

BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

ANIMAL OUTLOOK, Petitioner,

DAIRY MANAGEMENT INC., NATIONAL DAIRY COUNCIL, and INNOVATION
CENTER FOR U.S. DAIRY,
Proposed Respondents.

**COMPLAINT FOR ACTION TO STOP
FALSE OR DECEPTIVE ADVERTISING**

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EXECUTIVE SUMMARY

This complaint is filed by Animal Outlook (“AO”), a national, non-profit farmed animal advocacy organization, against three U.S. dairy organizations, Dairy Management Inc., National Dairy Council, and Innovation Center for U.S. Dairy (collectively referred to herein as “DMI”), for false and misleading advertising in their “Beat the Lag” advertising campaign (“BTL”). This campaign explicitly targets Gen Z, ages 10 to 23 years old, through video games to promote the dairy industry and the consumption of dairy products.¹

The Federal Trade Commission (“FTC” or “Commission”) regulates advertisers pursuant to the Federal Trade Commission Act (“FTC Act”) to protect consumers from false, misleading, and deceptive advertisements.² Members of the public, such as AO, may submit a complaint to the Commission to investigate advertisers for violations of the FTC Act.³

Through BTL, DMI propagates false, misleading and deceptive claims about the dairy industry, creating an inaccurate image of the industry for young children and teenagers, a particularly vulnerable audience. DMI uses both explicit and implied claims about the health and nutrient content of dairy, the environmental sustainability of dairy production, and the treatment of animals in the dairy industry to deceive young viewers and entice them and their families to purchase dairy products.⁴ DMI’s claims of “comfort[able]” cows who are “delicate[ly]” handled on dairy farms that cause no negative environmental effects while producing dairy products that pose no health risks are both unsubstantiated and overstated.⁵ AO urges the Commission to investigate this complaint and enforce the law to the fullest extent allowable to correct the harm caused by BTL and to prevent future deception of impressionable Gen Z consumers.

BTL is particularly nefarious because—in addition to disseminating misleading claims about health, the environment, and animal welfare—the campaign bolsters the impact of these misleading claims through endorsements by online influencers in an effort to gain more credibility and visibility with

¹ Don Schindler, *A new generation of Dairy Month activities*, HOARD’S DAIRYMAN (May 26, 2021), <https://hoards.com/blog-30260-a-new-generation-of-dairy-month-activities.html>.

² Summary of Federal Trade Commission Act, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/legal-library/browse/statutes/federal-trade-commission-act> (last visited Jul. 7, 2022).

³ 16 C.F.R. § 2.1 (2021).

⁴ See *id.*; Marilyn Hershey, *Delivering Dairy to Gen Z’s World*, UNDENIABLY DAIRY <https://www.usdairy.com/for-farmers/blog/checkoff-delivering-dairy-to-gen-z> (last visited Jul. 7, 2022).

⁵ PrestonPlayz, *7 New COWS That Minecraft Should Add!*, YOUTUBE (Oct. 27, 2020) (0:23) <https://youtu.be/pVgsNojEvII?t=23>; *id.* at 5:23, <https://youtu.be/pVgsNojEvII?t=323>.

a Gen Z audience.⁶ Moreover, DMI's deception of impressionable consumers goes beyond the present complaint. While this complaint focuses on BTL, DMI is actively developing other marketing campaigns aimed at its "high-priority target" of young children and teenagers, such as its current "Reset Yourself with Dairy" campaign.⁷

Deceptive advertising of any kind is contrary to the goal of the FTC and to the ability of consumers to make informed decisions about their purchases. FTC action is imperative so that DMI and other advertisers cannot use online influencers and platforms to target and manipulate young children and teenagers through false and misleading claims regarding the dairy industry.

INTRODUCTION

As authorized by 16 C.F.R. §§ 2.1 and 2.2 of the FTC regulations, AO respectfully requests that the Commission investigate and commence enforcement action against DMI for engaging in false or deceptive advertising in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 41-48.

In late 2020 to early 2021, DMI launched BTL to promote dairy products and the dairy industry using popular video gaming platforms, such as Twitch and YouTube, along with well-known video gaming influencers.⁸ BTL consisted of live-streamed and pre-recorded gaming videos, pre-recorded cooking demonstrations, and pre-recorded tours of both in-person and virtual dairy production facilities.⁹ As described herein, BTL makes unlawfully false and/or misleading representations regarding the nutritional qualities of dairy, the environmental sustainability of dairy production, and the treatment of animals within the dairy industry. The FTC should take immediate action to cease this deception.

PETITIONER

A. Animal Outlook ("AO")

⁶ Marilyn Hershey, *supra* note 4.

⁷ *See id.*; *Reset Yourself with Dairy*, UNDENIABLY DAIRY, <https://www.usdairy.com/reset-yourself-with-dairy> (last visited Jul. 7, 2022).

⁸ *Beat the Lag!*, UNDENIABLY DAIRY, <https://www.usdairy.com/beat-the-lag> (last visited Jul. 7, 2022); PrestonPlays, *supra* note 5; *National Dairy Checkoff Zeroing in on Gen Z Audience*, COWSMOPOLITAN (Jun. 8, 2021), <https://cowsmo.com/news/national-dairy-checkoff-zeroing-in-on-gen-z-audience/>.

⁹ *Beat the Lag!*, *supra* note 8.

Petitioner Animal Outlook is a national, nonprofit, 501(c)(3) organization whose mission is to change the world for animals. AO works to challenge the status quo of animal agribusiness, expose the truth, deliver justice, revolutionize food systems, and empower others to stand up for animals by leaving them off of their plates. In furtherance of its mission, AO advocates against government policies that encourage or allow cruelty to farmed animals, conducts public education on the realities of animal agriculture, coordinates public campaigns to encourage the adoption of vegan diets, and conducts undercover investigations to expose cruelty at animal agriculture facilities. AO also devotes considerable energy to combatting false claims made by animal-product advertisers, such as those made by BTL. Examples of these efforts include legal actions against grocery brand, The Kroger Co., and salmon factory, Cooke Aquaculture¹⁰ as well as a recent public awareness campaign against “humane-washing” a practice by advertisers to misrepresent their cruel treatment of animals as “humane.”¹¹

RESPONDENTS

The three Respondents—referred to collectively in this complaint as DMI—support the efforts of the National Dairy Promotion and Research Program (“the dairy checkoff”) by creating and disseminating promotional materials to encourage the public to purchase and consume dairy products.¹²

A. Dairy Management Inc.

Dairy Management Inc. is a nonprofit organization that operates the dairy checkoff.¹³ It acts on behalf of the National Dairy Promotion and Research Board (“Dairy Board”) and the United Dairy Industry Association (“UDIA”) and is overseen by the United States Department of Agriculture (USDA).¹⁴ Dairy Management Inc. manages National Dairy Council and founded the Innovation Center for U.S. Dairy.¹⁵

¹⁰ *Simple Truth Chicken Labeling Lawsuit – Settlement Reached*, ANIMAL OUTLOOK (Oct. 13, 2014), <https://animaloutlook.org/press/press-releases/simple-truth-chicken-label-removed/>; *Legal Advocacy*, ANIMAL OUTLOOK, <https://animaloutlook.org/legal-advocacy/#cooke> (last visited Jul. 18, 2022).

¹¹ *When A Fight Over Language Is Actually About The Right To Know The Truth*, ANIMAL OUTLOOK (Jul. 30, 2021), <https://animaloutlook.org/end-humanewashing/>.

¹² *About Us*, UNDENIABLY DAIRY, <https://www.usdairy.com/about-us> (last visited Jul. 18, 2022).

¹³ *Dairy Management Inc.*, UNDENIABLY DAIRY, https://www.usdairy.com/about-us/dmi?gclid=Cj0KCQjwidSWBhDdARIsAIoTVb02rzwiki5l72pa-rH2wYFlZGWx6F4wC2D91DTUuw-gbuI3vUxKY-0aAh4DEALw_wcB (last visited Jul. 18, 2022).

¹⁴ See *id.*

¹⁵ See *id.*

B. National Dairy Council (“NDC”)

National Dairy Council is a nonprofit organization funded by the dairy checkoff and managed by Dairy Management Inc.¹⁶ NDC works with Dairy Management Inc. and Innovation Center for U.S. Dairy., as dairy research and promotion programs to further dairy promotion.¹⁷ NDC’s work centers around the dissemination of the nutritional and health benefits of dairy.¹⁸

C. Innovation Center for U.S. Dairy (“IC”)

Innovation Center for U.S. Dairy is a volunteer organization comprised of leaders and executives from dairy companies around the United States that was founded by Dairy Management Inc.¹⁹ IC works with NDC and Dairy Management, Inc., as dairy research and promotion programs to further the dairy industry.²⁰ IC’s work centers around publicizing the social responsibility efforts of the dairy industry.²¹

STANDARD OF REVIEW

The FTC Act assigns to the FTC the responsibility to protect consumers from deceptive advertisements.²² According to the FTC Act, a representation, omission, or practice is deceptive if it is (1) likely to mislead consumers acting reasonably under the circumstances and (2) is material to consumers’ decisions.²³

A. FTC has the authority to regulate BTL’s misrepresentations.

The FTC has the power to review advertisements by DMI and enforce the FTC Act against these entities despite any other agency’s prior review or approval of the advertisements, including the United States Department of Agriculture (USDA). The Agricultural Marketing Service (AMS) within the

¹⁶ *National Dairy Council*, UNDENIABLY DAIRY, <https://www.usdairy.com/about-us/national-dairy-council> (last visited Jul. 18, 2022).

