



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Food and Drug Administration
College Park, MD 20740

DEC 5 2003

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Compassion Over Killing, Inc.
C/O Holly Mortensen
6624 Poplar Ave.
Apartment 1
Takoma Park, Maryland 20912

Re: Docket 03P-0270

Dear Ms. Mortensen:

This letter responds to your citizen petition, dated June 11, 2003, requesting the Food and Drug Administration (FDA) together with the United States Department of Agriculture (USDA) to take any appropriate administrative action to prevent further use of the United Egg Producers' (UEP) "Animal Care Certified" (ACC) logo in the labeling of eggs sold for consumer consumption, or to order all egg producers and retailers to refrain from further use of UEP's ACC logo.

In accordance with Title 21 of the Code of Federal Regulations 10.30(e)(2), this letter is to advise you that we have not been able to reach a decision on your petition within the first 180 days of its receipt. Because of competing agency priorities and the limited availability of resources, we have not been able to respond to your petition. We hope to be able to complete the review of your petition and respond to your request in the near future.

Should you have additional questions, do not hesitate to contact us.

Sincerely yours,

for Christine L. Taylor, Ph.D.
Director
Office of Nutritional Products, Labeling
and Dietary Supplements
Center for Food Safety
and Applied Nutrition
Food and Drug Administration

2003P-0270

LET 2

BEFORE THE UNITED STATES FOOD AND DRUG ADMINISTRATION

In re: United Egg Producers, Inc.)
 Sauder, R.W., Inc.)
 Eggland's Best, Inc.)
 Giant Food, Inc.)
 Albertson's, Inc.)
 Ken Klippen)

Docket No. 2003P-0270

CITIZEN PETITION TO PROHIBIT FALSE AND MISLEADING LABELING

* * *

Submitted to:

Dockets Management Branch
Food and Drug Administration, Room 1061
5630 Fishers Lane, Rockville, MD 20852

On: June 11, 2003

Submitted by:

Compassion Over Killing, Inc., representing 5,000 persons nationwide
P.O. Box 9773
Washington, DC 20016

Margot Barg, a consumer
746 Geary St., Apt. 506
San Francisco, CA 94109

Holly Mortensen, a consumer
6624 Poplar Ave., Apt. 1
Takoma Park, MD 20912

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Citizen Petition

The undersigned submits this petition under sections 201(n), 301, and 403(a) of the Federal Food Drug and Cosmetics Act, 21 U.S.C. sections 321(n), 331, and 343(a) to request the Commissioner of Food and Drugs to issue an order or take any other form of administrative action deemed appropriate to prevent further use of United Egg Producers "Animal Care Certified" seal, logo, terms, or an approximation thereof in the labeling of eggs sold for consumer consumption.

A. Action requested

Petitioners request that the Commissioner of Food and Drugs take any form of administrative action deemed appropriate to prevent further use of United Egg Producers "Animal Care Certified" seal, logo, terms, or an approximation thereof in the labeling of eggs sold for consumer consumption, or in the alternative issue the following

Proposed Order: All egg producers and retailers must refrain from further use of United Egg Producer s "Animal Care Certified" seal, logo, terms, or an approximation thereof in the labeling of eggs sold for consumer consumption, as such seals, logos, terms, and approximations thereof constitute false and misleading labeling.

B. Statement of grounds

To the extent that the U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA)¹ have concurrent jurisdiction over the matter, we request that the USDA work with FDA officials to remedy the concerns raised in this petition.²

Summary of the Complaint and Requested Action

Under the United Egg Producers' (UEP's) "Animal Care Certified" program (ACC), egg producers and retailers nationwide sell eggs labeled with an "ACC logo" (or seal) which evidences their participation in the program and alleged adherence to the its "Animal Husbandry Guidelines." ~~The seal leads the consumer to believe that the eggs are produced by hens that are free roaming, are not force molted through starvation, and do not have their beaks partially removed without anesthesia when young.~~ Contrary to the consumers' belief, the minimum standards for ACC hens allow cage space less than the equivalent of a letter-sized sheet of paper per bird, allow hens to be intentionally starved up to a point at which they may have lost 30 percent of their body weight, and allow partial removal of their beaks without anesthesia. As discussed further below, use of the "logo" constitutes

repeatedly
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egg
cartons.

