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CENTRAL DIST. OF CALIF.
LOS ANGELES

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

11 ASSOCIATION DES ÉLEVEURS DE
12 CANARDS ET D'OIES DU QUÉBEC, a
13 Canadian nonprofit corporation; HVFG
14 LLC, a New York limited liability
15 company; and HOT'S RESTAURANT
16 GROUP, INC., a California
17 corporation;

Plaintiffs,

18 - against -

19 KAMALA J. HARRIS, in her official
20 capacity as Attorney General of
21 California; EDMUND G. BROWN, in
22 his official capacity as Governor of
23 California; and the STATE OF
24 CALIFORNIA;

Defendants.

Case No. **CV12-5735** -SVW

(R2A)

COMPLAINT TO DECLARE
INVALID AND ENJOIN
ENFORCEMENT OF
CALIFORNIA HEALTH &
SAFETY CODE § 25982 FOR
VIOLATION OF THE FIFTH AND
FOURTEENTH AMENDMENTS
AND THE COMMERCE CLAUSE
OF THE UNITED STATES
CONSTITUTION

DEMAND FOR JURY TRIAL

BY FAX

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JURISDICTION

1. This case arises under the Constitution of the United States and under 42 U.S.C. § 1983. This court has subject matter jurisdiction under 28 U.S.C. § 1331.

NATURE OF THE ACTION

5 2. A California law concerning the feeding of birds takes effect on July 1,
6 2012. Sections 25980 through 25984 of the Health and Safety Code (the “Bird Feeding
7 Law”) make it a violation of state law — with civil penalties of up to \$1,000 for each
8 violation per day — for a person to “force feed a bird for the purpose of enlarging the
9 bird’s liver beyond normal size.” The statute defines “force feeding” as using a process
10 that causes a bird “to consume more food than a typical bird of the same species would
11 consume voluntarily.” In practice, the vagueness of this purported standard makes it
12 impossible for anyone to know at what point a particular bird has been fed “more
13 food” than the Bird Feeding Law allows.

14 3. Section 25982 of the Bird Feeding Law goes far further, however, in also
15 prohibiting the **sale** of any product in California “if it is the result of” such feeding, no
16 matter where in the world the particular bird was fed. In so doing, the Bird Feeding
17 Law imposes strict liability — crushingly strict liability, at the rate of \$1,000 per sale
18 per day — on distributors, restaurants, and others in the stream of commerce who,
19 when they sell a product of a duck, for example, cannot possibly know what the
20 particular duck from which it was produced had been fed throughout its lifetime.

21 4. If this law remains in effect and is deemed to apply to Plaintiffs, then
22 California will become the only place in the world where the sale of, for example, foie
23 gras — and every other product that is “the result of” ducks raised for their livers,
24 including duck breast, duck fat, and even duck feathers — would be banned within its
25 borders. As a result, the Bird Feeding Law destroys both the retail and the wholesale
26 markets for the sale of duck products in California and places a substantial burden on
27 interstate and foreign commerce. It does this without advancing any local interest (let
28

1 this suit. AECOQ is also suffering injury to itself in the form of a continuing drain on
2 its resources if section 25982 remains in effect and AECOQ must devote its resources to
3 ascertaining when its members have fed a duck or goose “more food” than the Bird
4 Feeding Law allows. AECOQ’s members’ ducks are raised in full compliance with
5 Canadian law, and their products are required to undergo USDA-approved inspection
6 at slaughterhouses in Canada as well as upon entry to the United States. Under the
7 NAFTA, the products of AECOQ’s members — foie gras, duck breast, duck leg, and
8 duck fat, for example — may be freely sold in every state of the United States. But
9 section 25982 prohibits any of these products from being sold within California as of
10 July 1, 2012, if the ducks of AECOQ’s members from which they came are deemed to
11 have been fed “more food than a typical bird of the same species would consume
12 voluntarily” — effectively closing off the entire state of California to Canadian imports
13 of foie gras and other duck products.

14 8. Plaintiff HVFG LLC (which does business as Hudson Valley Foie Gras
15 [“Hudson Valley”]) is a New York producer of duck products from ducks that are
16 raised and slaughtered on its USDA-inspected farm in full compliance with New York
17 and federal law. Hudson Valley is the largest producer of foie gras and other products
18 from ducks raised for foie gras in the United States. Until July 1, 2012, Hudson
19 Valley’s duck products, which include foie gras, duck breast, duck leg, and duck fat
20 could be freely sold in every state of the United States. But section 25982 now prohibits
21 any of Hudson Valley’s products from being sold within California if its ducks are
22 deemed to have been fed “more food than a typical bird of the same species would
23 consume voluntarily” — effectively closing off the entire state to Hudson Valley’s
24 wholesale sales.

