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SDNY Judge Not Sweet on Dannon's Bid for a Preliminary Injunction

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In a battle of leading yogurt beverage makers, Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York recently denied Dannon's application for a preliminary injunction in its false advertising suit against Chobani. The result of Judge McMahon's decision is that Chobani can continue to sell its yogurt drinks with labeling that claims its drinks contain 33% less sugar than Dannon's yogurt drinks. *Danone, US v. Chobani*, No. 18-cv-11702 (S.D.N.Y. Jan. 23, 2019). Although Judge McMahon found that Dannon is likely to succeed on its claims that Chobani's labeling is misleading under the Lanham Act and N.Y. General Business Law § 349, she concluded that Dannon was not entitled to a preliminary injunction because it had not shown it would be irreparably harmed absent an immediate injunction.

Dannon makes the nation's leading-selling drinkable yogurt for kids: "Danimals Smoothies." Danimals are available in eight flavors and sold in 3.1 fluid ounce bottles. All flavors currently contain 9 grams of sugar per serving. Chobani's competing drinkable yogurt, called "Gimmies," comes in three flavors and is sold in 4 fluid ounce bottles. Two Gimmies flavors – "Cookies & Cream Crush" and "Bizzy Buzzy Strawberry" – contain 9 grams of sugar per bottle, while the "Chillin' Mint Chocolate" flavor contains 7 grams.

Chobani's labels claim that Gimmies contains "33% less sugar than the leading kids' drinkable yogurt," which Chobani conceded refers to Dannon's Danimals. On the front and top of the Gimmies packaging, this claim is unqualified. On the back, the claim appears in much smaller typeface with an asterisk saying: "Chobani Gimmie Milkshakes: avg. 8 g sugar; leading kids' drinkable yogurt: avg. 12 g sugar, per 4 fl oz serving."

Chobani asserted that, according to its calculations, the average of the sugar content of the three Gimmie flavors rounds down to 8 grams per 4 fluid ounces. Since Danimals come in a smaller serving size than Gimmies, Chobani then calculated how much sugar a Danimals would contain if it came in a 4 fluid ounce package and found that it would contain nearly 12 grams. Because 12 grams is 33% more than 8 grams, Chobani concluded that Gimmies contained 33% less sugar than Danimals per fluid ounce.

The court found that the Gimmie labeling, while not literally false, would likely be found misleading because it required consumers to perform multiple calculations and search for "fine-print" disclaimers in order to understand the labeling properly. Drawing on the Second Circuit's recent decision in *Mantikas v. Kellogg*, which we blogged about here, Judge McMahon noted that a reasonable consumer "should not be expected to look beyond misleading representations on the front of the box to discover the truth regarding the advertisement on the side of the box."

Nonetheless, Judge McMahon found Dannon's preliminary injunction motion wanting. She found that Dannon had not shown irreparable harm from the misleading labeling, as Dannon's total market share for yogurt products grew to its second-highest level ever following Gimmies' introduction, and that subsequent decreased sales of kids' drinkable yogurt were not shown to be attributable to Gimmies' misleading labeling. The court also rejected Dannon's arguments that Chobani's marketing harmed Dannon's reputation as a purveyor of healthy snacks because Danimals do in fact have more sugar per ounce than Gimmies.

The court also weighed the impact such an injunction would have on Chobani, finding that it would cause substantial harm. Chobani presented evidence showing that a preliminary injunction would be "financially ruinous," as it would essentially amount to a forced recall that would cost the company millions of dollars in wasted product, lost sales, and logistical expenses, as well as jeopardizing relationships with retailers and consumers.

Finally, the court noted that a preliminary injunction was not necessary to advance the public's interest in truthful advertising, as Chobani had already begun revising its packaging to address Dannon's complaints and the products with the current labeling will either be sold or expire in a few weeks.

The opinion points to the likely significance of the Second Circuit's *Kellogg* decision, underscoring the inadequacy of fine-print disclosures to remedy what the court determined was likely to be implicitly false advertising. However, it also illustrates the importance of establishing likely irreparable harm that false advertising plaintiffs face when seeking the extraordinary remedy of a preliminary injunction.

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