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## FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

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### LEGISLATION, REGULATIONS & STANDARDS

#### NAD Recommends Modifications on Tortilla Packaging

BBB National Programs' National Advertising Division has recommended that Gruma Corp. discontinue and modify certain claims on its tortilla products. Olé Mexican Foods, Inc., a competitor, challenged Gruma's packaging claims. NAD said in a [news release](#) that it found certain "Zero sugar" and "oG sugar" claims were supported and recommended that Gruma discontinue its "1.5G Total Fat Per Serving" claim on all challenged products. NAD also recommended modifications to the challenged products' net carb calculation to use total carbohydrates minus dietary fiber for the 54g serving size as well as discontinuation of "oG Sugars" and "Zero Sugar" claims for the Mission Zero Net Carb Sundried Tomato Basil Tortilla. Gruma agreed to comply with NAD's recommendations.

### LITIGATION

#### California Court Dismisses Labeling Claim Against Licorice Maker

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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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A California federal court has dismissed a consumer’s claims that the maker of Wiley Wallaby licorice misleadingly labels its products as “natural” and “naturally flavored” while containing malic acid, an artificial ingredient. *Trammell v. KLN Enterprises, Inc.*, No. 23-1884 (S.D. Cal., filed September 12, 2024). The defendant moved to dismiss, alleging the plaintiff failed to plead his claims with sufficient particularity that the malic acid used in the product is artificial. The court agreed, holding that conclusory allegations that a flavoring is artificial are insufficient to state a claim. “As Plaintiff once again acknowledges in his [first amended complaint], Wiley Wallaby Very Berry Licorice is a licorice candy,” the court stated. “And nowhere on the Wiley Wallaby Very Berry Licorice labeling does it state that the product is ‘all natural,’ ‘100% natural,’ or ‘free of artificial ingredients.’”

## EPA Faces FOIA Suit from Center for Food Safety

The Center for Food Safety (CFS) has sued the U.S. Environmental Protection Agency (EPA) under the Freedom of Information Act (FOIA), alleging the agency unlawfully withheld public records pertaining to its actions on pesticide registrations. *Center for Food Safety v. EPA*, No. 24-2677 (D.D.C., filed September 18, 2024). CFS alleged in its complaint that EPA is violating FOIA because it has failed to produce responsive records to its request for EPA’s assessment of human health and ecological impacts of pesticides and tank mixes in a timely manner. CFS seeks declaratory and injunctive relief.

## Consumers Allege Safeway Deceptively Advertises Wine Sales

A group of consumers from California and Oregon have filed a proposed class action alleging Safeway deceptively markets its wine prices at stores nationwide. *Tempest v. Safeway*, No. 24-



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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 inspections, subject to FDA, USDA and FTC regulation.



6553 (N.D. Cal., filed September 18, 2024). The plaintiffs alleged that Safeway advertises wine at sales prices to Safeway Rewards members but its time-limited member discounts “are fake.” The plaintiffs argue that the company claims rewards members can buy wine at discounted prices during specific time periods, after which the promotions will end and wine will be sold at the original reference prices. “At the end of each promotion, Safeway just renews the promotion to keep the Safeway Rewards member price at the purported ‘discount’ price,” they alleged. “Safeway’s reference prices have never been prevailing market retail prices for Safeway Rewards members who purchase wine from Safeway. The reference prices are overstated and do not represent a bona fide price at which Safeway’s wine products were previously sold to Safeway Rewards members.”

## Court Certifies Dave’s Killer Bread Protein Labeling Class Action

A federal court in California has certified a consumer class action alleging Dave’s Killer Bread, Inc. and Flowers Foods, Inc. violated federal and state regulations by including unlawful labels on their bread products. *Swartz v. Dave’s Killer Bread, Inc.*, 21-10053 (N.D. Cal., filed September 20, 2024). The plaintiff alleged Dave’s unlawfully included protein content claims on the front of its bread products without also including the protein content calculated using the FDA-mandated protein digestibility-corrected amino acid score (PDCAAS) method as a percentage daily value on the nutrition facts panel. The defendants challenged the plaintiff’s claim that he would not have purchased the product or would have paid less for it had he known the “true nature of the products,” because he made a single purchase of the product after filing the lawsuit. The court disagreed, noting his claim is based on the allegation that he paid a price premium for the product, which had an unlawful label. “That single purchase does not contradict the allegation that plaintiff suffered an injury in fact,” the court said. “Nor does it

demonstrate that the injury of paying a premium is not traceable to the defendants' conduct, or that it cannot be redressed."

## Consumer Alleges Abbott Laboratories' Toddler Drinks Make Prohibited Health Claims

Abbott Laboratories faces a proposed class action alleging it makes prohibited nutrient content claims on its Go & Grow 360 Total Care by Similac Toddler Drink. *Gutierrez v. Abbott Labs.*, No. 24-1146 (E.D. Cal., filed September 5, 2024). The plaintiff alleged that Abbott capitalizes on parents' increasing desire to purchase food for their young children that provides physical health benefits. She pointed to labeling showing the product checking off items such as immune support, brain development and digestive health, and that two servings of the product have "28 important nutrients for growth and development." "By making nutrient content claims on its packages' front labels, Defendants mislead consumers into believing that foods for children under two should be purchased based on the quantities of the listed nutrients, when other considerations are just as, or more, important," she argues, also highlighting that the product contains added sugars, which are not recommended for young children.

## Attorney Ordered to Pay Attorneys' Fees for 'Frivolous' Coffee Suit

A Florida federal court has ordered a New York plaintiff's attorney to pay \$144,047 to Big Lots for fees the company incurred defending a proposed class action stemming from the company's coffee products. *Durant v. Big Lots*, No. 23-0561 (M.D. Fla., filed September 25, 2024). The attorney, Spencer Sheehan of Sheehan & Associates, P.C., represented a woman alleging the retailer used misleading labels on its coffee products. The plaintiff alleged the products yielded less brewed coffee than

the packaging promised. The court dismissed the plaintiff's complaint in March, entering judgment for Big Lots in May. In July, the court sanctioned Sheehan for bad faith, filing a frivolous lawsuit and fraud on the court. In a footnote in the court's fees ruling, the court also said that Sheehan, "a New York lawyer who is not admitted to practice law in the state of Florida, had engaged in a pattern of adding himself as co-counsel on cases in federal courts in Florida but—despite representing that applications were forthcoming—never moved for pro hac vice admission." The court declined to add a lodestar enhancement requested by Big Lots that would have brought the total fee amount to \$180,058.



## SCIENTIFIC / TECHNICAL ITEMS

## Study Purportedly Finds Evidence for Widespread Human Exposure to Food Contact Chemicals

A study has reportedly found that 25% of more than 14,000 known food contact chemicals (FCCs) were found in human samples. Geueke et al., "[Evidence for widespread human exposure to food contact chemicals](#)," *Journal of Exposure Science & Environmental Epidemiology* (September 17, 2024). The authors compared the more than 14,000 known FCCs to five biomonitoring programs and three metabolome/exposome databases. The authors reported that they found evidence for the presence of 3,601 FCCs in humans, including 194 FCCs from human biomonitoring programs, 80 of which have hazard properties of high concern. "The data presented here lend support to the possible contribution of [food contact materials (FCMs)] towards human exposure to FCCs," the authors said. "Since there are various FCCs with hazard properties of concern among the chemicals detected in humans and FCMs, their use in FCMs should be restricted to minimize human exposure."

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