



Animal Welfare Institute

900 Pennsylvania Avenue, SE, Washington, DC 20003

February 23, 2021

Serena Viswanathan
Acting Associate Director, Division of Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

VIA Electronic Mail

**Re: Complaint requesting action to enjoin false or deceptive advertising by
Boar's Head Provisions Co., Inc.**

Dear Acting Associate Director Viswanathan,

Please see the attached complaints submitted on behalf of the Animal Welfare Institute (AWI) requesting that the Federal Trade Commission investigate and enjoin Boar's Head Provisions Co., Inc. from using false and misleading claims on its turkey and chicken sausage products.

AWI is a nonprofit, 501(c)(3) organization dedicated to reducing animal suffering and promoting the welfare of all animals, including animals in agriculture. As a part of its mission, AWI promotes humane farming systems and works to advance legislative and regulatory efforts to improve conditions for farm animals. AWI strives to educate consumers about the true meaning of the many animal care claims encountered in the marketplace and to ensure meaningful and transparent regulatory definitions for terms that appear on food labels.

Boar's Head claims on product labels that its chicken sausage and Simplicity All Natural turkey products come from "humanely raised" animals, which AWI argues is deceptive advertising. AWI's complaints demonstrate that the claim is both material and likely to mislead consumers because it is inconsistent with consumer perception of the claim and because it is not based upon scientifically established animal welfare standards.

AWI wishes to be respectful of the FTC's time and resources. However, we decided to submit separate complaints for Boar's Head turkey and chickens products, because we feel it would be confusing for the arguments against the company's use of the "humanely raised" claim on different types of meat products to be addressed in one complaint. For example, the substantiation submitted by the company in its label approval applications differs for each product. It is also likely that Boar's Head uses different suppliers for its turkey and chicken products, which may require independent consideration. While some sections of each challenge overlap substantially, the assessment of the standards used by Boar's Head suppliers and the scientific analysis of key animal welfare indicators is significantly different for each challenge.

A majority of consumers agree that food producers should not be allowed to use the claim “humanely raised” on their product labels unless the producers exceed minimum industry animal care standards.¹ Boar’s Head cannot substantiate its “humanely raised” claim on its Simplicity All Natural turkey products because the audit upon which the claim is based, the National Turkey Federation Production Audit, is an industry-created codification of standard animal care practices. Boar’s Head similarly cannot substantiate its “humanely raised” chicken claim because the audit upon which it is based, Farm Animal Care and Training Auditing (FACTA), similarly merely codifies standard chicken industry animal care practices.

The National Advertising Division (NAD) of BBB National Programs, Inc., has affirmed that animal welfare claims based on compliance with industry audits do not meet consumer perceptions. In a similar case, the NAD recommended removal of the claim “ethically raised” because this unsubstantiated claim created a false perception among consumers that the producer exceeded minimum industry animal care standards.² In that case, the audit upon which the claim was based was similar to the NTF and FACTA audits in that it merely reflected compliance with industry guidelines, not scientifically established animal welfare standards.

AWI therefore respectfully requests that the FTC aid consumers by enjoining Boar’s Head from using this claim in a deceptive manner on its chicken and turkey products. Thank you for your consideration. Please feel free to contact me should any questions arise at dena@awionline.org or (202) 446-2147.

Sincerely,



Dena Jones, M.S.
Director, Farm Animal Program
Animal Welfare Institute

¹ *Survey of Consumer Attitudes About Chicken Welfare*, ANIMAL WELFARE INST. (Oct. 2020) <https://awionline.org/sites/default/files/uploads/documents/SurveyConsumerAttitudesChickenWelfare.pdf>. This perception of the claim has remained consistent for the past 10 years: *Survey of Consumer Attitudes About Animal Raising Claims on Food (Part II)*, Animal Welfare Inst. (Oct. 2018) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-survey-on-animal-raising-claims-Oct-2018.pdf> (82% of meat, poultry, egg or dairy purchasers agree); *Survey of Animal Raising Claims Used on Meat Packaging*, ANIMAL WELFARE INST. (Oct. 2013) (88% of frequent meat or poultry product purchasers agree) <https://awionline.org/sites/default/files/uploads/documents/fa-meatlabelingpoll-041714.pdf>; *U.S. Poll on the Welfare of Chickens Raised for Meat*, ANIMAL WELFARE INST. 2 (Apr. 2010) <https://awionline.org/sites/default/files/uploads/legacy-uploads/documents/FA-HumanelyRaisedCagedFreeSurvey-081110-1281725036-document-23248.pdf> (77% of frequent chicken purchasers agree).

² Exhibit B, NAD Decision, Clemens Food Group, LLC/Hatfield Pork Products, PR 6305 (2019).

BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

ANIMAL WELFARE INSTITUTE,
Petitioner,

BOAR'S HEAD PROVISIONS CO., INC.,
Proposed Respondent.

**Complaint for Action to Stop
False or Deceptive Advertising
Boar's Head Simplicity All Natural Turkey**

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Farm Animal Program

Erin Sutherland, Staff Attorney
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February 23, 2021

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INTRODUCTION

Pursuant to Federal Trade Commission (FTC) regulations, 16 C.F.R. § 2.1–2.2, Complainant the Animal Welfare Institute (AWI) requests that the FTC investigate and commence an enforcement action against Boar’s Head Provisions Co., Inc. (Boar’s Head) for engaging in false or misleading advertising in violation of the Federal Trade Commission Act, 15 U.S.C. § 45–58 (FTC Act) in regard to use of the claim “humanely raised” on certain of its turkey products.

Boar’s Head has issued and is continuing to issue unlawfully false and misleading representations about the treatment of animals used to produce its products. Text on product labels sold under the company’s name, indicate that turkeys were “humanely raised.” This statement is untrue and misleading. The low standards and industry-created auditing criteria employed on Boar’s Head producer farms are blatantly inadequate to support this claim and fall far below scientifically established standards for humane care of farm animals.

Consumers perceive the claim “humanely raised” to mean that those animals are raised to a standard of care that is higher than industry norms. This is not true for the turkeys raised by Boar’s Head suppliers. These suppliers breed their turkeys for rapid growth (which causes numerous health and welfare problems), confine turkeys indoors in crowded, barren environments, and subject them to near-constant, low-level lighting. Consumers do not believe these conditions are consistent with the claim “humanely raised.”

Consumers who purchase turkey products rely upon claims such as “humanely raised” in making their purchasing decisions. Because consumers perceive the claim “humanely raised” to mean something that Boar’s Head cannot substantiate, consumers are misled into choosing a product that is not what they expect. Boar’s Head is therefore unlawfully deceiving consumers

under the FTC Act. This deception harms consumers, competitors, and farmers by destroying the fair market for higher welfare poultry products.

Without intervention by the FTC, this deception is likely to continue. Consumers cannot determine firsthand the level of care provided to animals used to create food products, because they do not have access to farms and production practices are not apparent in the final product. As such, the Commission's intervention is necessary to stop Boar's Head from continuing to exploit consumers' willingness to pay for products that are produced from animals raised to a high standard of care. AWI requests that the FTC take action to stop Boar's Head from deceiving consumers with the false claim "humanely raised" on its turkey products.

PARTIES

I. Animal Welfare Institute

The Animal Welfare Institute (AWI) is a Washington, DC-based nonprofit founded in 1951. Since its creation, AWI has been dedicated to reducing animal suffering caused by people. AWI seeks better treatment of animals everywhere—in the laboratory, on the farm, in commerce, at home, and in the wild. This work includes efforts to improve the welfare of animals used in agriculture. In furtherance of its mission to alleviate animal suffering, AWI promotes higher-welfare farming systems and works to raise awareness about the cruel realities of conventional, industrial animal agriculture. AWI also founded a high-welfare food certification program, Animal Welfare Approved (which is now operated independently of AWI as Certified Animal Welfare Approved by A Greener World), to assist consumers in making better food choices, and to reward farmers who invest time and resources to provide the opportunity for the animals to engage in their natural behaviors and to reduce the pain and stress they experience.

As part of AWI’s goal to promote improved farming systems, the organization helps its members, and consumers in general, choose products that align with their personal preferences for improved treatment of animals. AWI educates its members and the public about how to choose products by publishing and regularly updating *A Consumer’s Guide to Food Labels and Animal Welfare*.³ This guide provides consumers an in-depth analysis of different animal raising claims and certification programs to aid in the complex process of choosing higher-welfare animal products.⁴ AWI’s work also requires monitoring the use of animal raising claims on animal product packaging so it can warn consumers about deceptive labeling practices. Based on this monitoring, AWI has found that the oversight of food label claims by the US Department of Agriculture (USDA) sometimes fails consumers, resulting in consumer deception.⁵

II. Boar’s Head Provisions Co., Inc.

Boar’s Head Provisions Co., Inc. is a Delaware corporation headquartered at 1819 Main Street, Suite 800, Sarasota, FL 34236. Boar’s Head operates meat and poultry-processing facilities in Arkansas, Michigan, Indiana, and Virginia. Boar’s Head products are marketed throughout the United States at most major grocery outlets.

³ *A Consumer’s Guide to Food Labels and Animal Welfare*, ANIMAL WELFARE INST. (Oct. 2020) https://awionline.org/sites/default/files/publication/digital_download/20FoodLabelGuideFull.pdf [hereinafter *AWI Consumer’s Guide*].

⁴ *Id.* at 1.

⁵ *Label Confusion 2.0: How the USDA Allows Producers to Use “Humane” and “Sustainable” Claims on Meat Packages and Deceive Consumers*, ANIMAL WELFARE INST. 2 (Sept. 2019) https://awionline.org/sites/default/files/publication/digital_download/19%20Label%20Confusion%20Report%20FINAL%20WEB%20II.pdf [hereinafter *Label Confusion 2.0*].

JURISDICTION

The FTC is vested with responsibility to prevent deceptive advertising in agriculture pursuant to the Packers and Stockyards Act, which extends jurisdiction to poultry products.⁶ According to the FTC’s *Enforcement Policy Statement on Food Advertising*,⁷ the FTC “assumed primary responsibility for regulating food advertising”⁸ while the Food and Drug Administration (FDA) takes primary responsibility for food labeling. This statement also notes that the FTC “intends to apply similar principles to consideration of claims for products regulated by the USDA.”⁹

USDA approval of label claims does not preclude FTC enforcement, however. The USDA approves labels that contain claims that are in essence advertisements. The FTC has recognized that “[s]ome claims that would technically comply with [an agency’s] labeling regulations might be deceptive if the context of the ad renders the express message of the claim misleading.” In this case, the USDA approved “humanely raised” on a product package without considering consumer perceptions or the scientific validity of the claim. Instead of affording deference to the USDA’s labeling regulations, the FTC should exercise its authority to prevent deceptive animal welfare advertising practices on poultry product labels because the USDA fails to consistently ensure that misleading animal welfare labels do not enter the marketplace.¹⁰ Deference to the USDA’s

⁶ 7 U.S.C. §§ 181–229b; § 227(b) (“The [FTC] shall have power and jurisdiction over any matter involving . . . poultry products”).

⁷ *Enforcement Policy on Food Advertising*, FED. TRADE COMM’N (May 13, 1994) <https://www.ftc.gov/public-statements/1994/05/enforcement-policy-statement-food-advertising>.

⁸ *Id.*

⁹ *Id.* at n.2.

¹⁰ *Infra* Part II.A.

approval should be “balance[d] . . . against the reasonable expectations of consumers” in favor of the FTC “exercising its full authority to protect consumers.”¹¹

STANDARD OF REVIEW

The FTC is the lead agency for preventing unfair and deceptive trade practices.¹² According to the FTC, unlawful deception will be found “if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”¹³ Thus, a representation is unlawfully deceptive if it is material to a consumer’s decision-making and likely to mislead the consumer.¹⁴ To ensure an advertisement is not deceptive, a marketer must ensure that all reasonable interpretations of an advertisement, whether implied or express, are truthful, not misleading, and supported by a reasonable basis.¹⁵ Advertisements should be examined from the perspective of a reasonable member of the group targeted by a given advertisement.¹⁶

FALSE OR MISLEADING CLAIM

I. Representation at Issue

A. “Turkey Used Is Humanely Raised” or “Humanely Raised.”

¹¹ *Statement of Commissioner Rohit Chopra*, FED. TRADE COMM’N (Sept. 19, 2019) https://www.ftc.gov/system/files/documents/public_statements/1544655/commissioner_rohit_chopra_statement_on_truly_organic_sept_19_2019.pdf.

¹² 15 U.S.C. § 45(a)(2).

¹³ *FTC Policy Statement on Deception*, FED. TRADE COMM’N 2 (Oct. 14, 1983) https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf; 15 U.S.C. § 45.

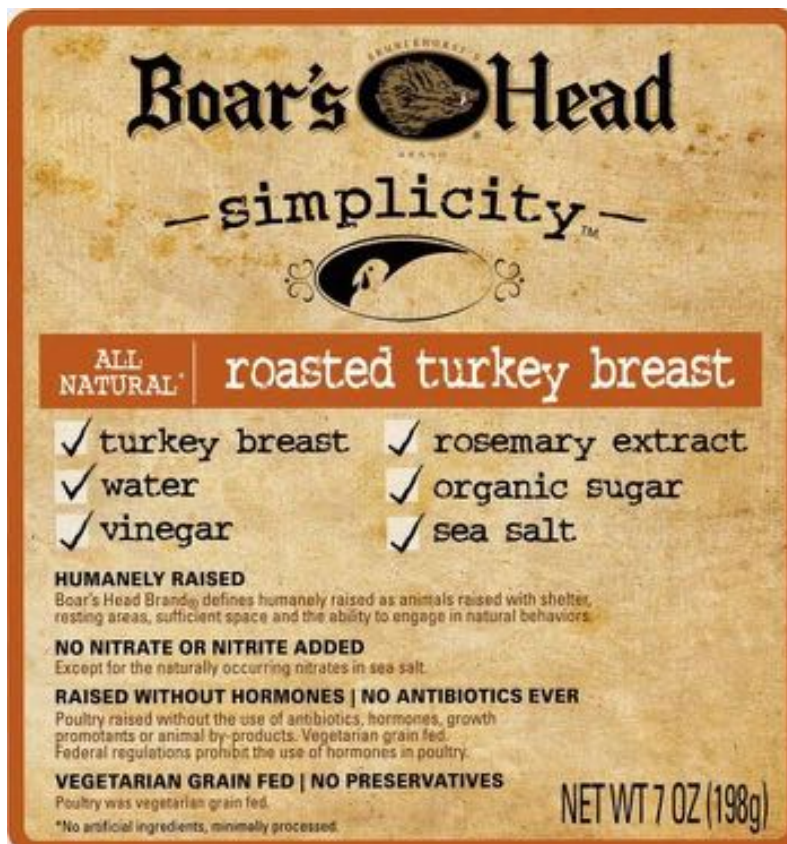
¹⁴ *FTC Policy Statement on Deception*, *supra* note 14, at 2.

¹⁵ See 16 C.F.R. § 260.2 (citing to FTC, Policy Statement Regarding Advertising Substantiation at 3 (Nov. 23, 1984) <https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation>).

¹⁶ *Id.*

This petition relates to representations made on certain Boar’s Head turkey product packages. Boar’s Head Simplicity All Natural turkey products, available in several varieties, contain the phrase “Turkey Used is Humanely Raised” or “Humanely Raised” in prominent placement on the product packaging. The text is featured strategically and prominently, boasting the claim to prospective purchasers.¹⁷ The claim is followed by a “definition” of the claim: “Boar’s Head Brand® defines humanely raised as animals raised with shelter, resting areas, sufficient space and the ability to engage in natural behaviors.”¹⁸

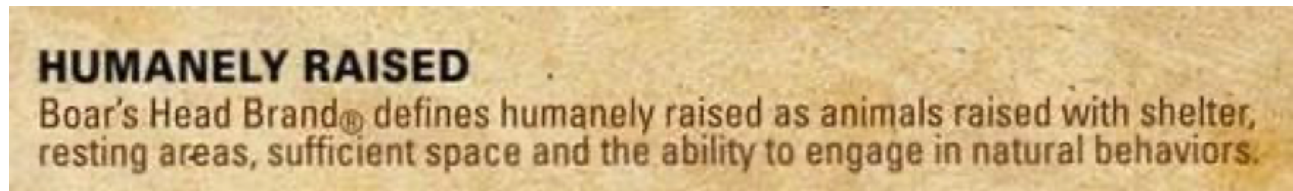
Figure 1.
Boar’s Head Simplicity All Natural Turkey.



¹⁷ See *infra* Figure 1.

¹⁸ See *infra* Figure 2.

Figure 2.
Boar's Head Simplicity All Natural Turkey, Definition Panel.



The Boar's Head "humanely raised" claim falsely supports the impression that the turkeys used to produce the product are raised to a standard of care that exceeds that of the turkey industry as a whole. "Humanely raised" also implies that Boar's Head animal care practices exceed those of competitors that do not use the claim.

The definition has a similar implication. Boar's Head defines "humanely raised" as "shelter, resting areas, sufficient space and the ability to engage in natural behaviors," implying that it provides these things while standard industry producers do not. Rather than remedying any confusion about what the producer means by the claim, the definition only furthers consumer deception. To appreciate the implication of the definition, the consumer would need to be aware of the fact that it merely describes industry standard for the raising of turkeys. But as discussed below, Boar's Head 1) fails to exceed industry standards and 2) fails to provide a level of animal care that meets consumer expectations and scientifically established standards for humane animal treatment, and is therefore unlawfully deceptive.

II. Practices at Issue

A. *The USDA Label Process Fails Consumers by Allowing Producers to Use Deceptive Claims.*

The USDA requires producers/processors to obtain pre-market label approval for animal raising claims through application to its Food Safety and Inspection Service (FSIS).¹⁹ The USDA publishes a *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submission*, last revised in December 2019.²⁰ The Guideline explains that the USDA has not defined animal welfare claims, including “humanely raised,” in regulations or policy guidelines.²¹ Instead, the USDA allows producers/processors to establish their own definition or employ a definition developed by another party.²² However, the USDA does not evaluate the relevance or appropriateness of third-party (independent) or second-party (industry) standards.²³

The USDA requires that applications for label approval include substantiation of any animal welfare claims. Documentation needed includes (1) a detailed written description explaining the meaning of the claim, (2) a signed document describing how the animals are raised, (3) a written description of product tracing and segregation mechanisms, and (4) a written

¹⁹ While the FSIS is responsible for label approval within the USDA, it is referred to as “the USDA” or “the Department” in this document for clarity.

²⁰ *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions*, U.S. DEP’T OF AGRIC., FOOD SAFETY AND INSPECTION SERV. (Dec. 2019) <https://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES> [hereinafter *USDA Label Guide*].

²¹ *Id.* at 7.

²² *Id.*

²³ In an August 2017 meeting with AWI, staff of the USDA-FSIS Labeling and Program Delivery office indicated they were not familiar with specific animal care standards of the certification and auditing program they accept as substantiation for animal raising claims on meat products.

description of how animals not raised in accordance with the claim are segregated from animals eligible for the claim.²⁴

The USDA does not independently verify compliance with animal welfare claims on the farm, during transport, or at slaughter.²⁵ Moreover, it accepts audits of industry trade association minimum animal care guidelines as substantiation for these claims, according to reviews of USDA label approval files by AWI.²⁶ The USDA approved this claim, however, the department has been known to approve animal raising claims with little to no substantiation.²⁷ The USDA relies solely on “desk audits” and conducts no on-site visits to verify compliance with its labeling policies. Additionally, it does not survey consumer perceptions of claims used by producers to ensure that claims approved by the department meet consumer expectations.²⁸ Because of the USDA’s flawed process for label approval, producers—eager to derive profits from taking advantage of consumer preferences—occasionally make unsubstantiated claims on their packages. These questionable claims may go unchallenged by the USDA, in part because it has not adopted meaningful definitions for many animal raising claims made on meat and poultry products. The role of the FTC in providing additional scrutiny is necessary to ensure that such claims are not unlawfully deceptive under the FTC Act. This complaint presents additional evidence not considered relevant by the USDA in its approval of this claim.

²⁴ *USDA Label Guide*, *supra* note 20, at 6.

²⁵ *See id.* at 6.

²⁶ *Label Confusion 2.0*, *supra* note 5; *Label Confusion: How “Humane” and “Sustainable” Claims on Meat Packages Deceive Consumers*, ANIMAL WELFARE INST. (May 2014) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-Food-Label-Report.pdf>.

²⁷ *Id.*

²⁸ *See USDA Label Guide*, *supra* note 20, at 6.

B. *The Basis of the Boar’s Head Humanely Raised Claim is the National Turkey Federation Audit, Which Represents a Baseline Industry Animal Care Standard.*

The Boar’s Head application file to the USDA for use of the claim “humanely raised” on its turkey products, as supplied to AWI under the Freedom of Information Act, consisted of 641 pages of documents.²⁹ These documents covered multiple applications for new or revised content for its All Natural Turkey packaging, dating from October 2006 to September 2019.³⁰ Audits included in the file indicate that the basis of the Boar’s Head “humanely raised” claim on its All Natural Turkey products is the animal care standards of the National Turkey Federation.³¹

The National Turkey Federation (NTF) is the trade association of the conventional turkey industry in the United States, and its producer/processor members account for 95 percent of turkeys raised in the country for meat.³²

The NTF has created a set of minimum animal care guidelines and an auditing tool for the turkey industry.³³ Animal agricultural trade association guidelines and auditing programs establish a consistent minimum level of animal care throughout the industry.³⁴ The primary objective of these programs is to avoid government regulation, reassure consumers when questionable practices are brought to light, and ultimately promote the industry and its products.³⁵

As noted above, Boar’s Head uses the NTF industry audit to demonstrate its supplier(s) compliance with industry animal care guidelines.

²⁹ *Boar’s Head Turkey USDA Label Approval File*, 1–641 (available upon request).

³⁰ *Id.* Not all of these applications related to the “humanely raised” claim.

³¹ *See id.* at 31–36 for example.

³² *About the National Turkey Federation*, National Turkey Federation, <https://www.eatturkey.org/about/>.

³³ *NTF Standards of Conduct*, National Turkey Federation, <https://www.eatturkey.org/animal-welfare/standards/>.

³⁴ D. JONES & M. PAWLIGER, *Voluntary Standards and Their Impact on National Laws and International Initiatives*, in INT’L FARM ANIMAL, WILDLIFE AND FOOD SAFETY L. 111–150 (Gabriela Steier & Kiran K. Patel, eds. 2017).

³⁵ *Id.* at 125.

C. *The NTF Industry Audit Does Not Reflect Humane Standards for the Raising of Turkeys, According to Scientific Research or by Comparison to Independent Animal Welfare Certification Programs.*

1. Consumers trust and rely on independent animal welfare certification programs to verify animal raising claims.

American consumers increasingly identify the welfare and protection of food animals as a major area of concern, both politically and as criteria for food selection.³⁶ However, they are confused about the meaning of animal welfare claims on labeling,³⁷ the accuracy of which consumers cannot typically verify for themselves.

A large majority of respondents to an October 2018 survey commissioned by AWI indicated consumers have more confidence in food that has been verified by an independent inspection.³⁸ In addition, respondents to another AWI-commissioned survey were four times more likely to say they place a higher degree of trust in animal care labels verified by a third-party animal welfare organization than labels verified by an agricultural industry association.³⁹

Nonprofit animal welfare certification programs have emerged as a means of helping consumers choose products from animals raised more humanely. Twenty years ago, there were no

³⁶ In a 2016 survey conducted for the American Society for the Prevention of Cruelty to Animals (ASPCA), 77 percent of consumers said they are concerned about the welfare of animals raised for food. *New Research Finds Vast Majority of Americans Concerned about Farm Animal Welfare*, ASPCA (Jul. 7, 2016) <http://www.asPCA.org/about-us/press-releases/new-research-finds-vast-majority-americans-concerned-about-farm-animal>.

³⁷ Fifty-six percent of respondents to a September 2018 survey commissioned by AWI said they are “confused about the meaning of some food label claims that may relate to how farm animals are raised.” *Survey of Consumer Attitudes about Animal Raising Claims on Food (Part I)*, ANIMAL WELFARE INST. (Oct. 2018) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-survey-on-animal-raising-claims-Sept-2018.pdf> [hereinafter *AWI 2018 Consumer Survey Part I*].

³⁸ *Survey of Consumer Attitudes about Animal Raising Claims on Food (Part II)*, ANIMAL WELFARE INST. (Oct. 2018) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-survey-on-animal-raising-claims-Oct-2018.pdf> [hereinafter *AWI 2018 Consumer Survey Part II*].

³⁹ *Survey of Animal Raising Claims Used on Meat Packaging*, ANIMAL WELFARE INST., 2 (Oct. 2013) <https://awionline.org/sites/default/files/uploads/documents/fa-meatlabelingpoll-041714.pdf> [hereinafter *AWI 2013 Consumer Survey*].

major third-party food labeling certification programs in the United States that specifically addressed animal welfare; today there are four.⁴⁰ Currently, there are approximately 1.5 billion farm animals being raised each year under the four animal welfare labels.⁴¹ Moreover, hundreds—perhaps thousands—of family farmers have been able to survive in an age of continued industry consolidation, thanks to these programs.

While the four third-party animal welfare certification programs are not in complete alignment with one another, all have addressed the demand for humanely raised turkey products by developing standards based on the science of animal welfare and the concept of “Five Freedoms,” originally conceived by the United Kingdom’s Farm Animal Welfare Council.⁴² Each program demands a baseline level of care that the NTF’s industry standards do not come close to approaching. American Humane Certified,⁴³ Certified Animal Welfare Approved,⁴⁴ Certified

⁴⁰ American Humane Certified, Certified Animal Welfare Approved, Certified Humane, Global Animal Partnership.

⁴¹ Estimating the number of animals raised under welfare certification programs is difficult due to overlap in producer membership in the various programs. One of the programs, American Humane Certified, claims its program currently certifies the raising of nearly one billion animals, while another program, Global Animal Partnership, cites a figure of more than 416 million animal annually. *2020 Impact Report*, AMERICAN HUMANE CERTIFIED, <http://www.humaneheartland.org>; *Our Program*, GLOBAL ANIMAL PARTNERSHIP, <http://www.globalanimalpartnership.org/program/>.

⁴² *Farm Animal Welfare Committee*, GOV.UK, <https://www.gov.uk/government/groups/farm-animal-welfare-committee-fawc>.

⁴³ American Humane Certified is an auditing and labeling program administered by the American Humane Association, a nonprofit organization. The program administers standards for beef cows, meat chickens, pigs, laying hens, dairy cows, and turkeys. Products marketed under this label bear a seal reading “American Humane Certified.” See *Our Standards*, AMERICAN HUMANE CERTIFIED, <http://humaneheartland.org/our-standards>.

⁴⁴ The Certified Animal Welfare Approved program is an auditing and labeling program administered by A Greener World, a nonprofit organization. The program administers standards for family owned and operated producers of pasture-raised beef and dairy cows, meat chickens, laying hens, turkeys, pigs, goats, sheep, bison, ducks, and geese. Products marketed under this label bear a seal reading “Certified Animal Welfare Approved by AGW.” See *Certified Animal Welfare Approved by AGW*, A GREENER WORLD, <https://agreenerworld.org/certifications/animal-welfare-approved/>.

Humane,⁴⁵ and the Global Animal Partnership (Step 2)⁴⁶ all have in common a base threshold for welfare that significantly exceeds the NTF minimum welfare guidelines.

A side-by-side comparison of the NTF standards and the standards of the third-party animal welfare certification programs clearly demonstrates that all third-party animal welfare certifications differ significantly from the NTF industry audit.⁴⁷

The third-party certification standards focus on benchmarks for welfare that have been identified by sound animal welfare science, as opposed to industry expedients, and all of the programs make their standards publicly available, allowing consumers to make informed purchasing choices.

⁴⁵ Certified Humane is an auditing and labeling program administered by Humane Farm Animal Care, a nonprofit organization. The program administers standards for beef and dairy cattle, meat chickens, laying hens, pigs, veal calves, turkeys, sheep, and goats. Products marketed under this label bear a seal reading “Certified Humane Raised and Handled.” *See Our Standards*, CERTIFIED HUMANE, <https://certifiedhumane.org/how-we-work/our-standards/>.

⁴⁶ The Global Animal Partnership program is an auditing and labeling program administered by Global Animal Partnership, a nonprofit organization. Producers are certified according to a six-tiered scale, where a Step 5+ certification signifies that the producer has met the program’s highest standards. The program currently administers standards for beef cows, bison, goats, sheep, pigs, meat chickens, laying hens, and turkeys. *See Our Standards*, GLOBAL ANIMAL PARTNERSHIP, <https://globalanimalpartnership.org/standards/>.

⁴⁷ AWI selected 14 of the most important animal care standards for comparison. As shown in Figure 4, the NTF audit covers 4 of these standards, while the four third-party programs cover between 10 and 14 of the standards. A detailed version of the comparison can be found in Exhibit A, *Comparison of Turkey Welfare Standards (Full)*.

Figure 4. COMPARISON OF TURKEY WELFARE STANDARDS

TURKEY WELFARE STANDARD	NTF	AHC	CH	GAP ¹	CAWA
1. Health Care					
1.1 Bird welfare health plan available for all flocks		✓	✓	✓	✓
1.2 Growth promoters & non-therapeutic antibiotics prohibited		✓	✓	✓	✓
1.3 Toe Conditioning prohibited			✓	✓	✓
1.4 Growth (and leg health) addressed through genetics &/or feeding regimes			✓	✓	✓
2. Food and Water					
2.1 Unrestricted access to water provided for all birds	✓	✓	✓	✓	✓
2.2 Unrestricted access to food provided for all birds on a daily basis during daylight hours	✓	✓	✓	✓	✓
3. Housing					
3.1 Clean, dry litter/bedding available at all times		✓	✓	✓	✓
3.2 Environmental enrichment required		²	✓	✓	✓
3.3 Indoor stocking density kept below 7.5 lbs. per square foot of space			✓	✓	✓
3.4 Light intensity during day maintained at 10 lux (1.0 ft candles) or higher		✓	✓	✓	✓
3.5 At least four hours continuous dark period provided every 24 hours		✓	✓	✓	✓
3.6 Ammonia in atmosphere not allowed to exceed 25 ppm	✓	✓	✓	✓	✓
4. Handling					
4.1 Hired workers trained in humane methods of turkey handling	✓	✓	✓	✓	✓
4.2 Catching of birds performed in low light		✓	✓	✓	✓

Abbreviations:

NTF = National Turkey Federation, AHC = American Humane Certified, CAWA = Certified Animal Welfare Approved, CH = Certified Humane, GAP = Global Animal Partnership

Notes:

¹ GAP is a welfare rating program with 6 Steps, where Step 1 represents an entry level. Chart indicates requirements of Step 2.

² AHC strongly encourages but does not currently require producers to provide environmental enrichment.

The conditions permissible for the raising of turkeys under NTF guidelines would shock most Americans. Under these standards, which represent the practices widely adopted and utilized

by the conventional turkey industry, tens of thousands of birds may be packed into windowless sheds without access to fresh air and direct sunlight and unable to perform natural behaviors critical to their well-being. Turkeys are deprived of adequate physical and social conditions as they are subjected to high flock sizes and stocking densities, poor environments that lack stimuli, and near-constant dim lighting that induces a state of inactivity in which the animals do nothing but eat and grow beyond the limitations of their own legs and organs. Turkeys in this environment become increasingly aggressive, which leads to injurious pecking and cannibalism among birds that contribute to high cull and mortality rates.⁴⁸

The following section describes some of the major shortcomings of the NTF industry standards, presents scientific evidence demonstrating their failure to provide for the health and well-being of turkeys, and, for each welfare issue, provides a comparison of the welfare standards required by authentic animal welfare labels thereby demonstrating that NTF guidelines do not reflect the consensus surrounding the meaning of “humanely raised.”

i. Crowded housing

In order to maximize profits, producers on conventional operations raise turkeys at high stocking densities,⁴⁹ which results in limited space per animal and significantly impacts turkey health and welfare.⁵⁰ Recent studies conducted to assess the effects of various stocking densities

⁴⁸ Marchewka, J., et al. Review of the Social and Environmental Factors Affecting the Behavior and Welfare of Turkeys (*Meleagris gallopavo*), *Poultry Science* 92.6 (2013): 1467–1473.

⁴⁹ Stocking density” refers to the number of birds, or the weight of birds, per area specified, such as 36.6 kg/m² or 7.5 lb/ft². On the other hand, “space allowance” refers to the amount of space allotted to each animal, such as 0.5 m² or 5 ft². Some references cite metric units while others cite customary US units, so conversion is often required when comparing different programs’ animal care standards for space.

⁵⁰ Beaulac, K., and Schwean-Lardner, K. Assessing the Effects of Stocking Density on Turkey Tom Health and Welfare to 16 Weeks of Age, *Frontiers in Veterinary Science* 5 (2018): 213.

on turkey health and welfare have found higher stocking densities are associated with significantly poorer bird mobility and decreased activity, likely the result of limited space. This is of particular concern from a welfare perspective as it can impede the bird's ability to access food and water, escape aggression by pen mates, and can cause painful conditions.⁵¹ Studies have shown that higher stocking densities contribute to an increased incidence of footpad lesions and breast blisters⁵² and lead to gait deterioration and increased injuries, such as broken wings.⁵³

According to the scientific literature, turkeys housed at higher stocking densities may also experience greater levels of stress.⁵⁴ Increased stress may result in turkeys being less capable of coping with additional environmental stressors, such as elevated temperatures, and can contribute to the development of respiratory problems. Higher stocking densities have been associated with higher rates of airsacculitis (an inflammation of the mucous membrane in the air sacs of birds), an increased severity of lung lesions in turkeys, and higher mortality rates.⁵⁵ Stocking density has also been linked to injurious and aggressive behaviors in turkeys, with higher densities leading to increased aggression and feather pecking.⁵⁶

Under NTF's animal care audit standards, "stocking density should be adequate for maximum performance and health according to company program," and requires inspectors to ensure

⁵¹ *Id.*

⁵² Erasmus, M. A. A Review of the Effects of Stocking Density on Turkey Behavior, Welfare, and Productivity, *Poultry Science* 96.8 (2017): 2540–2545.

⁵³ Bartz, B. M., et al. Effects of Stocking Density on Large White, Commercial Tom Turkeys Reared to 20 Weeks of Age: 1. Growth and Performance, *Poultry Science* 99.11 (2020): 5582–5586.

⁵⁴ Erasmus, *supra* note 52.

⁵⁵ *Id.*

⁵⁶ *Id.*; Beaulac, *supra* note 50.

stocking densities provide 15 pounds per square foot.⁵⁷ Most animal welfare certification programs require at least double the amount of space per bird. Both Certified Humane and Global Animal Partnership (Step 2) set a maximum stocking density of 7.5 pounds per square foot⁵⁸ and the Certified Animal Welfare Approved program requires each turkey to have access to at least 20 square feet of range and foraging area and a minimum of 11 square feet per bird, or a maximum density of 3.7 pounds per square foot, when housed indoors due to weather.⁵⁹

ii. Continuous lighting

It is common practice in the conventional poultry industry to use near constant, dim lighting as a management tool to influence productivity and minimize aggression. A typical lighting program used on a conventional turkey operation subjects birds to 23 hours of light per day at an intensity of 5-10 lux (or 0.5-1 foot candle).⁶⁰ NTF guidelines do not require producers to provide turkeys with any sort of darkness period, allowing for the use of continuous lighting programs that studies have shown present significant health and welfare concerns.⁶¹

A more recent study conducted to assess the impact of day length—meaning the period of time when birds are subjected to continuous light—on turkey behavior and health determined

⁵⁷ *Boar's Head Turkey USDA Label Approval File*, *supra* note 29 at 292. The particular NTF audit provided to USDA was conducted in September of 2017 using the NTF Animal Care Audit Checklist. This version of the checklist called for a maximum stocking density of 15 pounds per square foot, however this particular guideline has since been removed from NTF's Animal Care Audit Checklist, which now just vaguely requires that birds are "free to roam throughout the growing area. Birds can stand up, sit down and spread their wings." A maximum stocking density is no longer required.

