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Via Electronic (Peterson.williaml@dol.gov)
and UPS Overnight Mail

William Peterson
Regional Investigator
U.S. Department of Labor - OSHA
Raleigh Area Office
4407 Bland Rd., Suite 210
Raleigh, NC 27609

Re: Perdue Farms Inc. / Watts / Case No. 4-3750-15-036

Dear Mr. Peterson:

I. INTRODUCTION

Complainant Craig Watts is a farmer who raises chickens for Respondent Perdue Farms Inc. under an independent contractor agreement. Unhappy with the amount of money he earns under his contract with Perdue and unsuccessful in affecting change through the established contractual and regulatory channels, Watts devised a cruel scheme. Rather than euthanizing sick and injured chickens in his flock as is his obligation, Watts kept some of them alive. With the assistance of an outside group, Watts then filmed the suffering birds and cooperated with an activist group to post the video online. Armed with this staged and callous footage, Watts proclaimed in the video that the condition of his chickens showed they were not "humanely raised," as Perdue indicated on product labels for one of its consumer brands.

Putting aside the absurdity that Watts is "blowing the whistle" on himself, the video revealed that Watts not only disregarded the welfare of the chickens under his care, but also the "biosecurity" protocols designed to prevent the proliferation of infectious diseases in poultry flocks. As a result, Perdue reasonably required that Watts receive instruction on those issues before it placed a new flock on his farm. In this case, Watts claims that Perdue's response to his brazen disregard of animal welfare and biosecurity issues constitutes "retaliation" under the Food Modernization & Safety Act ("FMSA" or the "Act"). Watts' complaint is legally and factually deficient for several independent reasons, and should be dismissed by OSHA without further consideration.

As a threshold matter, OSHA lacks jurisdiction under the FMSA to entertain Watts' whistleblower complaint because the USDA, not the FDA, regulates adulterated and

misbranded "poultry products." Through a detailed system of inspections and pre-market approvals, USDA is statutorily responsible for ensuring that no poultry products, including those produced from chickens raised on Watts' farm, enter the stream of commerce unless they are truthfully labeled and fit for human consumption. Because Watts' whistleblower complaint squarely asserts alleged misbranding and adulteration of poultry products, OSHA should find that it lacks jurisdiction over his claims and dismiss this action. In addition, Watts cannot assert an employee whistleblower complaint under the Act against Perdue because, quite simply, he is not an employee of Perdue. Rather, the arrangement between Watts and Perdue is governed by an agreement that expressly establishes an independent contractor relationship, and expressly disavows an employment relationship. Moreover, the realities of the arrangement between Watts and Perdue conclusively establish an independent contractor relationship under the Darden factors utilized by OSHA.

Even assuming that Watts' case could overcome these insurmountable obstacles, his complaint fails on the merits for a multitude of reasons, too numerous to discuss in this introductory section. Among the fatal flaws to his complaint, Watts engaged in no "protected activity" under the Act, and posting online a video showing the conditions of his farm he allowed to exist do not suffice. In addition, Watts suffered no "materially adverse" action in retaliation for posting the video. Watts' independent contractor agreement with Perdue was not terminated, and he continues to receive flocks under that agreement. Watts' allegation that he experienced an "adverse action" due to a delay in the placement of a subsequent flock is not actionable since the date of the subsequent flock placement accommodated ***his*** schedule. Moreover, the time frame for Watts' subsequent flock placements was in line with the time frames for previous flock placements not only for Watts, but also for other growers in his area. The other alleged "retaliation" – requiring that Watts receive instruction on animal welfare and biosecurity issues, and monitoring his compliance with those issues, was indisputably motivated by his failure to adhere to those requirements, as depicted in the video of the chickens Watts permitted to suffer.

For these and other reasons, discussed in more detail below, OSHA should dismiss Watts' frivolous complaint without further consideration.[1/]

1/ This response is based on Perdue's understanding of the nature of Watts' allegations as set forth below, and it reserves the right to provide additional, supplemental, or clarifying information, and to request information and discovery from Watts and third parties. This response, accordingly, should not be construed as a comprehensive response to each of Watt's claims and allegations.

II. STATEMENT OF FACTS

A. Perdue's Business Model.

Perdue is an integrated poultry producer engaged in business through the United States, including North Carolina. See generally Bunting v. Perduce, Inc., 611 F. Supp. 682, 683–84 (E.D.N.C. 1985) (explaining Perdue business model). Within this integrated operation, Perdue owns hatcheries and breeding flocks, and delivers its chicks to independent contract growers–such as Watts. Id. Independent growers then provide the land, facilities, equipment, and labor to raise the chicks over the course of approximately eight weeks. Id. Perdue provides the chicks, feed, fuel (propane for the heaters) and medicine necessary for the independent grower to raise the chicks. Id. The growers are responsible for raising the chicks to the desired weight as efficiently as they can.

Critically, the growers maintain discretion on how to raise a given flock. Perdue assigns "flock advisors" to each grower for quality control and to ensure that growers adhere to applicable law. Flock advisors travel to farms in a specific geographic area (called a "complex") that supply the mature poultry to a particular processing facility. Compl. ¶¶ 4, 13. Flock advisors are available to provide recommendations to growers to improve efficiency, such as advice on equipment maintenance, feed consumption, poultry health and whether the birds are being culled[2/] properly.

Flock advisors generally visit each contract farm and its flock about once a week, but factors such as weather, issues a particular grower is facing, and the conditions on the particular farm may augment this schedule. During their visits, flock advisors complete a form recounting observations on the farm and the recommendations made to a grower. Flock advisors do not provide instruction to the growers on their day-to day activities, and if no issues arise during a visit, then no recommendations are given. Further, a grower is free to reject recommendations from a flock adviser to the extent they do not risk the welfare of the flock.

Perdue takes poultry welfare seriously. Each grower records twice daily how many birds have died or been euthanized to help alert Perdue about potential poultry health and welfare issues at the grower's farm. Moreover, each year Perdue conducts a seminar in each

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2/ Culling, or euthanasia, involves humanely ending a sick, deformed, or dying bird's life.

grower complex that covers recent developments, reviews biosecurity protocols[3/] and emphasizes animal welfare issues. Attendance at the seminar is not mandatory for growers, but each grower must receive information on biosecurity and animal welfare issues annually. As a result, if a grower elects not to attend the annual seminar, Perdue will provide one-on-one instruction on biosecurity and animal welfare issues. Watts elected not to attend this annual seminar over the last three years.

After the "grow out" period of the chicks is complete—usually about six to eight weeks, depending on the growing program—Perdue removes the birds from the grower's farm for processing. Once the birds have been removed and weighed, Perdue compensates the growers. Compensation is structured with a base pay, plus the opportunity for enhanced compensation based on the quality of the flock and the efficient use of flock inputs. The formula for final compensation is a function of the weight of the birds moved from the farm divided into the costs of feed, fuel, and other supplies provided to the grower.

B. Watts' Poultry Producer Agreement.

The independent contractor relationship between Perdue and Watts is governed by a "Poultry Producer Agreement" (the "Agreement") in accordance with applicable Federal law and regulations. See generally 7 U.S.C. § 181 et seq.; 9 C.F.R. § 201.100 et seq. The Agreement renews with each subsequent flock, and either party may terminate the Agreement with ninety days' notice. See Exhibit 1 (hereinafter the "Agreement") at § V.B (as amended by Perdue Producer Memoranda dated June 29 and December 16, 2009); accord 9 C.F.R. § 201.100(h)(1). The Agreement provides that Perdue will consign chicks and provide feed, fuel, medications, vaccinations, and other supplies to Watts. Agreement § I. In exchange, Watts agrees to accept, feed, water, and care for the consigned chicks until they are removed by Perdue. Id. § II.A–B. In doing so, Watts must:

- Only use the feed, fuel, medications, vaccinations, and other supplies provided by Perdue (Id. § II.C.);

3/ Biosecurity is different from poultry welfare. Biosecurity is a set of best practices to prevent the introduction of disease, infection, or parasites on farms, into poultry houses, or between farms owned by different independent contract growers. For example, it requires persons who visit a farm raising chickens to wear protective gear such as plastic boots, head coverings, and coveralls to reduce the spread of germs and disease.

- Provide the necessary housing, equipment, supplies to maintain said equipment, and utilities and labor to maintain said housing and equipment in good repair and operable condition (Id. §§ II.B.; III.C.);

- Provide for the prompt and proper disposal of deceased birds, and routinely and diligently cull injured or sick birds resulting from normal mortalities and/or catastrophic loss (Id. § II.E.);

- Notify Perdue within 24 hours if any chicks, for any reason, do not develop normally, or if there is any disease or parasitism noticeable within the flock, or if any situation exists which would have an adverse effect on the health or well-being of the flock or any part of the flock (Id. § II.H.).

