

Milking the System. The Ugly Truth Silenced by Ag-Gag Laws, Misleading Advertising, and Meaningless Labeling.

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Introduction

Several studies show that, nowadays, there are consumers who are willing to pay more for dairy products made by the companies that are providing the best care to the animals.¹ The information about dairy products must be accurate to allow the consumers to make an informed decision about which products they should buy and which they should avoid.

Two barriers prevent consumers from making the right choice when purchasing dairy products. The first issue is misleading advertising and/or meaningless labeling, and the second – purposeful secrecy when states help industries hide the conditions of industrial dairy production by creating ag-gag laws. With a growing market of conscious consumers, many industries try to meet the demand for ethical and environmentally friendly products. Unfortunately, while some businesses are implementing “greener,” more ethical practices into their operations, others try to mislead their consumers into believing that their products are worth paying more. While the majority of consumers care about buying ethical and environmentally friendly products and are willing to pay more, there is a lack of clear definition of products’ labels available to the public. Many labels are defined solely by the producers of the products. Unless an individual will take their time to research the topic thoroughly, there is no way to finding out whether such labels as “humane” mean anything and what requirements are behind such a label, if any.

While misleading advertising and meaningless labels are one way to trick conscious consumers, there is also another way by protecting information about animal abuse behind the walls of Confined Animal Feeding Operations (CAFO), also known as factory farms. Ag-gag laws are dangerous because they are designed to restrict access to the information about animal abuse.

¹ See Animal Welfare Institute, *Consumer Perceptions of Farm Animal Welfare*, available at https://webs.wofford.edu/williamsnm/animal%20ethics%20articles/fa-consumer_perceptionsoffarmwelfare_-112511.pdf, (last visited on May 8, 2020).

Consumers must know the way animals who are raised for human consumption are treated to make informed decisions about which products to buy. Moreover, ag-gag laws are unconstitutional because they violate the First Amendment of the U.S. Constitution.² It is essential to bring awareness to practices on factory farms because it will develop a much-needed skepticism towards “natural” and “humane” labels. In order to understand how large industries are making more money by making people believe their products are better than products of their competitors, the products’ labels must be analyzed as well as the effects of ag-gag laws.

There are two possible solutions to make sure that there is no misleading advertising or meaningless labeling: defining “humane” label at USDA level and/or allow courts to assess conditions where animals raised on a case-by-case basis. This paper will not define the term “humane,” but it will discuss the latter solution in more detail. Finally, to ensure business transparency, the ag-gag laws should be struck down.

² See U.S. Const. Amend. I

Misleading advertising is especially dangerous if used by large industries.

Misleading advertising is a dangerous weapon for any business to use. The consequences of misleading advertising are more significant when the market is as large as dairy production. Milk production increased by one percent in 2018. “The rate per cow, at 23,149 pounds, was 235 pounds above 2017. The annual average number of milk cows on farms was 9.40 million head, down 7,000 head from 2017.”³ It generated "cash receipts from marketings of milk" of \$35.2 billion in 2018.⁴ Milk production generates large profits and affects millions of consumers in the US.

The dairy industry affects animal welfare.

The dairy industry is a large business that affects animal welfare, public health, and the environment. Animal welfare is profoundly affected by different production techniques that the dairy industry implements to be more efficient. Those techniques are not the best for the cows' health. For example, the dairy industry increases the rate per cow to use fewer cows.

One of the causes of lameness in dairy cows is the type of flooring that the dairy industry chooses to use for the dairy cows' housing. The National Cattlemen's Beef Association found that the type of flooring affects dairy cows' welfare “by impairing locomotion and increasing the occurrence of hoof disorders and lameness.”⁵ The USDA found that lameness in dairy cows is a significant concern for the dairy industry not only because of its negative effect on dairy cows' welfare but also the milk production and income. The best flooring to reduce lameness in dairy

³ USDA, *Milk Production, Disposition, and Income 2018 Summary*, available at <https://downloads.usda.library.cornell.edu/usda-esmis/files/4b29b5974/qb98mq82c/c247f2732/mlkpd19.pdf>, (May 2019).

⁴ *Id.*

⁵ Animal Welfare Institute, *The Critical Relationship Between Farm Animal Health and Welfare*, available at <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-Animal-Health-Welfare-Report-04022018.pdf>, (April 2018).

cows is the rubber flooring, USDA noted that the rubber flooring “has been associated with reduced lameness or risk of lameness for dairy cows.”⁶ While concrete flooring, on the other hand, causes claw disorders and cow lameness that affects “cow comfort, health, and production.”⁷

Administration of growth hormones is another example of husbandry practice that affects animal welfare. Bovine somatotropin (bST) is a genetically engineered hormone. The dairy industry uses bST to increase milk production in cows. The European Union’s Scientific Committee on Animal Health and Animal Welfare found that “unnaturally high milk production” is correlated with “poor body condition and increased rates of gastrointestinal problems, susceptibility to heat stress, mastitis, lameness, and reproductive problems.”⁸ Both the European Union and Canada disapproved of bST, and the United States allowed its use initially. Then some dairy cooperatives and/or dairy processors in the United States have restricted the use of bST in their supply chains because of the public concerns about potential adverse effects of the hormone on public health and animal welfare. The decline was reported in 2014 when twenty eight percent of “large dairy operations” reported that they were “administering bST to a total of [a little over eighting] percent of their dairy cows.”⁹ While in 2002, “[a little over fifty-four] percent of large dairy operations” reported that they were “administering bST to [a little over thirty-four] percent of their cows in 2002.”¹⁰ This shows a decline of almost fifty percent over 12 years, "and the decline is expected to continue into the future."

