



FILED

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

ALAMEDA COUNTY
NOV 23 2020

CLERK OF THE SUPERIOR COURT
By *Danielle Fabreque*
Deputy

DIRECT ACTION EVERYWHERE
SF BAY AREA, an unincorporated
association, on behalf of the general
public,

Case No. RG17847475

Plaintiff,

v.

**STATEMENT OF DECISION
and FINAL JUDGMENT**

DIESTEL TURKEY RANCH, a Calif.
Corporation, exempt private foundation,

Defendant.

_____ /

FACTUAL BACKGROUND

A. The Parties

Plaintiff Direct Action Everywhere SF Bay Area

Plaintiff Direct Action Everywhere SF Bay Area (hereinafter “DxE”) is an association of activists committed to ending the exploitation and killing of animals. The SF Bay Area chapter was founded in 2013 and is DxE’s first and largest chapter. The stated mission of the association is to “achieve revolutionary social and political change for animals in one generation” including animal liberation toward the goal of a “world where animals are respected as unique individuals with unalienable rights, including bodily autonomy.” “Animal liberation” means species equality and the end to the use of conscious, feeling animals for human benefit. According to the association’s “The Forty Year Roadmap to Animal Liberation” the ultimate goal is a constitutional amendment granting equal rights and legal personhood to “non-human animals” within one generation.

The association’s Organizer’s Handbook states:

We reject the speciesism that enables the mass torture and killing of nonhuman animals and the blatant disregard for their home... as well as the unjust and oppressive institutions and ideologies that harm all animals.... Direct Action Everywhere stands out from other animal advocacy groups for a variety of reasons, but perhaps one of these reasons is because our strategy and tactics are so different from the norm within the animal rights movement... We use the proven tactics of nonviolent civil resistance, social influence and mass mobilization to create a world where every animal is safe, happy and free.

According to its New Activists Handbook (hereinafter "NAH"), DxE's primary tactics are:

Open rescue, protest, intentional community building, and the Liberation Pledge... In open rescue, activists enter farms and other facilities without permission [usually at night], document the conditions and remove some sick and injured animals. These animals are given whatever medical attention they require, and then placed in permanent homes, typically sanctuaries, where they spend the rest of their lives happy, safe and free.

In open rescue, as opposed to traditional undercover investigations, the investigators act openly, without masks, and publish their full identities.

The "Liberation Pledge," which all DxE activists must adhere to, has three components:

1. Publicly refuse to eat animals: live vegan.
2. Publicly refuse to sit where people are eating animals.
3. Encourage others to take the pledge.

DxE SF Bay Area organizes a monthly Day of Action protest against supermarkets, food festivals and large political or sporting events which they believe are exploiting animals. As stated in the NAH, "[p]rotest, especially when it's disruptive, forces people to pay attention to injustices being perpetrated on minority or marginalized populations. In addition, they not only demonstrate but also deepen the activists' seriousness and determination to the cause."

The Organizer's Handbook explains that DxE's open rescues and protests:

historically target companies and institutions who claim to sell products with superior animal welfare standards such as Whole Foods Market and Chipotle.

We criticize these companies for lying about the actual conditions on their farms and using these conditions to deceive customers with the idea that it is possible to raise and kill animals in a humane way, which we reject. We believe that “humane meat” is the wobbly linchpin holding together the whole system of meat.

It further describes the goal of many of DxE’s actions as aimed at dispelling what they call “The Humane Myth” and targeting those which they believe propagate it.

DxE, which is an unincorporated loose association of multiple chapters, is funded through Friends of DxE, a 501(c)3 nonprofit corporation. DxE has no paid staff. All of its activists are unpaid volunteers. DxE has no bank accounts and holds no assets. One of its founders, Wayne Hsiung, testified volunteer time is DxE’s primary resource. All of its expenditures are paid by Friends of DxE or by direct in-kind donations from volunteers. The NAH states DxE’s expenditures in 2013, its first year of operation, were \$4,000. In 2017, it anticipated expenditures of \$350,000 most of which was to be spent on animal care and operation of the Berkeley Animal Rights Center. Activists are also encouraged to become monthly financial donors to Friends of DxE.

Defendant Diestel Family Turkey Ranch

Defendant Diestel Turkey Ranch, also known as Diestel Family Turkey Ranch (hereinafter “Diestel”), is a California corporation in the business of commercial turkey production, including raising turkeys and selling whole turkeys and turkey products both wholesale and retail. Three corporate officers are all Diestel family members by blood or marriage: Jason Orrock, President and CFO; Jason Diestel, Vice President of Operations and Heidi Diestel Orrock, Vice President of Customer Service and Marketing. The Diestels’ great uncle Ernest Battiti started the turkey ranch in the 1920s. In 1949, Jack Diestel purchased the farm from his uncle and continued raising turkeys commercially and added an on-site feed mill. The Diestel Turkey Ranch began with 50 acres in Sonora, California and 3,000 turkeys. In 1980, Jack sold the farm to his son Tim and his wife Joan. Over the years, Diestel acquired additional locations and expanded the operation substantially, adding an on-site processing plant for slaughtering the turkeys and preparing them for market. In 2012, Tim and Joan transferred management of the corporation to their son Jason Diestel and their daughter Heidi and her husband Jason Orrock, although they continue to serve on the board of directors.

At the relevant times of trial, Diestel raised turkeys for consumer consumption in 8-10 different locations in the Sierra Nevada foothills with a total of 74 barns, each about

the length of a football field and each housing between 12,000 - 15,000 turkeys. The exception is Diestel's Sonora Ranch which it calls "the home ranch" because that is where the Diestel children grew up and which now serves as the corporate headquarters. Diestel's website invites customers to come visit "the ranch" by which they mean the Sonora headquarters, where over 8000 turkeys live and are entirely pasture raised.

Diestel processes over one million whole birds for sale each year which it markets as Diestel's Petite Turkey; Young Turkey; Young Turkey Non-GMO; Organic Young Turkey; Organic American Heirloom; and Pasture Raised. In addition, Diestel purchases over 600,000 head of raw, turkey parts annually from other suppliers across the country from which it produces a selection of turkey products such as 6 varieties of sliced deli turkey; 3 varieties of ground turkey; 3 varieties of turkey sausage; 2 types of turkey franks; 4 varieties of turkey patties; 7 varieties of cooked turkey breasts or drumsticks and 4 varieties of roasted or ready-to-roast birds. It has 30-40 regular employees which can increase up to 300 during the pre-holiday season.

Diestel's market share is that niche of turkey consumers who are concerned with where, how and by whom their food is grown or raised and who are prepared to pay a premium price for food which they believe to be fresher, healthier, sustainably and humanely produced. It is a major supplier to upscale markets such as Whole Foods, New Seasons and other "natural" food stores, although big box stores like Costco may carry their brand during the holidays. Many of Diestel's promotional materials such as brochures, wholesale talking points, website, Facebook page and blog highlight Diestel as "A Family Run Sustainable Ranch" and prominently feature photos of the entire family posed in front of live turkeys with references to "Four Generations of Ranching." Grandpa Jack even makes an appearance in the website video. The 2013-2014 version of the website stated: "Our family's turkey ranch has been providing the highest quality all-natural and organic free-range turkeys from our beautiful ranch in the northern California foothills since 1949. We still own and operate our sustainable family operation, which allows us to practice careful range management and ensures that every Diestel turkey product we produce is absolutely delicious."

Diestel turkeys are marketed as "minimally processed, no filler, no nitrates/nitrites and no antibiotics, hormones or growth stimulants, ever." The website says "Diestel turkeys enjoy the freedom of being slow grown with plenty of fresh air and room to roam, whether indoors or outdoors... our turkeys are raised almost twice as long and with nearly three times as much space as conventional birds. We give turkeys time to be turkeys which means they develop premium texture and flavor naturally." As of November 7, 2017, a Diestel promotional stated:

Looking for a turkey that was raised thoughtfully? We have you covered – to us Thoughtfully Raised means giving the birds plenty of fresh air and space to roam, whether indoors or outdoors. Our turkeys are given individual care and a wholesome diet. We care for the animals and the land!