⁵⁸ Certified Humane, at E18; Global Animal Partnership, at 4.6.2; *see* Exhibit A, Comparison of Turkey Welfare Standards (Full).

⁵⁹ Assuming a 41-pound bird, which is the average market weight of a male turkey according to the USDA. Certified Animal Welfare Approved, at 8.1.3; *see* Exhibit A, Comparison of Turkey Welfare Standards (Full).

⁶⁰ W. Winchell, *Lighting for Poultry Housing*, THE POULTRY SITE (Jan. 1, 2005), <https://www.thepoultrysite.com/articles/lighting-for-poultry-housing>.

⁶¹ Vermette, C., et al. The Impact of Graded Levels of Day Length on Turkey Health and Behavior to 18 Weeks of Age, *Poultry Science* 95.6 (2016): 1223–1237.

exposure to near-constant light increased mortality, reduced mobility, negatively impacted ocular health, and altered behavior.⁶² Longer day lengths resulted in more time inactive and less time walking, as well as reduced expression of comfort, exploratory, and exercise behaviors.⁶³ Gait scores, which are used to assess lameness and have been associated with pain, also worsened with longer day lengths.⁶⁴

This research also shows that providing birds with longer dark periods can have numerous welfare advantages. Mortality and morbidity, both of which are strong indicators of bird welfare, were reduced when birds were provided a period of darkness, as did incidence of skeletal disorders. Overall, this study suggests giving turkeys a period of darkness can result in increased exercise, improved immune function, stronger circadian rhythms, and proper sleep patterns, all of which can contribute to overall improved bird health. Providing a period of darkness can also slow growth earlier in life, which allows the birds' skeletal and metabolic systems to develop prior to having to support heavier weights later in the growing period.⁶⁵

As opposed to NTF guidelines that fail to require daily dark periods and allow for the use of continuous lighting programs, all animal welfare certification programs require a minimum of 6 hours of darkness per 24-hour period.⁶⁶ Additionally, each program requires a minimum light

⁶² Schwean-Lardner, K., et al. Basing Turkey Lighting Programs on Broiler Research: A Good Idea? A Comparison of 18 Daylength Effects on Broiler and Turkey Welfare, *Animals* 6.5 (2016): 27.

⁶³ *Id.*

⁶⁴ Vermette, et al. *supra* note 61.

⁶⁵ Schwean-Lardner et al., *supra* note 62.

⁶⁶ American Humane Certified, at M11; Certified Animal Welfare Approved, at 8.0.13; Certified Humane, at E18; Global Animal Partnership, at 4.5.1; See Exhibit A, Comparison of Turkey Welfare Standards (Full).

intensity of 10 lux (1 foot-candle), compared to NTF guidelines which fail to set a standard for light intensity and instead vaguely require that “adequate lighting” be available.⁶⁷

iii. Barren environment

The physical environment provided to turkeys in conventional indoor operations, which consists merely of feeders, waterers and litter, does not adequately promote the health and welfare of the animals, as it does not provide suitable features or enrichments that allow turkeys to perform their normal behavioral repertoire.⁶⁸ Lack of environmental enrichments has been linked to injurious pecking of other birds and cannibalism. Injuries birds inflict on each other contribute to high culling and mortality rates among adult turkeys.⁶⁹ Researchers believe increased injurious pecking is in part influenced by the lack of suitable foraging substrate in turkey housing that results in the birds re-directing this behavior towards each other.⁷⁰ The negative impacts of barren environments are further exacerbated by other environmental conditions common within the conventional turkey industry including high stocking densities and inadequate lighting, both noted above.

One particular study that assessed the impacts of providing young, fast-growing turkeys with environmental enrichments found that doing so resulted in less injurious pecking, better feather

⁶⁷ American Humane Certified, at M14; Certified Animal Welfare Approved, at 8.0.13; Certified Humane, at E15 requires a minimum illumination of 5 lux at bird eye level, but also requires an illumination of 20 lux for half the floor area; Global Animal Partnership, at 4.5.1; *Boar's Head Turkey USDA Label Approval File*, *supra* note 29 at 292; See Exhibit A, Comparison of Turkey Welfare Standards (Full).

⁶⁸ Dalton, H. A., Wood, B. J. and Torrey, S. Injurious Pecking in Domestic Turkeys: Development, Causes, and Potential Solutions, *World's Poultry Science Journal* 69.4 (2013): 865–876.

⁶⁹ *Id.*

⁷⁰ *Id.*; Martrenchar, A., et al. Influence of Environmental Enrichment on Injurious Pecking and Perching Behaviour in Young Turkeys, *British Poultry Science* 42.2 (2001): 161–170.

condition, and a decrease in wing, tail, and head injuries among turkeys.⁷¹ Another study also found that environmental enrichment improved welfare by significantly reducing injuries from wing-, tail-, and head-pecking, as well as reducing the number of birds that died or were culled as a result of pecking. This study also found that birds provided with enrichments took longer to sit back down after a period of being forced to stand in order to assess discomfort and leg health. This finding potentially indicates access to enrichments can help improve musculo-skeletal function.⁷²

Unfortunately, NTF's standards do not address lack of environmental stimuli and fail to require any sort of environmental enrichments. In contrast, both Certified Humane and Global Animal Partnership (Step 2) require that environmental enrichment be provided to encourage physical activity and stimulate exploratory behavior and foraging, and the Certified Animal Welfare Approved program requires access to dust baths as well as raised areas or perches.⁷³

iv. Rapid growth

The poultry industry has used selective breeding to increase productivity and breast meat yield, resulting in fast growth and higher weights at the expense of the birds' welfare. The connection between fast growth and poor welfare outcomes, particularly in regard to locomotor activity and leg health, has been well established for a number of decades.⁷⁴ Due to this practice, the growth of the turkey's skeleton and organs cannot keep up with the fast growth of muscle mass.

⁷¹ Martrenchar et al., *supra* note 70.

⁷² Sherwin, C. M., Lewis, P. D., and Perry, G. C. The Effects of Environmental Enrichment and Intermittent Lighting on the Behaviour and Welfare of Male Domestic Turkeys, *Applied Animal Behaviour Science* 62.4 (1999): 319–333.

⁷³ Certified Animal Welfare Approved, at 5.3.7, 5.0.9; Certified Humane, at E26; Global Animal Partnership, at 4.8.1, 4.8.2; See Exhibit A, Comparison of Turkey Welfare Standards (Full).

⁷⁴ Martrenchar, A. Animal Welfare and Intensive Production of Turkey Broilers, *World's Poultry Science Journal* 55.2 (1999): 143–152.

Rapid growth is associated with and contributes to a number of health and welfare problems, including deep muscle myopathy caused by an inadequate blood supply to the tissues, skeletal and leg disorders, footpad dermatitis and breast blisters. Rapid growth is also believed to be a factor in various metabolic diseases of turkeys, including cardiomyopathy and sudden death that results from internal hemorrhages.⁷⁵

To address the welfare concerns associated with rapid growth, Global Animal Partnership (Step 2) and Certified Animal Welfare Approved standards establish a limit on average daily weight gain, and Certified Humane requires feeding regimes to be controlled to prevent leg abnormalities and other welfare problems associated with rapid growth.⁷⁶ On the other hand, NTF standards do not limit growth rates or require practices that would limit the impacts of rapid growth such as controlled feeding.

ANALYSIS UNDER THE FTC ACT

Under the FTC Act, a representation is unlawfully deceptive if it is both “material” and “deceptive.”⁷⁷ The “humanely raised” claim by Boar’s Head satisfies both requirements.

I. Boar’s Head Representations Are Material

According to the FTC, deception is material when it is “likely to affect the consumer’s conduct or decision with regard to a product or service.”⁷⁸ “In other words, it is information that

⁷⁵ Hafez, M. and Hauck, R. *Genetic Selection in Turkeys and Broilers and Their Impact on Health Conditions*. World Poultry Science Association, 4th European Poultry Genetics Symposium, Dubrovnik, Croatia. No. 4. 2005.; Huff, G. R., et al. Stress Response Differences and Disease Susceptibility Reflected by Heterophil to Lymphocyte Ratio in Turkeys Selected for Increased Body Weight. *Poultry Science* 84.5 (2005): 709–717.

⁷⁶ Certified Animal Welfare Approved, at 2.2.7; Certified Humane, at FW3; Global Animal Partnership, at 1.2.1. See Exhibit A, Comparison of Turkey Welfare Standards (Full).

⁷⁷ *FTC Policy Statement on Deception*, *supra* note 14, at 2.

⁷⁸ *Id.*

is important to consumers.”⁷⁹ In this case, the Boar’s Head label claim “humanely raised” is likely to affect conduct by enticing consumers of turkey meat—who tend to be concerned about animal welfare (see discussion below)—to purchase Boar’s Head products over a competitor’s.

With no federal, and only limited state laws governing farm animal treatment and living conditions,⁸⁰ the vast majority of turkeys are raised in conventional, industrial agriculture systems like those described above.⁸¹ Recent calculations estimate that 99.8 percent of turkeys are raised in “concentrated animal feeding operations,” as defined by the USDA and the Environmental Protection Agency.⁸² Because animal raising conditions are not apparent in the products themselves, many consumers rely on label claims to learn about animal care and determine which products to purchase.⁸³ The industrial animal agriculture system is aware of this and eager to capitalize on it.

Numerous surveys confirm that consumers are extremely concerned about animal welfare and that it is a chief consideration in making their purchasing decisions. For instance, a survey conducted on AWI’s behalf in 2018 found that 70 percent of frequent meat, poultry, egg, or dairy

⁷⁹ *Id.* at 5.

⁸⁰ *Legal Protections for Animals on Farms*, ANIMAL WELFARE INST. (Oct. 2018) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-LegalProtections-AnimalsonFarms-110714.pdf> “No single federal law expressly governs the treatment of animals used for food while on farms in the United States.”; *id.* (explaining that though every state prohibits animal cruelty, the definition of animal cruelty varies in each state and typically exempts farm animals completely or exempts routine industry practices, or the state exempts treatment that is otherwise lawful within the state).

⁸¹ *U.S. Factory Farming Estimates*, SENTIENCE INST. (Apr. 2019) <https://www.sentienceinstitute.org/us-factory-farming-estimates>.

⁸² *Id.*

⁸³ *AWI 2018 Consumer Survey Part II*, *supra* note 38, at 1 (stating that 66% of individuals and 71% of frequent purchasers pay at least some attention to animal raising claims on labels of meat, poultry, egg, and dairy products); *Poll on Free Range and Humanely Raised Label Claims*, ANIMAL WELFARE INST. (Nov. 2015) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-FreeRangeHumanelyRaised-Poll-Dec2015.pdf> (69% of respondents stated that humane labeling was important in deciding what meat and poultry products they purchase) [hereinafter *AWI 2015 Free Range Survey*].

product purchasers are concerned about the welfare of farm animals.⁸⁴ Another survey by the American Society for the Prevention of Cruelty to Animals (ASPCA) found that 77 percent of individuals are concerned about the welfare of animals raised for food.⁸⁵

Other polling data similarly indicates that consumers are interested in animal welfare when making purchasing decisions and actively seek out humane options. The survey referenced above conducted by the American Society for the Prevention of Cruelty to Animals found that 69 percent of consumers pay attention to food labels regarding how the animals were raised, and that 75 percent want their stores to carry a greater variety of animal welfare certified meat, eggs, and dairy products.⁸⁶ A 2015 survey commissioned by AWI yielded similar results: 73 percent thought that the availability of humanely raised meat and poultry options at grocery stores was important.⁸⁷ A later AWI survey found that 63% of frequent meat, poultry, egg, or dairy product purchasers at least sometimes check the package label for information about how the animals are raised, and that 67 percent of consumers consider claims made on package labels when making this type of purchase.⁸⁸

Consumers are also willing to change their behavior based on their perception of how a company treats its animals. For example, a November 2018 survey conducted by YouGov reported that 63 percent of Americans said they would be less likely to buy meat from a company with a

⁸⁴ *AWI 2018 Consumer Survey Part I*, *supra* note 37 at 1.

⁸⁵ *Results From a Recent Survey of American Consumers*, ASPCA 1 (June 2016)
https://www.aspca.org/sites/default/files/publicmemo_aspca_labeling_fi_rev1_0629716.pdf.

⁸⁶ *Id.*

⁸⁷ *AWI 2015 Free Range Survey*, *supra* note 83.

⁸⁸ *AWI 2018 Consumer Survey Part I*, *supra* note 37 at 1.

bad reputation for animal welfare.⁸⁹ Claims such as “humanely raised” are material to this type of purchasing behavior—with many consumers being strongly motivated by such a claim. According to the 2018 Power of Meat survey,⁹⁰ 67 percent of consumers who have noticed the “humanely raised” claim are more likely to purchase a meat or poultry product with that claim over a conventional product.⁹¹ AWI is aware of at least 22 surveys confirming that consumers are interested in and make purchasing decisions of animal products based on animal welfare concerns.⁹²

It is only logical that if consumers are interested in farm animal welfare, then their understanding of a producer’s treatment of animals is material to their purchasing decisions. Boar’s Head knows this, and uses the claim “humanely raised” to capitalize on this interest, especially given the fact that many consumers are willing to pay a higher price for these kinds of products.⁹³ As such, because the claim “humanely raised” is important to consumers and likely to change a consumer’s conduct with regard to Boar’s Head turkey products, it is material.

⁸⁹ Jamie Ballard, *Women More Likely than Men to Care about Ethical Meat*, YOUNGOV (Nov. 26, 2018) <https://today.yougov.com/topics/food/articles-reports/2018/11/26/ethical-meat-price-quality-animal-rights>.

⁹⁰ An annual conference for meat industry groups and participants.

⁹¹ *Power of Meat: An In-Depth Look at Meat Through the Shoppers’ Eyes*, FMI & FOUND. FOR MEAT & POULTRY RSCH. & EDUC. 48 (Mar. 2018) http://www.meatconference.com/sites/default/files/books/Power_of_meat_2018.pdf.

⁹² *Consumer Perceptions of Farm Animal Welfare*, ANIMAL WELFARE INST., 6–9 (Sept. 2020) <https://awionline.org/sites/default/files/uploads/documents/ConsumerPerceptionsFarmWelfare.pdf>.

⁹³ *Id.* at 9–11 (citing numerous studies finding that consumers are willing to pay more for humanely raised food); *infra* pt. III. Consumer willingness to pay a premium for a product can also indicate materiality from an economic perspective. *FTC Policy Statement on Deception*, *supra* note 14, at 5 (citing *Am. Home Products*, 98 F.T.C. 136, 369 (1981), *aff’d* 695 F.2d 681 (3d Cir 1982)).

II. Boar’s Head Representations Are Likely to Mislead

Advertisers are responsible for all reasonable interpretations of their advertisements, even if consumers interpret this claim differently from one another.⁹⁴ If a “seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.”⁹⁵ Finally, if a specific consumer group is targeted or likely to be affected by an advertisement, the advertisement must be examined from the perspective of a reasonable member of the targeted group.⁹⁶

Consumers are likely to be misled by use of the claim “humanely raised” on Boar’s Head turkey product packages because consumers interpret it in a way that is unsupported by the company’s production practices. Here, because a particular group is targeted by the Boar’s Head advertisement, it should be interpreted from the perspective of a reasonable member of that group.⁹⁷ In using this label claim, Boar’s Head is targeting purchasers of meat and poultry products, who are concerned about the welfare of animals raised for their food. Many purchasers of meat and poultry products rely upon label claims to make determinations about what products to purchase and consume,⁹⁸ and reasonably interpret the Boar’s Head statement to mean exactly what it says: that the animals used for this product are “humanely raised.”

The targeted consumers, purchasers of meat and poultry products, believe that the claim “humanely raised” should be reserved for producers who exceed minimum industry animal care

⁹⁴ *FTC Policy Statement on Deception*, *supra* note 14, at 3.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *AWI 2018 Consumer Survey Part II*, *supra* note 38 (66% of individuals pay at least some attention to animal raising claims on labels of meat, poultry, egg, and dairy products).

standards. In fact, 82 percent of meat, poultry, egg, or dairy purchasers agree that food producers should not be allowed to use the claim “humanely raised” unless they exceed minimum industry animal care standards.⁹⁹ This result is one of four consumer surveys conducted on AWI’s behalf with similar findings in the past 10 years.¹⁰⁰

Boar’s Head turkey welfare standards – those of the NTF – are an industry-created and industry-verified codification of minimum animal care standards, and are not designed to demonstrate that a producer has exceeded conventional practices.¹⁰¹ As such, the Boar’s Head “humanely raised” claim creates a false impression that the company’s practices are more humane than conventional animal raising practices and is misleading.

- A. *The National Advertising Division of BBB National Programs Has a Record of Supporting Removal of Humane Claims Based on Industry Standards Because They Mislead Consumers.*

The National Advertising Division (NAD) of BBB National Programs, Inc., has found that claims such as “humanely raised” on conventional meat products are not consistent with consumer expectations. In some cases, the NAD has even found that producers cannot substantiate these claims and recommended removal from product packages. The FTC has a history of following up on cases referred by the NAD, and should strongly consider the NAD’s expertise in consumer

⁹⁹ *AWI 2018 Consumer Survey Part II, supra* note 38, at 2

¹⁰⁰ *AWI 2013 Consumer Survey, supra* note 39 (88% of frequent meat or poultry product purchasers agree); *U.S. Poll on the Welfare of Chickens Raised for Meat*, ANIMAL WELFARE INST. 2 (Apr. 2010) <https://awionline.org/sites/default/files/uploads/legacy-uploads/documents/FA-HumanelyRaisedCagedFreeSurvey-081110-1281725036-document-23248.pdf> (77% of frequent chicken purchasers agree) *Survey of Consumer Attitudes About Chicken Welfare*, ANIMAL WELFARE INST. (Oct. 2020) <https://awionline.org/sites/default/files/uploads/documents/SurveyConsumerAttitudesChickenWelfare.pdf> (citing that 84% of frequent chicken purchasers agree).

¹⁰¹ *See supra* Parts II.B, II.C.

perceptions of advertising to find Boar’s Head’s use of the claim “humanely raised” on a conventional turkey product misleading.

In September 2019, the NAD recommended that Hatfield Quality Meats¹⁰² remove the claim “Ethically Raised by family farmers committed to a higher standard of care governed by third party animal welfare audits” from the label of its conventional pork products.¹⁰³ The claim and the producer’s substantiation were comparable to the Boar’s Head “humanely raised” claim. In that case, AWI argued that the claim was material to consumers of pork products, and misled them into believing that the pigs raised under Hatfield’s care receive treatment exceeding industry standards. A consumer research survey confirmed these findings and determined that, of pork consumers who took home an animal welfare message from the claim, a vast majority were misled into thinking that Hatfield raised its animals to a standard of care higher than conventional industry practices.¹⁰⁴ Like the NTF industry audit used by Boar’s Head, Hatfield’s pork products are raised in accordance with the Pork Checkoff’s Common Swine Industry Audit (CSIA), which verifies compliance with industry standards.¹⁰⁵ As such, AWI argued that even the more limited claim, “ethically raised” was inappropriate because it was unsubstantiated and inconsistent with consumer expectations. The NAD found that because Hatfield’s production practices did not

¹⁰² A division of Clemens Food Group.

¹⁰³ Exhibit B, NAD Decision, Clemens Food Group, LLC/Hatfield Pork Products, PR 6305 (2019).

¹⁰⁴ Hal Poret, *Expert Report of Hal Poret Regarding Survey to Measure Consumer Perception of Claims on Hatfield Pork Products Packaging* (Jan. 2019) (available upon request) (finding that of the respondents who noticed a message about treatment or living conditions of animals, 70.6% received the impression that the animal treatment exceeded industry standards).

¹⁰⁵ *About CSIA, PORK CHECKOFF*, <https://www.pork.org/production/tools/common-swine-industry-audit/>.

exceed industry standards, the company could not substantiate the claim as it is interpreted by consumers, and recommended removal.¹⁰⁶

Consumers are likely to be misled in a similar way by use of the claim “humanely raised” on Boar’s Head turkey products. As discussed above, surveys indicate that consumers believe the claim “humanely raised” means that the standard of care for those animals exceeds that of typical conventional animal agriculture practices. Boar’s Head cannot substantiate this interpretation of its label because its use of the NTF industry audit demonstrates its suppliers merely meet minimum industry standards (as was the case with Hatfield’s “ethically raised” claim that was merely based on industry standards). Because Boar’s Head cannot substantiate this claim, it is likely to mislead the public.

The NAD has similarly weighed in on humane claims found on conventional chicken product packages. In 2010, AWI brought an NAD challenge against Perdue Foods, Inc., for its use of the claim “humanely raised” on its company-branded natural chicken products.¹⁰⁷ Perdue used standards of the National Chicken Council (NCC) as a basis for its “humanely raised” claim. In that challenge, AWI similarly argued that the claim, based on nothing more than adherence to NCC industry standards, misled consumers into thinking that the standard of care for those animals exceeded that of conventional animal agriculture.

In negotiation, Perdue agreed to remove the claim from all Perdue-branded chicken prior to the conclusion of the case, leaving the “humanely raised” claim on just the “Harvestland” brand of Perdue’s chicken offerings. Unfortunately, due to circumstances out of AWI’s control, another

¹⁰⁶ Exhibit B at 15–16.

¹⁰⁷ Exhibit C, NAD Decision, Perdue Farms Inc.

advocacy organization filed a lawsuit against Perdue relating to the “humanely raised” claim during the pendency of AWI’s NAD challenge. This forced NAD to close the action. However, in closing AWI’s challenge, the NAD found “consumer perception and understanding of ‘humane’ treatment or ‘raised humanely’ is directly relevant to the issue of whether such claims are substantiated or misleading to consumers.”¹⁰⁸ Perdue eventually settled the suit and removed the “humanely raised” claim from its “Harvestland” chicken packaging.

In 2011, AWI brought an NAD challenge against Allen Foods for its use of the claim “humanely raised” on its chicken products. AWI once again argued that the producer relied on NCC industry standards for the claim “humanely raised” and that the claim misled consumers into thinking that the standard of care for those animals exceeded that of conventional animal agriculture. However, shortly after the challenge was filed, Allen Foods entered bankruptcy, and the NAD closed the case in 2012. In closing the case, the NAD remarked that removal of the claim was “necessary and appropriate.”¹⁰⁹ Eventually, the company was purchased by Harim Foods and renamed Allen Harim Foods. AWI continued to monitor the product packaging and contacted the NAD in 2013 because the claim remained on the Allen Harim chicken products. AWI requested that the NAD refer the case to the FTC, which it did. In 2014, the FTC notified the NAD that Allen Harim Foods had agreed to participate in the NAD’s inquiry. However, instead of participating in the NAD process, Allen Harim elected to remove the claim and become third-party certified for animal welfare.

¹⁰⁸ Exhibit C at 7.

¹⁰⁹ Exhibit D, NAD Decision, Allen’s Chicken, PR 5447.

While the FTC is not bound by the decisions of the NAD, a finding by the NAD that an advertisement is inconsistent with consumer expectations and therefore misleading should at least be considered, especially given the FTC's stated appreciation for the NAD and industry self-regulation.¹¹⁰ Based on the NAD's determinations in similar cases, the FTC should enjoin Boar's Head from using the claim "humanely raised" on its turkey products.

B. *The Substantiation Offered by Boar's Head for the Humanely Raised Claim on its Turkey Products is Inadequate.*

As previously noted, Boar's Head uses the industry NTF audit to demonstrate its supplier(s) compliance with animal care guidelines. At least six of the label applications contained in the file include the following statement: "Turkeys are humanely raised as certified by independent third-party audits attached."¹¹¹ However, the 641-page file contains no evidence of independent third-party animal welfare certification. The file includes a total of seven audits related to the raising of animals, dated from March 2011 to September 2017.¹¹² Five of the seven audits in the file appear to be internal company audits utilizing NTF guidelines¹¹³ (typically referred to as "first-party" audits). The standard NTF audit forms contained in the file include this statement: "The following checklist is provided to assist turkey companies in complying with the

¹¹⁰ *Remarks of Andrew Smith, Director, Bureau of Consumer Protection, FTC*, FED. TRADE COMM'N, 7 (Sept. 24, 2018) https://www.ftc.gov/system/files/documents/public_statements/1413760/andrew_smith-nad_speech.pdf ("We appreciate the NAD's referrals and are grateful for the industry's role in offering a voluntary forum to address national advertising practices, and we are disappointed when companies fail to participate. Companies should take heed that Commission staff is committed to reviewing NAD referrals and recommending enforcement actions where appropriate."); *See also FTC Stats on NAD Referrals*, BBB Nat'l Programs (Aug. 2, 2019) <https://bbbprograms.org/media-center/insights-blog/insights/2019/08/02/ftc-stats-on-nad-referrals>.

¹¹¹ *See id.* at 12 for example.

¹¹² *Boar's Head Turkey USDA Label Approval File*, *supra* note 29.

¹¹³ *Id.* at 31–36, 209–15, 228–34, 238–40, 288–95. Some of these audits covered both production and slaughter, while others covered only one or the other.

Animal Welfare Guidelines recommended by the National Turkey Federation and voluntarily adopted by this company.”¹¹⁴

The file does contain two audits of NTF guidelines conducted by an independent auditing company.¹¹⁵ The file also contains one “Certificate of Conformity” with industry slaughter standards; however, there is no indication that the raising of turkeys was audited in this case.¹¹⁶ In sum, the Boar’s Head turkey file contains only two independent audits of the raising of turkeys to substantiate the claim “humanely raised” for label applications submitted by the company between 2010 and 2019.

As with the Boar’s Head chicken label application file, all the included animal care audits in the turkey file were merely “pass/fail.” However, unlike the chicken label file, nearly all the turkey audit scores in the turkey file were redacted by the USDA, making it impossible to discern areas of insufficiency. Moreover, most if not all the turkey audits did not cover the hatchery aspect of production.¹¹⁷

III. Lack of Market Restraint on Deception of Production Methods

Where a product or service is easily evaluated by consumers, the likelihood of deception is low because sellers want to encourage repeat business.¹¹⁸ This is not the case with poultry products. With respect to the claim “humanely raised,” the methods of turkey production are at issue, not the turkey product itself. As described above, while consumers are extremely interested

¹¹⁴ *See id.* at 31 for example.

¹¹⁵ *Id.* at 38–48, 614–25.

¹¹⁶ *Id.* at 599.

¹¹⁷ *See id.* at 32 for example. It is impossible to determine if hatcheries were included in any of the included audits due to the redaction of audit scores by the USDA.

¹¹⁸ *FTC Policy Statement on Deception*, *supra* note 14, at 5.

in the welfare of animals raised for their food, it is difficult for them to ascertain how animals are raised from just looking at a package of meat. Producers also work especially hard to hide how animals are raised,¹¹⁹ and the information that *is* provided to consumers about industry production practices is often oversimplified and misleading.¹²⁰ Thus, to ensure repeat customers, turkey sellers have the incentive to be *more* deceptive about production practices,¹²¹ because consumers cannot tell whether they are being deceived about a turkey's treatment upon receiving and consuming the product. In fact, producers are particularly motivated to exploit consumers' perceptions of animal welfare because consumers are willing to pay more for "humanely raised" food.¹²² Under these

¹¹⁹ Industrial agriculture continues to introduce anti-whistleblower legislation (often referred to as "ag-gag" bills) to prevent information about animal production practices from becoming public knowledge. See *Anti-Whistleblower ("Ag-Gag") Legislation*, ANIMAL WELFARE INST. <https://awionline.org/content/anti-whistleblower-legislation>.

¹²⁰ *Label Confusion 2.0*, *supra* note 5, at 1 ("Defining claims on the package may appear to promote transparency, but can be problematic for two reasons: Producers often define claims in a way that is not relevant to animal welfare, and the claims are approved [by the USDA] without sufficient verification that producers actually meet these definitions"); *id.* at 4 ("When consumers visit grocery stores to purchase meat and poultry products and see "humanely raised" or "sustainably farmed" labels, they cannot know the individual producer's—or the USDA's—interpretation of the claim. If the product being purchased is chicken, did the birds receive an average of 6.0 square feet of space, or were they restricted to only 0.6 square feet? Did they have eight hours of darkness for normal sleep every day, or was the dark period limited to 4 one-hour intervals per day? Was the indoor ammonia gas limit 10 ppm, or was it much higher? The USDA is currently approving the claim "humanely raised" for products from animals raised under conditions that vary widely. This inconsistency leads to consumer confusion and a large disparity between what consumers believe they are purchasing and the reality").

¹²¹ See, e.g., Muris, Chairman, FTC, *Aspen Summit: Cyberspace and the American Dream, Remarks at the Progress & Freedom Found.*, 2003 WL 21979851, at *3 (Aug. 19, 2003) (stating where a consumer cannot "use their own experiences to assess whether the seller's quality claims are true . . . the market may not identify and discipline a deceptive seller because the product's qualities are so difficult to measure. Moreover, a product market with special attributes—consumers cannot determine quality before purchase, higher quality products cost more to produce than lower quality products, and firms cannot credibly guarantee quality—may become a 'lemons market' in which only low-quality products are sold"). These types of goods "are subject to more intense scrutiny by the FTC." Azcuenaga, Commissioner, FTC, *Advertising Regulation and the Free Market, Remarks at the Int'l Cong. of Adver. & Free Market*, 1995 WL 307748, at *8 (May 11, 1995).

¹²² *Consumer Perceptions of Farm Animal Welfare*, *supra* note 92, at 9–11 (citing numerous studies finding that consumers are willing to pay more for humanely raised food, e.g. Kettle & Fire, *Certified Humane—How Food is Raised & Do People Care [Survey]* (2016) <https://www.kettleandfire.com/pages/how-your-food-is-raised> (Two-thirds of respondents to a survey said they would be willing to spend anywhere from 5% to 20% more for humanely raised food); *Humane Heartland Farm Animal Welfare Survey*, AMERICAN HUMANE ASS'N (Aug. 2013) <https://www.americanhumane.org/publication/humane-heartland-farm-animal-welfare-survey/> (when asked, "What

conditions, the market has almost nothing restraining turkey producers from deceiving consumers about how their animals are raised. Without intervention, Boar's Head is likely to continue deceiving consumers with its misleading "humanely raised" label claim on its turkey products.

RELIEF REQUESTED

The advertising described constitutes unlawful conduct, unfair methods of competition, and unfair and deceptive practices under the FTC Act, 15 U.S.C. § 41–58. AWI requests that the FTC investigate the practices described above and enjoin Boar's Head from using the claim "humanely raised" or other similarly misleading animal welfare claims on its turkey products.

Submitted February 23, 2021.



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is the most you are willing to pay for high quality, humanely raised products?" 34% of respondents said 10% to 20% more, while 28% of respondents said they would pay 20% to 30% more).

LIST OF EXHIBITS

- Exhibit A:** *Comparison of Turkey Welfare Standards (Full)*
Exhibit B: *NAD Decision, Clemens Food Group, LLC/Hatfield Pork Products, PR 6305*
Exhibit C: *NAD Decision, Perdue Farms Inc.*
Exhibit D: *NAD Decision, Allen's Chicken, PR 5447*

**EXHIBITS FOR THE ANIMAL WELFARE INSTITUTE'S
FEDERAL TRADE COMMISSION CHALLENGE
AGAINST BOAR'S HEAD SIMPLICITY ALL NATURAL
TURKEY PRODUCTS**

EXHIBIT A.

**COMPARISON OF TURKEY
WELFARE STANDARDS (FULL)**

EXHIBIT A. COMPARISON OF TURKEY WELFARE STANDARDS (FULL)

STANDARD	NATIONAL TURKEY FEDERATION ¹	AMERICAN HUMANE CERTIFIED ²	CERTIFIED HUMANE ³	GAP STEP 2 ⁴	CERTIFIED ANIMAL WELFARE APPROVED ⁵
1.0 Health Care					
Healthcare Oversight/Bird Health Plan	Veterinarian should be available and a disease prevention plan must be followed. Animal Health Plan not required.	An Animal Health Plan (AHP) must be developed in consultation with the flock veterinarian (M9).	An Animal Health Plan (AHP) must be drawn up and regularly updated in consultation with a veterinarian (H2).	Veterinarian-prescribed treatments must be administered according to veterinarian guidance. (1.4.3) Birds must be given veterinary attention, if required (2.13.2). Operation must have an Animal Health Plan but does not need to be developed in consultation with a vet (9.2.1).	Each farmer in the A/WA program must establish contact with a qualified expert such as a vet. The expert must be familiar with the birds on the farm; health requirements of the state, and methods to maximize bird health and welfare (3.0.2). A health plan emphasizing prevention of illness or injury must be prepared in consultation with the farm's qualified expert advisor (3.0.4)
Use of Growth Promoters and/or Non-Therapeutic Antibiotics	No standards or recommendations.	Birds must not be implanted or injected with any growth hormone / growth promoter or fed antibiotics or beta-agonists for the purpose of boosting growth or feed efficiency; in-feed antibiotics or anti-parasitic agents are not to be used unless for therapeutic reasons as prescribed by an attending veterinarian (M9).	The use of growth promoters is prohibited; antibiotics may only be given for therapeutic reasons (disease treatment) and only under direction of a veterinarian (FW5).	Turkey's given antibiotics, ionophores, beta agonists, sulfa drugs and/or arsenic-based drugs are prohibited from being marketed as G.A.P. Certified (1.3.1)	Growth hormones or the use of any other substances promoting weight gain are prohibited (3.1.3). Sub-therapeutic or non-therapeutic use of antibiotics, or any other medicines, to control or prevent disease or promote growth, is prohibited (3.1.2).

