

December 10, 2010

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex I)
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Proposed Revised Green Guides, 16 CFR Part 260, Project No. P954501

To the Office of the Secretary:

The Organic Consumers Association (“OCA”) and All One God Faith, Inc., d/b/a Dr. Bronner’s Magic Soaps (“Dr. Bronner’s”) are pleased to submit these comments in response to the Commission’s Proposed Revisions to Guides for the Use of Environmental Marketing Claims, 75 *Fed. Reg.* 63552 (Oct. 15, 2010).

The Commission has specifically requested comment “on what guidance, if any, it should provide regarding the use of organic claims to describe non-agricultural products.” 75 *Fed. Reg.* at 63586. OCA and Dr. Bronner’s urge the Commission, in the revised Guides, specifically to address claims that personal care products are “Organic.” As explained below, the current labeling of many of these products is deceptive, confusing and misleading to consumers. While OCA and Dr. Bronner’s believe that the labeling of such products is indeed within the jurisdiction of the National Organic Program (“NOP”) of the U.S. Department of Agriculture, NOP has to date failed to take any action to enforce the NOP standards with respect to these products. By providing appropriate guidance linked to the NOP standards, the Commission can help to bring a stop to these deceptive practices while ensuring application of consistent standards in the making of these claims.

1. The Organizations Submitting These Comments

A. Organic Consumers Association

OCA, located at 6771 South Silver Hill Drive, Finland, MN 55603, telephone 218-226-4164, is a non-profit educational organization dedicated to promoting the interests of the nation’s organic consumers. OCA represents over 850,000 members, supporters, subscribers and volunteers. In recent years, OCA has been active in pressing the U.S. Department of Agriculture and producers of organic goods to ensure that goods labeled and advertised as “Organic” comply with strict, reliable and consistent standards. OCA’s “Coming Clean” campaign has sought to educate consumers about the deceptive

labeling as “Organic” of personal care products and, recently, OCA initiated a consumer boycott of deceptively labeled brands of such products. OCA’s consumer education programs urge consumers generally to “Buy Local, Organic and Fair Made.”

In March of this year, OCA and the Consumers Union filed a request with the Commission to investigate the deceptive use of organic claims on personal care products.

B. Dr. Bronner’s

Dr. Bronner’s, a California corporation, located at 2751 Auto Park Way, Escondido, California 92029, manufactures and sells personal care and cosmetic products including the nation’s top-selling natural brand of liquid and bar soap under the brand “Dr. Bronner’s Magic Soaps.” Since 2003, Dr. Bronner’s has been certified by Oregon Tilth, a USDA-accredited certifier, as an organic operation. Dr. Bronner’s uses certified organic oils to make all the main cleansing and moisturizing ingredients in its products, without conventional agricultural or petrochemical material or petrochemicals, at all. Dr. Bronner’s liquid soap and other body cleansing products are labeled as “Made with Organic Oils” in compliance with the NOP; and the company also has introduced a line of organic lip balms, body balms and lotions, and shaving gels and organic hair care products, all of which are certified as meeting the requirements of the NOP for being labeled outright as “Organic.”

Dr. Bronner’s has played a leading role in advocating, with the USDA, for regulation of the deceptive and misleading labeling as “Organic” of personal care products which no reasonable consumer would regard as “Organic” if the consumer were aware of the composition of the product.

2. The Market for Organic Personal Care Products

As the Commission notes, the term “organic” is used to refer both to food and non-food products that are made from agricultural material produced using certain practices designed to promote health and environmental sustainability. As the Commission recently explained elsewhere, such practices are generally recognized as:

agricultural practices that promote healthy ecosystems; no genetically engineered seeds or crops, sewage sludge, long-lasting pesticides or fungicides; healthy and humane livestock management practices including use of organically grown feed, ample access to fresh air and the outdoors, and no antibiotics or growth hormones; and food processing that protects the healthfulness of the organic product, including the avoiding of irradiation, genetically modified organisms and synthetic preservatives.

Complaint, *In the Matter of Whole Foods Market, Inc.*, Dkt. No. 9324 ¶12 (Sept. 8, 2008).

Both the food and non-food segments of the organic market are large and growing, but the non-food segment—particularly the personal care products

component—is the fastest growing. According to the Organic Trade Association (“OTA”), total organic sales in the United States reached \$24.6 billion in 2008, of which organic food accounted for \$22.9 billion. OTA, 2009 ORGANIC INDUSTRY SURVEY, Executive Summary at 2 (May 2009). The total growth rate for the organic market was 17.1% from 2007 to 2008, but the growth rate for non-food products was 39.4%. *Id.* “This non-food category includes personal care products, nutritional supplements, fiber, clothing, household cleaners, flowers and pet food.” *Id.*

Organic personal care products include liquid soaps, bodywashes, shampoos, skin moisturizers, lotions and creams, lip balms, make-up and other cosmetic products. “Organic” personal care products represent a subset of the overall market for “natural” personal care products.

According to the Natural Marketing Institute’s 2009 LOHAS Consumer Trends Database, 25% of U.S. adults purchased natural or organic personal care products in the past six months. A recent NMI survey indicated that more than half of all U.S. consumers want personal care products made with natural or premium ingredients and 44% look for organic ingredients specifically. NMI, EVOLUTION OF NATURAL, ORGANIC AND PREMIUM PERSONAL CARE V (2006). Another recent NMI survey found that 52% of consumers believe that “the personal care products they put on their skin are just as important as the healthy and natural foods they consume.” NMI, 2008 Health and Wellness Trends Database, quoted in OTA, *The Regulation and Labeling of Organic Personal Care Products: Issues and Policy Approaches* (“OTA White Paper”) 11 (Oct. 2009).