The Agreement that lies at the heart of this case clearly delineates that Watts is an ***independent contractor*** for Perdue. Id. § IV ("[T]his is a service contract and not a contract of employment and PERDUE and [Watts] are each ***independent contractors***. Neither party, nor their agents or employees, shall be considered to be the employees of the other for any purpose whatsoever.") (emphasis added). Watts' Agreement also establishes the fundamental touchstones of an independent contractor relationship which have been recognized by OSHA:

> [Watts] is exclusively responsible for the performance of [Watts'] obligations under this Agreement. The employment, compensation, and supervision of any persons by [Watts] in the performance of such obligations is a matter of [Watts'] sole discretion and responsibility. [Watts] accepts full and exclusive liability for payment of any and all applicable taxes for workers' compensation insurance, unemployment compensation insurance, or old age benefits or annuities now or hereafter imposed by any governmental agency, as to [Watts] and all persons as [Watts] may engage in the performance of this Agreement. Said taxes shall be paid directly by [Watts] and shall not be chargeable to PERDUE. [Watts] agrees to hold PERDUE harmless from any liability with respect to any such taxes or other charges.

Id. § IV.B. Perdue places no limitation on Watts' right or ability to pursue other work, and Watts is free to operate his farm to other ends.[4/]

The historical relationship between Watts and Perdue fortifies Watts' status as an independent contractor. Until recently, Watts employed a full-time assistant to help him raise Perdue's birds, and Perdue had no economic relationship with Watts' assistant.[5/] In addition, Watts is free to hold other jobs and pursue other means of income through his farming operations. With respect to his independent contractor relationship with Perdue, Watts sets his own schedule (and formerly that of his assistant as well) and employs his own strategy in raising birds. Likewise, ***all*** of the work Watts performs in caring for the birds is done on his own property. Watts owns ***all*** of the land, facilities and equipment required to raise the chickens. Watts also provides ***all*** of the labor to raise the chickens and to maintain the land, facilities and equipment required to do so. Watts additionally provides all the utilities necessary to operate his poultry farm enterprise. Watts does ***not receive*** from Perdue a paycheck, vacation time, sick leave, workers' compensation benefits, 401(k) or pension benefits, health insurance, bereavement leave, or any other employee-type benefit. Instead, Watts is paid by Perdue per flock and receives an independent contractor tax Form 1099 at the end of each year. Perdue does not withhold any federal or state income tax from the payments it makes to Watts. As provided by Federal law and regulations, both Watts and Perdue are free to terminate the contract, without cause, with ninety days' notice. See Agreement § V.B (as amended by Perdue Producer Memorandum dated December 16, 2009); accord 9 C.F.R. § 201.100(h)(1).

In short, it is undisputed that Watts is an independent contractor for Perdue, and not an employee.

4/ For biosecurity reasons, a grower cannot raise chickens for other poultry integrators at the same time as a Perdue flock. Raising multiple flocks from different integrators at the same location unacceptably increases the risk of cross-contamination between the flocks as farm personnel move between the flocks. Nothing in Watts' Agreement, however, restricts him from providing services to another poultry integrator upon its termination.

5/ Perdue did require Watts' assistant to undergo its poultry welfare and biosecurity instruction.

C. Watts has Complained about Perdue for Years.

Watts has raised chickens for Perdue since 1992, with a brief hiatus in 1998–99 when he contracted to raise chickens for Mountaire Farms before re-signing a contract with Perdue. Compl. ¶11. Although Watts alleges in this case that Perdue retaliated against him because he complained about Perdue in an on-line video in December 2014, Watts has been complaining about Perdue for years. That, of course, removes any "causal connection" between his December 2014 on-line video and the alleged retaliation. In this regard, as early as 2012, Watts has been bombarding Lyn Price ("Price"), a Perdue grow out manager, with a disjointed laundry list of complaints about his work raising broiler chickens. For instance, Watts complaints include: i) the alleged unfairness of the competitive system that Perdue and other poultry integrators use to determine a poultry grower's pay; ii) the nature of the relationship between poultry integrators and poultry growers, including the unfairness of his own Agreement; iii) non-stop requests for, and inquires about, an increased rate of pay for poultry producers; iv) oversupply of chickens in the marketplace that has allegedly suppressed the price of chicken; v) the poultry industry's squeezing of contract farmers as a result of the aforementioned suppressed price of chicken; vi) vast and conclusory assertions that the entire poultry industry is, and has been, mislabeling products to mislead consumers in order to drive profits higher, at the expense of the contract farmer; vii) the allegedly misleading representations made by poultry integrators to entice farmers to commit to growing chickens; and viii) allegations that defective deliveries of chicks from Perdue's hatcheries have an adverse and arbitrary effect on an individual grower's pay. See, e.g, Ex. 2 – 15 (chronological collection of complaints made via email by Watts).

Despite Watts' supposedly altruistic mission to address animal welfare issues in this case, each of his complaints traces its roots to the amount of money that Watts receives. In one of his few communications about "animal welfare," Watts tipped his hand:

> I have documented the last year plus of birds and the various issues we have down here with pics and even some video. Mostly the front end of flocks. I refuse to buy the phrase "farm conditions"...
>
> ***But that stuff to me is minor...it is what it is...the contract pay is what I want to discuss***..not me personally..I am ok...but could be much better as I am not running barefoor [sic] through my money but treading water pretty well...but others are not so fortunate...especially the new farms.

Ex. 16 (ellipses in original, emphasis added). Clearly, the foundation of Watts' complaint against Perdue is based on money, not animal welfare. That further demonstrates the absence of Watts' "good faith" in bringing his complaint.

Though Watts' emails to Price had always contained aggressive undertones, in late 2014, Perdue personnel noted a marked change in Watts' behavior. For instance, John McLaurin, a flock advisor, observed in February of 2015 that "[d]uring the last several months [he had] noticed a change in [Watts'] behavior. He quit answering phone calls and would respond in text messages. Often times [Watts] would make snide remarks about [Perdue]." Similarly, on October 14, 2014, Watts sent Price an email discussing Perdue's recent settlement of a lawsuit involving the "humanely raised" label Perdue used with its Harvestland brand of chicken. Ex. 17. Watts concluded his email with a warning that the "humanely raised" settlement might lead to a "tsunami" of public opinion against poultry integrators. See id.

D. Watts Permits Sick and Injured Birds in his Flock to Suffer for Weeks, and then Films Them Suffering.

Because Watts did not get the reaction he sought from Perdue, his unusual behavior morphed into abject cruelty. In May 2014, ostensibly concerned with the welfare of his current flock—which was under his care and supervision—Watts invited a film crew from the animal rights organization Compassion in World Farming ("CIWF") to film a group of recently placed chicks on his farm. Compl. ¶¶29–30. Several weeks later, CIWF returned to Watts' poultry farm to "film more footage of the flock, which was then nearing the end of its growth cycle." Id. ¶31. CIWF then edited the footage into a short video, and released it on its website on or about December 3, 2014. See id. ¶32.

Watts' description of the birds under ***his*** care, in ***his*** chicken houses reveals his utter disregard for animal welfare. According to Watts, the video of the chicken house he oversaw:

> "depicts birds crowded wall-to-wall in one of [his] chicken houses, panting and trampling each other to move around" and "lying in their own litter and feces, unable to move, with large red, irritated patches of flesh across their breasts. Some of the birds shown are dead or apparently ill, and many others have apparent leg deformities."

Compl. ¶33.

Upon viewing the CIWF video, Perdue personnel were shocked by Watts' flagrant disregard for the welfare of the flock under his care and by his obliviousness to biosecurity. For instance, in one scene Watts calmly watches the suffering of deformed and sick chickens that have been under his care for weeks, including a "[p]articularly disturbing ... older bird with an obviously deformed leg that was allowed to continue its suffering, apparently for weeks." Ex. 18 at 1. Further, throughout the video chickens were shown panting and under heat stress, and "[f]ans visible in the background were not operating to properly ventilate and cool the house." Id. In other scenes, Watts and a CIWF representative are shown casually walking through a chicken house without proper protective clothing and footwear. Id.

The CIWF video provided irrefutable proof that Watts failed to comply with his contractually-mandated biosecurity and animal welfare responsibilities. To make matters worse, Perdue's flock advisor reports from the flock in the video did not indicate any of the issues in the video. In other words, the conditions in the video stood "in contrast to [Watts'] farm performance history and the conditions observed during a recent on-farm audit." Perdue found Watts' "willingness to portray conditions that are inconsistent not only with Perdue standards but with [Watts'] own farming practices [to be concerning]." Id.

Perdue acted swiftly to address Watts' unacceptable practices. Perdue sent Poultry Welfare auditors to Watts' poultry farm to ascertain the condition of the flock in his care at that time. Perdue consulted a report from the Center for Food Integrity's Animal Care Review Panel (the "Panel"), which reviewed the CIWF video and provided an assessment as to possible animal welfare violations.[6/] Attached hereto as Exhibit 19. The Panel's report is illuminating, and provides *inter alia*:

6/ The National Chicken Council ("NCC")— a non-profit trade association representing the U.S. chicken industry—requested a panel be convened to review the CIWF video, but neither NCC nor Perdue had any input or involvement in the preparation of the report. NATIONAL CHICKEN COUNCIL, *Overview*, http://www.nationalchickencouncil.org/about-ncc/overview/ (last accessed March 24, 2015). Perdue did not have access to the Animal Care Review Panel's report until it was published on December 5, 2014. The Center for Food Integrity created the Animal Care Review Panel program to engage recognized animal care specialists to examine video and provide expert perspectives for food retailers, the poultry industry and the media. The Panel includes a veterinarian, an animal scientist and an ethicist to assure various perspectives are represented. Ex. 19 at 6. The

In the video report, chickens are shown with what appear to be broken or defective legs and beak deformities. Other chicks appear to be lethargic and sick with an inference that this is a typical, widespread condition.