Toe Trimming/ Other Physical Mutilations	Toenail conditioning and preventative beak trimming, when used to minimize injury to birds and minimize stress, must be performed by well-trained personnel using properly designed and maintained equipment.	Toe-clipping may be performed within the first 24 hours of life using microwave trimming (M40); snood-trimming, caponization and dubbing are prohibited (M41); beak-trimming/tipping may be performed within the first 24 hours using infrared equipment or microwave technology (M42).	All surgical procedures, such as desmoothing, toe clipping, and pinning, are prohibited; beak trimming is allowed under the following conditions: only the tip of the upper beak may be removed; the procedure is performed on birds not older than 10 days of age; and only trained, competent personnel perform the procedure (H10).	Beak trimming / beak conditioning is only permitted using infra-red treatment at the hatchery (2.5.2). All other physical alterations, including toenail conditioning, are prohibited (2.5.1).	All mutilations or physical alterations of poultry are prohibited including: de-beaking (beak clipping, tipping and trimming); de-clawing; de-spurring; de-toeing and toe trimming; hole punching; pinning; notching; wattle trimming; comb trimming; and castration (caponizing) (5.4.1).
Limiting Growth	No standards or recommendations.	No standards or recommendations.	Nutrient content, feed quality and feeding regimes must be carefully controlled to minimize leg abnormalities and other welfare problems associated with rapid rate of growth (FW3).	The maximum average growth rate must not exceed 0.350 lbs (159 g) per day for toms and 0.213 lbs (97 g) per day for hens (1.2.1).	When averaged over their entire lives, the rate of growth of meat turkeys must not exceed 0.15 lbs (68.0 g) for females, and 0.19 lbs (86.2 g) for males, per day (2.2.7).
Mortality rate	Flocks must be inspected daily; mortality should be properly recorded and removed daily. No permissible mortality rate specified.	Flocks and facilities must be inspected at least twice daily and number of mortalities and culls must be recorded (M30); if mortality within a house exceeds 0.5% in a 24-hour period, a veterinary investigation must be made to determine the cause and remedy the problem (M11).	Turkeys, and the facilities on which they depend, must be inspected a minimum of twice daily (M9); if mortality within a house is in excess of 0.5% within 24 hours after birds are 7 days old, a veterinarian must perform an investigation (H11).	Flocks must be observed and monitored at least twice daily (2.1.1); annual flock mortality for turkeys up to 9 days old must not exceed a total of 3% (2.10.2); annual flock mortality for turkeys 10 days and older must not exceed 12% (2.10.3); If flock mortality exceeds the percentages above, a written intervention plan	All birds must be thoroughly inspected at least twice per 24 hours (5.0.1); if negative welfare impacts relating to growth rate, such as lameness, other skeletal health issues and/or mortality are seen or reported, breed and/or management changes must be made to improve welfare (2.2.8). No permissible mortality rate specified.

					must be developed (2.10.7)	
2.0 Food and Water						
Unrestricted Access to Water	Birds should have unrestricted access to drinkers as specified by company program.	Poultis and turkeys must have continuous access to an adequate supply of clean, fresh drinking water at all times, except immediately prior to transport (FW4).	Turkeys must have access to an adequate supply of clean, fresh drinking water at all times, except when directed by a veterinarian and when restricting the feed intake of male breeders (FW9).	All turkeys must have continuous access to drinking water (3.1.1); birds must have access to water until loading begins if water lines do not need to be elevated prior to catching or until 1 hour before loading if water lines must be elevated prior to catching (6.2.1).	Birds must have free access to clean, fresh water at all times (6.0.1); water must be distributed in a way that eliminates competition (6.0.4); all birds must have continuous access to water until the point of loading (13.0.12).	
Unrestricted, Daily Access to Food	Birds should have unrestricted access to feeders as specified by company program.	Birds must have unrestricted, daily access to food, except prior to transport or as required by the flock veterinarian (FW1).	Turkeys must have continuous access to nutritious feed each day, except when feed restriction is directed by a vet, when restricting the feed intake of male breeders, and prior to processing; withdrawal of feed to induce a molt in breeding birds is not permitted (FW2).	All turkeys must have ad-libitum access to feed during daylight hours (3.2.1); feeders must be designed and distributed to allow turkeys to eat without restriction (3.2.2).	Poultry must have constant access to food during daylight hours (6.3.1)	
3.0 Housing						
Access to Bedding/Litter	Litter moisture must not be excessive; litter should be loosely compacted when squeezed in the hand; birds shouldn't be excessively wet or dirty.	Birds must have access to well-maintained litter at all times; litter must be of a suitable, absorbent material, a sufficient depth (no less than 2 inches) for dilution of feces, reasonably clean, loose, and of good quality (E18).	The floor of all houses must be completely covered in litter; litter must be of a suitable material and particle size of good quality, managed to maintain optimal moisture conditions, of a sufficient depth for dilution of feces (at least 2 inches), and skimmed and topped up as necessary with fresh litter;	Floors of all houses must be completely covered with non-toxic, fibrous, and friable litter (4.3.1); litter must be of quality and quantity to provide a comfortable environment and allow for dust-bathing behavior (4.3.2).	Litter must be provided from placement of young birds (5.3.3); when birds are excluded from ranging/foraging areas during daylight hours, bedding must be available to birds at all times (8.4.2); bedding must be clean, dry, mold-free and replenished as needed and must not	

			housed turkeys must have access to litter at all times (E9).		cause discomfort or harm to the birds (8.4.4/.5).
Environmental Enrichment	No standards or recommendations.	The producer is strongly encouraged to provide appropriate environmental enrichments to the turkeys after 10 to 12 weeks of age, such as hanging 'toys', short perches, alfalfa, or other vegetation (E20).	Environmental enrichment should be used to stimulate exploratory, foraging and locomotive behavior and minimize injurious pecking. Managers must be able to demonstrate that they are using safe and effective methods of environmental enrichment throughout the rearing period (E26). (Also provides examples of possible enrichments to use)	Indoor enrichments must be provided by the time the poults are 21/10 days old and must be maintained throughout the life of the turkeys (4.8.1/2). Houses smaller than 1,000 ft ² must have at least 2 enrichments (4.8.4); houses larger than 1,000 ft ² must have 1 enrichment for every 1,000 ft ² plus 1 additional enrichment (4.8.5). (Also provides examples of acceptable enrichments)	It is recommended that meat turkeys have access to raised areas from 10 days of age, but they must have access to raised areas from four weeks of age; these may be perches or may be provided by straw bales or other items that allow the birds to get up off the floor (5.3.7); at least 1 inch per bird aerial perch space or 1 sq. in. per bird on a raised platform is recommended (5.3.7.2); all turkeys must have access to dust baths (5.0.9).
Space Allowances	Birds free to roam throughout the growing area; stocking density should be adequate for maximum performance and health according to company program; stocking density should provide 15lbs/ft ²	Turkeys must have sufficient freedom of movement to be able to stand, turn around, and flap their wings without difficulty; when the auditor walks through the house, the birds must be able to freely move away to a distance of at least five feet (E17).	All turkeys must have sufficient movement to be able to without difficulty, to stand normally, turn around and stretch their wings; maximum stocking density must not exceed 7.5 lbs/ft ² (E18).	Turkeys must have enough space to express natural behavior, including standing, turning around, and preening, without touching another turkey (4.6.5); stocking density must not exceed 7.5 lb/ft ² (4.6.2).	Minimum indoor space: 5 sq ft per bird; minimum additional foraging area when birds are excluded from a ranging and foraging area: 11 sq ft per bird; the minimum pen size on ranging and foraging areas for turkeys must be at least 18 ft by 10 ft (8.1.3/7.3.13).
Light Intensity	Adequate lighting should be available; company must have a lighting program in place	At least 8 hours of continuous, evenly distributed natural light must be provided within each 24-hour period; for houses without ample, evenly distributed natural light, the lighting system must provide an average minimum illumination of 10 lux (1	Lighting programs must be designed to maintain eye health and minimize leg problems without compromising other aspects of turkey welfare; a minimum of 8 hours of light, from either artificial light or access to daylight must be provided per 24-hour period (E14); the	Light intensity in housing during daylight hours, either from artificial or natural light, must be at least 20 lux (2 foot candles) (4.5.1).	Poultry housing must be kept at an average of at least 20 lux in daylight hours (8.0.13).

		foot-candle) throughout the house (M14).	lighting system must be maintained to give a minimum illumination of 0.5 foot candles (5 lux) at bird eye level; at least half the floor area must be provided with light of 2.0 foot candles (20 lux) (E15).		Birds must not be subjected to dim and/or continuous lighting or kept in permanent darkness (8.0.8); use of artificial light must not extend the maximum day-length beyond 16 hours (8.0.11).
Daily Dark Period	No standards or recommendations.	A minimum of 6 hours of darkness or the natural period of darkness must be provided (M14).	A minimum of 8 hours of continuous darkness (except when the natural period of darkness is shorter) must be provided in each period of 24 hours (E14).	Turkeys must be provided with a minimum of 6 hours of continuous darkness per 24-hour period from placement (4.5.3).	
Air Quality	Ventilation systems must provide quality air and remove noxious gases; ammonia levels must be under 25 ppm.	Ventilation equipment must be checked daily and maintained for proper operation; ventilation rates must be monitored daily and adjustments made in order to maintain minimum ventilation requirements and to maintain air quality Parameters (M34); Ammonia levels must not exceed 25 ppm, and ideally should be maintained at less than 10 ppm (M38).	Ventilation systems, whether natural or mechanical, must be designed to maintain air quality parameters under all foreseeable climatic conditions (E20). Levels of ammonia should be less than 10 ppm and must not exceed 25 ppm except during brief periods of severe inclement weather when ventilation is affected; standards also include recommendations for hydrogen sulfide, CO ₂ , carbon monoxide and dust (E21).	No specific standards for ventilation systems: air quality must be assessed at least once each day, using calibrated meters or testing strips, or sensory evaluation (4.4.1); if air quality levels exceed 10 mg/m ³ for dust and 15 ppm for ammonia, a written intervention plan must be designed and implemented immediately (4.4.2).	Shelters and housing must be well ventilated and allow fresh air to enter (8.0.5); the house or shelter must be managed to eliminate ammonia, dampness and mold (8.0.22). The human nose can detect ammonia at levels of 5ppm upwards. If the farmer can smell ammonia action must be taken to eliminate the source)
4.0 Handling					
Worker Training	Personnel involved in handling live birds should receive sufficient training.	Prior to being given responsibility for the welfare of the birds, all stockpersons/personnel must be properly trained	Prior to being given responsibility for the welfare of turkeys, caretakers must receive	Each operation must provide training to all turkey care-givers and/or managers that is provided prior to the	Hired catching teams must have completed training on humane methods of handling (12.1.7).

		and receive yearly updates (M26/M27).	proper training with regular updates (M7).	individual's handling of any turkeys on the operation and is on-going as necessary (9.5.1).	
Catching must occur in low or dim lighting to minimize stress	Not required.	Catching must take place in low lighting to minimize birds' fear reactions (T4).	Catching must take place in low lighting to minimize fear reactions of the birds (T10).	For turkeys that are caught and carried individually to transport containers, lights must be dimmed throughout the loading process to keep birds calm (lights do not need to be dimmed for turkeys that are herded and loaded mechanically) (6.3.3).	Planned catching (for example to take birds to slaughter) must be carried out in dusk or darkness (12.1.2).

¹ National Turkey Federation Animal Care Audit Checklist, September 2017.

² American Humane Certified, Animal Welfare Standards for Turkeys, March 2020.

³ Humane Farm Animal Care, Animal Care Standards for Turkeys, Aug 2014.

⁴ Global Animal Partnership, 5-Step Animal Welfare Standards for Turkeys v2.1, May 2020.

⁵ Certified Animal Welfare Approved by A Greener World, Standards for Turkeys, 2020.

(2/21)

Based on NTF's Animal Care Audit checklist performed on 9/12/17 (p. 288 of file)

EXHIBIT B.

**NAD DECISION, CLEMENS FOOD GROUP
LLC/HATFIELD PORK PRODUCTS PR 6305**

**Clemens Food Group, LLC
Hatfield Pork Products**

Challenger: *Animal Welfare Institute*
Product Type: *Food/Beverage*
Issues: *Express Claims*
Disposition: *Modified/Discontinued*

- **In an NAD proceeding, the advertiser is obligated to support all reasonable interpretations of its claims, not just the message or messages it intended to convey.**

Basis of Inquiry: The Animal Welfare Institute (“AWI” or “the challenger”), challenged the truthfulness and accuracy of claims made by Clemens Food Group, LLC / Hatfield Quality Meats (“Clemens,” “Hatfield” or “the advertiser”) in product packaging for its Hatfield pork products. The following claim served as the basis for this inquiry:

Express claim:

“Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits”

Implied claim:

The pork produced for Hatfield pork products comes from pigs raised in a more ethical manner than conventional production.

Challenger’s Position:

AWI challenged Hatfield’s claim, “ethically raised by family farmers committed to a higher standard of care governed by third party animal welfare audits,” found on its pork product labels, arguing that this label claim is deceptive and should be discontinued. AWI also argued that Hatfield should discontinue its implied claim that the pork produced for Hatfield pork products comes from pigs raised in a more ethical manner than conventional production.

I. AWI’s consumer perception survey

AWI commissioned a consumer survey of 400 total respondents, 200 of whom were control respondents while 200 were test group respondents. According to the challenger, there were three main findings. First, many consumers noted the claim, demonstrating its impact. Second, a high percentage of consumers were misled – they took the claim to mean that the animals’ treatment and living conditions on the farms exceeded industry standards. Third, because of the misleading claim, consumers are more likely to choose Hatfield products over those of competitors.

A. Consumers take note of and rely upon Hatfield’s label claim.

The challenger argued that the survey showed a strong indication that consumers notice and rely upon this claim in making their purchasing decisions, because 48.5% of respondents mentioned the “ethically raised” component of the claim, the “higher standards of care” component, or gave another answer referring to the ethical or humane treatment or care of animals.

AWI maintained that the claim is broad, unsubstantiated, and without qualification. Hatfield's possible qualification of this claim, that the pigs raised for Hatfield's products are raised "by family farmers committed to a higher standard of care" which are "governed by third party animal welfare audits," is misleading because Hatfield does define the higher standard of care on its label. Third-party certification is not a substitute for the obligation to ensure all reasonable takeaways of a claim are substantiated. According to AWI, the Common Swine Industry Audit (CSIA) touted does not measure ethical animal treatment and is not a true third-party audit in the way that consumers are likely to take away from the claim.

B. Hatfield's label claim implies that the treatment or living conditions of its animals exceed industry standards.

In response to the survey, 38.5 percent of respondents believed the ethically raised claim means exceeds industry standards. Of the 126 respondents who noticed a message about the treatment or living conditions of animals, 70.6 percent received the impression that the animal treatment exceeds industry standards. AWI also pointed to several studies showing the immense influence that animal welfare claims wield over purchasing decisions.¹

C. Hatfield's label claim causes consumers to choose its product over competitors' products.

Of consumers surveyed, a net 36.5 percent indicated that the label communicated to them that a reason for choosing Hatfield over other brands was that conditions were better for the animals. AWI argued this indicates that a substantial percentage of consumers understood the "ethically raised" portion of the claim to indicate an advantage over other products.

II. Hatfield's criticisms of AWI's survey

AWI addressed several of Hatfield's critiques of its consumer perception survey. First, Hatfield claimed the survey did not evaluate the actual label in the marketplace because the back panel and the website address were not provided to respondents. AWI responded that the back of the package tested by AWI did not include any information relevant to animal raising. AWI also noted that the only asterisk on the front of the package is related to a "raised without growth promotants" claim, which is accompanied by a "ractopamine free diet" explanation on the front label. AWI argued that although the back of the label refers people to the Hatfield website for recipes, cooking instructions, and serving suggestions, the information on a website cannot be used to qualify or clarify messages communicated on a package.

¹ Citing a 2017 University of Illinois study showed that "humanely raised" ranked among the top three meat-production attributes for consumers. A survey conducted by the American Society for the Prevention of Cruelty to Animals (ASPCA) found that consumers had an increased willingness to pay for products raised under a trustworthy welfare certification (32% premium for eggs, and 48% premium for chicken). A recent survey conducted on behalf of AWI in October 2018 confirmed that consumers are very much aware of and concerned about the implications associated with claims similar to Hatfield's.

Second, the challenger argued against Hatfield’s contention that the open-ended data do not support the study’s conclusion because answers that mention “ethically raised” are merely repeating language on the package, not showing what respondents think the phrase means. AWI contended that this argument is inaccurate. AWI’s conclusions from the survey were based on combining open-ended answers with clarifying closed-ended ones.

Third, Hatfield criticized the closed-ended question as leading because one of the options was the choice that supports AWI’s position (exceeds industry standards). AWI dismissed this argument because the closed-ended question also included a choice that does not support AWI’s position (meets industry standards), as well as “neither” and “don’t know” options.

AWI refuted Hatfield’s criticisms that the surveyed label is being “phased out” by demonstrating that it is still present in the marketplace. AWI also responded to Hatfield’s critique of AWI for including the “Hatfield” brand on the control and test labels, by arguing that revealing the brand is not unusual for this type of consumer perception survey.

III. “Ethically raised” claim support²

A. The Common Swine Industry Audit

The National Pork Board’s (NPB) Common Swine Industry Audit (CSIA) platform has the overarching goal of providing consumers with greater assurance of the efforts taken by pork producers to improve animal well-being and food safety. However, the industry itself makes no claim that the audit verifies superior treatment of animals. AWI argued that Hatfield and the conventional pork industry are not competent and reliable authorities on the meaning of the term “ethically raised.” The NPB has not demonstrated that its standards indicate “ethical” care of pigs.

According to AWI, the CSIA does not represent a “higher standard of care.” AWI pointed to four practices permitted under the CSIA—early weaning, poor quality flooring and bedding, barren environment, and painful procedures—that show the CSIA has lower standards than third-party animal welfare certification programs. First, early weaning can result in maternal deprivation and sudden change to the piglets’ environment, diet, and social group composition. The CSIA does not prohibit early weaning, even though no third-party animal welfare certification program allows weaning under the age of 21 days and some programs have minimums as high as 56 days. Second, studies have shown several animal welfare issues such as infections and tail biting can result from using floors without bedding. Most of the conventional pork industry uses slatted floors, as permitted under the CSIA, while most animal welfare certifications encourage solid flooring with ample bedding material. Third, pigs typically display signs of aggression, frustration, and stress when deprived of the ability to perform natural behaviors, such as rooting and foraging. The CSIA does not require enrichment for pigs, whereas all animal welfare certifications require some form of enrichment. Fourth, tail biting is a common issue on commercial farms; conventional pork

² As a procedural matter, AWI alleged that, in violation of ASRC rule 2.4(D), Hatfield failed to provide AWI with a separate exhibit containing a comprehensive summary of the proprietary information and data it provided to NAD. AWI argued that the “incorporated summar[ies]” provided throughout the document contain none of the expected detail.

producers typically dock pigs' tails, which may produce even more welfare concerns. Third-party animal welfare certification programs generally restrict or prohibit tail docking.

The challenger argued that the CSIA is not a "third party animal welfare audit." While CSIA standards are available to consumers on the NPB website, results from audits against the standards are not publicly available. Moreover, because the CSIA is a point-based system, producers can still become certified while having serious deficiencies in some areas.

AWI also addressed the arguments Hatfield made about its audits. AWI argued that while Hatfield has demonstrated that it audits its farms regularly, it has failed to demonstrate that these audits are to standards that are in fact ethical or represent a "higher standard of care." Auditing to a low standard does not fulfill the fundamental promise made by its claim, that its animals are treated better than those on other farms.

B. Hatfield's animal welfare program

1. USDA review of "ethically raised" claims

AWI argued that the USDA's Food Safety and Inspection Service ("FSIS") has been known to approve animal raising claims with little to no substantiation. According to AWI, the FSIS relies solely on "desk audits" and makes no onsite visits to verify compliance with its labeling policies. Claims like "ethically raised" may not get a meaningful review by the USDA, in part because the USDA has not adopted definitions for many animal raising claims made on meat and poultry products. AWI also maintained that weak or no substantiation may be provided for claims as a part of the FSIS label approval process sometimes, resulting in claims which may mislead consumers.

AWI challenged Hatfield's assertion that the Agricultural Marketing Service ("AMS") validates the company's "ethically raised" claim as part of the USDA's Process Verified Program ("PVP"). First, the AMS does not mention the claim in the most recent version of its Official Listing of Approved USDA Process Verified Programs. Instead, it identifies Hatfield's "Process Verified Points" as "No Antibiotics Ever," "Free to Roam/Gestation Crate Free," "Ractopamine Free Diet," and "PQA Plus Pork Export Verification Program." Second, the AMS has no established definition for the claim "ethically raised," and has determined that it lacks the authority to define any animal raising claim and is only able to verify a company's compliance with its own definition for a particular claim. Third, although the USDA conducts research into the welfare impacts of certain husbandry practices, the department has taken no position on the acceptability, from a welfare perspective, of any on-farm practice related to the raising of pigs.

2. Standards followed by competing pork producers

AWI argued that Hatfield's own policy on animal welfare indicates that it requires its producers simply to adhere to minimum industry standards set by the CSIA. There is no evidence that the animal care standards employed by Hatfield exceed the CSIA. Hatfield's packaging also includes a "ractopamine free diet" claim, and this is not a departure from the practices of the conventional

pork industry because use of the drug is declining in the US³ and is banned in the EU, China, and Russia. Furthermore, AWI surveyed the market and found that none of Hatfield's conventional competitors make animal welfare claims on product labels. Nearly all producers making animal welfare claims subscribe to higher animal care standards than Hatfield and are certified by a third-party animal welfare program.⁴

C. Aspirational claims

AWI responded to Hatfield's argument that its claim was aspirational, by arguing that claims made on product packages cannot be aspirational, as that flouts both the USDA's Food Labeling Guide and the Federal Trade Commission's Green Guides, which require that claims be substantiated, truthful, and not misleading. AWI contended that claims reflecting an undisclosed ambition to improve are inherently misleading, and, by definition, cannot be substantiated.

IV. "Ethically raised" claim and revisions to Hatfield's packaging

Hatfield's response stated that the challenged label claim was revised in April 2018 to read "Pork used is ethically raised* *Learn more at simplyhatfield.com." However, AWI argued that the challenged claim is still present in commerce and was observed as recently as May 26, 2019. Additionally, Hatfield's website is still filled with images of products bearing the same claim.

The challenger argued that even if Hatfield has revised the claim to be "pork used is ethically raised," removal should still be required. AWI maintained that the claim "ethically raised," even with a website referral, misleads consumers because it implies better treatment than conventional producers and the consumer has no way of understanding what is meant by this claim.

AWI argued that while the website referral could potentially provide consumers more information, consumers rely primarily on the information found on the package. AWI cited a study commissioned by the USDA that found that digital links on food packages are not "inherently associated with additional food information, and consumers often assume they are for marketing or industry use."⁵

V. Third-party certification programs and AWI's relationship to those programs

³ AWI noted that several other major pork producers, including Seaboard Foods, Triumph Foods, and Smithfield Fresh Meat Corporation participate in a USDA-administered ractopamine-free verification program.

⁴ In surveying the market, AWI found 42 retail brands of pork (excluding hot dog and bacon brands, as well as store brands). Of these, 14 were major conventional retail brands, including Smithfield, Tyson, Swift, and Hormel. None of these 14 major brands currently makes a value-added animal care claim on the package label. AWI found value-added animal care claims on the package label of 28 brands, including Hatfield. Of these, only Hatfield makes an animal care claim while operating under conventional industry production practices.

⁵ AMS-USDA, Deloitte Study of Electronic or Digital Link Disclosure, 40 (2017) available at <https://www.ams.usda.gov/sites/default/files/media/USDA%20Deloitte%20Study%20of%20Electronic%20or%20Digital%20Disclosure%20170801.pdf>. The study also found that information disclosure through digital link has a disproportionately negative impact upon low-income consumers, who are less likely to have access to the internet or a smart phone. *Id.*

AWI responded to Hatfield's criticisms that the third-party animal welfare programs AWI cited are "niche" by pointing out that approximately 1.5 billion farm animals in the United States are raised under these programs every year. Further, while Hatfield raised concerns about AWI's involvement in a third-party certification program, AWI rebutted that issue by noting that, although it created the Animal Welfare Approved certification program, it ceased administering the program in 2014.

AWI explained that while independent animal welfare certification programs are not in complete alignment with one another, they all demand a baseline level of care that Hatfield's standards do not meet. While certifications are not required to substantiate animal welfare claims, the challenger argued that the programs are useful ways to provide consumers with assurance of high welfare standards. Overall, AWI contends that, with or without third-party certification, the higher animal care standards companies tout need to be met and verified in some way.

Additionally, AWI disagreed with Hatfield's argument that AWI seeks to impose its singular view of animal welfare on those who disagree. Instead, AWI explained that it subscribes to the same theory of animal welfare recognized by governments, standards bodies, and academic institutions worldwide. It recognizes that animal welfare is not a black or white proposition but rather exists on a continuum from poor to good.

Advertiser's Position:

I. The plain meaning of Hatfield's claims

Hatfield argued that the original claim, on its face, conveys the intended meaning: Hatfield's ethically raised benefit is based on its exclusive use of family farmers who are committed to a higher standard of care, and this benefit is verified (in part) by third-party animal welfare audits.

Separately, in April 2018, Hatfield revised the claim on the products to instead read: "Pork used is Ethically raised* *Learn more at simplyhatfield.com." The website consumers are directed to contains the full details of the "ethically raised" practices the brand follows.

II. Substantiation for the claim "ethically raised by family farmers committed to a higher standard of care, governed by third-party animal welfare audits"

The advertiser noted that "ethically raised" is not defined by government regulation nor by the advertiser's consumer survey. Hatfield argued that a reasonable consumer would expect that "ethically raised" pigs live under conditions that advance sound animal care practices. According to the advertiser, the reference to "higher standards" is an aspirational statement that reflects and defines Hatfield's "commitment" to "ethically raised" animals.

A. The structure of Hatfield's animal welfare program

1. Hatfield's animal caretaker education and certification requirements

Hatfield explained that all of its animal caretakers at every stage of production must be certified under the NPB's PQA Plus Program, an industry-based educational program that incorporates best practices and input from a range of experts to arrive at a sound, outcome-focused approach. NPB standards are only one feature of Hatfield's proprietary program that provides a reasonable basis for its "ethically raised" claim.

2. Animal welfare audits

The CSIA was established by industry, packer, and customer representatives through support of the NPB. According to the advertiser, a key feature of the CSIA is the predominant focus on outcome criteria, providing a real-world, objective assessment of the conditions under which pigs are raised and processed that relate directly to the level of ethical treatment attained by each farm or facility audited. Auditing to the CSIA is part of a robust animal welfare program that enables Hatfield to meet a higher standard than other conventional pork processors and provides objective support for the "ethically raised" claim.

Hatfield took issue with AWI's argument that using the industry audit, the CSIA, means that Hatfield does not exceed the industry standard. Hatfield maintained that the CSIA is a tool, and that what matters is how companies choose to use it. To support this, it pointed to benchmarking data compiled by an independent auditing firm showing that Hatfield farms score quantitatively better than other farms across several categories.⁶

The advertiser also provided specifics on how it uses the CSIA above and beyond the industry baseline. Hatfield argued that it applies the CSIA with special rigor because it audits more of its suppliers more frequently than large conventional producers might be able to because of their size. 100% of Hatfield producer partners are audited annually and 33% of all farms are audited annually.⁷

3. Hatfield's farm practices

Hatfield argued that its innovative farm practices, relatively small scale, coordinated operations and other elements substantiate the claims related to how its animals are raised and allow it to advance animal welfare to a standard unique among conventional pork producers. Its commitment to reaching higher standards of animal care is reflected in a range of specific practices it has adopted, such as electronically tagging sows for closer monitoring and individual attention and employing an electronic feeding system on Hatfield-owned farms. Further the small number of farmers and geographic proximity mean the company is available to communicate quickly, conduct farm visits, and coordinate around animal welfare.

4. Adoption of leading animal welfare practices

⁶ The proprietary data is compiled by an independent auditing firm that compares Hatfield's scores to other farms it audits, on a blinded, aggregate basis.

⁷ Hatfield cited Dr. Temple Grandin's [The Importance of Measurement to Improve the Welfare of Livestock, Poultry and Fish](#) as an explanation of the value of frequent auditing. They contend that, through real-world examples, Dr. Grandin shows that frequent auditing leads to measurable improvements in animal welfare practices.

Hatfield argued that it is an industry thought leader and early adopter of improved animal raising techniques such as open pen sow housing. The advertiser has also worked closely with Dr. Temple Grandin, the premier animal welfare expert, and Dr. Parsons of the University of Pennsylvania's Veterinary School.

Hatfield also pointed to several metrics they argue support their claim of ethical raising practices. For example, unlike other conventional producers, Hatfield has a minimum age for weaning company-owned piglets. All of Hatfield's company-owned sows are group-housed and allocated more space per sow than what is required by both conventional producing standards and by American Humane Certified standards. All of Hatfield's company-owned sows are housed in barns equipped with electronic feeding systems. Hatfield also confidentially provided NAD with more detail about these company policies.⁸

B. USDA prior label approval and voluntary validation

1. FSIS prior label approval

The advertiser argued that NAD should give appropriate weight to the FSIS approval of the "ethically raised" claim. FSIS's approval of the label confirms the sufficiency of Hatfield's claim substantiation and provides independent regulatory validation of Hatfield's claims. FSIS is responsible for ensuring that claims that appear on pork labels are truthful and not misleading. Further, it is unlawful to market a meat, poultry, or pork product not authorized under the FSIS prior label approval system. FSIS evaluation of animal welfare claims is informed by its substantial experience and expertise. Like NAD, FSIS must consider the meaning of a claim and the sufficiency of the support reviewed at the time the label application is considered. Required documentation to substantiate the claim includes a description of the controls to ensure the claim is valid from birth to harvest and how the animals are raised to support that the claims are not false or misleading.

2. AMS voluntary verification program

Hatfield maintained that it operates under a well-defined, approved USDA Process Verified Procedure ("PVP") program which further validates claims. The PVP program is a voluntary program whereby AMS auditors conduct annual inspections to verify compliance with the animal welfare portions of Hatfield's self-designed program. AMS also scrutinizes internal training records and product promotional materials.

III. Implied comparative ethical treatment claims

⁸ Hatfield responded to AWI's assertion that ASRC rule 2.4(D) was not followed by pointing to its letter which provided an informative summary at each point where reference to confidential, proprietary information and documents is made. Hatfield also noted that many NAD cases arising under rule 2.4(D) involved the methodology and results of consumer surveys and other studies. Here, the information at issue is largely trade secrets and documents that validate findings fully explained in the summary portions of Hatfield's Initial Reply.

Although Hatfield argued it did not make such a claim, Hatfield maintained that it supported an implied claim that “the pork produced for Hatfield pork products comes from pigs raised in a more ethical manner than conventional production.” A reasonable consumer would not take away this message from the label, nor did the advertiser provide evidence to support the existence of this implied claim, even though it conducted a consumer survey.

Nonetheless, Hatfield maintained that the challenged implied claim is supported. Hatfield argued that animal welfare is not a finite goal and as such the “ethically raised” claim is aspirational, identifying a commitment to strive toward a higher standard of care. The “higher” aspiration is relative to Hatfield’s current practices and knowledge of animal welfare, and the commitment to expand its knowledge base and embrace suitable new approaches that advance animal welfare.

IV. Hatfield’s practices in relation to those of the conventional pork industry

Hatfield responded to AWI’s critiques of deficiencies in the CSIA audit criteria and claims that Hatfield’s practices are therefore also deficient. Hatfield contended that these critiques are misguided because their conclusions about Hatfield’s practices are false. For example, Hatfield prohibits non-therapeutic antibiotic use, does not practice teeth clipping, provides continuous access to water, and provides enrichment for animals if they show a need for it (though Hatfield does not have a formal enrichment policy). Additionally, Hatfield refuted AWI’s suggestion that Hatfield may be weaning pigs as early as 5-7 days of age, noting that weaning piglets at that age is both against Hatfield company policy and not conducive to animal health and growth. Hatfield provided the NAD more details about its policies confidentially.

Hatfield argued that the baseline against which the “ethically raised” claim is measured should be conventional pork producers, not the niche certification programs AWI cited. Hatfield’s label did not use any iteration of the term “certification” or any logo that might suggest an association with a certifying body, nor has Hatfield claimed that it meets standards equivalent to a certifying body. Hatfield thus argued that AWI’s insistence on tying an ethically raised claim to third-party certification criteria would incorrectly impose a level of proof that bears no relation to the messages reasonably conveyed by Hatfield’s label.

Moreover, Hatfield argued that AWI lacks a basis to assert that the “ethically raised” claims in context amount to an implied exclusive superiority claim (versus the rest of the conventional pork industry) that Hatfield achieves the very highest animal welfare standards across all segments of the pork industry. According to Hatfield, AWI’s challenge of the “ethically raised” claim—because Hatfield does not meet the “higher welfare standards” it prefers—is a public policy preference that is distinct from the nature of the express or implied claims actually conveyed.

V. AWI’s consumer survey

A. Survey results

Hatfield noted the survey author’s stated objective: to “design and conduct a survey to assess the extent to which, if at all, consumers understand the packaging to communicate that the treatment

or living conditions of animals used to produce Hatfield pork products exceeds industry standard.” According to Hatfield, while this was the objective, the author cannot point to any data to support these conclusions drawn from the survey data. For example, the survey data from the unaided questions showed that some proportion of respondents recognized and recalled the express claims such as “ethically raised” and “higher standard of care” on the front panel of the label. According to Hatfield, the survey author’s conclusion that the “‘ethically raised’ portion of the labelling was highly impactful on respondents and a notable selling point for the product,” was an observation unrelated to the challenged claim.

Further, Hatfield maintained that the leap from the survey finding that 36.5% of respondents would choose Hatfield versus another brand due to the “ethically raised” claims to the assertion that “ethically raised” must mean that consumers understand the express claim to really mean that Hatfield pork products exceed industry standards is an assertion not supported by the actual data reported in the Survey.

Furthermore, the advertiser argued that it was telling that the survey did not ask the respondents what “ethically raised” means. Ultimately, argued Hatfield, the conclusory findings of the survey do not support the challenger’s arguments about how consumers understand the claim “ethically raised.”

B. The survey flaws

The advertiser argued that AWI’s consumer perception survey also had five flaws which rendered it unreliable. First, the survey only tested the front panel of the label. Hatfield argued that the survey should have evaluated the actual marketplace label, which includes an asterisk to back panel information providing context to the primary “Ethically raised” claim and the website address where additional information is available to consumers.

Second, Hatfield criticized the way the unaided responses were grouped and reported and argued that this error inflated and distorted the survey results. The consumer takeaway results were based on aggregating responses that fell within three categories/claims: (i) “ethically raised,” (ii) the “higher standard of care,” or (iii) another answer referring to the ethical or humane treatment or care of animals. Hatfield argued that since AWI’s challenge is premised on the notion that Hatfield has falsely claimed its program is based on meeting a higher standard of care, the survey should have measured unaided responses specifically to the “higher standard of care” component of the claim. Hatfield noted that the way the survey results were provided to NAD prevents assessment of the potential relevance of the “higher of standard of care” portion of the claim, the portion seemingly most relevant to AWI’s challenge.

Third, Hatfield objected to the answer options for the survey question: “Which of the following, if any, did the label communicate about the treatment or living conditions of animals from this company’s farms? If neither, please indicate so.” The two substantive answer choices provided—that the company’s farms “meets industry standards” or “exceeds industry standards”—precisely paralleled AWI’s desired outcome, thus significantly discounting the value of the survey results.

Fourth, Hatfield noted that the control and test label used in the survey contained the Hatfield brand, and thus failed to control for any bias that could be associated with the brand. Finally, Hatfield argued that AWI tested a claim that is being phased out. Hatfield maintained that many Hatfield products now carry a modified claim in place of the claim tested: “Pork used is ethically raised* *Learn more at simplyhatfield.com.” This claim was not evaluated by the survey.

Decision:

Claims regarding animal welfare resonate powerfully with consumers who wish to align purchasing decisions with ethical concerns. NAD, as the advertising industry’s self-regulatory forum, is focused on ensuring that claims made in national advertising are truthful and adequately supported. In evaluating claims about ethical or humane treatment of animals raised for consumption, NAD does not take a position on such issues but evaluates what messages consumers can reasonably take away from such claims and whether the relevant evidence supports the claims so that the advertising is truthful and non-misleading. NAD appreciates that advertising concerning animal welfare informs consumers as they make purchasing decisions that reflect their particular social and ethical concerns. Because consumers cannot typically verify the accuracy of these claims for themselves, NAD plays an important role in reviewing such claims to ensure that they are truthful, non-misleading, and adequately substantiated.⁹

I. Jurisdiction

While NAD’s jurisdiction to review the claims was not directly challenged in this proceeding, NAD noted that the challenged “ethically raised” claim was reviewed by the USDA as part of the U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS) mandatory prior label approval system. The advertiser argued that the FSIS undertook a rigorous review of the ethically raised claim, validating Hatfield’s claim support. As NARB has previously stated, NAD and NARB will not automatically defer to regulatory determinations.¹⁰ NARB has found that where the record did not show whether the FSIS staff considered the impact of the claim on consumers or explained its reasoning as to whether the challenged claim was false and misleading to consumers, the panel did not believe that the FSIS determination should be dispositive of the outcome in the underlying NAD/NARB proceeding.¹¹ As in that case, the record here did not demonstrate that FSIS considered consumer impact or that it explained its reasoning with respect to its determination on the “ethically raised” claim. Nor did FSIS consider the consumer perception evidence, discussed below, submitted by the challenger to clarify the consumer takeaways reasonably conveyed by the claim. Accordingly, NAD undertook its own review of the challenged claims.

