

Almond Milk Class Fires Back At Bid To Dump Suit

By Joyce Hanson

Law360, New York (April 20, 2017, 4:32 PM EDT) -- Consumers accusing an almond milk maker of deceptively marketing its products as a healthy alternative to cow's milk have fired back at the company's attempt to toss their proposed class action suit, saying in California federal court Wednesday they have standing to bring the case because their claims are viable.

The proposed class, led by consumer Melanie Kelley, urged the court to dismiss organic food company WhiteWave Foods' motion to dismiss the suit, saying it should be denied because the suit's "unlawful" claim under California's Unfair Competition Law does not require a showing of deception of the reasonable consumer.

"Since the only basis upon which defendant moves to dismiss plaintiff's UCL claim is based on a purported failure to satisfy the reasonable consumer test, and because the 'unlawful' prong does not require satisfying that test, the motion to dismiss as to the unlawful prong must be denied," Kelley said.

Kelley also opposed WhiteWave's motion to dismiss the suit based on other claims under the UCL, as well as under California's False Advertising Law and Consumers Legal Remedies Act.

On March 22, WhiteWave Foods struck back at Kelley's allegations that it deceptively markets its Silk Almondmilk products as a healthy alternative to dairy milk, calling the lawsuit an "attack on the entire plant-based beverage industry" and "a waste of time."

Kelley's Jan. 24 proposed nationwide class action, which names WhiteWave parent WWF Operating Co. as the defendant, said that the Silk Almondmilk beverage maker falsely promotes its products as equivalent or even superior to dairy milk although they allegedly lack a number of essential nutrients.

Her complaint includes a table comparing U.S. Department of Agriculture daily reference values and recommended daily intakes for skim dairy milk versus the Silk Original Almondmilk beverage. Vitamins and nutrients in the comparison include protein, magnesium, potassium and Vitamin C, all of which show the dairy milk to contain higher values than Silk, according to Kelley's table.

WhiteWave wrote in its March 22 bid to dismiss Kelley's suit that although she claimed to have been tricked by WhiteWave into believing Silk Almondmilk was healthier than cow's milk, she failed to make a specific false labeling or marketing claim or to adequately allege that the company had misrepresented any ingredient.

“Plaintiff contends that Silk Almond milk cannot contain the word 'milk' without violating the [U.S. Food and Drug Administration] standard of identity of dairy milk,” WhiteWave wrote. “But courts have already rejected this contention, and plaintiff’s far-fetched claims have been summarily disposed of not once, but twice in prior decisions. This action amounts to nothing more than a waste of time and judicial resources.”

Legal counsel for Kelley, Lee A. Cirsch, told Law360 on Thursday that the plaintiff is optimistic the court will agree with her position.

“We strongly believe that plaintiff has alleged viable claims against WhiteWave for its unlawful and deceptive labeling and advertising of its Silk 'Almondmilk' products as detailed in our opposition papers,” Cirsch said.

Representatives for WhiteWave did not immediately respond to requests for comment on Thursday.

In July, Danone SA, the French food giant behind Activia yogurt and Evian water, said it planned to acquire WhiteWave Foods Co. in an approximately \$10 billion purchase to expand its North American presence and organic food offerings. The new company is called DanoneWave.

The U.S. Department of Justice filed a settlement proposal in federal court on April 3 over Danone’s now \$12.5 billion purchase of WhiteWave, asking the court to approve the DOJ’s requirement that the French yogurt company divest its Stonyfield Farms unit in order for Danone to proceed with the acquisition.

WWF Operating Co. is represented by Angela C. Agrusa and Nathan M. Davis of Liner LLP.

Kelley is represented by Lee A. Cirsch, Robert K. Friedl and Trisha K. Monesi of Capstone Law APC.

The case is Melanie Kelley v. WWF Operating Co., case number 1:17-cv-00117, in the U.S. District Court for the Eastern District of California.

--Additional reporting by Steven Trader and Fola Akinnibi. Editing by Jill Coffey.