SINCE 1985 Organic trade association

January 17, 2018

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Director, Standards Division, National Organic Program
USDA-AMS-NOP
1400 Independence Ave., SW, Room 2642-So., Ag Stop 0268
Washington, DC 20250-0268

RE: Docket ID Number AMS-NOP-15-0012; NOP-15-06; Organic Livestock and Poultry Practices-Proposal to Withdraw Final Rule

Dr. Lewis:

This comment addresses the USDA's Notice of Withdrawal[1] the Organic Livestock and Poultry Practices final rule[2] ("OLPP") currently set to become effective on May 14, 2018. It also addresses the Preliminary Regulatory Impact Analysis[3] ("PRIA") that purports to comprehensively review the original Regulatory Impact Analysis ("RIA") reaching a new conclusion regarding the alignment of the OLPP with Executive Orders 12866 ("EO 12866") and 13563 ("EO 13563").

The Organic Trade Association (OTA) is the membership-based business association for organic agriculture and products in North America. OTA is the leading voice for the organic trade in the United States, representing over 9,500 organic businesses across 50 states. Our members include growers, shippers, processors, certifiers, farmers' associations, distributors, importers, exporters, consultants, retailers and others. OTA's mission is to promote and protect organic with a unifying voice that serves and engages its diverse members from farm to marketplace.

OTA strongly opposes USDA's Notice of Withdrawal of the OLPP and demonstrates below that the grounds advanced in the Notice of Withdrawal are insufficient to support the withdrawal and are in conflict with USDA's obligations under the Organic Foods Production Act ("OFPA") and the Administrative Procedure Act ("APA"). A summary of the procedural history of organic livestock regulations appears in Appendix B. OTA urges USDA reverse course and let the OLPP become effective on May 14, 2018.

[1] *National Organic Program; Organic Livestock and Poultry Practices—Withdrawal,* 82 Fed. Reg.

[2] *See National Organic Program; Organic Livestock and Poultry Practices,* 82 Fed. Reg. at 7042-92 (January 19, 2017) ("Organic Livestock Rule" or "OLPP").

[3] Available at regulations.gov., Docket ID Number AMS-NOP-15-0012-NOP -15-6686, Open Docket Folder.

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I. Renewed Request for Enlargement of Time to Comply with the APA and OFPA

As a preliminary matter, OTA renews its prior written request that USDA enlarge the time for submission of responses to the Notice of Withdrawal.[4] In particular OTA notes that the PRIA raises several new questions not part of the original OLPP rulemaking that would be best served by more extensive review and elaboration. Thirty days is insufficient to develop and submit meaningful comments on the issues identified in the PRIA. As ample evidence of this we contrast the many months it took to prepare the original PRIA, the nearly 9 months that USDA took to review the record before issuing the final RIA in the OLPP and the 11 additional months it took prior to issuing the Notice of Withdrawal's PRIA on January 18, 2017. If USDA could not detect the computational flaws it now claims exist during the initial rulemaking and could only do so after 11 additional months, it is unrealistic to expect the affected parties to complete their analysis and preparation of comments over the 30-day period allowed by this rulemaking. USDA gave itself nearly 20 months on these question and gave the commenting public but 30 days.

Section 553 of the APA is not satisfied unless the agency "affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking process." *See, e.g., Forester v. Consumer Product Safety Commission*, 559 F.2d 774, 787 (D.C. Cir. 1977). In assessing whether the agency allowed enough time for comments, courts have focused on whether the agency provided an "adequate" opportunity to comment. *See* Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 296 (4th ed. 2006) (citing *Fla. Power & Light Co. v. U.S.*, 846 F.2d 765, 772 (D.C. Cir. 1988)). This analysis includes both the length of time allowed and the complexity of the inquiry. Moreover, Executive Order 12866, relied on by USDA, states that the public's opportunity to comment, "in most cases should include a comment period of not less than 60 days." *See Exec. Order No.* 12866, § 6(a), 58 Fed. Reg. 51735 (Oct. 4, 1993). There is no reason given in the Notice of Withdrawal for the shortening the public comment period to less than is recommended in EO 12866.

A. Additional Time is Needed to Consult the NOSB and Comply with the OFPA

The Notice of Withdrawal does not state the position of the National Organic Standards Board ("NOSB"), nor does it state the NOSB was consulted or that the NOSB waived its duty. It is black letter law that Congress may direct an agency to follow specific procedural requirements in addition to those required by the informal rulemaking procedures of the APA. Congress did so in the OFPA: the NOSB must be consulted prior to rulemaking on organic livestock. *See* 7 U.S.C. § 6518(k)(1)(the NOSB: "[S]hall provide recommendations to the Secretary regarding the implementation of this chapter,"); 7 U.S.C. § 6518(a)(the Secretary "shall establish [the NOSB] ….to assist….and to advise the Secretary on any other aspects of the implementation of this chapter."); 7 U.S.C. § 6503(c)("The Secretary: "[S]hall consult with the National Organic Standards Board…") USDA has officially recognized this duty. *See NOSB Policy Manual*, at Pg. 26 ("Similarly, the NOP, as required through OFPA, must consult and collaborate with the NOSB.")

[4] AMS Acting Administrator Bruce Summers denied OTA's requested enlargement of time on January 10, 2018 stating: "The proposed rule presents discrete issues that interested parties should be able to address within the current comment period." *See Attachment No. 1*

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Among the mandatory OFPA provisions that highlight the consultative duty pertinent to this rulemaking: "[the NOSB] shall recommend to the Secretary standards in addition to those in [the foregoing section] for the care of livestock to ensure that such livestock are organically produced." 7 U.S.C. § 6509(d)(2) (emphasis added). Congress further commanded: "[the Secretary] [S]hall hold public hearings and shall develop detailed regulations, with notice and public comment, to guide the implementation of the standards for livestock products…" 7 U.S.C. § 6509(g) (emphasis added). These provisions are an example of the kind of advice that Congress sought from the NOSB. But none limit the NOSB's overall advisory role as it is set forth in other cited sections. When read in context of the overall statute, NOSB has a broad and capacious duty to advise and the USDA has commiserate regulatory authority to act. *See* 7 U.S.C. § 6506(a)(11) ("General Requirements-authorization to adopt necessary provisions)

If any question regarding the NOSB role or the Secretary's consultative duty remains after examining the statute as a whole, the legislative history of the OFPA, discussed more thoroughly below, provides the clear intent of Congress.[5] "[T]he Committee expects that USDA, with the assistance of the National Organic Standards Board will elaborate on livestock criteria." *Report of the Committee on Agriculture, Forestry and Nutrition to Accompany S. 2830 Together with Additional and Minority Views, 101st Congress*, S. REP. NO. 101–35, at p. 289. The Senate went further, "The Board shall recommend livestock standards, in addition to those specified in this bill, to the Secretary." *Id.* at pg. 303. After the Senate action the bill went to conference with the House. "The Conference substitute adopts the House provision with an amendment which requires the Secretary to hold hearings and develop regulations regarding livestock standards in addition to those specified in this title."[6]

The refusal to grant additional time undermines the quality of the final record, and will likely deny affected parties the opportunity to meaningfully participate in this rulemaking in violation of the APA. Additionally, the failure to consult the NOSB on the proposed action deprived the Secretary of the very diverse and considered opinions of the individual NOSB members and their collaborative insights thereby violating the OFPA.

II. The PRIA Does Not Compel Withdrawal of the OLPP

The Notice of Withdrawal claims it is withdrawing the OLPP in part because of flaws in the USDA's method for calculating the expected costs and benefits of the OLPP. *See* 82 Fed. Reg. at 59990 ("[T]he calculation of benefits contained mathematical errors…") Assuming without conceding that the calculational error exists, OTA maintains that the identified error is insubstantial in light of the overall purpose of the OFPA and the OLPP. Moreover, the PRIA fails to *fully* comply with the relevant Executive Orders and most importantly, it elevates the cost-benefit analysis conducted for internal agency management purposes as one factor in determining the proper regulatory course to one that determines whether a final rule is justified or not. Misuse of the analytic framework to principally highlight costs, or understate benefits that the underlying statute requires be assessed, likely renders the final outcome substandard under the APA.

[5] *See Attachment 2*, incorporating by reference a Letter filed in this docket by the original sponsors of the OFPA, Sen. P. Leahy and Rep. DeFazio.

[6] H.R. Rep. 101-916 at 1177-78 (Oct. 22, 1990) (emphasis added).

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According to EO 12866, regulations should be adopted after assessment of "all costs and benefits." *See Section I (a).* "Costs and benefits…include both quantifiable measures…and *qualitative measures …that are difficult to quantify, but nevertheless essential to consider*. Further….[agencies should act to] maximize net benefits (including potential economic, environmental, public health and safety, and other advantages, distributive impacts; and equity…"[7] *Id. I(a)* In stark contrast to the preferred broad analysis and inclusion of non-quantifiable benefits like consumer protection, the Notice of Withdrawal addressed solely economic considerations and concluded: "AMS finds little, if any economic justification for the OLPP final rule." *See* 82 Fed. Reg. at 59991; *see also PRIA* at pg. 4 (same); at pg. 6 ("Correction of those errors shows that estimated benefits likely were overstated in the OLPP final rule RIA.") The PRIA barely touches on benefits. In fact, after revising the calculations the PRIA dismisses the benefits to farm animals, the farming operation, accredited certifying agents and consumers because it is "uncertain and difficult to quantity benefits of outdoor access and space requirements" and then blithely assumes such benefits "would not justify their quantifiable costs and paperwork burden." *Id.* at 7.

The PRIA focused only the agency's view that there was no "market failure." Accordingly, the Notice of Withdrawal contains inadequate information upon which an interested party could determine, and inadequate time to meaningfully comment upon, the full range of factors the agency is supposed to consider in the PRIA. Based on the limited time to review, and the narrow focus of the PRIA, it appears that the agency cannot properly determine whether the benefits of the OLPP justify the costs. This outcome violates the APA by making the final decision arbitrary and capricious.