¹⁷ *About Us*, *supra* note 12.

¹⁸ *National Dairy Council*, *supra* note 16.

¹⁹ *Innovation Center for U.S. Dairy*, UNDENIABLY DAIRY, <https://www.usdairy.com/about-us/innovation-center> (last visited Jul. 18, 2022); *Dairy Management Inc.*, *supra* note 13.

²⁰ *About Us*, *supra* note 12.

²¹ *Innovation Center for U.S. Dairy*, *supra* note 19.

²² Summary of Federal Trade Commission Act, *supra* note 2.

²³ 15 U.S.C. § 55(a); FED. TRADE COMM’N, FTC POLICY STATEMENT ON DECEPTION (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

USDA published advertising guidelines for Checkoff programs.²⁴ AMS indicates that all advertisements run by the Checkoff programs must be approved by AMS and that AMS requires compliance with FTC and Food and Drug Administration (FDA) rules for food labeling and advertising.²⁵ As such, BTL potentially had approval from AMS for the claims made in the advertisements, yet despite this approval, the claims in the campaign remain false and/or misleading under FTC guidelines and nothing in the guiding statutes or policies of the FTC preempts review of AMS' approval. The primary documents articulating the FTC's oversight of food advertising are the FTC Act, the *Enforcement Policy Statement on Food Advertising*, and the *FTC Policy Statement on Deception*.²⁶ None of these documents limit the FTC's ability to review the application of FTC policies by another federal agency. In fact, the *Enforcement Policy* indicates a shared jurisdiction over food advertising between USDA, FDA, and FTC, with the FTC retaining primary responsibility over non-label food advertising²⁷ such as BTL. Accordingly, the FTC has authority to regulate the subject of this complaint and is not compelled to defer to the USDA.

FALSE OR MISLEADING CLAIMS

A. Throughout BTL, DMI makes numerous representations regarding the health and nutrient content of dairy, the environmental sustainability of dairy production, and the welfare of animals within the dairy industry.

1. Health and Nutrient Content Claims

²⁴ U.S. DEP'T OF AGRIC., AGRIC. MKTG SERV., GUIDELINES FOR AMS OVERSIGHT OF COMMODITY RESEARCH AND PROMOTION PROGRAMS 58 (2020), <https://www.ams.usda.gov/sites/default/files/media/RPGUIDELINES092015.pdf>.

²⁵ *See id.* at 45-47.

²⁶ 15 U.S.C. § 41-48; FED. TRADE COMM'N, ENFORCEMENT POLICY STATEMENT ON FOOD ADVERTISING, <https://www.ftc.gov/legal-library/browse/enforcement-policy-statement-food-advertising> (last visited Jul. 7, 2022); FED. TRADE COMM'N, *supra* note 23.

²⁷ *Enforcement Policy*, *supra* note 26.

BTL makes multiple sweeping claims about the health and nutrient content qualities of dairy products, including the following:

- “Drinking dairy is linked to some health benefits including reduced inflammation and a stronger immune system”²⁸
- “Dairy products are nutritious”²⁹
- Dairy is a “good source of protein”³⁰
- “Milk makes your bones strong”³¹

Moreover, the campaign encourages viewers to consume more dairy as a way to overcome “lagging,” a term video gamers use for when a slow internet connection negatively affects their ability to play video games. The gamers in BTL advertisements explain that lag can also occur when the gamers themselves are slow due to poor nutrition and that by eating dairy, gamers can maintain their energy levels while playing video games and beat their own lag. Examples of such statements include:

- “Dairy can help you beat the lag”³²
- “Rockin’ Protein and dairy provides the energy you need to fuel your play”³³
- Influencer claims he eats a dairy snack when he “want[s] to beat the lag and [he] need[s] a pick me up”³⁴

In addition, BTL promotes the alleged general health benefits of dairy with the use of heart symbols throughout the campaign. For example, in a video with gamer PrestonPlayz, the more cheese his character eats, the more “hearts” he receives (correlating to the strength the player has).³⁵ This video alone has 1,736,290 views and PrestonPlayz has over 13 million subscribers on YouTube, disseminating these claims to an incredibly large audience of young people.³⁶ Finally, in the cooking demonstration

²⁸ MrBeast Gaming, *I Made a \$50,000 Player Building Competition!*, YOUTUBE (Nov. 17, 2020) (2:26), <https://youtu.be/j8Cl3mEpJY?t=146>.

²⁹ BriannaPlayz, *How to Tame a Pet MOOBLOOM in Minecraft!*, YOUTUBE (Oct. 28, 2020) (13:27), <https://youtu.be/qcA3AZM5Kus?t=807>.

³⁰ CaptainSparklez 2, *Twitch Rivals Minecraft PVP Tournament*, YOUTUBE (May 28, 2021) (1:28), <https://youtu.be/vEstuFh49u8?t=88>.

³¹ PrestonPlayz, *supra* note 5, at 5:05, <https://youtu.be/pVgsNojEvII?t=303>.

³² CaptainSparklez 2, *supra* note 30, at 1:18, <https://youtu.be/vEstuFh49u8?t=78>.

³³ GoldGloveTV, *I'm an MLB Pro! MLB Diamond Dynasty*, YOUTUBE (Jul. 16, 2021) (0:05), <https://youtu.be/ZJAUmZYXf0A?t=5>.

³⁴ *Id.* at 0:32, <https://youtu.be/ZJAUmZYXf0A?t=32>.

³⁵ PrestonPlayz, *supra* note 5, at 11:30, <https://youtu.be/pVgsNojEvII?t=690>.

³⁶ *See id.*

video co-created by baker Rosanna Pansino and gamer CaptainSparklez, Pansino explains that it is fitting that the influencers are making heart shaped cookies with dairy products because “dairy gives you energy” and “hearts, they’re your life, they’re your energy in video games.”³⁷ CaptainSparklez has a fanbase of over 11 million on YouTube and Pansino’s is over 13 million people.³⁸ Below are two images depicting the heart imagery from the BTL cooking demonstration.



Other similar statements in BTL include:

- “Not only is it delicious and nutritious but the wedge of cheddar cheese gives you increased strength. It basically is like a strength potion.”³⁹
- “If you eat the golden ice cream you get a massive amount of absorption hearts. Like one piece of golden ice cream, eight absorption hearts.” (see image below)⁴⁰



2. Environmental Sustainability Claims

³⁷ Undeniably Dairy, *How to Make Pixel Heart Jam Cookies*, YOUTUBE (May 14, 2021) (1:09), <https://youtu.be/RPZKUSETrqc?t=69>.

³⁸ CaptainSparklez, YOUTUBE, <https://www.youtube.com/c/CaptainSparklez> (last visited Jul. 18, 2022); Rosanna Pansino, YOUTUBE, <https://www.youtube.com/c/RosannaPansino> (last visited Jul. 18, 2022).

³⁹ PrestonPlayz, *supra* note 5, at 2:40, <https://youtu.be/pVgsNojEyII?t=160>.

⁴⁰ PrestonPlayz, *supra* note 5, at 11:30, <https://youtu.be/pVgsNojEyII?t=690>.

In addition to its numerous health claims, BTL touts the environmental sustainability of the dairy industry throughout its advertisements. BTL’s assertions that the dairy industry is “sustainable” are generic, unqualified claims about the dairy industry’s benefits to the environment.⁴¹ Examples include:

- “Dairy farms are recycling water and use each and every gallon as many times as possible and only using as much as they need”⁴²
- “Dairy products are nutritious, affordable, and sourced sustainably”⁴³
- “I want to bring awareness to how sustainable America’s dairy Farmers really are”⁴⁴

While some of the descriptions of dairy farms seem to reflect a tour of a specific farm, other statements, like BTL’s claim about recycled water, are made in broad terms, seemingly meant to reflect the practices of all dairy farms.

3. Animal Welfare Claims

BTL makes claims regarding the “humane” treatment of animals during the dairy production process, including:

- The cow “is getting a massage. They love that, it makes them feel good”⁴⁵
- “Our number one goal is to have comfortable, happy cows”⁴⁶
- Cows are milked “so delicately that the cow basically didn’t even notice what was going on”⁴⁷
- Dairy farms “provide outstanding cow comfort”⁴⁸
- Cows “are lavishly taken care of”⁴⁹
- “The cows they are very happy to line up for getting milked, like they are pushing their way in.”⁵⁰
- The cows “line up themselves...they line up on their own” to be milked⁵¹

⁴¹ PrestonPlayz, *supra* note 5, at 4:27, <https://youtu.be/pVgsNojEvII?t=275>; BriannaPlayz, *supra* note 30.

