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# FOOD & BEVERAGE LITIGATION UPDATE

SHOOK HARDY & BACON



LEGISLATION, REGULATIONS & STANDARDS

## Glyphosate to Join Prop. 65 List

California's Office of Environmental Health Hazard Assessment (OEHHA) has announced that glyphosate will be listed under the state's Safe Drinking Water and Toxic Enforcement Act (Prop. 65). In September 2015, OEHHA announced its findings on the carcinogenicity of glyphosate, a chemical used in pesticides that has been targeted in several putative class actions challenging whether a product can be "natural" if its ingredients retain some glyphosate residue from the growing process. The effective date of listing and the proposed safe harbor level will be determined after a California appeals court rules on a stay.

## EU Countries Vote Against Allowing GM Maize

A majority of EU countries reportedly voted against allowing the cultivation of two genetically modified (GM) types of maize as well as the extension of approved cultivation areas for another GM maize already grown in Spain. Neither vote was decisive under EU rules, which require 65 percent of countries' votes to decide, so the determination will go to European Commission President Jean-Claude Juncker. *See Reuters*, March 27, 2017.

In an April 4, 2017, press release, members of European Parliament urged the European Commission to halt plans to allow the import of GM maize, highlighting "the lack of data on the many sub-combinations of the variety—all of which would also be



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authorised" and arguing for reform of the GM authorization procedure.

## Proposed California Legislation Would Ban PFCs From Fast-Food Wrappers and Containers

The California legislature is considering a bill to make the state the first in the nation to ban perfluorinated chemicals (PFCs) from restaurant food wrappers and containers. The bill proposes that food providers "shall not serve, sell, offer for sale, or offer for promotional purposes prepared food or fast food in, on, or with take-out food service ware or packaging that contains a fluorinated chemical." The bill has been referred to the Committee on Environmental Safety and Toxic Materials and set for hearing on April 25, 2017.

According to the Centers for Disease Control and Prevention (CDC), scientists do not have enough information to evaluate the health effects of exposure to per- and polyfluoroalkyl substances (PFAS)—a group of materials to which PFCs belong—although some studies have allegedly shown that PFAS may affect the growth of fetuses, decrease fertility and interfere with normal hormonal function, among other possible effects. Exposure to PFAS from consumer products such as fast-food wrappers and containers, microwave popcorn bags, pizza boxes and candy wrappers is "usually low," CDC findings reportedly show, especially when compared to possible levels of exposure from contaminated drinking water or eating fish caught in contaminated waters.

## Bipartisan Congressional Group Calls for Review of "Havana Club" Trademark

Several members of Congress, led by Reps. Ileana Ros-Lehtinen (R-Fla.) and Debbie Wasserman Schultz (D-Fla.), have urged Secretary of State Rex Tillerson and Secretary of the Treasury Steven Mnuchin to review the Office of Foreign Assets Control's (OFAC's) "unprecedented decision to grant a license to allow Cubaexport, an entity wholly-owned by the Cuban government, to renew an expired trademark registration for Havana Club rum in the United States." The lawmakers express concern about the implications for American intellectual property rights holders because "Cubaexport claims rights to the Havana Club registration

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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.

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.


through its confiscation, without compensation, of the Jose Arechabala Company" in 1960.

"By allowing the Cuban regime to register the Havana Club trademark, OFAC is out of step with longstanding United States policy, and has set a terrible precedent for American intellectual property rights holders," Wasserman Schultz said in a March 29, 2017, press release. "I urge OFAC to reverse this misguided decision and send a loud and clear message to the international community that the United States has been and always will be a global leader on intellectual property rights."

The letter follows years of litigation over the trademark after OFAC revoked Cubaexport's prior license when it attempted to transfer the rights in 1997. Additional details on Bacardi Ltd.'s Freedom of Information Act request related to OFAC's 2016 reversal appear in Issue 593 of this *Update*.

