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ALMOND BEVERAGE, OAT WATER, AND SOAKED SOYBEAN JUICE: HOW THE DAIRY PRIDE ACT ATTEMPTS TO REMEDY CONSUMER CONFUSION ABOUT PLANT-BASED MILKS

INTRODUCTION

Sure, you've heard of the Trojan War, the Napoleonic Wars, and you probably know more about Star Wars than the other two combined. However, odds are that you've never once heard of the Mayo Wars,¹ and yet, the litigation behind it has likely impacted the food you have in your fridge at this very moment.

Like many wars, the Mayo Wars were fought between the big guy who set the status quo and the little rebel trying to shake things up. In this case, Unilever, owner of Hellmann's mayo, was the big guy. Unilever is one of the largest companies in the world, with annual revenues of over sixty billion dollars,² and Hellmann's mayo has been a staple in many American households since the brand first started producing mayo back in 1912.³ In 2014, Unilever decided to take on Hampton Creek, the rebel of this story and the company behind Just Mayo, an egg-free, vegan mayonnaise substitute.⁴ Unilever claimed Just Mayo was, by the Food and Drug Administration's ("FDA") standards, not mayo at all and, in its 2014 lawsuit, demanded that Hampton Creek remove Just Mayo from the "more than 22,000 locations" in which it was sold.⁵ Unilever's argument was based on the fact that Just Mayo violated

1. See Beth Kowitz, *The Mayo Wars Just Ended*, FORTUNE (Dec. 17, 2015), <https://fortune.com/2015/12/17/hampton-creek-just-mayo-fda/> [<https://perma.cc/5DY8-8ZZS>].

2. Josh Tetrick, *The Mayo Wars*, HUFFPOST (Nov. 21, 2014, 10:20 AM), https://www.huffpost.com/entry/unilever-hampton-creek-mayonnaise-lawsuit_b_6195824 [<https://perma.cc/PXG6-RZ5F>].

3. See *id.* (stating that Hellmann's mayo went into production in 1912); Mary Hanbury, *One of the Most Famous Mayo Brands in America Is Called Something Different Depending on Where You Are in the Country*, BUSINESS INSIDER (June 7, 2012, 1:25 PM), <https://www.businessinsider.com/americas-most-famous-mayo-brand-has-two-different-names-2017-6> [<https://perma.cc/4EWG-6ATM>] (stating that Hellmann's is "one of America's most popular mayonnaise brands").

4. See Tetrick, *supra* note 2.

5. See *id.*

the FDA's standard of identity for mayonnaise because it lacked an "egg yolk-containing ingredient[]."6 Because Just Mayo therefore did not meet the legal definition of mayonnaise, Unilever argued that Hampton Creek misbranded by labelling the product as "mayo."7 The FDA agreed with Unilever and issued a warning letter to Hampton Creek, informing the company that Just Mayo did not meet mayonnaise's standard of identity.8 While Unilever eventually dropped the lawsuit, the FDA still pursued Hampton Creek, forcing the company "to do a better job of explaining the meaning behind 'Just' on the label" by increasing the size of "egg-free" on the label and decreasing the size of "the company's logo of a cracked egg."9

While perhaps not the most riveting war ever fought, the Mayo Wars are an important part of the greater legal landscape dealing with standards of identity and misbranding in the food and beverage industry. However, while referred to as a "war," the Mayo Wars pale in comparison to an even greater food war that two industry giants are waging today: the war between the dairy industry and the plant-based milk industry.

With sales of plant-based milks, such as almond and soy milk, on the rise and dairy industry sales declining, dairy industry supporters are taking issue with plant-based milk products calling themselves "milk."10 In an effort to combat the "mislabeling" of non-dairy products, a few Senators banded together in an attempt to save the dairy industry by creating the DAIRY PRIDE Act.11 The Act was introduced in an effort to prohibit plant-based milk producers from using the term "milk" on their products and instead use a less misleading name, such as "almond imitation milk" or "soy beverage."12 This Comment argues that, although the DAIRY

6. *Id.*; see 21 C.F.R. § 169.140(c) (2019).

7. See Tetrick, *supra* note 2.

8. See Kowitt, *supra* note 1.

9. *Id.*

10. See Kathleen Justis, *Lactose's Intolerance: The Role of Manufacturers' Rights and Commercial Free Speech in Big Dairy's Fight to Restrict Use of the Term "Milk,"* 84 BROOK. L. REV. 999, 999–1001 (2019).

11. See Press Release, Tammy Baldwin, U.S. Senator, Wis., U.S. Senators Tammy Baldwin and Jim Risch Stand Up for America's Dairy Farmers (Mar. 14, 2019), <https://www.baldwin.senate.gov/press-releases/dairy-pride-2019> [<https://perma.cc/W6XM-VLXP>]. DAIRY PRIDE is an acronym that stands for "Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday." *Id.*

12. See *id.*

PRIDE Act claims to remedy consumer confusion regarding the nutritional value of these plant-based products, the Act's practical effect is to create anticompetitive issues between the dairy and plant-based milk industries by allowing Congress to pick winners and losers in this space, which could lead to congressional overreach in other markets under the guise of helping the consumer.

Part I of this Comment introduces the three main parties in this debate, namely the dairy industry, the plant-based milk industry, and the FDA, taking a detailed look into their origins and demonstrating how those origins shaped the role each one plays in the milk industry today. Part II delves into the litigation that has already taken place in the dairy milk versus plant-based milk space and details what the courts have settled regarding consumer confusion surrounding plant-based milks. Part III examines the possible positive and likely negative effects of the DAIRY PRIDE Act and proposes a more equitable and effective approach to accomplish the Act's goals.

I. BACKGROUND

A. *The Dairy Industry*

1. Who Cares About Dairy Milk? The Dairy Industry

While there are a vast number of milk and dairy trade associations and cooperatives,¹³ one of the most vocal in the fight against plant-based milks is the National Milk Producers Federation (“the Federation”).¹⁴ The Federation was established in 1916 “to serve as a clearinghouse for price information and represent the interests of dairy farmers before government.”¹⁵

In the mid to late 19th century, prior to the Federation's formation, milk processing cooperatives became popular, and “[b]y 1909, there were more than 2,700 dairy cooperatives in the United States.”¹⁶ By 1916, milk prices were stagnating, while farmers' costs were increasing, and public outcries erupted whenever the

13. See *BG Associations 2020*, DAIRY FOODS, <https://www.dairyfoods.com/associations> [<https://perma.cc/3DQX-F6BX>].

14. NAT'L MILK PRODUCERS FED'N, LEGACY OF LEADERSHIP 1916–2016: 100 YEARS OF THE NATIONAL MILK PRODUCERS FEDERATION 36 (2015).

15. *Id.* at 6.

16. *Id.*

industry attempted to raise prices.¹⁷ By December 1916, dairy industry leaders realized they had little bargaining power individually.¹⁸ They decided to band together and “approximately 700 dairy leaders from around the country gathered in Chicago” in an attempt to fix the milk-pricing problem.¹⁹ Thus, the Federation was born.²⁰ Its goals included “[i]mproving the conditions under which milk is produced,” “[i]mproving marketing methods,” “[s]tandardizing products,” and taking action “regarding quality, production costs and milk distribution that promote[s] the interests of both producers and consumers.”²¹ In its early years, the Federation spent its time “serving as a clearinghouse for price information and representing dairy farmers before various federal control boards” with the simple objectives of achieving “fair milk prices and workable regulations.”²² As the Federation got its footing, it began to undertake loftier initiatives, with an eye toward cementing milk’s place in the foundation of the American diet.²³

2. Why Do We Care About Milk? Dairy Lobbying & Advertising

Have you ever wondered why grocery shoppers clear the refrigerated section of milk right before a big storm? Or why so many stores in the wake of COVID-19 are out of milk and other dairy products so regularly? This phenomenon is thanks, in large part, to the early efforts of the Federation, dating all the way back to 1938.²⁴ In early summer 1937, a few grocer organizations started a milk promotion called “National Milk Month” in order to “distribute extra milk during the warm months of summer.”²⁵ These promotions proved so successful that by 1939, the organizations declared “June Dairy Month” the official time of year to celebrate all things dairy.²⁶ This success also caught the attention of the Federation, as it realized the influence that advertising and promotion

17. *Id.*

18. *See id.*

19. *Id.*

20. *Id.*

21. *Id.* at 7.

22. *Id.* at 8.

23. *See id.* at 36–39, 50–55.