⁴² BriannaPlayz, *supra* note 29, at 9:44, <https://youtu.be/gcA3AZM5Kus?t=584>.

⁴³ BriannaPlayz, *supra* note 29.

⁴⁴ PrestonPlayz, *supra* note 5, at 4:27, <https://youtu.be/pVgsNojEvII?t=275>.

⁴⁵ Complexity Gaming, *MonsoonGG Does DAIRY – From Farm to Table*, YOUTUBE (Jun. 30, 2021) (3:18), <https://youtu.be/b6Up5PGLFbM?t=198>.

⁴⁶ *Id.* at 5:36, <https://youtu.be/b6Up5PGLFbM?t=336>.

⁴⁷ PrestonPlayz, *supra* note 5, at 5:25, <https://youtu.be/pVgsNojEvII?t=325>.

⁴⁸ *Id.* at 0:23, <https://youtu.be/pVgsNojEvII?t=23>.

⁴⁹ *Id.* at 0:30, <https://youtu.be/pVgsNojEvII?t=30>.

⁵⁰ CaptainSparklez 2, *Eating My Way Through A Minecraft Dairy Farm w/Rosanna Panino*, YOUTUBE (Jun. 25, 2021) (1:00:22), https://youtu.be/acVX9IwTl_A?t=3622.

⁵¹ *Id.* at 1:00:39, https://youtu.be/acVX9IwTl_A?t=3639.

BTL’s animal welfare claims are based on tours of a small number of dairy farms, both virtual and in person, that the gamers went on as part of their participation in this campaign.⁵² And while many of these claims are accompanied by images of the specific dairy farms visited by the influencers, the scope of the influencers’ advertisements reaches far beyond these few farms. The animal welfare claims about the practices of these small farms are seamlessly intertwined with claims about dairy farming as a whole, such as claims about “America’s dairy farmers” and pleas to consume more dairy from any farm.⁵³ When viewed in the context of the entire advertisement, these animal welfare claims create a narrative about the dairy industry as a whole.

B. BTL’s advertising is in direct conflict with the reality of the dairy industry and its products.

1. Health and Nutrient Content

While BTL makes numerous definitive statements regarding the health benefits of dairy, many scientific opinions contradict these claims and emphasize the health risks from consuming dairy.⁵⁴ While BTL promotes the inflammation-reducing qualities of dairy, some studies show that dairy increases inflammation and instances of the conditions that inflammation causes, such as arthritis.⁵⁵ For example, in 2015, *The Journal of Nutrition* by the American Society for Nutrition published a study of 1,050 adults in Germany that found increased dairy consumption correlated to increases in low-grade inflammation.⁵⁶ Further, a 2021 study analyzing the body of scientific research regarding inflammation and dairy, *sponsored by NDC itself*, found that there is “insufficient evidence to prove an ‘anti-inflammatory’ effect of dairy foods.”⁵⁷ Thus, even studies funded by DMI contradict the exact claims that it disseminates through BTL.

⁵² *Dairy Farm Tech Grabs Gamers’ Attention*, UNDENIABLY DAIRY (Dec. 10, 2020), <https://www.usdairy.com/news-articles/minecraft-video-gamers-visit-dairy-farms-virtually>.

⁵³ PrestonPlayz, *supra* note 5, at 4:35, <https://youtu.be/pVgsNojEvII?t=275>.

⁵⁴ Mu Chen et al., *Dairy fat and risk of cardiovascular disease in 3 cohorts of US adults*, 104 AM. J. OF CLINICAL NUTRITION 1209 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5081717/pdf/ajcn134460.pdf>.

⁵⁵ Amy Paturel, *Is Dairy Arthritis-Friendly?*, ARTHRITIS FOUNDATION, <https://www.arthritis.org/health-wellness/healthy-living/nutrition/healthy-eating/dairy-and-inflammation> (last visited Jul. 7, 2022).

⁵⁶ Sabine Rohrmann et al., *Plasma Concentrations of Trimethylamine-N-oxide Are Directly Associated with Dairy Food Consumption and Low-Grade Inflammation in a German Adult Population*, 146 THE J. OF NUTRITION 283 (2016), <https://doi.org/10.3945/jn.115.220103>.

⁵⁷ Julie M. Hess et al., *Exploring the Links between Diet and Inflammation: Dairy Foods as Case Studies*, 12 ADVANCES IN NUTRITION 1S (2021), <https://doi.org/10.1093/advances/nmab108>.

Furthermore, the term “dairy” encompasses a wide range of products with different health impacts and BTL makes little effort at specificity. These products range from whole fat milk to skim milk, cheddar cheese to Swiss cheese, and Greek yogurt to chocolate ice cream, all with varying additives, ingredients, health benefits, and health risks.⁵⁸ Despite this, the calls to consume dairy and the claims made about dairy in BTL all indiscriminately promote dairy products generally, with even some specific references to whole-fat dairy.⁵⁹ While BTL speaks to the health benefits of dairy in generalized terms, the USDA Dietary Guidelines for 2015-2020 and 2020-2025 do not endorse all dairy products, but rather recommend only specific types of dairy, such as “low-fat” or “fat-free” dairy products, as nutritionally beneficial for Americans.⁶⁰ Moreover, the guidelines indicate that whole fat dairy products are high in saturated fat, which contributes to potential health issues, such as heart disease and inflammation and which Americans are recommended to avoid or limit.⁶¹ This is directly contradictory to the statement made by one influencer that dairy leads to “reduced inflammation” and a “stronger immune system.”⁶² These statements are also made in contradiction with the fact that the NDC the dairy checkoff’s arm for scientific research on the nutritional quality of dairy, specifically encourages the consumption of low-fat and fat-free dairy, not *all* dairy products, as these advertisements by DMI itself specifically promote.⁶³

BTL also falsely asserts that “milk makes your bones strong.”⁶⁴ Though that is the narrative that many Americans learn as children, more recent studies indicate that the link between dairy intake and bone strength is not as definitive as many of us learned, with there being little to no correlation.⁶⁵ Instead,

⁵⁸ U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 3 (2020-2025), https://www.dietaryguidelines.gov/sites/default/files/2020-12/DGA_2020-2025_ExecutiveSummary_English.pdf; U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 23, 82 (2015-2020), https://www.dietaryguidelines.gov/sites/default/files/2019-05/2015-2020_Dietary_Guidelines.pdf

⁵⁹ PrestonPlayz, *supra* note 5, at 11:27, <https://youtu.be/pVgsNojEvII?t=687>.

⁶⁰ U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 3 (2020-2025), https://www.dietaryguidelines.gov/sites/default/files/2020-12/DGA_2020-2025_ExecutiveSummary_English.pdf; U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 82 (2015-2020), https://www.dietaryguidelines.gov/sites/default/files/2019-05/2015-2020_Dietary_Guidelines.pdf

⁶¹ U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS: EXECUTIVE SUMMARY 3 (2020-2025), https://www.dietaryguidelines.gov/sites/default/files/2020-12/DGA_2020-2025_ExecutiveSummary_English.pdf; U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 56 (2015-2020), https://www.dietaryguidelines.gov/sites/default/files/2019-05/2015-2020_Dietary_Guidelines.pdf.

⁶² MrBeast Gaming, *supra* note 28.

⁶³ *National Dairy Council*, *supra* note 18.

⁶⁴ PrestonPlayz, *supra* note 5, at 5:05, <https://youtu.be/pVgsNojEvII?t=303>.

⁶⁵ *Dairy*, HARVARD SCHOOL OF PUBLIC HEALTH, <https://www.hsph.harvard.edu/nutritionsource/dairy/> (last visited Jul. 7, 2022).

vegetables tend to be a larger factor in bone strength because calcium, the nutrient that strengthens bones, from vegetables is easier for our bodies to process.⁶⁶

In general, the health benefit statements repeated throughout the BTL overstate the health claims made about dairy products. The influencers make overreaching claims about the nutritional benefits of “dairy” with no mention of the body of scientific evidence finding health risks associated with dairy, nor the differentiation between low-fat or fat-free and whole fat dairy products, as emphasized by the USDA’s own dietary guidelines.⁶⁷

2. Environmental Sustainability Claims

BTL deceptively touts the alleged “sustainability” of the dairy industry without sufficient substantiation. For example, BTL makes broad claims about the sustainability of dairy and couples that with the story of an individual farmer with new, innovative technology to re-purpose waste on their dairy farm, crafting a narrative that all dairy farmers have these niche practices that help the environment.⁶⁸ In one video, gamer, MrBeast, highlights a dairy farmer in Connecticut who makes biodegradable pots for plants using manure generated by his cows.⁶⁹ MrBeast then claims that the farmer “is making sure nothing goes to waste” and concludes this story with a generic encouragement to “drink milk” because of these practices.⁷⁰ MrBeast does not tell viewers to drink only milk from this specific farm in Connecticut, but instead insinuates that drinking any milk will support these efforts and that all dairy comes from farms with similar practices. However, BTL does not disclose that these new, innovative practices are an attempt at mitigating the significant damage that the dairy industry does cause to the environment.⁷¹ Dairy production is a major contributor to greenhouse gas emissions, causing direct and substantial harm to the environment.⁷² There are approximately 9.4 million cows in the United States dairy industry, producing a

⁶⁶ *Calcium*, HARVARD SCHOOL OF PUBLIC HEALTH, <https://www.hsph.harvard.edu/nutritionsource/calcium/> (last visited Jul. 7, 2022).

