

THE HUMANE SOCIETY OF THE UNITED STATES,
Petitioner,

ROSE ACRE FARMS, INC.
Proposed Respondent.

**COMPLAINT FOR ACTION TO STOP
FALSE OR DECEPTIVE ADVERTISING**

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INTRODUCTION

Pursuant to sections 2.1 and 2.2 of the Federal Trade Commission (“Commission” or “FTC”) regulations, 16 C.F.R. §§ 2.1 and 2.2, Complainant The Humane Society of the United States (“HSUS”) hereby requests that the Commission investigate and commence enforcement action against Rose Acre Farms, Inc. (“Rose Acre”) for engaging in false or misleading advertising in violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*

As described herein, Rose Acre is issuing unlawfully false and/or misleading representations about the treatment of chickens used in its egg production operations. Claims on company websites suggest that Rose Acre provides a “humane and friendly environment” for its caged hens, that hens have plenty of space to move around and socialize, that only chickens who are treated well and “happy” will lay eggs, and more. These claims are not true.

In fact, as detailed further in this complaint, the standard practices employed by Rose Acre fall far below the level of care represented and the reasonable consumer’s expectation of a “humane” or “friendly” environment and wholly misrepresent the conditions under which hens will lay eggs. As discussed below, consumers do not consider it “humane” to confine hens for life in wire cages so densely that they cannot fully spread their wings—as Rose Acre’s standards allow. This fact was compellingly demonstrated by the recent landslide passage of Proposition 2 in California, which, after 2015, makes such confinement a criminal offense punishable with jail time.

Rose Acre is deceiving consumers concerned about the suffering of animals with false assurances of care. FTC intervention is particularly important here because

there are virtually no market restraints on this type of deception. Consumers are unable to determine upon receiving the product that they have been deceived about the level of animal care provided because production practices are not readily apparent in the final product. For many consumers, company representations may be their only source of information about the animal care used to produce the eggs. The result is that repeat purchasers may continue to be deceived if the advertisements continue.

Accordingly, HSUS respectfully requests that the Commission take prompt action to stop Rose Acre from deceiving consumers with false representations relating to animal care.

PARTIES

1. **The HSUS**

The HSUS is the nation's largest animal protection organization with nearly eleven million members and constituents. The HSUS is based in Washington, DC, and works to protect all animals through education, investigation, litigation, legislation, advocacy, and field work. The HSUS campaigns to eliminate the most egregious factory farming practices, including the intensive confinement of laying hens in battery cages so cramped that they cannot even fully spread their wings.

2. **Rose Acre Farms, Inc.**

Rose Acre Farms, Inc. is one of the largest egg producers in the United States. Its corporate headquarters are located at P.O. Box 1250, 6874 North Base Road, Seymour, IN 47274. Rose Acre's eggs are marketed under several different brand names. According to its website, these include Rose Acre, Great Eggs, Christopher

Eggs, and Egglard's Best.¹

STANDARD OF REVIEW

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.”²

FALSE OR MISLEADING CLAIMS RELATING TO THE TREATMENT OF ANIMALS

1. False Claims of “Humane” Treatment

At issue in this petition are claims made on various pages of the Rose Acre website and associated media statements relating to company operations with respect to the treatment of hens. The express terms utilized and the net impression of the claims serve to target consumers concerned with animal suffering and impart messages that Rose Acre has unwavering standards of humane care that it implements as its top business priority. These claims are unlawfully deceptive. In reality, Rose Acre's operational standards are no greater than those imposed by the egg industry generally and, as detailed further in this complaint, they do not support claims of humane, or friendly living conditions, or “happy” chickens.

The various pages of Rose Acre's site contain numerous claims relating to hen welfare, among which are the following representative examples:

- a) All Rose Acre chickens “are kept in a humane and friendly environment;”
- b) Repeated claims that chickens are “happy” at all times and that “unhappy” chickens will not lay eggs;

¹ <http://www.roseacre.com/sales.html> (last visited June 15, 2010).

² FTC Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

c) Hens are provided with “plenty of space for each chicken to move about and socialize with the other chickens;”

d) Repeated references to battery cages as “pens” and “pen-based housing.”