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Dairy industry affects public health.

Besides affecting animal welfare, the dairy industry is affecting public health. One of the examples of the dairy industry affecting public health is the use of antibiotics. Bonnie M. Marshall et al. in their *Food Animals and Antimicrobials: Impact on Human Health* article, posted undeniable evidence “for animal-to-human transfer of resistant bacteria on farms using antibiotics for treatment and/or nontherapeutic use.”¹¹ There is a risk of exposure of consumers to resistant bacteria by consuming animal products. MRSA [Methicillin-resistant *Staphylococcus aureus*] presented itself: “in [twelve percent] of beef, veal, lamb, mutton, pork, turkey, fowl, and game samples purchased in the consumer market in the Netherlands, as well as in cattle dairy products in Italy.”¹²

The dairy industry fails to stop the over usage of antibiotics, which creates a risk of developing MRSA infection. One of the most common human and animal pathogens is *S. aureus*. As early as in 1948, the scientists observed the resistance of human isolates to penicillin and *S. aureus* was “one of the first strains characterized as resistant to antimicrobials.”¹³ In 2015, the resistance of human isolates to penicillin was up to ninety percent. In the late 1940s, the animal production industries used penicillin for the first time “mainly for the eradication or treatment of *Streptococcus agalactiae* in bovine mastitis.”¹⁴ Later, its extensive use resulted in “the selection of penicillin-resistant strains of *S. aureus*.”¹⁵ Scientists found resistant pathogens in dairy milk.

¹¹ American Society for Microbiology, *Food Animals and Antimicrobials: Impacts on Human Health*, available at <https://cmr.asm.org/content/24/4/718>, (Published online October 5, 2011).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

“Humane washing” as a way to mislead consumers.

Animal Legal Defense Fund defines humane washing as one of the practices that many food agriculture industries use by “making a misleading claim about the treatment of animals or the conditions in which they are born, raised or killed.”¹⁶ Some of the examples of misleading claims are labels such as “natural,” or “responsibly raised,” or using visuals showing animals on the green fields instead of showing how animals are born, raised, and killed in the dark warehouses.

When consumers are looking at the different labels printed on the products, they see various claims. However, the USDA does not define each claim, and producers define the vast majority of claims themselves. One of the examples of such claims is the “humane” claims. The USDA did not define “humanely raised” or “humanely handled.”¹⁷ It allowed producers to provide their definitions, which they often establish using the standards they use on their factory farms. Thus, the terms used in the definitions provide “no assurance about animal welfare.”¹⁸ Another example of poorly or undefined claims is “natural” claims. The USDA defined the label “natural” only referring to the way that the industry processes the meat after slaughter and avoid describing the conditions in which it raises the animals. Also, the USDA did not define “naturally raised,” and it does not require producers “to offer any assurances” concerning the conditions the animals live to use this claim.¹⁹

¹⁶ Animal Legal Defense Fund, *How False Advertising Lawsuits Help Animals*, available at <https://aldf.org/article/how-false-advertising-lawsuits-help-animals/>, (last visited on March 28, 2020).

¹⁷ American Society for the Prevention of Cruelty to Animals, *Meat, Eggs and Dairy Label Guide*, available at <https://www.aspca.org/shopwithyourheart/consumer-resources/meat-eggs-and-dairy-label-guide>, (last visited on March 28, 2020).

¹⁸ *Id.*

¹⁹ *Id.*

Misleading labeling of meat, eggs, and dairy products emerged due to “[t]he lack of a consistent approval process for animal welfare claims in the US”²⁰ Nevertheless, some certifications are recommended by ASPCA that assure the better treatment of the animals raised for human consumption. One of the examples of recommended labels is “Animal Welfare Approved.” This label indicates the prohibition of “[c]age confinement, hormones, and subtherapeutic (preventative or growth-promoting) antibiotics.”²¹

Unfortunately, products that have meaningful certifications “tend to be more expensive.”²² However, out of 1000 US consumers of animal products - respondents to the survey that was analyzed by C. Victor Spain et al., [sixty-three percent] were concerned with “cattle welfare.”²³ Also, seventy-eight percent of the respondents believed that it is essential that an independent third party or the federal government conduct “the animal-welfare assessments.”²⁴ Moreover, the majority of respondents were willing to pay more for the products with “a trustworthy welfare certification both in supermarket and in restaurants.”²⁵ Therefore, there is a significant demand for animal products made according to the highest animal welfare standards. However, there are many misleading claims made by the industries to increase their profits, which prevents consumers from making the right decisions.

In 2004, the Department of Human and Community Resource Development conducted a survey that was called The Ohio Survey of Food, Agricultural, and Environmental Issues. This

²⁰ NCBI, *Are They Buying It? United States Consumers’ Changing Attitudes toward More Humanely Raised Meat, Eggs, and Dairy*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6116027/>, (published online on July 25, 2018).

²¹ ASPCA, *Meat, Eggs and Dairy Label Guide*, available at <https://www.asPCA.org/shopwithyourheart/consumer-resources/meat-eggs-and-dairy-label-guide#Certifications>, (last visited March 29, 2020).