II. Messages Reasonably Conveyed

⁹ Chipotle Mexican Grill (Chipotle Restaurants), Report #5450, *NAD/CARU Case Reports* (April 2012).

¹⁰ PERDUE FARMS, INC. (Perdue Short Cuts / NARB Panel #141), Report #4576, *NAD/CARU Case Reports* (October 2006).

¹¹ *Id.*

NAD first turned to the messages reasonably conveyed by challenged express claim, “Ethically Raised” and with smaller font underneath, “By Family Farmers Committed to a Higher Standard of Care.” Underneath this text is the qualifier, “Governed by Third Party Animal Welfare Audits.” This claim appears on the front label on product packaging for Hatfield’s pork products.¹²

In determining the messages reasonably conveyed by the challenged advertising, NAD first considered AWI’s consumer perception survey conducted by Mr. Hal Poret (the “Poret Survey”). Well-conducted consumer perception surveys can be a valuable tool in determining whether consumers perceive implied claims in a given advertisement.¹³ The Poret Survey was submitted to show that the label communicates a message regarding animal welfare, that the label implies that the treatment or living conditions of Hatfield’s animals exceed industry standards, and that consumers rely on this claim in making their purchasing decisions.

NAD was satisfied that the Poret Survey was sufficiently reliable. Among other things, the survey used an appropriate universe¹⁴ and it made use of an appropriate control image¹⁵ and of control and filter questions to account for survey noise and to ensure that respondents were not selecting statements that did not inform their opinions. NAD also appreciated that the survey included open and closed-ended questions that were presented in a non-leading manner.

In arriving at its conclusion that the Poret Survey was methodologically sound, NAD considered but was not persuaded by the challenger’s criticisms. For example, Hatfield argued that the survey improperly aggregated open-ended responses that fell into three distinct categories: “ethically raised,” “higher standard of care,” or another answer referring to the ethical or humane treatment or care of animals. The Poret Survey, however, used closed-ended questions to determine which respondents took away a message about the treatment or living conditions of animals, and then proceeded to ask those respondents more focused questions, ultimately reaching the question, “Which of the following, if any, did the label communicate about the treatment or living conditions of animals from this company’s farms? If neither, please indicate so.” The answer options were:

- The treatment or living conditions of animals from this company’s farm meets industry standards for the treatment or living conditions of animals.
- The treatment or living conditions of animals from this company’s farms exceeds industry standards for the treatment or living conditions of animals.
- Neither
- Don’t know/no opinion

¹² The advertiser stated that its product packaging was modified in April 2018 to additionally include on the back panel a claim that “Pork used is ethically raised.* *Learn more at simplyhatfield.com.” This claim, however, was not challenged so NAD declined to review it.

¹³ PERDUE FARMS, INC. (Harvestland Organic Chicken), Report #6177, *NAD/CARU Case Reports* (April 2018).

¹⁴ The sample universe of the survey consisted of U.S. consumers age 18 and older who have purchased at least one relevant pork product in the past six months or who would consider doing so in the next six months.

¹⁵ An appropriate control requires that the control group of respondents be asked the same questions as the survey group after viewing a commercial that does not contain the allegedly deceptive material or without viewing any commercial. Capital One Bank (USA), N.A (Quicksilver Cash Back Rewards Credit Card), Report #5898, *NAD/CARU Case Reports* (October 2015). Here, the control image did not contain the challenged claim, but was otherwise identical to the test image.

- Not asked (Did not take away a message about treatment/living conditions of animals).

While the objective of the survey and ensuing analysis, particularly the grouping of responses to the open-ended questions, was broader than necessary to determine what was conveyed by “higher standard of care,” NAD determined that the survey ultimately and properly arrived at the relevant question of whether treatment or living conditions of animals from this company’s farms exceed industry standards for the treatment or living conditions of animals.¹⁶ As for the advertiser’s criticism that two of the answer choices were leading and reflected AWI’s desired outcome (“meets industry standards” and “exceeds industry standards”), NAD noted that not only were respondents given both “neither” and “don’t know” options, but that far more respondents chose “exceeds industry standards” over “meets industry standards” (38.5% vs. 3.5% on a net basis), suggesting that respondents who answered “exceeds industry standards” truly meant to indicate that choice. In other words, if both answer responses were leading, as the advertiser argued, NAD would have expected to see a greater percentage of respondents choose “meets industry standards” than was actually the case. Moreover, as the challenger noted, the “meets industry standards” choice did not, in fact, support the challenger’s position.

The advertiser also argued that the survey included the Hatfield brand on the control and test label, failing to control for bias that could be associated with the Hatfield brand. Without further explanation of how Hatfield’s brand recognition could have biased survey respondents against the advertiser, however, NAD was reluctant to set aside the results of the survey. NAD further noted that it does not, as a rule, require product label test stimuli in consumer perception surveys to be devoid of branding.¹⁷

The advertiser also faulted the survey for using a claim that was being “phased out” and replaced with “Pork used is ethically raised* *learn more at simplyhatfield.com.” NAD noted that the original claim was still circulating in the marketplace at the time of this challenge and that, in any case, the invitation to “learn more” and the reference to a website did not sufficiently alter the meaning of “ethically raised” claim at issue. As NAD has noted, inviting consumers to learn more by visiting a website does not change the reasonable consumer takeaway.¹⁸

Having found that the survey was reliable, NAD next turned to the results. According to the survey, a net rate of 51.5% of respondents answered that the label communicated something about the treatment or living conditions of animals from Hatfield’s farms, a response attributed to the “ethically raised” portion of the labelling. Moreover, a net 38.5% of respondents took away a message that the treatment exceeds industry standards. Although NAD recognizes that there is no hard and fast rule regarding the percentage required to demonstrate consumer confusion in a consumer perception survey, both the courts and NAD have held that approximately 20% or above

¹⁶ The challenger also criticized this particular question, arguing that it was a leading question that precisely paralleled AWI’s desired outcome. NAD found, however, that the survey properly included both “neither” and “don’t know” answer options, and was only asked to respondents who did take away a message regarding the treatment or living conditions of the animals.

¹⁷ See e.g. The Procter & Gamble Company (Charmin Ultra Strong and Charmin Ultra Soft Products), Report #5960, *NAD/CARU Case Reports* (May 2016) (of the issues NAD noted with the challenger’s survey, NAD did not fault the survey for leaving the Charmin branding on the label).

¹⁸ Beech-Nut Nutrition Company (Beech-Nut Baby Foods), Report #6070, *NAD/CARU Case Reports* (April 2017).

has been consistently considered “adequate” to show consumer confusion.¹⁹ Thus, NAD concluded that the Poret Survey sufficiently demonstrated that one reasonable message conveyed by the label is that the treatment or living conditions of animals from Hatfield’s farms exceeds industry standards for the treatment or living conditions of animals.

Additionally, NAD independently concluded that the challenged claim reasonably conveys the implied message that pork produced for Hatfield pork products comes from pigs raised in a more ethical manner than conventional production. The plain language of the claim “Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits,” states that Hatfield farmers are committed to a *higher* standard of care. The claim itself uses comparative language (i.e., higher) to define its standard of care. While Hatfield argued that its intended meaning was aspirational, a reasonable consumer takeaway from the claim that farmers are committed to a higher standard of care is that the farmers do, in fact, adhere to a higher standard of care.

III. The Advertiser’s Claim Support

As support for its claim that Hatfield’s pork products are “Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits,” the advertiser relied on caretaker standards, third-party auditing and related practices, and its relationship with animal welfare expert, Dr. Temple Grandin who helped to develop Hatfield’s sow houses and processing facilities. NAD reviewed this evidence to determine whether it supported a message that Hatfield’s animal raising practices exceed industry standards as was found to be reasonably conveyed by the Poret Survey.

Hatfield’s program relies in part on standards that the advertiser describes as “industry-wide standards” adopted by the National Pork Board (NPB). Hatfield explained that it requires all animal caretakers at every stage of production to be certified under the NPB’s PQA Plus Program, a certification that Hatfield explained “represents conformity with an industry-based education program” that focuses on delivering an outcome-focused approach. The advertiser also explained that it adheres to the Common Swine Industry Audit (CSIA) inspection criteria to ensure that industry best-practices criteria are employed. The CSIA, Hatfield explained, was designed using industry input to create a credible and “common on-farm audit system” for the swine industry. The advertiser explained that the CSIA tool is available to any pork producer. NAD appreciated that the outcome-focused criteria that the advertiser relies on are meant to directly address actual issues arising from the treatment of pigs, such as bruising. NAD determined, however, that these standards, certification, and criteria were ultimately industry standard metrics.

As NAD noted, the claim at issue communicates a message that Hatfield not only complies with industry standard animal welfare metrics, but that Hatfield’s animal welfare program goes beyond the animal welfare standards set by the industry. Thus, NAD determined, the advertiser’s reliance on the NPB standards, adherence to the CSIA criteria, and participation in the PQA Plus Program

¹⁹ The Procter & Gamble Company (Charmin Ultra Strong and Charmin Ultra Soft Products), Report #5960, NAD/CARU Case Reports (May 2016).

are not sufficient to support the claim. In reaching this conclusion, NAD considered but was not persuaded by the advertiser's argument that while the CSIA tool is available to any pork producer, Hatfield's use of the tool is relevant to whether the claim is supported. For example, Hatfield argued that the frequency of farms audited in a year and the results of the audit are relevant to whether the ethically raised claim is supported. NAD disagreed. While Hatfield demonstrated its diligence and commitment to carrying out the CSIA audit with a frequency which was not mandated by the CSIA, consumers were unlikely to equate a commitment to carrying out an industry standard audit with the "higher standard of care" it claims to provide – a standard that rises above that set by the industry. Hatfield's audit frequency, reviewing for compliance with industry standard care, may demonstrate a commitment to insuring that farms meet the industry standard, not that it meets the "higher standard of care" claimed on the package.

Hatfield also confidentially submitted a list of CSIA audit factors in which Hatfield outperformed other commercial producers. After a review of these audit factors, NAD determined that, without further information, it could not assess on this record whether these factors were the ones that consumers would understand to be relevant to their understanding of an "ethically raised" claim for raising pigs that did not define or qualify what ethical practices are followed. In arriving at its conclusion, NAD did not reach the issue of which specific animal welfare practices are necessary to support an "ethically raised" claim for raising pigs. The certification programs cited by the challenger set criteria beyond the scope of Hatfield's animal welfare program. Although the criteria set by certification programs do not determine which specific animal welfare practices are necessary to support an "ethically raised" claim, they might provide some evidence of the standards consumers might reasonably expect are met when making such a claim.

As for the advertiser's position that its commitment to animal welfare, including its relationship with Dr. Grandin and implementation of electronic feeding systems further support its "ethically raised" claim, NAD noted that the "higher standard of care" claim is directly tied to the language "governed by third party audits." Thus, NAD concluded, it is Hatfield's practices subject to third-party audit programs, and not practices that fall outside of those auditing programs, that are relevant to whether or not this claim is supported. Because the record did not demonstrate that the practices Hatfield cited as innovative are directly relevant to any third-party auditing program, NAD found that they were not able to support the claim at issue.

Additionally, while Hatfield demonstrated that certain of its animal welfare practices extend beyond practices on conventional animal farms, the reasonable consumer take away from the challenged claim, "ethically raised by family farmers committed to a higher standard of care, governed by third party animal welfare audits," does not define, limit or qualify specific animal welfare practices followed (except that it is verified by third party audits). Further, although NAD was encouraged by Hatfield's commitment to implementing additional animal welfare practices in the future, NAD determined that these aspirational programs were not sufficient to support a claim that Hatfield's commercially-available products, available for present consumption, are "ethically raised." NAD noted that the advertiser may be able to make a more limited animal welfare claim, so long as the claim is truthful and accurate, narrowly drawn, and communicates to consumers more clearly the parameters of the claim.

For these reasons, NAD recommended that the advertiser discontinue the claim “Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits.”

Conclusion:

NAD recommended that the advertiser discontinue the claim “Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits.” NAD noted that the advertiser may be able to make a more limited animal welfare claim, so long as the claim is truthful and accurate, narrowly drawn, and communicates to consumers more clearly the parameters of the claim.

Advertiser’s Statement:

While it disagrees that the claim should be discontinued Hatfield accepts NAD’s recommendation concerning the use of the “higher standard” portion of the claim and will take into account in future label claims NAD’s suggestion that Hatfield communicate more clearly the parameters of an animal welfare claim. Hatfield appreciates NAD’s favorable review of key aspects of its commitment to animal welfare. **(#6305 AG, closed 08/19/2019)**

EXHIBIT C.

NAD DECISION, PERDUE FARMS, INC.

Case #xxxx (xx/xx/16)

PERDUE FARMS INC.

Perdue Poultry Food Products

Challenger: *Animal Welfare Institute*

Product Type: *Food*

Issues: *Jurisdiction*

Disposition: *Administratively Closed*

Basis of Inquiry: Advertising and labeling claims made by Perdue Farms, Inc. ("Perdue") for its poultry products were challenged by Animal Welfare Institute ("AWI"). The challenged claims included the following:

- *"Humanely Raised"*
- *"Raised Cage Free"*

Challenger's Position:

The "Humanely Raised" Claim

According to the challenger, consumers understand this claim to mean that the advertiser's chickens are raised in a manner that is more humane than the standard practices within the poultry industry. As support, the challenger provided survey evidence which, it contended, demonstrated that 70% of consumers believe that "Humanely Raised" means that the chickens were raised under a standard of care better than is typical in the industry. According to AWI, the actual standard of care adhered to by the Perdue is derived from the National Chicken Council (NCC) and does not satisfy consumer expectations of humanity in animal care. In support of its assertion that Perdue chickens are not humanely raised, AWI cited scientific research¹ and offered a comparison between the NCC standards and those of other certification programs that provide a high standard of welfare and humane treatment of chickens.

According to the challenger, the NCC standards utilized by Perdue are based on requests from food retailers within the industry and while they do minimize the harshest conditions of chicken rearing, they do not comport with consumer expectations of what constitutes "humane" conditions. The challenger maintained that the conditions provided for the chickens include windowless sheds, wet litter or sawdust, dim lighting, crowded, indoor confinement, insufficient space for natural mobility and a rapid and unhealthy growth rate for the chickens.

For example, NCC guidelines require chicken producers to provide only 0.6-0.7 square feet of space per bird within the chicken's housing, a dense spacing that, according to AWI, prevents chickens from performing basic movements. In contrast, other animal welfare certification programs require significantly more space for chickens, capping the

¹ The challenger submitted the statements of Dr. Michael Appleby, an animal welfare scientist and veterinarian Dr. Michael Fox.

maximum density at 5.25 pounds per square foot or 6 pounds per square foot.² The challenger argued that this additional space provided by other programs allows for more typical chicken behavior, such as preening and the spreading of wings. According to the challenger, other welfare certification programs also require farms to provide chickens access to natural lighting and access to outdoor space, conditions denied to chickens raised by Perdue.

The challenger asserted that the U.S. Department of Agriculture ("USDA") "Process Verified" shield which appears on the packaging further misleads consumers about the standards the advertiser uses in rearing and raising its broiler chickens. It explained that the USDA Process Verified Program ("PVP") is a voluntary marketing program, which allows a producer to pay a fee and have their own processes verified for adherence, however, the USDA does not participate in the development or review of the standards themselves. The program merely allows the Agricultural Marketing Service (AMS) of the USDA to audit the company's own standards, and grants the advertiser the right to display the USDA "Process Verified" shield. The shield however does not define "humanely raised" or serve as substantiation for the claim.

Although the advertiser represented that the claim "Humanely Raised" had been discontinued prior to the NAD challenge, AWI noted that the claim continued to appear in connection with Perdue's Harvestland brand, in both website advertising and on packaging.

The "Raised Cage Free" Claim

The challenger argued the advertiser's claim, raised "cage free" chickens is misleading because broiler chickens are not in any standard, typical, industry or small-scale production system ever raised in cages. The challenger argued that although the claim is literally true, it confuses consumers who do not understand the distinction between "cage free" as it appears on packages of meat as opposed to cartons of eggs. Because a packed cage system is typical for egg-laying hens, a company that does not confine egg-laying chickens to cages is providing a condition of treatment that is meaningful to the consumer. However, argued the challenger, the claim of "cage free" for broiler chickens implies that these chickens are raised in conditions that go beyond the norm. The claim therefore exploits consumer's reliance on a meaningful and important representation with respect to egg-laying chickens, by applying it to a situation where it is basically rendered meaningless.

The challenger argued that consumer perception data, obtained from a Quick Query omnibus poll conducted by Harris Interactive, demonstrated that the claim, "Cage Free" created confusion about the difference in treatment the advertiser's chickens received. According to the challenger, the evidence showed that consumers believe that these chickens are treated more humanely and that, moreover, "cage free" is an added benefit

² The challenger referred specifically to certification standards of *Food Alliance and Certified Humane*.

over any competitor who does not use this claim on their packaging. The challenger contended that the "cage free" claim creates the impression of a benefit over other brands where none, in fact, exists.

Advertiser's Position:

The "Humanely Raised" Claim

The advertiser explained that although the "Humanely Raised" USDA Process Verified claim was truthful and substantiated, it had discontinued the claim and removed it from all of its Perdue branded products.³ Although the advertiser asserted the challenge should be administratively closed, based on Section 2.2(B)(i)(d) of the *NAD procedures*, the advertiser also provided evidence which, it maintained adequately substantiating its "Humanely Raised" claim.

The advertiser explained it has instituted the Perdue Farms Poultry Welfare Program as a comprehensive program meant to address every stage of a chicken's life cycle. The Program is meant to create an environment where the advertiser's chickens are healthy, safe, and humanely treated. Moreover, the advertiser asserted the USDA *Process Verified* program is designed as verification that particular claims are defined and verified through a well-designed, well-implemented, and well-maintained process. The advertiser explained to qualify, it is necessary for the advertiser to demonstrate that the claims made are substantive, verifiable, and repeatable, as well as not deceptive.⁴ The process includes regular audits by a third-party, to assure that the practices used are consistent with the claims made. The advertiser contended this verification process is evidence of the thorough and complete nature of their Perdue Farms Poultry Welfare Program, and sufficiently substantiates the "Humanely Raised" claim.

According to the advertiser, the USDA's Food and Safety and Inspection Service (FSIS) opinion on humane poultry treatment also supports the claim that the treatment of chickens within this program is qualified as "humane." The FSIS referenced the NCC Animal Welfare Guidelines and Audit Checklist in creating their recommendations for humane treatment. The advertiser contended this is evidence that its own systems, based in part on the NCC Guidelines, are considered humane by the USDA Process Verified Program as well as the USDA Food and Safety and Inspection Service.

The advertiser maintained that the AWI has mischaracterized the NCC guidelines and makes inaccurate assumptions about Perdue's husbandry practices. The advertiser explained its own Poultry Welfare Program is built off of the NCC guidelines, which define humane practices in the commercial poultry industry as recognized by the FSIS, as well as the USDA specifically referencing the Guidelines in defining humane handling of

³ According to Perdue, AWI sought to broaden the initial challenge and subsequently raised the issue of the claims made on Perdue's Harvestland branded poultry products.

⁴ PVP 1001 Procedure, USDA Process Verified Program: Program Requirements § 2.4.3.2 (July 2009).

poultry. The advertiser maintained the NCC guidelines are merely the starting point for its own Welfare Program, and that Perdue goes above and beyond these Guidelines.³ The advertiser asserted that its welfare program is the most extensive, comprehensive and well-documented program in any large or small scale chicken production.

Additionally, the advertiser noted that the PVP notification leads consumers to additional information beyond the information on the packaging, including at the USDA website for the PVP program, which relates to the advertiser's welfare program including its education, training and planning, hatching procedures, nutrition and feeding guidelines, comfort and shelter regulations, health care, catching and transporting and processing guidelines, and other information.

The advertiser asserted that the "humanely raised" claim is a purely monadic claim that conveys information about the advertiser's product, and does not compare the treatment of the advertiser's chickens to any other companies or farms within the industry.

The advertiser also argued that the surveys relied upon by the challenger are fatally flawed and are not reliable for any purpose.⁶ According to the advertiser, the flawed methodology used in this online survey is similar to that of a political push poll, where the questions are biased and intended to obtain a specific reaction.

The "Raised Cage Free" Claim

The advertiser maintained that the "Raised Cage Free" claim is truthful and, moreover, provides important information to consumers. In testing the consumer perception of its brand, Perdue found that only 35 percent of the total respondents believed that the advertiser's poultry products are produced under cage-free conditions. Accordingly, the claim "raised cage free" corrects misconceptions about an attribute that is of particular importance to consumers.

The advertiser again noted that the survey relied upon by the challenger for its assertion that the "Raised Cage Free" claim suggests that the chickens are treated "better" than other chickens is materially flawed and offers no reliable support for this interpretation of the claim. It maintained that the claim "Raised Cage Free" is a monadic claim about a product attribute and does not imply any comparison or convey information about any other product or company.⁷

During the course of the proceeding but subsequent to AWI's submissions to NAD, the advertiser notified NAD of a proposed class action lawsuit that had been filed against

³ The advertiser identified several treatment criteria where its own welfare program exceeded NCC guidelines including the monitoring of air quality, air temperature, use of third-party audits, training of employees and removal of sick birds.

⁶ The advertiser provided the statement of Philip Johnson, a survey expert. Perdue's criticisms of the survey included the choice of universe, methodology and biased questions.

⁷ Similar to the claims, "Vegetarian-fed" and "No Animal Byproducts," which are also truthful claims.

Perdue in the Superior Court of New Jersey. The lawsuit, according to the advertiser, involved the same claims and issues that were the subject of AWI's challenge before NAD. The advertiser argued that the NAD matter should therefore be administratively closed in accordance with Section 2.2 B(i)(b) of the *NAD/NARB Procedures*.

DECISION:

Section 2.2 B(i)(b) of the *NAD/NARB Procedures* provides that "if, at the commencement or during the course of an advertising...the advertising claims complained of are... the subject of pending litigation or an order by a court," NAD shall advise the challenger that the complaint is no longer appropriate for formal investigation in this forum.

Perdue maintained that because the "pending litigation" concerns the same claims and issues that were the subject of AWI's challenge, NAD must administratively close the case. NAD did not initially close the case because 1) it was unclear whether the lawsuit filed against Perdue constituted "pending litigation" within the meaning of *NAD Procedures*,⁸ and 2) although the complaint alleged that the claim "humanely raised" was false and misleading, it did not include any allegations concerning the claim "raised caged free," a claim which was also the subject of AWI's challenge before NAD.

NAD initially determined that the claim, "Raised Cage Free" was properly before NAD. The advertiser maintained that the claims "Raised Cage Free" and "Humanely Raised" are inextricably linked because, within the context of the NAD challenge AWI argued that the "Raised Cage Free" means "Humanely Raised," "treated in a humane fashion," "treated more humanely," and/or treated with a "heightened degree of animal welfare." Accordingly, argued Perdue, if the pending litigation precludes NAD's review of the claim "Humanely Raised" it must also preclude review of the claim "Raised Cage Free."

NAD did not agree. The *NAD/NARB Procedures* require NAD to close the case when "the advertising claims complained of are ... the subject of pending litigation or an order by a court (emphasis added)."⁹ Quite simply, the claims "Humanely Raised" and "Raised Cage Free" are distinct claims. Although the claims are related (both convey information about treatment of chickens) and may raise potentially overlapping issues, the two challenged claims appear in different contexts and on different packaging. NAD is not required to administratively close cases whenever there may be overlapping issues in pending litigation. The determining factor is whether the truth and accuracy of the specific claims before NAD is the subject of the pending litigation.¹⁰ However, NAD

⁸ At the time NAD was informed of the proposed class action lawsuit, the complaint had been filed with the Superior Court in New Jersey but had not been served upon the defendant.

⁹ Section 2.2 B(i)(b) of the *NAD/NARB Procedures*.

¹⁰ *Dyson, Inc.*, #4619, *NAD Case Reports* (2007). (NAD closed the case pursuant to Section 2.2 B (i)(b) as to those performance claims that were before the court in pending false advertising litigation. The remaining claims, concerned product demonstrations, which, although conveyed messaging about product performance were not before the court. The review of the product demonstrations was therefore were subject to NAD's discretion).

subsequently learned that an amended complaint had been served upon Perdue and contained allegations as to the truth and accuracy of both the "Humanely Raised" claim as well as the "Raised Cage Free." NAD therefore closed the case pursuant to Section 2.2 B(i)(b) of the *NAD/NARB Procedures*.

NAD recognizes that the purpose of Section 2.2B(i)(b) (which requires the closing of cases where the advertising claims challenged are the subject of pending litigation) is to avoid multiple and potentially conflicting findings from more than one tribunal. Such conflicting directives could be unduly burdensome for advertisers and create confusion for consumers. However, NAD also recognized that advertising self-regulation is not intended only to resolve disputes between competitors (or between consumers and companies) but also to foster consumer confidence in advertising by upholding truth and accuracy in national advertising and in furtherance of that end, to provide guidance to industry.

In administratively closing the case, NAD makes no substantive determination as to the truth and accuracy of the challenged claims. However, given the extensive time in which the matter was before NAD and the time and resources expended reviewing the evidence, NAD offers the following preliminary and procedural observations:

First, NAD appreciated the advertiser's notification that the claim "Humanely Raised" had been permanently discontinued from its Perdue branded products. However, because the claim appeared on Perdue's Harvestland brand product, in both website advertising and product packaging, the claim was not precluded by virtue of Section 2.2(B)(i)(d) of *NAD/NARB Procedures*.¹¹

Second, the fact that Perdue participates in the USDA Process Verified Program and the product receives a USDA Process Verified shield does not deprive NAD of jurisdiction or, by itself, resolve the issue of whether challenged claims are substantiated. Although NAD does not review language on labels and packaging that is mandated by federal law or regulation, or is "the subject of a federal government agency consent decree or order"¹² NAD determined that the two challenged claims did not fall under this exclusion¹³ but noted the evidence concerning the USDA program and the Perdue Farms Poultry Welfare Program, the nature of third party-audits and the standard of care and treatment of Perdue's chickens are, of course, relevant to the issue of whether the "humane raised" claim is truthful and accurate. NAD further observed that that the claim "raised cage free," although expressly truthful, may nevertheless communicate implied

¹¹ Section 2.2(B)(i)(d) requires NAD to close the matter when the advertising claims complained of are "permanently withdrawn from use prior to the date of the complaint and NAD/CARU received the advertiser's assurance, in writing, that the representation(s) at issue will not be used by the advertiser in any future advertising for the product or service"

¹² *NAD/NARB Procedures* Section 2.2(B)(i)(c).

¹³ *Pfizer Inc. (Revelation Tropical Parasiticide)*, NARB Panel #110 (April 2001). "The case-by-case review of claims by agency staff is not the sort of government action that NARC determined should defeat NAD jurisdiction." See also, *Perdue Farms Incorporated (Perdue Short-Cuts)*, Case Report #4576, *NAD/CARU Case Reports*, (October 2006).

messaging about the condition and/or treatment of its chickens. Advertisers are responsible for substantiating not only express claims but also implied messages reasonably conveyed by their advertising. Whether the evidence constitutes a reasonable basis to support messages communicated by the claims "humanely raised" and "raised cage free," is an appropriate issue for advertising self-regulation.

Finally, NAD recognizes that the ethical question of what constitutes "humane" treatment animals is not an issue to be determined by the advertising industry's self-regulatory body. However, consumer perception and understanding of "humane" treatment or "raised humanely" is directly relevant to the issue of whether such claims are substantiated or misleading to consumers.¹⁴ Accordingly, the role of advertising self-regulation is appropriate to ensure that such claims are truthful and accurate.

For the foregoing reasons, NAD administratively closed the case pursuant to *NAD/NARB Procedures* § 2.2 B(i)(b) due to the pending litigation, but noted for the record its willingness to reopen the case, upon the request of either party, should the court fail to reach a final determination on the truthfulness and accuracy of the challenged claims.

¹⁴ *United Egg Producers, Inc.*, Case Report #4108, *NAD/CARU Case Reports* (Nov. 2003)/NARB Panel No. 122 (Apr. 2004).

EXHIBIT D.

NAD DECISION, ALLEN'S CHICKEN, PR 5447

Case #5447 (040/4/12)
Allen Harim Foods
“Humanely Raised” chicken
Challenger: *Animal Welfare Institute*

Basis of Inquiry: Packaging claims made by Allen Family Foods for its chicken were challenged by the Animal Welfare Institute (“AWI” or “the challenger.”)¹ Allen Family Foods filed for bankruptcy in 2011 and has been taken over by Allen Harim Foods (“the advertiser.”) The claim at issue, which was disseminated by Allen Family Foods, is that the chicken is “humanely raised.”

Advertiser’s Position:

Allen Harim Foods stated that the “humanely raised” claim that formed the basis of this inquiry had been permanently discontinued.

Decision:

Because the advertiser permanently discontinued the claim that formed the basis of this inquiry—an undertaking that NAD determined was necessary and appropriate—NAD determined that this matter did not warrant the expenditure of its resources. NAD noted that Allen Family Foods, the original owner and marketer of the “humanely raised” chicken, had filed for bankruptcy. The current owner and marketer of the chicken—Allen Harim Foods—represented that the claim would be permanently discontinued. NAD therefore administratively closed the inquiry pursuant to subsection 2.2(B)(i)(f) of the NAD/NARB Procedures. (#5447 JF, closed 04/04/2012)

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¹ The Animal Welfare Institute challenged advertising that had been disseminated by Allen Family Foods. NAD was subsequently informed that Allen Family Foods had filed for bankruptcy, and that its operations had been taken over by Allen Harim Foods. The latter company informed NAD that the challenged claim had been permanently discontinued.

BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

ANIMAL WELFARE INSTITUTE,
Petitioner,

BOAR'S HEAD PROVISIONS CO., INC.,
Proposed Respondent.

**Complaint for Action to Stop
False or Deceptive Advertising
Boar's Head Chicken Sausage**

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Farm Animal Program

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February 23, 2021

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INTRODUCTION

Pursuant to Federal Trade Commission (FTC) regulations, 16 C.F.R. § 2.1–2.2, Complainant the Animal Welfare Institute (AWI) requests that the FTC investigate and commence an enforcement action against Boar’s Head Provisions Co., Inc. (Boar’s Head) for engaging in false or misleading advertising in violation of the Federal Trade Commission Act, 15 U.S.C. § 45–58 (FTC Act) in regard to use of the claim “humanely raised” on certain of its chicken sausage products.

Boar’s Head has issued and is continuing to issue unlawfully false and misleading representations about the treatment of animals used to produce its products. Text on product labels sold under the company’s name, indicates that chickens were “humanely raised.” This statement is untrue and misleading. The low standards and industry-created auditing criteria employed on Boar’s Head producer farms are blatantly inadequate to support this claim and fall far below scientifically established standards for humane care of farm animals. Moreover, the audit does not require producers to comply with key indicators of animal welfare, meaning that the audit process ensures that producers using only minimum animal care practices can achieve certification.

Consumers perceive the claim “humanely raised” to mean that those animals are raised to a standard of care that is higher than industry norms. This is not true for the chickens raised by Boar’s Head suppliers. These suppliers breed their chickens for rapid growth (which causes numerous health and welfare problems, including lameness), confine chickens indoors in crowded, barren environments, and subject them to near-constant, low-level lighting. Consumers do not believe these conditions are consistent with the claim “humanely raised.”

Consumers who purchase chicken products rely upon claims such as “humanely raised” in making their purchasing decisions. Because consumers perceive the claim “humanely raised” to

mean something that Boar’s Head cannot substantiate, consumers are misled into choosing a product that is not what they expect. Boar’s Head is therefore unlawfully deceiving consumers under the FTC Act. This deception harms consumers, competitors, and farmers by destroying the fair market for higher welfare poultry products.

Without intervention by the FTC, this deception is likely to continue. Consumers cannot determine firsthand the level of care provided to animals used to create food products, because they do not have access to farms and production practices are not apparent in the final product. As such, the Commission’s intervention is necessary to stop Boar’s Head from continuing to exploit consumers’ willingness to pay for products that are produced from animals raised to a high standard of care. AWI requests that the FTC take action to stop Boar’s Head from deceiving consumers with the false claim “humanely raised” on its chicken sausage products.

PARTIES

I. Animal Welfare Institute

The Animal Welfare Institute (AWI) is a Washington, DC–based nonprofit founded in 1951. Since its creation, AWI has been dedicated to reducing animal suffering caused by people. AWI seeks better treatment of animals everywhere—in the laboratory, on the farm, in commerce, at home, and in the wild. This work includes efforts to improve the welfare of animals used in agriculture. In furtherance of its mission to alleviate animal suffering, AWI promotes higher-welfare farming systems and works to raise awareness about the cruel realities of conventional, industrial animal agriculture. AWI also founded a high-welfare food certification program, Animal Welfare Approved (which is now operated independently of AWI as Certified Animal Welfare Approved by A Greener World), to assist consumers in making better food choices and to reward farmers who invest time and resources to assist consumers in making better food choices, and to

reward farmers who invest time and resources to provide the opportunity for the animals to engage in their natural behaviors and to reduce the pain and stress they experience.

As part of AWI's goal to promote improved farming systems, the organization helps its members, and consumers in general, choose products that align with their personal preferences for improved treatment of animals. AWI educates its members and the public about how to choose products by publishing and regularly updating *A Consumer's Guide to Food Labels and Animal Welfare*.¹ This guide provides consumers an in-depth analysis of different animal raising claims and certification programs to aid in the complex process of choosing higher-welfare animal products.² AWI's work also requires monitoring the use of animal raising claims on animal product packaging so it can warn consumers about deceptive labeling practices. Based on this monitoring, AWI has found that the oversight of food label claims by the US Department of Agriculture (USDA) sometimes fails consumers, resulting in consumer deception.³

II. Boar's Head Provisions Co., Inc.

Boar's Head Provisions Co., Inc. is a Delaware corporation headquartered at 1819 Main Street, Suite 800, Sarasota, FL 34236. Boar's Head operates meat and poultry-processing facilities in Arkansas, Michigan, Indiana, and Virginia. Boar's Head products are marketed throughout the United States at most major grocery outlets.

¹ *A Consumer's Guide to Food Labels and Animal Welfare*, ANIMAL WELFARE INST. (Oct. 2020) https://awionline.org/sites/default/files/publication/digital_download/20FoodLabelGuideFull.pdf [hereinafter *AWI Consumer's Guide*].

² *Id.* at 1.

³ *Label Confusion 2.0: How the USDA Allows Producers to Use "Humane" and "Sustainable" Claims on Meat Packages and Deceive Consumers*, ANIMAL WELFARE INST. 2 (Sept. 2019) https://awionline.org/sites/default/files/publication/digital_download/19%20Label%20Confusion%20Report%20FINAL%20WEB%20II.pdf [hereinafter *Label Confusion 2.0*].