⁶⁷ U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 3 (2020-2025), https://www.dietaryguidelines.gov/sites/default/files/2020-12/DGA_2020-2025_ExecutiveSummary_English.pdf; U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 82 (2015-2020), https://www.dietaryguidelines.gov/sites/default/files/2019-05/2015-2020_Dietary_Guidelines.pdf.

⁶⁸ MrBeast, *supra* note 28, at 2:43, <https://youtu.be/j8Cli3mEpJY?t=161>.

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *This dairy farm turns its manure into biodegradable pots and packaging*, THE OPTIMIST DAILY (May 19, 2021), <https://www.optimistdaily.com/2021/05/this-dairy-farm-turns-its-manure-into-biodegradable-pots-and-packaging/>.

⁷² *Cow burps are a major contributor to climate change — can scientists change that?*, THE PUBLIC BROADCASTING SERVICE NEWS HOUR (Mar. 6, 2022), <https://www.pbs.org/newshour/show/cow-burps-are-a-major-contributor-to-climate-change-can-scientists-change-that>.

majority of the United States' human-caused methane emissions.⁷³ When emitted, methane traps heat in the atmosphere, creating large-scale issues such as climate change and global warming, making dairy a less than “sustainable” practice.⁷⁴ Some few, specific dairy farmers, such as the one in Connecticut featured by MrBeast, are taking small measures to convince the public that they care about the environment, but they are only attempting to provide a minimal solution to a large problem that the dairy industry itself created.⁷⁵

BTL also makes more specific false claims regarding water conservation in the dairy industry. In fact, Petitioner's own investigations into multiple dairy farms across the county reveal that it is common practice for dairy farms to use excessive amounts of water in ill-conceived attempts to move and punish cows.⁷⁶ As evidenced in Petitioner's investigations of industrial dairy farms in California and Pennsylvania, cows are sprayed on their faces and bodies, often with scalding hot water, by workers trying to move them to and from milking parlors.⁷⁷ As demonstrated by an image from one of these investigations below, clearly these farms are not using “each and every gallon as many times as possible” and limiting water use only to “as much as they need.”⁷⁸



⁷³ *About Dairy*, ENV'T (2022); ENV'T (<https://www.>

⁷⁴ *Overview of* <https://www.>

⁷⁵ Steve Davie, [https://www.agri-](https://www.agri-pulse.com/art)

Collaborative Approach to Dairy Sustainability, THE NATURE CONSERVANCY (Feb. 4, 2021), <https://www.nature.org/en-us/what-we-do/our-priorities/provide-food-and-water-sustainably/food-and-water-stories/roadmap-collaborative-dairy-sustainability/>.

⁷⁶ *Dairy: Dead on Arrival*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/dick-van-dam-dairy/> (last visited Jul. 7, 2022); *Nestle's Nightmare: The Hard-to-Swallow Truth*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/nestles-nightmare/> (last visited Jul. 7, 2022).

⁷⁷ *Dairy*, *supra* note 76; *Nestle's Nightmare*, *supra* note 76.

⁷⁸ BriannaPlayz, *supra* note 29, at 9:44, <https://youtu.be/qcA3AZM5Kus?t=584>.

Overall, BTL’s claims of a sustainable dairy industry are both unsubstantiated and directly contradictory to the practices on many dairy farms across the country.

3. Animal Welfare Claims

BTL also makes unsubstantiated and false claims about the treatment of animals in dairy production. BTL describes “very happy” cows who are pampered with back scratches and who are willing and eager participants in the dairy industry.⁷⁹ BTL fails to mention any of the inhumane practices standard in the dairy industry such as burning the flesh of cows to remove their horns or using violent force to move the animals around the facility.⁸⁰ In stark contrast with the claims of “lavish” treatment and “outstanding cow comfort” that BTL claims, investigations into dairy farms across the country reveal that the experience of many dairy cows is one of cruel, inhumane treatment. In reality, dairy cows experience overcrowded living spaces, beatings, and injuries from excessive milking.⁸¹

As described in the previous sections, video footage and photographs from dairy farms depict workers spraying extremely hot water in cows’ faces, often to get them to move faster or in a certain direction.⁸² Similarly, electric prods, wooden canes, and metal pipes are all commonly employed to corral and maneuver the animals.⁸³ Petitioner has documented cows writhing and bellowing in pain at multiple

⁷⁹ Complexity Gaming, *supra* note 45; CaptainSparklez 2, *supra* note 50.

⁸⁰ Dairy, *supra* note 76; Nestle’s Nightmare, *supra* note 76.

⁸¹ Dairy: Dead on Arrival, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/dick-van-dam-dairy/#:~:text=Cows%20were%20forced%20to%20walk,of%20a%20dying%20dairy%20industry> (last visited July 22, 2022); Nestle’s Nightmare, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/nestles-nightmare/#:~:text=Martin%20Farms%20Responds%3A%20In%20the,animals%E2%80%A6have%20been%20terminated.%E2%80%9D> (last visited July 22, 2022); *The Truth About the Dairy Industry*, ANIMALEQUALITY, <https://animalequality.org/issues/dairy/> (last visited Jul. 7, 2022); *Welfare Issues for Dairy Cows*, COMPASSION IN WORLD FARMING, <https://www.ciwf.com/farmed-animals/cows/dairy-cows/> (last visited Jul. 7, 2022).

⁸² Dairy, *supra* note 76; Nestle’s Nightmare, *supra* note 76.

⁸³ *See id.*

industrial dairies as they attempt to evade workers' brutality.⁸⁴ This reality is far from the description provided by BTL which claim that dairy cows are "very happy to line up for getting milked" and they "line up on their own."⁸⁵ Multiple investigations on multiple dairy farms clearly show that violent force is commonplace as a tool for steering cows in all stages of the milking process.⁸⁶

Petitioner's investigations found sick and injured dairy cows being kicked and stomped on.⁸⁷

"Downed" cows, that cannot walk or stand due to injury or sickness, were dragged by a tractor from metal



Furthermore, BTL does not acknowledge that dairy relies heavily on the exploitation of pregnant cows and their calves. Because cows produce milk to provide for their young calves, dairy cows must constantly remain in a cycle of pregnancy and lactation.⁹¹ Pregnant mother cows are subject to the same cruel conditions described above throughout their gestation period. Newborn calves are forcibly separated from their mothers immediately after the pregnant cows are forced to give birth without pain medicine.⁹² Young female calves are then raised for dairy production and young male calves sent away to be raised for slaughter.⁹³ And, at ninety-four percent of U.S. dairies, it is standard practice to burn the flesh of baby calves with hot irons to remove their horns and permanently destroy the growth tissue that would allow

⁸⁴ *See id.*

⁸⁵ CaptainSparklez 2, *supra* note 50; *Id.* at 1:00:39, https://youtu.be/acVX9IwTl_A?t=3639.

⁸⁶ *Dairy*, *supra* note 76;

⁸⁷ *Nestle's Nightmare*, *supra* note 76.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *Nestle's Nightmare*, *supra* note 76.

⁹¹ Joe Loria, *This Single Fact is Why I Will Never Consume Dairy Again*, MERCY FOR ANIMALS (Aug. 15, 2017), <https://mercyforanimals.org/blog/this-single-fact-is-why-i-will-never-consume/>.

⁹² *Dairy*, *supra* note 76.

⁹³ *Male Dairy Cows Don't Get To Live More Than Two Years*, THE HUMANE LEAGUE (Mar. 16, 2021), <https://thehumaneleague.org/article/male-dairy-cows>.

new horns to grow, as depicted above.⁹⁴ This is an extremely cruel practice, especially when viewed in light of the fact that the American Veterinary Medical Association and the American Association of Bovine Practitioners both advise that dairy farmers select cows born without the genes to grow horns, a breed of cows that is widely available and avoids subjecting baby calves to severe head trauma.⁹⁵

ANALYSIS OF REPRESENTATIONS UNDER THE FEDERAL TRADE COMMISSION ACT

The FTC Act renders unlawful any “unfair or deceptive practices” by a person, partnership, or corporation.⁹⁶ Furthermore, the FTC Act prohibits false advertisement as an unfair or deceptive practice, as defined as an advertisement that is “misleading in a material respect.”⁹⁷

For the Commission to find that an advertisement is false, and therefore an unfair and deceptive practice, the advertisement must be (1) a material representation, omission, or practice and (2) “a representation, omission, or practice that is likely to mislead” the reasonable customer.⁹⁸ When the advertisement targets a specific audience, reasonableness is defined from the perspective of a reasonable consumer within that target audience.⁹⁹ In this case, the target audience of BTL is Gen Z, largely comprised of children and young teenagers, a highly impressionable audience, giving DMI an even higher standard of accuracy to meet so as to ensure their advertisements do not deceive the reasonable child and teenagers.