The relevant text of the website pages are attached to this complaint,³ but even without going further than the listed phrases, the use of words like “humane,” “friendly,” “happy,” and “plenty of space” operate to create a net impression of a strong set of Rose Acre animal care standards and practices that quite simply do not exist. Rose Acre has also emphasized the representation that chickens are “happy” and “comfortable” in media interviews and even in product posters.⁴

2. The Level of Care Provided By Rose Acre Falls Far Below the Level of Care Conveyed By Rose Acre’s Advertising.

A. HSUS Investigation of Rose Acre Facilities

In February and March 2010, HSUS conducted undercover investigations at egg farms, three of which are owned by Rose Acre. Approximately 3.92 million laying hens and 1 million young hens (pullets) are confined in cages at the three Rose Acre facilities where the HSUS investigator worked (in Winterset, Stuart and Guthrie Center, Iowa). These cages, known as “battery cages,” are barren wire cages in which the hens are packed so tightly that they are unable even to spread their wings without touching the cage sides or other hens. At the Guthrie Center location, 2.24 million hens are confined in battery cages stacked eight levels high. At the Stuart and Winterset locations, battery cages are stacked four levels high.

Contrary to claims on the Rose Acre website, the HSUS investigation found

³ Attachment 1.

⁴ Representative product posters advertising “happy” hens are included as Attachment 2.

that most hens at the company's battery cage facilities are forced to endure miserable conditions. The following are examples of what was observed:

Broken bones: Workers roughly yanked young hens (pullets) from their cages in the growing sheds and loaded them into mobile cages for transport to battery cages. Workers are required to stuff 14 hens in each small cage on the mobile rack, resulting in a mass of twisted bodies. The hens are trucked up to an hour in such conditions to the company's other locations.

Cruel, extremely rough handling: The HSUS investigator videotaped workers pulling young hens from the mobile cages by any available body part and stuffing them into battery cages.

Cruel depopulation methods: The HSUS investigator documented workers grabbing spent hens by their legs until they could hold no more, then cramming them into gassing carts where they are killed with carbon dioxide.

Trapped birds unable to reach food and water: Birds became trapped in the wire of the cages, resulting in an inability to reach food or water.

High mortality in layer and pullet sheds: The HSUS investigator working in the Winterset pullet sheds pulled dead young hens, some of them mummified after rotting in the cages for weeks, from cages every day.

Failure to maintain manure pits: According to one worker, the manure pit under a pullet shed had not been cleaned in two years. The ammonia levels caused the investigator respiratory distress despite the painter's face mask he wore. Rose Acre workers claimed that some hens are blinded because of excessive ammonia levels.

Abandoned hens: Some hens managed to escape from their cages and fall

into the manure pits below.⁵

In an interview responding to the investigation findings, a Rose Acre spokesperson stated that the company's animal welfare program is "state of the art across the whole world."⁶ In fact, not only are Rose Acre's guidelines nothing more than the industry standard—which the Better Business Bureau's ("BBB") National Advertising Review Board ("NARB") stated most consumers would not even consider "humane"⁷—but as reflected in the LayWel and other studies cited below, battery cages represent the far opposite end of the welfare spectrum from "state of the art."

B. Rose Acre's Standards – the United Egg Producers Guidelines – Are Not "Humane"

Rose Acre acknowledges in its website animal welfare statement that the standards of treatment the company adheres to are those of the United Egg Producers ("UEP"), and claims that the guidelines place "top priority on the comfort, health, and safety of the chickens."⁸ In fact, the minimal standards of care set forth by UEP's guidelines fall far below the high standards of animal care that Rose Acre represents to consumers. UEP's guidelines allow hens to be kept in battery cages and provide that each white leghorn hen need be allotted only sixty-seven square inches per bird,⁹

⁵ Attachment 3, An HSUS Report: Undercover Exposés at the Second- and Third-Largest U.S. Egg Producers Highlight Need for Industry Wide Reform, *available at* http://www.humanesociety.org/assets/pdfs/farm/report_2010_iowa_egg.pdf (last accessed June 15, 2010).

⁶ <http://brownfieldagnews.com/2010/04/08/rose-acre-farms-begins-third-party-audit> (last accessed June 15, 2010).

⁷ *United Egg Producers, Inc. (Animal Care Certified Eggs)*, NARB Panel Report #122, (April 2004).

⁸ <http://www.roseacre.com/cagesafe.html> (last accessed June 15, 2010); *see also* Attachment 1.

