

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
(EASTERN DIVISION)

INTERNATIONAL DAIRY FOODS ASSOCIATION)	
)	
Plaintiff,)	
)	CASE NO. _____
v.)	
)	
ROBERT J. BOGGS (solely in his official capacity as Ohio Director of Agriculture,))	Honorable Judge _____, U.S.D.J.
)	
Defendant.)	
)	

COMPLAINT

1. This action is brought to secure the right of consumers to obtain truthful information about the dairy products they buy, and the right of dairy processors, and retailers to provide such information to them through product labeling.

2. Defendant Robert J. Boggs, in his official capacity as Ohio Director of Agriculture, has adopted a regulation that unduly limits the ability of dairy product manufacturers from providing such truthful and non-misleading information to consumers. Ohio’s recently adopted regulations are unique in the United States and more restrictive than any other state’s labeling requirements for dairy products.

3. The Plaintiff is a trade association, the International Dairy Foods Association (“IDFA”). IDFA's 220 dairy processing members run more than 600 plant operations, and range

from large multi-national organizations to single-plant companies. Together they represent more than 85% of the milk, cultured products, cheese and frozen desserts produced and marketed in the United States. IDFA's members include many of the companies selling dairy products in the State of Ohio. Many of these products (e.g. fluid milk, yogurt, cheese) do not contain milk produced from cows treated with recombinant bovine growth hormone ("rbGH") also known as recombinant bovine somatotropin "(rbST)", a genetically engineered hormone administered to lactating dairy cows to increase their milk production.

4. The plaintiff's members want to inform consumers of this fact on product labels. The Ohio Director of Agriculture has instituted strict guidelines compelling the dairy providers to communicate this information in an unduly limited manner that is also more stringent than rules in effect in other states. This prohibition violates the First and Fourteenth Amendments to the United States Constitution, the dormant Commerce Clause of the United States Constitution, and 42 U.S.C. § 1983.

5. Plaintiff seeks declaratory and injunctive relief to prevent the State of Ohio's Director of Agriculture from further denying plaintiffs their rights under the Constitution and laws of the United States. Plaintiff also seeks an award of attorney fees pursuant to 42 U.S.C. § 1988 and costs.

JURISDICTION AND VENUE

6. The Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343, since the matter arises under the Constitution and laws of the United States, including the First

and Fourteenth Amendments and the Dormant Commerce Clause, Article I, Section 8, of the United States Constitution and 42 U.S.C. § 1983.

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) since a substantial part of the events giving rise to these claims occurred here, and because the defendant resides here and resides in the State of Ohio.

PARTIES

8. Plaintiff International Dairy Food Association (“IDFA”) is a trade association whose members include many of the milk dealers and manufacturers of dairy products which process and supply wholesale fluid milk and other dairy products in Ohio. Most, if not nearly all, packaged milk and most of the other dairy products sold in the State of Ohio is produced or manufactured and distributed by a member of IDFA.

9. IDFA members purchase raw milk, some or all of which is sourced from dairy farmers who individually, directly, or through their cooperatives market milk that they promise to the Plaintiff’s members is rbGH free – that is these dairy farmers have promised that they do not and will not use rbGH on their milk herd to increase milk production. Plaintiff’s members then process, manufacture, and sell this segregated milk from cows not treated with rbGH to their retail customers.

10. Defendant, Robert J. Boggs, is the Director of Agriculture for the State of Ohio. In that official capacity, Director Boggs exercises authority to establish policy and enforce the relevant provisions of the State of Ohio regulating the labeling and sale of food products in the State. Director Boggs is named as a defendant in this case in his official capacity only.

FACTS ABOUT rbGH

11. rbGH is a synthetic growth hormone produced in laboratories by genetically engineered bacteria. (rbGH is also known as recombinant bovine somatotropin, or rbST.). Lactating dairy cows naturally produce their own supply of bovine growth hormone, but when these cows are given injections of rbGH, the synthetic hormone combines with the naturally occurring one to permit a possible increase in the cows' milk production by up to ten percent or more under certain conditions.

