



## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant United Poultry Concerns hereby certifies that it is a nonprofit organization with no parent corporations and no stock.

Dated: September 5, 2017

By: /s/ Bryan W. Pease  
Bryan W. Pease  
Attorneys for Plaintiff

### I. INTRODUCTION

As federal courts have held, “Criminal acts are not ‘any less odious’ because they are sanctioned by a particular sect as religion. [Citation.] ‘However free the exercise of religion may be, it must be subordinate to the criminal laws of the country . . .’ [Citation.] Otherwise, ‘the professed doctrines of religious belief [would be] superior to the law of the land,’ and the result would be ‘to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.’ [Citation.]” (*Church of Scientology Flag Servs. Org. v. City of Clearwater* (M.D.Fla. 1991) 756 F.Supp. 1498, 1514.)

Unless an injunction is granted **prior to September 23, 2017**, Defendants will violate Penal Code §597(a) over a hundred times on that date. If an injunction is granted, Kapparot practitioners can go to a live market like last year when the district court’s TRO was in effect, where the chickens can lawfully be used for food rather than discarded in Defendants’ parking lot. Killing chickens to be

discarded rather than used for food violates Penal Code §597(a) because the killing would then lack any lawful purpose.

Rather than refute Plaintiff's legal arguments, Defendants improperly include a number of exhibits that were not part of the record in the district court and pertain to other cases involving other laws regarding the Kapparat issue. None of these exhibits are relevant nor can they be properly considered. This motion must be evaluated on its own merits and not by resorting to unpublished rulings in state trial courts from other cases.

## **II. ARGUMENT**

### **A. Intentionally killing animals for a purpose not specifically permitted by law violates Penal Code §597(a)**

There is no dispute that Defendants intend to intentionally kill and discard animals later this month, and there is no provision of California law exempting Defendants' planned actions from the prohibitions of Penal Code §597(a). Defendants' only argument for why they would not be violating this section is they disagree with caselaw cited by Plaintiff that "malicious" as that term is used in the statute means "without legal justification." (Response at 14-15.) However, they fail to provide any caselaw to support their position or to distinguish the cases cited by Plaintiff. Instead, they simply assert without any legal authority that any action motivated by religion can never be "malicious." (*Id.*)

Since the legislature did not provide a religious ritual exception to Penal Code §597(a), Defendants attempt to analogize their actions to a veterinarian euthanizing sick animals. (Response at 15.) However, there is an entire body of law regulating veterinary medicine, and there is even a provision allowing trained animal control staff to administer sodium pentobarbital for animal euthanasia without the supervision of a veterinarian under certain circumstances. (Cal. Bus. & Prof. Code §4827.)

Thus, a veterinarian or trained animal control employee euthanizing an animal under circumstances permitted by law is not acting “without legal justification,” which is why such actions are not malicious and thus do not violate Penal Code §597(a). Defendants, however, are not veterinarians or animal control employees and are not killing animals for any reasons permitted by any provision of California law. Accordingly, their actions in systematically slitting hundreds of chickens’ throats and discarding them in their parking lot rather than using them for food violate Penal Code §597(a).

Plaintiff already explained in its reply in support of motion for preliminary injunction previously filed in the district court that Cal. Bus. & Prof. Code §4827 provides legal justification for veterinary euthanasia, thus making it not “malicious.” (Dkt. #108 at 7-8.) This motion was fully briefed but never ruled on,

as the district court granted Defendants' motion to dismiss prior to hearing Plaintiff's motion for preliminary injunction.

Simply calling Plaintiff's argument "absurd" and then putting forth a false analogy that Plaintiff has already refuted is not sufficient for Defendants to avoid the requirements of Penal Code §597(a) and the clear caselaw holding that "malicious" means "without legal justification."

Penal Code §599c provides the applicable exception for allowing chickens to be killed when used for food, but not for simply discarding them after a religious ritual:

No part of this title shall be construed as interfering with any of the laws of this state known as the "game laws," or any laws for or against the destruction of certain birds, nor must this title be construed as interfering with the right to destroy any venomous reptile, or any animal known as dangerous to life, limb, or property, **or to interfere with the right to kill all animals used for food**, or with properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college or university of this state.

Because Penal Code §599c provides that Penal Code §597(a) shall not interfere with killing animals used for food, the actions of the live market business in killing chickens after they were used in the Kapparot ritual were done with legal justification last year. However, if this year Defendants instead collect the fee from participants and kill and discard chickens in their parking lot where they cannot be used for food, they will be violating Penal Code §597(a).

