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11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 MIYOKO’S KITCHEN, INC.,

14 *Plaintiff,*

15 v.

16 KAREN ROSS, in her official capacity as  
Secretary of the California Department of  
Food and Agriculture, and STEPHEN BEAM,  
17 in his official capacity as Branch Chief of the  
Milk and Dairy Food Safety Branch,

18 *Defendants.*

Case No. \_\_\_\_\_

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

20 Miyoko’s Kitchen, Inc.—a maker of 100% plant-based foods—brings this suit under the  
21 First Amendment because California’s Milk and Dairy Food Safety Branch has recently ordered  
22 Miyoko’s to remove truthful messages and images from its website and its product labels—  
23 including the phrase “100% cruelty and animal free,” the use of the word “butter” in the phrase  
24 “vegan plant butter,” and even an image of a “woman hugging a cow.”

## INTRODUCTION

1  
2 Miyoko's Kitchen, Inc. produces a popular line of 100% plant-based vegan cheese and  
3 butter products. The company prominently markets all its products as vegan and plant-based,  
4 with labels that unmistakably convey that they are "VEGAN" (for example, "CULTURED  
5 VEGAN PLANT BUTTER") and that they are "*Made From Plants*." Founded in 2013 by  
6 Miyoko Schinner—a Japanese immigrant who published a successful vegan-cheese cookbook the  
7 previous year—Miyoko's has grown rapidly, leading observers to predict that it has "the potential  
8 to do for dairy alternatives what Beyond Meat is doing for beef substitutes." The company's  
9 target market is people who want to avoid dairy made from animals. To that end, its products  
10 are all described—on its labels on grocery store shelves, on the company's website, and in its  
11 advertising—as "100% dairy and cruelty free." Schinner founded Miyoko's on "the principle of  
12 compassion for all living beings." "We're on a mission," she says, "to craft dairy products we all  
13 love, 100% from plants, making them kinder, greener and tastier than ever before."

14 But Miyoko's recently received a letter from the State of California that gravely imperils  
15 its ability to truthfully convey that mission, and accurately describe its products, to the public. In  
16 the letter, the Milk and Dairy Food Safety Branch of the Department of Food and Agriculture  
17 orders Miyoko's to remove claims that its vegan products are "100% cruelty and animal free,"  
18 "cruelty free," and "lactose free"—all entirely truthful statements. The State also instructs  
19 Miyoko's that it may not legally use the word "butter" in the phrase "Cultured Vegan Plant  
20 Butter." And the State informs Miyoko's that it may not "assert" that Miyoko's products "are  
21 'revolutionizing dairy with plants'"—in other words, the company may not proclaim its own  
22 mission to the public—because this renders its products "misbranded" under federal law.

23 Going further still, the State orders Miyoko's to "remov[e]" an "image of a woman  
24 hugging a cow" (and other images "associating the product with such activity") from the

1 company's website. According to the letter, Miyoko's statements and images, both on its labels  
2 and website, "require[] revision" to come into "compliance" with state and federal law. The  
3 company is ordered to "make the necessary changes" and submit them for review by the State.

4 The State's stance would suppress speech while in no way protecting the public from  
5 deception. For decades, plant-based producers have used terms like "vegan cheese," "soy milk,"  
6 and "cashew yogurt." Consumers are not confused by these labels. In fact, plant-based dairy  
7 terms are so widely used that the FDA itself uses them.

8 In censoring Miyoko's mission, its animal-friendly imagery, and its accurate descriptions  
9 of its plant-based products, the State of California has bowed to pressure from industry lobbyists  
10 and taken sides in a heated national debate between proponents of plant-based and animal-based  
11 foods. Because of the growing consumer demand for plant-based alternatives, conventional meat  
12 and dairy producers increasingly view plant-based foods as a threat. Their lobbyists have  
13 responded by pressuring legislators and regulators (including California's) to censor the speech of  
14 plant-based producers. Arkansas, for example, recently passed a law to prevent plant-based  
15 companies from truthfully using words like "meat" to describe their products—an effort that was  
16 recently enjoined by a federal court under the First Amendment.

17 California has now joined the ranks of these protectionist state actors. The State has  
18 insisted that Miyoko's make wholesale changes that would prevent the company from  
19 communicating its mission and cost well over \$1 million in new packaging alone. The State's  
20 action has already chilled Miyoko's speech and will significantly obstruct plant-based producers'  
21 ability to convey their message. The State's position, and its purported application of state and  
22 federal law, violate the First Amendment on an as-applied basis. Miyoko's accordingly seeks  
23 injunctive and declaratory relief to safeguard its right to engage in truthful and non-misleading  
24 speech about its plant-based dairy products, without fear of enforcement or reprisal by the State.

1 **JURISDICTION AND VENUE**

2 1. This action arises under the Constitution of the United States and 42 U.S.C.  
3 § 1983. The jurisdiction of this court is invoked under 28 U.S.C. §§ 1331 and 1343(a).

4 2. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1)–(2) because the  
5 plaintiff resides in Sonoma County, which is located in this judicial district, and a substantial part  
6 of the events or omissions giving rise to the claims occurred in Sonoma County.

7 **INTRADISTRICT ASSIGNMENT**

8 3. This action arises in Sonoma County because a substantial part of the events  
9 giving rise to the claim occurred in Sonoma County and the case should therefore be assigned  
10 under Civil Local Rule 3-2(c) to either the San Francisco Division or Oakland Division.

11 **PARTIES**

12 4. The plaintiff, Miyoko’s Kitchen, Inc., is incorporated in the State of California  
13 and headquartered in Petaluma, California. Miyoko’s is a certified B corporation, which means  
14 the company is meeting the highest standards of social and environmental performance, public  
15 transparency, and legal accountability.

16 5. Miyoko’s develops, produces, markets, and sells plant-based food products,  
17 including vegan cheese wheels in various flavors (classic chive, sundried tomato garlic, garlic  
18 herb, sharp English farmhouse, smoked English farmhouse, herbes de Provence, black ash), fresh  
19 vegan mozz (regular and smoked) and cultured vegan butter. Miyoko’s products are marketed  
20 and sold nationwide, including throughout California.

