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CITY BAR

**REPORT ON LEGISLATION
BY THE ANIMAL LAW COMMITTEE AND
THE CONSUMER AFFAIRS COMMITTEE**

**S. 130
H.R. 778**

**Sen. Baldwin
Rep. Welch**

AN ACT to require enforcement against misbranded milk alternatives.

DAIRY PRIDE Act

THIS LEGISLATION IS OPPOSED

A. INTRODUCTION

The Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act (DAIRY PRIDE Act), S.130 and H.R. 778, would have the effect of prohibiting the use of the word “milk” in names of products such as “soymilk,” “almond milk,” “coconut milk,” “rice-milk,” and similar plant-based beverages as well as words like “ice cream,” “yogurt,” and “cheese” for plant-based foods. Neither the facts nor the law warrant prohibiting the use of the terms “milk,” “ice cream,” “yogurt,” and “cheese” in plant-based product names because:

- Labeling a plant-based beverage “milk” does not mislead consumers, because no reasonable consumer would believe that such milk comes from a cow;
- The qualified use of the word “milk” in the names of plant-based products is not “a violation of milk’s standard of identity”;
- The names of popular non-dairy ice creams, yogurts, and cheeses already clearly state that they are plant-based, and thus they are not misleading;
- The health claims in the legislative findings misrepresent statements in the Dietary Guidelines published by the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Agriculture (USDA);
- There is no evidence that consumers are misled about the nutritional content of plant-based milks;
- The restriction on the use of the word “ice cream” undercuts the ostensible purpose of the bill to protect the public health; and
- Plant-based milks are a reasonable alternative to consumers who choose not to consume dairy products due to health needs, religious beliefs, and/or concerns about animals and the environment.

B. SUMMARY OF PROPOSED LEGISLATION

The bill would amend section 403 of the federal Food, Drug and Cosmetic Act (21 U.S.C. § 343) to provide that a food using “a market name for a dairy product” may not be introduced or delivered for introduction into interstate commerce unless such food “is, contains as a primary ingredient, or is derived from the lacteal secretion, particularly free from colostrum,¹ obtained by the complete milking of one or more hooved animals.” The bill defines “a market name for a dairy product” as the dairy products defined in Parts 131 and 133 and Sections 135.110, 135.115, and 135.140 of title 21, Code of Federal Regulations and successor regulations, and “any other term for which the Secretary has promulgated a standard of identity² with respect to a food that is formulated with a dairy product (as described in subparagraph (2)) as the primary ingredient.” Part 131 provides descriptions for milk,³ heavy cream,⁴ sour cream,⁵ and yogurt,⁶ among other items.⁷ Part 133 also defines milk (with a different definition than the definition in Part 131).⁸ Part 133 also describes specific types of cheeses made from cow’s, sheep’s, or goat’s milk such as mozzarella cheese,⁹ cheddar cheese,¹⁰ and cream cheese¹¹ though it does not include a description or definition of the generic term “cheese.” Section 135.110 describes cow’s milk ice cream. Section 135.115 describes goat’s milk ice cream. And Section 135.140 describes cow’s milk sherbet.

C. ARGUMENT

1. Labeling a plant-based beverage “milk” does not mislead consumers, because no reasonable consumer would believe that such milk comes from a cow.

The bill’s legislative findings suggest that the purpose of the bill is to protect consumers who are being misled into believing that certain plant-based foods and beverages

¹ Merriam-Webster defines “colostrum” as “milk secreted for a few days after childbirth and characterized by high protein and antibody content.” MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/colostrum>.

² A standard of identity may be established if “such action will promote honesty and fair dealing in the interest of consumers” in accordance with 9 USC § 341.

³ 21 CFR § 131.110(a) describes milk as “the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows.”

⁴ 21 CFR § 131.150.

⁵ 21 CFR § 131.160.

⁶ 21 CFR § 131.200.

⁷ 21 CFR § 131.206.

⁸ 21 CFR § 133.3 defines milk as “the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows, which may be clarified and may be adjusted by separating part of the fat therefrom; concentrated milk, reconstituted milk, and dry whole milk. Water, in a sufficient quantity to reconstitute concentrated and dry forms, may be added.”

