



**FIRM NEWS**

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**LEGISLATION, REGULATIONS & STANDARDS**

## USDA Proposes Rule Limiting 'Made in the USA' Claims for Meat, Poultry and Eggs

The U.S. Department of Agriculture (USDA) has issued a proposed rule that would tighten who can label meat, poultry or egg products as “Made in the USA” or “Product of USA.” On March 6, 2023, USDA [issued](#) an advance copy of the proposed rule, which is scheduled for publication in the Federal Register on March 13.

Under the proposed rule, two specific voluntary U.S.-origin label claims, "Product of USA" and "Made in the USA," would be generically approved for use on single-ingredient, Food Safety and Inspection Service (FSIS)-regulated products derived from animals born, raised, slaughtered and processed in the United

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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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**[M. Katie Gates Calderon](#)**

816.559.2419

[kgcalderon@shb.com](mailto:kgcalderon@shb.com)

States. The phrases would also be generically approved for use on multi-ingredient FSIS-regulated products if (i) all FSIS-regulated components of the product are derived from animals born, raised, slaughtered and processed in the United States; and (ii) all additional ingredients, other than spices and flavorings, are of domestic origin.

Under current regulations, meat, poultry and egg products that are born, raised and partially processed abroad can still include "Product of USA" or "Made in the USA" so long as they undergo a "significant transformation" after arriving in the United States. FSIS said it is taking the step to resolve consumer confusion surrounding current voluntary label claims related to the origin of FSIS-regulated products in the U.S. marketplace.

## Senators Introduce DAIRY PRIDE Act

U.S. Sens. Tammy Baldwin (D-Wis.), Jim Risch (R-Ida.), Susan Collins (R-Maine) and Peter Welch (D-Vt.) have introduced the "Defending Against Imitations and Replacements of Yogurt, milk, and cheese to Promote Regular Intake of Dairy Everyday Act" (DAIRY PRIDE Act), which would "require non-dairy products made from nuts, seeds, plants, and algae to no longer be mislabeled with dairy terms such as milk, yogurt or cheese."

The act would "nullify any guidance that is not consistent with dairy standards of identity," including the U.S. Food and Drug Administration guidance issued in February 2023 allowing plant-based alternatives to use dairy product names in limited circumstances. The senators' press release called the guidance "ill-advised" and asserted that the draft guidance "contradicts their own regulation and definitions, allowing non-dairy products to use dairy names, violating the Administrative Procedure Act, and hurting dairy farmers and producers."

## U.S., Canada Request GM Corn Trade Talks

The United States and Canada have requested formal trade discussions on Mexico's impending ban on the use of genetically modified (GM) corn in human food, which is set to take effect January 1, 2024. The ban had originally been intended to also affect corn in animal feed, but a February 2023 modification to the decree removed the deadline for that part of the ban to take effect.

U.S. officials argue that the regulation is not based on scientific research, a standard the three countries agreed to in 2020 by



**Lindsey Heinz**

816.559.2681

[lhein@shb.com](mailto:lhein@shb.com)



**James P. Muehlberger**

816.559.2372

[jmuehlberger@shb.com](mailto:jmuehlberger@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.



signing the United States-Mexico-Canada Agreement. About 90% of U.S. corn is produced through GM means, and Mexico is reportedly the largest importer of U.S. corn. The National Corn Growers Association predicted that the ban would be “catastrophic for American corn growers as well as the Mexican people, who depend on corn as a major staple of their food supply.”



## WHO Calls on Countries to Adopt Sodium Reduction Policies

Implementing sodium reduction policies could save an estimated seven million lives worldwide by 2030, according to a new report from the World Health Organization (WHO). WHO announced the release of its *Global Report on Sodium Intake Reduction*, which found the world is off-track to achieve the organization's goal of reducing sodium intake by 30% by 2025.

The report showed that only 5% of WHO Member Countries have mandatory and comprehensive sodium reduction policies and 73% lack full range of implementation of such policies. Only nine countries have a comprehensive package of recommended policies to reduce sodium intake, WHO reported: Brazil, Chile, Czech Republic, Lithuania, Malaysia, Mexico, Saudi Arabia, Spain and Uruguay.

“Unhealthy diets are a leading cause of death and disease globally, and excessive sodium intake is one of the main culprits,” Dr. Tedros Adhanom Ghebreyesus, WHO Director-General, said in a statement. “This report shows that most countries are yet to adopt any mandatory sodium reduction policies, leaving their people at risk of heart attack, stroke, and other health problems. WHO calls on all countries to implement the ‘Best Buys’ for sodium reduction, and on manufacturers to implement the WHO benchmarks for sodium content in food.”

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### LITIGATION

## “Fudge Covered Oreo” Lawsuit Dismissed

A New York court has dismissed with prejudice a complaint alleging that Mondelez Global misleads consumers by selling “Fudge Covered” Oreos produced without dairy ingredients containing milkfat. *Leonard v. Mondelez Global LLC*, No. 21-10102 (S.D.N.Y., entered March 8, 2023). The plaintiff had argued that the fudge covering was made with vegetable oils and nonfat

milk, violating a reasonable consumer’s expectations for the ingredients of fudge. The court disagreed.

