Approved Fred A Kerr 4/26/84
Date

MINUTES OF THE SENATE COMMITTEE ON AGRICULTURE AND SMALL BUSINESS.

The meeting was called to order by Senator Fred Kerr at
Chairperson

10:00 a.m./~~p.m.~~ on Tuesday, April 3, 1984, 19__ in room 423-S of the Capitol.

All members were present except: Senator Dan Thiessen (E)

Committee staff present: Raney Gilliland, Research Department
Norman Furse, Revisor's office

Conferees appearing before the committee:

Harland Priddle, Secretary, Department of Agriculture
Representative Bill Fuller
Becky Crenshaw, Kansas Farm Organizations
Ardeth Sauerwein, President, Associated Milk Producers, Newton
Marjorie Warta, Consumer, Newton
Virginia Benton, a dairy farmer, Lebo
Jack Greenwell, Manager-KC Div., Mid-America Dairymen Inc.
Also speaking for Jim Moore, Manager, Ks. Div.
Associated Milk Producers, Inc.
Pamela Bailey, Atty., Asso. Milk Producers Inc. &
Mid American Dairymen
Michael Ziebell, Ntl. Frozen Pizza Inst. & Tony's Pizza Service,
Marshall, Minn.
Don Patterson, General Foods, Kraft, Inc., Schreiber Foods,
Attorney, Topeka

Senator Karr moved the March 28, 1984 minutes be approved, seconded by Senator Allen. Motion carried.

HOUSE BILL 3055 - Senator Kerr stated House Bill 3055 had been recommended favorably by the House Agriculture and Livestock Committee, failed to receive favorable action in the House and was referred to the Federal and State Affairs Committee. Representative Fuller had requested of President Ross Doyen that it be amended into another active bill in the Senate, House Bill 3072. The request was honored. (Note Attachment 1, balloon draft of the proposed amendments to House Bill No. 3072)

Senator Kerr called on Secretary Priddle to explain the background for the introduction of House Bill 3055. Secretary Priddle stated the bill is known as a labeling act, speaking of dairy foods only; it does not include Pizza. It requires the identification and labeling of a dairy product. Since in August, 1983, the Kansas Filled Dairy Products Act was held unconstitutional, Secretary Priddle feels House Bill 3055 would help by requiring the labeling of all artificial dairy products. Any products not in compliance with the bill would be subject to administrative action by stop sale, injunctive action or criminal prosecution as the individual case requires. He stated Minnesota has a similar type of labeling at this time. Answering Senator Karr's inquiry, percentages would not have to be specified. Revisor Norman Furse confirmed Pizza is not a dairy product. (Note Attachments 2 & 3)

Representative Fuller stated he supports this type of legislation. It is patterned after the Minnesota law. He referred to line 41 and feels Pizza is not a dairy product. The bill gives protection to the consumer by having the product labeled. He stated the House had a technical question and differences in philosophy but he feels the balloon draft clears up these questions. He stated whatever legislation that is passed should be enforceable by the State Department of Agriculture.

Becky Crenshaw stated the Farm Organizations she represents support this bill as something to replace the repealed legislation and feels it is constitutional and should remain under the jurisdiction of the Department of Agriculture--do not put it under the Department of Health and Environment. They have worked with the Department of Agriculture for many years and want to continue to do so.

Ardeth Sauerwein read his testimony as contained in Attachment 4, stating the 750 members of the Associated Milk Producers support this bill, "It would not prohibit the sale of any product in Kansas, but would insure a clearer identification of its content."

Marjorie Warta stated as a consumer she supports this bill as amended and presented her testimony as contained in Attachment 5. She stated we are informed of the truth relative to lending and savings and she feels we should be informed of the contents of products being bought. Relative to Senator Gannon's inquiry referring to the laundry list of exemptions, she stated she had no trouble with them since they are well known.

Virginia Benton, as a dairy farmer, presented her testimony as contained in Attachment 6. She supports the bill and would like to see "those products not containing only real dairy products are labeled artificial".

Jack Greenwell stated since there is no longer a law that prohibits the sale or manufacture of filled dairy products that he feels this law is needed. "If artificial is on the level, then the consumer can read the label and make their own choice." (Note his Attachment 7) He stated artificial cheese, in particular, can have the color and texture of real cheese. He feels the public should know what they are buying.

Pam Bailey called attention to Attachment 8, her testimony, and summarized the contents. She stated this bill as written would reflect language as contained in federal legislation. Answering Senator Norvell's inquiry, she stated she believed it is constitutional as it stands.

Michael Ziebell referred to his testimony (Attachment 9) stating he feels the federal labeling requirements are sufficient in the labeling of all "imitation" products. He stated it will be impossible for a food processor to comply with both the Kansas law and Federal law and would cause many problems for producers in attempting to market dairy products and costly in selling to the various states with laws that are not uniform. Costs would be passed onto the consumer. He feels consumption of a product cannot be legislated. He requested that Pizza be exempt and suggested the use of exempting multi-component products. Mr. Ziebell stated it would be costly to get a right product inventory and administering it would be costly.

Answering Senator Allen's inquiry as to this being a backdoor tactic, Mr. Ziebell feels the real issue is producers are trying to legislate the consumption of cheese--he feels they need to develop new products. Mr. Ziebell feels it is imperative that uniform labeling is used across the nation and currently their labels are accepted across America. Revisor Norman Furse read the suggested language, "all multi-component products of which the artificial dairy product is only one component". Mr. Ziebell stated that would be OK. And as to Senator Gannon's suggestion to include "Pizza" in the exemptions, Mr. Ziebell stated that would be acceptable.

MINUTES OF THE SENATE COMMITTEE ON AGRICULTURE AND SMALL BUSINESS,

room 423-S, Statehouse, at 10:00 a.m./p.m. on Tuesday, April 3, 1984, 19__.

Don Patterson distributed Attachments 10 and 11 stating he had worked with the Attorney General's office during the legislation pertaining to the constitutionality of the Kansas Filled Dairy Products Act. He is appearing on behalf of Kraft, Inc., General Foods Corporation and Schreiber Foods, Inc. who oppose Kansas House Bill 3055. He stated there are many new and innovative dairy, part-dairy, non-dairy foods and they are labeled in full compliance with federal requirements including complete and accurate names and ingredient information and also bear nutrition labeling. His testimony points out the advantages to consumers of the alternative products, the need for uniformity and the burden on interstate commerce if this bill is enacted and that the federal requirements for the labeling of "imitation" foods are comprehensive and pervasive. He pointed out judicial precedents relative to similar statutes, and urged the committee give serious consideration to the non-passage of this bill. It would cause serious problems in marketing and advertising of products and he feels the use of "artiticial" instead of "imitation" would be challenged. He stated in the New York case the use of "imitation" conflicted with the federal law.

Senator Kerr called attention to Attachment 12 which was received by Federal Express Mail and distributed to committee members from Attorney Richard Frank, Washington, D.C. opposing House Bill 3055.

Senator Kerr asked the committee to express their feelings relative to what action, if any, should be taken on the amended bill. After considerable discussion, Senator Norvell suggested the bill being so controversial and not all committee members were present that it be held up and perhaps a vote taken at a later date. Senator Karr questioned if a problem would develop by use of the word "sherbet", etc.

Secretary Priddle stated he feels the bill is limited to dairy products and Pizza is not a dairy product. Don Jacka, Department of Agriculture, read from New Section 2 (b) the meaning of "dairy product" and feels this does not include Pizza. Senator Kerr questioned if it should be made clear Pizza is exempt, and if "artificial" is the proper word. Senator Allen stated he does not feel the bill is a trade barrier, as he interprets it.

The meeting was adjourned.

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SENATE

AGRICULTURE AND SMALL BUSINESS COMMITTEE

10:00 a.m., Room 423-S — TUESDAY, APRIL 3, 1984

Date

NAME	ADDRESS	ORGANIZATION
Michael B. Ziebell	Marshall, Mn	National Frozen Pizza Institute Tony's Pizza Service
Kim Nelson	Gardner, Ks	Dairy Farmer, Mid Am.
Jack Greenwell	Kansas City, Mo	Mid America Dairymen
Loretta Nelson	Gardner, Ks.	Dairy Farmer
Virginia Barton	Lebo, Ks	Dairy Farmer
Pamela E. Bailey	Wichita, KS	Associated Milk Producers, Inc. & Mid American Dairymen
Don Patterson	Topeka, Kansas	General Foods Kraft, Inc. Schreiber Foods
Kenneth M. Wilke	Topeka Kansas	Board of Agriculture
Alvin Epler	Hallowell KS	St Bd of ag.
DON JACKA	TOPEKA	ST BOARD OF AGRICULTURE
HARLAND REIDDLE	TOPEKA	ST. BOARD OF AGRICULTURE
Bill Fuller		House of Rep
Ben Vidricksen		SENATE
Judith Summerman	NEWTON	AMPI
Margaret Warta	Newton	Consumer
Beverly Cale	Salina,	Consumer
Brad Snyder	Salina	Consumer
Ray Brey	Salina	consumer
Robert Calhoun	SALINA	CONSUMER
Frances Kastner	Topeka	KFDA

PROPOSED AMENDMENTS TO H.B. NO. 3072

"AN ACT concerning dairy products; repealing the Kansas filled dairy products act; eliminating prohibitions on sale of milk which contains fat or oil other than milk fat; amending K.S.A. 65-707 and repealing the existing section and also repealing K.S.A. 65-725, 65-726, 65-727, 65-728, 65-729, 65-730, 65-731 and 65-732."

Be amended:

On page 1, following line 23, by inserting the following material to read as follows:

"New Section 1. It is the intent of the legislature to protect the consumers of this state from confusion, fraud and deception, to prohibit practices inimical to the general welfare and to promote the orderly and fair marketing of dairy products.

New Sec. 2. (a) "Person" means any individual, firm, partnership, association, trust, estate, corporation and any other business unit, device or arrangement;

(b) "dairy product" means milk, cream, sour cream, butter, cream, skim milk or skimmed milk, ice cream, whipped cream, flavored milk or skim milk drink, dried or powdered milk, cheese, cream cheese, cottage cheese, creamed cottage cheese, ice cream mix, sherbet, condensed milk, evaporated milk, concentrated milk and any other food products that are manufactured principally from milk or milk derivatives;

(c) "secretary" means the secretary of the state board of agriculture;

(d) "artificial dairy product" means any food which by its composition, intended use, sensory qualities, physical properties, package or label description purports to resemble or imitate any dairy product, but does not include: (1) Any distinctive proprietary food compound not readily mistaken for a dairy product, which is customarily prepared and designed for medicinal or special dietary use and predominantly so labeled; or (2) any dairy product flavored with chocolate or cocoa or

Att. 1

enriched with vitamins when the nonmilk fats or oils contained in the product do not exceed the amount of cocoa fat naturally present in the chocolate or cocoa used and the food oil, not in excess of .01% of the weight of the finished product, used as a carrier of the vitamins.

(e) "milk" means milk, skim milk, skimmed milk, cream, lowfat milk, nonfat dry milk and any fluid derivative of the listed items.

New Sec. 3. It shall be unlawful for any person, directly or indirectly, to knowingly manufacture, sell or exchange an artificial dairy product which does not adhere to the labeling requirements of sections 1 to 8, inclusive. Any artificial dairy product manufactured, sold or exchanged in violation of this act shall be considered a misbranded food under the Kansas food, drug and cosmetic act and the penalties and remedies provided by that act shall apply.

New Sec. 4. (a) The statement "an artificial dairy product" must be indicated in the upper 30% of the principal display panel of the package or container of an artificial dairy product. The statement shall not be less than 1/2 of the size of the product name or 1/4 of an inch or 18 point type, whichever is larger. The statement must be of similar type, style and color to the product name.