²² NCBI, *Are They Buying It? United States Consumers’ Changing Attitudes toward More Humanely Raised Meat, Eggs, and Dairy*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6116027/>, (published online on July 25, 2018).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

survey revealed that fifty-nine percent of Ohioans would be willing to pay more for the animal products with labels certifying that the animals were treated “humanely.”²⁶ Out of fifty-nine percent of respondents, forty-three percent would be willing to pay ten percent more, and more than twelve percent would be willing to pay twenty-five percent more.

Although we know now that many people are concerned about animal welfare, public health, environmental and ethical aspects of the practices that businesses use while raising animals for human consumption, this class of animals is “among the least-protected . . . under US law.”²⁷ Two federal laws cover factory-farmed animals, and their only concern is slaughter and transport. They are The Humane Methods of Slaughter Act of 1958 and the Twenty-Eight Hour Law enacted in 1994. Moreover, the Animal Welfare Act excludes factory-farmed animals. The vast majority of US animal products, including dairy, “come from animals raised under conditions set by their respective industries.”²⁸ Three meaningful certifications are operating nationwide, and they require a complete compliance “with standards that require, at minimum, enriched, spacious, cage-free environments verified by independent auditors on farms.”²⁹ These three certifications are Certified Humane, Global Animal Partnership, and Animal Welfare Approved. As of 2017, only 500 million animals, which is approximately five percent of factory-farmed animals, are being raised in compliance with these certifications.

²⁶ Andrew Rauch et al., Social Responsibility Initiative Department of Human and Community Resource Development the Ohio State University, *Ohioans’ Attitudes about Animal Welfare. A Topical Report from the 2004 Ohio Survey of Food, Agricultural and Environmental Issues*, available at <https://faunalytics.org/wp-content/uploads/2015/05/Citation472.pdf>, (January 2005)

²⁷ NCBI, *Are They Buying It? United States Consumers’ Changing Attitudes toward More Humanely Raised Meat, Eggs, and Dairy*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6116027/>, (published online on July 25, 2018).

²⁸ *Id.*

²⁹ *Id.*

It is simple to create a misleading claim because, most of the time, the USDA does not require any “substantiation of animal rearing claims.”³⁰ Furthermore, if it does require it, the proof that the industries have to provide is insufficient and “far below consumer expectation.”³¹ One of the examples of misleading advertising was identified by a 2015 Consumer Reports study that showed that consumers thought that a “natural” label indicated that “animals went outdoors when there are no such requirements for this label.”³² Consumers wanted animals to be outside while raised for human consumption and were willing to pay more for the products which appeared to have a certification of the same.

Another example of misleading advertising is the usage of the term “humane.” There were a few companies that used the “humane” claim. There were several lawsuits filed against those companies. There were two cases where the companies settled “in exchange for removing the claim.”³³ Misleading advertising affects animal welfare, public health, and make consumers spend more money on the products they could have bought for the same price as the ones that are without misleading labels.

First Amendment protects commercial speech as long as it is not misleading and does not concern unlawful activity.

Commercial speech is an essential part of the success of any business. Businesses need to have an opportunity to communicate with their consumers about their business’s values and vital information about products they are selling or services they are providing. “Commercial speech, while enjoying some First Amendment protections, ‘is not entitled to the same level of protection

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

as noncommercial speech.”³⁴ The Court established a four-part-test to analyze commercial speech cases when businesses are challenging the constitutionality of commercial speech regulations under the First Amendment. Commercial speech must at least concern lawful activity and cannot be misleading to be protected by the First Amendment. If the commercial speech concerns a lawful activity and not misleading, the next step is to determine whether the interest that the government is asserting by the restriction is “substantial.”³⁵ If the interest is substantial, the next step is to decide whether that regulation “directly advances” the interest that the government is asserting and whether “it is not more extensive than is necessary to serve that interest.”³⁶

In *Hudson*, electrical utility brought a legal action against the Public Service Commission of New York (Commission) challenging the constitutionality of regulation of the Commission. The Commission found that the utility did not have enough sources to continue furnishing the demand of its customers through the winter of 1973-1974. As a result of this finding, the Commission banned all the advertising that promoted the use of electricity. After there was no more shortage of electrical resources, the Commission asked for public comment on its decision to continue with its ban. Central Hudson Gas & Electric Corp. (Hudson) was in opposition to this regulation and challenged its constitutionality under the First Amendment. The Commission, however, continued with its ban.

The Commission divided all the advertising expenses into two categories: promotional and informational. The promotional category was dealing with the advertising “intended to stimulate the purchase of utility services.”³⁷ The informational and institutional category was “a broad

³⁴ Bus. & Prof. C. §§ 17200 and 17500, Bus. & Prof. C. 17200 Ch. 5-A.

³⁵ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 557 (1980).

³⁶ *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. 557, 557.