Defendant’s marketing materials seek to distinguish it from conventional turkey farmers. A press release entitled “Diestel Turkey Ranch Sets Standards for Sustainability” states:

In an industry so often ruled by volume & efficiency; where quicker is “better,” and where flavor, nutrition and quality are often overlooked, there is thankfully an exception to this norm. In the case of turkey, the anomaly is called the Diestel difference. Diestel Turkey Ranch is one of the last small, family-owned turkey grower-processors in the United States. On their beautiful ranch in the Sierra Foothills, the traditions of Great-uncle Ernest, who started the farm, are continued...The popularity of the Diestel holiday birds is a direct result of the careful farming practices the family employs: Allowing the birds to roam free, giving them plenty of time to grow, offering the birds the highest-quality, all-natural food sources and being meticulous about the finished product’s quality. In fact, Diestel farmers walk the turkeys every day and pay close attention to their health, removing the need for antibiotics.

Its website page entitled “The Diestel Difference” states, “We source the highest quality grains, mill our own feed, give our animals extra time to grow slowly, use multiple breeds to ensure a fully mature turkey at every weight range and treat our animals with compassion.” Another version of that page states, “Our turkeys enjoy the freedom of being slow grown in the clean Sierra Nevada foothills with individual care, where they are raised longer to develop flavor naturally.” The birds are fed a low-fat vegetarian diet free of antibiotics, growth stimulants and hormones and are all GAP rated. The page ends by saying, “Our turkeys are grown and processed directly to you by us – the Diestel Ranch. Our ranch is family owned and operated, since 1949, and we’re proud to be one of the last small, family owned turkey grower-processors in the United States.”

Diestel promotes the sustainability of its ranch and products throughout its marketing materials. On one web page Diestel states “Most farms rely on water that’s been chemically treated and transported in dirty, corroded pipes.” It claims, however, that it “use[s] fresh well water and cleans our barns and pipes regularly with probiotics” and its water is treated “with a state-of-the-art membrane water filtration technology,

which eliminates the need for chemicals. On our family ranch in Sonora, California, we're fanatical about advancing independent and regenerative agriculture for everyone. From pioneering new best practices for the industry to improving our operations here at home, we're always looking for ways to make our farm and our products better for our customers, our community, and our planet."

Defendant's website has an entire page devoted to "Animal Welfare" which in 2014 stated:

The Global Animal Partnership (GAP) is a non-profit that has a mission to improve the lives of farm animals. To help customers make thoughtful choices about the meat they purchase, GAP has developed a 5-step rating system to rate the level of humane care that animals receive.

Diestel embraces strict animal welfare practices, and when it comes to GAP ratings, it's no surprise that Diestel was the first turkey producer to achieve the highest GAP 5+ rating.

The webpage then has a multi-colored graphic with a brief summary of the criteria for each of the five different GAP steps, described as: Step 1 – No Cages No Crates No Crowding; Step 2 – Enriched Environment; Step 3 – Enhanced Outdoor Access; Step 4 – Pasture Centered; Step 5 – Animal Centered, No Physical Alterations; Step 5+ - Animal Centered, Entire Life on Same Farm.

According to Dan Neuerberg, Regional Meat Coordinator for Whole Foods Market, the Global Animal Partnership was created by former Whole Foods CEO, John Mackey. The organization was started in 2012 to create an animal welfare labeling program with objective standards for animal treatment which are subject to audits by independent third parties every 15 months, on a seasonally rotational basis. Dr. Joy Mench, a UC Davis veterinary professor and recognized expert in animal welfare with a specialty in poultry science, explained such an organization was considered necessary because the United States, unlike the European Union, has no federal laws regulating the treatment of animals on the farm. There are some state laws, but she considers them inconsistent and patchy. As a result, the United States has evolved into the use of a system of voluntary regulation in which supermarkets and chain restaurants have taken on the responsibility for monitoring the animal welfare conditions of their suppliers. One of the ways for doing that is by asking their suppliers to be audited as part of a certification program. Other examples are the Certified Humane and American Humane Certified programs, with which Dr. Mench is involved. She believes the criteria for

GAP and the humane certified programs are quite robust because the standards are scientifically based, extremely comprehensive and subject to very deep third party audits.

According to Dr. Mench, it is not typical for turkey producers to be GAP certified. Rather, the majority of conventional turkey producers adhere to the National Turkey Federal Association's "animal husbandry standards" which do not require audits and set no standards for most of the items GAP requires such as minimum space requirements, outdoor access, and environmental enrichments such as perches and pecking posts. Whole Foods Market requires its suppliers to be GAP certified, which it concedes requires a significant commitment of time and money from its producers – even to get to Step 1, which has over 100 requirements to meet.

Jason Diestel testified that the majority of Diestel turkeys are certified GAP Step 3, which requires a minimum of 3 square feet per turkey (as opposed to the conventional one square foot); outdoor access with shade and some vegetation or forage materials (as opposed to conventional indoor confinement only) and indoor enrichments such as perches and pecking posts (as opposed to conventional barns with no enrichments). Only the pasture raised birds at the Sonora Ranch, which represent less than 1% of Diestel's total turkeys, have been rated GAP 5 or 5+. All Diestel turkeys have been GAP rated since 2012 and Diestel has received certifications from the Non-GMO Project Verification for their Natural, Organic and Heirloom turkeys. It has been certified organic by Oregon Tilth for their organic labeled turkeys since 1999, which represent less than half of Diestel's turkeys.

Finally, under the "Product" heading, Diestel's website has a section entitled "Meet Our Birds" which has an entire page devoted to each of the six varieties of whole turkeys for sale and which describes the individual attributes of that variety, including its GAP Step rating. In addition, a graph is displayed setting forth all six varieties and indicates all are "tender and juicy," "slow grown," "contain no antibiotics, growth stimulants or hormones," and "100% vegetarian." The differences are then disclosed: such as the GAP rating for each variety; whether or not it is non-GMO verified; organic certified; the feather color and the sizes in which the processed bird is available for purchase. The whole bird section is followed by 18 pages of turkey deli products for sale, none of which discuss the attributes of the birds used for its production. However, Jason Diestel testified all of Diestel's turkey product suppliers are also GAP rated.

B. The Open Rescue

In 2015, plaintiff decided to target Diestel for an investigation and possible open rescue because it considered Diestel's marketing strategy to be one of the main

perpetuators of “The Humane Myth.” They believed Diestel’s marketing portrayed a misleading idyllic situation where all the turkeys were free to roam in the lush green pasture of Diestel’s Sonora ranch, were individually loved and cared for by Diestel family members who took the turkeys for daily walks, and were all rated GAP 5+. Wayne Hsiung, founder and activist for DxE, testified plaintiff suspected this advertising was false and unlawful and took steps to discover and expose the truth. He testified plaintiff would not have diverted its volunteer time and resources from other projects and taken action to expose Diestel if it had not used words such as “sustainable,” “antibiotic or chemical free,” “family farm,” or “local ranch grown turkeys.”

From January to October 2015, Hsiung and several other DxE activists undertook an investigation of Diestel’s operations, with Hsiung serving as “project lead.” Hsiung testified they spent a huge amount of time researching Diestel’s online marketing as well as obtaining copies of its brochures from local markets and talking with or emailing defendant’s employees. They also visited several of defendant’s ranches for offsite observation. They discovered the vast majority of turkeys were kept inside huge barns. The activists made 9 trips in total to Diestel’s ranches for in-person surveillance, in both day and night. Of those 9 trips, Hsiung admitted entering defendant’s property without permission six times. Despite defendant’s marketing that the birds “have plenty of fresh air” and “room to roam, indoors and outdoors” Hsiung testified he never saw the turkeys outside on a regular basis nor did he observe evidence they had been there, such as feathers, feces or tracks. It appeared to him that most of the time, the birds were all inside barns. Hsiung and other volunteers purchased video cameras and donated them to plaintiff for use in recording the conditions on the ranches.

Priya Swahney, co-founder and activist with DxE, testified she entered Diestel’s J59/Larsen ranch without permission in August and September 2015 as part of plaintiff’s investigation and also because she believes it is her right as a citizen of California to enter any operation that is abusing animals in order to save them. She said she personally entered 3 to 5 different barns and in each barn she saw thousands of turkeys living in over-crowded, filthy conditions, lacking care. She described birds with open bloody wounds, eyes swollen shut, inflamed crops so swollen they couldn’t stand, mutilated beaks and others struggling to breath. She described the smell of ammonia from turkey urine as so strong it gave her a coughing attack. She said she saw small weak turkeys being trampled upon by bigger stronger ones, as well as numerous dead decomposing birds and other birds with their legs so stuck in feces they could not free themselves. Ultimately, she decided to “rescue and liberate” two turkeys that appeared so little and weak she was concerned they would not survive. Even though she has no veterinary or animal husbandry background, Swahney’s main role on plaintiff’s investigative team was animal care - to ensure their safety and provide them with medical attention, food and

water. She described covering the two rescued turkeys with her coat and wrapping them in a heating pad to keep them warm because they were cold once outside the barn. The two were taken to a vet to receive medical attention, but both ultimately died for reasons she could not recall. Swahney receives a \$30,000-\$35,000 annual stipend from Friends of DxE for her services to DxE. As part of the plaintiff's leadership team, Swahney testified that she has been to a lot of farms and facilities where animals are being raised for food, even some certified humane, and in every instance she has seen animal cruelty.

