

BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

CITIZENS' COMPLAINT SEEKING
ACTION AGAINST AMERICAN HUMANE
ASSOCIATION AND BUTTERBALL, LLC
FOR DECEPTIVE ACTS
AND PRACTICES, INCLUDING
DECEPTIVE ADVERTISING

Docket No. _____

Submitted to:

Federal Trade Commission
The Bureau of Consumer Protection
The Division of Advertising Practices
600 Pennsylvania Ave. N.W.
Washington, DC 20580
Attn.: Jessica L. Rich, Director, Bureau of Consumer Protection
Attn.: Mary K. Engle, Associate Director, Division of Advertising Practices

On: November 12, 2014

Submitted by:

People for the Ethical Treatment of Animals, Inc.

Attn.: Jared S. Goodman, Director of Animal Law
PETA Foundation
1536 16th St. N.W.
Washington, DC 20036
202-540-2204
202-540-2208 (fax)
JaredG@petaf.org

CITIZENS' COMPLAINT

Petitioner People for the Ethical Treatment of Animals, Inc. (“PETA”), an animal protection charity and non-stock corporation under the laws of the Commonwealth of Virginia, with offices at 1536 16th St. N.W., Washington, DC 20036, submits this citizens’ complaint pursuant to Section 5 of the Federal Trade Commission Act (the “FTC Act”), 15 U.S.C. § 45, to request that the Federal Trade Commission (the “Commission”) investigate and commence enforcement action against American Humane Association (“AHA”), operating through its American Humane Certified program (“AHC”), also referred to as Humane Heartland, and Butterball, LLC (“Butterball”), which uses the AHC label on its products, for deceiving consumers about conditions for animals raised for food by producers that carry AHC certification.

Respondent AHA is a 501(c)(3) nonprofit organization, headquartered at 1400 16th St. N.W., Ste. 360, Washington, DC, 20036, and, according to its website, claims to be “the nation’s voice for the protection of children and animals,” which “reaches millions of people every day through groundbreaking research, education, training and services that span a wide network of organizations, agencies and businesses.”¹

Respondent Butterball is “the largest producer of turkey products in the U.S.”² and is headquartered at 1 Butterball Ln., Garner, NC 27529.

Executive Summary

The National Advertising Division of the Better Business Bureau has stated time and again that consumers rely on advertising claims about the treatment of farmed animals when they are making their purchasing decisions. This Commission has acknowledged the importance that many consumers place on a company’s claim of humane treatment of animals and the impact of that claim on purchasing decisions.

The humane treatment of farmed animals is of substantial concern to the majority of American consumers, and they are willing to spend more money on products carried by companies claiming to treat their animals humanely. In a survey of consumers, AHA itself found that 75% of consumers were very willing to pay more for humanely raised meat and 95% of consumers ranked a “humanely raised” label at or near the level of *absolute necessity* when considering its importance on their purchasing decisions.

Consumers have definite, reasonable expectations for companies that claim to treat their farmed animals humanely. They expect better treatment of those animals than the standard treatment within the industry. They expect that the animals went outdoors. They expect that, when the animals were slaughtered, it was done humanely. They find unacceptable the industry’s practice of slicing off birds’ beaks without pain relief, a stance that aligns with one court’s

¹ About Us, Am. Humane Ass’n, <http://www.americanhumane.org/about-us/> (last visited Oct. 28, 2014).

² Corporate Information, Butterball, <http://www.butterballcorp.com/corporate-information/> (last visited Oct. 27, 2014).

contemplation that a legal definition of “humane” would include not causing an animal undue pain.

The treatment of turkeys that the AHC program allows falls well short of a reasonable consumer’s expectations for humane treatment. As described herein, AHA is issuing unlawfully false and/or misleading representations about the meaning of its humane certification label, while fully acknowledging that consumers will rely on that label to inform their purchasing decisions.³ AHA asserts that the AHC label provides consumers with a way to identify turkeys at the grocery store that were humanely treated. However, the standards for AHC-labeled turkeys conform to the standard practices within the turkey industry. Consistent with standard industry practice:

- The AHC standards allow turkeys’ beaks to be sliced off.
- The AHC standards allow turkeys’ toes to be amputated.
- The AHC standards do not require turkeys to have access to the outdoors.
- The AHC standards allow for up to 20 percent of the turkeys to have visible difficulty walking, which results from genetic modifications that cause them to grow at a rate that their skeletons cannot sustain.
- The AHC standards do not require producers to provide turkeys with enrichment items.
- The AHC standards do not require natural light for the turkeys.
- The AHC standards allow cramped confinement of turkeys.
- The AHC standards allow ammonia of 25 ppm in the turkey sheds.
- The AHC standards allow painful, upside-down shackling of live turkeys.
- The AHC standards allow live birds to be dunked in electric water baths, where birds may experience painful electric shocks as they flap their wings.

The AHC standards on slaughter also adhere to the guidelines of a foundation established by the American Meat Institute, a national trade association representing turkey processors. Additionally, acts of deliberate, intentional abuse of turkeys—including kicking and throwing the birds—do not result in an automatic failure of the certification process.

A recent investigation revealed baby turkeys at a Butterball facility were ground alive (“macerated”) and had their beaks and toes mutilated, which causes acute and chronic pain. In its press release in response to the investigation, Butterball said there was “no mistreatment” of turkeys in the video footage, that the company adhered to industry standards, and that it was committed to maintaining its AHC certification. A past U.S. Department of Agriculture investigation of a Butterball turkey slaughterhouse—which was spurred by a PETA undercover investigation at the facility—confirmed that Butterball workers intentionally and repeatedly injured or killed birds by kicking, punching, throwing, or stepping on them; birds’ wings were

³ This complaint focuses on the turkey standards to highlight the misleading nature of the AHC program in general; the exclusion of AHC’s standards for other species of animals raised for food should not be perceived as a suggestion that the other standards are not also deceptive.

often injured or broken because they were roughly yanked out of transport cages; and that the abuses were typical of what one worker had observed there over a five year period.⁴

Moreover, a producer does not need to meet all of the AHC standards to obtain certification and the right to stamp the AHC label on its products. The certification carries marginal significance, other than to enable AHC-labeled producers to charge a higher price for their products based on a consumer's expectation that she is paying more for higher-quality treatment of animals.⁵

Reliance on the AHC label gives consumers a false assurance that they are supporting companies that provide better treatment to their animals than do other companies within the industry. The AHC label does not signify the level of care for animals that the reasonable consumer would expect from a third-party's certification of a product as "humane" and may lead the consumer to make repeat purchases based on her misconception. Because many consumers are likely to purchase an AHC-labeled product specifically because of what they believe that label signifies, the misleading nature of the label embodies the Commission's policy that deceptive claims are actionable when they are material, i.e., they influence purchasing decisions because they involve information that is important to the consumer. FTC intervention carries particular importance in this instance because of the lack of market restraints on these misleading claims.

Accordingly, PETA respectfully requests that the Commission take prompt action to stop AHA, through its AHC or Humane Heartland program, and Butterball, from deceiving consumers with false or misleading representations relating to animal care. Because of the high number of consumers who could be deceived by the AHC label over the remainder of this calendar year, prompt action by the Commission is critical. Eighty-eight percent of Americans consume turkey at Thanksgiving.⁶ Butterball sells about 25% of the turkeys consumed at Thanksgiving, and about 736 million pounds total of turkey are eaten on that day.⁷ In 2012, approximately thirty percent of turkey consumed by Americans during the year was consumed at Thanksgiving and Christmas.⁸ As a result, PETA respectfully requests that the Commission act with urgency.

