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LEGISLATION, REGULATIONS & STANDARDS

NAD Says Aldi Should Change Savings Claims Ads

The National Advertising Division (NAD) has recommended that Aldi, Inc. discontinue advertising based on a “market basket” comparison that claims consumers could save more than 50 percent by buying Aldi brands instead of name-brand products at other grocery chains. Texas-based HEB Grocery Co. first challenged print ads published in Houston then later added a challenge to print advertising outside Texas as well as in Facebook and YouTube ads. HEB challenged whether the ads “adequately informed the consumer of the basis of comparison and whether the advertiser’s broad savings claims were supported.” NAD found that where percentage savings claims did disclose the basis of comparison, the “disclosures were vague and non-specific” and did not clarify that the achieving the advertised savings would require switching from name brands to Aldi’s house brands. Further, NAD found insufficient evidence to support Aldi’s claims that consumers would “always” save up to 50 percent.

Aldi will reportedly appeal the decision to the National Advertising Review Board on jurisdictional grounds, arguing that the ruling should be limited to Houston advertising because the nationwide and internet ads “were mentioned for the first time in H-E-B’s reply” rather than the original complaint.

LITIGATION

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Livestock Associations Sue USDA for COOL Rule Repeal

Two livestock trade associations have filed a lawsuit against the U.S. Department of Agriculture (USDA) alleging the agency's 2016 repeal of marking and labeling regulations violates the Meat Inspection Act and the Tariff Act. *Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of Am. v. U.S. Dept of Agric.*, No. 17-0223 (E.D. Wash., filed June 19, 2017). The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF) and the Cattle Producers of Washington (CPW) assert that the Meat Inspection Act requires that meat from animals slaughtered outside the United States be "marked and labeled as required for imported articles" and the Tariff Act requires "conspicuous" marking "as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." After a World Trade Organization ruling against a U.S. requirement to include country-of-origin labeling (COOL) on imports of livestock from Canada and Mexico, USDA declared that all beef and pork products were no longer subject to COOL requirements. Additional details on the proceeding appear in Issues [542](#) and [547](#) of this *Update*.

R-CALF and CPW allege that USDA's action violated trade laws by allowing more than one billion pounds of imported meat to be labeled and sold as products of the United States, flooding the market with foreign goods and hurting U.S. cattle and hog producers. The plaintiffs argue that USDA's repeal accomplished "the exact opposite of what the authorizing statute requires." They seek declaratory judgment that USDA's failure to comply with statutory marking and labeling requirements is unlawful, an injunction, public notice of the challenged regulations and attorney's fees.

Lawsuit Challenges Sanderson Chicken's "All Natural" Claims

Sanderson Farms, Inc.'s "all natural" chicken contains pesticides, antibiotics and other pharmaceuticals, according to a lawsuit filed by the Center for Food Safety, Friends of the Earth and Organic Consumers Association. *Organic Consumers Ass'n v. Sanderson Farms*, No. 17-3592 (N.D. Cal., filed June 22, 2017). The plaintiffs allege that Sanderson's chicken products are advertised as "100% natural," but testing purportedly shows the products contain human and veterinary antibiotics, tranquilizers, growth hormones, steroids and pesticides. The complaint further alleges the presence of such drugs indicate that Sanderson's raises its



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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.



chickens in “unnatural, intensive-confinement, warehouse conditions” rather than “sipping lemonade and playing volleyball” as represented in the company’s online advertising. For alleged violations of California consumer-protection laws, the plaintiffs seek accounting of profits, injunctive relief, corrective advertising and attorney’s fees.

“Consumers should be alarmed that any food they eat contains steroids, recreational or anti-inflammatory drugs, or antibiotics prohibited for use in livestock—much less that these foods are falsely advertised and labeled ‘100% Natural,’” a representative for the Organic Consumers Association said in a June 22, 2017, press release. “Sanderson’s advertising claims are egregiously misleading to consumers, and unfair to competitors. The organic and free-range poultry sector would be growing much more rapidly if consumers knew the truth about Sanderson’s products and false advertising.”

