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Mondelez Biscuit Buyers Nab False Ad Cert. On 2nd Try

By **Hailey Konnath**

Law360 (March 8, 2021, 10:33 PM EST) -- A California federal judge on Monday certified two classes of consumers accusing Mondelez Global LLC of hiding the amount of sugar in its belVita breakfast biscuits, ruling they have now put forth a viable damages model almost exactly one year after denying their first class certification bid.

The consumers, led by named plaintiffs Patrick McMorrow, Marco Ohlin and Melody DiGregorio, allege that they didn't realize just how much sugar was in the products when they purchased them and instead believed they were making a healthy choice based on the labels' use of the term "nutritious."

In March 2020, U.S. District Judge Cynthia Bashant denied class certification, finding that the proposed class' damages model **didn't match up** with its claims against the company. In particular, Judge Bashant said their expert's proposed survey for determining damages was at odds with their theory of liability. The consumers had otherwise satisfied the numerosity, commonality, typicality, adequacy and superiority requirements, she said at the time.

But now the consumers have proposed a damages model that works with their claims, Judge Bashant said Monday. The consumers have suggested using a survey that will isolate and measure the price premium attached only to the term "nutritious" using market-based price points, she said.

Judge Bashant said she was undeterred by Mondelez's arguments that the proposed damages model doesn't account for the various possible interpretations of the term "nutritious" and that the model isn't anchored in real-world pricing data.

Under U.S. Supreme Court precedent, a damages model that serves as evidence of damages must measure only those damages attributable to the plaintiffs' theory of liability, and here that theory of liability is that Mondelez mislabeled the products as "nutritious," the judge noted. The consumers' model calculates the damages on a class-wide basis to arrive at the aggregate amount they allegedly overpaid during the relevant time period, and this is enough, Judge Bashant said.

The consumers' damages model "need not isolate and test the various possible interpretations of the term 'nutritious,'" the judge added.

"Under the applicable state consumer protection laws at issue here, plaintiffs need not prove that the putative class members individually relied on the allegedly misleading claims but instead that members of the public are likely to be deceived by those claims," Judge Bashant said.

Judge Bashant certified a pair of classes — one in New York and one in California — of all persons who have purchased belVita products that featured the phrases "nutritious steady energy," "nutritious sustained energy" or "nutritious morning energy." In California, the class period begins in November 2013, while in New York it begins in January 2015, according to the order.

The consumers **sued Mondelez in November 2017**, claiming they had relied on Mondelez's labeling when buying belVita items and believed the products were nutritious and energizing when they really contain high levels of added sugar.

Hoping to attract consumers who are conscious about health concerns, Mondelez introduced its belVita breakfast products in the U.S. in 2012, claiming on the labels for its crunchy biscuits, soft

baked biscuits, breakfast bites and breakfast biscuit sandwiches that the items provide "nutritious steady energy all morning" and are part of a "balanced breakfast," the complaint said.

In their first certification motion, the consumers said one of their experts would create a survey to determine damages by polling participants on what products they would purchase, based on their slogans, with the choices being between "Nutritious Sustained Energy," "Nutritious Steady Energy All Morning" and "4 Hours of Nutritious Steady Energy," or no claims about energy.

While the plaintiffs argued this would show the effect the slogans have on reasonable consumers, Judge Bashant said they missed the mark because the complaint and most of the bid for class certification focused on how much sugar is in the products and how the sugar content undercuts the "nutritious" claim.

"Nowhere in the motion do plaintiffs claim that the products' labels are misleading because the products in fact do not provide the consumer with energy," the judge said at the time. "And while it is true that plaintiffs' complaint broadly takes issue with the claims in general, it is clear that the reason why plaintiffs allege the claims to be misleading is because of the sugar content of the products combined with the use of the word 'nutritious.'"

Counsel for the parties didn't immediately respond to requests for comment Monday.

The class is represented by Paul K. Joseph of the Law Office of Paul K. Joseph PC and Jack Fitzgerald, Trevor M. Flynn and Melanie Persinger of the Law Office of Jack Fitzgerald PC.

Mondelez is represented by Dean N. Panos, Richard P. Steinken, Kate T. Spelman and Alexander M. Smith of Jenner & Block LLP.

The case is *McMorrow et al. v. Mondelez*, case number 3:17-cv-02327, in the U.S. District Court for the Southern District of California.

--Additional reporting by Joyce Hanson and Mike Curley. Editing by Daniel King.