⁴ See, e.g., Butterball's House of Horrors: A PETA Undercover Investigation, <http://www.peta.org/features/butterball-peta-investigation/> (last visited Oct. 30, 2014).; Undercover at a Butterball Turkey Plant, PETA, <https://secure.peta.org/site/Advocacy?cmd=display&page=UserAction&id=1460> (last visited Oct. 30, 2014).

⁵⁵ At a Kroger supermarket in Richmond, Virginia, the AHC-labeled frozen Butterball turkey breast cost approximately \$3.99 per pound (\$11.99 for 48 oz.), as opposed to \$1.99 per pound for frozen turkey breast by a different brand. See Exhibits 1-4: (1) AHC-labeled Butterball product (2) Price of AHC-labeled Butterball product, (3) Pride of the Farm product, (4) Price of Pride of the Farm product.

⁶ Turkey History & Trivia, National Turkey Federation, <http://www.eatturkey.com/why-turkey/history> (last visited Oct. 29, 2014).

⁷ Tim Sprinkle, Butterball is Facing a National Turkey Shortage, and It Doesn't Know Why, The Exchange, Nov. 14, 2013, <http://finance.yahoo.com/blogs/the-exchange/there-s-a-national-turkey-shortage--and-butterball-doesn-t-know-why-203735559.html> (last visited Oct. 29, 2014).

⁸ Turkey History & Trivia, *supra* note 6. ("More than 210 million [turkeys] were consumed in the United States [in 2012]. We estimate that 46 million of those turkeys were eaten at Thanksgiving [and] 22 million at Christmas.")

I. Legal Standard

The FTC Act declares unfair or deceptive acts or practices unlawful.⁹ A false oral or written representation or omission, if material, is deceptive within the meaning of the Act.¹⁰ “The statutory ban against false and misleading advertisements and representations applies to that which is suggested as well as that which is asserted.”¹¹ “It is a long-established principle that words and sentences may be literally and technically true and yet framed in such a setting as to mislead or deceive.”¹² Indeed, “[a] deceptive impression may be created by implication and innuendo without affirmative misrepresentation or misstating a single fact.”¹³

The Act also applies to deceptive omissions. “In consumer protection cases under Section 5 of the FTC Act, it can be deceptive to tell only half the truth, and to omit the rest.”¹⁴ An advertiser is required “to disclose qualifying information necessary to prevent” a statement “from creating a misleading impression.”¹⁵ For example, in *Horizon, Inc.*,¹⁶ the Commission held that Horizon violated the FTC Act, in part because many of its representations “consisted of partial truths, or literal or technical truths, framed in a setting to mislead or deceive.”¹⁷ “In several respects,” the Commission found, “Horizon’s sales techniques left material issues vague. The record [t]herein reveal[ed] widespread confusion and a lack of understanding about critical elements of Horizon’s property and Horizon’s obligations, all conducive to Horizon’s objectives.”¹⁸

“The tendency of . . . advertising to deceive must be judged by viewing it as a whole.”¹⁹ The Commission is “required to look at the complete advertisement and formulate [its] opinions on the basis of the net general impression conveyed by them and not on isolated excerpts.”²⁰ “To tell less than the whole truth is a well known method of deception,”²¹ and “the Commission repeatedly has held that deceptive non-disclosure of material facts is a violation of Section 5.”²² The focus is “the entire mosaic, rather than each tile separately.”²³

⁹ 15 U.S.C. § 45(a).

¹⁰ FTC Policy Statement on Deception § I (Oct. 14, 1983), *appended to Cliffdale Assocs., Inc.*, 103 FTC 110, 174 (1984).

¹¹ *The Raymond Lee Org., Inc.*, 92 FTC 489, 1978 WL 206103, at *140 (1978).

¹² *Horizon Corp.*, 97 FTC 464, 1981 WL 389410, at *255 (May 15, 1981) (quoting *Bockenstette v. FTC*, 134 F.2d 369, 371 (10th Cir. 1943)).

¹³ *MacMillan, Inc.*, 96 FTC 208, 1980 WL 338975, at *120 (1980).

¹⁴ Compl. Counsel’s Post-Trial Br., *Union Oil Co. of Cal.*, No. 9305, 2005 WL 906397 (FTC Mar. 9, 2005) (quoting *Int’l Harvester Co.*, 104 FTC 949, 1057 (1984)).

¹⁵ *Id.*

¹⁶ 97 FTC 464, 1981 WL 389410 (1981).

¹⁷ *Id.* at *216.

¹⁸ *Id.*

¹⁹ *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert denied*, 430 U.S. 983 (1977); *accord Horizon Corp.*, 1981 WL 389410, at *269 (in determining whether a representation is deceptive, the Commission is “not confined to analyzing isolated words and phrases”).

²⁰ *Standard Oil of Cal.*, 84 FTC 1401, 1471 (1974), *aff’d as modified*, 577 F.2d 633 (9th Cir. 1978), reissued, 96 FTC 380 (1980).

²¹ *P. Lorillard Co. v. FTC*, 186 F.2d 52, 58 (4th Cir. 1950).

²² Complaint Counsel’s Post-Trial Br., *Union Oil Co. of Cal.*, 2005 WL 906397 (quoting *Int’l Harvester Co.*, 104 FTC at 1057).

²³ *FTC v. Sterling Drug*, 317 F.2d 669, 674 (2d Cir. 1963).

The Commission’s ultimate “concern” is the “message conveyed or the implication created in the mind of the ordinary purchaser”.²⁴ “that vast multitude . . . who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.”²⁵ Whether advertising “is false or misleading is determined based on the objective ‘reasonable consumer’ standard.”²⁶ As long as an advertisement “reasonably can be interpreted in a misleading way,” it is “deceptive, even though other, non-misleading interpretations may be equally possible.”²⁷

A deceptive representation, omission, or practice is actionable under the FTC Act if it is “material.” A “material” misrepresentation is “one which is likely to affect a consumer’s choice of or conduct regarding a product. In other words, it is information that is important to consumers.”²⁸ This is a subjective standard. “[I]f consumers prefer one product to another, the Commission [does] not determine whether that preference is objectively justified.”²⁹

“[T]he Commission presumes that express claims are material,”³⁰ since “the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.”³¹ “[T]he Commission will [also] infer materiality” when “evidence exists that a seller intended to make an implied claim.”³²

II. The AHC Label Misleads Consumers Regarding the Treatment of Animals.

a. AHA Represents that its AHC Label Provides Consumers with a Way to Identify “Humanely Raised” Meat.

AHA refers to its certification program as the “first welfare certification program in the United States to ensure the humane treatment of farm animals.”³³ AHA purports that its AHC “label provides consumers a choice of humanely raised beef, pork, poultry and dairy products at their grocers.”³⁴ AHA further contends that its AHC program “promotes clear, reasoned communication with consumers and retailers about the meaning and value of humanely raised food and the benefits not only to animals but to people with the safety, quality, and nutrition in

²⁴ *Id.* at *263.

²⁵ *P. Lorillard Co.*, 186 F.2d at 58; *see* FTC Policy Statement on Deception § III; *see also* *Warner-Lambert*, 86 FTC 1398, 1415 n.4 (1975), *aff’d*, 562 F.2d 749 (D.C. Cir. 1977) (evaluating the claim from the perspective of the “average listener”); *Grolier*, 91 FTC 315, 430 (1978) (considering the “net impression” made on the “general populace”).

²⁶ *Ortega v. Natural Balance, Inc.*, 300 F.R.D. 422, 428-29 (C.D. Cal. 2014) (citations omitted).

²⁷ *Telebrands Corp.*, 2004 WL 3155567, at § III.B.1 (FTC Sept. 15, 2004) (citing *Kraft, Inc.*, 114 FTC 40, 120 n.8 (1991), *aff’d*, 970 F.2d 311 (7th Cir. 1992)).

²⁸ FTC Policy on Deception § IV.

²⁹ *Id.* § IV n.46.