⁹ United Egg Producers, Animal Husbandry Guidelines for U.S. Egg Laying Flocks 2010 Edition, *available at* <http://www.uepcertified.com/media/pdf/UEP-Animal-Welfare-Guidelines.pdf> (last accessed June 15, 2010).

an amount of floor space equivalent to less than a single sheet of letter-sized (8.5 by 11 inch) paper.¹⁰ Such restrictive confinement stands in sharp contrast to Rose Acre's claims that chickens have "plenty of space for each chicken to move about and socialize with the other chickens." In fact, the hens may be confined so restrictively in these cages that they do not have enough floor space to fully stretch, spread, or flap their wings. An article written by two members of UEP's scientific advisory committee cites a study that found that hens require 106 to 238 square inches for wing-stretching and 175 to 420 square inches for wing-flapping.¹¹

In addition, battery cages allowed under UEP's guidelines do not provide the opportunity for the hens to engage in basic natural behaviors, including nesting, dustbathing, perching, foraging, and exercising, all of which have been scientifically documented to be important for the welfare of laying hens.

Before they lay an egg, hens seek out a secluded place in which to prepare a nest. This nesting behavior in hens naturally takes place prior to egg-laying and is triggered by internal hormonal fluctuations¹² that occur even when a hen is confined to a cage,¹³ where she cannot engage in normal nesting behavior.¹⁴ Thus, caged hens

¹⁰ *Id.*

¹¹ J.A. Mench & J.C. Swanson, *Developing Science-Based Animal Welfare Guidelines* 3 (citing M.S. Dawkins & S. Hardie, *Space Needs of Laying Hens*, 30 *Brit. Poultry Sci.* 413 (1989)), available at <http://animalscience.ucdavis.edu/Avian/mench.pdf> (last accessed June 15, 2010).

¹² D.G.M. Wood-Gush, *Nest Construction by the Domestic Hen: Some Comparative and Physiological Considerations*, in *Neural and Endocrine Aspects of Behaviour in Birds* (P. Wright et al., eds. 1975); D.G. Wood-Gush & A.B. Gilbert, *Some Hormones Involved in the Nesting Behaviour of Hens*, 21 *Animal Behav.* 98 (1973).

¹³ I.J. Duncan, *Behavior and Behavioral Needs*, 77 *Poultry Sci.* 1766 (1998); M. Baxter, *The Welfare Problems of Laying Hens in Battery Cages*, 134 *Veterinary Rec.* 614 (1994).

¹⁴ See *supra* note 12.

may engage in a variety of abnormal behaviors, such as stereotypic pacing,¹⁵ because there is no outlet for their nesting behavior.

Battery cages allowed under UEP's guidelines do not provide hens with the opportunity to perch, which is a natural behavior of the hen. The foot of the hen is adapted for closing around a perch.¹⁶ Perches can serve as a refuge for hens to avoid injury from more aggressive hens and also help maintain bone strength and density.¹⁷

UEP's guidelines also fail to provide hens with the opportunity to forage. Foraging, or searching for food, is a natural behavior that is distinguishable from eating. Hens typically forage by scratching the earth and pecking, and even when caged hens are provided with a concentrated diet, their natural urge to forage remains.¹⁸ The lack of material for foraging may lead to redirected pecking and to the development of abnormal feather-pecking behavior.¹⁹

Battery cages that are permitted under UEP's guidelines are so restrictive that the hens have no opportunity to exercise. The lack of exercise in cages leads to bone weakness,²⁰ which often results in broken bones, especially at the end of the laying

¹⁵ D.G.M. Wood-Gush, *Strain Differences in Response to Sub-optimal Stimuli in the Fowl*, 20 *Animal Behav.* 72 (1972).

¹⁶ H.J. Blokhuis, *Rest in Poultry*, 12 *Applied Animal Behav. Sci.* 289 (1984) (citing W. Ellenberger & H. Baum, *Handbuch der vergleichenden Anatomie der Haustiere* at 1155 (1943)); M. Baxter, *The Welfare Problems of Laying Hens in Battery Cages*, 134 *Veterinary Rec.* 614 (1994).

¹⁷ M.C. Appleby & B.O. Hughes, *Welfare of Laying Hens in Cages and Alternative Systems: Environmental, Physical and Behavioural Aspects*, 47 *World Poultry Sci. J.* 109 (1991).

¹⁸ M.S. Dawkins, *Time Budgets in Red Junglefowl as a Baseline for the Assessment of Welfare in Domestic Fowl*, 24 *Applied Animal Behav. Sci.* 77 (1989); I.J.H. Duncan & B.O. Hughes, *Free and Operant Feeding in Domestic Fowls*, 20 *Animal Behav.* 775 (1972).

¹⁹ H.J. Blokhuis, *The Effect of a Sudden Change in Floor Type on Pecking Behaviour in Chicks*, 22 *Applied Animal Behav. Sci.* 65 (1989).