24. *See id.* at 51.

25. *June Dairy Month*, DAIRY ALLIANCE, <https://thedairyalliance.com/dairy-farming/june-dairy-month> [<https://perma.cc/CJR3-6QKV>].

26. *Id.*

could have on the industry.²⁷ At its national convention that same year, the Federation formed a committee to oversee dairy promotion and advertising nationwide.²⁸ Within a couple months, the American Dairy Association (“ADA”) was devised, with a focus on leading the industry’s advertising and promotional efforts, while allowing the Federation to focus primarily on legislation and lobbying.²⁹

a. Lobbying

One of the Federation’s earliest, and perhaps most iconic, lobbying victories is found in school cafeterias across the country. It all started in 1937 with a federal milk distribution program, which provided milk to the low-income populations of Boston.³⁰ This program quickly spread to five other cities and, within two years, the federal government “was distributing approximately 170,000 quarts of milk daily to more than 400,000 people.”³¹ With the success in these cities, by 1940, the federal government started a six-month test in low-income schools in Chicago and New York to see if the program would prove as successful in the school system.³² It proved so successful, in fact, that by 1946 the program was serving approximately 6.7 million children each day.³³ That same year, due in part to the Federation’s lobbying efforts, Congress passed the National School Lunch Act, requiring schools to offer milk to students at every school meal.³⁴ Through continued lobbying efforts, by 1971, the Federation made milk a permanent part of school lunch offerings across the country.³⁵ The Federation’s lobbying influence had grown so powerful by this time that, in 1972, when the Department of Agriculture proposed giving schools the option of serving milk or “another equally nutritious food,” the Federation was able to quash the proposal.³⁶ Over recent decades, the Federation fought hard, particularly in the school lunch arena, to ensure

27. See NAT’L MILK PRODUCERS FED’N, *supra* note 14, at 51.

28. *Id.*

29. *Id.*

30. *Id.* at 50.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 52.

35. *Id.* at 53.

36. *Id.*

that milk remained a cornerstone of the American school child's diet.³⁷

But the Federation's efforts did not stop with schools. In 2010, it successfully lobbied the FDA to continue recommending that most Americans consume three servings of dairy every day in the FDA's 2010–2015 Dietary Guidelines for Americans.³⁸ Five years later, when the Guidelines were up for renewal, the Federation again requested that the Dietary Guidelines continue to recommend three servings of dairy a day, and even suggested that the 2015–2020 Guidelines focus on the “serious public health problem of underconsumption of milk and dairy products.”³⁹ How seriously the writers of the Guidelines took this suggestion we may never know. What we do know is that the 2015–2020 Guidelines are still touting dairy as a key element of a healthy diet, recommending up to “3 cup-equivalents per day for adolescents ages 9 to 18 years and for adults.”⁴⁰

b. Advertising

What do Beyoncé, Harrison Ford, Kermit the Frog, Brett Favre, and Martha Stewart all have in common? Each starred in the now iconic “*got milk?*” campaign.⁴¹ This marketing masterpiece was at one time so pervasive in American culture that a milk mustache alone elicited thoughts of the ad's unmistakable lowercase white font.

Originally created in 1993 for the California Milk Processor Board by the advertising agency Goodby, Silverstein & Partners, the campaign quickly garnered popularity by featuring celebrities with milk mustaches.⁴² Within two years, the campaign caught the attention of the Milk Processor Education Program (“MilkPEP”), a

37. *Id.* at 53–54.

38. *Id.* at 55.

39. *Id.*

40. U.S. DEPT OF HEALTH & HUMAN SERVS. & U.S. DEPT OF AGRIC., 2015–2020 DIETARY GUIDELINES FOR AMERICANS 23 (2015) [hereinafter 2015–2020 DIETARY GUIDELINES].

41. *The 31 Best “Got Milk?” Ads, Definitely Ranked*, HUFFPOST (Feb. 24, 2014, 1:49 PM), https://www.huffpost.com/entry/got-milk-ads_n_4847121 [<https://perma.cc/S2ZU-5V96>] (last updated Dec. 6, 2017).

42. Kirk Kardashian, *The End of Got Milk?*, NEW YORKER (Feb. 28, 2014), <https://www.newyorker.com/business/currency/the-end-of-got-milk> [<https://perma.cc/4YVH-45NZ>].

national dairy advertising organization and close ally of the Federation,⁴³ which quickly licensed the content and distributed it across the country.⁴⁴ At one point in the mid-nineties, an astonishing ninety-one percent of American adults surveyed said they were “familiar” with the campaign.⁴⁵ Despite the campaign’s undeniable popularity, in 2014 MilkPEP decided to move in a different direction, seeking a more concrete advertising message.⁴⁶ Since 2014, the dairy message is protein-centric, with the new slogan “Milk Life,” in an effort to educate the ever more protein-conscious consumer that milk does in fact contain protein.⁴⁷

Ultimately, through the tireless lobbying and advertising efforts of the dairy industry, the American people have been trained to believe that milk is an integral part of their diet, and it is this belief that brings them stampeding toward the refrigerated section every time there is a storm or a global pandemic. However, notwithstanding this occasional phenomenon, it is clear that neither a timeless marketing campaign nor a redesign to align with consumer preferences is enough, as milk sales continue to decline.⁴⁸ In fact, over the last twenty years, Americans have transitioned from drinking about twenty-three gallons of milk per capita each year to about seventeen, with no turnaround in sight.⁴⁹ This could be due to a number of factors, including a drop in sales of cold cereal as consumers opt for more on-the-go options like granola bars, concerns over the environmental impact of milk production, and the growing obesity crisis in America.⁵⁰ Yet, all these factors combined likely do not measure up to dairy milk’s most formidable threat: plant-based milk.

43. MILKPEP, ANNUAL REPORT 2018, at 10 (2019).

44. Kardashian, *supra* note 42.

45. *Id.*

46. *See id.*

47. *Id.*

48. *See id.*; Amelia Lucas, *5 Charts That Show How Milk Sales Changed and Made It Tough for Dean Foods to Avert Bankruptcy*, CNBC (Nov. 13, 2019), <https://www.cnbc.com/2019/11/13/5-charts-that-show-how-milk-sales-have-changed.html> [<https://perma.cc/J9F5-7AM3>].

49. *Id.*

50. *See* Kardashian, *supra* note 42.

B. *The Plant-Based Milk Industry*

1. Beginnings and Continued Popularity

Perhaps the earliest and most prominent player to break into the plant-based milk scene was soymilk.⁵¹ As early as the 1950s, grocery stores began stocking their shelves with soymilk and it soon became the standard substitute for dairy milk.⁵² After the soybeans are soaked, crushed, cooked, and strained, the resulting “milk” “contains the same amount of protein as a cup of cow’s milk.”⁵³ Soymilk also naturally contains omega-3 fatty acids and fiber, and many manufacturers fortify their soymilk with vitamins A, D, B12, and calcium.⁵⁴ The final product is a substance with a very similar nutritional profile to dairy milk, leading the Dietary Guidelines for Americans, discussed above, to include soymilk as a recommended alternative to dairy milk.⁵⁵ But soymilk was just the beginning. These days consumers can find dairy alternatives made from almonds, oats, rice, coconuts, hemp, peas, and more, without needing to venture to a specialty foods store.⁵⁶ The ever-growing popularity and variety of these dairy alternatives translated into massive revenues for the plant-based milk industry, with worldwide sales reaching twenty-one billion dollars in 2015, while dairy milk consumption continues to decline.⁵⁷ Naturally, the dairy industry did not take well to the Dietary Guidelines recommending soymilk as a dairy milk substitute, nor was it pleased with the continued prosperity of the plant-based milk industry, as the dairy industry claimed plant-based milks were not, in fact, milk at all.⁵⁸ Thus began an almost twenty-five-year war between the dairy milk industry and the plant-based milk industry that is still being waged today.⁵⁹

51. See Meagan Bridges, *Moo-ove Over, Cow’s Milk: The Rise of Plant-Based Dairy Alternatives*, PRAC. GASTROENTEROLOGY, Jan. 2018, at 20, 22.

52. *Id.*

53. *Id.*

54. *Id.*

55. See *id.*; 2015–2020 DIETARY GUIDELINES, *supra* note 40, at 23.

56. See Bridges, *supra* note 51, at 22, 24.

57. *Id.* at 20.

