UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MIYOKO'S KITCHEN,

Plaintiff,

v.

KAREN ROSS, et al.,

Defendants.

Case No. 20-cv-00893-RS

ORDER DENYING MOTION TO DISMISS

I. INTRODUCTION

On December 9, 2019, plaintiff Miyoko's Kitchen ("Miyoko's") received a letter from the California Department of Food and Agriculture ("the Department") informing the company that the label for its "vegan butter" product failed to comply with numerous state and federal laws. Miyoko's responded by filing this action under 42 U.S.C. § 1983 against defendants Karen Ross, in her official capacity as Secretary of the Department, and Stephen Beam, in his official capacity as Branch Chief of the Milk and Dairy Food Safety Branch (collectively "the State"). Miyoko's claims the Department's interpretation and application of these laws to Miyoko's "vegan butter" product violates the First Amendment. The State now moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) and abstention doctrines. A videoconference hearing was held on June 25, 2020. For the reasons explained herein, the State's motion is denied.

II. BACKGROUND

Miyoko's produces and sells a variety of plant-based, vegan products which are designed to resemble dairy products in both appearance and taste. The company markets its foods using

product names that reference the products' more common dairy analogues, such as a "vegan butter" and "vegan cheese." As reflected, these dairy references are always preceded by conspicuous terms such as "vegan" or "plant-based." According to Miyoko's, their product labels leave no room for doubt among consumers that these products are fundamentally different from their dairy counterparts, in that they're not actually dairy.

Miyoko's was started in 2014, and it now sells its products in more than 12,000 stores nationwide and in Canada. It's plant-based dairy substitutes are sold in established grocery chains such as Safeway, Whole Foods, and Trader Joe's. According to the company's founder, Miyoko Schinner, it is a mission-driven business, dedicated to "the creation of a humane, healthy, and sustainable food supply" and to "ending animal cruelty and reducing climate change caused by animal agriculture."[1] Decl. of Miyoko Schinner, Dkt. No. 23-1 at 3.[2] To that end, Schinner and her husband also run a non-profit animal sanctuary for rescued farmed animals in Marin County, and an image of a sanctuary volunteer petting a rescued cow features prominently on Miyoko's advertising and packaging. *Id.*

On December 9, 2019, Miyoko's received a letter from the Milk and Dairy Foods Safety Branch of the California Department of Food and Agriculture indicating the branch had reviewed Miyoko's label for its "Cultured Vegan Plant Butter" product and found it deficient. According to the letter, the label "requires revision to be in compliance with Title 21, Code of Federal Regulations and the California Food and Agricultural Code ["FAC"] . . . ." Compl. Ex. 1

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[1] Defendants make evidentiary objections to certain portions of the declarations Miyoko's submitted along with its opposition briefing. For example, they argue large portions of the Simon declaration contain inadmissible hearsay, and that the Allsopp and Cohen Declarations address topics about which the declarants lack personal knowledge. These objections are well founded. *See, e.g.*, *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986) (concluding "it was improper for the district court, in ruling on the 12(b)(1) motion, to have considered the conclusory and hearsay statements contained in the affidavits," one of which "contain[ed] no information to indicate a basis in personal knowledge for the affiant's conclusory statement"). Accordingly, the declarations were only considered to the extent declarants were addressing subjects about which they had personal knowledge and not information they had heard from unspecified others. *See* Fed. R. Evid. 801-807, 602.

[2] All page numbers refer to ECF pagination.

(hereafter "Letter"), Dkt. No. 1-1 at 2. The letter outlined numerous purported violations of state and federal law. It states, in relevant part:

> 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 per centum by weight of milk fat. . . . 21 U.S.C. [§] 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 activities cannot be used on advertising of products which resemble milk products. [Food and Agriculture Code] 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 as [sic] imply that the product may be a dairy food without these characteristics. . . . Revise the claims to remove those claims which are characteristic of dairy products. . . .
>
> 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 milk and milk ingredients which render them ineligible for such claims. 21 [C.F.R. §] 101.18 and 21 [C.F.R. §] 130.8.

