

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT**

GROCERY MANUFACTURERS ASSOCIATION,
SNACK FOOD ASSOCIATION, INTERNATIONAL
DAIRY FOODS ASSOCIATION, and NATIONAL
ASSOCIATION OF MANUFACTURERS,

Plaintiffs,

v.

WILLIAM H. SORRELL, in his official capacity as the
Attorney General of Vermont; PETER E. SHUMLIN,
in his official capacity as Governor of Vermont;
HARRY L. CHEN, in his official capacity as
Commissioner of the Vermont Department of Health;
and JAMES B. REARDON, in his official capacity as
Commissioner of the Vermont Department of Finance
and Management,

Defendants.

Case No. 5:14-cv-117

**DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

STATE OF VERMONT

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Counsel for Defendants

William H. Sorrell, Peter E. Shumlin, Harry L. Chen, and James B. Reardon

Defendants answer Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief as follows:

Preliminary Statement

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1.

2. Admitted that the majority of corn, soybeans, sugar beets, and certain other crops produced in the United States are derived from genetically engineered plants. Denied that the FDA, EPA, and USDA adequately take into account the health, safety, and environmental concerns regarding genetically engineered plants. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2.

3. Admitted that FDA regulations do not require labeling of genetically engineered foods. The FDA's various statements regarding labeling of genetically engineered food speak for themselves. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3.

4. Admitted that the State of Vermont enacted Act 120 on May 8, 2014. Admitted that Act 120, which speaks for itself, contains, among other things, the language quoted in paragraph 4. Otherwise denied.

5. Admitted that Act 120 takes effect July 1, 2016. Otherwise denied.

6. Denied.

7. Denied.

Parties

8. Admitted that Defendant William H. Sorrell is tasked with implementing and enforcing Act 120 when that law goes into effect on July 1, 2016. Denied that Defendants Peter E. Shumlin, Harry L. Chen, or James B. Reardon will implement and enforce Act 120.

Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8.

9. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10.

11. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11.

12. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12.

13. Admitted that Defendant William H. Sorrell is the Attorney General of Vermont and is sued solely in his official capacity. Admitted that Defendant Sorrell is authorized to enforce Act 120 through penalties and civil actions and implement rulemaking for Act 120, as described by Act 120 and Consumer Protection Rule 121 (“Rule 121”), both of which speak for themselves. Otherwise denied.

14. Admitted that Defendant Peter E. Shumlin is the Governor of Vermont, is sued solely in his official capacity, and performs the functions described, but denied insofar as there is any implication that these functions involve the enforcement of Act 120.

15. Denied that Tracy Dolan is the acting Commissioner of the Vermont Department of Health, but admitted that Defendant Harry L. Chen is the Commissioner of the Vermont Department of Health and is sued solely in his official capacity. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the last sentence of paragraph 15. Otherwise denied.

16. Admitted that Defendant James B. Reardon is the Commissioner of the Vermont Department of Finance and Management, is sued solely in his official capacity, and manages special funds created pursuant to 32 V.S.A., chapter 7, subchapter 5. Otherwise denied.

Jurisdiction and Venue

17. Admitted that Plaintiffs' Amended Complaint asserts a federal question for purposes of 28 U.S.C. § 1331. Otherwise denied.

18. The allegations made in paragraph 18 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

19. Admitted that for the federal question(s) asserted venue is proper in this Court.

Factual Background

20. Denied to the extent that paragraph 20 alleges that genes are the only material responsible for the traits that an organism expresses or that the phrase "genetically engineered" has only the meaning set forth in paragraph 20.

21. Admitted that plant varieties have been genetically engineered for herbicide resistance and to repel pests. Denied to the extent that paragraph 21 alleges that genetic engineering necessarily results in more predictable and consistent production of a desired trait or that genetically engineered plants have eliminated the problem of weeds. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

22. Denied to the extent that paragraph 22 alleges that genetic engineering has led to a reduction in the use of pesticides. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22.

23. Admitted that persons purchasing non-organic food almost certainly consume ingredients derived from genetically engineered plants, and that the vast majority of foods sold in

grocery stores in the United States contain some amount of at least one ingredient that is connected to a genetically engineered plant. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

24. Denied to the extent that paragraph 24 alleges that Congress has delegated to the FDA exclusive authority to regulate food safety and labeling. Admitted that the FDA's 1992 Guidance to Industry for Foods Derived from New Plant Varieties, which speaks for itself, contains the quoted language. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

25. Admitted that FDA regulations do not require labeling of genetically engineered foods. The FDA's various statements regarding labeling of genetically engineered foods speak for themselves. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25.