LITIGATION

## Court Finds Bumble Bee Tuna Omega-3 Labeling "Open to Criticism" But Not Illegal

A California court held that Bumble Bee Foods, LLC did not act illegally by claiming its tuna was an "excellent source" of omega-3 fatty acids despite a U.S. Food and Drug Administration (FDA) proposal to prohibit the practice. *Garrett v. Bumble Bee Foods, LLC*, No. 14-264322 (order entered March 30, 2017). The plaintiffs alleged Bumble Bee began making the omega-3 claim in 2008, one year after FDA published its proposed rule, but the court found that Bumble Bee ended the claim after the rule was finalized in April 2014. "The fact that Bumble Bee engaged in conduct that was proscribed by a 'proposed' rule does not make it unlawful or illegal," the court said.

Bumble Bee began using the omega-3 claim after a supplement maker notified FDA in 2005 that it intended to use an omega-3 nutrient content claim on its product labels. Because FDA failed to object within 120 days, its claim was deemed permissible. The court noted an internal dispute at Bumble Bee over whether it too could use the claim. Ultimately, the marketing department "chose to disregard the advice of its own compliance specialist in deciding to go forward with the 'excellent source' claim." Bumble Bee's reliance on FDA's failure to act against the supplement maker was

not unlawful, the court found, and prohibiting Bumble Bee from using the same claim as another company could place it at a competitive disadvantage. Bumble Bee's decision to use the claim under such circumstances was "certainly open to criticism and challenge," the court noted.

The plaintiffs also claimed that Bumble Bee "failed to reveal a material fact on the label" of its tuna by displaying the American Heart Association "heart check" logo without disclosing it was a paid endorsement, but the court held that the plaintiffs had failed to prove that the logo was in fact a paid endorsement.

## "Codfather" Pleads Guilty in Fish Falsification Case

The owner of one of the largest commercial fishing businesses in the United States has pleaded guilty to conspiracy, falsifying federal records, cash smuggling and tax evasion in a case accusing him of deliberately misreporting the types of fish he caught to the National Oceanic and Atmospheric Administration (NOAA). *U.S. v. Rafael*, No. 16-10124 (D. Mass, plea entered March 30, 2017). Carlos Rafael, owner of Carlos Seafood, Inc. and known as the "Codfather," will face possible forfeiture of his business assets and up to five years in prison at his June 2017 sentencing.

An Internal Revenue Service (IRS) investigation apparently found that Rafael caught 800,000 pounds of fish over several years and reported it as haddock, pollock or other species with high NOAA quotas despite containing thousands of pounds of fish with lower quotas, including cod, flounder, grey sole, yellowtail and American plaice. Rafael also told IRS agents posing as potential buyers that he had been falsifying his reporting for 30 years, potentially throwing off NOAA numbers by millions and providing a possible explanation as to why fish stocks are smaller than scientists have projected over the years.

Restaurants and food companies have been targeted with claims of seafood fraud for several years. Details on seafood fraud reports and cases appear in Issues 416, 458, 583 and 602 of this *Update*.

## Dunkin' Donuts Franchises Settle Fake Butter Suits

Twenty-three Dunkin' Donuts franchise locations in Massachusetts have reached a tentative settlement with a plaintiff who claimed the stores served him "margarine or a butter substitute" on his

bagels despite his request for butter. *Polanik v. Boston Hill Donuts, LLC*, No. 1784-914 (Suffolk Cty. Superior Ct., settlement agreement filed March 24, 2017); *Polanik v. CM&R Donuts, Inc.*, No., 1784-915 (Suffolk Cty. Superior Ct., settlement agreement filed March 24, 2017). In both projected class actions, the plaintiff claimed he paid 25 cents each time he ordered butter and was never told a butter substitute was used instead. A Dunkin' Donuts spokesperson told *The Boston Globe* in 2013 that the recommended store procedure was to serve individual whipped butter packets if requested by the customer, but otherwise employees apply "vegetable spread" to bagels or pastries. If the settlement is approved, the plaintiff will receive $500 and up to 1,400 customers may claim free baked goods from specified stores in Massachusetts. The stores will also be required to use only butter for one year.

