UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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| GROCERY MANUFACTURERS ASSOCIATION, *et al.*, | ) | |
| *Plaintiffs,* | ) | |
| v. | ) | |
| WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont, *et al.*, | ) | Case No. 5:14-cv-00117-CR |
| *Defendants.* | ) | |

**VERMONT COMMUNITY LAW CENTER'S BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS**

## STATEMENT OF INTEREST OF VERMONT COMMUNITY LAW CENTER

Amicus Curiae Vermont Community Law Center has an interest in enhancing the free flow of accurate consumer information in the marketplace and preventing deception of consumers. Vermont Community Law Center is a nonprofit legal services provider representing Vermonters in a wide range of civil legal matters. As a consumer rights organization, the Vermont Community Law Center is deeply concerned about deceptive marketing schemes developed by manufacturers and retailers to gain an unfair competitive advantage in the marketplace. A finding that Act 120's natural provisions violate the First Amendment would hamstring Vermont's ability to ensure the integrity of its citizens' day-to-day purchasing decisions and hinder the free market.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

In recent years, consumers in Vermont and throughout the country have turned greater attention to the ingredients in the food they eat. In an effort to capitalize on this renewed public interest in the source of ingredients, dozens of manufacturers and retailers have developed marketing strategies that convey to the consumer a uniquely wholesome image. As part of that trend in food marketing, Plaintiffs' member companies intend to employ the terms 'natural' and 'all natural' on the packaging of their products that contain GE ingredients. Doc. 37-1 at ¶ 59. This artful branding of GE products is likely to attract those consumers searching for an unprocessed or minimally processed alternative to the chemically-infused and exquisitely manipulated products commonly found on food shelves today.

In an effort to prevent consumer confusion and to enhance the flow of accurate information related to the food supply, Vermont enacted a law regulating the sale of certain foods containing genetically engineered ingredients. Doc. 37-1 at ¶ 31 (Ex. A to Plts' Amend.

Complaint) (citing the legislature's concern that many consumers are under an incorrect assumption about whether the food they purchase is produced from genetic engineering). In addition to its disclosure requirements, Act 120 prohibits the use of the terms "Natural," "All Natural," "Naturally Grown," and "Naturally Made" ("Natural Provisions") on certain food products containing GE-derived ingredients. 9 V.S.A. §3043(c). Plaintiffs raise First Amendment challenges to the prohibition of these four narrow terms on GE product packaging, yet Plaintiffs fail to plead *any* predicate facts necessary to show that their desired commercial message is entitled to First Amendment protection, instead opting to assert "legal conclusion[s] couched as factual allegation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In fact, Plaintiffs cannot in good faith plead the necessary facts to raise a First Amendment challenge to the Natural Provisions because the proscription in question reaches only "false statements, erroneous statements, or statements that have a likelihood or tendency to deceive." *Association of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427, 457 (D.C. Cir. 2012). Despite Plaintiffs' assertion that the State bears the burden of showing a "sufficiently strong governmental interest justifying the intrusion on protected speech," Doc. 37-1 at ¶ 46, Plaintiffs' desired commercial message is "more likely to deceive the public than to inform it" and therefore lies outside of First Amendment protection in the first place. *Central Hudson v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980). The inherently deceptive quality of the "Natural" or "All Natural" label on GE food products, in addition to evidence showing that consumers have actually been deceived in the past, indicates that the use of such phrases is not protected by the First Amendment.

## ARGUMENT

### I. Plaintiffs Fail to State a Claim that the "Natural" provisions of Act 120 violate the First Amendment.

It is well-settled that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n. 20 (1983). Plaintiffs correctly reiterate the hornbook rule that the State "bear[s] the burden of demonstrating Act 120 satisfies constitutional scrutiny," Doc. 37-1 at ¶ 46. Nevertheless, in order to survive a motion to dismiss, Plaintiffs still must plead sufficient facts to demonstrate the plausibility of their claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

Here, Plaintiffs must plead that Act 120's prohibition on labeling GE products "Natural" or "All Natural" is unconstitutional. In order to do that, Plaintiffs must plead with sufficient facts, each element of a commercial speech First Amendment claim. Put another way, in order for Plaintiffs to meet the *Iqbal* standard for a commercial speech claim, they must make sufficient "factual allegations" that the prohibited speech, in this case the terms "Natural," "All Natural," "Naturally Grown," and "Naturally Made," is not misleading. *Id*. Plaintiffs entirely fail to meet this standard.

