



# Animal Law Podcast: Transcript for Episode 84, Interview with Asher Smith

**Mariann Sullivan:** Welcome to the Animal Law Podcast, Asher!

**Asher Smith:** Thanks so much for having me.

**Mariann:** It's a pleasure to have you. I'm really excited to talk about this case, which I think is unbelievably exciting. I'm excited to get to know you because you have a very cool job. And as we discussed, we're going to be doing this kind of deep dive into the Vital Farms case.

And you very recently received a favorable decision, which is going to allow you to move forward. And I want to go into detail, but I just wanted to start with talking about the fact that this is kind of part of a series of class actions based in false advertising claims. I think it started with the Nellie's Eggs case, and I think some of these are yours and I'm not sure all of them are.

So that's really cool. So can we just start by briefly, just kind of going through a big picture of what this is all about, the cases that have been filed and then we'll go into more detail on specifically on Vital Farms and the recent decision?

**Asher:** Sure. So a few years ago, PETA Foundation lawyers, representing consumers based in New York and other states around the country, won a motion to dismiss decision against Nellie's Eggs following an investigator actually visiting a Nellie's farm during a public tour and just taking very basic video and photos of what goes on there. And what goes on there isn't what consumers imagine at all when they think of free range. For example, at that Nellie's farm, they saw 20,000 hens in the shed. Hens that could barely move, hens that were missing feathers. And the basic premise of these lawsuits and of that first victory is that that's not what "free range" means. That's not what it means to say that hens can go out and frolic on plenty of green grass. And, you know, I don't know how much your listeners know about the regulation of false advertising but the basic blueprint is that there's not that much regulation of false advertising.

It's really left to private litigation to define what's in play what kind of claims can put you in hot water. And what we've seen since that Nellie's victory we got in 2020 is a real feeding frenzy of lawsuits against these free range egg sellers and Nellie's in particular. A couple of years ago, after we won that motion to dismiss victory against Nellie's eggs that established that it can be actual false advertising to say that hens are allowed to frolic on plenty of green grass when, in fact, they're packed 20,000 each to a shed.

We won our Vital Farms motion to dismiss in the Western district of Texas that same week. Another Southern district of New York judge said that another federal consumer class action lawsuit against Nellie's could move forward. And that wasn't a lawsuit brought by me or my colleagues for strategic impact, but that was, for lack of a better word, a normal class action lawsuit brought by a normal plaintiff's side class action lawyer using our same arguments and, to my immense personal gratification, the same Microsoft word photo collage I put together so many years before. Because this is now just an established kind of false advertising lawsuit you can bring.

And literally just a few weeks ago, yet another similar consumer class action was filed against Nellie's based on the exact same arguments this time in Florida federal court. The artwork in that complaint is actually getting a little bit more blurry as it gets copied from lawsuit to lawsuit, but that's really, as a strategic impact litigator, the most gratifying result possible. For better or worse, there isn't that much regulation or government oversight in this space. The regulatory environment, so to speak, is defined by private lawsuits.

**Mariann:** Yeah, it's kind of the dream. You started something and now it's taking off on its own and PETA can move on to do something different. And the fact that there's money to be made in this is a pretty exciting fact, because that is kind of what drives change.

And though, as you point out, the regulation may not be great. It's so much better than the regulation for animal welfare that at least you can bring a lawsuit. Very, very exciting. And I want to get into specifics on the Vital Farms case because that's what makes it so interesting. Finding out exactly how this works. Before we get into the lawsuit, or what's wrong with Vital Farms, just give us an idea of what their business is, what their business model is, how big they are...who do people think Vital Farms is?

**Asher:** Sure! Like anything else, treatment of farmed animals can be better or worse, but I think what consumers want to know when they purchase animal products advertised like Vital Farms is, as “humane”, is that animal welfare is above a threshold that makes these animals’ lives worth living. That they have a

baseline degree of emotional and physical welfare and that to a reasonable consumer, if you're not offering that, then it's a real category error to advertise these products as humane.

So the distinction between different egg sellers and different certifiers of egg sellers, I think is super interesting and revealing. What massive brands like Vital Farms want consumers to think, and how they price themselves to those consumers, is that they're offering the best of the best. When the truth is, even if they aren't exactly the same as the absolute worst of the worst factory farm, they're still middling. Even in comparison to other US-based welfare standards to say nothing of animal welfare laws from around the country. The business model here, super premium priced eggs, is premise on misrepresentations about ethical and humane treatment of animals and what it means to raise pasture raised hens.

And this is something that these companies understand and part of what's so interesting about Vital Farms specifically is that it's a publicly traded corporation, with a market cap in the hundreds of millions of dollars, who needs to disclose its risks in annual filings and in its annual 10K it explains to shareholders flat out, "We and many of our customers face pressure from animal rights groups to require all companies that supply food products to operate their business in a manner that treats animals in conformity with standards those groups might support." And they understand that if consumer preferences shift away from how they market their products, that's bad for their bottom line.

So what they're essentially saying is that their business requires that they have a cap on how well they can treat the animals under their care. And that's in direct conflict with their advertising, which promises as an essential tenant, the humane treatment of all farmed animals.

**Mariann:** How much more do they charge for their eggs?

**Asher:** You know, as someone who hasn't bought eggs in a really long time...

**Mariann:** I know, like, I never heard of them and I'm figuring they're probably really famous. I don't know, but I never of them, but yeah, I know what you mean, but is it a lot more?

