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LEGISLATION, REGULATIONS AND STANDARDS

NOSB to Remove Five Nonorganic Substances from List of Allowed Substances

The U.S. Department of Agriculture's National Organic Standards Board (NOSB) has removed five non-organic nonagricultural substances—egg white lysozyme, cyclohexylamine, diethylaminoethanol, octadecylamine, and tetrasodium pyrophosphate—from the National List of Allowed and Prohibited Substances governing the use of synthetic and non-synthetic substances in organic food production and handling. After determining that these substances "are no longer necessary or essential for organic handling" based on public comments and supporting documents, NOSB decided to let their use exemptions expire on September 12, 2016.

According to NOSB, suitable alternatives or new processing and handling practices have eliminated the need for (i) egg white lysozyme as a "processing aid/preservative for controlling bacteria that survived the pasteurization process of milk that is used for cheese manufacture"; (ii) cyclohexylamine, diethylaminoethanol and octadecylamine "for use only as a boiler water additive for packaging sterilization"; and (iii) tetrasodium pyrophosphate "for use only in meat analog products." *See Federal Register*, August 3, 2016.

Civil Rights Organization Files OSHA Complaints Against Farming Company

The Southern Poverty Law Center (SPLC) has urged the U.S. Occupational Safety and Health Administration to investigate Farm Fresh Foods, LLC, arguing the company forced sanitation workers to race against one another to carry and unpack 80-pound crates of chicken. The company allegedly required workers to unload raw chicken after cleaning the processing plant without washing their hands or changing clothes; SPLC asserts that workers' concerns about contaminating the chicken were ignored. Farm Fresh also allegedly denied workers bathroom breaks, disciplined them for walking around empty-handed and jeered at them while they worked.

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“It’s clear from the treatment of these workers that Farm Fresh Foods has little regard for its employees,” Naomi Tsu, SPLC deputy legal director, said in a July 26, 2016, press release. “Farm Fresh needs to listen to workers rather than retaliating against them. We’ve seen this happen again and again in the poultry industry—these companies must stop putting their bottom line before workers’ health and rights.”

LITIGATION

Natural Food Co. to Pay \$1.5 Million in Justice Dept. Agreement on Federal Immigration Laws

Following an investigation into potential criminal violations of federal immigration laws, Mary’s Gone Crackers Inc. will pay \$1.5 million and establish a corporate compliance program but will not be prosecuted, the U.S. Department of Justice has announced.

The investigation determined that 48 of the company’s employees were ineligible to work in the United States; Mary’s informed Immigration and Customs Enforcement that the employees had left the company, but further investigation found that Mary’s hired at least 13 of those employees back under different names. In addition to the \$1.5-million payment, Mary’s must establish an anonymous tip line for employees to report noncompliance issues, provide I-9 training to employees and report compliance measures to the U.S. Attorney’s Office for two years.

WLF Files Amicus Brief Urging Ninth Circuit to Strike San Francisco SSB Warning Law

The Washington Legal Foundation (WLF) has filed an amicus brief with the Ninth Circuit Court of Appeals arguing the court should enjoin a San Francisco statute requiring advertisements of sugar-sweetened beverages (SSBs) to disclose health warnings related to their consumption. *Am. Beverage Assoc. v. City of San Francisco*, Nos. 16-16072 and 16-16073 (9th Cir., amicus brief filed August 4, 2016). The brief argues that the government cannot compel speech unless the speech is designed to dispel deception, and San Francisco has failed to show the warning prevents consumer deception.

“The First Amendment protects not only the right to speak but also the right not to speak,” WLF Chief Counsel Richard Samp said in an August 4, 2016, press release. “In the absence of evidence that advertisements

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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for sugar-sweetened beverages are deceiving consumers, soft drink manufacturers should not be required to include ominous health warnings in their ads.”

Projected Class Action Targets Barilla for Pasta Slack Fill

Four consumers have filed a putative class action against Barilla S.p.A. alleging the company sells its specialty pasta and standard pasta products in nearly identical boxes but underfills the specialty boxes, amounting to unpermitted slack fill. *Berni v. Barilla S.p.A.*, No. 4196 (E.D.N.Y., filed July 28, 2016).

In addition to its traditional pasta products, Barilla sells gluten-free, “Protein Plus” and whole-grain varieties of pasta. The specialty and traditional pastas appear to be sold in similar amounts, the complaint asserts, but the specialty boxes actually contain less pasta—while one box of penne contains 454 grams, for example, the “Protein Plus” variety contains 411 grams and the gluten-free version contains 340 grams, despite being sold in similarly sized boxes. This discrepancy results in the specialty boxes including about 10 to 25 percent non-functional slack fill, the plaintiffs allege. For an alleged violation of the New York Business Code and an unjust enrichment claim, the plaintiffs seek class certification, restitution, attorney’s fees and an injunction requiring Barilla to repackage the pastas.

Drew’s “All Natural” Dressings Contain Synthetic Ingredients, Putative Class Alleges

A consumer has filed a projected class action against Drew’s LLC, maker of Drew’s salad dressings and marinades, alleging the company misrepresents its products as “all natural” because they contain xanthan gum, disodium phosphate, lactic acid and citric acid. *Haack v. Drew’s LLC*, No. 16-6022 (S.D.N.Y., filed July 28, 2016). The complaint cites draft guidance from the U.S. Department of Agriculture distinguishing natural and synthetic ingredients and guidelines from the U.S. Food and Drug Administration to support the argument that a reasonable consumer would be confused by the company’s use of “natural” on its packaging.

“Consumers lack the meaningful ability to test or independently ascertain or verify whether a product is natural, especially at the point of sale,” the plaintiff asserts. “Consumers would not know the true Nature of the ingredients merely by reading the ingredients label.” For alleged fraud and violations of New York and other state consumer-protection laws, the plaintiff seeks class certification, an injunction, treble damages and attorney’s fees.

