

Bad Break for belVita Breakfast Biscuits

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Earlier this week, Judge Cynthia Bashant of the Southern District of California granted a plaintiff's second bite at the apple (or rather biscuit) to certify a class of purchasers of belVita breakfast biscuits in *McMorrow v. Mondelez International, Inc.* The plaintiff alleged that Mondelez falsely labeled its belVita biscuits as providing "NUTRITIOUS SUSTAINED ENERGY;" "NUTRITIOUS STEADY ENERGY ALL MORNING;" and "4 HOURS OF NUTRITIOUS STEADY ENERGY." The plaintiff contended those statements were false or misleading in violation of California and New York law because the breakfast biscuits are not nutritious, and actually contain high amounts of added sugar and can increase the risk of serious diseases, including CHD, stroke, and other morbidity.

The Court denied the plaintiff's first attempt at class certification because his proposed consumer survey (a conjoint analysis) and damages model did not match his theory of liability—a prerequisite under the Supreme Court's decision in *Comcast v. Behrend*. Specifically, the Court ruled that while the plaintiff alleged that he paid more for the biscuits because of the "nutritious" labeling claim, his damages expert failed to isolate the specific price premium allegedly attributable to the term "nutritious," and instead sought to measure the premium attached to the label claims in their entirety. In other words, when measuring the value of a product advertised as providing "NUTRITIOUS STEADY ENERGY," the plaintiff's expert failed to account for the value of a product that provided "STEADY ENERGY."

The plaintiff's expert listened to the Court's concerns, and revised his damages model to compare the value of the product both with and without the "nutritious" claim. The Court found that this revised model satisfied *Comcast* because, among other things, it isolated the "nutritious" claim that formed the basis of the plaintiff's theory of liability and adequately accounted for supply-side factors including real-world pricing data and actual quantities of products sold during the class period. The Court further noted that the defendant's specific critiques about the details of the proposed survey, including that the plaintiff's experts had failed to provide evidence that a consumer's subjective preference for the term "nutritious" would translate into higher market prices, was not relevant at the class certification stage and that the defendant's other concerns went to the weight, but not the admissibility, of the survey evidence.

This is not a nail-in-the-coffin for Mondelez, as it will have another opportunity to challenge the expert's findings on summary judgment or at trial. As was the case in *Zakaria v. Gerber Products Co.*, a case cited by the defendant, a proposed damages model may be accepted for the limited purposes of class certification but nevertheless rejected on the merits once the calculations are actually performed and presented to the court. If the expert's calculations demonstrate that, as Mondelez argued, a preference for the term "nutritious" did not actually translate into higher market prices, the plaintiff's claims could be de-certified and/or dismissed on summary judgment.

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