A. BTL’s representations are material because they are likely to influence the decisions of a reasonable consumer.

BTL’s claims are material because they are likely to influence “the conduct or decision regarding a product or service” of a reasonable consumer.¹⁰⁰ The FTC presumes materiality for all intentional express or implied claims and recognizes that intentional claims by advertisers are meant to influence the purchasing decisions of consumers.¹⁰¹ The representations and omissions made throughout BTL are

⁹⁴ *Nestle’s Nightmare*, *supra* note 76.

⁹⁵ *See Id.*

⁹⁶ 15 U.S.C. § 45(a).

⁹⁷ 15 U.S.C. §§ 53(a), 55(a).

⁹⁸ FED. TRADE COMM’N, *supra* note 23.

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

intentionally crafted by DMI to entice young gamers into purchasing and consuming more dairy products.¹⁰² The advertisements are directed towards children and teenagers to convince them that dairy can improve their gaming. Moreover, the messages are parroted by influential gamers and influencers whom DMI hand-selected based on their understanding that “Gen Z finds [them] to be authentic.”¹⁰³ Additionally, DMI publically states its desire to “engage [Gen Z] with [the] story of how [dairy farmers] care for [their] land and [their] animals to produce nutritious milk” and acknowledges that Gen Z has “different expectation of companies and industries” than other generations.¹⁰⁴ When evaluated as a whole, the BTL advertisements reflect DMI’s knowledge of the potential influence of their messaging and an intention to influence with their messaging.¹⁰⁵ Accordingly, these claims are material.

1. Health and Nutrient Content

The Commission infers materiality for any representations or omissions that significantly involve health.¹⁰⁶ The FTC recognizes that consumers consider the nutritional values and health benefits of food products in their purchasing decisions. The Commission considers these claims so material that it even has a dedicated *Enforcement Policy Statement on Food Advertising* specifically to guide food advertisers on how to avoid deception in health and nutritional claims.¹⁰⁷ BTL makes multiple significant claims regarding the health benefits of dairy products as evidenced most prominently with the name of the campaign originating from DMI’s claim that dairy increases energy and helps gamers “beat the lag.”¹⁰⁸ Thus, BTL’s health and nutrient claims are material.

2. Sustainability

As recognized by the FTC in its *Guides for the Use of Environmental Marketing Claims* (“*Green Guides*”), the environmental impact of a product is material to consumers’ purchasing decisions.¹⁰⁹

¹⁰² Marilyn Hershey, *supra* note 4.

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ FED. TRADE COMM’N, *supra* note 23.

¹⁰⁶ *See id.*

¹⁰⁷ FED. TRADE COMM’N, ENFORCEMENT POLICY STATEMENT ON FOOD ADVERTISING, <https://www.ftc.gov/legal-library/browse/enforcement-policy-statement-food-advertising> (last visited Jul. 7, 2022).

¹⁰⁸ *Beat the Lag!*, *supra* note 8.

¹⁰⁹ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122 (Oct. 11, 2012) (to be codified 16 C.F.R. pt. 260), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-use-environmental-marketing-claims-green-guides/greenguidesfm.pdf.

Consequently, it is important that advertisements accurately reflect a product's environmental effects. With growing concerns of the state of our environment and its longevity, consumers are often choosing which products to buy or not to buy based on its friendliness to the environment.¹¹⁰ Sustainability is an even larger factor in purchasing decisions for younger generations, such as Gen Z.¹¹¹ DMI's own website indicates that seventy-seven percent of Gen Z cares about sustainability and sixty-seven percent of the generation make purchasing decisions based on sustainability.¹¹² It is becoming ever more appealing to advertisers, such as DMI to capitalize on this concern for the environment to tell consumers what they want to hear.¹¹³ BTL's sustainability claims attempt to influence purchasing decisions of individuals concerned with environmental impacts and as such, are material.

3. Animal Welfare

The treatment of animals is also a material concern for consumers when making purchasing decisions. As the cruelty in industrial animal agriculture continues to be exposed, consumers are becoming increasingly concerned with animal welfare and its role in the production of their goods.¹¹⁴ Moreover, even members of Congress have expressed concern to the Commission over the accuracy of animal welfare claims in food advertising, representing the public's genuine concern for the investigation of this type of deception.¹¹⁵ Furthermore, the Commission itself has demonstrated its commitment to prohibiting deceptive animal welfare claims by taking investigative action into other entities for false and deceptive claims regarding their treatment of animals, such as the United Egg Producers and Foster Farms.¹¹⁶ Other advertising regulatory bodies have recognized and taken action against misleading animal

¹¹⁰ Tensie Whelan and Randi Kronthal-Sacco, *Research: Actually, Consumers Do Buy Sustainable Products*, HARVARD BUSINESS REVIEW (Jun. 19, 2019), <https://hbr.org/2019/06/research-actually-consumers-do-buy-sustainable-products>.

¹¹¹ Katie Jahns, *The environment is Gen Z's No. 1 concern – and some companies are taking advantage of that*, CNBC (Aug. 2021), <https://www.cnbc.com/2021/08/10/the-environment-is-gen-zs-no-1-concern-but-beware-of-greenwashing.html>.

¹¹² Marilyn Hershey, *Dairy's Sustainability Story Can Give Gen Z Consumers What They Seek*, UNDENIABLY DAIRY (Mar. 19, 2021), <https://www.usdairy.com/for-farmers/blog/dairy-sustainability-story-can-give-gen-z-what-they-seek>.

¹¹³ *See id.*

¹¹⁴ Sustainability Spotlight: Animal Welfare, THE HARTMAN GROUP (Mar. 15, 2018), <https://www.hartman-group.com/infographics/88547198/sustainability-spotlight-animal-welfare>; Survey Reveals Consumer Demands For Certified Humane®, CERTIFIED HUMANE (Jan. 14, 2021), <https://certifiedhumane.org/survey-reveals-consumer-demands-for-certified-humane/>.

¹¹⁵ Sarah Von Alt, *Members of Congress Press FTC to Investigate Costco's Animal Welfare Claims*, MERCY FOR ANIMALS (Apr. 20, 2021), <https://mercyforanimals.org/blog/congress-press-ftc-to-investigate-costcos-animal-welfare/>.

¹¹⁶ *United Egg Producers ("Animal Care Certified" Program)*, FED. TRADE COMM'N (Sept. 30, 2006), <https://www.ftc.gov/legal-library/browse/cases-proceedings/closing-letters/united-egg-producers-animal-care-certified-program>; *Foster Farms/Mercy For Animals*, FED. TRADE COMM'N (Apr. 28, 2016), <https://www.ftc.gov/legal-library/browse/cases-proceedings/closing-letters/foster-farmsmercy-animals>

welfare claims. For instance, the Better Business Bureau (BBB) previously sided with animal advocates against a company misrepresenting their treatment of animals as “humane.”¹¹⁷ BBB has a National Advertising Review Board that works to protect consumers and fair competition in the market through the regulation of advertisers and their work constitutes the large majority of advertising law in the country.¹¹⁸ BBB is a leader in the business world for evaluating product advertisements for false claims and its recognition that the treatment of animals in food production is a factor that consumers consider when making decisions about what products to buy and that consumers will rely on the claims made by advertisers indicates the materiality of animal welfare claims.¹¹⁹

B. BTL’s representations are deceptive because they are likely to mislead the reasonable consumer.

BTL’s representations mislead consumers by disseminating unsubstantiated claims about dairy and omitting information critical to consumers’ accurate perceptions of the dairy industry. A representation or omission is deceptive if it is likely to mislead the reasonable consumer to have “false beliefs about the product.”¹²⁰ There is no one single reasonable belief that could be formed from an advertisement; an advertisement could lead multiple different reasonable consumers to form multiple different beliefs about a product.¹²¹ Nonetheless, if any one false belief is reasonably formed due to the representation or omission, then the advertiser is liable.¹²² As stated above, the reasonable consumer is based on a reasonable actor within the target audience of the advertiser, here youth ages 10 to 23 years old.

In determining if an advertisement is misleading, the Commission will consider “representations made or suggested by statement, word, design, device, sound, or any combination thereof” and “the extent to which the advertisement fails to reveal facts material in the light of such representations.”¹²³ The

¹¹⁷ *NAD Recommends Hatfield Discontinue Animal Welfare Claim for its Pork Products Following NAD Challenge*, BETTER BUSINESS BUREAU NATIONAL PROGRAMS (Sept. 19, 2019), <https://bbbprograms.org/archive/nad-recommends-hatfield-discontinue-animal-welfare-claim-for-its-pork-products-following-nad-challenge>.