A. The OLPP Remedies an Informational Market Failure and a Programmatic Compliance Failure[8]

EO 12866 identifies "failures of private markets *or* public institutions" as grounds justifying regulatory action. "The RIA for the OLPP final rule did not identify a significant market failure to justify the need for rule." *PRIA*, at 4. This statement overlooks that the OFPA was adopted by Congress because it determined there was a market failure. *See generally* Senate Committee on Agriculture, Forestry and Nutrition, *Report of the Committee on Agriculture, Forestry and Nutrition to Accompany S. 2830 Together with Additional and Minority Views*, 101st Congress, S. Rep. No. 101-357, (1990)(discussion of need for single national standard; inability of marketplace to solve the problem). Thus, it is against a market failure backdrop that the organic regulations were ultimately adopted and must be vigilantly maintained to ensure no backsliding. Confusingly, the PRIA explains, "Variance in production practices and participation in private, third-party certification programs, however, do not constitute evidence of significant market failure." *PRIA.* at 5 This conflicts generally with Congress'

[7] According to OMB's *Economic Analysis of Federal Regulations Under Executive Order 12866* (Jan. 1996) ("OMB Guidelines for Analysis"), regulators should determine: "The potential benefits to society justify the potential costs, recognizing that not all benefits and costs can be described in monetary or even in quantitative terms, unless a statute requires another regulatory approach." *Id.* at 2.

[8] In 2010 AMS published *Access to Pasture (Livestock).* Like the OLPP this rulemaking was undertaken to clarify the requirements for access to pasture and imposed quantitative measures designed to ensure pasture access was adequate and proveable. *See generally* 75 Fed. Reg. at 7154 (Feb. 17, 2010)

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original findings. Specifically here, variance in production practices is not the same as a free floating definition of "access to the outdoors" that defies consistent application, uniformity of management practices and consumer expectations. As is demonstrated below, the agency's PRIA overlooked the market failure caused by the absence of a single, consistent definition of "access to the outdoors" and the well-documented failure of the NOP's certifying agents to impose consistent compliance with the requirement's plain terms. *See* 7 U.S.C. § 6501(2)(consumer protection provision);

1. The Informational Market Failure

According to ***OMB Guidelines for Analysis*** there are several kinds of market failures that may be remediated by regulations. Among the failures described, "Market failures may also result from inadequate or asymmetric information." *Id*. at 4. [I]nadequate information can generate a variety of social costs, including inefficiently low innovation, market power, or *inefficient resource allocation resulting from deception of consumers*." *Id*.. (emphasis added) OMB goes on to note that "mandatory uniform quality standards for goods and services" is one solution to such consumer deception.[9] Here, of course, Congress determined that the organic market was failing in 1990 and adopted the OFPA as the cure. As is clear in the statute, Congress determined that organic products must meet a single national mandatory standard that must be consistently applied by the federal government. *See* 7 U.S.C. § 6501(1-2) Thus the premise of the NOP is that it is correcting a market failure that existed when there were multiple definitions of organic practices. From the outset of the NOP in 2000, "Access to the outdoors" has been required for all organically reared animals. 7 C.F.R. §205.239(a)(1) Today, if there is demonstrable evidence of "consumer deception," on organic products despite the NOP standard that "access to the outdoors" is required, a market failure exists as to that portion of the program.

On January 8, 2018 a class action lawsuit was filed in federal court in the Northern District of California.[10] (hereinafter "Complaint") The Complaint alleges that a major retailer is selling certified organic eggs that are represented as coming from laying birds that have "outdoor access" (as required by the NOP) when the birds do not, in fact, have "outdoor access." The Complaint does not allege the eggs come from facilities that are *not* organically certified. Instead, the complaint argues that the laying hens at these facilities, although certified organic, are "confined to industrial barns and do not actually have access to the outdoors." *Complaint* at ¶22.

> The industrial barns have two main parts: the central interior and the enclosed porches that run along the side. The porches, which purportedly provide outdoor access, are fully roofed and screened, without access to the soil and vegetation surrounding the industrial barns. A reasonable consumer would not deem this outdoor access. *Complaint* at ¶22.

[9] The *OMB Guidelines for Analysis* notes that compelled uniform product standards by agency regulation should be avoided unless a "particularly demanding burden of proof" is applied in order to avoid "unintentional harmful effects on the efficiency of market outcomes." *Id.* at 4. This concern is legally and factually irrelevant here because Congress has already determined the existence of a market failure and the need for mandatory and uniform standards in this marketplace.

[10] *See Gibson v. WalMart and Cal-Maine Foods*, No. 3:18-cv-00134 (N.D. Ca.) *See Attachment 3*

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The Complaint alleges that the failure to provide "outdoor access" while labeled as providing such, violates the (i) California's Business & Professions Code §§ 17200, et seq. (the Unfair Competition Law or UCL); (ii) California Civil Code §§ 1750, et seq. (the Consumers Legal Remedies Act or CLRA); and (iii) California Civil Code §§ 17500, et seq. (the False Advertising Law or FAL). *Id.* at ¶9.

The kind of operation at issue in the California case was identified in the OLPP.

> Poultry practices for outdoor access currently vary, especially practices implemented for layer operations. Some organic poultry operations provide large, open-air outdoor areas, while other operations provide minimal outdoor space or use screened and covered enclosures commonly called "porches" to meet outdoor access requirements.

82 Fed. Reg. at 7043. To reduce the regulatory variance, and thereby eliminate the informational asymmetry in the marketplace, the OLPP defined, "[O]utdoor space and requires that outdoor spaces for organic poultry include soil and vegetation." 82 Fed. Reg. at 7042 The OLPP stated this action was necessary to "[A]lign regulatory language and intent to enable producers and consumers to readily discern the required practices for organic poultry production *and to differentiate the products in the marketplace*.[11] 82 Fed. Reg. at 7044 The failure to implement the OLPP has resulted in the precise market failure identified in the OMB guidance, namely, consumer deception. Additionally, this market failure should be precluded by the OFPA's mandate that uniform standards consistently applied is the core of the National Organic Program—and would be precluded upon implementation of the OLPP.

This class action lawsuit demonstrates that consumers are confused by the "access to the outdoors" requirements of the NOP because the requirements are not consistently applied to require the animals to actually be out of doors. It is also inescapable that the OLPP would eliminate this kind of informational asymmetry.[12] An outcome that fails to address this market failure is arbitrary and capricious on its face and violates the APA.

2. The Public Institution Failure

Even assuming the PRIA is correct in its repeated statements that there is no market failure, which OTA contests, there is a failure of governmental processes that amounts to a failure to comply with the OFPA. The *OMB Guidelines for Analysis* expressly recognize a new regulation may be necessary in the absence of a market failure upon a "demonstration of compelling public need, such as improving governmental processes…" *Id.* at 3. This benefit was not considered by the PRIA.

[11] At the time of publication of the OLPP the Secretary said, "We believe that the space and outdoor access requirements in this proposed rule would enable consumers to better differentiate the animal welfare attributes of organic eggs and maintain demand for these products." 81 Fed. Reg. at 21988.

[12] The Notice of Withdrawal misstates the purpose of uniform and consistently applied product standards by concluding the OFPA, "[D]oes not imply that there should be no variation in organic production practices." 82 Fed. Reg. at 59991 Of course there may be variations in organic practices, but only if the range of variation in such practices conforms to the requirements of the regulation.

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As demonstrated above, Congress mandated adoption of national standards for organically produced products and commanded that these standards be consistently enforced. *See* 7 U.S.C. § 6501(1-2) In March 2010, the USDA's Office of Inspector General conducted an audit of the NOP and issued a report entitled, *Oversight of the National Organic Program.* The Report found inconsistent treatment of outdoor access questions for livestock by accredited certifying agents and noted that AMS "agreed that additional guidance would be beneficial." *Oversight of the National Organic Program,* OIG Audit Report No. 01601-03-Hy at pg. 22 ("OIG Report") *Available at* https://www.usda.gov/oig/webdocs/01601-03-HY.pdf (last visited September 12, 2017). Later, "AMS determined that rulemaking was necessary to reduce the variation in outdoor access practices for organic poultry…" 82 Fed. Reg. at 7043 The OLPP is the rulemaking solution and it is consistent with the principles under the relevant Executive Orders. "Modifications to existing regulations should be considered if those regulations have created or contributed to a problem that the new regulation is intended to correct, and if such changes can achieve the goal more efficiently or effectively." *OMB Guidelines for Analysis* at 4. The OLPP's clarifications are a far better solution to the problem of "inconsistent" application of federal organic standards by certifying agents than class action litigation or Inspector General findings that the enforcement of federal regulations is being conducted in violation of the foundational principles of the OFPA.

III. USDA Possesses Sufficient Statutory Authority to Adopt the OLPP

> "[U]SDA proposes withdrawing the OLPP rule based on its current interpretation of 7 U.S.C. 6905 (sic), under which the OLPP final rule would exceed USDA's statutory authority." 82 Fed. Reg. at 59988
>
> "USDA believes 7 U.S.C. 6509 is the relevant authority for OFPA-related regulations governing animal production practices." 82 Fed. Reg. at 59989
>
> "AMS is proposing to withdraw the OLPP final rule because * * * OFPA's reference to additional regulatory standards "for the care" of organically produced livestock should be limited to health care practices similar to those specified by Congress in the statute, rather than expanded to encompass stand-alone animal welfare concerns." 7 U.S.C. 6509(d)(2). 82 Fed. Reg. at 59989

In other words, the Notice of Withdrawal is based on the construction of a single section of the OFPA—Section 6509. This is an inappropriately crabbed reading of the OFPA and contravenes well settled legal principles. *See e.g. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (noting the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (internal quotation marks omitted)). "[T]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States,* 514 U.S. (2015) quoting *Robinson v. Shell Oil Co.*, 519 U. S. 337, 341 (1997).

