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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

NOSB Votes to Continue Allowing Hydroponics

The National Organic Standards Board (NOSB) has reportedly voted to continue allowing food grown in water-based nutrient solutions to be labeled "organic," rejecting a challenge brought by organic-food producers. The board will also allow aquaponics, which combine hydroponic systems with farmed fishing operations, but will prevent products grown with aeroponics—plants suspended in air with the roots exposed—from carrying the "organic" label. The 8-7 vote was reportedly criticized by farmers who argue that some of the benefits of organic farming are its effects on the ecosystem, while hydroponics separates plants from their natural habitats.

FDA Questioning Health Claim Linking Soy and LDL Reduction

The U.S. Food and Drug Administration (FDA) is proposing to revoke an authorized health claim linking consumption of soy protein to reduction of the risk of heart disease. FDA first authorized the claim in 1999 after concluding that evidence supported the proposition that soy protein lowered low-density lipoprotein (LDL) cholesterol. The agency states that although

"some evidence continues to suggest a relationship," studies published since 1999 have presented findings inconsistent with the health claim and that the "totality of currently available scientific evidence calls into question the certainty of this relationship." Other possible benefits of soy consumption will not be affected by the proposed rule.

If the claim is revoked, FDA says it will allow the use of a qualified health claim, which requires a lower standard of scientific evidence and would allow the industry to use qualifying language explaining the limited evidence of the link between soy and heart disease. FDA has opened a 75-day comment period for the proposed rule.

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LITIGATION

Ninth Circuit Affirms Dismissal of Copyright Claims for Lack of Jurisdiction

A California federal court has affirmed the dismissal of copyright infringement claims for lack of personal jurisdiction, holding that "a theory of individualized targeting" will not support specific jurisdiction. *Axiom Foods, Inc., v. Acerchem Int'l, Inc.*, No. 15-56450 (9th Cir., entered November 1, 2017). Axiom Foods, Inc., which supplies organic and "chemical-free" products to food and beverage companies, filed a lawsuit in California after Acerchem International's United Kingdom subsidiary distributed a newsletter to clients that included Axiom's "As Good As Whey" and "Non-GMO" logos. The lower court dismissed the case, finding that Acerchem UK maintains its principal place of business in the United Kingdom and "does not conduct business in the United States," adding that no more than 10 recipients of the newsletter were located in California.

Considering the jurisdictional issue, the Ninth Circuit focused on whether Acerchem UK aimed its business activities at California. In addition to the 10 identified California residents, Acerchem UK contacted 55 recipients of unknown residence that may have had legal or operational contacts with California; the court found the connection too attenuated and declined to consider the 55 contacts as possibly linked to California. Further, most of the

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.

email recipients were located in Western Europe. "The alleged infringement barely connected Acerchem UK to California residents, much less to California itself," the court found.

Cold-Pressed Juice Putative Class Action Filed Against Forager Project

Forager Project faces a putative class action alleging that its "cold-pressed" juices undergo a second, high-pressure processing, allegedly amounting to misrepresentation on the product labeling. *Berger v. Forager Project, LLC*, No. 17-6302 (E.D.N.Y., filed October 28, 2017) The plaintiff asserts that after the juices are cold-pressed and bottled, Forager subjects the bottles to high-pressure treatment that reduces "the biological, enzymatic and bacterial activity which existed after cold-pressing to an extent that is material to reasonable consumers." In addition, the plaintiff alleges that Forager does not disclose this second step on its labeling, misleading consumers who want cold-pressed juice because of its "greater integrity in composition than if it were made through a centrifugal machine." The complaint further argues that the name "Forager Project" contributes to consumer deception because "[f]oraging has traditionally referred to the gathering of food from the natural, undisturbed environment." Claiming violations of New York consumer-protection law, false advertising, fraudulent misrepresentation, implied warranty of merchantability and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

The putative class action joins a number of other lawsuits alleging similar claims against World Waters, Hain Celestial Group and PepsiCo filed in the latter half of 2017.