⁹ 21 CFR § 133.155.

¹⁰ 21 CFR § 133.133.113.

¹¹ 21 CFR § 133.133.

come from cows or other hooved animals. The findings state, “Plant-based products labeled as milk are misleading to consumers.” Yet the legislative findings offer no specific evidence to support these claims. And in fact, courts in recent cases have concluded just the opposite: that the plant-based beverages labeled “milk” are not misleading to consumers, for the simple reason that no reasonable consumer would believe that “soy milk,” for instance, is the same as the “milk” that comes from a cow.

In particular, two federal courts have recently found it implausible that a reasonable consumer¹² could confuse soymilk or similar products with milk from a cow. In *Ang v. Whitewave Foods Co.*, Case No. 13-cv-1953, 2013 U.S. Dist. Lexis 173185 (N.D. Cal., Dec. 10, 2013), the U.S. District Court for the Northern District of California rejected the very statement in the legislative findings. There, plaintiffs claimed that the defendants had misbranded plant-based products by using names like “soymilk,” “almond milk,” and “coconut milk.” They noted that 21 C.F.R. § 131.110 describes “milk” as a secretion from cows, and they argued that reasonable consumers were likely to believe that “soymilk,” “almond milk,” and “coconut milk” likewise came from a cow. The Court disagreed and dismissed the claims, finding that it was “simply implausible” that a consumer would mistake such plant-based products with dairy milk¹³ and that it was “highly improbable” that a reasonable consumer would simply disregard the words preceding the word “milk” in products like “soymilk” and “almond milk” and assume that the beverages came from cows.

Similarly, in *Gitson v. Trader Joe’s Co.*, Case No. 3:13-cv-01333, 2015 U.S. Dis. Lexis 170401 (N.D. Cal., Oct. 4, 2013), the U.S. District Court for the Northern District of California held that the use of the word “soymilk” in Trader Joe’s products could not conceivably violate the federal Food, Drug and Cosmetic Act. The Court found that a reasonable consumer—and even “the least sophisticated consumer”—would not think that soymilk comes from a cow.

We note that the use of the word “milk” for plant-based beverages is centuries old. Notably, the Oxford English Dictionary documents a reference to almond milk—or “mylke of almaundes”—dating from the early-fifteenth century.¹⁴ The term “rice milk” has been used since at least 1914.¹⁵ And the word “soymilk” has been used since at least 1936.¹⁶

¹² The FDA uses the “reasonable consumer” standard in evaluating labeling for dietary supplements and conventional foods. FDA, GUIDANCE: QUALIFIED HEALTH CLAIMS IN THE LABELING OF CONVENTIONAL FOODS AND DIETARY SUPPLEMENT (Dec. 2002), <http://www.fda.gov/ohrms/dockets/98fr/02d-0515-gdl0001.pdf>.

¹³ *Ang*, at *12-13.

¹⁴ See OXFORD ENGLISH DICTIONARY, <http://oed.com> (enter “milk”; then click “Go”) (citing CURYE ON INGLYSCH at 114 (eds. Constance B. Heatt and Sharon Butler) (1985)). The dictionary notes several other similar historical references, as well as more recent ones.

¹⁵ WILLIAM SHURTLEFF & AKIKO AOYAGI, HISTORY OF SOYMILK AND OTHER NON-DAIRY MILKS (1226 TO 2013) 6 (2013), <http://www.soyinfocenter.com/pdf/166/Milk.pdf>.

¹⁶ *Id.* at 7.

2. The qualified use of the word “milk” in the names of plant-based products is not “a violation of milk’s standard of identity.”

The legislative findings suggest that plant-based products violate milk’s standard of identity. They say that there is a “proliferation of plant-based products in the marketplace that are mislabeled as milk despite the standard of identity defined for this substance” and call on the Food and Drug Administration (FDA) to improve enforcement against these mislabeling practices “to avoid misleading consumers.”