> Dr. Newberry: The sick and lethargic chicks shown in the video appear to be failing to convert from living off internal yolk reserves to eating solid food. This incurable condition occurs in some chicks of every hatch and becomes evident within a few days after hatching. *These chicks should be euthanized immediately to minimize suffering as they will, unfortunately, not survive.*
>
> Dr. Bilgili: Chicks with congenital or development defects, such as a twisted leg or a crossed-beak are expected given the fact that more than nine billion chicks are hatched annually in the U.S. Usually chicks with congenital defects are euthanized at the hatchery and never sent to the farms. *Those that are missed or develop an anomaly after placement at the farm are supposed to be humanely euthanized by the farmer. This is an important part of the Animal Welfare Program that the farmer should have been trained on.*
>
> ...
>
> Dr. Newberry: A crossed-beak is an incurable congenital disorder and the chick should be euthanized immediately to minimize suffering due to difficulty feeding. A few chicks in every hatch will have such disorders.
>
> *Dr. Hester: The leg was twisted and the broiler should have been humanely euthanized as soon as detected rather than retained in the flock and allowed to continue its suffering. . . .*
>
> ...

The farmer in the video says the birds spend a majority of their time squatting due to breast size and inability to stand.

Panel operates independently and "[i]ts reviews, assessments, recommendations and reports will not be submitted to the poultry industry for review or approval." Id. at 5.

Dr. Hester: The genetic stock of broilers shown in the video have been bred for rapid growth rate and increased breast meat yields. These modern strains of broilers are physiologically and genetically distant from their ancestor, the Red Jungle Fowl. Not only have their genetics and physiology changed, but the behavior of these rapidly growing lines of broiler chickens has also been altered. The metabolic demands for rapid growth in broilers are huge, leaving less energy for activity. Broilers spend about 76 percent of their time sitting, 7 percent of their time standing idle on their feet, 3.5 percent standing preening, and 4.7 percent of their time standing eating. These chickens have enormous appetites feeding more than 50 times in a 24 hour period. They spend about 3 percent of their day drinking (Weeks et al., 2000, Applied Animal Behaviour Science 67: 111). *So contrary to what the farmer states, the broilers are able to stand, but they do spend the majority of their time idling and sleeping in a sitting position.* Genetically selecting broilers for rapid growth and broad breast has led to a more inactive chicken.

...

The narrator says the litter that covers the floor of the barn is not changed between flocks and sometimes not for years which results in poor living conditions for the birds.

Dr. Hester: It is hard for me to assess the quality of the litter through a video. I need to feel and smell the litter and see the whole house. If there has been no disease outbreak and there are no issues with the quality of the litter, then the litter can be recycled over several flocks so as to minimize impact on the environment due to waste disposal. With recycled litter, the farmer is responsible for removing caked and wet areas of the bedding. The old litter is stirred in between flocks and generally 1 to 2 inches of fresh litter is top-dressed on the old litter before the arrival of the hatchlings.

Dr. Bilgili: The bedding is the farmer's responsibility. What type of bedding to use, how to maintain its quality and when to replace is the farmer's call. If the litter is wet or caked, then it's the farmer who is not maintaining a proper house environment (i.e., ventilation, water drinker management). *The farmer can replace the litter after each flock with new*

bedding if he/she chooses. They save more money if they use it for a longer period. Keeping the same litter for a year is not at all common.

A bird is shown with little or no feathers on its underside. The narrator says this is due to the condition of the litter and the fact the bird spends a majority of its time squatting.

Dr. Bilgili: Broiler chickens today have a different feathering pattern. Also, because broilers rest with their breasts in contact with the bedding, this contact and associated friction can cause feather loss (similar to loss of hair on arms and legs of humans at contact points). The red color is probably due to contact irritation and/or inflammation from poor quality litter.

Dr. Hester: Inflamed red skin in the breast area with few feathers may be associated with too much contact with poor-quality litter. *Lame birds spend more time lying down and I suspect that the chicken shown in the video was lame and should have been humanely euthanized to prevent its continued suffering.*

...

The flock is described in the video as "a sea of panting birds," inferring they are overheated.

...

Dr. Bilgili: Broilers pant to dissipate heat when overheated – either due to high ambient temperature and humidity or poor environmental control in the house. Again, *the responsibility to respond to the needs of the flock lies with the farmer*, who is on site 24/7 to make the appropriate changes in house environmental parameters (i.e., increasing the number or duration of fans operating, initiating evaporative cooling, fogging, etc.).

Ex. 19 (italics added). Succinctly put, Watts' complaints about the conditions in ***his chicken houses*** were, according to the three separate and independent expert opinions, ***his responsibility***.

In addition to reviewing the Panel's report, Perdue conducted an in-house biosecurity audit to assess the issues depicted in the CIWF video. Based on the Panel's report, Perdue's in-house biosecurity audit, and Watts' track record of incidents of Laryngotracheitis on his farm,[7/] Perdue concluded that Watts needed to complete supplemental biosecurity and animal welfare training prior to the placement of his next flock in order to prevent further poultry welfare and biosecurity violations. By letter dated and hand delivered to Watts on December 29, 2014, Perdue informed Watts of its comprehensive decision. See Ex. 18.

E. Watts' Complaint.

On February 25, 2015, Watts filed this Complaint with OHSA under the FMSA, alleging an unlawful employment retaliation based on his involvement in the CIWF video. Compl. ¶¶29-30. The crux of Watts' complaint is his belief that Perdue's labelling of chicken as "humanely raised" was misleading because he does not raise them humanely on his farm. Id. ¶¶16–20. Watts alleges that based on his objecting to the animal husbandry procedures allegedly required by Perdue, he was subjected to adverse employment actions. Id. ¶¶36–51. These complained of actions consisted of increased scrutiny of Watts' operations (Id. ¶¶36, 43), additional training prior to the placement of Perdue's next flock with Watts (Id. ¶¶37–40), and a delay in the placement of his flock, which Watts speculated cost him $4,500 (Id. ¶¶41–42).

Based on the uniform legal authorities discussed below, Watts' complaint is procedurally deficient and devoid of merit. Dismissal, accordingly, is appropriate.

7/ On two occasions, flocks under Watts' care have become infected with the deadly avian virus Laryngotracheitis, a viral infection characterized by inflammation of the respiratory tract. During one such outbreak, Watts' poultry farm was quarantined by the government to prevent the escalation and spread of the virus. Such outbreaks and the resulting quarantine are extremely disruptive to both Perdue and Watts' business, and are illustrative of the harm that Perdue's prophylactic safety protocols are designed to neutralize.

III. ARGUMENT

A. OSHA Lacks Jurisdiction Over Craig Watts' Complaint Because FDA Does Not Regulate Poultry Products.

OSHA lacks jurisdiction to entertain Watts' whistleblower complaint. The Food Safety Modernization Act's ("FSMA") employee protection provision, 21 U.S.C. § 399d, authorizes OSHA to adjudicate whistleblower claims raised by private food industry employees discriminated against for reporting unlawful activities involving the production of food products within the FDA's regulatory jurisdiction. Although the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*, empowers FDA to regulate and prevent the sale of adulterated and misbranded "food," a more specific federal statute governs the regulation of adulterated and misbranded "poultry products." That statute, known as the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451 *et seq.*, grants USDA the authority to regulate the production and interstate sale of "poultry products." Through a detailed system of inspections and pre-market approvals, USDA ensures that no poultry products, including those produced from chickens raised on Watts' poultry farm, can ever enter the stream of commerce unless they are truthfully labeled and fit for human consumption. Because Watts' whistleblower complaint squarely pertains to the alleged misbranding and adulteration of poultry products, OSHA should find that it lacks subject matter jurisdiction for this claim under the FSMA and dismiss this action.

1. USDA Regulates the Sale of Adulterated Poultry Products Under its PPIA-Mandated *Ante-* and *Post-Mortem* Poultry Facility Inspection Program.

The PPIA prohibits the sale in interstate commerce of "any poultry products which are capable for use as human food and are *adulterated* . . . at the time of such sale." *Id.* § 458(a)(2). "Adulterated" poultry products are those that fall under one of several statutorily enumerated categories, including products that "bear[] or contain[] any poisonous or deleterious substance which may render [them] injurious to health"; "consist[] in whole or in part of filthy, putrid, or decomposed substance or [are] for any other reason unsound"; "ha[ve] been prepared, packed, or held in insanitary conditions whereby [they] . . . may have been rendered injurious to health"; or are, "in whole or in part, the product of any poultry which had died otherwise than by slaughter." *Id* § 453(g). To prevent the dissemination of adulterated poultry products, the PPIA authorizes the FSIS to regulate sanitary conditions and to conduct *ante-mortem* and *post-mortem*

poultry product inspections at poultry processing facilities.[8/] In other words, the PPIA expressly authorizes USDA to regulate and inspect poultry products both before processing (to ensure that no unfit poultry enters the slaughtering facility) and after processing (to ensure that no unfit poultry products enter the chain of commerce). All chickens raised by Perdue contract growers like Watts are processed at Perdue facilities subject to USDA's *ante-* and *post-mortem* inspections under the PPIA. As a result, the USDA is the statutorily-mandated gatekeeper at all Perdue processing facilities, ensuring that no chickens raised on Watts' poultry farm may enter a Perdue processing facility unless they are fit for human consumption (*i.e.*, not adulterated).