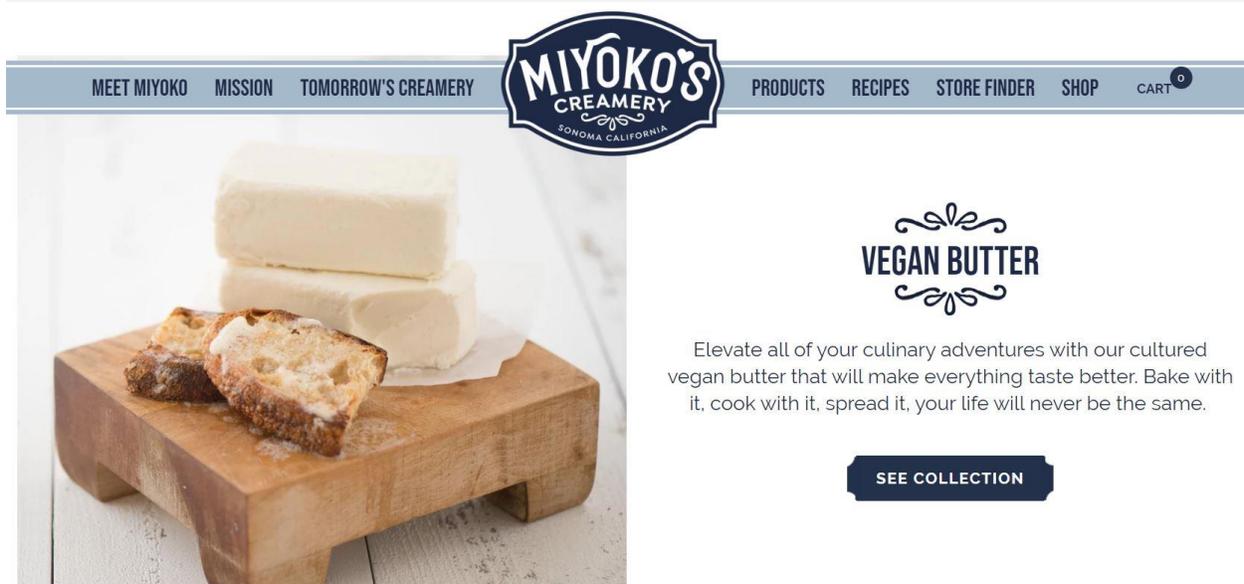
21 6. Defendant Karen Ross, as Secretary of the California Department of Food and  
22 Agriculture, heads the agency tasked with enforcing the Milk and Milk Products Act, Cal. Food  
23 & Agric. Code 32501 *et seq.*, which also governs “products resembling milk products.” Ross has  
24 acted, and continues to act, under color of state law at all times relevant to this complaint.



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Illustration 1  
Vegan butter, vegan cream cheese, vegan mozz,  
and cheese wheel made from plants



1 **Illustration 2**  
2 **Miyoko's website, Vegan Butter product**



11 12. Miyoko's business model relies entirely on consumers being able to clearly  
12 distinguish its products from animal-based dairy products. Consumers choose Miyoko's products  
13 because they are increasingly aware of how their food choices affect the environment, animal  
14 welfare, and their own health.<sup>1</sup> And studies show that consumers are often willing to pay nearly  
15 twice as much for plant-based alternatives to animal-based dairy. When consumers buy plant-  
16 based dairy alternatives, they are not accidentally purchasing cheaper, lower-quality products—  
17 quite the opposite. And producers of plant-based dairy alternatives do not want their products to  
18 be mistaken for animal-based counterparts, lest their products lose their primary appeal.

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22 <sup>1</sup> See DSM Food Specialties, *Consumer Insights Report: Plant Power: What's Behind the Market*  
23 *Growth for Plant-based Foods?*, [https://www.dsm.com/content/dam/dsm/food-](https://www.dsm.com/content/dam/dsm/food-specialties/reports/Consumer-Insights-Series-Plant-Power-2019.pdf?id=1550073911258)  
24 [specialties/reports/Consumer-Insights-Series-Plant-Power-2019.pdf?id=1550073911258](https://www.dsm.com/content/dam/dsm/food-specialties/reports/Consumer-Insights-Series-Plant-Power-2019.pdf?id=1550073911258) (last  
visited Feb. 5, 2020); see also Edlong, *Connecting with Consumers in Plant-based Dairy*, Food Dive (Nov.  
19, 2019), [https://www.fooddive.com/spons/connecting-with-consumers-in-plant-based-](https://www.fooddive.com/spons/connecting-with-consumers-in-plant-based-dairy/567437/)  
[dairy/567437/](https://www.fooddive.com/spons/connecting-with-consumers-in-plant-based-dairy/567437/) (last visited Feb. 5, 2020).

***The conventional dairy and meat industries lobby state and local governments to halt their rapidly growing plant-based competition.***

13. Miyoko's, along with other plant-based producers, has benefited from rapidly climbing demand for plant-based foods, experiencing unprecedented growth in recent years. Sales of plant-based dairy alternatives have been increasing year after year and now make up about 13% of the total market for dairy and dairy alternatives.<sup>2</sup> While sales of plant-based dairy alternatives have grown about 3.1 percent since last year, dairy sales have gone down about 5 percent.<sup>3</sup> The conventional dairy industry views competition from plant-based alternatives as a threat, and apparently sees the rising sales of plant-based dairy alternatives as linked to the decline in demand for animal-based dairy products.<sup>4</sup>

14. As a result, some players in the dairy industry—and in the meat industry too—have vigorously lobbied legislators and government agencies to take action against their plant-based competitors. For the past two decades, the National Milk Producers Federation has petitioned the FDA to prevent plant-based dairy alternatives from using dairy terminology to

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<sup>2</sup> Vegan cheese sales totaled \$117 million, showing 17.4% growth. Vegan butters were up to \$12.6 million, representing an uptick of 4.9%.

