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## Kind Bar 'Natural' Suit Can't Wait For FDA, Consumers Say

By Cara Salvatore

Law360, New York (April 7, 2016, 5:14 PM ET) -- Consumers suing Kind LLC over the health profile of its trendy snack bars urged a New York federal court Wednesday not to halt their multidistrict litigation, even as the U.S. Food and Drug Administration begins a long-awaited push to define "natural" for food.

In a number of class actions that were consolidated in New York federal court in August, the consumers accuse Kind of misbranding its bars, taking exception with the phrases "all natural," "non-GMO" and "healthy." The first two appear on the wrappers of all 37 Kind bars sold in the U.S., and the last on seven bar varieties, the plaintiffs say.

In its March motion to dismiss, Kind noted that the FDA has recently mounted an effort to set parameters for the term "natural." The initiative was prompted partially by federal courts' frequent requests for guidance on the issue, the FDA said in the Federal Register.

But the consumers say that the FDA focus is a red herring.

"Kind itself concedes (in fine-print ingredient lists) that its bars contain synthetic ingredients, and ... independent tests demonstrate the bars contain GMO ingredients," the consumers said Wednesday.

Kind "does not even deny that it violated the law. ... This court should not delay adjudicating any aspect of this case in the vague and desperate hope that the FDA may one day in the future provide guidance," they said. "It is speculative at best that the FDA ever will decide to issue regulations."

The FDA started asking for comments on the use of "natural" on food wrappers in November. It's collecting the information in a pre-rulemaking file.

Courts were already recognizing that the FDA had not spoken up on the topic, Kind said. "Now, given FDA's request, the case for staying plaintiffs' 'natural' claims ... is all the more warranted and straightforward," it said in the March motion.

Months before that request, though, the FDA had issued a warning letter to Kind in March 2015. It was directed towards the "romance language" in small print on the back of Kind wrappers, Kind has said; the regulator took a dim view of the usage of "healthy" there. The class actions flew after that warning letter was released, Kind said.

The actions were consolidated in August. Three class actions and five individual actions are left. In November, a judge appointed Finkelstein Blankinship Frei-Pearson & Garber LLP, Ahdoot & Wolfson PC and Pearson Simon & Warshaw LLP as co-lead interim class counsel in the consolidated litigation. They beat out Faruqi & Faruqi LLP for the top spot.

The plaintiffs are represented by Theodore Walter Maya of Ahdoot & Wolfson PC, Todd Seth

Garber and Greg Blankinship of Finkelstein Blankinship Frei-Pearson & Garber LLP, K.E. Richman of Richman Law Group LLP and Daniel Warshaw of Pearson Simon Warshaw & Penny LLP.

Kind is represented by Dale Giali, Henninger Bullock, Keri Borders, Rebecca Johns and Matthew Provance of Mayer Brown LLP.

The suit is In re: Kind LLC "Healthy and All Natural" Litigation, 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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