According to OTA, the U.S. market for organic personal care products is estimated to be between \$250 and \$500 million, representing one-quarter of non-food sales. *The Regulation and Labeling of Organic Personal Care Products: Issues and Policy Approaches* (“OTA White Paper”) 9 (Oct. 2009). An industry monitoring service, SPINS, estimated that the organic personal care market is \$207 million in all channels of distribution, as of August 2009, and that the rate of growth in sales through conventional channels (*i.e.*, not outlets specializing in natural/organic items) was 18% for the 52 weeks ending 8/8/2009. SPINS Data, cited in OTA White Paper at 9 n. 2. OTA indicates that “Organic personal care products are available in all channels of distribution, including the natural, food, drug and mass market channels as well as non-traditional and direct to consumer sales. The market is expected to continue to grow at a strong rate.” OTA White Paper at 9. Citing *Organic Monitor*, OTA estimates that there are over 2,500 brands in the U.S. that make some sort of “Organic” claim on a personal care item. *Id.*

Within OTA, approximately 150-175 companies indicated that their primary business is organic personal care. *Id.* at 10. That group of companies accounts for 62 different brands of which 13 have the word “Organic” in their brand names. *Id.*

3. Advertising and Labeling as “Organic” of Personal Care Products

A. Composition of Personal Care Products

Skin, body and hair care products such as liquid soaps, body washes, shampoos, lotions and moisturizers contain cleansing agents, known as “surfactants,” and/or moisturizing agents, known as “emollients,” which constitute the main ingredients in such products. The remainder of skin, body and hair care products generally consist mostly of water.

Genuinely “Organic” personal care products use cleansing and moisturizing ingredients which are derived from organically-grown agricultural material and are free of petrochemicals. By contrast, a number of companies use cleansers and moisturizers that are derived from petrochemicals and/or agricultural material produced using conventional, rather than recognized organic methods, and thus may have been produced using synthetic fertilizers, pesticides and/or herbicides.

Specifically, in turning non-organic agricultural material—such as conventional coconut oil—into a surfactant, a manufacturer first converts the oil into fatty alcohols, by tranesterifying the vegetable oil with methanol (a petrochemical) to make methyl esters, and then flowing hydrogen through the methyl esters at high pressure in the presence of a metal catalyst. This process, known as hydrogenation or hydrogenolysis, breaks down the methyl esters, leaving fatty alcohols and methanol, which can then be recovered. The resulting fatty alcohols can be used in their own right as emollient ingredients, or further reacted with other agricultural or petrochemical compounds, to produce surfactants or ester ingredients.

In turning the fatty alcohol into a surfactant, a manufacturer may employ the process of sulfation, which entails introducing, in a falling film reactor, a sulfuric ester group molecule into the fatty alcohol, such that sulfur from the sulfuric ester group molecule is linked through an oxygen atom to the fatty alcohol molecule. Sulfuric ester molecules are petroleum compounds derived as a byproduct of coal and petroleum refining. This process renders the fatty alcohol made from conventional agricultural material effective as a surface cleansing agent.

Consumers expect that personal care advertised as “Organic” is composed of cleansing and moisturizing ingredients made from organic material, and are free of petrochemical compounds, especially those that generate petrochemical contaminants of concern. A number of surfactants are made in part from petrochemicals, meaning that they are derived in part from petroleum or natural gas. The most commonly used of such surfactants is probably Cocamidopropyl Betaine, made by combining coconut oil with Amidopropyl Betaine, a petrochemical. This process results in contamination with traces of the petrochemicals Sodium Monochloroacetate, Amidoamine (AA) and

Dimethylaminopropylamine (DMAPA). Amidoamine is suspected of causing skin sensitization and allergic reactions even at very low levels for certain users.

In some cases, surfactants are created, in part, through a chemical process known as ethoxylation, in which the petrochemical (and carcinogenic) ethylene oxide (1,2-epoxyethane) is added to fatty alcohols (derived from non-organic vegetable oils) to make them more soluble and milder, and thus more effective as a foaming and cleansing agent. This process results in 1,4-Dioxane being created in at least trace amounts. 1,4-Dioxane has been detected by independent lab analysis in various products made by some of the companies that are labeled and advertised as “Organic”.

With respect to emollients, again, genuine “Organic” personal care products use emollients that are derived from organically-grown agricultural material and are free of petrochemicals. By contrast, some companies use emollients that are derived from petrochemicals, synthetic silicone and/or agricultural material produced using conventional, rather than recognized organic methods, and thus may have been produced using synthetic fertilizers, pesticides and/or herbicides. Common non-organic fatty alcohols used as moisturizers are cetyl alcohol, stearyl alcohol and/or cetearyl alcohol. Dimethicone is a pure synthetic silicone moisturizer found in many of the Subject Companies’ lotion and hair products, while another synthetic silicone ingredient, Cyclopentasiloxane, is the lead ingredient in the lotions made by at least one of those companies.

