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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

France to Ban Mass Culling of Male Chicks

France's agriculture minister has reportedly announced that the country will prohibit the mass culling of male chicks shortly after they hatch and ban the castration of piglets without anesthesia in an effort to support animal welfare. The minister indicated his intention to have the regulations take effect by the end of 2021. Germany previously banned the practice, but a court invalidated the law until a method for determining the sex of an embryo in the egg can be developed.

Portman Group Upholds Wine Complaint

The Portman Group, the U.K. alcohol industry's self-regulatory authority, has upheld a complaint against Trinchero Family Estates for its Ménage à Trois Midnight wine. Zenith Global brought a complaint arguing that the wine's name and marketing copy may breach the code by creating links between the product and sexual activity or sexual success. The panel agreed, finding that the text on the label—including "savour the pleasures of the dark"—did not dispel the sexual connotations of the Ménage à Trois name, which purportedly refers to the wine's blend of three

varietals. “In this case, the Panel urged the producer to avoid linking the sexual meaning of the name to the product and remove the text description on the bottle which did this,” the panel’s chair commented in a press release. “The Panel’s decision is a reminder to all producers that care must be taken when marketing a product to ensure that it does not draw direct links between the product and sexual activity.”

LITIGATION

Vegan Dairy Challenges California Law on Plant-Based Food Labeling

Miyoko’s Kitchen Inc. has filed a lawsuit asserting that California infringed its First Amendment right to free speech by requiring the removal of “truthful messages and images from its website and its product labels—including the phrase ‘100% cruelty and animal free,’ the use of the word ‘butter’ in the phrase ‘vegan plant butter,’ and even an image of a ‘woman hugging a cow.’” *Miyoko’s Kitchen v. Ross*, No. 20-0893 (N.D. Cal., filed February 6, 2020). The company reportedly received a letter from California in December 2019 that “orders Miyoko’s to remove claims that its vegan products are ‘100% cruelty and animal free,’ ‘cruelty free,’ and ‘lactose free’—all entirely truthful statements.”

“For decades, plant-based producers have used terms like ‘vegan cheese,’ ‘soy milk,’ and ‘cashew yogurt,’” the complaint asserts. “Consumers are not confused by these labels. In fact, plant-based dairy terms are so widely used that the [U.S. Food and Drug Administration (FDA)] itself uses them.” The complaint also asserts that the state’s letter cited FDA regulations on the standard of identity for “butter,” and the company argues that “FDA has repeatedly recognized that foods do not meet FDA’s threshold for ‘butter’ can of course use the term ‘butter’ in their common or usual name—products like peanut butter or apple butter, and all sorts of other fruit and nut butters have used the term ‘butter’ for well over a hundred years without any hint of consumers confusing them for butter from cow’s milk.” The company seeks preliminary and permanent injunctions enjoining California from enforcing the laws set forth in the December letter as well as costs and attorney’s fees.

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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.

“No Sugar Added” Implies Nothing About Competitors, Court Rules

A California appeals court has determined that the “no sugar added” phrasing on Califia Farms’ Cuties tangerine juice does not imply to consumers that competitors add sugar to their products. *Shaeffer v. Califia Farms LLC*, No. B291085 (Cal. App. Ct., entered February 6, 2020). The lower court dismissed the complaint, ruling that the “no sugar added” representation was truthful.

The appeals court considered “statements a business affirmatively and truthfully makes about its product and which do not on their face mention or otherwise reference its competing products at all.” The court found that a “statement may be ‘fraudulent’ (and hence actionable) if it is ‘deceptive and misleading in its implications,’” but declined to hold as actionable truthful statements about a company’s own product when the argument is that a reasonable consumer would “(1) likely to infer from such a statement that the very same statement is untrue as to comparable, competing products, (2) likely to infer that the product at issue is consequently superior to its competition, and (3) likely to be deceived if the statement is true as to the comparable, competing products.”

“First, a reasonable consumer is unlikely to make the series of inferential leaps outlined above. Second, we are hesitant to adopt a theory upon which ‘almost any advertisement [truthfully] extolling’ a product’s attributes ‘would be fodder for litigation,’” the court held, and it found precedents from other authorities that reached the same conclusion. The court affirmed the lower court’s dismissal and awarded appeals costs to Califia Farms.