**B. Defendants do not perform a religious ritual, but rather charge a fee to provide chickens and chicken killing and disposal services**

The sole basis for the district court dismissing this case was its ruling that Defendants are not engaged in “business practices,” which is required for Plaintiff to obtain injunctive relief under the Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code §17200, *et. seq.* However, last year, individuals who wished to perform the Kapparot ritual did so at a live market, and this *business* collected the fee that usually goes to Defendants. In exchange, the business provided the chickens for the ritual and later killed the chickens to be used for food, thus complying with the temporary restraining order and California law.

As Defendant Tenenbaum explained in his deposition:

·Q· · Rabbi, the fee that the participants paid to  
·5· · the facility in 2016, what was that for? · If they were  
·6· · just going in and performing the ceremony and leaving  
·7· · and didn't take a chicken or kill a chicken, what was  
·8· · the fee for?  
·9· · · · A· · The fee was for the chicken and for the  
10· · subsequent slaughter of the chicken.

(Plaintiff’s Ex. 16 at 185, Tr. at 59:4-10.)

**This is the same fee Defendants intend to charge on September 23, 2017 for providing and killing chickens in their parking lot.** However, unlike the live market business, Defendants’ business model is to discard the chickens rather than

use them for food, in violation of Penal Code §597(a), because their parking lot is not a licensed slaughterhouse.

In collecting the fee and providing and killing the chickens, the live market business did not “perform” the Kapparot ritual, which consists of an individual saying a prayer while holding a chicken, and not anything that happens to the chicken before or after the prayer. Nor does Chabad of Irvine “perform” the ritual, as admitted by Defendant Tenenbaum in his deposition. Rather, Defendants perform the exact same function as the live market business when they collect a fee to supply, kill and discard chickens in their parking lot for individuals performing the ritual.

15 · · · · Q · Did the Chabad of Irvine use chickens in  
16 · Kapparot in 2016?

17 · · · · A · Could I just -- Chabad of Irvine is people.

18 · · · · Q · Right.

19 · · · · A · **As an organization it did not organize a**  
20 · **Kapparot ceremony.** That's the only reason why I'm  
21 · misunderstanding the question.

22 · · · · Q · Okay. That's fair.

23 · · · · · Did the people that were members of Chabad of  
24 · Irvine use chickens for Kapparot in 2016?

25 · · · · A · Several did, yes.

·1 · · · · Q · What was the source of those chickens?

·2 · · · · A · This facility in Midway City.

·3 · · · · Q · When -- and did the people that are members of  
·4 · Chabad of Irvine make donations in order to have a  
·5 · chicken provided for them in 2016?

·6 · · · · A · If -- I want to be more technical. I wouldn't  
·7 · call it a donation because the fees were paid directly  
·8 · to the facility. I don't remember the name.

·9 · · · · Q · So the members of Chabad of Irvine made some

10. type of monetary payment directly to the facility in
11. 2016, and Chabad of Irvine did not collect any of those
12. proceeds? Is that --
13. A. Yes.
14. Q. -- correct?
15. A. Yes.

(Plaintiff's Ex. 16 at pp. 182-183, Tr. pp. 49:15-50:15.)

Defendants' Opposition is premised on their attorneys' **misrepresentation of the record to falsely claim the killing of the chickens is somehow part of the ritual**. The Opposition reads, "The atonement ritual involves gently holding a live chicken over a congregant's head, reciting a prayer, and then ritually slaughtering the chicken in a Kosher and humane manner. Decl. Rabbi Tenenbaum ¶¶ 4-6, Dkt. No. 90-6, Ex. D." (Opposition at 4.) However, what Defendant Tenenbaum *actually* said in his declaration, consistent with his deposition testimony, was: "This religious ritual includes gently holding a live chicken above one's head, and reciting a prayer, *whereafter* that chicken is ritually slaughtered in accordance with Jewish Law." (Tenenbaum Decl., ¶5, Dkt. #90-6, emphasis added.) The slaughter of the chicken is *not* part of the ritual—it happens *after* the participant performs the ritual and returns the chicken.

### C. Defendants' Communion example is inapposite

Defendants have admitted religious leaders do not perform the Kapparat ritual, but rather it is a *personal* ritual that each participant performs on their own. Thus, their analogy to Catholic Communion fails because that ceremony is

performed by a religious leader. Defendants’ analogy also fails because unlike the consecrated bread and wine in Communion, which Catholics believe is the body and blood of Christ, the chickens in the Kapparot ritual are not blessed or transubstantiated in any way, but are just ordinary chickens that can be provided by any business that sells chickens. The ritual is performed individually by participants who pay for a chicken and then go off separately and say a prayer. Nothing that happens to the chicken before or after the individual prayer is part of the ritual. (See transcript testimony quoted in Motion at pp. 6-8.)