³⁰ *Id.* § IV.

³¹ *Cent. Hudson Gas & Elec. Co. v. PSC*, 447 U.S. 557, 567 (1980).

³² FTC Policy on Deception § IV.

³³ Farm Animal Welfare, American Humane Association, <http://www.americanhumane.org/animals/programs/farm-animal-welfare.html> (last visited Oct. 23, 2014.).

³⁴ *Id.*

the protein products they buy and serve their families.”³⁵ AHA claims that the AHC standards are based on the Five Freedoms:³⁶ freedom from (1) hunger and thirst, (2) discomfort, (3) pain, injury, or disease, (4) fear and distress, and freedom (5) to express normal behaviors.³⁷

Discussing Foster Farms’ AHC certification on a public television program, AHA’s president and CEO Robin Ganzert, Ph.D., stated that with the AHC label on its products, Foster Farms “is able to declare to their consumers that their animals are raised humanely.”³⁸ She noted that “it is important for Americans to have faith [in the] products that they’re buying. That third-party assurance is what consumers are looking for.”³⁹ The AHC program’s director, Tim Amlaw, was quoted in an AHA press release as stating, “Consumers who choose to purchase products with the American Humane Certified seal are effectively using their voices to tell grocery stores, the agricultural industry and the food industry that they expect humane treatment of the food products they buy.”⁴⁰

b. Consumers are Concerned about the Humane Treatment of Animals Raised for Food, and that Concern Renders Respondents’ Deceptive Claims Material.

“Advertising claims which tout that the advertiser is addressing particular social or ethical concerns can provide consumers with important information about their purchasing choices.”⁴¹ This Commission has acknowledged that, “for many consumers, a company’s claim that its products are humane is important to their decision whether or not to purchase products from that company.”⁴²

Research shows that humane treatment of farmed animals is an issue of concern to many American consumers. A survey conducted by AHA itself found that, of 2,634 respondents, 34% of respondents were willing to pay 10-20% more for “humanely raised products,” and 28% of respondents were willing to pay 20-30% more.⁴³ Seventy-four percent of respondents were “very willing” to pay more for “humanely raised meat,” and 84% of respondents were “extremely interested” in “supporting the humane treatment of farm animals.”⁴⁴ Eighty-nine percent of respondents were “very concerned” about the welfare of America’s farmed animals.⁴⁵ When

³⁵ AMERICAN HUMANE ASSOCIATION, ANIMAL WELFARE STANDARDS FOR TURKEYS 4 (2013), <http://humaneheartland.org/our-standards> (Exhibit 5).

³⁶ Farm Animal Welfare, *supra* note 33.

³⁷ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at 4 (Exhibit 5).

³⁸ *America’s Heartland: Episode 903*, (public television broadcast 2013-14 season), *available at* http://www.americasheartland.org/episodes/episode_903/index.htm.

³⁹ *Id.*

⁴⁰ Press Release, Am. Humane Ass’n, American Humane Certified Responds to Inhumane Dairy Practices Shown on ABC’s ‘Nightline,’ (Feb. 2, 2010), *available at* <http://www.americanhumane.org/animals/animal-welfare-news/american-humane-certified-responds-to-inhumane-dairy-practices-shown-on-abc-s-nightline> html (last visited Oct. 23, 2014).

⁴¹ *Starbucks Corporation (Free Trade Certified Coffee)*, Report #4592, NAD Case Reports (Nov. 2006).

⁴² E-mail from Mary Engle, Associate Director, Bureau of Consumer Protection, FTC, to PETA (Oct. 16, 2008) (on file with PETA); *see also* E-mail from Mary Engle to Bonnie Robson, Counsel for PETA (Apr. 14, 2009) (on file with PETA) (“animal treatment is an important issue for many consumers”).

⁴³ Humane Heartland, Farm Animal Welfare Survey 5 (2013), *available at* <http://www.americanhumane.org/assets/humane-assets/humane-heartland-farm-animals-survey-results.pdf>.

⁴⁴ *Id.* at 7-9.

⁴⁵ *Id.* at 10.

asked to rank the importance of a “humanely raised” label to their purchasing decision, where 100 signified “Absolute necessity,” 95% of respondents ranked that label between 90 – 100, higher than the labels “organic,” “natural,” and “antibiotic free.”⁴⁶ When asked what a product’s “humanely raised certified label signif[ied],” 2,508 respondents answered “[b]etter treatment of animals.”⁴⁷ Within the survey, AHA acknowledged that humanely raised certified products cost more than other products.⁴⁸

That understanding is evident in other surveys’ results.⁴⁹ Seventy percent of surveyed consumers answered that they believed that “humanely raised” meant chickens were raised under a standard of care better than what is typical in the industry.⁵⁰ When questioned about the treatment of laying hens, 60.4% of respondents found the mutilation of the birds’ beaks (“debeaking”) without anesthesia unacceptable and 80.7% said they would pay more for eggs raised in a humane manner.⁵¹ In a survey by *Consumer Reports*, 90% of respondents said “humanely raised” “should mean the animals had adequate living space.”⁵²

Furthermore, all across the United States, consumers have encouraged, campaigned for, and voted for measures to improve the conditions under which farmed animals are raised, and food-production companies and restaurants have responded to consumers’ concerns about farm-animal welfare by implementing changes in their corporate practices.⁵³

In considering the meaning of “humane,” one court stated “that a possible legal definition of ‘humane’ might reference treatment that does not cause undue pain to an animal.”⁵⁴ The National Advertising Division (NAD) of the Better Business Bureau has determined that the statement that a product is humane is objective and customers rely upon it in making their purchasing decisions. In a case brought against Foster Farms, NAD rejected Foster’s assertion that “humane” is a question of morality outside NAD’s jurisdiction.⁵⁵ NAD explained, “Specific claims of ‘humane’ treatment and representations made in advertising regarding the health of animals and the development of husbandry practices represent are [sic] statements that are relied on by certain consumers in making purchasing decisions regarding animal products.”⁵⁶ In a challenge to Perdue Farms’ advertising, NAD reiterated that “consumer perception and

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* at 12.

⁴⁸ *Id.* at 5.

⁴⁹ Animal Welfare Institute compiled a number of survey results regarding consumers’ concern for the welfare of farmed animals and their willingness to pay more for “humanely raised” food. *Consumer Perceptions of Farm Animal Welfare*, Animal Welfare Institute, available at http://awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf.

⁵⁰ *Perdue Farms Inc. (Perdue Poultry Food Products)*, Case #5295, NAD Case Reports (03/02/11).

⁵¹ *United Egg Producers*, Report No. 122, NARB Case Reports (05/10/04).

⁵² *Consumer Reports Aims to Ban “Natural” Label*, MeatPoultry.com, June 16, 2014, http://www.meatpoultry.com/articles/news_home/Trends/2014/06/Consumer_Reports_aims_to_ban_n.aspx?ID=%7BC49A9FD4-0039-4C4A-B9F3-F45492ECE987%7D.

⁵³ See *Timeline of Major Farm Animal Protection Advancements*, Humane Society of the United States, http://www.humanesociety.org/issues/confinement_farm/timelines/timeline_farm_animal_protection.html (last visited Oct. 30, 2014).

⁵⁴ *Animal Legal Def. Fund v. HVFG LLC*, 12-cv-05809 WHA, at *8 (N.D. Cal. Mar. 15, 2013).

⁵⁵ *Foster Poultry Farms, Inc. (Chicken and Poultry Products)*, Case #4495, NAD Case Reports (05/12/06).