“Lightly Sweetened” Iced Tea Misleads, Consumer Argues

A consumer has filed a putative class action alleging Tipp Distributors Inc. mislabels its Steaz iced tea as “lightly sweetened” despite containing “objectively high amounts of sugar, as added sugar.” *Taylor v. Tipp Distrib. Inc.*, No. 20-0712 (E.D.N.Y., filed February 9, 2020). Consumers paid a premium for Steaz believing

it to contain less sugar than its competitors, the complaint asserts, but it contains 20 grams of added sugar, 40% of the recommended daily intake.

"By consuming the Products and the 40% DV of added sugar, the average person who wishes to follow the DGA must consume no more than 30 grams of sugar across 1,920 calories (2,000 calories – 80 calories)," the plaintiff argues. "It will be difficult to impossible for the average, reasonable consumer to not consume more than 30 grams of sugar in everything else they eat or drink because many foods and beverages have added sugars, albeit in much smaller amounts than the Products here. Given that most Americans have limited numeracy skills, it is not feasible to ensure no more than 30 grams of sugar are consumed, because this would entail detailed calculations after each food to see how many calories and added grams of sugar they should take in."

The plaintiff alleges violations of New York consumer-protection statutes and the Magnuson-Moss Warranty Act and seeks class certification, injunctive relief, damages and attorney's fees.

Putative Class Action Alleges Gummies Contain Synthetic Ingredients

Hornell Brewing Co. Inc. and its subsidiary Arizona Beverage Co. allegedly misrepresent their fruit snacks product as all natural despite containing citric acid, gelatin, ascorbic acid, dextrose, glucose syrup and modified food starch, a consumer alleges. *Silva v. Hornell Brewing Co. Inc.*, No. 20-0756 (E.D.N.Y., filed February 11, 2020). The plaintiff argues that these ingredients are synthetic and cites a 2013 U.S. Department of Agriculture draft guidance decision delineating what materials are natural or synthetic. "Congress has defined 'synthetic' to mean 'a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plants, animals, or mineral sources," the complaint argues. Further, "[s]urveys and other market research, including expert testimony Plaintiff intends to introduce, will demonstrate that the term 'natural' is misleading to a reasonable consumer because the reasonable consumer believes that the term "natural," when used to describe goods such as the Product, means that the goods are free of synthetic ingredients." The

plaintiff seeks damages, class certification, costs and attorney's fees for alleged violations of several state consumer-protection statutes and the Magnuson-Moss Warranty Act.

SCIENTIFIC / TECHNICAL ITEMS

Study Criticizes Marketing for "Toddler Milks"

A *Public Health Nutrition* study has purportedly found that "toddler milks," or "sugar-sweetened milk-based drinks for toddlers," are a growing market but are advertised as providing unsubstantiated benefits. Choi et al., "US toddler milk sales and associations with marketing practices," *Public Health Nutrition*, February 4, 2020. The researchers reportedly found that 45% of preschoolers (24 to 47.9 months) and 31% of young toddlers (12 to 23.9 months) consume sugar-sweetened beverages each day. "[T]oddler milk packages contain numerous nutrition-related and child development claims, such as 'DHA and iron to help support brain development' and 'probiotics to help support digestive health', which have not been supported by scientific research," the researchers assert. "These claims may mislead caregivers to believe that toddler milk provides benefits for their child's nutrition and development." The researchers called for countries "to enact Code provisions" that would limit or prohibit the promotion of breast milk substitutes, including toddler milks, to the general public; for countries that do have such regulations, the researchers called for toddler milks to be included in the definition of breast milk substitutes.

MEDIA COVERAGE

Kansas City Star Digs Into Fraudulent Organics Purveyor

The Kansas City Star has detailed the story of Randy Constant, a Chillicothe, Missouri, man who fraudulently sold millions of dollars' worth of "organic" grains—as much as 7% of all the corn

and 8% of all the soybeans sold nationally as organic in 2016. Federal investigators began looking into Constant when a competitor tipped off the government that it was impossible for him to have such high outputs legitimately. An FBI investigation revealed that he sold $140 million worth of “organic” grain from 2010-2017 that, if labeled correctly, would have likely been worth half of that total. The *Star* asserts that the U.S. Department of Agriculture had received a complaint in 2007 about Constant’s soybeans, which tests showed were genetically modified in violation of organic regulations, but the agency failed to take any action.

Attorneys for Constant argued that his fraud was a victimless crime, but the court disagreed, sentencing him to ten years for the “incalculable damage” to consumers and the organic food industry. Constant died before serving his sentence.