October 30, 2020

Via Electronic Mail: ***shareholderproposals@sec.gov***

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street NE
Washington, DC 20549

Re: Tyson Foods Inc. – Shareholder Proposal submitted by The Humane Society of the United States

Ladies and Gentlemen:

On October 15, 2020, the Humane Society of the United States (the "Proponent"), who is the beneficial owner of common stock of Tyson Foods, Inc. ("Tyson" or "the Company"), submitted correspondence in response to Tyson's letter dated October 1, 2020 ("No-Action Request"), which expressed the Company's intent to omit a shareholder proposal (the "Proposal") on the basis of Rule 14a-8(i)(4) and Rule 14a-8(i)(7). Proponent is now in receipt of Tyson's letter dated October 23, 2020 ("Additional Response") sent to the Securities and Exchange Commission ("SEC") and signed by Adam Deckinger. In that letter, the Company reaffirms its position that the Proposal may be excluded from the Company's 2021 proxy statement. A copy of this additional reply is being emailed concurrently to Adam Deckinger.

SUMMARY

Tyson attempts in both its No-Action Request and Additional Response to isolate some personal interest of Proponent, while ignoring entirely its shareholders' interests in full and accurate reporting on material financial matters, particularly where, as here, the Company is claiming serious financial concerns in one forum while telling shareholders the opposite in another. Tyson's conspicuously brief gloss on the Company's animal welfare policies raised by the Proposal's express text and subject matter is equally lacking in substance. Tyson cannot exclude a proposal by wholesale avoidance of its subject matter that raises specific financial and policy interests that are shared by shareholders generally.

PROPONENT'S REPLY TO TYSON'S ADDITIONAL RESPONSE

A. Rule 14a-8(i)(4)

Tyson's Additional Response is most notable for what it does not say: that the specific, severe risks facing the Company, as outlined for a federal court in 2019, would be immaterial to shareholders. But this is the fundamental question and the Company's failure to even address it, now for a second time, highlights that Tyson simply does not have any reasonable answer. The Company has avoided, rather than carried its burden to show, that the issues raised in the Proposal are not shared by its shareholders at large. Shareholders at large share an interest in the *severe harms* Tyson claims to face as well as in truthful and complete disclosures of such harms. In *State Street Corp*. (Jan. 5, 2007), which the Company cites in its Additional Response, the company's no-action letter explains:

> In Exchange Act Release 34-20091 (August 16, 1983), the Commission indicated that the purpose of the Rule was to prevent abuse of the proposal process by proponents attempting to achieve personal ends *that are not necessarily in the common interest of the shareholders generally*. (emphasis added).

Similarly, in *International Business Machines Corp.* (Jan. 31, 1995), the only other determination Tyson cited, explained that:

> The Commission long ago established that the purpose of a stockholder proposal process is "to place stockholders in a position to bring before their fellow stockholders matters of concern to them as stockholders in such corporation…" Release 34–3638 (January 3, 1945). *The purpose of Rule 14a–8(c)(4) is to allow registrants to exclude proposals that involve disputes that are not of interest to stockholders in general*. (emphasis added).

Accordingly the only way these two determinations could be of any help to Tyson would be for the Company to establish that the severe harms at issue here—including the possible loss of access to the single largest market-state in the U.S.—are somehow not of interest to shareholders "in general." *Id*. But as noted above, this is a hurdle the Company does not even attempt to clear.

Instead, Tyson simply ignores that the Proposal involves matters of documented and irreconcilably conflicting sworn statements regarding material financial risks to the Company, as well as risks resulting from the strength or weakness of the Company's animal welfare policies. And Tyson's silence is hardly surprising given the impossibility of disputing that such matters are "of interest to all shareholders" and don't simply benefit or further the interest of Proponent "uniquely." *See Consolidated Freightways, Inc*. (February 1, 1996); *Panhandle Eastern Corporation* (January 3, 1996).

Rather than carry its burden of proving the Proposal does not raise matters of interest to all shareholders, Tyson attempts to evade staff precedent by isolating some perceived, incidental interest of Proponent in the hope that speaking only to that "unique" interest will override the

express subject matter of the Proposal. Tyson's interpretation of this exclusion is thus incredibly dangerous and broad-sweeping as it would kill any shareholder proposal no matter how relevant to shareholders at large solely on the grounds that it relates to some other interest of a proponent.

Additionally, the Proposal does not simply "appear to include a facially neutral resolution," as Tyson claims. There is nothing neutral about shareholders' interest in the Company's documented, inconsistent disclosures about the possible loss of all sales of one of the Company's key products in the most populous state in the U.S., which is a major market for Tyson and has the world's fifth-largest economy.

B. Rule 14a-8(i)(7)

Tyson again fails to meet its burden of demonstrating that the Proposal does not involve substantial policy or other considerations. Tyson's claim that "[t]he Proposal and its supporting statement *say nothing about* the significant policy issue of the humane treatment of animals," is patently false. (emphasis added). Indeed, the Proposal, which Tyson quotes in its entirety in its Additional Response, begins by explaining that "In 2018, California passed a law ("Proposition 12") requiring *specific animal welfare standards* for some pork produced or sold statewide." (emphasis added). The Proposal is inherently tied to the humane treatment of animals because it requests clarification on whether the Company will comply or not comply with this *animal welfare* law (i.e., whether Tyson adopts a strong animal welfare policy or instead abandons a major regional market) and whether Tyson is going to face material losses related to its decisions and actions with respect to that *animal welfare* law.

CONCLUSION

The Company has again failed to demonstrate that the Proposal is excludable based on Rule 14a-8(i)(4) or Rule 14a-8(i)(7). Accordingly, we request that the Staff not concur with the Company's No-Action Request. Thank you for your careful consideration of this important Proposal.

Respectfully Submitted,

Mathew Prescott
Senior Director, Food & Agriculture
The Humane Society of the United States

cc: Adam.Deckinger@tyson.com
Read.Hudson@tyson.com
Phogan@sidley.com

October 23, 2020

Via Electronic Mail

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street NE
Washington, DC 20549

Re: Tyson Foods, Inc. – Shareholder Proposal submitted by The Humane Society of the United States

Ladies and Gentlemen:

On October 1, 2020, Tyson Foods, Inc., a Delaware corporation (the "Company"), submitted a letter (the "Original Company Letter") to the Securities and Exchange Commission (the "Commission") notifying the Commission that the Company intends to omit from its proxy materials for its 2021 Annual Meeting of Shareholders (the "2021 Annual Meeting") a shareholder proposal (the "Proposal") submitted by The Humane Society of the United States (the "Proponent").

On October 15, 2020, the Proponent submitted a response to the Commission regarding the Original Company Letter ("Proponent Letter"). The Company is submitting this letter to respond to the Proponent Letter and reaffirm its request for confirmation that the staff of the Division of Corporation Finance (the "Staff") will not recommend that enforcement action be taken by the Commission if the Company excludes the Proposal from its 2021 Annual Meeting proxy materials for the reasons set forth below, in addition to the reasons set forth in the Original Company Letter.

Pursuant to Staff Legal Bulletin No. 14D (November 7, 2008), this letter and its exhibits are being submitted via email to *shareholderproposals@sec.gov*. A copy of this letter and its exhibits will also be sent to the Proponent.

SUMMARY

The Proposal is clear on its face that the Proponent is seeking to gain advantage in litigation rather than to address a significant policy issue at the Company. The Proposal devotes nearly the entirety of its text to an affidavit filed by the Company in litigation in which Proponent is a party. That affidavit undercuts the Proponent's legal position in that litigation,

and so the Proponent seeks to use the shareholder proposal process as a collateral attack on that affidavit in an attempt to gain advantage in the litigation. This falls squarely into Rule 14a-8(i)(4). Further, the Proposal does not raise a significant policy issue and addresses a matter that involves ordinary course of business decision-making and thus, falls squarely into Rule 14a-8(i)(7). For these reasons, and as further explained in the Original Company Letter and herein, the Company may properly exclude the Proposal from the Company's proxy materials for the 2021 Annual Meeting.

THE PROPOSAL

Risk Disclosure Proposal

In 2018, California passed a law ("Proposition 12") requiring specific animal welfare standards for some pork produced or sold statewide.

In 2019, a Tyson Senior Vice President filed a declaration with the United States District Court for the Central District of California ("the declaration") testifying under penalty of perjury that Proposition 12 will "cause severe harm to Tyson" and "will increase Tyson's distribution costs," "add additional cost and complexity, at every step" and "make Tyson's processing and distribution operations significantly more complicated and costly." Tyson will have to "incur significant costs," "implement expensive changes" and "pay higher prices," the declaration claims, and Tyson's ability to recover some of "those increased costs will be highly constrained."

The declaration concludes: "Proposition 12 could force Tyson to exit, in whole or in part, from the California market for whole pork products. In doing so, Tyson would be harmed by losing millions of dollars in annual sales it makes into California. The forced exit from a major market such as California further would harm Tyson's relationships with its customers for whole pork products. Tyson depends on brand recognition and consumer goodwill to win and retain customers. The disappearance of Tyson's pork products from store shelves in California would harm Tyson's relationships with its customers . . . [and] Tyson will be forced to expend many millions of dollars and substantial time and effort ensuring compliance with Proposition 12 or suffer the harm of being forced out of the California market."

