

Almond Milk Co. Calls False Ad Suit A Wasteful Attack

By **Steven Trader**

Law360, New York (March 23, 2017, 3:46 PM EDT) -- Almond milk maker WhiteWave Foods on Wednesday struck back at a consumer's allegations that it deceptively markets its products as a healthy alternative to dairy milk, calling the California lawsuit an "attack on the entire plant-based beverage industry" and a waste of time.

In a January complaint, Melanie Kelley claimed that she was tricked by WhiteWave into believing its Silk Almond beverage was healthier than dairy milk, but notably absent from that proposed class action was any allegation that a specific labeling claim on the product was false, that any ingredient was misrepresented or that the company made any specific marketing claim that was false, WhiteWave wrote.

Instead, what Kelley is actually challenging is whether companies who make almond milk, "which has existed for centuries," can actually include the term "milk" on its label without engendering consumer deception as to whether almond milk is the same as milk that comes from cows, WhiteWave said.

"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."

What's more, Kelley is attempting to sidestep the labeling requirements already established under the Federal Food, Drug & Cosmetics Act and instead impose new requirements on the entire plant-based beverage industry under California's Unfair Competition Law, WhiteWave said.

"The very crux of plaintiff's state-law claims is that the common or usual name for almond milk is in conflict with the FDA's standard of identity of dairy milk," WhiteWave wrote. "The claims are thus premised on alleged violations of federal regulations that private citizens do not have the power to enforce, let alone expand, by imposing additional labeling requirements not prescribed by the FDA."

Further, no reasonable consumer would actually be led to believe that the term "milk" in "almond milk" promises a nutritional equivalent to dairy milk, nor would they be misled or confused by factually accurate marketing statements highlighting certain nutritional differences between the two beverages, WhiteWave contended.

Kelley didn't see it that way when she launched her proposed nationwide class action on Jan. 24, claiming WhiteWave falsely promoted its products as equivalent or even superior to daily milk when in fact they lacked a number of essential nutrients.

Food must be labeled as “imitation,” and are deemed misbranded when they are not, if the food is intended to substitute for and resemble another food but is nutritionally inferior to that food, Kelley argued, and a food is inferior when there is any reduction in the essential nutrient content.

“By calling its Silk Almond beverages ‘milk,’ a term historically used to define cow’s milk, defendant has capitalized on reasonable consumers’ understanding of the well-known health benefits and essential nutrients that dairy milk provides without actually providing those health benefits and essential nutrients,” Kelley wrote in January.

Lee Cirsch, an attorney for Kelley, told Law360 on Thursday they plan to "vigorously oppose the motion."

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.

--Editing by Alyssa Miller.