



# FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 602 | APRIL 29, 2016

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HARDY & BACON

## CONTENTS

### LEGISLATION, REGULATIONS AND STANDARDS

- U.S. Codex Delegates to Discuss Draft Positions for CAC Session in Rome ..... 1

### LITIGATION

- Chobani's Chlorine Claims Against Dannon Remain Restrained ..... 1
- Heinz False Source Suit Dismissed ..... 2
- Organic Consumers Association Challenges "Organic" Infant Formula Claims ..... 2
- Campbell's "Healthy" Gumbo Contains Trans Fat, Lawsuit Alleges ..... 3
- "Panera 2.0" Ordering System Unaccommodating to Visually Impaired, Consumers Allege ..... 4
- Lawsuit Alleges Company Substituted Jumbo Squid for Octopus ..... 4

## LEGISLATION, REGULATIONS AND STANDARDS

### U.S. Codex Delegates to Discuss Draft Positions for CAC Session in Rome

The U.S. Department of Agriculture's Office of the Under Secretary for Food Safety is convening a June 10, 2016, public meeting in Washington, D.C. to discuss U.S. draft positions for consideration at the 39<sup>th</sup> Session of the Codex Alimentarius Commission (CAC) in Rome, Italy, on June 27-July 1.

Agenda activities at the June 10 meeting will include Codex work on antimicrobial resistance, relations between CAC and other international organizations and issues regarding food integrity/authenticity. See *Federal Register*, April 25, 2016.

## LITIGATION

### Chobani's Chlorine Claims Against Dannon Remain Restrained

A New York federal court has rejected Chobani, LLC's motion for reconsideration of a preliminary injunction preventing the company from claiming in its advertising that competitor Dannon Co.'s yogurt products contain chlorine and are thereby unhealthy, unsafe and inferior to Chobani yogurt. *Chobani, LLC v. Dannon Co., Inc.*, No. 16-0030 (N.D.N.Y., order entered April 22, 2016). Chobani's marketing campaign displayed an image of a swimming pool—which is cleaned with calcium hypochlorite, a substance colloquially referred to as "chlorine"—while asserting that Dannon Light & Fit® yogurt contained chlorine, one of four chemical elements that constitute sweetener sucralose. Additional details about the complaint appear in Issue 590 of this *Update*.

According to the court, Chobani argued that the "limitations place it at a competitive disadvantage because it completely precludes usage of the phrase 'no bad stuff' in relation to Dannon products regardless of whether or not a safety message is at issue. Indeed, Chobani's memorandum goes on—for six pages, in fact—to point out instances where its competitors in the industry use 'nearly identical puffery.'" The court



## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 602 | APRIL 29, 2016

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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acknowledged that “the phrase ‘no bad stuff,’ standing alone or at the very least in the absence of a specific comparison to the safety of a direct competitor’s product, may very well amount to non-actionable puffery,” but in this case, “a statement about something being ‘bad’ or ‘bad stuff’ can take on a specific, non-puffing meaning when connected to an express or implied factual assertion about a specific competitor’s product. [] This is especially so where, as here, that kind of ‘negative phrasing’ was employed ‘in connection with other statements and images that paint[ed] Dannon’s products as a safety risk because they contain sucralose.’” The court was unconvinced that the injunction order had been made in error and refused to grant Chobani’s motion to reconsider the decision.

### Heinz False Source Suit Dismissed

A California federal court has dismissed a lawsuit alleging Kraft Heinz Food Co. mislabels its Heinz sauces as manufactured in the United States despite containing ingredients sourced outside the country, including turmeric, tamarind extract and jalapenos. *Alaei v. Kraft Heinz Food Co.*, No 15-2961 (S.D. Cal., order entered April 22). The complaint failed to meet the heightened pleading standards associated with fraud claims, the court found, in part because she did not allege that the Heinz 57® sauce she bought contained any specific ingredients of foreign origin. Further, she could not have standing to assert misrepresentation claims against products she did not purchase without arguing the other sauces were substantially similar to Heinz 57®. Accordingly, the court granted Kraft’s motion to dismiss but allowed the plaintiff leave to amend. Additional information on the complaint appears in Issue [589](#) of this Update.

### Organic Consumers Association Challenges “Organic” Infant Formula Claims

The Organic Consumers Association (OCA) has filed lawsuits against The Hain Celestial Group, Inc. and The Honest Co., Inc. alleging the companies’ “organic” infant formula products contain multiple substances prohibited for use in organic food by the U.S. Department of Agriculture (USDA). *Organic Consumers Assoc. v. Hain Celestial Grp., Inc.*, No. 16-2533 (D.C. Super. Ct., filed April 5, 2016); *Organic Consumers Assoc. v. Honest Co., Inc.*, No. SC125655 (Cal. Super. Ct., Los Angeles Cnty., filed April 6, 2016).

