

## Abbott Can't Ax False Ad Attack In Probiotic IP Row

By **Jasmin Jackson**

*Law360 (March 22, 2022, 7:41 PM EDT)* -- An Illinois federal judge held Tuesday that the maker of Similac infant formula, Abbott Laboratories, can't boot its rival's false advertising counterclaims in a patent suit over baby probiotics, finding that imprecise phrases used to puff up a product can be significantly misleading.

U.S. District Judge John Z. Lee said in the opinion that Evolve BioSystems Inc.'s false advertising and unfair competition counterclaims against Abbott Laboratories — over an allegedly overhyped rival infant probiotic — cleared the court's "low bar." This allows Evolve to keep the counterclaims tacked onto its patent infringement suit over ingredients in its competing product, Evivo, that help preterm infants metabolize milk.

According to Judge Lee, Abbott's label and commercial statement for Similac Probiotic Tri-Blend are "sufficient facts to support" Evolve's counterclaims that Abbott misled consumers on the competing product, which allegedly infringes patents covering Evivo by touting an unproven amount of gut-improving bacteria.

"Consumers could plausibly understand Abbott's statements as conveying a factual, testable information and reasonably rely upon them in making purchasing decisions," Judge Lee said.

Matthew Chivvis of Morrison & Foerster LLP, lead counsel for Evolve, told Law360 on Tuesday that "the court's ruling confirms that defendant's unsupported claims of product superiority do not qualify as mere puffery and that they can support causes of action for false advertising."

Evolve filed suit against Abbott in August 2019 and said that its Similac probiotic infringed a patent for its competing product that aids premature babies' digestion, which is exclusively licensed to Evolve by the Regents of the University of California. The university is also a named plaintiff.

Evolve amended the suit the following October and added a second patent that is also licensed out by the university.

Judge Lee refused to let Abbott escape the suit in November 2020, finding that the pharmaceutical giant was "closely following" the patented technology.

Later that month, Abbott filed false advertising counterclaims against Evolve in a sealed motion. Evolve responded with similar counterclaims in February 2021.

The following May, Abbott sought to dismiss Evolve's counterclaims and argued that phrases on its Similac product, including "unique blend" and "potent," couldn't be considered significantly misleading since they were "vague, unactionable 'claim[s] of superiority.'"

But Judge Lee said in his Tuesday order that although "vague, highly subjective or exaggerated commercial statements or advertisements may be deemed puffery," the court must still take all of the information into account and analyze the context in which it is provided.

"It is a small step to infer that customers of infant probiotic products rely on such commercial language as 'poten[t],' 'stabl[e],' and 'high-quality' to denote the products' function and efficacy," Judge Lee said.

Abbott and its counsel did not immediately respond to requests for comment on Tuesday.

The patents-in-suit are U.S. Patent Nos. 8,197,872 and 9,200,091.

Evolve Biosystems and the Regents of the University of California are represented by Matthew A. Chivvis, James Hancock and Parisa Jorjani of Morrison & Foerster LLP, and Todd H. Flaming of Todd Flaming LLC.

Abbott is represented by Kevin J. Boyle, Robert N. Kang, Charles B. Klein, Michael R. Rueckheim and Nimalka R. Wickramasekera of Winston & Strawn LLP.

The case is Evolve BioSystems Inc. et al. v. Abbott Laboratories, case number 1:19-cv-05859, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Adam Lidgett. Editing by Robert Rudinger.