²⁰ T.G. Knowles & D.M. Broom, *Limb Bone Strength and Movement in Laying Hens*

period when birds are removed from the cages.²¹

Regarding Rose Acre's specific characterization of the guidelines as creating "humane" and "friendly," conditions on its "Common Questions" page, the Commission is no doubt familiar with the BBB National Advertising Division's ("NAD") ruling in 2003 (and upheld by NARB in 2004) that the UEP was misleading consumers about animal welfare. While some practices that were subject to that ruling have since been slightly altered under the UEP Certified guidelines, the majority—including intensive confinement in battery cages—are still permitted. As reported by The Associated Press: "While the BBB found that the egg industry's standards have improved treatment of hens, it's not to a level that most consumers would find humane."²² What this means for Rose Acre, of course, is that the UEP guideline practices, which it purports give top priority to the welfare of chickens, do not even rise to a level that most consumers would find humane.

In addition to the BBB ruling, in September 2006, UEP entered into an Assurance of Voluntary Compliance with sixteen states and the District of Columbia to settle claims that its "Animal Care Certified" logo was misleading.²³ In the Assurance of Voluntary Compliance, UEP agreed that in its promotion and marketing

from Different Housing Systems, 126 *Veterinary Rec.* 354 (1990); T.E. Nightingale et al., *Immobilization-induced Bone Alterations in Chickens*, 52 *Can. J. Physiol. Pharm.* 916 (1974).

²¹ N.G. Gregory & L.J. Wilkins, *Broken Bones in Domestic Fowl: Handling and Processing Damage in End-of-lay Battery Hens*, 30 *Brit. Poultry Sci.* 555 (1989); N.G. Gregory et al., *Broken Bones in Domestic Fowls: Effect of Husbandry System and Stunning Method in End-of-lay Hens*, 31 *Brit. Poultry Sci.* 59 (1990).

²² The Associated Press, *Business Group Shells Egg-Industry Ads: Better Business Bureau Disputes Humane Claim* (May 11, 2004), available at <http://www.msnbc.msn.com/id/4951194/> (last visited June 15, 2010); see also *United Egg Producers, Inc. (Animal Care Certified Eggs)*, Report #4108, NAD CASE REPORTS (November 2003).

²³ Attachment 4, UEP Assurance of Voluntary Compliance (Sept. 2006).

of its standards to consumers, it would not misrepresent the level or type of care given to hens under the standards.²⁴ It also agreed not to misrepresent, directly or by implication, the nature, auditing body, or quality of audits done to ensure compliance with the standards.²⁵ UEP also agreed that a violation of the Assurance of Voluntary Compliance shall constitute a violation of the consumer protection laws of the states, including the District of Columbia.²⁶

Certainly, it follows that if UEP cannot tout its guidelines as “humane,” Rose Acre should not be permitted to describe them in such terms either. In other words, were UEP to place the Rose Acre claims of “humane” care on its own website, such action would violate the Assurance of Voluntary Compliance and would constitute a violation of consumer protection laws in seventeen separate jurisdictions as defined in the Assurance of Voluntary Compliance. The false description of the UEP Certified standards as “humane” and “friendly” is just as deceptive (and just as harmful to conscientious consumers) when made by Rose Acre as it would be if made by UEP itself.

C. Express Misrepresentations of Egg Production Requirements

Rose Acre expressly lists on its site a number of biological “needs” that hens require for egg production.²⁷ Take away any single item on the list, claims Rose Acre, and hens will simply stop laying any eggs.²⁸ While the false claims that providing the list of biological needs results in “happy” chickens is covered in the next section, at

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ <http://www.roseacre.com/cagesafe.html> (last visited June 15, 2010); *see also* Attachment 1.

²⁸ *Id.*

issue here is that the science simply does not support Rose Acre's biological claims. Chickens do not *need* the conditions Rose Acre claims are essential to lay eggs.²⁹

The law requires an advertiser be able to substantiate a claim before making it. There is simply no way for Rose Acre to provide substantiation for the claim that "unhappy" hens will not lay eggs. Indeed, it was once standard industry practice for egg producers to deliberately deprive hens of any food (i.e., starvation) for up to 14 days to manipulate the egg-laying cycle (a practice known as "forced molting").³⁰ Further, a high rate of egg productivity is in fact a direct cause of certain metabolic disorders of hens, including osteoporosis³¹ and "cage layer fatigue."³² Birds with osteoporosis are prone to bone fractures,³³ and those with cage layer fatigue may suffer from fractured thoracic vertebrae associated with degeneration of the spinal cord.³⁴ Scientists who specialize in the well-being of animals have noted that productivity is not necessarily a good indicator of welfare.³⁵ Hens have been laying

²⁹ HSUS does not complain about the various descriptors used to characterize the list of a hen's essential egg-laying needs. Whether hen house air is "country fresh" or temperatures are "computer-controlled" is not material to the deception at issue. The deception complained of herein is the false representation that the fact that chickens are laying eggs at all is proof that they are being treated humanely.