Letter, Dkt. No. 1-1 at 2-3. The letter also attaches two images, one from the Miyoko's website advertising the "Organic Vegan Butter" and the other an image of the physical packaging for the product.

Approximately two months after receiving the letter, Miyoko's filed this action. The company brings a First Amendment challenge to the State's application of the state and federal laws cited in the letter, as applied to Miyoko's "vegan butter" product. According to Miyoko's, its advertising and packaging for this plant-based product is neither misleading nor deceptive. Rather, its references to butter are qualified by conspicuous terminology which makes clear to consumers that the product is *not* dairy. Miyoko's contends that the State's position, as evinced in the 2019 letter, violates the company's "right to engage in truthful and non-misleading speech about its plant-based

dairy products, without fear of enforcement or reprisal by the State." Compl., Dkt. 1 at 3. Miyoko's requests a court order finding that the application of these state and federal regulations to the company's "vegan butter" product in the manner outlined in the Department's letter violates the First Amendment. The company also seeks injunctive relief to prevent the State from using its various enforcement powers against Miyoko's pursuant to this purportedly unconstitutional interpretation.

The State now moves to dismiss under Federal Rule of Civil Procedure 12(b)(1) and federal court abstention doctrines. First, the State argues the court lacks subject matter jurisdiction to hear the case, because there is not yet a justiciable controversy. Specifically, the State contends that the claims are not ripe and that the Miyoko's lacks standing to sue. According to defendants, this action is premature because the Department has not yet decided whether to bring an enforcement action against Miyoko's and because the letter does not represent the Department's final interpretation on the statutes cited therein. The State further claims that a finding of a justiciable controversy based on a single letter would expose agencies to a flood of litigation. Second, the State urges the Court to invoke *Pullman* or *Burford* abstention to decline to hear the case.[3]

III. LEGAL STANDARD

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "At an 'irreducible constitutional minimum,' standing requires the party asserting the existence of federal court jurisdiction to establish three elements: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2)

[3] Defendants also made an argument for abstention under *Youger v. Harris*, 401 U.S. 37 (1971), but it abandoned this argument in their reply. *See* Defs.' Reply in Support of Mot. to Dismiss, Dkt. No. 26 at 19 n.9.

causation; and (3) a likelihood that a favorable decision will redress the injury." *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir. 2010) (quoting *Lujan*, 504 U.S. at 560–61).

"The related doctrine of ripeness is a means by which federal courts may dispose of matters that are premature for review because the plaintiff's purported injury is too speculative and may never occur." *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). "[T]hrough avoidance of premature adjudication," the ripeness doctrine prevents courts from becoming entangled in "abstract disagreements." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

"Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss." *Chandler*, 598 F.3d at 1122. It is the plaintiff's burden to establish a court's subject matter jurisdiction. *See Assoc. of Am. Medical Colleges v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78 (1994). Lastly, in a "factual" challenge under Rule 12(b)(1), the Court may "look beyond the complaint" and consider affidavits and other extrinsic evidence relevant to the jurisdictional question. *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

IV. DISCUSSION

A. Justiciability

In *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), the Supreme Court set forth the following standard for Article III standing based on a threat of prosecution:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, *and there exists a credible threat of prosecution thereunder*, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

Id. at 298 (emphasis added). The Ninth Circuit has clarified that, when evaluating the genuineness of a claimed threat of prosecution, courts must consider: (1) whether the plaintiff has articulated a "concrete plan" to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate

proceedings; and (3) the history of past prosecution or enforcement under the challenged statute. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (quoting *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126–27 (9th Cir.1996)). In this context, the ripeness and injury-in-fact standing inquiries "merge[] almost completely." *Id.*