26. Admitted that a May 14, 2014, article in *The Atlantic* attributes the language quoted in paragraph 26 to Agriculture Secretary Tom Vilsack. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 26.

27. Admitted that a document published by the National Academy of Sciences in 2004 contains, among other things, the language quoted in the second sentence of paragraph 27. Admitted that in 2012 the American Medical Association made the statement quoted in the third sentence of paragraph 27. Admitted that a statement by the American Association for the Advancement of Science dated October 20, 2012 contains, among other things, the language quoted in the fourth sentence of paragraph 27. Those documents speak for themselves. Otherwise denied.

28. Admitted that there are studies demonstrating health risks associated with widely grown genetically engineered crops. Otherwise denied.

Act 120

29. Admitted.

30. Admitted that Section 1 of Act 120, which speaks for itself, contains, among other things, findings, a statement of purpose, and the language quoted in paragraph 30. Otherwise denied.

31. Admitted that Act 120, which speaks for itself, contains, among other things, the language quoted in paragraph 31. Denied that the “operative” part of Act 120 starts with Section 3043.

32. Admitted that Act 120, which speaks for itself, contains, among other things, the language quoted in paragraph 32. Admitted that Act 120, read without reference to Rule 121, does not by itself explicitly define “natural” or “words of similar import,” but denied to the extent that paragraph 32 alleges that Act 120, as implemented by Rule 121, fails to define the term “Natural or any words of similar import.”

33. Admitted that Act 120, which speaks for itself, contains exemptions, and that Act 120 contains, among other things, the language quoted in paragraph 33. Otherwise denied.

34. Admitted that Act 120, which speaks for itself, does not require that all foods containing GE ingredients be labeled. Otherwise denied.

35. Admitted that Act 120, which speaks for itself, provides for civil penalties and, along with Rule 121, specifies what those penalties are. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation in the last sentence of paragraph 35. Otherwise denied.

36. Admitted that Act 120, which speaks for itself, imposes liability on retailers in certain circumstances. Otherwise denied.

37. Admitted that Act 120, which speaks for itself, establishes a fund to pay costs or liabilities incurred by the Attorney General or the State in implementation and administration of Act 120, including rulemaking, and that the fund shall consist, among other things, of private donations. Otherwise denied.

38. Admitted that Act 120, which speaks for itself, requires that monies collected by the Office of the Attorney General or from funds appropriated or transferred by the General Assembly shall be disbursed only if monies in the Fund from private sources are insufficient to pay the costs or liabilities of the Attorney General or the State incurred in implementation and administration of the requirements of Act 120. Otherwise denied.

39. Admitted that Act 120, which speaks for itself, contains, among other things, the language quoted in paragraph 39.

40. Admitted that, under the USDA's "Certified Organic" program, food that qualifies for the certified organic label cannot be produced using "excluded" genetic engineering methods. Admitted that voluntary labeling programs, including the Non-GMO Project, exist. Otherwise denied.

COUNT ONE

41. Defendants repeat and reallege their answers to paragraphs 1 through 40.

42. The allegations made in paragraph 42 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

43. Denied.

44. Admitted that Act 120, which speaks for itself, requires the labeling of food produced with genetic engineering but does not require the labeling of foods produced without genetic engineering. Admitted that Act 120 contains exemptions. Otherwise denied.

45. The allegations made in paragraph 45 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

46. The allegations made in paragraph 46 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

47. The allegations made in paragraph 47 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

48. The allegations made in paragraph 48 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

49. The allegations made in paragraph 49 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

50. The allegations made in paragraph 50 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

51. The allegations made in paragraph 51 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

52. The allegations made in paragraph 52 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

53. The allegations made in paragraph 53 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

54. The allegations made in paragraph 54 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

55. The allegations made in paragraph 55 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

56. The allegations made in paragraph 56 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

COUNT TWO

57. Defendants repeat and reallege their answers to paragraphs 1 through 56.

58. The allegations made in paragraph 58 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

59. Admitted that Act 120, which speaks for itself, contains, among other things, the language quoted in paragraph 31, and that Act 120 applies to retailers and manufacturers. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the second and third sentences of paragraph 59.

60. Admitted that Act 120, which speaks for itself, contains, among other things, the language quoted in paragraph 60. Admitted that Act 120 does not apply to, among other things, food that is not packaged for retail sale and that is (a) a processed food prepared and intended for immediate human consumption or (b) provided in a restaurant. Otherwise denied.