<sup>3</sup> CISION PR Web, *Plant Based Foods Sales Experience 8.1 Percent Growth Over Past Year*, (Sept. 13, 2017), <http://www.prweb.com/releases/2017/09/prweb14683840.htm> (last visited Jan. 29, 2020); Plant Based Foods Ass'n, U.S. *Plant-Based Retail Market Worth \$4.5 Billion, Growing at 5x Total Food Sales*, (July 12, 2019), <https://plantbasedfoods.org/2019-data-plant-based-market/> (last visited Jan. 29, 2020).

<sup>4</sup> Mary Ellen Shoup, *Dairy Industry Sees Rise of Plant-based Milk as "Serious Threat,"* Dairy Reporter (May 3, 2017), <https://www.dairyreporter.com/Article/2017/05/04/Dairy-industry-sees-rise-of-plant-based-milk-as-serious-threat>; Keith Nunes, *Meeting the Challenges of Dairy Alternative Development*, Food Business News (Oct. 7, 2019), <https://www.foodbusinessnews.net/articles/14551-meeting-the-challenges-of-dairy-alternative-development>; Chuck Jolley, *Six Greatest Ag Challenges for 2018*, Feedstuffs (Dec 07, 2017), <https://www.feedstuffs.com/commentary/six-greatest-ag-challenges-2018> (warning that "[m]arket researchers estimate total sales of dairy and meat alternatives will reach \$25 billion in just two very short years").

1 describe their products.<sup>5</sup> Similarly, in February 2018 the United States Cattlemen’s Association  
 2 petitioned the USDA to prevent plant-based alternatives to meat from using the terms “beef”  
 3 and “meat.”<sup>6</sup>

4 15. After largely failing at the federal level, the animal agribusiness industry has  
 5 turned its pressure to states whose economies heavily rely on animal agriculture. For the past two  
 6 and a half years, the same dairy industry lobbyists that struck out with the FDA have been  
 7 writing to California’s Milk and Dairy Food Safety Branch to complain about vegan products  
 8 using “dairy terminology”—even though they are clearly labeled with plant-based terms like  
 9 “almond milk yogurt” and “cashew milk.”<sup>7</sup> Similarly, in Wisconsin, the Director of the  
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11 <sup>5</sup> See Letter from National Milk Producers Federation (NMFP) President/CEO to FDA  
 12 (Feb. 21, 2019), [https://www.nmpf.org/wp-content/uploads/2019/03/National-Milk-  
 13 Producers-Federation-Citizen-Petition-and-Attachments.pdf](https://www.nmpf.org/wp-content/uploads/2019/03/National-Milk-Producers-Federation-Citizen-Petition-and-Attachments.pdf); Letter from NMPF President/CEO  
 14 to Sylvia Mathew Burwell, Secretary U.S. Department of Health and Human Services (HHS)  
 15 and Thomas Vilsack, Secretary U.S. Department of Agriculture (USDA) (May 8, 2015),  
 16 [https://www.nmpf.org/wp-content/uploads//file/NMPF-Comments-DGAC-Report-  
 17 050815.pdf](https://www.nmpf.org/wp-content/uploads//file/NMPF-Comments-DGAC-Report-050815.pdf); Letter from Dr. Beth Briczinski, VP Dairy Foods & Nutrition, NMPF, to Docket #  
 18 FDA-2012-N-1210 (Aug. 1, 2014), [https://www.nmpf.org/wp-  
 19 content/uploads//file/Issues%20Watch%20Standards/NMPF-Comments-on-Nutrition-Label-  
 20 080114.pdf](https://www.nmpf.org/wp-content/uploads//file/Issues%20Watch%20Standards/NMPF-Comments-on-Nutrition-Label-080114.pdf); Letter from Dr. Beth Briczinski, Director Dairy Foods & Nutrition NMPF to Docket  
 21 # FDA-2010-N-0210 (July 28, 2010), [http://docplayer.net/41361054-National-milk-producers-  
 22 federation.html](http://docplayer.net/41361054-National-milk-producers-federation.html); Letter from Dr. Beth Briczinski, Director Dairy Foods & Nutrition NMPF to  
 23 Kathleen Sebelius Secretary HHS and Thomas Vilsack Secretary USDA (July 15, 2010); Letter  
 24 from Jerry Kozak Present/CEO NMPF to Margaret Hamburg Commissioner, FDA (April 28,  
 2010); Letter from Dr. Robert Byrne VP Regulatory Affairs NMPF to Dr. Christine Lewis  
 Director Office of Nutritional Products, Labeling and Dietary Supplements (Nov. 2, 2011);  
 Letter from Dr. Robert Byrne VP Regulatory Affairs NMPF to Joseph Levitt Director CFSAN  
 (Feb. 14, 2000).

<sup>6</sup> United States Cattlemen’s Association petition to USDA, No. FSIS-2018-0016,  
[https://www.fsis.usda.gov/wps/wcm/connect/e4749f95-e79a-4ba5-883b-394c8bdc97a3/18-  
 01-Petition-US-Cattlement-Association020918.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/e4749f95-e79a-4ba5-883b-394c8bdc97a3/18-01-Petition-US-Cattlement-Association020918.pdf?MOD=AJPERES).

<sup>7</sup> NMFP letter to Stephen W. Beam, Chief, Milk and Dairy Food Safety, CDFA (Jan. 3,  
 2018), [https://www.nmpf.org/wp-  
 content/uploads//files/NMPF%20Kite%20Hill%20Letter%20to%20CDFA%202018%2001%  
 2003\\_0.pdf](https://www.nmpf.org/wp-content/uploads//files/NMPF%20Kite%20Hill%20Letter%20to%20CDFA%202018%2001%2003_0.pdf); NMFP letter to CDFA (Sept. 28, 2017), [https://live-nmpf.pantheonsite.io/wp-  
 content/uploads/2017/10/NMPF-Letter-to-FDA-09-28-2017.pdf](https://live-nmpf.pantheonsite.io/wp-content/uploads/2017/10/NMPF-Letter-to-FDA-09-28-2017.pdf).

