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# IN THE SUPREME COURT OF CALIFORNIA

**ANIMAL LEGAL DEFENSE FUND,**
*Plaintiff and Respondent,*

*v.*

**LT NAPA PARTNERS LLC and KENNETH FRANK,**
*Defendants and Appellants.*

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE
CASE NO. A139625

# PETITION FOR REVIEW

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

### Cases

**Statutes**



**Rules**



**Miscellaneous**

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## ISSUES PRESENTED

1. Whether an advocacy organization acquires standing under the UCL (Bus. & Prof. Code §§ 17200 *et seq*.) to seek an injunction against a business simply because the organization, as part of its mission, uses its resources to investigate a business practice it opposes and believes is unlawful.

2. Whether a private party may seek an injunction under the UCL to enforce a state statute that a federal court has found to violate the United States Constitution and has permanently enjoined the California Attorney General from enforcing.

## INTRODUCTION:
## WHY THIS COURT SHOULD GRANT REVIEW

This case arises from a lawsuit brought by an advocacy organization, Animal Legal Defense Fund ("ALDF"), against a restaurant and its chef, LT Napa Partners LLC and Kenneth Frank (together, "La Toque"), seeking an injunction to enforce California's statute banning the sale of foie gras (Cal. Health & Safety Code § 25982). The Court of Appeal's published opinion found that ALDF had standing to sue La Toque simply because ALDF had chosen to investigate the restaurant and seek its prosecution. The Court of Appeal's opinion also permitted ALDF to continue prosecuting this action itself even after a federal court issued a permanent injunction enjoining enforcement of the state's foie gras statute on the basis that it violates the United States Constitution.

This case presents an increasingly recurring but unsettled issue of fundamental importance to all California advocacy organizations — and to all California businesses, who now, as a result of the Court of Appeal's published opinion, will again face lawsuits under the Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq*. [the "UCL"]) from any activist organization that chooses to target them for "investigation."

Here, in the absence of any guidance from this Court, the Court of Appeal concluded that an organization that opposes a business practice can generate standing for itself to bring a UCL lawsuit whenever it decides to use its resources to "investigate" a targeted business. As long as the organization diverts any of its resources, the only limitation is that the organization must claim

that, at the time of the investigation, it had not yet thought about suing the business.

Other courts have likewise grappled with the question of whether an advocacy organization has standing under the UCL in these circumstances. Indeed, we count at least three other lower court decisions since this Court's seminal 2011 opinion in *Kwikset v. Superior Court* (2011) 51 Cal.3d 310, including a case involving a consumer health advocacy organization. What makes the ruling here so problematic is that it takes the form of a published opinion that opens the floodgates to any activist entity that anoints itself the policeman of an industry it opposes.

Review is necessary because — like the Court of Appeal here — the lower courts are altogether *ignoring* this Court's definition of "injury in fact" under the UCL by failing to even consider the threshold requirement that it be born of "an invasion of a legally protected interest." *Kwikset*, 51 Cal. 3d at 322-23. State and federal courts in California, citing the absence of any guidance from this Court, are making up their own curious tests. Worse yet, because this Court has not addressed the UCL's touchstone requirement of *causation* for standing under the "unlawful" prong, the lower courts barely pay lip service to it.

This case also presents an issue of institutional significance to the judiciary as to the effect, in a state court action for injunctive relief under the UCL, of a federal court's permanent injunction against the enforcement of the predicate statute. In its zeal to opine on the UCL standing issue, the Court of Appeal here refused to credit the final judgment of a federal court which had recently found the statute at issue here unconstitutional and permanently enjoined

the California Attorney General from enforcing it. The perverse result is that, while even California's chief law enforcer herself can no longer enforce the invalid statute, the Court of Appeal allowed the private plaintiff here to continue to maintain this lawsuit to enforce it. This presents a threat to comity and federalism that can only be — and must be — addressed by this Court.

There are several compelling reasons for this Court to grant review:

*First*, the lower courts are woefully inconsistent in their analysis of what constitutes an "injury in fact and lost money or property" when it comes to an advocacy organization that chooses to use its resources to investigate a business practice it opposes. Most, like the Court of Appeal here, fail to even mention this Court's touchstone requirement of an "invasion to a legally protected interest." Review is thus necessary "to secure uniformity of decision." Cal. R. Ct. 8.500(b)(1).

*Second*, the issues at stake could not be of greater importance to the tens of thousands of advocacy organizations in California that would seek to sue under the UCL — and to the hundreds of thousands of businesses that now face such lawsuits. Proposition 64 was a statewide voter initiative specifically aimed at ending lawsuits against businesses where the plaintiff organization was not truly injured by a defendant business. The Court of Appeal ruling erodes the voters' intent. Review is thus also warranted "to settle an important question of law." Cal. R. Ct. 8.500(b)(1).

*Third*, this petition presents the question of UCL standing in the very context that this Court expressly left unaddressed in *Tobacco II* (2009) 146 Cal.4th 298 and *Kwikset*, namely, what a

plaintiff must prove to establish the required *causation* for standing under the "unlawful" prong of the UCL. Leading commentators and judges have recognized the absence of any further guidance on this issue, and only this Court can provide it.

*Fourth*, this petition raises a question of institutional interest as to the faith and credit to be accorded to a final judgment and permanent injunction of a federal court. The issue is core to our system of federalism, and yet we are unaware of any lower state court in California ignoring such an injunction, as the Court of Appeal did here. *See Oceanside Union School District v. Superior Court* (1962) 58 Cal.2d 180, 185 n.4 (review should be used "to review questions of first impression that are of general importance to the trial courts and to the profession" where establishing guidelines "will be of great benefit in many such cases").

* * *

This case warrants review for all of these reasons. There are countless advocacy organizations in California. Some favor abortion, some oppose it. Some favor medical marijuana, some oppose it. Beyond this case, the issue of whether an advocacy organization can generate its own standing to sue merely by choosing to "investigate" a business it opposes — and then can use that purported diversion of resources as the basis for dragging the targeted business into court — has massive ramifications for every business in this state, from the largest multinational corporations to the kinds of mom-and-pop merchants who were victimized under the UCL prior to the passage of Proposition 64.

In light of the confusion among the lower courts, the increasing frequency with which UCL lawsuits are filed by advocacy

organizations, the need to address the questions left unanswered in *Tobacco II* and *Kwikset*, and the still unsettled state of the law as noted by judges and commentators, this Court should act now to clarify the threshold issue of UCL standing presented by this petition for the courts and future litigants in the countless cases in which this issue will continue to arise.

## STATEMENT OF THE CASE

### A. In protest of a state ban on the sale of foie gras, La Toque serves the product to some of its guests for free, at the discretion of its outspoken chef.

In 2004, California banned the sale of foie gras products made from the livers of force-fed ducks. (Typed Op'n 1.) Ken Frank, the head chef at La Toque restaurant, testified in opposition to the ban at state senate hearings, debated the issue in the press, and has been an outspoken opponent of it ever since. (*Id*. at 2.) The ban went into effect on July 1, 2012. (*Id*. at 1.)

While the law prohibited force-fed foie gras products from being "sold," it did nothing to forbid preparing, serving, or even consuming them. Cal. Health & Safety Code § 25982 ("section 25982").[1] Thus, in protest of the law, Chef Frank had La Toque make random gifts of foie gras to certain lucky customers.[2] (Typed Op'n 2, 17-18.) Chef Frank continued to voice his opposition to the ban and went public with his restaurant's give-away-as-protest. *See, e.g.,* USA TODAY, "Napa Restaurants: Foie Gras at La Toque" (Aug. 12, 2012) (noting Frank's editorials against the ban and that, "[e]very week, he said, La Toque gives foie gras away").

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[1] Unspecified statutory references are to the California Health and Safety Code.

[2] La Toque is owned by Petitioner LT Napa Partners LLC ("LT"), and Chef Frank is LT's managing member. (Typed Op'n 2.) For the sake of simplicity, and unless the context suggests otherwise, this petition refers to Petitioners LT and Frank — i.e., the restaurant and its chef — together as "La Toque."

### B. ALDF is an organization that advocates for animal rights — and against foie gras. ALDF pays an investigator to dine at La Toque to try to receive foie gras.

ALDF is a non-profit organization "involved in every aspect of animal law." (Joint Appendix ("JA") 106.) ALDF claims it "has become especially active in educating the public about the animal welfare consequences of foie gras production." (*Id.*) Notably, ALDF has brought a raft of lawsuits as part of its efforts to shut down the foie gras industry. (JA 107.)

Consistent with its mission statement, in addition to targeting the foie gras industry with litigation, ALDF in this case paid a private investigator to visit La Toque "to attempt to buy foie gras" in September and October of 2012 and again in March 2013. (*Id.*; Typed Op'n 2.)

### C. ALDF fails to convince Napa authorities to prosecute La Toque. ALDF nonetheless sues the restaurant under the UCL, seeking an injunction against even serving foie gras for free.

Under the statute at issue, prosecution of a violation of section 25982 is limited to the district attorney or city attorney in the county or city where a violation occurs. Cal. Health & Safety Code § 25983(c). ALDF claims that its "paid staff" "diverted their attention from other ALDF projects to analyze the facts obtained during the investigation." (*Id.*) ALDF says it then "expended significant staff time and resources to share its investigation

findings with Napa law enforcement authorities." (*Id*.) ALDF failed to convince the Napa City Attorney to prosecute La Toque. (*Id*. at 2.)

Nonetheless, in March 2013, within just days after its investigator's third visit to the restaurant, ALDF filed its own lawsuit against La Toque. (JA 8.) ALDF's complaint contains a single cause of action under the UCL and seeks only injunctive relief against La Toque to restrain it from even "furnishing, preparing, or serving" foie gras in any manner (though, curiously, not from *selling* foie gras, which is all that section 25982 actually prohibits). (Typed Op'n 2)

The principal allegation of causation in ALDF's complaint is its conclusory statement that "[a]s a result of Defendants' refusal to follow the California Health and Safety Code Sections 25980, *et seq*., ALDF cannot engage in other activities that would better further its organizational mission." (JA 12.) ALDF alleges that "it is compelled to expose and stop illegal sales of products harming animal welfare" and that La Toque's alleged "continuing violations . . . cause ALDF to lose money, due to diverted staff time and resources." (*Id*.)

### D. La Toque brings an anti-SLAPP motion. The trial judge rules that La Toque does not satisfy prong one but nonetheless goes on to prong two and says that ALDF has standing to sue under the UCL. La Toque appeals.

La Toque filed an anti-SLAPP motion. (Typed Op'n 2.) La

Toque argued that, like the Boston colonists who protested the king by dumping tea in the harbor, the restaurant's give-away of foie gras in protest of the foie gras ban was "conduct in furtherance of the exercise of the . . . constitutional right of free speech in connection with a public issue or an issue of public interest" by its outspoken chef. (*Id*. at 12; Cal. Civ. Proc. Code § 425.16(e)(4).) The trial judge disagreed and ruled that La Toque had failed to satisfy prong one of the anti-SLAPP analysis. (JA 145.)

The trial judge stated, "The court could conclude its analysis here." (*Id*.) But the trial judge nevertheless went on to opine about the prong two issues, namely, as to whether ALDF had UCL standing and whether La Toque's gifts of foie gras constituted a sale. (JA 145-47.) La Toque appealed the denial of its anti-SLAPP motion.

### E. A federal court enters a final judgment that the state's foie gras ban is unconstitutional under the United States Constitution and permanently enjoins its enforcement. ALDF refuses to dismiss its lawsuit.