⁵⁶ *Id.*

understanding of ‘humane’ treatment or ‘raised humanely’ is directly relevant to the issue of whether such claims are substantiated or misleading to consumers.”⁵⁷ In considering a challenge to a foie gras producer’s implied claims of humane production, NAD pronounced that it “appreciates that advertising messages concerning animal welfare convey information that may enable customers to make purchasing decisions that reflect their particular social and ethical concerns. Consumers cannot typically verify the accuracy of these claims for themselves. NAD, therefore, plays an important role in reviewing such claims to ensure they are truthful, nonmisleading and adequately substantiated.”⁵⁸ Congress established that same role for the FTC.

Given the materiality inherent in AHA and Butterball’s claims, this matter requires FTC intervention. Consumers are willing to change their purchasing practices to support companies they understand to be treating farmed animals humanely. AHA itself has surveyed and documented consumers’ interest in supporting companies that provide humane treatment to farmed animals and acknowledged that such products carry a higher price at the store. Consequently, its deceptive representations regarding humane treatment, representations that influence consumers’ purchasing decisions and motivate them to pay more for a product carrying a humane label, are material deceptions in violation of the FTC Act.

- c. The Standards for Turkey Producers to Achieve the AHC Label Do Not Differ, or Differ Immaterially, from Standard Industry Practices.

Contrary to the AHC program’s claims that its program ensures humane treatment of animals raised for food and enables consumers to choose humanely raised products, AHC’s standards for turkey producers closely conform to the turkey industry’s prevailing practices. Like standard industry practices, which are often considered by consumers to be cruel and inhumane, the AHC program allows turkeys to be kept indoors at all times, without enrichment or natural light, with high levels of ammonia, in cramped spaces, and to have their beaks and toes mutilated.

Confinement: Indoors, Low Light, No Enrichment, Cramped, and High Ammonia Levels

The AHC standards for turkeys do not require access to the outdoors for the birds.⁵⁹ This is no different from the general turkey industry.⁶⁰

The AHC standards do not require turkey producers to provide enrichment items, such as perches, alfalfa, and toys, to the birds.⁶¹ The AHC standards do not require turkeys’ housing to have windows for natural light. Instead, turkeys must have a period of eight consecutive hours of light, and the minimum average level of light must be “10 lux (1 foot-candle) at the head height

⁵⁷ *Perdue Farms Inc. (Perdue Poultry Food Products)*, Case #5295, at 6, NAD Case Reports (03/02/11).

⁵⁸ *D’Artagnan, Inc. (Foie Gras)*, Case #4959, NAD Case Reports (01/16/09).

⁵⁹ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at 12 (Exhibit 5).

⁶⁰ *See, e.g., Broilers, Turkeys, Ducks (meat-bird production)*, Poultry Production, U.S. Environmental Protection Agency, <http://www.epa.gov/oecaagct/ag101/printpoultry.html> (last visited Oct. 23, 2014).

⁶¹ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at checklist p. 26 (Exhibit 5).

of the birds throughout the house.”⁶² Within the turkey industry, turkeys are typically housed without environmental enrichment and in low light.⁶³

Inside the barn, the “density of turkeys” cannot “exceed 7.88 pounds of bird weight per square foot” according to the AHC standards.⁶⁴ Such a measurement allows for cramped, crowded barns.

Butterball sells turkeys ranging in weight from 6 lbs.⁶⁵ to 32 lbs.⁶⁶ Application of the AHC standards on stocking density results in the following required space:

Weight	Space Required
6 lbs.	.76 sq. ft.
10 lbs.	1.27 sq. ft.
15 lbs.	1.9 sq. ft.
20 lbs.	2.54 sq. ft.
25 lbs.	3.17 sq. ft.
32 lbs.	4 sq. ft.

Agriculture professors at Ohio State University and the University of Arkansas wrote in 2007 that, for stocking density, “Commercial turkey guides recommend everything from 2.25 sqft for a 12 week old, 16 lb turkey hen to 3.5 sqft per bird for a 20 wk old, 40 lb canner tom.”⁶⁷ The California Poultry Workgroup’s publication on turkey care states, “The amount of space allowed per bird varies with the environment, sex and market weight, but is generally 2.5 square feet per hen and 3.5 square feet per tom.”⁶⁸ The AHC standard thus appears to fall within or near an accepted range in the turkey industry—they provide for slightly less space than industry standards for smaller birds, and slightly more (inches) for the largest birds. The result is still that turkeys are tightly packed within the turkey sheds. The square footage allowed to turkeys under the AHC standards is in stark contrast to the consumer’s expectation that birds raised humanely enjoy adequate living space.

⁶² *Id.* at 8.

⁶³ Chris M. Sherwin et al., *The Effects of Environmental Enrichment and Intermittent Lighting on the Behaviour and Welfare of Male Domestic Turkeys*, 62(4) APPLIED ANIMAL BEHAVIOUR SCIENCE 319-33 (1999). For the beneficial effects of natural lighting and environmental enrichment on turkeys produced by one of Britain’s largest producers, see Philip Clarke, *Daylight and Perches Good for Turkeys*, FARMERS WEEKLY, Feb. 22, 2012, <http://www.fwi.co.uk/articles/22/02/2012/131347/daylight-and-perches-good-for-turkeys.htm>.

⁶⁴ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at 24 (Exhibit 5).

⁶⁵ *E.g.*, Frozen Li'l Butterball, <http://www.butterball.com/products/detail/frozen-lil-butterball> (last visited Oct. 29, 2014).

⁶⁶ *E.g.*, Frozen Whole Turkey, <http://www.butterball.com/products/whole-turkeys/frozen-whole-turkey> (last visited Oct. 29, 2014).

⁶⁷ SANDRA G. VELLEMAN & NICHOLAS B. ANTHONY, THE IMPACT OF STOCKING DENSITY ON GROWTH AND YIELD OF COMMERCIAL PHEASANTS 2, <http://www.mwpoultry.org/ProjectPDFs/07-15.pdf>; see also MPRP Research Project Objectives, <http://www.mwpoultry.org/ResearchProjects.html?nocache=500001> (last visited Oct. 23, 2014) (indicating a 2007 publication date).

⁶⁸ TURKEY CARE PRACTICES 7 (1998), available at http://www.vetmed.ucdavis.edu/vetext/local-assets/pdfs/pdfs_animal_welfare/turkeyCarePrax.pdf; see also J.C. Voris, California Turkey Production, Poultry Fact Sheet No. 16c (1997), <http://animalscience.ucdavis.edu/Avian/pfs16C.htm>.

The AHC standards permit ammonia levels to reach as high as 25 parts per million in the turkey barns.⁶⁹ However, this measurement appears to be the general recommendation or standard in the industry. According to the National Turkey Federation's⁷⁰ advisory guidelines,⁷¹ the recommended ammonia level is less than 25 parts per million. Indeed, according to the National Chicken Council,⁷² National Turkey Federation, and U.S. Poultry & Egg Association,⁷³ "much of the industry literature is devoted to providing the informational resources to ensure that all poultry farmers achieve and maintain . . . ammonia concentrations [near or below 25 ppm] in their poultry houses."⁷⁴

As a result of these practices that the AHC standards allow and the turkey industry typically employs, turkeys may spend their whole lives in dark, windowless sheds without sufficient space to move freely. With no room to engage in normal behaviors and a barren environment without enrichment items, the birds may have nothing else to do but peck at each other⁷⁵—and injured birds have no ability to escape in such cramped quarters. The birds cannot engage in behaviors they would perform if they had adequate space and a humane environment: "[d]omestic turkeys, if given the opportunity, will exhibit the same wide range of comfort and grooming activities as their ancestors, including preening, which involves the arrangement, cleaning and general maintenance of the structure of the feathers by the beak or feet; raising and ruffling the feathers; stretching the wings; and dust-bathing."⁷⁶

In addition, the conditions wreak havoc on their health. High ammonia levels cause respiratory irritation and keratoconjunctivitis (ammonia-burned eyes).⁷⁷ Ammonia also destroys the cilia that would otherwise prevent harmful bacteria from being inhaled. As a result, turkeys "are inhaling harmful bacteria constantly" and develop respiratory infections, such as airsacculitis.⁷⁸ Low lighting can cause abnormalities in the birds' eye physiology and causes the birds stress, since they prefer bright light to explore their environment.⁷⁹ None of this suffering

⁶⁹ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at 34 (Exhibit 5).

