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

9th Circ. Gives Costco False Ad Suit Another Shot

By **Mike Curley**

Law360 (March 8, 2019, 4:38 PM EST) -- The Ninth Circuit has sent a false advertising suit against Costco Wholesale Corp. and NBTY Inc. over a diet supplement back to district court, saying one of its recent decisions in another case undercuts Costco's summary judgment.

In a memorandum Thursday, a three-judge panel wrote that the trial court in Tatiana Korolshteyn's suit against Costco and NBTY, now known as Nature's Bounty Co., didn't have the benefit of its decision in **Sonner v. Schwabe North America** when it rendered a summary judgment in the companies' favor.

Korolshteyn filed the suit in December 2014 alleging the companies violated California's Unfair Competition Law and Consumers Legal Remedies Act by misrepresenting that TruNature Ginkgo Biloba with Vinpocetine, a supplement made and sold by the companies, "supports alertness & memory" and "can help with mental clarity and memory."

In August 2017, a California federal judge **granted the companies summary judgment**, saying the labeling can't be unequivocally false given the existence of studies backing the claims.

Korolshteyn appealed, and in March 2018, Costco and NBTY urged the Ninth Circuit **not to revive the suit**, arguing Korolshteyn didn't prove their claims were false.

The Ninth District held off on deciding pending *Sonner v. Schwabe* until December. In that case, which also concerned California's false advertising statutes, the Ninth Circuit ruled the trial court had put a stricter standard of proof on the plaintiff than is usually needed to survive summary judgment, and the plaintiff only needed to show evidence of a dispute of material fact.

The trial court in Korolshteyn's suit, the panel wrote, used the wrong standard, and under the clarification in *Sonner v. Schwabe*, Korolshteyn's suit survives the summary judgment.

On Korolshteyn's Daubert motions to exclude Costco's expert witnesses, however, the Ninth Circuit wrote that the district court didn't abuse its discretion in allowing them.

The panel wrote that Korolshteyn's concerns about the validity of their evidence are best resolved through the trial process and cross examination and presentation of her own evidence to the contrary.

The panel remanded the case to district court for further proceedings.

Attorneys for Korolshteyn declined to comment.

Representatives for Costco could not immediately be reached for comment Friday.

U.S. Circuit Judges Richard C. Tallman and Sandra Segal Ikuta and U.S. District Judge Stephen R. Bough sat on the panel for the Ninth Circuit.

Korolshteyn is represented by Patricia N. Syverson, Manfred P. Mueck, Elaine A. Ryan and Nada Djordjevic of Bonnett Fairbourn Friedman & Balint PC and Stewart M. Weltman of Siprut PC.

The companies are represented by William A. Delgado and Megan O'Neill of Willenken Wilson Loh & Delgado LLP.

The case is Tatiana Korolshteyn v. Costco Wholesale Corp. et al., case number 17-56435, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Rachel Graf. Editing by Amy Rowe.

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