B. Advertising and Labeling of Personal Care Products as “Organic”

A number of companies are advertising and labeling their personal care products outright as “Organic”—as part of a brand name, sub-brand name, product description or otherwise-- despite the fact that the main cleansing and moisturizing ingredients of these products are derived from *non-organic* material (conventional agricultural, petrochemical or synthetic silicone material), rather than organic agricultural material. To justify the claim that their products are “Organic,” these companies often place a small strainer of organic herbs in hundreds of gallons of production batch water, and then list the resulting “organic herbal water extracts” at the beginning of the ingredient lists. Alternatively or in addition, the water byproduct of essential oil distillation, termed “floral water” or “hydrosol,” is used to justify organic product claims. In reality, these are “organic water” tricks, and the products are based on the same non-organic cleansers and moisturizers found in any conventional, mass-market personal care product.

Even more common than use of organic “hydrosol” water as the basis for the advertising and labeling of a personal care product as “Organic” is the use of reconstituted 200 X aloe powder water. The way in which use of such aloe powder water can be made the basis for the advertising of a product as “Organic” can be illustrated by the following sample formulation: :

84.85% Water
10% Olefin Sulfonate (pure petroleum surfactant)
5% Cocamidopropyl Betaine (hybrid petro/veg surfactant/viscosity builder)
0.175% 200 X organic aloe vera concentrate

$200 \times 0.175\% = 35\%$, reducing “water” to 50%, which when backed out, the reconstituted organic aloe “content” gives the product $35/50 = 70\%$ “organic water” content.

Again, the resulting product is a completely conventional petrochemical-based formulation, with inclusion of organic aloe powder used to justify making ordinary water the basis for an “Organic” claim.

Most companies engaging in organic fraud in personal care, utilize 200 X powdered organic aloe or organic floral waters as the basis for a claim, in the advertising and labeling, that the entire product is “Organic,” even though all their actual main cleansing and moisturizing ingredients in the product are not organic, and often are partly or entirely petrochemical based.

Specific examples of the deceptive advertising and labeling of personal care products as “Organic” are set forth below. In the ingredient lists below, the actual main cleansing and moisturizing ingredients are highlighted in bold. This is not intended to be a comprehensive or exhaustive list of products currently being deceptively labeled as “Organic,” but merely to illustrate the types of claims that are creating the current problem.

Hain Celestial.

Hain Celestial produces, and sells throughout the United States, personal care products labeled and advertised with the brand names “JASON Pure Natural & Organic,” “Avalon Organics,” and “Queen Helene Naturals Organic.” The terms “Pure Natural & Organic,” “Organic” and/or “Organics” appear prominently on the labels or containers of these products and in the advertising and promotional materials for the products.

The products include liquid soaps, body washes, moisturizing crèmes, face crèmes, shampoos and other products. These three Hain Celestial “Organic” brands accounted for more than \$25 million in sales in 2008, according to SPINS.

The major cleansing ingredients in Hain Celestial’s “JASON Pure Natural and Organic” personal care products are not made from organic material; rather, all such ingredients are made from conventional agricultural material combined with petrochemicals. Further, JASON liquid soap, bodywash and shampoo products contain Sodium Myreth Sulfate, an ingredient made in significant part with the petrochemical ethylene oxide, as the primary cleansing ingredient. Further, because this ingredient is ethoxylated with the petrochemical ethylene oxide, its use results in the inclusion, in

these products, of trace amounts of the carcinogenic substance 1,4-Dioxane. Virtually all the JASON products are preserved with synthetic petrochemically-derived preservatives.

For example, the ingredients of “JASON PURE, NATURAL & ORGANIC Lavender Satin Soap” are:

Aqua (purified water), **Sodium Myreth Sulfate**, Aloe Barbadensis Leaf Gel (Aloe Vera, Certified Organic), **Decyl Glucoside**, **Olea Europaea Fruit Oil (Extra Virgin Olive)**, **Glycerin (Vege)**, **Lauramide MEA**, **Triticum Vulgare Germ Oil (Wheat)**, **Glycol Stearate**, Lavandula Angustifolia Extract (Lavender), Tocopheryl Acetate (Vitamin E), Prunus Armeniaca Kernel Oil (Apricot), Panthenol (Vitamin B), Calendula Officinalis Flower Extract (Calendula, Certified Organic), Lecithin, Allantoin, Glycine Soja Protein (Soybean), Retinyl Palmitate (Vitamin A), Citric Acid, Citrus Grandis Fruit Extract (Grapefruit), Sodium Benzoate, Potassium Sorbate, Color (Natural), Fragrance Oil Blend.

Jason’s “Tea Tree Scalp Normalizing Shampoo,” labeled as “PURE, NATURAL AND ORGANIC,” is rated in the Environmental Working Group’s Cosmetic Safety Database as “high hazard,” with synthetic non-organic ingredients in the product linked to “cancer, developmental/reproductive toxicity and allergies/immunotoxicity,” among other things.