JURISDICTION

The FTC is vested with responsibility to prevent deceptive advertising in agriculture pursuant to the Packers and Stockyards Act, which extends jurisdiction to poultry products.⁴ According to the FTC’s *Enforcement Policy Statement on Food Advertising*,⁵ the FTC “assumed primary responsibility for regulating food advertising”⁶ while the Food and Drug Administration (FDA) takes primary responsibility for food labeling. This statement also notes that the FTC “intends to apply similar principles to consideration of claims for products regulated by the USDA.”⁷

USDA approval of label claims does not preclude FTC enforcement, however. The USDA approves labels that contain claims that are in essence advertisements. The FTC has recognized that “[s]ome claims that would technically comply with [an agency’s] labeling regulations might be deceptive if the context of the ad renders the express message of the claim misleading.” In this case, the USDA approved “humanely raised” on a product package without considering consumer perceptions or the scientific validity of the claim. Instead of affording deference to the USDA’s labeling regulations, the FTC should exercise its authority to prevent deceptive animal welfare advertising practices on poultry product labels because the USDA fails to consistently ensure that misleading animal welfare labels do not enter the marketplace.⁸ Deference to the USDA’s approval

⁴ 7 U.S.C. §§ 181–229b; § 227(b) (“The [FTC] shall have power and jurisdiction over any matter involving . . . poultry products”).

⁵ *Enforcement Policy on Food Advertising*, FED. TRADE COMM’N (May 13, 1994) <https://www.ftc.gov/public-statements/1994/05/enforcement-policy-statement-food-advertising>.

⁶ *Id.*

⁷ *Enforcement Policy on Food Advertising*, *supra* note 5 at n.2.

⁸ *Infra* Part II.

should be “balance[d] . . . against the reasonable expectations of consumers” in favor of the FTC “exercising its full authority to protect consumers.”⁹

STANDARD OF REVIEW

The FTC is the lead agency for preventing unfair and deceptive trade practices.¹⁰ According to the FTC, unlawful deception will be found “if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”¹¹ Thus, a representation is unlawfully deceptive if it is material to a consumer’s decision-making and likely to mislead the consumer.¹² To ensure an advertisement is not deceptive, a marketer must ensure that all reasonable interpretations of an advertisement, whether implied or express, are truthful, not misleading, and supported by a reasonable basis.¹³ Advertisements should be examined from the perspective of a reasonable member of the group targeted by a given advertisement.¹⁴

FALSE OR MISLEADING CLAIM

I. Representation at Issue

A. Chicken Used Is Humanely Raised.

This petition relates to representations made on certain Boar’s Head chicken product packages. Boar’s Head All Natural Chicken Sausage products, available in six flavor varieties,

⁹ *Statement of Commissioner Rohit Chopra*, FED. TRADE COMM’N (Sept. 19, 2019) https://www.ftc.gov/system/files/documents/public_statements/1544655/commissioner_rohit_chopra_statement_on_truly_organic_sept_19_2019.pdf.

¹⁰ 15 U.S.C. § 45(a)(2).

¹¹ *FTC Policy Statement on Deception*, FED. TRADE COMM’N 2 (Oct. 14, 1983) https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf; 15 U.S.C. § 45.

¹² *FTC Policy Statement on Deception*, *supra* note 11, at 2.

¹³ See 16 C.F.R. § 260.2 (citing to FTC, Policy Statement Regarding Advertising Substantiation at 3 (Nov. 23, 1984) <https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation>).

¹⁴ *Id.*

contain the phrase “Chicken used is humanely raised” in prominent placement on the product packaging. The text is featured strategically in a brightly colored and eye-catching box boasting the claim to prospective purchasers.¹⁵ The claim is followed by a dagger symbol (†), which leads the consumer to the *back* of the package to find the “definition” of the claim: “†Boar's Head Brand® defines humanely raised as animals raised with shelter, resting areas, sufficient space and the ability to engage in natural behaviors.”¹⁶ To read the definition, the consumer must understand that the dagger symbol means there is more information, find the information panel, turn the package *upside down*, and decipher the small, white text against a black background.

Figure 1.
Boar’s Head Chicken Sausage, Front.



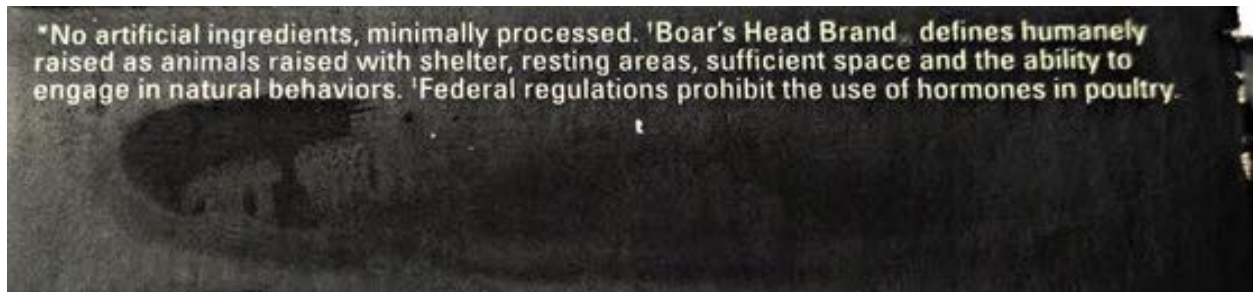
Figure 2.
Boar’s Head Chicken Sausage, Back.



¹⁵ See *infra* Figure 1.

¹⁶ See *infra* Figure 2–3.

Figure 3.
Boar's Head Chicken Sausage, Definition Panel.



The Boar's Head "humanely raised" claim falsely supports the impression that the chickens used to produce the sausage are raised to a standard of care that exceeds that of the chicken industry as a whole. "Humanely raised" also implies that Boar's Head animal care practices exceed those of competitors that do not use the claim.

The definition has a similar implication. Boar's Head defines "humanely raised" as "shelter, resting areas, sufficient space and the ability to engage in natural behaviors," implying that it provides these things while standard industry producers do not. Rather than remedying any confusion about what the producer means by the claim, the definition only furthers consumer deception. To appreciate the implication of the definition the consumer would need to be aware of the fact that it merely describes industry standard for the raising of chickens. But as discussed below, Boar's Head 1) fails to exceed industry standards and 2) fails to provide a level of animal care that meets consumer expectations and scientifically established standards for humane animal treatment. It is therefore unlawfully deceptive.

II. Practices at Issue

- B. *The USDA Label Process Fails Consumers by Allowing Producers to Use Deceptive Claims.*

The USDA requires producers/processors to obtain pre-market label approval for animal raising claims through application to its Food Safety and Inspection Service (FSIS).¹⁷ The USDA publishes a *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submission*, last revised in December 2019.¹⁸ The Guideline explains that the USDA has not defined animal welfare claims, including “humanely raised,” in regulations or policy guidelines.¹⁹ Instead, the USDA allows producers/processors to establish their own definition or employ a definition developed by another party.²⁰ However, the USDA does not evaluate the relevance or appropriateness of third-party (independent) or second-party (industry) standards.²¹

The USDA requires that applications for label approval include substantiation of any animal welfare claims. Documentation needed includes (1) a detailed written description explaining the meaning of the claim, (2) a signed document describing how the animals are raised, (3) a written description of product tracing and segregation mechanisms, and (4) a written description of how animals not raised in accordance with the claim are segregated from animals eligible for the claim.²²

The USDA does not independently verify compliance with animal welfare claims on the farm, during transport, or at slaughter.²³ Moreover, it accepts audits of industry trade association

¹⁷ While the FSIS is responsible for label approval within the USDA, it is referred to as “the USDA” or “the Department” in this document for clarity.

¹⁸ *Labeling Guideline on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions*, U.S. DEP’T OF AGRIC., FOOD SAFETY AND INSPECTION SERV. (Dec. 2019) <https://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES> [hereinafter *USDA Label Guide*].

¹⁹ *Id.* at 7.

²⁰ *Id.*

²¹ In an August 2017 meeting with AWI, staff of the USDA-FSIS Labeling and Program Delivery office indicated they were not familiar with specific animal care standards of the certification and auditing program they accept as substantiation for animal raising claims on meat products.

²² *USDA Label Guide*, *supra* note 18, at 6.

²³ *See id.* at 6.

minimum animal care guidelines as substantiation for these claims, according to reviews of USDA label approval files by AWI.²⁴ The USDA approved this claim, however, the department has been known to approve animal raising claims with little to no substantiation.²⁵ The USDA relies solely on “desk audits” and conducts no on-site visits to verify compliance with its labeling policies. Additionally, it does not survey consumer perceptions of claims used by producers to ensure that claims approved by the department meet consumer expectations.²⁶ Because of the USDA’s flawed process for label approval, producers—eager to derive profits from taking advantage of consumer preferences—occasionally make unsubstantiated claims on their packages. These questionable claims may go unchallenged by the USDA, in part because it has not adopted meaningful definitions for many animal raising claims made on meat and poultry products. The role of the FTC in providing additional scrutiny is necessary to ensure that such claims are not unlawfully deceptive under the FTC Act. This complaint presents additional evidence not considered relevant by the USDA in its approval of this claim.

C. *The Basis of the Boar’s Head Humanely Raised Claim is the FACTA Audit, Which Represents a Baseline Industry Animal Care Standard.*

The Boar’s Head application file to the USDA for use of the claim “humanely raised” consisted of (1) a completed application form, (2) a sketch of the proposed label bearing the “humanely raised” claim, (3) a list of Boar’s Head manufacturing facilities, (4) a Letter of Guarantee and Food Safety from a Boar’s Head supplier, dated January 2, 2019, and (5) three

²⁴ *Label Confusion 2.0*, *supra* note 3; *Label Confusion: How “Humane” and “Sustainable” Claims on Meat Packages Deceive Consumers*, ANIMAL WELFARE INST. (May 2014) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-Food-Label-Report.pdf>.

²⁵ *Id.*

²⁶ *See USDA Label Guide*, *supra* note 18, at 6.

reports from the Farm Animal Care Training and Auditing (FACTA) program, dated September 17, November 5, and December 12, 2018.²⁷

The Animal Welfare section of the supplier’s Letter of Guarantee states: “[Redacted] has committed to an animal welfare program *in compliance with the National Chicken Council Animal Welfare Guidelines* to ensure the proper handling, treatment and wellbeing of poultry during the production process” (emphasis added).²⁸

The National Chicken Council (NCC) is the trade association of the conventional meat chicken (“broiler”) industry in the United States, and its producer/processor members account for 95 percent of chickens raised in the country for meat.²⁹

The NCC has created a set of minimum animal care guidelines and an auditing tool for the broiler industry.³⁰ Animal agricultural trade association guidelines and auditing programs establish a consistent minimum level of animal care throughout the industry.³¹ The primary objective of these programs is to avoid government regulation, reassure consumers when questionable practices are brought to light, and ultimately promote the industry and its products.³²

As noted above, Boar’s Head uses the FACTA program to demonstrate its supplier(s)’ compliance with industry animal care guidelines. FACTA offers training, verification, and

²⁷ *Boar’s Head Chicken USDA Label Approval File*, 1–177 (available upon request).

²⁸ *Id.* at 32.

²⁹ *About NCC*, NAT’L CHICKEN COUNCIL, <https://www.nationalchickencouncil.org/about-ncc>.

³⁰ *National Chicken Council Animal Welfare Guidelines and Audit Checklist for Broilers*, NAT’L CHICKEN COUNCIL 3 (Feb. 2017) https://www.nationalchickencouncil.org/wp-content/uploads/2020/03/NCC-Animal-Welfare-Guidelines_Broilers_Dec2019.pdf.

³¹ D. JONES & M. PAWLIGER, *Voluntary Standards and Their Impact on National Laws and International Initiatives*, in INT’L FARM ANIMAL, WILDLIFE AND FOOD SAFETY L. 111–150 (Gabriela Steier & Kiran K. Patel, eds. 2017).

³² *Id.* at 125; *see also*, *Learn About FACTA*, FACTA, <http://factallc.com/about-us/> (“Our team will work jointly with yours to create and implement socially responsible on-farm company policies to *protect your livestock, brand, and profits* in an economically sensible manner.”) (emphasis added).

certification services to farm animal producers, including those that raise and slaughter chickens for meat.³³ While third-party animal welfare certification programs are all owned and administered by nonprofit animal protection organizations, FACTA is owned by Frost, PLLC, a public accounting firm that serves a “who’s who” of the food industry.³⁴ One of the services FACTA offers is a simple audit based on minimum industry standards.³⁵

A review of the broiler standards posted on the FACTA website—and reflected in the audit forms submitted with the Boar’s Head application—confirm that the FACTA audit is based on the NCC’s minimum industry animal care guidelines.

The FACTA and NCC industry standards are extremely similar, although not identical. In some cases, the FACTA standard is marginally higher, and in other key animal welfare areas, the NCC standard is higher.³⁶

D. *The FACTA Industry Audit Does Not Reflect Humane Standards for the Raising of Chickens, According to Scientific Research or by Comparison to Independent Animal Welfare Certification Programs.*

1. Consumers trust and rely on independent animal welfare certification programs to verify animal raising claims.

American consumers increasingly identify the welfare and protection of food animals as a major area of concern, both politically and as criteria for food selection.³⁷ However, they are

³³ *Learn About FACTA*, *supra* note 32.

³⁴ *Id.*

³⁵ *Id.* (“This audit includes an objective, science-based assessment of the [animal welfare] program using only company policies and the minimum industry standard that farm follows. . . . This audit is designed for companies that wish to follow minimum industry standards (ex. NPB, NCC or UEP guidelines)”).

³⁶ Exhibit A, FACTA Standards Lower than the Industry Standard.

³⁷ In a 2016 survey conducted for the American Society for the Prevention of Cruelty to Animals (ASPCA), 77 percent of consumers said they are concerned about the welfare of animals raised for food. *New Research Finds Vast Majority of Americans Concerned about Farm Animal Welfare*, ASPCA (Jul. 7, 2016) <http://www.asPCA.org/about-us/press-releases/new-research-finds-vast-majority-americans-concerned-about-farm-animal>.

confused about the meaning of animal welfare claims on labeling,³⁸ the accuracy of which consumers cannot typically verify for themselves.

A large majority of respondents to an October 2018 survey commissioned by AWI indicated consumers have more confidence in food that has been verified by an independent inspection.³⁹ In addition, respondents to another AWI-commissioned survey were four times more likely to say they place a higher degree of trust in animal care labels verified by a third-party animal welfare organization than labels verified by an agricultural industry association.⁴⁰

Nonprofit animal welfare certification programs have emerged as a means of helping consumers choose products from animals raised more humanely. Twenty years ago, there were no major third-party food labeling certification programs in the United States that specifically addressed animal welfare; today there are four.⁴¹ Currently, there are approximately 1.5 billion farm animals being raised each year under the four animal welfare labels.⁴² Moreover, hundreds—

³⁸ Fifty-six percent of respondents to a September 2018 survey commissioned by AWI said they are “confused about the meaning of some food label claims that may relate to how farm animals are raised.” *Survey of Consumer Attitudes about Animal Raising Claims on Food (Part I)*, ANIMAL WELFARE INST. (Oct. 2018) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-survey-on-animal-raising-claims-Sept-2018.pdf> [hereinafter *AWI 2018 Consumer Survey Part I*].

³⁹ *Survey of Consumer Attitudes about Animal Raising Claims on Food (Part II)*, ANIMAL WELFARE INST. (Oct. 2018) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-survey-on-animal-raising-claims-Oct-2018.pdf> [hereinafter *AWI 2018 Consumer Survey Part II*].

⁴⁰ *Survey of Animal Raising Claims Used on Meat Packaging*, ANIMAL WELFARE INST., 2 (Oct. 2013) <https://awionline.org/sites/default/files/uploads/documents/fa-meatlabelingpoll-041714.pdf> [hereinafter *AWI 2013 Consumer Survey*].

⁴¹ American Humane Certified, Certified Animal Welfare Approved, Certified Humane, Global Animal Partnership.

⁴² Estimating the number of animals raised under welfare certification programs is difficult due to overlap in producer membership in the various programs. One of the programs, American Humane Certified, claims its program currently certifies the raising of nearly one billion animals, while another program, Global Animal Partnership, cites a figure of more than 416 million animal annually. *2020 Impact Report*, AMERICAN HUMANE CERTIFIED, <http://www.humaneheartland.org>; *Our Program*, GLOBAL ANIMAL PARTNERSHIP, <http://www.globalanimalpartnership.org/program/>.

perhaps thousands—of family farmers have been able to survive in an age of continued industry consolidation, thanks to these programs.

While the four third-party animal welfare certification programs are not in complete alignment with one another, all have addressed the demand for humanely raised chicken products by developing standards based on the science of animal welfare and the concept of “Five Freedoms,” originally conceived by the United Kingdom’s Farm Animal Welfare Council.⁴³ Each program demands a baseline level of care that the industry’s NCC and FACTA standards do not come close to approaching. American Humane Certified,⁴⁴ Certified Animal Welfare Approved,⁴⁵ Certified Humane,⁴⁶ and the Global Animal Partnership (Step 2)⁴⁷ all have in common a base threshold for welfare that significantly exceeds the NCC and FACTA minimum welfare guidelines.

⁴³ *Farm Animal Welfare Committee*, GOV.UK, <https://www.gov.uk/government/groups/farm-animal-welfare-committee-fawc>.

⁴⁴ American Humane Certified is an auditing and labeling program administered by the American Humane Association, a nonprofit organization. The program administers standards for beef cows, meat chickens, pigs, laying hens, dairy cows, and turkeys. Products marketed under this label bear a seal reading “American Humane Certified.” *See Our Standards*, AMERICAN HUMANE CERTIFIED, <http://humaneheartland.org/our-standards>.

⁴⁵ The Certified Animal Welfare Approved program is an auditing and labeling program administered by A Greener World, a nonprofit organization. The program administers standards for family owned and operated producers of pasture-raised beef and dairy cows, meat chickens, laying hens, turkeys, pigs, goats, sheep, bison, ducks, and geese. Products marketed under this label bear a seal reading “Certified Animal Welfare Approved by AGW.” *See Certified Animal Welfare Approved by AGW*, A GREENER WORLD, <https://agreenerworld.org/certifications/animal-welfare-approved/>.

⁴⁶ Certified Humane is an auditing and labeling program administered by Humane Farm Animal Care, a nonprofit organization. The program administers standards for beef and dairy cattle, meat chickens, laying hens, pigs, veal calves, turkeys, sheep, and goats. Products marketed under this label bear a seal reading “Certified Humane Raised and Handled.” *See Our Standards*, CERTIFIED HUMANE, <https://certifiedhumane.org/how-we-work/our-standards/>.

⁴⁷ The Global Animal Partnership program is an auditing and labeling program administered by Global Animal Partnership, a nonprofit organization. Producers are certified according to a six-tiered scale, where a Step 5+ certification signifies that the producer has met the program’s highest standards. The program currently administers standards for beef cows, bison, goats, sheep, pigs, meat chickens, laying hens, and turkeys. *See Our Standards*, GLOBAL ANIMAL PARTNERSHIP, <https://globalanimalpartnership.org/standards/>.

A side-by-side comparison of the NCC standards, the FACTA standards, and the standards of the third-party animal welfare certification programs clearly demonstrates that (1) NCC and FACTA are fundamentally the same audit and (2) all third-party animal welfare certifications differ significantly from these industry audits.⁴⁸

The third-party certification standards focus on benchmarks for welfare that have been identified by sound animal welfare science, as opposed to industry expedients, and all of the programs make their standards publicly available, allowing consumers to make informed purchasing choices.

⁴⁸ AWI selected 14 of the most important animal care standards for comparison. As shown in Figure 4, the FACTA and NCC audits cover 3 and 4 of these standards, respectively, while the four third-party programs cover between 11 and 14 of the standards. A detailed version of the comparison can be found in Exhibit B, Comparison of Chicken Welfare Standards (Full).

Figure 4. COMPARISON OF CHICKEN WELFARE STANDARDS

CHICKEN WELFARE STANDARD	NCC	FACTA	AHC	CH	GAP ¹	CAWA
1. Health Care						
1.1 Bird welfare health plan available for all flocks	✓		✓	✓	✓	✓
1.2 Growth promoters & non-therapeutic antibiotics prohibited			✓	✓	✓	✓
1.3 Beak trimming & other physical alterations prohibited				✓	✓	✓
1.4 Growth (and leg health) addressed through genetics &/or feeding regimes				✓	✓	✓
2. Food and Water						
2.1 Unrestricted access to water provided for all birds	✓	✓	✓	✓	✓	✓
2.2 Unrestricted access to food provided for all birds on a daily basis			✓	✓	✓	
3. Housing						
3.1 Clean, dry litter/bedding available at all times			✓	✓	✓	✓
3.2 Environmental enrichment required		²	³	✓	✓	✓
3.3 Indoor stocking density kept below 7.5 lbs. per square foot of space			✓	✓	✓	✓
3.4 Light intensity during day maintained at 10 lux (1.0 ft candles) or higher			✓	✓	✓	✓
3.5 At least four hours continuous dark period provided every 24 hours			✓	✓	✓	
3.6 Ammonia in atmosphere not allowed to exceed 25 ppm	✓	✓	✓	✓	✓	✓
4. Handling						
4.1 Hired workers trained in humane methods of chicken handling	✓	✓	✓	✓	✓	✓
4.2 Catching of birds performed in low light			✓	✓	✓	✓

Abbreviations:

NCC = National Chicken Council, FACTA = Farm Animal Care Training and Auditing, AHC = American Humane Certified, CAWA = Certified Animal Welfare Approved, CH = Certified Humane, GAP = Global Animal Partnership

Notes:

¹ GAP is a welfare rating program with 6 Steps, where Step 1 represents an entry level. Chart indicates requirements of Step 2.

² FACTA audit includes a standard for environmental enrichment; however, it is not a requirement for passing the audit.

³ AHC strongly encourages but does not currently require producers to provide environmental enrichment.

The conditions permissible for the raising of chickens under NCC and FACTA guidelines would shock most Americans. Under these standards, tens of thousands of birds may be packed into windowless sheds without access to fresh air and direct sunlight. They permit chickens to spend their lives sitting in wet litter (the sawdust or wood shavings that typically cover the floors of chicken houses) or entirely without litter, on floors covered in chicken feces and urine. Under the standards, chickens live in constant dim light, inducing a state of inactivity in which the animals do nothing but eat and grow. Industrial chickens have been bred for rapid growth that renders their legs too weak to hold them. Their breasts are so disproportionately large relative to body size that by the end of their lives the birds cannot walk more than a few steps without toppling over.

The following section describes some of the major shortcomings of the NCC and FACTA industry standards, presents scientific evidence demonstrating their failure to provide for the health and well-being of chickens, and, for each welfare issue, provides a comparison of the welfare standards required by authentic animal welfare labels thereby demonstrating that NCC and FACTA guidelines do not reflect the consensus surrounding the meaning of “humanely raised.”

i. Crowded housing

To maximize income, industrial chicken producers raise their birds at high stocking densities.⁴⁹ NCC and FACTA guidelines provide only 0.6–0.7 square feet of space per bird—with a maximum stocking density of 9.0 pounds per square foot.⁵⁰ Intensively raised poultry grow

⁴⁹ “Stocking density” refers to the number of birds, or the weight of birds, per area specified, such as 30 kg/m² or 6 lb/ft². On the other hand, “space allowance” refers to the amount of space allotted to each animal, such as 0.19 m² or 2 ft². Some references cite metric units while others cite customary US units, so conversion is often required when comparing different programs’ animal care standards for space.

⁵⁰ *National Chicken Council Animal Welfare Guidelines and Audit Checklist for Broilers*, *supra* note 30, at 11–12. National Chicken Council guidelines recommend a range of stocking densities, from 6.5 lb/ft² when the chickens are younger and therefore smaller to 9.0 lb/ft² for larger, full-grown birds.

rapidly, and as a chicken approaches market age and weight, the bird's own body takes up most of the allotted space, leaving no room to perform simple activities without coming in contact with other birds. While NCC and FACTA guidelines grant each chicken only about 100 square inches, poultry research demonstrates that a chicken needs 138 square inches just to stretch one wing.⁵¹ The capacity to perform all behaviors is impacted by this level of crowding, including the ability to reach food and water.

Research comparing the welfare and behavioral effects of different stocking densities has found that at densities approximating those allowed by NCC and FACTA guidelines,⁵² flocks undergo increased incidence of foot and leg problems, skin dermatitis and bruising, increased disturbance of resting behavior, decreased physical activity and natural behaviors such as ground pecking, higher daily mortality for part of the rearing period, and disruption in lying and preening behavior, likely due to increased disturbance by other birds.⁵³

High stocking densities are generally recognized to impair chicken welfare because of the immediate effects of reduced space (such as increased aggression), and because high densities result in more chicken waste being discharged into the air and into the litter on which birds sit and lie.⁵⁴ The effect of high stocking density on other housing conditions, such as temperature,

⁵¹ Dawkins, M.S. and Hardie, S. Space Needs of Laying Hens, *Br. Poult. Sci.* (1989) 30:413.

⁵² The high stocking density used in this study was 40kg/m² or 8.19 lbs/ft². Hall, A.L. The Effect of Stocking Density on the Welfare and Behavior of Broiler Chickens Reared Commercially, *Animal Welfare* (2001) 10:23. This is less than the maximum density allowed by NCC guidelines, which is 9.0 lbs/ft² for birds over 7.5 pounds. *National Chicken Council Animal Welfare Guidelines and Audit Checklist for Broilers*, *supra* note 30, at D5.2.

⁵³ Hall, A.L., *supra* note 52; Martrenchar, A. et al. Influence of Stocking Density on Some Behavioral, Physiological and Productivity Traits of Broilers, *Veterinary Res.* (1997) 28:473; Sorensen, P., Su, G., & Kestin, S.C. Effects of Age and Stocking Density on Leg Weakness in Broiler Chickens, *Poult. Sci.* (2000) 79:864; Knowles, T. et al. Leg Disorders in Broiler Chickens: Prevalence, Risk Factors and Prevention, *PLOS ONE* 3(2):e1545 (2008); Ventura, B.A. et al. Effects of Barrier Perches and Density on Broiler Leg Health, Fear and Performance, *Poult. Sci.* (2010) 89:1574.

⁵⁴ Meluzzi, A., and Sirri, F. Welfare of Broiler Chickens. *Italian J. of Animal Sci.* (Supp. 1 2009) 8:161; Estevez, I., Density Allowances for Broilers: Where to Set the Limits?, *Poultry Sci.* (2007) 86:1265.

humidity, and ventilation, have serious animal welfare implications. Higher amounts of urine and feces in chicken housing lead to irritation and burning of the eyes, respiratory tract, and skin.⁵⁵

All animal welfare certifications require significantly more space than conventional industry standards as represented by NCC and FACTA guidelines. The Certified Humane and Global Animal Partnership (Step 2) certification programs set a maximum stocking density of 6.0 lbs/ ft², compared to the 9.0 lbs/ ft² allowed by NCC and FACTA.⁵⁶ The high-welfare Certified Animal Welfare Approved program requires each chicken to have continuous access to 4 square feet of outdoor range and foraging area and, when housed indoors due to weather, a minimum of 2 square feet per bird, or a maximum density of 2.75 lbs/ft².⁵⁷ Though third-party animal welfare standards differ somewhat, they establish a baseline far above that of NCC and FACTA industry standards.

ii. Near-constant, low-level lighting

It is common practice in the conventional poultry industry to use near-constant dim lighting to manipulate chicken behavior, particularly feed consumption, activity levels, and weight gain. The typical light intensity used in conventional production is about 0.5 foot candles, or 5.4 lux (comparable to a moonlit night), and birds are given just 4 (sometimes nonconsecutive) hours of

⁵⁵ Dawkins, M.S., Donnelly, S., and Jones, T.A. Chicken Welfare Is Influenced More by Housing Conditions than by Stocking Density, *Nature* (2004) 427:342; Dozier III, W.A. et al. Stocking Density Effects on Male Broilers Grown to 1.8 kilograms of Body Weight, *Poult. Sci.* (2006) 85:344; Dozier III, W.A. et al. Stocking Density Effects on Growth Performance and Processing Yields of Heavy Broilers, *Poult. Sci.* (2005) 84:1332.

⁵⁶ *Humane Farm Animal Care Animal Care Standards: Chickens*, CERTIFIED HUMANE 14 (2014), <https://certifiedhumane.org/wp-content/uploads/Std19.Chickens.4H-2-1.pdf>; *5-Step Animal Welfare Standards for Chicken Raised for Meat v3.2*, GLOBAL ANIMAL PARTNERSHIP 23–24 (2020), <https://globalanimalpartnership.org/wp-content/uploads/2020/05/G.A.P.s-Animal-Welfare-Standards-for-Chickens-Raised-for-Meat-v3.2.pdf>; See Exhibit B, Comparison of Chicken Welfare Standards (Full).

⁵⁷ Assuming a 5.5-pound bird. *Certified Animal Welfare Approved Meat Chicken Standards*, A GREENER WORLD (2020), <https://agreenerworld.org/certifications/animal-welfare-approved/standards/meat-chicken-standards/>. See Exhibit B, Comparison of Chicken Welfare Standards (Full).

darkness per 24-hour period.⁵⁸ It is the perception of the industry that this practice provides certain productivity advantages. However, the scientific literature confirms this type of lighting program can have detrimental impacts on the health and well-being of chickens.

Studies have shown that near-constant lighting can negatively impact welfare by increasing mortality and altering or eliminating circadian rhythms, which are essential for immune function and regulating behavior. It can also cause birds to experience the same negative health and physiological responses as total sleep deprivation, resulting in altered brain function, reduced immune function, and increased disease.⁵⁹ Dim lighting reduces mobility and activity, which can in turn increase incidence of footpad lesions that can cause pain and impact welfare.⁶⁰

Additional research has shown that providing birds with longer dark periods can have numerous welfare advantages, including decreased susceptibility to metabolic disease, reduced fearfulness and psychological stress, and more natural behavioral activities.⁶¹ Dark periods can also shift growth curves so that growth is slower earlier in life.⁶² This allows the bird's skeletal and metabolic systems to develop prior to having to support heavier weights later in life, which can affect health and mortality.⁶³ This was proven by one study that showed birds who were provided 7 to 10 hours of darkness during growth had lower mortality and morbidity rates, and

⁵⁸ W. Winchell, *Lighting for Poultry Housing*, THE POULTRY SITE (Jan. 1, 2005), <https://www.thepoultrysite.com/articles/lighting-for-poultry-housing>; *National Chicken Council Animal Welfare Guidelines and Audit Checklist for Broilers*, *supra* note 30, at D5.3.

⁵⁹ Schwean-Lardner, K., et al. Basing Turkey Lighting Programs on Broiler Research: A Good Idea? A Comparison of 18 Daylength Effects on Broiler and Turkey Welfare, *Animals* (2016) 6.5:2.

⁶⁰ Deep, A., et al., Effect of Light Intensity on Broiler Production, Processing Characteristics, and Welfare, *Poult. Sci.* (2010) 89.11: 2326-2333.

⁶¹ Bayram A. and Özkan, S. Effects of a 16-hour Light, 8-hour Dark Lighting Schedule on Behavioral Traits and Performance in Male Broiler Chickens, *J. of Applied Poult. Research* (2010) 19.3:263-273.

⁶² Schwean-Lardner et al., *supra* note 59.

⁶³ *Id.*

reduced metabolic and skeletal disorders than birds of the same weight who were provided just 1 hour of darkness.⁶⁴ Additionally, average gait score—which is used to assess leg weakness and lameness—worsened under longer lighting periods.⁶⁵

Despite these well-established findings, FACTA’s standards for lighting conform to what is typical within conventional production. FACTA requires light intensity be maintained at just 0.5 foot candle or 5.4 lux, and it fails to provide requirements for daily dark periods altogether.^{66 67} On the other hand, every animal welfare certification program, including American Humane Certified, Certified Animal Welfare Approved, Certified Humane, and Global Animal Partnership (Step 2), all require an average minimum light intensity of 10 to 50 lux.⁶⁸ Additionally, these animal welfare standards programs require a minimum of 4 to 6 hours of continuous darkness daily.⁶⁹

iii. Barren environment

The physical environment provided to chickens in conventional indoor confinement operations lacks sufficient complexity to adequately promote the health and welfare of the animals. Birds commonly show signs of stress and perform behaviors indicative of frustration and boredom as a result of unfulfilled behavioral needs and hunger, such as foraging, perching, and

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Humane Certified Animal Welfare Broiler Audit Program, Audit Standards*, FARM ANIMAL CARE TRAINING AND AUDITING (“FACTA”) at 40 (4.7.2) (2018) <http://factallc.com/wp-content/uploads/2018/06/2018-FACTA-LLC-Certified-Broiler-Standards1.pdf> [hereinafter *FACTA Audit*].

⁶⁷ By failing to require a daily period of darkness, FACTA standards are below that of the industry, which requires that birds be provided a minimum of 4 hours of darkness, in increments of 1, 2, or 4 hours, every 24 hours. *See National Chicken Council Animal Welfare Guidelines and Audit Checklist for Broilers*, *supra* note 30, at 23.

⁶⁸ American Humane Certified, at M11; Certified Animal Welfare Approved, at 8.0.13; Certified Humane, at E18; Global Animal Partnership, at 4.5.1; *See Exhibit B, Comparison of Chicken Welfare Standards (Full)*.

⁶⁹ American Humane Certified, at M11; Certified Animal Welfare Approved, at 8.0.8; Certified Humane, at E15; Global Animal Partnership, at 4.5.6; *See Exhibit B, Comparison of Chicken Welfare Standards (Full)*.

dustbathing.⁷⁰ A barren environment contributes to low levels of physical activity; modern broiler chickens spend 86% of their time sitting down, which compounds welfare problems to which they are predisposed due to increased growth rates and high body weight.⁷¹ These include lameness and contact dermatitis, including hock burns, breast burns, and foot pad dermatitis, due to prolonged skin contact with soiled, moist litter.⁷² These painful pathologies, combined with high stocking densities that restrict movement, further decrease levels of activity—particularly, activities related to behavioral expression—in chickens.⁷³

There is consensus within the scientific literature that environmental enrichments such as elevated platforms, strategically placed barriers, dust bathing materials, foraging material,⁷⁴ and straw bales can improve welfare by increasing physical and mental activity, reducing lameness, and simply allowing the birds to perform species-specific behaviors.⁷⁵ One study confirmed that birds in an enriched environment demonstrated more running, play fighting, wing flapping and stretching, ground scratching, and ground pecking than those without enrichments. Strikingly, these behaviors were observed to a greater extent among birds in an enriched environment even when they were not directly engaging with an enrichment tool.⁷⁶

⁷⁰ Riber, Anja B., et al. Environmental Enrichment for Broiler Breeders: An Undeveloped Field, *Frontiers in Veterinary Sci.* (2017) 4:86.

⁷¹ Baxter, M., et al. Evaluation of a Dustbathing Substrate and Straw Bales as Environmental Enrichments in Commercial Broiler Housing, *Applied Anim. Behav. Sci.* (2018) 78–85 (citing Weeks et al., The Behaviour of Broiler Chickens and its Modification by Lameness, *Appl. Anim. Behav. Sci.* (2000) 67 (1), 111–125).

⁷² Riber, Anja B., *supra* note 70.

⁷³ *Id.*; Bach, Monica H., et al. Effects of Environmental Complexity on Behaviour in Fast-Growing Broiler Chickens, *Appl. Anim. Behav. Sci.* 219 (2019) 104840.

⁷⁴ Bach, *supra* note 73.

⁷⁵ Riber, Anja B., *supra* note 70; Kells, A., Dawkins, M. S., and Cortina-Borja, M. The Effect of a “Freedom Food” Enrichment on the Behaviour of Broilers on Commercial Farms, *Animal Welfare* (2001) 10.4:347-356; Baxter, M., *supra* note 71.

⁷⁶ Vasdal, G., et al., Effects of Environmental Enrichment on Activity and Lameness in Commercial Broiler Production, *J. of Applied Animal Welfare Sci.* (2019) 22.2:197–205.