However, none of Tyson's 10-K or 10-Q reports mention Proposition 12, let alone disclose it as a risk to the company or its shareholders. Similarly, in those reports and on earnings calls, Tyson states that it has no supply-side issues with supplying pork to the markets in which it operates. These omissions and affirmative statements necessarily mean that, in fact, the company does not—despite the aforementioned declaration—face any material losses attributable to compliance or noncompliance with Proposition 12. After all, if the company did face the "severe harm" and losses described in the declaration, shareholders would have been entitled, under federal securities law, to a full risk disclosure from management.

RESOLVED: shareholders request that Tyson Foods confirm that the company faces no material losses from compliance or noncompliance with Proposition 12. If the company cannot so confirm, then shareholders request a risk analysis of any decision to comply or not to comply with Proposition 12, including the risks inherent in the company's failure to disclose such risks in its 10-K and 10-Q reports. These disclosures should be made within three months of the 2021 annual meeting, at reasonable cost, and omit proprietary information.

RESPONSE TO THE PROPONENT LETTER

I. The Proposal arises from active litigation in which the Proponent is a party. It may be omitted pursuant to Rule 14a-8(i)(4) because it "is designed to further a personal interest, which is not shared by the other shareholders at large."

As explained in the Original Company Letter and as indicated in its supporting statement, the Proposal stems from a litigation matter pending in the District Court for the Central District of California. In October 2019, the North American Meat Institute, a trade organization of which the Company is a member, filed a complaint in the District Court for the Central District of California against certain California state government officials questioning the constitutionality of Proposition 12, a California initiative that imposes unprecedented regulations dictating the conditions of confinement for breeding sows and veal calves (the "Proposition 12 Litigation"). The Proponent filed a motion to intervene in the Proposition 12 Litigation. The motion was granted and the Proponent is now a defendant in the Proposition 12 Litigation.

It is plain from the Proposal's supporting statement that the Proposal is motivated by a desire to undermine a declaration filed by a Tyson representative in support of the Proposition 12 Litigation plaintiff's motion for a preliminary injunction ("Tyson Declaration"). The Proponent Letter reinforces this point. It refers repeatedly to the Tyson Declaration. On p. 5 of the Proponent Letter, the Proponent writes that "Tyson attempts to deflect attention from the real issues presented in the Proposal – the 'severe harm' Tyson swore to a federal court that it faces and full and complete risk disclosures." On p. 6 the Proponent refers to the "problems with the Company's own message. See generally, Ex. 2, the Declaration." Pages 5 and 6 both quote extensively from the Tyson Declaration.

The Proponent Letter contends that the Proposal's roots in the Proposition 12 Litigation are irrelevant because the Proposal relates to a matter—disclosure of risks—in which all shareholders have an interest. As noted in the Original Company Letter, however, the Staff has on multiple occasions concurred in the exclusion of proposals that appear to include a facially neutral resolution, but where the facts demonstrate that the proposal's true intent was to further a personal interest or redress a personal claim or grievance. Some examples include: a proposal that would require the registrant to separate the position of chairman and CEO (*State Street Corp.* (Jan. 5, 2007) and a proposal that would require the registrant to adopt a written policy regarding political contributions and furnish a list of any of its political contributions (*International Business Machines Corp.* (Jan. 31, 1995). Even if Proponent's premise that the Proposal is of interest to shareholders at large is accepted, a premise with which the Company does not agree, that is not enough to overcome Proponent's personal grievance in connection

with the Proposition 12 Litigation and the Tyson Declaration that it is attempting to address through the Proposal. The shareholders at large simply do not share Proponent's personal interest in the Proposition 12 Litigation.

II. The Proposal Letter does not raise a significant social policy issue.

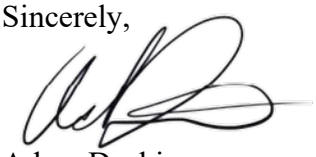
In its response to the Company's argument under Rule 14a-8(i)(7), the Proponent argues that the Proposal addresses a significant social policy issue and thus may not be excluded as pertaining to "ordinary business operations." In making this point, however, the Proponent morphs the Proposal into something it is not. The Proposal and its supporting statement say nothing about the significant policy issue of the humane treatment of animals. They are focused entirely on the Tyson Declaration, compliance with draft regulations, and disclosures in the Company's annual and quarterly filings. Nowhere in the Proposal or supporting statement is the issue of animal welfare discussed. The Proponent Letter cites no-action letters in which the proposal at issue dealt directly with animal welfare issues (e.g., the use of "cage-free" eggs; development of humane farming techniques). Those proposals are clearly distinguishable from a proposal focused on matters of compliance and disclosure decision-making—core responsibilities of management and fundamental to management's ability to run the Company on a day-to-day basis that should not be made subject to stockholder oversight.

CONCLUSION

Based upon the foregoing analysis and the arguments set forth in the Original Company Letter, we again respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2021 Annual Meeting proxy materials.

We would be happy to provide you with any additional information and answer any questions that you might have regarding this subject. If we can be of any further assistance on this matter, please do not hesitate to call me at 479-200-4067 or email me at Adam.Deckinger@tyson.com.

Sincerely,



Adam Deckinger
Vice President and
Associate General Counsel

cc: Matthew Prescott, The Humane Society of the United States
(mprescott@humanesociety.org)

John P. Kelsh, Partner, Sidley Austin LLP
(jkelsh@sidley.com)

October 15, 2020

Via Electronic Mail: ***shareholderproposals@sec.gov***

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street NE
Washington, DC 20549

Re: Tyson Foods Inc. – Shareholder Proposal submitted by The Humane Society of the United States

Ladies and Gentlemen:

I am writing on behalf of the Humane Society of the United States (the "Proponent"), who is the beneficial owner of common stock of Tyson Foods, Inc. ("Tyson" or "the Company") and who has submitted a shareholder proposal (the "Proposal") to the Company. I am in receipt of Tyson's letter dated October 1, 2020 ("No-Action Request") sent to the Securities and Exchange Commission ("SEC") and signed by Adam Deckinger. In that letter, the Company contends that the Proposal may be excluded from the Company's 2021 proxy statement. A copy of this reply is being emailed concurrently to Adam Deckinger.

SUMMARY

The Proponent submitted the Proposal to Tyson requesting the following:

> "**RESOLVED**: shareholders request that Tyson Foods confirm that the company faces no material losses from compliance or noncompliance with Proposition 12. If the company cannot so confirm, then shareholders request a risk analysis of any decision to comply or not to comply with Proposition 12, including the risks inherent in the company's failure to disclose such risks in its 10-K and 10-Q reports. These disclosures should be made within three months of the 2021 annual meeting, at reasonable cost, and omit proprietary information."

The full Proposal is attached as Exhibit 1.

Tyson's No-Action Request asserts that the Proposal is excludable pursuant to Rule 14a-8(i)(4) "because the Proposal relates to the redress of a personal claim or grievance against the Company and is meant to further a personal interest which is not shared by other shareholders at large" and Rule 14a-8(i)(7) "because the Proposal deals with a matter relating to the Company's ordinary

business operations." Tyson argues in support of its Rule 14a-8(i)(4) position that the Proponent is trying to further a personal interest related to a lawsuit both Tyson and the Proponent are involved in, but Tyson is *not* a party to, (the "Proposition 12 Litigation")[1] regarding an animal welfare law ("Proposition 12").[2] Tyson further argues that the Proposal is excludable under Rule 14a-8(i)(7) because it seeks to micromanage the Company's legal compliance and seeks to have the Company disclose its decision-making process regarding such matters. Below, we demonstrate that none of these arguments comport with U.S. securities regulations allowing companies to exclude shareholder proposals from their proxies, and that Tyson's arguments grossly mischaracterize the Proposal and its intent.

First, for context: In 2018, Proposition 12 passed in California requiring certain animal welfare standards for some pork products sold in the state. Then in 2019, in sworn testimony (the "Declaration")[3] a Senior Vice President at Tyson's wholly owned subsidiary, Tyson Fresh Meats, Inc., attested to "severe harm" and specific risks faced by Tyson as a result of that law, including the possibility of Tyson having to exit the California pork market in the near future. But Tyson never alerted shareholders to those risks and, in fact, made affirmative statements to shareholders that contradicted the content of the Declaration. Thus, there is an inconsistency in Tyson's statements regarding Proposition 12 and the risks that it may or may not present to the Company and its shareholders; it is that inconsistency which the Proposal seeks to clarify.

Against that backdrop, and contrary to Tyson's mischaracterizations, the Proposal gives Tyson two distinct options: to either 1) disclose to shareholders the *risks* it claimed to face in the Declaration, or 2) as an *alternative* to making such a disclosure, confirm that the Company faces no material losses from compliance or noncompliance with Proposition 12. As explained below, these risks—those outlined in the Declaration and those inherent in the Company's failure to disclose such risks—concern shareholders at large and Tyson's claims alleging some kind of abuse of the proxy process to address a personal grievance or further a personal interest are completely without merit.