25 9. Plaintiff Hot’s Restaurant Group, Inc., is a California corporation that
26 owns and operates restaurants in Hermosa Beach (Hot’s Kitchen) and Northridge
27 (Hot’s Cantina) in Los Angeles County, California. Until July 1, 2012, Hot’s was free
28 to sell dishes with duck products such as foie gras, duck breast, duck leg confit, and

1 duck fat, but it now risks prosecution — and literally millions of dollars in penalties —
2 for continuing to serve its customers if, even without its knowledge, any of these
3 products can be traced to a duck that is deemed to have been fed “more food than a
4 typical bird of the same species would consume voluntarily” for the purpose of
5 enlarging its liver. The same is true for every other restaurant, distributor, and gourmet
6 food store in California. Section 25982 thus effectively closes off the entire state of
7 California to the retail sale of products from ducks.

8 ***Defendants***

9 10. Defendant Kamala J. Harris is the current Attorney General of California.
10 In her official capacity under the California Constitution, the Attorney General is the
11 chief law officer of the state and has direct supervision over every district attorney,
12 sheriff, other law enforcement officers. Cal. Const. Art. 5, § 13.

13 11. Defendant Edmund G. Brown is the current Governor of California. In his
14 official capacity under the California Constitution, the Governor is vested with the
15 supreme executive power of the state. Cal. Const. Art. 5, § 1.

16 12. Defendant State of California is a state that, through its officers and
17 agencies, including the Governor and Attorney General, enforces California law.

18 **VENUE**

19 13. Venue in this district is proper under 28 U.S.C. § 1391(b) because at least
20 one Defendant resides in this district and all Defendants are residents of the State of
21 California, because the injuries giving rise to Plaintiffs’ claims are taking place in this
22 district, because a substantial part of the property that is the subject of the action is
23 situated in this district, and because all Defendants are subject to the Court’s personal
24 jurisdiction in this district.

25 **GENERAL ALLEGATIONS**

26 14. California Senate Bill 1520 was signed by the Governor and chaptered on
27 September 29, 2004. It added sections 25980 – 25984 to the California Health and
28 Safety Code (the “Bird Feeding Law”).

1 15. The Bird Feeding Law prohibits the sale of any product in California “if it
2 is the result of force feeding a bird for the purpose of enlarging the bird’s liver beyond
3 normal size.” Cal. Health & Safety Code § 25982.

4 16. The Bird Feeding Law defines “force feeding” to mean “a process that
5 causes the bird to consume more food than a typical bird of the same species would
6 consume voluntarily.” Cal. Health & Safety Code § 25980(b).

7 17. The Bird Feeding Law provides that any peace officer, humane society
8 officer, or animal control officer may issue a citation for a violation and that such a
9 citation “shall require the person cited to pay a civil penalty in an amount up to one
10 thousand dollars (\$1,000) for each violation, and up to one thousand dollars (\$1,000)
11 for each day the violation continues.” Cal. Health & Safety Code § 25983(a), (b).

12 18. These provisions of the Bird Feeding Law have taken effect as of July 1,
13 2012. Cal. Health & Safety Code § 25984(a).

14 19. The Bird Feeding Law does not provide any intelligible measure — such as
15 weight, volume, or caloric value — by which those involved in the feeding of ducks,
16 such as Plaintiffs AECOQ and Hudson Valley, may determine at what point a duck has
17 been fed “more food” than the statute allows such their duck products may continue to
18 be sold in California. *A fortiori*, the Bird Feeding Law makes it impossible for any
19 seller of duck products, such as a California distributor or restaurant like Plaintiff
20 Hot’s, to know whether its products are the result of a duck having been fed “more
21 food” than the Bird Feeding Law allows.

22 20. Section 25982 also contains no requirement of a *mens rea* on the part of
23 any person who sells a product that is the result of the bird feeding practice targeted by
24 the statute. In other words, Plaintiff Hot’s — along with any distributor or other
25 restaurant in California — faces prosecution and a \$1,000 civil penalty for every sale
26 they make of a product from a duck whose feeding habits they cannot possibly know
27 about. In penalizing a distributor or restaurant in California for selling a product of a
28 duck fed by another person “for the purpose of” enlarging its liver beyond normal size,

1 section 25982 also makes the prosecution of such distributor or restaurant dependent
2 on the mental state of another.

3 21. Every duck raised for human consumption and every product of a duck
4 sold in the United States for human consumption must be inspected and approved for
5 sale by the United States Department of Agriculture as wholesome and unadulterated so
6 that it may circulate freely in interstate commerce.

7 22. One such product is foie gras, which is French for “fatty liver.”