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Topps Alleges “Squeezy Squirt Pop” Infringes Patent

The Topps Co. has filed a patent and trade-dress infringement lawsuit against Koko’s Confectionery & Novelty Inc. alleging that Koko’s Squeezy Squirt Pop copies some features of the Juicy Drop lollipop. *Topps Co. v. Koko’s Confectionery & Novelty Inc.*, No. 16-0595 (S.D.N.Y., filed July 26, 2016). The complaint targets Squeezy Squirt Pop’s logo, font, bright and vivid colors set against a black background, flavor names and the appearance of the word “pop” as infringing trade dress.

In addition, Topps asserts ownership of a patent on “a combination lollipop candy and flavored liquid dispenser”; a Squeezy Squirt Pop “combines a lollipop with a flavored liquid in a squeeze dispenser that is then squirted into a trough-shaped cavity in the lollipop itself so that it can then be licked off.” For alleged patent infringement, trade dress infringement and a violation of the Lanham Act, Topps seeks an injunction, an order recalling the product from distributors, an accounting, treble damages and attorney’s fees.

OTHER DEVELOPMENTS

Texas Fines Blue Bell \$850,000 for *Listeria* Outbreak, with Conditions

The Texas Department of State Health Services has announced that Blue Bell Creameries must pay \$850,000 in connection with a 2015 outbreak of *Listeria monocytogenes* linked to the company’s ice cream manufacturing facilities.

Blue Bell must pay \$175,000 within 30 days, but the remaining balance of \$675,000 will not be due if the company follows the terms of its agreement with the state for 18 months.

The agreement requires Blue Bell to notify the agency of a presumptive positive test result for *Listeria* and to maintain “test and hold” procedures, through which the company must ensure that its ice cream is free of pathogens before shipping the products to retailers. *See Texas Press Release*, July 29, 2016.

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Hampton Creek Paid Employees to Purchase Just Mayo During Funding Round

Hampton Creek founder Josh Tetrick reportedly directed his employees to purchase Just Mayo, an eggless mayonnaise, at grocery stores while it pursued funding from investors, according to a *Bloomberg* report. Five former workers provided *Bloomberg* with receipts, expense reports, cash advances and emails telling employees, “We need you in Safeway buying Just Mayo and our new flavored mayos. . . . And we’re going to pay you for this exciting new project! Below is a list of stores that have been assigned to you.”

Tetrick told *Bloomberg* that the purchases were part of a quality-control program to assess Just Mayo from a customer’s perspective, but the survey database of that program did not account for hundreds of purchases, the report indicates. Additional emails also suggest the “Buyouts” project’s purpose was related to sales inflation, including one message that said, “The most important next step with Safeway is huge sales out of the gate. This will ensure we stay on the shelf to put an end to Hellmann’s factory-farmed egg mayo, and spread the word to customers that Just Mayo is their new preferred brand.” The former employees reportedly told *Bloomberg* that they were directed to do whatever they wanted with the products after purchasing them—from donating them to charity to throwing them away.

Another correspondence reportedly shows that employees were instructed to call grocery store managers and ask about Just Mayo to stoke demand and encourage the stores to order more product. Emails from a member of the corporate partnership team of Hampton Creek apparently told employees to pretend to be customers and lie if necessary; sample scripts include pretenses of catering or planning “back-to-school” events. *See Bloomberg*, August 4, 2016.

Hampton Creek gained national media attention when emails from the American Egg Board purportedly revealed an initiative to remove Just Mayo from shelves. The Good Food Institute will reportedly file a lawsuit on August 8, 2016, alleging the U.S. Department of Agriculture failed to fulfill three of its Freedom of Information Act requests related to the scandal. Details about the allegations against the American Egg Board appear in Issue [578](#) of this *Update*. *See Politico*, August 5, 2016.

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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.



USPTO Denies “World’s Healthiest Grocery Store” Registration to Whole Foods

The U.S. Patent and Trademark Office has rejected Whole Foods Market’s attempt to trademark the phrase “World’s Healthiest Grocery Store,” finding the statement to be merely descriptive and puffery. The company currently owns a trademark in “America’s Healthiest Grocery Store,” which it reportedly earned by using the mark in commerce for several years before registration. The rejection notice cites other examples of rejected puffery, including Boston Beer Co.’s attempt to register “The Best Beer in America.” Whole Foods may update and refile its application within six months. *See The Washington Post*, July 28, 2016.

SCIENTIFIC/TECHNICAL ITEMS

NAP Issues Report Targeting Potential Relationship Between Chemical Exposures and Obesity

The National Academies Press (NAP) has published a report summarizing a March 2015 workshop held by the National Academies of Sciences, Engineering, and Medicine on *The Interplay Between Environmental Chemical Exposures and Obesity*. The report summarizes both animal model and human epidemiological studies allegedly linking exposure to environmental chemicals “to weight gain and to glucose tolerance, insulin sensitivity, inflammation, and other aspects of the metabolic syndrome.” It also examines the “possible biological pathways and mechanisms underlying the potential linkages.”

Noting the purported efforts of so-called endocrine disruptors during prenatal and early childhood development, the report focuses on the increase in chemical production alongside obesity rates and raises questions about the metabolic effects of various substances such as “organophosphates and carbamates; polychlorinated biphenyls (PCBs); polybrominated biphenyls and fire retardants; heavy metals; solvents; and plastics, such as phthalates and bisphenol A (BPA).” In addition, the report addresses the potential role of infectious diseases and treatments, including antibiotics, in childhood obesity.

Additional details about the workshop appear in Issue [555](#) of this *Update*.