58. See NAT’L MILK PRODUCERS FED’N, *supra* note 14, at 36, 39.

59. See Justis, *supra* note 10, at 1000.

2. The Milk Wars: Dairy Versus Plant-Based

It all started in 1997 when the Soyfoods Association of North America (“SANA”) filed a citizen’s petition requesting that the FDA issue a new regulation under Part 102 of its regulations titled “Common or Usual Name for Nonstandardized Foods.”⁶⁰ Specifically, SANA petitioned for the new regulation to appear in Subpart B, “Requirements for Specific Nonstandardized Foods.”⁶¹ The proposed regulation sought to standardize both the terminology used to refer to soymilk products and the process by which companies produced soymilk.⁶²

While the FDA issued an official response noting receipt of the petition, it also stated that it was unable to address the issue due to budgetary and time constraints.⁶³ Most notably, however, the FDA “neither cautioned manufacturers about possible liability for misrepresentation, nor did it take any steps toward amending regulations so as to restrict use of the word ‘milk.’”⁶⁴ The Federation viewed the FDA’s lack of action as the agency’s tacit acceptance of soymilk misrepresenting itself as “milk” and opted to voice its disapproval directly to the FDA.⁶⁵ The Federation, along with other interest groups on both sides of the aisle, sent letters to the FDA detailing their stance on the issue.⁶⁶ Specifically, the Federation’s letter requested that the FDA “promote honesty and fair dealing in the interest of consumers” and prohibit the soy industry from “inappropriately using the name of a standardized food” and effectively “misbrand[ing]” its soy beverage.⁶⁷ Interestingly, the Federation’s letter primarily focused on soymilk, not other plant-based

60. Citizen Petition from Peter Golbitz, Comm. Chairperson, Soyfoods Ass’n of Am., to U.S. Food & Drug Admin., FDA-1997-P-0078-0002 (Feb. 28, 1997), <http://www.soyfoods.org/wp-content/uploads/SANA-Citizen-Petition-No.-97P-0078-2-28-97.pdf> [<https://perma.cc/XML6-YR36>].

61. *Id.*

62. *See id.*

63. Justis, *supra* note 10, at 1000.

64. *Id.* at 1000–01.

65. *Id.* at 1001.

66. *Id.*

67. Letter from Robert D. Byrne, Vice President of Regulatory Affairs, Nat’l Milk Producers Fed’n, to Joseph A. Levitt, Dir., Ctr. for Food Safety & Applied Nutrition, U.S. Food & Drug Admin., Attachment 11, National Milk Producers Federation, Comment Letter on Citizen Petition from the Good Food Institute to the Food and Drug Administration, FDA-2017-P-1298 (Feb. 14, 2000) [hereinafter Federation Letter], <https://www.regulations.gov/document?D=FDA-2017-P-1298-0092> [<https://perma.cc/C7NG-9L5Q>].

milks made from oats, rice, or coconuts.⁶⁸ Its reasoning was as follows: first, the Federation noted that its “marketplace information” showed that it was far less common for oat and rice milks to use the term “milk” as compared to soymilk, and second, the Federation acknowledged that coconut milk had a “well-established historical use of the term ‘milk’ in [its] nomenclature,” but most importantly, was “not attempt[ing] to directly compete with [traditional dairy milk].”⁶⁹ Despite the growing interest on the issue, the FDA remained silent, neither issuing guidance to any party nor clarifying its stance.⁷⁰

C. *Milk Regulation: Misbranding and False Advertisement*

1. The FDA’s Role

This lack of response or action by the FDA particularly frustrated the interested industries because it is, by definition, the FDA’s job to regulate food and drugs in the U.S. and has been since the passage of the Pure Food and Drug Act in 1906.⁷¹ The Act had a dual purpose.⁷² First, it served as a response to the ever-growing problem of “adulterated and deceptively packaged foods”⁷³ circulating throughout interstate commerce in America.⁷⁴ Second, it served as the vehicle to transform the FDA, which was originally created in 1862 as a scientific institution, into a regulatory agency with the primary duty of working with state and local governments to assure food and drug safety.⁷⁵

As time progressed, it became clear that the Pure Food and Drug Act did not give the FDA the power it required to actually protect consumers, as the FDA had no way of removing dangerous products from the market or imposing standards on how foods should

68. *Id.*

69. *Id.*

70. Justis, *supra* note 10, at 1001.

71. Giuliana D’Esopo, Note, *Don’t Cry Over Plant-Based Milk: Why the Use of the Term “Milk” on Non-Dairy Beverages Does Not Constitute “Misbranded” Under the Federal Food, Drug, and Cosmetic Act*, 14 J. HEALTH & BIOMEDICAL L. 481, 484 (2018).

72. *See id.*

73. *80 Years of the Federal Food, Drug, and Cosmetic Act*, U.S. FOOD & DRUG ADMIN. [hereinafter *80 Years of FDCA*], <https://www.fda.gov/about-fda/virtual-exhibits-fda-history/80-years-federal-food-drug-and-cosmetic-act> [https://perma.cc/6LYV-DPCZ] (last updated July 11, 2018).

74. *See* D’Esopo, *supra* note 71, at 484.

75. *Id.*

be produced.⁷⁶ This void in enforcement ability caught national attention in 1933 when the FDA's Chief Education Officer and Chief Inspector teamed up to curate a travelling exhibit highlighting 100 "dangerous, deceptive, or worthless" products on the market that the FDA was powerless to remove.⁷⁷ This exhibit, nicknamed the "American Chamber of Horrors," was so alarming that it garnered the attention of President Theodore Roosevelt after his wife attended the exhibit.⁷⁸ In response, in 1938 President Roosevelt signed the Federal Food, Drug, and Cosmetic Act ("FDCA") into law, closing many of the loopholes brought to light by the American Chamber of Horrors.⁷⁹ With its newly endowed power, the FDA could finally regulate, and even go so far as to provide legal definitions for, certain foods in order to protect the consumer from manufacturers intentionally substituting ingredients of lesser value.⁸⁰ These legal definitions are known as "standards of identity."⁸¹

2. Standards of Identity

At the heart of the fight between the dairy milk and plant-based milk industries is the use of the word "milk."⁸² This is due to the fact that milk is one of the many foods for which the FDA has provided a standard of identity.⁸³ Milk's standard of identity is "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows."⁸⁴ Under the FDA's power, vested by the FDCA, the agency is able to designate a food as misbranded in two different situations: (1) if the product contains any ingredients not represented on the label; or (2) if the product uses a term on its label that has been given a standard of identity, but the product itself does not conform to that term's standard of identity.⁸⁵ Should a food fall into either of these categories, the FDA may issue a warning letter to the manufacturer

76. See *80 Years of FDCA*, *supra* note 73.

77. *Id.*

78. *Id.*

79. *Id.*

80. *FDA: Foods Must Contain What Label Says*, U.S. FOOD & DRUG ADMIN. [hereinafter *FDA Labels*], <https://www.fda.gov/consumers/consumer-updates/fda-foods-must-contain-wh-at-label-says> [<https://perma.cc/YZK2-KHEH>] (last updated Feb. 4, 2013).

81. *Id.*

82. See discussion *supra* section I.B.2.

83. See *FDA Labels*, *supra* note 80.

84. 21 C.F.R. § 131.110(a) (2019).

85. See *FDA Labels*, *supra* note 80.

detailing the violation and asking the manufacturer to correct the product.⁸⁶ If the manufacturer does not comply, the FDA reserves the power to remove the misbranded product from commerce and prohibit the manufacturer from distributing it until the manufacturer has taken the appropriate corrective actions.⁸⁷

It is this history and enforcement structure that makes it all the more bizarre that the FDA effectively punted the soymilk issue until, in 2008 and 2012, it issued warning letters to two different soy product manufacturers.⁸⁸ Despite those warnings and the continued use of the term “milk” in dozens of other plant-based milk products, the FDA has made no official determination on SANA’s 1997 petition.⁸⁹ To this day, there is no evidence that the FDA has acted on these warnings or exercised its power to remove soymilk from the market.

This lack of guidance continued to deepen the divide between the two industries, with SANA and other plant-based groups arguing that (1) soymilk does not use “milk” as a stand-alone term and is therefore not in violation of the standard of identity;⁹⁰ and (2) other animal milks, such as goat’s milk or sheep’s milk, technically fall outside that standard, yet the FDA does not target those industries for enforcement violations.⁹¹ The Federation responded to these arguments by claiming that soymilk is also known as “soy beverage” or “soya drink” and should be using those labels, especially because they are jockeying for the place of dairy milk’s biggest rival and are therefore, by definition, trying to compete in the “milk” space.⁹² The Federation further states that although some animal-based milks technically fall outside the purview of milk’s standard of identity, those products’ use of the term “milk” is “well established and referenced in other standards of identity.”⁹³ Presumably, this is the Federation giving its blessing to any milk that comes from animals, just not milk that comes from plants.