The characterization of the OFPA has having a single authorizing section for regulations that might touch upon livestock production practices is manifestly incorrect and the USDA's focus on a single section of the statute is misplaced. Two sections of the OFPA directly contradict the Notice of Withdrawal's statutory construction argument. First,

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> If a production or handling practice is not prohibited or otherwise restricted under this chapter, such practice shall be permitted *unless it is determined that such practice would be inconsistent with the applicable organic certification program.* 7 U.S.C. § 7 U.S.C. 6512

This section plainly and unambiguously authorizes the Secretary to determine if *any production or handling practice* is consistent with the National Organic Program. There is no limitation with regard to livestock practices—the Secretary has complete authority to declare the "porches" that are used in poultry production are disallowed under the NOP, provided solely that the Secretary determines, as was done in the OLPP, that such "porches" are not consistent with the requirements of the NOP. Standing alone this provision would authorize the provisions of the OLPP that the Notice of Withdrawal principally concerns itself with.

> Second, 7 U.S.C. § 6506(a)(11) provides:
>
> A program established under this chapter shall—require such other terms and conditions as may be determined by the Secretary to be necessary.

Language such as this has been repeatedly recognized by federal courts as vesting the widest possible discretion in the agency to act. It appears that USDA has overlooked the existence of this section as it repeatedly casts Section 6509 as the only statutory section that authorizes the OLPP.

> [U] SDA also believes Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, USDA's discretion. *Compare* 7 U.S.C. 6509(g), with 7 U.S.C. 2151 ("The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter"), 82 Fed. Reg. at 59989 fn 3.

And,

> *Compare* 7 U.S.C. 6509(g) (regulations to "guide the implementation of standards for livestock products") with 7 U.S.C. 2151 ("The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter") 82 Fed. Reg. at 59989 fn 6.

And,

> [O]FPA's plain language does not mandate, and arguably limits, the Secretary's authority to promulgate prescriptive rules governing how producers meet programmatic standards.[13] 82 Fed. Reg. at 59989, fn 5

[13] In addition to being in direct conflict with 7 U.S.C. § 6506(a)(11) which authorizes all necessary regulations and imposes no extrinsic "limits" this statement is a breathtaking contradiction to the entire National Organic Program. While no one believes that every on-farm production practice must be prescribed by the NOP, the NOP is a several hundred page federal rule that sets forth in significant detail

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As can be plainly seen by comparing Section 6506(a)(11) to the quoted statements, not only is Section 6509 *not* the only section of the OFPA that authorizes the OLPP, but the breadth of authority that the Secretary suggests would be necessary (but is missing) is in fact expressly granted by the OFPA. Each of the statutory sections cited above must be read in *pari materia* with the other sections of the OFPA that call for development of additional livestock practices cited above. The Notice of Withdrawal identifies the question: "[T]he threshold question should be whether Congress has authorized the proposed action." 82 Fed. Reg. at 59988 59989. This question is simply answered: Yes.

IV. The Construction of the OFPA Advanced in the Notice of Withdrawal Conflicts with Many Existing Organic Regulations

As was pointed out in the OLPP and repeatedly in the many comments in the record, much of the current organic livestock standards pertain to livestock production requirements in addition to those authorized by the construction of Section 6509 advanced in the Notice of Withdrawal. The regulations include entire sections (7 CFR 205.238 – Livestock health care practice standard; 7 CFR 205.239 – Livestock living conditions) that govern the care of livestock which are not specifically mandated in the statute. Additionally, USDA's final *Pasture Rule* issued in 2010 (75 Fed. Reg. 7154) amended the regulations to specify conditions under which organic livestock and poultry may be temporarily confined indoors. The current organic livestock regulations contradict USDA's conclusion that implementation of the OLPP exceeds its statutory authority. *See e.g. Appendix A* (review of guidance materials detailing organic livestock production practices like those the Notice of Withdrawal suggests are not authorized by the OFPA.)

Conclusion

For the foregoing reasons the Notice of Withdrawal should be withdrawn and the OLPP should be implemented without further delay.

Respectfully submitted,

Nathaniel Lewis
Farm Policy Director
Organic Trade Association

cc: Laura Batcha

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precisely how "producers meet programmatic standards." *See e.g.* 7 U.S.C. § 6506(a)(2) and 6513 (requiring organic system plan) With specific regard to the contents of the livestock OSP, 7 U.S.C. § 6513 requires it: "shall contain provisions designed to foster the organic production of livestock consistent with the purposes of this chapter." Nothing in this language restricts livestock production practices to those enacted under Section 6509, or that relate solely to healthcare substances, or cabins the regulations in the manner described by the Notice of Withdrawal.

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Executive Director/CEO
Organic Trade Association

Attachment 1: Denial letter (Response to PR3…)
Attachment 2: Congressional Letter (FINAL OLPP)
Attachment 3: Walmart_OrganicEgg

Appendix A

USDA's "Guide for Organic Livestock Producers" details current requirements for organic livestock production and considerations for producers looking to convert their systems to organic.[14] This guide draws a direct connection between animal welfare concerns and the use of medical treatments.

- "Health management is not only medical treatment of sick animals. It is also the creation of a whole system that optimizes livestock welfare: a system that both minimizes the hazards of disease and supports a strong natural immune response in those instances when stress and pathogens do occur. (pg. 18)
- "Stress increases susceptibility to disease, so lowering stress helps support good health and animal welfare. A low-stress environment encompasses appropriate shelter (with good ventilation, sanitation, and freedom of movement); performing necessary physical alterations such as castration or dehorning in ways that are as humane as possible; moving animals gently and with respect for their inherent behaviors; and keeping animal numbers at appropriate levels to avoid overcrowding. (Pg. 48)
- "Encouraging exercise for pregnant animals leads to better health and smoother deliveries. All animals benefit from having room to carry out normal behavior (e.g., grooming, play, natural maintenance, and comfort behaviors). Exercise leads to improved muscle tone, relieves stress, boosts the immune system, and keeps the animals' overall well-being high. (pg. 49)
- "Animals that are in confinement and very close to each other and animals in cold weather conditions are prone to suffer from ectoparasites. Weather is not something that can be manipulated, of course, but animal density can be controlled with good management strategies. Other preventive strategies could include the following:
    - Employing stress-reducing practices including the following:
        - Providing adequate space for animals to exercise and to eat without excessive competition
        - Providing access to the outdoors
        - Providing quiet, calm care when moving or otherwise working with livestock
- *"Disease*. All systems of poultry production, both organic and conventional, are vulnerable to disease. Non-genetically modified vaccines for viral and bacterial diseases (such as Mareck's disease and salmonella) are allowed under the USDA organic regulations. Many diseases, such as coccidiosis, often can be controlled by good husbandry practices. Keeping flocks stress-free with good nutrition is the first step in any disease-prevention program. Maintaining good biosecurity on the farm can prevent poultry from being exposed to many pathogens. (pg. 96)

[14] https://www.ams.usda.gov/sites/default/files/media/GuideForOrganicLivestockProducers.pdf

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- *"Outdoor access.* e USDA organic regulations specifically require that all livestock, including poultry, have year-round access to the outdoors. Historically, the practical application of outdoor access has varied greatly between producers and certifiers, prompting in-depth discussion and even the possibility of changes in the regulations to make requirements more explicit. Certifiers currently differ in their interpretation of the regulations, especially with respect to the nature and extent of outdoor access. Check with your certifier to be certain that your plan for outdoor access is in compliance with the regulations. (pg. 97)
- *"Density.* Organic regulations require preventative health-care practices and conditions that allow for exercise, freedom of movement, and reduction of stress appropriate to the species. Higher density housing, such as in conventional confined-animal feeding operations, creates stress in the birds. Bare patches in feathering on the heads, necks, backs, and tails of poultry can be indications of pecking due to excessive stress. e perception that physical alterations are needed to promote the animals' welfare is generally higher among producers using house-based systems compared to those using pasture-based systems. The certifier must assess the adequacy of the preventative health-care practices that are in place and whether physical alterations (such as beak trimming, dew claw removal, or dubbing) meets the intent of the regulations. (pg. 97)"

According to foregoing USDA Guide for organic livestock and poultry producers, the link between on-farm animal management practices and overall animal health and welfare (and the reduction of need for medical treatment) is clear. The Guide also points to a number of specific areas of management where organic livestock and poultry farmers should focus to reduce stress, increase animal welfare, and comply with organic requirements: physical alterations, stocking densities, outdoor access, and transportation. The major provisions of the OLPP cover these areas specifically by detailing which physical alterations are permitted and which ones are prohibited; providing specific stocking densities to ensure housing allows for natural behaviors and reduces stress; clarifying a definition for outdoor access to ensure this practice effectively reduces stress and promotes natural behaviors; and providing standards that encompass transportation and slaughter, so animal stress is reduced throughout the production cycle, not only on the farm.

Based on this Guide, organic livestock and poultry farmers rely on management practices that promote animal health and welfare as their first line of defense against disease and pests. While USDA is now asserting that OFPA does not authorize rulemaking beyond medical treatments specifically included in the statue, it is clear, based on USDA's own guide to organic livestock and poultry producers, that welfare and reducing stress in animals has a direct link to livestock and poultry heath. The current standards include numerous requirements that promote animal well-being, and therefore animal health, and the final rule only clarifies the requirements for organic producers around this foundational preventive health care practice.