(b) Artificial dairy products shall comply with the applicable federal requirements set forth in section 403 of the federal food, drug and cosmetic act and in sections 101 and 105 of title 21 of the code of federal regulations.

(c) The product name of an artificial dairy product must be presented in bold face type on the principal display panel and must be in lines generally parallel to the base of the container or package.

(d) Every artificial dairy product shall provide, on the principal display panel, a statement of the major differences between the artificial dairy product and the dairy product it resembles. The information must be in a type size which is at least 25% of the name of the artificial dairy product, nor less

than 1/8 of an inch. This information shall include the differences in the fat or oil used and the major difference in the basic ingredients used to replace nonfat milk solids.

(e) A nutritional information panel must be provided on an artificial dairy product which indicates the quantitative nutritional differences between the artificial dairy product and the dairy product that it resembles in comparative columns. The nutrients to be included are those for which a U.S. recommended daily allowance has been established.

New Sec. 5. The secretary shall adopt any rules and regulations necessary and proper to assure compliance with the provisions of sections 1 to 8, inclusive, provide for periodic inspections, investigate violations and complaints and institute and prosecute civil or criminal actions for violations. The provisions of sections 1 to 8, inclusive, may be enforced by injunctions granted by any court of competent jurisdiction. Artificial dairy products which are in violation of any of the provisions of sections 1 to 8, inclusive, are subject to seizure and disposition in accordance with an appropriate court order or rules and regulations adopted by the secretary.

New Sec. 6. The provisions of sections 1 to 8, inclusive, are supplemental to all other laws relating to artificial dairy products which are not expressly referred to in those sections, and to all laws relating to the manufacture, sale, exchange or transportation of artificial dairy products within or outside the state of Kansas and shall not be construed to modify, repeal or in any way affect any part or provision of any such laws not expressly repealed by this act.

New Sec. 7. The secretary or authorized representatives of the secretary shall have the authority to issue and enforce a written or printed stop sale order to the owner or custodian of any quantity of artificial dairy products which the secretary or duly authorized representatives of the secretary determine to be in violation of any of the provisions of sections 1 to 8, inclusive, or rules and regulations adopted thereunder. The order shall prohibit further sale and movement of such artificial dairy

products, except upon approval of the enforcing officer, until such officer has evidence that the law had been complied with, and the officer has issued a release from the stop sale order of such artificial dairy products. The owner or custodian of such artificial dairy products shall have the right to appeal from the order to a court of competent jurisdiction in the county in which the artificial dairy products are located for a release from such order and for the discharge of such artificial dairy products from the order prohibiting the sale, processing and movement of such products in accordance with the findings of the court. The provisions of this section shall not be construed as limiting the right of the enforcement officer to proceed as authorized by other provisions of sections 1 to 8, inclusive.

New Sec. 8. The following shall be exempt from the provisions of sections 1 to 8, inclusive:

(a) Nonliquid toppings, dry coffee whiteners, liquid coffee whiteners, dips, dressings, whipped toppings and margarine or margarine-type products; and

(b) sales of artificial dairy products to or by a food service establishment licensed pursuant to K.S.A. 36-503 and amendments thereto.

New Sec. 9. If any provisions of this act or its application to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application. To this end the provisions of this act are severable.";

And by renumbering sections accordingly;

Also on page 1, in the title, in line 17, after the semicolon by inserting the following: "requiring labels on certain artificial dairy products; declaring certain acts to be unlawful;";

And the bill be passed as amended.

_____Chairperson

ATTACHMENT 2, 4/3/84

LABELING ACT

This amendment allows for the manufacture and sale of artificial dairy products in Kansas provided they are properly labeled.

Artificial dairy products are any food which by its composition, intended use, sensory qualities, physical properties, package or label description purports to resemble or imitate any dairy product.

Artificial dairy products must be labeled as follows:

1 Statement, "An Artificial Dairy Product" must appear on the upper 30 percent of the principle display panel of the package or container. The type size must be one half the size of the product name but not less than one quarter of an inch.

2 The product name must be presented in bold face type and generally parallel to the base of the container.

3 The principle display panel must state the difference in fat or oil used and the major difference in the basic ingredients used to replace nonfat milk solids.

4 The nutritional panel must contain quantitative nutritional differences between the artificial dairy product and the dairy product it resembles in comparative columns in accord with the U.S.R.D.A.'s.

The following are some products exempted from the law:

Non-liquid toppings, dry coffee whiteners, liquid coffee whiteners, dips, dressings, whipped toppings, margarine and margarine type products.

Any products not in compliance with the above provisions will be subject to administrative action by stop sale, injunctive action, or criminal prosecution as the individual case requires. We are requesting the cooperation of industry in the submission of labels and/or packages if there is any concern about the ability of a product to meet the new regulations.

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ATTACHMENT 3, 4/3/84

(1) AN ARTIFICIAL DAIRY PRODUCT

SHREDDED

(2) Imitation
Low Moisture
Part-Skim
Mozzarella Cheese

(3) MADE WITH SOYBEAN OIL AND CASEIN

NET WT. 8 OZ. 227 GRAMS

KEEP REFRIGERATED

K0558

0 30900 77772 6

INGREDIENTS: WATER, CASEIN, PARTIALLY HYDROGENATED SOYBEAN OIL, SALT, KASAL, LACTIC ACID, NATURAL FLAVOR, MODIFIED FOOD STARCH, SODIUM CITRATE, SORBIC ACID (PRESERVATIVE), SODIUM PHOSPHATE, GUAR GUM, ARTIFICIAL COLOR, VITAMIN A PALMITATE, MAGNESIUM OXIDE, FERRIC ORTHOPHOSPHATE, ZINC OXIDE, VITAMIN B_2, FOLIC ACID, PYRIDOXINE HCL (VITAMIN B_6), NIACINAMIDE, THIAMINE MONONITRATE (VITAMIN B_1), VITAMIN B_{12}.

(4)

NUTRITIONAL INFORMATION SERVING SIZE: 1 OZ. SERVINGS PER CONTAINER: 8	OUR PRODUCT	LOW MOISTURE PART-SKIM MOZZARELLA
CALORIES	80	80
PROTEIN	6g	8g
CARBOHYDRATE	1g	1g
FAT	7g	6g
*PERCENT OF CALORIES FROM FAT	72%	55%
*POLYUNSATURATED	3g	0g
*SATURATED	1g	3g
*CHOLESTEROL	(0mg/100g)0mg	(55mg/100g)15mg

PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)	OUR PRODUCT	LOW MOISTURE PART-SKIM MOZZARELLA
PROTEIN	10	20
VITAMIN A	8	4
VITAMIN C	0	0
THIAMINE	0	0
RIBOFLAVIN	10	8
NIACIN	0	0
CALCIUM	20	20
IRON	0	0

*THIS INFORMATION ON FAT AND CHOLESTEROL CONTENT IS PROVIDED FOR INDIVIDUALS WHO, ON THE ADVICE OF A PHYSICIAN, ARE MODIFYING THEIR TOTAL DIETARY INTAKE OF FAT AND CHOLESTEROL.

DIST. BY PREBLE CHEESE CO., P.O. BOX 610, GREEN BAY, WI 54305

Nutritional

Atch. 3

(4)

ATTACHMENT 4, 4/3/84

Chairman and members of the Senate Agriculture Committee

Re: Senate Bill ~~425~~

My name is Ardith Sauerwein. I'm a dairy farmer from Newton, and am presently serving as President of Associated Milk Producers, Incorporated with about 750 members. These dairy farmers receive a majority of their income from the sale of dairy products. I would like to talk in favor of ~~SB 425~~ HB 3055. We dairy farmers feel very strongly that the consumers need better labeling of dairy products.

We are not opposed to substitutes but we do think consumers deserve better labeling in order to make judicious decisions when they go into a store to purchase dairy products. Bill Fuller and his committee, with help of Secretary Priddle and others, thoroughly researched this idea. This bill was written only after they looked into labeling laws in Wisconsin, Minnesota, and New York.

Nutrition is a high priority for consumers these days. It stands to reason that good labeling laws can help those consumers to make wise decisions. When a purchaser of food products spends his money, he is entitled to know what that food item is made of. This information will add very little if any cost to the consumer. This bill would not prohibit the sale of any product in Kansas, but would insure a clearer identification of its content.

Thank you for your consideration and I hope that you will support ~~SB~~ HB 3072

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ATTACHMENT 5, 4/3/84

(5)

My name is Marjorie Warta and I am here today to express my concerns as a consumer regarding the Labeling Bill for non-dairy products which are imitation of dairy products.

As a consumer I feel that I have the right to know all the facts needed to make an informed choice of products in the market place. I should be able to make these choices without spending hours reading the fine print and running all over the store to make intelligent comparisons of similarly named products.

Being a consumer in today's marketplace is not an easy role as new ideas in food processing and marketing have tumbled one upon the other in rapid order--in fact, there are over 100,000 products in the local supermarket today, with as many as 8,000-10,000 being added each year. At times, when I am shopping for groceries, attempting to get the most nutritional value for the dollar, I wonder if there were advantages to being a pioneer woman. Milking the cow and gathering the eggs may have well been simpler tasks than reading labels in today's supermarket. New frozen foods, prepackaged foods, ready-to-eat foods, food mixes, whole meal combinations were unheard of when my grandmothers began housekeeping.

I have real concerns as I purchase dairy products in today's market. First, I am not always sure whether I am getting real dairy products or imitation products. I would appreciate some quickly visible method of identification on the product which would visually identify imitation and/or the real thing. Products that are sold to look like, appear like, and perhaps even taste

Atch. 5

like the genuine product should be labeled as synthetic, imitation, fabricated or dairy substitute. Secondly, I don't always wear my glasses to the store, so I would appreciate being able to read the identification of the dairy product in at least 1/8 inch letters. Thirdly, I am concerned about the nutritional value of imitation dairy products. I know what nutrients a person can obtain from cheddar cheese and how this food contributes to my calcium, protein, vitamin and mineral needs==or at least I am able to obtain the information from a nutritional listing of foods and their nutrients. To really know the nutrients in an imitation cheese product would be more of a challenge. Therefore, I would value the disclosure and comparison of the imitation and non-imitation dairy products in reference to the nutrient content of the products. Calcium intake is a real concern in the U. S. at the present time and we need to be able to read and compare labels and evaluate the calcium and other nutrient benefits of a product.

Also coconut oil or hydrogenated fats, as substitute for the milk fat, may be unhealthy for certain groups of people such as people on low cholesterol diets, and therefore the fat type and amount in a product is important. The quality of protein used in the imitation dairy products is another of the concern which I have relative to nutrient value of the product, realizing their is a difference between animal and plant protein quality. Lastly, we have been educated to evaluate our daily dietary intake by such methods as the Basic Four. We consider dairy products as one of these groups---so nutritionally does an imitation meet the

needs of this group of foods. It would greatly help consumers if it were marked imitation or a dairy substitute so consumers would be alerted to the nutritional content.

In conclusion I support any help which can be given consumers in Kansas. We have the right to be informed and the right to choose in our selection of dairy products. Hopefully, usable nutrition information will be included on food labels which will help us as consumers select nutritious foods for a balanced diet. May we be given the option to select either traditional dairy products and/or imitation dairy products depending on our individual nutritional needs.

Thank you for allowing me to share with you my concerns as a consumer.

ATTACHMENT 6, 4/3/84

(6)

LABELING OF IMITATION DAIRY PRODUCTS

Mr. Chairman:

Members of the Committee:

I am Virginia Benton. I am a diary farmer, not just a dairy farm wife. I help milk those cows and clean the barn. As a farmer who is helping produce nature's most nearly perfect food, naturally I have a great interest in the labeling companies are using.