⁷⁰The National Turkey Federation describes itself as "the national advocate for the turkey farmer and processors." About the National Turkey Federation, <http://www.eatturkey.com/about-us> (last visited Oct. 23, 2014).

⁷¹ NATIONAL TURKEY FEDERATION, ANIMAL CARE BEST MANAGEMENT PRACTICES 19 (2012), <http://www.eatturkey.com/sites/default/files/NTF%20Production%20Welfare%20-%202012%20FINAL.pdf>. See Exhibit 6.

⁷² The National Chicken Council is a "trade association that promotes and protects the interests of the chicken industry." Overview, About NCC, National Chicken Council, <http://www.nationalchickencouncil.org/about-ncc/overview/> (last visited Oct. 23, 2014).

⁷³ "The U.S. Poultry & Egg Association is the world's largest and most active poultry organization," and its membership includes turkey producers and turkey processors. About the U.S. Poultry & Egg Association, <http://www.uspoultry.org/about/> (last visited Oct. 23, 2014).

⁷⁴ Petition for Exemption From EPCRA and CERCLA Reporting Requirements For Ammonia Emissions from Poultry Operations 14 (Aug. 5, 2005), <http://www.uspoultry.org/environment/docs/poultrypetition.pdf>.

⁷⁵ See, e.g., M.E. ENSMINGER POULTRY SCIENCE 338 (Interstate Publishers, Inc., 1992); Sherwin, *supra* note 63.

⁷⁶ STANDING COMMITTEE OF THE EUROPEAN COMMISSION FOR THE PROTECTION OF ANIMALS KEPT FOR FARMING PURPOSES (T-AP), RECOMMENDATIONS CONCERNING TURKEYS 3 (2001), http://www.magrama.gob.es/es/ganaderia/temas/produccion-y-mercados-ganaderos/recpavosingles_tcm7-5584.pdf.

⁷⁷ Ian J. H. Duncan, "Welfare Problems of Meat-Type Chickens," Farmed Animal Well-Being Conference at the University of California-Davis, June 28-29, 2001.

⁷⁸ *Id.*

⁷⁹ Chris M. Sherwin, *Light Intensity Preferences of Domestic Male Turkeys*, APPLIED ANIMAL BEHAVIOUR SCIENCE, 1998, at 121-30; C.L. Barber et al, *Preferences of Growing Ducklings and Turkey Poults for Illuminance*, ANIMAL-WELFARE, 2004, at 211-24.

aligns with the reasonable consumer's expectations for "humane" treatment.

Inability to Walk Without Difficulty

The AHC standards allow for 10% of the hens and 20% of the toms to have visible difficulty walking.⁸⁰ Birds with difficulty walking, as defined by the AHC standards, are birds who "walk with a limp making awkward movements, but that are still able to walk at least 5 feet (after being goaded gently, if needed)."⁸¹ This is common among turkeys raised for food. Researchers have developed a scale of 1-5 to measure the impairment of a turkey's movement, with 1 representing turkeys whose legs lack defect and 5 representing bowlegged turkeys with "great difficulty walking"; turkeys bred at Ohio State University average a 3 on that scale.⁸²

"[T]urkeys have been bred to grow faster and heavier but their skeletons haven't kept pace, which causes 'cowboy legs.' Commonly, the turkeys have problems standing . . . and fall and are trampled on or seek refuge under feeders, leading to bruises and downgradings as well as culled or killed birds."⁸³ According to one animal scientist, due to skeletal disorders, "we must conclude that approximately one quarter of the heavy strains of broiler chicken and turkey are in chronic pain for approximately one third of their lives. . . . [T]his must constitute, in both magnitude and severity, the single most severe, systematic example of man's inhumanity to another sentient animal."⁸⁴

The AHC standards fail to address the genetic modifications that cause turkeys to grow at a rate that their skeletons cannot sustain. As the AHC standards allow for one-tenth to one-fifth of birds to have *visible* difficulty walking, it can be inferred that many turkeys raised by its certified producers are experiencing the kind of chronic pain that comes from their skeletons' inability to support their weight sufficiently—far more than the reasonable consumer would find humane.

Painful Mutilation of Turkeys' Toes and Beaks

The AHC standards allow the turkeys' toes to be amputated ("clipped"), including by a hot blade, and the ends of their beaks to be sliced off ("trimmed") by a machine with a blade,⁸⁵ if there is a "concern about cannibalism"—which tends to occur when the birds are closely confined without proper environmental enrichment.⁸⁶ Amputation of toes and mutilation of beaks are standard practices in the turkey industry. Like the AHC standards, the National Turkey Federation approves of cutting turkeys' toes with a hot blade.⁸⁷ According to the USDA's Agricultural Research Service, about one-third to one-half of the beaks of turkeys are cut off "to

⁸⁰ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at 25 (Exhibit 5).

⁸¹ *Id.* at checklist p. 28.

⁸² Alexis Madrigal, *Give Thanks? Science Supersized Your Turkey Dinner*, WIRED, Nov. 25, 2008, available at <http://www.wired.com/2008/11/turkeytech/all/>.

⁸³ R. Smith, *Cutting Edge Poultry Researchers Doing What Birds Tell Them To Do*, FEEDSTUFFS, Sept. 9, 1991, at 22.

⁸⁴ JOHN WEBSTER, *ANIMAL WELFARE: A COOL EYE TOWARDS EDEN* 156 (Blackwell 1995).

⁸⁵ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at 37-38 (Exhibit 5).

⁸⁶ *See, e.g.*, ENSMINGER *supra* note 75; Sherwin, *supra* note 63.

⁸⁷ ANIMAL CARE BEST MANAGEMENT PRACTICES, *supra* note 71, at 16 (Exhibit 6).

cut losses from poultry pecking each other.”⁸⁸ The National Turkey Federation even advises that, while it believes that “[b]eak conditioning is necessary to prevent feather damage and mutilation from birds pecking each other to establish social order,”⁸⁹ “using a mechanical clipper or hot blade has been largely replaced with the adoption of new technology and is not [sic] longer considered acceptable.”⁹⁰

Amputations of parts of the turkeys’ bodies “at the very least, will cause some acute pain,” but research also suggests that mutilating birds’ beaks and toes causes them *chronic* pain.⁹¹ Surveyed consumers specifically stated that they did not find acceptable the poultry industry’s practice of slicing off birds’ beaks without pain relief. Certainly, such painful mutilation practices are outside those consumers’ reasonable definition of “humane” treatment.

Painful Shackling and Electric Shocks

The AHC standards allow the birds to be shackled for slaughter.⁹² Shackling by the legs is a standard industry practice.⁹³ The AHC standards for turkeys allow electric water bath stunning,⁹⁴ which is intended to immobilize birds or render them unconscious for slaughter. This practice is standard within the turkey industry.⁹⁵

Being shackled upside-down is an unnatural posture for turkeys. For birds who have been grown at a rate their skeletons cannot support, being hung upside-down by their legs—legs that may have had “visible difficulty walking”—can result in broken bones from the act of being shackled, the weight of their top-heavy bodies hanging upside-down, and the stress of the unnatural position that causes urgent wing-flapping.⁹⁶ Evidence from studies of chickens demonstrates that the process of inversion and shackling is both stressful⁹⁷ and painful, and the wingtips may become bruised if turkeys flap while being hung.⁹⁸ Moreover, many birds flap

⁸⁸ *Settling Doubts About Livestock Stress*, AGRICULTURAL RESEARCH, Mar. 2005, at 4-7, available at <http://www.ars.usda.gov/is/AR/archive/mar05/stress0305.htm>.