For Tyson's position on Rule 14a-8(i)(4) to prevail, it must take the untenable position that its shareholders do not share a common interest in the possible loss of all sales of one of its key products in California (which is the most populous U.S. state, a major market for Tyson, and the world's fifth-largest economy), an inability to meet the public policy values expressed by voters in passing Proposition 12, and in the Company's compliance with financial reporting laws by making clear and nonconflicting statements about its supply chain. There is no plausible argument that this can be true, which is why Tyson's No-Action Request ignores these fundamental matters altogether. Instead, Tyson attempts to attack the messenger to avoid scrutiny of its irreconcilably conflicting messages about its financial future and operational capabilities.

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[1] N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019) (No. 2:19-cv-08569-CAS (FFMx)) (affirmed N. Am. Meat Inst. v. Becerra, No. 19-56408 (9th Cir. 2020)) (affirming district court ruling that plaintiff is not likely to succeed on the merits).

[2] Cal. Health & Safety Code §§ 25990, 25991(e).

[3] Decl. of Todd Neff ("Declaration"), N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019) (No. 2:19-cv-08569-CAS (FFMx)) (affirmed N. Am. Meat Inst. v. Becerra, No. 19-56408 (9th Cir. 2020)) (attached as Exhibit 2).

Moreover, because the Proposal addresses potentially massive financial harms and the significant policy issue of animal welfare, it is not excludable under Rule 14a-8(i)(7). The Proposal seeks information about whether the Company faces risks associated with complying with Proposition 12, a farm animal welfare law, but does not dictate that the Company comply or how it chooses to disclose such risks. The Proposal avoids dictating outcomes and leaves any decision-making to the board and management. It is a proposal that does not dictate methods or outcomes, that does not usurp board or management authority, and that does not micromanage; thus, it is not excludable on any of the asserted grounds under Rule 14a-8(i)(7). The Proposal also does not relate to ordinary business matters that are "so fundamental to management's ability to run a company on a day-to-day basis that they would not, as a practical matter, be subject to direct shareholder oversight." Release No. 34-40018 (May 21, 1998), 63 Fed. Reg. 29107 (1998).

While in this correspondence the Proponent addresses each issue Tyson raises, importantly, Staff need not review each argument should it concur with Proponent that: (1) the Proposal cannot be excluded on the basis of Rule 14a-8(i)(4) because it relates to issues and interests commonly shared by the Company's shareholders at large, and (2) the Proposal is not excludable under Rule 14a-8(i)(7) because it concerns an issue of significant public interest that is central to the Company's business. The Company does not at all argue that the interests addressed by the Proposal—significantly likely risks associated with the loss of a substantial market—are not shared commonly among shareholders. The Company also does not mention the significant public policy issue and fails to provide an analysis of the issue's purported lack of significance to the Company even though the Company bears the burden of demonstrating the Proposal does not involve substantial policy or other considerations. The Proposal is simply not excludable based on these clear exceptions to the exclusion rules and the Company's failures to meet its burdens under these rules in its No-Action Request.

ANALYSIS

I. Rule 14a-8(i)(4)

The No-Action Request asserts that the Proposal is excludable on the basis of Rule 14a-8(i)(4) as relating to a personal grievance and furthering a personal interest that is not commonly shared by the Company's shareholders generally.

Notably, Tyson places great emphasis on its assumptive arguments of Proponent's personal interest in the Proposal, but is entirely silent on why the Company's security holders at large would not be interested in matters addressing the humane treatment of animals or truthfully disclosing material financial crises relating to its supply chain in a major market. Tyson's position is doubly unpersuasive in that, first, the Staff has already determined that the humane treatment of animals—in this case, as defined by California voters—is a significant *public* policy issue. Second, it hardly needs explaining that complete and truthful reporting on imminent and material major financial concerns impacting the Company are both required by law, and of the highest financial stakes to shareholders making buy/sell decisions based on them.

A. Tyson misrepresents the Proposal's request and Proponent's intent.

The Company mischaracterizes the purpose of the Proposal as asking Tyson to redress a personal grievance that is currently being litigated. First, this argument confuses the issue here, and the purpose of Rule 14a-8(i)(4), by conflating the concepts of proponent motivation and redress of personal (i.e., unique) grievances. Proponent motivation that is tied to a personal interest but nevertheless supports the interests of shareholders at large cannot be a basis for exclusion under Rule 14a-8(i)(4). Indeed, every shareholder proposal is motivated by a personal interest of the proponent as any proposal that is germane and possibly beneficial to shareholders at large will, by extension, also be so for the proponent.

The purpose of the Rule 14a-8(i)(4) exclusion is to protect the shareholder proposal process from being used to redress personal gripes. See, e.g., Exchange Act Release No. 19135 (Oct. 14, 1982); Exchange Act Release No. 20091 (Aug. 16, 1983). This is why the emphasis has been placed on the words "uniquely benefit" when determining applicability of Rule 14a-8(i)(4). See Rayonier Inc. (Mar. 11, 2014).

Tyson's view of Rule 14a-8(i)(4) in its No-Action Request swallows the rule and makes it so that no public interest group would be able to make a request related to the group's interests, even if those are shared by many shareholders. The Company offers no stated limiting principle, and none is apparent in its rationale. Tyson's reasoning would virtually eviscerate Rule 14a-8 and ban any investor who publicly expresses opposition against a harmful company practice from bringing a shareholder resolution to address that issue and attempt to improve corporate stewardship, whether it be with regard to the environment, discrimination, human rights, animal welfare or any other such issue. Here, for instance, the Proponent is a tax-exempt 501(c)(3) nonprofit organization with a mission to "prevent animal cruelty, exploitation and neglect."[4] If Tyson's interpretation of Rule 14a-8(i)(4) is correct, then any proposal aimed at addressing animal cruelty in a company's business would be excludable if brought by the Proponent. But this is not the rule, nor has it ever been. See, e.g., Revlon, Inc. (Mar. 18, 2014); Amendments to R. 14a-8 Under the Securities Exch. Act of 1934 Relating to Proposals by Sec. Holders, Release No. 20091 (S.E.C. Release No. Aug. 16, 1983).

The Proposal addresses a legitimate major risk concerning the Company's supply chain and market complexity—a risk outlined by the Company itself in its own Declaration. The Proposal is not merely phrased in neutral terms that "*might* relate to matters which may be of general interest to all security holders," but instead addresses specific risks that *are* of concern to all shareholders. Exchange Act Release No. 19135 (Oct. 14, 1982) (emphasis added). Tyson's implied position in its No-Action Request is that its shareholders at large generally have no interest in disclosure of the potential loss of the California market for one of its key products, or in Tyson's irreconcilably conflicting statements about the stability of its supply chain.

[4] Our Mission, HSUS, https://www.humanesociety.org/our-policies#statement-2 (last visited Oct. 15, 2020).

Second, Tyson attempts to deflect attention from the real issues presented in the Proposal—the "severe harm" Tyson swore to a federal court that it faces and full and complete risk disclosures—by irrelevantly pointing to Proponent's defense in a lawsuit. There are situations where the SEC allows exclusion when the specific issue raised in a proposal is going to be resolved in a lawsuit and the company is a party to that litigation. See, e.g., Johnson & Johnson (Feb. 14, 2012) (concurring that there appears to be some basis for excluding the proposal under Rule 14a-8(i)(7) that "would affect the conduct of ongoing litigation to which the company is a party") (emphasis added). This is not the situation here, and Tyson attempts to stretch this litigation rule beyond its bounds.

The disputes in the Proposition 12 Litigation, and its outcome, simply have nothing to do with the significant and imminent financial consequences addressed in the shareholder Proposal. This is readily apparent by considering the substance of what Tyson's Declaration said in the fall of 2019:

1. That the Company faces severe and imminent financial harm; and
2. That Tyson has two potential courses of conduct available to it and both of them lead directly to severe financial harm.

If the Company made such statements without any connection to litigation, those statements would obviously be highly material to shareholders and thus the Company would be obligated to fully and accurately disclose their substance. The fact that the statements were made in a declaration does not make any difference, and Tyson notably points to zero authority to the contrary. Indeed, if anything, it makes the substance even more material to shareholders as presumably the Company takes care not to mislead or lie when its executives face criminal perjury penalties.

As a shareholder that has a stake in the Company along with other shareholders, the Proponent is concerned there is a purportedly major and unavoidable risk to the share price and that the Company is withholding material information about it from shareholders. These issues relate to Tyson's SEC filings and other investor communications, none of which are part of the Proposition 12 Litigation. Indeed, the Proposition 12 Litigation involves a challenge, not by Tyson but of an industry trade group, to the constitutionality of Proposition 12—an issue that cannot be redressed through this proxy process. Similarly, the Proposition 12 Litigation cannot resolve the matter at issue in this proxy process—whether the statements of risk made in the Declaration should have been separately disclosed to shareholders in securities filings, and if those statements of risk are inconsistent with any disclosures that were made to shareholders whether the Company should address the inconsistencies with shareholders. Tyson is free to reserve for the court its position on the constitutional issues but may not conceal from shareholders its position on material financial contingencies that must be disclosed by law. As such, the Proposal cannot be construed as trying to redress personal grievances not shared by other shareholders.