2. USDA Regulates the Sale of Misbranded Poultry Products Under its PPIA-Mandated Pre-Market Label Approval Program.

In addition to regulating adulterated poultry products, the PPIA also prohibits the sale in interstate commerce of "any poultry products which are capable for use as human food and are . . . *misbranded* at the time of such sale." 21 U.S.C. § 458(a)(2). "Misbranded" poultry products are those that have "labeling [that] is false or misleading in any particular," or that fail to bear any necessary labeling claims required under the PPIA or by USDA regulations. *Id.* § 453(h). With respect to misbranding, the PPIA establishes a label-approval process for poultry products, exclusively administered by the USDA's Food Safety Inspection Service ("FSIS").[9/] Under the PPIA, FSIS is required to analyze and approve each proposed label on any package of poultry to ensure that the content is neither false nor misleading before the product enters the marketplace. 9 C.F.R. § 381.129. The PPIA bars the use of any labels on poultry products sold or offered for sale through interstate commerce unless they have been approved by FSIS.[10/] FSIS is specifically authorized to prohibit the use of any label it deems false or misleading.[11/]

8/ See 21 U.S.C. § 453(p) (defining "official establishments"); 21 U.S.C. § 455(a); 9 C.F.R. §§ 381.70-75 (authorizing *ante mortem* inspections); 21 U.S.C. § 455(c); 9 C.F.R. §§ 381.76-94 (authorizing *post mortem* inspections); 21 U.S.C. § 456; 9 C.F.R. §§ 416.1-17 (authorizing regulation of sanitary practices).

9/ See generally 21 U.S.C. §§ 451 (determining that "regulation by the Secretary of Agriculture" would "protect the health and welfare of consumers"); see also Poultry Products Inspection Regulations, 9 C.F.R. §§ 381 et seq.; Label Approvals, 9 C.F.R. §§ 412 et seq.

10/ See 9 C.F.R. § 412.1(a) ("No final label may be used on any product unless the label has been submitted for approval to the FSIS"); Sanderson Farms, Inc. v. Tyson Foods, Inc.,

The FSIS has made clear that its pre-market label review authority extends to poultry label claims about animal raising. The FSIS interprets the PPIA "as requiring [the Secretary to] approve all labels used on . . . poultry products before the products are distributed in commerce," and "[w]ithout approved labels, meat and poultry products may not be sold, offered for sale, or otherwise distributed in commerce."[12/] As USDA recently explained, FSIS's label approval mission extends to label claims that have "economic significance," such as "special statements" like "claims regarding the raising of animals." 78 Fed. Reg. at 66,827. Likewise, FSIS's newly amended label regulations, effective January 6, 2014, continue to require producers to submit sketch applications to FSIS for poultry labels containing "[s]pecial statements and claims," including specifically "claims regarding the raising of animals."[13/] 9 C.F.R. 412.1(c)(3), (e).

In addition to obtaining FSIS pre-market label approval, Perdue also voluntarily participates in the USDA's Process Verified Program ("PVP"), which is administered by USDA's Agricultural Marketing Service ("AMS"). The PVP allows agricultural manufacturers like Perdue to voluntarily submit to regular USDA audits in exchange for third-party verification from AMS that the manufacturer complies uniformly with its own best practices for certain

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549 F. Supp. 2d 708, 716 (D. Md. 2008) ("[T]he USDA has jurisdiction to approve all aspects of poultry product labels and labeling").

11/ See Kuenzig v. Kraft Foods, Inc., No. 8:11-cv-838, 2011 WL 4031141, at *5 (M.D. Fla. Sept. 12, 2011), aff'd, 505 Fed. App'x 937 (11th Cir. 2013) ("[N]o final labeling can be used on any . . . poultry product unless the sketch labeling of the final labeling has been approved by [FSIS]," and "[i]f a label submitted for review is determined to be false or misleading, the FSIS can prohibit the use of the label"); see also 21 U.S.C. §§ 451, 457(c) (banning sale of poultry with any labeling that is false or misleading); 9 C.F.R. § 381.130 (authorizing FSIS to prohibit the use of false or misleading labeling on poultry products).

12/ *Prior Label Approval System: Generic Label Approval*, 78 Fed. Reg. 66,826, 66,826 (Nov. 7, 2013).

13/ FSIS has issued regulatory guidance explaining precisely how FSIS goes about evaluating "animal raising" claims on poultry labels. *Product Labeling: Use of the Animal Raising Claims in the Labeling of Meat and Poultry Products*, 73 Fed. Reg. 60,228, 60,228 (Oct. 10, 2008).

chosen product attributes, including "Humanely Raised."[14] 7 C.F.R. §§ 62.200 *et seq.* By successfully enrolling and participating in AMS's PVP, Perdue ensures that its products consistently meet its own high standards while also earning the right to represent publicly that its products are "USDA Process Verified." *See* 7 C.F.R. § 62.213. Under Perdue's "Humanely Raised" PVP, Perdue submits to constant USDA inspection of its contract grower farms that produce poultry destined to be labeled "Humanely Raised." This separate audit and verification by AMS ensures that Perdue products labeled "Humanely Raised" are in fact raised in accordance with Perdue's Best Practices, which in turn are based upon and exceed the NCC's Animal Welfare Guidelines. As a result, all Perdue poultry products that have borne the "Humanely Raised" label were raised on farms subject to constant USDA inspection.

Under the foregoing programs, it is beyond dispute that FSIS has granted pre-market label approval for Perdue's "Humanely Raised" label claim. In fact, FSIS has also even issued a reasoned decision specifically explaining its approval decision.[15] Four years ago, FSIS considered, and denied, a petition by Tyson Foods, Inc., requesting that FSIS withdraw its approval of "Humanely Raised" labels on Perdue chicken products. There, FSIS rejected Tyson's contention that Perdue's "Humanely Raised" labels were misleading on the following basis:

> Perdue has based its humane raising standards on the principles outlined by the [NCC] Animal Welfare Guidelines, which have been recognized by the industry. FSIS has reviewed the NCC guidelines for humane raising standards and determined that the practices and standards outlined, if followed, would not render a 'humanely raised' claim false or misleading. Additionally, AMS verified through Perdue's PVP that Perdue does follow the humane raising standards as outlined by NCC. *As such, Perdue is permitted to use the USDA process verified shield in conjunction with the claim that USDA has verified that Perdue's chickens are humanely raised in accordance with the NCC standards.*

14/ See USDA Process Verified Program Policies and Procedures, *available at* http://www.ams.usda.gov/AMSv1.0/pyprocessverifiedprograms.

15/ The FSIS Decision is a public record, available on FSIS's website. *See* USDA, FSIS, Letter from Rosalyn Murphy-Jenkins, Director, Labeling and Program Delivery Division, FSIS, et al. to Robert George, Associate General Counsel, Tyson Foods, Inc. (July 11, 2011), *available at* http://www.fsis.usda.gov/wps/wcm/connect/475f40e7-59aa-4f7b-8663-ef3e62551866/Petition_TysonFood_Response_071111.pdf?MOD=AJPERES.

FSIS Decision (attached hereto) at 2–3. In other words, FSIS has ruled that Perdue's poultry raising standards, if followed, would render its "Humanely Raised" label claim truthful, and AMS's PVP inspection program ensures that Perdue's poultry raising standards are in fact followed at the chicken farms responsible for raising Perdue chickens labeled "Humanely Raised."

3. The FDA Acknowledges USDA's Jurisdiction Over Poultry Products and Admits Its Own Lack of Authority Over Such Products Under the FDCA and FSMA.

The FDA is not at any time involved in the USDA's product inspection or pre-market label approval processes under the PPIA. Although the FDA has jurisdiction over certain specific aspects of food production that could occasionally implicate on-farm animal raising, such as animal feed and animal drugs, it does not exercise plenary authority over other aspects of poultry product manufacturing.[16/] Therefore, Watts' reliance on the *Tuente Livestock* and *Rhody Dairy* decisions are misplaced because those courts permitted FDA to exercise jurisdiction over issues arising from the use of animal drugs on swine and cows. In *Tuente Livestock*, the FDA challenged the defendant's sale of swine "whose edible tissues [were] tainted with illegal levels of . . . a certain animal drug known as sulfamethazine." *United States v. Tuente Livestock*, 888 F. Supp. 1416, 1418 (S.D. Ohio 1995). Similarly, in *Rhody Dairy*, the FDA complained that the defendants had failed to keep adequate record of their administration of animal drugs to cows. Here, Watts alleges the opposite—namely, that Perdue does not permit its growers to use antibiotics on poultry destined for human consumption. *See* Watts Compl. ¶¶ 23, 27. Additionally, Watts' reliance on a November 2014 FDA warning letter to a seafood manufacturer is not relevant to this inquiry because, unlike with poultry products, the USDA has no statutory oversight authority with respect to the labeling and adulteration of seafood products.

