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## LEGISLATION, REGULATIONS & STANDARDS

### USDA Redistributes Responsibilities Among Agencies

The U.S. Department of Agriculture (USDA) has reallocated responsibilities between its agencies, resulting in the elimination of the Grain Inspection, Packers, and Stockyards Administration (GIPSA). The Agricultural Marketing Service will absorb GIPSA's previous responsibilities as well as some program areas formerly overseen by the Farm Service Agency. The rule took effect November 29, 2018, finalizing changes initially announced in September 2017.

### EFSA Issues Report on Foodborne Parasites

The European Food Safety Authority (EFSA) has issued a scientific opinion on "the occurrence and control of three parasites that may be transmitted via food, namely *Cryptosporidium* spp., *Toxoplasma gondii*, and *Echinococcus* spp.," which cause the diseases "cryptosporidiosis, toxoplasmosis, and alveolar echinococcosis (AE) and cystic echinococcosis (CE), respectively." EFSA identified "many gaps in our knowledge of food-borne transmission of the three parasites" but suggested that

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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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“consumer preferences for raw, fresh produce may contribute to increasing the likelihood of infection.” EFSA further noted that commercial washing of fresh produce, “particularly with the reuse of washwater, may spread localised contamination throughout a batch,” resulting in contamination of ready-to-eat produce.

EFSA also researched the prevalence of contamination in meat, finding that “consumer preferences for animals raised with access to outdoor conditions, for not freezing meat prior to consumption, and for eating meat raw or rare may increase the likelihood of exposure to infective *T. gondii* tissue cysts.”

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## LITIGATION

### Ocean Spray Malic Acid Class Partially Certified

A California federal court has partially certified a class of consumers that alleges Ocean Spray Cranberries Inc. misled them into believing that their products were free of artificial flavoring but contained malic acid. *Hilsley v. Ocean Spray Cranberries Inc.*, No. 17-2335 (S.D. Cal., entered November 29, 2018). The court first found that the proposed class met the requirements of typicality, numerosity, commonality and adequacy of the class representative before focusing on the predominance issue for the breach of express warranty and breach of implied warranty allegations. The plaintiff asserted that damages for those allegations could be determined with a survey that apparently identified the price premium that consumers would pay based on the “no artificial flavors” representation. Ocean Spray argued that the “proposed damages model is fatally flawed” because of the use of “diverse comparative products, retailing concepts, juice percentages and an irrelevant specific time period,” and the court agreed, denying certification for those allegations.

The court found no issue with the remaining class-certification requirements and certified a class of California citizens who have purchased any of 12 Ocean Spray products since January 1, 2011.

### Sanderson Farms “100% Natural” Chicken Lawsuit to Continue

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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.

A California federal court has denied a motion to dismiss a lawsuit alleging that Sanderson Farms Inc. misleads consumers about the presence of antibiotics in its chickens. *Friends of the Earth v. Sanderson Farms Inc.*, No. 17-3592 (N.D. Cal., entered December 3, 2018). The plaintiffs—several advocacy groups—assert that Sanderson’s marketing misleads consumers into believing that its chickens are raised without antibiotics, while Sanderson argues that its labeling, advertisements and website communicate to consumers that the chicken products they purchase do not contain antibiotics.

“Sanderson argues its infographic on its ‘100% Natural’ webpage contains only true statements: it shows what ingredients are not added to the chicken and says nothing about antibiotic use or nonuse,” the court stated. “Defendant appears to make an *expressio unius* argument: that because antibiotics are *not* included in the list of excluded artificial ingredients, a reasonable consumer could not conclude that antibiotics are also excluded. As Plaintiffs correctly point out, however, the fact that the infographic contains true statements regarding the nonuse of hormones, steroids, seaweed, etc., does not provide sufficient context for a reasonable consumer to conclude that this chicken product, which is advertised as ‘100% Natural,’ has not been treated with antibiotics as part of the production process. A reasonable consumer, in light of Sanderson’s ‘100% Natural’ slogan, could plausibly believe that the infographic’s ‘no additives or artificial ingredients’ statement means no synthetic pharmaceuticals. Sanderson does not include a disclosure on the webpage stating unequivocally that antibiotics are used in its production process, and the infographic’s silence on the issue is not a disclosure. Sanderson is allegedly making an affirmative representation (‘100% Natural,’ ‘no additives or artificial ingredients’) that is contrary to the undisclosed characteristic (chicken raised with antibiotics before point of sale).”

