

FREE RANGE OR FREE REIGN? FALSE ADVERTISING IN THE EGG INDUSTRY

TARA LEWIS
J.D. CANDIDATE, 2017
GEORGETOWN UNIVERSITY LAW CENTER

INTRODUCTION

The average American will eat 250 eggs this year, and to feed its hungry consumers the United States produces more than 83 *billion* eggs each year.¹ 288 million egg laying hens produce these eggs and only 186 companies account for 99 percent of the industry.² A quick stroll down the refrigerated section of any grocery store will reveal egg cartons adorned with a myriad of claims about the quality and production methods of eggs including, but by no means limited to: organic, free-range, cage-free, and “United Egg Producers Certified.” In 2015, 9.9 percent of U.S. eggs were labeled as organic or cage-free.³ It is estimated that about 80 percent of eggs received the United Egg Producers certification last year.⁴ There are no statistics available that document how many eggs are labeled free-range.

While the terms organic, cage-free, and free-range tend to invoke images of happy chickens frolicking across a sunny farm, this scenario is one of pure fantasy in the commercial egg industry. Instead, a large majority of egg-laying hens are confined to battery cages and spend their entire lives allotted to a space smaller than a sheet of paper, often crammed so tightly with

¹ UNITED EGG PRODUCERS, *General US Stats* (May 2016), <http://www.unitedegg.com/GeneralStats/default.cfm#>.

² *Id.*

³ *Id.*

⁴ *Id.*

other birds that they will never be able to spread their wings.⁵ These millions of hens will never engage in natural behaviors such as nesting, foraging, or dust bathing, and many are trapped between the metal bars of the cages and trampled to death.⁶ Undercover investigations by groups such as PETA and the Humane Society of the United States have exposed some of these horrific practices and sparked a generation of conscious consumers who are willing to pay more for eggs from hens that are not subjected to cruel conditions.⁷ Indeed, eighty-one percent of the respondents to a Zogby International poll in 2000 indicated that they would be willing to pay more for eggs from chickens raised in a humane manner.⁸

While the demand for more humane standards exists, consumers must be able to identify the types of conditions hens are raised in to make informed purchasing decisions. Free-range, organic, and cage-free labeled eggs cost significantly more than eggs produced in battery cages,⁹ but the treatment of hens is strikingly similar, and no standard may truly be humane. This paper will begin by describing what the terms United Egg Producers Certified, organic, free-range, and cage-free legally mean for egg producers and the perceptions that they imply. It will then argue that the terms free-range and cage-free are misbranded under the Federal Food, Drug and Cosmetics Act, and false and misleading under the Federal Trade Commission Act. Finally, this paper will advocate for a clear federal definition of these labels and look towards the European

⁵ THE HUMANE SOCIETY OF THE U.S., *Barren, Cramped Battery Cages*, http://www.humanesociety.org/issues/confinement_farm/facts/battery_cages.html (last visited Feb. 26, 2017).

⁶ *Id.*

⁷ ANIMAL WELFARE INST., *Consumer Perceptions of Farm Animal Welfare*, https://awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf (last visited Feb. 26, 2017) [hereinafter Consumer Perceptions Poll].

⁸ *Id.*

⁹ Jeffrey Kluger, *Organic Eggs: More Expensive, but Not Healthier*, TIME (Jul. 8, 2010), <http://content.time.com/time/health/article/0,8599,2002334,00.html>.

Union as a model for humane standards and transparent advertising that lend truth to the terms cage-free and free-range. A major theme pervasive in all aspects of this paper is that the regulatory scheme responsible for ensuring truthful egg labeling is perhaps not all that it is cracked up to be.

I. THE REGULATORY LANDSCAPE

A. FEDERAL REGULATION OF EGGS

Eggs are regulated by the U.S. Department of Agriculture (“USDA”), the Food Safety and Inspection Service (“FSIS”), the Agricultural Marketing Service (“AMS”), and the Food and Drug Administration (“FDA”). Additionally, claims have been brought against egg producers for misleading advertisements under the Federal Trade Commission Act (“FTCA”) and state false advertising laws.

The USDA is responsible for regulating egg products such as liquid, frozen, or dehydrated eggs, as well as laying facilities, and packaging claims on egg product cartons under the Egg Products Inspection Act (“EPIA”).¹⁰ The FSIS, an agency within the USDA, administers the EPIA. Under the EPIA, the Secretary is tasked with “prevent[ing] the movement or sale for human food, of eggs¹¹ and egg products which are . . . misbranded.”¹² The purpose of the Act is to prevent “improperly labeled or packaged products [that] can be sold at lower prices and compete unfairly with . . . properly labeled and packaged goods.”¹³ Curiously, the definition of “misbranded” under the EPIA only mentions *egg products*, which are subject to an entirely different regulatory regime than shell eggs, however, the Congressional Statement of Purpose

¹⁰ See 21 U.S.C. § 1031 *et. seq.*

¹¹ *Id.* § 1033 (g) (“The term ‘egg’ means the shell egg of the domesticated chicken . . .”).

¹² *Id.* § 1032 (emphasis added).

¹³ *Id.* § 1031.

expressly subjects both eggs, defined as shell eggs under section 1031, *and* egg products, to the prohibition on misbranding.¹⁴ The Ninth Circuit, however, recently confirmed that the FSIS has no authority to regulate the labeling of shell eggs under the EPIA and is limited in its regulatory authority to the labeling of egg products.¹⁵

The AMS, also within the USDA, regulates few specific aspects of shell egg labeling. Under the Agricultural Marketing Act's ("AMA") shell egg surveillance program, the AMS is responsible for administering the voluntary shell egg grading service and ensuring that shell eggs are properly graded (for example as Grade A, AA, or B¹⁶) and packed, and that restricted eggs are properly disposed of.¹⁷ The Ninth Circuit ruled that the AMS does not have the authority to promulgate *mandatory* labeling requirements for shell eggs, and its role is limited to developing and improving "standards of quality, condition, quantity, grade, and packaging, and recommend and demonstrate such standards in order to encourage uniformity and consistency in commercial practices."¹⁸ The AMS does put forth brief, informal guidance on its website defining the terms cage-free and free-range, but its role in enforcing proper use of these terms is aspirational at best.¹⁹

The FDA bears the primary responsibility for ensuring that egg cartons are not misbranded. Under the FDCA, a food is "misbranded" if "its labeling is false or misleading in

¹⁴ *Id.* § 1032(l).