Similarly, the major cleansing ingredients in Hain Celestial’s “Avalon Organics” personal care products are not made from organic material; rather, all such ingredients are made from conventional agricultural material combined with petrochemicals. In particular, the main cleansing ingredient in “Avalon Organics” body and hair care products is Cocamidopropyl Betaine which, as noted above, is made by combining petrochemical and conventional agricultural compounds, and which has no organic content. For example, the ingredients of “AVALON ORGANICS Liquid Soap Lavender” are

Water (Purified), **Cocamidopropyl Betaine**, **Disodium Cocoamphodiacetate**, **Sodium Cocoyl Sarcosinate**, **Coconut Acid**, **Babassuamidopropalkonium Chloride**, Mentha Piperita Leaf (Organic) (Peppermint), Calendula Officinalis Flower, Chamomilla Recutita Flower Extracts, Vegetable Glycerin, Bisabolol (Chamomile), Ethylhexyl Glycerin, Arginine (amino acid), Panthenol (Pro-Vitamin B5), Tocopherol (Vitamin E), Mentha Piperita Leaf Oil (Organic) (Peppermint), Other Essential Oils

The main moisturizing ingredient of “AVALON ORGANICS” Hand & Body Lotion Lavender, is Cyclopentasiloxane, a pure synthetic silicone oil ingredient. The ingredients of the product are:

Water Purified, **Cyclopentasiloxane**, **Cetearyl Alcohol**, **Polysorbate 60**, **Helianthus Annuus (Organic Sunflower) Oil**, **Cetyl Alcohol**, **Vegetable Glycerin**, **Sorbitol**, **Stearyl Alcohol**, **Dimethicone**, Lavandula Angustifolia

Flower (Organic) (Lavender), Calendula Officinalis Flower, Chamomilla Recutita Flower Extracts, Babassuamidopropalkonium Chloride, Bisabolol (Chamomile), Theobroma Cacao (Organic) (Cocoa Butter), Organic Linium Usitatissimum, Cocos Nucifera Oils (Flaxseed & Coconut), Sodium Chloride, Beta Glucan (Oat), Ethylhexylglycerin, Arginine (amino acid), Stearic Acid, Organic Lavandula Angustifolia Oil, Other Essential Oils

Hain Celestials' "Queen Helene Naturals Organic" products similarly contain ingredients made from petrochemicals. For example, "Queen Helene Naturals Organic" Cocoa Butter Body Wash manufactured and sold by Hain Celestial contains Cocamidopropyl Hydroxysultaine.

Attached as Exhibit A hereto are examples of Hain Celestial advertisements of these products as "Organic."

Levlad/Nature's Gate.

Levlad produces and sells throughout the United States, under the brand name "Nature's Gate," a line of personal care products advertised, labeled and offered for sale as "Nature's Gate Organics." These include shampoos, skin lotions, liquid soaps, body washes and deodorants. These Nature's Gate "Organics" products accounted for more than \$5 million in sales in 2008, according to industry data.

The cleansing agents in the Nature's Gate "Organics" personal care products that contain cleansing ingredients, contain petrochemicals or petrochemical compounds, such as Disodium Laureth Sulfosuccinate, made with Ethylene Oxide, and Cocamidopropyl Betaine. The use of an ingredient ethoxylated with the petrochemical Ethylene Oxide results in the inclusion, in Nature's Gate Organics products, of trace amounts of the carcinogenic substance 1,4-Dioxane. The Nature's Gate "Organics" products use principal cleansing agents which are derived from conventional agricultural material (produced using synthetic fertilizers, pesticides and/or herbicides), rather than from organic agricultural material.

For example, the ingredients of Nature's Gate "Organics" Lavender & Aloe Nourishing Shampoo for Normal to Dry Hair include not only Disodium Laureth Sulfosuccinate, Ethylene Oxide and Cocamidopropyl Betaine, but other petrochemical compounds as well. Those ingredients are:

Water, Organic Lavandula Intermedia (Lavender) Flower/Leaf Stem Extract, **Disodium Laureth Sulfosuccinate, Cocamidopropyl Betaine, PEG-120 Methyl Glucose Dioleate, Decyle Glucoside**, Organic Lavandula Angustifolia (Lavender) Oil, Organic Echinacea Angustifolia Leaf Extract, Organic Aloe Barbadosensis Leaf Extract, Organic Arctium Lappa (Burdock) Root Extract, Organic Glycyrrhiza Glabra (Licorice) Root Extract, Organic Juniperus Communis (Juniper) Fruit Extract, Organic Salvia Officinalis (Sage) Leaf Extract, Organic Althaea Officinalis (Marshmallow) Root Extract, Organic Equisetum Arvense (Horsetail)

Leaf Extract, Panthenol, Soyamidopropalkonium Chloride, Hydrolyzed Wheat Protein, Hydrolyzed Wheat Starch, Isoceteth-20, Polysorbate 80, Disodium EDTA, Polyquaternium-10, Alcohol, Glyceryl Undecylenate, Phenoxyethanol, Citric Acid, Fragrance.

Nature's Gate Organics Body Wash Chamomile and Lemon Verbena Lotion is rated in the Environmental Working Group's Cosmetic Safety Database as "high hazard," with synthetic non-organic ingredients linked to cancer, developmental/reproductive toxicity and allergies/immunotoxicity, among other things.

Attached as Exhibit B hereto are examples of Nature's Gate advertisements of these products as "Organic."

Giovanni

Giovanni produces and sells throughout the United States, personal care products advertised and offered for sale as "Giovanni Organic Cosmetics," "Organic Body Care" and/or "Organic Hair Care." These products include body washes, lotions, bar soaps, body butters, shampoos and conditioners. It is estimated, based on industry data, that sales of Giovanni "Organic Cosmetics" products in 2008 exceeded \$8 million.