³⁰ Presently, most hens in the United States are force-molted using a low-nutrient diet made largely from insoluble plant fibers or from bulking agents such as corn, wheat middlings, or alfalfa until they lose 10-35% of their body weight.

³¹ S.C. Bishop et al., *Inheritance of Bone Characteristics Affecting Osteoporosis in Laying Hens*, 41 *Brit. Poultry Sci.* 33 (2000).

³² A.B. Webster, *Welfare Implications of Avian Osteoporosis*, 83 *Poultry Sci.* 184 (2004).

³³ C.C. Whitehead & R.H. Fleming, *Osteoporosis in Cage Layers*, 79 *Poultry Sci.* 1033 (2000).

³⁴ C. Riddell et al., *Bone Pathology of Birds Affected with Cage Layer Fatigue*, 12 *Avian Diseases* 285 (1968).

³⁵ J. Mench, *The Welfare of Poultry in Modern Production Systems*, 4 *Poultry Sci. Rev.* 107 (1992); D.M. Broom, *Does Present Legislation Help Animal Welfare? Sustainable Animal Production: Workshops, Discussion, Online Resources* (2000), available at www.agriculture.de/acms1/conf6/ws5alegisl.htm (last accessed June 15, 2010).

eggs long before even the minimal UEP guidelines were implemented. They lay eggs despite being intensively confined in battery cages. They were even laying eggs in the horrific conditions revealed by the HSUS undercover investigation of Rose Acre.³⁶

The express claims regarding the conditions required for egg production and the implied claims that Rose Acre hens live in idyllic conditions (evidenced by the very fact that they are laying eggs), therefore, are false and materially deceptive to consumers concerned with the welfare and housing environment in which laying hens are kept.

D. Express and Implied Misrepresentations of “Happy” Hens

Distinct from the false biological claims regarding egg-laying needs discussed in the previous section, Rose Acre makes express and implied representations regarding a chicken’s minimum needs to be “happy.” In fact, Rose Acre makes the claim repeatedly on its welfare page and others throughout its site that “an unhappy hen will not lay an egg.” Before proceeding, it is important to clarify that while a chicken’s subjective happiness would be subject to various interpretations, it is reasonable to conclude that consumers who care about the welfare of animals would at least take such a claim to mean that hens are treated humanely and have their physical and psychological needs met. Such an interpretation is even more likely when the claims are made on a page, like Rose Acre’s, dedicated entirely to laying out the company’s welfare standards and operations. As Rose Acre is liable for all reasonable consumer interpretations of what constitutes a “happy” hen,³⁷ it must at least be considered as an implied claim of humane, comfortable treatment that meets

³⁶ Representative examples of “egg-laying” conditions revealed by the HSUS investigation are included as Attachment 5.

³⁷ FTC Policy Statement on Deception, *supra* note 2.

the physical and psychological needs of the hens.

In stark contrast to Rose Acre’s representations of caged hens as “happy,” however, the NARB affirmed that most consumers find the intense confinement of hens in battery cages to be “unacceptable.”³⁸ The board noted that “it is unimaginable that consumers would consider treatment they find ‘unacceptable’ to be humane treatment...”³⁹ It would be equally unimaginable here that consumers would consider treatment they find unacceptable would produce “happy” chickens.

Further, the repeated representation that the act of laying eggs proves a chicken is “happy” (considering all reasonable interpretations of that term) is insupportable. As with the biological claims in the previous section, Rose Acre cannot substantiate such a claim, especially in light of the overwhelming evidence to the contrary. For example, the LayWel study—the most extensive scientific study into laying hen welfare ever conducted—found that under no circumstances can battery cages provide even “satisfactory welfare” for animals.⁴⁰ The LayWel study involved working groups in seven European countries, funding from the European Commission and data from 230 different flocks of hens. Additionally, the prestigious Pew Commission on Industrial Farm Animal Production also studied the impact of battery cages on birds’ welfare and concluded that battery cages should be eliminated.⁴¹ The Commission was funded by the Pew Charitable Trusts and Johns Hopkins School of

³⁸ *Animal Care Certified Eggs*, NARB Panel Report #122, *supra* note 7.

³⁹ *Id.*

⁴⁰ LayWel, *Welfare Implications of Changes in Production Systems for Laying Hens* (2006), *available at* <http://www.laywel.eu/web/pdf/deliverable%2071%20welfare%20assessment.pdf> (last accessed June 15, 2010).