⁸⁹ ANIMAL CARE BEST MANAGEMENT PRACTICES, *supra* note 71, at 16 (Exhibit 6).

⁹⁰ *Id.* Two newer practices the guidelines discuss are fulgurization, a process of heating the beak’s germinal tissue on the first day of the turkey’s life, and a device that “uses a short burst of high intensity light to denature a small area of germinal tissue at the tip of the beak.” *Id.*

⁹¹ Ian J.H. Duncan, *Welfare Problems of Poultry*, in *THE WELL-BEING OF FARM ANIMALS* 307-24 (J.B. Benson & Bernard Rollin eds., 2004); see also Ian J.H. Duncan, *Science-Based Assessment of Animal Welfare: Farm Animals*, 24(2) SCIENTIFIC AND TECHNICAL REVIEW OF THE OFFICE INTERNATIONAL DES EPIZOOTIES, 2005, at 483-92.

⁹² ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at 30 (Exhibit 5).

⁹³ *E.g.*, NATIONAL TURKEY FEDERATION, ANIMAL CARE BEST MANAGEMENT PRACTICES: SLAUGHTER GUIDELINES (2012) 14-15; TURKEY CARE PRACTICES, *supra* note 68, at 20.

⁹⁴ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at 30 (Exhibit 5).

⁹⁵ See, e.g., Mohan Raj, *Welfare During Stunning and Slaughter of Poultry*, 77 POULTRY SCIENCE 1815 (1998).

⁹⁶ See, e.g., L. H. Parker et al., *Sex and Shank Diameter Affect Struggling Behaviour of Shackled Broilers*, 76 (Suppl. 1) POULTRY SCIENCE 88 (1997).

⁹⁷ Govind Kannan and Joy A. Mench. *Influence of Different Handling Methods and Crating Periods on Plasma Corticosterone Concentrations in Broilers*, 37(1) BRITISH POULTRY SCIENCE 21 (1996); Govind Kannan et al., *Shackling of Broilers: Effects on Stress Responses and Breast Meat Quality*, 38(4) BRITISH POULTRY SCIENCE 323 (1997).

⁹⁸ N. G. Gregory, *Pathology and Handling of Poultry at the Slaughterhouse*, 50(1) WORLD’S POULTRY SCIENCE JOURNAL 66 (1994).

their wings at the entrance to the stun bath, which causes their shackled bodies to experience painful electric shocks.⁹⁹

Consumers want a “humane” label to signify humane slaughter, which the AHC standards do not guarantee. Painful shackling of birds whose legs may already have been in enough pain that the birds had difficulty walking, hanging the birds upside-down in an unnatural posture, and dunking them in an electrified bath that can cause painful shocks to hit their bodies while they are still alive and conscious does not amount to better treatment than what is typical in the industry, contrary to what consumers expect from a “humane” label.

Deliberate Acts of Abuse Against Animals

Deliberate abuse of turkeys, including “kicking, throwing, yelling at, or purposefully scaring the birds,” does not result in an automatic failure of the audit.¹⁰⁰ It is within the AHC program’s discretion whether the audit will be suspended for such conduct.¹⁰¹ The program may place the producer on probation if the incident is deemed severe after an investigation.¹⁰²

The turkeys are at the mercy of the AHC-certified producers and their employees and contractors. They cannot run away, given the physical ailments caused by their breeding and confinement, or defend themselves, since their beaks and toes have been amputated. If the AHC standards do not necessarily protect the birds from intentional acts of abuse, they certainly cannot satisfy the “humane” standard consumers expect.

The AHC Standards Adhere to Industry Guidelines

For its standards on slaughter and processing, “[t]he American Humane Certified program adheres to” the guidelines published by the American Meat Institute Foundation,¹⁰³ which “is a non-profit research, education and information foundation established by the American Meat Institute.”¹⁰⁴ The American Meat Institute (“AMI”) is “a national trade association that represents companies that process 95 percent of red meat and 70 percent of turkey products in the US and their suppliers throughout America.”¹⁰⁵ AMI advertises itself as “[t]he voice of the meat and poultry industry,” and its mission is to “represent the industry and advocate its views.”¹⁰⁶ In its list of five values, AMI’s only reference to animals is in its fifth value: “AMI values livestock and poultry as nutritious food sources.”¹⁰⁷

⁹⁹ *E.g.*, MICHAEL C. APPLEBY ET AL., POULTRY BEHAVIOUR AND WELFARE 193 (CABI Publishing 2004).

¹⁰⁰ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at checklist p. 37 (Exhibit 5).

¹⁰¹ *Id.*

¹⁰² *Id.* In addition, although the presence of live birds in the DOA (Dead on Arrival) bin or in the scalding results in an automatic failure of the audit, the producer is merely placed on probation. Producers on probation can be reinstated if they make “changes to the management, training, and company policies” that the program finds satisfactory to “remedy the issue” and if they pass a subsequent audit. *Id.*

¹⁰³ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at checklist p. 32 (Exhibit 5).

¹⁰⁴ About, AMI Foundation, <http://www.amif.org/about/> (last visited Oct. 23, 2014).

¹⁰⁵ About AMI, <http://www.meatami.com/ht/d/sp/i/204/pid/204> (last visited Oct. 23, 2014).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

In its assessment of the AHC label, *Consumer Reports* found that “many of the requirements in the American Humane standards mirror the conventional industry’s practices, and livestock producers do not have to meet all of the requirements to be certified.”¹⁰⁸

AHA’s claims that its standards are built on freedom to engage in normal behavior and freedom from pain, discomfort, and fear are wholly incongruous with a program that permits systematic cramped confinement of turkeys, mutilation of their beaks and toes, deprivation of enrichment items to allow them to “express normal behaviors,” and painful shackling in an unnatural posture followed by electric shocks before slaughter, among other inhumane acts. The AHC standards for its “humane” label are contrary to consumers’ expectations of “humane” treatment of farmed animals. Consumers expect better treatment for farmed animals raised under a “humane” label than the animals would generally receive, but the AHC standards for turkey producers are nearly in lockstep with the turkey industry.

d. A Turkey Producer Need Not Adhere to All of the AHC Standards to Pass the Audit, and the Auditor Need Not Observe Practices by Outside Contractors.

To obtain AHC certification, a turkey producer must first fill out an application.¹⁰⁹ The AHC program will then schedule an audit of the producer’s site with an “independent third party auditor.”¹¹⁰ AHA reviews the results of the audit with the producer, giving the producer the opportunity to correct problems.¹¹¹ Audit results are private, and dissemination to retailers and other entities requires the producer’s permission.¹¹² Audits occur annually thereafter, but AHA “reserves the right to perform an unannounced audit.”¹¹³ There is a fee or royalty negotiated to receive AHC certification.¹¹⁴

The AHC audit for turkey producers includes 120 audit items that add up to a total possible score of 1190 points.¹¹⁵ The producer’s score must be 85% of the 1190 possible points to receive certification.¹¹⁶ Some of these items do not have a direct impact on humane treatment of animals, such as simply making a company policy available to all employees and maintaining records on flocks for at least one year.¹¹⁷ Thus, a producer may disregard some items that are directly related to the turkeys’ care and still receive AHC certification as a “humane” producer of turkeys, thereby gaining the ability to adorn its products on supermarket shelves with the AHC label. A producer could, for example, have ammonia levels higher than 25 ppm or pack turkeys more densely than the AHC standards outline yet receive certification as “humane” and advertise its products as such to shoppers at the grocery store.

¹⁰⁸ American Humane Association, *Consumer Reports*, <http://www.greenerchoices.org/eco-labels/label.cfm?LabelID=309>.