Sugarfina Alleges Sweitzer Infringed Candy IP

Candy company Sugarfina has filed a lawsuit alleging that Sweitzer LLC copied its "innovative, distinctive, and elegant product and packaging" as well as its "types of candy" and "protectable names." *Sugarfina, Inc. v. Sweitzer LLC*, No. 17-7950 (C.D. Cal., filed October 31, 2017). Sugarfina asserts that it has approximately 140 lines of candy, presented in "museum-

quality Lucite that emphasizes the artisanal and rarefied quality of a gourmet small-portion tasting experience," and that Sweitzer copied the "size, shape, color or color combinations, texture, graphics and sales techniques" in its candy packaging and store designs.

Claiming trade-dress infringement under the Lanham Act, federal and common law trademark infringement, unfair business practices, patent and copyright infringement, Sugarfina seeks damages, corrective advertising, accounting, restitution and attorney's fees. Sugarfina filed a similar infringement claim against Sweet Pete's in June 2017.

"Ambiguous" Consent Agreement Dooms Trademark Registration Appeal

The Trademark Trial and Appeal Board has affirmed a refusal to register microbrewery 8-Bit Aleworks' application for a trademark despite an agreement between the company and 8bit Brewing Company specifying that 8bit did not object to the use. *In re 8-Brewing LLC*, No. 86760527 (T.T.A.B., entered October 30, 2017). The court found the consent agreement to be ambiguous and confusing as to which marks were covered by the agreement and vague as to how trade dress and packaging would distinguish the products. Further, the agreement failed to demonstrate how the companies' trade channels were different. Accordingly, the court held that "the shortcomings in the consent agreement are such that consumer confusion remains likely" and affirmed the refusal to register the mark.

SCIENTIFIC / TECHNICAL ITEMS

Study Reports Labeling Food as Snacks Increases Consumption

Researchers at the University of Surrey have evaluated the impact of "snack" labeling compared to "meal" labeling, reportedly finding that those who ate products labeled as snacks consumed "significantly more in terms of nearly all measures of food intake

than those in the other conditions." J. Ogden et al., "'Snack' versus 'meal': The impact of label and place on food intake," *Appetite*, October 23, 2017. Eighty female subjects ate food labeled or presented as either (i) a snack to be consumed standing or eaten from a container or (ii) a meal to be eaten from a plate at a table. The research reportedly showed that subjects consumed "significantly more" chocolate and more total mass and calories when the food was labeled as a snack. The authors concluded that "label and presentation influence subsequent food intake both independently and combined which is pertinent given the increase in 'snacking' in contemporary culture."

Consumers Confused By Natural, GMO and Organic Labeling

Researchers have reportedly found that consumers are unsure what "natural," "organic" and "Non-GMO Project Verified" mean when the phrases appear on food labels. Konstantinos G. Syrengelas et al., "Is the Natural Label Misleading? Examining Consumer Preferences for Natural Beef," *Applied Economic Perspectives and Policy*, October 2017; Brandon R. McFadden, et al., "Effects of the National Bioengineered Food Disclosure Standard: Willingness to Pay for Labels that Communicate the Presence or Absence of Genetic Modification," *Applied Economic Perspectives and Policy*, October 2017.

To investigate a petition to the U.S. Department of Agriculture asserting that "natural" labeling misleads consumers, researchers conducted an online choice experiment to determine whether including a definition of "natural" on a label deterred or encouraged study participants to pay a premium for steak. The researchers apparently found that the participants were unwilling to pay a premium if they either identified themselves as familiar with the definition of "natural" or if they were provided with the definition at the time of purchase.

Another October 2017 study in the same journal attempted to examine how consumers understand whether a food has genetically modified ingredients (GMO) and surveyed subjects about their willingness to pay for foods labeled "organic" as opposed to "non-GMO." Researchers concluded that many of the subjects did not distinguish between the two labels and did not identify differences in the label claims before determining

whether they indicated willingness to pay premiums for the "organic" and "non-GMO" products.