Since filled milk is now allowed, Kansas consumers will be exposed all of a sudden to a deluge of imitation dairy products. These consumers have a right to know what they are buying. We need the word ~~IMITATION~~ ARTIFICIAL on these products to alert them,--then, if they want to buy them, that's their business.

As a dairy farmer, I want them to buy the real product-----as a consumer, I want imitation products labeled so I won't unknowingly buy something I feel cannot possibly be as nutritious as the REAL thing.

Companies who produce imitation dairy products are trying to cut the cost, both to make themselves more money and to allure the consumer by the few pennies less the product sells for.

You, as a committee have a duty to those of us still very interested in feeding ourselves and our loved ones for optimum health, to be sure those products not containing only real dairy products are labeled ~~IMITATION~~ ARTIFICIAL !

Virginia Benton
R.R. #2
Lebo, Ks. 66856

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IN SUPPORT OF THE "DAIRY LABELING BILL"

Statement made by: Jack Greenwell - Manager, Kansas City Division - Mid-America Dairymen, Inc.

Also speaking for: Jim Moore - Manager, Kansas Division - Associated Milk Producers, Inc.

This bill was developed due to the "Filled Dairy Products Act" being declared unconstitutional in 1983 and therefore it is necessary to repeal both the Filled Milk and Filled Dairy Products Acts.

Due to this, there is no longer a law that prohibits the sale or manufacture of these products in Kansas.

Since Kansas will have imitation dairy products on the grocery store shelves for the first time in many years, we feel the consumer needs a way to determine, at a glance, that the product is not a "Real" dairy product.

Dairy products are probably the most imitated food that the consumer has the opportunity to purchase in the grocery store. The main reason for this is that imitations are much more economical to produce so it is an economic issue. Also they are easy to make look like the real dairy product even though the nutritional value cannot be imitated.

Eleven to twelve percent of total grocery store sales, including non food items, are from the dairy counter, second only to meat, so we are talking about products that the grocery shopper is purchasing in significant amounts.

The purpose of this bill is not to prohibit the sale of imitation dairy products but only to label them as such so the public cannot be deceived since these products are almost identical in looks and placed side by side in the same counter as real dairy products.

Since dairy products are trusted by the consumer to have the taste and nutrition that they expect for their families, they should not be deceived by "look alike" products. If ~~imitation~~ ARTIFICIAL is on the label, then the consumer can read the label and make their own choice.

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(8)

I. Introductory Remarks.

Thank you

Representing AMPI and Mid-Am.

Law firm's involvement with Dairy legislation

My own involvement with H.B. 3055

Pam Bailey
attorney

Atch. 8

II. History of House Bill 3055

Before directly addressing House Bill 3055 and its provisions, a brief sketch of its historical background should be made. In 1919 and 1923 respectively, the Federal and Kansas Filled Milk Acts were enacted. In essence, these acts were passed to protect the consumer and prohibit the sale of milk to which non-dairy fats had been added. Both of these acts were attacked on constitutional grounds, but both were upheld by the United States Supreme Court. These acts contained an absolute bar to the manufacture and sale of milk products containing both dairy ingredients and non-dairy fats.

In 1953, with the development of other dairy products, the need for further legislation was felt by the Kansas legislature and the Filled Dairy Products Act was adopted. This act essentially prohibited the sale or activities related to the sale of dairy products to which non-dairy fats had been added, blended, or compounded. Until recently, statutes such as the Kansas Filled Dairy Products Act were upheld. In Milnot v. Richardson, 350 F. Supp. 221 (1972), however, the Federal District Court for the State of Illinois held that the possibility of confusion of products no longer existed to support the validity of the Federal Filled Milk Act. In 1983, decisions by both the Kansas Supreme Court and the Federal District Court for the State of Kansas have challenged the constitutionality of the Kansas Filled Dairy Products Act. The Kansas Supreme Court in Strehlow v. Kansas State Board of

Agriculture, 232 Kan. 589 (1983) held the Filled Dairy Products Act to be unconstitutional as to a specific product, Imitation Lowfat Dry Milk. Plaintiff's challenge to the Act was upheld for due process and equal protection reasons. In General Foods Corporation v. Priddle, Case No. 82-4111 (8-9-83), Judge Rogers of the U. S. District Court for the State of Kansas declared the Kansas Filled Dairy Products Act to be in violation of the equal protection and due process clauses of the 14th Amendment. Both decisions, Strehlow and General Foods, rejected a long line of cases upholding Filled Milk Acts. Probably one of the biggest reasons cited by these courts and other courts who have rejected these types of acts, has been the fact that the consumer could be protected in other ways, namely through labeling. Judge Rogers in General Foods stated, and I quote, "Labeling laws obviate the need for such statutes as the Filled Dairy Products Act."

This is the reason House Bill 3055 is before you today. It is an attempt to protect consumers from fraud and deception through a less restrictive measure than the absolute prohibitions contained in the Filled Milk Acts. The method used to prevent fraud and deception in H.B. 3055 is one suggested by the courts and those opposed to the Filled Milk Acts -- labeling.

III. House Bill 3055

Given the history of House Bill 3055 as just presented, the purpose of this bill and the particular reason why labeling was chosen to accomplish this purpose should be clear. Rather than elaborating further on what has been recognized as a valid state interest and a valid method of protecting this interest, I would like to direct my comments more specifically to the provisions of House Bill 3055.

I first became involved with House Bill 3055 when some questions arose regarding its constitutionality. These questions arose because of a recent New York Federal District Court decision, Grocery Manufacturers of America v. Joseph Gerace, 83 Civ. 8629 (3-8-84). After a review of the GMA case and a comparison of the New York statute with House Bill 3055, I concluded that House Bill 3055 would not be declared unconstitutional using the rationale of the New York Federal District Court. The GMA case addressed several different issues and a review of GMA is contained in an earlier Memorandum which I prepared and a copy of which was forwarded to Representative Ediger. Without going into too much detail, I think I can best summarize the problem with the New York statute as one of conflict with federal law. The Federal Food, Drug and Cosmetic Act and its regulations relate to the mis-branding and adulteration of foods. The federal statute

provides that an imitation of another food is misbranded unless its label bears the word "imitation." Federal regulations define imitation as a food that is nutritionally inferior to the food it resembles. If a food is not nutritionally inferior, it is to be considered a substitute product.

The main problem with the New York statute was that its definition of imitation included both foods that were nutritionally inferior and those nutritionally equivalent or even superior. Because a person could not comply with both the federal regulations defining imitation and the New York definition of imitation at the same time, the court held this direct conflict meant federal law preempted New York's statute. Had the New York statute defined imitation at least as restrictively as the federal regulations, the court would not have held the New York statute to be federally preempted. As stated in my earlier Memorandum, House Bill 3055 does track the language of the federal regulations and therefore federal law would not preempt this proposed legislation.

Another challenge to the constitutionality of the New York statute concerned the burden on interstate commerce imposed by this statute. The court in GMA did not really decide that case on the basis that the statute imposed an impermissible burden on interstate commerce

and in fact did not use a balancing test to determine whether a burden existed. Because the analysis in GMA is incomplete, it should not be used to determine the burden imposed on interstate commerce by House Bill 3055. A valid public health objective, such as the one behind House Bill 3055, carries a strong presumption of validity and therefore the argument that it is invalid because it burdens interstate commerce is of no merit.

In further support of House Bill 3055, it must be recognized that federal legislation exists in the area and indicates that a valid public interest does exist. House Bill 3055, I think, does a nice job of protecting the interest in this area without unduly burdening interstate commerce and it also is even-handed in its application which would prevent constitutional challenges on the grounds of equal protection and due process.

Without belaboring these issues too much, and in the interests of time, I would be happy to address any specific questions you might have regarding House Bill 3055, its constitutionality, or any other issues of concern to this committee during questions after my remarks.

IV. Closing.

In closing, I would urge passage of House Bill 3055. Because the Kansas Filled Milk Products Act has

been declared unconstitutional by the Kansas Federal District Court and appears on shaky ground with the Kansas Supreme Court, the public interests protected by that statute need to be protected by another means. The Filled Milk Products Act fell because the courts felt less restrictive methods of protecting the public were available. This method is labeling and it is vital that this legislation be passed. I would urge the legislature not to delay thinking this type of legislation can wait for another year . . . this protection is needed now. As representatives of the people of Kansas, you must give Kansas purchasers and consumers a knowing choice between one nutritious product and another. House Bill 3055 accomplishes this objective and must be passed.

Thank you for allowing me to appear before you today on behalf of Associated Milk Producers, Inc. and the Mid-American Dairymen's Association. As I said earlier, I would be happy to answer any questions you may have.

ATTACHMENT 9, 4/3/84

Testimony of the
National Frozen Pizza Institute
Concerning House Bill No. 3055
as an Amendment
to House Bill No. 3072

Mr. Chairman, Members of the Committee; I am Michael Ziebell and I am today representing the National Frozen Pizza Institute to express our opposition to using House Bill No. 3055 as an amendment to House Bill No. 3072. The National Frozen Pizza Institute is a national non-profit trade group representing the nation's major frozen pizza manufacturers and many of their suppliers. The NFPI opposes House Bill 3055 because it would require labeling of food products in a manner different than currently required by the Federal government and the vast majority of other state governments. Non-uniform labeling requirements needlessly create costs for producers and consumers and serve to confuse consumers.

Federal Labeling Requirements

The Federal government already extensively regulates the labeling of all "imitation" products, including imitation dairy products. The Federal Food and Drug Administration, which has jurisdiction over all non-meat and poultry food products, requires all products which resemble and can substitute for standardized products (including dairy products) to bear the term "imitation" if these substitutes are nutritionally inferior to the standardized

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product. 21 C.F.R. Section 101.3(e). Where the substitute is nutritionally equivalent or superior to the standardized product, it need not bear the term "imitation", but must be descriptively labeled in a manner so as it is not confused with the standardized product, (e.g., margarine, mellorine, cheese substitute). The U.S. Department of Agriculture, which has jurisdiction over all meat and poultry products, including meat-topped pizza, similarly has adopted a definition of "imitation" which is identical to the FDA definition.

House Bill 3055 defines "imitation" in a manner inconsistent with Federal rules. Section 2(d) of House Bill 3055 defines all substitute dairy products as "imitations" irrespective of their nutritional profile. Thus, nutritionally equivalent or superior dairy substitutes, which under Federal law could be labeled as e.g., non-dairy coffee whitener or cheese substitute, must be identified as "imitation milk" or "imitation cheese" under the Kansas law.

Similarly, Section 4(e) would require comparative nutrition labeling on all products subject to the law. Federal law does not require comparative nutrition labeling for "imitation" or "substitute" products.

Finally, it will be impossible for a food processor to comply with both the Kansas law and Federal law. Section 4(b) of House Bill 3055 requires compliance with Federal law; because the Kansas definition of "imitation" would differ from the Federal definition, compliance with both laws is impossible.

It is critically important to food manufacturers who distribute their products nationwide to have uniform labeling laws. For years, the Association of Food and Drug Officials, a group including Kansas representatives, has urged the adoption of uniform labeling laws. Compliance with a variety of labeling laws imposed by different states makes doing business difficult if not impossible and imposes unnecessary trade barriers.

In recognition of the need for national labeling uniformity, the U.S. Congress amended the Federal Meat Inspection Act in 1967 to prohibit state and local governments from imposing labeling requirements which are "in addition to or different than" USDA requirements. See 21 U.S.C. Section 678. The provision has been upheld by various Federal courts, including the U.S. Supreme Court (Jones v. Rath Packing Co., 430 U.S. 519 (1977)) and has also been applied to labeling of non-meat/poultry products under the Federal Food, Drug and Cosmetic Act. See Cosmetic Toiletries and Fragrance Association v. Minnesota, 575 F.2d 1256 (8th Cir. 1978); Grocery Manufacturers of America v. Gerace, No. 83 Civ. 8629 (S.D.N.Y. March 9, 1984).