“[N]ot a single source claims that milk and butter are essential fudge ingredients or that milkfat is necessary to make fudge,” the court found. “Indeed, Molly Mills—who Plaintiff identifies as ‘one of today’s leading authorities on fudge’—describes fudge as ‘*most commonly* made from butter, sugar, and chocolate.’”

Referring to the vegetable oil and nonfat milk ingredients in the fudge covering, the court further noted, “He vaguely suggests that this is ‘inconsistent with what consumers expect,’ [] but provides nothing to support why a reasonable consumer would not expect ingredients that, in Plaintiff’s own words, are ‘often used’ in fudge.” The court then dismissed the allegations brought under New York law before going on to dismiss the Delaware, Kansas and Wyoming allegations on the same grounds.

## Plaintiff Challenges Sustainability of Bumble Bee Canned Fish Production

A group of consumers has filed a complaint asserting that a certification logo from the Marine Stewardship Council (MSC) that Bumble Bee Foods LLC features on its product labels misleads consumers into believing that the company’s fish-harvesting practices are sustainable. *Nasser v. Bumble Bee Foods LLC*, No. 23-1558 (C.D. Cal., filed March 2, 2023).

The plaintiffs allege that MSC-certified fisheries are allowed to harm dolphins, sea turtles and whales caught in nets and exploit the labor of migrant workers on fishing boats. “It, therefore, shocks the conscience to learn that Bumble Bee uses the hollow certification provided by MSC, an organization which Bumble Bee knows or should know blatantly violates its own standards and puts the very ecosystem MSC feigns to protect in serious danger,” the complaint asserts. The plaintiffs further argue that Bumble Bee’s practices are not sustainable because the company uses purse seiners, gillnets and longlines to catch fish, and “no reasonable consumer would deem these fishing practices sustainable.”

For alleged violations of California, Virginia and Illinois consumer protection statutes, the plaintiffs seek class certification, damages, injunctive relief, costs and attorney’s fees.

## Brad’s Plant Based Snacks Mislead Consumers on Protein Content, Suit

## Alleges

A California plaintiff has filed a proposed class action against Brad's Raw Chips, LLC, alleging the company misleads consumers on the amount of usable protein in its vegetable snacks. *Luna v. Brad's Raw Chips, LLC*, No. 23-0926 (N.D. Cal., filed March 1, 2023) The products at the center of the lawsuit are Brad's Plant Based Crunchy Kale, Veggie Chips and Veggie Flats.

The plaintiff alleges the products make protein claims on the front of their packaging while omitting a statement of the corrected amount of protein from the nutrition facts panel (NFP) in violation of federal and state law. He alleges in the complaint that manufacturers are required to calculate the corrected amount of protein per serving to reflect protein quality, or its ability to support human nutritional requirements, as well as provide a statement of the corrected amount of protein per serving in the nutrition facts panel expressed as a percent daily value.

"Consumers reasonably expect that Defendant's products will actually provide nutritionally the full amount of protein per serving claimed on the front of the package and stated in the protein quantity section of the NFP, i.e., that the products contain high quality proteins," the plaintiff said in the complaint. "But Defendant's products do not do so and instead contain low quality proteins. Had Defendant included a statement of the corrected amount of protein per serving in the NFP, as it was required to do under the law, it would have revealed that the product contains low quality proteins."

The plaintiff alleges violations of California's Unfair Competition Law, False Advertising Law and the Consumer Legal Remedies Act, as well as violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law and unjust enrichment. He is seeking class certification, injunctive relief, damages, restitution, pre- and post-judgment interest, attorneys' fees and costs.

## Hain Celestial Gets Midtrial Win in Heavy Metals Case

A court has granted Hain Celestial Group's motion for judgment as a matter of law after the plaintiffs rested their case in a lawsuit alleging heavy metals in the company's food caused the plaintiffs' son's autism spectrum disorder. *Palmquist v. Hain Celestial Grp., Inc.*, No. 21-0090 (S.D.T.X., entered March 3, 2023).

The court ruled that the plaintiffs had failed to offer evidence linking the food and the disorder. According to a transcript

provided to *Law360*, during the motion hearing, the court said "the scientific facts are simply not there."

"I'm convinced that there is no legally sufficient basis on which a reasonable jury could find for the plaintiffs," the court stated. "A failure to offer evidence of general causation is fatal to all of the plaintiffs' claims. Further, I'm so convinced of the merits of the Rule 50(a) motion in general that, if this case were to go to jury, and they were to return a verdict for the plaintiffs, that I would have to grant a renewed motion for judgment as a matter of law."