1 Wisconsin Dairy Products Association went directly to the Wisconsin Department of Agriculture,  
2 Trade and Consumer Protection to complain about Miyoko's vegan butter products. The  
3 Department opted to treat an industry trade group's complaint as a consumer complaint and  
4 referred it to Wisconsin's Public Health Division with marching orders to pull Miyoko's products  
5 from store shelves.

6 16. The meat industry has been no less shy about running to state governments to  
7 quash plant-based competition. In response to pressure from state cattlemen's associations,  
8 eleven states have passed protectionist measures to prevent producers of plant-based meat  
9 alternatives from using words like "meat," "beef," "sausage," and "roast" to describe plant-based  
10 products.

11 17. These laws are on the road to being struck down as unconstitutional. Just a few  
12 months ago, a federal district court in Arkansas determined that the plant-based food company  
13 challenging such measures is "likely to prevail on the merits of its First Amendment claim"  
14 because these protectionist laws do not directly and materially advance the goal of preventing  
15 consumer confusion and they are more extensive than necessary to achieve that stated goal.<sup>8</sup>

16 18. Like the statements at issue in Arkansas, all of Miyoko's statements for its plant-  
17 based products communicate truthful commercial information to consumers. Yet California's  
18 Milk and Dairy Food Safety Branch would require the company to stop publicizing its mission,  
19 change the entirety of its packaging, and refrain from its current marketing practices.

20  
21 ***California's Milk and Dairy Food Safety Branch attempts to censor Miyoko's  
truthful labels, its expression of its mission, and even the images on its website.***

22 19. California, where Miyoko's is based, is the largest milk producer of cow milk in

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23 <sup>8</sup> *Turtle Island Foods SPC v. Soman*, No. 4:19-CV-00514-KGB, 2019 WL 7546141, at \*9, 14  
24 (E.D. Ark. Dec. 11, 2019).

1 the United States.<sup>9</sup> California’s Milk and Dairy Food Safety Branch is tasked with promoting the  
2 California agricultural industry, including cow milk, and has taken upon itself to inspect  
3 Miyoko’s facilities despite lacking any jurisdiction to do so.

4         20. On December 9, 2019, the Branch sent Miyoko’s a letter claiming that the  
5 company’s vegan butter product “cannot bear the name ‘Butter’ because the product is not  
6 butter,” and instructed Miyoko’s to “[r]emove the word ‘Butter’ from the label.”

7         21. The letter informs Miyoko’s that “[i]mages of animal agriculture from the website  
8 must also be removed such as the image . . . of the woman hugging a cow”—even though an  
9 image of a person hugging a cow is emphatically not an “image of animal agriculture.” To the  
10 contrary, the purpose of the image is to send the message that, by choosing a vegan option,  
11 consumers can help protect cows from being harmed in the dairy industry. Many consumers  
12 choose vegan food to spare animals from the cruelty that has come to be associated with animal  
13 agriculture. The words “KINDER” and “100% dairy & cruelty free” on the image make the  
14 purpose of the message even clearer: the expression of a viewpoint that cows should be cared for,  
15 and *not* used for milk.

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24 <sup>9</sup> Rob Cook, *Milk Production: Ranking By State*, Beef2Live (Jan. 17, 2020),  
<https://beef2live.com/story-milk-production-ranking-state-0-111564>.

**Illustration 3**  
**Miyoko's website**



22. The letter also demands that Miyoko's censor its statement that its products are "100% dairy and cruelty free" even though this statement is entirely true. And the letter instructs Miyoko's to remove the claims "Lactose Free" and "Cruelty Free" from its vegan butter product because "the product is not a dairy product."

23. Remarkably, the letter tells Miyoko's to remove the claim "Hormone Free" because, according to the Branch, "although the food may be of plant origin, plants also contain endogenous hormones which regulate growth." Consumers understand that a dairy alternative made entirely from plants labeled with "Hormone Free" is merely emphasizing that it does not contain the controversial animal hormones artificially injected into some milk-producing cows. No reasonable consumer would think the label implies that Miyoko's plant-based butter is free of substances that occur in all plants. Indeed, food labels routinely include analogous statements such as "Chemical Free," even though every food literally contains chemicals, because consumers understand that "Chemical Free" refers to a lack of additives, not a lack of every substance—

1 such as chlorophyll or water—that could scientifically be classified as a “chemical.”

2 24. Finally, the letter instructs Miyoko’s that it may not tell consumers that it is  
3 “revolutionizing dairy with plants” because Miyoko’s products “fail[] to contain [] milk and milk  
4 ingredients.”

5 25. Complying with the State of California’s censorship and multiple directives would  
6 hobble Miyoko’s. It would simultaneously (1) cost the company more than \$1 million to change  
7 its labels and marketing, (2) restrict the company from proclaiming its own mission to the public,  
8 and (3) prevent the company from accurately communicating to consumers the nature and  
9 contents of its products—what the products taste like, what they’re made from, what they do and  
10 don’t contain, and how to use them.

11 26. In fact, the changes that the letter demands will more likely *create* consumer  
12 confusion—an average consumer would have no idea when to use “vegan spread” or “cultivated  
13 cashew cream”—and thus would be unlikely to buy those products if they needed something  
14 vegan to put on toast with jam, or something to put on a pizza in place of cheese from a cow.

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16 ***The letter relies on extreme and dubious interpretations of state and federal law to  
justify censoring Miyoko’s truthful statements.***

17 27. The Milk and Dairy Food Safety Branch cites a range of federal and state laws  
18 and regulations that it claims prevent Miyoko’s from showing the image of a woman hugging a  
19 cow, and from using terms like “vegan butter,” “100% cruelty and animal free,” “cruelty free,”  
20 “lactose free,” or “hormone free,” and phrases like “revolutionizing dairy with plants.”<sup>10</sup>

21 28. For example, the State attempts to invoke California Food and Agricultural Code

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23 <sup>10</sup> Specifically, the California Department of Food and Agriculture cites sections 321a and  
24 343(b) of title 21 of the United States Code; sections 102.5, 101.18, 101.3, and 130.8 of title 21 of  
the Code of Federal Regulations; and section 38955 of the California Food and Agricultural  
Code.

