

## PETITION TO HALT MISLEADING ADVERTISING BY MilkPEP

### I. ACTION REQUESTED

Switch4Good is a nonprofit nutrition advocacy organization supported by athletes, doctors, trainers, and dietitians focused on helping people make the switch to healthier lives by going dairy-free. Switch4Good requests that the Federal Trade Commission (FTC) bring an action pursuant to the Federal Trade Commission Act (FTCA) section 13, 15 U.S.C. § 53, to enjoin MilkPEP from disseminating or causing the dissemination of any current or future misleading advertisements, as described in more detail below. Additionally, Switch4Good requests that FTC require MilkPEP to issue a public retraction of and corrective statement regarding the statement that “drinking fat-free milk after exercise replenishes lost electrolytes and rehydrates better than a sports drink or water” in its advertisement *Built with Chocolate Milk: Refuel Post-Workout*<sup>1</sup> and “Real Recovery. Real Science: 20+ studies report the benefits of recovering with the high-quality protein and nutrients found in low-fat chocolate milk after a tough workout” from its homepage.<sup>2</sup>

### II. LEGAL FRAMEWORK

FTC has broad authority to regulate advertising by corporations, trade associations, and food advertisers pursuant to FTCA sections 5, 12, and 15, which together prohibit “persons, partnerships, or corporations” from engaging in “unfair or deceptive acts or practices in or affecting commerce,” 15 U.S.C. § 45(a), and from making “any false advertisement,” 15 U.S.C. § 52, that is “misleading in a material respect,” 15 U.S.C. § 55(a)(1). FTC pays “closest attention to . . . [a]ds that make claims about health or safety” or “that consumers would have trouble evaluating for themselves.” FTC, Advertising FAQ’s: A Guide for Small Business (2001), <https://www.ftc.gov/tips-advice/business-center/guidance/advertising-faqs-guide-small-business>. The legal framework for FTC action and interpretation of the FTCA in the context of health claims is set forth in FTC’s Enforcement Policy Statement on Food Advertising (1994), <http://www.ftc.gov/public-statements/1994/05/enforcement-policy-statement-food-advertising>, which relies on and works in conjunction with the FTC Policy Regarding Advertising Substantiation (1983), <http://www.ftc.gov/public-statements/1983/03/ftc-policy-statementregarding-advertising-substantiation> and the FTC Policy Statement on Deception (1983), [https://www.ftc.gov/system/files/documents/public\\_statements/410531/831014deceptionstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf). An advertisement is deceptive if it contains a representation or omission that is likely to mislead consumers acting reasonably under the circumstances and the representation or omission is material. *Id. at 2*. A representation or omission is deceptive if it leaves consumers with a misimpression about a product. *Id. at 3–4*. A material representation or omission is one that is likely to affect a consumer’s choice or use of a product. *Id. at 5*. The MilkPEP advertisement described below meets all these criteria.

### III. ARGUMENT

MilkPEP recently published an advertisement *Built with Chocolate Milk: Refuel Post-Workout*. In this advertisement, MilkPEP falsely implies that “drinking fat-free milk after exercise replenishes lost electrolytes and rehydrates better than a sports drink or water.”<sup>3</sup> In addition, on the homepage of the Built with Chocolate Milk website, it states “Real Recovery. Real Science; 20+ studies report the benefits

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<sup>1</sup> <https://builtwithchocolatemilk.com/science/refuel-your-body>