86. *Id.*

87. *Id.*

88. *See* Justis, *supra* note 10, at 1004.

89. *See id.*; Lauren Harris, *Mooove Over Cow’s Milk: Why the FDA Should Amend Their Guidelines to Include for Plant-Based Alternatives to Conventional Animal-Based Foods*, 39 N. ILL. U. L. REV. 301, 311 (2019).

90. Justis, *supra* note 10, at 1004.

91. *See, e.g.*, Federation Letter, *supra* note 67.

92. *Id.*

93. *Id.*

3. The DAIRY PRIDE Act

Regardless of which industry's interpretation is correct, eventually the Federation grew tired of the FDA's avoidance of the issue and decided to circumvent the agency by presenting the issue directly to Congress.⁹⁴ Members of Congress on both sides of the aisle saw the need not only to resolve the dispute, but also to take action in support of the dairy industry.⁹⁵ To accomplish this, in January 2017, a group of mixed-party senators banded together to introduce the "Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act," known colloquially as the "DAIRY PRIDE Act."⁹⁶

This proposed bipartisan act would require "non-dairy products made from nuts, seeds, plants, and algae to no longer be mislabeled with dairy terms such as milk, yogurt, or cheese."⁹⁷ The proposed legislation claims that, while current FDA standards of identity are clear, the FDA is not enforcing these regulations and is allowing the mislabeling of products to continue.⁹⁸ The Act alleges this lack of enforcement is harmful for two main reasons.⁹⁹ First, it is hurting the dairy industry by diminishing dairy farmers' tireless efforts to conform to FDA standards, while essentially allowing the plant-based milk industry to ignore these same "rigorous requirements."¹⁰⁰ Second, the FDA's silence is allowing plant-based milk producers to use "dairy's good name for their own benefit" by effectively tricking consumers into thinking that their products are as nutritious as dairy milk when in fact they are "often not equivalent to the nutrition content of dairy products."¹⁰¹

The DAIRY PRIDE Act would force plant-based dairy producers to relabel and potentially even rebrand their products in order to make it clear to consumers that they are not, in fact, milk.¹⁰² To be clear, the Act does not seek to force these manufacturers to relabel because consumers are confused about where plant-

94. Justis, *supra* note 10, at 1001–02.

95. *See id.* at 1002.

96. *See* Press Release, Tammy Baldwin, *supra* note 11.

97. *Id.*

98. *Id.*

99. *See id.*

100. *Id.*

101. *Id.*

102. *See id.*

based milk comes from. It is well-settled that the reasonable consumer understands almond milk does not come from cows.¹⁰³ The Act is instead concerned that consumers are confused about the relative health value of plant-based milks as compared to dairy milk and that, because the plant-based industry uses the term “milk,” consumers assume that dairy and plant-based milks are of equal nutritional value when in fact they often are not.¹⁰⁴

If passed, the Act would amend 21 U.S.C. § 343, titled “Misbranded food,” to add at the end of the section that “a food is a dairy product only if the food is, contains as a primary ingredient, or is derived from, the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more hooved mammals.”¹⁰⁵ Note that this amendment references dairy more generally rather than milk specifically, thus the inclusion of “hooved mammals” as opposed to just “healthy cows.”¹⁰⁶ The Act would also require the FDA to issue draft guidance nationwide within ninety days of enactment on how it intends to enforce the mislabeling of dairy products and to subsequently issue that guidance within 180 days of enactment.¹⁰⁷ No more than two years later, the FDA would be required to report to Congress detailing the progress made on the issue so that Congress could hold the agency accountable.¹⁰⁸ Thus far, Congress has read the Act twice and referred it to the Committee on Health, Education, Labor, and Pensions where it is currently sitting.¹⁰⁹

III. WHAT COURTS HAVE SETTLED ABOUT MILK THUS FAR

While Congress seems to side with dairy and the FDA waffles somewhere in the middle, the courts have resoundingly come down in favor of plant-based milks. Interestingly, all four cases discussed *infra* come out of California, the nation’s largest milk-producing state.¹¹⁰ Although a mere four cases—three from California state

103. See *e.g.*, *Painter v. Blue Diamond Growers*, 757 F. App’x 517, 519 (9th Cir. 2018).

104. See Press Release, Tammy Baldwin, *supra* note 11.

105. DAIRY PRIDE Act, S. 130, 115th Cong. § 4(a) (2017).

106. Compare *id.* (defining “dairy”), with 21 C.F.R. § 131.110(a) (2019) (defining “milk”).

107. S. 130 § 4(b).

108. See *id.*; Press Release, Tammy Baldwin, *supra* note 11.

109. See S. 130 – DAIRY PRIDE Act, CONGRESS.GOV, <https://congress.gov/bill/115th-congress/senate-bill/130> [https://perma.cc/PQV2-4URT].

110. Joyce Chepkemoi, *Top Milk-Producing US States*, WORLDATLAS (July 3, 2018), <https://www.worldatlas.com/articles/top-10-milk-producing-us-states.html> [https://perma.

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courts and one from the Ninth Circuit—is by no means indicative of how other courts in other states might respond to this issue, these cases represent the current universe of the milk litigation landscape and may at least hint at the way other courts or institutions would consider the issue.

A. *Ang v. Whitewave Foods Co.*

In the 2013 class action *Ang v. Whitewave Foods*, plaintiffs brought suit against the producers of “Silk Products” alleging, amongst other things, the company “misbranded” its soy, almond, and coconut milks by calling them “milk.”¹¹¹ Plaintiffs based their claims on two related theories: (1) that these plant-based milks violate the standard of identity for milk and therefore cannot use the term “milk” to describe them; and (2) that “a reasonable consumer could confuse soymilk, almond milk, or coconut milk for dairy milk.”¹¹²

Under the first theory, the court began by noting that, under the FDCA, a food must be identified by its “common or usual name” if it has one.¹¹³ If not, the food must be identified by an “appropriately descriptive term, or when the nature of the food is obvious, a fanciful name commonly used by the public for such food.”¹¹⁴ Plaintiffs, referencing milk’s standard of identity as defined in 21 C.F.R. § 131.110, argued that the definition prohibits these plant-based milks from using the term “milk” because they did not come from cows, as the standard of identity requires.¹¹⁵ The court did not find that argument compelling, stating that milk’s standard of identity “pertains to what milk is, rather than what it is not, and makes no mention of non-dairy alternatives.”¹¹⁶ Further, the court pointed out that FDA regulations state that the common or usual name for a food “shall accurately identify or describe, in as simple terms as possible, the basic nature of the food or its characterizing proper-

cc/3448-KM54].

111. *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 U.S. Dist. LEXIS 173185, at *2–3 (N.D. Cal. Dec. 10, 2013).

112. *Id.* at *9.

113. *Id.* at *10 (quoting 21 U.S.C. § 343(i)).

114. *Id.* (quoting 21 C.F.R. § 101.3(b) (2012)).

115. *Id.* at *10–11.

116. *Id.* at *11–12.

ties or ingredients,” and can be established through common usage.¹¹⁷ The court found that “soymilk” and “almond milk” accurately describe the “basic nature and content of the beverages, while clearly distinguishing them from milk that is derived from dairy cows” while also pointing out that the FDA “regularly uses the term soymilk in its public statements.”¹¹⁸

As for plaintiffs’ second theory, the court found it “simply implausible” that a reasonable consumer would mistake soy or almond milk for dairy milk, stating that the “first words in the products’ names should be obvious enough to even the least discerning of consumers.”¹¹⁹ Resting its argument on the fact that the terms “soy” and “almond” decreased rather than increased consumer confusion as to the nature of the product, the court concluded that, “[u]nder 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.”¹²⁰

B. *Gitson v. Trader Joe’s Co.*

The plaintiffs in the 2013 class action *Gitson v. Trader Joe’s Co.* alleged similar claims, namely that Trader Joe’s use of the term “soymilk” violated the FDCA because it was “misleading” to consumers.¹²¹ The court explained that there were two theories by which a product could violate the statute, ultimately rejecting both of them.¹²²

The first was that the use of the word “soymilk” was generally “false or misleading” to consumers within the meaning of 21 U.S.C. § 343(a), which deems a food “misbranded” if “its labeling is false or misleading in any particular [way].”¹²³ The court noted that the analysis of whether a food label is misleading is conducted from the “perspective of a reasonable consumer,” and in this case, the plaintiffs had not articulated a plausible argument for how the

117. *Id.* at *12.