61. Admitted that Act 120, which speaks for itself, contains, among other things, the language quoted in paragraph 61. Denied to the extent that paragraph 61 alleges that Act 120, as implemented by Rule 121, constitutes a complete ban on speech in all manner of media. The allegations made in paragraph 61 otherwise call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

62. The allegations made in paragraph 62 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

63. The allegations made in paragraph 63 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

COUNT THREE

64. Defendants repeat and reallege their answers to paragraphs 1 through 63.

65. The allegations made in paragraph 65 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

66. The allegations made in paragraph 66 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

67. The allegations made in paragraph 67 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

68. The allegations made in paragraph 68 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

69. The allegations made in paragraph 69 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

COUNT FOUR

70. Defendants repeat and reallege their answers to paragraphs 1 through 69.

71. The allegations made in paragraph 71 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

72. Admitted that Act 120, which speaks for itself, requires or prohibits certain labels on products sold in Vermont.

73. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 73. Admitted that Act 120, which speaks for itself, contains exemptions. Otherwise denied.

74. Admitted that Plaintiffs' members sell food in interstate commerce. Denied that the only way for manufacturers to avoid liability under Act 120 is to alter labeling on a regional or nationwide basis. Defendants are otherwise without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 74.

75. Admitted that manufacturers promote their food through advertising. Denied that manufacturers cannot achieve compliance with Act 120 without changing their nationwide, regional, and internet advertising.

76. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 76.

77. The allegations made in paragraph 77 call for a legal conclusion; therefore no response is required and none is made. To the extent that the allegation in paragraph 77 relates to Plaintiffs' claim that Act 120's disclosure requirements violate the Commerce Clause, the Court has dismissed that claim. To the extent a response is required: denied.

78. Admitted that, at the time the Amended Complaint was filed, there were bills or ballot measures pending in other states. The allegations made in paragraph 78 otherwise call for a legal conclusion; therefore no response is required and none is made. To the extent that the allegation in paragraph 78 relates to Plaintiffs' claim that Act 120's disclosure requirements violate the Commerce Clause, the Court has dismissed that claim. To the extent a response is required: denied.

79. The allegations made in paragraph 79 call for a legal conclusion; therefore no response is required and none is made. To the extent that the allegation in paragraph 78 relates to Plaintiffs' claim that Act 120's disclosure requirements violate the Commerce Clause, the Court has dismissed that claim. To the extent a response is required: denied.

COUNT FIVE

80. Defendants repeat and reallege their answers to paragraphs 1 through 79.

81. The allegations made in paragraph 81 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

82. Admitted that 21 U.S.C. § 343(a)(1) contains the quoted language. Admitted that the Federal Food, Drug, and Cosmetic Act (FDCA), which speaks for itself, does not require specific labeling for genetically engineered food as a class.

83. Admitted that the Nutritional Labeling and Education Act (NLEA), 21 U.S.C. § 343-1(a), *et seq.*, which speaks for itself, preempts certain state labeling requirements.

84. Admitted that the Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.*, and the Poultry Products Inspection Act, 21 U.S.C. § 451, *et seq.*, which speak for themselves, preempt certain state labeling requirements. Admitted that the USDA does not require special labeling of products containing genetically engineered ingredients or prohibit the use of the term “natural” on such products. The other allegations made in paragraph 84 call for a legal conclusion; therefore no response is required and none is made. To the extent a response is required: denied.

85. The allegations made in paragraph 85 call for a legal conclusion; therefore no response is required and none is made. To the extent that the allegation in paragraph 85 relates to Plaintiffs’ claims that Act 120 is preempted by the statutes listed in paragraph 85, the Court has dismissed those claims. To the extent a response is required: denied.

86. The allegations made in paragraph 86 call for a legal conclusion; therefore no response is required and none is made. To the extent that the allegation in paragraph 86 relates to Plaintiffs’ claims that Act 120 is preempted by the FDCA, NLEA, or statutes listed in paragraph 85, the Court has dismissed those claims. To the extent a response is required: denied.

Any factual allegations not expressly admitted above are denied.

DEFENDANTS' AFFIRMATIVE DEFENSES

1. Failure to state a claim.
2. Lack of standing.
3. Lack of subject matter jurisdiction.
4. Lack of ripeness.
5. Sovereign immunity.
6. Mootness.

DATED at Montpelier, Vermont this 27th day of May, 2015

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I, Megan J. Shafritz, Esq., attorney for Defendants, hereby certify that on May 27, 2015, I electronically filed Defendants' Answer to Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered participants.

DATED at Montpelier, Vermont this 27th day of May, 2015.

STATE OF VERMONT

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