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FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON

LEGISLATION, REGULATIONS & STANDARDS

FDA Lifts Import Alert on GE Salmon

The U.S. Food and Drug Administration (FDA) has deactivated an import alert that prevented the introduction of genetically engineered (GE) salmon into interstate commerce. The agency's statement indicates that it placed the ban in 2016 with the intention of lifting it when standards for labeling GE food were finalized. With the implementation of the National Bioengineered Food Disclosure Standard in late 2018, the authority to regulate GE food shifted to the U.S. Department of Agriculture (USDA), according to the statement, so the import ban deactivation will remove barriers for USDA regulation.

"With the deactivation of the import alert, AquAdvantage Salmon eggs can now be imported to the company's contained grow-out facility in Indiana to be raised into salmon for food. As was determined during the FDA's 2015 review, this fish is safe to eat, the genetic construct added to the fish's genome is safe for the animal, and the manufacturer's claim that it reaches a growth marker important to the aquaculture industry more rapidly than its non-GE farm-raised Atlantic salmon counterpart is confirmed."

Kind Petitions FDA to Revise Nutrient

Mark Anstoetter

Content Claims

Kind LLC has submitted a citizen petition urging the U.S. Food and Drug Administration (FDA) to require disclosure of added sugar and *trans* fat on food packaging and remove the required disclosures for total fat and cholesterol. In addition, the petition recommends that FDA "[r]evise its nutrient content claim regulations to only allow a food to bear a nutrient content claim highlighting the presence or absence of a nutrient if the food contains a meaningful amount of at least one health-promoting food, such as: vegetables, fruits (especially whole fruits), whole grains, legumes, nuts, and seeds, which are recommended in the most recent Dietary Guidelines for Americans."

USDA, HHS Announce 2020 Dietary Guidelines Meeting

The U.S. Department of Agriculture (USDA) and Health and Human Services (HHS) have announced the first meeting of the 2020 Dietary Guidelines Advisory Committee and the opening of the public comment period on the development of the updated guidelines. The March 28-29, 2019, meeting is open to the public and is the first of five public meetings the agencies intend to hold.

LITIGATION

Court Dismisses Part of Malic Acid Lawsuit

A California federal court has dismissed part of a putative class action alleging Bai Brands misleads consumers as to its ingredients because it does not label "malic acid" as "d-l malic acid." *Branca v. Bai Brands*, No. 18-0757 (S.D. Cal., entered March 7, 2019). The court first refused to dismiss the plaintiff's allegation that Bai beverages contain the artificial form of malic acid, finding that while his "assumption as to the type of malic acid contained in Defendants' Products ultimately may be incorrect, at the pleading stage, this Court 'does not operate as a fact-finder,' but, instead, must 'presume all facts plead as true.'"

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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.

The court also declined to "make a factual determination at this time as to whether malic acid is an artificial flavor" and denied Bai's motion to dismiss those claims.

The court then turned to the allegation that the use of "malic acid" on the ingredients list rather than "d-l malic acid" was misleading. "[W]ere Defendants required to list 'd-l malic acid' by its specific isomer on the ingredient list? No," the court held. "'The statute and regulations specifically instruct that ingredients should be listed by their 'common or usual name.' [] And '[t]he provision instructing that the name 'shall be a specific name and not a collective (generic name)' does not override the 'common or usual name' requirement.'" Accordingly, the court dismissed the allegation.

Tootsie Rolls Packaging Enjoined in Trade Dress Suit

An Ohio federal court has granted Spangler Candy Co. a preliminary injunction in its lawsuit alleging that Tootsie Roll Industries copied the packaging of its Dum Dums candy. *Spangler Candy Co. v. Tootsie Roll Indus.*, No. 18-1146 (N.D. Ohio, entered March 13, 2019). The court found the Dum Dums red bag not inherently distinctive, instead relying on evidence that Tootsie had intent to copy because it "specifically recognized the similarity between the violators' color scheme, had multiple other options, and chose to proceed with the similar design anyway." The court also found that "the amount-of-sales and established-place-in-the-market weigh strongly in Spangler's favor."

Coconut Beverage's "Healthy" Marketing Misleads, Consumer Alleges

A consumer has filed a putative class action alleging that The Hain Celestial Group's Coconut Dream, "a coconut 'milk' style drink that is primarily coconut oil (or coconut oil and added sugar) in water," is marketed to appeal to health-conscious consumers despite being "basically saturated fat (or saturated fat and added sugar)." *Andrade-Heymsfield v. Hain Celestial Grp. Inc.*, No. 19-0433 (S.D. Cal., filed March 5, 2019). The complaint alleges that Hain Celestial misleads consumers by representing Coconut

Dream as healthful despite studies purportedly linking coconut-oil consumption and increased risks of cardiovascular heart disease. The plaintiff also alleges a link between sugar consumption and obesity, metabolic syndrome and diabetes. She seeks class certification, damages, corrective advertising, destruction of misleading materials and attorney's fees for alleged violations of California consumer-protection statutes.

Sugarfina, Sweet Pete's Settle IP Dispute

Sugarfina and Sweet Pete's have reached an agreement to settle allegations that Sweet Pete's infringed Sugarfina's trademarks, copyrights, patent and trade dress by copying the "museum-quality Lucite" used to package its candies. *Sugarfina Inc. v. Sweet Pete's*, No. 17-4456 (C.D. Cal., settlement notice filed March 5, 2019). Under the agreement, Sweet Pete's will pay $2 million and change its packaging from the allegedly infringing cubes.