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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Costco Shoppers Score Cert. In Supplement Labeling Suit

By Shayna Posses

Law360, New York (March 17, 2017, 4:21 PM EDT) -- A California federal judge on Thursday granted class certification in a suit alleging that NBTY Inc. and Costco Wholesale Corp. falsely touted a ginkgo biloba product as improving mental alertness and memory, concluding that the shoppers fulfill all the class requirements.

U.S. District Judge Cathy Ann Bencivengo certified a class of Californians who bought TruNature Ginkgo Biloba with Vinpocetine within the applicable statute of limitations, saying the common question of whether the consumers were duped into buying the product based on allegedly false labeling statements about its health benefits reaches across the class.

"Here, plaintiff's entire lawsuit rides on her claim that TruNature [Ginkgo] provides no benefits and that the statements on the product labels are false. The answer to these questions will be the same for the entire class. Likewise, the determination of whether the statements on the label are material and likely to deceive a reasonable consumer will be the same for the entire class," the judge said. "The answers to these questions will resolve issues that are central to the validity of each class members' claims in one stroke."

Tatiana Korolshteyn originally filed suit in December 2014 over the labeling of TruNature Ginkgo, which represents that the product "supports alertness & memory" and "can help with mental clarity and memory."

The consumer alleged that she bought the product based on these claims, but as it turns out, the representations were false because ginkgo biloba and vinpocetine don't provide any mental clarity, memory or mental alertness benefits. She sought damages and injunctive relief for alleged violations of California's Unfair Competition Law and Consumers Legal Remedies Act.

Judge Bencivengo trimmed the suit in September, holding that Korolshteyn lacks standing to seek injunctive relief because she hasn't shown she's likely to be injured again and can't represent consumers in other states. The judge also pointed out deficiencies in her CLRA damages claim against NBTY.

Korolshteyn came back with a third amended complaint in late October and moved for class certification the next month of California-only UCL and CLRA classes.

However, the classes are identical, the judge noted Thursday, holding that the two laws are "materially indistinguishable" for the purposes of class certification. Thus, she certified one class of California purchasers of the ginkgo biloba product, saying the question of whether the alleged misrepresentations were material to a reasonable person can be

determined on a classwide basis.

The class also meets the other requirements for certification, including numerosity, Judge Bencivengo held, pointing to evidence that Costco sold more than 1 million units of TruNature Ginkgo to thousands of consumers during the class period.

Korolshteyn's claims are typical of the class, as well, the judge said.

"The wrongful conduct (the allegedly false statements) and the resulting harm (the amount paid to purchase TruNature [Ginkgo]) are the same. In other words, none of defendants' allegedly wrongful conduct is unique to the named plaintiff or any member of the proposed class," the judge said. "Therefore, the typicality requirement is satisfied."

The judge wasn't swayed by the companies' contention that the class didn't meet some of the requirements, like commonality and predominance. The companies argued that common questions don't predominate because some customers may have received a benefit from the product and thus aren't entitled to damages, according to the opinion.

But that's beside the point, Judge Bencivengo held, saying the consumer's claims don't rise or fall based on whether individuals experienced health benefits. Rather, the judge said, they're based on whether the representations were deceptive, meaning class members will be entitled to full restitution of the purchase price — regardless of any benefit received — should Korolshteyn prove that the shoppers wouldn't have bought the item if not for the alleged false statements.

Representatives for the parties didn't immediately return request for comment Friday.

The consumer is represented by Patricia N. Syverson, Manfred P. Muecke and Elaine A. Ryan of Bonnett Fairbourn Friedman & Balint PC and Stewart M. Weltman of Siprut PC.

Costco and NBTY are represented by William A. Delgado and T. Jean Mooney of Willenken Wilson Loh & Delgado LLP.

The suit is Tatiana Korolshteyn v. Costco Wholesale Corp., suit number 3:15-cv-00709, in the U.S. District Court for the Southern District of California.

--Editing by Kelly Duncan.

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