³⁷ *Id.* at 559.

category inclusive of all advertising not clearly intended to promote sales.”³⁸ The Commission found that the advertising of the use of electricity conflicts with the national policy of conserving energy. However, the Commission admitted that its ban is not perfect because it did not apply to the oil producers and banned the advertisement of the use of electricity in the “off-peak” hours, which is inconsistent with the idea of more efficient use of the electricity. Therefore, the Commission permitted the informational advertising “designed to encourage ‘shifts of consumption’ from peak demand times to periods of low electricity demand.”³⁹

Hudson challenged the constitutionality of the ban under the First Amendment. The First Amendment gives protection to commercial speech against unwarranted governmental regulation. The government cannot have complete power to control commercial speech. “[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them. . . .”⁴⁰ The Supreme Court of the United States used the four-prong-test when analyzing the constitutionality of the regulation. First, the Court determined whether the First Amendment of the Constitution protected the expression. For the First Amendment to protect the speech, the speech must concern lawful activity and not be misleading. The Commission alleged that promotional advertising would “give ‘misleading signals’ to the public by appearing to encourage energy consumption at a time when conservation is needed.”⁴¹ The Court did not find the commercial speech being misleading or connected to any unlawful activity. The Court found that the regulation only indirectly advanced the state interest involved. The Court declined to uphold the ban because the record failed to show

³⁸ *Id.* at 559.

³⁹ *Id.* at 560.

⁴⁰ *Id.* at 562.

⁴¹ *Id.* at 560.

that “the total ban on promotional advertising” met the requirement for the restriction to be “no more extensive than is necessary to serve the state interest.”⁴²

Current Litigation

Currently, there are several ongoing lawsuits nationwide against companies that either claim that they provide some extraordinary animal care or use different vague labels to mislead their consumers that they treat the animals raised for human consumption well when in fact, it is not the case. This increase of “public concern regarding the treatment of animals” raised for human consumption resulted in “humane washing” practice “where companies induce conscientious consumers to buy products based on false promises of “better” animal treatment.”⁴³

James Ehlers v. Ben & Jerry’s Homemade, Inc.

In October 2019, the class action and jury demand were filed against Ben & Jerry’s Homemade, Inc., alleging that Ben & Jerry’s ice cream products were “deceptively labeled and marketed.”⁴⁴ Plaintiff in the lawsuit, James Ehlers “is a resident of Winooski, Vermont, and a long-time purchaser of Ben & Jerry’s Products.”⁴⁵ Plaintiff was purchasing Ben & Jerry’s products in reliance on the representations on the labels and on the Ben & Jerry’s website, as well as on the “the written representations about “happy cows” on “Caring Dairy” farms.”⁴⁶

Plaintiff alleged that Unilever broke consumer trust because it presented the Ben & Jerry’s Products as made with milk produced by “happy cows” “on Vermont dairies that participate in a special, humane ‘Caring Dairy’ program.” Also, Unilever posted that it ensured that these farms met the requirements. Unilever used the reputation that Ben & Jerry’s earned not only in the State

⁴² *Id.* at 572.

⁴³ Animal Legal Defense Fund, Challenging Fairlife’s Deceptive Marketing Practices, available at <https://aldf.org/case/challenging-fairlifes-deceptive-marketing-practices/> (last visited on February 23, 2020).

⁴⁴ *James Ehlers v. Ben & Jerry’s Homemade Inc.*, 2019 WL 5942987 (D.Vt.).

⁴⁵ *James Ehlers*, 2019 WL 5942987 (D.Vt.).

⁴⁶ *Id.*

of Vermont but nationwide. Ben & Jerry's had a image of a socially and environmentally conscious company. Furthermore, since Unilever was well aware of a growing number of consumers who cared about animal welfare and environment, this reputation was important for Unilever when Unilever was purchasing Ben & Jerry's. It allowed Unilever to benefit from this growing market.

Next, in their class action complaint, the plaintiffs explained that the products that the plaintiff was selling were a mix of milk that the participants of the "Caring Dairy" program produced with the milk that CAFOs produced. However, the consumers thought that Unilever supported only "Caring Dairy" farms, which was "the original Ben & Jerry's ethos."⁴⁷ Therefore, the consumers were supporting CAFOs without knowing it. The way that Unilever represented the image of "happy cows" was by having pictures of blue sky and green grass with the cows, allowing consumers to believe that the cows can have access to outdoors, and Unilever treats them well. Also, on Ben & Jerry's website, Unilever was reassuring its consumers that all the farmers that Ben & Jerry's working with are required to participate in the "Caring Dairy" program. "Caring Dairy" program was defined by Unilever as "a unique program that's helping farmers move toward more sustainable practices on the farm."⁴⁸ Unsurprisingly, the defendants took out this characterization "after a non-profit organization sued Ben & Jerry's in Washington, D.C. Superior Court, alleging misrepresentation."⁴⁹

One of the milk producers for Unilever is St. Albans. In July 2019, St. Albans merged with Dairy Farmers of America, headquartered in Kansas City, Kansas. As of the beginning of 2017, less than [twenty-five percent] of St. Albans' farms were "Caring Dairy" farms. However, Unilever was suggesting to its consumers that all the milk and cream were from "happy cows" on

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

“Caring Dairy” farms. St. Albans does not keep its milk produced following the “Caring Dairy” farms program separate from the milk produced in factory-style, mass-production dairy operations. Factory-style, mass-production dairy operations practice “intensive cow confinement and extensive antibiotic use,” which is different from the consumer’s perception of “happy cows” or the Caring Dairy program.⁵⁰ In 2018, a St. Albans member – not a participant in the Caring Dairy program, but Ben & Jerry’s supplier “built an expansion in one of Vermont’s most polluted watersheds without the proper permits or inspection” turning the farm into one of “Vermont’s largest dairy operation plants.”⁵¹ In 2017, the same dairy operation had illegally discharged untreated agricultural waste into a creek that “feeds into Lake Champlain.”⁵² In 2015, this dairy operation” offered for sale a [dairy cow] for slaughter as food that was adulterated’ with ‘a new animal drug that is unsafe under section 512 of the FD&C Act, 21 U.S.C. 360b.’”⁵³ An investigation then found that this farm “held ‘animals under conditions that are so inadequate that medicated animals bearing potentially harmful drug residues are likely to enter the food supply.’”⁵⁴