On January 7, 2015, while La Toque's appeal was pending (and some two weeks before oral argument in the Court of Appeal), a federal court entered a final judgment based on its finding that section 25982 is preempted by federal law. *See Ass'n des Éleveurs de Canards et d'Oies du Québec v. Harris*, 2015 WL 191375 at *10 (C.D. Cal. Jan. 7, 2015). The federal court's final judgment "permanently enjoins and restrains" the California Attorney

General and her agents, etc., from enforcing section 25982 against the sale of foie gras. *Id.*

In light of the federal court's final judgment and permanent injunction, La Toque promptly tried to get ALDF to stipulate to dismiss La Toque's anti-SLAPP appeal. (*See* Req. for Dismissal of Appeal, dated Jan. 20, 2015.) ALDF refused. (*Id.*)

### F. La Toque notifies the Court of Appeal of the federal injunction to show that the lawsuit is moot, but the Court of Appeal issues a published opinion holding that ALDF has standing to enforce the state's foie gras ban despite the federal injunction.

La Toque filed a formal Request for Dismissal of Appeal two days prior to oral argument on the basis that the lawsuit was moot given the federal court's injunction. (*Id.*) The Court of Appeal denied the request without any explanation. (Order of Jan. 21, 2012.) At oral argument, La Toque renewed its request to dismiss its appeal on the basis of mootness. (Audio of Oral Arg. at 11:30:27.)

The Court of Appeal issued a published opinion. In it, the Court of Appeal went out of its way to opine on the issue of UCL standing. Instead of analyzing whether La Toque satisfied prong one of the anti-SLAPP analysis, the Court of Appeal simply assumed it did, and moved directly to the issues of UCL standing and of what constitutes a sale under section 25982. (Typed Op'n 4.)

As for the effect of the federal court's final judgment and permanent injunction against the enforcement of section 25982, the Court of Appeal relegated that issue to a footnote. (Typed Op'n 1 n.2.) The court acknowledged that "a Federal District Court held that Section 25982 is preempted by federal law and enjoined its enforcement" and noted La Toque's suggestion that the present lawsuit was therefore moot. (*Id*.) But it concluded that La Toque could later present that argument on remand to the trial judge. (*Id*.)

The Court of Appeal then went on to hold in its published opinion that an advocacy organization such as ALDF has standing under the UCL to sue a business such as La Toque for a violation of section 25982.[3]

[3] No petition for rehearing was filed in the Court of Appeal.

## LEGAL ARGUMENT

### I. REVIEW IS NECESSARY BECAUSE THE LOWER COURTS ARE SPLINTERED AS TO WHEN — IF EVER — AN ADVOCACY ORGANIZATION CAN CREATE UCL STANDING BY INVESTIGATING A BUSINESS PRACTICE IT OPPOSES AND BELIEVES IS UNLAWFUL.

Before the voters passed Proposition 64 in 2004, virtually anyone could sue a business under the UCL on behalf of the general public, even without having suffered an actual injury. Enterprising lawyers set up advocacy organizations such as "Citizens for Fair Business Practices" that sued businesses over claimed violations that government regulators deemed insufficient to prosecute. *See*, *e.g.,* California Attorney General press release of Feb. 26, 2003 (describing abuses of UCL before Proposition 64), available at http://goo.gl/z3S4sw.

Proposition 64 changed that by amending section 17204 of the Business and Professions Code. (Prop. 64, § 3.) Now the law requires that the plaintiff be someone "who has suffered injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. & Prof. Code § 17204; *Clayworth v. Pfizer* (2010) 49 Cal.4th 758, 788. As this Court explained in *Kwikset*, "[t]he intent of this change was to confine standing to those actually injured by a defendant's business practices[.]" *Kwikset*, 51 Cal.4th at 321 (emphasis added). The voters "clearly intended to restrict UCL standing" and to preserve it only "for those who had had business dealings with a defendant and lost money or property as a

result." *Id.* "It is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL." *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1362.

In defining "injury in fact," this Court in *Kwikset* relied on a "long line" of U.S. Supreme Court cases setting forth the requirements for standing under Article III of the U.S. Constitution. *Kwikset*, 51 Cal.4th at 322. Indeed, Proposition 64 itself expressly directed state courts to adopt the federal concept: "It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact *under the standing requirements of the United States Constitution*." *Id.* at 322 & n.5 (emphasis added); Prop. 64, § 1, subd. (e).

Today, standing to sue under the UCL requires the plaintiff to *both* "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., economic injury, *and* (2) show that the economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Id.* at 322. Our case illustrates the wide variance of opinions among the lower courts as to each aspect of the UCL standing analysis when it comes to an advocacy organization that claims it used some of its resources to "investigate" a business for a practice that it opposes and believes is unlawful. As will be painfully apparent below, review and guidance from this Court are necessary today.

### A. The lower courts are inconsistently applying — or altogether ignoring — this Court's definition of what constitutes "injury in fact" under the UCL. Both state and federal courts in California are looking to this Court for guidance as they try to divine the meaning of the UCL's requirement of "lost money or property" when applied to an advocacy organization.

In *Kwikset*, this Court explained that "injury in fact" is "an ***invasion of a legally protected interest*** which is (a) concrete and particularized; and (b) 'actual or imminent, not 'conjectural or hypothetical.'" *Kwikset*, 51 Cal.4th at 322-23 (emphasis added), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also* Black's Law Dictionary (10th ed. 2014). Despite this, in cases where the plaintiff is an advocacy organization which, as part of its very mission, uses its own resources to "investigate" a business practice it opposes, the courts have largely failed to adhere to the definition set forth by this Court.

This Court can search the attached opinions of the Court of Appeal and of the trial court in this case, and yet it will nowhere locate so much as a mention of the definitional requirement of "an invasion of a legally protected interest." That is a problem because only by ignoring this requirement could a court find standing for an advocacy organization that has no business dealings with a defendant other than to stage a purchase from it. There simply is no concrete and particularized "legally protected interest'" of an advocacy organization such as ALDF that could somehow be

invaded when a restaurant like La Toque gives foie gras to some of its guests for free.

After all, what "***legally protected*** interest" does an advocacy organization have in the general enforcement of the laws against its ideological adversaries? Other courts have reached the right answer. *See Animal Legal Defense Fund v. Mendes* (2008) 160 Cal.App.4th 136, 144 (ruling that ALDF had no standing to sue calf ranchers for alleged cruelty, rejecting ALDF's argument that "[t]hose who receive special value from policy-based statutes have standing to bring a civil action," and holding that even consumers who bought milk from defendants' cows lacked UCL standing because alleged cruelty gave them only what might be called a "moral injury").

The Second District recognized in *Buckland v. Threshold Enterprise., Ltd.* (2007) 155 Cal.App.4th 798 that the "requisite injury is defined as 'an invasion of a legally protected interest." *Id.* at 814. The Fourth District likewise recognized this in *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1346-47. *See also* Rylaarsdam et al., Cal. Prac. Guide Civ. Pro. Before Trial § 14:226.1b (The Rutter Group 2015) ("A plaintiff's "injury in fact" means an *invasion of a legally protected interest* that is concrete and particularized, and actual or imminent[.]") (emphasis added). Yet the First District in this case never even mentions this definition.

A UCL case is properly brought by a consumer or competitor who is actually injured by a defendant's business practice. After all, this Court has said that the UCL was "intended to preserve fair *competition* and protect *consumers* from market distortions." *Kwikset*, 51 Cal.3d at 331 (emphasis added). Yet even in the

consumer context, the mere fact that a defendant's business activity is alleged to be unlawful cannot confer UCL standing on a plaintiff where the plaintiff suffers no actual injury.

In *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, the Fourth District ruled that the purchasers of cell phone insurance did not suffer an actual economic injury under the "unlawful" prong — nor did they suffer "lost money as a result of the alleged unfair competition" — where the seller was unlicensed to sell such insurance. *Id*. at 1591-92. The purchasers got exactly what they wanted, just as ALDF's investigator did here. If that is the rule (as it should be), then the decision of the Court of Appeal in our case is in obvious conflict, because ALDF's belief that the foie gras its investigator received was being sold unlawfully does not injure *ALDF* in any way (especially where section 25982, the law purporting to ban the sale of foie gras, is now unenforceable).

As one judge recently observed in a UCL case filed in federal court, "Neither our courts of appeal nor the California appellate courts have decided whether a public advocacy firm such as ALDF can have standing under Proposition 64 to challenge a business practice inimical to its purpose and against which the firm expends its resources, thus reducing the money and property it would otherwise have for other projects." *Animal Legal Defense Fund v. HVFG LLC*, 2013 WL 3242244 at *3 (N.D. Cal. Jun. 25, 2013). Federal courts applying California law are required to predict how this Court would rule. Yet, because the Courts of Appeal are in disarray on this issue, and because this Court has not yet spoken on it, the federal courts are just as confused about UCL standing for advocacy organizations as the Court of Appeal was here.

In *Center for Science in the Public Interest v. Bayer Corp.*, 2010 WL 1223232 (N.D. Cal. Mar. 25, 2010), the plaintiff (CSPI) was "a non-profit organization dedicated to advocacy and the dissemination of information to its members regarding 'health topics of interest.'" *Id.* at *3. CSPI sued Bayer Corporation in an effort to stop Bayer from claiming that its multivitamins supported prostate health or reduced the risk of prostate cancer. *Id.* at *1. Like ALDF alleges here, CSPI argued vigorously that it had suffered an injury because Bayer's conduct allegedly "seriously interfere[d] with CSPI's missions" to "educate the public . . . and counter industry's powerful influence on public opinion and public policies." *Id.* at *3.

The court recognized that for CSPI to have standing under the UCL, it needed to show "a concrete and demonstrable injury to its activities, not simply a setback to the organization's abstract social interests." *Id.* (quoting *Project Sentinel v. Evergreen Ridge Apartments*, 40 F.Supp.2d 1136, 1138 (N.D. Cal. 1999)). It also explained that "[a] 'mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself' to provide standing." *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972)). The court held that CSPI had not satisfied this test and that CSPI's allegations were "insufficient to grant standing to sue on its own behalf" under the UCL. *Id.* at *4. Its reasoning, which applies with equal force here, was as follows:

> An organization's mere interest in a problem is insufficient to demonstrate a cognizable injury sufficient to confer standing. Rather, the allegations as currently pled indicate that, in reaction to Bayer's

> alleged misrepresentations, CSPI as an organization reacted by disseminating information about nutritional science and by educating its members. ***This conduct, rather than causing CSPI to incur injury, fulfilled the espoused purpose of the organization***. Accordingly, CSPI fails to allege any property loss or any interference with its institutional activities or ability to operate. Therefore, as currently pled, CSPI lacks standing to sue on its own behalf under the UCL[.]

*Id.* (emphasis added). Furthermore, although the court in *CSPI* gave the plaintiff leave to amend, it noted that allegations demonstrating that CSPI had in fact suffered injury to its institutional interests would be "hard to conceive." *Id.*

By contrast, in *Animal Legal Defense Fund v. HVFG LLC*, 2013 WL 3242244 (N.D. Cal. 2013), Judge Alsup noted the "absence of controlling precedent" on this issue. *Id.* at *3. In a quote that exemplifies the need for review by this Court, the court observed:

> This order recognizes that if standing is conferred on such advocacy organizations then standing might also have to be extended, by the same logic, to individuals who divert their charitable giving from one cause to another in order to combat a proscribed business practice — and further recognizes that such an extension would effectively ***take us back to the "any person" standing problem that Proposition 64 sought to cure***. On the other hand, if a competitor has standing by reason of money or property spent to combat a proscribed business practice, as a competitor surely does, then why should a public interest organization not have standing for the same reason? ***This can be argued either way.***

*Id.* (emphasis added). With nothing else to turn to, Judge Alsup then defaulted to a federal court decision from 2005 in the far

broader context of housing rights — which does not contain more than a single sentence addressing standing under the UCL. *See S. Cal. Housing Rights Ctr. v. Los Feliz Towers Homeowners Ass'n*, 426 F.Supp.2d 1061, 1069 (C.D. Cal. 2005).

