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Judge Gives Initial OK To Direct Digital \$4.5M False Ad Deal

By Hannah Meisel

Law360, Springfield (March 9, 2017, 8:10 PM EST) -- An Illinois federal judge on Thursday granted preliminary approval to a \$4.5 million deal to settle a class action over claims that nutritional supplement developer Direct Digital's joint health supplements aren't clinically proven and don't work as advertised.

U.S. District Judge Charles Norgle signed off on the settlement Directs Digital LLC **agreed to last week** after a year of discovery and negotiations in district court. Prior to federal court proceedings, the Seventh Circuit was **tapped to affirm** the district court's class certification, and the U.S. Supreme Court declined to hear the case last winter. Both sides said in their filing last Friday that the cost of continued litigation would outweigh the benefits at this stage.

"Further litigation will requires additional discovery as to the merits of the claims, including additional expert disclosures and depositions of experts," lead plaintiff Vince Mullins wrote in his memorandum in support of the motion. "There will be extensive motion practice, including likely summary judgment motions and appellate practice. This is undoubtedly a complex case, and continued litigation will come at considerable expense to Plaintiff and Direct Digital, and at significant expense of the limited resources of the Court.

Under the settlement agreement, Direct Digital will pay \$4.5 into a settlement fund for the class, which includes purchasers of Direct Digital's Instaflex Joint Support supplement product. Of that, \$400,000 will go toward notice costs.

The agreement also stipulates that Direct Digital will also agree to stop advertising the Instaflex product as promoting joint health and may no longer represent the product as "special, revolutionary or exclusively formulated," Friday's filing said.

Mullins first filed suit in 2013, claiming Instaflex is marketed as "scientifically formulated" and "clinically tested" to improve joint health. Mullins complained, however, clinical studies on the product's main ingredient, glucosamine, have shown the compound does not help joints.

The district court granted class certification in 2014, but Direct Digital appealed the decision and the Seventh Circuit weighed in, affirming the class in 2015. The Seventh Circuit's ruling analyzed and systematically rejected a Third Circuit standard that heavily emphasized plaintiffs' ability to identify class members based on receipts and other hard data. After Direct Digital appealed the class certification again, the U.S. Supreme Court declined to hear the case in February 2016.

Class members are eligible to receive up to \$15 for each bottle of Instaflex they claim they

purchased, up to seven bottles, or \$115, allowing them to recover roughly 20 percent of the \$70 price of a bottle of Instaflex, Friday's memo said. They will not have to show proof of purchase for those claims.

Mullins said the notice plan proposed in the settlement should reach roughly 75 percent of the target audience of Instaflex purchasers, utilizing print and internet ads.

Representatives for neither party could be reached for comment on Thursday.

Mullins is represented by Stewart M. Weltman and Joseph Siprut of Siprut PC, Elaine A. Ryan and Patricia N. Syverson of Bonnett Fairbourn Friedman & Balint PC and Max A. Stein of Boodell & Domanskis LLC.

Digital Direct is represented by Ari N. Rothman, Samantha M. Williams, Benjamin E. Horowitz and Daniel S. Silverman of Venable LLP and Darrell J. Graham of Roeser Bucheit & Graham LLC.

The case is Vince Mullins v. Direct Digital LLC, case number 1:13-cv-01829, in U.S. District Court for the Northern District of Illinois.

--Editing by Joe Phalon.

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