



Organic Consumers Association

Campaigning for Food Safety, Organic Agriculture, Fair Trade and Sustainability.

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Via E-Mail and First Class Mail

Miles V. McEvoy
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Dear Miles:

We are writing on behalf of the Organic Consumers Association and Dr. Bronner's Magic Soaps, (i) to call your attention to several significant recent developments relating to regulation of use of the term "Organic" on personal care products; (ii) to address your Memorandum of April 23, 2010 to the Chairman of the NOSB; and (iii) to urge the National Organic Program immediately to issue a Notice of Proposed Rulemaking for application of the existing NOP rules to personal care products making outright "Organic" claims.

1. Recent Developments

As noted in the January 14, 2010 Complaint filed with NOP by Organic Consumers Association and three companies (including Dr. Bronner's), Dr. Bronner's filed suit in San Francisco, California, Superior Court, against Hain Celestial, Kiss My Face, Levlad, YSL Beaute, Giovanni, Cosway and Country Life, among others, under section 43(a) of the federal Lanham Act, 15 U.S.C. §43(a)(1), for false and deceptive advertising, based on the deceptive and misleading labeling by these companies of their personal care products, as "Organic." Defendants removed the case to the U.S. District Court for the Northern District of California. *All One God Faith Inc. v. Hain Celestial Group et al*, No. 09-cv-03517 JF (N.D. Cal., Notice of Removal filed July 31, 2009).

Hain, Kiss My Face and Levlad, joined by most of the other defendant companies, then moved to dismiss the complaint on the grounds that USDA has *exclusive jurisdiction* over the labeling of products as "Organic" and that Dr. Bronner's should have been required to file a complaint with NOP before bringing an action under the Lanham Act. On December 14, 2009, the District Court issued a decision and order granting these companies' motion to dismiss the

complaint, with leave to amend. *Order, All One God Faith Inc. v. The Hain Celestial Group, et al*, Civ No. CV-09-3517 JF-HRL (N.D. Cal, filed Dec. 14, 2009)(“Dec. 14 Order”).

The Court agreed with Hain, Levlad and Kiss My Face that, in “enacting the OFPA, Congress created an exclusive federal mechanism for evaluating and approving synthetic materials....” *Order* at 4. The Court noted that the “USDA has indicated that it accepts all consumers and business complaints regarding alleged misuse of the word ‘organic’” *Id.* at 5 (citing Final Rule, 65 *Fed. Reg.* at 80627) and ruled that Dr. Bronner’s is required to file a complaint with the NOP in order to exhaust its administrative remedies. *Id.* at 10. The Court found that , “while to date the USDA has declined to exercise its authority with respect to the labeling of organic personal care products, it has asserted jurisdiction over such products in other ways, such as allowing producers and handlers of such products,... to seek USDA certification under the NOP.” *Id.* at 11. The Court found that “the labeling and marketing of ‘organic’ products falls within the exclusive jurisdiction of USDA.” *Id.* at 13.

Dr. Bronner’s then filed a third amended complaint. The defendants again moved to dismiss it on the grounds that USDA has exclusive jurisdiction over regulation of the use of the term “organic” on personal care products. In their motion, defendants noted the NOSB recommendation of November 2009 and the filing by OCA and the three companies, including Dr. Bronner’s, of the Jan. 14, 2010 Administrative Complaint. On May 24, 2010, the Court ordered the action stayed until the Court learns “how the USDA will proceed regarding the NOSB’s recommendation and Plaintiff’s administrative complaint.” *Order Granting YSL’s Motion to Dismiss and Staying Action as to All Remaining Defendants* at 12, *All one God Faith Inc v. The Hain Celestial Group, Inc.*, Case No. C 09-03517 JF (HRL) (N.D. Cal., May 24, 2010). The Court noted that, in “its previous order, the Court determined *that the USDA has jurisdiction over personal care products....*” *Id.* at 9(emphasis added). Further, the Court held, “the NOSB’s formal recommendation to the NOP—that the existing rules be amended to make clear that the NOP standards for labeling a product as ‘organic’ apply to personal care products—presupposes that the USDA has jurisdiction over the products involved.” *Id.* at 10. The Court scheduled, for September 10, 2010, a “a case management conference to determine the progress of the administrative proceedings before the USDA.” *Id.* at 14.

Thus, the District Court has determined that USDA should be given the opportunity to act promptly on the Administrative Complaint and is expecting a status report by September 10, 2010. The Court also emphasized, in its previous order, that if Dr. Bronner’s were dissatisfied with USDA’s actions to date “declin[ing] expressly to impose the NOP standards on personal care products,” Dr. Bronner’s should avail itself of USDA’s administrative appeal procedure. Dec. 14 Order at 10.

The need for USDA to act immediately to confirm its jurisdiction over the labeling as “Organic” of personal care products and commence regulation of such labeling was underscored by two other recent developments. First, on June 8, 2010, Whole Foods Market, the nation’s largest retailer of natural and organic personal care products, announced a policy requiring that any personal care or cosmetic product that is sold at Whole Foods Market and that is labeled “Organic” or “Made with “Organic”—including as part of a brand name—must, by June 1, 2011, be certified under the NOP. Any product making a “Contains organic [specified ingredients]” claim must be certified to the NSF/ANSI 305 Personal Care Standard. Whole Foods further announced that it expects each of its suppliers affected by this policy to submit its plans for compliance to Whole Foods, by August 1, 2010. See attached for full text of Whole Foods policy.