Other State Laws

Kansas is not the first state to consider "imitation" dairy labeling laws. Just recently, the State of New York adopted an "imitation cheese" labeling law which was inconsistent with Federal law. On March 9, 1984, a Federal District Court in New York struck down the New York law on the ground that it is preempted by Federal law.

Similarly, the States of Wisconsin and Minnesota have considered and adopted "artificial" dairy labeling laws. Both states are currently drafting regulations to further define the statutes and provide for exemptions. In fact, recognizing Federal preemption and the difficulty of applying these labeling laws to multi-component products, of which the dairy substitute is only one part, both Wisconsin and Minnesota have exempted (1) multi-component products; and (2) meat food products from their law's coverage.

Conclusion

It is critically important to all interstate food processors and distributors to have a uniform set of labeling laws. The National Frozen Pizza Institute strongly urges this Committee to either disapprove this Bill or amend it to make it consistent with Federal law. The sponsor's intent, as reflected in Section 4(b), appears to be consistency with Federal law. If this is the case, the Committee should take the following actions:

1) Amend the definition of "imitation" to be consistent with 21 C.F.R. Section 101.3(e).

2) Delete the nutritional labeling comparison requirement.

3) Exempt meat food products and poultry products which are subject to the exclusive jurisdiction of the U.S. Department of Agriculture and subject to explicit preemption provisions.
21 U.S.C. Section 678.

4) Exempt all multi-component products of which the dairy substitute or imitation dairy product is only one component.

Thank you for providing me the opportunity to present our views.

Statement Presented to
Senate Agricultural Committee
Topeka, Kansas
March 3, 1984

Thank you for the opportunity to speak before your committee today. My name is Donald Patterson and I am an attorney with Fisher, Patterson, Sayler and Smith in Topeka. I am appearing today on behalf of three interested parties: Kraft, Inc., General Foods Corporation, and Schreiber Foods, Inc. who oppose Kansas House Bill No. 3055. These firms are manufacturers of a variety of food products distributed throughout Kansas and the nation. Each of these companies would like to express its concern with respect to H.B. 3055 and the potentially devastating impact that this bill could have, both to industry and to consumers within the state of Kansas. I would like to speak briefly about some of the issues that concern Kraft, General Foods and Schreiber Foods.

1. The Nature of Products Affected and Advantages to Consumers

Kansas H.B. 3055 proposes to regulate the labeling of foods that either resemble or imitate dairy products. In recent years there have been vast strides in the development of wholesome and nutritious food products that are alternatives to some of the more traditional and well known dairy products. These new and innovative products include a variety of dairy, part-dairy and non-dairy foods, many of which are either nutritionally equivalent or nutritionally superior to traditional dairy products, for which standards of identity have been established. Each of these alternative products is labeled in full compliance with federal requirements including complete and accurate names and ingredient information. Many also bear nutrition labeling.

Many of these alternative products provide dietary advantages such as lower cholesterol, lower sodium and reduced calories, as well as desirable

functional properties such as longer shelf life and favorable melting properties. Such products are often preferable to consumers for dietary, religious or economic reasons. Consequently, many of these new alternative products have received enthusiastic acceptance and demand by consumers.

However, the wide use and acceptance of alternative products clearly does not justify an attempt to limit competition with real dairy products. The effect of the Kansas H.B. 3055 would be to impose labeling burdens so oppressive that consumers will be discouraged from buying and manufacturers will be discouraged from selling certain products that compete with products supported by the Kansas dairy industry. Numerous cases have held that the state may not use its powers as a basis to suppress competition or to protect a particular industry within the state. Such attempts at economic protectionism not only deny equality in the marketplace, but they also stifle innovation and deprive consumers of many desirable and nutritious products.

2. The Need for Uniformity and The Burden on Interstate Commerce

Our country's economic well-being and the abundance of products available to the consumer are derived largely from the absence of trade barriers between the states. Products move freely within the United States in reliance upon the constitutional protection against unreasonable burdens on interstate commerce. Kansas House Bill 3055 clearly would result in trade barriers unreasonably burdening interstate commerce. The proposal, if enacted, would be subject to a constitutional challenge as an unreasonable burden on interstate commerce.

Uniformity of laws is absolutely essential in the area of food labeling. This need for uniformity is critical to industy as well as consumers. The labeling requirements proposed in H.B. 3055 are different from federal laws and the laws of most other states.

For industry to comply with the special labeling requirements proposed by H.B. 3055, companies would be required to establish and implement separate labeling and product inventories, separate distribution channels, special recordkeeping systems, and special advertising programs for the state of Kansas. In many instances distributors will not and cannot maintain separate inventories to comply with different state laws. Ultimately, these special requirements may force manufacturers to raise the prices of products sold in Kansas or to discontinue the sale of these products in the state of Kansas. Kansas consumers will thus be faced with increased costs or the inability to purchase many wholesome and desirable food products.

In addition, uniformity in food labeling is essential for consumers to make informed choices in the marketplace. If "artificial dairy products" are labeled in a manner different from other imitation foods, consumers will receive a negative impression of inferiority that does not accurately reflect the true character of the food. Numerous alternative or substitute foods now found in the marketplace would not be governed by this proposal. The effect of the proposed labeling requirements would be to confuse and mislead the consumer with negative and disparaging labeling and to discourage manufacturers from selling nutritionally equivalent alternative products within the state of Kansas. Some products that contain only natural ingredients or only dairy ingredients would be required to bear the term "artificial", and thus mislead the buying public.

3. Federal Pre-emption

The federal scheme of regulation for food labeling and the federal requirements for the labeing of "imitation" foods are comprehensive and pervasive. The labeling of food products is governed by the Federal Food, Drug, and Cosmetic Act, the Fair Packaging and Labeling Act, and the Federal Code of

Regulations, administered by the United States Food and Drug Administration (FDA). The FDA regulations specifically define imitation foods and provide requirements for the labeling of imitation and substitute foods. Thus the proposed legislation, if enacted, would be subject to a judicial challenge on the grounds of federal pre-emption. Therefore, we strongly urge that Kansas conform to the federal regulations with the defeat of H.B. 3055.

4. Judicial Precedents

Statutes similar to the Kansas proposal have already been successfully challenged in various states. In Kansas, the Filled Dairy Products Act was held to be unconstitutional as a violation of the equal protection and due process clauses of the U.S. Constitution. The state of Kansas was permanently enjoined from enforcing that statute. General Foods v. Priddle, No. 82-4111 (D. Kan., August 9, 1983). In addition, attorney fees in the amount of $45,000 were awarded against the state of Kansas and Kansas taxpayers were ultimately required to bear this cost.

Most recently, the New York imitation cheese labeling statute and implementing regulations were held to be unconstitutional and a permanent injunction was entered prohibiting their enforcement by the state of New York. GMA v. Gerace, 83 Civ. 8629 (S.D.N.Y., March 8, 1984) (Copy attached). There, the state imitation labeling law was invalidated because it was pre-empted by federal law and because it created an unreasonable burden on interestate commerce.

5. Conclusion

For the foregoing reasons we urge that Kansas House Bill 3055, and similar special interest legislation be defeated.

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Senate Agricultural Committee
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March 3, 1984

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Many of these alternative products provide dietary advantages such as lower cholesterol, lower sodium and reduced calories, as well as desirable

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functional properties such as longer shelf life and favorable melting properties. Such products are often preferable to consumers for dietary, religious or economic reasons. Consequently, many of these new alternative products have received enthusiastic acceptance and demand by consumers.

However, the wide use and acceptance of alternative products clearly does not justify an attempt to limit competition with real dairy products. The effect of the Kansas H.B. 3055 would be to impose labeling burdens so oppressive that consumers will be discouraged from buying and manufacturers will be discouraged from selling certain products that compete with products supported by the Kansas dairy industry. Numerous cases have held that the state may not use its powers as a basis to suppress competition or to protect a particular industry within the state. Such attempts at economic protectionism not only deny equality in the marketplace, but they also stifle innovation and deprive consumers of many desirable and nutritious products.

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In addition, uniformity in food labeling is essential for consumers to make informed choices in the marketplace. If "artificial dairy products" are labeled in a manner different from other imitation foods, consumers will receive a negative impression of inferiority that does not accurately reflect the true character of the food. Numerous alternative or substitute foods now found in the marketplace would not be governed by this proposal. The effect of the proposed labeling requirements would be to confuse and mislead the consumer with negative and disparaging labeling and to discourage manufacturers from selling nutritionally equivalent alternative products within the state of Kansas. Some products that contain only natural ingredients or only dairy ingredients would be required to bear the term "artificial", and thus mislead the buying public.

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5. Conclusion

For the foregoing reasons we urge that Kansas House Bill 3055, and similar special interest legislation be defeated.

Attach 11, 4/3/84

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

GROCERY MANUFACTURERS OF AMERICA, INC., a Delaware Corporation,

Plaintiff,

- against -

JOSEPH GERACE, COMMISSIONER, NEW YORK DEPARTMENT OF AGRICULTURE AND MARKETS, and the NEW YORK DEPARTMENT OF AGRICULTURE and MARKETS,

Defendants,

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES and the DEPARTMENT OF AGRICULTURE OF THE UNITED STATES, MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES and the DEPARTMENT OF HEALTH AND HUMAN SERVICES OF THE UNITED STATES,

Additional Defendants on Counterclaim.

- x

MEMORANDUM DECISION

83 Civ. 8629 (HFW)

Dated: 3/8/84

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KEVIN THOMAS DUFFY, D. J.

Plaintiff Grocery Manufacturers of America ("GMA") has filed a complaint seeking injunctive and declaratory relief against the New York State Department of Agriculture and Markets ("Department") and Joseph Gerace, Commissioner the ("Commissioner") of the Department.[1] GMA claims, inter

alia, that existing federal statutes and regulations governing the labeling of imitation foods including the labeling of imitation cheese products preempts a recently enacted New York statute, N.Y. Agric. & Mkts. Law § 63 (McKinney Supp. 1983), and its implementing regulations, 1 NYCRR Part 18. The federal regulations require only that nutritionally inferior products be labeled imitation. The New York statute, on the other hand, requires that all products that resemble or are intended to substitute for traditional or standardized cheese products --whether nutritionally inferior, superior, or equivalent-- be labeled imitation.

GMA claims that this alleged intrusion into a federally regulated field violates the Due Process, Commerce, Equal Protection and Supremacy Clauses of the United States Constitution and the Due Process and Equal Protection Clauses of the New York Constitution. Plaintiff also seeks relief under 42 U.S.C. § 1983 and requests attorneys fees. The matter is presently before me on plaintiff's motion for a preliminary injunction. The parties agree and I find that there are no unresolved material issues of fact. Summary judgment as to plaintiff's motion for a preliminary and permanent injunction is therefore appropriate. See Fed. R. Civ. P. 56. To evaluate plaintiff's arguments, I turn first to an in depth description of the relevant statutes and regulations.