¹⁵ *See* *Compassion Over Killing v. FDA*, 849 F.3d 849, 854-55 (9th Cir. 2017).

¹⁶ 7 C.F.R. § 56.1.

¹⁷ *See* 7 C.F.R. § 56.1 *et. seq.*; USDA, *Complying with Shell Egg Surveillance*, <https://www.ams.usda.gov/rules-regulations/eggs/complying> (last visited Mar. 15, 2017). "Restricted eggs" are those with "cracks or checks in the shell, dirty eggs, incubator rejects, and inedible, leaker or loss eggs." *Id.*

¹⁸ *Compassion Over Killing v. USDA*, 849 F.3d 849, 854-55 (9th Cir. 2017).

¹⁹ USDA, *Questions and Answers about Shell Eggs*, <https://www.ams.usda.gov/publications/qa-shell-eggs> (last visited Mar. 17, 2017).

any particular.”²⁰ This prohibition has never been enforced in regards to misleading claims on egg cartons, and the FDCA does not contain a citizen suit provision for private enforcement of the statute.²¹

As a result of these hurdles, and perhaps the lack of clarity in the regulatory scheme generally, animal welfare groups, consumers, and producers have historically brought claims against misleading egg carton labels through other statutes such as the FTCA²² and state specific false advertising laws.²³ These lawsuits are generally settled for undisclosed sums of money, and producers have entered into agreements to discontinue misleading labels.²⁴ Although proven effective in some cases, piecemeal enforcement is costly and time-consuming for private citizens and non-profit organizations to undertake. Additionally, it is becoming increasingly difficult to collect enough evidence to mount a case under newly implemented “ag-gag” laws that prohibit the filming and photographing of industrial agricultural operations.²⁵ Further complicating the

²⁰ 21 U.S.C. § 343(a)(1) (emphasis added).

²¹ James Springer, *The Success of the Citizen Suit: Protecting Consumers from Inaccurate Information by Amending the Federal Food, Drug, and Cosmetic Act*, 68 FOOD & DRUG L.J. 401, 404 (2013).

²² See Complaint for Action to Stop False or Deceptive Advertising at 1, Humane Society of the U.S. v. Rose Acre Farms, http://www.humanesociety.org/assets/pdfs/farm/complaint_rose_acre.pdf (alleging that Rose Acre Farms, a subsidiary of Egghand’s Best, engaged in false advertising relating to the labeling of egg cartons and the welfare of its laying hens) [hereinafter HSUS Complaint].

²³ ALDF Announces Settlement of False Advertising Lawsuit Against Bay Area Egg Producer, ALDF (Feb. 5, 2014), <http://aldf.org/press-room/press-releases/aldf-announces-settlement-of-false-advertising-lawsuit-against-bay-area-egg-producer/>.

²⁴ See HSUS Complaint, *supra* note 22, at 15.

²⁵ THE HUMANE SOCIETY OF THE U.S., *Ag-Gag Laws Keep Animal Cruelty Behind Closed Doors*, http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html?referrer=https://www.google.com/ (last visited Mar. 19, 2017).

identification of non-compliant producers is the USDA's recent retraction of all animal welfare violation data from publicly accessible databases.²⁶

B. REGULATION OF ADVERTISED CLAIMS

Today, over 95 percent of commercial shell eggs in the United States are produced in conventional battery cage systems.²⁷ Conscious consumers, influenced by viral images depicting floor-to-ceiling wire cages crammed tightly with sick and panicked hens, have demanded better animal welfare standards; the market has answered and tapped into this demand by sprinkling promises on egg cartons of more humane production methods. Four main advertisements now consistently appear that entice consumers to choose their product: United Egg Producers Certified, organic, free-range, and cage-free. While these claims suggest superiority as compared to eggs without the label, and are thus priced accordingly, it is worth pointing out that they intentionally suggest a superior production method related to the welfare of the hens,²⁸ rather than a health²⁹ or safety³⁰ claim. In reality, the animal welfare standards under all four of these labels are only different in name.

²⁶ Karin Brulliard, *USDA abruptly purges animal welfare information from its website*, WASH. POST (Feb. 3, 2017), https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?utm_term=.44770174df07.

²⁷ JOEL L. GREENE & TADLOCK COWAN, TABLE EGG PRODUCTION AND HEN WELFARE: AGREEMENT AND LEGISLATIVE PROPOSALS 7 (Feb. 14, 2014) <https://pdfs.semanticscholar.org/47ce/d140eac346b2b8d59781291411dd60148bfe.pdf>.

²⁸ United Egg Producers notes that the certification is intended to ensure “humane” standards in caged hens and requires specific hen welfare standards in order to receive certification for eggs. *See* UNITED EGG PRODUCERS, *United Egg Producers Certification*, <http://uepcertified.com/> (last visited Apr. 29, 2017).

²⁹ Some scientists believe that eggs produced in cage-free and free-range systems are nutritionally superior, but the Ninth Circuit has recently deferred to the FDA's disapproval of this claim. *See* *Compassion Over Killing v. USDA*, 849 F.3d 849, 856 (9th Cir. 2017).

³⁰ Indeed, many producers believe that cage-free systems actually increase the risk of contamination and disease because hens are able to freely access others in the henhouse, as opposed to caged hens which may only come in direct contact with five to six other birds their lifetime. *See* Dan Flynn, *Cage-free hens don't improve egg food safety, nutrition levels*, FOOD

The most common advertising claim on shell eggs in the United States is the United Egg Producers Certification, appearing as a green check-mark with the words “United Egg Producers Certified.”³¹ The United Egg Producers (“UEP”) is a Capper-Volstead³² cooperative of egg farmers and includes over 95 percent of all egg-laying hens.³³ Under the Capper-Volstead Act, the UEP is granted limited immunity from antitrust laws so that it may “process, prepare for market, handle, and market” all of its own commodities.³⁴ The UEP purports to work directly with the USDA and the FDA and certifies approximately 76 percent of all commercial shell eggs each year.³⁵ In order to obtain certification, a producer must pass an audit after filing an “Application for Certification,” comply with the UEP Guidelines, and pay a yearly fee.³⁶ The UEP Guidelines were created by a nine-member scientific advisory committee for the purpose of ensuring “caged egg production is humane.”³⁷ However, the guidelines are permissive of battery cages “so restrictive that the hens have no opportunity to exercise” and “provide that each . . . hen need be allotted only sixty-seven square inches per bird, an amount of floor space equivalent to less than a single sheet of letter-sized (8.5 by 11 inch) paper.”³⁸ Indeed, it is possible to have

SAFETY NEWS (Mar. 1, 2017), <http://www.foodsafetynews.com/2017/03/cage-free-hens-dont-improve-egg-food-safety-nutrition-levels/#.WM7BpxIrKRs>.