Although the products contain "organic water" extracts of organic herbs that are over 99% water, none of the main cleansing or moisturizing ingredients in these Giovanni products is made from organic material. Giovanni product labeled as "Organic" do not contain at least 95% organic ingredients (excluding water and salt) and do contain non-agricultural substances not allowed by section 205.605.

For example, the ingredients of Giovanni's product advertised and labeled as "Organic Body Wash—Lavender Vanilla Snow" are

Organic Lavandula Angustifolia (Lavendar), Organic Echinacea Angustifolia (Coneflower), Organic Aginko Bilboa (Ginko Bilboa), Organic Rosasinensis (Hibiscus and Vanilla Planifolia (Vanilla) extracts (Aqueous), **Sodium Cocoyl Glutamate, Disodium Cocamphodiacetate, Cocamidopropyl Betaine, Vegetable Glycerin**, Panthenol (*Pro Vitamin B5)), Tocopheryl Acetate ((Vit. E)), Citric Acid ((corn)), Sodium Hydroxymethylglycinate, Essential Oil Fragrance.

Attached as Exhibit C hereto are examples of labels of and advertising and marketing materials for Giovanni "organic" and "Pure Organic Technology" products. Also submitted with this Complaint is a container of Giovanni "Pure Organic Technology Body Wash."

Country Life/Desert Essence

Country Life produces, and sells throughout the United States, a line of body washes, cleansing gels, shampoos and conditioners under the name, “Desert Essence Organics.” According to industry data, sales of these items in 2008 exceeded \$4 million.

The Desert Essence products labeled and marketed as “Organics” do not contain at least 95% organic ingredients (excluding water and salt) and do contain non-agricultural substances not allowed by section 205.605. The cleansing agents in the “Desert Essence Organics” body washes, shampoos and conditioners consist of and/or contain petrochemicals or petrochemical compounds, including Cocamidopropyl Betaine, and are derived from conventional, rather than organic, agricultural materials. For example, the ingredients of “Desert Essence Organics Body Wash—Almond” are:

Aqueous Infusion of Organic Extracts: Prunus Amygdalus Dulcis (almond) Extract, Camellia Sensis (green Tea) Leaf Extract, Salix Alba (Willow) Bark Extract and Macrocystis Pyifera (Sea Kelp) Extract, **Sodium Coco-Sulfate, Cocamidopropyl Betaine, Decyl Polyglucose, Vegetable Glycerin**, Citrus Grandis (Grapefruit) Seed Extract, Alpha Hydroxy Acids (Glycolic Acid from sugar cane and Malic Acid from fruits), Beta Hydroxy Acid (salicylic Acid), 1,2-Octanediol, Phenoxyethanol, Potassium Sorbate, Proprietary Blend of Essential Oils.

Attached as Exhibit D hereto are examples of advertising and marketing materials for Country Life/Desert Essence “Organics” products.

Freeman Beauty

Freeman Beauty distributes and sells throughout the United States a line of personal care branded as “Goodstuff Organics” with a seal on the front label that declares “Organic Fair Trade Ingredients”. However, products such as the “Freeman Good Stuff Organics Creamy Body Wash, Coconut & Aloe Vera” are composed almost entirely of synthetic *non*-organic ingredients. In fact, the product’s formula is based on Olefin Sulfonate, a pure petrochemical surfactant, Cocamidopropyl Betaine (a hybrid petrochemical non-organic surfactant), and various ethoxylated ingredients (PEG 4 Rapeseedamide, Disodium Laureth Sulfosuccinate, Laureth 4, PEG/PPG 18/18 Dimethicone). The ingredients of this product are:

Water, **Sodium C12 16 Olefin Sulfonate, Cocamidopropyl Betaine, PEG 4 Rapeseedamide, Cocoa Seed Butter**, Chamomila Recutita (Matricaria) Flower Extract, Rice Extract, Aloe Barbadensis Leaf Juice, **Coconut Oil, Grape Seed Oil, Tocopheryl Acetate, Cocamidopropyl PG Dimonium Chloride Phosphate, Disodium Laureth Sulfosuccinate, Glycol Distearate, Laureth 4, PEG/PPG 18/18 Dimethicone**, Citric Acid, Sodium Chloride, Disodium EDTA, Methylchloroisothiazolinone, Methylisothiazolinone, Limonene, Linalool, Fragrance

Attached as Exhibit E hereto are examples of advertising materials for Freeman “Goodstuff Organics” products.

4. The Deceptive Nature of “Organic” Labeling of Personal Care Products That Are Not Genuinely Organic

In its request for comments, the Commission states that it does not propose to address organic claims in the revised Green Guides because, “for products that are outside the NOP’s jurisdiction, the current record is insufficient for the Commission to provide specific guidance.” 75 *Fed. Reg.* at 63585. With respect to what the Commission calls “non-agricultural products,” including personal care products, the Commission suggests that, “It is unclear how consumers understand organic claims...and how marketers of those products substantiate their claims. No commenters submitted consumer perception evidence on this issue. The Commission, therefore, lacks a basis to provide guidance....” *Id.* at 63585-86.

OCA and Dr. Bronner’s contend that there is more than enough evidence of consumer understanding and perception to provide a basis for the Commission to provide guidance. The labeling of products such as those described above as “Organic” is deceptive, first, because such consumers expect and believe that a personal care product labeled “Organic” will use main cleansing and moisturizing ingredients made from organic agricultural material, not non-organic material (conventional agricultural, synthetic silicone or petrochemical material), and will *not* contain or be made from petrochemical compounds, such as Cocamidopropyl Betaine, Cocamidopropyl Hydrosultaine, Sodium Myreth Sulfate and/or Olfein Sulfonate. Second, the labeling is deceptive because consumers seeking “Organic” personal care products would not purchase those products if the consumers were aware of the true composition of those products; but rather, would purchase another product that is certified “Organic” or “Made with Organic [specified ingredients]” under the NOP.