When the defendants discussed the issue of defining the term “happy cows,” they stated that happiness is not something that anyone could measure objectively. They also noted that the plaintiff could not ask a cow how it feels to use it as a piece of evidence because Rule 30 applies only to “persons.” They explained that it is unreasonable for any consumer to believe that the claim “from happy cows” means from farms participating in the “Caring Dairy” program only. However, if the consumer is reading Ben & Jerry’s website that explains the way the cows have to be treated by the farmers who are participating in the Carrying Dairy program it is reasonable for any

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

consumer to believe that the term “happy cow” refers to the cow who is treated well by the farmers following the guidelines provided by the Carrying Dairy program.

Then the defendants went on to discussing again that there is no claim made by Ben & Jerry’s that they only work with the farmers who are participating in the Carrying Dairy program and that there is no evidence of that the consumers are focused on humane cow treatment as well as the effects of dairy farms on the environment. However, in a survey conducted in the USA, sixty-three percent were concerned with “cattle welfare” and seventy-eight percent of the respondents “thought it was important to know that animal-welfare assessments are conducted by an independent third party or the federal government (and not only the industry producer).”⁵⁵ Therefore, the majority of the respondents cared about the wellbeing of the cows and were socially and environmentally conscious.

The defendants also explained that they removed the phrase “happy cows” from the back of their products because they were redesigning the packaging, which was necessary to comply with new FDA requirements to modify the Nutrition Facts panel on the label. The defendants claimed that since there is no longer a “happy cows” phrase on their products, there is no threat of future injury to the plaintiff. However, the defendants will continue to enjoy the fruits of their reputation created by the misleading advertising unless there is an awareness brought to this issue.

As of May 7, 2020, this case is still in court. However, the court granted without prejudice the defendants’ motion to dismiss for failure to state a claim. In their motion to dismiss for failure to state a claim, the defendants elaborated on the meaning of the term “happy cow.” Furthermore,

⁵⁵ NCBI, *Are They Buying It? United States Consumers’ Changing Attitudes toward More Humanely Raised Meat, Eggs, and Dairy*, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6116027/>. (published online on July 25, 2018).

mentioned that although the plaintiff believed that Ben & Jerry's used milk only from the "happy cows," their website "d[id] not make this claim."⁵⁶

The court granted leave for the plaintiff to amend the complaint, however, no amended complaint has been filed since then. The court held that the plaintiff did not have grounds to ask for an injunction because the defendants removed the "happy cows" labels. And, the court held that the plaintiff failed to show that reasonable consumers were buying defendants' products solely because their ingredients were from "Caring Dairy" farms.

Mohammad Sabeehullah V. Fairlife, LLC

In June 2019, the plaintiff filed a class action complaint against Fairlife, LLC alleging that the label "Extraordinary care and comfort for our cows" that the Fairlife had on their products was "a sham."⁵⁷ The plaintiffs wanted to hold the defendants liable for massive consumer fraud involving the sale of milk products. There was an undercover video made that showed how Fair Oaks Farms were abusing and torturing their dairy cows and young calves on their farm. Plaintiff, Mohammad Sabeehullah, is a dairy consumer who is willing to pay more for the products of the companies that treat their animals humanely. Defendants advertised on their products' labels that they provided "extraordinary" care for the dairy cows. Therefore, the plaintiff purchased their

⁵⁶ *James Ehlers v. Ben & Jerry's Homemade Inc.*, 2019 WL 5942987 (D.Vt.), Defendants Ben & Jerry's Homemade, Inc.'S and Conopco, Inc.'S Motion to Dismiss Pursuant To F.R.C.P. 12(B)(6) And Incorporated Memorandum of Law, available at [https://1.next.westlaw.com/Link/Docket/IFCC5A7FEFA8011E9BE11E0A012830C99/Blob/ecf/VTDCT-DW/godls,18511494106/2-19CV00194_DocketEntry_01-13-2020_9.pdf?courtNorm=VT-DCT&courtnumber=1112&casenumber=2%3a19-CV-00194&originationContext=document&transitionType=DocumentImage&contextData=\(sc.Default\)&uniqueId=7b8e7b49-ccc0-4339-9394-7eef3e8e529e&attachments=false&localImageGuid=14d340be0396811eabbe28378619003e6](https://1.next.westlaw.com/Link/Docket/IFCC5A7FEFA8011E9BE11E0A012830C99/Blob/ecf/VTDCT-DW/godls,18511494106/2-19CV00194_DocketEntry_01-13-2020_9.pdf?courtNorm=VT-DCT&courtnumber=1112&casenumber=2%3a19-CV-00194&originationContext=document&transitionType=DocumentImage&contextData=(sc.Default)&uniqueId=7b8e7b49-ccc0-4339-9394-7eef3e8e529e&attachments=false&localImageGuid=14d340be0396811eabbe28378619003e6).