¹ FDA and FSIS share Federal authority to regulate eggs. Federal Register: December 5, 2000 (Volume 65, Number 234)

² In its MOU with the FTC, the FDA confirmed its commitment to prevent deception of the public, and takes primary responsibility for preventing deceptive food labeling. See Working Agreement Between FTC and FDA, 4 Trade Reg. Rep. (CCH) 9, 850.01 (1971).

false and misleading labeling. The program is an attempt to impersonate legitimate free-range producers, who operate at significantly higher costs, and to whom ACC producers and retailers fear losing market share. The false labelers named herein represent only a fraction of those currently using the ACC logo nationwide.³

Why This Case Is Appropriate for Commissioner Action

According to the UEP, "Egg producers representing more than 200 million layers nationwide or 80 percent of the industry have signed on to participate in the program." ACC is a national ad campaign that could potentially affect every egg consumer in the nation. As discussed herein, the program is a deliberate attempt to prevent a trend in consumers exercising socially responsible market choices by deceiving them at the point of purchase, and to head off foreseeable losses to the industry as a result of consumers exercising free choices.⁴ The program attempts to benefit from consumers' perception that the eggs are produced using developing welfare standards, without producers having to pay the production costs of actually doing so.

As discussed herein, the logos are designed to deceive consumers into buying eggs they normally would not, that is, eggs that appear to be produced under caring and humane conditions but which in fact are not. To the extent the consumer would not buy the eggs, the ACC program costs every purchasing egg consumer nationwide the price of the purchase. According to egg industry reports, the value of all egg production in 2002 was \$4.26 billion nationwide.⁵

While animal welfare/production method cases may not be typical of those selected for action by the Commissioner, this case really involves protection of U.S. consumers' right to make socially responsible market choices.

Factual Background and Parties

The United Egg Producers is an egg industry trade association headquartered at 1720 Windward Concourse, Suite 230, Alpharetta, GA 30005, which represents the vast majority of egg producers nationwide. The ACC program, which is funded by the American Egg Board, first published guidelines in 2000 based on recommendations by its "Scientific Advisory Committee." Ex. 1 ("UEP website"); Ex. 2 ("Guidelines"). Roughly 80 percent of the industry, producers representing more than 200 million layers

³ Petitioners have taken action to resolve the issue on their own. On May 28, 2003, at a conference inside the USDA at 14th & Independence Ave., N.W., Washington, D.C., a COK representative discussed the issue with Ken Klippen of the UEP and established that there was total disagreement on the issue. A COK representative sent Klippen a follow-up email on June 2, 2003 outlining COK's concerns about the program, to which he has yet to reply.

⁴ In 1999, the American Humane Association, which participated the same year on UEP's "scientific advisory committee," found that forty-four percent of consumers would pay five percent more for food labeled "humanely raised." Exs. 1&13, p .6.

⁵ See <http://usda.mannlib.cornell.edu/reports/nassr/poultry/pbh-bbp/plva0403.txt>

nationwide, have signed on to participate in the program. Ex. 1; Ex. 3 (“Participant list”). Under the program, egg producers and retailers nationwide can sell eggs labeled with an “ACC logo” which evidences their participation in the program and alleged adherence to its guidelines. Ex. 2. Participants are considered certified and may use the seal without significantly altering their husbandry practices because the program essentially codifies current husbandry practices and, where it does not, “phase in allowances” apply. Moreover, the proposed increase in cage space per bird is paltry, leaving the birds with still not enough room even to flap their wings. *Id.*⁶

Sauder, R.W., Inc., is an egg producer headquartered at 570 Furnace Hills Pike, Lititz, PA 17543. In addition to use of the ACC seal, Sauder maintains a website in which it makes extensive claims regarding the ACC program, including that “[the] guidelines significantly improve the comfort, health and safety of our hens” and are “humane.” Ex. 4.

