IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 17-55901

CYNTHIA CARDARELLI PAINTER, an individual, and on behalf of other members of the general public similarly situated
Plaintiff-Appellant,

v.

BLUE DIAMOND GROWERS, a California Corporation,
Defendant-Appellee.

APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
HON. STEVEN V. WILSON, PRESIDING
CASE NO. 2:17-CV-02235-SVW-AJW

OPPOSITION TO MOTION OF THE GOOD FOOD INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLEE

CAPSTONE LAW APC
GLENN A. DANAS (SBN 270317)
BEVIN PIKE (SBN 221936)
JOHN E. STOBART (SBN 248741)
GLENN.DANAS@CAPSTONELAWYERS.COM
BEVIN.PIKE@CAPSTONELAWYERS.COM
JOHN.STOBART@CAPSTONELAWYERS.COM
1875 CENTURY PARK EAST, STE. 1000
LOS ANGELES, CALIFORNIA 90067
TELEPHONE: (310) 556-4811
FACSIMILE: (310) 943-0396

Attorneys for Plaintiff-Appellant
CYNTHIA CARDARELLI PAINTER

I. INTRODUCTION

Proposed amicus curiae Good Foods Institute (GFI) does not purport to help the court resolve any of the actual issues raised in Appellant Cynthia Cardarelli Painter's appeal. The motion does not seek to address the "plausibility" of whether consumers are misled by Appellee Blue Diamond Growers' misbranding of their almond beverage by failing to adhere to the "imitation foods" provision of the Federal Food, Drug, and Cosmetic Act of 1938 (21 U.S.C. § 343)(FDCA), which is one of the primary legal issues in this appeal. The motion also does not promise to help the Court resolve the issue of whether Appellant's state law claims are preempted. Nor does the motion mention the role played by the Food and Drug Administration (FDA) in regulating the uniformity of food labeling or whether clarification will be provided on the issue of the FDA's primary authority over the applicability of the imitation provision.

Instead, GFI attempts to capitalize and expand upon the erroneous dismissal of this case in the District Court by vying for a ruling on the merits as to the branding of almond beverages and other "alternative foods" in general. "Big Dairy was already handed a resounding defeat in federal court," GFI boasts on their website.[1] Clearly, GFI is trying to short-cut the multiple petitions pending before

[1] Ball, *Smacking Down Plant Milk Censorship,* Good Food Institute, March 12, 2018. http://www.gfi.org/smacking-down-plant-milk-censorship, accessed March 19, 2018.

the FDA submitted by Congress, consumers, litigants and even GFI itself by requesting that this Court resolve whether "almond milk" is an "imitation" of dairy milk. Such a request is patently premature in this case considering this is an appeal from the dismissal of a complaint wherein the parties were deprived of an opportunity to develop an evidentiary record on the merits.

GFI fails to provide a legitimate purpose for considering its amicus curiae brief in this case. It is clear from the motion that the brief will conflate the issues by arguing on behalf of other products, such as "soy milk, coconut milk, goat milk, rice noodles, rye bread, gluten-free spaghetti, veggie bacon, and many more." (Mot. 4, ECF No. 25-1.) GFI also seeks to insert First Amendment arguments that were neither raised in the District Court nor the parties' appellate briefs. (*Id*.) Accordingly, GFI's request to file an amicus brief should be denied.

Alternatively, if the Court chooses to consider GFI's amicus curiae brief, it should do so only to acknowledge that a "plausible" cause of action exists (otherwise there would be no controversy), the "imitation" claim brought under state law is not preempted (otherwise GFI would argue preemption), and that the FDA is best situated to resolve the fact-specific issue of whether "almond milk" is "imitation milk" under the FDCA (as demonstrated by their Citizen Petition).

II. ARGUMENT

A. GFI's Motion to File an Amicus Brief Fails to Offer Assistance to the Court on the Actual Issues Presented in This Appeal

Traditionally, an amicus fulfills the "classic role" of "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Commissioner of Labor and Industry State of Mont*., 694 F.2d 203, 204 (9th Cir. 1982). Non-parties are normally permitted to file an amicus brief when they have "an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cmty. Ass'n for Restoration of Env't v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999). Generally, a motion for leave to file an amicus brief should inform the court as to what the proposed brief will add by way of argument that will "illuminate the issues" for the court. *Rutter Group Prac. Guide*, Fed. Ninth Cir. Civ. App. Prac. Ch. 8-E (2017).