Gurdee Sorbi, another DxE activist, testified she was also involved in the rescue of two turkeys from Diestel's J59/Larsen ranch. One of them, which she named Angie, survived and was ultimately placed in a sanctuary. Sorbi testified before she became a vegan, she had purchased a Diestel turkey in 2009 from Whole Foods market to eat for Thanksgiving because she believed it had led a good long happy life based on Diestel's brochure. She said the turkey cost 2/3rds more than other turkeys which she could have purchased at Safeway, but she was willing to pay the extra price because she thought the turkey had been humanely raised. She has since come to believe that all animal agriculture is abusive and that Diestel is a major purveyor of "The Humane Myth."

Hsiung testified plaintiff removed a total of six turkeys from Diestel without permission, of which he was involved in removing at least one. In May 2015, he arrived at one of defendant's barns only to find that all the turkeys had already been sent for processing. However, he discovered one bird alone outside the barn. He believed it was having trouble walking and breathing, so he and a companion videotaped themselves taking it from defendant's ranch. In addition, Hsiung photographed cartons of Mucosol and BioSupreme-L which he observed at Diestel's ranch and which he believed contradicted its claim that it did not use chemicals and drugs on the birds. As project lead, Hsiung testified the activists knew that it was important for the health of the birds to wear a biosecurity suit whenever they went into the barns and they always endeavored to do so. Nonetheless, he admitted there were occasions he entered barns or stood at the entrance to take pictures without a biosecurity suit.

The DxE activists ultimately produced over 40 hours of video footage from their visits to Diestel's barns which Hsiung edited down to a 2-3 minute clip which he entitled, "A Deadly Feast." The short video shows graphic footage of about ten individual turkeys in distressful conditions. Several of the birds have filthy feathers or have large patches of feathers missing. A couple have bloody wounds from being pecked by other birds. One or two were laying down in apparent distress. One had a large dropped crop which made it hard to walk. One poor little bird was huddled in a corner being stood on and pecked by a bigger bird. Finally, it depicts a dead, decomposing bird lying in the midst of the others. It also records Hsiung's own "open rescue" of the bird outside the barn. All of

the footage in the video was shot at night and the lighting and quality are less than ideal. If one is able to get past the disturbing images of the distressed and injured birds, in the background one can see the majority of the birds are healthy-looking, with room to move around and flap their wings albeit inside the large dark barn.

In October 2015, Hsiung collaborated with Michael Goldberg and Leslie Goldberg, DxE activists and former investigative reporters for the San Francisco Chronicle and San Francisco Examiner to turn the video and investigation into a 12 page published report also entitled, “A Deadly Feast – What you are not told about your Thanksgiving Turkey,” complete with glossy color photos of the dead and injured birds from the video. The Goldbergs donated over 100 hours of research into producing the report. Hsiung said he committed dozens of hours to it, in addition to all the time he spent editing the video and that he and other volunteers spent surveilling the Diestel ranch and removing the six birds.

Plaintiff published the report and video on the internet and sent it electronically to nationwide media, Whole Foods, GAP auditors and others on November 19, 2015, six days before Thanksgiving. The impact upon defendant was immediate. Heidi Diestel was the first to learn of the report when an ABC news reporter showed up unannounced at the Sonora ranch the morning the report was released and asked for her reaction to the video, which she had not yet seen. She offered to let him and his cameraman tour whichever ranches or barns he chose, cameras rolling. He selected the J59/Larsen ranch since it was the one featured in plaintiff’s video, which they then toured accompanied by Jason Diestel. The next day, the reporter advised them the story would not be airing as originally planned on the Monday before Thanksgiving, but that ABC would continue exploring plaintiff’s claims. According to Diestel, the story and plaintiff’s video never aired on ABC at all because its claims could not be substantiated. Defendant continued to receive media and customer inquiries about the story which they responded to with an open invitation to visit Diestel locations.

In response to the release of the report and video, Diestel also received a surprise visit from Dan Neurerburg, the Regional Meat Coordinator for Whole Foods, in charge of meat acquisitions for the chain. His boss had seen the video and requested that he go and inspect right away, which he did the next day on November 20. Neurerburg visited three ranches, taking notes and photos. He found the turkeys to appear healthy, with clean feathers, feet and bellies. He found the litter to be dry and in good shape even when he dug down into it, explaining that if the bedding is urine soaked the ammonia will burn the turkeys’ breast feathers, which he did not observe. Neurerburg had been to defendant’s farms once or twice a year for the previous twenty years on behalf of Whole Foods, as he had other turkey suppliers. He testified he had always considered Diestel to be a

premium brand because “how they raise their animals is much nicer, much better” than others.

Within 48 hours of plaintiff’s publication of the video, GAP initiated an emergency audit of Diestel’s operation. Both of its auditing companies, Earth Claims and IMI Global, conducted on-site inspections on November 22, 2015. The IMI auditor, Kelly Crymble, reported she found no signs of neglect or abuse of any of Diestel’s turkeys. She specifically inspected for any instances of lameness or footpad issues because of plaintiff’s report of 6” deep piles of feces and wet litter; but did not find any. She further reported she found the litter to be dry and friable and that in her previous inspections she had never seen 6” piles of turkey manure in defendant’s barns. Earth Claims likewise reported that it investigated plaintiff’s claims and found no issues of concern. Rather, it determined Diestel was in full compliance with GAP Step 3 criteria for its housed birds.

On November 24, 2015, Diestel issued its own press release in response to plaintiff’s claims. It read in relevant part:

We wanted to address the recent allegations by Direct Action Everywhere. ... One of the last small, family-owned turkey grower-processors in the United States, we are committed to animal welfare and transparency...

Diestel farmers walk the turkeys every day and pay close attention to their health, removing the need for antibiotics... In addition, Diestel birds are raised almost twice as long and given three times as much space as on conventional farms...

All of Diestel’s ranches receive third party audits by the Global Animal Partnership (GAP) and our turkeys are raised in accordance with their standards. We are proud to offer GAP Step 3 turkeys and GAP awarded Diestel’s pasture raised birds its highest 5+ rating. That’s not easily achieved and is a big point of pride for the Diestel family.

Reports of plaintiff’s investigation were carried in the Wall Street Journal and Washington Post. A little over nine months later, on September 8, 2016, Diestel received yet another unannounced inspection, this time from its organic auditor, Oregon Tilth, Inc. The auditor reported no issues of concern and verified the turkeys were utilizing outdoor access, had clean dry bedding and nothing other than an approved probiotic was being added to the water or misting system.

On January 30, 2017, plaintiff filed the instant lawsuit. The Third Amended Complaint (“TAC”) alleges that defendant violated California Business and Professions Code Section 17500 by falsely advertising its turkey products as “thoughtfully raised,” “humanely or thoughtfully raised on sustainable family farms,” “range grown,” and/or “slow grown,” when they are not. The TAC further alleges breach of Cal.Bus. & Prof Code 17200’s prohibition on fraud, unfair and unlawful conduct by such false advertising and by violation of the criminal animal cruelty statutes, Penal Code sections 597(b), 597.1(a)(1) and 597f(a). The final rendition of the TAC, after Hon. Ioana Petrou granted defendant’s Motion to Strike in part, seeks to enjoin the defendant from “unlawful and deceptive practices,” and an award of attorneys’ fees.

Again, just before Thanksgiving on November 13, 2017, plaintiff issued a press release authored by Michael Goldberg entitled “Residue of Prohibited Antibiotic Reported in Diestel Turkey – USDA.” Citing its own amended complaint as the source, the press release stated:

The residue of a FDA-prohibited antibiotic has appeared in tests done by the USDA on Diestel Turkey Ranch birds...The FDA-prohibited drug, Chloramphenicol, can have ‘severe toxic effects in humans including bone marrow suppression or aplastic anemia in susceptible individuals,’ according to the USDA. ‘Consumers are being misled by Diestel, said DxE co-founder Wayne Hsiung. ‘They think high-priced Diestel turkey is drug free when it actually contains drugs that can be harmful to humans.’