Second, the next day, June 9, 2010, the Organic Trade Association announced formally that its Board of Directors had “adopted a consensus position on the regulation and labeling of organic personal care products in the United States by supporting mandatory federal regulation of organic labeling claims on personal care products.” The announcement specifically indicated that the Board had “voted to endorse USDA regulation of personal care products ...Federal regulation will guarantee that organic personal care products meet a consistent standard and will assure that consumers can trust the organic claim.”

Taken together, these developments indicate a clear consensus in the regulated community (producers) and in the consumer community, for mandatory NOP regulation of the labeling of personal care products as “Organic.”

2. NOP Response to NOSB Recommendation and Administrative Complaint

In response to the Administrative Complaint filed by OCA and three companies (including Dr. Bronner’s), you wrote a letter to OCA’s national director indicating only that the “NOP is currently evaluating policy issues surrounding the organic labeling of personal care products” and that “NOP will collaborate with the Food and Drug Administration and the Federal Trade Commission to understand issues associated with the use of the term ‘organic’ in personal care products.” Noticeably absent from that letter was any commitment to commence regulation of personal care products that make outright claims to be “Organic” but do not remotely meet NOP standards for labeling of any agricultural product as “Organic.”

Your April 23, 2010 Memo to the Chairman of the NOSB similarly commits NOP only to “[c]onsider the recommendation of the NOSB on rulemaking and take them under advisement for future incorporation.” That memo also indicates NOP’s intention to collaborate with FDA and the FTC to “understand the issues associated with” use of the term “organic” on personal care products; and to “[b]egin gathering information regarding the organic labeling of personal care products in the marketplace.”

The April 23 memo does indicate some of the concerns of NOP about moving forward expeditiously with the regulation of labeling of personal care products. We believe, however, that these concerns are misplaced.

First, the memo suggests that the OFPA “frames organically produced agricultural products in the context of food and contains no references to personal care products or cosmetics.” To the contrary, the law provides that, “Any person who knowingly sells or labels *a product* as organic, except in accordance with this title, shall be subject to a civil penalty of not more than \$10,000.” 7 U.S.C. §6519(a). The ban on mislabeling that USDA/NOP is charged with enforcing is thus *not* limited to food products, but applies by its terms to *any* product labeled “Organic.” Further, as explained in detail in the Administrative Complaint, NOP necessarily has mandatory regulatory authority over the labeling as “Organic” of multi-ingredient finished products that include agricultural ingredients of any kind.

As noted in the Administrative Complaint, the vast majority of the personal care products that are currently being deceptively labeled as “Organic” *do* contain agricultural ingredients, are consumed by humans and marketed in the U.S., and are themselves, therefore, “agricultural products” within the meaning of the OFPA and NOP Regulations. It is for precisely that reason that such products necessarily fall within the scope of the OFPA and the NOP Regulations.

Second, in that regard, it is simply not true, as stated in your April 23 Memo, that the August 2005 NOP directive to certifying agents—allowing agricultural products to be certified as organic if they comply with NOP rules regardless of end use—represented a “different stance to previous statements.” In fact, NOP made clear at the *outset* of the program, that non-food products containing agricultural ingredients could be certified under NOP. In its May 2, 2002 “Policy Statement on National Organic Program Scope,” NOP stated that:

[W]e have been asked if the regulations under the NOP apply to the following product, classes of products and production systems,: mushrooms; pet foods,; aquatic animals; fabrics; *cosmetics; body care products*; over the counter medications; dietary supplements; fertilizers; soil amendments; and products from greenhouse, apiculture and hydroponic systems. Because these and other products classes of products and production systems contain agricultural products, the producer and handlers of such products, classes of products and production systems are eligible to seek certification under the NOP.

(emphasis added).

Two of the largest US bar soap manufacturers (Twincraft and Bradford) were then certified under USDA in October of 2002, by the world’s largest organic certifier, QAI. Dr. Bronner’s merely followed suit, obtaining its own certification in the spring of 2003.

It was only in 2004 that USDA took a “different stance,” shifting to the position that producers of personal care and cosmetic products could not seek even voluntary participation in the NOP because the USDA lacked regulatory authority to allow even the voluntary program. In an April 2004 “Guidance Statement,” the USDA stated that the “OFPA does not extend to products over which USDA has no regulatory authority,” including “such products as personal care, health care products, [and] fertilizers.” The organic industry and organic consumers combined forces, coordinated by OTA and OCA, to urge USDA to reverse this unexpected and unwanted development. The USDA a few months later reversed course and suspended the “Guidance Statement”, permitting the status quo that had prevailed since the launch of the program in 2002-- that qualified personal care may certify and participate in the National Organic Program.

