CLIENT ALERT

"I Can Believe It's Not Butter": Northern District of California Enjoins State Enforcement Against Use of "Butter" to Describe Vegan "Butter"

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One of the hottest food trends of the last few years has been the proliferation of plant-based alternatives to meat and dairy foods. Grocery stores now carry numerous "milk" alternatives, such as "soymilk" and "cashew milk." "Beyond Meat" and many other companies have launched meat substitutes that look and taste like real meat, which are rapidly gaining popularity.

The success of these new products has sparked a backlash from some food producers and plaintiffs' lawyers who argue that labeling plant-based products with recognized names such as "milk"," dairy", "butter" and "meat" is misleading and violates FDA standards of identity that reserve such terms for animal-derived products. Critics argue that the plant-based alternatives are free-riding off of the traditional products' hard-earned popularity while not offering the same nutritional benefits. Their initial efforts to enforce FDA standards of identity through the courts have largely failed, however. For example, a 2013 case against White Wave Foods was dismissed, with the court finding that the FDCA preempted plaintiffs' (in the courts view "implausible") allegations that labeling soy, almond and coconut-derived liquids as "milk" was inherently misleading. The court held that that FDA's standards "pertains to what milk is, rather than what it is not, and makes no mention of non-dairy alternatives …."

The latest battle in this ongoing war has also resulted in a victory for the plant-based food makers. In 2019, a California-based producer of vegan substitutes for dairy products sued the California Department of Food and Agriculture, seeking a declaratory judgment and injunction to stop threatened state enforcement against its use of the words "butter," "lactose-free" and "cruelty-free" (among other terms) on the company's "Cultured Vegan Butter" product. *Miyoko's Kitchen v. Ross, et al.*, No. 20-cv-00893-RS (N.D. Cal.). After first surviving a motion to dismiss for lack of standing, the plaintiffs this week obtained a preliminary injunction against the Department's threatened enforcement, clearing the way for continued use of the terms.

A current label for the Miyoko's Creamery "European Style Cultured Vegan Butter" is reproduced below:

While it refers to "butter", it also prominently includes the word "vegan," "100% crafted from plants" and the description, "Cashew and Coconut Oil Spread." However, in a nutshell (pardon the pun), the California Department of Food and Agriculture sought to enforce California law directing it to review food labeling for compliance with federal law. Federal law forbids a retailer from selling "misbranded" food items, such as those sold under the name of another food. The Department argued that Miyoko's use of the term "butter" rendered the product misbranded because, for nearly a century, the FDA's standard of identity for "butter" had required a product "made exclusively from milk or cream, or both . . . and containing not less than 80 per centum by weight of milk fat."

Miyoko's successfully argued that the Department's claims were barred by the First Amendment because it was not plausible for consumers to be misled as to the nature of its product, given that its label conspicuously coupled the word "butter" with the term "vegan," along with other qualifications, thus making clear that the product was not dairy-based.

Applying the four-part test applicable to governmental regulation of speech set out in *Central Hudson*, the court agreed. After noting that the weight of precedent was in favor of allowing plant-based alternatives to borrow names from animal-based foods, and citing the state's "underwhelming" evidence of consumer confusion, the court concluded the state's efforts to restrict the use of "butter" on the product could not pass Constitutional muster:

> [J]justifying governmental speech regulation using the government-issued dictionary is troublingly self-fulfilling. As the Eleventh Circuit has forcefully observed, though "[i]t is undoubtedly true that a state can propose a definition for a given term . . . it does not follow that once a state has done so, any use of the term inconsistent with the state's preferred definition is inherently misleading. …
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> To the degree this arrangement reflects identifiable linguistic norms, it embodies a substantially credible assertion of regulatory power over commercial speech; but without that indicia, the government's opinion of what words mean is not, by itself, especially compelling. Because, as discussed above, the State's view of "butter" stands

> largely by itself—unanchored by precedent, empirical research, or any other form of independently authoritative ballast—it does not disturb the weight of evidence tending to show that Miyoko's use of that word is likely not misleading. In this early phase of the litigation, it therefore appears Miyoko's decision to label its product as "butter" is entitled to First Amendment protection.

Applying similar reasoning, the court enjoined the government's threatened enforcement against Miyoko's use of the terms "lactose-free" and "cruelty-free" for the vegan butter products. However, it declined to enjoin enforcement regarding the company's use of "hormone-free" (which it said was actually false, given that plants do have hormones) and "revolutionizing dairy with plants" (which it said was a bridge too far in terms of Miyoko's actual impact on the dairy industry). Still, the decision marks a resounding win overall for Miyoko's and for similar, plant-based alternatives.

The decision can still be appealed by the Department, and it is only a preliminary injunction – not a final decision. However, the court's view that the likelihood of success weighs in Miyoko's favor is not a hopeful sign for the Department.

The larger implication of this ruling, and the gradually swelling body of case law, is that efforts to knock out the use of animal-based terminology for plant-based products based on *existing* law is not likely to succeed unless the plaintiff has strong evidence of consumer confusion. Another avenue being actively pursued by traditional producers is state and federal legislation, which could potentially rewrite the landscape for food labeling in this area. The prospect for such legislation likely awaits the outcome of the next elections.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Christopher A. Cole
Partner – Washington, D.C.
Phone: +1 202.624.2701
Email: ccole@crowell.com