Enrichments have also been shown to reduce disturbance, aggression, fear responses, and stress among birds, and enrichments encourage a more even distribution of animals within the facility, giving them more space and preventing crowding.⁷⁷ Environmental enrichment has been shown to decrease fearfulness, which is important as exaggerated fear responses may cause smothering and mortality due to the high numbers of birds confined to each shed.⁷⁸

Both Certified Humane and Global Animal Partnership (Step 2) require that environmental enrichment be provided in indoor housing to encourage physical activity and stimulate exploratory behavior and foraging.⁷⁹ These programs also specify which enrichment tools are approved and include guidance on the quantity and placement of such items.⁸⁰ While the FACTA standards do vaguely require that birds have access to enrichment, this particular standard has such a low point value that it is essentially optional.⁸¹ NCC guidelines fail to address environmental enrichment altogether.

iv. Rapid growth and lameness

The poultry industry has used selective breeding to increase productivity and breast meat yield, resulting in fast growth and higher weights at the expense of the birds' welfare. Since the 1950s, the average market weight of meat chickens has more than doubled, while the amount of

⁷⁷ Leone, E. H., and Estévez, I., Economic and Welfare Benefits of Environmental Enrichment for Broiler Breeders, *Poult. Sci.* (2008) 87.1:14–21.

⁷⁸ Tahamtani, Fernanda M., et al., Effects of Environmental Complexity on Fearfulness and Learning Ability in Fast Growing Broiler Chickens, *Appl. Anim. Behav. Sci.* 207 (2018) 49–56.

⁷⁹ *Humane Farm Animal Care Animal Care Standards: Chickens*, CERTIFIED HUMANE at E28 (2014), <https://certifiedhumane.org/wp-content/uploads/Std19.Chickens.4H-2-1.pdf>; *Global Animal Partnership 5-step Animal Welfare Rating Standards for Broiler Chickens*, GLOB. ANIMAL PARTNERSHIP at 4.8.1, 4.8.4, and 4.8.6 (2020), <https://globalanimalpartnership.org/wp-content/uploads/2020/05/G.A.P.s-Animal-Welfare-Standards-for-Chickens-Raised-for-Meat-v3.2.pdf>.

⁸⁰*Id.*

⁸¹ *FACTA Audit*, *supra* note 66, at 46 (4.27.0).

time it takes for the birds to reach market weight has been cut nearly in half.⁸² Researchers have connected fast growth to a range of health and welfare problems, including leg disorders, gait alterations, and lameness, as well as cardiovascular disease and metabolic disorders, including sudden death syndrome.⁸³

A recent multidisciplinary study that compared 16 genetic strains of meat chickens with different growth rates determined “strains with faster growth rates and higher breast yields had lower activity levels, poorer indicators of mobility, poorer foot and hock health, higher biochemical markers of muscle damage, higher rates of muscle myopathies, and potentially inadequate organ development.”⁸⁴ Birds that suffer from leg problems and lameness evidently spend more time sitting and inactive, increasing susceptibility to skin lesions (especially if the quality of litter is poor) and possibly inhibiting their ability to reach food or water.⁸⁵

The health and welfare problems associated with rapid growth are typical of birds raised in industrial production and are widely acknowledged and recognized among both the scientific community and the poultry industry. However, like NCC guidelines, FACTA standards fail to address this issue by recommending any cap on weight gain. In contrast, standards under the Global Animal Partnership (Step 2) and Certified Animal Welfare Approved programs establish a

⁸² *U.S. Broiler Performance*, NAT'L CHICKEN COUNCIL (2020) <https://www.nationalchickencouncil.org/about-the-industry/statistics/u-s-broiler-performance/>.

⁸³ Tullo, E., et al. Association between Environmental Predisposing Risk Factors and Leg Disorders in Broiler Chickens, *J. of Animal Sci.* (2017) 95.4:1512-1520; Bassler, A. W., et al. Potential Risk Factors Associated with Contact Dermatitis, Lameness, Negative Emotional State, and Fear of Humans in Broiler Chicken Flocks, *Poult. Sci.* (2013) 92.11: 2811-2826; Bessei, W. Welfare of Broilers: A Review, *World's Poultry Sci. J.* (2006) 62.3:455-466.

⁸⁴ Torrey, S. et al. In Pursuit of a Better Broiler: Growth Efficiency and Mortality of 16 Strains of Broiler Chickens, (2020) doi: 10.1101/2020.10.15.341586.

⁸⁵ Tullo, E. et al., *supra* note 83; Bassler, A. W., et al., *supra* note 83.

limit on average daily weight gain, and Certified Humane requires feeding regimes be controlled to prevent leg abnormalities and other welfare problems associated with rapid growth.⁸⁶

ANALYSIS UNDER THE FTC ACT

Under the FTC Act, a representation is unlawfully deceptive if it is both “material” and “deceptive.”⁸⁷ The “humanely raised” claim by Boar’s Head satisfies both requirements.

I. Boar’s Head Representations Are Material

According to the FTC, deception is material when it is “likely to affect the consumer’s conduct or decision with regard to a product or service.”⁸⁸ “In other words, it is information that is important to consumers.”⁸⁹ In this case, the Boar’s Head label claim “humanely raised” is likely to affect conduct by enticing chicken consumers—who tend to be concerned about animal welfare (see discussion below)—to purchase Boar’s Head products over a competitor’s.

With no federal, and only limited state laws governing farm animal treatment and living conditions,⁹⁰ the vast majority of chickens are raised in conventional, industrial agriculture systems like those described above.⁹¹ Recent calculations estimate that 99.9 percent of meat chickens are raised in “concentrated animal feeding operations,” as defined by the USDA and the

⁸⁶ Certified Animal Welfare Approved, at 2.2.5; Certified Humane, at FW3; Global Animal Partnership, at 1.2.1. See Exhibit B, Comparison of Chicken Welfare Standards (Full).

⁸⁷ *FTC Policy Statement on Deception*, *supra* note 11, at 2.

⁸⁸ *Id.*

⁸⁹ *Id.* at 5.

⁹⁰ *Legal Protections for Animals on Farms*, ANIMAL WELFARE INST. (Oct. 2018)

<https://awionline.org/sites/default/files/uploads/documents/FA-AWI-LegalProtections-AnimalsonFarms-110714.pdf>

“No single federal law expressly governs the treatment of animals used for food while on farms in the United States.”; *id.* (explaining that though every state prohibits animal cruelty, the definition of animal cruelty varies in each state and typically exempts farm animals completely or exempts routine industry practices, or the state exempts treatment that is otherwise lawful within the state).

⁹¹ *U.S. Factory Farming Estimates*, SENTIENCE INST. (Apr. 2019) <https://www.sentienceinstitute.org/us-factory-farming-estimates>.

Environmental Protection Agency.⁹² Because animal raising conditions are not apparent in the products themselves, many consumers rely on label claims to learn about animal care and determine which products to purchase.⁹³ The industrial animal agriculture system is aware of this and is eager to capitalize on it.

Research conducted by the industry demonstrates producers' awareness of consumers' concern for the welfare of animals raised for consumption. In fact, the NCC has conducted this research itself. Its 2018 consumer survey shows how much interest consumers have in this important issue. The NCC's survey found the following:

- 78% of chicken purchasers are concerned about how chickens are raised
- 77% of chicken purchasers are concerned about how chickens are housed
- 61% of chicken purchasers are concerned about the time it takes to raise a chicken⁹⁴

Other polling data similarly indicates that consumers of chicken products are interested in animal welfare when making purchasing decisions and actively seek out humane options. One poll conducted by the American Society for the Prevention of Cruelty to Animals found that 76 percent of individuals agreed with the statement "I wish there were more humanely-raised chicken products available to purchase," and 81 percent agreed with the statement "it is important to me

⁹² *Id.*

⁹³ *AWI 2018 Consumer Survey Part II*, *supra* note 39, at 1 (stating that 66% of individuals and 71% of frequent purchasers pay at least some attention to animal raising claims on labels of meat, poultry, egg, and dairy products); *Poll on Free Range and Humanely Raised Label Claims*, ANIMAL WELFARE INST. (Nov. 2015) <https://awionline.org/sites/default/files/uploads/documents/FA-AWI-FreeRangeHumanelyRaised-Poll-Dec2015.pdf> (69% of respondents stated that humane labeling was important in deciding what meat and poultry products they purchase) [hereinafter *AWI 2015 Free Range Survey*].

⁹⁴ *US Chicken Consumption Report*, NAT'L CHICKEN COUNCIL, 17 (July 2018) http://www.wattagnet.com/ext/resources/Images-by-month-year/18_07/US-Chicken-Consumption_FINAL_Report_240718.pptx (finding that 78% of chicken purchasers are concerned about how chickens are raised, 77% of chicken purchasers are concerned about how chickens are housed, 61% of chicken purchasers are concerned about the time it takes to raise a chicken) [hereinafter *NCC Chicken Consumption Survey*].

that the chickens I eat are raised humanely.”⁹⁵ Another poll, commissioned by AWI, yielded similar results: the survey found that 81 percent of individuals think it is important that farm animals are raised humanely, and 73 percent thought that the availability of humanely raised meat and poultry options at grocery stores was important.⁹⁶

Consumers are also willing to change their behavior based on their perception of how a company treats its animals. For example, a November 2018 survey conducted by YouGov reported that 63 percent of Americans would be less likely to buy meat from a company with a bad reputation for animal welfare.⁹⁷ Claims such as “humanely raised” are material to this type of purchasing behavior—with many consumers being strongly motivated by such a claim. According to the 2018 Power of Meat survey,⁹⁸ 67 percent of consumers who have noticed the “humanely raised” claim are more likely to purchase a meat or poultry product with that claim over a conventional product.⁹⁹ AWI is aware of at least 22 surveys confirming that consumers are interested in and make purchasing decisions of animal products based on animal welfare concerns.¹⁰⁰

It is only logical that if consumers are interested in farm animal welfare, then their understanding of a producer’s treatment of animals is material to their purchasing decisions. Boar’s Head knows this, and uses the claim “humanely raised” to capitalize on this interest, especially

⁹⁵ *Humane Treatment of Chickens Raised for Food*, ASPCA (Sept. (Sep. 2014) https://www.aspc.org/sites/default/files/aspc-2014_chicken_survey.pdf.

⁹⁶ *AWI 2015 Free Range Survey*, *supra* note 93.

⁹⁷ Jamie Ballard, *Women More Likely than Men to Care about Ethical Meat*, YOUGOV (Nov. 26, 2018) <https://today.yougov.com/topics/food/articles-reports/2018/11/26/ethical-meat-price-quality-animal-rights>.

⁹⁸ An annual conference for meat industry groups and participants.

⁹⁹ *Power of Meat: An In-Depth Look at Meat Through the Shoppers’ Eyes*, FMI & FOUND. FOR MEAT & POULTRY RSCH. & EDUC. 48 (Mar. 2018) http://www.meatconference.com/sites/default/files/books/Power_of_meat_2018.pdf.

¹⁰⁰ *Consumer Perceptions of Farm Animal Welfare*, ANIMAL WELFARE INST., 6–9 (Sept. 2020) <https://awionline.org/sites/default/files/uploads/documents/ConsumerPerceptionsFarmWelfare.pdf>.

given the fact that many consumers are willing to pay a higher price for these kinds of products.¹⁰¹ As such, because the claim “humanely raised” is important to consumers and likely to change a consumer’s conduct with regard to Boar’s Head chicken sausage products, it is material.

II. Boar’s Head Representations Are Likely to Mislead

Advertisers are responsible for all reasonable interpretations of their advertisements, even if consumers interpret this claim differently from one another.¹⁰² If a “seller’s representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.”¹⁰³ Finally, if a specific consumer group is targeted or likely to be affected by an advertisement, the advertisement must be examined from the perspective of a reasonable member of the targeted group.¹⁰⁴

Consumers are likely to be misled by use of the claim “humanely raised” on Boar’s Head chicken product packages because consumers interpret it in a way that is unsupported by the company’s production practices. Here, because a particular group is targeted by the Boar’s Head advertisement, it should be interpreted from the perspective of a reasonable member of that group.¹⁰⁵ In using this label claim, Boar’s Head is targeting purchasers of chicken products who are concerned about the welfare of animals raised for their food. Many purchasers of meat and poultry products rely upon label claims to make determinations about what products to purchase

¹⁰¹ *Id.* at 9–11 (citing numerous studies finding that consumers are willing to pay more for humanely raised food); *infra* pt. III. Consumer willingness to pay a premium for a product can also indicate materiality from an economic perspective. *FTC Policy Statement on Deception*, *supra* note 11, at 5 (citing *Am. Home Products*, 98 F.T.C. 136, 369 (1981), *aff’d* 695 F.2d 681 (3d Cir 1982)).

¹⁰² *FTC Policy Statement on Deception*, *supra* note 11, at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

and consume,¹⁰⁶ and reasonably interpret the Boar’s Head statement to mean exactly what it says: that the animals used for this product are “humanely raised.”

The targeted consumers, purchasers of chicken products, believe that the claim “humanely raised” should be reserved for producers who exceed minimum industry animal care standards. In fact, 84 percent of chicken purchasers agree that food producers should not be allowed to use the claim “humanely raised” unless they exceed minimum industry animal care standards.¹⁰⁷ This result is one of four consumer surveys conducted on AWI’s behalf with similar findings in the past 10 years.¹⁰⁸

Chicken consumers are misled by Boar’s Head’s use of the claim “humanely raised” because they believe that it indicates that the chickens used to produce the product were not raised using conventional animal agriculture practices. A survey of chicken consumers¹⁰⁹ that was conducted on AWI’s behalf found that consumers do not believe certain practices permitted under the FACTA industry audit are consistent with what they believe the claim “humanely raised” on a product label means.¹¹⁰ In summary, the survey found the following:

- 71% expect that producers who label their products as “humanely raised” raise chickens without the use of growth promoters or non-therapeutic antibiotics

¹⁰⁶ *AWI 2018 Consumer Survey Part II*, *supra* note 39 (66% of individuals pay at least some attention to animal raising claims on labels of meat, poultry, egg, and dairy products).

¹⁰⁷ *Survey of Consumer Attitudes About Chicken Welfare*, ANIMAL WELFARE INST. (Oct. 2020) <https://awionline.org/sites/default/files/uploads/documents/SurveyConsumerAttitudesChickenWelfare.pdf> (citing that 84% of frequent chicken purchasers agree) [hereinafter *Survey of Consumer Attitudes about Chicken Welfare*].

¹⁰⁸ *AWI 2018 Consumer Survey Part II*, *supra* note 39, at 2 (82% of meat, poultry, egg or dairy purchasers agree); *AWI 2013 Consumer Survey*, *supra* note 40 (88% of frequent meat or poultry product purchasers agree); *U.S. Poll on the Welfare of Chickens Raised for Meat*, ANIMAL WELFARE INST. 2 (Apr. 2010) <https://awionline.org/sites/default/files/uploads/legacy-uploads/documents/FA-HumanelyRaisedCagedFreeSurvey-081110-1281725036-document-23248.pdf> (77% of frequent chicken purchasers agree).

¹⁰⁹ Individuals who purchase fresh, frozen or processed chicken products at least one time per month.

¹¹⁰ *Survey of Consumer Attitudes about Chicken Welfare*, *supra* note 107, at 1.

- 52% expect that producers who label their products as “humanely raised” house chickens with at least one square foot of space per bird
- 58% expect that producers who label their products as “humanely raised” do not breed chickens for rapid growth that allows them to be ready for slaughter as early as 42 days of age
- 52% expect that producers who label their products as “humanely raised” do not expose their chickens to extremely low, artificial light levels for 20 hours a day
- 65% expect that producers who label their products as “humanely raised” do not confine their chickens indoors for their entire lives¹¹¹

All these practices are permissible and were used on the farms audited by FACTA for this Boar’s Head chicken product. Because these practices are permissible and practiced on farms supplying the Boar’s Head product, yet are inconsistent with the targeted consumer’s reasonable expectation of “humanely raised,” the claim is likely to be misleading.

A. *The National Advertising Division of BBB National Programs Has a Record of Supporting Removal of Humane Claims Based on Industry Standards Because They Mislead Consumers.*

The National Advertising Division (NAD) of BBB National Programs, Inc., has found that claims such as “humanely raised” on conventional meat products are not consistent with consumer expectations. In some cases, the NAD has even found that producers cannot substantiate these claims and recommended removal from product packages. The FTC has a history of following up on cases referred by the NAD,, and should strongly consider the NAD’s expertise in consumer perceptions of advertising to find Boar’s Head’s use of the claim “humanely raised” on a conventional chicken product misleading.

In September 2019, the NAD recommended that Hatfield Quality Meats¹¹² remove the claim “Ethically Raised by family farmers committed to a higher standard of care governed by

¹¹¹ *Id.*

¹¹² A division of Clemens Food Group.

third party animal welfare audits” from the label of its conventional pork products.¹¹³ The claim and the producer’s substantiation were comparable to the Boar’s Head “humanely raised” claim. In that case, AWI argued that the claim was material to consumers of pork products, and misled them into believing that the pigs raised under Hatfield’s care receive treatment exceeding industry standards. A consumer research survey confirmed these findings and determined that, of pork consumers who took home an animal welfare message from the claim, a vast majority were misled into thinking that Hatfield raised its animals to a standard of care higher than conventional industry practices.¹¹⁴ Like the FACTA industry audit used by Boar’s Head, Hatfield’s pork products are raised in accordance with the Pork Checkoff’s Common Swine Industry Audit (CSIA), which verifies compliance with industry standards.¹¹⁵ As such, AWI argued that even the more limited claim, “ethically raised” was inappropriate because it was unsubstantiated and inconsistent with consumer expectations. The NAD found that because Hatfield’s production practices did not exceed industry standards, the company could not substantiate the claim as it is interpreted by consumers, and recommended removal.¹¹⁶

Consumers are likely to be misled in a similar way by use of the claim “humanely raised” on Boar’s Head chicken products. As discussed above, AWI’s survey indicates that consumers believe the claim “humanely raised” means that (1) the standard of care for those animals exceeds that of typical conventional animal agriculture practices, and (2) conventional industry practices are not used by the producer. Boar’s Head cannot substantiate either of these interpretations of its

¹¹³ Exhibit C, NAD Decision, Clemens Food Group, LLC/Hatfield Pork Products, PR 6305 (2019).

¹¹⁴ Hal Poret, *Expert Report of Hal Poret Regarding Survey to Measure Consumer Perception of Claims on Hatfield Pork Products Packaging* (Jan. 2019) (available upon request) (finding that of the respondents who noticed a message about treatment or living conditions of animals, 70.6% received the impression that the animal treatment exceeded industry standards).

¹¹⁵ *About CSIA*, PORK CHECKOFF, <https://www.pork.org/production/tools/common-swine-industry-audit/>.

¹¹⁶ Exhibit C at 15–16.

label because its use of the FACTA audit demonstrates its suppliers merely meet minimum industry standards, as was the case with Hatfield’s “ethically raised” claim based on industry standards. Because Boar’s Head cannot substantiate this claim, it is likely to mislead the public.

The NAD has similarly weighed in on humane claims found on conventional chicken product packages. In 2010, AWI brought an NAD challenge against Perdue Foods, Inc., for its use of the claim “humanely raised” on its company-branded natural chicken products.¹¹⁷ Perdue also used NCC industry standards as a basis for its “humanely raised” claim. In that challenge, AWI similarly argued that the claim, based on nothing more than adherence to NCC industry standards, misled consumers into thinking that the standard of care for those animals exceeded that of conventional animal agriculture.

In negotiation, Perdue agreed to remove the claim from all Perdue-branded chicken prior to the conclusion of the case, leaving the “humanely raised” claim on just the “Harvestland” brand of Perdue’s chicken offerings. Unfortunately, due to circumstances out of AWI’s control, another advocacy organization filed a lawsuit against Perdue relating to the “humanely raised” claim during the pendency of AWI’s NAD challenge. This forced NAD to close the action. However, in closing AWI’s challenge, the NAD found “consumer perception and understanding of ‘humane’ treatment or ‘raised humanely’ is directly relevant to the issue of whether such claims are substantiated or misleading to consumers.”¹¹⁸ Perdue eventually settled the suit and removed the “humanely raised” claim from its “Harvestland” chicken packaging.

In 2011, AWI brought an NAD challenge against Allen Foods for its use of the claim “humanely raised” on its chicken products. AWI once again argued that the producer relied on

¹¹⁷ Exhibit C, NAD Decision, Perdue Farms Inc.

¹¹⁸ Exhibit D at 7.

NCC industry standards for the claim “humanely raised” and that the claim misled consumers into thinking that the standard of care for those animals exceeded that of conventional animal agriculture. However, shortly after the challenge was filed, Allen Foods entered bankruptcy, and the NAD closed the case in 2012. In closing the case, the NAD remarked that removal of the claim was “necessary and appropriate.”¹¹⁹ Eventually, the company was purchased by Harim Foods and renamed Allen Harim Foods. AWI continued to monitor the product packaging and contacted the NAD in 2013 because the claim remained on the Allen Harim chicken products. AWI requested that the NAD refer the case to the FTC, which it did. In 2014, the FTC notified the NAD that Allen Harim Foods had agreed to participate in the NAD’s inquiry. However, instead of participating in the NAD process, Allen Harim elected to remove the claim and become third-party certified for animal welfare.

While the FTC is not bound by the decisions of the NAD, a finding by the NAD that an advertisement is inconsistent with consumer expectations and therefore misleading should at least be considered, especially given the FTC’s stated appreciation for the NAD and industry self-regulation.¹²⁰ Based on the NAD’s determinations in similar cases, the FTC should enjoin Boar’s Head from using the claim “humanely raised” on its chicken products.

B. *As a Basis for the Boar’s Head Humanely Raised Claim, FACTA Standards and Auditing Process Are Likely to Mislead Consumers.*

¹¹⁹ Exhibit E NAD Decision, Allen’s Chicken, PR 5447.

¹²⁰ *Remarks of Andrew Smith, Director, Bureau of Consumer Protection, FTC*, FED. TRADE COMM’N, 7 (Sept. 24, 2018) https://www.ftc.gov/system/files/documents/public_statements/1413760/andrew_smith-nad_speech.pdf (“We appreciate the NAD’s referrals and are grateful for the industry’s role in offering a voluntary forum to address national advertising practices, and we are disappointed when companies fail to participate. Companies should take heed that Commission staff is committed to reviewing NAD referrals and recommending enforcement actions where appropriate.”); *See also FTC Stats on NAD Referrals*, BBB Nat’l Programs (Aug. 2, 2019) <https://bbbprograms.org/media-center/insights-blog/insights/2019/08/02/ftc-stats-on-nad-referrals>.

1. The FACTA program misleads consumers as to the nature of its standards.

As noted above, the FACTA program audits compliance with baseline industry animal care guidelines. In its pre-market label approval application to the USDA, Boar's Head offered as substantiation for the claim "humanely raised" a FACTA report issued to one Boar's Head chicken supplier (producer's identity redacted by the USDA). This report explains that FACTA's responsibility is to express an opinion on the assertion that the company is in compliance with NCC and FACTA guidelines.¹²¹

The FACTA report also states, "Throughout our evaluation, the Company participated within NCC guidelines, however, the Company's overall animal welfare program, including internal animal welfare policies, exceeds these industry standards."¹²² The report offers no specific support for this assertion, and the site audits attached to the report actually provide evidence to the contrary—that the producer's animal care standards do not, in fact, exceed basic industry standards.

The Boar's Head label application to the USDA includes 18 audits, each representing the inspection of an individual barn among barns housing chickens at different stages of production.¹²³ (The 18 audits cover three breeder houses, three hatchery houses, three pullet houses, and nine broiler houses.) The audit forms document 30 nonconformances with the FACTA industry audit.¹²⁴

The most frequently cited nonconformance in the FACTA audits are related to environmental enrichment in broiler houses. Nine of nine (100%) broiler houses inspected lacked

¹²¹ *Boar's Head Chicken USDA Label Approval File*, *supra* note 27 at 34, 88, 132.

¹²² *Id.*

¹²³ *Id.* at 35–177.

¹²⁴ Exhibit F, List of Boar's Head FACTA Audit Nonconformances.

any form of environmental enrichment.¹²⁵ As noted above, scientific research has demonstrated that environmental enrichment is extremely important to the welfare of chickens. The provision of environmental enrichment represents arguably one of the most significant differences between conventional and higher-welfare farm animal production systems. Moreover, the lack of enrichment in all the Boar's Head supplier broiler houses inspected by FACTA confirms that the FACTA audit represents only a baseline industry standard.

2. The FACTA program misleads consumers by employing a flawed auditing process.

The FACTA audit process allows producers using only minimum animal care practices to still pass.

- i. The FACTA process does not require compliance with 100 percent of the standards.

Similar to other conventional industry auditing programs, the FACTA audit is a point-based system. AWI does not endorse point-based programs because they can be used to certify producers with serious deficiencies in some areas of animal care. The FACTA audit allows producers to pass with a compliance score of only 80 percent,¹²⁶ while most third-party certification programs require compliance with 100 percent of the standards.¹²⁷

- ii. The FACTA process bases a small percentage of its overall score on essential standards.

As mentioned above, environmental enrichment is generally considered a significant factor in the welfare of chickens. Cognizant of this, FACTA has included a standard related to

¹²⁵ *Boar's Head Chicken USDA Label Approval File*, *supra* note 27, at 61, 66, 71, 76, 115, 120, 157, 162, 167.

¹²⁶ *FACTA Audit*, *supra* note 66, at 46 (4.27.0).

¹²⁷ *AWI Consumer's Guide*, *supra* note 1, at 6, 9 (explaining that American Humane Certified does not require compliance with 100 percent of its standards).

environmental enrichment in its audit, but then it allows producers to violate the standard and still pass. This is possible because the audit assigns the environmental enrichment standard only 5 possible points, representing a mere 1.5 percent of the audit’s 345 total possible points.¹²⁸ The audit also assigns low scores to other important animal care practices, including minimum lighting levels and maximum mortality levels.¹²⁹

- iii. The FACTA process allows producers to challenge standards and receive full credit.

According to the FACTA audit form, the chicken houses audited did not meet the FACTA lighting requirement, yet the producer received full credit for the standard. The form notes that the daytime lighting level was measured at only 0.1 foot candle (or approaching darkness), but that full credit was given for the lighting standard because the producer “provided research indicating bird welfare is not compromised at this level of foot candle.”¹³⁰ However, this explanation is inconsistent with the results of numerous research studies on the impact of low lighting on bird health and welfare.¹³¹

- iv. The FACTA process allows audits to be timed to avoid nonconformances.

Lameness and leg and foot disorders are a major threat to chicken health and welfare. These conditions should be audited near the end of the production cycle, just before the birds are sent to slaughter. However, “gait” and “paw” scores, which are used to assess leg and foot health, could not be obtained in six of the nine FACTA audits submitted with the Boar’s Head application, because the birds were too young to conduct the assessment.¹³²

¹²⁸ *FACTA Audit*, *supra* note 66, at 46 (4.27.0).

¹²⁹ *Id.* at 40, 43.

¹³⁰ *Boar’s Head Chicken USDA Label Approval File*, *supra* note 27 at 58, 63, 68, 73, 112, 117, 154, 159, 164.

¹³¹ *See supra* Part II.C.1.ii.

¹³² *Boar’s Head Chicken USDA Label Approval File*, *supra* note 27, at 60, 65, 70, 114, 156, 161.

- v. The FACTA process allows producers to determine the number of audit sites.

According to the FACTA report submitted with the Boar's Head application, the number of animal production sites selected for auditing "was based on management's judgment and they are responsible for the sufficiency of the number of sites selected."¹³³ To our knowledge, no third-party animal welfare certification program allows producers to determine the number of sites audited, and, in fact, some require auditing of all sites. Moreover, there is no indication in the FACTA report or on the FACTA website that sites are randomly selected, suggesting that the company may even be allowed to designate the sites to be audited.

III. Lack of Market Restraint on Deception of Production Methods

Where a product or service is easily evaluated by consumers, the likelihood of deception is low because sellers want to encourage repeat business.¹³⁴ This is not the case with poultry products. With respect to the claim "humanely raised," the methods of chicken production are at issue, not the chicken product itself. As described above, while consumers are extremely interested in the welfare of animals raised for their food, it is difficult for them to ascertain how animals are raised from just looking at a package of meat. Producers also work especially hard to hide how animals are raised,¹³⁵ and the information that *is* provided to consumers about industry production practices is often oversimplified and misleading.¹³⁶ Thus, to ensure repeat customers, chicken

¹³³ *Id.* at 34, 88, 132.

¹³⁴ *FTC Policy Statement on Deception*, *supra* note 11, at 5.

¹³⁵ Industrial agriculture continues to introduce anti-whistleblower legislation (often referred to as "ag-gag" bills) to prevent information about animal production practices from becoming public knowledge. See *Anti-Whistleblower ("Ag-Gag") Legislation*, ANIMAL WELFARE INST. <https://awionline.org/content/anti-whistleblower-legislation>.

¹³⁶ *Label Confusion 2.0*, *supra* note 3, at 1 ("Defining claims on the package may appear to promote transparency, but can be problematic for two reasons: Producers often define claims in a way that is not relevant to animal welfare, and the claims are approved [by the USDA] without sufficient verification that producers actually meet these definitions); *id.* at 4 ("When consumers visit grocery stores to purchase meat and poultry products and see

sellers have the incentive to be *more* deceptive about production practices,¹³⁷ because consumers cannot tell whether they are being deceived about a chicken’s treatment upon receiving and consuming the product. In fact, producers are particularly motivated to exploit consumers’ perceptions of animal welfare because consumers are willing to pay more for “humanely raised” food.¹³⁸ Under these conditions, the market has almost nothing restraining chicken producers from deceiving consumers about how their animals are raised. Without intervention, Boar’s Head is likely to continue deceiving consumers with its misleading “humanely raised” label claim on its chicken products.

RELIEF REQUESTED

The advertising described constitutes unlawful conduct, unfair methods of competition, and unfair and deceptive practices under the FTC Act, 15 U.S.C. § 41–58. AWI requests that the

“humanely raised” or “sustainably farmed” labels, they cannot know the individual producer’s—or the USDA’s—interpretation of the claim. If the product being purchased is chicken, did the birds receive an average of 6.0 square feet of space, or were they restricted to only 0.6 square feet? Did they have eight hours of darkness for normal sleep every day, or was the dark period limited to 4 one-hour intervals per day? Was the indoor ammonia gas limit 10 ppm, or was it much higher? The USDA is currently approving the claim “humanely raised” for products from animals raised under conditions that vary widely. This inconsistency leads to consumer confusion and a large disparity between what consumers believe they are purchasing and the reality”).

¹³⁷ See, e.g., Muris, Chairman, FTC, *Aspen Summit: Cyberspace and the American Dream, Remarks at the Progress & Freedom Found.*, 2003 WL 21979851, at *3 (Aug. 19, 2003) (stating where a consumer cannot “use their own experiences to assess whether the seller’s quality claims are true . . . the market may not identify and discipline a deceptive seller because the product’s qualities are so difficult to measure. Moreover, a product market with special attributes—consumers cannot determine quality before purchase, higher quality products cost more to produce than lower quality products, and firms cannot credibly guarantee quality—may become a ‘lemons market’ in which only low-quality products are sold”). These types of goods “are subject to more intense scrutiny by the FTC.” Azcuenaga, Commissioner, FTC, *Advertising Regulation and the Free Market, Remarks at the Int’l Cong. of Adver. & Free Market*, 1995 WL 307748, at *8 (May 11, 1995).

¹³⁸ *Consumer Perceptions of Farm Animal Welfare*, *supra* note 100, at 9–11 (citing numerous studies finding that consumers are willing to pay more for humanely raised food, e.g. Kettle & Fire, *Certified Humane—How Food is Raised & Do People Care [Survey]* (2016) <https://www.kettleandfire.com/pages/how-your-food-is-raised> (Two-thirds of respondents to a survey said they would be willing to spend anywhere from 5% to 20% more for humanely raised food); *Humane Heartland Farm Animal Welfare Survey*, AMERICAN HUMANE ASS’N (Aug. 2013) <https://www.americanhumane.org/publication/humane-heartland-farm-animal-welfare-survey/> (when asked, “What is the most you are willing to pay for high quality, humanely raised products?” 34% of respondents said 10% to 20% more, while 28% of respondents said they would pay 20% to 30% more).

FTC investigate the practices described above and enjoin Boar's Head from using the claim "humanely raised" or other similarly misleading animal welfare claims on its chicken products.

Submitted February 23, 2021.



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LIST OF EXHIBITS

- Exhibit A:** *FACTA Standards Lower than the Industry Standard*
Exhibit B: *Comparison of Chicken Welfare Standards (Full)*
Exhibit C: *NAD Decision, Clemens Food Group, LLC/Hatfield Pork Products, PR 6305*
Exhibit D: *NAD Decision, Perdue Farms Inc.*
Exhibit E: *NAD Decision, Allen's Chicken, PR 5447*
Exhibit F: *List of Boar's Head FACTA Audit Nonconformances*

**EXHIBITS FOR THE ANIMAL WELFARE INSTITUTE'S
FEDERAL TRADE COMMISSION CHALLENGE
AGAINST BOAR'S HEAD CHICKEN SAUSAGE
PRODUCTS**

EXHIBIT A.

FACTA STANDARDS LOWER THAN THE INDUSTRY

Exhibit A. FACTA STANDARDS LOWER THAN THE INDUSTRY

	Industry Standard	FACTA Standard
Flock Health	“Flocks must be inspected at least twice a day”	“Growers must be responsible for assessing the flock on a daily basis”
Lighting	“Except for the first week and last week of growout, birds are provided with a minimum four hours of darkness every 24 hours”	(No required hours of darkness)
Ventilation	“Ventilation systems must be designed, maintained, and operated in such a manner as to provide optimal air quality at all times, must include specifications for maintaining temperature and reasonable control of humidity”	(No standard for ventilation systems)
Plant Holding Time	“Holding times of live birds at the plant must be kept to the minimum consistent with good processing practices, with the maximum time from catching to slaughter recommended to not exceed 12 hours”	“Individual holding time for a truck must not exceed 24 hours at the processing plant”
Slaughter Injuries	“Corrective action must be initiated if the level [of broken or dislocated wings] exceeds 4%”	“An internal corrective action must be submitted to the auditor within seven days if the level of broken or dislocated wings exceeds 5%”

EXHIBIT B.