1 section 38955 to prevent Miyoko’s from using images of a woman hugging a cow or claims like  
2 “100% dairy and cruelty free.” But section 38955 applies only to “imitation milk products,”  
3 which the Code defines as “a product resembling a milk product which contains oils, fats, or  
4 other ingredients, other than milk or milk products, *in combination with milk or milk products.*”<sup>11</sup> This  
5 obviously does not include Miyoko’s products, which contain no milk.

6 29. The letter also attempts to cite FDA regulations to claim that a product using the  
7 word “butter” must contain “80 per centum by weight of milk fat.”<sup>12</sup> But the FDA has repeatedly  
8 recognized that foods that do not meet FDA’s threshold for “butter” can of course use the term  
9 “butter” in their common or usual name—products like peanut butter and apple butter, and all  
10 sorts of other fruit and nut butters have used the term “butter” for well over a hundred years  
11 without any hint of consumers confusing them for butter from cow’s milk.<sup>13</sup>

12 30. Notably, neither the FDA nor California’s Milk and Dairy Food Safety Branch  
13 has ever opted to take enforcement action against a product akin to almond butter out of concern  
14 for consumer confusion or claimed that these products violate 21 U.S.C. § 343(b), which states  
15 that a food is misbranded “[i]f it is offered for sale under the name of another food.”

16 31. The FDA has also consistently chosen not to take enforcement action against  
17 plant-based dairy alternatives under 21 C.F.R. § 102.5(a), which requires that food products  
18 “accurately identify or describe . . . the basic nature of the food or its characterizing properties or  
19 ingredients.”

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21 <sup>11</sup> Cal. Food & Agric. Code § 38914 (emphasis added).

22 <sup>12</sup> 21 U.S.C. § 321a (defining “butter” as “the food product usually known as butter, and  
23 which is made exclusively from milk or cream, or both, with or without common salt, and with or  
24 without additional coloring matter, and containing not less than 80 per centum by weight  
of milk fat, all tolerances having been allowed for”).

<sup>13</sup> *E.g.*, 21 C.F.R. §§ 164.150 (peanut butter), 150.110 (fruit butter).



1 a cow.”<sup>15</sup> The possibility of such confusion is “highly improbable” and “stretches the bounds of  
 2 credulity.”<sup>16</sup> Under the same logic, consumers would also have to “believe that veggie bacon  
 3 contains pork, that flourless chocolate cake contains flour, or that e-books are made out of  
 4 paper.”<sup>17</sup>

5 35. Other non-dairy products have long used the word “butter,” with qualifying  
 6 language, and consumers face no difficulty understanding that these products don’t come from a  
 7 cow. Consumers are not expecting butter from a cow when they purchase Miyoko’s “Vegan  
 8 Butter.” Likewise, consumer purchasing behavior, surveys, and label-reading studies confirm that  
 9 consumers understand the nature and contents of plant-based products that use terminology like  
 10 “soymilk” or “cashew cheese” or “vegan butter.” There is no compelling or reliable evidence that  
 11 indicates consumers purchase plant-based dairy products because they confuse them for animal-  
 12 based dairy products. Rather, consumers buy plant-based dairy products because they *want*  
 13 plant-based dairy products.

14 36. Recent research conducted by UCLA found that consumers were not confused  
 15 about the nutritional differences between animal and plant-based milk and cheese products.<sup>18</sup>  
 16 The research found that consumers were “generally accurate at identifying nutritional differences  
 17 between plant-based and animal-based milk and cheese products.”<sup>19</sup> It found no confusion on

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18 <sup>15</sup> *Ang v. Whitewave Foods Co.*, 2013 WL 6492353, at \*4.

19 <sup>16</sup> *Id.*

20 <sup>17</sup> *Id.*; see also *Painter v. Blue Diamond Growers*, No. CV 17-02235, 2017 WL 4766510, at \*2  
 21 (C.D. Cal. May 24, 2017), *aff’d*, 757 F. App’x 517 (9th Cir. 2018) (rejecting as “implausible” the  
 claim that almond milk was mislabeled under federal law).

22 <sup>18</sup> Research submitted in its entirety by UCLA School of Law Animal Law and Policy  
 Program as a comment on October 5, 2018, ID: FDA-2018-N-2381-1104,  
 23 <https://www.regulations.gov/document?D=FDA-2018-N-2381-1104>

24 <sup>19</sup> *Id.* (These percentages are the lower bound estimate because the consumers who  
 responded “I don’t know” were not coded as answering the question correctly.)

1 the part of consumers about differences between animal and non-animal sourced dairy products  
2 with the label “milk.”<sup>20</sup> Consumers similarly know what they are getting—and are not  
3 confused—when they purchase Miyoko’s foods.

4 37. These terms have become so ubiquitous in common usage that even the Merriam-  
5 Webster dictionary defines “butter” to include, “a buttery substance: such as (a): any of various  
6 fatty oils remaining nearly solid at ordinary temperatures; (b): a creamy food spread especially  
7 one made of ground roasted nuts.”<sup>21</sup>

8 38. The marketing and packaging of plant-based dairy products reveals that plant-  
9 based food producers do not mislead consumers but instead *distinguish* their products from  
10 conventional dairy products, while also describing how plant-based dairy products can fulfill the  
11 same roles that conventional dairy has traditionally played in consumers’ meals. Plant-based  
12 foods *rely* on their ability to differentiate themselves from animal-based products. And the way  
13 companies currently label plant-based dairy products effectively ensures that consumers get what  
14 they expect when purchasing these foods.

15 39. In the decades that plant-based producers have used dairy terminology with  
16 accompanying language explaining that the products are plant-based, dairy-free, or vegan,  
17 federal courts have determined that consumers are not misled by plant-based dairy products’  
18 marketing or packaging.<sup>22</sup> On the rare occasion when a consumer files a lawsuit contending that  
19 they have been misled by a plant-based milk, federal courts have resoundingly found these claims  
20 to be implausible.