The core issue before this Court is whether Appellant's First Amended Complaint states a "plausible" cause of action against Appellee Blue Diamond Growers under California consumer laws[2] for a violation of the FDCA.

[2] Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et. seq.*) ("UCL"), False Advertising Law (Cal. Bus. & Prof. Code §§ 17500 *et seq.*)

Specifically, the complaint charges Blue Diamond with misbranding its almond beverage by labeling it "almondmilk"[3] without informing the consumer it is "imitation milk," which is required under the FDCA when a substitute food has inferior nutritional value to the food it resembles.[4] 21 C.F.R. § 101.3. Also at issue is whether state law claims involving the "imitation" theory of misbranding almond beverages are preempted. The final question is whether the FDA has primary jurisdiction to make an administrative decision of whether the "imitation" provision should apply to the "almond milk" product.

GFI fails to address any of these issues. Presumably, GFI concedes that the complaint states a cause of action and that the state law claim, or at least part of the claim, is not preempted.[5] Furthermore, the motion does not state that the issue of FDA primary jurisdiction will be addressed; however, the fact that GFI submitted a

---

("FAL") and Consumers Legal Remedies Act (Cal. Civil Code §§ 1770 *et seq.*) ("CLRA").

[3] Blue Diamond Growers refer to their almond beverage as the compound word "almondmilk" where, in contrast, GFI refers to it as two separate words.

[4] Alternatively, Blue Diamond Growers could fortify their almond beverage so that it would not deprive consumers of the nutrients that are commonly associated with dairy "milk" products as defined by 21 CFR § 131.110.

[5] Although the motion promises a discussion on "express preemption … that neither party cites or discusses" a quick look at GFI's proposed amicus brief reveals that the "discussion" on preemption concludes that state "imitation" claims cannot exceed the section 403(c) of the FDCA, which is hardly a novel argument. (Mot. 5; Br. 13-14, ECF No. 25-2.)

Citizen Petition regarding the labeling of "innovative foods" is demonstrative of the FDA's authority on the issue. (Mot. 2 n.2.)

Overall, because the motion fails to address or otherwise "illuminate the issues" raised in this appeal, the court should deny considering it.

B. GFI Requests that the Court Rule on the Ultimate Merits of Appellant's Claim and Usurp the FDA's Jurisdiction

Instead of discussing plausibility, preemption, or primary jurisdiction, GFI identifies the "core issue" in this case as "interpreting the law's imitation provision and FDA's regulation thereunder." (Mot. 4-5.) "A significant part of GFI's work addresses regulatory issues confronting newly developed foods… ." (*Id*. 2.) As such, GFI attempts to use its role as an amicus in this appeal as another platform to advance its agenda in favor of deregulation (or relaxed regulation) of plant-based foods. In other words, GFI is requesting that this Court, not the FDA, directly resolve the issue of whether labeling almond beverages as "almond milk" is a violation of the imitation provision of the FDCA.

Interestingly, GFI indirectly admits that this is an issue for the FDA to resolve. Otherwise, why would GFI submit a Citizen Petition requesting the FDA expressly allow almond beverage to be called milk? (Mot. 2.) GFI acknowledges that Appellant has submitted an official comment to GFI's Citizen Petition. (*Id.*) Also, GFI has actively opposed the bipartisan charge against "fake milk" led by Rep. Peter Welch (D-Vt.) and Rep. Mike Simpson (R-Idaho) who, along with other

congressional members, asked the FDA to investigate and take action against manufacturers of non-dairy "milk" beverages.[6] (*Id.* 2-3.) There is no doubt that this is an issue of great public concern that has been submitted on multiple occasions to the FDA for resolution.

Moreover, whether an almond beverage can carry a milk label is an issue of first impression best suited for the FDA to resolve. *See, Kelley v. WWF Operating Company*, No. 1:17-CV-117-LJO-BAM, 2017 WL 2445836, at *4 (E.D. Cal., June 6, 2017) ("Plaintiff's position—that Defendant's almondmilk is mislabeled in that it should be labeled as an "imitation"—is an issue of first impression."). In *Kelley*, the court invoked the doctrine of primary jurisdiction, finding that this issue "implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch." *Id*. (citing *Astiana v. Hain Celestial Group, Inc.*, 783 F.3d 753, 760 (9th Cir. 2015)). In doing so, the *Kelley* court referred the almond beverage issue to the FDA in June 2017 and stayed the action pending FDA's response. The Central District did the same thing regarding the same issue in July 2017, citing *Kelley*'s referral to the FDA. *Cuevas v. Topco Associates, LLC*,

[6] Associated Press, *Stop Calling Almond, Soy and Rice Milks 'Milk,' 25 Members of Congress Say*, Los Angeles Times, Dec. 23, 2016. http://www.latimes.com/business/la-fi-almond-milk-soy-milk-20161223-story.html, accessed March 19, 2018.