⁵⁷ Complaint, *Mohammad Sabeehullah and Nabil Khan v Fairlife, LLC*, available at [https://1.next.westlaw.com/Link/Docket/I6881F6A7917111E99B14F2EE541CF11A/Blob/ecf/INNDCT-DW/godls,07114231573/2-19CV00222_DocketEntry_06-17-2019_1.pdf?courtNorm=IN-NDCT&courtnumber=1042&casenumber=2%3a19-CV-00222&originationContext=document&transitionType=DocumentImage&contextData=\(sc.Default\)&uniqueId=87ddb92f-6b62-4bba-98a8-1abc5145b97d&attachments=false&localImageGuid=I73db703092ce11e9bbce8e008bdb5863](https://1.next.westlaw.com/Link/Docket/I6881F6A7917111E99B14F2EE541CF11A/Blob/ecf/INNDCT-DW/godls,07114231573/2-19CV00222_DocketEntry_06-17-2019_1.pdf?courtNorm=IN-NDCT&courtnumber=1042&casenumber=2%3a19-CV-00222&originationContext=document&transitionType=DocumentImage&contextData=(sc.Default)&uniqueId=87ddb92f-6b62-4bba-98a8-1abc5145b97d&attachments=false&localImageGuid=I73db703092ce11e9bbce8e008bdb5863).

products while relying on this representation. Plaintiff stopped purchasing defendants' products as soon as he learned about inhumane practices.

Plaintiff alleged that it is reasonable for consumers to believe that the humane labels are referring to better treatment of dairy cows by the defendants. Plaintiff referred to one of the surveys that were conducted by the American Humane Association. The survey that analyzed answers of 2,634 consumers found that: “(1) [about ninety-five] percent of the consumers believe a product that is labeled humanely raised referred to the “better treatment of animals,” (2) [seventy-four] percent of the consumers would be “very willing” to pay an increased amount for such products, and (3) of that [seventy-four] percent, [thirty-four] percent were willing to pay [ten to twenty] percent more, (4) while [twenty-eight] percent would be willing to pay [twenty to thirty] percent more for humanely raised products.”⁵⁸ Defendants made a promise to provide “extraordinary animal care” on one type of their products and “extraordinary care and comfort for our cows” on others. However, an undercover investigator from the Animal Recovery Mission recorded several instances of the methodical and monstrous inhumane treatment of the Defendants' cows that took place at Fair Oaks Farms.⁵⁹ Below are some of the daily practices that were documented:

- “• Calves tortured, kicked, stomped on, body slammed;
- Calves thrown off the side of trucks;
- Calves stabbed and beaten with steel rebar;
- Calves through the dirt by their ears;
- Calves hit in the mouth and face with hard plastic milking bottles;

⁵⁸ *Id.*, see also American Humane Association, *Humane Heartland Farm Animals Welfare Survey*, available at <https://www.americanhumane.org/app/uploads/2013/08/humane-heartland-farm-animals-survey-results.pdf>, (last visited on March 28, 2020).

⁵⁹ See <https://vimeo.com/340769169> (last accessed on May 8, 2020) and <https://vimeo.com/341672220> (last accessed on May 8, 2020).

- Calves kneed in the spine;
 - Calves left to die in over 100-degree temperatures;
 - Calves provided with improper nutrition;
 - Calves denied medical attention;
 - Calves experiencing extreme pain and suffering, and in some cases permanent injury and death;
- and
- Calves that do not survive the torture are dumped in mass graves.”⁶⁰

After watching the videos recorded by the undercover investigator from the Animal Recovery Mission, it was clear that the defendants were not providing any “extraordinary care and comfort” to their animals, but instead, they were abusing their animals. The motion to transfer this case had been filed in June 2019, and the order to transfer the case to the Northern District of Illinois was entered in October 2019.

Tillamook County Creamery Association lawsuit

In 2019, The Animal Legal Defense Fund (ALDF) filed a lawsuit on behalf of a class of Oregon consumers against the Tillamook County Creamery Association (Tillamook) after they “heavily advertised” itself as a “‘co-op’ of small family farms.”⁶¹ However, these family farms represented only a small part of Tillamook’s production. The majority of Tillamook milk is coming from Tillamook facility located in the desert of eastern Oregon that holds 32,000 dairy cows in inhumane, industrialized conditions. Tillamook markets dairy products nationwide using the “Tillamook” brand name and “is poised to do over \$1 billion in sales in 2020.”⁶² Tillamook violated Oregon’s consumer protection laws. The plaintiffs amended their complaint in this case

⁶⁰ *Id.*

⁶¹ Animal Legal Defense Fund, *Challenging Tillamook’s Deceptive Advertising*, available at <https://aldf.org/case/challenging-tillamooks-deceptive-advertising/> (updated September 26, 2019).

⁶² *Id.*

on September 19, 2019. The last update on ALDF’s website was that the defendants had to file their answer to the First Amendment complaint by October 18, 2019. Tillamook is another critical case to bring awareness about misleading tactics that many industries are using for consumers to spend more money on their products.

Ag-gag laws are unconstitutional

Since the awareness is rising, and so does the skepticism, one of the methods to protect the factory farm industry is to implement ag-gag laws. As its name applies, Ag-Gag laws try to “‘gag’ would-be whistleblowers and undercover activists by punishing them for recording footage of what goes on in animal agriculture.”⁶³ The Ag-Gag laws were “originally designed to prevent the public from learning about animal cruelty.” Ag-Gag laws are dangerous because they are banning filming and photography on farms, which otherwise would bring awareness to the public about the way the industries are treating the animals raised for human consumption. Several states had already found ag-gag laws unconstitutional.