**Asher:** Yeah, I think the price premium, especially when you're talking about eggs, a product where, you know, there are supermarket brands that sell for literal dollars a dozen, these eggs sell for often more than \$5 anywhere in the grocery store, they could be more than \$7. We're talking about a price premium.

That's multiple dollars per carton of egg, which for a good that, unfortunately, many people buy as a staple really adds up.

**Mariann:** Can we talk a little bit about, this is the general image, but what kind of assertions that you laid out in your lawsuit, in the complaint, specific assertions, do they make about who they are and how they're they run their business?

I know one of them that was a highlight was a photograph of hens.

**Asher:** Exactly. So, let's talk through what a consumer sees when they're in the grocery aisle and they find and purchase a carton of Vital Farms eggs. Each carton actually comes with an insert that shows individual hens, often with names, in lush vegetation and beautiful green grass. And under that, in each of these inserts, each carton says, "Our mission is to bring ethically produced food to the table by coordinating a collection of family farms to operate with a well-defined set of agricultural practices that accentuates the humane treatment of farm animals as a central tenant." Elsewhere in those same inserts, they frequently say things like, to quote one example, "Take a lead from the girls, go outside every day."

And that's so fascinating for a number of reasons. For one, that's a clear factual claim that these hens can actually viably go outside every day, which our lawsuit, contests. Note also, which I think is so interesting here, is that they commit to treating not just laying hens humanely but all farmed animals. So presumably that should also mean the male chicks whose uniform slaughter they condone and that also formed the basis of our lawsuit.

**Mariann:** I think, of all of these loathsome things that they say, I think the one that really gets me the most is that they call them "our girls". Oh my God. These allegations that they make about their product go far beyond other companies that just put free range on their package right? I mean, they charge more, but they also make pretty high claims compared to other quote unquote free range companies.

**Asher:** That's right. What they really want consumers to believe is that they're offering the best of the best, they're offering the most humane eggs, they're offering the most ethical eggs.

And it was fascinating seeing, after we sued them, how they defended that in court. You know, in our Nellie's case, the substantive legal arguments there were largely a legal concept called "puffery", which is the idea that happy slogans

might not actually be intended to convey factual information. But in the Vital Farms case, we saw those arguments evolve and, in a way, become more desperate now that we had that Nellie's precedent. And now the arguments, we saw, was because they pay a private third party for a sticker on each carton that says they're humane, whether or not they're fulfilling their various promises around free range, or humane and ethical treatment, they say that whatever that third party decides or whatever the industry accepted should control.

And thankfully that's not what the law is. A seller can't advertise up is down and down is up and then say, "Oh, it's okay. We pay another private company to tell us that's how language works."

**Mariann:** So, getting back to the allegations of how they operate, before we get into the specifics of that, can you just tell us a little bit...? I mean, people who are listening know probably a fair amount about laying hens and the lives they live.

And this is not the worst of the worst. We're not talking... I mean, I guess it's lucky for these companies that the worst of the worst is **so bad** that you can actually still treat hens really badly and still not be the worst of the worst. But what is the reality for these hens and how do you know this? Like, are there undercover investigations? How did you find out what the actual conditions are? But first, what are those conditions in comparison to their claims that "the girls are frolicking around in the grass."

**Asher:** Sure. So, our lawsuit challenges several practices that are both endemic in the egg industry, and also directly at odds with any claim to humanely or ethically sell eggs.

Uh, the first of these is maceration, the uniform culling of male chicks, which often literally means running the male chicks fully conscious through a machine with rotating blades that's similar to a wood chipper. And I think your listeners would be darkly amused by a story that the Vital Farms CEO told NPR about this practice in 2016.

As unbelievable as it sounds, the literal CEO of a massive egg company told NPR that, until a few years before 2016, he never thought about where hens came from or what happens to their male siblings until he ran into folks from PETA, specifically. And then he says, "I told them what I do for a living and they said, 'oh, that's horrific' and he said, 'why is that?' And they said, 'because of what happens to the male chicks.'" And then the Vital Farms CEO actually told NPR that that's when he learned about what happens at the hatcheries.

**Mariann:** Oh my god!

**Asher:** I know! That supplies these farmers with hens. It's unbelievable.

**Mariann:** So, this is something I should have clarified before, Vital Farms doesn't... Do they raise any chickens themselves or is it completely contracted out?

**Asher:** It's contracted out with hatcheries and pullet houses.

**Mariann:** They don't raise chickens themselves?

**Asher:** Exactly. And what he's essentially saying, or wants people to believe, is that the uniform culling of male chicks should be shocking even to a savvy industry insider. So what chance does a reasonable consumer have then? And inferring what the truth is, based on happy slogans and images that Vital Farms sells them.

**Mariann:** So he was shocked by it, but they continued to do it? And advertise that they treat farm animals well, ethically?

**Asher:** Yeah. And they eventually added a kind of hard to find disclaimer to their website, in fine print, trying to confuse consumers who might be trying to do more research about this, saying on their website that they have a close relationship to a team of scientists developing an alternative to the mass killing of male chicks.

