to stay cases when they could require the court to determine a new regulatory question that is more appropriately decided by the applicable government agency. Under this doctrine, stays are particularly appropriate when an industry is statutorily subject to the "jurisdiction of an administrative body with regulatory authority" and the issue involved "requires expertise or uniformity in administration." *Syntek Semiconductor Co., Ltd. v. Microchip Tech., Inc.*, 307 F.3d 775, 781 (9th Cir. 2002).

Accordingly, when it comes to CBD class actions based on misrepresenting the amount of CBD in products or illegally selling CBD as an unapproved drug, a few key facts support the need for a stay. First, the Food, Drug and Cosmetics Act subjects essentially all uses of CBD to the Food and Drug Administration's ("FDA") regulatory authority. Second, regulating food and drugs requires the FDA's particular expertise. Third, because CBD is sold nationwide, uniformity in administering rules applicable to CBD is important. Fourth, in the spring of 2019, the FDA formed a task force on CBD regulation and has since signaled that it is working to promulgate regulations to address the use of CBD in food and cosmetics.

Relying on these facts, CBD companies have used the primary jurisdiction doctrine to convince federal courts throughout the United States to stay class action cases against them until the FDA promulgates more definite regulations regarding CBD. *Dasilva* and *Davis* are just the latest in a line of cases stayed on primary jurisdiction grounds. In January of 2020, the Southern District of Florida stayed *Snyder v. Green Roads of Florida*, No. 0:19-cv-62342 (S.D. Fla. Jan. 3, 2020); in May 2020, the Central District of California stayed *Collette v. CV Sciences, Inc.*, No. 2:19-cv-10227 (C.D. Cal. May 22, 2020); in June 2020, the Eastern District of California stayed *Glass v. Global Widget, LLC*, No. 2:19-cv-01906 (E.D. Cal. June 15, 2020); and in August 2020, the District of Massachusetts stayed *Ahumada v. Global Widget*, No. 1:19-cv-12005 (D. Mass. Aug. 11, 2020), all on primary jurisdiction grounds. At least one case, however, has declined to use the primary jurisdiction doctrine to stay a class action. In *Potter v. Potnetwork Holdings, Inc.*, No. 1:19-cv-24017 (S.D. Fla. Mar. 30, 2020), a plaintiff brought a class action alleging that the defendants' CBD oil and gummies contained less CBD than listed on the labels, and defendants argued the case should be stayed under the primary jurisdiction doctrine. *Potter*, slip op. at 1, 7. The Southern District of

Florida declined to issue a stay, reasoning that "the FDA has not expressed interest in modifying the disclosure requirements for nutrients or additives," and it was not aware of any "regulation under consideration that may affect these specific food labeling requirements." *Id.* at 9.

It is important to note that because stays do not completely dispose of these cases, they will eventually recommence once the FDA promulgates the necessary CBD regulations, the FDA announces it will not do so, or Congress passes legislation otherwise regulating CBD.

II. California Attorney General Argues Businesses With Provisional Cannabis Licenses Have No Due Process Rights

In a recent dispute over the revocation of a provisional cannabis license in California, the California Attorney General has relied on the fact cannabis is federally illegal as a basis for dismissing the case. In *Harrens Labs v. Bureau of Cannabis Control*, which was filed just last month in Alameda County Superior Court, a Bay Area marijuana testing lab filed suit against California cannabis regulators, alleging its due process rights were violated when its provisional business license was revoked without notice, a hearing, or an appeals process. Pet'rs' Unverified Pet. Writ Mandate, *Harrens Labs v. Bureau of Cannabis Control*, No. RG21089893 (Cal. Super. Ct. Feb. 25, 2021). Harrens Labs alleged twelve armed investigators entered the company's premises without notice, and delivered a letter revoking its provisional license, effective immediately. *Id.* at 8. The California Bureau of Cannabis Control ("BCC") "then proceeded to seize from the premises all the cannabis samples collected by Harrens Lab from other licensees for cannabis lab testing services." *Id.* The BCC relied on at least the following alleged violations:

- Harrens Labs was unable to take accurate representative testing samples of cannabis.
- Harrens Labs violated state rules by using a third-party courier to ship cannabis samples.
- Harrens Labs failed to generate shipping manifests before transporting marijuana goods.
- Harrens Labs shipped marijuana samples and goods without state-mandated METRC labels.
- Harrens Labs modified the lab premises without the BCC's approval.
- Harrens Labs did not install a required video surveillance system. *Id.* at 24.

