

## PepsiCo Misbrands Gatorade Fit Drinks As 'Healthy,' Suit Says

By **Gina Kim**

Law360 (February 27, 2023, 8:24 PM EST) -- PepsiCo was hit with a proposed class action Friday in California federal court accusing it of misbranding Gatorade Fit drinks as "healthy" and an "excellent" source of vitamins with no added sugar, even though the complaint claims the drinks are basically water flavored with minimal watermelon juice concentrate and preservatives.



PepsiCo was hit with a proposed class action in California federal court accusing the beverage giant of mislabeling its Gatorade Fit drinks as "healthy" and an "excellent source of vitamin A & C." (Court Documents)

In a 15-page **complaint** filed Friday, David Gumner of Orange County, California, accused the beverage giant of misbranding its line of Gatorade Fit products as "real healthy hydration" with "no added sugar" and an "excellent source of vitamins A & C." But PepsiCo's use of the statements on the bottle packaging renders the drinks misbranded, because they don't meet the federal requirements necessary to make such claims, the suit stated.

"Gatorade Fit is essentially water that is flavored with a small amount of watermelon juice concentrate and citric acid and sweetened with stevia leaf extract," Gumner alleged, arguing that the company adds electrolytes and fortifies its drinks with ascorbic acid and other vitamins. Without fortification, the beverages wouldn't even provide 10% or more of vitamins A and C, he added.

"Pepsi fortifies Gatorade Fit such that 500 milliliters (16.9 fl. oz.) of any Gatorade Fit product contains 100% of the FDA's daily recommended value of each of these vitamins," Gumner alleged. "Absent fortification, no Gatorade Fit variety would provide 10% or more vitamin A or C, and none are a significant source of calcium, iron, protein or fiber either."

According to the complaint, products are deemed misbranded in situations where labels make nutrient content claims when the products aren't manufactured in accordance with the federal requirements for making those claims. Generally, nutrient content claims aren't permitted on food labels and are allowed only when a claim is defined by regulation and the requirements for making such claims are met, the suit stated.

While the U.S. Food and Drug Administration allows the use of the word "healthy" in food labeling for products that are a

good source of nutrients, the law requires that the food have at least 10% of the recommended dietary intake or the daily reference value of one or more of vitamins A and C, calcium, protein or fiber, Gumner alleged.

If a nutrient is added to a food product to meet the 10% requirement, that addition must be in accordance with the fortification policy under [Title 21, Section 104.20](#) of the Code of Federal Regulations, the suit stated.

Under that policy, fortification is permitted only in the following four instances: to correct a dietary insufficiency recognized by the scientific community; to restore nutrients to levels representative of the product before storage, handling and processing; to balance vitamin, mineral and protein content when it is done in proportion to the total caloric content; or to avoid nutritional inferiority when replacing a traditional food, according to the complaint.

However, Gumner said, none of those instances applies to the Gatorade Fit beverages. First, vitamin A and C deficiencies are extremely rare. Second, Gatorade Fit isn't a product for which nutrients are lost during storage, handling or processing, he said.

The third basis, which relates to products that are fortified to contain 21 specific nutrients, doesn't apply to Gatorade Fit because the drinks weren't fortified to contain all 21 nutrients, the suit states. And finally, the fourth basis doesn't apply because the drinks at issue don't replace a traditional food, Gumner said.

"None of the Gatorade Fit products meet the 10% requirement without fortification and thus must comply with the fortification policy," Gumner alleged.

"By using the misbranded claims," the complaint said, "Pepsi was able to gain a greater share of the relevant drink market than it would have otherwise and also increased the size of the market."

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 wants to represent all people in the Golden State who at any time in the last four years bought the Gatorade Fit drinks for personal or household use.

The plaintiff seeks relief against PepsiCo for violating California's unfair competition law and for unjust enrichment, as well as attorney fees and costs. Gumner also wants a court order requiring PepsiCo to disgorge all profits obtained through any means of illegal acts or practices and pay restitution. The suit seeks the appointment of Gumner as class representative and his attorneys as class counsel.

Representatives for the proposed class and PepsiCo did not immediately respond to inquiries for comment Monday.

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

Counsel information for the defendants was not immediately available Monday.

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.

--Editing by John C. Davenport.