¹¹⁸ *National Advertising Division*, BETTER BUSINESS BUREAU, <https://bbbprograms.org/programs/all-programs/national-advertising-division> (last visited Jul. 18, 2022).

¹¹⁹ *See id.*

¹²⁰ FED. TRADE COMM’N, *supra* note 23.

¹²¹ *See id.*

¹²² *See id.*

¹²³ 15 U.S.C. § 55(a).

Commission will look at representations themselves, as well as the entire advertisement and the context in which the claim was made.¹²⁴

1. Health and Nutrient Content

DMI's health and nutrient content claims in BTL are deceptive because they are likely to lead reasonable consumers to believe that dairy products have health benefits that they do not. The FTC specifically recognizes health claims as a category in which deceptive advertising is detrimental to consumers.¹²⁵ The FTC and the Food and Drug Administration ("FDA") share jurisdiction over the regulation of health claims in food advertising, with the FTC primarily responsible for non-label advertising and the FDA primarily responsible for advertising on the label.¹²⁶ Despite this division of responsibility, due to the FDA's scientific expertise, the FTC often yields to the FDA's guidance on the accuracy of health claims even when such claims do not appear on the label.¹²⁷ Therefore advertisers should meet FDA standards for health claims to avoid FTC violations.¹²⁸

According to the FDA, a health claim is any claim that "characterizes the relationship of any [food] to a disease or health-related condition."¹²⁹ A disease or health-related condition is any "damage to an organ, part, structure, or system of the body such that it does not function properly (e.g., cardiovascular disease), or a state of health leading to such dysfunctioning (e.g., hypertension)."¹³⁰ The claim can be either an express claim or an implied claim through the use of "symbols (e.g., a heart symbol)," writing, or references to third parties.¹³¹

¹²⁴ *See id.*

¹²⁵ *Enforcement Policy*, *supra* note 26.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ Federal Trade Commission, 21 C.F.R. § 101.14(a)(1) (2021), <https://www.ecfr.gov/current/title-21/chapter-I/subchapter-B/part-101/subpart-A/section-101.14>.

¹³⁰ 21 C.F.R. § 101.14(a)(5) (2021), <https://www.ecfr.gov/current/title-21/chapter-I/subchapter-B/part-101/subpart-A/section-101.14>.

¹³¹ 21 C.F.R. § 101.14(a)(1).

In evaluating health claims, the FTC considers multiple factors and failure to satisfy any one of these criteria could lead to the FTC’s determination that the health claim is false or misleading.¹³² First, health claims must have “competent and reliable scientific evidence.”¹³³ While not required to have a scientific consensus, there must be an “overall scientific agreement” that the claim is accurate.¹³⁴ Because this is based on scientific knowledge, the FTC will likely agree with the FDA’s determination on the substantiation of a health claim.¹³⁵ BTL fails to satisfy this factor. For example, BTL claims that dairy is a “good source of protein” despite it not meeting FDA guidelines for that qualification.¹³⁶ Claims that a food is “a good source of” a specific nutrient must be substantiated by FDA nutritional standards.¹³⁷ The FDA requires that any food described as a “good source of” a nutrient contain 10% to 19% of the recommended daily value.¹³⁸ The recommended daily value of protein is 50 grams, so according to the FDA, a food that is a “good source of protein” must have 5 to 9.5 grams of protein per serving.¹³⁹ While cheddar cheese has 23.3 grams of protein per serving, whole milk only has 3.27 grams of protein per serving, falling well below the threshold to qualify as a “good source.”¹⁴⁰

Second, health claims must have adequate qualifications that indicate any substantial or significant scientific disagreements as to the validity of the claim.¹⁴¹ BTL fails to satisfy this factor as well. Despite studies that show that dairy contributes to inflammation and does not affect bone strength, BTL fails to qualify their claims that dairy “reduces inflammation” and “makes your bones strong.”¹⁴²

BTL also does not satisfy the final criterion considered by the FTC when evaluating health claims. FTC advises that advertisers should make adequate disclosures regarding the limits of the health

¹³² *Enforcement Policy*, *supra* note 26.

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *CaptainSparklez 2*, *supra* note 30;

¹³⁷ *See id.*

¹³⁸ 21 C.F.R. § 101.54(c).

¹³⁹ *Daily Value on the New Nutrition and Supplement Facts Labels*, U.S. FOOD AND DRUG ADMINISTRATION, <https://www.fda.gov/food/new-nutrition-facts-label/daily-value-new-nutrition-and-supplement-facts-labels> (last visited Jul. 7, 2022).

¹⁴⁰ *Milk, whole, 3.25% milkfat, with added vitamin D*, UNITED STATES DEPARTMENT OF AGRICULTURE, <https://fdc.nal.usda.gov/fdc-app.html#/food-details/746782/nutrients> (last visited Jul. 7, 2022); *Cheese, cheddar*, UNITED STATES DEPARTMENT OF AGRICULTURE, <https://fdc.nal.usda.gov/fdc-app.html#/food-details/328637/nutrients> (last visited Jul. 7, 2022).

¹⁴¹ *Enforcement Policy*, *supra* note 26

¹⁴² Amy Paturel, *supra* note 55; *Dairy*, *supra* note 76; PrestonPlayz, *supra* note 5, at 5:05, <https://youtu.be/pVgsNojEvII?t=303>; MrBeast Gaming, *supra* note 28.

claim and any potential health risks posed by the food.¹⁴³ Further, the FTC’s *Enforcement Policy* specifically warns advertisers to qualify health claims regarding dairy and its health risks, advice that DMI did not follow in the creation of BTL.¹⁴⁴ The FTC explains that a health claim that benefits in regards to a reduction in the risk of osteoporosis in an advertisement for a “dairy product that is high in saturated fat, may create the deceptive impression among reasonable consumers that consuming the dairy product will reduce the risk of osteoporosis without increasing the risk of any other health-related condition or disease, for example, heart disease.”¹⁴⁵ Therefore the FTC’s guidance to advertisers is to “include a disclosure that conveys the presence and significance of the risk-increasing nutrient” to prevent deception.¹⁴⁶

BTL specifically advertises that dairy “makes your bones strong,” with weak bones being both a major cause and symptom of osteoporosis.¹⁴⁷ Many dairy products are high in saturated fat, as recognized by the United States Department of Agriculture (“USDA”) in their Dietary Guidelines for both 2015-2020 and 2020-2025.¹⁴⁸ However, BTL’s claim about bone strengthening qualities of dairy does not include a disclosure by DMI, as directed by the Commission’s *Enforcement Policy*, acknowledging these health risks or specifying a low-fat or fat-free dairy with a lower saturated fat content and a lower risk of heart disease.

BTL makes multiple other similar claims about the purported energy benefits, protein content, and immune system support associated with dairy products as a whole without any disclosures about saturated fat content, heart disease risk, or any other risks of certain dairy products as identified by the USDA.¹⁴⁹ Below is a screenshot from BTL in which dairy is claimed to have these benefits.

¹⁴³ *Enforcement Policy*, *supra* note 26.

¹⁴⁴ *See id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ PrestonPlayz, *supra* note 5, at 5:03, <https://youtu.be/pVgsNojEyII?t=303>; *Osteoporosis*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/osteoporosis/symptoms-causes/svc-20351968> (last visited Jul. 7, 2022).

¹⁴⁸ U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS: EXECUTIVE SUMMARY 3 (2020-2025), https://www.dietaryguidelines.gov/sites/default/files/2020-12/DGA_2020-2025_ExecutiveSummary_English.pdf; U.S. DEP’T OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 56 (2015-2020), https://www.dietaryguidelines.gov/sites/default/files/2019-05/2015-2020_Dietary_Guidelines.pdf.

¹⁴⁹ CaptainSparklez 2, *supra* note 30, at 1:28, <https://youtu.be/vEstuFh49u8?t=88>; MrBeast Gaming, *supra* note 28, at 2:26, <https://youtu.be/j8Cli3mEpJY?t=146>.



Additionally, FTC guidelines also regulate implied health claims in food advertisements. Implied claims consist of “statements, symbols, vignettes, or other forms of communication” that, in the context of the advertisement, demonstrate to a reasonable consumer that there is a relationship between the food and a disease or health condition.¹⁵⁰ Implied health claims must be substantiated by scientific evidence in the same way that express claims must.

The FTC, the FDA, and the AMS all recognize the heart symbol as an implied health claim.¹⁵¹ AMS is a branch of the USDA that has its own guide to advertising, largely reliant on the FTC’s guidance, specifically for federal Research and Promotion Programs, such as the dairy checkoff.¹⁵² The heart symbol in food advertisements is a common signifier for health benefits, especially related to heart functioning.¹⁵³ These agencies advise that to avoid deception qualifying language accompany the symbol to indicate the specific health benefit that the heart is meant to express.¹⁵⁴ Further, the agencies indicate that use of the heart symbol without any explaining language would likely lead the reasonable consumer

¹⁵⁰ 21 C.F.R. § 101.14(a)(1) (2021), <https://www.ecfr.gov/current/title-21/chapter-I/subchapter-B/part-101/subpart-A/section-101.14>.