Counsel for Harrens Labs attempted to reach an informal resolution with the BCC, to no avail. *Id.* at 8-9. In particular, the BCC told Harrens Labs that "the license was revoked and that no appeal or hearing was available due to BPC § 26050.2." *Id.* at 9. Harrens Labs and its former CEO Ming Li then filed suit against the BCC, petitioning the Alameda County Superior Court for a writ of mandate (a) ordering the BCC to provide Harrens Labs with an administrative hearing to appeal the license revocation and (b) staying enforcement against Harrens Labs until such a hearing occurs.

In response, the BCC, represented by the California Attorney General, argued that no such writ should be issued. The BCC argued that there is no federally protected right to engage in cannabis activity whatsoever because cannabis is illegal under federal law. It has also argued that any state law rights that exist depend on "the nature of the right or privilege conferred by a statute." *See* BCC's Opp'n Ex Parte Appl. Temporary Stay Order & Order to Show Cause Why Prelim. Inj. Should Not Issue at 20-24, *Harrens Labs v. Bureau of Cannabis Control*, No. RG21089893 (Cal. Super. Ct. Feb. 25, 2021). According to the BCC, however, the applicable statute expressly provides that

"[p]rovisional licenses can…be revoked without hearing or an opportunity to appeal." *Id.* (citing Cal. Bus. & Prof Code § 26050.2(h)). As a result, the BCC argued that Harrens Labs has no right to a hearing under California law. The Superior Court has not yet ruled on the merits of Harrens Labs' request to enjoin enforcement of the license revocation. On March 4, 2021, it ruled that Harrens Labs could continue to operate its business until the motion for a preliminary injunction is decided, contingent on a $10,000 bond. *See* Order on Ex Parte Appl. Temporary Stay Order & Order to Show Cause Why Prelim. Inj. Should Not Issue, *Harrens Labs v. Bureau of Cannabis Control*, No. RG21089893 (Cal. Super. Ct. March 4, 2021).

This is not the first time that California regulators have seized on the federally illegal status of cannabis to argue that a cannabis company is not entitled to the same level of due process protection as other businesses. In a case currently pending in the United States District Court for the Eastern District of California, a hemp company named Apothio, LLC has sued California state and county officials for alleged constitutional violations. Complaint, *Apothio, LLC v. Kern Cty.*, No. 1:20-cv-00522 (E.D. Cal. April 10, 2020). The alleged violations stem from the seizure and destruction of cannabis plants that exceeded the .3% THC ceiling required for the plants to be categorized as industrial hemp per federal law. *Id.* at 8-40. Although Apothio alleges the defendants violated its due process rights, the California Attorney General has moved to dismiss on the basis that the plants were contraband, and therefore Apothio lacked a protectable interest in the plants. *See id.* at 42-43, 48-50; Mem. P. & A. Supp. Mot. Dismiss Compl., *Apothio, LLC v. Kern Cty.*, No. 1:20-cv-00522 (E.D. Cal. June 12, 2020); Mot. Dismiss Pl.'s Compl. for Failure State Claim, *Apothio, LLC v. Kern Cty.*, No. 1:20-cv-00522 (E.D. Cal. June 15, 2020). While the issues raised by Apothio and Harrens Labs have yet to be resolved on the merits, the resolution of these cases will have important implications for cannabis licensees and entities facing enforcement actions by state officials in the future.

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If you have any questions about the issues addressed in this Client Alert, or if you would like a copy of any of the materials we reference, please do not hesitate to contact us:

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