³¹ UNITED EGG PRODUCERS, ANIMAL HUSBANDRY GUIDELINES 2016 EDITION 4 (2003) [hereinafter UEP GUIDELINES].

³² UNITED EGG PRODUCERS, *About Us*, www.unitedegg.org (last visited Mar. 19, 2017); Christine A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, AMERICAN BAR ASS’N (Dec. 2010) http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Varney12_21.authcheckdam.pdf.

³³ *About Us*, *supra* note 32.

³⁴ Varney, *supra* note 32.

³⁵ UEP GUIDELINES, *supra* note 31 at 5.

³⁶ *Id.* at 6.

³⁷ *Id.* at 5.

³⁸ HSUS Complaint, *supra* note 22, at 7.

“toxic ammonia levels; hens unable to stand upright in cage; unclean water; [and] a lack of ventilation” and still receive the certification.³⁹

Most telling, in 2003, the Better Business Bureau’s (“BBB”) National Advertising Division (“NAD”) ruled that the UEP label was misleading to consumers because it included an “animal care certified logo.”⁴⁰ The BBB believed that while treatment of caged hens was marginally better under the new guidelines, it was still not at the level that consumers would find “humane.”⁴¹ The UEP has since entered into an Assurance of Voluntary Compliance with the FTC and sixteen states where it agreed that the advertisement was misleading, and paid settlement claims to mislead consumers.⁴² As a result, the “animal care certified” claim no longer appears, but the label’s graphic and “United Egg Producers Certified” text still appears in an identical fashion. Because a large majority of eggs on the market are UEP certified, and the large majority of shell eggs are produced in traditional battery cages, this paper will use the UEP Certification as the baseline minimum for animal welfare standards⁴³ and price.

The term organic is regulated by the USDA under the Organic Foods Production Act of 1990⁴⁴ (“Organic Foods Act”). In order to use the USDA’s official organic label, a product must be produced and handled without the use of any synthetic chemicals and in compliance with the producer’s organic plan.⁴⁵ This means that egg laying hens cannot be treated with antibiotics or

³⁹ *Id.* at 15.

⁴⁰ THE ASSOCIATED PRESS, *Business Group Shells Egg-Industry Ads: Better Business Bureau Disputes Humane Claim* (May 11, 2004), <http://www.nbcnews.com/id/4951194/#.WM7JMhIrKRr>.

⁴¹ *Id.*

⁴² See HSUS Complaint, *supra* note 22, at 10.

⁴³ The author does not believe that these Guidelines *should* represent the minimum animal welfare standards required for laying hens, but believes they nonetheless serve as the minimum in the egg industry.

⁴⁴ The Organic Foods Production Act of 1990, as amended, 7 U.S.C. § 6501 *et. seq.* (1990).

⁴⁵ *Id.* § 6504.

hormones in the absence of illness or fed synthetic feed.⁴⁶ Regulations require “[y]ear-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight”⁴⁷ Although many consumers believe that the organic label indicates better treatment for the animal,⁴⁸ most eggs labeled organic are produced using traditional industrial-scale henhouses, which house tens of thousands of hens, and “offer[] only tiny enclosed porches as ‘outdoor access’—or no outside access whatsoever.”⁴⁹ Some certified organic farms have over one million hens and still use traditional cramped industrial-style barns, but offer a small screened in porch, blocked by industrial-strength fans, to pay lip service to the regulation.⁵⁰

Free-range is widely used at the discretion of producers because the USDA provides no legal definition for the term.⁵¹ Brief guidance, couched as a generally recognized industry standard on the AMS website, adds some meaning to the term and notes that hens must have “continuous access to the outdoors during their laying cycle. The outdoor area may be fenced and/or covered with netting-like material.”⁵² In practice, this often means that the egg-laying

⁴⁶ *Id.* § 6509(e)(1) (“all poultry from which meat or eggs will be sold or labeled as organically produced shall be raised and handled in accordance with this chapter prior to and during the period in which such meat or eggs are sold.”).

⁴⁷ 7 C.F.R. § 205.239.

⁴⁸ Consumer Perceptions Poll, *supra* note 7 (“When asked to identify their top three reasons for purchasing “natural” or “organic” . . . respondents to an online poll conducted by the American Meat Institute and the Food Marketing Institute chose “better health and treatment of the animal.”).

⁴⁹ THE CORNUCOPIA INST., SCRAMBLED EGGS 6 (2d ed., Dec. 2015)
<https://www.cornucopia.org/egg-report/scrambledeggs.pdf>.

⁵⁰ *Id.*

⁵¹ The USDA does provide a legal definition for “free-range” as it relates to poultry, but not eggs. See CERTIFIED HUMANE, “Free Range” and “Pasture Raised” officially defined by HFAC for Certified Humane Label (Jan. 16, 2014), <http://certifiedhumane.org/free-range-and-pasture-raised-officially-defined-by-hfac-for-certified-humane-label/> [hereinafter CERTIFIED HUMANE].

⁵² USDA, *Questions and Answers about Shell Eggs*, <https://www.ams.usda.gov/publications/qa-shell-eggs> (last visited Mar. 17, 2017).

hens get the same tiny screened-in porch as the organic egg-laying hens, only accessible to a few hens at a time. Mark Kastel of the Cornucopia Institute explains,

“Access” typically means a few small doors that lead to a screened-in porch with cement, dirt, or a modicum of grass. And often . . . industrial fans that suck ammonia out of the building create “hurricane winds” through the small doorways, and the birds don’t really want to walk through that.⁵³

There are no regulations in place for how large or accessible the access to outdoors must be.