<sup>2</sup> <https://builtwithchocolatemilk.com>

<sup>3</sup> <https://builtwithchocolatemilk.com/science/refuel-your-body>

of recovering with the high-quality protein and nutrients found in low-fat chocolate milk after a tough workout.”<sup>4</sup> MilkPEP’s primary hydration claim relies on a study based on (7) seven healthy males of Irish extraction without lactose intolerance. According to the National Institutes of Health (NIH), “lactose intolerance is least common among people who are from, or whose families are from, Europe.”<sup>5</sup> The research subjects were also young (average age: 26 years) yet according to the most esteemed gastroenterological journal in the world, lactose malabsorption is more common in older adults.<sup>6</sup> It is clear why the National Dairy Council funded a study with such suitable participants instead of using a broad sampling of Americans. MilkPEP then extrapolates findings from a very specific, unrepresentative demographic to the population at large, making broad, false implications that milk is an exercise recovery drink for all Americans, regardless of race, age, or ability to digest lactose, when it clearly is not. This is not “real science”. Cow’s milk is not suitable to “real recovery” if you are lactose intolerant or even sensitive to the lactose found in cow’s milk, as you will experience multiple deleterious symptoms that will cripple recovery. For example, subjects in the study consumed an average of 136.6 grams of lactose, which is more than three times the amount shown to cause malabsorption in nearly all healthy, lactose intolerant individuals.<sup>7</sup> Such malabsorption is frequently accompanied by abdominal pain and distension, borborygmi (rumbling and gurgling), flatus (gas), and diarrhea.<sup>8</sup> Importantly, since diarrhea can lead to dehydration, most people of color as well as many older individuals who act in accordance with the study’s findings and recommendations would experience the opposite effect, losing fluid and diminishing recovery. If MilkPEP is specifically advertising to young, healthy men of Irish extraction, this should be specified since their products are likely to have deleterious consequences in most people, acting oppositely to their purported claims of superior rehydration and recovery. MilkPEP’s false statement is likely to mislead consumers acting reasonably in the circumstances, to the consumer’s detriment. This false statement by MilkPEP will affect a highly significant portion of the population, considering the NIH statistic that at least thirty-six percent (36%) of all Americans are lactose intolerant.<sup>9</sup> Even worse, communities of color—including Blacks, Asians, Latinx, and Native Americans—are disproportionately affected by lactose intolerance. Their lactose intolerance likely ranges from seventy percent (70%) to ninety-eight percent (98%). Knowing this, MilkPEP’s advertisement falsely implies that milk is an exercise recovery drink for all Americans to convince consumers to change their behavior and consume a product that works oppositely to their claims. This is a deceptive practice that will harm millions of Americans.

#### IV. CONCLUSION

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<sup>4</sup> <https://builtwithchocolatemilk.com>

<sup>5</sup> National Institutes of Health, *Definition & Facts for Lactose Intolerance*,

<https://www.niddk.nih.gov/health-information/digestive-diseases/lactose-intolerance/definition-facts#morelikely>

<sup>6</sup> Storhaug CL, Fosse SK, Fadnes LT. *Country, regional, and global estimates for lactose malabsorption in adults: a systematic review and meta-analysis*. *Lancet Gastroenterol Hepatol*. 2017;2(10):738-746. doi:10.1016/S2468-1253(17)30154-1. The supportive text reads: “The prevalence of lactose malabsorption in older adults is reported to be somewhat higher than in younger adults.”

<sup>7</sup> Seery S, Jakeman P. *A metered intake of milk following exercise and thermal dehydration restores whole-body net fluid balance better than a carbohydrate–electrolyte solution or water in healthy young men*. *British Journal of Nutrition*. 2016; 1-9.

<sup>8</sup> Deng Y, Misselwitz B, Dai N, Fox M. *Lactose Intolerance in Adults: Biological Mechanism and Dietary Management*. *Nutrients*. 2015;7(9):8020-8035. Published 2015 Sep 18. doi:10.3390/nu7095380

Text from this paper that backs up the claim: “Lactose intolerance related to primary or secondary lactase deficiency is characterized by abdominal pain and distension, borborygmi, flatus, and diarrhea induced by lactose in dairy products.”

<sup>9</sup> National Institutes of Health, *Definition & Facts for Lactose Intolerance*,

<https://www.niddk.nih.gov/health-information/digestive-diseases/lactose-intolerance/definition-facts#morelikely>

The NIH statistics for lactose intolerance are proof that milk is not a healthy choice for millions of Americans, much less a good choice for an exercise recovery drink.<sup>10</sup> However, MilkPEP’s advertisement implies otherwise. As a result, MilkPEP’s advertisement does far more than cause financial harm—it also promotes physical harm to those who rely on its advertisement. Switch4Good therefore requests that FTC enjoin MilkPEP from disseminating, or causing the dissemination of, the statements that “drinking fat-free milk after exercise replenishes lost electrolytes and rehydrates better than a sports drink or water”<sup>11</sup> and “Real Recovery. Real Science: 20+ studies report the benefits of recovering with the high-quality protein and nutrients found in low-fat chocolate milk after a tough workout”.<sup>12</sup> Additionally, Switch4Good requests that FTC require MilkPEP to issue a public retraction and corrective statements regarding both assertions that “drinking fat-free milk after exercise replenishes lost electrolytes and rehydrates better than a sports drink or water”<sup>13</sup> and Real Recovery. Real Science: 20+ studies report the benefits of recovering with the high-quality protein and nutrients found in low-fat chocolate milk after a tough workout”<sup>14</sup> and refrain from any similar misleading advertisements in the future.

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<sup>10</sup> Id.

<sup>11</sup> <https://builtwithchocolatemilk.com/science/refuel-your-body>

<sup>12</sup> <https://builtwithchocolatemilk.com>

<sup>13</sup> <https://builtwithchocolatemilk.com/science/refuel-your-body>

<sup>14</sup> <https://builtwithchocolatemilk.com>