

Ms. Mary K. Engle
Associate Director
Division of Advertising Practices
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Deceptive Milk Labeling And Advertising Concerning rBST

Dear Ms. Engle:

False and deceptive advertising regarding milk and recombinant bovine somatotropin (“rBST”) has mislead consumers for years. These practices are clear violations of the Federal Trade Commission Act and result in higher milk prices for consumers and less choice for dairy farmers.

Supplementing dairy cows with rBST increases milk production and has been verified as completely safe for both cows and humans by the Food and Drug Administration. Although milk processors and retailers certainly have the right to inform customers about the use or non-use of rBST, current advertising practices mislead consumers by falsely claiming that there are health and safety risks associated with milk from rBST-supplemented cows. This misleading advertising has created an artificial demand and higher consumer prices for milk from cows not supplemented with rBST, even though it is equivalent to milk from cows supplemented with rBST. Fueled by the deceptive advertising, milk

processors are forcing dairy farmers to discontinue the use of rBST. This not only makes it more difficult for the farmers to operate profitably but also causes more affordable milk from rBST-supplemented cows to be less available to consumers.

On November 1, 2006, Pennsylvania Secretary of Agriculture Dennis Wolff condemned the coercive behavior of milk processors and dairy cooperatives and confirmed that milk from cows supplemented with rBST has been “deemed completely safe for human consumption.”¹ The Secretary continued, “[i]n fact, there is no way to differentiate between the milk from herds using rBST and those not using it. . . . [C]onsumers are not basing their decisions on sound science but rather on manipulative marketing.”

The result is that consumers -- many of whom are misled by the deceptive advertising -- pay higher prices for milk and get nothing in return. As one farmer, who was recently forced to stop supplementing his cows with rBST, bluntly put it, “the consumer is getting ripped off.”²

Over the past dozen years, FDA has made numerous efforts to end the deceptive practices relating to milk and rBST; however, these initiatives have not

¹ Pennsylvania Secretary of Agriculture Dennis Wolff, *Today rBST - What's Next?*, PA FARM NEWS, November 1, 2006.

² James F. Russell, *Certified Milk is Not Aiding Dairy Farmers: Consumers Paying More at the Store*, Worcester Telegram & Gazette, November 5, 2006.

been successful in curbing the ever-increasing tactic among milk processors to advertise in a way that misleads reasonable consumers into thinking that milk from cows not supplemented with rBST is superior to milk from cows that are supplemented.³ The FTC is asked, therefore, to take immediate action to investigate these deceptive practices pursuant to its mandate under the FTC Act. FTC action is needed to ensure that milk consumers are able to make informed decisions and fair competition is protected.

**Scientific Evidence Confirms That Milk
From rBST-Supplement Cows Is Safe and Equivalent To Other Milk**

In 1993, FDA approved rBST as a supplement for dairy cows.⁴ The scientific data reviewed and endorsed by FDA in connection with the approval shows that supplementing cows with rBST has no effect on the presence or concentration of BST in milk. In fact, all milk, regardless of whether it is from rBST-supplemented cows, contains BST. In 1994, FDA stated unequivocally that “FDA approved the product because the agency had determined after a thorough review that rBST is safe and effective for dairy cows, that milk from rBST-treated cows is safe for human consumption . . . In addition, the agency found that there

³ A request has been made to FDA about current practices regarding milk and rBST. Enclosed is a copy of the letter sent to the FDA.

⁴ See 58 Fed. Reg. 59946 (Nov. 12, 1993).

was no significant difference between milk from treated and untreated cows”⁵

In 1999, in response to inquiries about the safety of rBST, FDA conducted a comprehensive audit of the studies used to determine the human food safety of rBST and upheld the Agency’s original conclusion that milk from cows treated with rBST is perfectly safe for human consumption.⁶

Indeed, the research shows that there is no nutritional or compositional difference in protein, milk solids, fat content, flavor, or color in milk from cows that have been supplement with rBST.⁷ Put simply, milk from cows supplemented with rBST is equivalent in all respects to other milk.

Current Advertising Regarding Milk And rBST Is Deceptive

The FTC Act requires that advertising claims be substantiated. Notwithstanding the overwhelming evidence that there is no difference in the milk from cows supplemented with rBST, milk processors persist in claiming on their labels and in advertisements that the use of rBST is somehow harmful, either to cows or to the people who consume milk from rBST-supplemented cows. The

⁵ See 59 Fed. Reg. 6279, 6280 (February 10, 1994).