Additionally, sometimes a small “pop hole” is provided, which allows hens to look outside but have no full body access.⁵⁴

The only difference between organic and free-range labels is that free-range hens may be fed synthetic feed and treated with hormones and antibiotics, while organic hens may not be. However, hormones cannot legally be added to poultry,⁵⁵ and “no large-scale farms in the U.S. do so.”⁵⁶ The UEP also notes that egg-laying hens are *rarely*, if ever, given antibiotics, and if so, it is usually for a short time to treat a disease or prevent a recurring disease.⁵⁷ In reality, the two terms may be used for eggs that are identically produced and often appear on egg cartons in tandem.

⁵³ Anders Kelto, *Farm Fresh? Natural? Eggs Not Always What They’re Cracked Up to Be*, NPR (Dec. 23, 2014), <http://www.npr.org/sections/thesalt/2014/12/23/370377902/farm-fresh-natural-eggs-not-always-what-they-re-cracked-up-to-be>.

⁵⁴ CERTIFIED HUMANE, *supra* note 51.

⁵⁵ FSIS, *Meat and Poultry Labeling Terms*, <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education> (last visited Apr. 29, 2017) (“*Hormones are not allowed in raising hogs or poultry*. Therefore, the claim “no hormones added” **cannot be used** on the labels of pork or poultry unless it is followed by a statement that says ‘Federal regulations prohibit the use of hormones.’”) (emphasis in original).

⁵⁶ FDA, *Steroid Hormone Implants Used for Food-Producing Animals*, <https://www.fda.gov/AnimalVeterinary/SafetyHealth/ProductSafetyInformation/ucm055436.htm> (last visited Mar. 23, 2017); *See Kelto, supra* note 53.

⁵⁷ UNITED EGG PRODUCERS, *Are antibiotics given to egg-laying hens?* (Sept. 18, 2015), <http://uepcertified.com/faq/are-antibiotics-given-to-egg-laying-hens-2/>.

The standards for cage-free eggs are even more ambiguous. According to the AMS website, cage-free egg laying hens must be “housed in a building, room, or enclosed area that allows for unlimited access to food, water, and provides the freedom to roam within the area during the laying cycle.”⁵⁸ In other words, rather than numerous small cages, hundreds of thousands of hens may be kept in one large cage and still satisfy the industry standard. Although the hens in many “cage free” houses can technically move freely, they are often still packed so tightly that they engage in cannibalism and feather-plucking from stress and will never step foot outside.⁵⁹

Common to all four of these labels are other cruel practices that are not limited in any way. For example, all systems may still kill male chicks by placing them directly into a grinder upon hatching.⁶⁰ It is common practice in all systems to burn the beaks off hens to limit fighting, however this painful mutilation is done without analgesics and causes many hens to starve to death in fear of the pain from eating.⁶¹ Hens may still be kept in large commercial henhouses and forced to live atop inches of feces, crushed cage-mates, and breathe in levels of ammonia so high that the toxins result in blindness and respiratory diseases.⁶² Lastly, hens lay less eggs as they age and are often slaughtered at less than two years old.⁶³ While in transit to the slaughterhouse, hens

⁵⁸ *Id.*

⁵⁹ Gregory Barber, *Are Cage-Free Eggs All They're Cracked Up to Be?*, MOTHER JONES (Feb. 10, 2016), <http://www.motherjones.com/blue-marble/2016/02/corporations-are-going-cage-free-whats-next-hens>.

⁶⁰ THE HUMANE SOCIETY OF THE U.S., *Cage-Free v. Battery-Cage Eggs*, http://www.humanesociety.org/issues/confinement_farm/facts/cage-free_vs_battery-cage.html?referrer=https://www.google.com/ (last visited Mar. 13, 2017) [hereinafter *HSUS Cage-free vs. Battery-cage*].

⁶¹ *Id.*

⁶² Darrin Karcher, *Poultry housing: Is cage-free the solution?*, FARM PROGRESS (Nov. 2009), <http://magissues.farmprogress.com/mif/mf11nov09/mif052.pdf>.

⁶³ See *HSUS Cage-free vs. Battery-cage*, *supra* note 60.

are deprived of food and water, and slaughter itself is painfully cruel, as poultry are explicitly excluded from the Humane Methods of Slaughter Act and the federal Animal Welfare Act.⁶⁴

While each of these labels is meant to indicate something different in the mind and in the pocket-book of the consumer, the standards for each are deceptively similar, and deceptively suggestive of humane practices.

II. EGG CARTON LABELS DECEIVE CONSUMERS AND A FEDERALLY REGULATED STANDARD IS NEEDED

Two main problems exist with respect to current egg carton labels: (1) the free-reign of producers to use terms that are legally and practically meaningless to deceive consumers as to the welfare of egg-laying hens; and (2) the lack of a meaningful, regulated definition for the terms free-range and cage-free. The animal welfare standards for eggs bearing the labels United Egg Producers Certified, organic, cage-free, and free-range are not different in regards to animal welfare in any meaningful way. Because consumers are misled into paying a premium for products bearing the cage-free and free-range labels, they are plainly violative of the FDCA and the FTCA. In order for consumers to make informed decisions when purchasing eggs, the FDA should issue regulations explicitly defining the terms free-range and cage-free in order to hold producers accountable for misuse of these labels.

⁶⁴ ANIMAL WELFARE INST., *Humane Methods of Slaughter Act*, <https://awionline.org/content/humane-methods-slaughter-act> (last visited Mar. 13, 2017); THE HUMANE SOC'Y OF THE U.S., *Cruel Poultry Slaughter*, http://www.humanesociety.org/issues/slaughter/facts/cak_slaughter.html?referrer=https://www.google.com/ (last visited Mar. 13, 2017) (“Birds are first dumped or pulled from transport crates and snapped into shackles, often causing broken bones, bruising, and hemorrhaging, Next, they are shocked with electric water; the majority are paralyzed but may not be rendered unconscious. Some miss the water tank and aren’t even paralyzed. Birds then have their throats cut, but according to the USDA, millions miss the blade and drown in tanks of scalding water while conscious and able to feel pain.”).

