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LEGISLATION, REGULATIONS & STANDARDS

Cooke Aquaculture Fined $332,000 For Puget Sound Salmon Pen Collapse

The Washington Department of Ecology has reportedly fined Cooke Aquaculture $332,000 for violations of state water quality laws related to a net pen failure that released approximately 250,000 farmed Atlantic salmon into Puget Sound. Cooke initially blamed the failure on high tides coinciding with the August 2017 solar eclipse; state investigators determined that the pen collapsed because the company failed to clean and maintain the nets, reportedly finding that they were covered with more than 110 tons of mussels, clams and other marine organisms that increased tidal drag and overwhelmed the mooring systems. The state reports that about 57,000 of the escaped fish have been captured.

Before the Puget Sound farm collapsed, Cooke reportedly applied to build a salmon farm in Washington's Strait of Juan de Fuca. The state has terminated Cooke's leases for both the Puget Sound location and a second location in Port Angeles and placed a moratorium on new net pen permits. The state legislature is also considering a bill that would prohibit the state from entering or renewing leases for marine finfish farming of non-native species.

FSIS Denies Request to Waive Line Speeds for Chicken Processing

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

The Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture has denied a petition from the National Chicken Council seeking to waive the line speed limit of 140 birds per minute in processing plants. FSIS told the council that processors of young chicken are permitted to run at higher speeds if they were one of 20 participants in a New Poultry Inspection System pilot study operating under a *Salmonella* Initiative Program (SIP) waiver. During the pilot program, participants demonstrated that they could maintain process control at line speeds up to 175 birds per minute and were capable of "consistently producing safe, wholesome and unadulterated product" and "meeting pathogen reduction and other performance standards." The agency's letter indicated that it would consider granting additional SIP waivers but would not grant waivers that would allow processors to operate without maximum line speeds.

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LITIGATION

Appeals Courts to Review SSB Warning Labels, Taxes

The Ninth Circuit has granted an en banc rehearing of its September 2017 decision to block a San Francisco ordinance requiring health warnings on sugar-sweetened beverages (SSBs) on the grounds that it unduly burdened and chilled speech protected by the First Amendment. *Am. Beverage Ass'n. v. City & Cty. of San Francisco*, No. 16-16072 (9th Cir., entered January 29, 2018). The September ruling overturned a 2016 district court decision determining that the city's interest in public health and safety was a reasonable basis to enforce the ordinance, which required black-box warning labels on all advertising for SSBs that could take up as much as 20 percent of the advertising space.

In addition, the Pennsylvania Supreme Court has agreed to hear a challenge to Philadelphia's SSB tax that claims the 1.5 cent-per-ounce tax violates state law; the challengers allege that because the tax is levied on distributors and ultimately borne by consumers, it duplicates the state's preexisting sales tax on soft

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.

drinks. *Williams v. City of Philadelphia*, No. 2 EAP 2018 (Pa., order entered January 30, 2018).

Canadian Trade Group Files Suit to Quash Plastic Bag Ban

The Canadian Plastic Bag Association (CPBA) has petitioned a British Columbia court to quash a "checkout bag regulation bylaw" passed by the city of Victoria, arguing the municipality does not have the legal authority to enact the rule. *Canadian Plastic Bag Ass'n v. City of Victoria,* No. S-180740 (S.C.R. British Columbia, filed January 22, 2018). On January 18, 2018, the Victoria City Council adopted a bylaw that prohibits businesses from providing single-use plastic shopping bags to customers and mandating them to charge from C$.15 for paper or C$1 for reusable bags. CPBA alleges that the city's municipal powers are defined by British Columbia's Community Charter, Spheres of Concurrent Jurisdiction—Environmental and Wildlife Regulation and the Environmental Management Act; taken together, the group argues, the provincial laws do not authorize individual municipalities to "regulate, prohibit or impose requirement[s]" related to either solid waste management or the sale or dispensing of plastic bags. In addition, CPBA alleges that the Community Charter, which governs municipal revenues, does not give the city the authority to require businesses to charge fees to customers for the "purpose of promoting 'sustainable business and consumer habits.'"