Despite amending their Complaint, Plaintiffs have failed to assert anywhere in the 26-page amended complaint that the prohibited speech is not misleading.[1] Mere "legal conclusions couched as a factual allegation" do not rise to the standard required by *Iqbal*. *Ashcroft v. Iqbal*,

[1] Plaintiffs obliquely assert that Act 120 will "punish and indirectly chill [their] truthful and non-misleading speech . . . ." Doc. 37-1 at ¶ 63. However, it is unclear whether Plaintiffs are warning of the chilling of the use of the terms "natural" and "all natural" or whether they refer more generally to other similar phrases yet to be determined by the appropriate rulemaking agency. Regardless, mere "legal conclusions couched as a factual allegation" do not rise to the standard required by *Iqbal*. *Ashcroft v. Iqbal,* 556 U.S. 662,678 (2009). To meet this standard, Plaintiffs need to assert with sufficient factual basis that labeling a GE product "Natural" or "All Natural" is *not* misleading. They do not.

556 U.S. 662, 678 (2009). As Amicus discusses below, labeling a GE product "All Natural" *is* misleading. Plaintiffs have not and cannot make the factual allegations that labeling a GE product "Natural," "All Natural," "Naturally Grown," and "Naturally Made" is not misleading. For this reason, the Court should dismiss Plaintiffs' Amended Complaint as to Plaintiffs' "Natural" claims.

## II. Plaintiffs Cannot Plead Sufficient Facts to Overcome a Motion to Dismiss as to the "Natural" Claims Because Labeling a GE Product "Natural" or "All Natural" is Misleading and Therefore Lies Completely Outside of First Amendment Protection.

It is well established that the First Amendment does not protect commercial speech that is either inherently misleading or misleading in practice. *Central Hudson*, 447 U.S. 557 (1980); *In re R.M.J.*, 455 U.S. 191, 207 (1982). Because the relevant commercial speech jurisprudence places a premium on the free flow of accurate information to assist consumers in making informed decisions, "there can be no constitutional objection to the suppression of commercial messages . . . more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563. The United States Supreme Court has explained that "that the States retain the authority to regulate advertising that is *inherently misleading or that has proved to be misleading in practice*." *In re R.M.J.*, 455 U.S. at 207 (emphasis added).

Labeling a GE product "Natural" or "All Natural" is inherently misleading or misleading in practice for at least four important reasons. First, because relevant case law supports a conclusion that such a labeling scheme is inherently misleading as a matter of law. Second, because labeling GE products as "Natural" is misleading in practice. Third, because federal patent law supports a conclusion that genetically engineered products are not "Natural." Fourth, because consumer protection laws support the conclusion that labeling GE products "Natural" or "All Natural" is misleading.

A. Without Resorting to Extrinsic Evidence this Court May Properly Determine that Labeling a GE Product "Natural," "All Natural," or "Naturally Made" is Inherently Misleading as a Matter of Law.

Whether speech is "inherently misleading" is a question of law that may be determined at the pleadings stage. *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 911, 108 (1990). Indeed, the *likelihood* of consumer confusion has been the focus of the misleading analysis since the Supreme Court first indicated that commercial speech "more likely to mislead than to inform" falls outside of the First Amendment's protective reach. *Central Hudson*, 447 U.S. 557 (1980); *In re R.M.J.*, 455 U.S. 191 (1982). Because the touchstone of this analysis is likelihood of deception - rather than actual deception - a court may properly make the 'inherently misleading' determination without regard to consumer surveys or other extrinsic evidence. Even when "reasonable minds can differ" as to the deceptive quality of an advertisement, "Supreme Court precedent clearly leaves the determination . . . to the court." *Farrin v. Thigpen*, 173 F.Supp.2d 427, 439 (M.D.N.C. 2001) (citing *Peel*).