## Court Tosses Claims that “Fit” Protein Bars Misled Consumers

A federal court in New York has thrown out a proposed class action alleging that the maker of FitCrunch and FitBar protein bars deceptively marketed their products as “healthy.” *Seljak v. Pervine Foods, LLC*, No. 21-9561 (S.D.N.Y., entered March 3, 2023).

Three consumers filed the lawsuit against Pervine Foods on behalf of themselves and others who purchased the company's FitCrunch Whey Protein Baked Bar products or FitBar products. They asserted that the term "Fit" misleads consumers into thinking the products are "healthy," when in fact their fat content exceeded the permissible level to be labeled as "healthy" under the Federal Food, Drug, and Cosmetic Act, according to the court's opinion.

The defendant filed a motion to dismiss, arguing in part that the plaintiffs failed to plead an actionable misstatement. The court agreed, concluding that the FitCrunch labels are not misleading and noting that the label indicates the protein bars have a high number of calories and contain images of desserts.

"Accordingly, before even turning to the ingredient label, a reasonable consumer viewing this label simply would not believe that FitCrunch products are 'healthy,'" the court stated. "Indeed, such belief is plainly 'inconsistent with the face of the package, and with common sense.'"

The court additionally ruled that the plaintiffs could not proceed on their claims regarding the FitBar products because they had not purchased them.

## Consumer Alleges AriZona Fruit Snacks Mislead on Preservative Content

A California woman has filed a proposed class action against the makers of AriZona Beverages fruit snacks, alleging that the company's representation of the products as free of preservatives is deceptive because the products contain citric acid. *Jamison v. Arizona Beverages USA LLC*, No. 23-0920 (N.D. Cal., filed March 1, 2023).

The plaintiff said in the complaint that she relied on the product's label indicating it contained "no preservatives" when she purchased it. She alleged that the product contains citric acid, a preservative. While citric acid can also be used for flavoring, she said it still acts as a preservative even if it was intended for another purpose.

"By representing the Product has 'No Preservatives,' Defendant seeks to capitalize on consumers' preference for less processed products with no preservatives," she alleges in the complaint, citing research that 84% of American consumers buy "free-from" foods because they're seeking more natural or less-processed foods.

For alleged violations of California's Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act as well as unjust enrichment, the plaintiff is seeking class certification, injunctive relief, restitution, disgorgement, damages, attorney's fees and costs.

## Fourth Circuit: 'Gruyere' Too Generic to Receive Certification Mark

A federal appeals court has ruled against Swiss and French consortiums that argue "gruyere" should only refer to cheese that is produced in the Gruyère region of Switzerland and France. *Interprofession Du Gruyere v. U.S. Dairy Export Council*, No. 22-1041 (4th Cir., entered March 3, 2023).

The ruling follows an attempt by the Swiss Interprofession du Gruyère (IDG) and French Syndicat Interprofessionnel du Gruyère (SIG) to register the word "gruyere" with the U.S. Patent and Trademark Office (USPTO) as a certification mark. The U.S. Dairy Export Council and two companies opposed the certification mark, arguing that the term is generic and thus ineligible for such protection. USPTO's Trademark Trial and Appeal Board (TTAB) agreed with the opposers, holding that "gruyere" could not be registered as a certification mark because it is generic.

The consortiums filed a complaint challenging the TTAB ruling in U.S. District Court, and the district court granted summary judgment to the opposers on the same grounds, leading the

consortiums to appeal. A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit again sided with the opposers.

The court held that while the lower court made certain improper inferences in its analysis, “the record nevertheless contains evidence that is ‘so one-sided’ that there is no genuine issue as to any material fact and Opposers must prevail as a matter of law.”

“The [U.S. Food and Drug Administration] standard of identity, the pervasive sales of non-Swiss and non-French cheese labeled as gruyere in the United States, and the common usage of gruyere ‘establish[] that when purchasers walk into retail stores and ask for [gruyere], they regularly mean’ a type of cheese, and not a cheese that was produced in the Gruyère region of Switzerland and France,” the court held.

## Trident Buyers Allege Sweetener Misrepresentation

A consumer has alleged that the label for Mondelez Global’s Trident Sugar Free Gum with Xylitol implies to potential purchasers that xylitol is the primary sweetener despite listing sorbitol first on the ingredients list. *Quilez v. Mondelez Global LLC*, No. 23-1889 (S.D.N.Y., filed March 6, 2023). The plaintiff alleges that she “read and relied on the statement that the Product was a ‘Sugar Free Gum With Xylitol’ to expect that the gum’s sweetening component was predominantly or exclusively xylitol, or at the very least, that it was present in a relatively significant amount.” Xylitol, the complaint asserts, provides more oral health benefits than sorbitol; “[n]umerous studies of chewing gum based on noncariogenic sweeteners have concluded that xylitol is the polyol of choice in sugar free chewing gum for a variety of reasons,” the plaintiff argues.

For alleged violations of New York consumer laws and allegation of fraud, unjust enrichment and breach of warranties, the plaintiff seeks class certification, damages, costs and attorney’s fees.

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