118. *Id.* at *11–12.

119. *Id.* at *12–13.

120. *Id.* at *14–15.

121. *Gitson v. Trader Joe’s Co.*, No. 13-cv-01333-VC, 2015 U.S. Dist. LEXIS 170401, at *1–3 (N.D. Cal. Dec. 1, 2015).

122. *Id.* at *3–6.

123. *Id.* at *3; 21 U.S.C. § 343(a).

term “soymilk” would mislead a reasonable consumer.¹²⁴ The court addressed one of plaintiffs’ arguments, which seemed to suggest that people might confuse soymilk for dairy milk, finding it implausible given that “people drink soymilk in lieu of cow’s milk.”¹²⁵ Plaintiffs also argued that soymilk is misleading because its product purports to have similar nutritional value to dairy milk.¹²⁶ Again, the court deemed this argument implausible because “even an unsophisticated consumer[] would not assume that two distinct products have the same nutritional content,” and if that consumer was concerned about nutrition facts, he “would consult the label.”¹²⁷

Under the second theory, a food may be misleading if it “purports to be or is represented as” a food with its own standard of identity.¹²⁸ However, the court explained that the mere fact that milk has a standard of identity “does not categorically preclude” another product from using the term.¹²⁹ The standard of identity “simply means that a company cannot *pass off* a product as ‘milk’ if it does not meet the regulatory definition of milk.”¹³⁰ Trader Joe’s was not attempting to pass its soymilk off as dairy milk, the court concluded, because it was not in any way attempting to mislead its customers into thinking that its soymilk came from cows.¹³¹

C. Kelley v. WWF Operating Co.

Four years after *Ang* and two years after *Gitson*, yet another class action came before the California courts in *Kelley v. WWF Operating Co.*, with plaintiffs once again bringing claims against Silk products, alleging that Silk’s packaging was “false [and] misleading.”¹³² Specifically, plaintiffs alleged that both Silk’s packaging and commercials led them to believe that Silk products were “nutritionally superior to dairy milk and contained comparable amounts of the essential vitamins and nutrients contained in dairy

124. *Gitson*, 2015 U.S. Dist. LEXIS 170401, at *3–4.

125. *Id.* at *3–5.

126. *Id.* at *5.

127. *Id.*

128. *Id.* at *5–6.

129. *Id.* at *6.

130. *Id.* (emphasis in original).

131. *Id.*

132. *Kelley v. WWF Operating Co.*, No. 1:17-cv-117-LJO-BAM, 2017 U.S. Dist. LEXIS 86971, at *1–2 (E.D. Cal. June 5, 2017).

milk and contained higher amounts of protein and vitamin D than dairy milk.”¹³³ Therefore, plaintiffs concluded, Silk products were misbranded under the FDCA “because they substitute for and resemble dairy milk, are nutritionally inferior to dairy milk, and fail to state ‘imitation milk’ on their labels as required.”¹³⁴ The crux of plaintiffs’ argument was that the Silk products were “imitations” under 21 C.F.R. § 101.3(e).¹³⁵

In this case, the court ultimately opted to refer the issue to the FDA, which had primary jurisdiction over the matter, stating that the court was not the proper forum for deciding whether Silk products were substitutes for or nutritionally inferior to dairy milk, such that they should be considered “imitations” under federal law.¹³⁶ The court distinguished the case from *Ang* and *Gitson* by explaining that the question of whether the plant-based products were “imitations” under 21 C.F.R. § 101.3(e) was both a question distinct from those posed in *Ang* and *Gitson* and also an issue of first impression for the court.¹³⁷ At this juncture, it is unclear whether the FDA ever took action regarding the court’s referral.

D. *Painter v. Blue Diamond Growers*

In this most recent class action, which reached the Ninth Circuit in California, the plaintiffs in *Painter v. Blue Diamond Growers* decided to pivot from the familiar, unsuccessful arguments used in *Ang* and *Gitson*, opting instead to follow the *Kelley* plaintiffs by alleging that almond milk is mislabeled under 21 C.F.R. § 101.3(e) if its packaging does not contain “imitation milk,” because it is a “substitute for and resemble[s] dairy milk but [is] nutritionally inferior to it.”¹³⁸ However, the *Painter* plaintiffs found even less success than the *Kelley* plaintiffs, as the Ninth Circuit affirmed the lower court’s dismissal of all of plaintiffs’ claims.¹³⁹

The court acknowledged that plaintiffs were correct in that the FDCA requires labels of imitation food products to bear the word “imitation” immediately before the word that the product attempts

133. *Id.* at *2.

134. *Id.* at *3.

135. *Id.*

136. *Id.* at *11–12.

137. *See id.* at *15.

138. *See Painter v. Blue Diamond Growers*, 757 F. App’x 517, 518 (9th Cir. 2018).

139. *Id.*

to imitate.¹⁴⁰ Nevertheless, the court found plaintiffs unable to make a plausible argument detailing how a reasonable consumer could be misled into believing that almond milk and dairy milk are nutritionally equivalent.¹⁴¹ The court also found that plaintiffs could not plausibly allege that Blue Diamond mislabeled its products because almond milk is not an imitation of dairy milk under 21 C.F.R. § 101.3(e).¹⁴² “[A]lmond milk is not a ‘substitute’ for dairy milk as contemplated by section 101.3(e)(1),” the court explained, “because almond milk does not involve literally substituting inferior ingredients for those in dairy milk.”¹⁴³ The court further decided that a reasonable jury could not conclude that almond milk is “nutritionally inferior” to dairy milk because “two distinct food products necessarily have different nutritional profiles.”¹⁴⁴

With these four cases making up the current milk litigation landscape, it appears that little is left unsettled in the plant versus dairy milk space. Not so in the mind of some members of Congress. Although the courts have already settled the very issues that the DAIRY PRIDE Act intends to address, some members of Congress clearly take issue with the courts’ reasoning and feel compelled to tackle these issues in their own way.

IV. ANALYZING THE POSSIBLE COSTS AND BENEFITS OF THE DAIRY PRIDE ACT

Although the DAIRY PRIDE Act seeks to remedy consumer confusion, its practical effect would actually be to increase confusion, while at the same time creating anticompetitive issues between the dairy and plant-based milk industries by allowing Congress to pick winners and losers in this space, potentially opening the door to future congressional overreach in other markets under the guise of helping the confused consumer. Section A below details the possible benefits the DAIRY PRIDE Act could provide by exposing some of the ills the Act purports to cure. Section B illuminates a few ways in which the DAIRY PRIDE Act could have unintended, negative consequences that, in the end, would not outweigh the likely small amount of alleviated consumer confusion. Section C proposes

140. *Id.* at 519.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

a labelling solution that would be equitable to both industries while also accomplishing the Act's goals more fully.

A. *Why The DAIRY PRIDE Act Might Actually Have a Case*

1. The Snowball Effect: True Consumer Confusion

These days, everything from almond to oat, soy to sesame, and cashew to coconut can call itself milk so long as it is soaked and strained to become a beverage. Although this phenomenon is to the chagrin of the dairy industry, many consumers likely do not bat an eye at these “imposters” as they peruse the dairy aisle. Over time, though, suppose these non-dairy milk offerings expand. Lollipop milk and cookie milk sneak their way in. Soon after, Reese's milk, Twizzler milk, and Oreo milk are all fighting for that few feet of coveted, refrigerated space in the local grocery store. Eventually, every child's sugar-filled fix can be found in milk form. While arguably far-fetched, this is the future the DAIRY PRIDE Act fears: true consumer confusion surrounding what something purporting to be “milk” actually is and how healthy it is in comparison to real dairy milk. Although some may suggest that chocolate milk has already opened the door to this sugary-milk nightmare, the important thing to remember is that although chocolate milk may contain a decent amount of sugar, it is in the end still derived from dairy milk, and thus maintains milk's underlying protein and vitamin content. The candy-based milks of the future, if made by a process comparable to the plant-based milks of today, could simply be made from candy that is soaked in water, strained, and fortified with vitamins after the fact.

