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Canada Dry Ginger Ale Drinkers Move To Settle Label Dispute

By **Rick Archer**

Law360 (January 7, 2019, 7:02 PM EST) -- Representatives of a class of Canada Dry ginger ale consumers have asked a California federal court to approve a settlement potentially worth millions to end their claims the soda maker misleadingly labeled its product as made with "real ginger."

Lead plaintiffs Jackie Fitzhenry-Russell and Gegham Margaryan — who argued that despite its labeling, Canada Dry contained only trace amounts of ginger — asked the court Friday to approve the class settlement, saying Keurig Dr. Pepper Inc. agreed to compensate up to 1 million California Canada Dry drinkers 40 cents per soda product purchased and modify the "real ginger" marketing claim.

"KDP shall be permitted, at their option, to use any of the following phrases in the labeling of the products: 'ginger,' 'real ginger,' or 'natural ginger,'" in combination with one of the following three words in the same typeface and size (or in the case of audio, same volume and speed): 'taste,' 'extract,' or 'flavor,' " the motion said.

The 2016 suit claimed Canada Dry was labeled as "made from real ginger," but that lab tests found the soda had "no detectable amount of any ginger compounds" and that even Dr. Pepper's own testing showed the amount of ginger was below the threshold of human taste. The suit argued this misleading claim led customers to pay a higher price for the soda than they would have otherwise.

Dr. Pepper sought to exclude the class expert and argued a class could not be certified because consumers have different interpretations of what the "real ginger" claim meant, but in June U.S. Magistrate Judge Nathanael Cousins **certified the class**. He said Dr. Pepper's own marketing research found a significant percentage of its consumers relied on the "real ginger" claim as he rejected the challenge to the expert.

A trial in the case was scheduled to begin Thursday, according to court documents.

In their settlement motion, the plaintiffs said additional putative class actions making similar claims were filed in Massachusetts, New York, Illinois, **Missouri, Texas** and Florida after the class was certified.

They said the Illinois, Missouri, Texas and Florida claims were consolidated in Missouri state court, and that mediation produced a 49-state, \$11.2 million settlement. The 49-state settlement received preliminary approval Dec. 19, according to court records.

Individual settlements have been reached in the Massachusetts and New York cases, the California plaintiffs said.

According to the California motion, under the terms of both the 49-state and California settlements, Canada Dry buyers will be eligible for a payment of 40 cents per soda purchased, to a maximum of \$5.20 without proof of purchase or \$40 with proof.

While the nationwide settlement would reduce individual payments on a pro rata basis once the dollar cap is reached, Dr. Pepper will be allowed to terminate the California settlement if it receives more

than 1 million claims because of the ease of filing claims without proof of purchase, they said.

"It is estimated that there are only 2.3 million class members and that the likely number of claims based on typical claim rates is around 100,000 so the receipt of more than 1 million valid claims could be evidence of such fraud," they said.

The two class representatives would receive \$5,000 each and \$2.25 million in legal costs.

"We're very pleased Dr. Pepper has agreed to change their Canada Dry advertisements in the exact way we've been asking since the beginning of the case," Adam Gutride, a counsel for the California class, told Law360 Monday.

Counsel for Dr. Pepper in the California case declined comment, and representatives of the company and counsel for the 49-state plaintiffs did not immediately respond to requests for comment Monday.

The California class is represented by Adam J. Gutride, Seth A. Safier, Marie A. McCrary and Matthew T. McCrary of Gutride Safier LLP, Hovanes Margarian of the Margarian Law Firm and Daralyn J. Durie, Adam Brausa and David McGowan of Durie Tangri LLP.

Dr. Pepper is represented in the California case by Jonathan A. Shapiro, Ariel D. House, Van H. Beckwith and Monica H. Smith of Baker Botts LLP.

The 49-state class is represented by Craig D. Cherry of Haley Olson PC, Matthew H. Armstrong of the Armstrong Law Firm LLC, David C. Nelson of Nelson & Nelson, Attorneys at Law PC and Joshua H. Eggnatz and Michael J. Pascucci of Eggnatz Pascucci.

The California case is Jackie Fitzhenry-Russell et al. v. Keurig Dr. Pepper Inc. et al., case number 5:17-cv-00564 in the United States District Court for the Northern District of California.

The Missouri case is Julie George et al. v. Keurig Dr. Pepper Inc. et al., case number 1822-CC11811 in the Circuit Court of the City of St. Louis.

--Editing by Amy Rowe.