Another important distinction of this Proposal from those in the determinations Tyson cites, is that the Proposal does not ask for affirmative policies that would benefit the Proponent. Instead, all the Proposal asks is for disclosure of a risk analysis or confirmation that there is no risk. Tyson should not be able to avoid scrutiny or its obligation to disclose risks because the Company has

filed a statement in support of third-party plaintiffs in a lawsuit to which it is not a party. Tyson cites nothing to the contrary.

In its No-Action Request, Tyson is simply trying to attack the messenger for problems with the Company's own message. See generally, Ex. 2, the Declaration. But all shareholders deserve full and complete information related to the material risks outlined in the Declaration, which raises legitimate and identifiable concerns shared by shareholders at large.

B. The Proposal relates to interests shared by shareholders at large.

The statements made in the Declaration assert "severe harm" to the Company caused by Proposition 12. As noted as background in the Proposal, the Company's representative testified that Proposition 12 will "cause severe harm to Tyson" and "will increase Tyson's distribution costs," "add additional cost and complexity, at every step of the processing and distribution process," and "make Tyson's processing and distribution operations significantly more complicated and costly."[5] The Declaration further claims that "Proposition 12 could force Tyson to exit, in whole or in part, from the California market for whole pork products. In doing so, Tyson would be harmed by losing millions of dollars in annual sales it makes into California."[6] Tyson's exit of the California market is significantly likely because, as stated in the Declaration, "[e]fforts to come into compliance must begin immediately, and it is not clear that Tyson will be able to meet all of Proposition 12's requirements in time [before January 1, 2022]."[7]

These statements conflict with statements made by Tyson elsewhere and do not comport with the lack of reference to these harms in the Company's SEC filings and other communications with investors. Shareholders have a right to be informed of the risks alleged in the Declaration, if there are indeed such risks, including the risks inherent in the Company's failure to disclose such risks in its 10-K and 10-Q reports. See SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1165 (D.C. Cir. 1978) ("The reporting provisions of the Exchange Act are clear and unequivocal, and they are satisfied only by the filing of complete, accurate, and timely reports.").

Whether Tyson's animal welfare policies meet the expectations of California consumers or whether the Company will have to pull out of the market altogether is a concern shared by all the Company's stakeholders. Indeed, Green Century Capital Management, Inc. ("Green Century"), a leader in the environmentally and socially responsible investing field for more than 25 years and with over $800 million assets under management, recently submitted a complaint to the SEC raising concerns about Tyson's apparent violations of securities laws (the "Complaint" attached as Exhibit 3) alleging Tyson has mispresented risks to its supply chain and materially omitted the disclosure of risks related to Proposition 12—risks the Proposal requests the Company disclose. As evidenced by the Complaint, issues of the purported risks associated with compliance or noncompliance of Proposition 12 are material to other investors—not just the Proponent.

[5] Declaration ¶¶ 4, 9, 10.
[6] Id. ¶¶ 12, 13.
[7] Id. ¶ 8.

Likewise, a near identical shareholder resolution was submitted to a Tyson competitor, Hormel Foods, Corp. ("Hormel"). Hormel also submitted a declaration outlining harms it faces due to Proposition 12. Hormel significantly implemented the resolution, and the proposal was subsequently withdrawn. In implementing the resolution, Hormel published a statement noting it "is preparing to fully comply when [Proposition 12] goes into effect" and "has confirmed that it faces no risk of material losses from compliance with Proposition 12."[8] In its release, Hormel also acknowledges "that California voters feel strongly about this issue." This communication from Tyson's competitor clearly exemplifies that company compliance with Proposition 12 is of concern to many shareholders.

Similarly, the state of Tyson's supply chain is of material concern to shareholders. See Ret. Bd. of Policemen's Annuity & Benefit Fund of Chicago on Behalf of Policemen's Annuity & Benefit Fund of Chicago v. FXCM Inc., 333 F. Supp. 3d 338, 347 (S.D.N.Y. 2018) (defining materiality as "a substantial likelihood that a reasonable shareholder would consider it important") (citation and internal quotation marks omitted). Indeed, Tyson repeatedly makes statements to investors assuring them of a favorable supply chain yet makes no mention that it faces an imminent and serious supply problem in the California market. See Complaint, Ex. 3 at 3-4. The loss of the California pork market, which is roughly 13% of the U.S. market, is a likely possibility according to the Declaration. Indeed, the Company claimed that even if it wanted to comply and endeavored to do so it may fail and thus lose access to the entire California market. See Declaration ¶ 8. The knowledge that the Company may inevitably lose such a sizable market share for one of its key products in a state that has the fifth largest economy in the world would quite obviously be highly material to Tyson's shareholders.

The Company cites four determinations, General Electric Company (Feb. 28, 2020), State Street Corp. (Jan. 5, 2007), MGM Mirage (Mar. 19, 2001), and International Business Machines Corp. (Jan. 31, 1995), none of which is germane to this consideration.

For instance, in General Electric Company, which also cites to these other determinations for support, a terminated employee had a history of submitting tainted proposals that demonstrated a clear pattern of abusing the shareholder proposal process to redress his personal grievance, which involved a personal employment dispute against the company and his former supervisor. Here, there is no such employment history with the Company, no pattern of submitting tainted proposals, nor any similar personal interest. The Proposal is further distinguishable from the ones addressed in these determinations, in that the Proposal is not one that simply "*might* relate to matters which may be of general interest to all security holders." Exchange Act Release No. 19135 (Oct. 14, 1982) (emphasis added). On the contrary, the fact that the Company believes it may imminently no longer be able to sell one of its primary products in the single largest U.S. marketplace for that product rises above the level of a concern that *might* or *may be* of general interest to security holders; any reasonable security holder clearly has an interest in this matter.

[8] Hormel Foods Company Information about California Proposition 12, Hormel, https://www.hormelfoods.com/newsroom/company-news/hormel-foods-company-information-about-california-proposition-12/ (last visited Oct. 15, 2020) (attached as Exhibit 4).

Tellingly, in its 2019 10-K, Tyson addressed potential threats related to Brexit and potential disruption in the UK market, even when the Company's UK sales were only 3% of its total (including products other than pork) international sales, which were only 3% of Tyson's total sales.[9] When discussing what "[n]ew or more stringent domestic and international government regulations could impose material costs on [Tyson] and could adversely affect [its] business," Tyson broke from its usual boilerplate language and specifically mentions how the UK's "potential exit" from the EU might affect its business.[10] Since this language was not included in prior reports, including Tyson's 2018 10-K, it is clear the Company is aware of its duty to update disclosures when specific changes in law have a substantial likelihood to materially impact it. See Complaint, Ex. 3 at 4-5. In contrast, Tyson's representative submitted sworn testimony in federal court asserting that Proposition 12 *will* "cause severe harm to Tyson" (so much so that the harm described in the Declaration was submitted "in support of the preliminary injunction motion," which requires a showing of *immediate injury* and *irreparable harm* such that extraordinary relief is necessary),[11] yet the Company has never once mentioned these impacts of Proposition 12 in any of its SEC filings, earnings calls, or shareholder meetings.

Until Tyson confirms that it actually faces no material risks or discloses all material risks to its supply chain, this discrepancy is a liability for the Company. See Complaint, Ex. 3. Aside from the policy issue of humane animal treatment here, incomplete or conflicting information about supply issues in a major domestic market carries high financial stakes for Tyson's shareholders. This is also a concern commonly shared by shareholders generally. As such, the Proposal may not be excluded on the basis of Rule 14a-8(i)(4).

II. Rule 14a-8(i)(7)

The Proposal cannot be excluded under Rule 14a-8(i)(7) because it addresses a significant policy issue that Tyson fails even to address in its No-Action Request, let alone carry its burden of proof on, and it does not relate to "ordinary business practices."

A. The Proposal addresses the significant policy issue of humane treatment of animals, which is fundamental to the Company's business.

The Proposal raises the significant social policy issue of humane treatment of animals, which relates to the central business of the Company, and therefore the Proposal may not be excluded

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[9] Tyson Food Facts, Tyson, https://ir.tyson.com/about-tyson/facts/default.aspx (last visited Oct. 15, 2020).

[10] Tyson, Annual Report (Form 10-K) 13 (Nov. 12, 2019) ("Changes in laws or regulations that impose additional regulatory requirements on us (including the United Kingdom's potential exit from the European Union) could increase our cost of doing business or restrict our actions, causing our results of operations to be adversely affected. For example, increased governmental interest in advertising practices may result in regulations that could require us to change or restrict our advertising practices."), https://s22.q4cdn.com/104708849/files/doc_financials/2019/ar/dcdf2f5b-689d-4520-afd6-69691cf580de.pdf.

[11] Declaration ¶ 1; Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20, 24 (2008).

under Rule 14a-8(i)(7) as relating to ordinary day-to-day business that shareholders could not feasibly vote on. By approving Proposition 12 the California public emphatically expressed its collective interest in animal welfare policies, as well as food safety and consumer protection issues. All of these issues are central to Tyson's particular business model and thus affect the Company's financial condition. Tyson acknowledges the significance of animal welfare issues on its website and admits in its SEC filings that there are significant risks associated with changing laws or regulations,[12] yet despite advising shareholders that it understood the material importance of these issues generally, it concealed altogether its purported specific concerns about Proposition 12 compliance. For Tyson, issues of animal welfare transcend ordinary business matters and speak directly and fundamentally to a public interest that is material to the Company's business. As Staff Legal Bulletin 14E makes clear, this is a textbook example of an issue that the Staff would exempt from Rule 14a-8(i)(7) as a policy issue that transcends day-to-day business matters.