Other drugs that appeared in tests done on Diestel turkeys by the USDA’s National Residue Program include amikacin, hygromycin, ipronidazole, melengestrol acetate, and ketamine, a narcotic that the Drug Enforcement Agency describes as “a disassociative anesthetic that has some hallucinogenic side effects.” Ketamine has not been approved by the FDA for use in poultry.”

Three weeks later, Diestel filed a cross-complaint against DxE and Hsiung for trespass and conversion and sought an injunction against them to prohibit the unlawful business practice of promoting trespass and conversion or burglary in open rescues, a violation of Business and Professions Code Section 17200. In addition, the cross-complaint prays for general damages, punitive damages, restitution, and attorneys’ fees.

The matter proceeded to an eight-day court trial in October 2019 before Hon. Michael Markham of the Alameda County Superior Court. After the conclusion of the trial but before rendering judgment, Judge Markham was required to recuse himself due

to illness and the case was reassigned to Judge Julia Spain. The parties stipulated to Judge Spain ruling upon the case based upon the trial transcripts and the evidence previously admitted.

Plaintiff's Evidence

At trial, plaintiff focused on six elements of defendant's marketing which it contended are false and misleading as follows:

1. Diestel's references to the Sonora ranch are likely to mislead consumers into believing all of its turkeys are raised there;
2. Diestel's turkeys are not "thoughtfully raised" in that they are not raised in fresh air, not permitted to roam in fields, and do not receive individual care;
3. Diestel's emphasis upon its GAP 5+ rating is likely to deceive consumers into believing all its products are from GAP 5+ rated birds;
4. Diestel's use of the terms "slow grown" and "proprietary breeds" are likely to mislead consumers into believing its turkeys live long lives and that the common commercial breed is not also raised by Diestel;
5. Diestel is not a "small family farm" where the turkeys are cared for by family members;
6. Diestel does dose its turkeys with antibiotics and/or chemicals when it claims it does not.

In addition to the testimony of Wayne Hsiung and the other activists involved in the open rescue and "A Deadly Feast" report, Plaintiff called as a witness Kent Larson, who lives next door to Diestel's Jamestown ranch. Larson testified his family used to raise turkeys and sold the adjoining land to Diestel. He has lived next door "intermittently" since 1999 and continuously since 2017. Larson testified that he had never seen Diestel's turkeys outside of the barns until 2017. He also testified that when his family raised turkeys, it was normal to find dead, injured or bleeding birds in the barn. On cross examination, he admitted that he has no idea how defendant's turkeys were being raised on a day-to-day basis and that he is extremely angry at the Diestel family about a shooting range that was located too close to his property. His testimony added little weight to plaintiff's claims.

Plaintiff also called two expert witnesses, Dr. Sherstin Rosenberg and Sanjay Hukku, Phd. Dr. Rosenberg is a licensed veterinarian and the Executive Director of the Happy Hen Sanctuary. She is also a financial supporter of DxE and has participated in their protests. In addition, Friends of DxE is a major financial supporter of the Happy

Hen Sanctuary. Dr. Rosenberg disclosed she has never worked on a commercial turkey farm and is unaware of conventional turkey standards or practices.

Dr. Rosenberg testified that the ten or so individual turkeys depicted in the video edited by Hsiung were in extreme distress, dying or dead. She described the medical condition of several of the birds, one with a pendulous crop which would prevent it from passing food; one with a supinated foot which made it difficult to walk; others who were too weak to stand or had large patches of missing or dirty feathers. Having viewed the video, but not having personally examined any of the birds, she concluded that Diestel's turkeys are suffering from stress which is suppressing their immune systems due to confinement, living in filth and poor air quality. She testified that the birds are overcrowded in the barns and do not have "room to roam." She believes they are living in filth because defendant only changes the bedding litter between flocks (i.e. every four to five months) and not daily as she does for the 22 turkeys in her care at the sanctuary. She testified it is impossible to have 15,000 turkeys in a barn as defendant does and have "fresh air," explaining that the veterinary reference to "fresh air" means that the ammonia level from the urine does not exceed 25 parts per million, which is when the turkeys begin to experience deleterious effects. She opined that several of the birds appeared to be having great difficulty breathing. Dr. Rosenberg testified that "beak conditioning" or beak trimming is an inhumane practice in which a laser drills holes into a young turkey's beak to cause the tip to fall off. She observed several of the birds in the video appeared to have deformed beaks and said even though the birds do tend to peck each other, beak conditioning would not be necessary if the birds were not overcrowded. She concluded that rather than being "thoughtfully raised" with "individual care," it appears Diestel's turkeys are the subject of systematic neglect. It was Dr. Rosenberg's opinion that GAP standards do not provide adequate space for turkeys and that commercial growers like Diestel put economic concerns over the well-being of the turkeys, whom she believes should be treated with care and compassion, and not eaten.

Although his academic studies were in rhetoric and his dissertation was on "*Plotting Sex: Pornography's Performatistic Screen*," Sanjay Hukku, Phd was admitted as an expert in "consumer insight and consumer surveys" arising from his background in marketing, brand development and the study of semiotics or how signs and symbols create and convey meaning. He works as an advertising strategist and designs surveys and focus groups to determine the connotations consumers are giving to advertising materials. He was the only one of plaintiff's witnesses who was not directly associated with DxE or a vegan. He was retained by plaintiff to review Diestel's marketing materials and form an opinion as to the impression they convey and to develop and conduct a survey which would measure consumers' reactions to defendant's advertising.

Dr. Hukku performed what he called a “brand audit” by going through the Diestel advertising materials which were provided to him by plaintiff, including excerpts from Diestel’s website, YouTube and Facebook pages. He also viewed the current website for himself to determine how Diestel has been “speaking to consumers and how consumers would have been relating to them.” He concluded that defendant has maximized consumers’ tendency to favor family, homespun, and “real” images by its use of photos of live turkeys, the Sonora ranch and Diestel family members. He further concluded that when taken in the aggregate, the totality of defendant’s marketing would lead consumers to believe that the Diestel family has a deep and ongoing involvement in the day-to-day care for the turkeys’ well-being, including ensuring that the turkeys are taken for a walk regularly by family members or others close to the family. He opined that the many references to “the Sonora ranch” or “our family ranch” or “our ranch” as opposed to the comparatively few references to partner ranches would lead consumers to conclude that there is only one Diestel location, the green pastures of the Sonora property. He said the references to “plenty of fresh air” and “room to roam” were likely to lead consumers to believe the turkeys have space to move around comfortably inside the barn and outdoors and that the prominent mention of the GAP 5+ rating would lead consumers to believe all Diestel turkeys enjoy a high GAP rating. He indicated the phrase “thoughtfully raised” connotes a high “level of ethics, concern and care for the life experiences of the turkeys.” Finally, he concluded the “dominant visual cues” from defendant’s advertising are misleading and that has not materially changed over time. As a result, he opines consumers have been willing to “over invest” in Diestel products because it has been portrayed as an ethical, thoughtful small family farm rather than a faceless corporation.

In addition to his brand audit, Dr. Hukku developed a consumer survey which was administered by Survey Monkey to 300 willing participants, all of whom were over the age of 25, had purchased or considered purchasing poultry products that year, and who earned \$50,000 plus annually. The survey consisted of 2 narrative and 9 multiple choice questions to be answered after viewing a 3-minute composite video of selected excerpts from defendant’s 2008 – 2012 advertising, including excerpts from a video produced by Whole Foods entitled “Meet the Ranchers” which plaintiff found especially objectionable and which had been removed from defendant’s website by the time of trial. Dr. Hukku testified the survey results confirmed his own conclusion that Diestel’s advertising is misleading. Among the narrative responses to a request to describe a typical day in the life of a Diestel Turkey were: “plenty of room to roam,” “cared for by hand in natural eco-system,” “free range,” and “inside a barn – have seasonal access to outdoors or pasture.” Responses to what “thoughtfully raised” meant included: “extremely caring” and “what’s best for the turkey, not for the profit.” Over 50% responded the turkeys live outside in a pasture and are raised at the Diestel family ranch in Sonora. Over 80% of

respondents indicated that being “thoughtfully raised” with “room to roam” at a family ranch would be material to their decision to purchase a Diestel turkey.

At trial, plaintiff presented no evidence in support of the claim made in its Third Amended Complaint that dangerous chemical residues had been found by the USDA’s National Residue Program. Despite having issued a public press release about the alleged presence of such “toxic,” “harmful” and even “hallucinogenic” chemicals in Diestel’s turkeys, at trial DxE conceded it was no longer pursuing an injunction based on the allegations of chemical or anti-biotic use in Diestel’s birds. Plaintiff also stipulated that it does not dispute that defendant uses a slow-growth feed for the turkeys. Finally, plaintiff presented no specific evidence or argument regarding the allegations in the TAC that defendant violated Penal Code Sections 597(b), 597.1(a)(1) and 597f(a), the criminal animal cruelty and neglect statutes, and failed to address them in either its pre or post trial briefs.