The DAIRY PRIDE Act is a reaction to that fearful future, attempting to remedy the problem before it takes root more broadly. While the picture of this future is meant to be nothing more than an illustration, it bears elements of truth. For most of America's history, dairy milk has been the only milk in the general public eye, save for a few pockets of the country with more diverse cultural backgrounds and familiarity with coconut milk or rice milk. Today, the milk aisle is flooded with options made from every plant, nut, and seed imaginable. Although this diversity in offerings is not inherently bad, it creates fertile ground for savvy companies to stretch the term “milk” to include truly unhealthy offerings. With so many milk options already crowding the shelves, and

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considering the burgeoning obesity crisis America faces, this is the last thing consumers need.

Furthermore, the *Gitson* court was far too idealistic about how the reasonable consumer, or at least the average consumer, shops.¹⁴⁵ Perhaps the reasonable consumer is health-conscious and thorough, and compares the nutrition labels of competing products. And although the “reasonable consumer” standard is that which the FDCA requires, this is not the *average* consumer. The average consumer is the working mom making a quick run to the store after she gets off work but before her kids get off their aftercare bus. The average consumer is the man who sees a commercial pitching how great and healthy plant-based milks are and to whom it does not occur that those milks might not actually be the healthiest option. The average consumer is someone who rarely reads labels, and if so, barely understands the true health consequences of nutritional facts. The one factor uniting these consumers is that almost none of them will pick up a carton of plant-based milk and a carton of dairy milk to compare and understand the impact each might have on their body.

Though the argument could be made that the FDCA should shift its perspective from that of the reasonable consumer to that of the average one, that argument is for another article. Suffice it to say that the heart of the FDA Guidelines and the FDCA seeks to help protect consumers from harmful products and educate them on how to make healthy choices through food. Although plant-based milks are not harmful, the point remains that if the average consumer flies below the radar of the reasonable consumer, perhaps the FDA Guidelines and the FDCA are not truly able to satisfy their foundational goals and should instead shift their perspective slightly to create standards that account for both categories of consumers.

While the DAIRY PRIDE Act is unable to remedy all these ills, it might give the average consumer a bit more pause the next time they find themselves in the dairy aisle and see that the almond milk they have been buying is now called “almond beverage” or “almond imitation milk.” Although this change might not cause them

145. See *Gitson v. Trader Joe's Co.*, No. 13-cv-01333-VC, 2015 U.S. Dist. LEXIS 170401, at *4 (N.D. Cal. Dec. 1, 2015).

to compare the label with dairy milk, it could go a long way in signaling that these plant-based products are not as equal to dairy milk as some commercials would like consumers to believe.

2. Comparing the Milk Debate to The Mayo Wars

Although the mayo and milk industries have vast differences, mayo and milk are both governed by standards of identity. Despite this similarity, the Mayo Wars and the resulting changes forced on Just Mayo by the FDA suggest that the FDA has not treated the infringement of standards of identity equally across all industries.¹⁴⁶ When Hampton Creek decided to introduce its egg-free “Just Mayo” in 2013,¹⁴⁷ it caught the attention of not only Unilever, one of the world’s largest mayo producers, but also the FDA.¹⁴⁸ While Unilever was presumably concerned about the competition this hip, new brand could stir up, the FDA was concerned because Just Mayo was egg-free, in violation of mayo’s standard of identity requiring any product bearing the name “mayo” to contain eggs in some form or fashion.¹⁴⁹ Due to this violation, the FDA issued a warning letter making Hampton Creek aware that its product did not comply with the applicable standard of identity and was, as a result, misbranded.¹⁵⁰ However, the FDA treated the warnings behind the Hampton Creek letter much more seriously than those which it sent to the soy industry in 2008 and 2012.¹⁵¹ Recall that those soy industry warnings, while sent, were never followed up on and the FDA did not take enforcement action.¹⁵² This is very different from the treatment Hampton Creek received, as it was forced to redesign multiple elements on its label, as well as to further explain the meaning behind “Just” in the product’s name.¹⁵³

In fairness, this analogy is not iron-clad. The core difference between Just Mayo and plant-based milks like soymilk lies in the fact

146. See Kowitt, *supra* note 1.

147. *Cracking the Egg: Food Innovators at California Start-Up Seek Egg Alternatives*, CBS NEWS (Sept. 20, 2013), <https://www.cbsnews.com/news/cracking-the-egg-food-innovators-at-calif-start-up-seek-egg-alternatives/> [https://perma.cc/R5WF-DUG2].

148. See Kowitt, *supra* note 1.

149. See *id.*; 21 C.F.R. § 169.140 (2019).

150. See Kowitt, *supra* note 1.

151. Compare *id.* (discussing FDA treatment of letters to Hampton Creek), with Justis, *supra* note 10, at 1004 (discussing FDA treatment of letters to soy product manufacturers).

152. Justis, *supra* note 10, at 1004.

153. Kowitt, *supra* note 1; see *supra* notes 7–9 and accompanying text.

that Just Mayo does not, in its name, convey to the consumer that it is in fact eggless, while the name soymilk more clearly denotes that the product is not actually from cows. That said, the point remains that the FDA issued warning letters in both cases to the respective manufacturers but did not follow through on those warnings with comparable force, requiring one to undertake relabeling efforts while allowing the other to continue with its labeling practices free from interference.

Although the FDA never acknowledged this difference in treatment, it is a sign that the agency is still active in guarding the standards of identity against products that attempt to use a term, but do not live up to the definition. This makes it all the more curious that the FDA never followed through on enforcing milk's standard of identity in the soy industry. It is possible, however, that the FDA viewed the Mayo Wars and the milk wars as two distinct issues. On the one hand, the Mayo Wars centered around a new product that was one ingredient shy of meeting the standard of identity but was otherwise compliant. On the other hand, soymilk started appearing on American grocery store shelves as far back as the 1950s and essentially had the FDA's implicit blessing, given that the FDA only sent the industry warning letters in 2008 and 2012, allowing the term "soymilk" to become entrenched in the American vocabulary for over fifty years.¹⁵⁴

The character of the two different products and the companies backing them could have also played a significant role in the differing treatment. Just Mayo was the product of a San Francisco start-up looking to introduce more sustainable, vegan options to the market.¹⁵⁵ Plant-based milks were the products of WhiteWave Foods, parent company of Silk brands, and Blue Diamond Growers, whose 2017 annual revenue pushed almost \$1.5 billion.¹⁵⁶ Although consumers and manufacturers might not want to believe that the FDA is more willing to squish the little guy rather than fight the industry giants, it is quite possible that this is the ugly truth. The larger industries have more money to funnel toward lobbying efforts, while the small start-ups struggle to have the same

154. See Bridges, *supra* note 51, at 22; Justis, *supra* note 10, at 1004.

155. Kowitz, *supra* note 1.

156. See *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 U.S. Dist. LEXIS 173185, at *2 (N.D. Cal. Dec. 10, 2013); BLUE DIAMOND GROWERS, 2017 ANNUAL REPORT 3, 5 (2017).

impact. Perhaps the FDA is simply choosing the path of least resistance.

This suspicion is supported not only by the FDA's own research practices and its treatment of certain products, but also by surveys taken by FDA researchers and scientists who can attest that, to a certain degree, the FDA is in the pocket of industry giants.¹⁵⁷ The FDA website itself admits that the agency largely relies on the testing data interested drug companies submit regarding how safe and effective their drugs are, as the agency itself "doesn't actually test drugs" and instead "conduct[s] limited research in the areas of drug quality, safety, and effectiveness standards."¹⁵⁸ The structure of this process alone is cause for concern, given that it could incentivize companies to distort their findings in an effort to maximize profits.¹⁵⁹ The logic follows that the industry giants are more sophisticated, which allows them to more tactfully distort their data and effectively fly under the radar of the FDA's "limited research."¹⁶⁰ In this way, the argument could be made that the FDA is unknowingly in the pocket of big industry. However, there is evidence that this capture is known and accepted by the FDA as well.¹⁶¹

The first bit of evidence that the FDA is complicit in its industry capture comes from FDA employees themselves.¹⁶² In a 2006 survey, "sixty percent of researchers knew of instances in which industry had inappropriately influenced the FDA's decisions."¹⁶³ Further, "[a] full twenty percent of FDA scientists 'have been asked explicitly by FDA decision makers to provide incomplete, inaccurate or misleading information to the public, regulated industry, media, or elected/senior government officials.'"¹⁶⁴ These are the results of an alarming 5918 FDA employees who participated in the thirty-eight-question survey, conducted by the Union of Concerned

157. See Jason Iuliano, *Killing Us Sweetly: How to Take Industry Out of the FDA*, 6 J. FOOD L. & POL'Y 31, 35 (2010).

158. *Development & Approval Process: Drugs*, U.S. FOOD & DRUG ADMIN. [hereinafter *Development & Approval Process*], <https://www.fda.gov/drugs/development-approval-process-drugs> [https://perma.cc/247D-JUUM] (last updated Oct. 28, 2019).

