



Having trouble reading this email? [View it in your browser.](#)

ISSUE 781 | September 09, 2022



FIRM NEWS

Shook Partner Discusses US, EU Additive Lawsuits in Law360

Shook Partner Connor Sears has authored “[Food, Drug, Cosmetic Cos. Should Expect More Additive Suits](#)” for *Law360*. In the article, Sears explores the recent spate of litigation alleging that additives approved for use by the U.S. Food and Drug Administration (FDA) are causing harm to consumers because the same additives are not approved for use in certain other countries. Challenged additives are used in a wide variety of foods, including fish, cereal, dairy, meat, candy and more.

“Considering the wide scope of products that may face future lawsuits, manufacturers and distributors may be curious about how courts have treated similar lawsuits,” Sears notes. He suggests that courts may approach additives lawsuits similarly to how lawsuits alleging harm from partially hydrogenated oils (PHOs) were decided between 2015, when FDA determined PHOs to be unsafe for food, and 2018, when a ban on their use took effect.

[Read the full article >>](#)

LEGISLATION, REGULATIONS & STANDARDS

ASA Rules on Heineken’s UK Advertising

SHARE WITH [TWITTER](#) | [LINKEDIN](#)

SUBSCRIBE

PDF ARCHIVES

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.

For additional information about Shook’s capabilities, please contact



[Mark Anstoetter](#)

816.559.2497

manstoetter@shb.com

The U.K. Advertising Standards Authority (ASA) has not upheld complaints against Heineken UK Ltd. arguing that the company's underground and Reddit advertisements particularly appealed to those under the age of 18.

ASA received complaints about two ads, including a poster ad at Paddington underground station and a paid-for ad on Reddit. The ads included computer-generated images of people holding a can of Heineken beer. Complainants asserted that they are likely to appeal particularly to those under 18, in violation of CAP Code 18.14.

ASA noted that the characters in the ads had been created specifically for Heineken's ad campaign and were not based on any existing characters. Additionally, ASA concluded that neither characters were shown engaging in any activity that would particularly appeal to those under 18.

"Both were depicted wearing stylised clothing, and the female character's armour-like clothing and stylised hair, in particular, were reminiscent of the sort of stylisation seen in gaming avatars," ASA said in its assessment. "However, we considered the stylisation in itself did not mean that the characters, or the ads, would have greater appeal to under-18s than to over-18s."

EFSA Provides Opinions on Animal Welfare in Transport to Food Processing Facilities

The European Food Safety Authority has issued several opinions, in keeping with its Farm to Fork Strategy, that provide guidance on compliance when transporting animals to food processing facilities and slaughterhouses. The opinions identify possible hazards to animal welfare in transport and provide information on combating disease or other disorders that would threaten animal welfare. Types of animals covered by the opinions include cattle; pigs; domestic birds and rabbits; sheep and goats; and horses and donkeys.

LITIGATION

Fraud Claims To Continue In Kashi Strawberry Bars Ingredient Suit



M. Katie Gates Calderon

816.559.2419

kgcalderon@shb.com



Lindsey Heinz

816.559.2681

lheinze@shb.com



James P. Muehlberger

816.559.2372

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

An Illinois federal court has granted a partial motion to dismiss a putative class action alleging that Kashi Sales L.L.C. misled consumers by making the flavoring of “Ripe Strawberry” cereal bars with pear juice concentrate and apple powder. *Johnston v. Kashi Sales L.L.C.*, No. 21-0441 (S.D. Ill., entered September 8, 2022). The plaintiff alleged that she “expected the filling would contain more strawberry ingredients than other fruit ingredients, but did not expect that the ‘filling would contain more pears and apples compared to strawberries.’” The court first disposed of the plaintiff’s request for injunctive relief, finding that she did not have standing because she is aware of the allegedly deceptive sales practices.

The court discussed a number of decisions centered on similar issues and compared their outcomes. “Like the deceptive advertising cases that survive dismissal—where the words in defendants’ labels were subject to different plausible interpretations—the phrase ‘Ripe Strawberry’ is subject to different plausible interpretations,” the court found. “It is unclear whether Kashi is describing ‘Ripe Strawberry’ as a flavor, smell, ingredient, or a process (i.e., selecting only fruit that is ripe).” The court also noted that “Kashi’s packaging further contributes to Johnston’s reasonable interpretation,” and declined to dismiss the plaintiff’s allegation based on Illinois’ consumer fraud statute.