⁶ See Center for Veterinary Medicine, Food and Drug Administration, “Update on Human Food Safety of BST,” February 5, 1999 (<http://www.fda.gov/cvm/index/updates/bstsafup.html>); and “Report on the Food and Drug Administration’s Review of the Safety of Recombinant Bovine Somatotropin,” February 10, 1999 (<http://www.fda.gov/cvm/index/bst/RBRPTFNL.htm>).

⁷ See e.g., Office of Technology Assessment, *U.S. Dairy Industry at a Crossroad: Biotechnology and Policy Choices*, May 1991, OTA-F-470 at 38-39 (cites to five additional references that support this conclusion); Cornell University – BST Fact Sheet, June 9, 1995 (<http://www.cfsan.fda.gov/~ear/CORBST.html>); 59 Fed. Reg. 6279, 6280 (February 10, 1994).

conclusive scientific evidence summarized above not only fails to substantiate such advertisements, but it repudiates any claim that milk from rBST-supplemented cows is harmful or of lesser quality.

Advertising that contains material representations “likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment” violate the FTC Act.⁸ Health and safety claims, such as the rBST claims currently made by milk processors, are presumed to be material.⁹ These claims are also likely to mislead – indeed they have already misled – reasonable consumers regarding the safety of milk from rBST-supplemented cows.

Misleading Health Claims Regarding rBST

Much current milk advertising concerning rBST preys upon consumer fears by suggesting -- or outright stating -- that milk from rBST-supplemented cows presents health or safety risks to the consumer. For example, Kleinpeter Dairy in Baton Rouge makes the following false claim about its milk:

Many people believe that rBGH causes premature puberty in children. We want you to know that Kleinpeter Dairy is concerned about your children’s healthy growth and well-being. Let our family comfort yours in this regard because our kids drink Kleinpeter milk, too! Next time you’re

⁸ FTC Policy Statement on Deception, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

⁹ *Id.*

buying milk, look at the label. If it says it's 'from cows not treated with rBGH', then it's the healthy choice for you and your family. Attachment A.

Kleinpeter's claim that milk from non-supplemented cows is healthier for children is patently false -- there is no evidence to suggest that milk from rBST-supplemented cows has any adverse developmental effect on children.¹⁰ The Kleinpeter label violates the FTC Act because the material claim about the health effects of rBST cannot be substantiated, as required, and is likely to mislead consumers.

Alta Dena Dairy, a brand owned by one of the largest dairy corporations in the country, Dean Foods, also makes implied claims that milk from non-supplemented cows is somehow healthier:

By not using rBST, we protect the health of our cows, their milk and our customers.
Attachment B.

Alta Dena reinforces its "health" and safety message by also declaring:

No rBST in all of our products means better health and happier cows. Attachment B.

As demonstrated by the scientific evidence summarized above, the use of rBST has no harmful effects on cows or people. Further, conclusive studies prove that milk

¹⁰ See American Academy of Pediatrics, November 1991 (published in *Pediatrics*, Vol. 88:1056-57) ("Milk derived from cows treated with rBST (recombinant bovine somatotropin) is safe for the human infant and adult and is nutritionally similar to ordinary milk.").

from cows supplemented with rBST is no different than milk produced by non-supplemented cows. Thus, Alta Dena's claim that not using rBST "protect[s] the health of our cows, their milk and our customers" is false and misleading and, therefore, violates the FTC Act's prohibition on deceptive advertising.

The website of Wilcox Family Farms, a large milk processor in Washington State, also advances misleading health claims about rBST. Wilcox's website includes the following testimonials purportedly received from consumers:

Judith: Congratulations and thank you!! on your decision to go rBGH free! *You've made not only a wise health decision but a sound business one. I believe more people will be purchasing your products knowing they are healthier and safer.*

Will: I believe that you will find these decisions rewarding in a number of ways, including increase [sic] sales, broad public appreciation and support, access to additional markets and, what may be the most significant from a business profitability standpoint, *freedom from lawsuits in a decade or so when the health effects of human injection of dairy products containing rBGH are generally acknowledged.*

Sophia: As a mother of two *I try to give my family wholesome all natural foods as much as possible. I was elated to find my already favorite milk was now labeled Free of Antibiotics and Artificial Growth Hormones. I am hoping that you will take*

this one step further and be completely hormone free (Emphasis added)
Attachment C.