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21 <sup>20</sup> *Id.*

22 <sup>21</sup> *Butter*, Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/butter>.

23 <sup>22</sup> *Gitson v. Trader Joe's Co.*, 13-cv-01333-WHO, 2013 WL 5513711, at \*6-7 (N.D. Cal.  
24 Oct. 4, 2013) (holding that no reasonable consumer could confuse soy milk with as  
cow’s milk when labels stated *lactose & dairy free*).

1           40. Miyoko’s own products uniformly use qualifying language that distinguishes them  
2 from animal-based dairy products. Miyoko’s labeling and marketing materials all clearly indicate  
3 that its products are plant-based, dairy-free, and vegan, and thus are entirely truthful. There is no  
4 evidence of consumer confusion about the ingredients or source of any of Miyoko’s foods.

5           41. Through its enforcement position, the State of California is attempting to prohibit  
6 plant-based dairy companies from marketing their products as plant-based dairy analogues in the  
7 advertising, labeling, and packaging of their products. This will commercially harm the plant-  
8 based dairy industry, restrict speech by plant-based dairy producers, and, in turn, protect  
9 conventional dairy producers from competition.

10           42. The Milk and Dairy Food Safety Branch may be tasked with supporting the  
11 State’s agricultural industries, but it is prohibited by the First Amendment from taking sides in a  
12 contentious national debate on the role of plant-based foods and leveraging its power to censor  
13 one emerging industry’s speech in order to protect a more powerful and entrenched industry.

14                           ***The effect of the State’s enforcement position on Miyoko’s***

15           43. Absent injunctive and declaratory relief, the State of California’s enforcement and  
16 regulatory position will continue to chill Miyoko’s truthful and non-misleading speech, threaten  
17 its ability to deliver its core mission to the public, cause untold harm to its business, and expose  
18 the company to a substantial risk of prosecution for its truthful and non-misleading speech. The  
19 State’s application of state and federal laws and regulations is specifically designed to and will  
20 significantly disadvantage Miyoko’s because it restricts how Miyoko’s can market, advertise, and  
21 sell its products in the marketplace.

22           44. Miyoko’s plant-based dairy products are distributed throughout California and  
23 nationwide at many retailers, including Safeway, Trader Joe’s, Oliver’s, Whole Foods, and  
24 Target. Miyoko’s produces and sells many products clearly labeled as “plant based,” “vegan,” or

1 “made from plants,” and using descriptive terms, including:

- 2 • “cheese wheel made from plants” (cashew cream fermented with live cultures);
- 3 • “cultured vegan butter made from plants” (cashew cream fermented with live cultures);
- 4 • “fresh vegan mozz made from plants” (cashew cream fermented with live cultures); and
- 5 • “vegan cream cheese” (cashew cream fermented with live cultures).

6 Labels for Miyoko’s products also include modifiers like “vegan” and “made from plants” that  
7 clearly indicate that the products do not contain milk from cows or other animals. But because its  
8 labels include terms that also apply to conventional dairy, like “butter,” “cheese,” “mozzarella,”  
9 “cream cheese,” and “dairy,” Miyoko’s reasonably fears prosecution by the State of California.

10 45. Miyoko’s offers its products to consumers because it believes that plant-based  
11 dairy products contribute to the creation of a humane, healthy, and sustainable food supply. Like  
12 other plant-based dairy companies, Miyoko’s markets its products as dairy analogues and uses  
13 dairy and dairy-related terminology. Miyoko’s cannot accurately and effectively describe its  
14 products without comparison to the conventional dairy products they are designed to replace.

15 46. The State’s position, if left undisturbed, would also force companies like Miyoko’s  
16 to consider creating one set of labels for California and another set for other states, potentially  
17 raising the cost to come to market. Compliance with the State’s interpretation of the regulations  
18 would therefore have a severe detrimental impact on Miyoko’s nationwide marketing and  
19 packaging of its products.

20 47. Since 2013, Miyoko’s has invested significant time and expense in developing its  
21 products and marketing and packaging those products in truthful and non-deceptive ways. Yet,  
22 because of the State’s actions, Miyoko’s must now either: (1) choose to continue to have its  
23 products sold in California as packaged, at a substantial risk of prosecution; (2) design, produce,  
24 and distribute different, specialized marketing and packaging for its products when they will be

1 sold in California, creating a logistical nightmare in distribution channels that service  
2 neighboring states; or (3) change the entirety of its marketing and packaging nationwide because  
3 of the State's position, at considerable expense, and causing confusion to its consumers. Each of  
4 these options would put Miyoko's at a significant commercial disadvantage for no legitimate  
5 reason in that they require Miyoko's to incur costs and to abstain from describing its products in  
6 a manner that consumers already understand.

7 48. As a result of the State's enforcement and regulatory position, Miyoko's is likely to  
8 experience other serious harms. For example, retail chains that operate in California and other  
9 states may be less likely to carry plant-based dairy products, including those produced and sold  
10 by Miyoko's, if they cannot do so in the same manner in all their stores. Miyoko's also risks  
11 liability for advertising in other states that spills over into California markets (including regional  
12 and national advertising that reaches California consumers through print, television, radio, and  
13 the internet). And compliance with the State's regulatory interpretations could create bad will for  
14 Miyoko's, as customers become frustrated with the unavailability of plant-based dairy products in  
15 California.

16 49. These serious harms—in conjunction with the added expense that the State seeks  
17 to impose by forcing Miyoko's to specifically tailor its product labels for distribution in  
18 California—demonstrate that the burden on speech is unjustifiably excessive when weighed  
19 against the State's illusory, unproven need to prevent alleged consumer confusion.

20 **CLAIM FOR RELIEF: FIRST AMENDMENT (42 U.S.C. § 1983)**

21 50. Miyoko's has the right, under the First Amendment to the U.S. Constitution, to  
22 engage in truthful speech and to control the content of that speech through marketing,  
23 advertising, labeling, and public advocacy.