But what they don't disclose on their website is that that's going nowhere. They've actually sued the scientists they contracted with for allegedly defrauding Vital Farms about the viability of their product. And in the meantime Vital Farms' third party certifier Humane Farm Animal Care has absolutely nothing to say about this mass slaughter of male chicks. They don't impose any kind of limitation on chick culling or even prescribing culling methods. Even as now, we see a number of countries in Europe, just ready to flat out ban the practice. Other practices at issue in our lawsuit are the uniform cutting of hens' beaks, which are complex and sensitive sensory organs. But which, because they house hens by the thousand fold in sheds, their line is that they need to do this because otherwise these hens will literally cannibalize each other or engage in self-mutilation because they are driven to such madness with completely dysfunctional social settings.



And, you know, the sellers like Vital Farms try to say this is a necessary evil, but again, it's only a necessary evil if you are exploiting these animals to maximize profits from them at every turn. If you are housing hens by the thousand-fold then maybe it seems like you don't have a choice, but you do. The choice was made when you decided on that extreme stocking density.

**Mariann:** And you certainly have a choice as to whether you're going to lie to your buyers.

**Asher:** Exactly. And we see a really interesting parallel in other industries as well. In other cases that we follow closely and to give credit to some other lawyers here. There was a fascinating decision about a year ago around whether or not Starbucks could advertise cocoa products as ethical despite the fact that child slavery practices are endemic to the cocoa trade and the decision there, which I think has a lot of parallels here, and we certainly argued to the court and won on the issue of whether or not these parallels exist is that well, even if this is endemic, a consumer, that's interested in ethical product, will be sensitive to that issue. And would reasonably assume that if you're calling a product ethical, then it doesn't come from these kinds of supply chain practices.

**Mariann:** Yeah, exactly. Yeah. That's why consumer protection law, you know, has so much power because it's not just about what they're doing to the animals. Just the fact that, you know, all right, fine. If you want to do that, you can't tell consumers that you're not doing things like that. Well, hopefully, and it looks like that's the way things are going. All right. Just finish up a little bit more about everything bad that they do, and then we'll get onto the lawsuit.

**Asher:** Sure. And these issues really feed into each other. So, once again, the third-party certifier that Vital Farms and Nellie's uses, they actually use the same certifier, they say in their standards, they take the, their words, risk of outbreaks of cannibalism as a given essentially, and endorse what they euphemistically call "beak trimming" because they say there's no solution to it yet. They say that the causes of cannibalism and ways to prevent have yet to be identified. Well, okay. How about I point you to the stocking density section of your welfare standard? And that's where we get to whether or not it's reasonable for these companies to advertise themselves as free range or pasture range.

And the key insight fueling our successful litigation in this space is that, to a reasonable consumer, outdoor access isn't just a question of theoretical access of leaving some potholes open some of the time on the side of the barn or how lush the outdoor space may look in advertising, but it depends on stocking density.

Hens cannot maintain a natural pecking order at extreme density and instead stressed hens will violently enforce ad hoc social dynamics to secure access to the limited space they have and the limited resources they have available, including outdoor access. Hens will suffer from bullying and being pecked, um, during a public tour of a Nellie's farm that informed our litigation against Nellie's many hens were seen suffering from feather loss, presumably caused by either pecking from more dominant hens or by self-mutilation.

Many hens could barely move. If they can't move around they'll also suffer things like osteoporosis or bone fractures or foot deformities. This is completely allowed by the third party certifier who's limit here in a single level shed is 1.5 square feet of space. And if a seller like Vital Farms might have some minimal perching areas, that means they could actually bring that down to 1.2 square feet of space. I know that you asked me earlier, how do we find out about this? Well, first of all, I'd recommend any of your listeners, if they can, if they could tag along a public tour of one of these barns, do it. I think it will be extremely educational, but the other is that you can go look at their third party standards and you can go see what the minimum is they require.

And I can tell you, these companies are not altruists, they're not gratuitously going above and beyond typically what's required of them. Typically, what they're allowing is the minimum standards of these certifiers, which here can be as little as 1.2 square feet of space a bird.

**Mariann:** Yeah, that's really interesting. So you don't have to do an undercover investigation or sneak in there or find out... because it's actually in writing. They have this third-party humane farm animal care, which is, I think is the major third-party certifier of quote unquote humane animal care. And you can just assume they're following those rules and just say, "this is not what you're advertising," is that right?

**Asher:** That's exactly right. So, what a consumer's required to be aware of when they're in the grocery aisle, it's actually quite simple. A consumer's required to be aware of what they're being told, essentially at the point of sale. If you have a consumer looking at a carton of eggs and there's nothing on the carton of eggs that says, "oh, when we're showing you this green grass, we actually mean inside is 1.2 square feet of space per bird."

That's not how it works. You don't just stand in the grocery aisle and start wildly Googling. If they're telling you something on the carton or inside the carton, that's what a consumer is charged with knowing.



**Mariann:** You've highlighted the major things, but there's also a couple of the standard things that are complained about; one of them obviously is that they don't get to live out their full lifespan.

**Asher:** Exactly.

**Mariann:** Another one. This is, I just wanted to ask you a question about this, is that you mentioned that these hens lay an egg a day. Which you know is insane when you figure that jungle fowl from whom they are descended, you know, lay one clutch of eggs a year, I think. So you can imagine how laying one egg a day, and all of the sanctuaries say that it causes enormous problems with the chickens that they get from egg-laying facilities. But when you say that they make them do that, is that the way they're bred, they breed them to do that?