A. FREE-RANGE AND CAGE-FREE EGGS ARE “MISBRANDED” UNDER THE FDCA

The FDCA leaves much to be desired in determining what constitutes a legally “misbranded” food. The standard set forth by the statute is simply that the label must be “false and misleading in *any* particular.”⁶⁵ Courts interpret this language in light of the reasonable consumer’s understanding of what the label indicates, and in order to prove a claim of fraudulent representation, “a jury must be given evidence about the meaning (unless obvious) of the representation claimed to be fraudulent[.]”⁶⁶ In order to be misbranded, the representations must be misleading to a reasonable consumer.⁶⁷

The terms free-range and cage-free as they are currently defined by the AMS are misleading to consumers because they plainly indicate higher levels of animal welfare, namely that free-range hens are able to freely roam outside and cage-free hens are not confined to cages. The Oxford dictionary defines free-range as “kept in natural conditions, with freedom of movement.”⁶⁸ A commercial henhouse with a small, inaccessible screened-in porch is certainly not natural, and in many cases does not allow for *any* freedom of movement. The term cage-free is plainly false, as hens may still be kept in enclosed, cramped industrial houses with no access to fresh air, although many consumers inaccurately believe they are raised outdoors.

There is ample reason to believe that reasonable consumers would not find the terms free-range and cage-free to accurately represent the actual conditions of egg-laying hens.⁶⁹

⁶⁵ 21 U.S.C. § 343 (emphasis added).

⁶⁶ U.S. v. Farinella, 558 F.3d 695, 701 (9th Cir. 2009).

⁶⁷ *See id.*

⁶⁸ OXFORD DICTIONARY, *Free-range*, <https://en.oxforddictionaries.com/definition/us/free-range> (last visited Mar. 17, 2017).

⁶⁹ Discussed *infra*. in CONSUMER PERCEPTIONS.

Many consumers feel bewildered by the existing labeling regime. The National Chicken Council reports that 60 percent of U.S. consumers find chicken labels confusing.⁷⁰ A survey conducted by egg producer Vital Farms revealed that the majority of consumers believe that the terms free-range and cage-free indicate that the hens were raised primarily outdoors, although this is simply false.⁷¹ As explained by a former senior-vice president of the UEP, “[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 breaks, they are shocked[.]”⁷²

Evidence of misbranding might include pictures of henhouse conditions in which free-range and cage-free egg-laying hens are kept in order to illustrate the lack of free movement and outdoor access. Photographs of the facilities are telling. Figure one depicts a traditional operation that uses battery cages and meets the United Egg Producers Certification standards (this paper’s baseline comparison of minimum animal welfare). Figure two shows a facility that labels its eggs as cage-free. Figure three claims that it meets the standards for free-range and organic and labels its eggs as such.

Figure One⁷³

⁷⁰ *Over 60 Per Cent of Consumers Find Chicken Labels Confusing*, THE POULTRY SITE (Mar. 16, 2016), <http://www.thepoultrysite.com/poultrynews/category/38/labelling-traceability/>.

⁷¹ Jane Black, *Scratching out a market eager for “pasture-raised” eggs*, WASH. POST (Apr. 8, 2015).

⁷² HSUS Complaint, *supra* note 22, at 20.

⁷³ Chris Isidore, *Bill Maher to Costco ‘Free the hens already’*, CNN MONEY (Jul. 10, 2015), <http://money.cnn.com/2015/07/10/news/companies/maher-costco-chickens-eggs/>.



Figure Two⁷⁴



Figure Three⁷⁵

⁷⁴ Aj Mast, *Eggs That Clear the Cages, but Maybe Not the Conscience*, N.Y. TIMES (Jul. 16, 2016), https://www.nytimes.com/2016/07/17/business/eggs-that-clear-the-cages-but-maybe-not-the-conscience.html?_r=0.

⁷⁵ PETA (2014), <http://www.peta.org/wp-content/uploads/2014/03/Free-Range-Hens-Overcrowded.jpg> (last visited Mar. 14, 2017).



The photographs beg the question: do the marketing claims free-range and cage-free mean anything at all?

B. FREE-RANGE AND CAGE-FREE CLAIMS ARE DECEPTIVE UNDER THE FTCA

Free-range and cage-free egg advertising claims are unlawful under the FTCA because they mislead consumers to pay more for a nearly identical product. Section 5 of the FTCA prohibits deceptive acts and practices in or affecting commerce.⁷⁶ In order to prove deception, three elements must be shown: (1) a representation, omission or practice that is likely to mislead the consumer; (2) the consumer must be acting reasonably under the circumstances; and (3) the representation, omission or practice must be a “material” one, or in other words, the practice must be likely to affect the consumer’s conduct or decision with regard to the product.⁷⁷ The first

⁷⁶ 15 U.S.C. § 45(a)(1).

⁷⁷ Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence, Federal Trade Commission, Guide/Report, 2007 WL 2506620 (May 18, 2007).

two elements are similar to the elements needed to prove misbranding and are discussed *supra*. The third element required to solidify a deceptive trade practice claim under the FTCA focuses on market distortion and unfair competition with other brands that do not use deceptive labeling.

Evidence of actual consumer perceptions is critical to prove that the terms free-range and cage-free are likely to affect a consumer's decision whether or not to purchase a particular carton of eggs. Consumers are willing to pay more for eggs that they believe were humanely produced, and labels that advertise heightened animal welfare standards are extremely persuasive to consumers. The NAD has recognized that animal welfare concerns are an important motivator in consumer behavior:

Advertising claims which tout that the advertiser is addressing particular social or ethical concerns can provide consumers with important information about their purchasing choices.⁷⁸

In a survey conducted by the ASPCA, two-thirds of consumers responded that they purchase animal welfare certified food products “even when it means a modest increase in price.”⁷⁹ A study by UEP revealed that “50 percent of consumers rate animal welfare issues as an important factor in deciding which foods and brands to buy, and which stores to shop.”⁸⁰ In another poll, the UEP discovered 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.”⁸¹ The

⁷⁸ Starbucks Corporation (Free Trade Certified Coffee), Report #4592, NAD Case Reports (Nov. 2006); United Egg Producers (Animal Care Certified Eggs), Report #4108, NAD Case Reports (Nov. 2003).