Staff Legal Bulletin 14E confirmed that the Staff, in evaluating whether a proposal is excludable under Rule 14a-8(i)(7), would consider whether the subject matter giving rise to the Proposal is a transcendent social policy issue. If so, the Proposal would not be excludable. Staff Legal Bulletin 14H (CH) makes clear that a proposal's underlying subject matter focus – in this instance, animal welfare – can supersede the ordinary business exclusion even when a proposal touches upon core "nitty gritty" business practices—a clarification that is notable even though the Proposal does not implicate these kind of practices, as explained below in section B:

> "[T]he Commission has stated that proposals focusing on a significant policy issue are not excludable under the ordinary business exception *because* the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote. Thus, a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the nitty-gritty of its core business. Therefore, proposals that focus on a significant policy issue transcend a company's ordinary business operations and are not excludable under Rule 14a-8(i)(7)."

Staff Legal Bulletin 14H (Oct. 22, 2015) (internal quotations omitted).

Significantly, despite knowing of the heightened expectation to include policy discussions in no-action requests,[13] Tyson's No-Action Request does not include a discussion of the Company's

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[12] See, e.g., Animal Welfare, Tyson, https://www.tysonfoods.com/sustainability/animal-welfare (last visited Oct. 15, 2020); Tyson, Annual Report (Form 10-K) 13 (Nov. 12, 2019), https://s22.q4cdn.com/104708849/files/doc_financials/2019/ar/dcdf2f5b-689d-4520-afd6-69691cf580de.pdf.

[13] The omission of any evidence or argument needed to meet its burden of proof is all the more glaring in light of Tyson's own counsel's analysis of the Staff's guidance encouraging inclusion of a policy discussion, which they have not done here. See SEC Staff Issues New Guidance on Excluding Shareholder Proposals Under Exchange Act Rules 14a-8(i)(7) and 14a-8(b), Sidley (Oct. 18, 2019), https://www.sidley.com/en/insights/newsupdates/2019/10/sec-staff-issues-new-guidance-on-excluding-shareholder-proposals (analysis of Staff Bulletins 14J, 14K, and 14I by the law firm representing the Company on its No-Action Request) (last visited Oct. 15, 2020).

analysis of the policy issue and its purported lack of significance, which according to Staff Legal Bulletin No. 14I would facilitate the Staff's review of the request to exclude the Proposal. Staff Legal Bulletin No. 14I (Nov 1, 2017); see also Staff Legal Bulletin No. 14J (Oct. 23, 2018); Staff Legal Bulletin No. 14K (Oct. 16, 2019). Since the Proposal raises a policy issue that the Staff in the past has found to be significant for other companies, under SLB 14I the Staff will look for an explanation of why the policy issue is not significant for the Company. Thus, Tyson has not met its burden of demonstrating that it is entitled to exclude the Proposal. See The TJX Companies, Inc. (Apr. 9, 2020) (noting "[t]he [c]ompany has not provided a board analysis or other analysis addressing the significance of the [p]roposal to the [c]ompany's business operations. Accordingly, [Staff] do not believe that the [c]ompany may omit the [p]roposal from its proxy materials in reliance on rule 14a-8(i)(7)").

The Staff has long recognized that matters related to policies on animal welfare address a significant policy issue and, therefore, generally are not excludable under Rule 14a-8(i)(7). See, e.g., The TJX Companies, Inc. (Apr. 9, 2020) (unable to concur that the proposal is excusable under rule 14a-8(i)(7) "given that the [p]roposal indicates that the policy issue of the humane treatment of animals is significant to the [c]ompany"); Revlon, Inc. (Mar. 18, 2014) (unable to concur that the proposal is excusable under rule 14a-8(i)(7) because "the proposal focuses on the significant policy issue of the humane treatment of animals"); Coach, Inc. (Aug. 19, 2010) (noting "that although the proposal relates to the acquisition and sale of fur products, it focuses on the significant policy issue of the humane treatment of animals, and it does not seek to micromanage the company to such a degree that we believe exclusion of the proposal would be appropriate"); Bob Evans Farms, Inc. (June 6, 2011) (finding that a proposal to encourage the board to phase-in the use of "cage-free" eggs so that they represent at least five percent of the company's total egg usage "focuses on the significant policy issue of the humane treatment of animals and does not seek to micromanage the company to such a degree that exclusion of the proposal would be appropriate"); Denny's (Mar. 17, 2009) (finding that a proposal requesting the board to commit to selling at least ten percent cage-free eggs by volume could not be excluded in reliance on Rule 14a-8(i)(7)); Hormel Foods Corp. (Nov. 10, 2005) (unable to concur that a proposal encouraging the development of more humane farming techniques is excludable under rule 14a-8(i)(7)).

Proposition 12 involves specific animal welfare issues of significant public concern as shown by the widespread public debate it received, getting both legislative and press attention. The following are just a few examples of the public discourse regarding Proposition 12:

- Proposition 12, Legislative Analyst's Office (Nov. 6, 2018), https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018 (last visited Oct. 15, 2020).
- *2018 VOTER GUIDE:* A look at California's Prop 12: Farm animal confinement initiative, ABC News (Nov. 7, 2018), https://abc7news.com/what-props-won-in-california-proposition-results-2018/4330896/ (last visited Oct. 15, 2020).
- Tara Duggan, New ballot initiative could increase California farm animal welfare standards, SF Chronicle (Aug. 29, 2017), https://www.sfchronicle.com/food/article/New-ballot-initiative-could-increase-California-12159349.php (last visited Oct. 15, 2020).

- Charlotte Simmonds, History in the making: California aims for world's highest farm animal welfare law, The Guardian (Jul. 10, 2018), https://www.theguardian.com/environment/2018/mar/07/history-in-the-making-california-aims-for-worlds-highest-farm-animal-welfare-law (last visited Oct. 15, 2020).
- The Times Editorial Board, Endorsement: Yes on Proposition 12. Let's get rid of cages for hens for real, LA Times (Sept. 28, 2018), https://www.latimes.com/opinion/editorials/la-ed-proposition12-20180928-story.html (last visited Oct. 15, 2020).
- Hilary Hanson, California Votes To Ban Cages For Hens, Give Farm Animals More Room, Huff Post (Nov. 7, 2018), https://www.huffpost.com/entry/california-prop-12-farm-animals-cage-free_n_5be31a73e4b0dbe871a5f5b3 (last visited Oct. 15, 2020).

Staff Legal Bulletin 14E states that a proposal raising a significant policy issue will not be excludable as long as a sufficient nexus exists between the nature of the proposal and the Company. See Exchange Act Release No. 40018 (May 21, 1998). In this instance, there is a clear nexus because Tyson does significant business in California—the state that enacted Proposition 12. The nexus of the Proposal to the Company is also demonstrated in the Company's published statements and policies. The Company says it has built its reputation on being a leader in animal welfare. Tyson's Sustainability webpage professes significant commitment to "advance transparency in animal welfare practices, be a leader in animal experience research and innovation, and ensure the safety of animals and the people who care for them."[14] Tyson sees the humane treatment of animals as an integral part of the mission of the Company.[15] Indeed, Tyson dedicates significant space to animal welfare in its sustainability reports in which the Company discusses how its mother pigs are housed—a practice directly regulated by Proposition 12.[16] Tyson writes: "Across the pork supply chain, good animal welfare is heavily dependent upon the environments in which the animals are raised. . . As part of the supply chain from which we procure market hogs, 100 percent are raised in open pen systems, and growers are expected in incorporate best management practices."[17] Thus, there is a clear nexus between the Proposal and the Company, and as such the Proposal is not excludable.

Moreover, a proposal requesting the disclosure of the business risk related to developments in the political, legislative, regulatory and scientific landscape regarding an issue of significant public interest is not excludable as relating to "ordinary business practices." See The Goldman Sachs Group, Inc. (Feb. 7, 2011). As explained by Staff Legal Bulletin No. 14E (Oct. 27, 2009), a proposal that requires a risk assessment will not be excludable under Rule 14a-8(i)(7) where its subject matter transcends the day-to-day business matters of the company or raises policy issues so significant that it would be appropriate for a shareholder vote. This is the case here—the Proposal requests the disclosure of a risk analysis, which could simply be a confirmation that the Company faces no material risks, related to the "severe harms" Tyson has raised, under penalty of perjury, in its Declaration before a federal court. Other proposals requesting a report detailing the

[14] Sustainability, Tyson, https://www.tysonfoods.com/sustainability (last visited Oct. 15, 2020).
[15] Animal Welfare, Tyson, https://www.tysonfoods.com/sustainability/animal-welfare (last visited Oct. 15, 2020).
[16] See 2019 Sustainability Report, Tyson, https://www.tysonsustainability.com/animal-welfare/dedicated-network (click "Swine") (last visited Oct. 15, 2020).
[17] Id.

known and potential risks and costs to the company caused by any enacted or proposed state laws or policies have not been excluded under this rule. See, e.g., Procter & Gamble (Aug. 16, 2016) (unable to concur that company could exclude proposal requesting a risk analysis of a state policy supporting discrimination against LGBT people). Similarly, this Proposal requesting risk disclosure relating to a state law on an issue of public significance should not be excludable under Rule 14a-8(i)(7).

