



LEGISLATION, REGULATIONS & STANDARDS

## L.A. Proposal Would Require Vegan Option on Menus

A Los Angeles councilperson has reportedly introduced a motion that would require entertainment venues and other establishments to offer at least one “vegan protein option” in an effort to combat climate change. The motion cites “several studies which suggest a link between the meat and dairy industry and the environment, including a University of Oxford study that found if more people in the United States adopted plant-based eating it could cut greenhouse-gas emissions from food sources by 70 percent,” according to *CBS Los Angeles*. The proposal would hold city departments accountable for offering vegan options at city-operated venues such as zoos and parks.

## Oklahoma Health Board Approves Food Safety Standards for Cannabis-Infused Products

Oklahoma’s Board of Health has unanimously approved recommendations from the state’s Medical Marijuana Food Safety Standards Board on health and safety requirements for producing cannabis-infused foods, according to *Tulsa World*. The standards incorporate existing state food regulations but will add stricter criteria and tests, including testing for cannabinoid potency, heavy-metals levels and chemical residues.

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For additional information about Shook’s capabilities, please contact



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## ASA Dismisses Bacardi Ad Complaint

The U.K. Advertising Standards Authority (ASA) has declined to take action against Bacardi-Martini Ltd. following a complaint that its television ad “was irresponsible because it encouraged immoderate drinking by implying that drinking should take place before and throughout a night out.” In its determination, ASA found that “a sealed bottle of Bacardi rum was shown on several occasions but none of the characters in the ad were shown actually serving or drinking the rum” until the group of characters reaches a bar. “The implication was that the group would drink some of the alcohol during their night out, but we noted that none of the characters shown in the ad seemed to be dancing, moving, or otherwise interacting with each other in a way suggestive of intoxication or excessive alcohol consumption at any point, including in the final scenes,” ASA ruled. “For those reasons we concluded that the ad did not encourage immoderate drinking and was not irresponsible.”



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## EFSA Issues Opinion on PFAS in Food

The European Food Safety Authority (EFSA) has released an opinion proposing a revision to tolerable intakes of per- and polyfluoroalkyl substances (PFAS), which food packaging can contain. The authors reportedly observed high levels of PFAS in “meat and meat products” as well as “fish and other seafood.” In addition, PFAS was “detected in blood samples of almost all individuals assessed, demonstrating ubiquitous exposure.”



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### LITIGATION

## Amazon to Stop Selling Force-Fed Foie Gras in California

Following a California settlement, Amazon has reportedly agreed to stop selling foie gras produced from force-fed ducks and geese. The settlement between the company and Los Angeles County stems from a lawsuit alleging that Amazon violated a 2004 California law banning the sale of the products. Under the agreement, Amazon will not sell—or allow its third-party sellers to offer for sale—force-fed foie gras in California for five years.

A lawsuit seeking to invalidate the ban awaits a ruling on certiorari from the U.S. Supreme Court after the Ninth Circuit

### 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

found that the statute was not preempted by the Poultry Products Inspection Act.

inspections, subject to FDA, USDA and FTC regulation.

## Whole-Grain Cheez-It Lawsuit Revived

The Second Circuit has reversed a lower court's dismissal of a lawsuit alleging that Kellogg Co. misleads consumers by marketing its Cheez-Its as "made with whole grain." *Mantikas v. Kellogg Co.*, No. 17-2011 (2nd Cir., entered December 11, 2018). The lower court had agreed with Kellogg that the "made with whole grain" label was factually accurate and would not mislead reasonable consumers, and it dismissed the complaint for failure to state a claim.

"Although the district court is correct that an allegedly misleading statement must be viewed 'in light of its context on the product label or advertisement as a whole,' [] the court misapplied that principle to Plaintiffs' claims in this case," the court held. "Plaintiffs' core allegation is that the statements 'Whole Grain' and 'Made With Whole Grain' are misleading because they communicate to the reasonable consumer that the grain in the product is predominantly, if not entirely, *whole* grain." The primary ingredient of Whole Grain Cheez-Its, the court noted, was enriched white flour, with whole grain flour appearing as second or third on the ingredients list.

Although the Nutrition Facts panel clarified that a serving was 29 grams and the whole grain content was between five and eight grams per serving, "we cannot conclude that these disclosures on the side of the box render Plaintiffs' allegations of deception implausible," the court stated. "[A] reasonable consumer should not be expected to consult the Nutrition Facts panel on the side of the box to correct misleading information set forth in large bold type on the front of the box. Plaintiffs plausibly allege that the Nutrition Facts panel and ingredients list on whole grain Cheez-Its—which reveals that enriched white flour is the predominant ingredient—contradict, rather than confirm, Defendant's 'whole grain' representations on the front of the box." Accordingly, the court vacated the district court's dismissal and remanded the case for further proceedings.

## Fannie May Slack-Fill Suit Dismissed

An Illinois federal court has dismissed a putative class action alleging that Fannie May Confections Brands Inc. underfills its Mint Meltaways and Pixies candy boxes. *Benson v. Fannie May Confections Brands Inc.*, No. 17-3519 (N.D. Ill., E. Div., entered



December 10, 2018). The court previously dismissed the plaintiffs' complaint on the grounds that it provided "bare-bones" factual allegations and failed to allege a claim that would not be preempted by the federal Food, Drug and Cosmetic Act.

The court dismissed the plaintiffs' argument that Fannie May's 14-ounce boxes contained less slack fill than its seven-ounce boxes, the subject of the complaint. "This type of comparison tells the Court nothing about the slack-fill in the containers in question," the court found. "The fact that a different container is filled to a different level is not only unsurprising, it is what one would expect."

The court compared the plaintiffs' allegations with those in *White v. Just Born Inc.*, in which the complaint survived a motion to dismiss (but was later dismissed at the class certification stage). "Here, Plaintiffs have not identified an identical box containing a greater volume of the same product," the court held. "Instead, they point to a larger box of the same products that contains proportionately less slack-fill. Plaintiffs ask the Court to accept the conclusion that a box containing twice as much product should include twice as much slack-fill if all of the slack-fill is functional. For the reasons stated above the Court finds this comparison unhelpful and the opinion in *White* distinguishable."

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