⁷⁹ *New Research Finds Vast Majority of Americans Concerned about Farm Animal Welfare*, ASPCA (July 7, 2016), <http://www.asPCA.org/about-us/press-releases/new-research-finds-vast-majority-americans-concernedabout-farm-animal>.

⁸⁰ HSUS Complaint, *supra* note 22, at 19.

⁸¹ *Id.*

FTC itself has acknowledged that “claims about the production methods of eggs are material to consumers’ egg purchasing decisions.”⁸² Consumers in California were so concerned about the welfare of laying-hens that in 2008 a ballot measure was passed to ban the use of battery cages and set standards for the confinement of hens.⁸³ The ballot measure specifically prohibited “confinement of farm animals in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs,”⁸⁴ and an overwhelming 63.5 percent of voters voted yes to the measure, even though egg farmers would incur significant costs to comply and pass those costs down to the consumer.⁸⁵ The constitutionality of the measure, as an undue burden on interstate commerce, was challenged but upheld in the Ninth Circuit.⁸⁶ Consumers are interested in purchasing products they believe to be ethically and humanely produced and will pay a much higher price for products advertised as such.

The FTC recently denied to take regulatory action in response to a petition by Compassion Over Killing, a non-profit organization, to regulate misleading egg carton labels.⁸⁷ Compassion Over Killing submitted rulemaking petitions to the FDA, FTC, AMS, and FSIS “requesting that each agency take regulatory action to revise the current labeling requirements for eggs . . . and/or to promulgate new regulations that would require all egg cartons to identify the conditions in which the egg-laying hens were kept during production.”⁸⁸ The FTC denied the

⁸² *Compassion Over Killing v. FDA*, 2014 WL 7336231, *4 (N.D. Cal. Dec. 23, 2014).

⁸³ *California Proposition 2, Standards for Confining Farm Animals (2008)*, BALLOTPEdia, [https://ballotpedia.org/California_Proposition_2,_Standards_for_Confining_Farm_Animals_\(2008\)](https://ballotpedia.org/California_Proposition_2,_Standards_for_Confining_Farm_Animals_(2008)) (last visited Mar. 27, 2017).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ The 9th Circuit held that egg farmers did not have standing because they could not establish fluctuations in egg prices as a result of the California law and therefore lacked an injury needed to establish Article III standing. *See generally* *Missouri v. Harris*, 847 F.3d 646 (9th Cir. 2017).

⁸⁷ *See generally* *Compassion Over Killing v. FDA*, 849 F.3d 849 (9th Cir. 2017).

⁸⁸ *Id.* at 852.

petition and stated that it lacked sufficient evidence to establish that unfair or deceptive acts were “prevalent,” because it had not issued cease-and-desist orders regarding the practice of free-range and cage-free egg advertising.

While the FTC is permitted to initiate rulemaking proceedings “only where it has reason to believe that the unfair or deceptive acts or practices . . . are prevalent,”⁸⁹ the FTC is not limited to examining the extent of previous enforcement actions to make a finding of prevalence. Under the FTCA, the FTC may use “any [] information available that indicates a widespread pattern of unfair or deceptive acts or practices.”⁹⁰ The FTC claimed that the Plaintiffs in *Compassion Over Killing* submitted only “isolated examples of potentially misleading egg labels,”⁹¹ but how many egg cartons must the Plaintiffs submit to make a showing of prevalence? The AMS guidance itself promotes misleading standards, and there is no reason to believe that any industrial egg producer adheres to higher welfare standards than is what is listed on the AMS website, because it would place them at a disadvantage in the marketplace. Higher animal welfare standards are costlier, and if producers are able to take advantage of cage-free advertisements without actually providing cage free conditions, they have no incentive to do so. It is thus likely that a *majority* of eggs on the market bearing these labels are deceptive, and the FTC cannot ignore this important aspect of the problem.⁹²

⁸⁹ See 15 U.S.C. § 57a(b)(3)(A)–(B).

⁹⁰ *Id.* (emphasis added).

⁹¹ *Compassion Over Killing v. FDA*, 849 F.3d 849, 855 (9th Cir. 2017).

⁹² See *Motor Vehicle Mfr. Ass’n v. State Farm Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (“[A]n agency rule would be arbitrary and capricious if it . . . entirely failed to consider an important aspect of the problem[.]”).

C. THE FDA SHOULD PROMULGATE A REGULATION DEFINING FREE-RANGE AND CAGE-FREE

It is reasonable for a consumer to believe that the words free-range and cage-free represent that the eggs were produced in humane conditions and egg-laying hens are primarily kept outdoors without significant confinement. It is also reasonable for a consumer to believe that the FDA regulates these terms and ensures that they are not false. Neither of these beliefs are true under the current regulatory regime, and a federal definition of both terms should be enacted by the FDA to remedy consumer deception.

While AMS does put forth scant guidance on its website to define free-range and cage-free, this guidance is not legally binding and far from clear, and is therefore often disregarded. A standard promulgated by the FDA through notice and comment rulemaking procedures would clarify the conditions that hens must be housed in, so that both producers and consumers are not left to formulate their own mismatched interpretations. The FDA has the primary authority to regulate the labeling of shell eggs under the FDCA, and thus is best situated to regulate these misleading claims. The FDA is only responsible for food and drug products, and has specific expertise with regard to shell eggs, as opposed to the FTCA, which is responsible for a wide variety of consumer practices and products.⁹³ Although the USDA is responsible for administering the organic certification program, it has traditionally been sympathetic to the interests of food producers and has failed to enforce its own standards with regards to organic eggs.⁹⁴ Additionally, its authority is limited to that of egg-products, as opposed to eggs in the

⁹³ Anything in or affecting interstate commerce is within reach of the FTC. *See* 15 U.S.C. § 45(a)(1).