Eggland’s Best, Inc., is an egg producer headquartered at 860 First Ave., King of Prussia, PA 19406, which advertises with the ACC seal. Ex. 5 (“EB’s ad”). Eggland’s Best has been previously charged by the FTC with false advertising, based on claims that its eggs would not increase consumers’ cholesterol level.⁷

Giant Food, Inc., is an egg retailer headquartered at 6400 Sheriff Rd., Landover, MD 20785, with retail outlets in several states. Giant sells its own brand of eggs, which it advertises with the ACC seal. Ex. 6 (“Giant’s ad”).

Albertsons, Inc., is an egg retailer headquartered at 250 E. Parkcenter Blvd., Boise, ID 83706, with retail outlets in several states. Albertsons sells its own brand of eggs, which it advertises with the ACC seal. Ex. 7 (“Albertsons ad”). Albertsons is currently a defendant in an unrelated civil suit alleging deceptive advertising.⁸

Ken Klippen is vice president and a representative of UEP who has advertised the program during television interviews. Ex. 8 (“Fox News transcript”). Klippen stated that “[t]he research showed that it was humane to have chickens in cages. In fact, they would prefer to be in cages.”

⁶ The guidelines are termed “recommendations” with which the producer “should” comply. There is nothing in the guidelines regarding “beak trimming” and “molting” that suggests deviation from current expected animal husbandry practices. While the “housing and space allowance” does mandate some change, the program has a “phase in” allowance that will run until 2008. Even then, the birds will still not have enough room to even flap their wings, let alone engage in other natural behaviors like nesting, foraging, and roosting. In addition, where existing equipment cannot be altered, it may be used for the remainder of its “useful life.” Ex. 2. This suggests that the only significant change likely to occur in these facilities is a reduction of the overall flock. Exhibit 13 discusses how, rather than a cost associated with the program, the reduction may actually increase profits as production comes into line with demand. Ex. 13, p. 2.

⁷ See 59 F.R. 46437-02, Sept. 8, 1994.

⁸ See http://seattletimes.nwsources.com/html/localnews/134682108_pink24m.html

Holly Mortensen, a resident of Maryland, is an egg consumer who is petitioning the FTC on the grounds that she would have purchased eggs assuming that the hens were free roaming, and would have been emotionally harmed as a result. Ex. 9 (“Mortensen declaration”).

Margot Barg, a resident of California, is an egg consumer who is petitioning the FTC on the grounds that she normally purchases eggs marked “animal care certified” on the assumption, in part, that the hens are not purposefully starved, and that this deception would cause her emotional harm. Ex. 10 (“Barg declaration”).

Compassion Over Killing, Inc. (COK), is a nonprofit animal advocacy organization based in Washington, D.C., which primarily focuses on cruelty to animals in agriculture.

The Labels and Consumer Perception

As discussed above, producers and retailers label their eggs with the ACC seal conspicuously displayed to the consumer at the point of purchase. Exs. 4-7. The UEP and others also advertise the seal, in conjunction with use of the term “humane,” orally, on the Internet, and in print labeling (see FN 1.). Exs. 1, 4, 8. The seal evidences the producers’ and retailers’ participation in the ACC program and alleged adherence to the its “Animal Husbandry Guidelines.” Exs. 1, 2. For the reasons discussed below, the petitioners believe that this constitutes false and misleading labeling which must be stopped. See 21 U.S.C. § 1036

The Survey

On June 6, 2003, five COK members randomly selected 165 egg consumers in Washington, D.C., to fill out a ten-question survey marked with the ACC “logo.” Ex. 11-A (“Survey”). The respondents were not told for whom the survey was being conducted until they had filled out and signed their surveys. The results of the survey are included below:

Survey Results

Among the 165 respondents who were regular egg consumers AND/OR expected to buy eggs in the future:

1. Do you buy eggs on a regular basis from a retail establishment?

Yes:	75.8%
No:	23.0%
Don’t Know:	1.2%

2. Do you plan to buy eggs from a retail establishment in the future?

Yes:	98.8%
No:	0.0%

Don't Know: 1.2%

3. Between A and B (above), which eggs are *More Likely* to have been laid by hens kept in cages?

A: 13.3%
B: 66.7%
No Difference: 6.7%
Don't Know: 13.3%

4. Between A and B (above), which eggs are *More Likely* to have been laid by free-roaming hens?

A: 70.3%
B: 8.5%
No Difference: 7.3%
Don't Know: 13.9%

5. Between A and B (above), which eggs are *More Likely* to have been laid by hens that had their beaks partially removed without anesthesia while young?