The problem is exacerbated further by the fact that, without guidance from this Court, the lower state and federal courts routinely look back to this same 2005 housing rights case — as the Court of Appeal did here — which does not even cite to *any* post-Proposition 64 cases. *See* Typed Op'n 8; *see also Animal Legal Defense Fund v. Great Bull Run, LLC*, 2014 WL 2568685 (N.D. Cal. Jun. 6, 2014) (citing the foregoing cases).[4] This Court should grant review to put an end to this cycle of the proverbial "blind leading the blind" on an issue of such importance.

The desultory analyses undertaken by courts above in addressing the potential UCL standing of an advocacy organization illustrate the need for this court's intervention. Regardless of how the issue is resolved, the law should be made clear.

### B. This case at last presents the issue that this Court could not address in both *Tobacco II* and *Kwikset* on the critical *causation* requirement for standing in cases brought under the "unlawful" prong of the UCL.

[4] The Court may note that, not unlike the Trevor Law Group from the pre-Proposition 64 days, ALDF is the self-represented plaintiff in countless cases threatening businesses with claims under section 17200 for injunctive relief (and for fees as a "private attorney general").

In *Kwikset*, this Court addressed the plaintiff's threshold obligation to plead and prove the *causation* requirement for standing under the "fraudulent" prong of the UCL. But, in an oft-cited footnote, it expressly left unanswered the important question of when a plaintiff has standing under the UCL's "unlawful" prong. "As in [*In re Tobacco II Cases*], we need express no views concerning the proper construction of the cause requirement in other types of cases." *Kwikset*, 51 Cal.4th at 326, n.9; *see also Tobacco II*, 46 Cal.4th at 324-25 (discussing causation requirement in Proposition 64 and explaining that it must be construed in light of voters' intention "to impose limits on private enforcement actions under the UCL").

Indeed, the bench, bar, and academe have been left to wonder ever since. The significance of the issue is reflected by the order of publication in *Medrazo v. Honda of North Hollywood* (2012) 205 Cal.App.4th 1, at the request of noted UCL practitioner Kim Kralowec (on behalf of the Consumer Attorneys of California) available at http://goo.gl/qSfeiZ (citing "famous footnote 17" from *Tobacco II*, which expressly left open question of how to establish UCL standing under "unlawful" prong"); *see also* 20 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 1, 17 (observing that this Court "has yet to address explicitly the standing inquiry in cases brought under the 'unlawful' or 'unfair' prongs of the UCL outside of the misrepresentation context").

This petition squarely presents the question that this Court expressly had to leave unaddressed in *Tobacco II* and *Kwikset*. And it does so not through a garden-variety claim but, rather, in a case that will enable the Court to define the contours of UCL standing

for tens of thousands of nonprofit organizations and millions of California businesses. It is thus an ideal vehicle for the Court to grant review.

Here, the panel below cited only a single case in its four-sentence analysis of the causation issue. Specifically, the panel rejected our argument that, because ALDF's very mission is to investigate perceived animal rights violations and litigate over them, its voluntary use of resources to fulfill its mission could not have been "caused" by La Toque. (Typed Op'n 11-12.) Instead, the panel cited a District of Columbia Circuit Court of Appeals opinion — which has nothing to do with the UCL's causation requirement — for its view that "the proper focus of the inquiry is not the 'voluntariness or involuntariness' of the expenditures." (*Id.* & n.8)

Like the Court of Appeal here, other courts have essentially glossed over this fundamental requirement as well. For example, in *People for the Ethical Treatment of Animals, Inc. v. Hot's Restaurant Group, Inc.* (*see* Attachment III), the trial court's order simply parrots the same string of cases cited above. Yet, despite briefing on the issue, that court's order nowhere even mentions the critical issue of causation. *See also Animal Legal Defense Fund v. Great Bull Run, LLC*, 2014 WL 2568685 at *6 (finding UCL standing for ALDF and PETA without ever discussing how their voluntary expenditure of money and time to "witness and record" the bull run was somehow *caused by* defendant, other than to note that event was "inimical to their missions").

The First District has previously recognized the need for an actual causal connection between the defendant's alleged noncompliance with the law and the plaintiff's actual harm. "When

a UCL action is based on an unlawful business practice, as here, . . . there must be a causal connection between the harm suffered and the unlawful business activity. That causal connection is broken when a complaining party would suffer the same harm whether or not a defendant complied with the law." *Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1099 (footnote omitted); *see also Two Jinn, Inc. v. Gov't Payment Svc., Inc.* (2015) 233 Cal.App.4th 1321, 1334 (recognizing, in putative competitor case, that "pre-litigation" investigation costs "do *not* establish standing to bring a UCL claim because they are not an economic injury *caused by* the business practices that [plaintiff] characterizes as unlawful").

Meanwhile, other federal courts have plainly held that "voluntary expenditures do not confer standing." In *Paws v. U.S. Dep't of Agric. Animal and Plant Health Inspection Serv.*, 1996 WL 524333 (E.D. Pa. Sept. 9, 1996), an animal rights group specifically alleged that it had made voluntary expenditures to "rescue" allegedly mistreated elephants from certain exhibitors. *Id.* at *2. But the court recognized this as insufficient to form the basis of Article III standing. It held that "voluntary expenditures do not confer standing." *Id.*; *see also Int'l Primate Protection League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 936-38 (4th Cir. 1986) (rejecting notion that animal rights group's financial contribution towards support of 17 experimental monkeys could confer standing because "this expenditure represented a voluntary offer to help the Maryland authorities").

As a leading commentator has noted, while this Court in *Tobacco II* did not require actual reliance for a UCL claim not based upon a fraud theory, it did not eliminate the touchstone

requirement of *causation*: "The relevant question, for standing purposes in an 'unlawful' prong case, is going to be whether the defendant's statutory violation *caused* the plaintiff to lose money." *See* THE UCL PRACTITIONER, "UCL 'unlawful prong opinion: *Medrazo v. Honda of North Hollywood*" (blog post) (Sep. 14, 2012) (emphasis added), available at http://goo.gl/xOV2cj.

Review is necessary for this Court to now say what the law is on this issue. In *Kwikset*, this Court noted that a plaintiff may show economic injury where it has been "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary." *Kwikset*, 51 Cal.4th at 323. Of course, the key word in that sentence is "required," and yet we are aware of no case under the "unlawful" prong — and certainly no case involving an advocacy organization that seeks standing based on its self-initiated investigation — that adheres to this Court's teaching.

The question left unanswered in *Tobacco II* and *Kwikset* has now percolated in the lower courts to the point that it is at a boil.

## II. THIS COURT SHOULD ADDRESS — AS AN IMPORTANT MATTER OF FEDERALISM — WHETHER A PRIVATE PLAINTIFF MAY SEEK AN INJUNCTION UNDER THE UCL TO ENFORCE A STATE STATUTE THAT A FEDERAL COURT HAS FOUND TO VIOLATE THE UNITED STATES CONSTITUTION AND PERMANENTLY ENJOINED THE CALIFORNIA ATTORNEY GENERAL FROM ENFORCING.

The Court of Appeal's published opinion results in the absurdity that, while no one who was statutorily authorized to enforce section 25892 — i.e., the local district attorney or city attorney, or the California Attorney General herself — may bring a prosecution under that statute, ALDF alone has been allowed to proceed with this action. *See* Cal. Health & Safety Code § 25983(c).

Were this result to stand, then any private party seeking to enforce an unconstitutional statute could do an end-run around a final judgment and permanent injunction simply by filing a UCL claim. This Court should grant review to provide clarity on this issue. In doing so, it should address the deference that a state court must accord to a final judgment of a federal court.

We are well aware of the general rule that judicial opinions of the lower federal courts are generally only persuasive and entitled to "great weight" as opposed to precedential authority. *People v. Bradley* (1969) 1 Cal.3d 80, 86. But this case presents a different circumstance from the cases setting forth the general rule: here, a federal court has not simply ruled on a question of law but, rather, has permanently enjoined enforcement of a state law because it violates the federal constitution. Here, some two weeks before oral argument in the Court of Appeal, the federal court actually entered both a *final judgment* and a *permanent injunction* against the enforcement of the very statute underlying ALDF's UCL claim. *Ass'n des Éleveurs*, 2015 WL 191375 at *10; *see also* Fed. R. Civ. P. 65(d)(2) (providing that every injunction binds the parties, the "parties' officers, agents, servants, employees, and attorneys," and "other persons who are in active concert or participation with anyone [so] described").

Notwithstanding La Toque's efforts in informing the Court of Appeal of the federal injunction and its effect of mooting ALDF's claim (*see ante*, pp. 9-11), the Court of Appeal's published opinion did no more than merely note that the effect of the federal court's final judgment and permanent injunction could be raised *after* remand (Typed Op'n p. 1, n.2) — and went on to provide a 19-page *de novo* analysis of La Toque's anti-SLAPP motion finding that ALDF had standing to continue prosecuting its lawsuit seeking to enforce section 25982.[5]

This Court has long held that "[f]ull faith and credit must be given to a final order or judgment of a federal court." *Levy v. Cohen* (1977) 19 Cal.3d 165, 172-73. Indeed, "[a] federal judgment is as final in California courts as it would be in federal courts[.]" *Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881, 887; *see also Valerio v. Boise Cascade Corp.* (1986) 177 Cal.App.3d 1212, 1223 ("Under federal law, it is clear that the pendency of an appeal does not alter the res judicata effect of an otherwise final judgment.").

The requirement that state courts give full faith and credit to federal judgments is inherent in and essential to our federal system

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[5] At oral argument, Justice Simons said that, at the time La Toque notified the Court of Appeal, it was "already aware" of the outcome in the federal court. (Audio of Oral Arg. at 11:34:56.) Moreover, as evidenced in Attachment III, the animal rights group PETA had a virtually identical pending UCL action against a restaurant for an alleged violation of section 25982. Yet even PETA recognized that the federal court's final judgment and permanent injunction meant "game over" for its wishful UCL claim. Unlike ALDF (or the Court of Appeal on La Toque's request), PETA dismissed its lawsuit within days of entry of the federal judgment. (Audio of Oral Arg. at 11:44:42.)

of government. "It would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts, given the basic requirements that state courts honor the judgments of courts in other states and that federal courts must honor state court judgments." Wright et al., Federal Practice and Procedure § 4468 (2014).

Here, the Court of Appeal's approach is not just "unthinkable" but, if not reviewed, would undermine basic notions of federalism. For example, in light of Judge Walker's ruling in the Proposition 8 case — which, like Judge Wilson's, was embodied in a final judgment and permanent injunction from a federal district court — could anyone seriously argue that an advocacy organization that opposes same-sex marriages remains free to bring a UCL action against a wedding chapel that performs them? *See Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 1004 (N.D. Cal. 2010) (finding Proposition 8 unconstitutional, ordering entry of judgment, and permanently enjoining its enforcement by state officials). Yet, in spite of Judge Wilson's final judgment and permanent injunction, the Court of Appeal effectively took that position with ALDF's UCL action against La Toque here. (Typed Op'n p. 1, n.2.)