The proposed legislation fails to acknowledge the fact that the plant-based beverages at issue are not labeled just “milk”; rather, they simply include the word “milk” in their name. And in fact, in *Gitson* (see Section C.1 above), the U.S. District Court for the Northern District of California drew on just this distinction in holding that a manufacturer’s use of the word “soymilk” did not violate milk’s “standard of identity.”¹⁷ The Court reasoned that the fact that milk has a standard of identity “does not categorically preclude a company from giving any food product a name that includes the word ‘milk.’”¹⁸ Rather, the “standardization of milk simply means that a company cannot *pass off* a product as “milk” if it does not meet the regulatory definition of milk.”¹⁹ The Court found that the manufacturer in that case did not purport to pass off its product as cow’s milk because the product clearly identified itself as derived from soy—“soymilk.”²⁰

3. The names of popular non-dairy ice creams, yogurts, and cheeses state their plant-based sources clearly, and thus they would not be misleading to a reasonable consumer.

The legislation would not allow non-dairy ice creams to use the word “ice cream” in their product names. Yet current product names for popular non-dairy ice creams would not mislead a reasonable consumer to believe that they come from cow’s or goat’s milk. The brands So Delicious and Ben & Jerry calls their products “non-dairy frozen desserts.” The brand Tofutti calls its soy-based products “frozen dessert.” And Luna & Larry’s brand calls its dessert “Coconut Bliss.”

Likewise popular non-dairy yogurts clearly state that they are plant-based. For example, “cultured coconut” (So Delicious brand), “dairy-free yogurt alternative” (Silk brand), “cultured soy” (Nancy’s brand), “cultured almondmilk” (Amande), “soy yogurt” (Stonyfield brand), and “soyogurt” (Wildwood brand).

And popular cheese alternatives clearly state that they are dairy free. For example, “cream cheese alternative” (Go Veggie and Teese brands), “Dairy Free Mozzarella” (Tofutti brand), “vegan gourmet shreds” (Follow Your Heart brand), “tree nut cheese” (Dr. Cow brand), “cheddar style shreds” (Daiya brand, package says in large letters “deliciously dairy free”).

¹⁷ *Gitson*, at *5-6.

¹⁸ *Gitson*, at *6.

¹⁹ *Id.*

²⁰ *Id.* at *6-7.

For the reasons explained in the cases cited in sections C.1 and C.2 above, like plant-based milks, these plant-based foods would not mislead a reasonable consumer into believing they were made with cow's milk. And given that the products already clearly identify themselves as being plant-based and/or dairy free, it's not clear what consumer-protection problem this legislation is trying to remedy.

4. The health claims in the legislative findings misrepresent recommendations in the 2015-2020 Dietary Guidelines published by the U.S. Department of Health and Human Services and the U.S. Department of Agriculture (“Dietary Guidelines”).²¹

The legislative findings say that the Dietary Guidelines state, “Dairy products are an important part of a healthy diet for both children and adults,” “most Americans are not meeting recommended intake for the dairy food group,” and “dairy foods are excellent sources of critical nutrients for human health, including vitamin D, calcium, and potassium, all of which are under consumed by people of the United States.”

Astonishingly, the legislative findings fail to disclose a crucial fact: The Dietary Guidelines include fortified soymilk in the dairy group.²² So all of the legislative findings quoted above apply to at least one plant-based milk. The Dietary Guidelines recommend that Americans increase consumption of certain foods in the dairy group, including fortified soymilk, as follows: “Most individuals in the United States would benefit by increasing dairy intake in fat-free or low-fat forms, whether from milk (including lactose-free milk), yogurt, and cheese or from *fortified soy beverages (soymilk)*.”²³

The legislative findings also state, “The amount of calcium per calorie is lower for most plant-based alternative milk products. To obtain the amount of calcium contained in one cup of non-fat fluid milk from a plant-based milk alternative, the portion size and calorie intake must be greater.” But the differences are negligible, and do not hold true for low-fat and reduced fat milks.²⁴

The Dietary Guidelines rank 36 food sources by amounts of calcium and energy per standard food portions and per 100 grams of foods.²⁵ Both almond milk and soymilk have more calcium per 100 grams than skim milk, and rice drink is not far behind. This is how one

²¹ The Dietary Guidelines are available on HHS's website at https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf.

