

To: Food and Drug Administration  
From: Kim Boyle, Attorney at Law  
Professor Eric Goldman, Santa Clara University School of Law (egoldman@gmail.com)  
Date: November 26, 2018  
Re: Docket No. FDA-2018-N-3522

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We're legal experts in trademark and false advertising law. These comments respond to the Food & Drug Administration's September 28, 2018 notice entitled "Use of the Names of Dairy Foods in the Labeling of Plant-Based Products" (FDA-2018-N-3522). We make five brief points.

### **1) Plant-Based Liquids Have Been Called "Milk"<sup>1</sup> For Centuries**

The term "milk" has a venerable history as the descriptor of plant-based liquids. The term "almond milk" dates back to at least 14th century England; and the term "soy-bean milk" has been used in the United States since the 19th century.<sup>2</sup> Reflecting these longstanding meanings, the *Oxford American Dictionary's* second definition for "milk" is "the white juice of certain plants."<sup>3</sup>

### **2) Consumers Call Plant-Based Liquids "Milk"**

Consistent with the well-understood definitions of "milk," consumers expect plant-based liquids to be called "milk." As a Plant Based Foods Association (PBFA) survey has shown, "78% of cow's-milk drinkers agree that the word 'milk' is the most appropriate term for products such as soy milk and almond milk."<sup>4</sup>

### **3) Renaming Plant-Based Liquids Would Hurt Consumers**

Forcing existing plant-based milks to pick another descriptive term would hurt consumers. Any alternative to "milk" would be less accurate. This would reduce the ability of consumers to confidently compare and choose between marketplace options. Also, consumers would need to learn the new nomenclature, creating a transition period that would lead to avoidable and unproductive short-term marketplace confusion.

### **4) Dairy and Non-Dairy Alternatives Can Co-Exist**

Dairy and plant-based alternatives already co-exist in the marketplace. Some consumers, including vegans and lactose-intolerant individuals, intentionally choose plant-based milks

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<sup>1</sup> Our comments focus on the term "milk," but we believe the same dynamics apply to "yogurt" and "cheese."

<sup>2</sup> *A Brief History of Plant Milks*, Vegan Food & Living, Apr. 23, 2018, [www.veganfoodandliving.com/a-brief-history-of-plant-milks/](http://www.veganfoodandliving.com/a-brief-history-of-plant-milks/).

<sup>3</sup> *Milk*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/milk> (definition 1.2); Benjamin Kemper, *Nut Milks Are Milk, Says Almost Every Culture Across the Globe*, *Smithsonian.com*, Aug. 15, 2018, [www.smithsonianmag.com/history/nut-milks-are-milk-says-almost-every-culture-across-globe-180970008/](http://www.smithsonianmag.com/history/nut-milks-are-milk-says-almost-every-culture-across-globe-180970008/).

<sup>4</sup> Shannon Campagna, PBFA Oral Remarks at FDA Hearing July 26, 2018, <https://www.regulations.gov/contentStreamer?documentId=FDA-2018-N-2381-1097&attachmentNumber=1&contentType=pdf>.

precisely because they are not dairy products. Other consumers, including those who also consume dairy options, select non-dairy alternatives for the taste, the health benefits of reducing dairy consumption, or other reasons.<sup>5</sup>

To help consumers navigate product options as they try to ensure—or avoid—dairy consumption, products vendors are prominently labeling their offerings, and grocery stores emphasize those distinctions. For example, packaging for non-dairy alternatives routinely prominently display distinguishing words like “vegan,” “plant-based,” or “dairy-free.” These disclosures ensure that consumers can find and select the product they want.

## **5) The Dairy Industry Can Educate Consumers About the Benefits of Dairy Products**

We do not believe that consumers selecting non-dairy alternatives are doing so under the mistaken belief that dairy and non-dairy products are nutritionally identical. Indeed, as we’ve mentioned, many consumers select non-dairy options precisely because of their differences in nutrition.

Nevertheless, if the dairy industry believes that consumers are making poor choices in the marketplace due to their lack of knowledge, the dairy industry can undertake consumer education campaigns to correct any misapprehensions. The dairy industry already spends significant amounts on consumer marketing, and they can use that marketing to highlight the benefits of dairy products. These marketing efforts would be far more helpful to consumers, and cause far less marketplace confusion, than attempting to rename the product categories.

## **Conclusion**

We believe that current usage of the term “milk” tracks consumer expectations, so changing the nomenclature would harm consumers with no commensurate benefit. If in fact consumers do not understand the differences between dairy and non-dairy products, the dairy industry can and should remedy that consumer misunderstanding through educational initiatives. We appreciate the opportunity to submit these comments for your consideration.

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<sup>5</sup> *Not Milking It*, Comax Flavors, <https://plantbasedfoods.org/wp-content/uploads/2018/07/Comax-Not-Milking-It-Non-Dairy-Infographic-8-17.pdf> (enumerating reasons why consumers choose non-dairy alternatives).