⁴¹ The Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Production in America* (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Industrial_Agriculture/PCIFAP_FINAL.pdf (last accessed June 15, 2010).

Public Health; it was chaired by the former Governor of Kansas and included scientists, veterinarians and the former U.S. Secretary of Agriculture.

Further evidence that egg-laying is not dependant on humane treatment of chickens is found in the audit checklist for the UEP guidelines that Rose Acre touts so highly. It would be possible to receive a failing score on at least five of Rose Acre's listed egg-laying "needs" and still pass a certification audit. A producer could fail, for example, any *or even all* of the following categories and still pass a UEP Certified audit: toxic ammonia levels; hens unable to stand upright in cage; unclean water; lack of ventilation. Rose Acre's assurances to consumers, however, imply that such a facility would not provide the minimum egg-laying "needs" of hens and therefore would not be producing any eggs. It defies logic to claim to consumers that a facility could pass a UEP welfare certification while failing to provide minimum conditions to produce even a single egg. Yet, that is exactly the deception that Rose Acre is fraudulently representing as true to its conscientious consumers.

In short, the UEP guidelines that Rose Acre falsely claims ensure "happy" hens, do not even ensure the express welfare conditions which the company lists on its site as absolute prerequisites to the laying of a single egg. And even if all conditions, as listed by Rose Acre and the UEP guidelines were provided, they still would not rise to a level that consumers would find humane, or, by the same logic, "happy."⁴² Consumers looking for assurance that chickens are treated humanely and have their physical and psychological needs met are deceived by Rose Acre's express and implied assurances of such and by the company's false claims of how to measure such treatment (i.e., laying eggs proves "happy" hens). For the same reasons the NARB

⁴² *Animal Care Certified Eggs*, NARB Panel Report #122, *supra* note 7.

concluded that it is unimaginable to call “humane” an intensive confinement battery cage system, it is equally unimaginable to imply that hens are “happy” in such a system, regardless of whether or not they are laying eggs.

E. Battery Cages Are NOT “Pens”

On Rose Acre’s “Common Questions” page, there is a section that addresses how hens are housed. Rose Acre refers to its battery cage system as “farms where the chickens are kept in pens...” This reference is again emphasized later in the paragraph:

All of our chickens, *including those kept in pens*, are kept in a humane and friendly environment.⁴³ (Emphasis added.)

While the description of battery cages as humane and friendly is addressed separately in this document, it is the carefully worded reference to them as “pens” that is the deception at issue here. While the word “cage” appears in other places on the site, it appears nowhere on the “Common Questions” page, leaving consumers who look only to that page for answers a significantly distorted picture of the Rose Acre housing system.

“Cage” and “pen” can certainly conjure very different interpretations in the minds of reasonable consumers, particularly with regard to egg production. “Cage” is the industry-standard term that consumers associate with crowded battery cage confinement. Consumers wishing to avoid this production method often seek out “cage-free” eggs, for which there is a rapidly-emerging market. Thus, describing housing conditions as anything other than “cages” suggests to consumers that the

⁴³ <http://www.roseacre.com/eggfaq.html> (last accessed June 15, 2010); *see also* Attachment 1.

hens are not raised in battery cages.

Certainly, the common notion of a pen is very different than that of a cage. Even the UEP does not use the word “pen.” The word “pen” is not used anywhere in the UEP Guidelines to reference battery cages or a caged housing system. In fact, the only use of that descriptor anywhere in the guidelines is in reference to early experiments with cage-free enclosure designs, exactly the opposite of a caged enclosure.⁴⁴ Rose Acre’s use of housing terminology different than the industry standard certainly suggests that the company’s housing enclosures are something different than the industry standard to which the term “cage” is applied. At the very least, the statement must be viewed from the perspective of a consumer reading Rose Acre’s description of its housing as “pens” instead of “cages” and taking away the reasonable, yet false, conclusion that Rose Acre does not confine its hens in battery cages.

That Rose Acre uses the word “cage” on other pages of the site does not remedy the misrepresentation on the “Common Questions” page. In addressing this type of issue, the Commission has expressly stated that advertisers should “assume that customers don’t read an entire Web site, just as they don’t read every word on a printed page.”⁴⁵ There is no “clear and conspicuous” indication that the description of its housing system as “pen-based” on this page is incomplete or requires clarification of the relationship between pens and cages.⁴⁶ Consumers may read this page alone and come away with the false impression that Rose Acre has a housing system vastly

⁴⁴ UEP Guidelines, *supra* note 9, at 22.