Moreover, the USDA organic regulations have required outdoor access and adequate space for freedom of movement for organic livestock and poultry since they became final in 2002:

7 CFR 205.239

(a) The producer of an organic livestock operation must establish and maintain year-round livestock living conditions that accommodate the health and natural behavior of animals, including:

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(1) Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment

(4) Shelter designed to allow for:

(i) Natural maintenance, comfort behaviors, and opportunity to exercise;

(ii) Temperature level, ventilation, and air circulation suitable to the species; and

(iii) Reduction of potential for livestock injury;

However, the organic industry has seen an inconsistent application of the regulations, particularly regarding how Accredited Certification Agencies (ACAs) evaluate "outdoor access." The roots of this inconsistency lie in an appeals decision made in October 2002 shortly following the publishing of the final organic standards in the *Federal Register*. In this case, a single operation made application to an ACA to achieve organic certification for its laying operation in Massachusetts. When the certifier conducted the inspection, its determination was that porches did not satisfy the outdoor access requirements under the organic standards, and it issued a Proposed Notice of Denial of Certification. The operation then appealed the decision, and three days following, the ACA received notification that USDA had sustained the appeal and was directed to retroactively grant certification to the date of the Proposed Notice of Denial of Certification. It is upon this single sustained appeals decision at USDA that the allowance of "porches" to be considered outdoor access rests. The National Organic Program never amended the regulations in response to this appeals decision, and inconsistency among ACA's enforcement of outdoor access requirements has existed in the organic industry ever since. Most ACAs do not allow porches to satisfy outdoor access requirements, thus creating an uneven playing field between producers depending on which ACA they choose for certification services.

The Accredited Certifiers Association, which represents most ACAs operating under USDA accreditation, including 14 ACAs housed in State Departments of Agriculture, has indicated on numerous occasions its wish for consistent and clear standards to enforce and that the final rule become effective without further delay. This final rule provides the clarity and consistency ACAs are asking for. The final Organic Livestock and Poultry Practices rule would prevent future inconsistency regarding outdoor access and ensure a level playing field for all organic livestock and poultry operations.

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Appendix B

The OLPP is the product of more than a decade of public deliberation, compromise, and unanimous National Organic Standard Board recommendations. It is supported by the vast majority of organic producers, handlers, and consumers. It eliminates inconsistencies among Accredited Certification Agencies (ACAs) on the interpretation and application of the organic standards on organic poultry and livestock operations; and it accomplishes these benefits with a generous and staggered implementation timeline to accommodate the adjustments individual businesses may need to make to come into compliance with the added clarification this final rule provides.

USDA's proposed action is based off of only 28 of the more than 47,000 comments submitted in the 2nd Proposed Rule issued on May 10, 2017 requesting public input on four options for agency action (82 Fed. Reg. 21742). 28 commenters recommended withdrawing the final rule, a few suggested suspending the rule, 1 commenter suggested delaying the effective date, and the remaining commenters (at least 40,000 by USDA's analysis) requested that USDA allow the rule to become effective. USDA is ignoring the public and transparent process by which this rule was developed and the overwhelming support for the rule among producers, handlers, consumers, and trade associations. This is unacceptable.

- **1995-2000:** NOSB made a series of recommendations that were incorporated into the final rule establishing the USDA organic regulations in 2000. These included healthcare practices, outdoor access and livestock living conditions.

- **2002:** The USDA organic regulations were implemented, and a sustained appeals decision resulted in inconsistent application of outdoor access requirements among ACAs and in the organic poultry sector.

- **2010:** An audit conducted by USDA's Office of the Inspector General (OIG) identified inconsistencies in certification practices regarding outdoor space.

- **2011:** NOSB unanimously adopted a final detailed set of recommendations that were intended to further define, clarify and incorporate production practices including provisions establishing maximum ammonia levels, perch space requirements, outdoor access clarifications, specific indoor and outdoor space requirements and stocking densities for avian species.

- **2013-2017:** NOP released an economic analysis of two options for regulations regarding outdoor access for poultry and indicated it would pursue rulemaking to clarify outdoor access based on the NOSB recommendations.

- **2016**: NOP released a proposed rule (81 Fed. Reg. 21955) to ensure consistent application of the organic regulations for livestock and poultry operations.

- During the rulemaking process, NOP completed an additional economic analysis at the request of Congress and stakeholders.

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- **2017:** NOP released the final rule incorporating producer feedback provided in the comment period. The rule was published in the *Federal Register* on January 19, 2017 (82 Fed. Reg. 7042). Due to the White House Memorandum to federal agencies released on January 20, 2017, requesting a regulatory freeze on rules recently published or pending, the effective date of the rule was delayed to May 19, 2017. On May 10, 2017, USDA delayed the effective date by an additional six months to November 14, 2017, and reopened the comment period. Over 47,000 comments were received on this 2nd proposed rule with over 40,000 of those comments requesting USDA to allow the rule to become effective. On November 14, USDA delayed the effective date, yet again, to May 14, 2018 based on the recommendation of a single commenter (82 Fed. Reg. 53643).

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USDA Agricultural Marketing Service

1400 Independence Avenue, SW
Room 3071-S, STOP 0201
Washington, D.C. 20250-0201

JAN 10 2018

Ms. Kelley Poole
Vice President of Government Affairs
Organic Trade Association
444 North Capitol Street NW, Suite 445-A
Washington, D.C. 20001

Dear Ms. Poole:

Thank you for your letter of December 22, 2017, regarding the Organic Livestock and Poultry Practices rulemaking. You requested a 60-day extension of the comment period for the proposed rule to withdraw the Organic Livestock and Poultry Practices final rule.

On November 14, 2017, the Agricultural Marketing Service (AMS) announced in the Federal Register that the effective date of the Organic Livestock and Poultry Practices final rule is delayed until May 14, 2018. AMS published a proposed rule to withdraw the Organic Livestock and Poultry Practices final rule in the Federal Register on December 18, 2017. The 30-day public comment period closes on January 17, 2018.

AMS is providing a 30-day public comment period so that we can consider the public comments received on the proposed withdrawal and make a final decision on the Organic Livestock and Poultry Practices rule by the current effective date of May 14, 2018. We are not granting your request for a 60-day extension of the public comment period because interested parties had the opportunity to comment on the underlying Organic Livestock and Poultry Practices final rule in 2016, as well as the rulemaking in 2017 that culminated in the delay of the effective of this final rule until May 14, 2018. The proposed rule presents discrete issues that interested parties should be able to address within the current comment period. Additionally, extending the comment period would prevent AMS from resolving the status of the Organic Livestock and Poultry Practices rulemaking by May 14, 2018.

Thank you again for your engagement in this rulemaking. I will be submitting your letter and my response to the docket for this rulemaking (docket number AMS-NOP-15-0012).

Sincerely,

Bruce Summers
Acting Administrator

Congress of the United States
Washington, DC 20515

January 17, 2018

The Honorable Sonny Perdue
Secretary
United States Department of Agriculture
1400 Independence Ave, SW
Washington, DC 20250

Dear Secretary Perdue:

We write today to address misinterpretation of the U.S. Department of Agriculture's (USDA) regulatory authority under the Organic Foods Production Act of 1990 (OFPA).

In its latest Federal Register notice on the issue, published on November 14, 2017, the Agricultural Marketing Service (AMS) stated: "Although animal welfare is an important USDA priority, AMS believes that OFPA's reference to additional regulatory standards 'for the care' of organically produced livestock is limited to health care practices similar to those specified by Congress in the statute, rather than as reflecting a stand-alone concern for animal welfare." As the original sponsors of the organics legislation, we write to make clear that this recently-developed belief is misguided, as the statutory language and legislative history make clear.

Twenty-seven years ago, Congress passed OFPA as part of the 1990 Farm Bill. This was in an effort to establish consistent, national standards applicable to agricultural products, including livestock, sold or marketed as "organic" and those purposes of OFPA were reflected directly in the statute and the final 1990 Farm Bill (7 U.S.C. §§ 6501). We were clear in the bill that "livestock" included poultry (7 U.S.C. § 6502(11), and that all "livestock to be slaughtered and sold or labeled as organically produced" must be raised in accordance with statutory requirements (7 U.S.C. § 6509(a).

One difficulty we had in establishing detailed livestock raising requirements in 1990 was that the organic livestock sector was still in its infancy, as was noted in the Senate Report 101-357 to accompany S. 2830, the Food, Agriculture, Conservation, and Trade Act of 1990. However, we recognized then the immense opportunity for growth, and therefore proposed a partnership model between government and private organizations in standard setting and certification. This resulted in the idea behind the National Organics Standard Board ("NOSB"), which could use the growing experience of the private, grassroots farmers to shape organic standards.

Of course it would not have made any sense for Congress to constrict the influence of the NOSB in the way AMS's current interpretation does. That is why Senate Report 101-357 explained that: "The Committee regards this Board as an essential advisor to the Secretary on *all issues* concerning this bill and anticipates that many of the **key decisions concerning standards** will result from recommendations by this Board." To reflect the importance of the NOSB in developing the organic program through full participation on a wide range of issues, and not just those pertaining to "health care," Congress included the consultation requirement in the statute.

With respect to the "health care" provisions alluded to by AMS in the latest rulemaking, it is true that Congress enumerated three prohibited practices regarding the application of antibiotics, synthetic parasiticides, and other medication. However, Congress also clearly required the NOSB to recommend standards "in addition to" these "for the care of livestock." Nonetheless, the AMS is interpreting the inclusion of NOSB's "addition[al]" recommendations "for the care" of organically produced livestock in this statutory section as an indication that Congress intended to limit the USDA's regulatory authority for rules relating to living conditions and animal welfare. This belies the true congressional intent, as outlined in the Senate Report, where it was explained why Congress added the NOSB recommendations provision to this section: "The Committee expects that, after due consideration and the reception of public comment, the Board will best determine the necessary balance between the goal of restricting livestock medications and the need to provide humane conditions for livestock rearing." Congress was also aware of the need for more research to be done in areas not limited to medical attention or the "health care" needs of animals. Indeed, as was stated in the Senate Report, "[w]ith additional research and as more producers enter into organic livestock production, the Committee expects that USDA, with the assistance of the National Organics Standard Board, will elaborate on livestock criteria."