No. 5:17-CV-00462-DOC-SP, ECF No. 34 (C.D. Cal., July 18, 2017). It would be appropriate for this case to join them.

Lastly, Appellant contends that whether "almond milk" is an "imitation" is an issue of fact that cannot be decided without an adequate evidentiary record. *See Kelley*, *supra*, at *5 n.4. Since this case is still at the pleading stage, there is no evidentiary record to aid the court in resolving this issue. For example, there is no evidence of the olfactory properties of almond beverage or milk before this Court. On this record, there is nothing to compare the similarities and differences of milk and almond beverage, other than the facts alleged in the complaint.

Appellant contends that the ultimate issue of whether an almond beverage labeled as "almondmilk" or "almond milk" must also be labeled as "imitation milk" cannot be resolved in this appeal and is best left for the FDA. Thus, GFI's proposed brief is premature and of little value to the Court.

C. It Is Improper For An Amicus To Raise New Issues For The Court To Decide On Appeal

An amicus generally cannot raise new issues on appeal. *See Tyler v. City of Manhattan*, 188 F.3d 1400, 1404. (10th Cir. 1997) ("Our review of the relevant case law demonstrates that it is truly the exceptional case when an appellate court will reach out to decide issues advanced not by the parties but instead by amicus."). GFI claims the brief does not "inject new issues" into this appeal. (Mot. 4.) However, GFI then goes on to explain that its brief advances a "broad legal

perspective" that is "not represented by the parties" regarding "future implications" of "labeling of new and existing alternative food products," the brief covers statutory "provisions that neither party cites or discusses," and that the brief "presents *one more argument* not addressed by either party" to this appeal. (Mot. 4-6 (emphasis added)). To summarize, GFI first denies injecting new issues into the appeal and then describes all the new issues covered in the brief.

Most concerning is the "one more argument" GFI is attempting to raise. This refers to an alleged First Amendment right to call the almond beverage whatever the manufacturer wants to call it. "Food producers have free speech rights too, and the government cannot force them to use vague and derogatory names like 'imitation milk.'" Ball, *Smacking Down Plant Milk Censorship, supra* (quoting GFI's attorney Nigel Barrella). However, other circuits have rejected requests from amicus curiae who have sought to assert new arguments into an appeal. *See, e.g.*, *Day v. Persels & Associates, LLC*, 729 F.3d 1309, 1325 (11th Cir. 2013) (court "cannot address" arguments regarding Article III standing raised for the first time by consumer rights amicus). Specifically, the court "will not allow" an amicus curiae to "control the course" of litigation by "requesting individual relief not requested by anyone else." *Id.*

Here, none of the parties are advancing constitutional arguments. The claim of unconstitutionality is more in line with GFI's agenda within the food industry in

general (*i.e*. advocating for "innovative" food producers that make "imitation" foods). Accordingly, the Court should decline considering GFI's amicus brief and the additional arguments it raises regarding the constitutionality of the FDA's imitation provision.

III. CONCLUSION

Plaintiff-Appellant respectfully requests the Court deny GFI's request to file an amicus brief pursuant to Rule 29 of the Federal Rules of Appellant Procedure.

Dated: March 19, 2018

Respectfully submitted,

Capstone Law APC

By: / S / Glenn A. Danas
Glenn A. Danas
Bevin Pike
John E. Stobart

Attorneys for Plaintiff-Appellant
Cynthia Cardarelli Painter

CERTIFICATE OF COMPLIANCE PURSUANT TO FRAP RULE 32(g)

I certify that the attached Opposition to Motion of the Good Food Institute for Leave to File Brief as Amicus Curiae in Support of Defendant-Appellee complies with the length limits permitted by Fed. R. App. P. 27(d)(2) and does not exceed 5,200 words, and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 27(d)(2).

Dated: March 19, 2018

Capstone Law APC

By: / S / Glenn A. Danas
Glenn A. Danas
Bevin Pike
John E. Stobart

Attorneys for Plaintiff-Appellant
Cynthia Cardarelli Painter

9th Circuit Case Number(s) 17-55901

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) March 19, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) / S / Patti A. Diroff

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)