8 23. The most common duck raised for foie gras in North America (and the one
9 raised by Plaintiffs AECOQ and Hudson Valley), is the mulard, which is the hybrid
10 progeny of two ducks which not only come from different species but also are not even
11 from the same genus.

12 24. Plaintiffs AECOQ and Hudson Valley are sellers of foie gras and a variety
13 of other products — such as duck breast, duck legs, duck fat, duck tongues, duck skin,
14 duck bones, and duck feathers — from ducks raised for foie gras as well as from mulard
15 ducks not raised for foie gras.

16 25. The products of Plaintiffs AECOQ and Valley are regularly sold by
17 distributors and restaurants in California.

18 26. Once processed, it is extremely difficult, if not impossible, for a person to
19 know whether a duck product comes from a duck that was raised for the purpose of
20 enlarging its liver — or how much any duck was fed throughout its lifetime.

21 27. Like countless other restaurants, Plaintiff Hot’s regularly purchases duck
22 products from distributors and includes these products — ranging from foie gras to
23 duck legs and duck fat — in dishes prepared for consumers in its restaurants.

24 28. As a result of section 25982 taking effect on July 1, 2012, Plaintiff Hot’s
25 and other restaurants in California have stopped selling foie gras and other duck
26 products out of fear of prosecution and penalties of up to \$1,000 per violation per day.
27 This is causing Plaintiff Hot’s significant lost sales.

28

1 practices to the vague and arbitrary limitation in section 25980(b) in order to sell their
2 products in California, section 25982 directly regulates out-of-state and foreign conduct
3 and therefore violates the Commerce Clause.

4 50. As alleged above, because the Bird Feeding Law bans the production of
5 duck products using its prohibited feeding practices, the practical effect of section
6 25982's ban on the sale of such duck products is to discriminate against out-of-state
7 and foreign goods such as those from Plaintiffs AECOQ's members and from Hudson
8 Valley, and section 25982 therefore violates the Commerce Clause.

9 51. As alleged above, section 25982 places excessive burdens on interstate and
10 foreign commerce without advancing any legitimate local interest in the feeding of
11 ducks beyond California's borders.

12 52. As alleged above, an actual controversy has arisen and now exists
13 regarding a matter — the constitutionality of section 25982 — over which this Court
14 has subject matter jurisdiction. A declaratory judgment will terminate and afford relief
15 from the uncertainty, insecurity, and controversy giving rise to this action.

16 53. Plaintiffs therefore seek declaratory and further relief under 28 U.S.C.
17 §§ 2201 *et seq.* (the Declaratory Judgment Act).

18 **FOURTH CAUSE OF ACTION**

19 **Injunctive Relief**

20 54. Plaintiffs re-allege and incorporate by reference all of the preceding
21 paragraphs.

22 55. Section 25982 is unconstitutional for the reasons sated in the foregoing
23 causes of action.

24 56. The enforcement of section 25982 will cause immediate and irreparable
25 injury to Plaintiffs, including but not limited to loss of opportunity, disruption of
26 business, lost profits, diminution in value, and civil penalties.

27 57. Because Defendants' enforcement of section 25982 will cause harm that
28 cannot be adequately compensated in damages, Plaintiffs request that this Court

1 provide preliminary and permanent injunctive relief enjoining Defendants from
2 enforcing section 25982 with respect to Plaintiffs and those similarly situated.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiffs respectfully seek the following relief from this Court:

5 A. A declaratory judgment, pursuant to 28 U.S.C. § 2201 *et seq.* (the
6 Declaratory Judgment Act), that section 25982 of California Health & Safety Code is
7 unconstitutional on its face and as applied to each Plaintiff for each of the reasons
8 stated above;

9 B. A preliminary injunction prohibiting the enforcement of section 25982 as
10 unconstitutional;

11 C. A permanent injunction prohibiting the enforcement of section 25982 as
12 unconstitutional;

13 D. An award of reasonable attorneys fees and costs to the extent permitted by
14 law, including but not limited to under 42 U.S.C. § 1988; and

15 E. Such other relief as the Court deems just and proper.

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17 Dated: July 2, 2012

THE TENENBAUM LAW FIRM

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21 Michael Tenenbaum, Esq.

22 *Counsel for Plaintiffs Association des*
23 *Éleveurs de Canards et d'Oies du Québec,*
24 *HVFG LLC, and Hot's Restaurant Group,*
25 *Inc.*

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DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury.

Dated: July 2, 2012

THE TENENBAUM LAW FIRM



Michael Tenenbaum, Esq.

*Counsel for Plaintiffs Association des
Éleveurs de Canards et d'Oies du Québec,
HVFG LLC, and Hot's Restaurant Group,
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