BACKGROUND

The labeling of all food products shipped in interstate commerce is regulated generally by the Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 et seq., and its implementing regulations promulgated by the FDA. 21 C.F.R. § Part 100, et seq. The Act requires that the label of a food bear its "common or usual name ... if any there be," 21 U.S.C. § 343(i), and prohibits the sale of a food under the name of another food. 21 U.S.C. § 343(b). The FDCA further provides that a food which is an imitation of another food product is misbranded "unless the label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated." 21 U.S.C. § 343 (c). The statute, however, does not define the word "imitation." In 1973, the Food and Drug Administration ("FDA") promulgated regulations defining imitation food as food which "is a substitute for and resembles another food but is nutritionally inferior to that food." 21 C.F.R. § 101.3(e).[2] The regulations also provide that a substitute food that is not nutritionally inferior must be identified by an appropriate common or usual name or, if none exists, a descriptive term. See 21 C.F.R. §§ 102.1(a) & (b); 21 C.F.R. § 1.17. Violators of the FDCA are subject to both civil and criminal sanctions. 21 U.S.C. §§ 332-34. Unlike its counterparts in meat, poultry and packaging, the FDCA contains no express preemption provision.[3]

The production and labeling of all meat and poultry food products shipped in interstate commerce is regulated by the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601, et seq., the Federal Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451 et seq., and their respective implementing regulations, 9 C.F.R. § 317, et seq. Both the FMIA and the PPIA are administered by the United States Department of Agriculture ("USDA") which has the authority to approve all labels for meat and poultry food products prior to their shipment in interstate commerce. 21 U.S.C. §§ 607(d)(meat) & 457(d)(poultry). The misbranding provisions of the FMIA and the PPIA are substantially identical to the FDCA provisions. Compare 21 U.S.C. § 343(c) with 21 U.S.C. §§ 453(h)(poultry) & 601(n)(meat). No formal regulation has been issued defining "imitation" under either the FMIA or the PPIA, however, proposed rules are presently pending, 44 Fed. Reg. 75991, 76007-09 (Dec. 21, 1979), and the USDA has as a matter of policy adopted the FDA's definition of the term. See In Re: Castleberry's Food Co., FMIA No. 36 at p. 10 (USDA 1981); Food Labeling: Tentative Positions of Agencies, 44 Fed. Reg. 75990 (Dec. 21, 1979); Affidavit of Robert G. Hibbert, Director of Standards and Labeling Division, Meat and Poultry Inspection Technical Service, United States Department of Agriculture sworn to on December 9, 1983 at ¶ 2-3; Affidavit of Donald Houston, Administrator of the Food Safety Inspection Service, United States Department of Agriculture sworn to on February

2, 1984 at ¶ 4. Violators of the FMIA and the PPIA are subject to both civil and criminal sanctions. 21 U.S.C. §§ 461 & 467 (poultry); 21 U.S.C. §§ 672-676 (meat). Both Acts have an express preemption provision allowing the states to exercise concurrent jurisdiction in enforcement of the Acts but prohibiting the states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to or different than, those made under" the respective statutes. 21 U.S.C. §§ 467(e) & 678.[4]

Section 63 of the New York Agriculture and Markets Law was enacted on July 22, 1982, and became effective one year later.[5] The statute requires, in part, that products deemed under New York law to be imitation cheese or imitation cheese food bear the word "imitation" on their labels in letters of the same color, on a contrasting background, and of equal size as the letters of the brand name or product designation whichever is larger.[6] The statute further provides that service food establishments which offer products containing imitation cheese or imitation cheese food must (a) post a sign on the premises which states the names of the foods containing imitation cheese or imitation cheese food in block letters at least three inches in height against a contrasting background; (b) state on their menus the names of the products containing imitation cheese or imitation cheese food immediately after the product designation on the menu in letters of equal size; and (c) conspicuously label any

container used by consumers which contains imitation cheese or imitation cheese food product.[7]

The Commissioner of the New York Department of Agriculture and Markets issued final regulations implementing the statute which were to become effective on February 1, 1984. Pending the outcome of this litigation, however, the Commissioner has agreed not to enforce the statute and its regulations. The regulations define "imitation" cheese as "any food which is similar in texture, color, flavor, taste, and appearance" to cheese. 1 NYCRR §§ 18.1(c) & (d). Thus, the New York regulations require the word imitation on nutritionally equivalent or superior substitute cheese products instead of the federal requirement of the word "substitute" or other common or descriptive term. This conflict in definition as well as the additional labeling, sign posting and menu notification requirements form the basis of plaintiff's claims.

STANDING

Defendants' initial argument that GMA lacks standing to bring this action is without merit.[8] The standing of an association to assert the rights of its members is well established. See Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1976); National Motor Freight Ass'n v. United States, 372 U.S. 246 (1963). In Hunt, the Court stated that an association may have standing if:

> The association ... allege[s] that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members entitled to invoke the court's jurisdiction.

432 U.S. at 342-43, quoting Warth v. Seldin, 422 U.S. 490, 511 (1975).

Plaintiff's members are engaged in the business of producing, selling and distributing food products throughout the United States. Affidavit of Sherwin Gardner, Vice President, Science and Technology, GMA, sworn to January 17, 1984. Implementation of the New York statute will have an immediate and direct effect on them. See e.g., Affidavit of Thomas Brennan, District Manager of Industrial Products, Schreiber Foods, Inc. sworn to on January 12, 1984. Moreover, since "neither the claims asserted, nor the relief requested, requires the participation of individual members in the lawsuit," Hunt, 432 U.S. at 343, the individual members themselves are not indispensable parties. Under the Hunt standard, therefore, GMA has standing to assert the rights of its members in contesting the labeling provisions of the New York statute.

Further, GMA --as the representative of manufacturers and distributors of food products-- is a proper party to press a challenge to the sign and menu posting requirements of the New York statute even though those provisions apply only to food service establishments. Uncontroverted affidavits submitted by GMA fully support a finding that it's members will suffer direct and immediate harm in the form of lost sales as the result of the sign and menu posting requirements of the New York statute. Affidavit of Thomas Brennan, District Manager of Industrial Products, Schreiber Foods, Inc. sworn to on January 12, 1984; Affidavit of George W. Cawman, Vice President of Marketing, Schreiber Food, Inc. sworn to on December 13, 1983; Affidavit of Olindo DiFrancesco, President, Olindo's Food, Inc. sworn to on January 17, 1984. As indicated by the affidavit of Thomas Brennan, supra, the likely consequence of the sign and menu posting requirements is that food service establishments will purchase only natural cheese products in order to avoid compliance with the statute and the stigma associated with the term "imitation." I find therefore that under the Hunt standard, GMA also has standing to challenge the sign and menu posting requirements of Section 63.

PREEMPTION

Both the FDA and the USDA agree that the sign and menu posting requirements of the New York statute are not preempted by the FDCA, FMIA or the PPIA. GMA's challenge to

those provisions under the Commerce Clause will be addressed in a later section. The more difficult matter raised by the New York Imitation Cheese Statute is whether the labeling regulations are preempted by the respective federal statutes under the Supremacy Clause of the United States Constitution. The Commissioner argues that the federal regulations govern only the labeling of imitation cheese and do not extend to the labeling of food products which merely contain artificial cheese. Thus, defendants contend that the state is not preempted from issuing its own regulations in the related field.[9]

A. The Federal Meat and Poultry Acts

(1) The Preemptive Effect of the Federal Regulations

Both the FMIA and the PPIA explicitly address the labeling and ingredient requirements for all federally inspected meat and poultry food products transported in interstate commerce. In fact, the USDA is now considering proposed regulations on the labeling of meat and poultry food products containing cheese substitutes and a revised standard of identity for meat-topped pizza which would include a consideration of imitation cheese. Affidavit of Robert Hibbert, supra, at ¶ 6; 48 Fed. Reg. 35654-59 (Aug. 5, 1983). Each statute provides that while the state may exercise concurrent jurisdiction in enforcing the federal regulations, it may not impose labeling requirements that are "in addition to, or different than, those made under" the respective acts.

21 U.S.C. §§ 678 & 467(a). The New York regulations, which require meat and poultry products to be labeled in a manner other than that prescribed by the USDA, are "in addition to or are different than" the federal regulations in contravention of the express preemption provision of the FMIA and the PPIA. See Jones v. Rath Packing Co., 430 U.S. 519 (1977)(California practice of determining average net weight of meat food packages different from federal law is preempted; Armour & Co. v. Ball, 468 F.2d 76 (6th Cir. 1972), cert. denied, 411 U.S. 981 (1973)(Michigan law establishing standards of identity for sausage different from federal standards is preempted). The preemption provision found in the PPIA, in fact, was a Congressional response to a decision of the Second Circuit upholding a New York statute which imposed state labeling requirements for turkeys which were in addition to the labeling requirements of federal law. See Swift & Co. v. Wickham, 364 F.2d 241 (2d Cir. 1966), cert. denied, 385 U.S. 1036 (1967); Pub. L. 90-492 (Aug. 18, 1968) (adding to 21 U.S.C. § 467 (e)); 90 H.Rep. No. 1333, 90th Cong. 2d Sess. reprinted in 1968 U.S. Code Cong. & Ad. News 3426, 3427 (extending federal regulation to ensure state requirements at least equal to federal).

Moreover, the USDA has unequivocally stated that labels consistent with New York's regulatory scheme will not be approved by the agency if the product to be labeled is not nutritionally inferior to the product for which it

substitutes. Affidavit of Donald Houston, Administrator of the Food Safety Inspection Service, United States Department of Agriculture, sworn to Feb. 2, 1984 at ¶ 8; Affidavit of Robert G. Hibbert, Director of Standard and Labeling Divison, Meat and Poultry Inspection Technical Services, Food Safety and Inspection Service, United States Department of Agriculture sworn to Dec. 9, 1983 at ¶¶ 7 & 8. Thus, as to those meat and poultry products containing cheese substitutes which are subject to federal inspection and labeling provisions under the FMIA and the PPIA, the New York provisions are expressly preempted.

(2) Validity of the Federal Regulations

In apparent recognition that the New York statute is preempted, the Commissioner attacks the validity of the USDA's "imitation policy" asserting that the USDA policy of applying the FDA's definition of imitation is procedurally defective because there was no formal notice and comment period as required by the Administrative Procedure Act ("APA"), 5 U.S.C.§ 522, et seq. The distinction between a "rule" as defined in 5 U.S.C. § 551, which must be published with a notice and comment period, and "a general statement of policy" or an "interpretative rule" which are each excluded from the requirements of the APA, 5 U.S.C. § 553(b)(3)(A), "is enshrouded in considerable fog." Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir.), cert. denied, 423 U.S. 824 (1975).

Faced with a similar problem, the District of Columbia Circuit Court of Appeals distinguished the three terms in Pacific Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974), and held that an order of the Federal Power Commission establishing a priority schedule for curtailing delivery of natural gas in time of shortage was a general statement of policy. Id. at 41. The Court explained that "[a] general statement of policy is the outcome of neither rulemaking nor an adjudication, it is neither a rule nor a precedent but is merely an announcement which the agency hopes to implement in future rulemakings or adjudications." Id. at 38. "Interpretative rules are similar in some respects to general statements of policy ... An interpretative rule expresses the agency's view of what another rule, regulation, or statute means." 506 F.2d at 37 n. 14. On the other hand, the court found that a rule "establishes a standard of conduct which has the force of law." Id. at 38. It memorializes a binding norm not subject to challenge by individual parties. In holding that the FPC's order was a statement of general policy, the Court noted that the Commissioner intended "to establish the policy by proceeding through individual adjudications." Id. at 41.