Animal Legal Def. Fund v. Reynolds, 297 F. Supp. 3d 901

This case is concerned Iowa Code § 717A.3A that provided: “A person is guilty of agricultural production facility fraud if the person willfully does any of the following:

- a. Obtains access to an agricultural production facility by false pretenses.
- b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the

⁶³ Animal Legal Defense Fund, *Ag-Gag Laws*, available at <https://aldf.org/issue/ag-gag/> (last visited March 29, 2020)

statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.”⁶⁴

The Court, in this case, noted that undercover investigations are “an important tool” that journalists and advocacy groups use to get the information about the practices that the slaughterhouses and other agricultural facilities use.⁶⁵ Iowa’s facilities were subjects of many investigations recently. Iowa is the largest producer of pork and eggs nationwide, and a large supplier of other animal products. In 2008, the undercover investigation was able to record a video where the workers were “beating pigs with rods and sticking clothespins into pigs’ eyes and faces,” resulting in criminal charges against several employees.⁶⁶

The Court found Iowa’s law content based on their face. Subsection (a) explicitly discriminates against a person who obtains access to an agricultural production facility by false pretenses.⁶⁷ Subsection (b) discriminates against a person who makes a false statement as part of an application for employment at an agricultural facility and possesses an intent to commit an unauthorized act.⁶⁸ It is necessary to evaluate what a person said to determine whether the person’s words fall into either of this subsections, which makes § 717A.3A “a content-based restriction on speech.”⁶⁹

Besides being a content-based regulation, this law is viewpoint-based because the law discriminates against a particular viewpoint when “the government has singled out a subset of messages for disfavor based on the views expressed,” and it need not do so explicitly.”⁷⁰ The law

⁶⁴ Iowa Code § 717A.3A (LexisNexis, Lexis Advance through legislation from the 2019 Regular Session and HF2267, SF155, SF2091, SF2132, SF2134, SF2137, SF2198, and SF2408 from the 2020 Regular Session of the 88th General Assembly).

⁶⁵ *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 908 (S.D. Iowa 2018).

⁶⁶ *Id.*

⁶⁷ See Iowa Code § 717A.3A(1)(a).

⁶⁸ See Iowa Code § 717A.3A(1)(b).

⁶⁹ *Animal Legal Def. Fund v. Reynolds*, 297 F. Supp. 3d 901, 908 (S.D. Iowa 2018).

⁷⁰ *Id.*

automatically becomes a viewpoint-based restriction of speech when the government’s purpose is to suppress a specific viewpoint. The U.S. District Court for the Southern District of Iowa issued a preliminary injunction, “preventing the state from enforcing its new Ag-Gag law while the lawsuit proceeds.”⁷¹

As of May 4, 2020, this case is an active case, and, according to ALDF, opposition response is due. *Reynold* is an important case because as of now, there are no federal laws that regulate and control the way that the industries treat their animals raised for human consumption. Two federal laws that do cover factory-farmed animals only concerned with slaughter process and transport, and, moreover, “are laxly enforced.”⁷²

Animal Legal Defense Fund v. Otter, 300 F.R.D. 461, 2014 BL 166127 (D. Idaho 2014)

In 2014, Mercy for Animals released one of their videos containing animal abuse to the public. On that video, “workers using a moving tractor to drag a cow on the floor by a chain attached to her neck and workers repeatedly beating, kicking, and jumping on cows.”⁷³ Mercy for Animals’ agents recorded these abusive practices while they were conducting an undercover investigation. After this investigation, The Idaho Dairymen’s Association that represents Idaho dairy producers became a sponsor of a bill that later became Idaho Code § 18–7042. Idaho Code § 18–7042 made “‘interference with agricultural production,’ which has both the purpose and effect of impairing the public debate about animal welfare, food safety, environmental, and labor issues that arise on public and private land” a crime.⁷⁴ Idaho Code § 18–7042 criminalized any

⁷¹ Animal Legal Defense Fund, *Court Bars Enforcement of Iowa’s Unconstitutional Ag-Gag Law While Lawsuit Proceeds*, available at <https://aldf.org/article/court-bars-enforcement-of-iowas-unconstitutional-ag-gag-law-while-lawsuit-proceeds/>, (last visited March 28, 2020)

⁷² Animal Legal Defense Fund, *Challenging Iowa’s Ag-Gag 2.0 Law*, available at <https://aldf.org/case/challenging-iowas-ag-gag-2-0-law/>, (last visited on May 8, 2020).

⁷³ *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015), *aff’d in part, rev’d in part sub nom.* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

⁷⁴ *Animal Legal Defense Fund et al v. Otter et al*, Docket No. 1:14-cv-00104 (D. Idaho Mar 16, 2014), Court Docket, Complaint.

undercover investigations and videography that recorded the production of different types of agricultural products “for food, fiber, fuel, and other lawful uses.”⁷⁵

Later in 2014, several animal rights organizations filed a complaint against the Governor and Attorney General of Idaho. The plaintiffs challenged the constitutionality of Idaho Code § 18–7042, which was Ag-Gag law in Idaho. ALDF alleged in their complaint that Idaho Code § 18–7042 violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

During one of the hearings, one of Idaho’s senators compared undercover investigations like the one that was conducted by Mercy for Animals to “terrorism, [which] has been used by enemies for centuries to destroy the ability to produce food and the confidence in the food’s safety.”⁷⁶ Members of the House of Representatives also showed their support of Idaho Code § 18–7042 because they believed it was essential to protect the dairy industries from such investigations. One of the House Representatives stated that undercover investigators were “extreme activists who want to contrive issues simply to bring in the donations.”⁷⁷