Whether an organization opposes marriage equality or foie gras, comity and federalism require state courts to give effect to federal court injunctions. This Court should not countenance such a challenge to first principles, lest it risk the kind of unwelcome attention recently brought to the judiciary in Alabama. There, like here, a federal district court issued a (preliminary) injunction enjoining the state attorney general and "his officers, agents, servants and employees, and others in active concert or

participation with any of them who would seek to enforce the marriage laws of Alabama that prohibit same-sex marriage" from enforcing the Alabama laws prohibiting same-sex marriage. Alabama Supreme Court Justice Roy Moore wrote a letter to all of the state probate court judges saying that, despite the federal court's preliminary injunction, they should not issue marriage licenses until after the U.S. Supreme Court rules. *See, e.g.,* L.A. TIMES, (Feb. 12, 2015) (observing that "Alabama has been in a confused state on matrimony all week as state Supreme Court Chief Justice Roy Moore ordered probate judges to ignore the federal courts that had ruled in favor of gay marriage"), available at http://goo.gl/DHMc1J.

Here, the situation is perhaps worse. The Court of Appeal has allowed ALDF to proceed with a lawsuit to enforce a statute which a federal district court has found unconstitutional and the enforcement of which has been *permanently* enjoined. (And the Court of Appeal did so despite a request by La Toque to dismiss its anti-SLAPP motion appeal on the basis that the lawsuit was moot.)

Even ALDF itself acknowledged before oral argument that this lawsuit cannot escape the effect of the federal court's final judgment and permanent injunction here. *See, e.g.,* Opp. to Req. for Dismissal, dated Jan. 21, 2015, at p. 6 ("***If*** and when ***the ban is restored***, the Court's interpretation of what conduct is proscribed by the statute will inform enforcement of the law.").[6] Moreover, in

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[6] It is notable that ALDF was granted amicus status to participate in the federal court case, including to file a brief in support of the California Attorney General in which ALDF had an opportunity to (continued...)

speaking to the press after the Court of Appeal issued its opinion, ALDF's counsel of record admitted that the final judgment of the federal court precludes ALDF from pursuing this lawsuit under the UCL. "Matthew Liebman, lawyer for the Animal Legal Defense Fund, acknowledged Thursday that the suit cannot proceed unless the federal judge's decision is overturned." *See* S.F. CHRONICLE, "Animal rights groups can sue Napa restaurant over foie gras" (Mar. 5, 2015), available at http://goo.gl/UyD8No.

No court has ever held that a private party has standing under the UCL to maintain an action to enforce a law that not even California's chief law enforcer may enforce. Because the published opinion in this case reflects the Court of Appeal's willingness to ignore the effect of a final federal court judgment and permanent injunction, this Court should grant review to address this issue of institutional significance to the judiciary.

## CONCLUSION

The Court of Appeal's published opinion represents the latest stab in the dark by a lower court in applying the test for UCL standing to an advocacy organization seeking to sue a business whose practices it opposes and believes are unlawful. The lower courts have no clear guidance as to when — or even whether — such an organization can generate standing merely by virtue of its voluntary expenditures in support of its own mission. Meanwhile,

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(...continued)
argue — and did argue (unsuccessfully) — that section 25982 was not unconstitutional. (Audio of Oral Arg. at 11:33:17.)

they continue to erode the voters' intent behind Proposition 64 and, here, even defy a final judgment of a federal court. With this case as an ideal vehicle, this Court should grant review to light the way on this issue of sweeping public importance.

April 14, 2015

**THE MICHAEL TENENBAUM LAW FIRM**

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Counsel for Plaintiffs and Appellants

**LT NAPA PARTNERS LLC and KENNETH FRANK**

**CERTIFICATE OF WORD COUNT**

**(Cal. R. Ct. 8.504(d)(1))**

The text of this petition consists of 7,351 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: April 14, 2015

Michael Tenenbaum

ATTACHMENT:

PUBLISHED COURT OF APPEAL OPINION

Filed 3/5/15

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

| | |
|---|---|
| ANIMAL LEGAL DEFENSE FUND,<br>Plaintiff and Respondent,<br>v.<br>LT NAPA PARTNERS LLC, et al.,<br>Defendants and Appellants. | A139625<br><br>(Napa County Super. Ct. No. 26-61166) |

Plaintiff and respondent Animal Legal Defense Fund (plaintiff) filed an action against defendants and appellants LT Napa Partners LLC and Kenneth Frank (defendants), alleging defendants sold foie gras in their Napa restaurant in violation of section 25982 of the Health and Safety Code (Section 25982). Defendants moved to strike plaintiff's claim pursuant to the anti-SLAPP statute,[1] section 425.16 of the Code of Civil Procedure (Section 425.16). Defendants appeal from the trial court's denial of the motion. We affirm.[2]

BACKGROUND

In 2004, the Legislature enacted Section 25982, banning the sale of foie gras effective July 1, 2012. (See Health & Saf. Code §§ 25980, et seq.) Plaintiff advocated

[1] "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

[2] On January 7, 2015, a Federal District Court held that Section 25982 is preempted by federal law and enjoined its enforcement. (*Des Eleveurs de Canards et d'Oies du Quebec v. Harris* (C.D.Cal., Jan. 7, 2015, No. 2:12-cv-5735-SVW-RZ) ___ F.Supp.3d. ___ [2015 U.S. Dist. LEXIS 5806].) Two days before oral argument, defendants requested dismissal of the present appeal, apparently on the basis that the present lawsuit was mooted by the federal ruling. We denied that request. Nothing in that denial or in this decision precludes defendant from presenting arguments after remand regarding the effect of the federal decision on the present lawsuit.

for passage of the ban and has been active in informing the public about the law and its view that production of foie gras involves cruelty to animals.[3] Defendant Frank, who is the head chef at Napa restaurant La Toque, has been a vocal opponent of Section 25982. For example, he testified at state senate hearings preceding passage of the law, publicly debated the merits of the ban, and authored a newspaper opinion article against the ban. La Toque is owned by defendant LT Napa Partners, LLC ("LT Napa"); Frank is the managing member of LT Napa.

After the ban went into effect, plaintiff paid an investigator to dine at La Toque on three occasions in September 2012, October 2012, and March 2013. On each occasion he requested foie gras and was told that if he ordered an expensive tasting menu he would receive foie gras. On two of the occasions it was described as a "gift" from the chef. He ordered the tasting menus and was served foie gras. He was not told he was served foie gras in protest against the foie gras ban and was not provided information about defendant Frank's opposition to the foie gras ban.[4]

Plaintiff brought the results of its investigation to Napa law enforcement authorities. Over the course of three months, plaintiff attempted to persuade the Napa authorities to take action based on the alleged violation of Section 25982 at La Toque, but the city attorney declined. Subsequently, plaintiff initiated the present suit, alleging a cause of action under the Unfair Competition Law ("UCL") (Bus. & Prof. Code §§ 17200, et seq.) based on defendants' alleged violation of Section 25982. Plaintiff does not request damages but seeks an injunction prohibiting defendants from "furnishing, preparing, or serving foie gras in any form or manner whatsoever."

Defendants brought a special motion to strike plaintiff's action as a SLAPP under Section 425.16. The trial court denied the motion, concluding defendants had failed to

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[3] Section 25982 bans the sale of products that are "the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."

[4] In a declaration, Frank averred that, "[s]hortly after" the investigator's March 2013 visit, La Toque started "presenting a 'protest card' " when serving foie gras. He averred the cards explained his "criticism of and opposition to" Section 25982.

show plaintiff's cause of action arose from protected activity and concluding plaintiff had shown a probability of prevailing on the merits. This appeal followed.[5]

DISCUSSION

I. *The Anti-SLAPP Law*

"In 1992, the Legislature enacted [S]ection 425.16 in an effort to curtail lawsuits brought primarily 'to chill the valid exercise of . . . freedom of speech and petition for redress of grievances' and 'to encourage continued participation in matters of public significance.' (§ 425.16, subd. (a).) The section authorizes a special motion to strike '[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States [Constitution] or [the] California Constitution in connection with a public issue . . . .' (§ 425.16, subd. (b)(1).) The goal is to eliminate meritless or retaliatory litigation at an early stage of the proceedings. [Citations.] The statute directs the trial court to grant the special motion to strike 'unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.' (§ 425.16, subd. (b)(1).)" (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1395–1396, fn. omitted (*Gallimore*).)

"The statutory language establishes a two-part test. First, it must be determined whether the plaintiff's cause of action arose from acts by the defendant in furtherance of the defendant's right of petition or free speech in connection with a public issue. [Citation.] 'A defendant meets this burden by demonstrating that the *act underlying* the plaintiff's cause fits one of the categories spelled out in [S]ection 425.16, subdivision

[5] We have considered an amicus curiae brief filed in favor of plaintiff by John L. Burton, the author of the senate bill that resulted in enactment of the ban on foie gras. Amicus requested that this court take judicial notice of various legislative history materials regarding the enactment of Section 25982. We deny the request because most of the materials are unnecessary to resolution of the issues on appeal and those materials that we rely upon are published materials regarding which a motion for judicial notice is unnecessary. (*Wittenberg v. Beachwalk Homeowners Assn.* (2013) 217 Cal.App.4th 654, 665, fn. 4 ["A motion for judicial notice of published legislative history, such as the Senate Analysis here, is unnecessary."].)

(e).' [Citation.] Assuming this threshold condition is satisfied, it must then be determined that the plaintiff has established a reasonable probability of success on his or her claims at trial." (*Gallimore, supra*, 102 Cal.App.4th at p. 1396.) "Whether [S]ection 425.16 applies and whether the plaintiff has shown a probability of prevailing are both legal questions which we review independently on appeal." (*Ibid.*) The statute provides that Section 425.16 "shall be construed broadly." (§ 425.16, subd. (a).)

II. *We Assume For Purposes of Appeal That Plaintiff's Lawsuit Arises Out of Defendants' Conduct In Furtherance of Speech*

A defendant can meet its burden of making a threshold showing that a cause of action is one arising from protected activity by demonstrating the act underlying the plaintiff's cause of action falls within one of the four categories identified in Section 425.16, subdivision (e). (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) Among other things, defendants contend plaintiff's UCL claim arises out of "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4).) In particular, they contend the serving of foie gras at La Toque was in furtherance of defendant Frank's public opposition to the foie gras ban. For purposes of the present appeal we will assume that conduct is protected activity within the meaning of Section 425.16, subdivision (e). (See *Smith v. Adventist Health Systems/West* (2010) 190 Cal.App.4th 40, 56 [assuming satisfaction of first step and proceeding to consideration of second step of Section 425.16 analysis].)

III. *Plaintiff Has Demonstrated a Probability of Prevailing*

In order to establish a probability of prevailing for purposes of Section 425.16, subdivision (b)(1), " 'the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' " (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88–89.) However, a defendant that advances an affirmative defense to the plaintiff's claims bears the burden of proof on the defense.

(*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 676.)

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.' ([Bus. & Prof. Code] § 17200.) Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.' [Citations.] In service of that purpose, the Legislature framed the UCL's substantive provisions in ' "broad, sweeping language" ' [citations] and provided 'courts with broad equitable powers to remedy violations.' " (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 320 (*Kwikset*).)

On appeal, defendants contend plaintiff failed to demonstrate a probability of prevailing because plaintiff lacks standing, there is no basis for liability against defendant Frank, and plaintiff's evidence fails to show defendants sold foie gras within the meaning of Section 25982. We disagree.