Furthermore, where a proposal focuses on the differences between a company's statements and its practices regarding an issue of significant public concern, the proposal ought not be excluded. See T. Rowe Price Group, Inc. (March 13, 2020) (Staff was unable to concur that the company may exclude a proposal under Rule 14a-8(i)(7) as the proposal "is focused on possible differences between T. Rowe Price Group's public statements and pledges regarding climate change and the voting policies and practices of its subsidiaries . . . regarding climate change"). That is again what we have here—the Proposal requesting a risk analysis, if applicable, arises out of the differences between the Company's sworn statements and its animal welfare practices. Again, this means the Proposal is not excludable on the basis of Rule 14a-8(i)(7).

B. The Proposal does not seek to micromanage the Company or otherwise relate to "ordinary business practices."

The Company again misconstrues the plain language of the Proposal. The No-Action Request asserts that "[t]he Proposal seeks oversight of judgment of the Company's compliance with laws as well as disclosure of the Company's decision-making process regarding matters of legal compliance." But, instead, the Proposal seeks information about whether the Company faces risks associated with complying with Proposition 12. It does not dictate that the Company comply, nor does it seek disclosure of the Company's decision-making process regarding compliance. The Proposal avoids dictating outcomes and leaves any decision making to the board and management. A proposal that does not dictate methods or outcomes, that does not usurp board or management authority, and that does not micromanage is not excludable on any of the asserted grounds under Rule 14a-8(i)(7).

As recently restated in Johnson & Johnson (Jan. 29, 2020), "[t]he Commission has explained that "ordinary business matters" for purposes of rule 14a-8(i)(7) are those tasks that are "'so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.'" (quoting Release No. 34-40018 (May 21, 1998)). The Proposal simply does not relate to practices that are "so fundamental to management's ability to run a company on a day-to-day basis that they would not, as a practical matter, be subject to direct shareholder oversight." Id. The Company cites three determinations to support its argument that a company's legal compliance program is excludable on the grounds that compliance with laws and regulations is a matter of ordinary business operations—Corrections Corporation of America (Mar. 18, 2013); Halliburton Company (Mar. 10, 2006); Refac (Mar. 27, 2002)—but these determinations are distinguishable and this argument is irrelevant. In contrast to these precedents, the current Proposal does not attempt to prescribe specific actions, but only seeks reporting and analysis on relevant, highly material issues related to the fact that the company recently claimed it may very soon forfeit its right to sell pork in the most populous U.S. state. The Proposal does not request disclosure of the Company's legal compliance program or to explain

how or why it is or is not complying with a law, but instead, simply requests that the Company either disclose the risks associated with such compliance or noncompliance, or confirm that no such risks exist.

Tyson advances the untenable proposition that any proposal touching on disclosure obligations is excludable as involving ordinary business matters, but that is not borne out by the authorities it cites. In Eli Lily and Co. (Jan. 13, 2017), for example, the request sought 10-K and 10-Q disclosures that were "additional" (information on all lawsuits) to those already legally required (information on material litigation). Eli Lilly and Co., No-Action Request (Dec. 16, 2016) at 3 ("The reference to 'all lawsuits,' regardless of materiality, underscores the fact that the proposal relates to ordinary business matters, providing a basis for exclusion."). But here, the Proponent only seeks what is already legally required: disclosure of material risks. As such, the Proposal seeks nothing "additional" beyond what the Company already owes. Accordingly, Eli Lilly and Co. and similar determinations are of no help to Tyson. Likewise, all of these (post-1999) determinations apply the standard enunciated in Johnson Controls, Inc. (Oct. 26, 1999), that is, that shareholder resolutions relating to disclosures, are not automatically excludable, especially where, as here, an important social issue is implicated. "In Johnson Controls, Inc., the Staff stated that it will now 'consider whether the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business.'" Idacorp, Inc, No-Action Request at 7 (Dec. 12, 2003). In Idacorp. Inc. the Staff were unable to concur in the exclusion of a proposal under rule 14a-8(i)(7) where the proposal sought disclosures regarding charitable donations. Id.; see also Bank of Am. Corp. (Feb. 22, 2008) (unable to concur in exclusion of resolution relating to assessing and managing social and environmental risk in project financing).

Tyson also argues that the Proposal "probe[s] too deeply into matters of a complex nature upon which shareholders, as a group, are not in a position to make an informed judgment." Yet, Tyson has made disclosures of risks related to other regulatory challenges and supply chain issues. As noted above, in recent SEC reports, Tyson disclosed the risks it faces related to regulatory uncertainty in the UK because of Brexit. The Company reported these risks to shareholders and the SEC but has failed to mention far more financially significant risks related to losing the California market, which according to the Declaration could happen even if the Company makes efforts to stay in that market. This shows an internal inconsistency, especially since the stakes of regulatory uncertainty in the UK are purportedly far lower. For instance, the Company never claims it may not be able to operate in the UK but Tyson does claim it may need to leave California's pork market entirely by January 1, 2022. Tyson cannot reasonably claim that these risks can be hidden from its shareholders because they supposedly are of a more "complex nature" given that it has disclosed similar risks regarding Brexit where the stakes are purportedly far lower.

In the language of Staff Legal Bulletin 14 K, the present Proposal neither seeks "intricate detail" nor imposes "a specific strategy, method, action, outcome or timeline for addressing an issue." It does not supplant the judgment of management and the board. It does not prescribe "specific timeframes or methods for implementing complex policies." It merely seeks disclosure on significant policy issues that the Company itself has identified as important. As such, the Proposal should not be excluded as relating to the Company's "ordinary business operations."

CONCLUSION

The Company has failed to demonstrate that the Proposal is excludable on the basis of Rule 14a-8(i)(4) or Rule 14a-8(i)(7). Accordingly, we request that the Staff not concur with the Company's No-Action Request. Thank you for your careful consideration of this important Proposal.

Respectfully Submitted,

Mathew Prescott
Senior Director, Food & Agriculture
The Humane Society of the United States

cc: Adam.Deckinger@tyson.com
Read.Hudson@tyson.com
Phogan@sidley.com

EXHIBIT 1

August 14, 2020

Tyson Foods Inc.
ATTN: Corporate Secretary
2200 Don Tyson Parkway
Springdale, AR 72762-6999

Via USPS and email: amy tu@tyson com and kate powell@tyson com

RE: Shareholder proposal for inclusion in the 2021 proxy materials

Dear Ms. Tu,

Enclosed with this letter is a shareholder proposal submitted for inclusion in the proxy statement for the 2021 annual meeting and a letter from The Humane Society of the United States' (HSUS) brokerage firm, BNY Mellon, confirming ownership of Tyson Foods Inc. common stock. The HSUS has continuously held at least $2,000 in market value of Tyson Foods Inc. common stock for the one-year period preceding and including the date of this letter and will hold at least this amount through and including the date of the 2021 shareholder meeting.

Please e-mail me to confirm receipt of this proposal.

And if Tyson will attempt to exclude any portion of this proposal under Rule 14a-8, please advise me within 14 days. Thank you for your assistance.

Sincerely,

Matt Prescott

Matthew Prescott
Senior Director of Food and Agriculture
The Humane Society of the United States
240-620-4432
mprescott@humanesociety org

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WEALTH MANAGEMENT

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August 14, 2020

Amy Tu
EVP & General Counsel
Tyson Foods Inc.
2200 Don Tyson Parkway
Springdale, AR 72762-6999

Dear Ms. Tu,

BNY Mellon National Association, custodian for The Humane Society of the United States, verifies that The HSUS has continuously held at least $2,000.00 in market value of Tyson Foods Inc. common stock for the one-year period preceding and including the date of this letter. Thank you.

Sincerely,

Stacy Stout

Stacy Stout
Vice President, Client Service Manager
BNY Mellon Wealth Management
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Risk Disclosure Proposal

In 2018, California passed a law ("Proposition 12") requiring specific animal welfare standards for some pork produced or sold statewide.

In 2019, a Tyson Senior Vice President filed a declaration with the United States District Court for the Central District of California ("the declaration") testifying under penalty of perjury that Proposition 12 will "cause severe harm to Tyson" and "will increase Tyson's distribution costs," "add additional cost and complexity, at every step" and "make Tyson's processing and distribution operations significantly more complicated and costly." Tyson will have to "incur significant costs," "implement expensive changes" and "pay higher prices," the declaration claims, and Tyson's ability to recover some of "those increased costs will be highly constrained."

The declaration concludes: "Proposition 12 could force Tyson to exit, in whole or in part, from the California market for whole pork products. In doing so, Tyson would be harmed by losing millions of dollars in annual sales it makes into California. The forced exit from a major market such as California further would harm Tyson's relationships with its customers for whole pork products. Tyson depends on brand recognition and consumer goodwill to win and retain customers. The disappearance of Tyson's pork products from store shelves in California would harm Tyson's relationships with its customers . . . [and] Tyson will be forced to expend many millions of dollars and substantial time and effort ensuring compliance with Proposition 12 or suffer the harm of being forced out of the California market."