This was demonstrated by consumer research conducted in 2008 by Dr. Bronner’s, the topline results of which are attached hereto as Exhibit F. The consumer research conducted by Dr. Bronner’s included a statistically valid random sample telephone survey of 400 California consumers of organic personal care products; and personal interviews of 453 randomly selected organic products shoppers in at Whole Foods, Trader Joe’s, and six independent natural product outlets, throughout California. In the phone survey, 89% of respondents believed that a product labeled as “Organic” should not contain petrochemicals; 87% believed such a product should not contain synthetic preservatives; and 92% believed such a product should not contain cleansing ingredients based on conventional agricultural materials. When asked if they were looking for a liquid soap they consider “Organic,” 70% of respondents indicated they would prefer a liquid soap with major cleansing ingredients based on organic agriculture from farms that do not use synthetic pesticides and herbicides.

Even more tellingly, in the phone survey, consumers ranked “Avalon Organics Glycerin Hand Soap,” “Jason Pure Natural and Organic Satin Soap,” “Nature’s Gate

Organics Liquid Soaps” and “Kiss My Face ‘Obsessively Organic’ Liquid Soap” all as being *more “organic”* than Dr. Bronner’s liquid soap labeled “Made with Organic Oils”. It is perhaps not surprising that consumers would regard a product labeled outright as “Organic” as being more organic than a product labeled merely “Made with Organic [specified ingredients].”

Yet all of those products in fact use principal cleansing agents derived from conventional and petrochemical material, which consumers said they would *not* expect to see in a product labeled “Organic.” And, 85% of respondents stated that *if they knew* a brand actually contained petrochemicals and that its major cleansing ingredients were derived from conventional agriculture, *they would not buy that brand but would look for another product.*

The personal interviews of organic consumers yielded similar results. Consumers ranked soaps that they were shown, hypothetically labeled “Blue Sky Organics” and “Pure Natural and Organic” as being more organic than a “Blue Sky Liquid Soap Made with Organic Oils.” Consumers also ranked the Avalon, Nature’s Gate and Kiss My Face “Organic” products as being “more organic” than Dr. Bronner’s liquid soap. Yet, even though the Avalon, Nature’s Gate and Kiss My Face products all are based on main cleansing ingredients made from non-organic agricultural and petrochemical compounds, 57% of those same respondents said a product labeled “Organic” should not contain cleaning ingredients derived from conventional agriculture, and 66% said such products should not contain petrochemicals. Again, asked whether if they were looking to buy a liquid soap they considered organic, and they knew a particular soap’s major cleansing ingredients were made from conventional, non-organic agriculture, combined with petrochemical compounds, 58% of respondents said they would “look for another brand with more organic materials.”

Consistent with this survey research is other evidence that has been compiled by OCA in the course of its “Coming Clean” campaign. (A description of that campaign is attached hereto as Exhibit G). A survey conducted by OCA in connection with that campaign (results attached hereto as Exhibit H revealed, among other things, that 98.6% of responding organic personal care consumers believed that a product with a derivation of the word “organic” in its name should be either 100% organic or, at a minimum, not contain synthetic detergents or preservative ingredients.

In addition, in the course of that campaign, OCA has received hundreds of messages from consumers across the country complaining that, if they knew that products labeled “Organic” contained petrochemicals and used main cleansing ingredients that were not derived from organic agricultural materials and used petrochemicals, they never would have purchased such products, and they felt completely deceived. Attached as Exhibit I hereto are some examples of the more than 1,300 messages received by OCA from consumers during the initial stage of that educational campaign.

Leading consumer groups, including Consumers Union, have also recognized the serious impact on consumers of the deceptive and misleading labeling as “Organic” of

personal care products that no reasonable consumer would consider organic. Michael Hansen, Consumers Union senior scientist, told the NOSB at its meeting on November 3, 2009:

Our basic position is that no organic claims should appear on any personal care product that does not come under the purview of NOP. So that means, we believe that for personal care products there should be the same standard as food. We understand that there may be some alternative standards for, quote, "made with organic" or other non-USDA organic products, but we believe that that is not in line with the NOP. So we think the NOP has to make a decision. You either have to take it all on -- that means for all categories -- or do none of it. We think you should take it all on, so as to have consistency in the meaning of organic, not only within personal care products, but also in a consumer's comparison of what that product label means vis-a-vis food. There should be one standard, whether it is for personal care products or food. So one way we think this could be done is that there should be a section on the National List for, quote, "made with organic", end quote, and, quote, "organic". So there should be sections on the National List for these personal care products.