Defendant’s Evidence

Heidi Diestel Orrock (hereinafter “HDO”) and her brother Jason Diestel (hereinafter “JD”) testified about the family tradition and current practice of raising turkeys. JD said one of his earliest memories is “walking the flock” with his father after dinner. He explained that “walking the flock” is one of the traditions passed down from generation to generation in which someone walks through the flock daily and observes what needs it may have, because things can change on an “hourly basis.” He said he continues to do this today, as well as employing others whose job it is to “walk the flock” daily. JD graduated from Cal Poly San Luis Obispo which a major in agribusiness, during which he was exposed to the operations of conventional turkey producers. However, he testified he was not interested in conventional methods of poultry farming because he was “raised with a set of values to place quality first throughout our turkey operation.” He said an example of the Diestel commitment to quality is found in the family secrets of “Breed, Feed and Time” which are promoted in their advertising materials.

JD explained “Breed” refers to the fact that conventional turkey producers use one breed of turkey for everything, whether to obtain a 10 lb. or a 40 lb. bird for sale, the only difference being the length of time it is allowed to live and mature. In contrast, Diestel has developed smaller proprietary breeds of turkey which it uses to obtain the lower weights consumers’ desire and which allows the birds to grow close to maturity before they are processed. HDO testified that as a result, their turkeys have optimal “meat to bone ratio” rather than being fattened up faster than their bones can carry as was

said to occur in conventional turkey farms. JD testified “Feed” refers to the fact Diestel mills its own 100% vegetarian coldmash feed which is always consistent and lower in fat or “energy” so the birds grow a little slower. Conventional turkey producers, on the other hand he said, use rations between wheat or corn which are constantly changing depending on which is cheapest and this inconsistency stresses the birds. In addition, he said conventionally raised turkeys are fed heat processed pellets which are partially predigested which makes the food go through the digestive system more quickly and produces faster growth, resulting in turkeys which get fatter faster than their immature bones can support. “Time” refers to the conventional turkey industry method of increasing bird size while reducing the time from birth to market. The combination of proprietary breeds and lower energy feed results in it taking more time for Diestel turkeys to get to market, which is what Diestel calls “slow grown.” Dr. Herman Kuhl, a poultry nutrition expert who consults with Diestel on their feed, agreed that defendants do use a low energy/low fat feed which is not typical in the industry. He described the benefits of this feed as giving the birds time to develop a “good skeleton” before they begin putting on too much fat. Nonetheless, it was his opinion that Diestel’s large “Select” turkey has about the same development time to market as other producers. Jason Orrock, President of Diestel, testified defendant’s Nicholas 700 or “Select” turkey breed grows 1 to 1½ weeks slower than conventionally raised birds of that breed. Overall, Orrock testified that conventionally raised turkeys live an average of 12 -15 weeks. In contrast, he said Diestel turkeys live approximately 18 to 18½ weeks, which is not as Diestel’s marketing says, “twice as long.”

Another marketed “Diestel difference” is that its turkeys are “thoughtfully raised” which Diestel advertising defines as “plenty of fresh air,” “room to roam,” “individual care” and a “wholesome diet.” JD testified the unique Diestel barn construction, in which the barns are several hundred feet long and one or both sides have an opening five feet tall which runs the length of the building and starts two to three feet off the ground. The opening is screened in with chicken wire that lets sunshine and air inside. A curtain is attached to the outside of the opening to be raised or lowered as the weather requires. The barns for the GAP Step 3 birds also have ten-foot-long doors along the bottom spaced every thirty to forty feet through which the turkeys can go outside into an enclosed pen area which is the same size as the barn itself during the daytime. Some of the barns have outside pens on both sides of the barn. Through this construction, Diestel says the turkeys have “room to roam, whether indoors or outdoors” daily, unless inclement weather or extraordinary circumstances won’t permit it. JD also said this construction is in sharp contrast to conventional turkey barns which have solid wall construction and use massive fans to cool the barns down so the turkeys will eat more. HDO testified that “individual care” is provided when the farmers are walking the flock and checking the birds’ feathers and eyes, to see if any of them needs individual

attention. She also said it means to “give them the very best care.” The “wholesome diet” aspect of “thoughtfully raised” was discussed hereinabove.

To rebut plaintiff’s allegations that the turkeys were living in filth, JD testified that each flock gets fresh, new bedding, which is kept dry and friable. The brooder house for baby chicks uses pinewood shavings and when the flock is moved to a grow house or barn, it receives new 6” deep litter made of rice hulls. The rice hulls are rototilled every few weeks to turn the fresh bedding to the top. He said it is unusual for conventional turkey farms to provide each flock with new bedding and many even reuse the brooder house litter, which contributes to the conventional farms’ need to use chemicals and pesticides for microbial management and control ammonia levels. In contrast, he testified Diestel does not use chemicals but instead relies upon natural probiotics such as a yucca extract, BioSupreme L, which is administered through the water and has anti-inflammatory properties and antioxidants. Rather than use harsh cleaning chemicals, he said Diestel uses a probiotic surfactant which is certified by the Green Clean Institute and organically approved. JD testified Diestel birds are never fed antibiotics or growth hormones. In the event a bird or flock is prescribed an antibiotic for medical reasons, he said the bird(s) are removed from the Diestel label. Nonetheless, dead birds are a daily occurrence in the barns and part of the reason for daily “walking the flock” is to cull out ill or injured birds and remove any which have died.

Dr. Mark Bland, who has served as Diestel’s veterinarian and poultry consultant for the past seven years, confirmed that Diestel turkeys are anti-biotic free and chemical free. He explained that in commercial turkey production the number one problem involving enteric bird health is control of coccidia, an intestinal parasite found where there is poor litter management. Conventional producers regularly use ionophores, a class of antibiotics, to treat it. Diestel, however, uses oregano oil and good litter management, which is why it changes the litter between flocks and rototills, which is unusual in the industry. In addition, he testified Diestel treats the turkeys with other natural, homeopathic products such as thyme, Biosupreme for intestinal health, Mucosol for respiratory health, IOMED35, an iodine product which acts as an expectorant, and aspirin. Dr. Bland testified all of these products are appropriate for turkeys and not harmful to human health. Anti-biotics may be prescribed as a last resort to save a flock, Dr. Bland said, but if so, the turkeys are removed from the Diestel “program.” He also stated his belief that no poultry in the U.S. is given growth hormones because they are illegal and not cost effective.

Dr. Bland has worked as a poultry veterinarian for over thirty years and as a private poultry consultant for over twenty years. His clients are mostly medium sized family farms on the West Coast and vary between conventional and ABF (anti-biotic

free) and organic poultry producers. In addition, he performs animal welfare audits through the American Association of Avian Pathologists. In his work with Diestel, he visits the operation four times a year, reviews animal health, vaccination programs and food safety issues. He conducts walk throughs of various barns, checks on air quality and litter management, addresses any animal health issues, performs field necropsies if necessary and endeavors to ensure overall bird health. He testified that in the seven years he has worked with Diestel, he has never observed anything which gave him concern about the turkeys' welfare, much less seen signs of neglect or abuse.

Regarding Wayne Hsiung's testimony that in 9 trips to Diestel's J59/Larsen ranch in 2015 he never saw turkeys outside, Dr. Bland explained that 2015 was an extraordinary year in the poultry industry in which 50 million birds had to be put down in the Midwest alone due to the worst outbreak of a high pathogen avian flu (HPAI-H5N2) he could recall. The outbreak began in British Columbia in December, 2014 and travelled down the coast. On December 18, 2014, he wrote a letter to all of his clients who raised commercial poultry outdoors including Diestel and advised that they "place their birds back into confinement" to protect them from the bird flu which is carried by wild water fowl. He also recommended that all on-farm ponds be drained, waterfowl hunting be post-poned and overall biosecurity enhanced. On January 24, 2015, the California State Veterinarian directed all California poultry producers to "separate your flock(s) from wild birds by keeping them indoors...for at least the next three months." On March 16, 2015, Anne Malleau, the GAP Executive Director and then Global Meat Co-ordinator for Whole Foods, advised its poultry suppliers that GAP had a protocol for the flu crisis which would enable them to maintain their certification without placing the birds outside. On April 13, 2015, Dr. Bland wrote Diestel and advised that he was "very worried" about the many outbreaks of avian flu, three of which were in California and one close to Diestel's operations. As to Diestel's turkeys, he wrote "They must stay indoors." On June 27, 2015, Dr. Bland wrote Diestel, "If we can get to July 1, 2015 with no new [out]breaks in the Midwest or West Coast then I will stand aside and let your company make the decisions as to whether you place your commercial turkeys outdoors...However, please do not drop your guard on your existing bio-security protocols...Please remember, over 5 million birds have either died or have been destroyed due to HPAI infection." On September 13, 2015, Dr. Bland wrote Diestel and advised "It is my professional opinion, we keep our birds indoor this fall, winter and into spring for 2015 and 2016....I believe very strongly we will have our hands full with HPAI when the waterfowl fly south for the winter." On October 27, 2015, the California State Veterinarian again wrote all California poultry producers and directed them to "keep your birds confined from now until next April, if possible." She further advised them to "continue to invest in biosecurity in order to protect your flocks, your business and the California economy."