A. *Plaintiff Has Shown a Probability of Prevailing on The Standing Issue*

1. *Legal Background*

In *Kwikset*, *supra*, 51 Cal.4th 310, the California Supreme Court examined the standing requirements of the UCL in light of the 2004 approval of Proposition 64. The court explained that, "While the substantive reach of [the UCL] remains expansive, the electorate has materially curtailed the universe of those who may enforce [its] provisions. . . . 'In 2004, the electorate substantially revised the UCL's standing requirement; where once private suits could be brought by "any person acting for the interests of itself, its members or the general public" [citation], now private standing is limited to any "person who has suffered injury in fact and has lost money or property" as a result of unfair competition. [Citations]. The intent of this change was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of " 'clients who have not used the defendant's product or service, viewed the defendant's advertising, or had any other business dealing with the defendant. . . .' " [Citation.] While the voters clearly intended to restrict UCL

standing, they just as plainly preserved standing for those who *had* had business dealings with a defendant and had lost money or property as a result of the defendant's unfair business practices.' " (*Kwikset, supra,* 51 Cal.4th at pp. 320–321.)[6]

*Kwikset* interpreted the Proposition 64 requirement that a party has "lost money or property" to mean that a party must "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." (*Kwikset, supra,* 51 Cal.4th at p. 322.) *Kwikset* pointed out that " '[i]njury in fact' is a legal term of art" that makes reference to one of the requirements for federal standing under article III, section 2 of the United States Constitution. (*Kwikset*, at p. 322.) Indeed, "[t]he text of Proposition 64 establishes expressly that in selecting this phrase the drafters and voters intended to incorporate the established federal meaning. The initiative declares: 'It is the intent of the California voters in enacting this act to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been *injured in fact under the standing requirements of the United States Constitution*.' " (*Kwikset*, at p. 322.)

"[P]roof of injury in fact will in many instances overlap with proof of" loss of "money or property," as also required by Proposition 64. (*Kwikset, supra*, 51 Cal.4th at p. 323.) *Kwikset* noted that such "economic injury . . . is itself a classic form of injury in fact," and "the quantum of lost money or property necessary to show standing is only so much as would suffice to establish injury in fact." (*Kwikset*, at pp. 323–324.) "However, because economic injury is but one among many types of injury in fact, the Proposition 64 requirement that injury be economic renders standing under [Business and Professions Code,] section 17204 substantially narrower than federal standing under article III, section 2 of the United States Constitution, which may be predicated on a broader range

[6] The UCL's standing provision provides, "[a]ctions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by [various law enforcement officials] . . . or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition." (Bus. & Prof. Code § 17204.)

of injuries." (*Kwikset*, at p. 324.) Nevertheless, injury in fact is "not a substantial or insurmountable hurdle;" it suffices "to ' "allege[ ] some specific, 'identifiable trifle' of injury." ' " (*Ibid*.) "If a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact." (*Id.* at p. 325.)

Finally, "Proposition 64 requires that a plaintiff's economic injury come 'as a result of' the unfair competition . . . . [Citations.] 'The phrase "as a result of" in its plain and ordinary sense means "caused by" and requires a showing of a causal connection or reliance . . . .' " (*Kwikset*, *supra*, 51 Cal.4th at p. 326.)

2. *Analysis*

In the present case, plaintiff contends it suffered injury in fact and lost money as a result of defendants' conduct in serving foie gras because it "has diverted significant organizational resources to combat [defendants'] continuing illegal sales of foie gras." Plaintiff submitted a detailed declaration from its executive director, Stephen Wells, outlining plaintiff's advocacy against foie gras in general and in favor of California's ban on the sale of foie gras in particular. Plaintiff wrote letters of support for the bill that enacted Section 25982, and "[d]uring the months before the law became effective, [plaintiff] performed public outreach to remind the public of the July 1, 2012 effective date and reinforce the law's importance." Following the effective date of the ban, plaintiff paid a private investigator to visit La Toque, and "[u]pon learning the results of the investigations . . . , paid staff at ALDF diverted their attention from other ALDF projects to analyze the facts obtained during the investigation." Subsequently, plaintiff "expended significant staff time and resources to share its investigation findings with Napa law enforcement authorities." Plaintiff's staff attorneys "diverted time and attention from other projects and attempted to persuade the Napa authorities to enforce" the ban on sale of foie gras "over the course of at least three months." Mr. Wells' declaration also averred that defendants' alleged violations of Section 25982 "harm [plaintiff's] organizational mission," and "[t]he diversion of limited resources has caused [plaintiff] to postpone projects that would reach new media markets, reach new people,

better develop [plaintiff's] organization, and advance its mission." Alternatives to spending on the California foie gras ban include, for example, "advocating an end to cruel production methods in other states and at the federal level."

Plaintiff points out that, although *Kwikset* declined to "supply an exhaustive list of the ways in which unfair competition may cause economic harm," the court did note that a plaintiff "required to enter into a transaction, costing money or property, that would otherwise have been unnecessary" would have standing under the UCL. (*Kwikset*, *supra*, 51 Cal.4th at pp. 323–324.) Plaintiff contends its expenditure of resources in investigating defendants' alleged sales of foie gras and attempting to persuade the Napa authorities to prosecute were such transactions. *Kwikset* cited *Hall v. Time Inc*. (2008) 158 Cal.App.4th 847, 854–855 (*Hall*), as a case "cataloguing some of the various forms of economic injury." (*Kwikset*, at p. 323.) *Hall* had cited *Southern Cal. Housing v. Los Feliz Towers Homeow.* (C.D.Cal. 2005) 426 F.Supp.2d 1061, 1069 (*Southern Cal. Housing*), as an example of a case where a plaintiff "expended money due to the defendant's acts of unfair competition," with the parenthetical "housing rights center lost financial resources and diverted staff time investigating case against defendants." (*Hall*, at p. 854.) In *Southern Cal. Housing*, the federal district court held that a housing advocacy organization met the Proposition 64 standing requirement by "present[ing] evidence of actual injury based on the loss of financial resources in investigating [a] claim and diversion of staff time from other cases to investigate the allegations here." (*Southern Cal. Housing*, at p. 1069.) Accordingly, although *Kwikset* did not *hold* that the precise expenditures made by plaintiff constitute injury in fact under the UCL, the court did express some approval for that proposition through its approving citation to *Hall*.

Cases addressing the federal standing requirement—which are relevant as explained in *Kwikset*, *supra*, 51 Cal.4th at page 322—also support the proposition that the plaintiff's claimed diversion of resources can constitute injury in fact. For example, in *Havens Realty Corp. v. Coleman* (1982) 455 U.S. 363 (*Havens*), a Fair Housing Act action, the plaintiff alleged it "had to devote significant resources to identify and counteract the defendant's . . . racially discriminatory steering practices." (*Havens*, at p.

379.) *Havens* held that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources" was sufficient to demonstrate injury in fact. (*Ibid.*; see *Fair Hous. of Marin v. Combs* (9th Cir. 2002) 285 F.3d 899, 903–905 [listing cases and finding standing where organization's "resources were diverted to investigating and other efforts to counteract [the defendant's] discrimination above and beyond litigation"].)

Defendants rely on *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798 (*Buckland*), disapproved on other grounds in *Kwikset*, *supra*, 51 Cal.4th 310, in arguing that plaintiff does not have standing. But the reasoning of that case supports plaintiff's position that it has established a prima facie case. In *Buckland*, a women's rights advocate bought skin creams that were allegedly sold by the defendants in violation of federal marketing laws. (*Id.* at 804–805.) The plaintiff in *Buckland* acknowledged she had incurred "the cost of purchasing each of these products in order to meet the letter of the law to have . . . economic damages that provide standing under the statutes by which I am proceeding in the case." (*Id.* at p. 805.) In considering whether the plaintiff had standing under the UCL, *Buckland* surveyed the post-*Havens* federal case law and concluded the federal circuits were divided on "whether the costs an organization incurs to pursue litigation are sufficient, in themselves, to establish an injury in fact." (*Id.* at p. 815.) *Buckland* adopted the rule of the majority of the circuits that, " '[a]n organization cannot . . . manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit.' " (*Ibid.*, quoting *Spann v. Colonial Village, Inc.* (D.C. Cir. 1990) 899 F.2d 24, 27 (*Spann*).) *Buckland* concluded its plaintiff did not have standing under that rule "[b]ecause the costs were incurred solely to facilitate her litigation . . . [and] to hold otherwise would gut the injury in fact requirement." (*Buckland*, at p. 816.)

Nevertheless, *Buckland* recognized that, under the federal cases it followed, "funds expended independently of the litigation to investigate or combat the defendant's misconduct may establish an injury in fact." (*Buckland*, *supra*, 155 Cal.App.4th at p. 815, citing *Spann, supra*, 899 F.2d at p. 27; see also *Fair Housing Council v.*

*Roommate.com, LLC* (9th Cir. 2012) 666 F.3d 1216, 1219 ["[A]n organization has 'direct standing to sue [when] it showed a drain on its resources from both a diversion of its resources and frustration of its mission.' [Citation.] However, ' "standing must be established independent of the lawsuit filed by the plaintiff." ' "].) *Buckland* distinguished *Havens* and *Southern Cal. Housing* on the basis that Buckland could not allege a "diversion of resources" comparable to the allegations of the organizations in those other two cases, "and her investigation costs, if any, are inextricably tied to her litigation expenses." (*Buckland*, at p. 816; see *Havens*, *supra*, 455 U.S. at p. 379; *Southern Cal. Housing*, *supra*, 426 F.Supp.2d at p. 1069.)

Accepting, as we must, the truth of the averments in Mr. Wells' declaration (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 444), we conclude the present case is like *Havens* and *Southern Cal. Housing* and unlike *Buckland*. The declaration indicates plaintiff spent months on the effort to persuade Napa authorities to take action based on the alleged violations of Section 25982. Thus, plaintiff has presented evidence its investigatory expenditures, as well as the resources spent in attempting to persuade the authorities, had a purpose independent of the current litigation and might have rendered such litigation unnecessary.[7] Moreover, Mr. Wells' declaration indicates that, in addition to general advocacy against foie gras, plaintiff specifically advocated for passage of the California ban on sale of foie gras and has expended resources on educating the public about the ban, including immediately before the statute's July 2012 effective date. Plaintiff, thus, has presented evidence of a genuine and longstanding interest in the effective enforcement of the statute and in exposing those who violate it. Plaintiff's evidence provides a basis to conclude that defendants' alleged violations of the statute tended to frustrate plaintiff's advocacy for an *effective* ban on the sale of foie gras in California, and tended to impede plaintiff's ability to shift its focus on

[7] We need not and do not conclude that plaintiff will ultimately persuade the court that the expenditure of resources had a purpose independent of the current litigation and were not expenditures made to "manufacture the injury." (*Buckland, supra*, 155 Cal.App.4th at p. 815.) We hold only that plaintiff's showing regarding standing is sufficient to defeat the defendants' special motion to strike.

advocacy efforts in, for example, other states and at the federal level. (See *Havens, supra,* 455 U.S. at p. 379 [the plaintiff alleged the defendants' racial steering practices " 'frustrated' " the plaintiff's " 'efforts to assist equal access to housing through counseling and other referral services' "].) In sum, Mr. Wells' declaration is sufficient to make a prima facie showing of standing to sue.

Defendants argue that a recent decision from this District's Division 4, *Two Jinn, Inc. v. Government Payment Service, Inc.* (Feb. 3, 2015, A136984) ___ Cal.App.4th ___ [2015 Cal.App. Lexis 102] (*Two Jinn*), demonstrates plaintiff's lack of standing. There, a licensed bail agent brought a UCL action to enjoin the defendant from engaging in bail agent activities in violation of legal requirements. (*Two Jinn*, at *2.) The plaintiff, like plaintiff in this case, argued it had standing because " '[w]ell before any litigation was considered,' it expended significant time and resources investigating and documenting [the defendant's] activities in order to assist government regulators and convince them to uniformly enforce the law." (*Id.* at *24.) The *Two Jinn* court assumed that under *Buckland* such a showing would demonstrate that plaintiff's investigation "was conducted independently of [the] lawsuit," but the court held that the plaintiff had failed to present any evidence in support of its argument. (*Two Jinn*, at *24.) "Indeed, [plaintiff's general counsel] expressly conceded that [its] investigation constituted 'pre[-]litigation activities.' " (*Ibid*.) The court noted that the plaintiff had shared its evidence with the California Department of Insurance, but "it did so as part of this litigation in order to support its petition for a writ of mandate." (*Ibid.*) Here, Mr. Wells' declaration, which avers the investigation and enforcement efforts with Napa authorities had a purpose independent of the lawsuit, as well as harm from the diversion of resources and the frustration of plaintiff's advocacy efforts, provides the evidence absent in *Two Jinn* and establishes a prima facie case of standing.

