IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

OCHEESEE CREAMERY, LLC,

Plaintiff,

v. CASE NO. 4:14cv621-RH/CAS

ADAM H. PUTNAM, in his official capacity as Florida Commissioner of Agriculture; and
GARY NEWTON, in his official capacity as Chief of the Florida Bureau of Dairy Industry,

Defendants.
_____/

ORDER GRANTING SUMMARY JUDGMENT FOR THE DEFENDANTS

This case presents a First Amendment challenge to the longstanding requirement that a product sold as "skim milk" contain the same vitamins as whole milk. This order rejects the challenge.

I

Congress adopted the Federal Food, Drug, and Cosmetic Act in 1938. The Act allows the responsible federal official—now the Secretary of Health and

Human Services—to establish a "reasonable definition and standard of identity," as well as a "reasonable standard of quality" for any food:

> Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container.

21 U.S.C. § 341.

This case involves a "reasonable definition and standard of identity" for milk. Whole milk comes from the cow with a significant amount of cream and vitamin A and a modest amount of vitamin D. Most whole milk in the United States has been voluntarily fortified with vitamin D. *See* 21 C.F.R. § 131.110(b)(2) (permitting the addition of vitamin D in a specified amount). Cream may be removed or "skimmed" from whole milk. The removal of the cream substantially lowers the fat content but also removes vitamins A and D. Because of the nutritional value of those vitamins, they ordinarily are replaced, resulting in a familiar product routinely available on grocery-store shelves: "skim milk."

Acting under § 341, the Secretary has established a requirement for skim milk: it must include the same nutritional value, that is, substantially the same amount of vitamin A, as unfortified whole milk. *See* 21 C.F.R. § 130.10(b) (requiring the addition of nutrients "to restore nutrient levels so that the product is not nutritionally inferior"). *See also* U.S. Dep't of Health and Human Services,

Grade "A" Pasteurized Milk Ordinance, at Appx. O (2005) ("[V]itamins A and D must be added to dairy products from which fat has been removed . . . in an amount necessary to replace the amount of these vitamins lost in the removal of fat."). The plaintiff disputes whether the addition of vitamin D to skim milk is mandatory, but for purposes of this case it makes no difference.

The federal standard applies only to skim milk in interstate commerce. The State of Florida has adopted this same requirement for skim milk sold intrastate in Florida. *See* Fla. Stat. § 502.014(5) ("The department has authority to adopt rules . . . to implement and enforce the provisions of this chapter. In adopting these rules, the department shall be guided by and may conform to the definitions and standards of the administrative procedures and provisions of the Grade 'A' pasteurized milk ordinance and other applicable federal requirements."); Fla. Admin. Code R. 5D-1.001(1) (adopting (i) "Grade A Pasteurized Milk Ordinance ('PMO'), 2005 Revision, Public Health Service/Food and Drug Administration, its Appendices and notes;" and (ii) "21 Code of [F]ederal Regulations, Parts 101, § 130.17, Parts 131, 133 and 135, Revised April 1, 2007").

II

The plaintiff Ocheesee Creamery, LLC, skims cream from whole milk and sells the cream. Prior to issuance of a stop-sale order on October 9, 2012, Ocheesee also sold the leftover nonfat milk, without restoring vitamins A and D.

Ocheesee labeled the product "skim milk," thus violating the standard of identity for skim milk. The defendant Florida Commissioner of Agriculture and Consumer Services issued the stop-sale order.

In this action Ocheesee challenges only the Florida requirement, not the federal counterpart. Ocheesee says that it sells its vitamin-deficient nonfat milk only within Florida. Whether this is so is disputed—some of the vitamin-deficient nonfat milk found its way to a store in Alabama—but ultimately this does not matter. It is clear that Ocheesee wishes to sell its nonfat milk in Florida, could and would do so but for the challenged Florida requirement, and thus has standing to pursue this action.

The parties have filed cross-motions for summary judgment. The issue is ripe for determination on the merits.

III

The First Amendment's protection of free speech extends to commercial speech. The Supreme Court so held in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 563–66 (1980). Under *Central Hudson*, a restriction on commercial speech is valid only if (1) the asserted governmental interest in restricting the speech is substantial; (2) the challenged restriction directly advances the asserted governmental interest; and (3) the restriction is not more extensive than is necessary to serve that interest. *See, e.g.,*

Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 183 (1999); *Central Hudson*, 447 U.S. at 563-66.