## Plaintiffs Claim Wise Foods Underfilled Potato Chip Bags

Wise Foods, Inc. is facing a projected class action claiming the company's potato chip bags have more than double the amount of slack fill as its major competitors' bags. *Alce v. Wise Foods, Inc.*, No. 17-2402 (S.D.N.Y., filed April 3, 2017). The plaintiffs claim that bags of 21 varieties of Wise's Potato Chips, Kettle Cooked Potato Chips and Ridgies can contain as much as 67 percent slack fill, while the company's own Dipsy Doodles Corn Chips contain only about one-third slack fill. For alleged violations of New York's Deceptive and Unfair Trade Practices Act, false advertising laws, the District of Columbia's Consumer Protection Procedures Act and unjust enrichment, the plaintiffs seek class certification, an injunction, damages and attorney's fees.

## California Court Refuses to Dismiss Projected Slack Fill Class Action Against Golden Grain

A California court is allowing to proceed a putative slack-fill class action against Golden Grain Inc., a subsidiary of PepsiCo, Inc. that makes Near East® rice and grain products. *Arcala v. Golden Grain Co.*, No. 16-555084 (order entered April 5, 2017). The plaintiffs allege that Golden Grain's couscous, rice pilaf, quinoa, tabbouleh and other products are packaged with nonfunctional slack fill in violation of state law, and the court rejected Golden Grain's arguments that the complaint made no distinction between functional and nonfunctional slack fill. Among other relief, the

plaintiffs are seeking an injunction, restitution and class certification.

## Court Tentatively Approves $8.25-Million Settlement in Whole Foods Kombucha Class Action

A federal court in California has given preliminary approval to a proposed $8.25-million settlement of a class action claiming that kombucha tea products manufactured by Millennium Products, Inc. and sold at Whole Foods were mislabeled. *Retta v. Millennium Products*, No. 15-1801 (C.D. Cal., order entered January 31, 2017). The plaintiffs claimed that the kombucha labels (i) used the term "antioxidant" when the product contained none; (ii) used the term "non-alcoholic" when the fermented tea product allegedly contained alcohol in excess of the amount permitted for non-alcoholic beverages; and (iii) understated the amount of sugar in the product.

In its order, the court granted class certification and approved monetary and injunctive relief, including Millennium's agreements to (i) add warning labels that the product contains alcohol and must be refrigerated because it is under pressure; (ii) conduct regular sample testing to ensure the accuracy of the products' sugar content; and (iii) adopt any new industry methodology for testing the alcohol content of kombucha beverages, if one is developed.

## TTAB Refuses Trademark Registration for La Finca Wines

The Trademark Trial and Appeal Board (TTAB) has affirmed a refusal by the U.S. Patent and Trademark Office (USPTO) to register a trademark for La Finca wines on the grounds that the winemaker failed to show evidence that the brand has acquired distinctiveness. *In re Finca La Celia, S.A.*, No. 86130560 (opinion issued March 31, 2017). Argentina-based winemaker Finca La Celia, which sells its La Finca wines in Trader Joe's stores, applied for registration of the mark in 2013 and appealed after a second reconsideration was denied. TTAB reversed USPTO's refusal to register the mark on the ground that it was generic, holding that even though the term "la finca," which means "the estate" in Spanish, is "merely descriptive," the term is "not perceived by the relevant public as a generic name for a type of wine."

TTAB affirmed the USPTO ruling that the maker had failed to show La Finca wines had acquired distinctiveness. After examining "copying, advertising expenditures, sales success, length and exclusivity of use, unsolicited media coverage, and consumer studies," the board found insufficient evidence to support the winemaker's claim.

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