Applying that standard to this case, I find that the USDA's imitation food policy is more akin to a statement of general policy or an interpretative rule than to a rule which requires formal notice and comment proceedings. Because the

policy is merely an interpretation of a statutory term not defined by the relevant statute, it may be an interpretative rule. I believe, however, that the policy is a statement of the general policy of the agency pending the outcome of rulemaking proceedings. After reviewing the FDA's 1973 definition of imitation, the USDA stated in 1979 in the Federal Register that the tentative position of the agency was to follow the 1973 FDA regulations pending further comment and formal rulemaking proceedings. 44 Fed. Reg. 76008 (Dec. 21, 1979). The USDA expressly adopted the policy in 1981 through the adjudicatory process in In Re Castleberry's Food Co., FMIA Docket No. 36 (Sept. 18, 1981) which was made available to the public in accordance with 5 U.S.C § 552(a)(2).[9] Formal rulemaking proceedings are presently pending. Moreover, the statutory scheme expressly permits the implementation of the policy on a case by case basis by requiring that all labels be individually approved by the agency prior to shipment in interstate commerce and that challenges to USDA labeling decisions to be made through individual adjudications. See 21 U.S.C. §§ 607(d) & (e); 21 U.S.C. §§ 457 (c) & (d). Thus, it appears to me that the USDA's adoption of the FDA's definition of "imitation" is merely a statement of general policy that is not procedurally invalid on the grounds that there was no formal rulemaking. See also 5 U.S.C. § 553 (b)(3)(A); Noel v. Chapman, 508 F.2d 1023 (2d Cir.), cert. denied, 423 U.S. 824 (1975); Continental Oil Co. v. Burns, 317 F. Supp. 194 (D.Del.

1970); K. Davis, Adminstrative Law Treatise §§ 7:4 & 7:5 (2d ed. 1979).

Even if I were to find the federal regulation invalid, the preemption provisions alone appear to preclude state regulation of meat and poultry food products containing imitation cheese. New York's regulations requiring the term imitation on all labels are "in addition to" the federal standard and are thus, expressly preempted. Besides his challenge to the procedural validity of the regulation, the Commissioner raises a question as to the substantive validity of the definition of imitation as adopted by the FDA. I turn to this argument in the following section in addressing preemption under the FDCA.

B. The Federal Food Drug and Cosmetic Act.

(1) The Preemptive Effect of the Federal Regulations

The regulatory scheme promulgated under the FDCA likewise preempts the labeling of food products which resemble or substitute for cheese or which contain cheese substitutes. The Commissioner, however, argues that the FDCA does not preempt New York's statute because, unlike the FMIA and the PPIA, the FDCA contains neither explicit labeling provisions applicable to artificial cheese nor an express preemption provision. In support, the Commissioner relies on Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919), in which the Supreme Court held that, absent federal action, the state retains its right to provide for adequate safeguards against

deception in the sale of food products. The Commissioner's argument, however, ignores the preemptive effect of the federal regulations that implement the FDCA. When Congress has given an agency the authority to act, the resulting "federal regulations have no less preemptive effect than federal statutes." Fidelity Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1981). Consequently, the issue is whether the regulatory scheme, read in conjunction with the federal statute, has impliedly preempted the field.

The Supreme Court recently discussed the standard I must apply in determining whether state laws are preempted by federal law in Silkwood v. Kerr-McGee, 104 S.Ct. 615 (1984). The Court explained that:

> state law can be preempted in either of two general ways. [a.] If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. ... [b.] If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent that it actually conflicts with federal law ... or where state law stands as an obstacle to the accomplishment of the full purpose and objectives of Congress.

Id. at 621 (citations omitted). Plaintiff argues that the New York regulations are invalid under either analysis. I will address each argument in turn.

(a) Congressional Intent to Occupy the Field

GMA contends that the FDCA manifests a Congressional desire to comprehensively regulate the labeling of food products shipped in interstate Commerce, leaving no room for

state regulation. In considering similar arguments, the Supreme Court has cautioned that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons --either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained." Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). The test for determining regulatory preemption is whether the agency intended its regulations to supersede state law. Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 154 (1981).

The principal focus of the FDCA is to "keep impure and adulterated [food and] drugs out of the channels of commerce." 62 Cases of Jam v. United State, 318 U.S. 593, 596 (1950). The federal labeling provisions in question here were specifically "designed to protect the public from inferior foods resembling standard products but marketed under distinctive names. See S.Rep. No. 361, 74th Cong. 1st Sess. 8-11." Id. at 600. Nothing in the FDA regulations necessarily reflects an intention by the FDA to displace the imitation food labeling requirements of a state. The statute itself does not reveal an unmistakable intention to oust state regulation. Moreover, plaintiff has not demonstrated that there is an overwhelming need for national uniformity or that the statute was designed to create such uniformity. Thus, there is no persuasive reason for me to find that

Congress intended to occupy the field. Cf. Swift & Co. v. Wickham, 364 F.2d 241, 244 (2d Cir. 1966)(the court, in dicta, notes that the FDCA does not preempt state regulation), cert. denied, 385 U.S. 1036 (1967).

(b) Actual Conflict

In my view, however, the state regulations are preempted because they are in conflict with the federal regulations. In Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978), the Supreme Court explained that:

> A conflict will be found "where compliance with both federal and state regulations is a physical impossibility ... ," Florida Lime & Advocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state "law stands as an obstacle to the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Jones v. Rath Packing Co., supra, at 526, 540-541. Accord, De Canas v. Bica, 424 U.S. 351, 363 (1976).

The New York regulations require that all cheese substitutes or food containing cheese substitutes be labeled "imitation" even though the FDA would require that only "nutritionally inferior" products be labeled with the term. The FDA expressly found that labeling all substitutes as imitation is misleading and confusing to consumers. 38 Fed. Reg. 2138 (Jan. 19, 1973). Instead, the federal regulations require nutritional equivalent products to be labeled by a common or descriptive term, e.g., mozzarella cheese substitute. The New York standard as applied to nutritionally equivalent or superior products is contrary to

the federal standard and products labeled as such would be deemed misbranded under the federal statute. See 21 U.S.C.§ 434(c); 21 F.F.R. §101.3(e); Affidavit of Robert Hibbert, supra at ¶ 7 & 8; Affidavit of Donald Houston, supra, at ¶ 8. Thus, if a manufacturer complies with the New York statute, the manufacturer would, at the same time, violate the federal regulations and would therefore be subject to sanctions under the federal statute for misbranding. In short, compliance with both regulations is impossible.

The Commissioner suggests that the New York regulations are consistent with federal regulations because the language of the regulations do not preclude "a nutritionally equivalent" food product from being labeled an "imitation." Although the FDA has determined that some nutritionally equivalent products may be designated as "imitation," 38 Fed. Reg. 20702-703 (Aug. 2, 1973), the agency has also determined the specific circumstances under which that can occur. It has stated that:

> A manufacturer or distributor may label a substitute food which is not nutritionally inferior to the traditional food as an imitation if he concludes that the product is inferior in some other way and if the use of the term is not misleading.

Id. (emphasis added). Thus, any question as to when use of the label "imitation" is required is foreclosed by the FDA's regulations.

In addition, the New York regulations frustrate FDA's dual purpose of encouraging the development of nutritious foods and of informing the public of "the actual characteristics amd properties of a new food product." See 38 Fed. Reg. 2138 (Jan. 19, 1973); accord, 38 Fed. Reg. 20702 (Aug. 2, 1973). The FDA has expressly rejected the Commissioner's per se application of the term "imitation" to all food substitutes because the term connotes inferiority and would thereby discourage the development of nutritionally superior products in contravention of Congressional intent in passing the FDCA. 38 Fed. Reg. 2138 (January 18, 1973). Moreover, the FDA found that the indiscriminate use of "imitation" on all foods leads to consumer confusion which the FDCA was designed to prevent. Thus, the state regulation interferes with the "accomplishment and execution of the full purposes and objectives" of the agency's regulations. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1977) citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Under these circumstances, where the state regulations directly conflict with federal law and in fact, stand as an obstacle to the accomplishment of the purpose of the federal law, the state regulations are preempted by the federal regulatory scheme.

(2) Validity of the Federal Definition of Imitation

The Commissioner's primary argument in support of the state regulations is that the FDA and the USDA are not enforcing the respective statutes as Congress intended. None

of the pertinent federal statutes define the term "imitation."[10] The Commissioner argues, however, that judicial precedent construing the term requires the federal agencies to adopt a definition which comports with the term's ordinary and plain meaning. This, defendant contends, is precisely what New York has done in requiring all artificial cheese products that resemble traditional cheese in taste, smell, texture and appearance to be labeled imitation. Because the agencies have ignored this precedent, the Commissioner argues that the FDA's definition of imitation is contrary to the FDCA and is invalid.

In Federation of Homemakers v. Schmidt, 539 F.2d 740 (D.C. Cir. 1976), the Distict of Columbia Circuit Court of Appeals deferred to the expertise of the FDA in promulgating its definition of imitation and found that the regulation which takes into account only nutritional inferiority is "well within the zone of reasonableness required of agency rulemaking." 539 F.2d at 743-744. The Eighth Circuit adopted the reasoning of the Court in Homemakers and again upheld the regulation in National Milk Producers' Federation v. Harris, 653 F.2d 339 (8th Cir. 1981). The Commissioner challenges the reasoning of each decision on the ground that the Courts improperly deferred to the agency's interpretation of a statutory term. I disagree. Certainly, statutory interpretation is a question of law which, as a general rule, is freely reviewable. Nevertheless, "the interpretation of an agency charged with the

administration of a statute is entitled to substantial deference," Blum v. Bacon, 457 U.S.132, 141 (1981), unless the agency's interpretation is "contrary to the indications of the statute itself." SEC v. Sloan, 436 U.S. 103, 117 (1977).

The Commissioner cites no legislative authority which indicates that Congress intended to adopt a standard for imitation that requires consideration of texture, color, flavor, taste and appearance. My own research discloses none. Cases construing the term "imitation" prior to the issuance of the 1973 regulations, however, do tend to support the Commissioner's position. See e.g., 62 Cases More of Jam v. United States, 340 U.S. 593, 599-600 (1951); United States v. 651 Cases, More or Less, of Chocolate Chil-Zert, 114 F. Supp. 430, 432 (N.D.N.Y. 1953). In each of these cases, the Courts struggled with the definition of the term "imitation" and considered whether the substitute food product resembled the traditional food in terms of taste, smell, texture and appearance. The only consistent holding to be extrapolated from the cases is that the term "connotes inferiority". 62 Cases of Jam v. United States, 340 U.S. at 599; United States v. 651 Cases, ... of Chocolate Chil-Zert, 114 F. Supp. at 432.

The FDA regulation is not to the contrary. As a practical matter, the agency must consider taste, smell, texture and appearance in order to make the preliminary determination that the product is a substitute for or resembles

a traditional food. See In Re: Castelberry's Food Co, FMIA No. 36 (USDA 1981). Moreover, the FDA's definition preserves the notion of inferiority. The imitation standard merely defines inferiority in terms of a product's nutritional content and requires that a product which is nutritionally inferior to the food it resembles be labeled imitation. Nutritionally equivalent products may only be labeled imitation if the product is inferior to the traditional food for some other reason. The agency's abandonment of taste, smell and appearance as the test of inferiority in favor of a nutritional equivalency standard because the former test was too subjective is well within the discretion granted to it by Congress. See Weinberger v. Hyson, Wescott & Dunning, Inc., 412 U.S 609 (1973); CIBA-Geigy Corp. v. Richardson, 446 F.2d 466, 468 (2d Cir. 1971).

Furthermore, Congress appears to be satisfied with the FDA's standard for imitation because, although it has twice amended the FDCA misbranding provisions since the regulations were issued, Pub. L. 94-278 (1976)(adding § 343(c)); Pub. L. 95-203 (1978)(adding §§ 343 (o) & (p)), Congress has not acted to amend FDA's imitation standard. See United States v. Rutherford, 442 U.S. 544, 554 (1978)(that Congress has not acted to correct any misperception of its statutory objectives on an issue of public importance weighs in favor of deference to the agency's construction).

