

FDA On The Case, Kind Tells Judge In 'Natural' Label MDL

By **Pete Brush**

Law360, New York (May 23, 2016, 7:43 PM ET) -- Kind LLC told a New York federal judge Monday that the U.S. Food and Drug Administration's work in determining how "all natural" labeling can be used militates for a stay of multidistrict litigation that claim the snack bars are loaded with artificial stuff, but consumers countered the agency process could take years and yield no action.

U.S. District Judge William H. Pauley III asked at a hearing on Kind's motion to dismiss whether a stay would be the best outcome given the agency is six months into an effort to regulate such labeling, a process that has yielded at least 8,000 public comments.

The multidistrict litigation consolidating more than a dozen class actions stems from consumers who claim they paid premium prices for snack bars because they were deceived by labels claiming the bars are made from natural ingredients.

Consumers attorney Todd S. Garber of Finkelstein Blankinship Frei-Pearson & Garber LLP told the judge the FDA effort could take years and result in no action. Moreover, Garber said, the consumers have actionable claims related to Kind's labeling related to genetically modified organisms that go beyond questions over its "all natural" labels.

"Why should we wait around for years?" Garber said. He also asserted that, because the GMO and "all natural" claims are related, discovery should proceed on both.

Kind counsel Dale Giali of Mayer Brown LLP rejected the notion that plaintiffs' GMO claims were discernable.

"It is simply a variant on their 'natural' claims," Giali said.

Kind also argues that the Ninth Circuit's ruling last year in *Astiana v. Hain Celestial Group* gives the agency primary jurisdiction over all-natural labeling. Hundreds of similar cases are pending, all of which will benefit from the outcome of the agency's work, Giali said.

"The FDA is on the job," Giali said. "It's the FDA's job to be on the job."

Judge Pauley didn't give any strong clues as to how he might rule, although he did wonder whether the litigation would benefit from an amended complaint breaking out the particulars of GMO-related claims.

“We can be clearer” on the GMO-related allegations, Garber said.

The lawsuits had also made allegations related to Kind's use of "healthy" labeling. But a recent FDA decision allowing the snack maker to use that work has taken that question off the table, the sides said.

The consumers were represented by Todd S. Garber of Finkelstein Blankinship Frei-Pearson & Garber LLP.

Kind was represented by Dale Giali of Mayer Brown LLP.

The litigation is In re: Kind, case number 1:15-md-02645, in the U.S. District Court for the Southern District of New York.

--Editing by Brian Baresch.

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