However, none of Tyson's 10-K or 10-Q reports mention Proposition 12, let alone disclose it as a risk to the company or its shareholders. Similarly, in those reports and on earnings calls, Tyson states that it has no supply-side issues with supplying pork to the markets in which it operates. These omissions and affirmative statements necessarily mean that, in fact, the company does not—despite the aforementioned declaration—face any material losses attributable to compliance or noncompliance with Proposition 12. After all, if the company did face the "severe harm" and losses described in the declaration, shareholders would have been entitled, under federal securities law, to a full risk disclosure from management.

RESOLVED: shareholders request that Tyson Foods confirm that the company faces no material losses from compliance or noncompliance with Proposition 12. If the company cannot so confirm, then shareholders request a risk analysis of any decision to comply or not to comply with Proposition 12, including the risks inherent in the company's failure to disclose such risks in its 10-K and 10-Q reports. These disclosures should be made within three months of the 2021 annual meeting, at reasonable cost, and omit proprietary information.

EXHIBIT 2

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORTH AMERICAN MEAT INSTITUTE,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California, KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and SUSAN FANELLI, in her official capacity as Acting Director of the California Department of Public Health,

Defendants.

Case No. 2:19-cv-08569-CAS (FFMx)

DECLARATION OF TODD NEFF

The Honorable Christina A. Snyder

Date: November 18, 2019
Time: 10:00 a.m.
Location: Courtroom 8D

Complaint filed: October 4, 2019

[Filed concurrently with Plaintiff's Notice of Motion and Motion for Preliminary Injunction]

I, Todd Neff, do declare and state the following under penalty of perjury:

1. I am Senior Vice President for Tyson Fresh Meats, Inc., a wholly owned subsidiary of Tyson Foods, Inc. (collectively, "Tyson"), where I have worked since 1986. I am providing this declaration, based upon my personal knowledge and experience, in support of the motion for preliminary injunction filed by the North American Meat Institute ("Meat Institute"), of which Tyson is a member.

2. Tyson is a protein-focused food company with more than 134,000 employees. Tyson was founded in 1931 during the Great Depression by John W. Tyson. Tyson is one of the largest producers and processors of pork in the United States. Tyson accounts for about 16% of hogs processed at federally-inspected plants in the United States. In 2018, the company processed approximately 21 million hogs for market, in nine processing facilities across the country. Tyson sells pork and prepared food products through all retail distribution channels, including club stores, grocery stores, and discount stores throughout the United States, including California.

3. My understanding is that California's Proposition 12 prohibits the sale in California of whole pork meat that a business owner or operator knows or should know is the meat of a breeding sow confined not in compliance with Proposition 12's requirements, or the meat of such a sow's immediate offspring. I also understand that, subject to statutory and regulatory exceptions, the confinement standards prohibit (i) confining a breeding sow in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely, or (ii) after December 31, 2021, confining a breeding pig with less than 24 square feet of usable floor space per pig. And that Proposition 12 also requires the California Department of Food and Agriculture and the California Department of Public Health to promulgate rules and regulations for the implementation of Proposition 12 by September 1, 2019. I understand that those state agencies have not yet promulgated any draft or final regulations necessary to implement Proposition 12.

4. Proposition 12 will cause severe harm to Tyson. Although 100 percent of the market hogs that Tyson procures are raised in open pens, not all of the independent farmers who contract with Tyson house breeding sows in compliance with Proposition 12's 24-square-feet-per-sow requirement. To come into compliance with Proposition 12, Tyson will have to (i) incur significant costs to ensure an adequate supply of hogs that are compliant with Proposition 12, and (ii) implement expensive changes to its distribution system to ensure that only compliant meat is sold in California.

5. Tyson relies heavily on independent farmers, who raise the hogs that Tyson processes at its pork plants and provide hogs to meet customer demand for Tyson's pork products. The vast majority of these independent farmers do not confine breeding sows in compliance with Proposition 12's confinement standards. Under current practices, after breeding sows are inseminated, they are housed in individual stalls until pregnancy has been confirmed. Thereafter, some pregnant sows are housed as part of a group in open pens ("group sow housing") but a majority remain in individual gestation crates throughout their pregnancy. The group sow housing systems provide approximately 16–20 square feet of floor space per sow.

6. Compliance with Proposition 12 will be extremely burdensome for the independent farmers who sell their hogs to Tyson. To come into compliance, Tyson's contract farmers will have to invest significant capital to reconfigure existing barns or construct new ones to meet Proposition 12's confinement standards. Independent farmers will need to obtain financing to implement these changes. In addition to refitting costs and ongoing operating expenses, Proposition 12's square-footage requirements will lower farm productivity by decreasing the number of sows that can be kept on a farm. Proposition 12 may also prohibit a settling period for early bred sows which may result in increased embryonic death loss.

7. To persuade partner farmers to change their operations, Tyson will have to pay higher prices for hogs bred in compliance with Proposition 12. Tyson's ability to recover those increased costs will be highly constrained by the basic economics of pork

processing. Tyson's expenses will increase on the entire weight of each Proposition 12 compliant hog it purchases, but Tyson will only be able to charge an increased price on finished products that are both destined for California and subject to Proposition 12.

8. Efforts to come into compliance must begin immediately, and it is not clear that Tyson will be able to meet all of Proposition 12's requirements in time. Tyson must negotiate with independent farmers regarding the terms of agreements to produce Proposition 12 compliant hogs. The farmers, in turn, would have to arrange financing and begin construction of compliant facilities.

9. Proposition 12 will also make Tyson's processing and distribution operations significantly more complicated and costly. Tyson will have to segregate compliant meat from non-compliant meat to ensure the latter is not shipped into California. This segregation will add additional cost and complexity, at every step of the processing and distribution process, from slaughter to final delivery. California hogs will have to be segregated from non-California hogs during slaughter and processing. This will require segregating live animals before slaughter, either in time (by coordinating deliveries from hundreds of independent farmers spread over thousands of square miles), or in space (by constructing costly additional pen space). It will also require segregating carcasses as they are processed, necessitating processing floor downtime to ensure that non-compliant product is clear of the floor before California-compliant hogs are processed.

10. Proposition 12 also will increase Tyson's distribution costs. Tyson's distribution and inventory-management systems will have to maintain duplicate item codes and SKUs (stock keeping units)—one for California, and one for every other state—for every one of the company's uncooked pork products. Tyson also must set aside additional space in its warehouses and distribution centers to store pork specifically destined for the California market, and ensure that its products will be similarly segregated by third-party distributors who are likely to charge Tyson a premium.

11. Finally, when Tyson ships product to customers who do business in other states and California, it will have to segregate California product in shipment, forcing the company to make inefficient use of limited pallet and truck space.

12. In the alternative, Proposition 12 could force Tyson to exit, in whole or in part, from the California market for whole pork products. In doing so, Tyson would be harmed by losing millions of dollars in annual sales it makes into California. The forced exit from a major market such as California further would harm Tyson's relationships with its customers for whole pork products. Tyson depends on brand recognition and consumer goodwill to win and retain customers. The disappearance of Tyson's pork products from store shelves in California would harm Tyson's relationships with its customers and undercut Tyson's goodwill in the California marketplace.

13. Without preliminary relief, therefore, Tyson will be forced to expend many millions of dollars and substantial time and effort ensuring compliance with Proposition 12 or suffer the harm of being forced out of the California market.

Executed on this 30th day of September 2019, in Dakota Dunes, South Dakota.

By: _____
Todd Neff

EXHIBIT 3

September 4, 2020

Stephanie Avakian, Co-Director
Division of Enforcement
Securities and Exchange Commission
100 F Street, NE, Washington, DC 20549

Sent via email: avakians@sec gov

Re: Request for investigation into Tyson Foods, Inc.'s apparent violations of securities laws

Dear Co-Director Avakian,

Green Century Capital Management, Inc. ("Green Century") requests that the U.S. Securities and Exchange Commission ("SEC" or "Commission") open an investigation into Tyson Foods, Inc.'s ("Tyson" or "the company") repeated misrepresentations and omissions of highly material information from communications with shareholders, including Green Century.

This information concerns the impact on shareholders of its wholly owned subsidiary, Tyson Fresh Meats, Inc.'s, unwillingness or inability to comply with a California animal cruelty statute governing the sale of pork products in that state. According to the sworn testimony ("the Declaration") of the company's subsidiary, made under the penalty of perjury, as of at least 2019, the company faces "severe harm" as a result of that statute: compliance would require immediate expenditure of "many millions of dollars and substantial time and effort" and may prove impossible to achieve before the law takes effect in 2022,[1] and failure to comply will subject the company to "the harm of being forced out of the California market."[2]

Despite the extraordinary, specific, and "severe" risks described in the Declaration, the company has never communicated such risks to its shareholders—not in its SEC filings, not at its shareholder meetings, not on any of its quarterly earnings calls, and to our knowledge, not anywhere else.