We also reject defendants' contention that plaintiff failed to make a prima facie showing that its economic injury was "caused by" defendants' conduct (*Kwikset, supra*, 51 Cal.4th at p. 326), because the "purpose of [plaintiff's] existence is to invest [its] resources in litigation activities." That the expenditure of resources in investigating

defendants' alleged lawbreaking was wholly consistent with plaintiff's mission does not mean the resources were not in fact diverted from other activities as a result of defendants' conduct. Where the economic injury is diversion of resources, the proper focus of the inquiry is not the "voluntariness or involuntariness" of the expenditures. (*Equal Rights Center. v. Post Properties, Inc.* (D.C.Cir. 2011) 633 F.3d 1136, 1140 (*Equal Rights Center*).) Instead, the proper focus is on whether the plaintiff "undertook the expenditures in response to, and to counteract, the effects of the defendants' alleged [misconduct] rather than in anticipation of litigation." (*Ibid.*)[8] Plaintiff has made a prima facie showing it can satisfy the UCL's causation requirement for standing.

B. *Plaintiff Has Shown a Probability of Prevailing on Its Claim That Defendants Unlawfully Sold Foie Gras*

1. *Plaintiff Has Shown a Basis for Liability Against Defendant Frank*

Defendants contend plaintiff has not shown a basis for liability against defendant Frank because there is no evidence that Frank himself directly served foie gras to any patron of La Toque. However, the complaint alleges, "[d]efendants, by themselves *and through agents*, routinely sell foie gras in violation of" Section 25982. (Emphasis added.) The evidence in the record shows Frank is the "managing member" of LT Napa (the owner of La Toque) and has worked as the restaurant's "head chef" since 1976. Moreover, there is evidence Frank is personally responsible for the restaurant's policy regarding serving foie gras. His own declaration states, "In the exercise of my constitutionally protected right of petition and free speech, my restaurant, La Toque, is protesting the law, not breaking it, by giving away foie gras to customers I choose to give it to. I give away a much smaller amount of foie gras than I did before July 1, 2012, when Section 25982 went into effect. However, what I do give away to customers is my way of dumping tea in the harbor, so to speak." If the serving of foie gras at La Toque

[8] Although the *Equal Rights Center* case did not frame this aspect of the standing issue as a causation analysis, the reasoning of the case is applicable to show satisfaction of the UCL's causation requirement.

violates Section 25982, plaintiff has shown a basis for its claim that Frank is personally liable for the violation.[9]

2. *Plaintiff Has Shown A Probability of Prevailing on Its Claim Defendants Unlawfully "Sold" Foie Gras*

"Business and Professions Code section 17200 et seq. prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct. It embraces ' " ' "anything that can properly be called a business practice and that at the same time is forbidden by law." ' " ' " (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143, fn omitted.) "[Business and Professions Code] Section 17200 'borrows' violations from other laws by making them independently actionable as unfair competitive practices. [Citation.]" (*Korea Supply*, at p. 1143.) At issue in the present case are Health and Safety Code section 25981 and Section 25982. Under Health and Safety Code section 25981, it is unlawful to "force feed a bird for the purpose of enlarging the bird's liver beyond normal size." Section 25982, in turn, prohibits the sale of foie gras produced through force-feeding, stating "[a] product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." Plaintiff's UCL action claims defendants violated Section 25982 by selling foie gras at La Toque.

"As with all questions of statutory interpretation, we attempt to discern the Legislature's intent, 'being careful to give the statute's words their plain, commonsense meaning. [Citation.] If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary.' " (*Ste. Marie v. Riverside County Regional Park & Open–Space Dist.* (2009) 46 Cal.4th 282, 288.) If terms used in a statute "are not specifically defined, a court may also consider evidence of legislative history in ascertaining the statute's

[9] Because plaintiff has shown a probability of prevailing on this issue, we need not address its contention that defendants forfeited the issue by failing to properly raise it below.

meaning." (*Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1425.)

At the outset, we reject defendants' contention that Section 25982 is a statute "imposing criminal penalties" that must be construed narrowly. In *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294 (*Lungren*), the California Supreme Court rejected the proposition that "all statutes with *civil monetary* penalties should . . . be strictly construed." (*Id.* at p. 313.) The court interpreted "dictum" in *Hale v. Morgan* (1978) 22 Cal.3d 388—upon which defendants here rely—as possibly supporting narrow construction of a statute's " 'penalty clause.' " (*Lungren*, at p. 314.) But *Hale* "did not purport to alter the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose." (*Lungren*, at p. 313; accord *Smith v. Superior Court* (2006) 39 Cal.4th 77, 92.) In particular, that rule of broad construction applies to the interpretation of statutes "that define[] the conduct proscribed by the Act, and the scope of the government's authority to enjoin and prohibit that conduct, rather than the method of assessing the amount of penalty for transgressing the proscription." (*Id.* at p. 314.) That is what is at issue in the present case: we construe the language of Section 25982 defining what conduct is prohibited, rather than a penalty clause related to the prohibition. Because defendants do not deny that Section 25982 is intended for the protection of the public within the meaning of *Lungren*,[10] we broadly construe Section 25982 in favor of its public purposes.[11]

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[10] The legislative history indicates proponents of the foie gras ban argued the force feeding involved in its production "is a cruel and inhumane process." (See, e.g., Sen. Com. on Bus. & Prof., Analyses of Sen. 1540 (2003–2004 Reg. Sess.) as amended Apr. 26, 2004; Assem. Com. On Bus. & Prof., Analysis of Sen. 1520 (2003–2004 Reg. Sess.) as amended May 6, 2004.) " 'It has long been the public policy of this country to avoid unnecessary cruelty to animals.' [Citation.] '[T]here is a social norm that strongly proscribes the infliction of any "unnecessary" pain on animals, and imposes an obligation on all humans to treat nonhumans "humanely." ' " (*Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 504; see also *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* (1993) 508 U.S. 520, 538 [referring to "legitimate governmental interests in . . . preventing cruelty to animals"].) Defendants do not dispute

On the merits, defendants do not dispute that the foie gras served at La Toque was produced through force-feeding. The sole issue regarding the applicability of Section 25982 is whether defendants' conduct in serving foie gras at La Toque constituted "sales" prohibited under the statute. In opposing defendants' anti-SLAPP motion, plaintiff presented a declaration from its investigator, who averred that on three occasions he was told he would obtain foie gras if he purchased a tasting menu at La Toque. On two of the occasions the foie gras was characterized as a "gift," apparently foie gras was not listed in the description of the tasting menu, and apparently a separate amount was not charged for the item. Defendants quote section 2106, subdivision (1) of the Commercial Code for the proposition that "[a] 'sale' consists in the passing of title from the seller to the buyer for a price." Although that definition expressly applies only to the Commercial Code, both parties agree it is a reasonable general definition. (See also Merriam-Webster's Collegiate Dictionary, 10th ed., 2001, at p. 1028 [defining a "sale" as "the transfer of ownership of and title to property from one person to another for a price"].) Employing that definition, defendants assert that plaintiff's evidence does not show that foie gras was provided for a price.

We find guidance in the California Supreme Court's recent decision in *Ennabe v. Manosa* (2014) 58 Cal.4th 697. There, the court applied section 25602.1 of the Business and Professions Code, which states that a person "who sells, or causes to be sold, any alcoholic beverage, to any obviously intoxicated minor" can be liable for resulting injuries or death. (See *Ennabe*, at pp. 702, 709–710.) The court considered whether the defendant could be held liable under the provision where she supplied alcohol to a minor at a party, and the minor was charged a fee to enter the party. (*Ibid.*) The statute considered in *Ennabe* is part of the Alcoholic Beverage Control Act, which defines a sale

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that the public interest in preventing cruelty to animals is equivalent to the interest in the "protection of the public" referenced in *Lungren*, *supra*, 14 Cal.4th at page 313.

[11] The additional cases cited by defendants supporting their argument for narrow construction of Section 25982 precede *Lungren* and do not provide a basis to distinguish the present case from *Lungren*. (See, e.g., *People v. Mobile Oil Corp.* (1983) 143 Cal.App.3d 261.)

to include "any transaction whereby, for any consideration, title to alcoholic beverages is transferred from one person to another." (Bus. & Prof. Code, § 23025; see also *Ennabe*, at p. 714.)

In interpreting the statute, *Ennabe* noted it was unclear whether a rule of liberal or strict construction was applicable, because both rules applied under different principles of statutory interpretation. (*Ennabe*, *supra*, 58 Cal.4th at pp. 713–714.) Turning to the statutory language, *Ennabe* stated, the "broad definition of a sale shows the Legislature intended the law to cover a wide range of transactions involving alcoholic beverages: a qualifying sale includes '*any* transaction' in which title to an alcoholic beverage is passed for '*any* consideration.' (Italics added.) Use of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions." (*Ennabe*, at p. 714.) The court concluded "the plain meaning of a 'sale,' as defined in [Business and Professions Code] section 23025 and used in [Business and Professions Code] section 25602.1, includes [the minor's] payment of the entrance fee for [the defendant's] party, irrespective of the fact possession of a particular drink did not occur immediately upon payment." (*Ennabe*, at p. 715.)

*Ennabe* cited with approval a 1985 Attorney General Opinion that is more analogous to the present case. (*Ennabe*, *supra*, 58 Cal.4th at pp. 716–717.) In that opinion, the California Attorney General interpreted liquor licensing laws with respect to commercial enterprises that offer "complimentary" alcoholic beverages to paying customers who purchase another good or service. (*Offer of "Complimentary" Alcoholic Beverage is "Sale"*, 68 Ops.Cal.Atty.Gen. 263 (1985) ("Opinion No. 85-701").) The Attorney General was asked, "May the operator of a commercial enterprise who does not have an alcoholic beverage license legally offer and provide 'complimentary' alcoholic beverages to any interested adult guest, customer or passenger of the business or service, without specific charge while at the same time charging for the product provided or the services rendered?" (*Id.* at 263.) Considering analogous out-of-state authority, the Attorney General concluded that "complimentary" alcohol is in fact "sold," even though

the operators do not charge additional amounts to customers who elect to consume alcohol. (*Id.* at pp. 265–267.) As the opinion explained, " 'It is wholly immaterial that no specific price is attached to those articles separately.' . . . [T]he furnishing of the beverages, although denominated 'complimentary', are for a consideration and constitute a sale within the meaning of California's Alcoholic Beverage Control Act." (*Id.* at p. 267; accord *Ennabe*, at p. 717.) To hold otherwise would undermine the Legislature's intent to regulate the provision of alcoholic beverages. (Opinion No. 85-701, at p. 267.)