As an initial matter, the parties debate whether this case is a "pre-enforcement challenge" or rather a challenge to the Department's "actual enforcement position," a distinction which determines the applicable test to apply. Pl.'s Opp. to Mot. to Dismiss, Dkt. No. 23 at 7. They agree, however, that sending a notice letter of the sort Miyoko's received is but the first step on the Department's path of "escalating notifications of enforcement." Decl. of Stephen Beam, Dkt. No. 17-2 at 2-3. If repeated warnings go unheeded, the Department has the authority to impound mislabeled food, and violations are also punishable by modest fines, a short term of imprisonment, or both. *See* FAC §§ 32765, 35281. While recognizing this case does not fit neatly into either the pre-enforcement or ongoing enforcement category, that question need not be reached; as shown below, even if treated as a pre-enforcement challenge, Miyoko's prevails under the three-factor *Thomas* test.

a. *"Concrete plan" to violate the statutes*

Miyoko's easily satisfies this first requirement. As Schinner attests, the company has "no intention of discontinuing the use of words such as 'butter' and 'cheese,' preceded by unequivocal qualifiers." Schinner Decl. at 5. Likewise, the company's "vegan butter" product remains on store shelves and is still advertised on the company's website. This is in direct violation of the letter's order to "[r]emove the word butter from the label." Letter at 2. Under the State's interpretation of the applicable law, Miyoko's has been in continuous violation at least since December 9, 2019, when the Department informed Miyoko's of its noncompliance.

The State's arguments to the contrary are unavailing. According to the State, because Miyoko's claims it adheres to applicable statutes and regulation and instead argues the Department has misapplied the laws at issue, there is no "concrete plan" to violate any statute "[a]s a matter of

pleading." Mot. to Dismiss, at 10. This argument elevates form over substance. Miyoko's complaint and opposition briefing make clear that the company will continue to violate these statutes as the Department interprets them, because it believes these interpretations as applied to Miyoko's are unconstitutional. Because "the parties remain philosophically on a collision course," this factor is met. *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997).

b. *Specific warning or threat to initiate proceedings*

The letter sent to Miyoko's constitutes a "specific warning" that the Department might initiate enforcement proceedings, sufficient to satisfy the second prong. Although the Department's letter does not contain an explicit threat about the consequences of non-compliance, the Department does not mince words. *See, e.g.*, Letter at 2 ("Remove the word 'Butter' from the label."); *id.* ("This label requires revision to be in compliance . . . ."); *id.* at 3 ("Remove these claims as they render the product misbranded . . . .").

The State, for its part, characterizes these initial warning letters as mere "invitations for private parties to submit their proposals" which generally "lead to productive discussions" and "routinely" result in a mutually agreeable, compliant product label. Beam Decl., at 2. Yet, given the letter's substance and tone, it is hard to see how the letter's demands were intended to foster constructive dialogue. In no place does the letter imply the Department's interpretations on dairy-related labeling statutes are subject to further negotiation or debate. Rather, Miyoko's was justified in interpreting this letter as a demand fundamentally to alter its product (and its many similarly branded products) at a potential cost of millions of dollars, or else proceed down the path to enforcement.

Moreover, by the State's own admission, the Department's next step in its protocol of "escalating notifications" for a noncompliant product is, once 30 days have elapsed without response to the initial notice, to issue a second notice exclaiming, in bold lettering: "Failure to submit product labels for review and approval may result in the impound and/or condemnation of unapproved products by CDFA at the retail level pursuant to FAC sections 32731 and 32765." Ex. to Beam Decl., Dkt. No. 17-3 at 10. In just 60 more days, the Department may begin

impounding products, according to its protocol. Beam Decl. at 4. In short, Miyoko's was already on the path to enforcement, given its refusal to comply with what it alleges are unconstitutional statutes and regulations. The threat was not "merely hypothetical and conjectural, but actual." *Canatella v. State of California*, 304 F.3d 843, 853 (9th Cir. 2002).

Nor do cases relied on by the State suggest otherwise. In *Rincon Band of Mission Indians v. San Diego Cty.*, 495 F.2d 1 (9th Cir. 1974), for example, a Native American tribe wrote to the County of San Diego seeking clarification on the county's policy and jurisdiction to enforce gambling laws. The County Sheriff replied by letter, noting "State law, as well as the County ordinance, is quite specific relative to gambling, and all of the laws of San Diego, State, Federal and County, will be enforced within our jurisdiction." *Id.* at 4. The Sheriff further stated, "We feel that the laws of the State and the County are not made for a few, but meant to include everyone, and they shall be administered in that manner." *Id.* This general policy statement bears little resemblance to the Department's letter to Miyoko's, which made unambiguous demands concerning a particular product label and referenced specific statutory provisions.