The FDA's regulations defining "imitation" represent a carefully considered effort to construe a statutory term not defined by Congress. The notice of proposed rulemaking published in 1973 stated that the term must be defined in light of its common understanding and must take into account recent advances in the industry which have developed food substitutes that are not inferior to the products for which they substitute. 38 Fed. Reg. 2138 (Jan. 19, 1973). The agency recognized that applying the term "imitation" to nutritionally equivalent or superior foods would be misleading to the consumer because traditional notions of the term suggest inferiority. Id. In August of 1983, after a notice and comment period, the FDA reaffirmed its existing definition of "imitation," 48 Fed. Reg. 37665 (Aug. 19, 1983), and noted that consumer recent surveys supported a finding that the term "imitation" connotes an inferior product. Id. at 37665-66. As the Court stated in Homemakers, "the new regulation successfully reconciles the need to alert the public to inferior products with the proscription in subsection 343(a) against false or misleading labels." Federation of Homemakers v. Schmidt, 539 F.2d 740, 743 (D.C. Cir. 1976).

In arguing that the Court in Homemakers improperly deferred to the agency's expertise, defendants urge me to follow Swift & Co., Inc. v. Walkley, 398 F. Supp. 1198 (S.D.N.Y. 1973)(Weinfeld, J.). In Swift, the court denied a motion by a manufacturer of imitation frankfurters to enjoin

the state from requiring a meat product bearing a USDA approved label to be labeled "imitation frankfurter." Judge Weinfeld did not address the FDA's recently issued "nutritionally inferior" standard for imitation food. Instead, the court reasoned that the USDA's admitted disregard of the statute did not prevent the state from exercising its concurrent jurisdiction to enforce it. Id. The case does not warrant a different result here. The FDA has not refused to enforce the statute nor, as the result here shows, has it issued standards contrary to the FDCA. I believe that the Eighth and District of Columbia Circuits properly deferred to the agency's expertise and find that the regulation as issued is valid.

COMMERCE CLAUSE

As a second ground for enjoining Section 63, plaintiff argues that the statute imposes an impermissible burden on interstate commerce. In deciding whether the state requirements unconstitutionally burden interstate commerce the threshold inquiry is whether the state regulation operates even-handedly between intrastate and interstate commerce to effectuate a legitimate local public interest. Hughes v. Oklahoma, 441 U.S. 332, 336 (1979); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1969). In this case, I have no doubt that the regulations operate even-handedly to the extent that all foodstuffs containing imitation cheese are subject to the menu and sign posting requirements. The question thus devolves to whether, despite the even-handed operation of the regulations,

the burden on interstate commerce is excessive in relation to the putative local benefits. Pike v. Bruce Church, Inc., 397 U.S. at 142. Because I have already found that the labeling provisions of the New York statute are invalid, I need only consider whether the burden the sign and menu posting provisions place on interstate commerce is excessive in light of the putative local benefits.[11]

A. Asserted Local Benefits

The New York regulations are intended to promote a legitimate and, indeed, laudible purpose. The statute was enacted to promote informed consumerism and fair competition by preventing fraud and deception in the marketing of alternative cheese products. Regulation of the production of foodstuffs market has traditionally been a matter of local concern. Florida Avacado and Lime Growers v. Paul, 373 U.S. 132 (1963); American Meat Institute v. Ball, 550 F. Supp. 285, 287 (W.D. Mich. 1982). So, too, has been the protection of consumers from deception and fraud. Savage v. Jones, 225 U.S. 501 (1912). The state clearly has a legitimate interest in protecting purchasers from the adverse consequences of unknowingly consuming inferior cheese substitutes. The sign and menu regulations which would require the labeling of inferior products as imitation would effectuate that purpose.

The statute as applied to nutritionally equivalent and superior cheese products, however, reaches beyond that limited interest and attempts to prevent consumer deception in the

consumption of cheese food products that will not affect the consumer's nutritional well-being. Nutritionally equivalent and superior cheese substitutes have nutritional, dietary, medical, religious and economic advantages not found in traditional cheese products. See Affidavit of Dr. Robert G. Bursey, Manager, Nutrition Research, Kraft, Inc., sworn to January 11, 1984; T. Graff, Report of Economic Impact of Imitation Cheese, August, 1982, Exhibit 2 to Plaintiff's Reply Brief; Affidavit of R.W. Nicholas, Director, Institutional Food Products, Anderson Clayton Foods, sworn to January 11, 1984. The blanket labeling of all substitutes as "imitation" does little to convey to the consumer information as to the ingredients, nutritional value or effect on the consumer's health. In fact, the blanket labeling requirement may itself cause consumer confusion because consumers equate the term "imitation" with inferior products and because all other food products are labeled under the federal standard. See e.g, Affidavit of Thomas Blaisdell Smith, Director of Government Affairs, Public Voice for Food and Health Policy sworn to January 10, 1984.

As an example, in American Meat Institute v. Ball, 550 F.Supp. 285 (W.D. Mich. 1982), aff'd on other grounds, No. 82-1742 (6th Cir. Jan. 6, 1984), a Michigan state statute requiring that meat products not meeting Michigan standards be accompanied by a placard stating that such products "do not meet Michigan's high ingredient standards but do meet lower

federal standards," was found to have little, if any, local public benefit for similar reasons. In finding that the statute promoted no legitimate state interest, the court stated that "the Michigan placard does not rectify any lack of meaningful information, but merely substitutes one form of incomplete information for another." Id. at 292. I likewise believe that the menu and sign posting requirements as applied to all substitute cheese products do little to effectuate the purpose of the statute and thus, have limited value to the public.

B. Burden on Interstate Commerce

As a practical matter, food service establishments will have no method of determining whether the product they serve is an imitation within the meaning of the state statute. The only notice a restauranteur or store owner may have of what is being served is through the packaging of the product by the manufacturer yet the manufacturer is not required to comply with the labeling provisions of the statute. Under these circumstances, the retailer has few alternatives; he will be unable to comply with the statute, will opt in favor of serving only natural cheese, or will insist that the manufacturer provide information sufficient to insure the retailer's compliance with the statute. If he chooses either of the latter alternatives, I am faced with the question of whether, despite the putative local benefits, the statute places an excessive burden on interstate commerce.

There is no question that the implementation of the New York regulations will have an immediate and direct impact on interstate commerce. The State regulations will necessarily increase the costs of doing business in New York for plaintiff's members as they will incur additional expenses in providing necessary information to retailers. See Exibits 7-15 to Plaintiff's Reply Brief. Producers, desirous of continuing to do business in New York, will be compelled to provide information to the retailer in addition to that required by federal law which will be limited to use in New York. Moreover, as the affidavit of Thomas Brennan, supra, demonstrates, GMA's members will suffer direct loss in the form of lost sales if the retailer chooses to serve only natural cheese. See also Affidavit of George W. Cawman, supra. The affidavit of Olinda DiFransesco, supra, indicates that because of the anticipated enforcement of the New York statute, some manufacturers have already suffered a loss of sales.

Furthermore, there are less burdensome means of serving the same objectives. Inasmuch as the federal government has found it possible to protect consumers from misleading packaging through its ingredients requirements, it cannot be said that less burdensome measures are not available to New York. In view of the questionable local benefits to be achieved by the regulations, I find that the New York sign and menu posting provisions impose an unacceptable burden on interstate commerce.

Because I have ruled that the labeling provisions of Section 63 of the New York Agriculture and Markets Law as interpreted by the Commissioner's regulations are preempted by federal regulations and that the menu and sign posting provisions of the statute place an unreasonable burden on interstate commerce, I need not address plaintiff's equal protection or state law claims.

For the reasons stated above, New York's Imitation Cheese Statute, N.Y. Agric. & Mkts. Law § 63 (McKinneys Supp. 1983), and its implementing regulations, 1 NYCRR 18, are unconstitutional and a permanent injunction enjoining defendants from enforcing those provisions is granted. Plaintiff's request for attorneys fees is denied.

SO ORDERED.

DATED: New York, New York
March 8, 1984

U.S.D.J.

NOTES

1. The United States Department of Agriculture and the United States Food and Drug Administration have responded as additional defendants on the Commissioner's counterclaim.

2. Nutritionally inferior is defined in 21 C.F.R. §101.3(e)(4) as:

> (i) Any reduction in the content of an essential nutrient that is present in a measurable amount, but does not include a reduction in the caloric or fat content... (ii) For the purpose of this section, a measurable amount of an essential nutrient in a food shall be considered to be 2 percent or more of the U.S. RDA of protein of any vitamin or mineral listed under §105.3(b) of this chapter per average usual serving, or where the food is customarily not consumed directly, per average usual portion, as established in §101.9.

3. The FDA has issued its food labeling regulations under both the Fair Package and Labeling Act ("FPLA") and the FDCA. See 21 C.F.R. Part 101; 38 Fed. Reg. 20702 (Aug. 2, 1973). The FPLA provides labeling requirements that are similar to the misbranding provisions set forth in the FDCA. Compare 15 U.S.C. § 1453 with 21 U.S.C. § 343. While the FPLA contains an express preemption provision, 15 U.S.C. § 1460, plaintiff does not suggest that the New York regulations are preempted under that statute.

4. Both preemption provisions provide in part:

> Marking, labeling, packaging, or ingredient requirements ... in addition to, or different than, those made under this chapter may not be imposed by any State ... with respect to articles prepared at any official establishment in accordance with the requirements under this chapter, but any State ... may, consistent with the requirements under this chapter exercise concurrent jurisdiction with the Secretary ... for the purpose of preventing the distribution of ... any such articles which are adulterated or misbranded ... . This chapter shall not preclude any State ... from making requirement or taking other action,

consistent with this chapter, with respect to any other matters regulated under this chapter.

5. A 1983 amendment changed the size of the required labels from one third the size of the brand name to letters of equal size. N.Y. Agric. & Mkts Law § 63 (McKinneys Supp. 1983) as amended by 1983 N.Y. Laws ch. 617, § 1; see also n. 6, infra.

6. The labeling provisions of the statute require that:

> The word "imitation" must appear on the labels of imitation cheese and imitation cheese food in letters of the same color, same contrasting background, and of equal size as the brand name or product designation, whichever is larger. "Imitation" must immediately precede the brand name or printed product designation, without intervening printed or graphic matter, everytime the brand name or product designation appears on the label.
>
> Labels of products containing imitation cheese or imitation cheese food must bear the words "contains imitation cheese" or "contains imitation cheese food" immediately preceding the name of the food. The letters in the quoted phrase must be in the same color, on the same contrasting background, and of equal size as the letters in the product designation.

7. The sign and menu posting provisions require that:

> Establishments which offer products containing imitation cheese or imitation cheese food for carryout or on premises consumption must prominently post a sign which state the product designation of the food followed immediately by the words "contains imitation cheese" or "contains imitation cheese food." The letters on the sign must be in block letters at least three inches high in height and on a contrasting background which can be easily read by consumers under normal conditions of purchase.

> Service food establishments which offer any product containing imitation cheese or "imitation cheese food product" must state on the menu that the product "contains imitation cheese" or "contains imitation cheese food." The quoted phrase must immediately follow the product designation on the menu, and it must be in letters of equal size and on a contrasting background.
>
> Service food establishments which place imitation cheese or "imitation cheese food product" on tables, or otherwise make it available for use by customers, must conspicuously label the container of such product "imitation cheese" or "imitation cheese food product."

8. In their answer, the Commissioner also suggests that plaintiff's claims are barred by the eleventh amendment. The eleventh amendment simply does not prevent the declaratory and injunctive relief sought by GMA, see Edelman v. Jordan, 415 U.S. 651 (1974), nor does it prevent an award of attorneys fees under 42 U.S.C § 1988 in a proper case. Hutto v. Finley, 437 U.S. 678 (1978).