A: 3.64%
B: 70.30%
No Difference: 4.24%
Don't Know: 21.82%

6. Between A and B (above), which eggs are *More Likely* to have been laid by hens that had food withheld from them for a period of time until they may have lost 30 percent of their body weight?

A: 4.9%
B: 69.1%
No Difference: 3.6%
Don't Know: 22.4%

7. Would seeing the "Animal Care Certified" logo in photo A (above) on a carton of eggs increase your likelihood of buying that carton instead of one without the logo?

Yes: 71.5%
No: 17.0%
Don't Know: 11.5%

8. Would you consider the practice of confining hens in cages where they are given less space than a sheet of letter-sized paper to be "humane"?

Yes: 5.5%
No: 90.3%
Don't Know: 4.2%

9. Would you consider the practice of partially removing the beaks of young hens without anesthesia to be "humane"?

Yes: 3.64%

No: 93.94%
Don't Know 2.42%

10. Would you consider the practice of withholding all food from hens up to a point at which they may have lost 30 percent of their body weight to be "humane"?

Yes: 4.24%
No: 92.12%
Don't Know: 3.64%

As evidenced by the survey, the seal leads the consumer to believe that the eggs are produced by hens that are free roaming, are not intentionally starved to jolt their bodies into a new laying cycle, and do not have their beaks partially removed without anesthesia when young. Ex. 11-B ("Survey results"). Contrary to the consumers' belief, the minimum standards for ACC hens allow cage space less than the equivalent of a letter-sized sheet of paper per hen, allow intentional starving up to a point at which the hens may have lost 30 percent of their body weight, and allow partial removal of the hens' beaks without anesthesia. Exs. 1, 2.

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Other Evidence of Consumer Perception

In September 2000, Zogby International conducted a poll of U.S. consumers which showed that 75.4 percent of respondents found it unacceptable to starve hens for over a week to induce molting, that 86.2 percent of respondents found it unacceptable to densely crowd hens in cages, and that 60.4 percent of respondents found partially removing hens' beaks was unacceptable. In addition, 80.7 percent of respondents said they would be willing to pay more for eggs from hens raised in a "humane" manner. Ex. 12 ("Zogby poll").

While the poll focused on whether consumers found the practices acceptable or not, rather than indicative of "animal care," the poll is further evidence that consumers are misled by the ACC seals. By the UEP's own admission, the ACC program seals are designed to instill the belief in the consumer that the hens producing the certified eggs are better provided for and subject to higher welfare standards than hens that produce eggs without the ACC seals. Ex. 2, p. 2. If the vast majority of consumers find that the standards described above, which are prescribed for ACC hens, are in fact "unacceptable," they cannot at the same time believe that such standards represent an improvement in the hens' welfare.

The seal, which the UEP would argue represents to consumers an improvement in production methods, in fact represents standards that the majority of consumers find "unacceptable." Why would the UEP initiate such a program advertised by "logos"? As proven by the evidence above, the logo gives the opposite impression to consumers and, as such, is deceptive.

In addition to the survey, the private petitioners, who are both egg consumers, have explained in detail how ACC labeling influences their perception of the labeled eggs and how this deception harms them as consumers. Exs. 9, 10. Specifically, they note that the logos would be material to a decision to purchase the ACC labeled eggs over non-ACC labeled ones, would mislead them with regard to how the hens are treated and, as such, injure them.

The surveys and petitioners' declarations show that the method of production is an important and material factor in egg consumers' exercising choice in the market. This is consistent with a trend of growing U.S. consumer concern over animal production methods. A Gallup poll conducted last month showed that 62 percent of Americans support passing strict laws concerning the treatment of farm animals.⁹

The evidence proves that U.S. egg consumers believe that a certain set of improved production conditions exists when exposed to the ACC seal at the point of purchase, as well as oral, Internet, and print labeling of the seal, in conjunction with use of the term "humane." This set of conditions is material to the consumer's decision to purchase the ACC-labeled eggs. In reality, the consumers are purchasing eggs produced under an opposite set of conditions, which the producer can maintain at little or no additional cost. The producers obtain the value of the consumers' belief in an improved product, without actually significantly improving it.¹⁰ As discussed below, this constitutes "false labeling" and should be halted by the Commissioner.