⁴⁵ *Dot Com Disclosures: Information About Online Advertising*, FTC Staff Paper at 5 (2000).

⁴⁶ *Id.*

more spacious and open than the confinement of a battery cage operation.

Rose Acre should not be permitted to introduce new and ambiguous terminology to reflect an already established and precisely named housing system, especially since many consumers seek to avoid that specific housing system. Rose Acre's use of such new terminology is materially deceptive in the housing picture it creates for consumers.

ANALYSIS OF REPRESENTATIONS UNDER THE FEDERAL TRADE COMMISSION ACT

1. Unlawful Deception Relating to Animal Care

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.”⁴⁷ Further, if a particular consumer group is targeted, or likely to be affected by the ad, the Commission will examine an ad from the perspective of a reasonable member of that group.⁴⁸

As noted above, an element of unlawful deception is that it is likely to cause detriment to the consumer. The test for establishing this element—referred to as materiality—is whether the deception “is likely to affect the consumer's conduct or decision with regard to a product or service.”⁴⁹ The NAD has firmly recognized that social issues, such as the treatment of animals, matter to consumers and have an important bearing on purchasing decisions:

Advertising claims which tout that the advertiser is addressing particular social or ethical concerns can provide consumers with important information about their purchasing choices.⁵⁰

⁴⁷ FTC Policy Statement on Deception, *supra* note 2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Starbucks Corporation (Free Trade Certified Coffee)*, Report #4592, NAD Case

Here, the Rose Acre ads are directed at those consumers most likely to be misled by them: conscientious and compassionate people who are concerned that hens and other animals might suffer to produce eggs for the company.

There can be no reasonable dispute that many consumers are concerned enough about animal welfare to alter their purchasing habits on the basis of representations such as those made by Rose Acre here. For example, voters in California recently elected to make it a criminal offense (beginning in 2015) to confine hens so densely that they cannot even fully spread their wings—the very battery cage confinement allowed by UEP guidelines and used by Rose Acre.⁵¹ Despite opposition to the measure by Rose Acre itself, 63.5% of California voters approved California’s Proposition 2.⁵² Thus, a strong majority of California consumers consider the same conduct which Rose Acre touts as “humane” and “friendly” to be cruelty worthy of a criminal sanction which may include jail time.

UEP’s own public relations firm conducted a poll in 2004 and found that 54 percent of consumers were willing to pay 5 to 10 percent more for eggs with the label “Animal Care Certified,” 10 percent were willing to pay 15 to 20 percent more, and 77 percent reported they would consider switching to a brand with such a label.⁵³ In addition, according to UEP’s public relations firm “50 percent of consumers rate animal welfare issues as important in deciding which foods and brands to buy, and

Reports (November 2006); *see also United Egg Producers, Inc. (Animal Care Certified Eggs)*, Report #4108, NAD Case Reports (November 2003); *D’Artagnan, Inc. (Foie Gras)*, Report #4959, NAD Case Reports (January 2009).

⁵¹ Cal. Health & Safety Code § 25990 (West 1999 & Supp. 2009).

⁵² http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-2.htm (last accessed June 15, 2010).

⁵³ Attachment 6, Excerpt, *Laying Out the Facts*, Golin/Harris International (2004).

which stores to shop.”⁵⁴ As explained by UEP’s then-senior vice president Gene Gregory, “[consumers] can’t imagine that you put hens in cages, take away feed and trim beaks.’ When consumers are told that producers do cage, molt by feed withdrawal and trim beaks, they are shocked[.]”⁵⁵

2. Lack of Substantiation for Reasonable Interpretations of Express and Implied Claims

"Before disseminating an ad, advertisers must have reasonable support for all express and implied objective claims that the ad conveys to consumers. When an ad lends itself to more than one reasonable interpretation, there must be substantiation for each interpretation.”⁵⁶

Inherent in express or implied claims of advertisers is the representation that the advertiser can substantiate such claims. The Commission has made expressly clear that such representations are material to consumers and that it will vigorously enforce the substantiation requirement.⁵⁷ Rose Acre has made express and implied claims on its site that are false and for which there can be no reasonable substantiation.

Rose Acre’s representations that chickens require “happy” conditions (which it claims to provide) in order to lay even a single egg are not only insupportable by scientific means, but are contrary to the direct evidence revealed by HSUS’ undercover investigation at Rose Acre, during which chickens continued to lay eggs even in horrific conditions.

⁵⁴ *Id.*

⁵⁵ *Bird Husbandry Production Costs Are Market Issue*, Feedstuffs, Oct. 16, 2000.