Even the FDA itself takes the view that its regulatory responsibilities do not extend to poultry products under the FDCA or the FSMA. For instance, FDA has acknowledged, in an FSMA-mandated report to Congress, that "FDA's responsibility in the food area generally covers all domestic and imported food except meat, poultry, and processed eggs, which are

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16/ As mentioned, the FDCA authorizes the agency to regulate, among other things, "animal feed," defined as "an article which is intended for use for food for animals other than man," 21 U.S.C. §§ 321(w), 360b; and "new animal drugs," meaning "any drug intended for use for animals other than man, including . . . for use in animal feed," id. §§ 321(v), 360b.

primarily the responsibility of the U.S. Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS)."[17/] Elsewhere, FDA has explained that in the wake of FSMA's passage, "the U.S. Department of Agriculture will continue to have primary responsibility for regulating meat, poultry and egg products" while "FDA will continue to have primary responsibility for regulating all other foods."[18/] Furthermore, shortly after enactment of the FSMA, FDA's Deputy Commissioner for Foods introduced the law by explaining that "FDA's jurisdiction and the new law cover about 80 percent of the U.S. food supply, essentially everything but meat and poultry."[19/] Countless other industry sources have also confirmed that FDA does not have regulatory jurisdiction over poultry products under the FDCA or FSMA.[20]

17/ See FDA, "Annual Report to Congress on Food Facilities, Food Imports, and FDA Foreign Offices Provisions of the FDA Food Safety Modernization Act," Nov. 2013, *available at* http://www.fda.gov/Food/GuidanceRegulation/FSMA/ucm376478.htm.

18/ See FDA, "Impact of the Food Safety Modernization Act on the Food Industry," *available at* http://www.accessdata.fda.gov/scripts/FDTraining/course_03/module_02/lesson_02/FD03_02_02_050.cfm

19/ See Speech of Michael R. Taylor, Deputy Commissioner for Foods, FDA, to Global Food Safety Conference, Feb. 17, 2011, *available at* http://www.fda.gov/aboutfda/centersoffices/officeoffoods/ucm243591.htm.

20/ See, e.g., Renée Johnson, Cong. Research Serv., The Federal Food Safety System: A Primer, at 5 (2014) ("FSMA did not directly address meat and poultry products under USDA's jurisdiction"), *available at* https://www.fas.org/sgp/crs/misc/RS22600.pdf; Food Safety News, "New Whistleblower Protections Could Impact Food Safety Oversight," Nov. 14, 2012, *available at* http://www.foodsafetynews.com/2012/11/new-whistleblower-protections-could-impact-food-safety-oversight/#.VRxV72d0yUk (noting that the FSMA "extends protections to corporate employees exposing problems with FDA-regulated products, but noting that "USDA-regulated product industry workers still lack protections," such as worker "who monitor our beef, poultry, pork, and egg products"); ScienceBlogs, "OSHA issues new whistleblower protections for food industry workers," March 12, 2014, *available at* http://scienceblogs.com/thepumphandle/2014/03/12/osha-issues-new-whistleblower-protections-for-food-industry-workers/ (explaining that under the FSMA "[w]histleblowers in food industries regulated by the [USDA], such as beef and poultry producers, aren't covered").

For the foregoing reasons, OSHA should find that it lacks jurisdiction to entertain Watts' challenge and dismiss this action.[21/]

B. Watts Has No Standing to Bring a Claim Against Perdue Under The FMSA's Employee Protection Provision Because He Is An Independent Contractor.

The FMSA generally prohibits covered entities from "discharge[ing] an ***employee*** or otherwise discriminat[ing] against an ***employee*** with respect to compensation, terms, conditions, or privileges of employment because the ***employee***, whether at the employee's initiative or in the ordinary course of the employee's duties" engaged in activity protected by the FMSA. 21 U.S.C. § 399d (emphasis added). In the context of the FMSA, the term employee "means an individual presently or formerly working for a covered entity, an individual applying to work for a covered entity, or an individual whose employment could be affected by a covered entity." 29 C.F.R. § 1987.101(e).

Where, as here, the definition of the term "employee" is "completely circular and explains nothing," the Supreme Court has directed courts to use a common-law test based on traditional notions of agency to determine whether a worker is an employee or an independent contractor. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (interpreting ERISA's definition of employee as "any individual employed by an employer"). In Darden,

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21/ As mentioned briefly supra at Part II.B, the Packers and Stockyards Act of 1921, as amended ("PSA"), 7 U.S.C. §§ 181-229, also authorizes USDA to regulate "poultry growing arrangements" between "poultry growers," like Watts, and "live poultry dealers," like Perdue, id. § 182. For example, the PSA mandates that live poultry obtained under a poultry growing arrangement must be paid for by the close of the 15th day following the week in which the poultry is slaughtered, id. § 228b-1; that poultry growing arrangements include three-day cancellation periods for poultry growers, id. § 197a(a); that live poultry dealers disclose any additional capital investments needed on the poultry growers' farms during the term of the contracts, id. § 197a(b); that disputes arising from poultry growing arrangements be venued in the federal judicial district where performance takes place, id. § 197b(a); and that poultry growers have the ability to opt out of arbitration provisions in poultry growing arrangements, id. §§ 197b(b), 197c. The PSA also makes it unlawful for live poultry dealers like Perdue to engage in any unfair, unjustly discriminatory, anti-competitive, or deceptive practices, id. § 192, and it authorizes the USDA to enforce the PSA through investigation of and regulatory action against those businesses in violation, id. § 228b-2, b-3, b-4.

Robert Darden, a former insurance salesman for Nationwide Insurance, brought suit against Nationwide after it informed Darden he had forfeited portions of his retirement plan with Nationwide by violating the terms of a non-compete provision. Darden argued that as Nationwide's former employee, Nationwide violated the Employee Retirement Income Security Act of 1974 ("ERISA") by terminating retirement benefits that had vested. The trial court held that "Darden's ERISA claim [could] only succeed if he was Nationwide's 'employee,' a term [ERISA] defines as 'any individual employed by an employer.'" Id. at 321. On appeal, the Supreme Court adopted a common-law test for determining whether Darden was an employee of Nationwide, and wrote in pertinent part:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 323–24 (quoting Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730, 751–752 (1989)).

OHSA adopted the Darden test for determining whether an individual is an employee or an independent contractor where statutory definitions of the term employee are vague.[22/] The OSHA webpage describes the Darden factors as follows:

22/ See e.g., OSHA, Office of Federal Contract Compliance Programs, Frequently Asked Questions – Employer-Employee Relationship, *available at* https://www.dol.gov/ofccp/regs/compliance/faqs/Employer-Employee_Relationship.html (explaining nature and application of Darden factors); OSHA, Letter from Raymond Donnelly, Director of Office of General Industry Enforcement, Standard Interpretations Letter, Apr. 30, 1996, *available at*

- **The contractor's right to control when, where, and how the individual performs the job:** The degree to which the contractor retains the right to direct and control how and when an individual performs his or her work is a strong indicator of whether an employment relationship exists, regardless of whether the contractor exercises that right. If the contractor retains substantial control over when, where, and how the individual performs work, that is a strong indicator that the individual is an employee. However, if the contractor has little control over the manner in which the work is performed, that may indicate that the individual is not an employee.

- **The skill required for the job**: Independent contractors typically have their own methods for doing the work and are hired because of their specialized knowledge and expertise, or because such expertise is not routinely used in the contractor's business. However, if the work performed by an individual does not require such specialized skills or is a regular part of the contractor's normal business, this is an indicator that the individual may have an employment relationship with the contractor.

- **The source of the instrumentalities and tools**: Generally, independent contractors procure and use their own equipment and materials needed to perform the work they are hired to do. If the contractor furnishes the tools, materials, and equipment for the individual to work, this will tend to show the existence of an employment relationship between the individual and the contractor.

- **The location of work**: If the individual works at a location that is owned or controlled by the contractor, this may be an indicator that the individual is an employee, particularly if the individual's work can be performed elsewhere. However, if the individual retains the discretion to perform the work at another location, this may indicate a non employee status.

- **The duration of the relationship between the parties**: An extended, continuing relationship between the individual and the contractor without a pre-–defined duration may indicate the existence of an employment

https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22156 (same).

relationship. Independent contractors generally do not have such an extended relationship since they usually perform discrete tasks over a pre–determined period of time that is agreed upon by the parties.

- **Whether the contractor has the right to assign additional projects to the individual**: Independent contractors typically agree to provide very specific services to a company and usually have the freedom to accept or decline additional jobs. If the contractor has the right to assign additional work to an individual at its discretion, then this may indicate the existence of an employment relationship.

- **The extent of the individual's discretion over when and how long to work**: If the contractor exercises control over the hours that the individual begins work and the duration of the workday, then this may indicate that an employment relationship exists. Independent contractors are usually constrained by timeframes for deliverables, but can exercise discretion over when they begin work and how long their workday is within those general constraints.

- **The method of payment**: Independent contractors are generally paid an amount that is agreed upon in advance for performing a particular job. If an individual is paid a regular salary or is paid by the hour, week, or month, that may indicate the existence of an employment relationship.

- **The contractor's role in hiring and paying assistants:** Employees generally do not hire and pay for their own assistants. If the individual has discretion to hire and pay for his or her own assistants without the approval of the contractor, that may indicate that the individual is an independent contractor.

- **Whether the individual's work is part of the regular business of the contractor**: Employees typically perform jobs that are a regular or routine part of the employer's business, while independent contractors generally perform specialized work that lies outside of an employer's normal business.

