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July 14, 2003

The Director National Advertising Division  
c/o David G. Mallen  
Council of Better Business Bureaus  
70 W. 36<sup>th</sup> Street, 13<sup>th</sup> Floor  
New York, N.Y. 10018

**Responding to the National Advertising Division of the  
Better Business Bureau**

**Regarding Petition brought by:  
Compassion over Killing**

**Summary of the Response**

United Egg Producers' ("UEP") Animal Care Certified™ ("ACC") program and certification mark are the result of an intense scientific process designed to produce attainable standards for improving the living conditions of laying hens. It has been widely adopted by responsible egg producers around the country. Adherence to the program substantially improves the lot of the nations' flock of laying hens. Use of the marks certainly does not constitute false advertising. COK's filing is a politically motivated effort to gain publicity for its extreme animal rights agenda.

**Factual Background**

UEP is an egg industry trade association representing a majority of egg producers nationwide. UEP recently released its new certification program and the revised animal husbandry guidelines to which the program adheres. The UEP based its guidelines on recommended improvements suggested by an Independent Scientific Advisory Committee for Animal Welfare in 1999 to review the treatment of egg-producing hens. The Committee, unpaid by UEP, that generated the guidelines was composed of representatives from the USDA, the U.S. Humane Association, scientists, and academics. It was not, as the COK asserts, a sham created by the egg industry to perpetrate a fraud upon the public. On the contrary, the revised animal husbandry guidelines, released in October 2002, place top priority on the comfort, health and safety of the chickens, and include:

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1. By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services or cosmetics; or
  2. By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics.
- (b) Unfair or deceptive act or practice: The dissemination or the causing to be disseminated of any false advertisement with the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

15 U.S.C.A. § 52

The term “false advertisement” means an advertisement, other than labeling, which is misleading in a material respect. . . .

15 U.S.C.A. § 55

#### False Advertising and Misrepresentation

As an initial matter, COK’s argument falls short because the trademarked ACC logo, as it appears integrated with product labels, is not a false advertisement. The applicable law specifically excludes labels from its definition of “false advertisement.” 15 U.S.C.A. § 55. Even if it did, however, the UEP does not produce the labels at issue, all of which are generated by the producers who sell the eggs. UEP is a trade organization—it does not sell eggs to consumers.

Moreover, UEP’s use of the logo in conjunction with its internet site and oral and printed statements using the word “humane” are neither false nor do they constitute a misrepresentation under applicable false advertising theories.

COK’s filing does not come close to establishing that the express or implied message conveyed by the ad is false. The express or implied representation conveyed by the ACC logo is that the production methods of ACC eggs comply with UEP animal husbandry guidelines. An independent group of scientists and veterinarians have concluded that those guidelines are humane. COK may have a different opinion as to what constitutes humane treatment, but that is irrelevant. UEP and its members need not be held captive by the extremist views of a radical animal rights organization.

COK suggests that consumers will conclude that Animal Care Certified™ eggs are organic or free-range. Organic or free-range eggs are invariably clearly labeled as such and are marketed at a much higher price point than Animal Care Certified eggs, frequently in an entirely separate area of the supermarket. It is not reasonable to conclude that consumer’s will

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automatically assume ACC eggs to be free-range or organic.

UEP did not misrepresent the ACC program as humane. "A misrepresentation is an express or implied statement contrary to fact." Cliffdale Assoc., Inc. 103 F.T.C. 110, 176 (1984). The FTC relies upon "evidence developed under accepted standards of scientific research" to find facts for its falsity and/or misrepresentation analysis. F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1097 (1994). COK alleges that UEP's use of the ACC logo in conjunction with oral and written statements using the word "humane" misrepresent the certified product. The Independent Scientific Advisory Committee, whose members included representatives from the American Humane Association, determined that the production practices of the ACC egg producers provide "a solid base from which to reassure the public that they are practicing good management and care for their birds." Scientific Advisory Committee on Animal Welfare, Recommendations for UEP Animal Welfare Guidelines, 3 (September 2000).

COK's "proof" amounts to a survey of 165 generic egg consumers in Washington, DC and detailed declarations from two individual egg consumers. This evidence, unlike the contrary findings of an independent scientific advisory committee, is neither developed under accepted standards of scientific research, nor performed by well-qualified experts.

A second theory asserted by the FTC is "reasonable basis."

To prevail on this theory, the government must 'show that the advertiser lacked a reasonable basis for asserting that the message was true.' In determining whether an advertiser has satisfied the reasonable basis requirement, the Commission or court must first determine what level of substantiation the advertiser is required to have for his advertising claims. Then, the adjudicator must determine whether the advertiser possessed that level of substantiation.

Pantron I Corp., 33 F.3d at 1096, citing Thompson Medical Co., 104 F.T.C. 648, 818-819. UEP has a reasonable basis for asserting that ACC egg production practices are humane, relying upon the findings of the independent scientific advisory committee. "Competent scientific or medical tests or studies" presented sufficient substantiation for reasonable basis theory. Thompson Medical Co., at 821, citing Porter & Dietsch, Inc., 90 F.T.C. 770, 885 (1977).

Respecting this established and oft-cited common law, the adjudicator of the instant case should also find the conclusions of a scientific study to be conclusive and sufficient substantiation for reasonable basis purposes. Highly qualified experts in animal husbandry and humanity, including representatives from the American Humane Association, executed the scientific study. After several meetings, thousands of pages of research, visits to breeder companies, visits to pullet growing and laying farms, and visits to cage manufacturers, the Committee concluded that the husbandry guidelines, which (now) require compliance of all ACC egg producers, were not inhumane. UEP has a reasonable basis to assert that ACC egg

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production practices are humane.

Unfair or Deceptive Acts

As the NAD adjudicator should find UEP innocent of any false advertising campaign under the weight of relevant evidence, scientific study, statutes and common law, 15 U.S.C.A. § 52(b) commands the same to dismiss any charges of unfair or deceptive acts connected with the false advertising complaint.

Conclusion

UEP has neither disseminated, nor caused to be disseminated, any false advertisement. UEP has made no false or misleading claims thereby misrepresenting its Animal Care Certified™ logo now appearing on egg cartons containing eggs produced in compliance with UEP's revised Animal Husbandry Guidelines. ACC eggs are not confused with cage-free eggs. COK cannot meet the burden of proof required by the "falsity" theory because its survey and declaratory evidence is neither developed, nor performed under acceptable scientific standards. Alternatively, UEP's independent committee report provides a "reasonable basis" to assert that the revised animal husbandry guidelines are humane. Finally, because UEP has committed no false advertising offense, it is innocent of any unfair or deceptive act or practice in or affecting commerce.

Respectfully Submitted,



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