The court applied a three-step analysis when analyzing the First Amendment challenge. First, the plaintiff bears the burden of “‘demonstrat[ing] that the First Amendment even applies’ to the activity he or she claims is protected as expression.”⁷⁸ Then, in case that the conduct or the speech at the question is protected, the Court can move to the second step. The second step is an analysis of the context in which that speech or conduct took place. Then the Court can determine which First Amendment standard or standards to use. Finally, the Court can move to determine whether the government’s reasoning for restricting the conduct or speech satisfies the standard or

⁷⁵ *Id.*

⁷⁶ *Otter*, 118 F. Supp. 3d 1195, 1200.

⁷⁷ *Id.*

⁷⁸ *Id.*, at 1202.

standards that the Court determined applicable. The Court found that Idaho Code § 18–7042 was a content-based regulation, and, therefore, it had to survive the highest level of scrutiny. The Court found that Idaho Code § 18–7042 was targeting “undercover investigators who intend to publish videos they make through the press and seeks to suppress speech critical of animal agricultural practices.”⁷⁹ The final step was to determine whether Idaho Code § 18–704 was a narrowly tailored law and advanced the compelling governmental interest. The State argued that false speech is an unprotected speech by the First Amendment relying heavily on the decision in *Alvarez*. However, in *Alvarez*, the Court held that the government could criminalize false statements only in cases where those statements cause a “legally cognizable harm.”⁸⁰

In *Alvarez*, the defendant lied that he received the Congressional Medal of Honor, and, therefore, violated the Stolen Valor Act.⁸¹ However, the Court held that the Stolen Valor Act violated the First Amendment. The Court explained that if they were to give the power for the Government to be able to restrict all false speech, it would give the Government an authority to decide which specific subjects of false speech it could criminalize.

Alvarez discussed that there are types of speech that are not protected by the First Amendment and may lead to legally cognizable harm. Some of the examples of such speech that the Court provided here were perjury, fraud, defamation, deceptive commercial or political advertising, and material misrepresentations in stock offerings. All of these types of speech may cause legally cognizable harm.

⁷⁹ *Id.*, at 1202.

⁸⁰ *Id.*, at 1203.

⁸¹ *United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 2542 (2012).

In *Otter*, however, the State did not provide any proof that it was trying to prohibit any legally cognizable harm. The harm that the publication of the real story that happened on factory farms might cause is not the same type of direct material harm that *Alvarez* examined.

Also, although *Alvarez* the Court plurality mentioned that “made to ... secure moneys or other valuable considerations, say offers of employment,” are not protected, here, the undercover agents were not looking for any material gain, but to they were looking to “find evidence of animal abuse and expose any abuse or other bad practices the investigator discovers.”⁸² Therefore, the misrepresentation in *Otter* is not the same as the one was discussed in *Alvarez*, because there was no material advantage at issue.

The Court found that Idaho Code § 18–7042 was both content and viewpoint-based, and therefore, the law had to survive the highest level of scrutiny. Content-based laws are unconstitutional unless the government narrowly tailored them to advance its compelling interest. Content-based restrictions are permitted only in cases limited “to the few ‘historic and traditional categories [of expression] long familiar to the bar,’ like obscenity, ‘fighting words,’ defamation, and child pornography.”⁸³ The Court held that the journalistic and whistleblower speech did not fall in those categories. “Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”⁸⁴ The Court held that Idaho Code § 18–7042 violated the First Amendment.

Another challenge that ALDF brought up, in this case, was the equal protection clause. The Equal Protection Clause states that the government cannot “deny to any person within its

⁸² *Otter*, 118 F. Supp. 3d 1195, 1204.

⁸³ *Id.*, at 1207.

⁸⁴ *Id.*, at 1209.

jurisdiction the equal protection of the laws.”⁸⁵ The Court applied a traditional equal protection analysis. The Court had to determine whether the law was relating to a legitimate governmental interest. Supreme court held that the desire to harm a politically unpopular group does not amount to legitimate governmental interest.

The law can be discriminatory on its face, on its effect, or, although the law is neutral on its face, was enacted with a discriminatory purpose. Here, Idaho Code § 18–7042 discriminated both on its face and had a discriminatory purpose. It specifically discriminates against whistleblowers in the agricultural industry. Furthermore, the ALDF provided evidence that Idaho Code § 18–7042 had a purpose of silencing animal rights groups. Therefore, the Court held that Idaho Code § 18–7042 did not survive the equal protection clause challenge.

⁸⁵ *Id.*

Conclusion

With a growing market for the dairy products made by the businesses that treat their animals humanely, although many businesses are implementing humane practices, others are trying to mislead its consumers to make larger profits. It is possible to increase the overall welfare of dairy cows by providing them with better housing conditions, food, and access to exercising. However, in order to reach these goals, businesses have to start treating their animals humanely. Also, businesses have to develop and implement more socially responsible, ethical, and transparent business practices. The definitions of the labels provided by third parties rather than by the industries themselves should be clear and available to every consumer, and, finally, the industries should not use misleading advertising in order to make their products more appealing. Finally, the ability to investigate is essential to the welfare of animals and public health, and Ag-Gag laws are interfering with that ability.