24 51. The State of California's enforcement and regulatory position—as embodied in its

1 December 9, 2019 letter to Miyoko’s, its similar communications to other plant-based food  
2 producers, and its application or proposed application of state and federal statutes and  
3 regulations as reflected in the letter—unreasonably restricts Miyoko’s right to free speech by  
4 prohibiting the company from making truthful statements about the identity, quality, and  
5 characteristics of vegan and plant-based products, including referring to plant-based products  
6 using dairy and dairy-analogue terms.

7 52. Specifically, the State of California’s enforcement and regulatory position  
8 prohibits Miyoko’s from truthfully labeling, marketing, and advertising plant-based dairy  
9 products in a manner that effectively and accurately describes them as replacements for  
10 conventional dairy products. The State’s position further restricts Miyoko’s ability to convey its  
11 core mission to the public through language and images.

12 53. The State of California, through officials in the Department of Food and  
13 Agriculture, is prohibiting Miyoko’s from engaging in protected speech based on its content and  
14 based on the viewpoint expressed through that speech.

15 54. The State of California, through officials in the Department of Food and  
16 Agriculture, is preventing Miyoko’s from discussing truthful and non-misleading information  
17 about matters of public significance.

18 55. There is no substantial state interest in the speech restrictions imposed by the  
19 State, and the restrictions and requirements go far beyond what would be necessary to protect  
20 any purported state interest in preventing consumer deception or confusion. Moreover, the State  
21 of California has failed to substantiate any claims of consumer deception or confusion through  
22 actual, empirical evidence—as opposed to mere speculation or rote invocation of speculative  
23 concerns about confusion.

24 56. Content-based or viewpoint-based rules are not necessary to achieve any

1 purported government interest.

2 57. The State of California is prohibiting not just Miyoko's protected speech but the  
3 speech of any plant-based dairy company that does business in California.

4 **PRAYER FOR RELIEF**

5 For all of these reasons, the plaintiff request that this Court:

- 6 a. Grant a preliminary and/or permanent injunction enjoining the defendants from  
7 enforcing state or federal law against Miyoko's in the manner set forth in the  
8 State's December 9, 2019 letter;
- 9 b. Enter a declaration that the application of the state and federal laws set forth in  
10 the State's December 9, 2019 letter to Miyoko's violates the First Amendment to  
11 the United States Constitution on a solely as-applied basis;
- 12 c. Award costs, attorneys' fees, and interest under 42 U.S.C. § 1988; and
- 13 d. Allow such other and further relief as this Court finds just.

14  
15 Respectfully submitted,  
16 /s/ Alene Anello  
Alene Anello (State Bar No. 316387)  
Amanda Howell (*pro hac vice* forthcoming)  
**ANIMAL LEGAL DEFENSE FUND**  
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23  
24 *Attorneys for Plaintiff Miyoko's Kitchen, Inc.*

# **Exhibit 1**



CALIFORNIA DEPARTMENT OF  
FOOD & AGRICULTURE

Karen Ross, Secretary

December 9, 2019

Rosalie Burkett  
Miyoko's Kitchen  
2086 Marina Avenue  
Petaluma, CA 94954

Dear Ms. Burkett,

The label for the Miyoko's Kitchen product currently bearing the words "Cultured Vegan Plant Butter" has been reviewed by the California Department of Food and Agriculture, Milk and Dairy Food Safety Branch. This label requires revision to be in compliance with Title 21, Code of Federal Regulations and the California Food and Agricultural Code (hereafter FAC). Please review the label, make necessary changes, and resubmit it for review. The revisions needed are numbered below and on the label.

1. The product currently features two statements of identity. One of the names of the food listed on the first package is "Cultured Vegan Butter". The other name listed on the product is "Cashew Cream fermented from live cultures". The name "Cashew Cream fermented from live cultures" appears toward the bottom of the page in small blue font. The name "Cashew Cream Fermented from live cultures" should be revised to be a principal part of the principal display panel as required by 21 CFR 101.3 for the name of the food.

The product cannot bear the name "Butter" because the product is not butter. "Butter" is defined in 21 U.S.C. 321a. as the food product made exclusively from milk or cream, or both with or without common salt ... and containing no less than 80 percentum by weight of milk fat, all tolerances having been allowed for. 21 USC 343(b) deems a food misbranded if it is offered for sale under the name of another food. The pervasive advertising of this product as "Butter" is just that, offering for sale this food, which is not butter; as a form of butter, or as butter itself. Remove the word "Butter" from the label. Images of animal agriculture from the website must also be removed such as the image below of the woman hugging a cow with other cows grazing in the background and the claim "100% dairy and cruelty free". Dairy images or associating the product with such



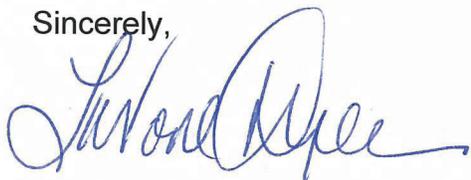
Miyoko's Creamery  
December 9, 2019

activities cannot be used on the advertising of products which resemble milk products. FAC 38955.