**Asher:** More or less, yes. And I think that poster practices, um, what we kind of have on your, the rubric of end of life practices, really as much as anything else puts the lie to the idea that they love these hens, that are showing them some kind of kindness or that they treat them humanely.

**Mariann:** "The girls"

**Asher:** Exactly. "The girls." That they treat them humanely as individuals, because something that I think would shock consumers of these eggs, even if you've gotten over the other issues, but you think, "okay, they're doing as much as they can for them." Which obviously isn't the case, but let's say you're in that Headspace.

When egg sellers claim to love their hens, when they claim to love "the girls" that love only lasts as long as these birds are at their very most profit-maximizing. So that means that hens kept by these sellers often only live through just one laying cycle, after about a year of egg laying. And after about 13 months, that rate of an egg a day every day, has depleted these hens of calcium. It's worn out the reproductive systems. Um, it's literally drained the calcium from their bones, causing a condition known as hypocalcemia that in turn causes things like osteoporosis, bone fractures, weakness, paralysis. It could also cause sudden death. That's not a natural part of a hen's laying cycle, it's caused by that overproduction.

It can also be exacerbated by vitamin and mineral imbalances and lack of access to direct sunlight if they're unable to get outdoors regularly. It's exacerbated by stress. If you're an egg seller, though, what this actually means is that hens lay

fewer eggs and the eggs they do lay as they develop these conditions become more thin, more fragile, more prone to breaking.

Broken eggs, in the words of one Nellie's supplier who spoke to that investigator who tagged along on a farm tour, quote unquote, leeches into the profits. So in the words of Vital Farms CEO, the next step for many of his hens is to be sold to what he calls, not euphemistically at all really, a pet food plant. Packed into crates and shipped hundreds of miles before being slaughtered alongside their factory farmed peers for whom there was no pretension of love or kindness.

Again, this is just one more practice completely allowed by the third-party certifiers as well. There's no minimum number of laying cycles that the third party certifier, here Humane Farm Animal Care, requires. There's no actual slaughter policy.

Nellie's eggs, I believe, even sells hens to live markets where they can be packaged into crates and cages, immersed in filth and even sold alive to individuals who'll kill them using whatever method they may choose.

**Mariann:** So, we have the picture now, now let's get to the lawsuit. They say they're great. They're not.

So who were the plaintiffs who got duped?

**Asher:** Sure. So plaintiffs are compassionate consumers from around the country, specifically here in New York, California, Michigan, Florida, and Texas, who feel that they were deceived in the grocery aisle. When they came home with their carton of Vital Farms eggs., who saw each of those inserts, they saw these hens with names, they saw our central tenet is humane treatment of farmed animals, they saw the lush green grass. These consumers are smart. Like they're not just out on a flight of fancy, you know, through the course of my job and we can get into this, I speak to a lot of consumers, a lot of egg purchasers, and they're not dumb because they believe what they're told.

And what they're told is that they're buying the products of factory farms. I think the thing that blows their minds the most is just that inside these sheds, it's not small clutches of hens with functional pecking orders and social groupings. It's thousands and thousands of hens.

**Mariann:** Yeah, it is sad that in today's world, like, people can think that people are dumb for believing what they're told about ethical practices. And, uh, that's just a sad commentary.

Since it is a multi-state class action. And we're going to get a little into what that means. Obviously you mentioned that these are people from different states, but this is under state law. So it involves various laws in different states. We can't hope to go through into detail on all of those statutes. But that being said, can you tell us perhaps what the general theme of all these statutes is?

**Asher:** Sure. And the general theme of these statutes is kind of exactly what we've been talking about. That consumers are entitled to understand the context that's been given to them. So you mentioned this is a consumer class action for very boring legal reasons that meant this case was brought in federal court, in the Western district of Texas, it was brought in the fifth circuit and I think fifth circuit precedent is actually really informative on this because when we're talking about concepts like humane and ethical, we see a lot of different arguments from sellers about what these terms mean. And their go-to argument is that they don't mean anything.

It's like how I live in New York City and every now dollar 50 slice joints as they have the number one pizza consumers understand there's not a real test being done. Come on, that's how advertising works. And the answer we got in this case is that that's not how false advertising law works. Everything comes down to context.

And one famous example we got from the fifth circuit, way back, is if you remember those "better ingredients, better pizza, Papa John's" ads. Well, does better ingredients, better pizza mean anything? Um, maybe not by itself, but as the fifth circuit explained, put those words in a comparison ad about sauce and dough and now you're saying something that consumers can take as a factual claim. So maybe the words humane and ethical can sound amorphous in some contexts, but here we're not talking about abstractions. We're talking about the supply chains of animal products, and there's a lot of precedent saying this creates verifiable consumer expectations around animal products.

One precedent that the Animal Legal Defense Fund won, a while back, was in a California federal court in a case challenging so-called humane foie gras. They won a decision explaining that humane means that products are not sourced from animals, experiencing quote unquote undue pain. And that's really the standard that we've taken here, because our argument is essentially that all of these practices are unnecessary, but for Vital Farms decision to maximize profits, instead of anything else.