⁹⁴ The USDA has generally turned a blind eye to the requirement that organic hens have “access . . . to the outdoors.” 7 C.F.R. § 205.239; *See generally* THE CORNUCOPIA INSTITUTE, *supra* note 49.

shell.⁹⁵ The FDA possesses the regulatory authority “to promulgate regulations for the efficient enforcement of [the FDCA],” which tasks the agency to ensure that shell eggs are not misbranded; although, this authority is discretionary.⁹⁶ The Ninth Circuit has made clear that the FDA has the authority, rather than the AMS and FSIS, to promulgate such a regulation, and has warned the FDA to pay attention to mislabeled egg cartons in the future.⁹⁷

In *Compassion Over Killing*, the FDA also rejected Plaintiff’s petition to require mandatory egg-carton labels specifying the conditions of egg-laying hens.⁹⁸ Plaintiffs challenged the FDA’s denial as arbitrary and capricious because the agency “summarily exercise[d] its discretion to prioritize other agency goals in order to avoid addressing Plaintiff’s request for rulemaking.”⁹⁹ Indeed, the FDA determined that it would “take enforcement action against misbranded eggs on a case-by-case basis, as opposed to promulgating regulations that would apply to all producers.”¹⁰⁰ But, even if an agency chooses to exercise its discretion to pursue ad hoc enforcement actions, it must “at a minimum, clearly indicate that it has considered the potential problems identified in the petition and ‘provide a reasonable explanation as to why it cannot or will not exercise its discretion’ to initiate rulemaking.”¹⁰¹ An agency cannot entirely fail to consider an important aspect of a problem,¹⁰² and an agency must “support and explain its conclusions with reasoned analysis.”¹⁰³ The FDA, in its short 19-page denial letter,¹⁰⁴ *nowhere*

⁹⁵ See 21 U.S.C. § 1031 *et. seq.*

⁹⁶ *Id.*

⁹⁷ *Compassion Over Killing v. FDA*, 849 F.3d 849, 857 (9th Cir. 2017).

⁹⁸ *Id.* at 856.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 857.

¹⁰¹ *Id.* at 854 (citing to *Mass. v. EPA*, 549 U.S. 497, 533 (2007)).

¹⁰² See *Motor Vehicle Mfr. Ass’n v. State Farm Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁰³ *Ctr. For Biological Diversity v. U.S. Dept. of Interior*, 623 F.3d 633, 648 (9th Cir. 2010).

¹⁰⁴ See FDA, Petition Denial Docket No. FDA 2007-P-0122 (Aug. 28, 2013),

http://saova.org/rulemaking/FDA_petition_denial.pdf.

addressed the Plaintiff’s argument that *affirmative* misrepresentations on egg cartons (i.e. the claims that they are produced in free-range or cage-free conditions) are misleading to consumers. This is a critical aspect of the problem. Additionally, the FDA failed to mention the evidence of currently misbranded egg cartons that the Plaintiff put forth in the petition. Instead, the letter focused on explaining why the terms free-range and cage-free are not facts *material* to the representation of the product, and thus not misleading. But this argument conflates the two standards for misbranded. Under the FDCA, “labels may be misleading in two ways: through an affirmative misrepresentation or, alternatively by an omission of material fact,”¹⁰⁵ whereas only an omission must be a material fact; an affirmative representation requires no finding of materiality. By using the standard for an *omission* of material fact to determine whether egg cartons are misbranded, the FDA failed to take into account an important aspect of the problem: the affirmative representations made about animal welfare. Even the Ninth Circuit was skeptical of the FDA’s review of the petition and noted,

[S]uch broad discretion should not be construed as providing a blanket exception to APA review in any matter involving the allocation of agency resources . . . Here, the FDA’s explanation for denying Plaintiff’s rulemaking petition barely meets this low burden. The FDA could have better addressed Plaintiffs’ evidence of misleading representations that appear on egg cartons to demonstrate that the agency fully appreciated one of the primary bases for Plaintiffs’ rulemaking petition—that information concerning egg-laying hens’ living conditions is necessary in order to correct the affirmative representations that frequently appear on egg labels and convey misleading information.¹⁰⁶

¹⁰⁵ Appellants Opening Brief at 24, *Compassion Over Killing v. FDA*, 849 F.3d 849 (2017) (No. 15-15107), 2015 WL 3819577; 21 U.S.C. § 321(n) (“If an article is alleged to be misbranded because the labeling or advertising is misleading, then in determining whether the labeling or advertising is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling or advertising fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertising relates under the conditions of use prescribed in the labeling or advertising thereof or under such conditions of use as are customary or usual.”).

¹⁰⁶ *Compassion Over Killing v. FDA*, 849 F.3d 849, 857 (9th Cir. 2017).

Additionally, while the FDA is entitled to exercise its discretion by choosing to regulate through ad hoc enforcement actions, it cannot argue that it will bring enforcement actions against individual egg producers when it currently has no legal definition of the disputed labeling terms. The FDA would first need to decide on a uniform definition of free-range and cage-free before bringing any action for misbranding. Whether the FDA chooses to exercise its discretion in ad hoc enforcement actions, or in a sweeping regulation, it should still promulgate a definition of the labeling terms to eliminate misbranding and consumer deception.

III. THE EUROPEAN UNION AS A MODEL FOR FREE-RANGE AND CAGE-FREE REGIMES

The European Union is a leader in farmed animal welfare and is home to the most stringent legal protections for egg-laying hens. As early as 1976, the Council of Europe signed the European Convention for the Protection of Animals Kept for Farming Purposes, which requires that “all farm animals be provided with care in a manner ‘appropriate to their physiological and ethological needs.’”¹⁰⁷ In 1999, a Council Directive (“the Directive”) was adopted which prohibited “barren” battery cages (those without any perches, nest boxes, or litter for dust bathing) from construction and required existing systems to be phased out by 2012.¹⁰⁸ The Directive recognized that “[t]he protection of laying hens is a matter of Community competence” and “[d]ifferences which may distort conditions of competition interfere with the smooth running of the organization of the market in animals and animal products.”¹⁰⁹ The

¹⁰⁷ Gaverick Matheny & Cheryl Leahy, *Farm-animal Welfare, Legislation, and Trade*, 70 *LAW & CONTEMP. PROBS.* 325, 339 (2007), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1415&context=lcp>.

¹⁰⁸ *Id.* at 339; Council Directive 1999/74, 1999 O.J. (L203) 1, 5 (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:203:0053:0057:EN:PDF> [hereinafter *Laying Hens Directive*].

¹⁰⁹ *Laying Hens Directive*, *supra* note 108, at preamble.