This is particularly true where the deceptiveness is "conspicuous" and "reasonably clear from the face of the advertisement" such that "common sense" would lead a Court to assess what an average consumer is bound to take away from the advertisement. *Kraft, Inc. v. F.T.C.,* 970 F.2d 311, 320 (7th Cir. 1992), cert. denied, 507 U.S. 909, 113 (1993); *see also, e.g., Langlitz v. Board of Registration of Chiropracters*, 486 N.E.2d 48, 53 (Mass. 1985) (evaluating the deceptive quality of an advertisement by resort to "common experience and common sense."); *Matter of Zang*, 741 P.2d 267, 277 (Ariz. 1987) (en banc) ("we think it self-evident that the message conveyed by respondents' advertisements was inherently misleading."). The Supreme Court has similarly found that a common sense evaluation is appropriate. *F.T.C. v. Colgate-Palmolive*, 380 U.S. 374, 391-92 (1965) (holding, prior to the Court's current commercial speech

jurisprudence, that the FTC need not conduct a survey of the public where it finds, "within the bounds of reason", that consumer deception is likely); *R.M.J.*, 455 U.S. at 203 (concluding in the post-*Central Hudson* era that an advertisement may be determined to be misleading based upon "the particular content or method of the advertising.").

The facts presented in Plaintiffs' complaint, taken as true, can lead this Court to find that use of the terms "Natural," "Naturally Made," and "All Natural" on food packaging containing GE ingredients is inherently misleading. Plaintiffs assert that their member companies "currently use, and intend to continue to use, the 'natural' terms specifically identified in Act 120 with respect to products that contain ingredients derived from GE crops." Doc. 37-1, at ¶ 59. Common experience suggests that the term "Natural" refers to things that tend to occur in nature. Indeed, Plaintiffs explain that genetic engineering "allows a plant to express a desired trait that it would not otherwise express." Doc. 37-1, at ¶ 21. In other words, Plaintiffs essentially acknowledge that genetic engineering allows a plant to express a trait that it would not *naturally* express. Where an advertiser employs artful semantics to sidestep the plain and obvious conclusion it wishes to avoid, courts are not hesitant to declare the statement to be misleading. See, e.g., *Sears, Roebuck and Co. v. F.T.C.*, 676 F.2d 385 (9th Cir. 1982) (upholding conclusion that a dishwasher advertisement was misleading where it boasted the machine's ability to thoroughly clean "heavily soiled dishes" without the need to pre-rinse them, despite the manufacturer's own user manual cautioning purchasers to do otherwise); *U.S. v. Bell*, 414 F.3d 474, 480 (3rd Cir. 2005) (upholding conclusion that a website was inherently misleading where it shared fraudulent tax advice that was based "purely on semantics" and legal interpretations "take[n] . . . out of context.").

The constitution allows a State to intervene when private business pursues a competitive advantage dependent upon systematic consumer deception. Here, Plaintiffs obfuscate the origin and manufacturing processes of their GE products. While no one holds a monopoly on the term "Natural," Plaintiffs use of these terms tricks a significant portion of consumers into believing that GE products are not what in fact they are: the result of extensive genetic manipulation. This is the very measure of deception. See, e.g., *Bronco Wine Co. v. Jolly*, 129 Cal. Cir. Ct. App.4th 988, 1006 ("To the extent a brand name of geographic significance . . . is suggestive of a false or misleading source of the grapes used in making the wine, it is inherently misleading[.]"); *see also*, Joe *Conte Toyota, Inc. v. Louisiana Motor Vehicle Com'n*, 24 F.3d 754 (5th Cir. 1994) (finding the term "factory invoice" to be inherently misleading in a vehicle advertisement where the term did not actually refer to the price the car dealer paid the manufacturer).

Thus, applying a "common-sense" approach similar to that described by the Seventh Circuit in *Kraft, Inc. v. FTC*, this Court can find as a matter of law that labeling a GE product "Natural" or "All Natural" is inherently misleading.

B. Labeling a GE product "Natural" or "All Natural" is misleading in practice.

The United States Supreme Court has repeatedly explained that "that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be *misleading in practice*." *In re R.M.J.*, 455 U.S. at 207 (emphasis added). Labeling a product as "Natural" or "All Natural" when it in fact contains GE ingredients has consistently "proved to be misleading in practice."