Under *Ennabe* and Opinion No. 85-701, La Toque's serving of foie gras as part of a tasting menu constituted a sale of foie gras. Plaintiff's investigator's decision to order and agreement to pay the specified price for the tasting menu was the consideration offered for the entirety of the food served, including the foie gras. (*H. S. Crocker Co., Inc. v. McFaddin* (1957) 148 Cal.App.2d 639, 644 (*H. S. Crocker Co.*) ["The 'price' is the consideration passing from the buyer to the seller for the latter's interest in the thing sold."].) Under the investigator's averments, the foie gras served as part of the menu was "sold" to him as much as any other part of the tasting menu. Defendants present no reason in logic or the law why we should conclude otherwise. Defendants assert that "giving free foie gras to customers who purchased specific meals at the normal price was not a 'sale.' " It appears they contend not all of the patrons who ordered the tasting menu received foie gras, despite paying the same amount as the investigator. However, regardless of whether other patrons paid the same amount without receiving foie gras, the investigator's averments show the receipt of foie gras was part of the tasting menu offered to *him prior to his decision to order it*. Thus, the foie gras was part of the property he was offered for the price he agreed to pay. Regardless of whether other patrons received foie gras on a random basis without a prior agreement, the investigator's averments show he was "sold" foie gras as part of the tasting menu. Neither does the server's characterization of the foie gras as a "gift" on two of the occasions change the analysis, when the investigator was led to understand that he could only obtain the "gift" by purchasing the tasting menu. As in *Ennabe* and Opinion No. 85-701, it is " ' "immaterial that no specific" ' " and separate price was attached to the foie gras; the

furnishing of the foie gras, even if characterized as a gift, was " '*for a consideration and constitute[d] a sale* within the meaning of' " Section 25982. (*Ennabe*, *supra*, 58 Cal.4th at p. 717.)[12]

Defendants also argue the concept of sale in Section 25982 should be construed more narrowly than it was in *Ennabe* and Opinion No. 85-701 because the Legislature did not broadly define "sold" for purposes of Section 25982. Defendants assert, "It is instructive that the Legislature chose to adopt the substantially broader definition of 'any consideration' for the 'sale' of alcohol . . . , but chose not to do so for its ban of the 'sale' of foie gras produced by force feeding." We disagree. The standard definition of a sale in the Commercial Code, discussed previously, contemplates that any form of consideration—even non-monetary consideration—may constitute the "price" of the item sold. (*H. S. Crocker Co.*, *supra*, 148 Cal.App.2d at pp. 644–645; accord *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal. App. 4th 604, 615.) The absence of an express broad definition for "sold" applicable to Section 25982 does not mean that the consideration for foie gras must take any particular form. In light of the broad construction we apply to Section 25982, it is appropriate that the outcome in the present case be the same as that under the Alcoholic Beverage Control Act. Notably, allowing restaurants to avoid the foie gras ban by the expedient of "gifting," while informing patrons they will receive foie gras if they purchase other goods, would substantially

[12] Defendants assert La Toque's policy for serving foie gras was other than as described by the investigator. For example, they assert, "There is no evidence in this case that foie gras was offered on a consistent basis to customers that ordered certain meals but only on a random basis to customers chosen by the duty chef. The evidence only showed that a gift of foie gras was offered on some occasions to patrons who ordered certain menu items. . . . La Toque patrons are occasionally served free foie gras on an arbitrary basis, as chosen by the duty chef, and often when the patrons order certain menu items (i.e., those that would complement, or be complemented by, a serving of foie gras)." Regardless of whether defendants ultimately prove the truth of their assertions, the evidence in plaintiff's investigator's declaration is prima facie evidence of a violation of Section 25982 and sufficient to satisfy the second prong of the anti-SLAPP analysis. We need not and do not decide whether serving foie gras for no extra charge on a truly random basis, not tied to particular menu items or in response to a request by a patron, would constitute a sale prohibited under Section 25982.

undermine the ban itself. (See Opinion No. 85-701, *supra*, 68 Ops. Cal Atty. Gen. at p. 267.)

By analogy to *Ennabe*, *supra*, 58 Cal. 4th 697, and Opinion No. 85-701,[13] we construe the term "sold" in Section 25982 to encompass serving foie gras as part of a tasting menu, regardless of whether there is a separate charge for the foie gras, whether it is listed on the menu, and whether it is characterized as a "gift" by the restaurant. Plaintiff has shown a probability of prevailing on its UCL claim based on violation of Section 25982.

DISPOSITION

The trial court's order is affirmed. Costs on appeal are awarded to respondents.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

[13] In light of the authoritativeness of *Ennabe*, *supra*, 58 Cal. 4th 697, we need not discuss the various other authorities cited by the parties to support their respective positions, none of which is directly on point.

Superior Court of Napa County, No. 26-61166, Hon. Diane M. Price, Judge.

Greenwald & Hoffman, Paul A. Hoffman and Paul Evan Greenwald; Law Offices of Manuel S. Klausner and Manuel S. Klausner; and The Michael Tenenbaum Law Firm and Michael Tenenbaum for Defendants and Appellants.

Animal Legal Defense Fund, Matthew Liebman and Christopher A. Berry; Fenwick & West, William R. Skinner for Plaintiffs and Respondents.

Drinker Biddle & Reath, Sheldon Eisenberg and Erin E. McCracken for John L. Burton as Amicus Curiae on behalf of Plaintiffs and Respondents.

ATTACHMENT:

TRIAL COURT ORDER

SUPERIOR COURT FOR THE STATE OF CALIFORNIA,

COUNTY OF NAPA

ANIMAL LEGAL DEFENSE FUND,

Plaintiff,

v.

LT NAPA PARTNERS, LLC, et al.

Defendants.

Case No.: 26-61166

RULING ON SUBMITTED MATTER REGARDING SLAPP MOTION

Defendants' special motion to strike Strategic Lawsuit against Public Participation (SLAPP) came on for hearing on May 31, 2013. Having read and considered the papers submitted in support of and in opposition to the motion and heard oral argument, the court took the matter under submission, and now rules as follows:

The motion is DENIED.

Plaintiff's Request to Strike Defendants' New Evidence in Reply

Plaintiff requests that the court strike defendants' new evidence in reply. Defendants' new evidence is their current practice of presenting customers with a "protest card" with the free gift of foie gras, explaining defendant Kenneth Frank (Frank)'s opposition to California's anti-foie gras policy. (See Supplemental Declaration of Frank dated May 23, 2013.)

Plaintiff's request is granted. In the motion, defendants claimed that plaintiff need not conduct further investigations at La Toque because plaintiff had all the information it needed regarding defendants' conduct. Since defendants produced new evidence in reply, plaintiff did not have an opportunity to respond to or to investigate the new information. Defendants have not shown good reason for their failure to present them in the moving papers. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335 fn. 8, quoting 9 Witkin, Cal. Procedure (3d ed. 1985) § 496, p. 484.)

Defendants' Motion to Strike Strategic Lawsuit against Public Participation (SLAPP)

In deciding an anti-SLAPP motion, the court engages in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity (i.e., that the acts or acts of which plaintiff complains were taken in furtherance of defendant's right of petition or free speech). If such a showing has been made, the court then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. (Cal. Code Civ. Proc., § 425.16, subd. (b); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66.)

In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. (Cal. Code Civ. Proc., § 425.16, subd. (b)(2).) The court must accept as true the evidence favorable to plaintiff. *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291. When assessing plaintiff's showing, the court must also consider evidence presented by the defendant. (Cal. Code Civ. Proc., § 425.16, subd. (b)(2).) The court does not weigh defendant's evidence against plaintiff's in terms of either credibility or persuasiveness. Rather, defendant's evidence is considered only to determine whether it defeats plaintiff's claims as a matter of law—e.g., by establishing a defense or the absence of a necessary element. *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 585.

Plaintiff's complaint contains a single cause of action for defendants' alleged violations of the Unfair Competition Law. Plaintiff alleges defendants have violated and continue to violate the Unfair Competition Law by selling foie gras in violation of California Health and Safety Code Section 25982. California Health and Safety Code Section 25982 states, "A product

may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size."

Defendants contend the cause of action for violations of the Unfair Competition Law arises from acts in furtherance of their rights protected under the anti-SLAPP statute. "[A]ct in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Cal. Code Civ. Proc., § 425.16, subd. (e)(4).) Defendants argue their acts fit within Section 425.16, subdivision (e)(4) because their serving of "free" foie gras to customers at La Toque is an individual demonstration to protest the policies of the State of California and is intended to invite dispute about the policies of the State of California and Health and Safety Code section 25982.

Assuming arguendo the debate over public policy involving the production, sale and consumption of foie gras qualifies as a "public issue" or an "issue of public interest" under Section 425.16, subdivision (e)(4), defendants have failed to show their acts are in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, the courts ask whether an intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it. (*Texas v. Johnson* (1989) 491 U.S. 397, 404). In *Texas v. Johnson*, the court held that burning a flag at a political protest was protected speech. (*Id.* at p. 406.) Unlike Johnson, defendants in the instant case fail to show the act of serving foie gras in a restaurant conveys a particularized, understandable message to their patrons. Defendants serve foie gras at La Toque without accompanying material or discussion of the controversial nature of the product. (See Declaration of Frank dated April 29, 2013.) Plaintiff's investigator, Kevan Kurt (Kurt), was served foie gras upon ordering the Chef's Table Tasting Menu on three separate occasions after section 25982 went into effect on July 1, 2012. No statement of any kind was made that suggested defendants' acts were intended to convey a message. (See Amended Declaration of Kurt.) Without the surrounding context, the recipients of the foie gras have no

way of knowing that serving the product is to invite dispute about the policies of the State of California and Health and Safety Code section 25982. Thus, defendants have failed to meet their burden of showing that the challenged cause of action is one arising from protected activity.

The court could conclude its analysis here. However, even if the court were to consider defendants' new evidence in reply regarding defendants' use of "protest cards" in conjunction with serving foie gras at La Toque and the court were to find that defendants' acts fit within Section 425.16, subdivision (e)(4), the court believes that plaintiff has met its burden of establishing a probability of prevailing on the merits of the cause of action for violations of the Unfair Competition Law.

Under the Unfair Competition Law, standing extends to a person who has suffered an injury in fact and has lost money or property as a result of the unfair competition. (Cal. Bus. & Prof. Code, § 17204.) Plaintiff has standing under the Unfair Competition Law.

Plaintiff has suffered actual injury. Although not binding, the court finds *So. Cal. Hous. Rights Ctr. v. Los Feliz Towers Homeowners Ass'n Bd. of Dirs.* (C.D. Cal. 2005) 426 F.Supp.2d 1061 persuasive. In *So. Cal. Hous. Rights Ctr.*, a housing rights organization brought an Unfair Competition Law action against a condominium association that failed to accommodate a disabled condominium owner. The court held that the organization had standing because it presented evidence of actual injury based on loss of financial resources in investigating the disabled owner's claim and diversion of staff time from other cases to investigate the allegations. (*So. Cal. Hous. Rights Ctr. v. Los Feliz Towers Homeowners Ass'n Bd. of Dirs., supra,* 426 F.Supp.2d at p. 1069.) Here, plaintiff diverted staff time and resources from other activities or projects to identify, investigate and counteract defendants' conduct. (Amended Declaration of Stephen Wells (Wells).) Relying on *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, defendants argue that plaintiff has not suffered injury in fact. *Buckland* is distinguishable. Unlike the plaintiff in *Buckland* who bought defendant's product in order to establish injury in fact, plaintiff in the instant case spent resources on investigating defendants' conduct and diverted resources to take the findings to the Napa law enforcement authorities. (See Amended Declaration of Wells.) Moreover, the *Buckland* court acknowledged that funds expended independently of the litigation to investigate or combat the defendant's misconduct

may establish an injury in fact. (*Buckland v. Threshold Enterprises, Ltd.*, *supra*, 155 Cal.App.4th at p. 815.) Here, plaintiff's expenses were incurred to investigate or combat the defendant's misconduct. (Amended Declaration of Wells.)