JD and HDO testified Diestel followed Dr. Bland and the California State Veterinarian's guidance and kept their turkeys indoors for all of 2015, except the summer months of July, August and part of September. The turkeys were not able to safely return outside until April 2016.

Dr. Bland testified that bio-security protocols are essential to keep the turkeys safe from diseases, for both animal health and human health. Diestel's bio-security protocols include prohibiting all staff and employees from owning birds of any type. In the event they come into contact with any non-Diestel birds or poultry or with someone else who owns birds, they must shower, launder their clothes and disinfect their footwear and vehicle's steering wheel and floorboards. Before entering a turkey barn, all staff must suit up in paper overalls, gloves and protective shoe coverings. After leaving the barn, they must disinfect their shoes with probiotic enhanced water. Pens must be secured so no outside critters can get in. The chicken wire is in place so no wild birds can fly through. Unknown visitors from outside the operation are prohibited. No trespassing signs are prominently displayed on all the farm gates and fences. Dr. Bland explained toxins and pathogens are easily transmitted and without strict observance of these bio-security protocols, the turkeys are put at risk. If the turkeys are put at risk, it becomes a food safety issue because bacteria like Salmonella or Pasteurella can be passed on in their meat and make people sick or die.

Dr. Bland's general assessment is that Diestel raises turkeys "very well." He testified the barns are not overcrowded, the birds have room to stretch and preen. He said he has regularly seen the barn birds outside in the pens except in 2015 and that the barns have good ventilation and provide more space than conventional turkey houses. Dr. Bland testified he has never seen piles of mud or feces in Diestel's barns and that 75-80% of the time he has found the litter dry and "where it should be" in terms of quality. Sometimes, due to fog or rain, he has found the litter contained too much moisture which causes it to cake, which is then dealt with by rototilling. When confronted with the photographs from "A Deadly Feast," Dr. Bland agreed with plaintiff's expert, Dr. Rosenberg, that they depicted a bird with a pendulous crop, several injured and weak birds which he believed should have been culled or euthanized and a dead, decomposing bird, which he testified was atypical and not tolerated at Diestel. However, he conceded that in a barn of 15,000 it is possible to miss a bird in distress. As to the weak and dead birds, Dr. Bland testified they are common in every flock because the runts of a litter can tend to have failure to thrive issues, which vets in the turkey industry refer to as "born to die." Dr. Bland said turkeys have "cow downer syndrome" meaning when they go down due to illness or injury, they don't want to live after that. Nonetheless, he opined "turkeys are as thriving and living as the people who take care of them. So if you take care of them well, they'll do just fine." In his opinion, Diestel does just that.

Dr. Joy Mench, the poultry welfare expert and UC Davis veterinary professor noted earlier, supported Dr. Bland's assessment that Diesel turkeys are doing well. Dr. Mench was retained by Diestel to evaluate its commercial turkey production and see if there were any practices which were inconsistent with good animal care. In preparation, she viewed "A Deadly Feast" and reviewed GAP standards and defendant's records. She then spent 90 minutes talking with JD and visited defendant's J59/Larsen ranch because she wanted to see if she saw anything like what was reported by plaintiff. Dr. Mench testified she has visited hundreds of turkey farms and noted very few turkey farms have any kind of certification. She opined that most turkey producers could never reach a GAP Step 3 rating. Diestel, she said, is one of only two that has attained a GAP Step 5. In walking through the barns, Dr. Mench testified she looked at beaks, feathers and feet, as well as for any injuries. Out of 10,000 birds in that facility, she found two sick birds that should be euthanized, four that were significantly feather-pecked, but should recover and two others with walking difficulty, but which could still get to food and water. She did not note any ammonia burns on the turkey's hocks which could have indicated overcrowding and ammonia-soaked litter. She observed a lot of normal behaviors such as dust bathing and foraging and saw that the birds had plenty of room to move around. She saw perches and other environmental enrichments which are not provided by conventional producers and noted the open side of the barn drew in plenty of fresh air. Dr. Bland had testified that all commercial turkey producers use "beak conditioning" in order to reduce cannibalism and harmful pecking of other birds. Dr. Mench noted that the birds' beaks had been conditioned, but she commented that the trimming was actually very lightly done and just took off the hook at the tip, leaving the beaks quite long. She confirmed that Diestel does grow a smaller breed of bird with a slower growth rate which she said is important because it leads to lower rates of lameness and foot pad dermatitis. Overall, it was her opinion that the turkeys were very healthy, active, well feathered, had clean food and water, the litter was in nice, dry condition and the air quality was good. She concluded that Diestel is very aware of and committed to animal welfare on its farms.

In response to Dr. Hukku's consumer survey, defendant called Dr. Rebecca Reed-Arthurs, who holds a Phd in economics from UC Davis. As part of her academic coursework, she had been involved analyzing biases common in data derived from surveys. Her dissertation included an assessment of the impact of question framing on surveys and the degree to which it can bias responses. She was admitted as an expert on the issues of survey design, methodology, sampling and statistical analysis. Upon review of Dr. Hukku's survey methodology, Dr. Reed-Arthurs concluded the data it produced was flawed and unreliable because Hukku failed to follow standard methodologies and practices. She opined he had biased the survey by implying it was sponsored by Diestel and that his use of multiple-choice answers likely predisposed the survey responses. She

further concluded that he had failed to control for respondents' prior beliefs about agricultural practices and therefore the results were skewed. She also found his "willingness to pay and/or buy" questions were unrealistic because they were not representative of the actual thought process people go through in making purchases, such as budget constraints and choosing between fresh, frozen, organic and other salient characteristics. Dr. Reed-Arthurs' analysis was compelling in relegating Dr. Hukku's survey to anecdotal evidence.

CONCLUSIONS OF LAW

Plaintiff's Complaint

A. Plaintiff's standing under the FAL and UCL's "fraud" prong

Plaintiff's first cause of action alleges defendant violated California's False Advertising Law (FAL) by making untrue or misleading representations regarding its turkey products. Business and Professions Code Section 17500 prohibits any "unfair, deceptive, untrue or misleading advertising." Plaintiff's second cause of action alleges violation of California's Unfair Competition Law (UCL). The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." (Bus. & Prof. Code 17200). Plaintiff alleges that defendant breached the UCL in two ways: first by engaging in fraudulent misrepresentations and false advertising regarding the turkey products; and secondly by unlawfully violating Cal. Penal Code 597, et. seq, the criminal animal cruelty statutes. The FAL and UCL claims overlap, because [a]ny violation of the FAL necessarily violates the "fraudulent" prong of the UCL. *Kasky v. Nike, Inc.*, 27 Cal.4th 939, 949 (2002).

To pursue a claim for false advertising, Bus. & Prof. Code section 17535 provides that a plaintiff must have "suffered injury in fact and ha[ve] lost money or property as a result of a violation" of the FAL and "may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section." Bus. & Prof. Code sections 17203 and 17204 apply the same standing criteria for individual and representative claims based on violation of the UCL. Diestel contends DxE does not meet the standing requirements. While it is preferable to have threshold issues like standing adjudicated in the earlier stages of a case, standing is of such essential importance that it can be raised at any time, including for the first time on appeal. *McKinny v. Board of Trustees* (1982) 31 Cal. 3d 79, 90.