The Actual Husbandry Conditions

Under the ACC program, a producer or retailer can be certified despite allowing each hen cage space less than the equivalent of a letter-sized sheet of paper, engaging in forced molting through starvation up to a point at which hens may have lost 30 percent of their body weight, and engaging in partial removal of the hens' beaks without anesthesia. This effectively codifies the standards of husbandry that have existed in battery-cage farming for several years, rather implementing new ones. Ex. 2, p. 1-2; Ex. 13 ("The Squawk Over Ohio's Eggs," Cleveland Plain Dealer, June 1, 2003, p. 2).

Petitioner Compassion Over Killing recently documented conditions in an ACC-certified facility. Ex. 14 ("Ise Photos"). The photos show cages stuffed with ill and injured hens covered in feces, having lost many of their feathers, some sharing cage space with dead hens. There is no reason to believe that the facility is not in compliance with the ACC guidelines, which is exactly the point. As discussed above, ~~U.S. egg consumers do not~~

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⁹ See <http://www.gallup.com/poll/releases/pr030521.asp>

¹⁰ The evidence suggests that a consumer would actually be willing to pay more for ACC eggs. Ex. 12.

consider such conditions consistent with the plain meaning of the words “animal care,” and it is doubtful that any reasonable consumer could.¹¹

While the minimum standards alone provide a basis to find that the ACC program’s seals constitute deceptive labeling, producers may use the seal without significantly altering their husbandry practices because the program essentially codifies current husbandry practices and, where it does not, “phase in allowances” apply. See FN 5. A reasonable consumer would assume that eggs from a particular producer that are now marked with the ACC seal are somehow different, in terms of production methods, from those eggs from a producer which are not marked. This is the claim the UEP intends to convey by using the seal. Ex. 3, p. 2. However, the nature of the program and allowances for existing equipment make it possible for a producer to use the seal without making any meaningful changes at all. See FN 5.

Use of the Term “Certified” and Design of the “Logo”

According to a recent USDA Food Safety and Inspection Commissioner(FSIS) publication, the term “certified” implies official inspection and evaluation, and cannot be used without closely associating it with the name of the organization responsible for the “certification” process. See FSIS’s “Meat and Poultry Labeling Terms,” updated January 2001 (www.fsis.usda.gov/oa/pubs/labterm.html); Backgrounder “Using the Claim ‘Certified Organic By...’ on Meat and Poultry Product Labeling,” updated March 2, 2000 (www.fsis.usda.gov/oa/background/organic.html) (“Backgrounder”); Federal Register: April 12, 1999 (Volume 64, Number 69).

The FSIS has found that the term “certified” implies official government verification and requires that it be associated with the “certifying” organization so that consumers will realize that it has not been certified by the government and will not be misled. The UEP “logo” clearly implies that the eggs are certified by an official government agency without referencing the “certifying” organization, which is, in fact, the UEP itself as well as the American Registry of Professional Animal Scientists, another non-governmental organization. It is in direct violation of USDA published policy and cannot be reconciled.¹² While it is true that such restrictions, as published, specifically apply in the context of meat and poultry product labeling, they apply to protect all consumers, are based on diction and design, and would apply equally in the context of egg labeling.

The FSIS publication “Using the Claim ‘Certified Organic By...’ on Meat and Poultry Product Labeling” includes a discussion of “Animal Production Claims,” including the

¹¹ The term “care” is defined in part as: “Attentive assistance or treatment to those in need,” i.e., a hospital that provides emergency *care*. See The American Heritage Dictionary of the English Language, Fourth Edition, Houghton Mifflin Co., 2000.

¹² See 21 USC 1037(e)(1) (No person shall—(1) manufacture, cast, print, lithograph, or otherwise make any device containing any official mark or *simulation* thereof, or any label bearing any such mark or simulation, or any form of official certificate or *simulation thereof*, except as authorized by the Secretary) (emphasis added).

terms "Free Range" and "Raised In An Open Pasture," and it is clear from the examples listed therein that misuse and association of the term "certified" with these terms would be prohibited. Id. This is exactly the type of deceptive message the false labelers are engaging in by using the term "certified" in their ads.