Plaintiff's injury was caused by defendants' conduct. Plaintiff incurred expenses to investigate defendants' conduct. Plaintiff paid Kurt to visit La Toque to attempt to buy foie gras from defendants. Kurt reported that he ordered and received foie gras as part of the meal he purchased. (Amended Declaration of Wells.) Upon learning the results of the investigations at La Toque, plaintiff diverted from other projects to analyze the facts obtained during the investigation and concluded that La Toque's serving of foie gras violates California Health & Safety Code section 25980, *et seq.* (*Id.*) Plaintiff expended staff time and resources to share its investigation findings with Napa law enforcement authorities and to persuade them to enforce California Health & Safety Code section 25980, *et seq.* (*Id.*) The Napa City Attorney declined to take legal action against La Toque. (*Id.*) As a result of defendants' refusal to follow the California Health & Safety Code section 25980, *et seq.*, plaintiff cannot engage in other activities. The diversion of limited resources has caused plaintiff to postpone projects that would reach new media markets, reach new people, better develop plaintiff's organization, and advance its mission. (*Id.*)

As a private entity suffering economic injury as a result of the alleged unlawful or unfair business practices of defendants, plaintiff may seek an injunction without complying with the heightened requirements of California Business & Professions Code Section 17204 or the requirements of California Code of Civil Procedure Section 382. Here, plaintiff is suing on its own behalf in this matter, regarding injury that the organization itself has suffered. Plaintiff is not bringing this claim on behalf of others in a representative capacity.

Plaintiff's evidence supports its claim that defendants' serving of foie gras to customers at La Toque is a sale in violation of Health & Safety Code § 25980 *et seq.* California Health and Safety Code Section 25982 states, "A product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size." A definition for "sold" is not given by the text of the Foie Gras Ban. In the absence of a specific definition, "sold" should be interpreted according to its plain meaning. (*Caminetti v. U.S.* (1917)

242 U.S. 470, 485.) The plain meaning of "sold" is the transfer of property for a price. (Black's Law Dictionary (7th Ed. 2001).) A price is defined as any consideration sufficient to create a contract. (*H.S. Crocker Co. v. McFaddin* (1957) 148 Cal.App.2d 639, 644-645.)

The evidence gathered by Kurt shows that foie gras was served by defendants when bundled with other items as part of the Chef's Table Menu. Mr. Frank declares that La Toque serves "free" foie gras to customers on a random basis regardless of what they order. (Declaration of Frank.) Based on the evidence presented, it is clear that a person cannot come into the restaurant and simply ask for or be served "free" foie gras; the product is served only to *paying* customers, whether randomly in the dining room or as part of a menu. The total price of a meal at La Toque is consideration exchanged for providing both food and the other elements of the dining experience to customers, including the possibility of receiving foie gras. While there is no set menu price charged for the serving of foie gras at La Toque, there *is* payment of valuable consideration in exchange for foie gras that creates a sale.

Plaintiff has shown future harm and continuing violations by defendants. Plaintiff contends that foie gras sales at La Toque are ongoing and that plaintiff will continue to divert resources until the sales end. (See Amended Declaration of Wells.) Even if the court were to consider defendants' new evidence that La Toque has started providing protest cards to customers getting foie gras, the new evidence does not change the nature of those transactions—they are sales. Providing protest cards does not change the fact that customers who receive foie gras from La Toque furnish consideration in exchange for receiving the product.

For the foregoing reasons, defendants' special motion to strike (SLAPP) is denied and there is no basis to award defendants attorney's fees in connection herewith.

Dated: 7/1/13

Diane M. Price, Judge

ATTACHMENT:

TRIAL COURT ORDER IN
*PETA V. HOT'S RESTAURANT GROUP, INC.*
(Superior Court of California, County of Los Angeles,
Case No. YC068202)
Dated: Oct. 9, 2013

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

| | | | |
|---|---|---|---|
| DATE: 10/09/13 | | | **DEPT.** M |
| HONORABLE Ramona G. See | JUDGE | A. Eubanks | DEPUTY CLERK |
| HONORABLE | JUDGE PRO TEM | | ELECTRONIC RECORDING MONITOR |
| M. Fondon, C.A. | Deputy Sheriff | None | Reporter |

8:30 am YC068202

Plaintiff Counsel

PEOPLE FOR THE ETHICAL TREATMEN VS HOT'S RESTAURANT GROUP

Ruling/ Submitted Matter

Defendant Counsel

**NATURE OF PROCEEDINGS:**

RULING ON SUBMITTED MATTER: DEFENDANT HOT'S RESTAURANT GROUP, INC.'S DEMURRER TO FIRST AMENDED COMPLAINT

On September 11,2013 Defendant's Demurrer to the First Amended Complaint was heard, argued and taken under submission by the Court. After further review of all moving and opposition papers, and after consideration of the argument of counsel, the Court now rules as follows on the submitted matter:

Defendant Hot's Restaurant Group, Inc.'s Demurrer to the First Amended Complaint is OVERRULED on the grounds that sufficient facts are alleged in support of the cause of action for Violation of Business and Professions Code Section 17200, including an injury in fact. See Kwikset Corp. v. Superior Court, (2001) 51 Cal.4th 310, 323-24. Plaintiff sufficiently alleges an economic injury through diversion and expenditure of resources and costs in investigating defendant's alleged unlawful conduct. See Id.; S. Cal. Housing Rights Ctr. v. Los Feliz Towers Homeowners Assoc. Board of Dirs., 426 F.Supp.2d 1061, 1069 (C.D. Cal. 2005)(a non-profit housing rights organization sufficiently alleged lost money or property when it alleged that it investigated allegations of disability discrimination in housing by the defendant); Havens Realty Corp. v. Coleman 455 U.S. 363, 379 (1982).



**MINUTES ENTERED**
10/09/13
**COUNTY CLERK**

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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| HONORABLE | JUDGE PRO TEM | | ELECTRONIC RECORDING MONITOR |
| M. Fondon, C.A. | Deputy Sheriff | None | Reporter |

| | | | |
|---|---|---|---|
| 8:30 am | YC068202 | Plaintiff Counsel | |
| | PEOPLE FOR THE ETHICAL TREATMEN VS HOT'S RESTAURANT GROUP | Defendant Counsel | Ruling/ Submitted Matter |

**NATURE OF PROCEEDINGS:**

Plaintiff specifically alleges that it redirected resources and staff time to investigate Defendant's unlawful practices. See First Amended Complaint, ¶¶ 4, 36-42. An advocacy group, such as Plaintiff, may allege injury in fact when it challenges a business practice and expends resources in doing so. See Animal Legal Def. Fund v. HVFG LLC, 2013 US Dist. LEXIS 89169 (N.D. Cal. June 25, 2013); Fair Housing Council of San Fernando Valley v. Roommate.com, LLC 666 F.3d 1216, 1219 (9th Cir. 2012)("an organization has 'direct standing to sue [when] it showed a drain on its resources from both a diversion of its resources and frustration of its mission.' However, 'standing must be established independent of the lawsuit filed by the plaintiff.' An organization 'cannot manufacture [an] injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all"). Unlike Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal.App.4th 798 (holding that plaintiff could not simply purchase a product to initiate litigation), Plaintiff has alleged expenditure of expenses and resources independent of a mere attempt to pursue litigation and the Court must treat the complaint's allegations as true for the purpose of deciding a demurrer. Defendant contends that mere "interference with" or "frustration of" a non-profit's mission cannot confer standing. Instead, Plaintiff must show a "concrete and

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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| HONORABLE | JUDGE PRO TEM | | ELECTRONIC RECORDING MONITOR |
| M. Fondon, C.A. | Deputy Sheriff | None | Reporter |

| | | | |
|---|---|---|---|
| 8:30 am | YC068202 | Plaintiff Counsel | |
| | PEOPLE FOR THE ETHICAL TREATMEN VS HOT'S RESTAURANT GROUP | Defendant Counsel | Ruling/ Submitted Matter |

**NATURE OF PROCEEDINGS:**

demonstrable injury to its activities, not simply a setback to the organization's abstract social interests." See Center for Science in the Public Interest v. Bayer Corp. 2010 WL 1223232 (N.D. Cal. Mar. 25, 2010)("CSIP"). This Court agrees, however, Plaintiff has alleged a concrete injury in the form of diversion and expenditure of resources. Thus, the Court finds that CSIP is distinguishable, because, that plaintiff did not allege the expenditure and diversion of resources as alleged in the instant case and only alleged that the Defendant's conduct was simply against the organization's stated goals and mission. Finally, the Court finds Clapper v. Amnesty Int'l USA 113 S.Ct. 1138 (2013) is inapposite because it did not involve a violation of Business and Professions Code § 17200. Instead, it involved an analysis of Art. III of the U.S. Constitution and involved a hypothetical chain of events which might lead to unauthorized government interception of communications.

Defendant is ordered to file an answer within ten days of receipt of the Court's ruling.

The Court re-sets this case for Case Management Conference on December 17,2013 at 8:30am in Department M.

CLERK'S CERTIFICATE OF MAILING



MINUTES ENTERED
10/09/13
COUNTY CLERK

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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| DATE: 10/09/13 | | | **DEPT.** M |
| HONORABLE Ramona G. See | JUDGE | A. Eubanks | DEPUTY CLERK |
| HONORABLE | JUDGE PRO TEM | | ELECTRONIC RECORDING MONITOR |
| M. Fondon, C.A. | Deputy Sheriff | None | Reporter |

| | | | |
|---|---|---|---|
| 8:30 am | YC068202 | Plaintiff Counsel | |
| | PEOPLE FOR THE ETHICAL TREATMEN VS HOT'S RESTAURANT GROUP | Defendant Counsel | Ruling/ Submitted Matter |

**NATURE OF PROCEEDINGS:**

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the
Minute Order
upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Torrance, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: 10.09.13

Sherri R. Carter, Executive Officer/Clerk

By: _____
A. Eubanks

The Tenenbaum Law Firm
1431 Ocean Avenue Suite 400
Santa Monica CA 90401



**MINUTES ENTERED**
10/09/13
**COUNTY CLERK**

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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| HONORABLE | JUDGE PRO TEM | | ELECTRONIC RECORDING MONITOR |
| M. Fondon, C.A. | Deputy Sheriff | None | Reporter |

| | | | |
|---|---|---|---|
| 8:30 am | YC068202<br><br>PEOPLE FOR THE ETHICAL TREATMEN<br>VS<br>HOT'S RESTAURANT GROUP | Plaintiff Counsel<br><br>Defendant Counsel | Ruling/ Submitted Matter |

**NATURE OF PROCEEDINGS:**

Santa Monica CA 90401

PETA Foundation
2154 W Sunset Boulevard
Los Angeles CA 90026



**MINUTES ENTERED**
10/09/13
**COUNTY CLERK**

## PROOF OF SERVICE

I, Michael Tenenbaum, declare that I am over 18 years of age and not a party to this action. My business address is 1431 Ocean Ave., Ste. 400, Santa Monica, CA 90401.

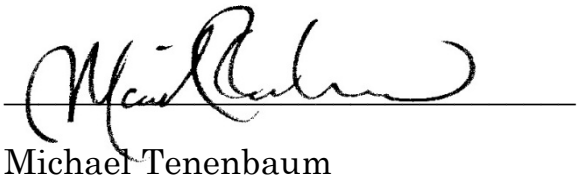
On April 14, 2015, I served true copies of the following document(s):

**PETITION FOR REVIEW**

**[X] BY MAIL** by enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed on the attached Service List (where service is indicated as having been made by mail) and by placing the envelope for collection and mailing, following my ordinary practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 14, 2015



Michael Tenenbaum

**SERVICE LIST**

***Animal Legal Defense Fund v. LT Napa Partners LLC et al.***

By mail

Matthew Liebman, Esq.
Animal Legal Defense Fund
170 E. Cotati Ave.,
Cotati, CA 94931
Tel: (707) 795-2533

*Counsel for Plaintiff and Respondent Animal Legal Defense Fund*

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Clerk, Superior Court, County of Napa (Case No. 2661166)
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