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11 July 2007

Ms. Lydia B. Parnes
Director
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Mr. William Blumenthal
General Counsel
Office of General Counsel
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Ms. Parnes & Mr. Blumenthal:

The Center for Food Safety (CFS), a non-profit membership organization addressing environmental and safety concerns regarding food production, is writing to the Federal Trade Commission (FTC) to request that the agency take action to prevent the misleading practice of advertising of seafood products as “organic” within the United States.¹ As described herein and the attached petition² to the USDA, National Organic Program, the advertising of seafood products as “organic” is an unfair and deceptive practice that misleads U.S. consumers and violates Federal Trade Commission Act.³

In 1990, Congress passed the Organic Foods Production Act (OFPA), which established standards for production and handling of foods labeled as “organic.”⁴ The OFPA vested USDA with

¹ FTC, Policy Statement on Deception at 2, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984).

² See Attach. 1

³ 15 U.S.C. § 41 et seq.

⁴ 7 U.S.C. § 6501, et seq.

authority to promulgate regulations governing the production of all agricultural products marketed as organic, including seafood. In 2000, USDA published its final regulations for agricultural products, including land-based livestock. However, recognizing fundamental differences between land-based livestock and aquaculture, the USDA set out to establish separate regulations for fin and shellfish. This regulatory process is ongoing, and final regulations have yet to be implemented. While these regulations are being developed, sales of organic food have drastically increased, and manufacturers, including aquaculturalists, are eager to join this emerging market.

In this booming market, some manufacturers have begun to label their seafood products as “organic” even in the absence of USDA standards. CFS believes that labeling this seafood as “organic” is “a representation . . . or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”⁵ When companies use a term with significant, yet inapplicable meaning, reasonable consumers are likely to be deceived.

First, labeling seafood as “organic” in the absence of USDA standards is likely to mislead consumers. Consumers have come to rely on the term “organic” as a symbol that the food they are about to purchase was produced in a sustainable, humane and ecologically responsible way. Consumers, unaware of the USDA’s inner workings or the lack of seafood-specific standards, are likely to assume that an “organic” fish was produced in a manner that mirrors the agriculture standards they have come to expect, such as freedom from antibiotics, restricted use of parasiticides, all-organic feed inputs and accommodation of the animal’s natural behaviors. In reality much of the seafood today labeled as “organic” has not been raised in accordance with these expectations.

Second, this deception is experienced by the reasonable consumer. The reasonable consumer cannot be expected to fully understand the regulatory process behind the establishment of organic standards, nor the current status of those standards for finfish or shellfish. According to the FTC’s Guided Regarding Environmental Marketing Claims, marketers “must be able to substantiate the reasonable interpretations that consumers draw from a claim.”⁶ Further, “while a seller has some latitude in puffing his goods, he is not authorized to misrepresent them or to assign to them benefits they do not possess.”⁷ Here, it is far beyond “mere puffery” to claim that these seafood products are organic when no standards exist for the use of this term. This is particularly true as the term has such a strong meaning for regulated agricultural products. This is an intentional deception affecting consumers in two ways. First, it preys upon a consumer’s assumption that food products cannot feature the label “organic” if it does not meet USDA standards. And second, it conjures up all of the environmental or health conscious reasons for choosing organic foods, and attaches those reasons to seafood which is often not produced in accordance with these assumptions.

Finally, this misrepresentation is “material” for four reasons. First, a material misrepresentation is one which a reasonable person would regard as important in deciding how to act, or which the maker knows a would-be buyer is likely to regard as important. Many consumers make purchasing decisions based on organic status of a food and consider this information important enough to command a price

⁵ FTC Policy Statement, *supra* note 1.

⁶ FTC, Facts for Business: Environmental Marketing Claims, October 1999.

⁷ Restatement of Torts 2d §538(a).

premium. Second, the FTC considers express claims (such as “organic”) to be material. Where such a claim is misleading or false, materiality is presumed. Third, where the misleading information pertains to factors such as health, cost and quality, it has been found to be material. Consumers have many reasons for purchasing organic foods, such as health or environmental concerns, which pertain to the cost and quality of the product. Fourth, the FTC has traditionally held that material injury exists when “consumers would have chosen differently but for the deception.”⁸ Many consumers, wary of traditional aquaculture, would likely forego farmed fish if not for this deceptive labeling.

As this labeling is misleading, CFS requests that the FTC pursue bad-faith actors under the authority of the FTC Act.⁹ Attached to this letter, please find CFS’ complaint to the USDA, which outlines the alleged violations, provides examples of misrepresentations, and lists the contact information for these manufacturers. The FTC has jurisdiction to take enforcement action against these companies because it is in the public interests to curtail the misleading usage of the term “organic” in a way that adversely affects the public.

Additionally, CFS respectfully requests that the FTC apply the interpretations found in the “Guides for the Use of Environmental Claims” to unsupported “organic” claims (i.e. “organic” claims for which no USDA regulations exists). CFS believes that this would provide industry with additional and necessary guidance regarding use of the term “organic” on non-agricultural products. These Guides currently apply to environmental claims included in labeling or advertising.¹⁰ Representing a product as “organic” is a general environmental benefit claim and this labeling should therefore “not be presented in a manner that overstates the environmental attribute or benefit, expressly or by implication.”¹¹ Further, labeling unregulated products as “organic” runs against the Guides’ preference for *substantiated* environmental marketing claims and discourages the use of such claims until such substantiation duty can be met.¹²

Accordingly, CFS requests that the FTC notify the parties identified in the attached petition that they must cease and desist use of the term “organic” in all advertising and product labeling or face administrative action by the agency. CFS also requests that the agency initiate and develop guidelines to prevent the misleading use of the term “organic” on non-agricultural consumer products that fall outside the standards setting and enforcement jurisdiction of the USDA.¹³

⁸ FTC Policy Statement, *supra* note 1.

⁹ 15 U.S.C. §46.

¹⁰ 16 C.F.R. § 260.2

¹¹ 16 C.F.R. § 260.6(c)

¹² 16 C.F.R. § 260.7(a)

¹³ Use of the term “organic” in marketing claims on products neither certified by an USDA accredited certifying agency nor governed by the Organic Foods Production Act is becoming increasingly prevalent. *See* Attach 2, providing examples of these claims such as: <http://www.theorganicmattressstore.com> (last visited July 10, 2007)(making advertising claims of mattresses as “organic”) or <http://www.gownrestoration.net/topic.asp?TOPIC=DryCleaning> (last visited July 10, 2007)(making advertising claims of drying cleaning services as “organic”).

Respectfully submitted,

Joseph Mendelson III
Legal Director

Attach.