12. rbGH was first developed in the early 1980s. In 1982, several major drug companies filed new animal drug applications with the United States Food and Drug Administration ("FDA") to gain approval of rbGH and permit the use of this synthetic hormone on dairy cows.

13. Following a study by the Animal Sciences Division of Monsanto, on November 5, 1993, FDA approved the new animal drug application for rbGH. According to the FDA, Monsanto's application was approved because the Monsanto study concluded that rbGH would be safe and effective for dairy cows, that milk from rbGH-treated cows would be safe for human consumption, and that production and use of rbGH would not have a significant impact on the environment.

14. Since rbGH's inception, IDFA has not opposed rbGH. IDFA's position has been to support the use of approved technologies. And, IDFA's position also has unequivocally been to support its members' First Amendment right to market and label their products in a truthful, non-misleading manner and to oppose any measures that unlawfully infringe on that right.

15. In the case of rbGH, there has been a fundamental paradigm shift with consumers. There has been and is growing, consumer interest in knowing about whether or not rbGH is used to produce the milk that consumers purchase.

16. Some consumers have pointed out that FDA's approval of rbGH was not without qualification.

17. Furthermore, many consumers today oppose the use of this genetically engineered hormone. Some are concerned with the human health implications. Other consumers have expressed concern that the use of rbGH could result in greater milk production, lower milk prices, and thereby causing supply imbalances and harm to the farmers who choose not to use the drug. Still others believe that administering supplemental amounts of growth hormones to lactating dairy cows amounts to poor animal husbandry, or are just opposed to the use of genetic engineering in the production of food. Some consumers purchase food products based upon representations made regarding the care, feeding and treatment of animals including, but not limited to, the use of products like rbGH.

18. Consumer survey data reveals that there is substantial consumer concern and interest over the use or non-use of rbGH.

19. Moreover, use of rbGH is not widely accepted worldwide for many of these same reasons. It has not been approved in Canada, Japan, New Zealand or Australia. And the European Union imposed a moratorium on rbGH's use in 1993. Canada in particular refused to permit rbGH largely over public concerns for animal health. Thus, dairy products produced in Canada and sold in Ohio cannot lawfully be produced with rbGH, and rbGH may not be lawfully sold to dairy farmers in Canada.

20. As a result, many consumers today want and indeed demand of dairy product manufacturers that dairy products be labeled so they can tell which products contain milk from cows treated with rbGH and which do not. Many consumers also want to decide for themselves whether or not to buy products containing milk from treated cows. If they decide to buy only products that do not contain milk from treated cows, they want to be able to readily find those products in the marketplace.

21. As a result of consumer demand, many of Plaintiff's members have individually decided that they will not accept milk from their suppliers that comes from cows that have been treated with rbGH. These members have entered into agreements and made other arrangements with their suppliers to ensure that the milk they receive from these sources does not come from treated cows. In some cases, IDFA members have agreed to pay farmers a monetary premium to compensate them for participating in these agreements.

22. Plaintiff's members also want to be able to inform consumers, through effective product labeling, that their milk products do not contain milk from cows treated with rbGH.

FDA LABELING POLICY REGARDING rbGH

23. Under the federal Food, Drug and Cosmetic Act (the "federal Act"), the FDA has authority to regulate the labeling of milk and milk products. That authority includes the power to prohibit the sale of any such products the labeling of which is false or misleading.

24. When the FDA approved the use of rbGH, it decided not to require special labeling for milk derived from cows treated with this genetically engineered hormone because it concluded that there was no significant difference between milk from treated and untreated cows. However, FDA did state that food companies that did not use milk from cows treated with rbGH

could voluntarily inform consumers of this fact in their product labels, provided that any such statements were truthful and not misleading.

