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“Butter” Luck Next Time: Court Finds California Cannot Preclude Vegan Dairy from Using “Vegan Butter” Labeling

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Judge Richard Seeborg of the Northern District of California recently ruled in favor of Miyoko’s Kitchen in a suit concerning Miyoko’s labeling of its plant-based spread as “vegan butter.” In doing so, Judge Seeborg determined that absent evidence that the “vegan butter” label was false or would mislead consumers, the state of California could not restrict Miyoko’s constitutionally protected commercial speech. *Miyoko’s Kitchen v. Karen Ross*, Case No. 20-cv-00893 (N.D. Cal. August 10, 2021).

By way of background, in 2019, the California Department of Food and Agriculture notified Miyoko’s that the company’s labeling of its “vegan butter” violated state and federal law, and requested that Miyoko’s remove the following five claims: “hormone free,” “butter,” “lactose free,” “cruelty free,” and “revolutionizing dairy with plants.” According to the Department, Miyoko’s marketing of its “vegan butter” gave the misleading impression that the product was a dairy product without traditional dairy characteristics. In response, Miyoko’s filed a lawsuit against the State, arguing that the Department lacked the authority to regulate the company’s commercial speech under the First Amendment. In December of 2020, the State filed a motion for summary judgment, and in March 2021, Miyoko’s filed a cross-motion for summary judgment.

In deciding the parties’ cross-motions, the court applied the *Central Hudson* standard applicable to the censorship of commercial speech. Under *Central Hudson*, the court first must determine whether the restricted speech is misleading or related to unlawful activity. If it is, the First Amendment does not apply, and the government is free to restrict the speech. If it is not, the restriction survives only if the censoring body “assert[s] a substantial interest to be achieved by [the] restriction,” and the restriction both directly advances that interest and is not more extensive than necessary.

Applying this standard, the court held that the First Amendment afforded Miyoko's no basis for relief with respect to the "hormone free" claim. Because the spread contains naturally occurring plant hormones, the claim is irrefutably false, and First Amendment protections do not apply.

But the court reached a different conclusion as to the "butter" claim, finding none of the State's evidence of consumer confusion to be compelling. First, the State cited the FDA's statutory definition of "butter," arguing that because the statute has been on the books for ninety-odd years, it must be reflective of what consumers understand "butter" to mean. As the court noted, the FDA defines "butter" as a product "made exclusively from milk or cream, or both . . . and containing not less than 80 per centum by weight of milk fat." Because Miyoko's spread did not meet the dairy and fat-content requirements for the FDA's statutory definition of "butter," the State argued it did not comport with consumer understanding of the term. But the court was unmoved, noting that this argument "defies common sense" because "language evolves." Absent any indication that "old federal food definitions are more faithful indicators of present-day linguistic norms," the court found the federal definition of "butter" insufficient to make the State's case..

The court was likewise unconvinced by the State's consumer perception survey evidence, which indicated that consumers correctly identified plant-based cheese products 74% of the time. The State argued this indicates a 26% confusion rate, and shows that the label is misleading. However, the court observed that the State conveniently ignored the study's other findings – including that consumers were only able to correctly identify animal-based cheese products 81% of the time. The court determined this survey does little other than suggest that "consumers are perhaps a bit better at identifying traditional cheese than vegan cheeses."

Having found no compelling evidence of consumer confusion, the court rejected the State's attempt to assert an interest in avoiding such confusion as a justification for restricting Miyoko's labeling. The court noted that any such confusion was mere speculation, and that "the record lacks material reasonably supporting the conclusion that removing 'butter' from Miyoko's labeling 'will in fact' advance that interest 'to a material degree.'" The court applied the same logic to the remaining claims, finding that absent evidence that consumers are misled by Miyoko's use of the claims, the State may not restrict Miyoko's use of "lactose free," "cruelty free," and "revolutionizing dairy with plants."

Advertisers can take some comfort in this decision; it serves as a reminder that the First Amendment gives advertisers the freedom to brand their products in creative or fanciful ways, so long as the advertising is not false, and as long as the government lacks a compelling interest that justifies limiting the speech. But of course, government interference is hardly advertisers' only concern; the risk of a consumer class action or a competitive advertising challenge (whether in court or at the National Advertising Division) is always in play.

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