

SOY MILK, BLACK BEAN BURGERS, AND ALMOND-MILK ICE CREAM:

PRODUCERS' FIRST AMENDMENT RIGHT TO USE CLEAR LABELS ON FOOD

Americans today enjoy a wide variety of plant-based foods. Increasingly, consumers are buying plant-based versions of meats, dairy products, and eggs, such as meaty burgers made of proteins derived from peas or wheat, soy milk and nut cheeses, and scrambles that get their eggy flavor from mung beans. In fact, these products now exceed three billion dollars in sales annually.

Consumers buy plant-based foods for a number of reasons – for example, to increase diet variety or for their attractive nutritional profiles. They find them easy to incorporate into their lifestyles because plant-based meats, dairy products, and eggs can be used just as the conventionally produced versions would be. Burgers go on buns with mustard and ketchup. Milks go on cereal and in coffee. And eggs can be scrambled or be used in baking.

Clear labels communicate both of these important qualities to consumers: that these foods are plant-based and that they are functionally meats, dairy products, and eggs. But with consumers increasingly choosing alternatives to conventional animal products, some ranchers and dairy producers are launching legislative or regulatory attacks to censor the words that can be used on the labels of plant-based foods. These attacks are ill-conceived in a variety of ways: for example, they are anti-competitive and patronizing to consumers. But perhaps most critically, producers have a right under the First Amendment to describe their products in a clear manner consistent with consumer expectations.

CONSUMER UNDERSTANDING

The rising popularity of alternatives to conventional animal products demonstrates that Americans are making informed

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- JUDGE SAMUEL CONTI, *ANG V. WHITEWAVE FOODS* (2013)

decisions based on their preferences, tastes, values, health concerns, and so on. A 2006 survey asked more than 800 adults what soy milk is made out of, and nearly all respondents knew it was not cow's milk.² People know what they are getting and have every right to continue knowing. For the dairy and meat industries to argue otherwise is an affront to consumer intelligence and choice.

Courts have sided definitively against lawsuits alleging that plant-based terms like "soy milk" are misleading:

- In 2013, private plaintiffs sued WhiteWave, the maker of Silk plant-based milks, alleging that the products were misbranded. Judge Samuel Conti ruled that the plaintiffs' claim that they had been deceived "stretches the bounds of credulity" and that "under plaintiffs' logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper."³
- In 2015, Judge Vince Chhabria dismissed allegations that Trader Joe's had violated standards of identity (standardized definitions for a wide range of food products) by using the term "soymilk," explaining that the fact that a standard of identity for milk exists, "does not categorically preclude a company from giving any food product a name that includes the word milk" and that "Trader Joe's has not, by calling its products 'soymilk,' attempted to pass off those products" as cow's milk.⁴
- In 2017, Judge Stephen V. Wilson dismissed a lawsuit alleging that almond milk marketing was misleading on the basis that consumers falsely believed that almond milk had the same nutritional profile as dairy milk. "No reasonable consumer could be misled by Defendant's unambiguous labeling and factually accurate nutrition statements," his opinion read. "By using the term 'almond milk,' even the least sophisticated consumer would know instantly the type of product they are purchasing."⁵

These products are already called what they should be. As a practical matter, consumers would have to decipher vague, confusing, and in some cases, outright misleading phrases – e.g., "coconut liquid," "almond juice," "soy beverage," "wheat gluten alternative," and so on. In short, banning the use of already

¹ Nielsen 2017 <http://www.prweb.com/releases/2017/09/prweb14683840.htm>

² Good Food Institute, *Citizen Petition*, FDA-2017-P-1298, Attachment A: Soyfoods Association of North America, Summary of Consumer Research, <https://www.regulations.gov/document?D=FDA-2017-P-1298-0001>.

³ *Ang v. Whitewave Foods Co.*, Civ. No. 13-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013).

⁴ *Gitson v. Trader Joe's Company*, Civ. No. 13-1333, 2015 WL 9121232, at *1-2 (N.D. Cal. Dec. 1, 2015) (regarding the specious claim that consumers will assume animal products (e.g., cow's milk) and their plant-based counterparts (e.g., soy milk) are nutritionally equivalent, the ruling noted that consumers "would not assume that two distinct products have the same nutritional content" and could easily consult the label).