159. See Iuliano, *supra* note 157, at 35.

160. See *Development & Approval Process*, *supra* note 158.

161. See Iuliano, *supra* note 157, at 34, 64, 67–70.

162. *Id.* at 34.

163. *Id.*

164. *Id.*

Scientists and Public Employees for Environmental Responsibility in 2006.¹⁶⁵

The second bit of evidence is drawn from the FDA's own history of approving certain products. In the case of stevia, rather than being pressured to approve a dangerous product, the FDA was instead pressured to withhold approval for a safe product. Despite copious amounts of data suggesting that stevia was in fact safe for human consumption as a sweetener, the FDA curiously "bann[ed] stevia in 1991 to satisfy an anonymous trade complaint."¹⁶⁶ Even more curiously, "[a]fter nearly twenty years and numerous Freedom of Information Act requests, the FDA has steadfastly refused to release the name of the company that requested the ban."¹⁶⁷ The FDA held so firm on this ban that it was not until Congress "forced its hand in 1994" that stevia was finally approved.¹⁶⁸ However, even at that time, the FDA only gave stevia narrow approval: for use as a dietary supplement, not a sweetener.¹⁶⁹ In fact, for over a decade, the FDA staunchly stood by its assertion that stevia was safe as a dietary supplement, but was "toxic" as a "food additive."¹⁷⁰ That lasted until 2008, when the FDA suddenly changed its tune.¹⁷¹ This was not due to new scientific data or more rigorous testing but rather to a petition from industry giants like Coca-Cola, Pepsi, Merisant, and Cargill.¹⁷² This petition requested that the FDA grant stevia "Generally Recognized as Safe" ("GRAS") approval, which would finally allow stevia to be sold and marketed as a sweetener.¹⁷³

The FDA handled this request in a very savvy manner—instead of giving stevia GRAS approval, which numerous other consumers had asked for over the preceding decades, the agency instead issued a letter of "no objection."¹⁷⁴ This meant that the FDA did not object to the use of stevia as a sweetener at the time, but that it

165. See *Survey: FDA Scientists (2006)*, UNION CONCERNED SCIENTISTS (July 11, 2008), <https://www.ucsusa.org/resources/survey-fda-scientists#ucs-report-downloads> [<https://perma.cc/5ZYT-4S3P>].

166. See Iuliano, *supra* note 157, at 65–67.

167. *Id.* at 67.

168. *Id.* at 68.

169. *Id.*

170. *Id.*

171. *Id.* at 69.

172. *Id.*

173. *Id.*

174. *Id.* at 70.

could choose to object at any time in the future.¹⁷⁵ In effect, “the FDA . . . reserved the right to selectively target companies,” which could open the door for the agency to “allow Coca-Cola and Pepsi to market stevia while preventing smaller companies from producing the sweetener.”¹⁷⁶ Even *if* the FDA’s treatment of stevia is a stand-alone example, it is enough to breed suspicion that the FDA has been and is being unduly influenced by the likes of big industry. The plant-based milk industry may merely be the latest example of this phenomenon.

Regardless of whether or not the FDA is tucked snugly in the deep pockets of industry giants, it instills doubt in the consumers’ and Congress’ mind when it appears that an agency is exercising its enforcement powers incongruously across industries with arguably analogous behavior. That is precisely why Congress took the matter into its own hands. The oversight called for by the DAIRY PRIDE Act would hopefully eliminate the FDA’s selective enforcement and, ultimately, make the agency more responsible to Congress and the consumer.

3. Helping the Dairy Industry Bounce Back

Throughout American history, the small family farm has been a staple of our national identity. Even Jefferson was known to center his political ideology around the “independent agrarian citizen.”¹⁷⁷ These deeply rooted ideals still weave their way into the fabric of agricultural legislation today, as Congress refuses to allow this part of the American dream to collapse under the weight of disaster, weather fluctuations, or the volatile agricultural market.¹⁷⁸

Congressional agricultural aid began back in 1933 during the Great Depression when President Franklin D. Roosevelt passed the Agricultural Adjustment Act, which provided mandatory price support for vital crops like corn, cotton, and wheat, and guaranteed a base level of production to ensure that these products remained on track with their market demand.¹⁷⁹ The Act also allowed Con-

175. *Id.*

176. *Id.*

177. Anthony Kammer, *Cornography: Perverse Incentives and the United States Corn Subsidy*, 8 J. FOOD L. & POL’Y 1, 5–6 (2012).

178. *See id.* at 4–7.

179. *Id.* at 9–10.

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gress to purchase any surplus of these crops in order to help stabilize market prices.¹⁸⁰ This legislation paved the way for what are known today as Farm Bills.¹⁸¹ Current Farm Bills are multi-year, omnibus legislation touching on almost every aspect of American agricultural policy, including “commodity programs, trade, rural development, farm credit, conservation, agricultural research, food and nutrition programs, [and] marketing.”¹⁸² Thus, these bills help to prop up agricultural industries in good times, and bail them out in bad, to ensure both the small family farm and big industry are alive and well.

These bills suggest that Congress is willing to step in and buttress industries in the face of famine, draught, and natural disaster, and that it is also willing to extend a financial olive branch to industries in the face of a volatile market. Although Congress should never interfere with a market to the degree that its actions begin to override consumer preferences, consumers benefit from having these sorts of financial safeguards in place. Without some degree of congressional monetary aid in uncertain times, the consumer would risk the extinction of entire portions of the food pyramid every time there was a global pandemic. In the same way, the DAIRY PRIDE Act seeks to serve an equivalent purpose as the Farm Bills, albeit on a smaller scale: providing support to the dairy industry. Images of the classic American dairy farmer and the local milkman are iconic pieces of our history, and ones that should not vanish merely because the industry is struggling with a new competitor in the market.

Federal support for the dairy industry in particular is not a new phenomenon. One year before the DAIRY PRIDE Act was introduced, “the dairy industry asked the U.S. Department of Agriculture (USDA) for a staggering \$150 million to buy their excess cheese.”¹⁸³ While the Department of Agriculture was not willing to foot the entire sum, it still gave the dairy industry twenty million dollars to alleviate some of its financial strain.¹⁸⁴ Although these sorts of payouts occasionally draw criticism from both sides of the

180. *Id.* at 9.

181. *Id.*

182. *Id.* at 13.

183. Joanna Grossman, *Dairy Industry Doesn't Deserve American Taxpayer Bailout*, HILL (Mar. 8, 2018, 2:45 PM), <https://thehill.com/opinion/energy-environment/377406-dairy-industry-doesnt-deserve-american-taxpayer-bailout> [<https://perma.cc/3Y2E-YZE4>].

184. *Id.*

aisle, the fact remains that Congress has a history of monetarily and legislatively insulating agriculture from the market under certain conditions.¹⁸⁵ For this reason, the DAIRY PRIDE Act should be permitted to give the dairy industry what is, in comparison to various crop subsidies of the past, a small boost in the right direction.

B. *Why The DAIRY PRIDE Act Might Actually Create Issues*

1. The Changes Required Will Not Decrease Confusion

The DAIRY PRIDE Act is centered around ensuring that manufacturers of plant-based milks are not able to mislead the consumer into believing that plant-based milks are of equal nutritional value to dairy milk.¹⁸⁶ The Act's solution is to force plant-based milk producers to effectively rebrand their products and reeducate their consumer base.¹⁸⁷ The rebranding would come in the form of altering existing packaging so that the label either does not contain the word "milk" at all, or otherwise has the word "imitation" immediately precede "milk."¹⁸⁸ The reeducation would effectively consist of two elements: (1) explaining to consumers that these rebranded products are still the exact same products they have come to know and trust; and (2) clarifying for the average consumer that two completely different products, made with different ingredients, and produced by utterly different processes, in fact have different nutritional content. But, suppose the rebranding and reeducation are truly necessary because the average consumer *is* misled and confused about the ways in which plant-based and dairy milks differ. The question then becomes not whether this process is necessary, but whether it will accomplish its intended goals. Based off of the habits of the average consumer, it will not.