Likewise, in *Resighini Rancheria v. Bonham*, 872 F. Supp. 2d 964, 967 (N.D. Cal. 2012), counsel for the Resighini Rancheria, another Native American tribe, contacted the California Department of Fish and Game inquiring whether State Game Wardens would be enforcing the State's Fish and Game Code against tribal members for fishing in certain portions of the Klamath River. General counsel for the agency responded that "[w]hile the [agency] generally does not have authority to enforce state fishing regulations against Indians on their own reservations, [it] may criminally enforce the Fish and Game Code against Resighini members on the Yurok Reservation in the same manner as it regulates non-Indian fishing on the reservation." *Id.* Shortly after receiving this response, the tribe sued. The *Resighini* court held that plaintiffs "failed to make the requisite showing of a 'credible threat of prosecution'" by the Department of Fish and Game, in part because "the statement by [Fish and Game's] general counsel in the letter does not constitute a specific warning or threat to initiate proceedings." *Id.* at 971-2. According to the court, "The statement d[id] not establish the requisite degree of specificity or likelihood of

enforcement." *Id.* at 972. By contrast, the letter to Miyoko's identified precise ways in which the "vegan butter" labeling was noncompliant and demanded the label be changed.

Lastly, the fact that the Department could still "reconsider its assessment altogether, decide that it no longer believes Miyoko's violated any law," and ultimately decline to take any adverse enforcement action cannot be a basis for the State to duck this nonfrivolous constitutional challenge. Although the letter does not serve as a definitive policy statement of the Department, it nonetheless carried significant consequences for its recipient. Indeed, as the Department should have been aware, its interpretations of state and federal law threaten the viability of not just the "vegan butter" product, but of Miyoko's entire business model. *See* Decl. of Michele Simon, Dkt. No. 23-4 at 4. According to the Department, "Cultured Vegan Butter" can never serve as a viable statement of identity because of its use of the word "butter"; instead, it advises that "Cashew Cream Fermented from live cultures" serve as the product name, even though this is unlikely to resonate with consumers in the same way. Letter at 2. The letter understandably caused a stir at Miyoko's and has already impacted long-term planning and subsequent advertising decisions. *See* Decl. of Neil Cohen, Dkt. No. 23-2 at 2-4. Now that the Department is being asked to defend its application of these statutes to Miyoko's, it should not be allowed to backtrack and disclaim its prior interpretations and demands. Because the December 2019 letter to Miyoko's was a specific warning of the risk of enforcement, Miyoko's satisfies the second prong.

c. *History of past prosecution or enforcement*

Admittedly, the Department does not have a history of impounding food products unrelated to food safety concerns. *See* Beam Decl. at 4 (noting not a single instance of non-safety-related impoundment in Beam's 16 years as Branch Chief). However, that statistic in and of itself, does not end the analysis. Because the threat of impounded products looms so large, businesses would be expected to accede to the Department's labeling demands. *Cf. Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) ("[T]he alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized without an actual prosecution.").

Therefore, enforcement history should not be judged solely by the frequency with which

the Department undertakes its most severe sanction possible. Instead, enforcement history should take into account the Department's record of utilizing its "escalating notifications of enforcement" policy to enforce dairy labeling requirements on plant-based food companies like Miyoko's. From this perspective, Miyoko's has established a history of enforcement. *See* Simon Decl. at 3 ("Unfortunately, this letter did not altogether come as a surprise to me."); *id.* at 4 ("The aggressive enforcement posture of the Milk and Dairy Food Safety Branch has been an ongoing topic of conversation at PBFA board meetings . . . ."). The State also acknowledged at the hearing that the Department had issued similar letters to other producers of plant-based dairy substitutes over the past few years, although it could not provide any statistics.