**COMPARISON OF CHICKEN
WELFARE STANDARDS (FULL)**

EXHIBIT B. COMPARISON OF CHICKEN WELFARE STANDARDS (FULL)

STANDARD	NATIONAL CHICKEN COUNCIL ¹	FACTA ²	AMERICAN HUMANE CERTIFIED ³	CERTIFIED HUMANE ⁴	GAP STEP 2 ⁵	CERTIFIED ANIMAL WELFARE APPROVED ⁶
1.0 Health Care						
Healthcare Oversight/Bird Health Plan	Access to a veterinarian experienced in poultry care must be available. Each company must have a written flock health and welfare monitoring plan developed in consultation with a veterinarian (D4: 12)	A veterinarian must be available for consultation regardless of the stage of production. (7.4.0) Grower(s) must be responsible for assessing the flock on a daily basis and recording if any cull birds are observed (4.16.0)	An Animal Health Plan (AHP) that was developed in consultation with the flock veterinarian (M12).	An Animal Health Plan (AHP) must be drawn up and regularly updated in consultation with a veterinarian (H2). If any flock performance parameters fall outside tolerance limits identified in the AHP, the veterinarian must be informed and a program of action must be developed to remedy the problem (H5).	Veterinarian-prescribed treatments must be administered according to veterinarian guidance. (1.4.3) Birds must be given veterinary attention, if required (2.13.2). Operation must have an Animal Health Plan but does not need to be developed in consultation with a vet (9.2.1).	Each farmer in the AWA program must establish contact with a qualified expert such as a vet. The expert must be familiar with the birds on the farm; health requirements of the state and methods to maximize bird health and welfare (3.0.2). A health plan emphasizing prevention of illness or injury must be prepared in consultation w/ the farm's qualified expert advisor (3.0.4)
Use of Growth Promoters and/or Non-Therapeutic Antibiotics	No standards or recommendations	No standards or recommendations	Growth hormones/ antibiotics (except ionophores), or beta-agonists may not be used for the purpose of boosting growth or feed efficiency. (M12)	Growth promoters are prohibited. Antibiotics, including coccidiostats, may only be used for therapeutic reasons (disease treatment) under the direction of a veterinarian (FW5).	Chickens given antibiotics, beta ionophores, beta agonists, sulfa drugs and/or arsenic-based drugs are prohibited from being marketed as G.A.P. Certified (1.3.1)	Growth hormones or the use of any other substances promoting weight gain are prohibited (3.1.3). Sub-therapeutic or non-therapeutic use of antibiotics, or any other medicines, to control or prevent disease or promote

							growth, is prohibited (3.1.2).
Beak Trimming/ Other Physical Mutilations	May be necessary for slower-growing strains. These strains should be treated/conditioned at the hatchery using either the hot blade or the infrared method. No more than 1/3 of the beak should be removed with either method. (C:15)	If beak trimming, toe trimming, comb dubbing or spur removal practices are used, the company is required to have a written policy justifying the reasoning behind using these practices, and how the procedure is performed (2.25.0) (standard listed under breeder site standards)	Standards do not address beak trimming	Beak trimming, toe clipping; caponizing; dubbing; other surgical alterations are prohibited (H11).	Beak trimming / beak conditioning; dubbing; caponization; de-spurring; and toe trimming/clipping/de-toeing/toe conditioning are prohibited (2.5.1).	All mutilations or physical alterations of poultry are prohibited including: de-beaking (beak clipping, tipping and trimming); de-clawing; de-spurring; de-toeing and toe trimming; hole punching; pinoning; notching; wattle trimming; comb trimming; and castration (caponizing) (5.4.1).	
Limiting Growth	No standards or recommendations	No standards or recommendations	No standards or recommendations	Nutrient content and feeding regimes must be controlled to prevent leg abnormalities and other welfare problems associated with rapid growth (FW3)	The maximum average growth rate must not exceed 68 grams (0.150 lbs) per day. (1.2.1)	When averaged over their entire lives, the rate of growth of meat chickens on an optimum ration must not exceed 0.088 lbs (40 g) per day (2.2.5).	
2.0 Food and Water							
Unrestricted Access to Water	Watering space must meet manufacturers' recommendations or good poultry husbandry practices; must be adjusted in height so they are easily accessible by all birds. Drinking systems must be checked for proper	Feeders and drinkers must be free of debris and litter and in working condition, so as not to obstruct the bird's ability to eat and drink. Growers should verify that feeders and drinkers are in proper	Chickens must have continuous access to an adequate supply of clean, fresh drinking water at all times and monitored daily. The number of birds per waterer must be less than or equal to the maximum number recommended by the	Chickens must have continuous access to an adequate supply of clean, fresh drinking water at all times and monitored regularly (FW9a/FW11)	Chickens must not have to travel more than 13 feet to access water (FW8). Number of	Chickens must have continuous access to drinking water. (3.1.1)	Birds must have free access to clean, fresh water at all times (6.0.1) Water must be distributed in a way that eliminates competition (6.0.4)
				Chickens must be checked daily and any debris cleaned out. (3.1.2)	Birds must have access to water until loading begins if water lines do not need to be	All birds must have continuous access to water until the point of loading (13.0.12).	

	operation on a daily basis. (D2:3/4) Water withdrawal prior to slaughter must not exceed one hour prior to the start of catch for that house (D4:7b)	condition on a daily basis (4.14.0) Water withdrawal is only acceptable to prepare the flock for transport and cannot exceed one hour prior to the start of catching (4.15.0)	manufacturer. Chickens must not have to travel more than 15 feet to access a drinking point (FW4/FW6). Waterers must be at optimal height and of appropriate design (FW7). Water must be provided up to the time when catching begins (T1).	drinkers by type: 1 Bell per 100 chickens; 1 Nipple per 10 chickens; 1 Cup per 28 chickens (FW10). Must be of an appropriate design and placed at optimum height for the size and age of the birds (FW11). Birds must have access to water up to the time of catching (T8)	elevated prior to catching or until 1 hour before loading if water lines must be elevated prior to catching (6.2.1).	
Unrestricted, Daily Access to Food	Unrestricted, daily access to feed not required.	Unrestricted, daily access to feed not required.	Chickens must have unrestricted, daily access to food, except prior to transport for processing or as required by the flock veterinarian (FW1).	Chickens must have free access to nutritious feed each day, except when required by a flock veterinarian or prior to processing (FW2).	All chickens must have ad-libitum access to feed during daylight hours (3.2.1)	Unrestricted, daily access to feed not required.
3.0 Housing						
Access to Bedding/Litter	Litter should be loosely compacted when squeezed in the hand; litter must be managed to maintain optimal foot pad health and to control ammonia. (D3:6/7)	Litter must be dry, friable and well maintained in order to promote animal health and welfare, and allow the birds to exhibit their natural behaviors (4.23.0)	The broilers must have access to well-maintained litter at all times that is maintained in a dry and friable condition. Must be absorbent, sufficient depth (no less than 2 in.), clean and good quality. (E19/E20)	The floor of all houses must be completely covered in litter and chickens must have access to the litter area at all times. Litter must be of good quality (clean, dry, dust-free, and absorbent); managed to maintain it in a dry, friable condition; be of a sufficient depth for dilution of feces; allow birds to dust bathe; and be skimmed and topped up as necessary with fresh litter (E9).	Floors of all houses must be covered with a minimum total of 3 in of non-toxic litter (4.3.1). Litter must be friable and no more than 10% of the littered area is caked. (4.3.2) Must be of quality and quantity to provide a comfortable environment, and allow for dust-bathing behavior, and foraging/scratching (4.3.4).	In stationary housing, bedding must be available to chickens at all times (8.4.1). Bedding must be clean, dry, mold-free and replenished as needed and must not cause discomfort or harm to the birds (8.4.4./5) Litter must be provided from placement of young birds (5.3.3).

Environmental Enrichment	No standards or recommendations.	Enrichment, whether occupational (e.g., devices that provide broilers with control or challenges, or encourage exercise) or physical (e.g., nest boxes), must be available to the broilers during the growout period (4.27.0)	The producer is strongly encouraged to provide environmental enrichments to the broilers, such as straw bales, short perches, etc. (E21)	Environmental enrichment required; should be used to stimulate exploratory, foraging and locomotive behavior and minimize injurious pecking. Approved enrichments: ramps, low perches, pecking blocks, straw bales, scattering of whole grains, cabbages, cauliflower, sprouts, broccoli, rounded tubes, hanging wooden blocks (E28) (Also provides guidance on placement)	Indoor enrichments must be provided by the time the chicks are 10 days old and must be maintained throughout the life of the chickens (4.8.1/.2). Indoor environment must contain at least 2 different types of enrichments that are used by the chickens (4.8.4). For every 750 ft ² of indoor space, there must be a minimum of 1 enrichment (4.8.6).	Meat chickens must have access to raised areas from four weeks of age. These may be perches or straw bales or other items that allow the birds to get up off the floor (5.3.7). At least 1 inch per bird aerial perch space or 1 sq. in. per bird on a raised platform is recommended (5.3.7.2) All chickens must have access to dust baths (5.0.9)
Space Allowances	Stocking density must allow all birds to access feeders and drinkers, and will depend on the target market weight, type of housing, ventilation system, feeder/drinker equipment, litter management, and husbandry. Below 4.5 lbs liveweight requires 6.5 pounds per square foot; 4.5 to 5.5 lbs liveweight requires 7.5 pounds per square foot; 5.6 to 7.5 lbs liveweight requires 8.5 pounds per square foot; More than 7.5 lbs liveweight requires 9.0 pounds per square foot. (D5:2)	Stocking density must at least meet the NCC's recommended density (4.28.0)	The stocking density for adult broilers must be based on the target weight of the birds. Space allowances for the broilers must be at least 1 square foot for each 7.0 pounds of bird weight (E18).	All chickens must have sufficient movement to be able to without difficulty, to stand normally, turn around and stretch their wings. Density allowance must not exceed 6 lbs/ft ² (E20).	Chickens must have enough space to express natural behavior, including standing, turning around, and preening, without touching another chicken. (4.6.1) For birds placed from 1 January 2018 to 30 June 2020, stocking density must not exceed 6.5 lbs/ft ² . For birds placed from 1 July 2020 onwards, stocking density must not exceed 6 lbs/ft ² (4.6.2).	Minimum indoor space: 0.67 sq ft per bird. Minimum additional space foraging area when birds are excluded from a ranging and foraging area: 2 sq ft per bird. The minimum pen size on ranging and foraging areas for chickens must be at least 18 ft by 10 ft (8.1.13/7.3.13).
Light Intensity	Operation must have a flock lighting program	The company must have a written	8 hours of continuous daytime light must be	Light levels must be maintained at	Light intensity in housing must be at	Poultry housing must be kept at an average

	developed in consultation with a vet or poultry welfare professional. (D5:3)	lighting program. FACTA requires light intensity be maintained at 0.5 foot candle. Written documentation of a consultation with the veterinarian is required if the period(s) of light is below 0.5 foot candle at bird height (4.7.0)	provided within each 24-hour period. Light levels must be an average minimum of 10 lux (1 foot-candle). (M11)	an average minimum illumination of 2 foot candles (20 lux) throughout the house, except in shaded areas (E18).	least 50 lux (4.6 foot candles). (4.5.1)	of at least 20 lux in day/light hours (8.0.13).
Daily Dark Period	Birds must be provided a minimum of four hours of darkness, in increments of one, two, or four hours, every 24 hours. (D5:3)	No darkness requirement.	A minimum of 4 hours of continual darkness must be provided (M11).	A minimum of 8 hours of light and 6 hours of continuous darkness must be provided within each 24-hour cycle, except when the natural period of darkness is shorter. (E15)	By day 3 after placement (except when raised under natural lighting conditions and dark periods are shorter), chickens must be provided with at least 8 hours of continuous light and at least 6 hours of continuous darkness daily throughout their lives. (4.5.6).	Birds must not be subjected to dim and/or continuous lighting or kept in permanent darkness (8.0.8).
Air Quality	Ventilation systems must be designed, maintained, and operated in such a manner as to provide optimal air quality at all times. Ammonia in the atmosphere must not exceed 25 parts per million at bird height (D3:4/5)	No specific standards for ventilation systems. Ammonia levels must never exceed 25 ppm at bird height (4.24.0)	Ventilation equipment must be checked daily and maintained for proper operation, with records kept (M37) Automatic ventilation systems must be provided and include additional equipment or means of ventilation so as to prevent suffering in the event of a failure (E12). Ammonia must not exceed 25 parts per million (E14).	Ventilation systems, whether natural or mechanical, must be designed to maintain air quality parameters under all foreseeable climatic conditions. (E23). Ammonia levels should be less than 10 ppm and must not exceed 25 ppm except during brief periods of severe inclement weather when ventilation is affected. Standards include	No specific standards for ventilation systems. If ventilation system is electric, producers must have an alternative power supply and/or fail-safe device in working condition in the event of power failure (9.4.1) Air quality measures must not exceed the following levels when calibrated meters or testing strips are used: dust: 10 mg	Shelters and housing must be well ventilated and allow fresh air to enter (8.0.5). The house or shelter must be managed to eliminate ammonia, dampness and mold (8.0.22) (The human nose can detect ammonia at levels of 5ppm upwards. If the farmer can smell ammonia action must

				recommendations for hydrogen sulfide, CO ₂ , carbon monoxide and dust (E22).	per cubic meter; ammonia: 20 ppm. (4.4.2)	be taken to eliminate the source.)
4.0 Handling						
Worker Training	All employees who work with live birds must be trained at least annually on the fundamentals of chicken behavior and welfare and must focus on acceptable procedures at the specific locations where they work. Training must emphasize that abuse of the animals is not tolerated under any circumstances (B)	Any individual that is responsible for animal welfare/care or handling must be trained. Training must be conducted annually (4.3.0)	Prior to being given responsibility for the welfare of the birds, all stockpersons must be properly trained and receive yearly updates (M25/26). Workers performing specialized duties, catch and transport crews, processing plant crews, and outside workers must also be trained (M27-30).	Prior to being given responsibility for the welfare of chickens, caretakers must receive proper training with regular updates (M2/M7). Personnel involved in catching and transport, processing and shackling must also receive training (T3/P4/P11).	Each operation must provide training to all care-givers (whether full-time, part-time, seasonal or contractual) and/or managers that is ongoing as necessary and, at a minimum, when any changes affecting the care and management of chickens are implemented (9.5.1).	Hired catching teams must have completed training on humane methods of handling (12.1.7)
Catching must occur in low or dim lighting to minimize stress	Not required.	Not required.	Catching must take place in low lighting to minimize birds' fear reactions (T4).	Catching must take place in low lighting to minimize fear reactions of the birds (T9).	Lights must be dimmed throughout the catching and loading process (6.3.1).	Planned catching (for example to take birds to slaughter) must be carried out in dusk or darkness (12.1.2).

¹ National Chicken Council, Animal Welfare Guidelines & Audit Checklist for Broilers, Feb. 2017.
² Farm Animal Care Training & Auditing, Humane Certified Animal Welfare Broiler Audit Program Audit Standards, 2018.
³ American Humane Certified, Animal Welfare Standards for Broiler Chickens, May 2019.
⁴ Humane Farm Animal Care, Animal Care Standards for Chickens, Aug 2014.
⁵ Global Animal Partnership, 5-Step Animal Welfare Standards for Chickens Raised for Meat v3.2, May 2020.
⁶ Certified Animal Welfare Approved by A Greener World, Standards for Meat Chickens, 2020.

(02/21)

EXHIBIT C.

**NAD DECISION, CLEMENS FOOD GROUP
LLC/HATFIELD PORK PRODUCTS PR 6305**

**Clemens Food Group, LLC
Hatfield Pork Products**

Challenger: *Animal Welfare Institute*
Product Type: *Food/Beverage*
Issues: *Express Claims*
Disposition: *Modified/Discontinued*

- **In an NAD proceeding, the advertiser is obligated to support all reasonable interpretations of its claims, not just the message or messages it intended to convey.**

Basis of Inquiry: The Animal Welfare Institute (“AWI” or “the challenger”), challenged the truthfulness and accuracy of claims made by Clemens Food Group, LLC / Hatfield Quality Meats (“Clemens,” “Hatfield” or “the advertiser”) in product packaging for its Hatfield pork products. The following claim served as the basis for this inquiry:

Express claim:

“Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits”

Implied claim:

The pork produced for Hatfield pork products comes from pigs raised in a more ethical manner than conventional production.

Challenger’s Position:

AWI challenged Hatfield’s claim, “ethically raised by family farmers committed to a higher standard of care governed by third party animal welfare audits,” found on its pork product labels, arguing that this label claim is deceptive and should be discontinued. AWI also argued that Hatfield should discontinue its implied claim that the pork produced for Hatfield pork products comes from pigs raised in a more ethical manner than conventional production.

I. AWI’s consumer perception survey

AWI commissioned a consumer survey of 400 total respondents, 200 of whom were control respondents while 200 were test group respondents. According to the challenger, there were three main findings. First, many consumers noted the claim, demonstrating its impact. Second, a high percentage of consumers were misled – they took the claim to mean that the animals’ treatment and living conditions on the farms exceeded industry standards. Third, because of the misleading claim, consumers are more likely to choose Hatfield products over those of competitors.

A. Consumers take note of and rely upon Hatfield’s label claim.

The challenger argued that the survey showed a strong indication that consumers notice and rely upon this claim in making their purchasing decisions, because 48.5% of respondents mentioned the “ethically raised” component of the claim, the “higher standards of care” component, or gave another answer referring to the ethical or humane treatment or care of animals.

AWI maintained that the claim is broad, unsubstantiated, and without qualification. Hatfield's possible qualification of this claim, that the pigs raised for Hatfield's products are raised "by family farmers committed to a higher standard of care" which are "governed by third party animal welfare audits," is misleading because Hatfield does define the higher standard of care on its label. Third-party certification is not a substitute for the obligation to ensure all reasonable takeaways of a claim are substantiated. According to AWI, the Common Swine Industry Audit (CSIA) touted does not measure ethical animal treatment and is not a true third-party audit in the way that consumers are likely to take away from the claim.

B. Hatfield's label claim implies that the treatment or living conditions of its animals exceed industry standards.

In response to the survey, 38.5 percent of respondents believed the ethically raised claim means exceeds industry standards. Of the 126 respondents who noticed a message about the treatment or living conditions of animals, 70.6 percent received the impression that the animal treatment exceeds industry standards. AWI also pointed to several studies showing the immense influence that animal welfare claims wield over purchasing decisions.¹

C. Hatfield's label claim causes consumers to choose its product over competitors' products.

Of consumers surveyed, a net 36.5 percent indicated that the label communicated to them that a reason for choosing Hatfield over other brands was that conditions were better for the animals. AWI argued this indicates that a substantial percentage of consumers understood the "ethically raised" portion of the claim to indicate an advantage over other products.

II. Hatfield's criticisms of AWI's survey

AWI addressed several of Hatfield's critiques of its consumer perception survey. First, Hatfield claimed the survey did not evaluate the actual label in the marketplace because the back panel and the website address were not provided to respondents. AWI responded that the back of the package tested by AWI did not include any information relevant to animal raising. AWI also noted that the only asterisk on the front of the package is related to a "raised without growth promotants" claim, which is accompanied by a "ractopamine free diet" explanation on the front label. AWI argued that although the back of the label refers people to the Hatfield website for recipes, cooking instructions, and serving suggestions, the information on a website cannot be used to qualify or clarify messages communicated on a package.

¹ Citing a 2017 University of Illinois study showed that "humanely raised" ranked among the top three meat-production attributes for consumers. A survey conducted by the American Society for the Prevention of Cruelty to Animals (ASPCA) found that consumers had an increased willingness to pay for products raised under a trustworthy welfare certification (32% premium for eggs, and 48% premium for chicken). A recent survey conducted on behalf of AWI in October 2018 confirmed that consumers are very much aware of and concerned about the implications associated with claims similar to Hatfield's.

Second, the challenger argued against Hatfield's contention that the open-ended data do not support the study's conclusion because answers that mention "ethically raised" are merely repeating language on the package, not showing what respondents think the phrase means. AWI contended that this argument is inaccurate. AWI's conclusions from the survey were based on combining open-ended answers with clarifying closed-ended ones.

Third, Hatfield criticized the closed-ended question as leading because one of the options was the choice that supports AWI's position (exceeds industry standards). AWI dismissed this argument because the closed-ended question also included a choice that does not support AWI's position (meets industry standards), as well as "neither" and "don't know" options.

AWI refuted Hatfield's criticisms that the surveyed label is being "phased out" by demonstrating that it is still present in the marketplace. AWI also responded to Hatfield's critique of AWI for including the "Hatfield" brand on the control and test labels, by arguing that revealing the brand is not unusual for this type of consumer perception survey.

III. "Ethically raised" claim support²

A. The Common Swine Industry Audit

The National Pork Board's (NPB) Common Swine Industry Audit (CSIA) platform has the overarching goal of providing consumers with greater assurance of the efforts taken by pork producers to improve animal well-being and food safety. However, the industry itself makes no claim that the audit verifies superior treatment of animals. AWI argued that Hatfield and the conventional pork industry are not competent and reliable authorities on the meaning of the term "ethically raised." The NPB has not demonstrated that its standards indicate "ethical" care of pigs.

According to AWI, the CSIA does not represent a "higher standard of care." AWI pointed to four practices permitted under the CSIA—early weaning, poor quality flooring and bedding, barren environment, and painful procedures—that show the CSIA has lower standards than third-party animal welfare certification programs. First, early weaning can result in maternal deprivation and sudden change to the piglets' environment, diet, and social group composition. The CSIA does not prohibit early weaning, even though no third-party animal welfare certification program allows weaning under the age of 21 days and some programs have minimums as high as 56 days. Second, studies have shown several animal welfare issues such as infections and tail biting can result from using floors without bedding. Most of the conventional pork industry uses slatted floors, as permitted under the CSIA, while most animal welfare certifications encourage solid flooring with ample bedding material. Third, pigs typically display signs of aggression, frustration, and stress when deprived of the ability to perform natural behaviors, such as rooting and foraging. The CSIA does not require enrichment for pigs, whereas all animal welfare certifications require some form of enrichment. Fourth, tail biting is a common issue on commercial farms; conventional pork

² As a procedural matter, AWI alleged that, in violation of ASRC rule 2.4(D), Hatfield failed to provide AWI with a separate exhibit containing a comprehensive summary of the proprietary information and data it provided to NAD. AWI argued that the "incorporated summar[ies]" provided throughout the document contain none of the expected detail.

producers typically dock pigs' tails, which may produce even more welfare concerns. Third-party animal welfare certification programs generally restrict or prohibit tail docking.

The challenger argued that the CSIA is not a "third party animal welfare audit." While CSIA standards are available to consumers on the NPB website, results from audits against the standards are not publicly available. Moreover, because the CSIA is a point-based system, producers can still become certified while having serious deficiencies in some areas.

AWI also addressed the arguments Hatfield made about its audits. AWI argued that while Hatfield has demonstrated that it audits its farms regularly, it has failed to demonstrate that these audits are to standards that are in fact ethical or represent a "higher standard of care." Auditing to a low standard does not fulfill the fundamental promise made by its claim, that its animals are treated better than those on other farms.

B. Hatfield's animal welfare program

1. USDA review of "ethically raised" claims

AWI argued that the USDA's Food Safety and Inspection Service ("FSIS") has been known to approve animal raising claims with little to no substantiation. According to AWI, the FSIS relies solely on "desk audits" and makes no onsite visits to verify compliance with its labeling policies. Claims like "ethically raised" may not get a meaningful review by the USDA, in part because the USDA has not adopted definitions for many animal raising claims made on meat and poultry products. AWI also maintained that weak or no substantiation may be provided for claims as a part of the FSIS label approval process sometimes, resulting in claims which may mislead consumers.

AWI challenged Hatfield's assertion that the Agricultural Marketing Service ("AMS") validates the company's "ethically raised" claim as part of the USDA's Process Verified Program ("PVP"). First, the AMS does not mention the claim in the most recent version of its Official Listing of Approved USDA Process Verified Programs. Instead, it identifies Hatfield's "Process Verified Points" as "No Antibiotics Ever," "Free to Roam/Gestation Crate Free," "Ractopamine Free Diet," and "PQA Plus Pork Export Verification Program." Second, the AMS has no established definition for the claim "ethically raised," and has determined that it lacks the authority to define any animal raising claim and is only able to verify a company's compliance with its own definition for a particular claim. Third, although the USDA conducts research into the welfare impacts of certain husbandry practices, the department has taken no position on the acceptability, from a welfare perspective, of any on-farm practice related to the raising of pigs.

2. Standards followed by competing pork producers

AWI argued that Hatfield's own policy on animal welfare indicates that it requires its producers simply to adhere to minimum industry standards set by the CSIA. There is no evidence that the animal care standards employed by Hatfield exceed the CSIA. Hatfield's packaging also includes a "ractopamine free diet" claim, and this is not a departure from the practices of the conventional

pork industry because use of the drug is declining in the US³ and is banned in the EU, China, and Russia. Furthermore, AWI surveyed the market and found that none of Hatfield's conventional competitors make animal welfare claims on product labels. Nearly all producers making animal welfare claims subscribe to higher animal care standards than Hatfield and are certified by a third-party animal welfare program.⁴

C. Aspirational claims

AWI responded to Hatfield's argument that its claim was aspirational, by arguing that claims made on product packages cannot be aspirational, as that flouts both the USDA's Food Labeling Guide and the Federal Trade Commission's Green Guides, which require that claims be substantiated, truthful, and not misleading. AWI contended that claims reflecting an undisclosed ambition to improve are inherently misleading, and, by definition, cannot be substantiated.

IV. "Ethically raised" claim and revisions to Hatfield's packaging

Hatfield's response stated that the challenged label claim was revised in April 2018 to read "Pork used is ethically raised* *Learn more at simplyhatfield.com." However, AWI argued that the challenged claim is still present in commerce and was observed as recently as May 26, 2019. Additionally, Hatfield's website is still filled with images of products bearing the same claim.

The challenger argued that even if Hatfield has revised the claim to be "pork used is ethically raised," removal should still be required. AWI maintained that the claim "ethically raised," even with a website referral, misleads consumers because it implies better treatment than conventional producers and the consumer has no way of understanding what is meant by this claim.

AWI argued that while the website referral could potentially provide consumers more information, consumers rely primarily on the information found on the package. AWI cited a study commissioned by the USDA that found that digital links on food packages are not "inherently associated with additional food information, and consumers often assume they are for marketing or industry use."⁵

V. Third-party certification programs and AWI's relationship to those programs

³ AWI noted that several other major pork producers, including Seaboard Foods, Triumph Foods, and Smithfield Fresh Meat Corporation participate in a USDA-administered ractopamine-free verification program.

⁴ In surveying the market, AWI found 42 retail brands of pork (excluding hot dog and bacon brands, as well as store brands). Of these, 14 were major conventional retail brands, including Smithfield, Tyson, Swift, and Hormel. None of these 14 major brands currently makes a value-added animal care claim on the package label. AWI found value-added animal care claims on the package label of 28 brands, including Hatfield. Of these, only Hatfield makes an animal care claim while operating under conventional industry production practices.

⁵ AMS-USDA, Deloitte Study of Electronic or Digital Link Disclosure, 40 (2017) available at <https://www.ams.usda.gov/sites/default/files/media/USDA%20Deloitte%20Study%20of%20Electronic%20or%20Digital%20Disclosure%20170801.pdf>. The study also found that information disclosure through digital link has a disproportionately negative impact upon low-income consumers, who are less likely to have access to the internet or a smart phone. *Id.*

AWI responded to Hatfield's criticisms that the third-party animal welfare programs AWI cited are "niche" by pointing out that approximately 1.5 billion farm animals in the United States are raised under these programs every year. Further, while Hatfield raised concerns about AWI's involvement in a third-party certification program, AWI rebutted that issue by noting that, although it created the Animal Welfare Approved certification program, it ceased administering the program in 2014.

AWI explained that while independent animal welfare certification programs are not in complete alignment with one another, they all demand a baseline level of care that Hatfield's standards do not meet. While certifications are not required to substantiate animal welfare claims, the challenger argued that the programs are useful ways to provide consumers with assurance of high welfare standards. Overall, AWI contends that, with or without third-party certification, the higher animal care standards companies tout need to be met and verified in some way.

Additionally, AWI disagreed with Hatfield's argument that AWI seeks to impose its singular view of animal welfare on those who disagree. Instead, AWI explained that it subscribes to the same theory of animal welfare recognized by governments, standards bodies, and academic institutions worldwide. It recognizes that animal welfare is not a black or white proposition but rather exists on a continuum from poor to good.

Advertiser's Position:

I. The plain meaning of Hatfield's claims

Hatfield argued that the original claim, on its face, conveys the intended meaning: Hatfield's ethically raised benefit is based on its exclusive use of family farmers who are committed to a higher standard of care, and this benefit is verified (in part) by third-party animal welfare audits.

Separately, in April 2018, Hatfield revised the claim on the products to instead read: "Pork used is Ethically raised* *Learn more at simplyhatfield.com." The website consumers are directed to contains the full details of the "ethically raised" practices the brand follows.

II. Substantiation for the claim "ethically raised by family farmers committed to a higher standard of care, governed by third-party animal welfare audits"

The advertiser noted that "ethically raised" is not defined by government regulation nor by the advertiser's consumer survey. Hatfield argued that a reasonable consumer would expect that "ethically raised" pigs live under conditions that advance sound animal care practices. According to the advertiser, the reference to "higher standards" is an aspirational statement that reflects and defines Hatfield's "commitment" to "ethically raised" animals.

A. The structure of Hatfield's animal welfare program

1. Hatfield's animal caretaker education and certification requirements

Hatfield explained that all of its animal caretakers at every stage of production must be certified under the NPB's PQA Plus Program, an industry-based educational program that incorporates best practices and input from a range of experts to arrive at a sound, outcome-focused approach. NPB standards are only one feature of Hatfield's proprietary program that provides a reasonable basis for its "ethically raised" claim.

2. Animal welfare audits

The CSIA was established by industry, packer, and customer representatives through support of the NPB. According to the advertiser, a key feature of the CSIA is the predominant focus on outcome criteria, providing a real-world, objective assessment of the conditions under which pigs are raised and processed that relate directly to the level of ethical treatment attained by each farm or facility audited. Auditing to the CSIA is part of a robust animal welfare program that enables Hatfield to meet a higher standard than other conventional pork processors and provides objective support for the "ethically raised" claim.

Hatfield took issue with AWI's argument that using the industry audit, the CSIA, means that Hatfield does not exceed the industry standard. Hatfield maintained that the CSIA is a tool, and that what matters is how companies choose to use it. To support this, it pointed to benchmarking data compiled by an independent auditing firm showing that Hatfield farms score quantitatively better than other farms across several categories.⁶

The advertiser also provided specifics on how it uses the CSIA above and beyond the industry baseline. Hatfield argued that it applies the CSIA with special rigor because it audits more of its suppliers more frequently than large conventional producers might be able to because of their size. 100% of Hatfield producer partners are audited annually and 33% of all farms are audited annually.⁷

3. Hatfield's farm practices

Hatfield argued that its innovative farm practices, relatively small scale, coordinated operations and other elements substantiate the claims related to how its animals are raised and allow it to advance animal welfare to a standard unique among conventional pork producers. Its commitment to reaching higher standards of animal care is reflected in a range of specific practices it has adopted, such as electronically tagging sows for closer monitoring and individual attention and employing an electronic feeding system on Hatfield-owned farms. Further the small number of farmers and geographic proximity mean the company is available to communicate quickly, conduct farm visits, and coordinate around animal welfare.

4. Adoption of leading animal welfare practices

⁶ The proprietary data is compiled by an independent auditing firm that compares Hatfield's scores to other farms it audits, on a blinded, aggregate basis.

⁷ Hatfield cited Dr. Temple Grandin's [The Importance of Measurement to Improve the Welfare of Livestock, Poultry and Fish](#) as an explanation of the value of frequent auditing. They contend that, through real-world examples, Dr. Grandin shows that frequent auditing leads to measurable improvements in animal welfare practices.

Hatfield argued that it is an industry thought leader and early adopter of improved animal raising techniques such as open pen sow housing. The advertiser has also worked closely with Dr. Temple Grandin, the premier animal welfare expert, and Dr. Parsons of the University of Pennsylvania's Veterinary School.

Hatfield also pointed to several metrics they argue support their claim of ethical raising practices. For example, unlike other conventional producers, Hatfield has a minimum age for weaning company-owned piglets. All of Hatfield's company-owned sows are group-housed and allocated more space per sow than what is required by both conventional producing standards and by American Humane Certified standards. All of Hatfield's company-owned sows are housed in barns equipped with electronic feeding systems. Hatfield also confidentially provided NAD with more detail about these company policies.⁸

B. USDA prior label approval and voluntary validation

1. FSIS prior label approval

The advertiser argued that NAD should give appropriate weight to the FSIS approval of the "ethically raised" claim. FSIS's approval of the label confirms the sufficiency of Hatfield's claim substantiation and provides independent regulatory validation of Hatfield's claims. FSIS is responsible for ensuring that claims that appear on pork labels are truthful and not misleading. Further, it is unlawful to market a meat, poultry, or pork product not authorized under the FSIS prior label approval system. FSIS evaluation of animal welfare claims is informed by its substantial experience and expertise. Like NAD, FSIS must consider the meaning of a claim and the sufficiency of the support reviewed at the time the label application is considered. Required documentation to substantiate the claim includes a description of the controls to ensure the claim is valid from birth to harvest and how the animals are raised to support that the claims are not false or misleading.

2. AMS voluntary verification program

Hatfield maintained that it operates under a well-defined, approved USDA Process Verified Procedure ("PVP") program which further validates claims. The PVP program is a voluntary program whereby AMS auditors conduct annual inspections to verify compliance with the animal welfare portions of Hatfield's self-designed program. AMS also scrutinizes internal training records and product promotional materials.

III. Implied comparative ethical treatment claims

⁸ Hatfield responded to AWI's assertion that ASRC rule 2.4(D) was not followed by pointing to its letter which provided an informative summary at each point where reference to confidential, proprietary information and documents is made. Hatfield also noted that many NAD cases arising under rule 2.4(D) involved the methodology and results of consumer surveys and other studies. Here, the information at issue is largely trade secrets and documents that validate findings fully explained in the summary portions of Hatfield's Initial Reply.

Although Hatfield argued it did not make such a claim, Hatfield maintained that it supported an implied claim that “the pork produced for Hatfield pork products comes from pigs raised in a more ethical manner than conventional production.” A reasonable consumer would not take away this message from the label, nor did the advertiser provide evidence to support the existence of this implied claim, even though it conducted a consumer survey.

Nonetheless, Hatfield maintained that the challenged implied claim is supported. Hatfield argued that animal welfare is not a finite goal and as such the “ethically raised” claim is aspirational, identifying a commitment to strive toward a higher standard of care. The “higher” aspiration is relative to Hatfield’s current practices and knowledge of animal welfare, and the commitment to expand its knowledge base and embrace suitable new approaches that advance animal welfare.

IV. Hatfield’s practices in relation to those of the conventional pork industry

Hatfield responded to AWI’s critiques of deficiencies in the CSIA audit criteria and claims that Hatfield’s practices are therefore also deficient. Hatfield contended that these critiques are misguided because their conclusions about Hatfield’s practices are false. For example, Hatfield prohibits non-therapeutic antibiotic use, does not practice teeth clipping, provides continuous access to water, and provides enrichment for animals if they show a need for it (though Hatfield does not have a formal enrichment policy). Additionally, Hatfield refuted AWI’s suggestion that Hatfield may be weaning pigs as early as 5-7 days of age, noting that weaning piglets at that age is both against Hatfield company policy and not conducive to animal health and growth. Hatfield provided the NAD more details about its policies confidentially.

Hatfield argued that the baseline against which the “ethically raised” claim is measured should be conventional pork producers, not the niche certification programs AWI cited. Hatfield’s label did not use any iteration of the term “certification” or any logo that might suggest an association with a certifying body, nor has Hatfield claimed that it meets standards equivalent to a certifying body. Hatfield thus argued that AWI’s insistence on tying an ethically raised claim to third-party certification criteria would incorrectly impose a level of proof that bears no relation to the messages reasonably conveyed by Hatfield’s label.

Moreover, Hatfield argued that AWI lacks a basis to assert that the “ethically raised” claims in context amount to an implied exclusive superiority claim (versus the rest of the conventional pork industry) that Hatfield achieves the very highest animal welfare standards across all segments of the pork industry. According to Hatfield, AWI’s challenge of the “ethically raised” claim—because Hatfield does not meet the “higher welfare standards” it prefers—is a public policy preference that is distinct from the nature of the express or implied claims actually conveyed.

V. AWI’s consumer survey

A. Survey results

Hatfield noted the survey author’s stated objective: to “design and conduct a survey to assess the extent to which, if at all, consumers understand the packaging to communicate that the treatment

or living conditions of animals used to produce Hatfield pork products exceeds industry standard.” According to Hatfield, while this was the objective, the author cannot point to any data to support these conclusions drawn from the survey data. For example, the survey data from the unaided questions showed that some proportion of respondents recognized and recalled the express claims such as “ethically raised” and “higher standard of care” on the front panel of the label. According to Hatfield, the survey author’s conclusion that the “ethically raised” portion of the labelling was highly impactful on respondents and a notable selling point for the product,” was an observation unrelated to the challenged claim.