Certainly these changes will signal to the astute consumer that perhaps he should reconsider the nutritional value of the milk products he purchases. However, for the *average* consumer, the changes will likely lead to, at best, a mere continuation of brand loyalty for the plant-based milk consumer, or at worst, even more

185. *Id.*

186. See Press Release, Tammy Baldwin, *supra* note 11; see also DAIRY PRIDE Act, S. 130, 115th Cong. (2017).

187. See Press Release, Tammy Baldwin, *supra* note 11.

188. See *id.*; 21 C.F.R. § 101.3(e) (2019).

consumer confusion. Consumers searching for their favorite plant-based milks would be confronted with new labels reading “almond beverage” or “soy drink,” and the wait time in the local coffee shop line would increase as everyone who asked for almond milk in their latte would be asked whether “almond beverage” would be alright, likely leaving the consumer frustrated and puzzled. The plant-based milk industry would presumably be required to take on a coordinated, national campaign in order to explain to the consumer that, while the name is different, the product has remained exactly the same. In the end, if the consumer was confused about the difference between plant-based milk and dairy milk in the first place, it is unlikely that adding or interchanging one word on the label will go that far in truly educating the consumer about the differing health benefits of plant-based and dairy milks.

2. Potential Antitrust Problems and Congressional Overreach

For most of its history, milk fought to earn its place at the American dinner table through vigorous competition with soft drinks, juices, and coffees alike. Although over time those other drinks have largely eclipsed milk’s coveted spot, milk has kept its place in the market as the “healthy” mealtime beverage of choice. Thus, as plant-based milk sales and popularity began to skyrocket, dairy milk needed to innovate in order to remain relevant in the eyes of the American consumer. This is exactly what consumers hope to see in the market: competition promoting innovation for their benefit. In many ways, the plant-based milk industry was a maverick, disrupting the well-established milk industry status quo and aggressively competing with tired, old dairy milk. Over time, dairy milk has increased its variety tremendously, expanding its offerings from the whole, two-percent, one-percent, and skim milk of old, to the organic, ultra-filtered, DHA omega-3-added, multi-flavored options consumers can choose from today. If not for plant-based milk’s success, the consumer might still be saddled with dairy milk’s four original offerings. Not only are both industries pushing each other to create new and improved products, they are also pushing each other to market more effectively to win over any undecided consumers. While advertising is a large part of the issue underlying the DAIRY PRIDE Act, even aside from the term “milk,” both industries need to convince a largely health-conscious consumer base of millennials new to buying their own groceries that their industry’s offering is superior.

All of the aforementioned competition is good because in the end, the consumer reaps the benefits of the subsequent innovation. However, the DAIRY PRIDE Act would realistically stall the engine of innovation that drives these industries because it would effectively make the milk market a dairy monopoly. With plant-based milks having to, in some instances, completely change their name in order to differentiate themselves from the other plant-based beverage options, the only “milk” product left would be dairy milk. In essence, the DAIRY PRIDE Act would police the maverick so that the dairy industry would not have to. By policing the plant-based maverick and stifling its ability to promote rigorous competition, Congress would ultimately tell the consumer that putting these product terms into bright-line boxes is more important than any tangible consumer benefit.

But perhaps the most dangerous and impactful aspect of the entire DAIRY PRIDE Act lies in the fact that it would endow Congress with the power to pick winners and losers in an otherwise perfectly healthy, competitive market. Because congresspeople are merely human, it is unsurprising that they often act in their own self-interest. That self-interest becomes dangerous when it is baked into legislation that further bolsters Congress’ power under the guise of helping the confused consumer.

The courts have already determined that the consumer is not confused, and while Congress often overrides the courts, in this case, because courts are far less likely to be subject to capture than members of Congress from dairy producing states, they are the more appropriate entity to tackle this issue. Further, plant-based and dairy milk producers are arguably innovating more than ever before, and unlike the struggling dairy industry, the FDA and consumers alike seem to be unphased by a world in which “milk” can come from plants and cows. By offering no cognizable consumer benefit, the Act begins to look more like the proverbial toe dip, allowing Congress to test the waters of its own power limitations in the marketplace. The DAIRY PRIDE Act would do more than merely prop up the dairy industry in times of natural or economic disaster. It would effectively chill the vigorous competition currently taking place between the plant-based and dairy industries, with the consumer emerging as the biggest loser.

At the end of the day, Congress should be guarding the consumer’s best interests, rather than feigning consumer confusion as a ploy to prop up the industry that lines their respective states’

pockets. If we allow Congress to so blatantly pick winners and losers in the market, we risk that congressional power seeping into other industries and issues, such that the competitive marketplace becomes Congress' world and the consumer is just living in it.

C. *A Proposed Solution*

As it exists today, the DAIRY PRIDE Act will not treat both of the industries at play equitably, nor will it have its intended impact of reducing consumer confusion regarding the nutritional value of plant-based and dairy milk. In order to create a sustainable remedy, any proposed solution ought to contain those two elements, namely (1) an equitable apportionment of the burden of educating the consumer, and (2) tangible consumer education, such that the goals of the Act are met and maintained in perpetuity.

The Act is currently inequitable because only the plant-based milk industry would be required to make changes to its labelling and naming conventions. This would not only result in the plant-based milk industry needing to spend untold dollars relabeling all of its products, but would also put the industry at a disadvantage by forcing it to reeducate its consumers. This is particularly unfair as many plant-based milks have enjoyed long histories of using the term "milk" in their nomenclature and have used their current naming conventions to develop a familiarity between the consumer and the product.¹⁸⁹ Therefore, any change required should be imposed upon *both* the dairy and the plant-based milk industries, forcing both to take action in an effort to close any perceived gap in consumer understanding.

A fairer solution would be to require both industries to print a standardized graphic on the front of their labels, detailing the serving size, as well as the total fat, protein, and carbs, in large font. Because the vitamins in these products add to the overall nutritional value and are held by both industries as vital elements of their products, perhaps nutritional experts from both industries, along with the FDA, could discuss adding certain critical vitamin and mineral contents to the graphic as well. This remedy would ensure that both industries have skin in the consumer-education game by forcing them both to bear this cost. It would also prevent the plant-based milk industry from being unfairly disadvantaged

189. See Bridges, *supra* note 51.

by forcibly assuming the entire burden of relabeling its products and reeducating the consumer.

This solution is also much more likely to have the desired impact on the consumer. Specifically, the graphic would ideally be eye-catching and easy for the consumer to compare and understand across products, resulting in tangible consumer education. While the nutrition label obviously already provides this and other nutritional information to the consumer, this proposed graphic would provide the consumer with the most critical information in an easily comparable and accessible way. No longer would the consumer need to pull the carton out of the refrigerated section and turn it on its side to parse through all the values on the nutrition label and compare those values to another product. She would instead be able to know, with very little effort, which product had the macronutrients she desired, and choose accordingly.

CONCLUSION

While the DAIRY PRIDE Act seeks to resolve consumer confusion, in reality it would likely increase confusion and unfairly disadvantage what is truly an entrenched industry, all while opening the door for Congress to pick winners and losers in future markets under the guise of aiding the consumer.

Although the remedy proffered by the DAIRY PRIDE Act could have positive long-term effects, such as preventing a snowball effect that would eventually render standards of identity useless and assisting the dairy industry in its efforts to bounce back from its recent decline, the potential problems presented by its solution outweigh these benefits. Not only would the Act's forced relabeling likely fail in its effort to actually educate the consumer, it would potentially lead to more consumer confusion, antitrust issues, and congressional overreach. A more equitable and effective solution would be to force both the dairy and plant-based milk industries to print a standardized graphic containing the most essential nutritional information on the front of the label in large, eye-catching font, so that the consumer could easily compare critical nutrition facts and choose the product that suits her needs.

In a perfect world, these warring industries, the FDA, and Congress would all prize consumer nutrition and education above all else when deciding how to resolve the issue of the warring milk industries. In our imperfect world, when billions of dollars come

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into play, the health and nutritional education of the American consumer can quickly get lost in the tussle, with neither side willing to sacrifice its own profits for consumers' health. While there is a very strong argument for Congress stepping back and allowing the market to settle this dispute itself, there are clearly members of Congress who feel differently. That said, the DAIRY PRIDE Act should serve as a cautionary tale that congresspeople are also human, and with that, are subject to their own self-interest. Despite the good intentions behind the DAIRY PRIDE Act, the Act would serve as a vehicle for congressional overreach, allowing Congress to play god in the market, inevitably resulting in irreparable harm to consumers' interests and the free market.

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