⁵ *Painter v. Blue Diamond Growers*, Civ. No. 17-2235 (C.D. Cal. May 24, 2017).

well-established names would result in more consumer confusion, not less, and would present a serious hurdle to manufacturers trying to describe their products.

CONSTITUTIONALITY

First Amendment jurisprudence makes clear that if the government intends to restrict corporate speech (e.g., banning terms like “almond milk” and “veggie burger”), it must further a legitimate government purpose. Privileging one industry over another does not qualify.

The Supreme Court’s decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission* affirmed that commercial speech (like words on labels) is protected by the First Amendment.⁶ The Court explained that the government can only restrict commercial speech when the restriction directly advances a substantial governmental interest.⁷ Moreover, the restriction must not be more extensive than necessary.⁸ The Court later clarified in *Sorrell* that content-based restrictions – which prohibit speech on the basis of what it says – are subject to heightened scrutiny.⁹

It would be difficult, if not impossible, to imagine a scenario where the government would meet the high bar of demonstrating that banning common names (e.g., “coconut milk,” “coconut meat”) and/or names with clear descriptors (e.g., “dairy-free yogurt,” “vegan beef jerky”) is not an overly restrictive approach to ensuring consumer understanding.¹⁰

In fact, in 2017, the Eleventh Circuit held that the state of Florida had violated the First Amendment when it told a creamery that it could not label its low-fat milk as “skim milk” without adding Vitamin A.¹¹ The court found that the state’s restriction on the term “skim milk” was “clearly more extensive than necessary to serve its interest in preventing deception and ensuring adequate nutritional standards.”¹²

In a far less recent, but equally important, case, Kansas’s Artificial Dairy Products Act – a precursor to today’s state bills targeting plant-based alternatives – was struck down in 1987 on another constitutional ground: preemption.¹³ There, the court ruled that the state’s requirement that non-dairy or hybrid products be

labeled “artificial” was an obstacle to accomplishing the federal Food Drug and Cosmetic Act’s purpose of ensuring consumer clarity.¹⁴ Rather, the legislation’s problematic provisions would engender “misleading and inaccurate information to consumers” by employing “the pejorative label ‘artificial dairy product.’”¹⁵

PREVALENCE AND LONGSTANDING USE OF TERMS

The prevalence of food names that include terms that also pertain to conventional meat or dairy products cannot be overstated (peanut butter, nut meat). A quick Google search shows that “soy milk” and “soymilk” are 25 times more common than “soy beverage” and “soy drink;” “almond milk” and “almondmilk” exceed “almond beverage” and “almond drink” at a rate of well over 30 times. It should come as a shock to no one that these are the names by which consumers recognize these products.

“Soy milk” and “coconut milk” are standard and well-understood concepts. Humans have consumed plant-based milks and non-animal based meats for centuries and across cultures. In the U.S., “soy milk” has been in commercial use since the 1940s and even appears in USDA materials dating back to the early 1960s.

According to Merriam-Webster, the word “meat” means food and nourishment and dates back to the Middle Ages; the specific denotation referring to animal flesh is not even listed in the first two definitions of the term.¹⁶ Likewise, even the specific phrase “almond milk” appears in texts from the fourteenth century.¹⁷ The long history of countless types of foods carrying these names underscores how desperate (and more than a little silly) it is for certain sectors of the dairy and meat industries to claim ownership over everyday words.

CONCLUSION

Food companies should continue to use clear labels that consumers understand. The government should refrain from imposing restrictions that could violate the Constitution, put the federal government in the untenable role of picking winners and losers in the marketplace, and cause consumer confusion. In order to protect the Constitution, the free market, and common sense, legislators should oppose any attempts to ban common terms on product labels.

⁶ See generally *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

⁷ *Id.* at 564.

⁸ *Id.*

⁹ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011).

¹⁰ See *Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999) (describing “inherently misleading” standard in terms of “awesome impact” leaving consumers “bound to be misled”).

¹¹ See generally *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017).

¹² *Id.* at 1240.

¹³ See generally *Comm. for Accurate Labeling and Marketing v. Brownback*, 665 F. Supp. 880 (D. Kan. 1987).

¹⁴ *Id.* at 885.

¹⁵ *Id.* at 884-85.

¹⁶ *Meat*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/meat> (accessed Mar. 6, 2018).

¹⁷ *Almond milk*, OxfordDictionaries.com, https://en.oxforddictionaries.com/definition/almond_milk (accessed Mar. 6, 2018).

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