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NY Judge Says Kind Bar Deceptive Ad Suit Can Proceed

By **Ryan Boysen**

Law360 (February 11, 2019, 9:36 PM EST) -- Consumers suing Kind LLC for allegedly mislabeling its snack products can go forward with their suit after a two-year pause, a New York federal court ruled Monday, saying recent months had made it clear the FDA doesn't intend to issue new guidelines on the term "natural" anytime soon.

The consumers are suing Kind for portraying its products as both "non-GMO" and "all natural," and in 2016 U.S. District Judge William H. Pauley III stayed the "all natural" claims pending a rollout of new guidelines on that term that the U.S. Food and Drug Administration had said it was working on. The "Non-GMO" claims **were stayed** last year to avoid splitting the two issues apart.

Now that the FDA's "natural" initiative has stalled and six months have passed since the court-set soft deadline of August 2018, Judge Pauley said it was time to move forward with or without the agency's new rules.

"On balance, this court concludes that the stay should be lifted," Judge Pauley said. "Given that there is no reason to continue the stay on the 'non-GMO' claims and that neither party wishes to litigate the claims in piecemeal fashion, it makes sense to begin discovery. It is time for this multi-district litigation to move forward."

The parties had also been waiting for the U.S. Department of Agriculture to release its own guidelines on the "non-GMO" phrase, in which GMO stands for genetically modified organism. That agency dragged its feet as well — sparking a **lawsuit** by an impatient nonprofit in the process — but ultimately released its new rules in December by establishing the National Bioengineered Food Disclosure Standard.

The FDA had announced it would begin formulating new guidelines for the term "natural" in marketing and labeling in 2015, but in contrast to the USDA's effort the FDA initiative appears to have stalled.

Judge Pauley said there is "no indication whether the FDA is earnestly working toward a uniform 'natural' standard, or whether it has shelved that effort."

"As such, this court explained that it 'cannot sit idly by on an illusory assurance that something is likely to happen,'" he said, referring to his decision to set a loose deadline of August 2018 for the FDA to put up or shut up.

The MDL consolidating more than a dozen class actions stems from consumers who say they paid premium prices for snack bars because they were deceived by labels claiming they are made from "non-GMO" or "all natural" ingredients, when in reality the bars contain both genetically modified and heavily processed ingredients.

The consumers moved to lift the stay on the "all natural" claims last year, but in September Kind **fought back** against that request, saying it was still entirely possible that the FDA's new guidelines would play an outsize role in the litigation.

Neither party responded Monday for requests for comment.

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

Kind is represented by Dale Giali of Mayer Brown LLP.

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

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