9. Section 552(a)(2) of the Adminstrative Procedure Act provides in pertienent part that:

> Each agency, in accordance with published rules, shall make available for public inspection and copying--
> (A) final opinions ... made in the adjudication of cases ...
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register ...
> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than the agency only if--
> (i) it has been indexed and either made available or published as provided by this paragraph; or
> (ii) the party has actual or timely notice of the terms thereof.

10. The Filled Milk Act, 21 U.S.C. §§ 61-65, in particular, lends little support to the Commissioner's position. The statute, which was enacted in 1923 and held unconstitutional in Milnot v. Richardson, 350 F.Supp. 221 (D. Ill. 1972), precluded any person form manufacturing or shipping in interstate commerce any item of "filled milk". 21 U.S.C. § 61. "Filled milk" was defined as any milk ..."to which has been added ... any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk... ." 21 U.S.C. § 61(c). The statute did not apply to the labeling of food products. Neither the Act nor the few cases construing it expressly define the term "imitation." See e.g., Carolene Products v. United States, 323 U.S. 18 (1944). Rather, the statute merely presented an absolute ban on all substitute milk products whether or not the product was an imitation or was informatively labeled.

11. The Commissioner's contention that 21 U.S.C. § 25, which was enacted in 1902, removes the Commerce Clause issue from this case is baseless. The statute provides, in part, that:

> All articles known as ... imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State ... and remaining therein for use, consumption, sale or storage therein, shall, upon the arrival within the limits or such State ...be subject to the operation and effect of the laws of such State ....

21 U.S.C. § 21. One of the few cases to construe the statute make it clear that Congress, in passing 21 U.S.C. § 25, intended to preserve to the states their traditional police powers of protecting its citizens from adulterated foods. Cloverleaf Co. v. Patterson, 315 U.S. 148 (1941). As the Court noted in Cloverleaf, however, 21 U.S.C. § 25 does not permit a state to act in a way "inconsistent with federal legislation." I should also note that the Commissioner has cited no authority, except the statute itself, for this broad proposition.

ATTACHMENT 12, 4/3/84

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*ADMITTED IN MARYLAND ONLY

April 2, 1984

Senator Fred Kerr
Chairman, Agriculture Committee
State Capitol
Room 143 North
Topeka, Kansas 66612

Re: House Bill No. 3055 --
"Imitation" Dairy Labeling

Dear Senator Kerr:

Our firm represents a number of frozen pizza manufacturers and cheese alternate producers who oppose the adoption of House Bill No. 3055. It is our understanding that the Senate Agriculture Committee will be considering an amendment to H. 3072 (repeal of the Filled Milk Act) similar to House Bill No. 3055. Attached for your review in considering this amendment are the following documents:

1) Testimony of the National Frozen Pizza Institute presented before the House Federal/State Affairs Committee in opposition to House Bill 3055.

2) Section 408 (21 U.S.C. Section 678) of the Federal Meat Inspection Act which explicitly prohibits state or local governments from imposing labeling requirements on meat food products which are "in addition to or different from" USDA requirements. The wording of this provision has been upheld many times including by the U.S. Supreme Court. See Jones v. Rath Packing Co., 430 U.S. 519 (1977). See also, Anthony J. Pizza Food Products Corporation v. Wisconsin, No. 81-1744 (7th Cir., February 16, 1982), aff'g. No. 77-C-101 (W.D. Wisc. March 30, 1981) and Grocery Manufacturers of America v. Gerace, No. 83-8629 (S.D.N.Y. March 8, 1984).

Att. 12

3) Letter from Wisconsin Department of Agriculture to our firm indicating that multi-component meat food products are exempt from the Wisconsin artificial dairy labeling law.

We urge your Committee to reconsider the merits of House Bill 3055. The labeling proposed in that bill is inconsistent with federal requirements, and therefore will cause a substantial burden for food manufacturers seeking to distribute in interstate commerce. In the event there is strong feeling on the part of the Committee to move forward with this legislation, I would urge the following changes be made:

1) Specifically exempt multi-component meat food products from the bill's coverage.

2) Adopt the Federal definition of "imitation" as set forth at 21 C.F.R. Section 101.3(e).

Thank you for your consideration of this matter.

Respectfully submitted,

RICHARD L. FRANK

Enclosures

Testimony of the

National Frozen Pizza Institute

Before The

Federal/State Affairs Committee of
The Kansas House

On

House Bill No. 3055

Good afternoon. My name is Michael Ziebell and I am here today representing the National Frozen Pizza Institute to express our opposition to House Bill 3055. The National Frozen Pizza Institute is a national non-profit trade group representing the nation's major frozen pizza manufacturers and many of their supplier. The NFPI opposes House Bill 3055 because it would require labeling of food products in a manner different than currently required by the Federal government and the vast majority of other state governments. Non-uniform labeling requirements needlessly create costs for producers and consumers and serve to confuse consumers.

Federal Labeling Requirements

The Federal government already extensively regulates the labeling of all "imitation" products, including imitation dairy products. The Federal Food and Drug Administration, which has jurisdiction over all non-meat and poultry food products, requires all products which resemble and can substitute for standardized products (including dairy products) to bear the term "imitation" if these substitutes are nutritionally inferior to the standardized product. 21 C.F.R. Section 101.3(e). Where the substitute is

nutritionally equivalent or superior to the standardized product, it need not bear the term "imitation," but must be descriptively labeled in a manner so as it is not confused with the standardized product (e.g., margarine, mellorine, cheese substitute). The U.S. Department of Agriculture, which has jurisdiction over all meat and poultry products, including meat-topped pizza, similarly has adopted a definition of "imitation" which is identical to the FDA definition.

House Bill 3055 defines "imitation" in a manner inconsistent with Federal rules. Section 2(d) of House Bill 3055 defines all substitute dairy products as "imitations" irrespective of their nutritional profile. Thus, nutritionally equivalent or superior dairy substitutes, which under Federal law could be labeled as e.g., non-dairy coffee whitener or cheese substitute, must be identified as "imitation milk" or "imitation cheese" under the Kansas law.

Similarly, Section 4(e) would require comparative nutrition labeling on all products subject to the law. Federal law does not require comparative nutrition labeling for "imitation" or "substitute" products.

Finally, it will be impossible for a food processor to comply with both the Kansas law and Federal law. Section 4(b) of House Bill 3055 requires compliance with Federal law; because the Kansas definition of "imitation" would differ from the Federal definition, compliance with both laws is impossible.

It is critically important to food manufacturers who distribute their products nationwide to have uniform labeling laws. For years, the Association of Food and Drug Officials, a group including Kansas representatives, has urged the adoption of uniform labeling laws. Compliance with a variety of labeling laws imposed by different states makes doing business difficult if not impossible and imposes unnecessary trade barriers.

In recognition of the need for national labeling uniformity, the U.S. Congress amended the Federal Meat Inspection Act in 1967 to prohibit state and local governments from imposing labeling requirements which are "in addition to or different than" USDA requirements. See 21 U.S.C. Section 678. This provision has been upheld by various Federal courts, including the U.S. Supreme Court (Jones v. Rath Packing Co., 430 U.S. 519 (1977)) and has also been applied to labeling of non-meat/poultry products under the Federal Food, Drug and Cosmetic Act. See Cosmetic Toiletries and Fragrance Association v. Minnesota, 575 F.2d 1256 (8th Cir. 1978); Grocery Manufacturers of America v. Gerace, No. 83 Civ. 8629 (S.D.N.Y. March 9, 1984).

Other State Laws

Kansas is not the first state to consider "imitation" dairy labeling laws. Just recently, the State of New York adopted an "imitation cheese" labeling law which was inconsistent with Federal law. Last Friday, a Federal District Court in New York struck down the New York law on the ground that it is preempted by Federal law.

Similarly, the States of Wisconsin and Minnesota have considered and adopted "artificial" dairy labeling laws. ~~Both of these laws are currently under attack in Federal Court.~~ Interestingly, recognizing Federal preemption and the difficulty of applying these labeling laws to multi-component products, of which the dairy substitute is only one part, both Wisconsin and Minnesota have exempted (1) multi-component products; and (2) meat food products from their law's coverage.

Conclusion

It is critically important to all interstate food processors and distributors to have a uniform set of labeling laws. The National Frozen Pizza Institute strongly urges this Committee to either disapprove this Bill or amend it to make it consistent with Federal law. The sponsor's intent, as reflected in Section 4(b), appears to be consistency with Federal law. If this is the case, the Committee should take the following actions:

1) Amend the definition of "imitation" to be consistent with 21 C.F.R. Section 101.3(e).

2) Delete the nutritional labeling comparison requirement.

3) Exempt meat food products and poultry products which are subject to the exclusive jurisdiction of the U.S. Department of Agriculture and subject to explicit preemption provisions.
21 U.S.C. Section 678.

4) Exempt all multi-component products of which the dairy substitute or imitation dairy product is only one component.

Thank you for providing me the opportunity to present our views.

§ 678. Non-Federal jurisdiction of Federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Mar. 4, 1907, c. 2907, Title IV, § 408, as added Dec. 15, 1967, Pub.L. 90–201, § 16, 81 Stat. 600.

Historical Note

Effective Date. Section effective Dec. 15, 1967, see section 20 of Pub.L. 90–201, set out as a note under section 601 of this title.

Legislative History. For legislative history and purpose of Pub.L. 90–201, see 1967 U.S.Code Cong. and Adm.News, p. 2168.

State of Wisconsin
DEPARTMENT OF AGRICULTURE, TRADE & CONSUMER PROTECTION

La Verne Ausman
Secretary

801 West Badger Road
P.O. Box 8911
Madison, Wisconsin 53708
608 266-1721

February 24, 1983

Mr. Richard L. Frank
Olsson & Frank, P.C.
Attorneys at Law
Suite 400
1029 Vermont Avenue, N.W.
Washington, D. C. 20005

Dear Mr. Frank:

Re: Dairy Substitute Labeling Requirements

This is in response to your letter of January 21, 1983, and will also confirm several telephone conversations we have had relative to the above captioned subject.

Enclosed is a copy of the latest draft of the proposed Chapter Ag 56, Wis. Adm. Code. This latest draft is identified by the date and code number 2/18/83-7. It contains a number of changes from the proposal presented at public hearing and identified as 9/24/82-2.

One of the changes includes a rewrite of section Ag 56.01(2)(d). This rewrite was made as requested at the public hearings and also by the Assembly Committee on Agriculture and Nutrition.

The original purpose of this subsection was to provide that new dairy products that do not have a standard of identity, as described in Ag 56.01(2)(a)(b) and (c), would not have to be labeled as "artificial dairy products." This purpose has not changed and the new wording will hopefully clarify and verify this.

Furthermore, it was never the intent that the new law, the rule, or this subsection would apply to compound foods such as meat food products, including meat topped pizzas or multicomponent compound foods such as macaroni and cheese. We firmly believe that the new section, Ag 56.01(2)(d), will eliminate any further questions about this.

As you know, the Policy Board of the Department of Agriculture, Trade and Consumer Protection approved issuing the final order on this proposed rule in December, 1982. The last step in the rulemaking procedure here in Wisconsin is referral of the proposed rule to the appropriate legislative committees. The Assembly Committee on Agriculture and Nutrition held a public hearing on the proposed rule on February 9, 1983, and requested that the Department consider changing Ag 56.01(2)(d) as indicated earlier. The Senate Committee on Agriculture held a public hearing on the proposed rule on February 15, 1983, and waived any objections to the proposed rule.

The Assembly Committee has until next Monday, February 28, 1983, to act on the proposed change in Ag 56.01(2)(d). If they do not object to this change, the final order will be signed on the proposed rule. Although this is not certain, it would appear that the effective date of the new rule will be May 1, 1983.

Sincerely,

N. E. Kirschbaum

N. E. Kirschbaum
Administrator
FOOD DIVISION

NEK/T1/5/D6

Enc.