Candy Maker Alleges Competitor Infringed Trademarks, Patents

Sugarfina, maker of “luxury boutique” candies, has filed a trademark, copyright, patent and trade dress infringement suit against Sweet Pete’s alleging the competitor relied “heavily on several design elements of Sugarfina’s distinctive packaging and marketing” of Cuba Libre[®], Peach Bellini[®], Fruttini, Candy Cube, Candy Concierge and Candy Bento Box[®] products. *Sugarfina v. Sweet Pete’s*, No. 17-4456 (C.D. Cal., filed June 15, 2017). Sugarfina asserts that Sweet Pete’s copied the names, “size, shape, color or color combinations, texture, graphics and sales techniques” of all six named product lines that Sugarfina packages in “museum-quality Lucite.” Sugarfina further argues that Sweet Pete’s was “a failing business prior to its radical transformation into a Sugarfina copycat.” The plaintiff seeks an injunction, treble damages, corrective advertising and attorney’s fees.

Beverage-Packaging Company Files Trademark Infringement, Cyberpiracy Suit Against Former Chair

Gizmo Beverages has filed a lawsuit against its former chair alleging trademark infringement, cyberpiracy and conversion in response to his reported refusal to surrender company-related domain names and email accounts. *Gizmo Beverages, Inc. v. Park*, No. 17-2037 (C.D. Cal., filed June 14, 2017). Gizmo licenses the

patents for a bottle-cap closure from another company, but after defendant Don Park allegedly failed to pay \$400,000 for the licensing agreement, Gizmo removed him from management. Park registered the domain name "gizmoclosure.com," one letter different from Gizmo's "gizmoclosures.com," and has continued using the domain and associated email addresses after leaving the company. Gizmo seeks an injunction, transfer of all domain names, damages and attorney's fees.

RICO Claims Dismissed in Tomato Suit

A California federal court has dismissed Racketeer Influence and Corrupt Organizations Act (RICO) claims against tomato-processing companies Los Gatos and Ingomar but will allow a bribery claim to proceed. *Morning Star Packing Co. v. SK Foods, L.P.*, No. 9-0208 (E.D. Cal., order entered June 14, 2017). The Morning Star Packing Co. brought a RICO and bribery lawsuit against several competitors in 2009, alleging they conspired to fix prices, rig bids and avoid competing for the same customers. The court dismissed Morning Star's RICO claims against Ingomar and Los Gatos, finding that the company could not show that the competitors committed two injurious predicate acts. Similar claims against other competitors—SK Foods and Intramark—were not at issue in the ruling and will proceed to trial.

The court refused to grant summary judgment on Morning Star's bribery allegations against Ingomar. "Viewing this evidence in the light most favorable to Morning Star, and drawing all reasonable inferences in its favor, a reasonable juror could conclude Ingomar and SK Foods had a 'meeting of the minds' to bribe customers," the court held.

SCIENTIFIC/TECHNICAL ITEMS

AHA Advisory Examines Dietary Fats and Cardiovascular Disease

The American Heart Association (AHA) has issued an advisory concluding that replacing saturated fats with unsaturated fats will lower the incidence of cardiovascular disease (CVD), especially if combined with an "overall healthful dietary pattern." Frank M. Sacks, et al, "Dietary Fats and Cardiovascular Disease: A Presidential Advisory From the American Heart Association," *Circulation*, June 15, 2017. AHA reviewed multiple studies on the effects of dietary saturated fat intake and its replacement with other types of fats, as well as replacement with carbohydrates, and

concluded that replacing saturated fat with polyunsaturated vegetable fat and changing dietary patterns reduces the risk of CVD by as much as 30 percent.

Key recommendations of the review include lowering intake of saturated fat, increasing intake of polyunsaturated fat and avoiding coconut oil, which more than 70 percent of Americans regard as “healthy,” despite that it actually increases LDL cholesterol.

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