The congressional intent was clear in providing the USDA broad regulatory authority—that is, authority not "limited to health care practices similar to those specified by Congress in the statute"—could not be any clearer. Further, when Congress passed the 1990 Farm Bill, it directed USDA to conduct research on a number of topics, such as "the development of efficacious protocols and materials for handling organically produced products and improvements in the technology of organic livestock production." Of course, it would have made little sense to direct and fund such research, while restricting the agency's authority in such a way as to make implementation of the findings impossible.

Finally, the Conference Report produced after the House and Senate agreed on language for the final 1990 Farm Bill should resolve any further question in this matter. With respect to animal production practices and materials, Congress explained: "The Conference substitute adopts the House provision with an amendment which requires the Secretary to hold hearings ***and develop regulations regarding livestock standards in addition to those specified in this title.*** This language was broad and clear on the USDA's authority to promulgate, through notice and comment, regulations regarding "livestock standards" that are "in addition to" any of those specified in the original language that became law in 1990. There is zero evidence in the statutory language, the Conference Report, or the Senate Report indicating a congressional intent to limit or in any way restrict the USDA's rulemaking authority when relying on the NOSB to develop animal raising standards for certification within the National Organic Program. To the contrary, the Conference Report reflected an agreement reached between the House and Senate, Congress was unequivocal that the opposite was true: Congress "recognize[s] the need to *further elaborate* on the standards set forth in the title and expect that by holding public discussions with interested parties and with the National Organic Standards Board, the Secretary will determine the necessary standards...".

The now thrice-delayed organics rule would continue the process initiated with the access to pasture rule finalized in 2010, and would, in keeping with the purposes of OFPA, establish clear

and consistent standards for all organic livestock. We feel strongly that the rule is consistent with recommendations provided by USDA's Office of Inspector General, and nine separate recommendations from the NOSB. It will align regulatory language and congressional intent to enable producers and consumers to readily discern the required practices for organic poultry production and to differentiate the products in the marketplace. This is as Congress intended when it enacted OFPA and established the NOSB.

Sincerely,

PATRICK LEAHY
United States Senator

PETER DeFAZIO
United States Representative

Attachment 3

Steve W. Berman (*pro hac vice* pending)
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Attorneys for Plaintiff and the Proposed Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DONNIE LEE GIBSON II, on behalf of himself and all others similarly situated,

Plaintiff,

v.

WAL-MART STORES, INC., a Delaware corporation, CAL-MAINE FOODS, INC., a Delaware corporation,

Defendants.

Case No. 3:18-cv-00134

CLASS ACTION

COMPLAINT

DEMAND FOR JURY TRIAL

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JURY TRIAL DEMAND 31

Plaintiff Donnie Lee Gibson II (plaintiff) brings this action on behalf of himself and all others similarly situated against Wal-Mart Stores, Inc., and Cal-Maine Foods, Inc., both Delaware corporations (collectively, defendants). Plaintiff's allegations against defendants are based upon information and belief and upon investigation of plaintiff's counsel, except for allegations specifically pertaining to plaintiff, which are based upon his personal knowledge.

I. OVERVIEW

1. America's largest and most profitable food companies should be honest and forthright in their dealings with consumers. When these food companies fail to uphold their responsibility for ensuring truthful advertising to consumers, such consumers are deceived into paying more for products or buying products that they otherwise would not have. Such food companies should be required to make restitution to the consumers they have deceived.

2. Walmart is the largest and most profitable retailer in the world. Walmart is responsible for the marketing and sale of shell eggs to consumers across the United States, including in California, under various store brands, including its own private label.

3. Cal-Maine is one of the largest and most profitable shell egg companies in the United States. Cal-Maine is responsible for the production and marketing of shell eggs to consumers nationwide, including in California, under various store brands, including a private label for Walmart.

4. Defendants market these private label eggs as having provided the laying hens "with outdoor access." Consumers typically pay a significant premium for such eggs, due to the perceived improvements to the welfare of laying hens.

5. A recent investigation performed by plaintiffs' counsel, however, demonstrates that the Cal-Maine hens supplying these private label eggs for Walmart do not actually have access to the outdoors.

6. Instead, Cal-Maine confines its laying hens to industrial barns without outdoor access. Upon counsel's investigation of one such industrial barn complex, there was not a single hen outside on the grounds. Rather, the hens are kept inside enclosed structures, never stepping foot out onto the

pasture surrounding the industrial barns. The industrial barns have two main parts: the central interior and the enclosed porches that run along the side. The enclosed porches, which purportedly provide outdoor access, are fully roofed and screened. A reasonable consumer would not consider this barred and screened porch to be outdoor access:

7. And each porch can hold only a small fraction of the flock housed in the industrial barn. Indeed, inside one porch, only about one hundred of tens of thousands of hens—less than 1% of the flock—were visible. And inside another porch, there were fewer still. This is not outdoor access for the laying hens, as promised by defendants to the consumers paying a premium for it.

8. Thus, consumers paying more for these eggs have been deceived. Defendants falsely advertise their "farm fresh" eggs as having been laid by hens "with outdoor access," such that they have failed to meet their basic obligation of truthfulness to consumers. A recent survey demonstrates that a reasonable consumer believes outdoor access to mean that all animals have access to outdoor pasture and fresh air throughout the day. Had plaintiff and class members known the truth, they would not have purchased these private label eggs or paid as much for them.

9. Accordingly, defendants' conduct described herein violates the (i) California's Business & Professions Code §§ 17200, *et seq.* (the Unfair Competition Law or UCL); (ii) California Civil Code §§ 1750, *et seq.* (the Consumers Legal Remedies Act or CLRA); and (iii) California's

Business & Professions Code §§ 17500, *et seq.* (the False Advertising Law or FAL). Plaintiff brings this action on behalf of a California class for restitution, injunctive relief, and any other relief deemed appropriate by the court to which this case is assigned.

II. PARTIES

10. Plaintiff Donnie Lee Gibson II is a resident of Pittsburg, California. During the year preceding the filing of this complaint, plaintiff regularly purchased Organic Marketside private label shell eggs from Walmart in the state of California. Prior to purchase, plaintiff saw the product packaging stating that the hens were provided "with outdoor access." Plaintiff Gibson would not have purchased the shell eggs or paid as much for them had defendants disclosed the truth. Plaintiff seeks restitution and injunctive relief requiring defendants to cease their deceptive marketing and sale of private label eggs marketed as providing hens "with outdoor access."

11. Wal-Mart Stores, Inc., is a Delaware company with its principal place of business in Bentonville, Arkansas. Wal-Mart is responsible for the marketing and sale of shell eggs to consumers under its Organic Marketside private label.

12. Cal-Maine Foods, Inc., is a Delaware corporation headquartered in Jackson, Mississippi. Cal-Maine is responsible for the production, processing, and marketing of shell eggs to consumers throughout the United States, including in California, under various store brands, including Organic Marketside for Walmart.

III. JURISDICTION AND VENUE

13. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332(d), because the amount in controversy for the Class exceeds $5,000,000, and the class includes members who are citizens of a different state than defendant.

14. This Court has personal jurisdiction over defendant because the injury to plaintiff and class members arises from the marketing and sale of shell eggs in California.

15. Venue is proper in this Court under 28 U.S.C. § 1391(b), because Wal-Mart Organic Marketside shell eggs are sold throughout the State of California, including in this judicial district.

IV. FACTUAL ALLEGATIONS

A. Defendants Are Responsible for the Marketing and Sale of Store-Brand Eggs for Walmart, Labeled as Having Come From Hens "With Outdoor Access."

16. According to its website, Cal-Maine is the "largest producer and marketer of shell eggs in the United States."[1] It operates in a single segment, "which is the production, grading, packaging, marketing and distribution of shell eggs."[2] In 2016, Cal-Maine sold over twelve billion shell eggs, representing approximately 23% of domestic shell egg consumption.[3] Besides its own brands, Cal-Maine "produce[s], market[s], and distribute[s] private label specialty shell eggs."[4]

17. Walmart (including Sam's Club) is Cal-Maine's top customer, representing almost 30% of Cal-Maine's total sales in 2016.[5] Cal-Maine produces and packages eggs to be sold under Walmart's store brands. One of those private labels is Organic Marketside.

18. Walmart is the "largest retailer in the world," with over 260 million customers and revenue of $485.9 billion for fiscal year 2017.[6] Its supercenters "offer a one-stop shopping experience by combining a grocery store with fresh produce, bakery, deli and dairy products with electronics, apparel, toys and home furnishings."[7] Likewise, its neighborhood markets "offer fresh produce, meat and dairy products, bakery and deli items, household supplies, health and beauty aids and a pharmacy."[8] Wal-Mart markets and sells shell eggs to consumers under its Organic Marketside private label, including those produced and packaged by Cal-Maine.

19. These private label shell egg cartons are each marked with a USDA plant number associated with the egg processor. For example, P1100 is the USDA plant number for one of Cal-Maine's major industrial complexes, located in Chase, Kansas[9]:

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[1] http://calmainefoods.com/company/.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] http://calmainefoods.com/media/1133/calm-october-2016.pdf, at 12.

[6] https://corporate.walmart.com/our-story.

[7] https://corporate.walmart.com/our-story/our-business.

[8] *Id.*

[9] https://apps.ams.usda.gov/plantbook/Query_Pages/PlantBook_Query.asp#PlantNumber.

20. P1100 is a certified organic operation for the handling of shell eggs.[10] Cal-Maine also owns certified organic production facilities in Chase, Kansas. Accordingly, Cal-Maine produces shells eggs at its facilities in Chase, Kansas, and then packages them at its plant in Chase, Kansas, for marketing and sale under private label for Walmart.

