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PepsiCo Trims But Can't Nix 'Healthy' Gatorade False Ad Suit

By **Hailey Konnath**

Law360 (December 1, 2023, 9:48 PM EST) -- A California federal judge has agreed to dismiss a portion of the latest version of a proposed class action accusing PepsiCo of misbranding its Gatorade Fit drinks as "healthy," though the judge again gave the consumer plaintiffs the opportunity to file a new version of the complaint.

Gumner's amended complaint included enough detail on the circumstances of his decision to purchase Gatorade to support his claim that he relied on the allegedly misleading label, U.S. District Judge Cormac J. Carney ruled. However, Gumner's request for equitable restitution as part of his unfair competition claim had to be dismissed — at least for now — because he failed to adequately allege that he otherwise lacks a plausible legal remedy, according to the Wednesday ruling.

There are indeed other remedies available under other laws, the judge said.

Judge Carney gave Gumner until Dec. 13 to file another amended complaint.

It's the third time Judge Carney has weighed in on a motion to dismiss from PepsiCo. Previous versions of the complaint were thrown out with leave to amend.

Gumner **first lodged his suit** in February, claiming that PepsiCo labeled Gatorade Fit as "healthy" and an "excellent" source of vitamins with no added sugar when, in reality, the drinks are essentially just water flavored with minimal watermelon juice concentrate and preservatives. PepsiCo's use of those statements on the bottle packaging renders the drinks misbranded because they don't meet the federal requirements necessary to make such claims, Gumner claimed.

Meanwhile, PepsiCo has repeatedly called Gumner's claims "**conclusory.**" In its latest motion to dismiss, PepsiCo argued that Gumner hasn't cured the defects the court identified in its last dismissal order. Specifically, it said Gumner lacks standing to sue under California's unfair competition law because he hasn't plausibly alleged that he relied on PepsiCo's alleged misrepresentations in purchasing the Gatorade.

Judge Carney said in his order that, this time around, Gumner has included enough in his complaint to render his allegations "just beyond threadbare."

"Though his allegations regarding reliance are far from robust," Gumner has now specifically alleged that he's interested in fitness and healthy eating and was looking for a healthy beverage when he purchased Gatorade fit, according to Judge Carney.

And because Gatorade's target population doesn't suffer from a deficiency of any of the vitamins that the label identified as making it "healthy," it's plausible that Gumner wasn't getting the health benefit he sought based on the misleading label, the judge said.

"His allegations as to reliance do not contain the detail of some of the cases the court cited in its last order, but they are sufficiently similar to the cases recapped above for the court to find them adequate at the motion-to-dismiss stage," Judge Carney said.

However, the judge partially agreed with PepsiCo that there are other statutes — like the Consumer Legal Remedies Act and California false advertising law — that provide adequate legal remedies for

his alleged harm. And Gumner hasn't addressed why he couldn't bring a claim under those statutes rather than under unfair competition law, the judge said.

"The court will therefore dismiss without prejudice Gumner's claim under the UCL for equitable restitution because Gumner may pursue adequate monetary remedies under other statutes," Judge Carney said.

At the same time, Gumner's claim for prospective equitable relief wasn't challenged by PepsiCo and thus survives, per the order.

Gumner said he bought a Gatorade Fit around November 2022 at a Walmart in Laguna Niguel, California, after reading and relying on the statements on the bottle. Gumner said he would have paid less for the drink or wouldn't have bought it at all had he known the truth.

Gumner is looking to represent all individuals in the Golden State who, at any time in the last four years, bought the Gatorade Fit drinks for personal or household use.

PepsiCo and counsel for Gumner didn't immediately respond to requests for comment late Friday.

Gumner is represented by Paul K. Joseph, Jack Fitzgerald, Melanie Persinger and Trevor M. Flynn of Fitzgerald Joseph LLP.

PepsiCo is represented by Andrew S. Tulumello and Claire L. Chapla of Weil Gotshal & Manges LLP.

The case is David Gumner v. PepsiCo Inc., case number 8:23-cv-00332, in the U.S. District Court for the Central District of California.

--Additional reporting by Gina Kim. Editing by Jeremy Abrams.