In 2006, Consumer Union launched a new women's shopping magazine titled *ShopSmart--No Hype + No Ads + Just Great Buys*; like Consumer Reports and other CU publications, the magazine accepts no advertising revenue. The inaugural issue of the publication included a piece entitled, "How to find real organic body care products." A copy of the article is attached hereto as Exhibit J The piece pictures several of Hain's Avalon and Jason products, Kiss My Face and Nature's Gate products, all labeled as "Organic," and warns consumers that:

THE WRONG STUFF: Labels may lie, but ingredient lists are pretty straightforward, and yet many of those we found on so-called organic products (like those at left) were eye opening. Along with ingredients like organic aloe juice and tea tree oil were potentially unhealthy chemicals, although the amounts at which these substances become problematic are generally unknown. Parabens, which we found in many products, may among other things disturb the endocrine system. Other examples include Cocamidopropyl Betaine, which can trigger allergic reactions, and Phenoxyethanol, which can irritate skin and eyes. These and other synthetics such as disodium EDTA and Sodium Myreth Sulfate that aren't approved by the government's organic program just shouldn't be in "organic" products. So before you buy, read the labels front and back!

Included in Exhibit J are three other articles from later issues of Consumer Union's *Shop Smart*, warning and educating consumers about the deceptive labeling of personal care products as "Organic:" : "When organic isn't," ""What you should know about chemicals in your cosmetics;" and "What's your beauty IQ?"

The deception of organic consumers through labeling practices has also affected the marketing practices of retail outlets in varying ways. At one end of the spectrum, many retail outlets have themselves been confused and misled by the labeling practices of the Respondent Companies, and have contributed to the further deceptive promotion of these products as “Organic.” For example, Jimbo’s, a regional health food chain of four stores in San Diego County, California featured “Organic” personal care products in its September 2006 in-store flier (attached hereto as Exhibit K), which stated that:

Organics is the trend of the moment in the personal care industry; however, it is more than just a sales and marketing gimmick. Organics means a crop is produced with no synthetic pesticides or fertilizers and takes ‘natural’ a step further, as it is considered the healthiest option for crops and the environment. The Nature’s Gate Organics line is an example of taking health and beauty to the next level in personal care.

Yet, as noted above, the main cleansing ingredients in Nature’s Gate “Organic” products *are* based on petrochemicals combined with non-agricultural material that was produced with “synthetic pesticides and fertilizers.” See, to the same effect, the promotional in-store flier (attached hereto as Exhibit L) of the national chain Sunflower Markets, touting special offers of “organic” personal care products sold by some of the companies listed above.

At the other end of the spectrum, some retailers have recognized the deception that is occurring and have tried to educate their own consumers about it. Whole Foods Market, the single largest retailer of organic-positioned personal care products in the world, in June 2010 announced new guidelines for use of the term “organic” on personal care products (attached as Exhibit M). Among other things, by June 1, 2011, any product making an “organic” product claim, e.g., “organic body wash”, must be certified by USDA/NOP to the standard for being able to make an outright organic claim and display the USDA seal (more than 95% organic).

OCA and Dr. Bronner’s therefore contend that there is more than enough evidence of consumer understanding and perception to provide a basis for the Commission to provide guidance with respect to “organic” claims about personal care products.

5. The Commission Should Provide Guidance With Respect to Organic Claims About Personal Care Products

With respect to agricultural products, the Commission suggests that there is no need for FTC guidance because “the NOP provides a comprehensive regulatory framework governing organic claims for agricultural products... the Commission does not want to propose duplicative or possibly inconsistent advice.” 75 *Fed. Reg.* at 63585. The Commission then suggests that the NOP’s regulatory framework “does not apply to organic claims for non-agricultural products,” including personal care products not

containing agricultural ingredients or not making claims to meeting NOP standards. *Id.* The Commission then states that because of the lack of “consumer perception evidence,” the Commission “lacks a basis to provide guidance on the use of organic claims for products outside NOP’s jurisdiction.”

The Commission’s analysis of NOP’s jurisdiction is actually inaccurate: the USDA NOP does have jurisdiction over any personal care product making an “organic” claim. But NOP is not currently exercising that jurisdiction and it may be a considerable period of time—likely years—before it does so. The Commission can in the meantime help to combat consumer deception, consistent with the Commission’s mission and the dictates of section 5, by including in the Green Guides the requirement that personal care products labeled outright as “Organic” must comply with the NOP standards for such labeling.

The Commission suggests that, “It is unclear how consumers understand organic claims that describe non-agricultural products....” That is not the case. An outright “organic” claim necessarily and inherently implies to a consumer, first, that the product is in fact based on agricultural ingredients, and second, that organic practices were followed in producing those agricultural ingredients. The deception of consumers by organic claims on non-agricultural cosmetics is thus twofold—the claim falsely implies that the main ingredients are, one, made from agricultural material, and two, that those agricultural materials are organic.

A. NOP Does Have Jurisdiction Over Labeling of Personal Care Products as “Organic”

The Commission’s suggestion that “non-agricultural products” are “outside the NOP’s jurisdiction” is misplaced. Products making claims to be “organic” necessarily fall within NOP’s jurisdiction. USDA itself has acknowledged that section 6519 of the Organic Foods Production Act—

provides the Secretary with the authority to take action against misuse of the term “organic.” USDA will monitor use of the term “organic” in product names and will restrict use of the term in names that are determined to be deliberately misleading to consumers.

