



United States of America
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Division of Advertising Practices

July 10, 2015

Via Email Only

John R. Fleder
Hyman, Phelps & McNamara, P.C.
700 Thirteenth Street, N.W., Suite 1200
Washington, D.C. 20005
JFleder@hpm.com

Re: Xochitl, Inc., FTC File No. 152-3012

Dear Mr. Fleder:

The staff of the Federal Trade Commission's Division of Advertising Practices has conducted an investigation of Xochitl, Inc. and Xochitl Gourmet Foods LLC (collectively, "Xochitl") regarding possible violations of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52, in connection with Xochitl's advertising for its non-organic line of corn chips. Specifically, our inquiry focused on whether, from at least 2009 through 2014, Xochitl's claim of "No GMO" for its non-organic corn chips (including Salted Mexican Style, Cajun Style, Picositos con Limon Mexican Style, Sea Salt Mexican Style, No Salt Mexican Style, and Garlic varieties) was false and/or unsubstantiated. Xochitl expressly made the "No GMO" claim in advertisements and product packaging, often under an "All Natural" heading with other claims.

As you are aware, at the end of last year, Consumer Reports published an article in *Consumer Reports Magazine* that discussed testing for genetically modified organisms ("GMOs") in various corn chip products. In October 2014, Consumer Reports requested that the FTC investigate Xochitl's "No GMO" claim after testing identified significant amounts of GMO corn in six different packages of Xochitl's non-organic corn chips with expiration dates ranging from April to July 2014.

According to Consumer Reports, testing was done by an independent lab with expertise in GMOs and "was rigorous, utilized the best available technology and went above and beyond industry standards with this product to ensure the accuracy of [its] results." The test results found, on average, more than 75% GMO corn content in the six tested packages of Xochitl chips. The lab used a comparative testing method to account for the degradation of DNA that may occur during the processing of corn into corn chips. Results using this method reflect the percentage of intact GMO corn DNA relative to all intact corn DNA. This method is highly unlikely to produce false positives, because if there is insufficient intact corn DNA, then the test results will be inconclusive, rather than positive for GMOs. Accordingly, we believe that the

results from the testing conducted on Xochitl chips by the lab hired by Consumer Reports were reliable.

In addition, the staff's investigation revealed that Xochitl did not specifically request non-GMO corn or information from its ingredient suppliers regarding GMO testing and their methods for preventing GMO contamination throughout the ingredient chain, despite the fact that nearly all domestically produced corn in the U.S. contains GMOs.¹ Nor were Xochitl chips verified by the Non-GMO Project² or certified as Organic by the United States Department of Agriculture ("USDA") during this period.³ Although third-party verification is not required in the United States for non-GMO content claims, absent such verification or other evidence from its ingredient suppliers that the corn used in the Xochitl chips was non-GMO, the staff believes that Xochitl did not possess a reasonable basis to support its claims that Xochitl chips contained "No GMO."

Last year's *Consumer Reports Magazine* article reported that Xochitl stated that the corn the company uses comes from a supplier that provided test results with many of the deliveries Xochitl received indicating that the corn was non-GMO. However, this statement relates to Xochitl's efforts to ensure that corn purchased for Xochitl chips is non-GMO *after* Consumer Reports contacted the company rather than *prior* to the Consumer Reports contact.

Although the staff is concerned that Xochitl made false and unsubstantiated claims that Xochitl chips contained "No GMO," we have decided not to recommend enforcement action. The staff notes that soon after being contacted by Consumer Reports, and even before the Federal Trade Commission contacted Xochitl, Inc., the company removed the "No GMO" claim from advertising and product packaging for Xochitl chips. In addition, as reported in *Consumer*

¹ The United States Department of Agriculture reported that as of 2014, 93% of the nation's corn acreage grows GMO corn. In 2009, when Xochitl began manufacturing Xochitl chips, this number was 80%. See United States Department of Agriculture, Economic Research Service, "Adoption of Genetically Engineered Crops in the United States, 1996-2014, *available at* <http://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption.aspx> (last visited Jun. 29, 2015).

² The Non-GMO Project is a non-profit 501(c)(3) organization that provides third-party verification for non-GMO food. It verifies a product enrolled in its Non-GMO Project Program by using GMO testing (with an action threshold of 0.9% GMO content) and evaluating the complete product chain for GMO contamination. See Non-GMO Project Standard *available at* <http://www.nongmoproject.org/product-verification/non-gmo-project-standard/> (last visited Jul. 7, 2015).

³ USDA Organic regulations require farmers and processors to provide evidence to the USDA that they did not use GMOs and that a product was protected from GMO contamination "from farm to table." See, e.g., The U.S. Department of Agriculture's Blog, "Organic 101: Can GMOs Be Used in Organic Products?" *available at* <http://blogs.usda.gov/2013/05/17/organic-101-can-gmos-be-used-in-organic-products/> (last visited Jun. 29, 2015).

John R. Fleder, Esq.

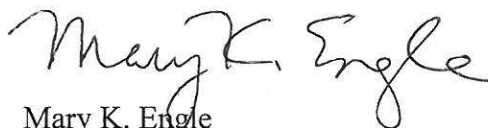
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Reports Magazine, Xochitl has since ensured that deliveries of raw corn from its suppliers are accompanied by reliable test results indicating that the corn is non-GMO. Due to the limited shelf life of Xochitl chips, the staff believes it is unlikely that products with the potentially false and unsubstantiated claims remain on store shelves. Moreover, Xochitl has represented to staff that it now conducts internal testing on samples of ingredient lots to help ensure its ingredients are non-GMO and has enrolled in the Non-GMO Project Program to seek Non-GMO Project Verification for Xochitl chips. For these reasons, among others, it appears that no further action is warranted by the Commission at this time, and the investigation is closed. The staff appreciates Xochitl's cooperation in the resolution of this matter.

This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

Very truly yours,

A handwritten signature in black ink that reads "Mary K. Engle". The signature is written in a cursive, flowing style.

Mary K. Engle
Associate Director