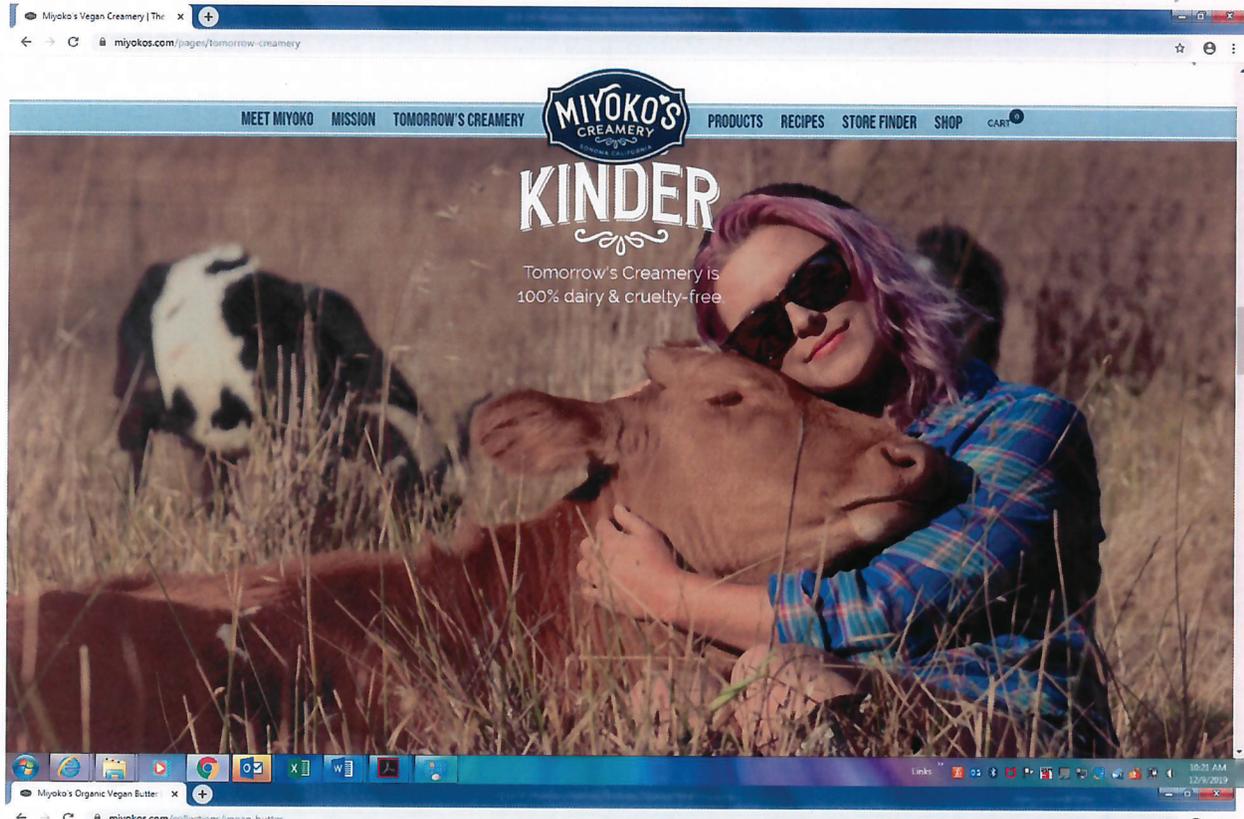
2. The product makes the following claims "Lactose Free", "Hormone Free", and "Cruelty Free". Because the product is not a dairy product it cannot assert these claims as they imply that the product may be a dairy food without these characteristics. Additionally, although the food may be of plant origin, plants also contain endogenous hormones which regulate growth. 21 CFR 102.5 (a) provides that the common or usual name of a food, which may be a coined term, shall accurately identify or describe, in as simple and direct terms as possible the basic nature of the food or its characterizing properties or ingredients. Under subdivision (c) of this same section it states that "The common or usual name of a food shall include a statement of the presence or absence of any characterizing ingredient(s) or component(s) and/or the need for the user to add any characterizing ingredient(s) or component(s) when the presence or absence of such ingredient(s) or component(s) in the food has a material bearing on price or consumer acceptance or when the labeling or the appearance of the food may otherwise create an erroneous impression that such ingredient(s) or component(s) is present when it is not, and consumers may otherwise be misled about the presence or absence of the ingredient(s) or component(s) in the food. Revise the claims to remove those claims which are characteristic of dairy products. (The images are included on page 3 of 3 of this letter)

3. The products assert that they are "revolutionizing dairy with plants". The product is ineligible to make these claims as it is wholly composed of plant oils and is not of dairy origin. Remove these claims as they render the product misbranded with respect to dairy products and the food fails to contain the milk and milk ingredients which render them eligible for such claims. 21 CFR 101.18. and 21 CFR 130.8.

Sincerely,



LaVone Dyer R.E.H.S. R.D.I.  
Senior Environmental Scientist  
California Department of Food and Agriculture  
Milk and Dairy Foods Safety Branch



MEET MIYOKO MISSION TOMORROW'S CREAMERY **MIYOKO'S CREAMERY** PRODUCTS RECIPES STORE FINDER SHOP CART

## Miyoko's Organic Vegan Butter

"I am so happy to be able to share this cultured butter with the world. This takes vegan cooking to a whole new level and melted on morning toast it's a mind-blowing start to the day."

*Miyoko*

### EUROPEAN STYLE CULTURED VEGAN BUTTER

\$ 6.49

Our organic vegan butter is made with organic coconut oil, and is a culinary game-changer that brings plant-based buttery goodness to your morning toast & beyond.

Miyoko's organic vegan butter revolutionizes the concept of vegan butter and its applications. Our vegan butter more closely resembles real butter than any other plant-based butter on the

VEGAN  
Melts, browns, bakes & spreads phenomenally  
**MIYOKO'S**  
TOMORROW'S CREAMERY  
EUROPEAN STYLE CULTURED VEGAN BUTTER  
Made from Plants  
USDA ORGANIC  
CASHEW CREAM  
FRAGRANT & BUTTERY

Links 10:22 AM 12/9/2019



CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

MIYOKO'S KITCHEN, INC.

(b) County of Residence of First Listed Plaintiff Sonoma County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) ANIMAL LEGAL DEFENSE FUND, 525 East Cotati Avenue Cotati, CA 94931, (707) 795-2533 and GUPTA WESSLER PLLC 1900 L Street, NW, Suite 312 Washington, DC 20036 (202) 888-1741

DEFENDANTS

KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and STEPHEN BEAM, in his official capacity as Branch Chief of the Milk and Dairy Food Safety Branch,

County of Residence of First Listed Defendant Sacramento County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. § 1983

Brief description of cause: Deprivation of First Amendment right to free speech

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 02/06/2020

SIGNATURE OF ATTORNEY OF RECORD

/s/ Alene Anello

## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

**Authority For Civil Cover Sheet.** The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
  - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
  - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
  - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
  - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
  - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
  - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
  - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
  - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
  - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.