The Supreme Court also has explained it this way: "Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623-24 (1995). If the commercial speech concerns lawful activity and is not misleading, the government must meet the three-part *Central Hudson* test. *See id.* at 624.

Ocheesee says that under the First Amendment and *Central Hudson*, Ocheesee has a right to label its vitamin-deficient nonfat milk as "skim milk," even though the product does not meet the standard of identity for skim milk established long ago at both the federal and state levels. Ocheesee says this is so because its vitamin-deficient nonfat milk is wholesome, not harmful, and nobody has been misled or otherwise complained.

The assertion, if sustained, would initiate a frontal assault on the Federal Food, Drug, and Cosmetic Act and its state counterparts, whose validity was established long ago. Although the general reliability of food labels and corresponding nutrition standards is now taken for granted to a large extent, it was not always so. Establishing uniform meanings and nutrition standards was a major goal of statutes of this kind. *See, e.g.*, *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 230-31 & n.7 (1943) (upholding a standard of identity and

adding: "The provisions for standards of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of products superficially resembling each other."); *Hebe Co. v. Shaw*, 248 U.S. 297, 302-03 (1919) (upholding an Ohio statute against a Fourteenth Amendment challenge brought by the maker of an allegedly wholesome milk product that did not meet the state's standard of identity and nutritional standard).

As a general matter, the federal and state statutes adopting standards of identity and nutrition standards for foods easily pass muster under *Central Hudson*. So does the specific standard of identity and nutritional standard for skim milk. A state can recognize—and indeed deliberately create—a standard meaning of a term used to describe a food product, including, in this instance, skim milk.

Ocheesee says, though, that its description of its product is literally true: the product is milk from which the cream has been skimmed—nothing more and nothing less. Ocheesee cites dictionary definitions that describe skim milk as precisely what Ocheesee sells: milk from which the cream has been skimmed. And it is undoubtedly true that a typical consumer would think "skim milk" is simply milk from which the cream has been skimmed. Far from a condemnation of the standard of identity and nutritional standard for skim milk, these sources show how well the standard of identity and nutritional standard have worked:

consumers take for granted the nutritional value of skim milk without even knowing that the vitamins have been restored. The record includes a survey that confirms this conclusion: most consumers buy milk for its nutritional value, and most expect skim milk to include the same vitamin content as whole milk. ECF No. 28-4 at 7–9.

In any event, even if it would not mislead consumers to affix a "skim milk" label to Ocheesee's vitamin-deficient nonfat milk, the ban on calling the product "skim milk" still would survive *Central Hudson* scrutiny. The governmental interest in establishing a standard of identity and nutritional standards for milk is substantial. The challenged restriction directly advances that interest; indeed, the match is nearly perfect. And the restriction is not more extensive than is necessary to serve that interest; a standard of identity works only if products that do not meet the standard cannot appropriate the identity.

IV

Ocheesee also complains about positions the state took in an effort to resolve the dispute with Ocheesee. Ocheesee is surely correct that if it meets the state's other labeling and nutritional requirements, it can include on its package a truthful description of just how it makes the product and what the differences are between that product and skim milk. But any challenge to purported restrictions on truthful additional information on Ocheesee's packaging is not yet ripe. *See*, *e.g.*, *City of*

Los Angeles v. Lyons, 461 U.S. 95, 102, 111 (1983); *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1346 (11th Cir. 1999).

V

Finally, Ocheesee has moved to strike the testimony and report of the defendants' expert. Parts of the report are admissible and indeed helpful. Other parts are not. I have considered the report only to the extent admissible. And the summary-judgment ruling would be the same either way. This order denies the motion to strike.

VI

For these reasons,

IT IS ORDERED:

1. The defendants' summary-judgment motion, ECF No. 28, is granted.

2. The plaintiff's summary-judgment motion, ECF No. 29, is denied.

3. The plaintiff's motion to strike, ECF No. 51, is denied.

4. The clerk must enter judgment stating, "This action was resolved on a motion for summary judgment. It is ordered that the plaintiff Ocheesee Creamery, LLC, recover nothing on its claims against the defendants Adam H. Putnam and Gary Newton in their official capacities."

SO ORDERED on March 30, 2016.

s/Robert L. Hinkle
United States District Judge