Furthermore, in such claims, "[a]ll words in the claim are to be contiguous and of the same size, style, and color...." Backgrounder, p. 2. The UEP "logo" violates this restriction by displaying the term "certified" in a conspicuous horizontal style, while the term "animal care" is disassociated, displayed in a curved style and partially obscured by the seal itself. Thus, the "logo" not only violates USDA policy regarding misuse of the term "certified," but also violates the restrictions on design that would apply even if it properly disclosed all of the relevant information.

The Net General Impression of the Ads

As discussed above, the use of the term "certified" in conjunction with the term "care" convey the impression that the labelers provide affirmative attention or assistance to animals in need (FN 15), and that the provision of this care is certified by an official government agency. By combining the terms into what the UEP terms a "logo," but which is, in fact, a simulation of an official seal which is conspicuously displayed on the carton without further information, ACC labelers are able to convey the net general impression that the hens which produced their eggs are provided some additional level of affirmative, government-certified care. For the reasons discussed above, this is deceptive and injurious to the misled consumers.

The ACC Logos Constitute False and Misleading Labeling Under Other Applicable Federal Laws

21 U.S.C. § 1036 prohibits labeling of egg products in a way that is "false or misleading" The "FTC Policy Statement on Deception" and "Enforcement Policy Statement on Food Labeling" provides persuasive authority to guide the Commissioner determining that the seals are false and misleading.

An advertisement is deceptive if it contains a representation or omission that is likely to mislead consumers. A representation may be made by express or implied claims. An express claim directly makes a representation. In addition to deception arising from affirmative representations in an advertisement, the omission of material information may also be deceptive in certain circumstances. Deception can occur through omission of information that is necessary to prevent an affirmative representation from being misleading. Deception Policy, p. 2.

In the instant case, the ACC seal constitutes an express claim that the hens which produced the eggs are "well cared for" and that this fact has been "certified." The terms however imply a certain claim to the reasonable consumer, namely that the hens are free roaming, are not force molted through starvation, and do not have their beaks partially

removed without anesthesia when young. This is evidenced by the surveys, declarations, and other evidence discussed above. The consumers are in fact misled because the hens are kept under the opposite conditions.

The misrepresentation is compounded by the false labelers' omission of material information, namely the actual conditions under which the hens are kept. Because the consumer assumes from the representations a set of conditions opposite to that which actually exists, disclosure of the actual conditions is presumably necessary to prevent the claim from being misleading. The UEP and other false labelers have, however, failed to disclose *any* conditions. In fact, the full UEP Guidelines are not even available to the public on the Internet. See Ex. 1

The next step in identifying deception in an ad requires one to consider the representation from the perspective of a consumer acting reasonably or as an average consumer would, under the circumstances. If the representation is directed primarily to a particular group, one examines reasonableness from the perspective of that group. Precedent establishes that an advertisement that can reasonably be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. Furthermore, an interpretation will be presumed reasonable and material if it is the claim the advertiser attempted to convey. Deception Policy, p. 3.

In the instant case, there is ample evidence that the average consumer interprets the terms "animal care certified" and "humane" to mean that hens are free roaming, are not force molted through starvation, and do not have their beaks partially removed without anesthesia when young. Exs. 9-12. This, petitioners would argue, is the plain meaning any consumer would attribute to the terms. See The American Heritage Dictionary of the English Language (supra, FN 14) (defining "care" as "Attentive assistance or treatment to those in need."). To the extent the logos target consumers who are concerned about animal welfare, they are doubly deceptive. Such consumers would presumably choose to purchase these ACC-labeled eggs over others assuming that the ACC producer had taken significant steps to improve the "care" of the hens, when in fact they have not. See Ex. 2; Exs. 9-12.

The analysis of whether this is a reasonable interpretation, however, is unnecessary because the interpretation borne out by the surveys and other evidence is exactly what the UEP and other false labelers attempt to convey and is therefore presumptively reasonable.