**Mariann:** I do love that that case was cited. Was that the foie gras case, the one in California? And then also the Hemy vs Purdue in the New Jersey... Like the fact that animal law is starting to build a body of case law that kind of examines these issues. And we actually have, or you actually have things to cite that where courts have thought about these issues before.

And yes, obviously whether the word humane has meaning is obviously something that's hugely important. Before we get more into that, can we talk a little bit about...? Because I think one of the most important things here, as we spoke about in the beginning is that this is a class action, with the potential to actually, you know, have damages and to actually have legal fees, which is a big deal.

But I don't know a lot about class actions and this is characterized as a purported nationwide class with state subclasses. Can you explain what that means? And what cause of action is national and which ones are limited to specific states?

**Asher:** So the way that claims like this are typically structured, and after recent Supreme Court precedent, you'll often see these claims brought in the seller's home district in federal court.

And each of the claims here are essentially state false advertising claims. Um, there's no federal consumer false advertising law that consumers can use to get access to the courts and argue that advertising is false. So what we have in the Western district of Texas is a lawsuit where we've packaged claims from our New York, from our Florida, from our Michigan, California, and Texas consumers saying that this violates New York false advertising law, it violates Michigan false advertising law, Florida, California, Texas, et cetera.

And in addition, it also violates those states common law fraud laws as developed by courts in those states over the decades and sometimes centuries. It violates various other common law principles. What we're explaining to the court is that, even though these are a lot of different state laws, they all have to be understood under essentially the same test of who a reasonable consumer is, what reasonable consumers would believe, and that kind of analysis tends not to be too different state-by-state. You might have some conflicts state-by-state and also conflicts having to do with what kind of damages can be brought state by state and how damages have to be framed. But the real crux of the case is very consistent consumer by consumer kind of regardless of what state they happen to reside in and where they happen to be deceived.

**Mariann:** And at what point does it get certified as a class? What does that process and what are the requirements for that? That's a huge piece of class action, obviously, of class action litigation. You have to get certified as a class.

So how does that happen?

**Asher:** That happens as the lawsuit unfolds, that happens after the pleading stage, it often happens after there's been a fair bit of what's called discovery in the case where we can better understand whether or not different issues that might come up under state law actually do raise in different facts or they raised the same facts such as they're suitable for being evaluated together as a class action.

I mean, the basic criteria really is the same jurisdiction by jurisdiction and it's whether or not there's so many plaintiffs or potential plaintiffs that it wouldn't be viable to bring this as a set of individual claims and here, where we're talking about an enormous national seller whose sales are in the hundreds of millions of dollars, it certainly is not the case that individual consumers can bring these cases by themselves in each state. Whether or not these consumers claims raise the same issues, which here we would certainly argue that they do. That under each of these state consumer laws what's required is that they have had a reasonable expectation of what this advertising means. That they actually saw the same advertising, which is very much the case here, where we're talking about a national brand with the same carton of eggs across the country that you can find, regardless of whether you're buying in California or Florida,

**Mariann:** You know, obviously as everyone knows about class actions, I mean, these consumers, they didn't lose that much individually, so it would hardly be worth it even though they're very, very angry. You don't have to find that plaintiff, as you do so often in other animal contexts, who's just willing to really put themselves out to bring litigation. I mean, you can just put together a whole lot of plaintiffs who were cheated out of a relatively small amount.

That seems to me to be a super game changer for animal rights litigation. If class actions on these kind of claims are going forward. I didn't see any reference to standing in this motion. And you just can't do an animal... We can't talk about an animal law case without talking about standing regardless of what the issue is.

So what is the basis of the plaintiff's standing; that they got cheated out of this amount of money? That they spent on these eggs?

**Asher:** Exactly. And the one caveat I'll offer a priority, especially about how much money is at stake for these consumers, is I can tell you, in speaking to these consumers, they acutely feel how much money they've been cheated out of.

And, that's kind of the nature of these humane washed animal products, which is that they're kind of the paradigmatic super premium priced product. And that's the source of, that's frequently under various state laws. Certainly the case under New York law, where I practice, that's often the crux of the injury that consumers have standing to sue under. That they paid a super premium or a premium price that they would not have paid but for the false advertising.

**Mariann:** Yeah. And I mean, it is interesting cause I've heard people say, I don't personally agree with this, but I've heard people argue that, you know, class actions are just to a scam where lawyers can make a lot of money, but everybody was just cheated out of 2 cents. But the lawyer... which, you know, that's a totally, maybe there are cases like that.

I don't care, because consumer shouldn't be quick cheated out of 2 cents, but here they were cheated out of money, yes. But they were also completely betrayed. I mean, They, they really cared about buying this. So it it's clearly I can see how it it's the money, but it's not even just the money. So that's the basis of their standing, that they got told they were buying something and they bought something else.

Do they have to, um, I mean, I assume that would establish reliance. They can show that they wouldn't have bought this product. had they not been lied to. Do they have to have to set that forth? Or is it just obvious?

**Asher:** That's a fascinating question because it's something that really does differ state by state, whether or not consumers have to establish that they actually relied on the false advertising.

However, I can tell you, that's not really an issue here with these animal products. And, in a way, animal products are sort of that almost paradigmatic false advertising context, because you have products that sell at a price premium and that price premium is because of the claims of humane treatment.