25. In response to requests by several states, industry groups, and consumer representatives, the FDA in February 1994 issued interim guidance on the voluntary labeling of milk and milk products derived from cows not treated with rbGH. The purpose of this notice was to inform interested parties of a label format that FDA would not second guess and to give guidelines to those that might use FDA's label format.

26. In its interim guidelines, later qualified in a July 27, 1994 letter, the FDA asserted that labeling statements to the effect that products were from cows not treated with rbGH could satisfy the requirements of being truthful and not misleading. However, the agency stated that implication that milk derived from cows not treated with rbGH is safer or of higher quality "could best be avoided by the use of accompanying information that puts the statement in proper context." As one example of how such context could be achieved, the FDA suggested that labels employ the following contextual language: "No significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows."

27. However, FDA has expressly stated that the proposed contextual language or even any contextual language is not necessary or mandatory: "that in many instances a statement like 'from cows not treated with rbST' would not be misleading, and in no instance is the specific statement 'No significant difference . . .' required by FDA."

28. Although not necessary or mandatory, IDFA has since the adoption of the FDA guidance consistently and always recommended to its Members that any label claim regarding the non-use of rbGH include the FDA suggested contextual language in some form somewhere

on the package label. IDFA cannot and did not dictate to its Members that the contextual language be used and has taken no position on the size, font, location or color of the use of the qualifying language.

29. Since 1994, Monsanto has on several occasions requested that FDA or the Federal Trade Commission (“FTC”) limit the use of rbGH labels or to find that labels in the marketplace are false or misleading. With very limited exceptions, since resolved, neither FDA nor FTC has found rbGH labels in the marketplace to be misleading. Monsanto has more recently turned to state legislatures and state agriculture departments supported by dairy farmers using rbGH to obtain label restriction decisions that FDA and FTC have refused to make.

OHIO RULE REGARDING rbGH

30. Prior to 2008, the Director had general authority regarding ensuring consumers obtain truthful and non-misleading information regarding food products. Ohio Rev. Code § 3715.60. He also had the same authority regarding dairy product labeling. Ohio Rev. Code § 917.05.

31. On February 7, 2008, the Director, in his official capacity, issued an Emergency Rule regarding dairy product labeling that for the first time in Ohio, and notwithstanding existing authority to enforce truthful and non-misleading labeling, singled out rbGH for specific rules and restrictions that go beyond the FDA Guidance by preventing certain milk labels, requiring the FDA disclaimer language and imposing rules on placement, size and location of the FDA disclaimer language (the “Emergency Rule”).

32. Upon information and belief, prior to issuing the Emergency Rule, the Director did not use his existing authority to enforce against any IDFA member dairy product manufacturer that was not already complying with the FDA Guidance.

33. Dairy products have been sold in Ohio with non-rbGH use labels since the 1990's. Ohio took no action against these labels until February, 2008, when dairy farmers raised concerns about their customers' general requirements for milk from cows not treated with rbGH.

34. Upon information and belief, prior to issuing the Emergency Rule, there was no predicate complaint by the Director and no predicate enforcement action against any IDFA member regarding labels that did not comply with FDA Guidance that led to the issuance of the Emergency Rule.

35. Upon information and belief, the primary interest of the Director in adopting the Emergency Rule was not consumer complaints over alleged non-truthful or misleading labels. Rather, the primary interest of the Director was in responding to dairy farmer concern that effective February 1, 2008, most fluid milk packaged and sold in Ohio was requested to be from cows not treated with rbGH – a response to the growing consumer demand regarding the non-use of rbGH.

36. After industry reaction and hearings, the Defendant in his official capacity adopted effective May 22, 2008, a rule solely regarding dairy labeling that among other things prohibits certain truthful claims expressly permitted in other states (e.g. “rbGH Free – our farmers pledge”), requires the FDA “No significant difference” language, imposes size, style and location restrictions regarding the FDA language that are not consistent with other

states, and imposes a heretofore new requirement regarding verification of the non-use of rbGH claim beyond dairy farmer affidavits.