The UEP noted in the "public perceptions" portion of its Guidelines that "consumers regard the humane treatment of farm animals as important and that their ethical perspectives on animal treatment are continuing to evolve. Maintaining the present level of consumer confidence is critical to the egg production industry."¹³ Ex. 2, p. 2. The UEP

¹³ In 2001, the USDA in its "International Egg and Poultry Review," discussed the impact of consumers' animal welfare concerns on the industry:

published its guidelines in October 2000, one month after the Zogby poll, which ran on Reuters and CNN, determined that the UEP's specific guidelines were unacceptable to a strong majority of U.S. egg consumers. Ex. 12. Because it would be unreasonable to presume that the UEP would attempt to convey production method claims that the majority of U.S. egg consumers found unacceptable, we must presume that they intended the opposite—that the ACC program is intended to convey claims of animal care inconsistent with the actual practices, but consistent with what the average consumer finds acceptable. Hence this interpretation is presumptively reasonable.

Finally, a representation must be material, i.e., likely to affect a consumer's choice or use of a product or service. Material misrepresentations are likely to cause injury to the consumer, in that they would have chosen differently but for the deception. Express and implied claims which the advertiser intended are presumptively material. Deception Policy, p. 6.

The logos at hand should be regarded as presumptively material because, as discussed above, the ACC seal constitutes an express claim that the hens which produced the eggs are "well cared for" and that this fact has been "certified." The terms, however, imply a certain claim to the reasonable consumer, namely that the hens are free roaming, are not force molted through starvation, and do not have their beaks partially removed without anesthesia when young—which, as discussed above, is the claim the labelers must have intended in light of the Zogby poll.

Even if the UEP and others were to argue that the logos are not presumptively material, petitioners' extrinsic evidence proves materiality. Both the recent survey and petitioners' declarations show that the ACC "logo" significantly affected the consumers' decision when purchasing a particular carton of eggs. Exs. 9-11.

While the UEP and other false labelers may argue that their claims are substantiated by the use of a "scientific advisory committee" and therefore lawful, they cannot argue that the terms "animal care certified" and "humane" are completely objective, and therefore subject to substantiation analysis. See FTC Policy Statement on Labeling Substantiation, 48 Fed. Reg. 10,471 (1984). The surveys reflect some difference in consumer interpretation of the terms. Furthermore, the surveys and other evidence discussed above

Another key issue affecting egg production worldwide concerns the ethical treatment of animals. In the EU, The Council Directive on minimum standards for the protection of laying hens requires a decrease in bird stocking density and a ban on the use of conventional laying cages by the year 2012 (Germany is proposing that requirements on cages be in effect by 2007). The concern among egg producers is that this directive will increase the price of eggs and reduce consumption. McDonald's Corp (which uses about 2.5 percent of total U.S. egg production) recently announced that it would purchase eggs only from free-range hens. Industry estimates costs of production will increase between 11 cents/dozen and 24/cents dozen.

show that consumers attribute an opposite meaning to the terms than would be argued by UEP, and, as such, the terms cannot be considered entirely objective in the context of these ads.

To the extent that the UEP would argue that substantiation analysis would apply, the UEP and others do not have a reasonable basis on which to continue disseminating their claims because the weight of expert opinion suggests that no reasonable advertiser would equate the ACC guidelines with the terms “animal care certified” or “humane.” See Ex. 15 (“Expert Opinions”). As demonstrated by the compilation of expert opinions, the use of battery cages, beak trimming without anesthesia, and forced molting through starvation as husbandry practices lead to immense and unnecessary suffering and physical pain—a conclusion based on the various experts’ scientific research. Id. Interestingly, Dr. Joy Mench, who participated in the UEP’s own “scientific advisory committee” for the guidelines, describes the guidelines’ recommended cage size as “meager.” Id. In addition, The Humane Society of the United States notes that “[t]he United Egg Producers is not tackling the systematic abuses within the industry that severely compromise the welfare of individual birds....[The UEP guidelines] seem designed more to mollify consumers than to address the extreme animal welfare abuses that have become the norm in this industry.” Id.