A 2010 poll by the Hartman Group, a Washington-based research firm, found a majority of respondents erroneously believed the term "natural" implied "absence of pesticides," "absence of herbicides," and "absence of genetically modified foods." *Cereal Crimes*, The Cornucopia

Institute Report 2011, available at http://cornucopia.org/cereal-scorecard/docs/Cornucopia_Cereal_Report.pdf (last visited November 10, 2014). Two consumer polls conducted by San Francisco-based research firm Context Marketing, released in 2009 and 2010, showed that more consumers value the term "natural" than "organic." Approximately 50% of polled consumers said the "natural" label on food was either important or very important to them. *Coporate Definitions of All Natural: How Consumers are being Decieved*, The Cornucopia Institute, available at http://www.cornucopia.org/2014/04/corporate-definitions-natural-consumers-deceived/ (last visited November 10, 2014. Closer to home, a 2013 poll performed by the University of Vermont found that nearly 54% of Vermonters believed that a product labeled "All Natural" contained no GMO ingredients.[2]

The Federal Trade Commission explained that affirmative statements like "All Natural" on a label are presumed to have an impact on consumers based on the logic that a company selects a particular label precisely because consumers believe it has a particular meaning. See *FTC Policy Statement on Deception*, appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984) (explaining that "the Commission presumes that express claims are material [because] [i]n the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."). For this reason, in the context of consumer deception, the FTC has explained that "[i]f an ad conveys more than one meaning to reasonable consumers and one of those meanings is false, that ad may be condemned." *In re Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983).

[2] In addition to the consumer survey done by the University of Vermont, Vermont consumers have complained that labeling a GE-product "Natural" or "All Natural" is misleading.

Plaintiffs appear to assert in their complaint that there is no scientific difference between GE and non-GE products. See Doc. 37-1, at ¶ ¶ 21-28 (explaining that scientific organizations have found no basis for requiring GE products to be labeled). Unlike many types of advertising claims scrutinized under the inherently misleading standard, Plaintiffs appear to assert that the "Natural" or "All Natural" label in the context of GE is not the type that can be proven or disproven. Thus, Plaintiffs' ask this Court to conclude that it is not deceptive to label a product "Natural" or "All Natural" when it contains GE ingredients. This argument fails for several reasons.

In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, 96 S. Ct. 1817, 1830-31, 48 L. Ed. 2d 346 (1976) the Supreme Court rejected the "not provable" argument explaining that "[o]bviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, 96 S. Ct. 1817, 1830-31, 48 L. Ed. 2d 346 (1976). That it may ultimately be impossible to scientifically prove that GE products are not "Natural," or "All Natural" does not bar the State from prohibiting that misleading speech.

Relevant data demonstrates that labeling a GE product "Natural" or "All Natural" is "misleading in practice," *In re R.M.J.*, 455 U.S. 191 (1982), and that such labeling is material - that is likely to influence consumers decision. Thus, labeling a GE product "Natural" or "All Natural" may be constitutionally proscribed.

C. Patent Law Supports the Conclusion that Genetically Engineered is not "Natural."

It is well settled that patent law prohibits patenting "products of *nature*." *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 130 (2001) (quoting *Diamond v.*

*Chakrabarty*, 447 U.S. 303, 313 (1980)) (emphasis added). In 1948, Justice Douglas explained that "patents cannot issue for the discovery of the phenomena of *Nature*" which, he asserted, "are part of the storehouse of knowledge of all men." *Funk Brothers Seed Company v. Kalo Inoculant*, 333 U.S. 127, 130 (1948) (emphasis added). In 1980, the Court discussed genetic engineering in the context of patent law and held that a bacteria strain "with markedly different characteristics from any found in *nature*" was patentable. *Diamond v. Chakrabarty*, 447 U.S. 303, 305, 310 (1980)(emphasis added). According to the Court, "the relevant distinction [for patentability] was not between living and inanimate things, but between products of *nature*, whether living or not, and human-made inventions." *Id.,* at 313 (emphasis added). In short, the Court concluded that products of "nature" were not patentable, while "human-made inventions" were. *Id.* [3]

Plaintiffs cannot have it both ways. If a GE seed is not "natural" for the purposes of acquiring the benefits of patent protection, it certainly cannot become "natural" for the purposes of constitutional analysis or avoiding liability under Act 120. If a GE seed is not natural when Plaintiffs move to patent it, they cannot plausibly argue that the resulting food cultivated and processed from that seed can be truthfully labeled as "natural" with no risk of consumer confusion.