⁵⁶ *Dot Com Disclosures*, *supra* note 45, at 20.

⁵⁷ FTC Policy Statement Regarding Advertising Substantiation, *appended to Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

The further representations that the conditions Rose Acre lists on its site and the UEP guidelines generally will ensure “happy” chickens are also insupportable, as is the claim that its self-styled “pen-based” housing system provides a “humane and friendly” environment.” In fact, such statements are contrary to the overwhelming scientific and public opinion evidence cited throughout this complaint and to the clear language of the NARB that it would be unimaginable to call “humane” the battery cage system that so many consumers find unacceptable.⁵⁸ Rather than changing the housing system, Rose Acre has changed the descriptor of it to “happy” or “friendly.” But in all cases, the terms refer to the same underlying cages that consumers have expressed their disapproval over.

There can be no reasonable basis for labeling a practice that consumers consider unacceptable with a word that suggests general acceptance, like “happy,” “humane,” “friendly,” or the like. There can be no reasonable basis for substituting an industry-standard term, like cages, with an ambiguous term like “pens,” particularly when there is no clear and conspicuous disclosure that lets consumers know that, in fact, pens and cages mean exactly the same thing. There can be no reasonable basis for the representation that chickens will not lay eggs if they are not “happy,” given all reasonable interpretations of that term, which Rose Acre leaves undefined and open to consumer perception. There can be no reasonable basis for the representation that chickens in densely crowded cages have “plenty of space” to “move about and socialize with other chickens,” given that battery cages not provide the opportunity for basic natural behaviors, or even enough space for the hens to fully stretch, spread, or flap their wings. And there can be no reasonable basis for the representation that all

⁵⁸ *Animal Care Certified Eggs*, NARB Panel Report #122, *supra* note 7.

chickens at Rose Acre are “happy at all times,” given the findings of the HSUS investigation, the fact that the chickens are intensely confined, that they are deprived of their natural nesting, perching, foraging and other behavioral needs, and so on.

While Rose Acre would be free to advertise the specifics of its housing and production systems, it is not free to only generally describe them as ensuring humanely treated, happy chickens. Given the well-established majority of consumers who find caging systems and other UEP guideline practices unacceptable, as well as the false consumer assurances that unhappy chickens will not lay eggs, the Commission’s policy of vigorously enforcing unsubstantiated claims is needed here to stop Rose Acre’s consumer deception. As the Commission has expressly declared, a company’s failure to rely upon a reasonable basis to substantiate its representations “constitutes an unfair and deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.”⁵⁹

3. Lack of Market Restraints on Deception Regarding Production Methods and Conditions

The Commission has stated that where a product or service is easily evaluated by consumers, the likelihood of deception is low because sellers would want to encourage repeat business. In the instant case, however, where it is the method of production, rather than the final product, that is the subject of controversy and that method is nearly impossible for consumers to directly evaluate, the effect is exactly the opposite—to encourage repeat business, the seller is more likely, rather than less likely, to be deceptive about such manufacturing methods in order that repeat purchasers will not be dissuaded.

⁵⁹ *Id.*

Just as a company that produces apparel under sweatshop conditions would want to hide its method of production from its customers, so too does Rose Acre have strong incentives to misrepresent the actual conditions under which laying hens are kept. In neither case would the consumer be able to examine the production process by examining just the product purchased. The sweatshop company would have strong incentives to disseminate ads featuring a state-of-the-art facility with “happy” workers in lush surroundings in order to hide its darker reality and avoid dissuading consumers from repeat purchases. Similarly, the reality of caged laying hens is one of intensive confinement, unnatural surroundings and a lifetime of suffering by commission and omission. And so there are strong incentives for egg producers and sellers such as Rose Acre to mislead consumers about these conditions in order to prevent repeat purchasers from being dissuaded.

There are virtually no market restraints on the likelihood of deception in this instance because consumers are unable to tell upon receiving the product that they have been deceived. Production practices are not readily apparent in the final product. The result is that repeat purchasers may continue to be deceived if the advertisements continue.

Choosing to remain silent about the miserable lives of caged laying hens is one thing, but making unqualified, affirmative misrepresentations about them is something else entirely. It is unethical, deceptive, and unlawful.

RELIEF REQUESTED

The actions described above constitute unlawful conduct, unfair methods of competition, and unfair and deceptive practices under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* Accordingly, HSUS respectfully requests that the

Commission take prompt action to stop Rose Acre from deceiving consumers with false claims as described herein.

Respectfully submitted,



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