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FOOD & BEVERAGE LITIGATION UPDATE

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LEGISLATION, REGULATIONS & STANDARDS

Senate Bill to Investigate PFAS Introduced

Sens. Debbie Stabenow (D-Mich.), Mike Rounds (R-S.D.) and Gary Peters (D-Mich.) have introduced legislation that would providing funding for the U.S. Geological Survey (USGS) to conduct environmental sampling for per- and polyfluoroalkyl substances (PFAS), which can be used in food packaging. According to the senators' press release, "There are more than 3,000 chemicals containing PFAS but less than 30 of these substances can be detected using current technology. The data collected by the USGS could be used to better assess the likely health and environmental impacts of exposure to PFAS chemicals and determine how to address contamination moving forward."

ASA Denies Doritos Ad Complaint

The U.K. Advertising Standards Authority (ASA) has declined to uphold a complaint arguing that Walkers Snacks targeted children under 16 with a product high in fat, salt or sugar by showing an advertisement for Doritos before YouTube videos. The complaint asserted that the "media or context" of the ad targeted children under 16, but ASA found that Walkers had taken "a range of steps to ensure that the ad was not targeted to children under the age of 16, using both age restrictions and interest based factors." Walkers applied YouTube age-targeting restrictions by not approving the ad for families and instructing YouTube to show the ad to users logged into accounts with a self-reported age of 18 or older.

Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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"We understood from the complainant that the ad had been seen by an 8-year-old child who was not signed into YouTube, using a device used by both adults and children," ASA held. "We acknowledged that the actions taken by Walkers Snacks had not prevented that child from being served the ad. However, we considered on balance that, because YouTube was a medium primarily used by those aged 18 and over and Walkers Snacks had targeted the ad at users with a self-reported or inferred age of 18 and over, and they had used additional factors including significant interest-based targeting to further exclude under-16s from the target audience, Walkers Snacks had taken reasonable steps to appropriately target the ad."

LITIGATION

GFI Challenges Missouri Definition of "Meat"

The Good Food Institute (GFI) and Tofurky Co. have filed a civil-rights action alleging that Missouri "criminalizes truthful speech by prohibiting 'misrepresenting' a product as 'meat' if that product is 'not derived from harvested production livestock or poultry.'" *Turtle Island Foods v. Richardson*, No. 18-4173 (W.D. Mo., filed August 27, 2018). The lawsuit responds to Missouri's agriculture bill, which was amended to include the contested language in June 2018 and took effect August 28.

The complaint alleges that the statute seeks "to prevent plant-based and clean meat producers, including Tofurky, from accurately informing consumers what their products are: foods designed to fulfill the roles conventional meat has traditionally played in a meal." The plaintiffs argue that consumers are unlikely to be confused because "historically, the term 'meat' has had multiple meanings, including to describe the edible part of any food, such as a fruit or nut"; further, "clean meat" products "that use such terms like 'deli slices,' 'burger,' 'sausages,' or 'hot dogs'" feature labels that contain "accompanying qualifying and descriptive language" to "accurately convey to consumers the products' ingredients." In addition, "in the decades that plant-based producers have used the terms 'beef,' 'meat,' 'sausage' and other analogues together with accompanying language explaining that the products are plant based, meatless, vegan, or vegetarian, there have been no consumer-protection lawsuits in Missouri—or any other state—challenging the accuracy of plant-based meat products' marketing or packaging."

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ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility

GFI and Tofurky allege a violation of the First Amendment, arguing that the statute is "facially overbroad because it violates the rights of third parties not before the court, including those who would sell clean meats, and because it restricts substantially more speech than the Constitution permits in comparison to its plainly legitimate scope," as well as a violation of the Commerce Clause "because the Statute aims to put Plaintiff Tofurky at a disadvantage in Missouri in order to protect local economic interests from interstate competition."

Court Dismisses Aspartame Claims Against Diet Dr Pepper

A California federal court has dismissed with prejudice a putative class action alleging that Diet Dr Pepper is falsely advertised as a weight-loss product. *Becerra v. Dr Pepper/Seven Up, Inc.*, No. 17-5921 (N.D. Cal., entered August 21, 2018). The plaintiff alleged that the term "diet" leads consumers to believe the beverage is a weight-loss or weight-management product despite that aspartame could allegedly cause weight gain. The court, which previously dismissed the complaint three times, found implausible "that reasonable consumers would believe consuming Diet Dr Pepper leads to weight loss or healthy weight management absent a change in lifestyle." The court held that the plaintiff again failed to plead facts that could pass a "reasonable consumer" test and that the plaintiff failed to sufficiently plead a causal link between aspartame and weight gain.

Plaintiffs Question Nutritional Benefits of Jamba Juice Smoothies

Jamba Inc. and Jamba Juice Co. face a putative class action alleging the company's advertising deceives and misleads consumers about the nutritional value and ingredients of its smoothie beverages. *Turner v. Jamba, Inc.*, No. 18-5168 (N.D. Cal., filed August 23, 2018). The plaintiffs allege that Jamba's smoothies contain more sugars than typical sodas or soft drinks rather than being "simple and nutritionally on par with eating whole fruits and vegetables." In addition, the complaint asserts that the smoothies contain concentrated fruit juice blends—predominantly apple, pear and grape—rather than "whole fruits and veggies." The plaintiffs also allege that the sherbets and frozen yogurts used in the smoothie blends contain "numerous additives," including sugar, corn syrup, caramel coloring, carrageenan, citric acid, guar gum, lactic acid, locust bean gum and pectin. Claiming violations of California's and New York's

inspections, subject to FDA, USDA and FTC regulation.

consumer-protection statutes, the plaintiffs seek class certification, declaratory judgment, injunctive relief, damages and attorney's fees.

"Organic" Salt Does Not Exist, Complaints Allege

A plaintiff has filed two putative class actions alleging the manufacturers of "organic salt" violate consumer-protection laws against deceptive advertising because salt is an inorganic mineral that "cannot be identified as organic" pursuant to the National Organic Program. *Garcia v. HimalaSalt-Sustainable Sourcing, LLC*, No. 18-7410 (C.D. Cal., filed August 23, 2018); *Garcia v. Frontier Natural Prods. Coop.*, No. 18-7457 (C.D. Cal., filed August 24, 2018). In both complaints, the plaintiff alleges that she paid a premium for the products—HimalaSalt's Himalayan salt and Simply Organic's flavored salts—because she believed them to be "more healthful than regular salt." Claiming violations of California's consumer-protection statutes, the plaintiff seeks class certification, injunctive relief, restitution, damages and attorney's fees in both cases.

MEDIA COVERAGE

The Guardian Reports on Vanilla, Cream Content in U.K. Ice Cream

A U.K. television show has aired a report on the ingredients in locally available vanilla ice creams, finding that many products do not contain cream, fresh milk or vanilla. "One in five of the ice-creams examined by *Which?* contained none of the three ingredients shoppers might reasonably expect to find in vanilla ice-cream," *The Guardian* reports. The program reportedly found that ice cream products replaced cream and milk with "partially reconstituted dried skim milk, and in some cases, whey protein" while vanilla "was often replaced with a general 'flavouring.'" *The Guardian* notes that the United Kingdom has "no requirements for manufacturers to meet before a product can be called ice-cream." *VICE* compared U.K. regulations to those promulgated by the U.S. Food and Drug Administration, finding that the United States has stricter standards that dictate a product's minimum levels of dairy fat to earn "ice cream" on its label.

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