21. As depicted, defendants advertise these store brand "farm fresh" eggs as laid by hens "free to roam, nest and perch in a protected barn with outdoor access":[11]

22. As described below, however, Cal-Maine's hens are confined to industrial barns and do not actually have access to the outdoors.

[10] https://organic.ams.usda.gov/Integrity/Search.aspx.

[11] And plaintiff notes that the abstract packaging is, in part, grass green, with a hen in mid-step.

B. The Hens Producing Cal-Maine's Store-Brand Eggs for Walmart Are Actually Confined to Industrial Barns, Without Outdoor Access.

23. Along with Cal-Maine's 24,000 square foot packing plant (P1100) on Avenue K in Chase, Kansas, Cal-Maine's neighboring parcel on 6th Road has eight industrial poultry houses, each measuring 370 feet by 113 feet and each housing tens of thousands of hens, as partially depicted in this picture taken before the completion of construction:

24. In 2014, Cal-Maine completed its acquisition of Delta Egg Farm, LLC, which included the above-depicted "organic egg production complex with capacity for approximately 400,000 laying hens located near Chase, Kansas."[12] As stated in its 2014 annual report, after its acquisition of Delta Egg Farm, Cal-Maine embarked on an "organic facility expansion" in Chase,

[12] http://www.businesswire.com/news/home/20140217005423/en/Cal-Maine-Foods-Announces-Agreement-Acquire-Remaining-Interests. Property records show that Delta Egg Farm, LLC, was the prior owner of this parcel 080-067-26-0-00-00-005.00-0.

Kansas.[13] Since that time, Cal-Maine has doubled the industrial barns at this location from four to eight.

25. In September and October of 2017, on days when it was 84°F and 70°F, respectively, counsel investigated this Cal-Maine industrial egg farm. Outside on the grounds, there was not a chicken in sight. Instead, Cal-Maine confines its laying hens to industrial barns without outdoor access. The hens are kept inside these enclosed structures, never stepping foot out onto the pasture surrounding the industrial barns. The industrial barns have two main parts: the central interior and the enclosed porches that run along the side. The porches, which purportedly provide outdoor access, are fully roofed and screened, without access to the soil and vegetation surrounding the industrial barns. A reasonable consumer would not deem this outdoor access.

26. In addition, each porch can hold only a small fraction of the flock housed in the industrial barn. Indeed, inside one porch, only about one hundred of tens of thousands of hens—less than 1% of the flock—were visible. And inside another porch, there were fewer still. This is not outdoor access for the hens, as promised by defendants to the consumers paying a premium for it

27. Pictures taken during counsel's investigation document the lack of outdoor access for the laying hens. In the below picture, you can see in the distance the completed construction of the eight industrial barns:

[13] http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjQ5NjU3fENoaWxkSUQ9LTF8VHlwZT0z&t=1, at 13.

28. As you get closer, you can see that each barn has fans at the end to circulate air inside the barn, with screened porches running along each side:

29. Viewed head on, with trucks parked to the right, you can see that the porches are completely enclosed—with the same roof as the interior part of the industrial barn, an enclosing wall on one side and enclosing bars with screening on the other side:

30. A closer view of the enclosed porches confirms that they are without access to non-enclosed space or to the pasture surrounding the industrial barns. The theoretical ability to view the outdoors is not the same as having access to it:

31. The man standing in the porch provides perspective on the vast size of these industrial barns—the screened side is three times his height:

32. Here is a close up of the individual, who is maneuvering an interior door, which separates the enclosed porch into sections:

33. To the right of the man's feet, you can see one of the lower popholes that provide access for a small fraction of the laying flock to the enclosed porch:

34. And this picture also shows points of debris on the screen that runs across the vertical slats and keeps the hens on the enclosed porch:

35. The below picture shows another of the approximately four lower popholes along each side of the vast industrial barn:

36. And because this is a multi-tiered barn, there are also approximately four upper popholes along each side. You can see the little door at the top of the ramp (recall that the man was one third the height of the screened side):

37. And here is a close up of an upper pophole:

38. When counsel's investigation continued in October, the man shown above to demonstrate proportion was no longer working on the interior door of the porch. Yet inside the porch visible from the road, there were only about one hundred of the tens of thousands of laying hens housed in the barn—or less than 1% of the flock. And none were actually outside the enclosure pecking in the soil and vegetation surrounding the industrial barns.

39. Here are a few hens at one end of the screened and barred porch:

40. And here is a closer view of hens at one end of the enclosed porch:

41. Here are hens seen at the base of the long ramp/steps:

42. And here is a closer view of hens at the base of the ramp/steps. None is able to leave the industrial barn or peck and scratch in the soil and vegetation surrounding the industrial barn:

43. Here are hens clustered near a lower pophole:

44. And here are some hens scattered in between popholes. None have outdoor access—they can only look out at it:

45. At a second enclosed porch, even fewer hens were present:

46. Of the twenty or thirty seen along the length of this porch, here is a hen on the platform at the top of the ramp/steps:

47. And here is a hen near the base of the ramp/steps. This is not access to the outdoors:

48. Thus, each of these eight industrial barns, together housing hundreds of thousands of hens, has roofed porches running along both sides, enclosed by bars and screening, without any access to the soil and vegetation surrounding the industrial barns. A reasonable consumer would not consider this to be "outdoors."

49. Moreover, each porch can hold only a tiny fraction of the tens of thousands of hens housed in the central interior of the structure.

50. Further, only a tinier fraction still—less than 1% of the flock—was seen out on the enclosed porches. There are multiple reasons for this.

51. Each enclosed porch has popholes through which some hens can enter from the central portion of the barn into the porch and later exit the porch back into the central portion of the barn. For each of these barns, however, there is only two porches with about eight popholes each, including both lower and upper, such that any one of the tens of thousands of hens inside each industrial barn would need to travel over an immense quantity of birds to get to a pophole. But hens are not naturally inclined (or even physically capable) of trampling or flying over much of a massive flock to get to pophole. Rather, the natural behavior of chickens precludes them from aggressively encroaching on the space of other birds in an effort to reach a door. In addition, the hens entering the enclosed porch from the upper pophole need to walk down a long, steep ramp to reach the bottom. For these reasons, a reasonable consumer would not consider the popholes of industrial barns to provide meaningful access to the enclosed porches—and certainly not access to the outdoors.

52. Thus, a claim that hens housed in such a manner are provided "with outdoor access" is false and misleading both as to "access" and as to "outdoors." Instead, Cal-Maine's hens are confined to industrial poultry houses and do not have actual outdoor access, rendering defendants' packaging of the eggs false and misleading.

C. The "With Outdoor Access" Label Is Material to Consumers.

53. Surveys consistently demonstrate that consumers have become increasingly interested in farm animal welfare. According to an online survey of 1,000 Americans dated June 29, 2016, more than three in four (77%) consumers say that they are concerned about the welfare of animals

that are raised for human food, including laying hens.[14] In addition, "more than two-thirds (69%) of consumers pay some or a lot of attention to food labels regarding how the animal was raised."[15] And consumers' concern "about how animals are raised has increased over time, as 74% of consumers say they are paying more attention to the labels that pertain to how an animal was raised than they were five years ago."[16]

54. Part of raising animals in a way beneficial to their welfare includes maintaining living conditions and health care practices in a way that accommodates the health and natural behavior of the animals, including laying hens. True outdoor access is intended to ensure a production system that provides living conditions that allow the chickens to satisfy their natural behavior patterns and provides preventative health care benefits. Such true outdoor access contributes to preventative health care management by enabling hens to develop and reproduce under conditions that reduce stress, strengthen immunity, and deter illness. And true outdoor access affords hens the freedom of choice to satisfy natural behavior patterns. Being outside in the sunlight to engage in natural behaviors like scratching in the soil and pecking in the grass thus improves the welfare of laying hens. Here is an example of a large-scale egg farm with hens that are actually outdoors:

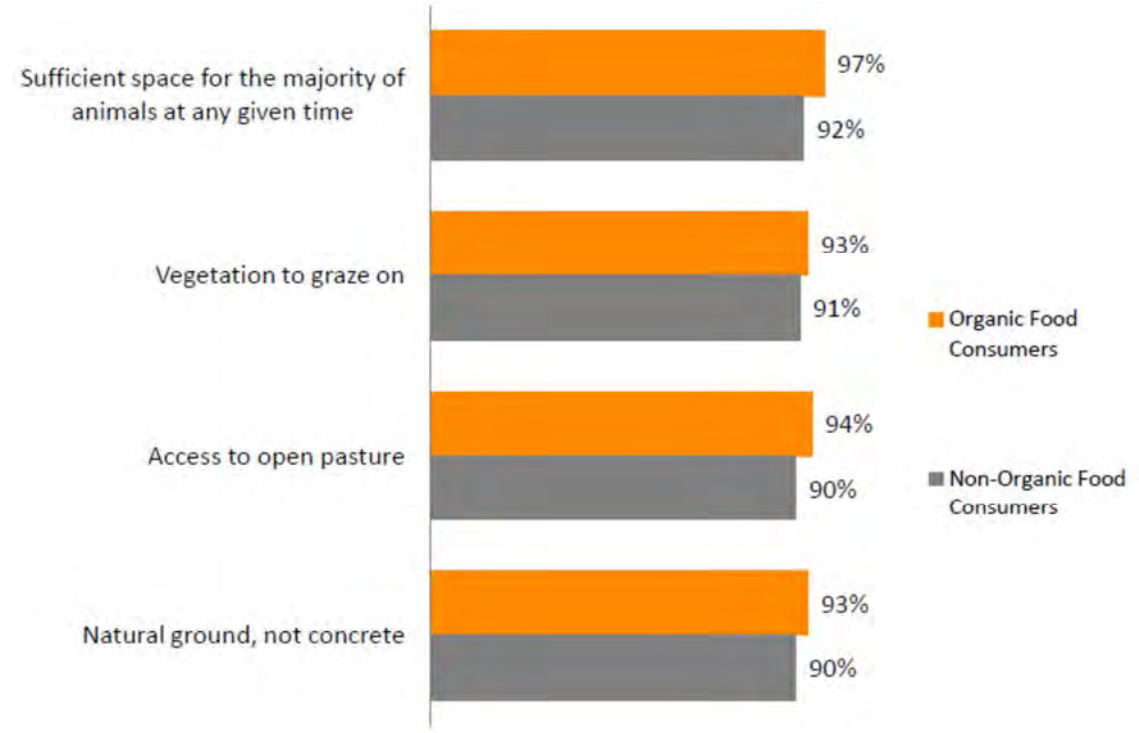
[14] https://www.aspca.org/animal-cruelty/farm-animal-welfare/aspca-farm-surveys; https://www.aspca.org/sites/default/files/publicmemo_aspca_labeling_fi_rev1_0629716.pdf.