In support of its argument, Diestel contends that plaintiff “has not shown and cannot claim that it lost money or property as a result of Diestel’s alleged actions because DxE SF Bay Area has no bank accounts and thus no money to lose.” (Diestel Closing Trial Brief, pg. 5) However, in its complaint and at trial, plaintiff relied upon the “diversion of resources” theory through which some organizations have been found to have standing under the UCL prong for alleged *unlawful* business practices. In *Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App. 4th 1270, plaintiff alleged defendants had violated Health and Safety Code section 25982 by unlawfully selling foie gras and that such unlawful activity constituted unfair competition in violation of the UCL. In affirming the trial court’s decision to deny defendant’s anti-SLAPP motion, the Court of Appeal found plaintiff had standing under the UCL’s unlawful prong because it had expended significant paid staff time and paid an investigator to expose and counteract defendant’s violation of the law. The DCA further found that plaintiff had presented evidence of a genuine and long-standing interest in the effective enforcement of the statute and that its expenditures had been undertaken in response to and because of defendant’s violation of the law and not in anticipation of litigation, thus meeting the requirement of economic injury caused by the alleged unfair business practice.

Plaintiff argues the same reasoning applies to its diversion of significant volunteer time and donated materials, such as the DSLR cameras, in its investigation of defendant. As Wayne Hsiung testified, volunteers are plaintiff’s most significant resource. California courts have long recognized volunteer time as having economic value. (See, *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 274-275). Defendant contends plaintiff’s diversion of resources failed to identify specific “aspects of their mission that were put on-hold as a result of defendant’s actions.” Instead, it argues plaintiff’s investigation was an opportunity for plaintiff to further its mission by conducting an open rescue, a stated tactic and goal for each chapter, and that expenses incurred in furtherance of an organization’s core activity do not confer standing. (*Int’l Acad. of Oral Med. & Toxicology v. The U.S. Food & Drug Admin.* (D.D.C. 2016) 195 F. Supp 3d 243, 258-259. But plaintiff’s reliance on *Animal Legal Defense Fund* and defendant’s efforts to distinguish it are inapposite because in this case, plaintiff’s UCL claim is predicated on fraud and misrepresentation and violations of the FAL which require plaintiff to plead and prove actual reliance in order to have standing. *Moore v. Mars Petcare US, Inc.* (2020) 966 F.3d 1007; *Hinojos v. Kohl’s Corporation* (2013) 718 F.3d at 1103-1104.

The California Supreme Court established the criteria for standing under the UCL fraud prong and FAL in two seminal cases, *In re Tobacco II Cases* (2009) 46 Cal.4th 298 and in *Kwikset Corporation v. Superior Court* (2011) 51 Cal.4th 310, both decided after

the passage of Proposition 64 narrowed the standing requirements for the UCL and FAL to those plaintiffs who have suffered an injury in fact or lost money as a result of a violation. In *Kwikset*, our Supreme Court acknowledged, as it had in *In re Tobacco II Cases*, that false advertising claims actually resound in fraud theory, alleging deceptive misrepresentations to consumers. Recognizing that “reliance is the causal mechanism of fraud” *Tobacco II* held that a plaintiff “proceeding on a claim of misrepresentation as the basis of his or her UCL action must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions.” (*Tobacco II*, p.306.) *Tobacco II* further held “It is not... necessary that [the plaintiff’s] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor influencing his conduct...It is enough that the representation has played a substantial part, and so had been a substantial factor, in influencing his decision.” (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976. *Kwikset* extended this same reasoning to false advertising claims under the FAL, holding those “[p]laintiffs who can truthfully allege they were deceived by a product’s [advertising] into spending money to purchase the product, and would not have purchased it otherwise, have “lost money or property” within the meaning of Proposition 64 and have standing to sue.” (*Kwikset*, p. 317) Thus, to have standing under the fraud prong of the UCL or the FAL, a plaintiff must allege and prove that it actually relied upon and was deceived by defendant’s alleged misrepresentation or false advertising and suffered economic injury as a result. *Moore v. Mars Petcare US, Inc.* (2020) 966 F.3d 1007; *Kane v. Chobani* (2014) 973 F. Supp 2d 1120; *Figy v. Amy’s Kitchen*, No.13-3816, 2013 WL 6169503, at 3-4 (N.D.Cal, Nov.25, 2013).

Plaintiff’s thirty-five page Third Amended Complaint is completely devoid of any allegation that plaintiff or any of its volunteer activists acting on plaintiff’s behalf relied upon defendant’s alleged false advertising. No evidence was produced at trial that plaintiff or any of its volunteer activists acting on plaintiff’s behalf relied upon any alleged misrepresentations by defendant. Indeed, it was established at trial that plaintiff could not aver or prove such reliance because its leadership, Hsiung and Swahney, and its activists like the Goldbergs and Sorbi, are all vegans who would not rely upon defendant’s advertising – true or not - to purchase turkey meat to eat. In addition, Hsiung and Sorbi testified they believed Diestel’s marketing was likely false and was a major contributor to “The Humane Myth” before plaintiff’s investigation ever began. Hsiung testified:

“The Humane Myth” is the idea that on some idyllic pasture animals are being well treated in meat production. It is one of the, I would say, fundamental obstacles we face as animal advocates in trying to achieve various

types of institutional and cultural change...Diestel was one of the largest offenders in this regard because of the very aggressive marketing they used to describe the conditions of the animals they're raising...It makes it extraordinarily difficult for people to talk about animal rights in a meaningful way when there are false statements and false beliefs perpetrated on the public by companies like Whole Foods and Diestel...The fundamental reason we decided to investigate Diestel was precisely because we suspected very strongly the marketing they were using was false and unlawful.”

Plaintiff cannot establish actual reliance under the law if from the outset its agents already strongly suspected that the defendant's advertising was false and were not deceived by it. (CACI 1907, 1908) It is not actionable reliance under the law to intentionally divert resources or suffer economic harm in order to attempt to prove your pre-existing belief that advertising is false.

Without proof of actual reliance, DxE has no standing to bring a cause of action for fraud under the UCL or false advertising under the FAL. Although it appears dubious that Diestel is a “small” family farm or that its birds receive “individual” care or live “twice as long” as other commercial turkeys, because plaintiff lacks standing, this court is without jurisdiction to adjudicate those claims. Accordingly, plaintiff's claims under the FAL and the fraud prong of the UCL are dismissed with prejudice. (See, *Cummings v. Stanley* (2009) 177 CA4th 493, 501.)

B. Plaintiff's claims under the UCL's “unlawful” and “unfair” prongs

Although as mentioned hereinabove, it appears to this court that plaintiff abandoned its UCL claims based on unlawful and unfair conduct, to-wit: violations of Penal Code section 597(b), 597.1(a)(1) and 597f(a), because there was no reference to them in plaintiff's pre or post trial briefs and no specific evidence or argument regarding them during the trial. However, because standing is such a critical issue and can be raised at any point in the proceedings, the court will address plaintiff's standing under the unlawful and unfair prongs of the UCL as well. (*McKinney, op.cit.*)

It is settled that there is no private right of action to enforce California's animal cruelty laws. (See, *ALDF v. Mendes* (2008) 160 Cal.App. 4th 136; *ALDF v. Calif. Expo and State Fairs* (2015) 239 Cal.App.4th 1286. However, Bus. & Prof. Code 17202 specifically authorizes the court to grant injunctive relief to enforce a penalty, forfeiture, or penal law in a case brought under the UCL for unfair competition. (*Leider v. Lewis* (2017) 2 Cal.5th 1121) Under California's animal cruelty laws, it is a crime for the owner of an animal to deprive or fail to provide the animal with necessary sustenance, drink, or

shelter or to fail to provide the animal with proper care and attention. (Penal Code 597(b), 597f(a) and 597.1(a)(1).), with the caveat provided in Penal Code section 599(c), that “No part of this title [on animal cruelty] shall be construed as interfering ... with the right to kill all animals used for food.”

Under the reasoning of *ALDF v. LT Napa Partners LLC* as discussed hereinabove and plaintiff’s un rebutted evidence at trial that it devoted a significant number of volunteer hours and donations of equipment in its investigation and effort to publicly expose what it contends is defendant’s violation of the animal cruelty laws, the court is persuaded plaintiff has established its standing to pursue these claims under the UCL’s unlawful and unfair prongs, for which “...it suffices to allege some specific, identifiable trifle of injury.” (*ALDF v. LT Napa*, supra, quoting *Kwikset* at p. 325.) As previously referenced, volunteer hours, energy, talent and skill have long been recognized by the court as having economic value. *Sundance v. Municipal Court*, supra.