37. The Director stated that consumer complaints regarding misleading labels gave rise to the Ohio Rule. The Director did not articulate any other government interests that would be served by the Ohio Rule.

38. Before adopting the Ohio Rule, however, the Director had little, if any substantial evidence of harm to consumers arising out of the labeling on dairy products.

39. Upon information and belief, overwhelming consumer sentiment was and remains in favor of continuation of existing labeling. Instead, the Director adopted the Ohio Rule based on speculation and conjecture of harm arising out of the labeling of dairy products and with a primary interest regarding dairy farmer concerns over having to “give up” an approved technology in response to consumer demands.

40. Upon information and belief, the overwhelming majority of consumers do not support the Ohio Rule. Instead the Ohio Rule is supported by Monsanto and dairy farmers who believe that their income will be adversely affected by decisions not to purchase milk from cows treated with rbGH.

41. Notwithstanding FDA and Federal Trade Commission (“FTC”) 2007 review of labels and advertising that concluded that, with minor exceptions, there is no evidence of misleading labeling or advertising of milk produced without the use of rbGH, the Director concluded without evidence or justification that much, if not all, of the existing labels in the marketplace are *per se* misleading. He did this without first investigating any alleged violations

of existing authority and without enforcing against any purported violations using his existing authority.

42. The Ohio Rule is the most limiting of all presently effective federal or state regulations or guidelines regarding the labeling of rbGH. Labels that are perfectly legal, if not expressly permitted, in other jurisdictions are prohibited in Ohio.

43. Most labels presently used on dairy products would have to be completely restructured in order to meet the Ohio Rule even though they are perfectly legal, if not expressly permitted, in other jurisdictions. The Director concluded that the cost of such compliance would be minimal (\$250 - \$300 per label) in the face of industry statements that costs for complying with Ohio Rule alone would be at least in the tens of thousands of dollars.

44. The Ohio Rule by its terms and on its face would require most, if not all, existing labels for sale of dairy products in Ohio (and as a practical effect elsewhere in the United States) to be significantly modified to conform with the regimented Ohio Rule.

45. Specifically, the Ohio Rule requires that the FDA language be in the same font, style and even color as the “permitted claim” (“this milk is from cows not supplemented with rbST” or substantially equivalent claim). The Ohio Rule prescribes a specific minimum size of print for the required FDA Disclaimer language (the font size must be at least 7 point) and requires that the FDA language be at least half the size of the rbGH claim. The Ohio Rule proscribes existing claims in the marketplace (e.g. “rbGH Free”) even when such claims are accompanied by explanatory language such as “our farmers pledge no use of rbGH”.

46. All dairy products are subject to the Ohio Rule.

47. No other food product is subjected to the Ohio Rule. Thus, other food products are permitted to make other consumer friendly claims (akin to “from cows not treated with rbGH”) while dairy products alone are subjected to the terms of the Ohio Rule. The general rule for labeling of food products under Ohio’s regulations is that the Director shall use and apply the generally recognized federal standards for food labeling. As to dairy products, however, use or non-use of rbGH alone has been singled out and is subject to unique rules preventing certain speech, forcing certain speech, and limiting speech.

48. The Ohio Rule on its face requires verification of the accuracy of the non-use of rbGH claim even though a label claim made “that farmers pledge not to use rbGH” is itself an accurate statement when supported by dairy farmer declarations that they will not use rbGH.

OTHER STATE LABELING POLICIES REGARDING rbGH

49. In 1994, the State of Vermont adopted a Notification and Labeling statute for products containing rbGH (“Vermont statute”). The Vermont statute required that if rbGH has been used in the production of milk for retail sale within Vermont, the retail product must be labeled accordingly. In addition, the Vermont statute required all milk producers to notify their milk handlers, by affidavit, before using rbST on their dairy cows.