And you have a class of consumers who, but for those false claims of humane treatment, would not be buying these products. That the market exists entirely because consumers will rely on these claims and otherwise, maybe these consumers would just stick with store brand eggs, or maybe they would realize



that, especially when you're dealing with a product sold at national scale, there just is not a humane or ethical version of this product.

And the alternative is to go vegan and, you know, for any consumers that want to make that choice, I'm happy to tell them about how easy it is to replace eggs in your diet with now Just Eggs or various egg replacers that you can use for baking.

**Mariann:** It is heartbreaking that these people, like, were spending all this money to buy such a stupid product, but that's a totally different podcast so we aren't going there.

But yeah, I guess it totally makes sense that reliance is obvious here. You're not going to buy the eggs that are three times more expensive, unless you're relying on what you're being told about them. What about injury? Is there, are there any issues ever that come up? I just remember one case reading something along the lines of, um, the court saying, "well, they paid for milk, they got milk. It's milk all milk is the same."

Do you have to show any injury? Does this vary from state to state? Do you have to show any injury beyond the fact that you paid for humanely raised eggs and didn't get humanely raised eggs, even though your eggs are kind of the same eggs as other eggs? Because you don't make any argument that these eggs were more healthy or any of that other nonsense, it's just that they were lied to about how the chickens were treated?

**Asher:** Yeah. Yes and no, it often is enough in this space that we're dealing with consumers who paid premium prices that they wouldn't have otherwise because of how these products were advertised. But I think in speaking with consumers, it's also the case that they are not getting the benefit of their bargain, because I think that these companies very opportunistically understand that they're selling a kind of lifestyle product, in a way. That the people who tend to buy these eggs are people who talk to their friends about the kind of eggs they buy. In some cases, they even proselytize for the eggs they're buying and that's because they believe these eggs to come from certain supply chain practices that just don't reflect reality.

So I would love to see a lot of development in that space of treating these kind of humane washed animal products as lifestyle products. In addition to being the paradigmatic price premium product.

**Mariann:** Yeah, that's such an important point that you can, you can buy a product for, for reasons other than the product itself.

I mean, it seems so obvious, but I can see like them arguing that that's the way to shut it down, but it doesn't seem that they have done that. So who are the defendants here? It's obviously the company, but you've also sued the individuals, you attempted to sue the individuals. And we can talk a little later about how the case was dismissed against them.

**Asher:** That's right. The case that survived the motion is in this process is exclusively against Vital Farms as a corporation. The reason why various individual defendants, including high level executives with Vital Farms were in the case is that they were individually responsible for a lot of the falsehoods that deceived consumers into buying their products and they understood that these were false. For example, I told you that story earlier about the Vital Farms CEO basically having his own come to Jesus moment about what chick culling is, but still selling his products and calling them humane. About admitting that at their end of life, hens are sold as pet food.

Now, I can tell you that even though they're no longer defendants in the case, what these executives knew about their supply chain practices and what they understood consumers to believe about their advertising and what decisions they made about how to advertise eggs is still very much going to be part of the crux of this lawsuit.

**Mariann:** Now they brought a motion to dismiss and they offered a number of reasons for dismissal, but I just want to focus on maybe the most salient. Their arguments that these statements that were identified as misrepresentations in the complaint, which we, we talked about before, they particularly were fond of the word ethical.

Though they used all of the keywords there. They're arguing that they aren't actionable. And, and that's really the heart of the matter. First of all, they are... this is really bad one. They claim that they, even though they put a photo of a hen on pasture, they claim that that's plainly true as there's no allegation that this hen didn't exist or that she didn't live at Vital Farms.

Can you tell us about the court's reaction to that argument?

**Asher:** Yeah, I'd love to, and that... it is really insane because, you know, argument one is, well, humane or ethical, they don't mean anything. Well, I can

tell you what they mean based on your carton, which seems to be that it means actual access to the outdoors.

And this really gets that issue of whether or not a seller can outsource to a self chosen third party, whether up means up or up means down. The court recognized to quote from the decision that the HFAC standards, the Humane Farm Animal Care standards set certain standards for the space and the birds and poultry houses, and only requires hens to have quote unquote access to, but not actual use of pastures when the temperature is greater than 32 degrees.

But under these standards, as recognized by the court, hens that have never spent any time in a pasture can be considered pasture raised. The court explained there is no basis to argue that conformity to third party standards, which may not represent a term's plain meaning as understood by consumers, renders the term not misleading as a matter of law.

As the court further recognized, Vital Farms' argument would mean that hens who, in the court's words, have never spent any time in a pasture can be considered pasture raised. So what we now have as a clear precedent that says pasture raised implies to reasonable consumers that hens have actual use of pasture and the same as now true of indications of humane and ethical treatment and how it relates to practices we've been discussing, like beak cutting or early sale for slaughter or chick culling.

**Mariann:** Yeah. I just think that this is such a hugely important part of this decision. Um, maybe the other decisions, which I haven't read in this area are saying the same thing, but the idea that you can argue that third party, not governmental, but just third party standards, they call themselves humane, prove that you're humane in the eye of a consumer. That would just destroy any, any ability to ever get into court on anything.

Because of course, you know, they can set themselves up to say anything. And the court really did give this argument short shrift and I was very pleased to see that cause, cause you know, you can always imagine the court going down these routes in your panicky moments. They also argued that that certain statements just such as ethical and the statements in their mission statements were just... I don't know whether they were saying it was puffery, but they were just too vague or subjective.