Also like the court in *ALDF*, this court rejects defendant’s contention that plaintiff failed to prove that its economic injury was caused by defendant’s conduct. As that court held, “[t]hat the expenditures 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... 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.” (*ALDF* at 1283 quoting from *Equal Rights Center v. Post Properties, Inc.* (D.C.Cir.2011) 633 F.3d 1136, 1140. The court finds the evidence in this case persuasive that it is more likely than not that plaintiff’s investigation in this case was to counteract what it believed was Diestel’s perpetuation of “The Humane Myth” rather than in anticipation of litigation. Accordingly, the court finds plaintiff has satisfied the UCL’s causation requirement for standing as to the unlawful and unfair claims.

To establish unlawful animal cruelty under the Penal Code, plaintiff needed to prove that defendant failed to provide the turkeys with the basic necessities of food, water, shelter, or provide proper care and attention and that defendant’s agents knew or should have known that defendant was failing to provide these necessities. *People v. Speegle* (1997) 1997 53 Cal.App.4th 1405; *People v. Brian* 91980) 110 Cal.App. 3d Supp 1; CALJIC 1497, 1498, 1499. The overwhelming weight of the evidence was to the opposite. Defendant’s turkeys are all GAP certified at one level or another, a level of care and attention the vast majority of turkey producers never attain. It was undisputed that the defendant prepares a higher quality low fat feed for its birds. There was not one scintilla of evidence that the birds were deprived of adequate food or water. Quite to the

contrary, the evidence established defendant provides the birds with ample food and probiotic water to help fatten them up for market. The unique construction of all of defendant's barns which provide open sides for fresh air and sunlight, curtains for shade and the GAP 3 barns which offer outdoor access more than satisfy the Penal Code's requirement for shelter.

The only contention plaintiff could plausibly make, which was not argued at trial, is that the defendant failed to provide proper veterinary care and attention to the approximately ten individual turkeys depicted in great distress in its video "A Deadly Feast." It is important to note that Hsiung and Swahney testified it took 9 trips to defendant's property over nine months and six intrusions into at least 3 to 5 different barns at the J59/Larsen ranch to identify and videotape the ten individual birds in dire straits. That means that plaintiff's activists saw somewhere in the vicinity of 50,000 to 60,000 turkeys during their visits to defendant's operation. Certainly not to minimize the needs of those ten distressed birds, but in a commercial operation the size of Diestel's, they represent less than .02% of the total. There was no evidence that suffering from drop crop or a supinated foot or being small, weak and on the bottom of the pecking order were the result of defendant's lack of care. Rather, these are as likely as not the harsh realities of an imperfect world and natural selection, which may occur whether one is born on a commercial turkey ranch or on the wilds of the Serengeti. It is the remaining 99.8% which leads the court to give great credence to the testimony of Dr. Bland, Dr. Mench, Dan Neuerburg, and the Earth Claims and IMI GAP audits that overall, Diestel's birds are doing quite well.

In any event, plaintiff failed to produce any evidence that defendant or any of its agents knew or should have known that those individual birds were in distress. Without evidence of *scienter*, failure to provide care and attention for those birds is not animal cruelty under the law. As Dr. Bland testified, even "walking the flock" daily, it is possible to overlook a few birds that need special care, not out of criminal neglect but out of human limitation. Plaintiff failed to carry its burden of proof that defendant had violated any of the animal cruelty laws and thus failed to establish its claim under the UCL that defendant had unlawfully or unfairly engaged in unfair competition.

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that plaintiff take nothing by way of its complaint and JUDGMENT is hereby entered for defendant Diestel Turkey Ranch and against plaintiff Direct Action Everywhere SF Bay Area on the complaint. Defendant is awarded costs of suit, according to proof.

Diestel's Cross-Complaint

Diestel's cross complaint alleges cross-defendants DxE and Wayne Hsiung committed multiple acts of trespass onto its property between September and October 2015 and converted or stole two turkeys, which also is alleged to have constituted trespass to personal property. At trial, plaintiff's activists and Hsiung admitted visiting defendant's property at least nine times, illegally entering its barns six times and stealing six turkeys as part of what they deemed an "open rescue." As described in the plaintiff's Organizers Handbook, investigators such as Hsiung in this case, admit their actions and publish their full identities as acts of civil disobedience.

The facts of Diestel's cross-complaint being undisputed, accordingly the court finds in favor of cross-complainant Diestel Turkey Ranch and against cross-defendants Direct Action Everywhere SF Bay Area and Wayne Hsiung as to the allegations of trespass and conversion of two turkeys. The court has found no record that the trial on the liability and damages of the cross-complaint was bifurcated and Diestel failed to present any evidence of damages at trial. Accordingly, the court awards nominal damages of \$1 per 6 occasions of trespass and \$1 per converted turkey for a total of \$8 awarded to cross-complainant and against cross-defendants jointly and severally. Likewise no evidence or argument was presented on Diestel's claim for punitive damages and the court has found no record that it was bifurcated. It appears to have been abandoned.

In its fourth cause of action, Diestel alleged a UCL claim against DxE and Hsiung for engaging in the unlawful business practices of trespass (a violation of Penal Code section 484) and turkey theft (a violation of Penal Code 484 and/or 459) and seeks an injunction against DxE and Hsiung from entering any of its properties and from engaging in or encouraging others to engage in any further "open rescues."

A business is defined as "an organization or enterprising entity engaged in commercial, industrial, or professional activities. Businesses can be for-profit entities or they can be non-profit organizations that operate to fulfill a charitable mission or further a social cause, such as DxE." A business practice is defined as "a method, procedure, process, or rule employed by a business in the pursuit of its objectives." According to plaintiff's Organizer's Handbook and the New Activist's Handbook and the evidence presented at trial, the court finds DxE is engaged in the unlawful business practices of trespass and theft, which it calls open rescues. Cross-defendant Wayne Hsiung admitted he acted in this case and in others as an agent of DxE in carrying out these unlawful business practices. The undisputed evidence in this case was that Hsiung violated the biosecurity protocols for the turkey barns and put the turkeys at risk for disease vectors

and pathogens. Fortunately, it does not appear that any harm was done this time, except perhaps to the four turkeys that died while in cross-defendants' possession. Given DxE and Hsiung's professed care and concern for the turkeys, one cannot help but wonder how it would have impacted them if their reckless disregard for the turkeys' biosecurity had resulted in the premature deaths of thousands of them had they been infected with some avian flu or pathogen by their trespass and been put down.

Accordingly, to ensure compliance with the Penal Code, the protection of Diestel's real and personal property, as well as the health and safety of the turkeys at issue, the court finds it appropriate pursuant to Bus. & Prof. Code section 17203 to enjoin Direct Action Everywhere SF Bay Area, including its agents, activists and those working on its behalf, and Wayne Hsiung from entering any real property belonging to Diestel Family Ranch aka Diestel Family Turkey Ranch and to further enjoin said cross-defendants from removing or advocating that others remove any turkey or other animal from Diestel Family Ranch's possession without the express consent of Diestel Family Ranch.

Cross defendants are advised as follows: Bus. & Prof. Code section 17207(a) provides: "Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars (\$6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant."

Accordingly, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that the court finds **JUDGMENT** for cross-complainant **DIESTEL TURKEY RANCH** and against cross-defendants **DIRECT ACTION EVERYWHERE SF BAY AREA** and **WAYNE HSIUNG** and awards the sum of \$8.00 payable jointly and severally, plus costs of suit in an amount to be determined. **DIRECT ACTION EVERYWHERE SF BAY AREA**, its agents, activists and others working in its behalf and **WAYNE HSIUNG** are hereby enjoined from entering the real property of **DIESTEL TURKEY RANCH** and from removing or advocating that others remove any turkey or other animal from the possession of **DIESTEL TURKEY RANCH** without the express consent of Diestel Turkey Ranch.

Dated: November 23, 2020


Judge Julia Spain

Case Title: Direct Action Everywhere SF Bay Area v. Diestel Turkey Ranch
Case No. RG17-847475

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is 24405 Amador Street, Hayward, California. I served the Order. By placing copies in envelopes addressed as shown below and sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

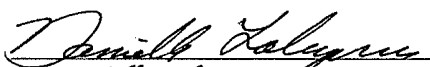
Blackman, Brian R.
Blaxter/Blackman LLP
601 California Street Ste. 1505
San Francisco, CA 94108

Mehta, Sonya Z.
Siegel, Yee Brunner & Mehta
475 14th Street Ste. 500
Oakland, CA 94612

Elsner, Gretchen
Elsner Law & Policy LLC
314 South Guadalupe Street
Santa Fe, NM 87501

Date: 11-23-20

Chad Finke
Executive Officer/Clerk of the Superior Court

By: 
Danielle Labrecque, Deputy Clerk