Final Rule, National Organic Program, 65 Fed. Reg. 80548, 80582 (Dec. 21, 2000 (“Final Rule”)). USDA has further recognized that, “The NOP is ultimately responsible for the oversight and enforcement of the program, including oversight of exempt and excluded operations and cases of fraudulent or misleading labeling.” *Final Rule, 65 Fed. Reg. at 80557.*

It is clear, then, that USDA has authority to prohibit and to seek penalties for the labeling of any product as simply “Organic” in violation of the OFPA and NOP Regulations, particularly if that labeling is fraudulent or misleading. Thus, for example, if a producer of a completely synthetic personal care product with *no* agricultural

ingredients—for example, a jar of petrolatum—labeled and sold that product as “Organic Body Crème,” there would seem to be no question that USDA NOP could impose civil penalties on the producer of that product, just as much if it was labeled Organic Toast Spread.

Indeed, as a logical matter, NOP’s authority must extend to the labeling of *any* product insofar as such labeling is meant to imply to consumers that the product is an organic agricultural product, *even if* the product were in fact made entirely of *non-*agricultural materials. NOP cannot, logically, interpret the scope of its enforcement authority to include, for example, the mislabeling of a non-organic canola oil product as “Organic Cooking Oil”, yet to exclude the mislabeling of a synthetic motor oil product as “Organic Cooking Oil”, on the ground that motor oil is non-agricultural in the first place. Similarly, with regard to non-food fiber and textiles, NOP cannot—and to our knowledge, does not—interpret its authority to cover the labeling of a non-organic but agricultural cotton fiber as “Organic Yarn,” but not to cover the labeling of a pure petrochemical nylon fiber from being labeled as “Organic Yarn.” NOP’s authority necessarily rests on the *representation* that a product is an organic *agricultural* product, not whether the product making that claim is in fact agricultural in the first place.

In any event, all of the personal care products of concern here *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.

NOP has issued a variety of guidance and interpretative statements, over the last decade, with respect to the application of the OFPA and NOP Regulations to personal care products. In its latest guidance document, issued in April 2008, NOP stated that:

If a cosmetic, body care product or personal care product contains or is made up of agricultural ingredients, and can meet the USDA/NOP organic production, handling, processing and labeling standard, it may be eligible to be certified under the NOP regulations.

- Any cosmetic, body care product or personal care product that does not meet the production, handling, processing, labeling, and certification standards described above, may not state, imply or convey in any way that the products is USDA-certified organic or meets the USDA organic standards.

However:

- USDA has no authority over the production and labeling of cosmetics, body care products and personal care products that are not made up of agricultural ingredients or do not make any claims to meeting USDA organic standards.

At least one court has held, however, that USDA *does* have such authority, and the USDA itself has implicitly agreed. Dr. Bronner's filed suit in San Francisco, California, Superior Court, against Hain Celestial, Kiss My Face, Levlad, Giovanni 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).

The 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 defendants that, in "enacting the OFPA, Congress created an exclusive federal mechanism for evaluating and approving synthetic materials...." Dec. 14 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.

In the meantime, at its November 2009 meeting, the NOP's National Organic Standards Board ("NOSB") adopted, by a 12-1 vote, a recommendation of its Certification, Accreditation and Compliance Committee that the NOP Regulations be explicitly made mandatory for personal care products. That Recommendation noted that, "The USDA is responsible for product organic claims but is not currently enforcing this in the area of personal care products....[T]he NOP should take the necessary initial steps to bring this product class into a coordinated existence with organic food products under the regulation."

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 November 2009 NOSB recommendation and the filing by OCA and three companies, including Dr. Bronner's, of an administrative complaint with USDA in January 2010. 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.

In an April 23, 2010 Memorandum to the NOSB, the head of NOP indicated that the NOP would (1) communicate with the Food and Drug Administration and the FTC regarding use of the term “organic” in personal care products in order to achieve a “comprehensive approach;” (2) obtain information regarding organic labeling of personal care products in the marketplace; and (3) ‘consider the recommendations of the NOSB on rulemaking and take them under advisement for future incorporation.’”

B. The Commission Should Provide Guidance Until NOP Exercises Its Authority Over the Labeling of Personal Care Products as “Organic”

Although NOP does have authority to regulate the labeling of personal care products as “Organic,” it has not as of yet determined to exercise that authority. NOP has not taken any of the steps outlined in its April 23, 2010 Memorandum. Further, USDA’s Strategic Plan for 2010-12 indicates that any amendment to the NOP regulations to cover personal care products will be treated as a low priority. It may well take several years, then, before NOP issues any regulations governing labeling and marketing of personal care products as “Organic.”

In the meantime, consumers would continue to be deceived, confused and misled by the types of organic claims described above. In these circumstances, consistent with the purposes of the Green Guides, and the Commission’s responsibility to enforce section 5, the Commission should include in the Green Guides guidance on organic claims about personal care products, pending full regulation of this area by NOP. As indicated above, there is a sufficient factual record to provide a basis for such guidance.

To avoid “duplicative or possibly inconsistent advice,” *75 Fed. Reg.* at 63585, the Commission should simply include in the Green Guides the requirement that any claim that a personal care product is outright “Organic”—where the term “organic” is part of a brand name or modifies the primary product descriptor-- will be considered deceptive unless that product complies with the NOP regulations and is entitled to be certified as “Organic.”

This approach will also leave USDA/NOP with the flexibility to develop appropriate standards for personal care products labeled as “made with organic [specified ingredients].” 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 for NOP to develop and, in the meantime, use of the “Made With” claim can be left free of regulation.

Thank you for your time and attention to this important matter and your consideration of these comments.

Sincerely yours,

Ronnie Cummins
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Organic Consumers Association

David Bronner
President
Dr. Bronner’s Magic Soaps