Florida Magistrate Recommends Against Awarding Fees to Chipotle

A Florida magistrate has recommended that a district court deny Chipotle Mexican Grill Inc.'s motion for $1.5 million in attorney's fees and costs after the company was granted summary judgment against claims that its advertising misled consumers into believing its food products only contained ingredients free of genetically modified organisms (GMOs). *Reilly v. Chipotle Mexican Grill, Inc.*, No. 15-23425 (S.D. Fla., report and recommendation filed January 26, 2018). Although Florida's Deceptive and Unfair Trade Practices Act (FDUPTA) permits prevailing parties to recover

costs and fees, the magistrate noted that the trial court has broad discretion to consider various factors, including: (i) the scope and history of the litigation; (ii) the ability of the non-prevailing party to satisfy an award; (iii) whether an award of fees would deter similar litigants; (iv) the merits of the respective positions; and (v) whether the claim was brought to resolve a significant legal issue. The magistrate noted that "most, if not all" of the factors weighed in the plaintiff's favor, including a finding that although the plaintiff was ultimately wrong on the state of the law, her claims were brought in good faith. Moreover, the magistrate noted, "FDUPTA is designed to protect the consuming public, not to penalize them for attempting to enforce its provisions."

Ninth Circuit Vacates Trademark Infringement Win For Whole Foods

The U.S. Court of Appeals for the Ninth Circuit has vacated and remanded a lower court's grant of summary judgment in favor of Whole Foods Market Inc. in a trademark infringement case related to the company's "Eat Right America" promotion. *Eat Right Foods Ltd. v. Whole Foods Mkt., Inc.,* No. 15-35524 (9th Cir., entered January 29, 2018). Plaintiff Eat Right Foods (ERF), a New Zealand-based maker of organic foods, registered U.S. marks for "EatRight" and "Eat Right" in 2001 and 2003; ERF has also sold a line of gluten-free cookies to Whole Foods.

In 2009, Whole Foods contracted with Nutritional Excellence, LLC, which previously did business as "Eat Right America," to use a food-scoring system to advertise the nutritional value of products to shoppers. In early 2010, an ERF executive discovered Whole Foods using an "Eat Right America" promotion and contacted Whole Foods to suggest the grocery buy its brand outright. Later that year, ERF discovered that Nutritional Excellence had applied to register the "EatRight America" mark and opposed the application, later settling its claims with that company. Over the next two years, ERF and Whole Foods communicated multiple times about its dispute over the use of the ERF marks; in December 2013, ERF filed suit for trademark infringement, false designation of origin and unfair competition. The trial court granted summary judgment to Whole Foods, finding ERF's claims barred by laches and acquiescence.

In its review, the Ninth Circuit noted that laches bars a trademark claim when “the trademark holder knowingly allowed the infringing mark to be used without objection for a lengthy period of time” and that to prove that laches bars a claim, “a defendant must ‘prove both an unreasonable delay by the plaintiff and prejudice to itself.’” ERF argued that any delay on its part was reasonable because of its attempts to settle its claims against Whole Foods without litigation; Whole Foods argued that ERF delayed filing suit in an effort to persuade the grocery to buy its brand. The district court agreed with Whole Foods that the delay was not reasonable, but the Ninth Circuit found that decision “violated the cardinal rule of summary judgment: that disputed issues of material fact must be resolved in favor of the non-moving party.”

The appeals court also held that the delay in filing did not prejudice Whole Foods, either with expectations-based or evidentiary prejudice. In addition, the court noted that the doctrine of acquiescence requires an affirmative act that conveys implied consent, an inexcusable delay and prejudice. Because the flaws in the district court’s reasoning in its laches analyses also affected its finding of acquiescence, the appeals court said “those issues alone would be enough for us to vacate the acquiescence finding and remand for further proceedings.”

“Brother Thelonious” False Endorsement Suit to Proceed

A California federal court has refused to dismiss a trademark infringement and right of publicity lawsuit filed by the estate of Thelonious Monk against a craft brewery selling “Brother Thelonious Belgian Style Abbey Ale,” finding the estate sufficiently pleaded all causes of action. *Monk v. North Coast Brewing Co.,* No. 17-5015 (N.D. Cal., entered January 31, 2018). Monk’s son had agreed to allow North Coast Brewing Co. to use the musician’s name, likeness and image on the ale in exchange for the brewery’s donation of a portion of the profits to the Thelonious Monk Institute of Jazz, but he allegedly revoked his consent because the brewer extended the use to apparel and other merchandise.

The court found plausible that the estate had a protectable interest in Monk's name, image and likeness and that it had alleged enough facts to support a possible finding of likelihood of confusion. Although it noted both parties failed "to engage with the relevant doctrine" of law, the court will consider the trademark infringement claim as one of false endorsement and permit a claim for unjust enrichment to proceed as a quasi-contract claim.