²² HHS & USDA, 2015–2020 DIETARY GUIDELINES FOR AMERICANS 8TH EDITION 23 (Dec. 2015) (“Soy beverages fortified with calcium, vitamin A, and vitamin D, are included as part of the dairy group because they are similar to milk based on nutrient composition and in their use in meals. Other products sold as “milks” but made from plants (e.g., almond, rice, coconut, and hemp “milks”) may contain calcium and be consumed as a source of calcium, but they are not included as part of the dairy group because their overall nutritional content is not similar to dairy milk and fortified soy beverages (soymilk).”).

²³ *Id.* at 49.

²⁴ *See* DIETARY GUIDELINES, *supra* note 18, FOOD SOURCES OF CALCIUM, APPENDIX 11 at 108-111.

²⁵ *Id.*

cup each of almond milk, soymilk, and rice drink compare with one cup of cow’s milk in the Dietary Guidelines’ ranking:

Rank	Food	Calories in Standard Portion	Calcium in Standard Portion (mg)	Calories per 100 grams	Calcium per 100 grams (mg)
6	Almond milk	91-120	451	38-50	188
15	Soymilk	109	340	45	140
24	Low-fat milk (1%)	102	305	42	125
26	Skim milk (nonfat)	83	299	34	122
27	Reduced fat milk (2%)	122	293	50	120
31	Rice drink	113	283	47	118
34	Whole milk	149	276	61	113

In fact, both tofu and spinach both rank higher in calcium than cow’s milk.²⁶

5. There is no evidence that consumers are misled about the nutritional content of plant-based milks.

The legislative findings state that “dairy foods are excellent sources of critical nutrients for human health, including vitamin D, calcium, and potassium, all of which are under consumed by people of the United States” and “Imitation dairy products, such as plant-based products . . . often do not provide the same nutrition content as real milk, cheese, and yogurt derived from dairy cows,” implying that plant-based milks are inferior. The next finding says that plant-based products are misleading to consumers, suggesting that consumers do not understand that plant-based products have a different nutritional content than milk.

The USDA-mandated Nutrition Facts label²⁷ ensures that consumers are not misled about plant-based beverages’ nutritional content. Thus, there is no likelihood that a reasonable consumer would be misled into believing a plant-based beverage has the same nutritional content as cow’s milk. Indeed, in *Gitson v. Trader Joe’s Co.* (discussed in Section C.1 above), the Court found that a reasonable consumer would not assume that soymilk and cow’s milk have the same nutritional content,²⁸ pointing to the fact that a reasonable consumer could simply consult the Nutrition Facts label for information about nutrient content.²⁹

6. The restriction on the use of the word “ice cream” undercuts the ostensible purpose of the bill to protect the public health.

The legislative findings imply that the purpose of the bill is to protect the public health; indeed, five of the eight legislative findings concern nutrition and two state that plant-

²⁶ *Id.*

²⁷ 9 CFR Part 317.

²⁸ *Gitson* at *4.

²⁹ *Id.*

based milk product names are misleading. But if the purpose of the proposed legislation is to protect the public health, why then does the legislation bar plant-based desserts from calling themselves “ice cream”? The Dietary Guidelines urge individuals to “limit calories from added sugars and saturated fats . . .”³⁰ and The USDA recommends that individuals “cut back on foods containing saturated fat including . . . ice cream and other dairy desserts.”³¹ The Dietary Guidelines also say, “[I]ndividuals should eat as little dietary cholesterol as possible while consuming a healthy eating pattern.”³² Individuals who wish to minimize their intake of cholesterol, and thus reduce their risk of cardiovascular disease,³³ can do so by avoiding animal products.