The court then turned to the plaintiff’s allegation that she expected the product to contain a non-negligible amount of honey based on the packaging representation “Made with Wildflower Honey.” “But similar to how it was unreasonable for the plaintiff in [*Red v. Kraft Foods Inc.*] to be deceived into thinking a box of crackers contains huge amounts of vegetables—it is fanciful that reasonable consumers will be deceived into thinking that the primary sweetening ingredient in fruit-filled cereal bars is honey—not fruit.” Accordingly, the court dismissed the consumer fraud allegation.

New Suit Alleges Kellogg’s ‘Harvest Wheat’ Crackers Misled Consumers

An Illinois consumer has filed a putative class action against Kellogg Sales Co., alleging it misrepresented the amount of whole grains its Harvest Wheat Toasteds crackers contain. *Moore v. Kellogg Sales Co.*, No. 22-03172 (C.D. Ill., filed September 5, 2022).

The plaintiff asserts in the complaint that consumers want to consume more whole grains, but their efforts to do so are stymied by confusing product labels. “One food and nutrition professor

inspections, subject to FDA, USDA and FTC regulation.



stated, ‘Even people with advanced degrees cannot figure out how much whole grain’ is in products represented to consumers as whole grain,” the plaintiff said in the complaint. She asserted that despite the labeling of the crackers at issue as “Harvest Wheat,” and the product’s appearance of having a dark brown color and visible pieces of grains, it “contains a negligible absolute and relative amount of whole grains compared to refined grains.”

The plaintiff alleged that the value of the crackers was materially less than its value as represented by the defendant, and that the defendant sold more of the product at higher prices than it would have had it not mislabeled the product.

For alleged violations of state consumer fraud acts, unjust enrichment and negligent misrepresentation, the plaintiff is seeking class certification, injunctive relief, damages and attorneys’ fees.

Putative Class Action Alleges Juice Maker Used Deceptive Labeling

A New York consumer has filed a putative class action against juice maker Suja Life, LLC, alleging the company deceptively labeled its juice blends as “Cold-Pressed.” *Lumbra v. Suja Life, LLC*, No. 22-893 (N.D.N.Y., filed August 28, 2022).

The plaintiff alleges that the packaging of Suja’s “Cold-Pressed” juices led her to believe they were not processed after being extracted. She asserts in the complaint that typically, juices that are not subjected to treatment after they’re extracted are labeled as “Cold-Pressed,” while juices that are treated usually prominently disclose treatment. She alleges that Suja failed to prominently disclose to consumers that after its juices are cold-pressed, they are subjected to a treatment known as high-pressure processing.

“By describing the Product as ‘Cold-Pressed’ without any prominent, clear disclaimers of other processing steps, consumers expect it will be fresh,” the plaintiff asserts. “However, the Product is not fresh and has more in common with juices sold in standard refrigerator cases because it is highly processed after being cold-pressed.”

The plaintiff alleges violations of state consumer fraud acts, breach of express warranty and implied warranty of merchantability, negligent misrepresentation, fraud and unjust enrichment. She is seeking class certification, damages and costs and expenses including attorneys’ fees.

TTAB Rejects Energy Drink Maker's Application for 'Purple Rain' Trademark

The U.S. Trademark Trial and Appeal Board (TTAB) has denied energy drink and dietary supplements manufacturer JHO Intellectual Property Holdings LLC's bid to register the mark PURPLE RAIN in connection with its products. *NPG Records, LLC v. JHO Intellectual Property Holdings LLC*, No. 91269739 (T.T.A.B., entered August 23, 2022).

JHO sought to register the mark for its energy drinks, energy bars and a range of dietary and nutritional supplement products. NPG Records, LLC, which claims to own registered and common law rights in the trademark PURPLE RAIN, and Paisley Park, which owns the rights in the name, image and likeness of Prince Rogers Nelson, the musical artist commonly known as Prince, opposed the bid.

Paisley Park said the mark should be denied in part because of the false suggestion of a connection with Prince. In a recent precedential ruling, TTAB agreed, granting Paisley Park's motion for partial summary judgment.

"We find on this record that PURPLE RAIN points uniquely and unmistakably to Prince," TTAB wrote in the opinion. "There is plentiful evidence of the notoriety of Prince's PURPLE RAIN song and PURPLE RAIN movie. There is also evidence of Opposers' substantial merchandising efforts dovetailing the song and movie and the connection to Prince."

SHB.COM

ATLANTA | BOSTON | CHICAGO | DENVER | HARTFORD | HOUSTON | KANSAS CITY
LONDON | LOS ANGELES | MIAMI | NEW YORK | ORANGE COUNTY | PHILADELPHIA
SAN FRANCISCO | SEATTLE | ST. LOUIS | TAMPA | WASHINGTON, D.C.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

© Shook, Hardy & Bacon L.L.P. All rights reserved.

[Unsubscribe](#) | [Forward to a Colleague](#) | [Privacy Notice](#)