ISSUE 666 | March 16, 2018

FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

USDA Withdraws Organic Livestock and Poultry Rule

The U.S. Department of Agriculture (USDA) has issued a final rule withdrawing the Organic Livestock and Poultry Practices Rule, leaving existing organic regulations in effect. The USDA announcement noted that withdrawal was opposed by "consumers, organic farmers, organic handlers, organizations representing animal welfare, environmental, or farming interests, trade associations, certifying agents and inspectors, and retailers."

In January 2018, a group that included the Union of Concerned Scientists, the Humane Society of the United States, the Natural Resources Defense Council and Whole Foods Market published a full-page ad in *The Washington Post* expressing their opposition to the withdrawal of the rule.

ASA Rules "Natural" Claims Misleading

The U.K. Advertising Standards Authority (ASA) has upheld a complaint that a "100% Natural Ingredients" claim was misleading because the processing of the snack bar's ingredients did not comply with the Food Standards Agency's (FSA's) criteria for use of the term "natural." United Biscuits submitted a list of

Mark Anstoetter

ingredients for its “Go Ahead Goodness” snack bars and asserted that all ingredients were made in a traditional manner. After ASA referred to FSA guidance, it determined that the refining of sunflower oil involves the use of chemical solvents and the process of creating reduced-fat cocoa powder involves the addition of potassium carbonate. Because the FSA guidance says neither the solvent extraction process nor the use of acid or alkali solutions is “in line with consumer expectations of ‘natural,’” ASA ruled that consumers would not consider the ingredients natural and that the advertisement was misleading.

French Baker Fined For Keeping Bakery Open

A French bakery owner who opened his storefront seven days a week to accommodate tourist crowds has reportedly been fined €3,000 for violating a regional law mandating that bakeries close at least one day each week. Cédric Vaivre, owner of Boulangerie du Lac, operates the only bakery in his Aube town; during previous summers, he received an exemption to Aube’s prefectural decree allowing him to stay open all week but did not obtain similar permission in 2017. Christian Branle, mayor of Vaivre’s town, reportedly told local newspaper *L’Est éclair,* “In a tourist area, it seems essential that we can have a business open every day during the summer. There is nothing worse than closed shops when there are tourists.” An Aube official reportedly told Vaivre his only solution is to open a second bakery.

LITIGATION

Quaker Oats Wins Dismissal of Flavored-Oatmeal Litigation

A California federal court has dismissed with prejudice a putative consolidated class action alleging that Quaker Oats Co. falsely advertised its instant oatmeal as containing maple syrup, finding that the plaintiffs were unable to allege conduct not preempted by the federal Food, Drug and Cosmetic Act (FDCA). *In re Quaker Oats Maple & Brown Sugar Instant Oatmeal Litig.,* No. 16-1442

816.474.6550
manstoetter@shb.com

Madeleine McDonough
816.474.6550
202.783.8400
mmcdonough@shb.com

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.

(C.D. Cal., entered March 8, 2018). The court previously found that flavoring claims were preempted by the FDCA and the Nutritional Labeling and Education Act, but the court also allowed the plaintiffs to replead so it could consider preemption from the standpoint of maple as a sweetener.

In its reconsideration, the court noted that, "to evade preemption at this stage, Plaintiffs would need to either allege that the Products' labels violate the FDA's sweetener requirements *or* raise claims that are not addressed by federal law." Because the amended complaint did not allege violations of specific federal laws or raise other claims, the court again found that all counts were preempted by the FDCA and denied leave to amend.

Slack-Fill Complaint Filed Against Cookie Dough Bites Maker

A consumer has filed a putative class action alleging boxes of Cookie Dough Bites, made by Taste of Nature Inc., contain up to 58 percent slack fill. *Gillespie v. Taste of Nature, Inc.,* No. 18-2105 (C.D. Cal., filed March 13, 2018). The complaint alleges that the candies are packed in a plastic pouch inside the box that makes the box appear to be more than half full, but if the candy is removed from the pouch and poured back into the box, the box appears to be about one-third full. Claiming violations of California's consumer-protection laws, the plaintiff seeks class certification, injunctive relief, damages, restitution and attorney's fees.

Dairy Queen Alleges "Blizzard" Water Infringes Trademarked Treats

American Dairy Queen Corp. has filed a lawsuit challenging W.B. Mason Co.'s application for a "Blizzard" trademark for its bottled water. *Am. Dairy Queen Corp. v. W.B. Mason Co., Inc.*, No. 18-0693 (D. Minn., filed March 12, 2018). Dairy Queen alleges that it trademarked "Blizzard" for milkshakes in 1946 and has extended the mark to ice milk, ice cream, soft serve, machinery and restaurant services. The complaint asserts that the Blizzard marks are "widely recognized by the general consuming public of the United States as a designation of source of Dairy Queen's goods

and services." Alleging trademark infringement, unfair competition by false designation, trademark dilution, unfair competition and violation of Minnesota's deceptive trade practices law, Dairy Queen seeks an injunction barring W.B. Mason from using the Blizzard mark, destruction of packaging and advertising materials, award of profits generated from use of the infringing mark and attorney's fees.

Lawsuit Alleges "Keenwah" Snacks Have Minimal Quinoa

I Heart Foods Inc. faces a putative class action alleging that its "I Heart Keenwah" Quinoa Puffs contain mostly rice and pea protein rather than the quinoa implied by the product name. *Ransom v. I Heart Foods Inc.*, No. 18-1465 (E.D.N.Y., filed March 8, 2018). According to the complaint, Quinoa Puffs are made from quinoa flour, brown and white rice flours and pea protein concentrate. Manufacturing methods for "puffed extrusion foods" require ingredients that have a low fat and high starch content, the plaintiff asserts, and the high levels of lipids in quinoa suggest that the product is mostly made of rice. In addition, the complaint argues that because pea protein has five times the amount of protein contained in quinoa, the label's claim of five grams of protein per serving is likely due to the pea protein. Alleging violations of New York consumer-protection laws, breach of warranties, fraud and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

"Pasture-Raised" Egg Lawsuit Settlement Announced

The Organic Consumers Association (OCA) has announced the settlement of a lawsuit alleging Handsome Brook Farms mislabeled eggs as "Pasture Raised" despite being sourced from non-pasture producers or from producers not meeting standards for pasture-raised products. OCA noted that since the suit was filed, Handsome Brook's new management has developed internal audit processes and supply chain management to ensure compliance with American Humane Association standards for pasture-raised eggs. The settlement includes Handsome Brook's

agreement to participate in independent third-party auditing of its sales and purchase records for 18 months.

Seventh Circuit Dismisses Hacky Sack Suit Against Wendy's

The U.S. Court of Appeals for the Seventh Circuit has ruled that the Guinness World Records holder for hacky sack kicks has no valid claims for false advertisement, false endorsement or right of publicity against Wendy's International Inc., which distributed a hacky sack with a children's meal and challenged children to break the plaintiff's record. *Martin v. Wendy's Int'l Inc.*, No. 15-6998 (7th Cir., entered March 9, 2018). An Illinois district court previously dismissed the plaintiff's suit for failure to state a claim.

"No reasonable consumer would think [the plaintiff] endorsed the footbags," the appellate court held, because "Guinness World Records" was printed on both the toy and its packaging and the instructional card identified the plaintiff as the holder of the record rather than an endorser. The court also found that "no reasonable consumer would believe that free toys accompanying kids' meals to encourage intra-family play were the same types of items used to set world records." Finally, the court held that the exception for truthful identification of a performer in the Illinois Right of Publicity Act barred the plaintiff's identity-based claim.