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Soy Milk Makers Seek KO Of False Labeling Suit

By **Raphael Pope-Sussman**

Law360, New York (August 05, 2013, 6:23 PM ET) -- The makers of Horizon and Silk food products asked a California federal judge Thursday to toss a putative class action alleging they deceptively labeled sugar as evaporated cane juice, arguing that the suit is precluded by a prior settlement.

Dean Foods Co., Whitewave Foods Co. and Whitewave unit Horizon Organic Dairy argued in a motion to dismiss that the suit is barred by an \$800,000 April **settlement** in Florida, in which they agreed to remove references to evaporated cane juice from their products.

They also said that the suit incorrectly alleges that the labeling of products such as almond, soy or coconut milk cannot, under U.S. Food and Drug Administration rules, be referred to as milks, even though these are the common names for these products.

"This case was over before it started," the motion said. "Ten days after the court in Florida preliminarily approved the class settlement, certified a class for settlement purposes and enjoined any class members from filing related lawsuits, plaintiffs [Alex Ang and Kevin Avoy] filed the instant action, alleging substantially the same claims — with a couple new twists."

The motion also sought dismissal of Dean, a former owner of Whitewave, as a defendant in the suit, arguing that Dean was improperly targeted and should be released for lack of parent liability.

The California suit, similarly to a Florida action, claims that Dean, Whitewave and Horizon flouted FDA regulations by marketing products like Silk Soymilk, Horizon Organic Vanilla Lowfat Milk and Tuberz Yogurt as containing "All Natural Evaporated Cane Juice" or "Organic Evaporated Cane Juice."

"The FDA has specifically warned companies not to use" the term "evaporated cane juice," because it is misleading, violates labeling requirements, and is not, technically juice, the complaint says.

The complaint also includes the additional claim that consumers were misled by the use of term "milk" to describe plant-based drinks, and cited a 2008 FDA letter to Lifesoy Inc. challenging its use of the term "soy milk" as evidence that Whitewave and Horizon were in violation of agency rules. Plant-based drinks should not be referred to as milk, the complaint says.

Whitewave attacked these accusations, arguing that the cane juice claim was already resolved by the settlement and that the letter was simply an aberration against the widespread acceptance of terms like "soy milk," including in FDA regulations.

According to the motion, evaporated cane juice is juice taken from sugar cane and evaporated. It differs from ordinary refined sugar in its impact on taste profiles and food coloration and is commonly listed as an ingredient in healthy foods, the motion said.

The case is similar to a slew of suits filed over evaporated cane juice nationwide in the last 15 months, many of which have been filed by Pierce Gore, counsel for Ang and Avoy in the case, according to the motion to dismiss.

A representative for Dean Foods declined to comment on the case. Representatives for Whitewave and the plaintiffs did not immediately respond to a request for comment Monday.

The plaintiffs are represented by Pierce Gore of Pratt & Associates.

Whitewave, Horizon and Dean are represented by Angela C. Agrusa, Randall J. Sunshine and Nathan M. Davis of Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor LLP.

The case is Ang et al. v. Whitewave Foods Co. et al. in the U.S. District Court for the Northern District of California.

--Editing by Andrew Park.

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