¹⁵¹ *Enforcement Policy*, *supra* note 26; Food Labeling; General Requirements for Health Claims for Food, 58 Fed. Reg. 2478-01 (Jan. 6, 1993) (to be codified at 21 C.F.R. pts. 20, 101), 1993 WL 1547(F.R.); U.S. DEPT OF AGRIC., AGRIC. MKTG SERV., *supra* note 24.

¹⁵² U.S. DEPT OF AGRIC., AGRIC. MKTG SERV., *supra* note 24, at 5.

¹⁵³ *See id.* at 58.

¹⁵⁴ Food Labeling; General Requirements for Health Claims for Food, 58 Fed. Reg. 2478-01.

to believe the food has general heart health benefits with no health risks.¹⁵⁵ Because consumers viewing heart symbols in product advertisements would reasonably come to many potentially untrue conclusions regarding the health of the food without additional qualifications from the advertiser, this would likely be deceptive or misleading.¹⁵⁶

BTL employs heart imagery in their advertising without the appropriate qualifying language. For instance, in the video game streaming videos, players earn “hearts” when they eat dairy products, such as cheese and ice cream in the game.¹⁵⁷ Below is an example of the number of hearts that a player received after his character consumed cake made from dairy milk.¹⁵⁸



In BTL’s advertising, the “hearts” give players advantages such as super strength, “life” or energy to improve their character’s performance in the game.¹⁵⁹ Moreover, in one BTL video, an influencer explicitly states the campaign’s desired connection between the heart symbols in the video games and the real-life health benefits of dairy by saying, “dairy gives you energy but also in [video] games, the hearts, they’re your life, they’re your energy in the game.”¹⁶⁰ However, these broad claims about “energy,” and “life” and super strength as benefits from eating dairy overstate dairy’s health benefits and fail to acknowledge the scientific research that contradicts these claims, finding a link

¹⁵⁵ Food Labeling; General Requirements for Health Claims for Food, 58 Fed. Reg. 2478-01; U.S. DEP’T OF AGRIC., AGRIC. MKTG SERV., *supra* note 24.

¹⁵⁶ Food Labeling; General Requirements for Health Claims for Food, 58 Fed. Reg. 2478-01.

¹⁵⁷ PrestonPlayz, *supra* note 5, at 11:30, <https://youtu.be/pVgsNojEyII?t=690>.

¹⁵⁸ *See id.* at 11:50, <https://youtu.be/pVgsNojEyII?t=710>.

¹⁵⁹ *See id.* at 2:40, <https://youtu.be/pVgsNojEyII?t=160>; *See id.* at 11:30, <https://youtu.be/pVgsNojEyII?t=690>.

¹⁶⁰ Undeniably Dairy, *supra* note 37.

between some dairy products and heart disease and finding no or adverse effects on bone strength.¹⁶¹ The claims also ignore the USDA’s nutritional guidelines that only recommend certain kinds of dairy, specifically fat-free or low-fat dairy products, as nutritionally beneficial by advertising the generic healthiness of dairy products generally.¹⁶²

One BTL video shows a character who receives a “massive amount of hearts” after eating ice cream in the video game, followed by the statement “if it ain’t made with real whole milk, it ain’t ice cream,” encouraging viewers to consume full-fat milk, against the guidance of the USDA.¹⁶³ The reasonable ten-year-old on their computer viewing BTL’s advertisements is likely to be deceived into believing that dairy is healthy because it gives his player hearts and would fail to understand that his full-fat dairy ice cream, high in saturated fat, is not guaranteed to give him super strength and is likely to cause heart disease.

2. Environmental Sustainability

BTL makes similarly sweeping claims about the dairy industry’s environmental benefits that mislead consumers about the reality of the dairy industry.

The FTC’s *Green Guides* outline guidance to advertisers regarding sustainability claims.¹⁶⁴ The FTC discourages advertisers from making broad claims about sustainability because they are hard to prove.¹⁶⁵ The FTC warns that consumers are likely to form beliefs about products based on sweeping sustainability statements that do not reflect the product’s actual effects on the environment.¹⁶⁶ However, if advertisers choose to make broad claims, those claims should be qualified by more specific claims about the product’s effect on the environment.¹⁶⁷ Furthermore, any specific claims used to substantiate broad

¹⁶¹ Mu Chen, *supra* note 56; Diane Feskanich, *Milk, Dietary Calcium, and Bone Fractures in Women: A 12-Year Prospective Study*, 87 AMERICAN JOURNAL OF PUBLIC HEALTH 992 (1997), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1380936/pdf/amiph00505-0106.pdf>.

¹⁶² U.S. DEPT OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 3 (2020-2025), https://www.dietaryguidelines.gov/sites/default/files/2020-12/DGA_2020-2025_ExecutiveSummary_English.pdf; U.S. DEPT OF AGRIC., DIETARY GUIDELINES FOR AMERICANS 82 (2015-2020), https://www.dietaryguidelines.gov/sites/default/files/2019-05/2015-2020_Dietary_Guidelines.pdf.

¹⁶³ PrestonPlayz, *supra* note 5, at 11:27, <https://youtu.be/pVgsNojEyII?t=687>.

¹⁶⁴ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122 (Oct. 11, 2012) (to be codified 16 C.F.R. pt. 260), https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-use-environmental-marketing-claims-green-guides/greenguidesfrn.pdf.

¹⁶⁵ *See id.* at 62,126.

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

claims should also be accompanied by “trade-offs resulting from the benefit(s) to determine if they can [truly] substantiate this claim.”¹⁶⁸ Finally, the FTC emphasizes that advertisers should not overstate the significance of an environmental claim.¹⁶⁹

BTL makes several broad, unsubstantiated claims about the sustainability of dairy products, ignoring specific guidance in the *Green Guides*. While the FTC advises advertisers not to use broad terms about environmental benefits and sustainability regarding their products because of the meaning attributed to them by reasonable consumers,¹⁷⁰ BTL’s repeated use of the word “sustainable” without sufficient qualification, purposefully and recklessly leaves consumers with ill-defined and inaccurate perceptions of dairy products.¹⁷¹ Below is a screenshot from one of BTL’s unqualified uses of the term “sustainable.”



Moreover, despite specific farmers’ attempts to improve the sustainability of their dairy production, the dairy industry as a whole continues to significantly contribute to water use and greenhouse gas emissions to the detriment of the environment.¹⁷² For example, the University of Kentucky recommends that dairy cows should consume between 30 to 50 gallons of water per day, or up to 415 pounds of water.¹⁷³ If this number is multiplied by the size of even a small industrial dairy at 1,000 cows, then each farm is using close to a half million pounds of water *every single day*, a staggering amount the reasonable

¹⁶⁸ See *id.*

¹⁶⁹ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. at 62,125.

¹⁷⁰ See *id.* at 62,125-62,126.

¹⁷¹ PrestonPlayz, *supra* note 5, at 4:27, <https://youtu.be/pVgsNojEyII?t=275>; BriannaPlayz, *supra* note 29.

¹⁷² Wyatt Bechtel, *A Whole Lot of Water Goes Into That Milk*, DAIRY HERD MAGAZINE (Nov. 1, 2017), <https://www.dairvherd.com/news-news/whole-lot-water-goes-milk>.

¹⁷³ *Water Needs for the Dairy Herd*, UNIVERSITY OF KENTUCKY – COLLEGE OF AGRICULTURE, FOOD, AND ENVIRONMENT, <https://afs.ca.uky.edu/content/water-needs-dairy-herd> (last visited July 23, 2022).

consumer would likely not consider “sustainable.” Because BTL’s advertisements fail to define their use of the word “sustainable,” they fail to acknowledge any environmental harms associated with dairy products, so that consumers are likely to make purchase decisions in reliance on an incomplete understanding of the environmental effects of dairy.

Further, one BTL video contains a more specific false claim about the limited use of water in the dairy industry. A video gamer says that dairy farmers are “recycling water,” “only using as much as they need.”¹⁷⁴ This sweeping assertion fails to depict the reality of many industrial dairy farms where water is wasted on a daily basis. By way of example, the image below depicts a California dairy spraying a downed cow repeatedly in an attempt to force her to rise,¹⁷⁵ a common practice in dairies.



The reasonable consumer, especially the reasonable ten-year-old, would not realize that phrases such as “only using as much as they need” mean the dairy industry is wasting thousands of gallons of water by spraying cows in the face out of frustration or to make them move faster.¹⁷⁶ Not only is this a false claim, directly contradictory to video and photographic footage of dairy farms, but this is a broad overstatement about the practices of the dairy industry as a whole, directly contradictory to the Commission’s guidance on sustainability claims.¹⁷⁷

3. Animal Welfare

¹⁷⁴ BriannaPlayz, *supra* note 29, at 9:44, <https://youtu.be/qcA3AZM5Kus?t=584>.