The impact of these deceptive health claims regarding rBST is clear: other consumers are led to believe that there is a difference between milk from cows supplemented with rBST and other milk. They are also being told that milk from supplemented cows is somehow unhealthy. Companies like Kleinpeter, Dean, and Wilcox¹¹ perpetuate and reinforce, rather than correct, those beliefs because the misleading advertising allows them to sell equivalent milk at higher prices. These statements regarding the health and safety of milk from rBST-supplemented cows violate the FTC Act because they contain false representations of material facts and, thus, are likely to mislead consumers.

Misleading Claims Regarding The Quality Of Milk From Cows Supplemented With rBST

In addition to deceiving the public about the health effects of rBST, milk processors also disparage the quality of milk from cows supplemented with rBST. Berkeley Farms, another subsidiary of Dean Foods, misleads consumers by employing a deceptive quality comparison on its website:

Not all milk is created equal. At Berkeley Farms, we make sure our milk is certified rBST-hormone-free...We strive for quality control by paying our dairy farmers

¹¹ Numerous milk processors make similarly misleading advertising claims regarding rBST. This long list includes among others: Artisan Cheese Trading Company, Crescent Ridge Dairy, Humboldt Creamery, Promised Land Dairy, Schepps Dairy, Smith Creamery, Stonyfield Farms, Thomas Dairy, and Wright Dairy. See Attachment H.

incentive bonuses to produce superior milk containing higher levels of vitamins, minerals and protein. Attachment D.

As explained above, milk from rBST-supplemented cows is indistinguishable from milk from cows that are not supplemented. Berkley Farms' unsubstantiated claim that its milk is "superior" to other milk is misleading and, therefore, violates the FTC Act because superiority claims must be substantiated.

Even the nationally-known milk and dairy brand Borden is not above engaging in these deceptive practices. For example, consider the following representations in a current Borden advertisement:

Since 1857, Borden has taken a lot of pride in providing customers with premium, great tasting dairy products. That's why we work exclusively with farmers that supply 100% of our milk from cows that haven't been treated with artificial hormones. So, who do you trust when it comes to your family's milk? Attachment E.

Borden's advertisement sends the clear message to consumers that the way to produce premium, great tasting dairy products is to avoid milk from cows supplemented with rBST. This is not true. The advertisement is unquestionably designed to either misinform or play upon and reinforce the misimpressions of consumers. Unsubstantiated comparative claims, such as this one, violate the FTC Act.

Sunshine Dairy Foods of Portland, Oregon, also misleads consumers into thinking that rBST use is somehow related to the quality of milk:

Sunshine Dairy Foods believes in the basic goodness of dairy products. We are allied with Dairy Farmers that practice sustainable farming and are rBST free. Attachment F.

Sunshine Dairy Foods further advances this implied superiority claim by suggesting that, in selling milk produced from non-supplemented cows, it is providing “the very best products.” Attachment F. These claims mislead customers into believing that milk from cows supplemented with rBST is incompatible with “basic goodness.” Again, as explained above, there is no difference between milk from cows supplemented with rBST and milk from cows not supplemented and, therefore, the Sunshine Dairy Foods advertisement violates the FTC Act’s ban on false and deceptive advertising.

Other milk processors mislead customers about the quality of milk by manipulating customer beliefs concerning nutrition or authenticity. Dutch-Way Dairy in Pennsylvania, for example, implies that milk from non-supplemented cows is inherently more nutritional. In one advertisement, Dutch-Way dubs its milk:

The Natural Milk. No Added BST (hormones). The way it’s meant to be! From our family farm to you. Attachment G.

The unmistakable message of this advertisement – that Dutch-Way milk is superior to milk from cows supplemented with rBST – misleads consumers in violation of the FTC Act. Again, there is no nutritional or other difference between milk from rBST-supplemented and non-supplemented cows.

Dutch-Way Dairy also graphically disparages the use of rBST by depicting a syringe labeled “BST” injecting a dairy cow in the hindquarters:



Attachment G. This graphic uses exaggerated imagery – the oversized syringe – to manipulate consumer concerns about the humane treatment of animals. The advertisement’s pictorial claim that rBST is harmful to dairy cows is false and unsubstantiated and, therefore, it violates the FTC Act.