**D. Strict scrutiny does not apply**

Defendants attempt to trigger strict scrutiny review of Penal Code §597(a) even though California does not have a Religious Freedom Restoration Act (“RFRA.”) They argue that strict scrutiny should apply anyway because of “selective application of a criminal statute against the religious rite of a synagogue.” (Oppo. at 18.) However, the only selective application happening here is *lack of enforcement against Defendants* for actions that would otherwise subject people to arrest for animal cruelty. As former Los Angeles Animal Services Director Ed Boks testified in his declaration, he absolutely would have enforced Penal Code §597(a) against anyone he caught killing and discarding animals in a parking lot, but city managers improperly told him *not* to enforce the law against Defendants *because of their religion*. (Plaintiff’s Ex. 4 at 28.)

**E. The district court's dissolving of the TRO is irrelevant**

The district court dissolved last year's TRO *after* the Kapparot ritual had already been performed at the live market where the chickens could be lawfully used for food in compliance with the TRO. At the conclusion of the telephonic hearing dissolving the TRO, the district court gave Plaintiff leave to file a motion for preliminary injunction, which Plaintiff did. However, the district court ultimately granted Defendants' motion for judgment on the pleadings prior to ruling on Plaintiff's preliminary injunction motion.

The case referred to by the district in dissolving the TRO, *Hernandez v. Comm'r*, 490 U.S. 680 (1989), had not yet been briefed by Plaintiff because it was cited on page 20 of the 30-page brief Defendants submitted just prior to the telephonic hearing on the matter. In *Hernandez*, the Court found that quid pro quo payments to the Church of Scientology were not charitable contributions, and denial of requested deductions did *not* violate either the Establishment Clause or the Free Exercise Clause of the First Amendment because the statute was secular in purpose and neither advanced nor inhibited religion.

Obviously a court cannot dictate to an individual whether a particular belief is central to their religion or not, but as the *Hernandez* court explained, this is not the relevant inquiry. In *Hernandez*, the burden imposed on the religious practices of petitioners was not substantial, and "even a substantial burden would be justified

by the ‘broad public interest in maintaining a sound tax system,’ free of ‘myriad exceptions flowing from a wide variety of religious beliefs.’” (*Id.* at 699-700.)

In the present case, Defendants have admitted killing chickens to be discarded rather than used for food is *not* central to their religious beliefs. Accordingly, there is no basis on which to even consider a judicially created exception to Penal Code §597(a).

**F. Plaintiff complied with all procedural rules**

Plaintiff did “give reasonable notice of the motion to all parties” pursuant to FRAP 8(C) when it filed a regularly noticed motion. This motion was not filed as an emergency motion pursuant to Ninth Circuit Rule 27-1.

Defendants oddly argue that Plaintiff also somehow violated FRAP 8 by not first bringing the motion to the district court. However, Plaintiff did file a motion for preliminary injunction, but the district court granted Defendants’ motion to dismiss before hearing it. (Dkt. #89.)

**G. The other elements for a preliminary injunction are met**

Plaintiff has shown a likelihood of success on the merits regarding diversity jurisdiction, Article III standing and statutory standing, as the district court already ruled in its favor on these issues. Defendants have misrepresented the holding of *Animal Legal Def. Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270 (“*Napa Partners*”), in which the economic transaction conferring organizational

standing was *not* the plaintiff's investigator's purchase at the restaurant, but rather the plaintiff's monetary costs in hiring the investigator. *Napa Partners* held, "plaintiff has presented evidence its investigatory expenditures, as well as the resources spent in attempting to persuade the authorities, had a purpose independent of the current litigation and might have rendered such litigation unnecessary." (*Id.* at 1282.)

Defendants again rely on their mistaken UCL standing argument to claim Plaintiff has not shown likelihood of irreparable injury, claiming their illegal acts do not constitute harm to Plaintiff. However, under Cal. Bus. & Prof. Code §17200, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." Under section 17203, "Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction." Thus, the statute specifically provides for the remedy being sought.

Defendants' arguments on balance of hardships and public interest also both depend on their legally unsupported position that killing and discarding hundreds of animals does not violate Penal Code §597(a). However, because Defendants' actions are illegal as Plaintiff has shown, both of these elements also tip to Plaintiff's favor.

### III. CONCLUSION

Plaintiff respectfully requests an injunction to preserve the status quo pending the outcome of this appeal prior to September 23, 2017.

**SIMON LAW GROUP  
LAW OFFICE OF BRYAN W. PEASE**

Dated: September 5, 2017

By: /s/ Bryan W. Pease  
Bryan W. Pease  
Attorneys for Plaintiff

### CERTIFICATE OF COMPLIANCE

I certify the above reply is proportionately spaced, has a typeface of 14 points and contains 2,591 words.

Dated: September 5, 2017

By: /s/ Bryan W. Pease

### CERTIFICATE OF SERVICE

I certify that I am not a party to this action. On September 5, 2017, I served all parties who have appeared in this action with the foregoing document through the ECF electronic filing system.

Dated: September 5, 2017

By: /s/ Bryan W. Pease