

Hershey Kisses Goodbye To Food Labeling Class Action

By **Y. Peter Kang**

Law360, Los Angeles (March 31, 2015, 4:42 PM ET) -- A California federal judge on Tuesday tossed a putative consumer class action against The Hershey Co. alleging it misled customers about antioxidants in its chocolate and cocoa products, ruling that the evidence didn't show the labeling was likely to misinform a reasonable consumer.

The court in May 2014 trimmed most of the claims in the suit, preserving only lead plaintiff Leon Khasin's claim under California's Unfair Competition Law that the statement "natural source of flavanol antioxidants" on some Hershey products is "false and misleading," according to court documents.

Hershey argued that Khasin didn't prove he was deceived by the antioxidant statement on the label, and there was no evidence of classwide deception since the plaintiff didn't prove that reasonable consumers would likely have been misled by Hershey's statements. U.S. District Court Judge Edward J. Davila agreed with the defendant and granted the motion for summary judgment in favor of Hershey.

"There is insufficient evidence that the 'natural source of flavanol antioxidants' statement on the challenged Hershey products was likely to mislead reasonable consumers and that the label statements were therefore unlawful on that basis," the judge wrote in the 12-page order. "Even if the court were to accept Khasin's personal logic to arrive at the conclusion that the phrase ... misleads consumers because it appears to violate FDA regulations, 'not every regulatory violation amounts to an act of consumer fraud.'"

Judge Davila said that under California law, Khasin can't obtain relief by arguing how consumers could react; he must show how consumers actually do react.

"Without such proof, Khasin does not satisfy the UCL's 'reasonable consumer' test," the judge wrote.

Khasin also didn't prove he lost money or property or demonstrate economic injury as required by the UCL, the judge said.

"Khasin proffers no evidence to show economic injury, but rather claims that his purchases are 'legally worthless' because they are inaccurate representations of what he thought he was purchasing," Judge Davila said.

The plaintiff's complaint, filed in April 2012, alleged that Hershey products he had purchased had unlawful representations on the packaging, including misleading antioxidant nutrient content claims,

nutrient content claims without required disclosures, healthy diet claims, sugar-free claims, unlawful serving sizes, the listing of polyglycerol polyricinoleic acid as “PGPR” and failure to disclose vanillin, according to the order.

In November 2012, the court dismissed claims for violations of the Magnuson-Moss Warranty Act and the Song-Beverly Act while also rejecting Hershey's contention that the Ninth Circuit's ruling on Lanham Act claims in *Pom Wonderful LLC v. The Coca-Cola Co.* barred the state law claims, since the appeals court held private parties could not seek to enforce U.S. Food and Drug Administration labeling regulations.

An attorney for the plaintiff told Law360 on Tuesday they didn't agree with the decision.

“While plaintiffs have the highest regard for Judge Davila, we believe this opinion to be in contrast to California and Ninth Circuit law,” Richard Barrett said. “We are currently weighing our options.”

A representative for Hershey did not immediately respond to a request for comment Tuesday.

Khasin is represented by Richard R. Barrett of Law Offices of Richard R. Barrett PLLC and Ben F. Pierce Gore of Pratt & Associates.

Hershey is represented by Steven A. Zalesin, Travis J. Tu and Michelle W. Cohen of Patterson Belknap Webb & Tyler LLP and John W. Fowler of Bergeson LLP.

The case is *Leon Khasin v. The Hershey Co.*, case number 5:12-cv-01862, in the U.S. District Court for the Northern District of California.

--Additional reporting by Sindhu Sundar. Editing by Christine Chun.