Ice cream made from dairy milk tends to contain significantly more saturated fat than plant-based ice creams, with the exception of plant-based ice creams made from coconut milk, and no plant-based ice creams contain cholesterol. Here’s how the sugar, total fat, saturated fat, and cholesterol, in ½ cup of six popular brands of vanilla compare:

Brand	Total fat	Saturated fat	Sugar	Cholesterol
Haagen Dazs Vanilla Dairy Ice Cream ³⁴	17g	10g	20g	90mg
Ben & Jerry’s Vanilla Dairy Ice Cream ³⁵	16g	10g	20g	90mg
Breyer’s Vanilla Natural Dairy Ice Cream ³⁶	7g	4g	14g	20mg
Luna & Larry’s Organic Coconut Bliss Vanilla (Coconut milk based) ³⁷	16g	14g	13g	0mg
Almond Dream Vanilla Dairy-Free (Almond milk based) ³⁸	7g	1g	12g	0mg
So Delicious Vanilla Dairy-Free (Soy milk based) ³⁹	3g	0g	14g	0mg

³⁰ DIETARY GUIDELINES, *supra* note 18, at xii.

³¹ USDA, Choose Foods and Beverages with Less Saturated Fat, Sodium, and Added Sugars, Choose My Plate, <https://www.choosemyplate.gov/saturated-unsaturated-and-trans-fats>.

³² DIETARY GUIDELINES, *supra* note 18, at 32.

³³ *Id.* (“Strong evidence from mostly prospective cohort studies but also randomized controlled trials has shown that eating patterns that include lower intake of dietary cholesterol are associated with reduced risk of CVD [cardiovascular disease], and moderate evidence indicates that these eating patterns are associated with reduced risk of obesity.”)

³⁴ Haagen-Dazs, Vanilla, <https://www.haagendazs.us/products/2473/ice-cream/vanilla>.

³⁵ Ben & Jerry’s, Vanilla, <http://www.benjerry.com/flavors/vanilla-ice-cream>.

³⁶ Smartlabel, Breyers, Ice Cream, Natural Vanilla, <http://smartlabel.breyers.com/product/2749366/nutrition?locale=en-US>.

³⁷ Luna & Larry’s Coconut Bliss, Vanilla Island, <http://coconutbliss.com/bliss/vanilla-island>.

³⁸ Almond Dream, Vanilla, <http://www.dreamplantbased.com/product/almond-dream-vanilla>.

³⁹ So Delicious Dairy Free, Creamy Vanilla, <http://sodeliciousdairyfree.com/products/soy-milk-frozen-desserts/creamy-vanilla>.

7. Plant-based milks are a reasonable alternative to consumers who choose not to consume dairy products due to health needs, religious beliefs, and/or concerns about animals and the environment.

There is no evidence that prohibiting the use of words such as “milk,” “ice cream,” “cheese,” and “yogurt” in plant-based products would cause consumers to buy more animal-based dairy products instead of plant-based products. The simple fact is that the growing consumer interest in plant-based milks, ice cream, yogurt, and cheese is due *not* to any confusion about what these milks contain; rather, it is in large part due to consumers’ deliberate choice to consume non-dairy alternatives. Some consumers do not drink or limit their intake of cow’s milk because they (i) are allergic to it,⁴⁰ (ii) are lactose intolerant,⁴¹ (iii) have a moral conviction that it is unjust for humans to exploit non-human animals,⁴² (iv) have animal welfare concerns relating the treatment of dairy cows,⁴³ (v) have adopted plant-based diets on the recommendation of their doctors and nutritionists,⁴⁴ (vi) have concerns

⁴⁰ Cow’s milk is a “major food allergen” (21 USC § 321(qq)(1)) for which there is no suitable therapy available except avoidance. Approximately 0.6–2.5% of preschoolers, 0.3% of older children and teens, and less than 0.5% of adults are allergic to cow’s milk. (Heidrun Hochwallner *et al.*, *Cow’s Milk Allergy: From Allergens to New Forms of Diagnosis, Therapy and Prevention*, 66 *METHODS* 22 (March 2014), available at http://ac.els-cdn.com/S1046202313003034/1-s2.0-S1046202313003034-main.pdf?_tid=9fc54a30-dbf1-1e6-afd8-0000aacb361&acdnat=1484579054_d1c2edf9a82bc48c4f06be67e7de2524.) The current treatment for a cow’s milk allergy is the elimination of cow’s milk from the diet. (*Id.* at 28.) For people who are allergic to cow’s milk, plant-based milks are often a reasonable alternative. Plant-based milks that are made from tree nuts and soy also contain allergens (21 USC § 321(qq)), but not all people who are allergic to cow’s milk are allergic to plant-based milks. (*See, e.g., id.* (Soy milk induces allergic reactions in up to 15% of infants who are allergic to cow’s milk.)).