- **Whether the contractor is in business**: Employees are usually not engaged in their own separate business (or the business of another entity)

when performing work for the contractor. Independent contractors, however, are usually engaged in their own separate business when they perform work for the contractor.

- **The provision of employee benefits to the individual**: Employees typically receive benefits from the contractor, such as health insurance, life insurance, leave, or workers' compensation, while independent contractors do not normally receive such benefits from the contractor.

OSHA, Office of Federal Contract Compliance Programs, Frequently Asked Questions – Employer-Employee Relationship, *available at* https://www.dol.gov/ofccp/regs/compliance/faqs/Employer-Employee_Relationship.html.

In addition to the Darden factors, the Fourth Circuit has also held that courts "can not [sic] ignore the clear expression [in a contract] ...to establish an independent contractor relationship." Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 262 (4th Cir. 1997) (quoting Robb v. U.S., 80 F.3d 884, 893 (4th Cir. 1996)); accord Ratledge v. Sci. Applications Intern. Corp., Civ. A. No. 1:10–cv–239, 2011 WL 652274, *4 (E.D. Va. Feb. 10, 2011) ("In determining employment status, the Fourth Circuit has also examined the beliefs the parties held about the nature of their relationship."). A contractual definition of a relationship as that of an independent contractor is particularly persuasive where "the mutual intent to create an independent contractor relationship [is] confirmed uniformly by the parties in the way they treat[] benefits and taxes and in the way they represent[] their relationship to third parties." See id. at 262–63.

Applying the factors discussed above establishes that Watts is an independent contractor for Perdue and is thus precluded from invoking the "employee protections" provision of the FMSA. See id. The Agreement clearly defines Watts as an independent contractor, and provides that "neither party, nor their agents or employees, shall be considered to be the employees of the other for any purpose whatsoever." Agreement § IV. The parties have confirmed the terms of the Agreement, and comported their behavior with respect to the Agreement's delineation of Watts as an independent contractor. Indeed, the parties' course of dealings evokes many of the Darden factors, and is supportive of the conclusion that Watts is an independent contractor. Given that the Darden test requires a weighing of the factors, with no one factor being dispositive (Id. at 324), it is helpful to review Watts' work history in the context of each factor:

The hiring party's right to control how the individual performs the job. Watts is free to set his own work schedule and employ his own strategy in raising the flocks. Perdue's flock advisors offer advice to Watts on how to maximize the performance of his birds, but Watts is free to (and often has) rejected this advice in favor of his own strategy.

The skill required. Watts engages in specialized process of raising chickens. The process involves industry specific knowledge and experience that cannot be replicated (safely or efficiently) by those without it.

The source of the instrumentalities and tools. Watts owns his chicken houses, the land and the tools and "instrumentalities" required to raise the birds. Watts also supplies and pays for the utilities necessary to operate his farm. On the other hand, Perdue merely supplies the feed, medication (prior to placement of No Antibiotics Ever flocks at Watts' poultry farm) and chicks for Watts to raise.

The location of the work. The entirety of Watts' work takes place on his own farm.

The duration of the relationship between the parties. Each new flock of birds is governed by a self-renewing independent contractor agreement. As provided by Federal law and regulations, both Watts and Perdue are free to terminate the contract, without cause, with ninety days' notice. See Agreement § V.B (as amended by Perdue Producer Memorandum dated December 16, 2009); accord 9 C.F.R. § 201.100(h)(1).

Whether the hiring party has the right to assign additional projects to the hired party. The scope of Watts' obligations to Perdue are embodied in the Agreement. Perdue may not force Watts to accept any additional projects or to raise more birds than for which he contracts in a given flock.

The extent of the hired party's discretion over when and how long to work. Watts is free to set his own day-to-day schedule and work when he wants. Indeed, the Agreement does not set when and how long Watts must provide poultry growing services.

The method of payment. Watts does not draw a salary or an hourly wage. Instead, his earnings are calculated based on the weight of his flock according to the competitive system. Payments are made as lump sum payments at the end of each flock cycle. Watts has a substantial impact on the amount he is paid since it is calculated based on his efficiency as a poultry grower.

The hired party's role in hiring and paying assistants: Watts is free to employ others (and until recently has done so) to help raise Perdue's birds, with whom Perdue has no economic relationship. The Agreement also reflects that Watts is responsible for managing his assistant's performance.

Whether the work is part of the regular business of the hiring party. Perdue is a poultry integrator, and is in the business of selling chickens. However, Perdue's business model relies on independent contract farmers to raise Perdue's chickens to market weight. Thus, Perdue is not normally in the business of raising chickens, with the limited exception of its independent contractor relationship with the growers.

Whether the hiring party is in business. Watts raises chickens as a business. In the past, he has contracted with one of Perdue's competitors, Mountaire Farms. Further, Watts earnings on his annual Form 1099 do not contain the business expenses that he pays for his business of raising chickens. Furthermore, Watts is free to operate his farm property to other ends, provided that it does not interfere with the health and welfare of Perdue's chickens.

The provision of employee benefits. Perdue does not provide Watts with any employment benefits.

The tax treatment of the hired party. At the end of each year, Watts receives a Form 1099 identifying the total amount he has earned from Perdue. Perdue does not withhold taxes on Watts' behalf. The Agreement likewise reflects that Watts is responsible for paying his own taxes.

The Darden factors conclusively establish that Watts is an independent contractor with Perdue, and not its employee. This conclusion is in line with those of courts nationwide, including in the Fourth Circuit, which have recognized that poultry growers are ***independent contractors*** of the integrators whose chickens they raise. See e.g., Holly Farms Corp. v. N.L.R.B. 517 U.S. 392, 395 (1996) ("Holly Farms hatches broiler chicks at its own hatcheries, and immediately delivers the chicks **to the farms of independent contractors**.") (emphasis added); N.L.R.B. v. Hudson Farms, 681 F.2d 1105, 1106 (8th Cir. 2982) ("Hudson Farms, an integrated poultry producer, employs truck drivers and yard workers to transport its poultry between **independent contract growers**, which raise the chickens to market weight, and the company's processing plants.") (emphasis added); Smith v. Perdue Farms, Inc., No. 2:11–CV–640–WKW, 2012 WL 4792460, at *1 (M.D. Ala. Oct. 9, 2012) ("Defendant Perdue Farms, Inc. breeds and hatches chickens, but ... relies upon a network of **independent local farms** to raise its chicks to maturity.") (emphasis added); Bunting, 611 F. Supp. at 683 ("Perdue owns its own

hatchery and breeding flock, delivering its baby chicks to **independent contract growers**.") (emphasis added); In re Pilgrim's Pride Corp., 453 B.R. 684, 688–89 (N.D. Tex. 2011) ("[T]he Court concludes that no employment relationship existed between [poultry integrator] and [poultry grower]. The uncontroverted facts on the record establish that the [poultry growers] maintained control over their day-to-day operations and possessed ultimate responsibility for the success or failure of their chicken farm.").

Further still, Federal courts in the Fourth Circuit have also widely held that independent contractors do not qualify as employees in the context of similar federal whistleblower statutes. See e.g., Farlow v. Wachovia Bank of N.C., N.A., 259 F.3d 309, 310, 313 (4th Cir. 2001) (Title VII of the Civil Rights Act of 1964); Garrett v. Phillip Mills, Inc., 721 F.2d 979, 980 (4th Cir. 1983) (Age Discrimination in Employment Act); Adler v. Anchor Funding Servs., LLC, No. 3:10cv515, 2011 WL 1843226, at *3 (W.D.N.C. May 16, 2011) (Americans with Disabilities Act); U.S. ex rel, Suh v. HCA-Healthcare Co., No. 7:02–CV–166–F, 2009 WL 1834586, at *3 (E.D.N.C. June 23, 2009) (anti-retaliation provision of False Claims Act); Herman v. Mid-Atl. Installation Servs., Inc., 164 F. Supp. 667, 671 (D. Md. 2000) (Fair Labor Standards Act).

Because Watts is not an employee of Perdue, he is not covered by the "employee protection" provisions of the FMSA. For this additional reason, OSHA should dismiss Watts' complaint.

C. Standards of a Retaliation Claim Under the FSMA.

Even if OSHA had jurisdiction over Watts' complaint (it does not), and even if Watts were an employee of Perdue (he is not), his retaliation claim fails. To state a *prima facie* case of retaliation under the FMSA, a complainant must "allege the existence of facts and evidence" that show:

i) The employee engaged in a protected activity;

ii) The respondent knew or suspected that the employee engaged in the protected activity;

iii) The employee suffered an adverse action; and

iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

29 C.F.R. § 1987.104(e)(1). If a complaint fails to establish a *prima facie* case of retaliation under the Act, the Complaint will be dismissed and no investigation will commence. Id. at § 1987.104(e)(1), (3). Moreover, even when a complaint establishes a *prima facie* case of retaliation under the Act, "further investigation of the complaint will not be conducted if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity." Id. at § 1987.104(e)(4).