And how did the court address that argument?

**Asher:** Well, that's where we're talking about better ingredients, better pizza again because again, if you use these words and then you show sauce and dough, it's clear what you mean. If you use those words and you show a hen in the lush green field, it's clear what you mean.

It's clear that they're not just talking about some abstraction. They're talking about the supply chain in which their hens live in which their “girls” live. And that's why it was so crucial to be able to draw on these precedents that our accord embraced, that humane in the context of animal products means freedom from undue pain, that ethical as established in cases that we've been discussing, such as in that Starbucks context, can mean sensitivity to even endemic supply chain issues.

And our argument here is that it's not controversial or confusing what ethical means they're using it in the exact same context as the word humane. That it means essentially the same thing as the word humane here and thankfully we won that argument.

**Mariann:** It's so disgusting that they use words like ethical and humane and then contend those words don't mean anything, which is exactly, of course, why people are buying their product.

But I'm vociferating. You know, one of their ploys that they clearly used, if you look at their papers is to disparage PETA. Or at least say things that they think are disparaging, like PETA has a vegan agenda, or PETA is crazy animal rights activists.

How do you handle this sort of thing when it comes up? Do you just ignore.

**Asher:** You know, it really is irrelevant, but you know, the fact is, even though PETA was happy to explain to consumers why the only humane option is an actual vegan option. It matters that consumers who want to do good, who want to support ethical practices are being diverted into supporting these practices that are anything but. And you know, the fact that PETA has a vegan mission doesn't mean that farmed animals can't be treated better or worse, or that animal welfare can be above or below the threshold that makes these animals lives actually worth living.

**Mariann:** Yeah, and it doesn't appear that the court fell for that at all, but it is interesting that they're still trying that, uh, these ad hominem attacks on PETA and other animal rights groups, I think PETA gets the worst of it, but maybe not.

Let's talk about the statute of limitations arguments that were made, because this was also kind of hilarious.

Well, maybe I shouldn't use the word hilarious, but the main argument seems to be that they think that the plaintiff should have discovered in the exercise of reasonable diligence, these misrepresentations or alleged misrepresentations so long ago, because they've been on their website for so long that the statute of limitations has run.

Can you just talk about that and how the court dealt with that argument?

**Asher:** Yeah. I mean, this was a really weak argument on their part and the court saw right through it. I mean, their argument is essentially that a company can purposely engage in behavior they intend to mislead consumers, without any risk of adverse legal decisions, as long as the truth may have been published somewhere on the internet a long time ago.

And as we got into before, that's not the law. A consumer in the grocery aisle is not required to take out their phone and do half an hour of research before putting the egg, the egg carton in their cart. You know, the consumer is only responsible for what they were told in the grocery aisle or at the point of sale.

It's not the case that, "oh, I see, I see this egg carton. It has a lot of engaging messaging there about how the hens are treated. Let me go off and do some research and figure out what the case is." You know, that's not when the statute of limitations starts to run. The statute of limitations runs from when the consumers actually saw the advertising.

**Mariann:** Really an unbelievable argument. I mean, I think there's a whiff of desperation to it. So, um, so what are next steps in the case?

**Asher:** The next step is that we're going to actually get to take discovery from Vital Farms. We're going to get to actually see under the hood and see more about their actual animal welfare record.

You know, this lawsuit was premised on the practices that are disclosed in various resources online or in the standards of their third party certifier. But now we're actually going to get to see what kind of welfare records and veterinary records they're keeping. What they're tracking, just as importantly, what they're not tracking.

So we're going to build on our motion to dismiss victory throughout the case and hopefully eventually win at trial. But I also do want to emphasize that that motion to dismiss victory was, in and of itself, a major precedent that we'll be using to fuel future lawsuits. And myself and my colleagues, other PETA Foundation lawyers are eager to assist other consumers who've been tricked into supporting the very abuse they're trying to avoid.

We actually have a survey on our website, it's at [peta.org/humane](https://peta.org/humane) that allows shoppers to report if they've been misled by humane labels. I can tell you that I personally review every survey response. In addition, if you were to email [humane@PETA.org](mailto:humane@PETA.org), that would go to the same inbox and I review that just as carefully.

**Mariann:** That's really cool. I love that you're pursuing this and I don't know whether...has there, like, it's always been kind of a thing that it's hard to work with consumers who are, you know, meat eaters or egg eaters. But I assume since you're all on the same page about whether companies should lie to consumers that reduces the, it's not like trying to get humane reforms, you're just trying to stop companies from lying.

And we can all agree on that, can't we?

**Asher:** Exactly. And we couldn't bring these lawsuits if there were a consumers who, because they were told, believe that the right thing to do here is to support what they're told are ethical or humane supply chain practices. And, you know, we're trying to educate folks consumer by consumer that that's not the case, but at the same time, these consumers exist.

There is literally billions of dollars going to creating more of these consumers and convincing these consumers that this is how you do good. And those are the folks that we want to hear from, and that could help us actually make law in this space. You know, I know that we've discussed the fact that there's not a lot of actual statutes on the books about what it means when you use certain advertising terms or what the penalties for using a certain kind of term falsely. It's through consumers like this that we're able to actually make the law here.