¹⁷⁵ *Dairy*, *supra* note 76.

¹⁷⁶ *Dairy*, *supra* note 76.

¹⁷⁷ Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. at 62,125.

As with health and sustainability claims, BTL makes extremely broad and unsubstantiated claims about animal welfare practices in the dairy industry. However, in addition to broad claims that are meant to induce consumers to form varying beliefs, including false beliefs about the product, BTL makes misleading claims about the treatment of animals in the dairy industry. BTL claims that cows are housed in “lavish” “outstanding cow comfort” in stark contrast to the reality for dairy cows living in lots filled with feces and urine, revealed by numerous investigations.¹⁷⁸ Furthermore, the contexts in which the claims were made are likely to lead a reasonable consumer to believe that all dairy products are made in facilities that treat animals that way.

BTL describes tours taken by gamers at a few small dairy facilities and then inaccurately extrapolates the conditions at these few farms with the dairy industry as whole. The videos often use images of specific dairy farms visited by the gamers and then make generic claims about dairy and its benefits. In one video, there is footage of a dairy cow experiencing what the farmer says is a “massage,” incorporated with other messaging about supporting U.S. dairy farmers and dairy production in general.¹⁷⁹ Viewers are told that this tour shows “the entire process start to finish of farm to table dairy products.”¹⁸⁰ When viewed in light of the entire BTL advertising campaign, which centers around the reasons why gamers should buy and consume more dairy in any and all forms, DMI deceptively weaves favorable moments of footage from specific farms into a larger narrative of animal welfare in the U.S. dairy industry. The reasonable ten-year-old viewing the cow getting a back massage in an advertisement for dairy would likely falsely believe that the cows used to make all of the dairy products on the grocery store shelves received that same treatment. Instead, most of those products likely came from cows raised by industry standards, being shocked by electric prods and having the horns on their head burned at the flesh as described above.¹⁸¹

¹⁷⁸ *Video Reveals That Neglected, Lame Cows Suffer in Pain and Filth at Pennsylvania Dairy—Just for Cheese*, PETA INVESTIGATES, <https://investigations.peta.org/reitz-dairy-farm-neglect/> (last visited Jul. 18, 2022); *Filthy N.C. Dairy Farm Shuts Down Following PETA Investigation*, PETA INVESTIGATES, <https://investigations.peta.org/north-carolina-dairy-farm/farm-shuts-down/> (last visited Jul. 18, 2022).

¹⁷⁹ Complexity Gaming, *supra* note 45, at 3:18, <https://youtu.be/b6Up5PGLFbM?t=198>.

¹⁸⁰ Complexity Gaming, *supra* note 45, at 0:23, <https://youtu.be/b6Up5PGLFbM?t=23>.

¹⁸¹ *Dairy*, *supra*, note 76; *Nestle's Nightmare*, *supra* note 76.

C. The representations in BTL are made by influencers acting as endorsers, making the claims of particular concern to the FTC.

The FTC expresses special concern for deceptive claims made in endorsements of products in the *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (“*Endorsement Guides*”), blog posts about influencer marketing, and a staff publication supplementing the *Endorsement Guides*.¹⁸² The Commission has taken enforcement action against, sent warning letters to, and proposed more stringent advertising guidelines for deceptive influencers.¹⁸³ The Commission recognizes that “[i]nfluencer marketing is becoming increasingly prevalent....[and] [r]eports indicate that the global influencer marketing industry is set to grow to approximately \$16.4 billion in 2022.”¹⁸⁴ “Consumers’ increasing reliance on online views” increases the FTC’s urgency and interest in preventing deceptive influencer advertisements.¹⁸⁵

According to the *Endorsement Guides*, endorsements of products “may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”¹⁸⁶ Further, advertisers are generally responsible for the claims made by their endorsers.¹⁸⁷ Advertisers have a responsibility to provide endorsers with guidelines to ensure compliance with FTC advertising regulations.¹⁸⁸ After providing this guidance, advertisers are expected to take reasonable steps to ensure that endorsers remain in compliance with these regulations and if they fail to do this, the advertisers will be held liable for any deceptive claims made by endorsers.¹⁸⁹

¹⁸² *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. § 255, <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.

¹⁸³ Lesley Fair, *Three FTC actions of interest to influencers*, FED. TRADE COMM’N (Sept 7, 2017), <https://www.ftc.gov/business-guidance/blog/2017/09/three-ftc-actions-interest-influencers>; FED. TRADE COMM’N, OFF. OF THE CHAIR, STATEMENT OF CHAIR LINA M. KHAN REGARDING THE ENDORSEMENT GUIDES REVIEW COMMISSION FILE NO. P204500 (May 19, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P204500KhanEndorsementStatement.pdf.

¹⁸⁴ FED. TRADE COMM’N, OFF. OF THE CHAIR, *supra* note 183.

¹⁸⁵ *See id.*

¹⁸⁶ 16 C.F.R. § 255.

¹⁸⁷ 16 C.F.R. § 255.1(d).

¹⁸⁸ *The FTC Endorsement Guides: What People Are Asking*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking#advertisersresponsibilities> (last visited Jul. 7, 2022).

¹⁸⁹ Lesley Fair, *FTC-FDA warning letters: Influential to influencers and marketers*, FED. TRADE COMM’N (Jun. 7, 2019), <https://www.ftc.gov/business-guidance/blog/2019/06/ftc-fda-warning-letters-influential-influencers-marketers>.

In the case of BTL, DMI did not reasonably ensure the advertisements' compliance with FTC guidelines, instead allowing videos with false and deceptive claims to be disseminated on their behalf and allowed the influencers to make numerous misleading claims. These claims are echoed repeatedly throughout BTL by multiple influencers, suggesting that the inclusion of the claims was not an innocent mistake, but rather part of coherent and intentional intent to deceive Gen Z consumers. Because of the repeated nature of the claims throughout different platforms and influencers, it is not reasonable for DMI to argue that it not aware of the claims and was not able to address them before they were posted. Furthermore, most of the advertisements were pre-recorded videos. It is reasonable and expected by the FTC that an advertiser, such as DMI, screen pre-recorded messages for deceptive or misleading claims.¹⁹⁰

D. BTL targets young children and teenagers, an audience of particular concern for the FTC.

BTL's abundance of misleading claims are of particular significance to the FTC's mission because children are the campaign's target audience.¹⁹¹ DMI selected these particular influencers to promote the dairy industry because of their combined over 120 million followers, most of whom are in Generation Z, ages 10 to 23 years old at the time of the campaign launch.¹⁹² Furthermore, DMI specifically chose to spread their messaging through online gaming platforms on which children and teenagers spend a large part of their time.¹⁹³ In May 2022, FTC Chair, Lina M. Khan, released a statement regarding the proposed new *Endorsement Guides* highlighting the FTC's concern for "child-directed influencer advertising."¹⁹⁴ Children are often unable to appraise the nuances and limits of claims made in advertisements and are at particular risk for deception and misinformation. DMI directly targeted this specific audience that the FTC strives to protect with deceptive and misleading advertisements.

¹⁹⁰ *The FTC Endorsement Guides*, *supra* note 188.

¹⁹¹ *Dairy Farm Tech Grabs Gamers' Attention*, *supra* note 52.

¹⁹² *See id.*

¹⁹³ Don Schindler, *supra* note 1.

¹⁹⁴ FED. TRADE COMM'N, OFF. OF THE CHAIR, *supra* note 183.

Additionally, as explained above, the reasonableness standard employed by the FTC for evaluating advertisements for deception is based on the target audience.¹⁹⁵ As the target audience for BTL is Gen Z, ages 10 to 23 years old, the campaign's advertisements are deceptive if the reasonable ten-year-old would have false or mistaken beliefs about dairy based on DMI's claims.¹⁹⁶ As is detailed in this complaint, the reasonable ten-year-old child watching DMI's BTL would likely see the dairy industry as an environmentally-friendly industry that produces dairy products devoid of any health risks and which are derived from cows housed in 5-star resorts who receive regular back massages, a depiction of the dairy industry that is wildly inaccurate.

RELIEF REQUESTED

BTL constitutes unlawful conduct, unfair methods of competition, and unfair and deceptive practices under the FTC Act, 15 U.S.C. §§ 41-48. Accordingly, AO respectfully requests that the FTC act swiftly to:

1. Grant an injunction compelling DMI to remove all aforementioned false and misleading claims.
2. Prohibit DMI from issuing any further false or misleading statements of this nature in the future.
3. Grant an injunction compelling DMI to publish and promulgate amended statements to rectify the aforementioned deceptive statements throughout all platforms on which the original messages were distributed.
4. Engage the USDA to ensure that future approvals of checkoff-related advertising comply with the FTC Act and that sufficient controls exist to prevent future false and deceptive claims.
5. Impose all other appropriate penalties.

¹⁹⁵ FED. TRADE COMM'N, *supra* note 23.

¹⁹⁶ Marilyn Hershey, *supra* note 112.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'PH' with a stylized flourish.

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