[15] *Id.*

[16] *Id.*

55. Accordingly, the "with outdoor access" claim is material to consumers, and defendants therefore use that purported attribute to tout its product. But, as set forth above, that claim is false and misleading to consumers.

56. Indeed, an April 2104 survey of 1,000 consumers nationwide conducted by the American Society for the Prevention of Cruelty to Animals, found that almost seventy percent of consumers (68%) believe outdoor access to mean that "[a]ll animals have access to outdoor pasture and fresh air throughout the day."[17] Moreover, consumers believe the following should be conditions of outdoor access:[18]



57. Thus, it is materially misleading for defendants to claim that the hens are provided "with outdoor access" when a reasonable consumer believes that to mean there is access for the majority of animals at any given time to open pasture and vegetation throughout the day.

[17] http://www.aspca.org/sites/default/files/aspca_organic_labeling_public_memo_4-10-14.pdf.

[18] *Id.*

58. Another recent article asks its readers: "Does 'outdoor access' mean claws on grass? Or are screened-in porches acceptable?"[19] The overwhelming response was that porches are not acceptable. For example, consumers had the following to say:

- Yes, of course! How can they call them free range if they can't even go outside?

  Tracylekels (9/17/17)

- Yes. If labeled organic and free range, they must eat organic feed and roam outside at will.

  BDSmith (9/17/17)

- This is a no brainer.....let the chickens or hens graze outdoors in large fields if you want to be able to call them free range, and organic. The poultry industry has been playing word games with the wording a vast majority of all their products. The public truest has no idea what their [sic] purchasing based on these misleading labels, and this is wrong.

  Brad (9/17/17)

- Yes! We pay more for the eggs and chicken meat with the belief that these animals are treated humanely and with as natural a diet as possible only to find out they are treated as terribly as most factory farmed animals. If I'm gonna pay extra I want them to be out there enjoying outside, eating bugs and being free range!

  Abbi (9/17/17)

- 'Porches'? Give me a break--this cute name obscures the fact that this is just a way of reintroducing factory farming for organic hens. Truth in advertising! The standard is about

[19] https://www.countable.us/articles/1114-organic-chickens-outdoor-access.

> ensuring that consumers know what they are buying, without having to be detectives and visit personally every farm that claims its hens are organic. 100,000 hens in each coop, smack up against another coop, with no outside access, should not be called 'organic.' The whole point of organic regulations is to reconnect the animals with nature. A concrete floor with screening, aka 'porch,' with no grass, sun, natural water source, or room to move is not nature.
>
> Jerise (9/18/17)

- Should free range mean free range? Of course! The real issue seems to be that corporate interests will pay lawyers a huge amount of money to try to twist common language and get around the meaning of the labels in the hopes that the profit they make with delays and arguments and getting away with abuses.

  Lucinda (9/18/17)

59. So it is materially misleading for defendants to claim that laying hens are provided "with outdoor access" when reasonable consumers believe this to mean that the hens can put their claws in the grass—not be confined to enclosed porches.

60. To be sure, under new, clarifying regulations issued during the Obama administration but presently postponed under the Trump administration until May 14, 2018,[20] defendants would not even qualify for use of the "organic" label under the National Organic Program (NOP), which governs use of the term "organic."[21] Use of "organic" on the label requires, *inter alia*, that there is "access for all animals to the outdoors,"[22] but the comments received by USDA demonstrated "there is a gap between how consumers think birds are raised on organic farms and the actual practices of

[20] 82 Fed. Reg. 52643.

[21] 7 C.F.R. §205.102.

[22] 7 C.F.R. § 205.239.

some—but not all—organic producers"[23] using the porch system, because "consumers expect that organic birds come into contact with soil and vegetation and can exhibit natural behaviors."[24]

61. Indeed, a recent Los Angeles Times article describes the porch system as a "loophole in organic regulations that has allowed factory egg farms, some with 100,000 hens to a barn, to earn an organic imprimatur without much more than a nod to letting chickens leave their coop—that is, attaching a gated, screened porch to their barns."[25] And, as an industry insider notes, when you put hens in "a building with no windows, no natural light and a screened porch and label it as 'organic,'" consumers are "going to be a little bit ticked off."[26]

62. Thus, under the clarifying regulation if and when it becomes effective, Cal-Maine's private label eggs for Walmart here at issue would not even qualify as "organic."[27] But defendants take their marketing one step further—beyond the purview of the NOP—and affirmatively describe the hens as free to roam "with outdoor access" though that description is false and misleading to a reasonable consumer.

D. Eggs Touting Animal Welfare Attributes Command a Significant Price Premium Over Conventional Eggs.

63. As further evidence of its materiality to consumers, consumers usually pay a significant price premium for eggs touting animal welfare attributes. The Cal-Maine eggs marketed

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[23] 82 Fed. Reg. 7042, 7068.

[24] USDA Agricultural Marketing Service, National Organic Program, *Organic Livestock and Poultry Practices Final Rule: Questions and Answers* (Jan. 2017), at 1, available at https://www.ams.usda.gov/sites/default/files/media/OLPPExternalQA.pdf.

[25] http://www.latimes.com/business/la-fi-organic-eggs-20171121-story.html.

[26] *Id*.

[27] The clarifying regulation at § 205.241 includes, *inter alia*, the following outdoor space requirements: "(1) Access to outdoor space and door spacing must be designed to promote and encourage outside access for all birds on a daily basis…. (2) At least 50 percent of outdoor space must be soil. Outdoor space with soil must include maximal vegetative cover appropriate for the season, climate, geography, species of livestock, and stage of production…. (4) For layers (Gallus gallus), outdoor space must be provided at a rate of no less than one square foot for every 2.25 pounds of bird in the flock…." 82 Fed. Reg. 7042, 7091. Outdoor access need not be provided for pullets under 16 weeks of age or during nest box training not to exceed five weeks. *Id*. at 7092.

And § 205.2 defines soil as the "outermost layer of the earth comprised of minerals, water, air, organic matter, fungi, and bacteria in which plants may grow roots," and vegetation is defined as "[l]iving plant matter that is anchored in the soil by roots and provides ground cover." *Id*. at 7089.

and sold at Walmart are no exception. There is a premium for cage-free eggs as compared to conventional eggs, and a further premium still for cage-free eggs "with outdoor access":

Shell Egg Product	Specialty Description	Cost
Great Value (Walmart Brand)	No	$1.86
Marketside (Walmart Brand)	Yes, cage free	$2.98
Organic Marketside (Walmart Brand)	Yes, cage free with outdoor access	$3.97

For a premium price:

And for a further premium still:

64. Thus, consumers pay a significant premium for Cal-Maine's private label eggs for Walmart, and in particular for "outdoor access," which further supports the materiality of their marketing claim to consumers.

65. Indeed, defendant Cal-Maine acknowledges that prices for such specialty eggs are generally higher because their perceived benefits are important to consumers. As it reports online, "We are one of the largest producers and marketers of value-added specialty shell eggs in the U.S." and "we classify nutritionally enhanced, cage-free, organic and brown eggs as specialty products."[28] As of 2017, specialty eggs represent 24.69 percent of dozens sold and 50.3 percent of Cal-Maine's sales revenue.[29] As it explains: "Prices for specialty eggs…are generally higher due to consumer willingness to pay for the perceived increased benefits from those products."[30]

66. Survey data supports Cal-Maine's acknowledgement: 81% of respondents to a poll of 1,204 adults nationwide stated that they were "willing to pay more for eggs from chickens" that they know were "raised in a humane manner."[31]

V. CLASS ACTION ALLEGATIONS

67. Under Rule 23 of the Federal Rules of Civil Procedure, plaintiff seeks certification of a class defined as follows:

> All consumers who purchased Cal-Maine shell eggs sold under the Organic Marketside private label for Walmart in California during the four years prior to the filing of the complaint.

68. Excluded from the class are defendants; the officers, directors or employees of defendants; any entity in which any defendant has a controlling interest; and any affiliate, legal representative, heir or assign of defendants. Also, excluded from the class are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

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[28] http://calmainefoods.com/company/.

[29] http://calmainefoods.com/media/1133/calm-october-2016.pdf, at 24.

[30] http://calmainefoods.com/company/.

[31] *U.S. Public Supports Humane* Treatment *for Hens*, Zogby International for Farm Sanctuary (Sept. 2000), accessible at http://www.isecruelty.com/poll.php.

69. Plaintiff does not know the exact number of class members at the present time. However, due to the nature of the trade and commerce involved, there appear to be tens if not hundreds of thousands of class members such that joinder of all class members is impracticable.

70. The class is defined by objective criteria permitting self-identification in response to notice, and notice can be provided through techniques similar to those customarily used in other consumer fraud cases and complex class actions.

71. There are questions of law and fact common to the class. Defendants' deceptive marketing and sale of shells eggs similarly impact class members, all of whom purchased and paid more than they should have for shell eggs.