¹⁰⁹ *Becoming American Humane Certified™*, Humane Heartland, <http://www.humaneheartland.org/our-farm-programs/american-humane-certified> (last visited Oct. 23, 2014).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ ANIMAL WELFARE STANDARDS FOR TURKEYS, *supra* note 35, at checklist p. v (Exhibit 5).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at checklist pp. 3-4.

Moreover, a facility that uses outside companies for transportation or processing need not have that outside company audited to achieve certification. While the AHC standards assert that the auditor must observe the outside company's processes, they allow the facility to only provide documentation of training for the outside company's employees if observation by an auditor is not "a viable option."¹¹⁸ As a result of the scoring system, the meaning of the label is also not consistent across the field of labeled products, even within the same industry. Consequently, even the minimal standards of the AHC program may not be met by its certified companies and their contractors.

e. Conditions at Butterball Evince the Misleading Nature of the AHC Label.

Butterball produces more than one billion pounds of turkey annually and is the "largest producer of turkey products" in the United States.¹¹⁹ Butterball's products account for twenty percent of turkey production in the United States.¹²⁰

All of Butterball's products have been granted certification by the AHA and are slated to bear the AHC label by fall of this year.¹²¹ However, in response to a journalist's question regarding what changes Butterball made to obtain certification, an AHA spokesperson provided no specific answers.¹²² In light of Butterball's history of employing workers who have committed acts of egregious cruelty against the turkeys in their care,¹²³ AHA's reticence is troubling.

Butterball engages in practices that the reasonable consumer would find inhumane but that the AHC standards approve. For example, Butterball's turkeys move down the processing line in shackles,¹²⁴ just as the AHC standards and turkey industry allow. Butterball's grow-out farms densely stock the turkey barns,¹²⁵ just as the AHC standards and turkey industry allow.

A recent investigation at a Butterball hatchery, from April to May 2014, revealed Butterball workers grinding baby turkeys alive in a macerating machine and mutilating their beaks and toes.¹²⁶ Although this footage predates the announcement that *all* of Butterball's

¹¹⁸ *Id.* at checklist p. 2.

¹¹⁹ Press Release, Butterball Announces Expanded Corporate Citizenship Program, Sept. 23, 2014, *available at* <http://www.butterballcorp.com/press-releases/butterball-announces-expanded-corporate-citizenship-program/>.

¹²⁰ Corporate Information-Facts, <http://www.butterballcorp.com/corporate-information/facts/> (last visited Oct. 23, 2014).

¹²¹ Butterball Announces Expanded Corporate Citizenship Program, *supra* note 119.

¹²² Tom Philpott, *Butterball Goes Humane for Thanksgiving. Really?*, MOTHER JONES, Sept. 27, 2014, *available at* <http://www.motherjones.com/tom-philpott/2014/09/butterball-goes-humane-thanksgiving-really>.

¹²³ *See, e.g.*, Butterball Animal Cruelty: Two More Workers Convicted after Mercy for Animals Investigation, Feb. 25, 2013, http://www.huffingtonpost.com/2013/02/25/butterball-animal-cruelty_n_2758472.html.

¹²⁴ General Laborer Job Opening at Butterball in Ozark, AR, <http://www.dcjobs.com/j/t-general-laborer-e-butterball-l-ozark-ar-jobs-j8858076.html> (last visited Oct. 23, 2014).

¹²⁵ *See, e.g.*, For Sale: Butterball Turkey Farm with 75 Acres, http://www.adpost.com/us/homes_offices/1219918/ (last visited Oct. 23, 2014).

¹²⁶ Amanda Dolasinski, *Mercy for Animals Allege Abuse at Hoke County Butterball Turkey Plant*, FAYETTEVILLE OBSERVER, June 4, 2014, *available at* http://www.fayobserver.com/news/local/article_75f64240-4aff-5dfc-83f4-aed4a04baa53.html; Tom Philpott, *This Video Shows What Happens to Baby Turkeys at the Butterball Plant*, MOTHER JONES, June 4, 2014, *available at* <http://www.motherjones.com/tom-philpott/2014/06/turkey-butterball-undercover-video>.

products will bear the AHC label this fall, the investigation came *after* an announcement in November 2013 that *all of Butterball's fresh, whole turkeys had been granted the AHC label.*¹²⁷

Butterball announced in a press statement that its Animal Care and Well-Being Advisory Council saw no evidence of mistreatment of turkeys in the video; the statement also noted Butterball's adherence to industry standard practices and its commitment to maintaining AHC certification.¹²⁸ The reasonable consumer would likely disagree with the council's conclusion, considering that a majority of survey respondents found that slicing off the ends of birds' beaks without anesthesia was unacceptable and, in mulling a possible legal definition of "humane," a court focused on not causing undue pain to an animal. However, as described in Section II(c) of this complaint, it is not against AHC standards, or the general practices of the turkey industry, to mutilate turkeys' beaks and toes. In addition, it is not against AHC standards to macerate baby turkeys.¹²⁹

These realities of Butterball's treatment of turkeys, which is permitted by the AHC standards, exemplify the misleading nature of the AHC label.

III. The Federal Trade Commission Should Enforce the FTC Act Against AHA and Butterball because their False and Misleading Claims are Difficult for Consumers to Detect.

If a particular consumer group is targeted, or likely to be affected by an advertisement, the Commission will examine advertising from the perspective of a reasonable member of the targeted group.¹³⁰ In determining which advertising claims to challenge, the Commission prioritizes "those claims [that] are expensive for consumers . . . , or are beyond the competence or expertise of ordinary consumers to verify."¹³¹ "Because of their lack of susceptibility to consumer assessment," AHA and Butterball's claims about the treatment of animals raised and killed by AHC-labeled companies are of exactly the type "subject to more intense scrutiny by the FTC."¹³²

"[P]rocess attributes" that "are important to consumers for ethical reasons, such as the use of child labour, or harvesting techniques that threaten an endangered species," are often "difficult

¹²⁷ American Humane Association Encourages Americans to serve a "Humane Table" This Holiday Season, Nov. 6, 2013, American Humane Association, <http://www.americanhumane.org/american-humane-association-encourages-americans-to-serve-a-humane-table-this-holiday-season.html> (last visited Oct. 23, 2014).

¹²⁸ Press Release, Butterball Responds to Undercover Hatchery Video, June 3, 2014, Butterball, <http://www.butterballcorp.com/press-releases/butterball-responds-to-undercover-hatchery-video/>.

¹²⁹ AMERICAN HUMANE CERTIFIED WELFARE STANDARDS CHECKLIST: HATCHERIES (CHICKS AND POULTS) 12, http://www.humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Standards+Checklists.

¹³⁰ FTC Policy on Deception, *supra* note 10.

¹³¹ FTC Commissioner Mary L. Azcuenaga, The Role of Advertising and Advertising Regulation in the Market, before the Turkish Association of Advertising Agencies Conference on Advertising for Economy and Democracy, § IV.A. (Apr. 8, 1997), available at <http://www.ftc.gov/speeches/azcuenaga/turkey97.shtm>; see also FTC Commissioner Roscoe B. Starek, III, The Consumer Protection Pyramid: Education, Self-Regulation, and Law Enforcement, before the Korea Consumer Festival '97 (Dec. 2, 1997) ("Some of the most harmful violations that we pursue involve deceptive 'credence claims'—that is, claims whose accuracy is extremely difficult for consumers to assess based on their own experiences."), available at <http://www.ftc.gov/speeches/starek/koreaweb.shtm>.