50. Violations of the Vermont statute were punishable by civil penalties and prosecution as a misdemeanor criminal offense.

51. The mandatory labeling was later found to be an unconstitutional infringement of Commercial Speech in *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

52. The Vermont statute further authorized the state Commissioner of Agriculture to adopt rules regarding voluntary labeling.

53. The Vermont rules as to voluntary rbST free labeling were adopted in 1995 and remain in effect and were not impacted by the *Amestoy* decision. 6 Vt. Stat. Ann. § 2760 (2008).

54. With respect to the qualifying statements, the Vermont rules endorse language comparable to that suggested in the FDA interim guidelines—that the “FDA has found that no significant difference has been shown between milk derived from cows treated with synthetic bovine somatotropin and milk derived from untreated cows.” The Vermont rules further provide that the qualifying label statements be as clear and conspicuous as the “rbST-Free” claim, made in direct conjunction with such claim, and be no less than one third the size of such claim.

55. Several other states have adopted voluntary labeling statutes or regulations, permitting the plaintiff’s members to include statements on their labels, informing consumers that the products so labeled do not contain milk from treated cows. For example, Minnesota permits food companies to state on product labels that products are “Farmer Certified rBGH-free” or that “Milk in this product is from cows not treated with rBGH.” To support these claims, Minnesota requires that producers provide affidavits to their handlers stating that the producers’ dairy cows have not been, and will not be, treated with rBGH, nor will they be treated in the future without advance written notice to the handler.

56. Wisconsin and Alaska also expressly permit “rBGH-free” claims. These claims are prohibited per se by the Ohio Rule.

57. Maine not only permits voluntary labeling of rbGH free milk, it has also adopted the “State of Maine Quality Trademark” that can only be used if milk is by producer affidavit declared to be produced without the use of rbGH. Thus, far from concluding that an rbGH free claim is misleading, Maine believes that its consumers want and deserve this information.

58. Most recently, the Commonwealth of Pennsylvania has adopted guidelines for voluntary labeling that are less restrictive than the Ohio Rule including a provision for variances and a recognition that statements “rbGH Free” can be made under some circumstances. The Ohio Rule provides no methodology for variances and is outright inconsistent with other rules adopted nationwide

59. Most other states permit voluntary rbGH labeling as a matter of administrative policy. Many of these states have in place policies similar to the one Minnesota adopted by statute, and others additionally require the inclusion of a “contextual statement” such as that suggested by the FDA in its interim guidelines, but have permitted the claim to be of a commercially reasonable size (e.g. 1/3 the size of the rbGH-free claim). Most other states do not mandate the form, size, location or color of the FDA language.

60. However, a very small number of states, and cities within those states, have tried to prohibit parties like the plaintiff’s members from saying anything about rbGH on their product labels or by limiting the truthful, non-misleading claims in ways that limit free speech or illegally interfere with interstate commerce. Like the Defendant here, the City of Chicago and the State of Illinois attempted to prohibit truthful labeling demanded by consumers. After suit by Ben & Jerry’s Homemade, Inc. and others brought in 1996, Illinois and Chicago settled the case and established guidelines similar to Vermont for truthful labeling. See Docket on Pacer N.D.

Illinois, Ben & Jerry's Homemade, Inc., et al v. Lumpkin, et al, No. 96 C 2748 and Illinois Department of Public Health, Office of Health Protection, Division of Food, Drug and Dairies, Technical Release #36, (Nov. 2, 2007).

61. In addition, Monsanto sued one milk processor claiming that its rbGH labeling was misleading, but the case settled and the processor in New England continues to make its "No Artificial Growth Hormone Used" claim with a non-contiguous FDA language that does not comply with Ohio's location, size, style and color requirements.

62. The Ohio Rule is the most restrictive regulation that is presently effective. Moreover, other states with rbGH labeling regulations have adopted a less restrictive approach to products produced in states permitting the product's specified claims. In so doing, such states have, for now, avoided imposing their regulations on products produced outside their borders in conformance with another state's rules and regulations or guidance.