On the occasion of USDA’s reversal of the April 2004 policy, Senator Patrick Leahy (D-Vt), widely regarded as the “father” of the OFPA, stated that he had specifically requested this reversal, also, because “OFPA’s purpose is to regulate the use of organic labels on organic products and that opening this loophole conflicts with the law’s intent.” Office of Senator Leahy, Press Release, May 26, 2004. The author of OFPA did not intend NOP to enable organic cheaters to maraud in the marketplace and defraud consumers unchecked. (Attached).

USDA veered off course again in April 2005 with its “USDA Response to NOSB Feedback on Issue Statements: Fishmeal, Inerts, Antibiotics and Scope of Authority”, indicating that personal care products could not even be voluntarily certified under NOP. Because the allowance for voluntary certification had been in effect since the launch of the NOP based on the May 2002 “Policy Statement,” and because the OCA and Dr. Bronner’s and others had relied on that May 2002 statement in voluntarily investing substantially in certifying so they could label their products in accordance with NOP, Dr. Bronner’s brought suit against USDA to challenge the abandonment of the voluntary program. *All One God Faith Inc. v. U.S. Department of Agriculture*, Civ. No. 05cv1178 (PLF) (D.D.C., filed June 13, 2005). The USDA then reversed its earlier position as to the voluntary program and, in August 2005, issued the directive to certifying agents referred to in your memo. That position represents the original and correct position about the scope of the NOP.

Third, your Memo notes that there “are a number of organic labeling schemes in the marketplace that utilize different, private standards (or no standard at all) to label personal care products as organic.” You cite as examples NSF; Ecocert and OASIS. In fact, the vast majority of personal care products labeled “Organic” do not bear any private certification and do not purport to comply with any standard at all, NOP or private. The NSF standard actually adopts the NOP rule for products labeled outright as “Organic;” for those products, it is not a different, private standard at all. The other two standards, Ecocert and OASIS, are used on a very small portion of personal care products and, because they permit a product to be labeled as “Organic”

even though it does not meet basic consumer expectations of what an “Organic” personal care product should contain, do nothing to protect or inform consumers.

Accordingly, the concerns expressed in the memo do not provide a basis for refraining from imposing immediate mandatory regulation at least of those personal care products labeled outright as “Organic.”

3. Request for Immediate Rulemaking for Labeling of Personal Care Products Outright as “Organic”

As explained in detail in the Administrative Complaint, the most urgent need is for USDA/NOP to remedy the deception and defrauding of consumers through the labeling outright as “Organic” of personal care products which use main cleansing and moisturizing ingredients derived from *non-organic* agricultural materials and/or which contain or are made with petrochemical compounds. As discussed in the Complaint, it is *not* necessary for NOP to issue new regulations to address the particular issues arising from the inclusion of organic agricultural ingredients in personal care products. The “Made with Organic [specified ingredients]” claim does not have the same corrosive effect on the integrity of the term “organic” and can ultimately be permitted under regulations tailored to use of that term on personal care products. Of course, those regulations will take a substantial amount of time to develop and, in the meantime, use of the “Made with” claim can be left free of regulation.

There is no reason why NOP cannot proceed to implement the NOSB recommendation with respect to outright “Organic” claims on personal care products, by initiating a rulemaking to adopt the simple amendments to the regulations recommended by NOSB. *First*, it is not necessary for NOP extensively to consult with the FDA or the FTC. Your suggestion that FDA “has authority to regulate the labeling and safety of personal care products” (April 23 Memo, p. 3) is not accurate with respect, specifically, to the labeling of personal care products as “Organic.” As your memo concedes, the FDA *itself*, in its March 2010 statement, made clear that organic labeling of personal care products must comply with *NOP* organic standards. And as NOP explained in its April 2008 Guidance Document, “FDA does not define or regulate the term ‘organic’ as it applies to cosmetics, body care of personal care products.” Nor does the FTC assert any area of exclusive jurisdiction that would need to be accommodated in order for the NOP to proceed with a rulemaking.

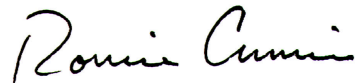
Second, there is no need for NOP to consume time or resources undertaking its own consumer research. There is ample evidence already available of consumer confusion and deception, consisting not only in the research and surveys already conducted by OCA and Dr. Bronner’s but also the reaction of the retail community exemplified by the Whole Foods announcement, Consumers Union advocacy on behalf of consumers, etc. Of course NOP could solicit the available research and information in a notice of proposed rulemaking.

Third, there is a clearly a consensus in every relevant community—consumers, retailers, producers—that NOP should initiate mandatory regulation of the labeling of personal care products. That position has now been endorsed by OTA, by OCA, by FDA, by Sen. Leahy, the Consumers Union and by Cornucopia, among others.

For these reasons, we urge USDA to issue, within the next few weeks, a notice of proposed rulemaking to adopt the NOSB recommendations with respect to the labeling outright as “Organic,” of personal care products.

Thank you as always for your time and attention, and for your continuing energy and commitment to the promotion of organic agriculture and the welfare of consumers. With best regards,

Sincerely yours,



Ronnie Cummins
Executive Director, Organic Consumers Association



David Bronner
President, Dr. Bronner’s Magic Soaps