¹³² *Id.*

for consumers to detect.”¹³³ For example, Commissioner Julie Brill explained that “ensuring” that environmental marketing claims “are truthful is particularly important,” because “[c]onsumers often cannot determine for themselves whether a product, package, or service is, in fact, ‘recyclable,’ ‘made with renewable energy,’ or possesses another environmental attribute that is being promoted.”¹³⁴ The same is true of humane marketing claims like AHA’s. Consumers can easily tell how much a packaged turkey costs, or how it looks or tastes, but they cannot observe or learn specifically of the treatment of that turkey during life and before and during slaughter. The Commission should adhere to its announced policies and prioritize enforcement of the FTC Act against AHA and Butterball.

The Commission well knows that if a product can be easily evaluated by the consumer, there is little likelihood of deception because the company would lose repeat business if the product is deficient. Such is not the case when there is asymmetric information regarding process attributes, which in this case concern the treatment of the living turkey. While the consumer relies on the packaging for information about production processes, the producer and AHA have access to far more complete information about those processes.¹³⁵ The consumer’s inability to discern the veracity of the humane claim makes her more likely to be deceived or misled about the very information that will lead her to become a repeat customer. As a result, she may purchase a lower-quality or more objectionable product than was her intention.

In evaluating the AHC label, *Consumer Reports* stated, “the American Humane Association program does not require certain standards that consumers are likely to expect from a welfare label, and producers can be certified without fulfilling 100% of the requirements.”¹³⁶ A survey commissioned by *Consumer Reports* supports its contention that consumers expect more: 88% of respondents said the term “humanely raised” should include humane slaughter, and 79% said the term should mean the animals went outdoors.¹³⁷ The AHC label conveys to consumers that AHC-labeled products are humane without clearly and conspicuously disclosing the parallels between the practices by its certified turkey producers and the general practices of the turkey industry. When a label is confusing to consumers regarding the humane treatment of animals, the National Advertising Review Board (“NARB”) of the Better Business Bureau has

¹³³ Jill E. Hobbs, *Technical Barriers to Trade*, in HANDBOOK ON INTERNATIONAL TRADE POLICY 394, 395 (William A. Kerr & James D. Gaisford eds., 2011).

¹³⁴ Opening Keynote of FTC Commissioner Julie Brill, 2010 PMA Marketing Law Conference 1 (Nov. 18, 2010), available at <http://www.ftc.gov/speeches/brill/101118promomarketingspeech.pdf>.

¹³⁵ As recognized by agricultural economists:

Where producers are willing to supply products conforming to animal welfare principles, but consumers are not able to distinguish between these and other goods, there is a dysfunction in the market. Many goods produced by the food industry are best qualified as credence type goods, since their quality cannot be discerned by consumers prior to or after purchase. By definition, a credence type good implies a market with imperfect information: asymmetric information between the buyer and seller, thus a specific type of market failure. Since consumers are not able to distinguish by quality (animal friendly), they may choose the lower quality good and this may drive the higher quality good from the market. Labeling is the standard prescription for dealing with different qualities while permitting consumer choice.

David Blandford & Linda Fulponi, *Emerging Public Concerns in Agriculture: Domestic Policies and International Trade Commitments*, EUR. REV. OF AGRIC. ECON., 1999, at 40.

¹³⁶ *Consumer Reports*, *supra* note 108.

¹³⁷ *Consumer Reports* Aims to Ban “Natural” Label, *supra* note 52.

found that the label should be discontinued or the guidelines that control the label should be changed.¹³⁸ The need to discontinue AHA's confusing label or change its controlling guidelines is paramount because the AHC label carries substantial potential to be more deceptive than a company's own assertions on its packaging. As AHA's Ganzert recognized, consumers trust "third-party assurance." While consumers may expect bias or exaggeration from a company regarding its own products, they likely expect an independent organization's assessment of a product to be reliable.

An average consumer seeing the AHC label would tend to trust the third-party label and have great difficulty vetting the label's assertion that the product is "humane" against the AHC program's standards and producers' audit results, especially where AHC-labeled producers use outside companies that the auditor did not observe, since such results are private. The AHC standards must be located online then downloaded separately for each species of animal raised for food. Even if the consumer were able to download and view the AHC standards while browsing the turkey selection at the grocery store, the consumer would have no idea of which standards the producer complied with to make up its 85% score. Nor could the consumer know whether the producer was placed on probation, nor whether there were acts of intentional, deliberate abuse of animals that the AHC program deemed not severe enough to suspend the audit or to require probation. The consumer also will likely be unaware much of problematic conduct discussed above, as the standards do not clearly outline what does still occur.

AHA and Butterball are taking advantage of consumers' concern for humane treatment of farmed animals. The AHC label deflects attention from the inhumane treatment of turkeys raised by its certified producers, and it falsely assures the buying public that these producers have raised their animals in a way that contrasts the general treatment of turkeys within the industry. Consumers who are considering which turkey to purchase at the grocery store cannot readily recognize that there is no or no material difference in the way the AHC-labeled turkey was raised and killed and the way other turkeys were raised and killed. If AHA made clear to consumers that the standards for its AHC-labeled turkeys are only marginally different in some instances and not different at all in other instances from the general practices of the turkey industry, and that a producer need not meet each of the standards to obtain certification, most consumers would not choose to spend more money on an AHC-labeled product than a non-labeled product.

Butterball and other turkey producers have an incentive to mislead consumers in order to charge a premium for turkeys the consumers erroneously believe were treated humanely. AHA has an incentive to grant the label because there is a fee or royalty for certification. The AHC label fulfills both incentives, and its misleading effect on the well-intentioned, but informationally disadvantaged, purchasing public is unlawful.

IV. Relief Requested

AHA's deceptive and misleading advertising label violates Section 5 of the FTC Act. PETA urges the Commission to take action to stop AHA and Butterball from deceiving consumers about the nature of the AHC-certified products. Contrary to AHA's claims, which represent that its label provides consumers with a way to choose humanely raised products at the

¹³⁸ *United Egg Producers*, Report No. 122.

supermarket, its standards track the prevailing practices within the turkey industry, nullifying any claim that farmed animals raised and killed under its label have been treated in a manner consistent with a reasonable consumer's expectation of the import of a "humane" label.

Many consumers would choose to not pay more for these products absent the misleading claim and if they knew the truth: that the producers' practices materially correspond to the general practices within the turkey industry with only, if any, marginal differences. These consumers depend on the Commission to protect them from AHA's deception and its misleading label, which takes advantage of their concern for animals. This Complaint demands that AHA, its AHC program, and Butterball be held accountable for misleading consumers into believing that turkey producers granted the AHC label are treating their animals in a way that differs from the prevailing standards within the industry and that the reasonable consumer would consider humane.

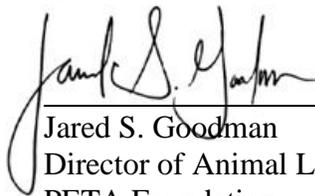
Accordingly, the undersigned petitioner respectfully requests that the Commission:

- (1) require AHA to remove its label from the turkey products it currently endorses, including those of Butterball, including those already in stores;
- (2) if Butterball and other producers cannot remove the label from in-store products, require AHA, Butterball and other certified producers to place a sticker over the label on products already in stores;
- (3) prevent Butterball from placing the label on any of its products that have not yet been packaged;
- (4) enjoin AHA and its AHC or Humane Heartland program from making such misleading statements in the future;
- (5) require AHA and Butterball to disclose the actual conditions under which the animals were raised on any future AHC-labeled product;
- (6) require AHA and Butterball to disseminate corrective statements in all media in which the misleading statements were previously disseminated;
- (7) require AHA to disclose the actual audit reports of its certified producers; and
- (8) impose all other penalties as are just and proper.

DATED November 12, 2014.

For People for the Ethical Treatment of Animals (PETA)

By:



Jared S. Goodman
Director of Animal Law
PETA Foundation
202-540-2204
JaredG@petaf.org