The [lawsuit](#) against Hain Celestial challenges the label claims of its Earth’s Best products, which the complaint argues are all labeled organic despite none meeting federal organic regulations. “Behind the pictur-



## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 602 | APRIL 29, 2016

esque red barn of the Earth's Best logo displayed on each of the Falsely Labeled Products lies a chemical soup of synthetic, toxic, and hazardous ingredients," the complaint argues. "For example, of the 48 ingredients in Earth's Best Organic Infant Formula, *more than half* are not agricultural and are *furthermore* not permitted in organic foods by federal law." Challenged ingredients include ascorbyl palmitate, a preservative; zinc sulfate, "recognized by federal regulations as a hazardous compound"; sodium selenite, "recognized by general regulations as a very toxic and hazardous substance"; calcium pantothenate, which is "synthetically produced from formaldehyde and isobutyraldehyde"; and "other 'innovative' ingredients like taurine (whose safety for infants has not been determined."

The complaint in the lawsuit against The Honest Co. is similar, alleging 11 of the 40 ingredients are synthetic and not permitted in organic products. "Some of these ingredients are federally regulated as hazardous compounds. At least one of these ingredients is irradiated. Finally, some have not even been assessed as safe for human foods—much less for infant formulas," the complaint asserts. In both lawsuits, OCA seeks injunctions preventing the companies from labeling the products as "organic."

"Our job as a consumer advocacy group is to call out and hold accountable companies like The Honest Co. and Hain Celestial when they knowingly and intentionally mislead consumers," OCA's international director said in an April 26, 2016, press release. "OCA has long been a defender of organic standards, which means also defending the organic label. Our goal with this lawsuit is to force these companies to either comply with USDA organic standards or stop calling their products 'organic.'"

### Campbell's "Healthy" Gumbo Contains *Trans* Fat, Lawsuit Alleges

A consumer has filed a putative class action against Campbell Soup Co. alleging the company misrepresents its Healthy Request gumbo soup as "healthy" despite containing *trans* fat. *Brower v. Campbell Soup Co.*, No. 16-1005 (S.D. Cal., filed April 25, 2016). Campbell has branded itself as "one of the world's leading providers of healthy and nutritious foods," the complaint asserts, in part by establishing a research group, Campbell's Center for Nutrition & Wellness, and obtaining "heart-check" certification from the American Heart Association (AHA) for some of its products. Despite its marketing, Campbell adds "partially hydrogenated soybean oil, containing artificial *trans* fat, to Healthy Request Gumbo,"



## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 602 | APRIL 29, 2016

the plaintiff argues. The complaint details health risks reportedly linked to the consumption of *trans* fat, including increased risks of cardiovascular ailments, type 2 diabetes and Alzheimer's disease.

The "statements, images, and emblems" appearing on Healthy Request Gumbo's label—the "Healthy Request" branding, "heart healthy" claim, vignettes of vegetables and grains, claims that the soup was "cooked with care" and "made with lean chicken meat," and the AHA certification—"taken individually and especially in context of the label as a whole, are false and misleading because they suggest the product is generally healthy, and specifically heart healthy," the complaint argues. For alleged violations of California's consumer-protection statutes and a breach-of-warranties claim, the plaintiff seeks class certification, damages, restitution and attorney's fees.

### "Panera 2.0" Ordering System Unaccommodating to Visually Impaired, Consumers Allege

Two consumers have filed a putative class action against Panera LLC involving the restaurant chain's "2.0" ordering system using touchscreen kiosks and a "fast lane" pick-up shelf, which they allege fails to accommodate the visually impaired. *Gomez v. Panera LLC*, No. 16-21421 (S.D. Fla., filed April 20, 2016). The plaintiffs argue that they each visited a Florida location of Panera and found themselves "unable to enjoy the same ordering and dining experience as sighted patrons" because they were "denied the ability to independently select and purchase lunch." The kiosks "were not designed and programmed to interface with commercially available screen reader software and further were not equipped with auxiliary aids (such as an audio interface system) for disabled individuals who are visually impaired," the complaint alleges. The plaintiffs further argue that Panera's website is unusable to them because it does not integrate with their screen reader programs. They seek orders requiring Panera to update its website to accommodate the visually impaired and an order directing Panera "to evaluate its policies, practices and procedures toward persons with disabilities."

### Lawsuit Alleges Company Substituted Jumbo Squid for Octopus

A consumer has filed a proposed class action against Vigo Importing Co. alleging its octopus product is actually jumbo squid, "which is significantly cheaper and of a lower quality than octopus." *Fonseca v. Vigo Importing Co.*, No. 16-2055 (N.D. Cal., San Jose Div., filed April 19, 2016). The complaint details each animal's taxonomy within the



## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 602 | APRIL 29, 2016

### 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.

animal kingdom and describes the current populations of each—octopus populations “have dwindled around the world due to over-fishing,” while “jumbo squid populations have been thriving” because of the squid’s “ability to adapt to changing ocean conditions caused by global warming.” As a result, “the cost of octopus has risen dramatically compared to the cost of squid,” and “due to similarities in texture, squid can easily be substituted for octopus without the consumer being able to tell the difference particularly when sold in a sauce like garlic sauce or marinara sauce.” The plaintiff argues that independent DNA testing determined the contents of Vigo’s Octopus in Marinade and Octopus in Soy and Olive Oil were actually jumbo squid. For alleged breach of warranties, unjust enrichment, fraud, misrepresentation and violations of state consumer-protection laws, he seeks class certification, damages, restitution and attorney’s fees.