Further, Hatfield maintained that the leap from the survey finding that 36.5% of respondents would choose Hatfield versus another brand due to the “ethically raised” claims to the assertion that “ethically raised” must mean that consumers understand the express claim to really mean that Hatfield pork products exceed industry standards is an assertion not supported by the actual data reported in the Survey.

Furthermore, the advertiser argued that it was telling that the survey did not ask the respondents what “ethically raised” means. Ultimately, argued Hatfield, the conclusory findings of the survey do not support the challenger’s arguments about how consumers understand the claim “ethically raised.”

B. The survey flaws

The advertiser argued that AWI’s consumer perception survey also had five flaws which rendered it unreliable. First, the survey only tested the front panel of the label. Hatfield argued that the survey should have evaluated the actual marketplace label, which includes an asterisk to back panel information providing context to the primary “Ethically raised” claim and the website address where additional information is available to consumers.

Second, Hatfield criticized the way the unaided responses were grouped and reported and argued that this error inflated and distorted the survey results. The consumer takeaway results were based on aggregating responses that fell within three categories/claims: (i) “ethically raised,” (ii) the “higher standard of care,” or (iii) another answer referring to the ethical or humane treatment or care of animals. Hatfield argued that since AWI’s challenge is premised on the notion that Hatfield has falsely claimed its program is based on meeting a higher standard of care, the survey should have measured unaided responses specifically to the “higher standard of care” component of the claim. Hatfield noted that the way the survey results were provided to NAD prevents assessment of the potential relevance of the “higher of standard of care” portion of the claim, the portion seemingly most relevant to AWI’s challenge.

Third, Hatfield objected to the answer options for the survey question: “Which of the following, if any, did the label communicate about the treatment or living conditions of animals from this company’s farms? If neither, please indicate so.” The two substantive answer choices provided—that the company’s farms “meets industry standards” or “exceeds industry standards”—precisely paralleled AWI’s desired outcome, thus significantly discounting the value of the survey results.

Fourth, Hatfield noted that the control and test label used in the survey contained the Hatfield brand, and thus failed to control for any bias that could be associated with the brand. Finally, Hatfield argued that AWI tested a claim that is being phased out. Hatfield maintained that many Hatfield products now carry a modified claim in place of the claim tested: “Pork used is ethically raised* *Learn more at simplyhatfield.com.” This claim was not evaluated by the survey.

Decision:

Claims regarding animal welfare resonate powerfully with consumers who wish to align purchasing decisions with ethical concerns. NAD, as the advertising industry’s self-regulatory forum, is focused on ensuring that claims made in national advertising are truthful and adequately supported. In evaluating claims about ethical or humane treatment of animals raised for consumption, NAD does not take a position on such issues but evaluates what messages consumers can reasonably take away from such claims and whether the relevant evidence supports the claims so that the advertising is truthful and non-misleading. NAD appreciates that advertising concerning animal welfare informs consumers as they make purchasing decisions that reflect their particular social and ethical concerns. Because consumers cannot typically verify the accuracy of these claims for themselves, NAD plays an important role in reviewing such claims to ensure that they are truthful, non-misleading, and adequately substantiated.⁹

I. Jurisdiction

While NAD’s jurisdiction to review the claims was not directly challenged in this proceeding, NAD noted that the challenged “ethically raised” claim was reviewed by the USDA as part of the U.S. Department of Agriculture’s Food Safety and Inspection Service (FSIS) mandatory prior label approval system. The advertiser argued that the FSIS undertook a rigorous review of the ethically raised claim, validating Hatfield’s claim support. As NARB has previously stated, NAD and NARB will not automatically defer to regulatory determinations.¹⁰ NARB has found that where the record did not show whether the FSIS staff considered the impact of the claim on consumers or explained its reasoning as to whether the challenged claim was false and misleading to consumers, the panel did not believe that the FSIS determination should be dispositive of the outcome in the underlying NAD/NARB proceeding.¹¹ As in that case, the record here did not demonstrate that FSIS considered consumer impact or that it explained its reasoning with respect to its determination on the “ethically raised” claim. Nor did FSIS consider the consumer perception evidence, discussed below, submitted by the challenger to clarify the consumer takeaways reasonably conveyed by the claim. Accordingly, NAD undertook its own review of the challenged claims.

II. Messages Reasonably Conveyed

⁹ Chipotle Mexican Grill (Chipotle Restaurants), Report #5450, *NAD/CARU Case Reports* (April 2012).

¹⁰ PERDUE FARMS, INC. (Perdue Short Cuts / NARB Panel #141), Report #4576, *NAD/CARU Case Reports* (October 2006).

¹¹ *Id.*

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NAD first turned to the messages reasonably conveyed by challenged express claim, “Ethically Raised” and with smaller font underneath, “By Family Farmers Committed to a Higher Standard of Care.” Underneath this text is the qualifier, “Governed by Third Party Animal Welfare Audits.” This claim appears on the front label on product packaging for Hatfield’s pork products.¹²

In determining the messages reasonably conveyed by the challenged advertising, NAD first considered AWI’s consumer perception survey conducted by Mr. Hal Poret (the “Poret Survey”). Well-conducted consumer perception surveys can be a valuable tool in determining whether consumers perceive implied claims in a given advertisement.¹³ The Poret Survey was submitted to show that the label communicates a message regarding animal welfare, that the label implies that the treatment or living conditions of Hatfield’s animals exceed industry standards, and that consumers rely on this claim in making their purchasing decisions.

NAD was satisfied that the Poret Survey was sufficiently reliable. Among other things, the survey used an appropriate universe¹⁴ and it made use of an appropriate control image¹⁵ and of control and filter questions to account for survey noise and to ensure that respondents were not selecting statements that did not inform their opinions. NAD also appreciated that the survey included open and closed-ended questions that were presented in a non-leading manner.

In arriving at its conclusion that the Poret Survey was methodologically sound, NAD considered but was not persuaded by the challenger’s criticisms. For example, Hatfield argued that the survey improperly aggregated open-ended responses that fell into three distinct categories: “ethically raised,” “higher standard of care,” or another answer referring to the ethical or humane treatment or care of animals. The Poret Survey, however, used closed-ended questions to determine which respondents took away a message about the treatment or living conditions of animals, and then proceeded to ask those respondents more focused questions, ultimately reaching the question, “Which of the following, if any, did the label communicate about the treatment or living conditions of animals from this company’s farms? If neither, please indicate so.” The answer options were:

- The treatment or living conditions of animals from this company’s farm meets industry standards for the treatment or living conditions of animals.
- The treatment or living conditions of animals from this company’s farms exceeds industry standards for the treatment or living conditions of animals.
- Neither
- Don’t know/no opinion

¹² The advertiser stated that its product packaging was modified in April 2018 to additionally include on the back panel a claim that “Pork used is ethically raised.* *Learn more at simplyhatfield.com.” This claim, however, was not challenged so NAD declined to review it.

¹³ PERDUE FARMS, INC. (Harvestland Organic Chicken), Report #6177, *NAD/CARU Case Reports* (April 2018).

¹⁴ The sample universe of the survey consisted of U.S. consumers age 18 and older who have purchased at least one relevant pork product in the past six months or who would consider doing so in the next six months.

¹⁵ An appropriate control requires that the control group of respondents be asked the same questions as the survey group after viewing a commercial that does not contain the allegedly deceptive material or without viewing any commercial. Capital One Bank (USA), N.A (Quicksilver Cash Back Rewards Credit Card), Report #5898, *NAD/CARU Case Reports* (October 2015). Here, the control image did not contain the challenged claim, but was otherwise identical to the test image.

- Not asked (Did not take away a message about treatment/living conditions of animals).

While the objective of the survey and ensuing analysis, particularly the grouping of responses to the open-ended questions, was broader than necessary to determine what was conveyed by “higher standard of care,” NAD determined that the survey ultimately and properly arrived at the relevant question of whether treatment or living conditions of animals from this company’s farms exceed industry standards for the treatment or living conditions of animals.¹⁶ As for the advertiser’s criticism that two of the answer choices were leading and reflected AWI’s desired outcome (“meets industry standards” and “exceeds industry standards”), NAD noted that not only were respondents given both “neither” and “don’t know” options, but that far more respondents chose “exceeds industry standards” over “meets industry standards” (38.5% vs. 3.5% on a net basis), suggesting that respondents who answered “exceeds industry standards” truly meant to indicate that choice. In other words, if both answer responses were leading, as the advertiser argued, NAD would have expected to see a greater percentage of respondents choose “meets industry standards” than was actually the case. Moreover, as the challenger noted, the “meets industry standards” choice did not, in fact, support the challenger’s position.

The advertiser also argued that the survey included the Hatfield brand on the control and test label, failing to control for bias that could be associated with the Hatfield brand. Without further explanation of how Hatfield’s brand recognition could have biased survey respondents against the advertiser, however, NAD was reluctant to set aside the results of the survey. NAD further noted that it does not, as a rule, require product label test stimuli in consumer perception surveys to be devoid of branding.¹⁷

The advertiser also faulted the survey for using a claim that was being “phased out” and replaced with “Pork used is ethically raised* *learn more at simplyhatfield.com.” NAD noted that the original claim was still circulating in the marketplace at the time of this challenge and that, in any case, the invitation to “learn more” and the reference to a website did not sufficiently alter the meaning of “ethically raised” claim at issue. As NAD has noted, inviting consumers to learn more by visiting a website does not change the reasonable consumer takeaway.¹⁸

Having found that the survey was reliable, NAD next turned to the results. According to the survey, a net rate of 51.5% of respondents answered that the label communicated something about the treatment or living conditions of animals from Hatfield’s farms, a response attributed to the “ethically raised” portion of the labelling. Moreover, a net 38.5% of respondents took away a message that the treatment exceeds industry standards. Although NAD recognizes that there is no hard and fast rule regarding the percentage required to demonstrate consumer confusion in a consumer perception survey, both the courts and NAD have held that approximately 20% or above

¹⁶ The challenger also criticized this particular question, arguing that it was a leading question that precisely paralleled AWI’s desired outcome. NAD found, however, that the survey properly included both “neither” and “don’t know” answer options, and was only asked to respondents who did take away a message regarding the treatment or living conditions of the animals.

¹⁷ See e.g. The Procter & Gamble Company (Charmin Ultra Strong and Charmin Ultra Soft Products), Report #5960, *NAD/CARU Case Reports* (May 2016) (of the issues NAD noted with the challenger’s survey, NAD did not fault the survey for leaving the Charmin branding on the label).

¹⁸ Beech-Nut Nutrition Company (Beech-Nut Baby Foods), Report #6070, *NAD/CARU Case Reports* (April 2017).

has been consistently considered “adequate” to show consumer confusion.¹⁹ Thus, NAD concluded that the Poret Survey sufficiently demonstrated that one reasonable message conveyed by the label is that the treatment or living conditions of animals from Hatfield’s farms exceeds industry standards for the treatment or living conditions of animals.

Additionally, NAD independently concluded that the challenged claim reasonably conveys the implied message that pork produced for Hatfield pork products comes from pigs raised in a more ethical manner than conventional production. The plain language of the claim “Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits,” states that Hatfield farmers are committed to a *higher* standard of care. The claim itself uses comparative language (i.e., higher) to define its standard of care. While Hatfield argued that its intended meaning was aspirational, a reasonable consumer takeaway from the claim that farmers are committed to a higher standard of care is that the farmers do, in fact, adhere to a higher standard of care.

III. The Advertiser’s Claim Support

As support for its claim that Hatfield’s pork products are “Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits,” the advertiser relied on caretaker standards, third-party auditing and related practices, and its relationship with animal welfare expert, Dr. Temple Grandin who helped to develop Hatfield’s sow houses and processing facilities. NAD reviewed this evidence to determine whether it supported a message that Hatfield’s animal raising practices exceed industry standards as was found to be reasonably conveyed by the Poret Survey.

Hatfield’s program relies in part on standards that the advertiser describes as “industry-wide standards” adopted by the National Pork Board (NPB). Hatfield explained that it requires all animal caretakers at every stage of production to be certified under the NPB’s PQA Plus Program, a certification that Hatfield explained “represents conformity with an industry-based education program” that focuses on delivering an outcome-focused approach. The advertiser also explained that it adheres to the Common Swine Industry Audit (CSIA) inspection criteria to ensure that industry best-practices criteria are employed. The CSIA, Hatfield explained, was designed using industry input to create a credible and “common on-farm audit system” for the swine industry. The advertiser explained that the CSIA tool is available to any pork producer. NAD appreciated that the outcome-focused criteria that the advertiser relies on are meant to directly address actual issues arising from the treatment of pigs, such as bruising. NAD determined, however, that these standards, certification, and criteria were ultimately industry standard metrics.

As NAD noted, the claim at issue communicates a message that Hatfield not only complies with industry standard animal welfare metrics, but that Hatfield’s animal welfare program goes beyond the animal welfare standards set by the industry. Thus, NAD determined, the advertiser’s reliance on the NPB standards, adherence to the CSIA criteria, and participation in the PQA Plus Program

¹⁹ The Procter & Gamble Company (Charmin Ultra Strong and Charmin Ultra Soft Products), Report #5960, NAD/CARU Case Reports (May 2016).

are not sufficient to support the claim. In reaching this conclusion, NAD considered but was not persuaded by the advertiser's argument that while the CSIA tool is available to any pork producer, Hatfield's use of the tool is relevant to whether the claim is supported. For example, Hatfield argued that the frequency of farms audited in a year and the results of the audit are relevant to whether the ethically raised claim is supported. NAD disagreed. While Hatfield demonstrated its diligence and commitment to carrying out the CSIA audit with a frequency which was not mandated by the CSIA, consumers were unlikely to equate a commitment to carrying out an industry standard audit with the "higher standard of care" it claims to provide – a standard that rises above that set by the industry. Hatfield's audit frequency, reviewing for compliance with industry standard care, may demonstrate a commitment to insuring that farms meet the industry standard, not that it meets the "higher standard of care" claimed on the package.

Hatfield also confidentially submitted a list of CSIA audit factors in which Hatfield outperformed other commercial producers. After a review of these audit factors, NAD determined that, without further information, it could not assess on this record whether these factors were the ones that consumers would understand to be relevant to their understanding of an "ethically raised" claim for raising pigs that did not define or qualify what ethical practices are followed. In arriving at its conclusion, NAD did not reach the issue of which specific animal welfare practices are necessary to support an "ethically raised" claim for raising pigs. The certification programs cited by the challenger set criteria beyond the scope of Hatfield's animal welfare program. Although the criteria set by certification programs do not determine which specific animal welfare practices are necessary to support an "ethically raised" claim, they might provide some evidence of the standards consumers might reasonably expect are met when making such a claim.

As for the advertiser's position that its commitment to animal welfare, including its relationship with Dr. Grandin and implementation of electronic feeding systems further support its "ethically raised" claim, NAD noted that the "higher standard of care" claim is directly tied to the language "governed by third party audits." Thus, NAD concluded, it is Hatfield's practices subject to third-party audit programs, and not practices that fall outside of those auditing programs, that are relevant to whether or not this claim is supported. Because the record did not demonstrate that the practices Hatfield cited as innovative are directly relevant to any third-party auditing program, NAD found that they were not able to support the claim at issue.

Additionally, while Hatfield demonstrated that certain of its animal welfare practices extend beyond practices on conventional animal farms, the reasonable consumer take away from the challenged claim, "ethically raised by family farmers committed to a higher standard of care, governed by third party animal welfare audits," does not define, limit or qualify specific animal welfare practices followed (except that it is verified by third party audits). Further, although NAD was encouraged by Hatfield's commitment to implementing additional animal welfare practices in the future, NAD determined that these aspirational programs were not sufficient to support a claim that Hatfield's commercially-available products, available for present consumption, are "ethically raised." NAD noted that the advertiser may be able to make a more limited animal welfare claim, so long as the claim is truthful and accurate, narrowly drawn, and communicates to consumers more clearly the parameters of the claim.

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For these reasons, NAD recommended that the advertiser discontinue the claim “Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits.”

Conclusion:

NAD recommended that the advertiser discontinue the claim “Ethically Raised by Family Farmers Committed to a Higher Standard of Care, Governed by Third Party Animal Welfare Audits.” NAD noted that the advertiser may be able to make a more limited animal welfare claim, so long as the claim is truthful and accurate, narrowly drawn, and communicates to consumers more clearly the parameters of the claim.

Advertiser’s Statement:

While it disagrees that the claim should be discontinued Hatfield accepts NAD’s recommendation concerning the use of the “higher standard” portion of the claim and will take into account in future label claims NAD’s suggestion that Hatfield communicate more clearly the parameters of an animal welfare claim. Hatfield appreciates NAD’s favorable review of key aspects of its commitment to animal welfare. **(#6305 AG, closed 08/19/2019)**

EXHIBIT D.

NAD DECISION, PERDUE FARMS, INC.

Case #xxxx (xx/xx/16)

PERDUE FARMS INC.

Perdue Poultry Food Products

Challenger: *Animal Welfare Institute*

Product Type: *Food*

Issues: *Jurisdiction*

Disposition: *Administratively Closed*

Basis of Inquiry: Advertising and labeling claims made by Perdue Farms, Inc. ("Perdue") for its poultry products were challenged by Animal Welfare Institute ("AWI"). The challenged claims included the following:

- *"Humanely Raised"*
- *"Raised Cage Free"*

Challenger's Position:

The "Humanely Raised" Claim

According to the challenger, consumers understand this claim to mean that the advertiser's chickens are raised in a manner that is more humane than the standard practices within the poultry industry. As support, the challenger provided survey evidence which, it contended, demonstrated that 70% of consumers believe that "Humanely Raised" means that the chickens were raised under a standard of care better than is typical in the industry. According to AWI, the actual standard of care adhered to by the Perdue is derived from the National Chicken Council (NCC) and does not satisfy consumer expectations of humanity in animal care. In support of its assertion that Perdue chickens are not humanely raised, AWI cited scientific research¹ and offered a comparison between the NCC standards and those of other certification programs that provide a high standard of welfare and humane treatment of chickens.

According to the challenger, the NCC standards utilized by Perdue are based on requests from food retailers within the industry and while they do minimize the harshest conditions of chicken rearing, they do not comport with consumer expectations of what constitutes "humane" conditions. The challenger maintained that the conditions provided for the chickens include windowless sheds, wet litter or sawdust, dim lighting, crowded, indoor confinement, insufficient space for natural mobility and a rapid and unhealthy growth rate for the chickens.

For example, NCC guidelines require chicken producers to provide only 0.6-0.7 square feet of space per bird within the chicken's housing, a dense spacing that, according to AWI, prevents chickens from performing basic movements. In contrast, other animal welfare certification programs require significantly more space for chickens, capping the

¹ The challenger submitted the statements of Dr. Michael Appleby, an animal welfare scientist and veterinarian Dr. Michael Fox.

maximum density at 5.25 pounds per square foot or 6 pounds per square foot.² The challenger argued that this additional space provided by other programs allows for more typical chicken behavior, such as preening and the spreading of wings. According to the challenger, other welfare certification programs also require farms to provide chickens access to natural lighting and access to outdoor space, conditions denied to chickens raised by Perdue.

The challenger asserted that the U.S. Department of Agriculture ("USDA") "Process Verified" shield which appears on the packaging further misleads consumers about the standards the advertiser uses in rearing and raising its broiler chickens. It explained that the USDA Process Verified Program ("PVP") is a voluntary marketing program, which allows a producer to pay a fee and have their own processes verified for adherence, however, the USDA does not participate in the development or review of the standards themselves. The program merely allows the Agricultural Marketing Service (AMS) of the USDA to audit the company's own standards, and grants the advertiser the right to display the USDA "Process Verified" shield. The shield however does not define "humanely raised" or serve as substantiation for the claim.

Although the advertiser represented that the claim "Humanely Raised" had been discontinued prior to the NAD challenge, AWI noted that the claim continued to appear in connection with Perdue's Harvestland brand, in both website advertising and on packaging.

The "Raised Cage Free" Claim

The challenger argued the advertiser's claim, raised "cage free" chickens is misleading because broiler chickens are not in any standard, typical, industry or small-scale production system ever raised in cages. The challenger argued that although the claim is literally true, it confuses consumers who do not understand the distinction between "cage free" as it appears on packages of meat as opposed to cartons of eggs. Because a packed cage system is typical for egg-laying hens, a company that does not confine egg-laying chickens to cages is providing a condition of treatment that is meaningful to the consumer. However, argued the challenger, the claim of "cage free" for broiler chickens implies that these chickens are raised in conditions that go beyond the norm. The claim therefore exploits consumer's reliance on a meaningful and important representation with respect to egg-laying chickens, by applying it to a situation where it is basically rendered meaningless.

The challenger argued that consumer perception data, obtained from a Quick Query omnibus poll conducted by Harris Interactive, demonstrated that the claim, "Cage Free" created confusion about the difference in treatment the advertiser's chickens received. According to the challenger, the evidence showed that consumers believe that these chickens are treated more humanely and that, moreover, "cage free" is an added benefit

² The challenger referred specifically to certification standards of *Food Alliance and Certified Humane*.

over any competitor who does not use this claim on their packaging. The challenger contended that the "cage free" claim creates the impression of a benefit over other brands where none, in fact, exists.

Advertiser's Position:

The "Humanely Raised" Claim

The advertiser explained that although the "Humanely Raised" USDA Process Verified claim was truthful and substantiated, it had discontinued the claim and removed it from all of its Perdue branded products.³ Although the advertiser asserted the challenge should be administratively closed, based on Section 2.2(B)(i)(d) of the *NAD procedures*, the advertiser also provided evidence which, it maintained adequately substantiating its "Humanely Raised" claim.

The advertiser explained it has instituted the Perdue Farms Poultry Welfare Program as a comprehensive program meant to address every stage of a chicken's life cycle. The Program is meant to create an environment where the advertiser's chickens are healthy, safe, and humanely treated. Moreover, the advertiser asserted the USDA *Process Verified* program is designed as verification that particular claims are defined and verified through a well-designed, well-implemented, and well-maintained process. The advertiser explained to qualify, it is necessary for the advertiser to demonstrate that the claims made are substantive, verifiable, and repeatable, as well as not deceptive.⁴ The process includes regular audits by a third-party, to assure that the practices used are consistent with the claims made. The advertiser contended this verification process is evidence of the thorough and complete nature of their Perdue Farms Poultry Welfare Program, and sufficiently substantiates the "Humanely Raised" claim.

According to the advertiser, the USDA's Food and Safety and Inspection Service (FSIS) opinion on humane poultry treatment also supports the claim that the treatment of chickens within this program is qualified as "humane." The FSIS referenced the NCC Animal Welfare Guidelines and Audit Checklist in creating their recommendations for humane treatment. The advertiser contended this is evidence that its own systems, based in part on the NCC Guidelines, are considered humane by the USDA Process Verified Program as well as the USDA Food and Safety and Inspection Service.

The advertiser maintained that the AWI has mischaracterized the NCC guidelines and makes inaccurate assumptions about Perdue's husbandry practices. The advertiser explained its own Poultry Welfare Program is built off of the NCC guidelines, which define humane practices in the commercial poultry industry as recognized by the FSIS, as well as the USDA specifically referencing the Guidelines in defining humane handling of

³ According to Perdue, AWI sought to broaden the initial challenge and subsequently raised the issue of the claims made on Perdue's Harvestland branded poultry products.

⁴ PVP 1001 Procedure, USDA Process Verified Program: Program Requirements § 2.4.3.2 (July 2009).

poultry. The advertiser maintained the NCC guidelines are merely the starting point for its own Welfare Program, and that Perdue goes above and beyond these Guidelines.³ The advertiser asserted that its welfare program is the most extensive, comprehensive and well-documented program in any large or small scale chicken production.

Additionally, the advertiser noted that the PVP notification leads consumers to additional information beyond the information on the packaging, including at the USDA website for the PVP program, which relates to the advertiser's welfare program including its education, training and planning, hatching procedures, nutrition and feeding guidelines, comfort and shelter regulations, health care, catching and transporting and processing guidelines, and other information.

The advertiser asserted that the "humanely raised" claim is a purely monadic claim that conveys information about the advertiser's product, and does not compare the treatment of the advertiser's chickens to any other companies or farms within the industry.

The advertiser also argued that the surveys relied upon by the challenger are fatally flawed and are not reliable for any purpose.⁶ According to the advertiser, the flawed methodology used in this online survey is similar to that of a political push poll, where the questions are biased and intended to obtain a specific reaction.

The "Raised Cage Free" Claim

The advertiser maintained that the "Raised Cage Free" claim is truthful and, moreover, provides important information to consumers. In testing the consumer perception of its brand, Perdue found that only 35 percent of the total respondents believed that the advertiser's poultry products are produced under cage-free conditions. Accordingly, the claim "raised cage free" corrects misconceptions about an attribute that is of particular importance to consumers.

The advertiser again noted that the survey relied upon by the challenger for its assertion that the "Raised Cage Free" claim suggests that the chickens are treated "better" than other chickens is materially flawed and offers no reliable support for this interpretation of the claim. It maintained that the claim "Raised Cage Free" is a monadic claim about a product attribute and does not imply any comparison or convey information about any other product or company.⁷

During the course of the proceeding but subsequent to AWI's submissions to NAD, the advertiser notified NAD of a proposed class action lawsuit that had been filed against

³ The advertiser identified several treatment criteria where its own welfare program exceeded NCC guidelines including the monitoring of air quality, air temperature, use of third-party audits, training of employees and removal of sick birds.

⁶ The advertiser provided the statement of Philip Johnson, a survey expert. Perdue's criticisms of the survey included the choice of universe, methodology and biased questions.

⁷ Similar to the claims, "Vegetarian-fed" and "No Animal Byproducts," which are also truthful claims.

Perdue in the Superior Court of New Jersey. The lawsuit, according to the advertiser, involved the same claims and issues that were the subject of AWI's challenge before NAD. The advertiser argued that the NAD matter should therefore be administratively closed in accordance with Section 2.2 B(i)(b) of the *NAD/NARB Procedures*.

DECISION:

Section 2.2 B(i)(b) of the *NAD/NARB Procedures* provides that "if, at the commencement or during the course of an advertising...the advertising claims complained of are... the subject of pending litigation or an order by a court," NAD shall advise the challenger that the complaint is no longer appropriate for formal investigation in this forum.

Perdue maintained that because the "pending litigation" concerns the same claims and issues that were the subject of AWI's challenge, NAD must administratively close the case. NAD did not initially close the case because 1) it was unclear whether the lawsuit filed against Perdue constituted "pending litigation" within the meaning of *NAD Procedures*,⁸ and 2) although the complaint alleged that the claim "humanely raised" was false and misleading, it did not include any allegations concerning the claim "raised caged free," a claim which was also the subject of AWI's challenge before NAD.

NAD initially determined that the claim, "Raised Cage Free" was properly before NAD. The advertiser maintained that the claims "Raised Cage Free" and "Humanely Raised" are inextricably linked because, within the context of the NAD challenge AWI argued that the "Raised Cage Free" means "Humanely Raised," "treated in a humane fashion," "treated more humanely," and/or treated with a "heightened degree of animal welfare." Accordingly, argued Perdue, if the pending litigation precludes NAD's review of the claim "Humanely Raised" it must also preclude review of the claim "Raised Cage Free."

NAD did not agree. The *NAD/NARB Procedures* require NAD to close the case when "the advertising claims complained of are ... the subject of pending litigation or an order by a court (emphasis added)."⁹ Quite simply, the claims "Humanely Raised" and "Raised Cage Free" are distinct claims. Although the claims are related (both convey information about treatment of chickens) and may raise potentially overlapping issues, the two challenged claims appear in different contexts and on different packaging. NAD is not required to administratively close cases whenever there may be overlapping issues in pending litigation. The determining factor is whether the truth and accuracy of the specific claims before NAD is the subject of the pending litigation.¹⁰ However, NAD

⁸ At the time NAD was informed of the proposed class action lawsuit, the complaint had been filed with the Superior Court in New Jersey but had not been served upon the defendant.

⁹ Section 2.2 B(i)(b) of the *NAD/NARB Procedures*.

¹⁰ *Dyson, Inc.*, #4619, *NAD Case Reports* (2007). (NAD closed the case pursuant to Section 2.2 B (i)(b) as to those performance claims that were before the court in pending false advertising litigation. The remaining claims, concerned product demonstrations, which, although conveyed messaging about product performance were not before the court. The review of the product demonstrations was therefore were subject to NAD's discretion).

subsequently learned that an amended complaint had been served upon Perdue and contained allegations as to the truth and accuracy of both the "Humanely Raised" claim as well as the "Raised Cage Free." NAD therefore closed the case pursuant to Section 2.2 B(i)(b) of the *NAD/NARB Procedures*.

NAD recognizes that the purpose of Section 2.2B(i)(b) (which requires the closing of cases where the advertising claims challenged are the subject of pending litigation) is to avoid multiple and potentially conflicting findings from more than one tribunal. Such conflicting directives could be unduly burdensome for advertisers and create confusion for consumers. However, NAD also recognized that advertising self-regulation is not intended only to resolve disputes between competitors (or between consumers and companies) but also to foster consumer confidence in advertising by upholding truth and accuracy in national advertising and in furtherance of that end, to provide guidance to industry.

In administratively closing the case, NAD makes no substantive determination as to the truth and accuracy of the challenged claims. However, given the extensive time in which the matter was before NAD and the time and resources expended reviewing the evidence, NAD offers the following preliminary and procedural observations:

First, NAD appreciated the advertiser's notification that the claim "Humanely Raised" had been permanently discontinued from its Perdue branded products. However, because the claim appeared on Perdue's Harvestland brand product, in both website advertising and product packaging, the claim was not precluded by virtue of Section 2.2(B)(i)(d) of *NAD/NARB Procedures*.¹¹

Second, the fact that Perdue participates in the USDA Process Verified Program and the product receives a USDA Process Verified shield does not deprive NAD of jurisdiction or, by itself, resolve the issue of whether challenged claims are substantiated. Although NAD does not review language on labels and packaging that is mandated by federal law or regulation, or is "the subject of a federal government agency consent decree or order"¹² NAD determined that the two challenged claims did not fall under this exclusion¹³ but noted the evidence concerning the USDA program and the Perdue Farms Poultry Welfare Program, the nature of third party-audits and the standard of care and treatment of Perdue's chickens are, of course, relevant to the issue of whether the "humane raised" claim is truthful and accurate. NAD further observed that that the claim "raised cage free," although expressly truthful, may nevertheless communicate implied

¹¹ Section 2.2(B)(i)(d) requires NAD to close the matter when the advertising claims complained of are "permanently withdrawn from use prior to the date of the complaint and NAD/CARU received the advertiser's assurance, in writing, that the representation(s) at issue will not be used by the advertiser in any future advertising for the product or service"

¹² *NAD/NARB Procedures* Section 2.2(B)(i)(c).

¹³ *Pfizer Inc. (Revelation Tropical Parasiticide)*, NARB Panel #110 (April 2001). "The case-by-case review of claims by agency staff is not the sort of government action that NARC determined should defeat NAD jurisdiction." See also, *Perdue Farms Incorporated (Perdue Short-Cuts)*, Case Report #4576, *NAD/CARU Case Reports*, (October 2006).

messaging about the condition and/or treatment of its chickens. Advertisers are responsible for substantiating not only express claims but also implied messages reasonably conveyed by their advertising. Whether the evidence constitutes a reasonable basis to support messages communicated by the claims "humanely raised" and "raised cage free," is an appropriate issue for advertising self-regulation.

Finally, NAD recognizes that the ethical question of what constitutes "humane" treatment animals is not an issue to be determined by the advertising industry's self-regulatory body. However, consumer perception and understanding of "humane" treatment or "raised humanely" is directly relevant to the issue of whether such claims are substantiated or misleading to consumers.¹⁴ Accordingly, the role of advertising self-regulation is appropriate to ensure that such claims are truthful and accurate.

For the foregoing reasons, NAD administratively closed the case pursuant to *NAD/NARB Procedures* § 2.2 B(i)(b) due to the pending litigation, but noted for the record its willingness to reopen the case, upon the request of either party, should the court fail to reach a final determination on the truthfulness and accuracy of the challenged claims.

¹⁴ *United Egg Producers, Inc.*, Case Report #4108, *NAD/CARU Case Reports* (Nov. 2003)/NARB Panel No. 122 (Apr. 2004).

EXHIBIT E.

NAD DECISION, ALLEN'S CHICKEN, PR 5447

Case #5447 (040/4/12)
Allen Harim Foods
“Humanely Raised” chicken
Challenger: *Animal Welfare Institute*

Basis of Inquiry: Packaging claims made by Allen Family Foods for its chicken were challenged by the Animal Welfare Institute (“AWI” or “the challenger.”)¹ Allen Family Foods filed for bankruptcy in 2011 and has been taken over by Allen Harim Foods (“the advertiser.”) The claim at issue, which was disseminated by Allen Family Foods, is that the chicken is “humanely raised.”

Advertiser’s Position:

Allen Harim Foods stated that the “humanely raised” claim that formed the basis of this inquiry had been permanently discontinued.

Decision:

Because the advertiser permanently discontinued the claim that formed the basis of this inquiry—an undertaking that NAD determined was necessary and appropriate—NAD determined that this matter did not warrant the expenditure of its resources. NAD noted that Allen Family Foods, the original owner and marketer of the “humanely raised” chicken, had filed for bankruptcy. The current owner and marketer of the chicken—Allen Harim Foods—represented that the claim would be permanently discontinued. NAD therefore administratively closed the inquiry pursuant to subsection 2.2(B)(i)(f) of the NAD/NARB Procedures. (#5447 JF, closed 04/04/2012)

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¹ The Animal Welfare Institute challenged advertising that had been disseminated by Allen Family Foods. NAD was subsequently informed that Allen Family Foods had filed for bankruptcy, and that its operations had been taken over by Allen Harim Foods. The latter company informed NAD that the challenged claim had been permanently discontinued.

EXHIBIT F.

**LIST OF BOAR'S HEAD FACTA
AUDIT NONCOMFORMANCES**

EXHIBIT F. BOAR'S HEAD NONCOMFORMANCES

STANDARD	NUMBER OF TIMES AUDITED	NUMBER OF NONCOMFORMANCES CITED
1. Hatchery Welfare		
1.6.0: Functional generator on site.	3	1
1.6.1: Generator check in place.	3	3
1.21.0: Transportation boxes cleaned and sanitized after each delivery.	3	3
2. Pullet Policies & Observations		
2.8.1: Brooding program is being followed on-farm.	3	1
2.14.0: Feeders and drinkers are free of debris and in working condition.	3	2
2.17.0: Preventative measures are taken to reduce mortality and culls.	3	1
2.24.0: Houses are stocked so birds can move freely.	3	1
2.26.0: Vaccination schedule has been reviewed by a vet.	3	1
2.27.0: Written program detailing pullet handling techniques during vaccination.	3	1
2.31.0: Program protects flocks from temperature extremes during holding, loading, and transport; provides flocks with ventilation while moving to breeder sites.	3	1
3. Breeder Policies & Observations		
3.8.1: Brooding program is followed on-farm.	3	1
3.18.0: Preventative measures are taken to reduce mortality and culls.	3	1
3.25.0: Houses are stocked so birds can move freely.	3	1
4. Broiler Policies & Observations		
4.10.1: Biosecurity program is onsite and is being followed.	9	1
4.27.0: Enrichment is provided.	9	9
4.25.0: Birds are protected from extreme weather during growing cycle.	9	1
4.26.0: Facility is in good state of repair.	9	1