Conclusion

The evidence collected herein by petitioners shows that the UEP and other false labelers are deceiving and misleading U.S. egg consumers by using the ACC seal and by displaying the seal and its terms on the Internet, and in print. This conclusion is supported by consumers’ declarations, multiple surveys, media reports, expert opinions, and analysis of the logos themselves under federal law. The evidence also shows that the ACC logos constitute a pattern of deception affecting consumers nationwide, preventing them from making free and informed choices about the products they purchase, and causing them significant injury as a result. The evidence shows that the deception is a deliberate attempt to head off a trend in consumers making socially responsible market choices. In every way, the matter is ripe for action, and petitioners respectfully request that the Commissioner move now to halt the deceptive labeling.

E. Certification

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner which are unfavorable to the petition.

(signature)



(name of petitioner)

HENRY M. MARTENSON

(mailing address)

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TALONIA PARK MD 20912

(telephone number)

301-270-4993

Exhibit List

1. United Egg Producer website:
http://www.unitedegg.com/html/news/animalcarelogo_090902.html
2. United Egg Producers' *Animal Husbandry Guidelines for U.S. Egg Laying Flocks*.
3. List of egg producers participating in "Animal Care Certified" program.
4. Saunder, R. W., Inc., website:
<http://www.saudereggs.com/animalCareCert/index.cfm>
5. Photo of "Animal Care Certified" logo on carton of Eggland's Best eggs.
6. Photo of "Animal Care Certified" logo on carton of Giant eggs.
7. Photo of "Animal Care Certified" logo on carton of Albertson's eggs.
8. Partial transcript from WTTG Fox 5 news program, "Fowl Play," which aired on February 23, 2003.
9. Affidavit from Holly Mortenson, an egg consumer in Maryland.
10. Affidavit from Margot Barg, an egg consumer in California.
- 11-A. Survey on egg consumers' opinions regarding the ACC logo and prescribed practices.
- 11-B. Results from survey on egg consumers' opinions regarding the ACC logo and prescribed practices.
12. Zogby poll on consumer attitudes toward standard egg industry practices. Also, CNN article about the Zogby poll: "Poll: U.S. citizens support humane treatment for egg-laying hens," published on September 20, 2000 at:
<http://www.cnn.com/2000/FOOD/news/09/20/food.hens.reut/>
13. News article: "The Squawk Over Ohio's Eggs," by Fran Henry. Printed in *The Plain Dealer* on June 1, 2003.
14. Photographs taken by Compassion Over Killing investigators at Ise-America, an "Animal Care Certified" egg farm in Cecilton, Maryland, on May 13, 2003.
15. Expert opinions on standard egg industry practices and the UEP guidelines specifically.
16. Humane Society of the United States statement on UEP guidelines
<http://www.hsus.org/ace/14515>

Survey

Please circle your answer.



1. Do you buy eggs on a regular basis from a retail establishment?

Yes	No	Don't Know
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2. Do you plan to buy eggs from a retail establishment in the future?

Yes	No	Don't Know
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3. Between A and B (above), which eggs are *More Likely* to have been laid by hens kept in cages?

A	B	No Difference	Don't Know
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4. Between A and B (above), which eggs are *More Likely* to have been laid by free-roaming hens?

A	B	No Difference	Don't Know
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5. Between A and B (above), which eggs are *More Likely* to have been laid by hens that had their beaks partially removed without anesthesia while young?

A	B	No Difference	Don't Know
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6. Between A and B (above), which eggs are *More Likely* to have been laid by hens that had food withheld from them for a period of time until they may have lost 30 percent of their body weight?

A	B	No Difference	Don't Know
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7. Would seeing the "Animal Care Certified" logo in photo A (above) on a carton of eggs increase your likelihood of buying that carton instead of one without the logo?

Yes	No	Don't Know
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For questions 8 - 10: Currently, there is no legal definition of "humane" treatment of hens.

8. Would you consider the practice of confining hens in cages where they are given less space than a sheet of letter-sized paper to be "humane"?

Yes	No	Don't Know
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9. Would you consider the practice of partially removing the beaks of young hens without anesthesia to be "humane"?

Yes	No	Don't Know
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10. Would you consider the practice of withholding all food from hens up to a point at which they may have lost 30 percent of their body weight to be "humane"?

Yes	No	Don't Know
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