

Almond Milk Makers Duck Drinkers' Bid For Label Change

By **Joe Van Acker**

Law360, New York (October 21, 2015, 5:23 PM ET) -- A New York federal judge on Wednesday refused to order Blue Diamond Growers and the maker of Silk Almond Milk to remove all references to almonds on their labels, holding that consumers claiming the products don't contain enough almonds aren't at risk for future harm.

In an order denying the consumers' request for an injunction, U.S. District Judge Victor Marrero said that while some judges have ruled that future injury isn't necessary in consumer protection suits, the U.S. Supreme Court and the Second Circuit have held otherwise.

"In the instant action, plaintiffs do not have standing to seek injunctive relief because they have not alleged that they will purchase defendants' almond milk labeled products in the future," Judge Marrero said.

The requested injunction would have required the milk makers to remove all images and references to almonds from their products or to disclose that almonds make up just 2 percent of their almond milks.

The buyers argued that an injunction was necessary because many American consumers are replacing dairy milk with almond milk under the assumption that it's healthy. But the milk contains the thickener carrageenan, which they said could be unhealthy.

In 2013, a federal magistrate judge certified a class of consumers seeking injunctive relief in their suit accusing The Coca-Cola Co. of misbranding Vitaminwater as a healthy drink, and the buyers in the instant suit unsuccessfully attempted to apply that decision. But Judge Marrero explained that the judge who certified the class against Coca-Cola had relied on nonbinding case law from California and a single ruling from New York, which he said was unpersuasive.

The parties have exchanged a number of letters in recent months, with Blue Diamond and Silk producer WWF Operating Co. alleging a raft of deficiencies in the consumers' suits. Judge Marrero said that he decided to treat that correspondence as motions to dismiss but ruled that the buyers have adequately pled their claims, with the exception of their request for an injunction.

The judge consolidated three suits against Blue Diamond and three against WWF in July 2015, holding that all of the consumers have alleged basically the same thing, namely that Blue Diamond's Almond Breeze and WWF's Silk almond milk are only about 2 percent almonds.

Blue Diamond has told consumers that its milk contains 50 almonds per half gallon but that amount of Almond Breeze only contains 30 almonds, according to the plaintiffs, who have claimed that they were duped into believing that the drinks provided substantial health benefits.

Judge Marrero also ruled on Thursday that based on the letters they've exchanged with the defendants, the consumers have substantiated their claims well enough to survive dismissal.

Counsel for WWF declined to comment, and attorneys for the other parties didn't respond to requests for comment on Wednesday.

The consumers are represented by James C. Kelly of The Law Office of James C. Kelly.

WWF is represented by Angela Agrusa of Liner LLP and Joshua H. Epstein of Davis & Gilbert LLP.

Blue Diamond is represented by Joshua L. Solomon of Pollack Solomon Duffy LLP.

The case is Tracy Albert and Dimitrios Malaxianis v. Blue Diamond Growers, case number 1:15-cv-04087, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Juan Carlos Rodriguez. Editing by Christine Chun.

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