

Russell, Spalding Neverflat Buyer Spar Over Ball Quality Suit

By **Rick Archer**

Law360 (December 17, 2018, 6:04 PM EST) -- A Russell Brands customer is seeking class certification in New York federal court for a suit claiming the company's Spalding Neverflat basketballs don't live up to the name, while the company is seeking dismissal, saying there is no proof customers were harmed or misled.

In motions filed Friday, lead plaintiff Jaish Markos sought class certification for his suit claiming the Neverflat balls don't bounce as high as the Kentucky-based Russell claims, and lose significant air pressure over the course of a year, while Russell sought summary judgment, saying Markos had neither the evidence of customers in general being misled or of any personal loss that would give him standing to sue.

"Markos never measured how high his basketball bounced and never measured air pressure in his ball. He never contacted Spalding about the product warranty and Spalding's 100 percent satisfaction guarantee, but instead sought legal advice shortly after his purchase," Russell said.

Markos, a New York resident, said in his suit filed in June that he purchased a Neverflat basketball online in June 2015. He said that Russell's marketing material stated the ball would maintain its full air pressure of seven to nine pounds per square inch and a rebound height of 54 to 60 inches for at least a year without the need to reinflate, which the packaging claimed was "10x longer" than other balls.

However, he claimed, independent laboratory tests found the balls actually lose about 2 psi over 200 days, and that the initial rebound height is actually 46 to 48 inches and drops about 5 percent over the 200-day period. Other basketball models that retailed for a fraction of Neverflat's price had higher rebounds when tested, and neither he nor other Neverflat buyers would have paid the premium if they had known, he claimed.

"Given that Spalding's widespread representations, which were communicated to every consumer on Spalding's website, the products' packaging, and on the products themselves, were false, plaintiff's claims are ideally suited for class treatment," Markos said in the memorandum in support of the class certification motion.

In its summary judgment motion, however, Russell said Markos has not provided any evidence of pressure loss or rebound reduction of the ball he bought, but only testimony of his own subjective dissatisfaction with its performance, and that he never sought a refund from the company. Therefore, he had failed to show any losses and had no standing to file, the company argued.

It also argued that Markos' experts failed to disprove the "10x" claim, did not conduct an "air loss analysis" and that the rebound height claims were on a website "barely any putative class members could have possibly seen." It said Markos had provided no evidence that Neverflat buyers as a group were misled by the statements.

"He proffers no consumer surveys purporting to demonstrate that, like him, a reasonable consumer would be misled by Spalding's Neverflat statements into thinking that the basketballs will maintain the exact same 'rebound height' for one year regardless of the circumstances," it said.

In a phone interview Monday Jason Setzer, one of the counsel for Markos, said his client's standing comes from what their testing identified as a common design defect in all Neverflat balls, and that the name of the product is itself an obviously misleading claim.

"You don't need a consumer survey when that's so clear in terms of labeling," he said.

Counsel for Russell declined comment.

Markos is represented by Jason P. Sultzer and Joseph Lipari of the Sultzer Law Group PC, Michael R. Reese and George V. Granade II of Reese LLP, and Melissa S. Weiner of Pearson Simon & Warshaw LLP.

Russell is represented by Michael R. McDonald and Joshua S. Levy of Gibbons PC.

The case is Jaish Markos v. Russell Brands LLC, case number 7:16-cv-04362, in the United States District Court for the Southern District of New York.

--Editing by Dipti Coorg.