The Supreme Court has never held that the First Amendment protects false commercial speech. Indeed, untruthful speech, commercial or otherwise, has never been protected for its own sake. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36, 49, and n. 10 (1961). Accordingly, even the very United States patent laws Plaintiffs

[3] Indeed, Plaintiff member corporation Monsanto holds numerous patents for genetically engineered seeds.

take advantage of appear to contravene Plaintiffs' desired commercial message that its GE-derived products are "natural."

E. Consumer Protection Laws Support the Conclusion that Genetically Engineered Products are not "Natural."

In their Amended Complaint and Briefings before this Court, Plaintiffs contend that Act 120 is unconstitutional, in part, because the Vermont Consumer Protection Act (VCPA) already provides an alternate avenue to prevent possible deception through its private right of action available to deceived consumers. Doc. 37-1 at ¶ 62; Plaintiffs' Response to Defendants' Motion to Dismiss p. 14.

Under the VCPA, a deceptive act or practice requires the presence of three elements: (1) a representation, omission, or practice likely to mislead consumers; (2) the consumer interprets the message reasonably under the circumstances; and (3) misleading effects that are material, that is, likely to affect the consumer's conduct or decision regarding the product. *Carter v. Gugliuzzi*, 168 VT 48 (1998). Vermont courts analyze the VCPA using an objective standard. Rather than require the showing of reliance or actual injury, the inquiry is whether the representation or omission had the "capacity or tendency to deceive" a reasonable consumer. *Bisson v. Ward*, 160 VT 343, 351, 628 A.2d at 1261 (1993); *Peabody v. P.J.'s Auto Village, Inc.*, 153 VT 55, 57, 569 A.2d at 462 (1989). To be reasonable, the consumer's understanding need not be the only one possible. Carter, 168 VT 48, 56 (1998) (emphasis added). For example, "[i]f an ad conveys more than one meaning to reasonable consumers and one of those meanings is false, that ad may be condemned." *Carter*, 168 VT 48, 56 (1998)(quoting *In re Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983)).

In the not-so-hypothetical instance where a product containing GE ingredients is labeled and sold as "Natural," the elements of a VCPA claim could be met and the label could be

condemned as deceptive. First, there would be a representation - the "Natural" label; second, that representation would likely mislead consumers - as already pointed out, the majority of consumers believe "Natural" means no GE ingredients; and third, the misleading effects of the "Natural" label would be material because materiality is presumed for affirmative representations.

Plaintiffs' contention that Act 120 is void because it is purely duplicative of protections available under the VCPA is illogical in light of the many examples in which the government has adopted laws clarifying specific prohibitions a particular deceptive practice. For example, despite the existence of the Federal Trade Commission Act, which prevents unfair or deceptive practices in commerce, Congress passed the Fair Debt Collection Act prohibiting unfair or deceptive practices in the specific context of debt collection. 15 U.S.C. § 1692(e). That the unfair practices prohibited by the Fair Debt Collection Act may also qualify as violations of the Federal Trade Commission Act does not mean Congress is prohibited from providing additional clarity and specificity on the practice of debt collection. The same logic applies here. Under the First Amendment, the Vermont legislature may adopt specific prohibitions on misleading labels despite the possibility that the VCPA may also provide protection.

The fact that the "Natural" label prohibited by Act 120 is also, as the Plaintiffs appear to argue or concede, a valid cause of action under the constitutional VCPA, actually supports the conclusion that the state has the constitutional ability to prohibit such deceptive speech. Indeed, as the Court has pointed out on numerous occasions, "there can be no constitutional objection to the suppression of commercial messages . . . more likely to deceive the public than to inform it." *Central Hudson,* 447 U.S. at 563.

## CONCLUSION

As the D.C. Circuit Court of Appeals explained in *Association of Private Sector Colleges and Universities v. Duncan*, "since the regulations now facially reach only false statements, erroneous statements, or statements that have the likelihood or tendency to *deceive,* there can be no doubt that the regulations are constitutional: They regulate speech that is not entitled to protection in the first place." *Association of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427, 457 (D.C. Cir. 2012). Such is the case here. Act 120's Natural Provisions restrict only misleading speech. This Court should dismiss Plaintiffs' claims that Act 120's Natural Provisions violate the United States Constitution.

DATED: November 14, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2014, I electronically filed with the Clerk of Court the following document:

Vermont Community Law Center's Proposed Brief Amicus Curiae in Support of Defendants

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DATED: Burlington, VT, November 14, 2014

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