**Mariann:** Yeah, it does seem like a very exciting area. And the other exciting areas when we alluded to before is, is money. Not necessarily for PETA. Though I'm all for PETA getting money. But I know you also work with firms on these cases and other firms, as you mentioned, are just going out and, having nothing to do with PETA, just starting to notice that there is a lot of consumer deception in this area and there is a lot of room for class action lawsuits.



So what relief do you get here? Do the consumers just get back their money? Right? I mean, assuming there's a total win, the consumers just get back their money and where do the legal fees come from?

**Asher:** So these kinds of cases are typically on contingency. It's that lawyers take these cases because they think they can win.

And that's what's so exciting about the feeding frenzy we're seeing in this space now, is we're seeing normal, non animal rights weirdo, class action lawyers who think there's money to be made here. And that's because the damages in these cases come from the price premiums that are charged on top of every package of falsely advertised humane washed eggs.

And when you're dealing with products that are advertised and sold nationally, that adds up. I can tell you that these corporations are defending themselves as if there's a lot of money for them to lose here.

**Mariann:** I certainly hope there is a lot of money for them to lose. And let's talk... can you just tell us a little bit of an idea, because I always find this an interesting aspect, you are working with a law firm, which makes total sense because this is a very specific area of practice. But can you tell us a little bit about what the role of PETA is in this type of situation? You have a big legal department with great lawyers and what the role of the firms is, how you, how you coordinate.

**Asher:** Sure. Yeah. And, and this is actually something that obviously we see thrown in our face during briefing. I think to very little effect, frankly, if my opponents in all my cases want to use part of their precious word count to do non-sequitur attacks on PETA, that's perfectly fine by me. But I think that what I'd emphasize here is that, you know, PETA, PETA Inc is an advocacy organization.

I and my colleagues work for the PETA Foundation. Um, we're full-time litigators with the PETA Foundation, essentially working as a boutique law firm. Uh, to help bring cases in the animal rights space often that involves representing PETA Inc such as against roadside zoos around the country, including most of the folks who... against most of the folks who appeared on Tiger King. Often that involves representing individual plaintiffs who have nothing to do with PETA.

And in those cases, like in any other lawsuit, you know, the plaintiffs are the ones who guide litigation, all the major decisions about strategy and about

settlement belong to the individual plaintiffs. In a case where I, as a lawyer with the PETA Foundation, in representing clients who aren't PETA, you know, PETA is just on the sidelines as a very interested observer, obviously rooting on victories in this space, but they don't actually have a formal role in the lawsuit itself.

**Mariann:** So but are you also working with other law firms like private law firms?

**Asher:** We are. Yeah. And it's really exciting to kind of see the lawyers who maybe found plaintiffs in this space, or they're interested after we're able to find plaintiffs in this space, who are interested in bringing these cases. Obviously, as full-time animal rights litigators, we have our areas of expertise such as how to argue that the advertising of animal products is not puffery, or we bring a number of cases against terrible roadside zoos under the endangered species act. And we're always looking to partner with outside counsel who has their own expertise, who for example, may be experts in how to bring complex class action litigation, because that's not something that we're doing every day.

**Mariann:** Yeah. It's, it's very exciting. And it's a great way to spread the word and to get more lawyers excited about working in this field. So, uh, I'm super excited. This case, these cases, all of them. I just think this is opening up a whole, a whole can of worms. You should excuse the expression, but a can of worms for the industry.

There'll be lots more to say about it. Is there anything else on your docket that you would like to share?

**Asher:** Yeah, I mean, at any given moment, we have a large number of cases trying to move the ball forward for animals in a number of contexts. Obviously laying hens and animals used for food. And the advertising of those products is one area where we've seen a lot of exciting and very quick progress recently.

Yeah, we've also, I mean, in the years before and after Tiger King came out on Netflix, we've had a number of victories against essentially, almost all of the exhibitors seen on that show. We've personally won victories against Tim Stark and Jeff Lowe, establishing that their treatment of animals that these decrepit roadside hellholes is so bad it violates the endangered species act.

We currently have a number of cases to ensure that folks who support the use of animals in areas like scientific experimentation, can't do that without being accountable to the public, for example, that they can't hide what actually goes

on in their labs from their public or that they can't hide the identities of who's actually approving these experiments.

We have a number of cutting edge cases under the first amendment. Uh, both dealing with animals used for food in the ad gab context, which I'm sure your listeners are very familiar with. We also have a very interesting case right now in Washington DC federal court around whether or not the blocking of animal activism from the National Institutes of Health social media pages violates the first amendment of the Constitution. That's a case that we're really interested to see move forward.

**Mariann:** That sounds really interesting. Well, we will be talking again in the future, Asher. You, we, or one of your, I know you have many fine lawyers on your staff and it sounds like you have a lot going on and we'll hopefully have an opportunity to share it with people on the Animal Law Podcast, I would love that.

Thank you for sharing this with us. This case has got legs and I am really excited about this whole project. It's just always been obvious that even though there may be no laws to protect animals or very few and not great laws to protect consumers. Once you really start putting that together and putting the lies together, it does give us an opportunity to get these cases into court and that's exactly what you're doing.

So thank you so much for doing it and thank you for sharing it with us today.

**Asher:** Thank you so much for having me. I really appreciate it.