In sum, although a close case, Miyoko's has met its burden of establishing a "credible threat of prosecution" under *Thomas*. Moreover, in the First Amendment context, a showing of even a modest risk of enforcement should weigh in favor of a finding of justiciability. The Ninth Circuit has emphasized that, given the potential for "chilled" speech, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). Because Miyoko's satisfies the standing and ripeness requirements, the State's motion to dismiss for lack of subject matter jurisdiction is denied.

B. Abstention

Alternatively, the State requests that the Court abstain from hearing this case, under either the *Pullman* or *Burford* abstention doctrines. Neither doctrine applies here.

a. *Pullman* abstention

Pullman abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy" that is properly before it. *Canton v. Spokane Sch. Dist. No. 81*, 498 F.2d 840, 845 (9th Cir.1974). "By allowing federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions . . . *Pullman* abstention is intended both to avoid a collision between the federal courts and state . . . legislatures, . . . and to prevent the premature determination of constitutional

questions." *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (internal quotations omitted). Abstention under *Pullman* is appropriate only when "(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) [the proper resolution of] the possible determinative issue of state law is uncertain." *Confederated Salish v. Simonich*, 29 F.3d 1398, 1407 (9th Cir.1994).

Here, the State fails at step one. The Ninth Circuit has held that "in First Amendment cases, the first Pullman factor 'will almost never be present because the guarantee of free expression is always an area of particular federal concern.'" *Porter*, 319 F.3d at 492 (quoting *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989). "Indeed, constitutional challenges based on the first amendment right of free expression are the kind of cases that the federal courts are particularly well-suited to hear. That is why abstention is generally inappropriate when first amendment rights are at stake." *J–R Distribs., Inc. v. Eikenberry*, 725 F.2d 482, 487 (9th Cir.1984), *overruled on other grounds by Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491(1985).

On this point, the State's reliance on *Almodovar v. Reiner*, 832 F.2d 1138 (9th Cir. 1987) is misplaced. In *Almodovar*, the Ninth Circuit concluded *Pullman* abstention was warranted in the face of ambiguous state statutes, particularly because a case was already pending before the California Supreme Court, which would soon offer authoritative interpretations that might avoid a constitutional violation. There are no such authoritative interpretations on the horizon here. The *Almodovar* court likewise found there was little risk of chilled speech, whereas the affidavits Miyoko's submitted in conjunction with its opposition brief establish that its speech has already been chilled as a result of the Department's letter. *Compare id.* at 1140 to Cohen Decl. at 3-4 (noting ways in which the letter has impacted the company's marketing strategy). In short, this case presents none of the exceptional circumstances that might warrant *Pullman* abstention. *See Ripplinger*, 868 F.2d at 1048 ("Abstention from the exercise of federal jurisdiction is the exception rather than the rule.").

b. Burford abstention

Neither does this case implicate the abstention doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). "Under *Burford*, federal courts may decline to exercise jurisdiction when the case involves 'an essentially local issue arising out of a complicated state regulatory scheme.'" *Ripplinger*, 868 F.2d at 1049 n.5 (quoting *International Bhd. of Elec. Workers, Local Union No. 1245 v. Public Serv. Comm'n*, 614 F.2d 206, 211 (9th Cir.1980)).

Again, this narrow doctrine is ill-suited to First Amendment challenges. *See id.* ("A case involving a first amendment challenge to a state statute is unlikely to implicate purely local issues that the state courts may be especially competent to deal with."). Nor has the State concentrated challenges to the Department's enforcement decisions in a particular court—a hallmark of *Burford* abstention. *See Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 296 (9th Cir. 1996), as amended (Aug. 5, 1996)). Because exercising jurisdiction in this as-applied challenge will not "disrupt state efforts to establish a coherent policy" regarding dairy labeling, abstaining under *Burford* would be inappropriate. *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001).

V. CONCLUSION

Based on the foregoing, the State's motion is denied.

IT IS SO ORDERED.

Dated: June 25, 2020

RICHARD SEEBORG
United States District Judge