63. It is important that Plaintiff milk dealers, as national and regional distributors of milk and milk products, be able to label the products they sell in a consistent, uniform manner. Requiring that one label be used in the State of Ohio, when another is used in virtually every other part of the country, imposes unjustifiable and impermissible burdens and costs on these plaintiffs, and severely restricts the extent to which they can include truthful information about rbGH on the labels of their products sold in these other parts of the country in competition with regional companies expressly permitted to make claims prohibited or substantially limited by the Ohio Rule.

PLAINTIFF'S MEMBERS' EFFORTS TO VOLUNTARILY LABEL

64. Ever since FDA approved the use of rbGH on dairy cows, some dairy processors have wanted to add declarations to their product labels informing consumers that their products do not contain milk from cows treated with rbGH. Plaintiff's members submitted comments to the FDA concerning its interim guidance on the voluntary labeling of such products, and thereafter corresponded with the FDA to obtain guidance on the specific wording contemplated for product labels. In addition, plaintiff's members corresponded with individual states to determine whether voluntary labeling would be permitted.

65. As a result, over the past 14 years plaintiff's members have developed voluntary rbGH messages for addition to the labels of their dairy products. Many messages state, truthfully and in non-misleading terms, that the milk in those products comes from dairy cows that are certified not to have been treated with rbGH. Many, but not all, of the messages also state that no difference in composition, nutritional value, or safety has been shown, and no test is available to distinguish between milk from treated and untreated cows.

66. Beginning at least in 1995, some of Plaintiff's members developed label and advertising messages, entitled "rbGH FREE – our cows are not treated with the growth hormone rbGH," and have stated, truthfully and in non-misleading terms, that the farmers that supply that member with milk and cream have pledged not to treat their dairy cows with rbGH.

67. The Ohio Rule prohibits labels expressly permitted in a number of other states and not prohibited in other states.

68. The Ohio Rule dictates not only the words (or equivalent use), but the form, size, location and even the color of the language that must be used.

69. Relevant Ohio law and regulations subject parties alleged to have violated those provisions to a range of penalties, including criminal prosecution.

70. Plaintiff's members want to inform consumers, through product labeling that their products do not contain milk from cows treated with rbGH. They want to do so by using informational messages that are neither false nor misleading. They want to do so through effective messaging free from governmental dictates that are not necessary for consumer information. Defendant's refusal to permit plaintiff's members from adding such messages to their milk labels is unlawful because the Ohio Rule: dictates the words that cannot be used; dictates words that must be used; and dictates the location, style, size and even color of the forced speech to their product labels. Defendant's policy and practice of prohibiting any claim the milk is "rbGH free" on the labels of milk and milk products, and defendant's denial of plaintiff's members' right to market dairy products in defendant's jurisdiction with labels containing such messages, prevent and restrain plaintiff's members from adding such messages to labels concerning plaintiff's members' products, and violate plaintiff's members rights under the Constitution and laws of the United States.

FIRST CLAIM

(Violation of the First and Fourteenth Amendments)

(Violation of 42 U.S.C. § 1983)

71. The allegations contained in paragraphs 1 through 70 above are re-alleged and incorporated by reference herein.

72. The actions taken by the defendant to unduly limit truthful, non-misleading communications to concerned consumers on dairy product labels that Plaintiff's members' milk products are not derived from cows treated with rbGH, unlawfully burden the plaintiff's First Amendment commercial speech protections, as applied to the States' actions under the Fourteenth Amendment.

73. The actions taken by defendant to unduly limit the Plaintiff's members ability to communicate truthful, non-misleading information to concerned consumers by adding rbGH declarations to their product labels, does not directly and materially advance a substantial governmental interest in a way that is not more extensive than is necessary to so advance that interest.