In analyzing a retaliation claim in another context, the Fourth Circuit held that "opposition activity is protected when it responds to an employment practice that the employee *reasonably believes* is unlawful." Jordan v. Alt. Res. Corp., 458 F.3d 332, 338 (4th Cir. 2006) (emphasis in original) (interpreting the employee protection provisions of Title VII).[23/] In other words, where a plaintiff lacks an objectively reasonable belief that the opposed practice was unlawful, he does not engage in protected activity. See id. at 360 ("In short, we conclude that [plaintiff] could not have had an *objectively reasonable* belief that, in complaining to management about the two related conversations, she was complaining about conduct that was unlawful....") (emphasis in original); Session v. Anderson, 719 F. Supp. 2d 650, 654 (W.D. Va. 2010) (dismissing action for retaliation under Title VII because it "was not objectively reasonable to believe that" defendant's employee's comments violated Title VII); Greene v. A. Duie Pyle, Inc., 371 F. Supp. 2d 759, 764 (D. Md. 2005) (dismissing case where plaintiff could not have objectively believed comments from a supervisor violated Title VII). Thus, if a plaintiff does not have an objectively reasonable belief that his/her alleged "protected activity" was opposing an unlawful practice, he/she fails to state a *prima facie* case of retaliation. See 29 C.F.R. § 1987.104(e)(1)(i); Jordan, 458 F.3d at 338; Session, 719 F. Supp. 2d at 654; Greene, 371 F. Supp. 2d at 764.

23/ As one court observed: "Although there are no reported cases discussing a cause of action for retaliation under the FSMA, the standard for stating a cause of action for retaliation under the FSMA can be formulated from the language of the statue combined with the well-known standard for stating a claim of retaliation under other laws such as the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act." Chase v. Bros. Intern. Food Corp., 3 F. Supp. 3d 49, 53 (S.D.N.Y. 2014). Given the continuing dearth of cases interpreting the FMSA, the Chase court's observation that analogous federal anti-discrimination statutes provide valuable guidance on the FMSA's application is particularly persuasive. See id.

Similarly, the Supreme Court limited the phrase "adverse action" in retaliation claims to allow recovery only for employment actions that are "materially adverse." See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) ("We speak of *material* adversity because we believe it is important to separate significant from trivial harms.") (emphasis in original). As the Court wrote in Burlington: "The antiretaliation provision [of Title VII] prohibit[s] employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers, and normally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." Id. at 68 (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 338 (1997)); accord Artis v. U.S. Foodservice, Inc., Civ. A. No. ELH–11–3406, 2014 WL 640848, *16 (D. Md. Feb. 18, 2014) ("An action that merely causes an employee irritation or inconvenience, but does not affect a term, condition, or benefit of her employment, is not an adverse employment action.") (quoting Springgs v. Pub. Serv. Comm'n of Md., 197 F. Supp. 2d 388, 393 (D. Md. 2002)); Thorn v. Sebelius, 766 F. Supp. 2d 585, 603 (D. Md. 2011) (describing allegedly retaliatory acts such as "retaliatory emails" and "unwarranted reprimands" as "nothing more than unactionable 'personal slights.'") (citation omitted); Adams v. Upper Chesapeake Med. Ctr., Inc., Civ. A. No. AMD 08–346, 2009 WL 997103, *4 (D. Md. Apr. 14, 2009) (finding that "occasional yelling from a boss" and "being ignored or avoided by other employees does not rise to the level of a materially adverse employment action").

Therefore, only those employment actions which would deter future parties from reporting or opposing activities under the FMSA are sufficiently "material" as to be actionable under the Act's employee protection provision. See 29 C.F.R. § 1987.104(e)(1)(iii); Burlington, 548 U.S. at 68; Artis, 2014 WL 640848, *16; Thorn, 766 F. Supp. 2d at 603; Adams, 2009 WL 997103, *4.

D. Watts Cannot State A *Prima Facie* Case Of Retaliation.

Even assuming *arguendo* that Watts qualifies as an "employee" under the Act, he cannot establish a *prima facie* case of retaliation for a myriad of reasons, each of which requires dismissal of his complaint.

1. Watts' Complaint is not "objectively reasonable."

In order for Watts's objections to Perdue's labelling of chickens to be protected activity under the FMSA, Watts must have reasonably believed that the activity he was objecting to was unlawful. Jordan, 458 F.3d at 338. The facts alleged by Watts in support of his belief

that Perdue's labelling of chickens was misleading illustrates that Watts could ***not*** have reasonably believed he was objecting to unlawful conduct.

Watts states that he first became concerned with Perdue's labelling in June 2012, when he saw a commercial depicting a chicken farm that "did not match the condition of the flocks raised on his farm...." Compl. ¶¶16–17. Watts surmises that the misleading depiction "was intentionally designed by Perdue to solicit more business from these consumers." Id. ¶16. However, Watts' argument is fundamentally flawed because the chickens raised at Watts' poultry farm were never sold with the "humanely raised" label, and Watts was aware of this fact. See Ex. 14. Thus, Watts lacks any factual basis to conclude that the chicken houses depicted in the June 2012 commercial do not accurately reflect the conditions of the chickens raised and sold under the "humanely raised" label. Further, as noted *supra* at Part III.A.2, all poultry labeling receives approval from the USDA and FSIS, the very governmental entities charged with assuring that poultry brand labels are *not misleading*.

This mistake by Watts, however, is not the only misconception he has with respect to Perdue's labelling procedures. Watts also laments that Perdue ceased administering antibiotics to chicks, resulting in "an increase in the number of chicks placed on his farm carrying bacterial infections and genetic deformities." Compl. ¶¶22–23. However, Watts neglected to tell OSHA that the flocks placed on his farm (at all times relevant to this dispute) were part of Perdue's "No Antibiotics Ever" ("NAE") brand of chicken. Intuitively, in order to market a product advertised as NAE, Perdue may ***not*** administer antibiotics to the chicks, and must also prevent Watts from doing so. See Compl. ¶27 ("[Perdue] prohibits [Watts] from administering any antibiotics ... to sick birds.").

Watts next complains that birds "have a high rate of leg deformities" and decries Perdue for "not culling sick and deformed birds from flocks at the hatchery with a level of care sufficient to minimize suffering and prevent the introduction and spread of diseases among the flocks placed on Watts's farm." ¶¶24–25. Undoubtedly, a small percentage of birds in each flock—whether delivered to Watts or another contract farmer—will display deformities and sickness. See Ex. 19. However, under the explicit terms of the Agreement, the responsibility for diligently and humanely culling and euthanizing birds after delivery to Watts' poultry farm is his and his alone. Agreement § II.E. It is wholly unreasonable for Watts to shirk his responsibilities of culling sick, dying, and deformed birds, and then purport that the presence of such birds in his flock caused him to object to Perdue's labelling.

Watts also objects to the "flock density" of the flocks placed on his farm, and states that "Perdue crowds too many chickens into each house" and that "[t]he flock density of

flocks placed by [Perdue] on Watts' poultry farm has, at times, even exceeded the National Chicken Council's animal welfare guidelines." Compl. ¶22. However, such a conclusory allegation with no factual support is insufficient to establish that Watts reasonably believed that flock density actually exceeded appropriate levels. Watts has not identified the flock number, the date of placement, or even how he supposedly determined that the flock density was in fact excessive. In short, this allegation lacks facts to support Watts' alleged belief that Perdue's labelling of chickens was unlawful.

Finally, Watts alleges that Perdue recently changed its "facility standards to require that birds be kept in houses with solid walls devoid of any windows or other openings," which has resulted in a lack of sunlight and fresh air that "has impaired the birds' quality of life, causing overheating, increased stress and reduced levels of activity." Compl. ¶26. However, Perdue does not require solid wall houses, and there are still a few farmers who do not have such walls. Nevertheless, and as Watts is no doubt aware, solid walls protect growers' flocks from the elements, natural predators and exposure to other fowl carrying avian diseases. See Ex. 19. Moreover, solid house walls allow a grower to achieve a higher housing classification and an increase in their pay. Not surprisingly, almost all farmers have elected to switch to solid walls. Indeed, solid sidewall tunnel ventilated poultry houses are the standard in the industry because of their efficiency and ability to provide a comfortable environment to poultry regardless of the weather.[24/]

When viewed in the aggregate, it is evident that Watts could not have reasonably believed that the activity he was allegedly objecting to by creating and disseminating the CIWF video was unlawful under the FMSA. This is self-evident, because the treatment of chickens that Watts objected to was in fact his own responsibility. Due to Watts' culpability in creating the animal welfare problems he complained of, his knowledge that the chickens he was raising were not advertised as "humanely raised" and his knowledge that the chickens he was raising were NAE flocks and thus forbidden from receiving antibiotics, Watts could not have reasonably believed that the conduct he was objecting to was unlawful under the FMSA.

[24/] See Michael Czarick and Bobby Tyson, *The Design and Operation of Tunnel-Ventilated Poultry Houses*, 2 UNIV. OF GA. COOP. EXTENSION SERV. 8 (May 1990), *available at* https://www.poultryventilation.com/tips/vol2/n8; R.A. Backlin, et al., *Tunnel Ventilation of Broiler Houses*, Univ. of Fla. IFAS Extension (June 1998), *available at* http://edis.ifas.ufl.edu/pdffiles/PS/PS04100.pdf.

