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February 6, 2003

Joan Z. Bernstein, Esquire
Bryan Cave, LLP
700 Thirteenth Street, N.W.
Washington DC 20005-3960

Re: **Maine Quality Trademark for Milk and Milk Products**

Dear Ms. Bernstein-

This is in response to your letter dated November 8, 2002, as well as subsequent letters from your office dated December 18 and 23, respectively. In your correspondence you requested that the Maine Attorney General's Office and the Maine Department of Agriculture, Food and Rural Resources (the "Department") take action to suspend the use of the State of Maine Quality Trademark for milk and milk products. You also asked that this Office bring enforcement proceedings in response to what you allege to be deceptive claims being made by the two dairies currently licensed to affix the trademark to their milk packages. In support of these requests you raised three issues: first, whether the requirements established by the Maine Department of Agriculture's rules for the use of the trademark are being met by the dairies that are licensed to use it; second, whether the trademark and/or the advertising by these dairies are misleading to consumers; and, third, whether the trademark unlawfully restricts market access. The Commissioner of the Maine Department of Agriculture, Food and Rural Resources has separately written to you concerning the first of these issues. I am writing to you now in response to the second and third issues. Following a careful review of these issues, this Office believes that the actions you requested are not warranted.

The Maine Quality Trademark, registered by the Department with the United States Patent and Trademark Office, is intended for use by persons, as authorized by the Department, on labels of goods satisfying certain standards established by Maine law. 7 M.R.S.A. § 443-B. In 1994, the Maine Legislature enacted 7 M.R.S.A. § 2901-B, which directed the Department to promulgate rules permitting the use of the Maine Quality Trademark on milk and milk products. Section 2901-B specifically required that the rules include limitations relating to the use of milk from cows that have been treated with rBST. In conformity with this statute, the Department

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subsequently adopted 01-001 CMR Chapter 136 - Official State of Maine Grades and Standards for Milk and Milk Products for Use with the State of Maine Quality Trademark, thereby establishing the requirements for the licensure of dairies for the use, of the trademark. Among those requirements are (i) that at least 80% of the milk in any package displaying the trademark must be produced within the State of Maine, and (ii) that 100% of the milk in that package must be from cows that have not been treated with rBST.

If there were evidence that a dairy licensed to use the trademark was not meeting the requirements of these laws, then it would be appropriate for the Department to consider an administrative action to revoke or suspend that license, and/or for this Office to consider initiation of a civil enforcement proceeding. However, neither this Office nor the Department is aware of any evidence to support this claim. In any event, even the failure of a licensed dairy to meet the requirements of the Department's rules is not a reason to suspend the Department's use of the trademark altogether,

Moreover, as it was recently written to you, the Department is satisfied that the reporting and milk handling practices of the dairies licensed to use the trademark provide reasonable assurance that the requirements for the use of the trademark are being met. With respect to the requirement that milk marketed with the Maine Quality Seal must come from cows not treated with rBST, the Department's reliance on affidavits is legally sufficient. In the event the Department believed that further substantiation might be necessary, its rules provide that it may take other actions as may be necessary to verify compliance, such as drawing blood from the milking herd, examining milk production records, inspecting medicine storage places and reviewing business records.

This Office does not believe that the State of Maine Quality Trademark is misleading to consumers. The trademark simply consists of a silhouette of the State of Maine divided into three horizontal sections, with the word Quality appearing in the middle section. Nor do we believe that advertising milk as having come from cows that have not been treated with rBST or artificial growth hormones is misleading to consumers. Such statements do not constitute health claims of any sort. This advertising simply allows consumers, who are interested for any reason in buying milk that is not produced from cows treated with rBST, to make an informed decision. For example, many consumers choose to purchase eggs from free range chickens. Advertisements that eggs are from free range chickens are similar to those describing milk produced from cows not treated with rBST. While some consumers may prefer these products, the advertisements are not misleading as long as the chickens are free range and the cows are not treated with rBST.

On the other hand, we agree that advertisements that make health claims about rBST or the lack of rBST could be misleading unless they are substantiated by competent scientific or medical tests or studies. However, the mere statement that a product comes from cows not treated with rBST or artificial growth hormones is not a health claim.

Finally, you raise an issue of whether the Maine Quality Trademark unlawfully restricts market access. As discussed above, the Department has registered and licensed the Maine Quality Trademark in accordance with its statutory authority. Maine has a lawful interest in

establishing criteria for the use of its registered trademark. Maine also has a legitimate interest in promoting goods and products produced within the State of Maine.

Moreover, the Maine Quality Trademark program is purely voluntary and imposes no restrictions whatsoever on sale of milk in the State. Licensure for the use of the trademark is applied even-handedly to both in-state and out-of-state dairies. Both in-state and out-of-state dairies, whether licensed to use the trademark or not, may freely participate in the Maine milk market, without limitation and without being subject to any increased costs or restrictions. Consumer choice is not impaired in any way,

In short, we see no legal barrier to the State's making use of its trademark in this way.

Accordingly, in our view no legal action is warranted with respect to the use of the Maine Quality Trademark. Likewise, we find that advertising accurately stating that milk comes from cows not treated with rBST or artificial growth hormones is neither false nor misleading.

Thank you for writing. If you have any other questions, please let me know.

Sincerely,

G. Steven Rowe
Attorney General

cc: Commissioner Robert Spear
Jeffrey Modisett, Esq- (by fax)