Impact Of Deceptive Advertising On Consumers And Dairy Farmers

Deceptive labeling and advertising is an all too effective tool for milk processors to profit from false, negative messages about milk from cows

supplemented with rBST. Consumer perception studies confirm that consumers are deceived by the advertising regarding milk and rBST. In a telephone survey conducted in July 2005, 68% of respondents stated that they believe milk labeled “hormone free” was “safer” and “healthier.”¹² In another research study commissioned by a non-profit conservation and natural resources advocacy group, over 50% of people reviewing “no hormone” claims on milk labels incorrectly believed there was a difference in the milk. Further, of those who thought there was a difference, over 50% believed the “hormone free” milks to be superior to the milk without these claims.¹³

The false and misleading rBST claims prevalent in the marketplace imply that milk from non-supplemented cows is superior, disparage milk from rBST-supplemented cows, and create consumer confusion. Deceptive advertisements prey upon consumer concerns about health and safety and allow

¹² Results of telephone survey conducted by Marketing Horizons, Inc. between July 11 and July 27, 2005. *See also* SWR Worldwide, *Report on Perceptions of Milk Labels in the Southern District of New York*, December 4, 2001 (confirming consumers believe that “no hormone” and “rBST free” claims mean that the milk is “better.”).

¹³ SWR Worldwide Report, *supra* note 12. Similarly, in 1994, Monsanto Company commissioned a survey in which consumers were asked their reaction to a variety of different kinds of “BST-free” labels. *See* Westgate Research, Inc., *A Study of Consumer Interpretation of Voluntary BST Labels*, March, 1994. In every instance, no matter what disclaimers were included, more than half of the consumers surveyed understood any reference to BST usage as implying that milk from supplemented cows is less safe, less nutritious, or tastes different than milk from cows that have not received BST supplements. Between 87% and 97% of those who believed there was a difference thought that milk produced by non-supplemented cows would be safer, have better nutritional value, or would taste better than milk produced by BST-supplemented cows.

milk processors to charge higher prices for equivalent products, which are passed on to the consumer.¹⁴ As the Pennsylvania Secretary of Agriculture observed, “[i]n some states, a gallon of milk from herds not using supplemental hormones is selling for nearly twice the dollars per gallon of ‘regular’ milk.”¹⁵

In addition to some consumers paying more for the equivalent, so-called “hormone-free” milk, the availability of milk from rBST-supplemented cows is shrinking as milk processors coerce dairy farmers to stop supplementing cows with rBST. For example, some dairy cooperatives recently told their producer members that premiums would be paid in exchange for producer affidavits pledging not to use rBST.¹⁶ Farmers who did not sign the affidavit and continue to sell milk from cows supplemented with rBST may be assessed a punitive “hauling charge” for their decision.

Farmers who rely on rBST to maintain efficient milk production levels have expressed fear that the rBST-free requirements being imposed by milk processors will ultimately impact their ability to operate profitably.¹⁷ As noted

¹⁴ Bruce Mohl, *Stores Hike Prices on Milk Free of Synthetic Hormones*, Boston Globe, October 10, 2006.

¹⁵ Wolff, *supra* note 1.

¹⁶ Cf. Andy Andrews, *Cooperative Looks For Solutions To ‘Dire’ Milk Prices*, SOLANCO AREA ONLINE NEWS, October 31, 2006.

¹⁷ Bruce Mohl, *Two Dairies to End Use of Artificial Hormones: Hope to Compete with Organic Milk*, Boston Globe, September 25, 2006.

above, the Pennsylvania Secretary of Agriculture recently condemned the coercive behavior of milk processors.¹⁸ The Secretary recommended that farmers attempt to resist this coercion and “seriously consider the effects it will have on their business if not offered a fair compensation.” Massachusetts Agriculture Commissioner Doug Gillespie similarly reported that milk processors in his state, such as HP Hood and Dean Food’s Garelick Farms, have been able to significantly raise the retail price of their milk yet are not passing that increase back to the farmers that were forced to stop using rBST.¹⁹ Garelick Farms allegedly threatened not to buy milk from any Massachusetts farmers unless the state began to certify which farms were not supplementing cows with rBST.²⁰

¹⁸ Wolff, *supra* note 1.

¹⁹ Russell, *supra* note 2.

²⁰ Russell, *supra* note 2.

Conclusion

Deceptive labeling practices regarding milk from cows supplemented with rBST have allowed a growing number of milk processors to compete unfairly and to mislead consumers. Action by the FTC is needed to ensure that consumer choices are accurately informed and that competition is protected. It is requested that the FTC investigate the current advertising practices regarding milk and rBST.

Sincerely,

Brian Robert Lowry
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Office of Policy, Stewardship,
Regulation and Government