

Protein manufacturers beware: Muscle Milk in hot water again

October 2, 2018

California federal Judge M. James Lorenz partially certified various classes and subclasses of consumers who had sued protein supplement Muscle Milk maker Cytosport, Inc., alleging that its product labels overstate its nutritional benefits. *Chayla Clay, et al v. Cytosport, Inc.*, case no. 3:15-cv-00165, US Dist. Ct., S.D. Cal., Sept. 7, 2018.

Judge Lorenz granted in part and denied in part the plaintiffs' motion to certify nationwide classes and subclasses in California, Florida and Michigan in their suit against Cytosport Inc. The plaintiffs, consumers who purchased Cytosport's ready-to-drink shake and/or protein powder products, claimed the nutritional fact listing on the shake overstated how much protein was in it; and that the protein powder, although displayed with a "lean" or "lean lipid" special blend label, was not any leaner than similar products in the market that weren't marketed as lean.

The judge held that the plaintiffs met the necessary requirements to certify nationwide classes under California's Unfair Competition Law (UCL) and False Advertising Law (FAL) insofar as they relate to the protein content statements on the shake label and the leanness claims on the powder label, noting all the alleged misconduct came out of California even though the products were sold nationwide. He also held that the nationwide class period would go back four years before the suit was filed.

"The fact that some products were purchased in one state rather than another should be immaterial to the choice of law under the facts of the present case, because the alleged misconduct occurred entirely in California," the judge said. "Defendant points to no state with a greater interest in enforcing its laws under the facts of this case."

In addition, regarding the protein powder "lean" labeling allegation, the judge also certified California subclasses based on the UCL and FAL claims, and regarding the shake protein content statements, the judge certified California subclasses relating to the UCL, FAL and California's Consumer Legal Remedies Act (CLRA). The judge also certified Florida and Michigan subclasses relating to such claims.

Cytosport agreed to settle a labeling class action for \$5.3 million in November 2013 over descriptions of Muscle Milk as "healthy." Cytosport argued that the release of claims in that case extended to the labeling claims here. However, the Court said the newer claims aren't based on the same facts.

The court denied class certification for some claims, including warranty claims and assertions about L-glutamine.

Cytosport has already sought to appeal the district court's grant of class certification. See *Clay v. Cytosport*, No. 18-80123 (9th Cir. September 21, 2018). To be determined as to whether Cytosport prevails. In the meanwhile, should you have questions about your ingredient and labeling claims, please reach out to qualified counsel at Dentons.

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