The court was further unpersuaded by Sanderson’s argument that its Frequently Asked Questions page discloses the use of antibiotics: “Review, to the contrary, is limited to the four corners of a specific webpage at issue. No authority suggests a reasonable consumer is expected to search a company’s entire website (or certainly all of a company’s statements across all forms of advertisements) to find all possible disclaimers.” The court also dismissed Sanderson’s arguments about its careful wording in a

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.



series of commercials. “A lawyer may well catch this turn of phrase, but the reasonable consumer standard does not demand that consumers interpret advertisements the same way a judge interprets statutes,” the court noted. Finding none of Sanderson’s arguments persuasive, the court denied the motion to dismiss.

## Second Circuit Affirms Truffle Lawsuit Dismissal

In a summary order, the U.S. Court of Appeals for the Second Circuit has affirmed a lower court’s judgment in favor of Monini North America in a lawsuit alleging that consumers were misled about the truffle content of the company’s truffle-flavored oil. *Jessani v. Monini N. Am. Inc.*, No. 17-2504 (2nd Cir., entered December 3, 2018).

“According to plaintiffs, truffles are the most expensive food in the world,” the court stated. “In this context, representations that otherwise might be ambiguous and misleading are not: it is simply not plausible that a significant portion of the general consuming public acting reasonably would conclude that Monini’s mass produced, modestly-priced olive oil was made with ‘the most expensive food in the world.’ [] This is particularly so given that the product’s ingredient list contains no reference to the word ‘truffle’ and the primary label describes the product only as being ‘Truffle Flavored.’ Accordingly, plaintiffs’ state law consumer protection claims fail.”

## “Nuts ‘N More” Spread Lacks White Chocolate, Plaintiff Alleges

A consumer has alleged that Nuts ‘N More LLC’s White Chocolate Peanut Spread does not contain the amount of milkfat required to meet the U.S. Food and Drug Administration (FDA) definition of “white chocolate.” *Morrison v. Nuts ‘N More LLC*, No. 18-11192 (S.D.N.Y., filed November 30, 2018). According to the complaint, FDA requires white chocolate to contain “not less than 3.5 percent by weight of milkfat,” but the white chocolate spread does not contain any dairy ingredients. “Because there is no additional milkfat to supplement the Product to meet FDA definition of white chocolate, the Product cannot be marketed as white

chocolate and thus must be deemed imitation white chocolate,” the plaintiff asserts. She alleges that she and other consumers paid a premium for what she believed to be white chocolate “and received an inferior Product than what was represented to them by Defendant.” For alleged violations of New York consumer-protection statutes and fraud, the plaintiff seeks class certification, damages, restitution and attorney’s fees.

## “Natural” Marinade Contains Citric Acid, Canola Oil, Complaint Argues

A consumer has filed a putative class action challenging La Lechonera Products Inc.’s “all natural” and “no preservatives” representations on its marinade packaging, alleging that the presence of citric acid and canola oil in the product preclude the company from making those marketing claims. *Williams v. La Lechonera Prods. Inc.*, No. 2018-39361-CA-01 (Fla Cir. Ct., 11th Jud. Dist., filed November 26, 2018). The complaint asserts that canola oil and citric acid are substantially processed and synthetic ingredients.

The plaintiff alleges that La Lechonera injured him and other consumers in 14 ways, including that the consumers “paid a sum of money for Products that were not as represented,” “ingested a substance that Plaintiff and other members of the Class did not expect or consent to,” “were denied the benefit of truthful food labels,” and “were forced unwittingly to support an industry that contributes to environmental, ecological, and/or health damage.” The plaintiff seeks class certification, injunctive relief, damages and attorney’s fees for an alleged violation of Florida’s consumer-protection statutes, breach of express warranty and unjust enrichment.

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