74. The actions taken by defendant to unduly limit the plaintiff's members ability to communicate truthful, non-misleading information to concerned consumers by adding rbGH declarations to their product labels, deny plaintiff's members their fundamental right to free speech, under color of state law, and therefore violate the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983.

75. As a direct and proximate result of the actions described above, plaintiffs have sustained actual injury and damages, all of which are ongoing.

SECOND CLAIM

(Violation of the Dormant Commerce Clause)

76. The allegations contained in paragraphs 1 through 70 above are re-alleged and incorporated by reference.

77. Plaintiff's members distribute milk or dairy products on an international, nationwide or regional basis. It is essential that they be able to label their products in a uniform manner, so that products, once packaged, can be shipped to any state, depending only on the demand for such products and the availability of a means to transport them.

78. The great majority of states follow the voluntary labeling guidelines issued by the FDA, have instituted rules similar enough that permit the dairy industry to effectively inform consumers regarding the non-use of rbGH while being truthful and non-misleading or have approved or otherwise permitted labeling being used in other States. Defendant's restrictive regulations (imposed 14 years after voluntary labeling began) on how the plaintiff's members can communicate truthful, non-misleading rbGH declarations on their labels will impose significant and unwarranted financial and operating burdens on interstate commerce and will have the practical effect of projecting Ohio's rbGH labeling regulations onto the plaintiff members labeling practices destined for all other states.

79. Given pre-existing regulation in some states and if other states change their rbGH labeling regulations in the future, as the dairy industry has seen done in Vermont, Illinois, Pennsylvania, Alaska, Minnesota, Wisconsin and Maine in just the past few years, the Plaintiff's members will face, and with the Ohio Rule already face, the commercially impossible situation of inconsistent labeling requirements, not to mention the added costs of specially tailoring

different labels to meet each state's requirements and the ever increasing risk that mislabeled products may enter Ohio or another state in violation of that state's requirements.

80. In effect, Ohio's labeling requirements will force plaintiff's members to either maintain segregated labeling, packaging and shipping procedures for products destined for the State of Ohio (a matter that is commercially impractical or impossible for the dairy industry), or forfeit their First Amendment right to speak in all the many states, other than the State of Ohio, which impose far less stringent standards for how the plaintiff members can provide rbGH labeling. The alternative is to forego doing business in Ohio or have the practical effect of projecting Ohio's labeling regulations outside the State's borders by imposing Ohio's rules everywhere even though other jurisdictions expressly permit what Ohio now prohibits. Thus, speech permitted in other states will effectively be lost in those other states through compliance with Ohio Rule.

81. The actions taken by the defendant to unduly restrict the manner in which plaintiff's members can add rbGH declarations to their product labels, impose undue burdens on interstate commerce and creates an impermissible risk of inconsistent regulation among the states, causing the projection of Ohio's regulations beyond its border. Moreover, these violations of the commerce clause are excessive in comparison to any purported local benefits, to protect the public against false or misleading advertising. Indeed, the Ohio Rule may have the practical effect of depriving concerned Ohio (and other states') consumers of truthful rbGH information on their milk products. Accordingly, defendant's actions violate the Commerce Clause, Article I, Section 8, clause 3, of the United States Constitution.

82. The practical effect for one or more of plaintiff's members will be to abandon any claim regarding rbGH on the dairy product label – whether sold inside or outside Ohio.

83. The practical effect for one or more of plaintiff's members will be to conform to the Ohio Rule both inside and outside Ohio until yet another state adopts a rule that is more unduly restrictive regarding rbGH labeling.

THIRD CLAIM

(Denial of Equal Protection of the Laws in violation of the Fourteenth Amendment)

(Violation of 42. U.S.C. § 1983)

84. The allegations contained in paragraphs 1 through 70 above are re-alleged and incorporated by reference herein.

85. The actions taken by defendant to unduly limit plaintiff's members ability to communicate truthful, non-misleading rbGH declarations on their product labels, are discriminatory, and not rationally related to any legitimate government interest. For example, manufacturers and retailers of many other food products are permitted to freely label those products to inform consumers of the use and nonuse of certain food production methods and components, but the defendant has severely limited the manner in which plaintiff's members may do so with respect to rbGH. Defendant has no rational basis for drawing this distinction or for applying these severe restrictions on rbGH labeling or to the class of food producers and retailers (including plaintiff's members) that market products that do not contain milk or cream derived from cows treated with rbGH.