2. The alleged adverse action was not material.

For an adverse employment action to be actionable, it must also be "material." Burlington N. & Sante Fe Ry. Co., 548 U.S. at 68. The crux of Watts' Complaint is that Perdue required that he complete a training session on biosecurity and animal welfare prior to receiving his next placement of chickens, which resulted in a nine-day delay in the next flock placement and speculative damages of $4,500. Watts also alleges that Perdue has continued to subject him to "intensive scrutiny" by "sending auditors to visit and inspect Watts's farm since January 15, 2015." Compl. ¶43. These acts simply are not material. Further, it is illustrative that even though the Agreement's terms allow either party to terminate the Agreement *without cause*, Perdue has not done so. This alone is cause for skepticism, as it defies all logic that Perdue would intentionally retaliate against Watts, with whom it could easily end its contractual relationship with or without cause.

Watts' allegation that Perdue "did not place a new flock on [Watts'] farm until January 15, 2014 [sic], approximately 9 days after he would have typically received a new flock," (Compl. ¶41) simply cannot be reconciled with an email Watts sent to Price on January 14, 2015 at 12:03 AM. Watts wrote:

> daniel [McLaurin] said he and mike were coming out at 10 in the morning...i have just walked in...been fighting and working on heaters since about 4 this afternoon...have not got all the fans sealed as of right now...I do a little more than staple some plastic...
>
> i am frozen, wet and tired...i still have some sealing that needs to be done and shut off the attic vents....**i will not have this done by 10 in the morning...this afternoon...330 or so I will be done.** but honestly I have no problem being placed back at Tier One...**your call**...

Ex. 20 (emphasis added).

In other words, as of the early hours of the morning on the day before his eventual January 15 placement, Watts was completely unprepared to have birds moved onto his farm. Recognizing this, Watts offered an estimate that he would be prepared to receive his next placement later that afternoon, after he had made the necessary preparations for the arrival of the chicks. In short, Perdue's alleged delay in placing a flock on Watts' poultry farm cannot constitute a material harm if Watts would not have been able to accommodate the arrival of the flock sooner than he actually did.

Further, neither the required training nor the increased monitoring of Watts' poultry farm constitute a materially adverse employment action. The alleged "intensive scrutiny" of Watts' poultry farm by Perdue is a red herring. Perdue is contractually permitted to enter Watts' poultry farm "to inspect the flock or facilities," and is further entitled to "enter upon the premises of [Watts' poultry farm]" if Watts is not raising the flock in accordance with the Agreement's terms. See Agreement § III.D. Even putting aside the shocking animal welfare violations depicted in the CIWF video, Perdue had a contractual right to enter Watts' poultry farm and demand inspection of the Watts' flock and his attendant facilities at any time. As was made expressly clear to Watts: "Perdue's increased attention to your poultry farm during the weeks [following release of the CIWF video] is not for purposes of retribution, but to ensure that Perdue's poultry are being properly cared for in an environment that ensures both adequate animal husbandry and animal welfare practices." Ex. 18 at 2.

Watts' objection that Perdue required that he complete additional training on animal welfare and biosecurity is also baseless. Every year, Perdue conducts a *required* training seminar on animal welfare and biosecurity for *all of its independent growers*. A grower who does not attend the annual training will be retrained by a Perdue representative one-on-one. For the past three years, Watts has not attended the training seminar put on by Perdue. As of the date of the release of the CIWF video, Watts had not completed his *required* training for 2014 on animal welfare and biosecurity. In light of the content of the CIWF video, Perdue acted rationally in requiring Watts to conduct the supplemental training, especially in light of Watts' failure to complete the required training.

As stated above, none of the alleged retaliatory actions are sufficiently material to support a *prima facie* case of retaliation under the FMSA. Incredibly, Watts all but admits that the alleged retaliatory actions he has complained of are minor annoyances, and thus not actionable. See Burlington, 548 U.S. at 68. In a recent Podcast produced by Upvoted by reddit, Watts discussed this case, and said: "[Perdue] put me on some kind of performance improvement plan, I call it house arrest. **No biggie**. Um..ya know..**just more annoying than anything**."[25/] If Watts himself characterizes Perdue's Performance Improvement Plan (which includes the increased monitoring of Watts' poultry farm and the additional animal welfare training) as "no biggie" and "more annoying than anything," Watts cannot now contend that such actions constitute materially adverse employment actions. Therefore, the Complaint should be dismissed.

25/ Upvoted by reddit, 013: One Farmer's Right, posted Apr. 10, 2015, *available at* https://soundcloud.com/upvoted/013-one-farmers-fight.

3. Watts Cannot Show That Any Allegedly Adverse Employment Action Taken Against Him Was Causally Related To His Protected Activity.

The circumstances of this case do not raise an inference that the *production and dissemination* of the CIWF Video was a contributing factor in the allegedly adverse action of delaying Watts' flock placement, ramping up supervision of Watts' poultry farm, and/or requiring Watts to undergo additional animal welfare and biosecurity training. See 29 C.F.R. § 1987.104(e)(1)(iv).

Watts' claim that he suffered a delayed flock placement unravels quickly. The time between flock placements is controlled by several variables, including a grower's personal schedule, a grower's availability and/or readiness to receive a placement, availability of chicks for placement, any unresolved biosecurity or animal welfare problems occurring at a grower's farm and inclement weather. Over the past nineteen flocks, the average time between flock placements at Watts' poultry farm has been approximately 19.62 days compared to 17.73 days for other growers in the Complex. Further, Watts waited 23 days and 14 days (an average of 18.5 days) for the two flocks that have been placed with him there since the CIWF video, but prior to the filing of the Complaint. That is ***less time*** than the average for Watts. Over that same time period, the average turnaround for other flocks in the Complex was 15 days and 15.75 days, respectively. Thus, for one of the flocks—the flock at issue in Watts' Complaint—Watts waited about 8 days longer to receive birds than other growers in his Complex. Yet, the Complaint conveniently omits that Perdue's following placement of birds with Watts occurred ***quicker*** than average when compared to the rest of the Complex. The reason for Watts' omission is that it undercuts any argument that the variation in the days between flocks was retaliatory as opposed to a normal deviation from an established average.

By the same logic, Watts' reliance on the proximity of the alleged protected activity to the alleged retaliatory conduct for purposes of establishing causation is nonsensical in light of his track record of speaking out against Perdue. Well before filing his Complaint, Watts went before Congress and testified about the alleged inequities inherent in the poultry producer contracts. Further, on an almost weekly basis for three years, Watts has sent accusatory and negative emails to Price that detail his laundry list of problems with the way Perdue operates. But, perhaps most demonstrative of the lack of animus by Perdue, in 2013 Watts posted a video on YouTube showing sick and deformed chickens from his farm. Ex. 21. In other words, Watts engaged in the same activity that he now promotes as a "protected activity," but was subjected to no adverse action at that time. This further proves that the actions which Watts calls retaliatory were not caused by any protected activity. Watts has failed to allege facts that indicate a causal

link between the protected activity and the retaliatory conduct, and therefore his Complaint fails to state a *prima facie* case of retaliation (three times over).

E. Perdue Would Have Taken The Exact Same Action Against Watts If He Had Not Worked With CIWF To Film The Chickens At Watts' poultry farm.

Assuming that Watts has stated a *prima facie* case of retaliation (he has not), Perdue produced clear and convincing evidence that it would have subjected Watts to further training regardless of the release of the CIWF video. See 29 C.F.R. § 1987.104(e)(4). As the Panel's report makes clear, the conditions portrayed in the CIWF video fell far short of industry standards. Ex. 19. The Panel's report also makes clear that the sick, deformed, and suffering birds in the video ***should have been*** euthanized by Watts. Likewise, the birds' panting was the result of poor ventilation, and was also the responsibility of Watts. The Panel's report also establishes that Watts is responsible for maintaining a satisfactorily sanitary litter condition.

The CIWF video itself also provided Perdue with disturbing and irrefutable video evidence that the conditions at Watts' poultry farm where he was raising Perdue's chickens were unacceptable. Thus, it was the condition of Watts' chicken operation shown in the video, not Watts' complaints therein, which triggered Perdue's corrective actions at Watts' poultry farm. To compound Perdue's concerns with regard to Watts' animal husbandry, a review of Watts' flock advisor visitation reports indicated that he was satisfactorily culling deformed and sick birds during visits from his flock advisor. Thus, Perdue was forced to confront a grotesque but inevitable conclusion: Watts was intentionally allowing sick, deformed and dying chickens to suffer in order to produce a self-serving propaganda video intended to create a "tsunami" of public opinion against Perdue. See Ex. 17.

Moreover, Watts' knowledge that the chickens portrayed in the "humanely raised" commercial from 2012 were not the same chickens he was raising undermines his entire claim. Watts now contends that Perdue's labelling of one brand of chicken was misleading because, based on Watts's experience with an entirely distinct brand of chickens, he believed "[Perdue's] use of the phrase 'humanely raised' on their labeling was not truthful." Compl. ¶20. By way of illustration, Watts's argument is tantamount to accusing Coca-Cola of mislabeling Sprite as "caffeine free" because Coke has caffeine in it.

IV. CONCLUSION

There is no merit to any of Watts' claims. In reality, Watts has intentionally neglected his contractual duties in order to create substandard conditions of animal welfare at

Watts' poultry farm in the hopes of extorting and publicly blackmailing Perdue. At no time during his witch hunt has Watts stated a viable claim of retaliation under the FMSA, and his Complaint should be dismissed without further consideration.

Please do not hesitate to let me know if you have any questions or need anything further.

Sincerely,

Todd J. Horn

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Attachments
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