Directive's standards are based on recommendations from a Scientific Veterinary Committee and seek to provide minimum welfare requirements for all laying hens.¹¹⁰

The Directive describes three different types of hen rearing systems that are similar to the systems used in the United States. The systems are described as unenriched cages, enriched cages, and alternative systems.¹¹¹ Unenriched cages are battery cage systems and their construction is no longer permitted.¹¹² Enriched cage systems require:

- (a) at least 750 cm² of cage area per hen, 600 cm² of which shall be usable . . . and no cage shall have a total area that is less than 2000 cm²;
- (b) a nest;
- (c) litter such that pecking and scratching are possible;
- (d) appropriate perches allowing at least 15 cm per hen.¹¹³

Although the enriched systems do allow the hens to be housed in cages, the standards require that each hen be allotted enough space (nearly a square foot, as opposed to the 432 cm² recommended by the UEP¹¹⁴) to engage in natural behaviors, such as nesting and scratching. The hens must also have continuous access to food and water.¹¹⁵

The third type of housing is referred to as an alternative system and accounts for 42 percent of egg production in the European Union.¹¹⁶ Alternative housing requires at least one nest for every seven hens (with at least 1 m² of nest space for a maximum of 120 hens), adequate perches, at least 250 cm² of littered area per hen, as well as adequate access to food and water.¹¹⁷

¹¹⁰ *Id.* at art. 1. Establishments with fewer than 350 hens and establishments rearing breeding laying hens are not subject to the Directive. *Id.* at art. 1(2).

¹¹¹ *See id.* at art. 3.

¹¹² *Id.* at art. 5(2).

¹¹³ *Id.* at art. 6(1).

¹¹⁴ The UEP recommends about 67 square inches of space per bird, which translates to approximately 432 cm². *See* UEP GUIDELINES, *supra* note 31, at 21.

¹¹⁵ *See* Laying Hens Directive, *supra* note 108, at art. 6(2)-(3).

¹¹⁶ HUMANE SOC'Y INT'L, EGG PRODUCTION IN THE EU AND US 2, http://www.hsi.org/assets/pdfs/ttip_briefing_eggs.pdf (last visited Mar. 29, 2017).

¹¹⁷ Laying Hens Directive, *supra* note 108, at art. 4(1).

Stocking density “must not exceed nine laying hens per m²” of usable area.¹¹⁸ There are additional requirements for access to open runs outdoors, including:

- (i) there must be several popholes giving direct access to the outer area, at least 35 cm high and 40 cm wide and extending along the entire length of the building; in any case, a total opening of 2 m must be available per group of 1000 hens;
- (ii) open runs must be . . .
—equipped with shelter from inclement weather and predators and, if necessary, appropriate drinking troughs.¹¹⁹

In addition to welfare standards, the Directive requires all production facilities to register with the agricultural authority in the Member State and place on each egg a number, which can then be used to determine the type of production method the egg was produced in as well as its farm of origin.¹²⁰

The European Unions’ system of standards illustrates the type of transparency that allows consumers to make informed purchasing decisions. The FDA should adopt a definition of cage-free that includes a space requirement (no less than 750 cm² to allow for natural behaviors) for each hen, similar to the requirement under the Directive for enriched cages. The cage-free standard should require that hens are able to engage in nesting, scratching, and pecking behaviors and have continuous access to food and water, which the EU’s Scientific Veterinary Committee has determined are the *bare minimum* standards required for animal wellbeing.

If an egg is labeled free-range, the FDA should require that the hens have continuous and meaningful access to the outdoors and put forth a specific space requirement, as the Directive does. A specific space requirement, and a specific doorway requirement, will ensure that egg

¹¹⁸ *Id.* at art. 4(4).

¹¹⁹ *Id.* at art. 4(3).

¹²⁰ EUROPEAN COMMISSION, *Laying Hens*, https://ec.europa.eu/food/animals/welfare/practice/farm/laying_hens_en (last visited Mar. 29, 2017).

producers cannot comply with the free-range requirements by providing a small, but in practice inaccessible, outdoor area. The free-range definition should also include the nesting requirements as put forth in the Directive, which require hens to have adequate access to nesting space. By adopting regulations through notice-and-comment rulemaking, the public will be able to help shape what they believe free-range and cage-free indicate and will also have a cause of action under the APA to challenge the promulgated standards should they fall short.

Lastly, the FDA should require that eggs labeled free-range and cage-free bear a number that can be traced back to the farm from which the egg was produced, as the Directive requires. The FDA could easily require egg producers to register with the agency, as only 186 different companies produce 99 percent of eggs on the market.¹²¹ If the eggs are required to bear a number that corresponds to the facility they were produced in, concerned consumers will have direct access to information needed in order to make informed decisions and can “vote with their dollar” for or against increased animal welfare standards in the egg industry. Although this would require the FDA to compel commercial speech, producers would likely be receptive to this type of labeling because it in no way immediately suggests anything about the product, but is simply a numerical marking. Producers who do follow heightened animal welfare standards will benefit because they will be able to show consumers that their eggs are produced in a superior manner and deserve the free-range and cage-free labels. Consumers have a right to be informed about the products they are purchasing and this method has already proven highly effective in the European Union.

¹²¹ *General US Stats, supra* note 1.

CONCLUSION

The current egg labeling regime is misleading and toothless. Animal welfare is increasingly important to consumers and visible in the media as each day more and more companies decide to switch to cage-free eggs.¹²² The FDA possesses the authority to enact regulations defining the terms free-range and cage-free, and should do so in order to protect consumers, who often make purchasing decisions under the false belief that they are supporting more humane animal production methods. The FDA should also enact clear definitions of these labeling terms to protect the egg producers that do produce eggs under humane conditions and truthfully market their eggs. The difference in price between free-range and cage-free eggs distorts the market by making it impossible for truly humanely produced products to successfully compete, because egg producers that do not follow heightened animal welfare standards may still reap the benefit of selling their eggs for increased prices. The FDA must catch up with a changing society and hatch a new regulatory scheme.

¹²² *Walmart aims to switch to cage-free egg supply chain by 2025*, REUTERS (Apr. 6, 2016), <http://www.cnbc.com/2016/04/06/wal-mart-aims-to-switch-to-cage-free-egg-supply-chain-by-2025.html>; *Costco Finally Changes to Cage-free Eggs*, THE ODYSSEY (May 9, 2016), <https://www.theodysseyonline.com/costco-finally-cage-free-eggs>.