86. The actions taken by the defendant to unduly limit plaintiff's members ability to include rbGH messages on their product labels, deny plaintiff's members their right to equal protection of the laws, under color of state law, and therefore violate the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

87. As a direct and proximate result of the actions described above, plaintiffs have sustained actual injury and damages, all of which are ongoing.

FOURTH CLAIM

88. The allegations contained in paragraphs 1 through 70 above are re-alleged and incorporated by reference herein.

89. The Ohio Rule provides that "A dairy label which contains a production claim that 'this milk is from cows not supplemented with rbST' . . . *may* be considered misleading on the basis of such language, unless" certain enumerated requirements are met.

90. The inclusion of the word "may" renders the Ohio Rule's prohibitions vague and uncertain. It is not clear from the Ohio Rule, on its face, whether the disfavored labeling language regarding rbGH is actually prohibited or not; rather, it "may" be prohibited. Second, the Ohio Rule's use of the word "may" causes it to be unconstitutionally void for vagueness because its enforcement is optional and discretionary. The Ohio Rule is unconstitutionally void for vagueness because it does not clearly define the speech which it prohibits and because it delegates too much discretion in enforcement.

91. As a direct and proximate result of the actions described above, Plaintiff has sustained actual injury, which is ongoing.

IRREPARABLE INJURY

Plaintiff's members will suffer irreparable injury unless this Court enjoins defendant from further acting to unduly restrict the manner in which plaintiff's members can add truthful and non-misleading rbGH declarations to their product labels, and from further enforcing the policy or following the practice of unduly circumscribing claims about rbGH on the labels of milk and milk products in the State of Ohio.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court enter judgment in their favor and grant plaintiff:

1. A declaration, pursuant to 28 U.S.C. §§ 2201 and 2202, that the actions taken by defendant to unduly circumscribe the plaintiff's members' ability to add rbGH declarations to their product labels, are illegal and void because they violate:
 - (a) The First and Fourteenth Amendments to the United States Constitution;
 - (b) The Commerce Clause, Article I, Section 8, of the United States Constitution,
 - (c) The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,
 - (d) 42 U.S.C. § 1983;
2. A preliminary and permanent injunction, entered pursuant to this court's equitable powers, and 42 U.S.C. § 1983, barring defendant from further circumscribing

plaintiff's members' ability to add truthful and non-misleading rbGH declarations to their product labels, so that plaintiff's members, without being subjected to civil or criminal sanctions, threats, or penalties, may lawfully include such declarations on their product labels, and market their products under such labels and displays in the State of Ohio;

3. Costs incurred in the prosecution of this action, including attorneys' fees, pursuant to 42 U.S.C. § 1988; and
4. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

John C. McDonald (0012190)
250 West Street
Columbus, Ohio 43215
Tel: (614) 462-2201
Fax: (614) 462-3465
Email: jmcdonald@szd.com
Trial Attorney for Plaintiff

Of Counsel:

John P. Gilligan (00024542)
SCHOTTENSTEIN, ZOX & DUNN CO., L.P.A.
250 West Street
Columbus, Ohio 43215
Tel: (614) 462-2221
Fax: (614) 222-3438
Email: jgilligan@szd.com

Charles M. English
Wendy Yoviene
Todd J. Wagnon

Thelen Reid Brown Raysman & Steiner LLP
701 Eighth Street, NW
Washington, DC 20001
(202) 508-4000
Email: cenglish@thelen.com
Email: wyoviene@thelen.com
Email: twagnon@thelen.com