72. Plaintiff asserts claims that are typical of the class. Plaintiff and all class members have been subjected to the same wrongful conduct because they all have purchased deceptively advertised shell eggs. As a result, and like other members of the class, plaintiff purchased and paid an amount for shell eggs which he otherwise would not have paid.

73. Plaintiff will fairly and adequately represent and protect the interests of the class. Plaintiff is represented by counsel competent and experienced in both consumer protection and class action litigation.

74. Class certification is appropriate because defendants have acted on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

75. Class certification is also appropriate because common questions of law and fact substantially predominate over any questions that may affect only individual members of the class, including, *inter alia*, the following:

a. Whether defendants advertised their shell eggs as providing the laying hens with access to the outdoors;

b. Whether these laying hens did not in fact have access to the outdoors;

c. Whether the lack of access to the outdoors would be material to a reasonable consumer purchasing shells eggs advertised as providing hens with access to the outdoors;

d. Whether defendants' shell eggs label was likely to deceive a reasonable consumer;

e. Whether defendants' conduct violates the UCL, FAL and CLRA;

f. Whether the challenged practices harmed plaintiff and members of the class; and

g. Whether plaintiff and members of the class are entitled to restitutionary, injunctive, or other relief.

76. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, since joinder of all the individual class members is impracticable. Furthermore, because the injury suffered by each individual class member may be relatively small, the expense and burden of individual litigation would make it very difficult or impossible for individual class members to redress the wrongs done to each of them individually and the burden imposed on the judicial system would be enormous.

77. The prosecution of separate actions by the individual class members would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct for defendants. In contrast, the conduct of this action as a class action presents far fewer management difficulties, conserves judicial resources and the parties' resources, and protects the rights of each class member.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW (CAL. BUS. & PROF. CODE § 17200, *et seq.*)

78. Plaintiff realleges and incorporates by reference all paragraphs alleged herein.

79. Cal. Bus. & Prof. Code § 17200 prohibits any "unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Defendants have engaged in unlawful, and unfair, and fraudulent business acts and practices and unfair, deceptive, untrue, and misleading advertising in violation of the UCL.

80. Defendants have violated the unlawful prong by virtue of their violations of the CLRA, as described in the second cause of action.

81. Defendants have violated the unfair prong of section 17200 because the acts and practices set forth herein offend established public policies supporting truth in advertising to consumers. Defendants' deceptive use of the "with outdoor access" packaging is unethical, oppressive, unscrupulous and injurious to consumers. The harm that these acts and practices cause greatly outweighs any benefits associated with them. Defendants' conduct also impairs competition within the market for shell eggs, and prevents plaintiff and class members from making fully informed decisions about the kind of shell eggs to purchase and the price to pay for such products.

82. Defendants have violated the deceptive prong of section 17200 because, as set forth above, they deceptively marketed shell eggs sold under private label for Walmart as providing hens "with outdoor access." This misrepresentation of material information was likely to deceive a reasonable consumer.

83. Plaintiff has suffered injury in fact, including the loss of money, as a result of defendants' unlawful, unfair, and/or deceptive practices. Plaintiff and members of the class were directly and proximately injured by defendants' conduct and lost money as a result of defendants' material misrepresentations, because they would not have purchased or paid as much for the shell eggs had they known the truth.

84. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of defendants' business. Defendants' wrongful conduct is part of a general practice that is still being perpetuated and repeated throughout the State of California.

85. Plaintiff requests that this Court enter such orders or judgments as may be necessary to enjoin defendants from continuing their unfair and deceptive business practices, to restore to plaintiff and members of the class the money that defendants acquired from them by this unfair competition, and to provide such other relief as set forth below.

86. Plaintiff is entitled to an award of reasonable attorneys' fees under California Code of Civil Procedure Section 1021.5 for the benefit conferred upon the general public of the State of California by any injunctive or other relief entered herein.

SECOND CAUSE OF ACTION

VIOLATIONS OF THE CONSUMERS LEGAL REMEDIES ACT
(CAL. CIV. CODE § 1750, *et seq.*)

87. Plaintiff realleges and incorporates by reference all paragraphs alleged herein.

88. Defendants are each a "person" under Cal. Civ. Code § 1761(c).

89. Plaintiff is a "consumer," as defined by Cal. Civ. Code § 1761(d), who purchased Cal-Maine's shell eggs sold under private label for Walmart.

90. Cal. Civ. Code § 1770(a)(5) prohibits "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have…."

91. Defendants violated this provision of the CLRA with their material misrepresentations set forth on the egg carton packaging.

92. As set forth above, defendants deceptively marketed shell eggs sold under private label for Walmart as providing hens "with outdoor access."

93. Plaintiff and members of the class were directly and proximately injured by defendants' conduct and lost money as a result of defendants' material misrepresentations, because they would not have purchased or paid as much for the shell eggs had they known the truth.

94. In accordance with Civil Code § 1780 (a), plaintiff and class members seek restitutionary, injunctive and equitable relief for defendants' violations of the CLRA. Plaintiff requests that this Court enter such orders or judgments as may be necessary to restore to any person in interest any money which may have been acquired by means of such unfair business practices, and for such other relief, including attorneys' fees and costs, as provided in Civil Code § 1780 and the prayer for relief. In addition, after mailing appropriate notice and demand in accordance with Civil Code § 1782(a) & (d), plaintiff will amend this complaint to include a request for damages.

95. Plaintiff includes an affidavit with this complaint reflecting that venue in this district is proper, to the extent such an affidavit is required by Cal. Civ. Code § 1780(d) in federal court.

THIRD CAUSE OF ACTION

VIOLATIONS OF THE FALSE ADVERTSING LAW
(CAL. BUS. & PROF CODE §§ 17500, *et seq.*)

96. Plaintiff realleges and incorporates by reference all paragraphs alleged herein.

97. California Business & Professions Code §§ 17500, *et seq.* broadly proscribes deceptive advertising in this State. Section 17500 makes it unlawful for any corporation intending to sell products or perform services to make any statement in advertising those products or services concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or not to sell those products or services as advertised at the price stated therein, or as so advertised.

98. As alleged herein, defendants deceptively marketed shell eggs sold under private label for Walmart as providing its hens "with outdoor access." As described above, this misrepresentation of material information was likely to deceive a reasonable consumer.

99. Defendants knew or reasonably should know that such marketing of shell eggs was and is deceptive.

100. Plaintiff has suffered injury in fact, including the loss of money, as a result of defendants' false advertising. Plaintiff and members of the class were directly and proximately injured by defendant's conduct and lost money as a result of defendants' material misrepresentations, because they would not have purchased or paid as much for defendants' shell eggs had they known the truth.

101. All of the wrongful conduct alleged herein occurred, and continues to occur, in the conduct of defendants' business. Defendants' wrongful conduct is part of a general practice that is still being perpetuated and repeated throughout the State of California.

102. Plaintiff requests that this Court enter such orders or judgments as may be necessary to enjoin defendants from continuing their deceptive advertising, to restore to plaintiff and members of the class the money that defendants unlawfully acquired, and to provide such other relief as set forth below.

103. Plaintiff is entitled to an award of reasonable attorneys' fees under California Code of Civil Procedure Section 1021.5 for the benefit conferred upon the general public of the State of California by any injunctive or other relief entered herein.

FOURTH CAUSE OF ACTION

BREACH OF CALIFORNIA COMMON LAW OF UNJUST ENRICHMENT

104. Plaintiff realleges and incorporates by reference all paragraphs alleged herein.

105. To the detriment of plaintiff and class members, defendants have and continue to be unjustly enriched as a result of the wrongful conduct alleged herein. Defendants have unjustly benefited by receiving higher prices for their shell eggs than would have been possible absent the wrongful conduct. Between the parties, it would be unjust for defendants to retain the benefits attained by its wrongful actions. By reason of the foregoing, defendants have violated California's common law of unjust enrichment.

106. Accordingly, plaintiff and class members seek full restitution of defendants' enrichment, benefits, and ill-gotten gains acquired as a result of the wrongful conduct alleged herein.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, individually and on behalf of all others similarly situated, respectfully requests that this Court enter a judgment against defendant and in favor of plaintiff, and grant the following relief:

A. Determine that this action may be maintained as a class action with respect to the class identified herein and certify it as such under Rules 23(b)(2) and/or 23(b)(3), or alternatively certify all issues and claims that are appropriately certified, and designate and appoint plaintiff as class representative and his counsel as class counsel;

B. Declare, adjudge and decree the conduct of defendants as alleged herein to be unlawful, unfair and/or deceptive;

C. Enjoin defendants from continuing the unfair and deceptive marketing of its shell eggs;

D. Award plaintiff and the class restitution of all monies paid to defendants as a result of its unfair and deceptive business practices;

E. Award plaintiff and the class reasonable attorneys' fees, costs, and pre- and post-judgment interest; and

F. Award plaintiff and the class such other further and different relief as the nature of the case may require or as may be determined to be just, equitable, and proper by this Court.

JURY TRIAL DEMAND

Plaintiff, by counsel, requests a trial by jury for all claims so triable.

DATED: January 8, 2018

HAGENS BERMAN SOBOL SHAPIRO LLP

By: */s/ Elaine T. Byszewski*

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DECLARATION RE CLRA VENUE

I, Jennifer Brolliar, do hereby declare and state as follows:

1. I am a party plaintiff in the above captioned action. Pursuant to Cal. Civ. Code § 1780(d), I make this declaration in support of the Class Action Complaint and the claim therein for relief under Cal. Civ. Code § 1780(a).

2. This action for relief under Cal. Civ. Code § 1780(a) has been commenced in a county that is a proper place for trial of this action because Wal-Mart Organic Marketside shell eggs are sold throughout the State of California, including in this county.

This declaration is signed under penalty of perjury under the laws of the State of California this 23 day of December 2017.

Donnie Lee Gibson II