⁴¹ People who are lactose intolerant, for instance, are unable to fully digest the lactose (a sugar) in milk. (Mayo Clinic, Lactose Intolerance, Definition (Sept. 2, 2016), available at <http://www.mayoclinic.org/diseases-conditions/lactose-intolerance/basics/definition/con-20027906>.) As a result, they have uncomfortable symptoms such as diarrhea, gas, and bloating after consuming dairy products. (*Id.*) Unlike people who are allergic to dairy milk, lactose intolerant individuals may consume dairy products, but limiting intake of dairy products is one way to reduce symptoms. (Mayo Clinic, Lactose Intolerance, Lifestyle and Home Remedies (Sept. 2, 2016), available at <http://www.mayoclinic.org/diseases-conditions/lactose-intolerance/basics/lifestyle-home-remedies/con-20027906>.)

⁴² *See generally* the website of the American Vegan Society at www.americanvegan.org; the website of the Peace Advocacy Network at <http://www.peaceadvocacynetwork.org>.

⁴³ Woodstock Farm Sanctuary, *Cows for Dairy*, available at <http://woodstocksanctuary.org/learn/animals-used-for-food/cows-for-dairy>. For example, some consumers find the common industry practice of taking one- and two-day-old calves away from mother cows unconscionable; or they find reports about violations of animal cruelty laws by employees of dairy producers disconcerting. For example, Wisconsin’s Wiese Brothers Farms workers, Abelardo Jaimes and Lucia Martinez, were convicted of multiple counts of animal cruelty relating to treatment of dairy cows in April 2014. Katie DeLong, *Animal cruelty: Two more convictions tied to Wiese Bros. Farm*, Fox6, (May 6, 2014), available at <http://fox6now.com/2014/05/06/two-more-connected-to-wiese-brothers-farm-convicted-of-animal-cruelty>.

⁴⁴ *See, e.g.*, Thomas Campbell, MD, T. Colin Campbell Center for Nutrition Studies, *How to Get Calcium Without Dairy* (Dec. 12, 2014) (suggesting that plant-based sources of calcium are strongly preferable to cow’s milk, for which health problems may be attributable), available at <http://nutritionstudies.org/how-to-get-calcium-without-dairy>.

about the environment,⁴⁵ (vii) possess certain religious beliefs,⁴⁶ or (viii) prefer the taste of plant-based milks.

D. SUMMARY

For the reasons explained above, the Animal Law Committee and Consumer Affairs Committee oppose the Dairy Pride Act.

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⁴⁵ See, e.g., FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, ANIMAL PRODUCTION AND HEALTH DIVISION, GREENHOUSE GAS EMISSIONS FROM THE DAIRY SECTOR (2010) (“The global dairy sector contributes 4.0 percent to the total global anthropogenic GHG [greenhouse gas] emissions”), available at <http://www.fao.org/docrep/012/k7930e/k7930e00.pdf>; Beth Gardiner, *How Growth in Dairy Is Affecting the Environment*, NY TIMES (May 1, 2015), available at <https://www.nytimes.com/2015/05/04/business/energy-environment/how-growth-in-dairy-is-affecting-the-environment.html>.

⁴⁶ E.g., Charles Camosy, *Why all Christians Should go Vegan*, WASHINGTON POST (Jan. 5, 2017) (“The Bible is clear, and early Christians understood it: Animals are meant to be our companions, not our food.”), available at https://www.washingtonpost.com/posteverything/wp/2017/01/05/why-all-christians-should-go-vegan/?postshare=9371483625693074&tid=ss_fb-bottom&utm_term=.bced95051698; The Jewish Vegetarian Society, *What’s Jewish About Being Veg?*, (“There is no disputing that, according to the Torah, God asked human beings to be vegans in his very first conversation with Adam and Eve.”), available at <https://www.jewishveg.org/whats-jewish-about-being-veg>.