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[1] Decl. of Todd Neff ("Neff Decl.") ¶¶ 8, 13, N. Am. Meat Inst. v. Becerra, 420 F. Supp. 3d 1014 (C.D. Cal. 2019) (No. 2:19-cv-08569-CAS (FFMx)) (attached as Exhibit A). See also Cal. Health & Safety Code §§ 25990, 25991(e) (establishing Prop. 12's prohibitions and timeline for compliance).

[2] Neff Decl. ¶ 13. Green Century, has no independent knowledge regarding the impacts claimed in this Tyson executive's sworn Declaration, which focuses on aspects of the company's business that it does not make public. Thus, Green Century is not in a position to judge the accuracy of the Declaration's claimed impacts on the company.

With over $800 million assets under management, Green Century has been a leader in the environmentally and socially responsible investing field for more than 25 years.

In November of 2018, California voters passed Proposition 12 ("Prop 12"). In October of 2019, nearly a year after Prop 12's enactment, Tyson offered sworn testimony to a federal district court in California in which the company described the law's impact on the company.[3] According to that Declaration, signed by a Tyson Fresh Meats Senior Vice President, Prop 12 will "cause severe harm to Tyson" and "will increase Tyson's distribution costs," "add additional cost and complexity, at every step of the processing and distribution process," and "make Tyson's processing and distribution operations significantly more complicated and costly."[4] Tyson will have to "incur significant costs," "implement expensive changes to its distribution system," and "pay higher prices," the Declaration claims. It goes on to claim that, "Tyson's ability to recover those increased costs [higher prices paid for pigs] will be highly constrained."[5]

The Declaration concludes:

> Proposition 12 could force Tyson to exit, in whole or in part, from the California market for whole pork products. In doing so, Tyson would be harmed by losing millions of dollars in annual sales it makes into California. The forced exit from a major market such as California further would harm Tyson's relationships with its customers for whole pork products. Tyson depends on brand recognition and consumer goodwill to win and retain customers. The disappearance of Tyson's pork products from store shelves in California would harm Tyson's relationships with its customers . . . . Tyson will be forced to expend many millions of dollars and substantial time and effort ensuring compliance with Proposition 12 or suffer the harm of being forced out of the California market.[6]

The Declaration explicitly states that this is not just an issue on the horizon. Indeed the Declaration was submitted "in support of the preliminary injunction motion filed by the North American Meat Institute ("NAMI"), of which Tyson is a member."[7] Prevailing on a motion for preliminary injunction requires, among other things, a showing of immediate injury and irreparable harm such that extraordinary relief is necessary.[8] As such, the company must have believed it would suffer irreparable harms in the immediate future at the time the declaration was filed.

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[3] See generally id
[4] Id. ¶¶ 4, 9, 10.
[5] Id. ¶¶ 4, 7.
[6] Id. ¶¶ 12, 13.
[7] Id ¶ 1.
[8] Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20, 24 (2008).

According to the Declaration, Tyson must now make decisions as to whether it is going to meet Prop 12's new animal welfare standards or eliminate sales to California. The company has sworn that each option will have significant negative financial impacts. And, the company claims that this creates a significant problem for it as of October 2019. According to the Declaration, "[e]fforts to come into compliance must begin immediately, and it is not clear that Tyson will be able to meet all of Proposition 12's requirements in time [before January 1, 2022]."[9] Thus, more than a year after Prop 12 passed, the company had apparently not even begun preparations to comply and was not sure it would even be able to comply by Prop 12's deadlines. The lack of preparation to meet new regulatory requirements and the possible choice not to adopt those requirements—which would result in the loss of the ability to sell one of the company's primary products in the most populous state in the country—involve serious risks that, again, the company has apparently never communicated to investors.

In both its required SEC filings and in other statements the company made in connection with the sale of securities, Tyson has misrepresented and omitted the highly material facts set out in the October 2019 Declaration, including that the company will soon suffer "severe harm" which may include having to completely withdraw from doing business in California.[10] As described below, this violates securities law anti-fraud provisions including specific provisions outlawing misrepresentation and omission of material facts from reports the company is obligated to file by the Securities Exchange Act.

I. Tyson's apparent violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5

SEC Rule 10b-5 implements Section 10(b) of the Securities Exchange Act of 1934 and the scope of liability under the rule is coextensive with the statutory provision it implements. 17 C.F.R. § 240.10b–5(b); see also 15 U.S.C. § 78j(b). To prove a violation of Rule 10b-5, the SEC must show that a person has:

> (1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device;
>
> (2) with scienter;
>
> (3) in connection with the purchase or sale of securities.[11]

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[9] Id. ¶ 8.
[10] Id. ¶¶ 4, 12.
[11] SEC v. Frohling, 851 F.3d 132, 136 (2d Cir. 2016) (citation and internal quotation marks omitted); see also SEC v. Wolfson, 539 F.3d 1249, 1256 (10th Cir. 2008) (explaining that

Tyson's repeated misrepresentation and omission of the facts set out in its Declaration satisfies each element of Rule 10b-5 liability. These misrepresentations and omissions all relate to subjects that are material to reasonable investors. These material subjects include animal cruelty, noncompliance with California state law, and the implications of these matters on the company's financial well-being.[12] Likewise, the statements and omissions described below were made "in connection with," the sale of securities.[13] They occurred in many contexts: in website statements, in discussions at annual shareholder meetings, on quarterly earnings conference calls, and in statements in SEC filings. These misrepresentations and omissions were made with the fraudulent intent (scienter) required to constitute a violation of Rule 10b-5.

As discussed below, Tyson's repeated misstatements of, and failures to mention, the serious risks described in the Declaration in its SEC filings and public/shareholder statements are material misrepresentations and omissions that the company had a duty to speak to accurately and completely.[14] Where a public company like Tyson knows of specific material risks, it cannot speak of them only in half-truths, generalities, or boilerplate language.[15] Even though a high-level Tyson executive

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unlike private litigants in a § 10(b) enforcement action "[t]he SEC is not required to prove reliance or injury" (alteration in original) (citation and internal quotation marks omitted)). "Sale" is statutorily defined to include "every contract of sale or disposition of a security or interest in a security, for value"; and "offer" is defined as including "every attempt or offer to dispose of . . . a security or interest in a security, for value." SEC v. Aly, No. 16 Civ. 3853 (PGG), 2018 WL 1581986, at *24 (S.D.N.Y. Mar. 27, 2018) (alteration in original) (quoting 15 U.S.C. § 77b(a)(3)) (internal quotation marks omitted).

[12] The materiality analysis is an "objective" one, focused on "the significance of an omitted or misrepresented fact to a reasonable investor." SEC v Morgan Keegan & Co , Inc , 678 F.3d 1233, 1245 (11th Cir. 2012) (citation and internal quotation marks omitted). It does not matter "whether isolated statements . . . were true," if "defendants' representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor regarding the nature of the securities offered." Halperin v. eBanker USA.com, Inc., 295 F.3d 352, 357 (2d Cir. 2002) (citation omitted).

[13] A statement or omission is "in connection with" the purchase or sale of a security for the purpose of § 10(b) if it "somehow touches upon or has some nexus with any securities transaction." SEC v Rana Research, Inc , 8 F.3d 1358, 1362 (9th Cir. 1993) (citation and internal quotation marks omitted).

[14] See Frohling, 851 F.3d at 136 (outlining requirements for § 10(b) violation).

[15] FindWhat Investor Grp. v. FindWhat.com, 658 F.3d 1282, 1305 (11th Cir. 2011) ("By voluntarily revealing one fact about its operations, a duty arises for the corporation to disclose such other facts, if any, as are necessary to ensure that what was revealed is not so incomplete as to mislead." (citations and internal quotation marks omitted)); In re K-tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 898 (8th Cir. 2002) ("[E]ven absent a duty to speak, a party who discloses material facts in connection with securities transactions assume[s] a duty to speak fully and truthfully on those subjects." (second alteration in original) (citation ichand internal quotation marks omitted)).

detailed the financial costs and risks entailed by the company's choice to comply or not comply with Prop 12 in sworn testimony in federal court, Tyson provides incomplete and inaccurate descriptions of these costs and risks in its SEC filings and public statements, falling short of federal law's required full and truthful disclosures.

A. Tyson's affirmative material misrepresentations in apparent violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5

In its 2019 10-K report, the company explained: "We believe the supply of live hogs is adequate for our present needs. . . . [A]lthough we generally expect adequate supply of live hogs in the regions we operate, there may be periods of imbalance in supply and demand."[16] In the 10-K reports for prior years, back to 2016, the company said essentially (and at times exactly) the same thing.[17] The problem with Tyson's sanguine description of an adequate supply of pigs is that it is irreconcilable with the Declaration's dire description of the company's California-market supply dilemma. As the Declaration explains:

> To come into compliance with Proposition 12, Tyson will have to (i) incur significant costs to ensure an adequate supply of hogs that are compliant with Proposition 12, and (ii) implement expensive changes to its distribution system to ensure that only compliant meat is sold in California. . . . Efforts to come into compliance must begin immediately, and it is not clear that Tyson will be able to meet all of Proposition 12's requirements in time.[18]

In the above language and elsewhere, the Declaration explains that: Tyson is not at all sure it can or will secure an adequate supply of pigs to supply the California marketplace; as of late 2019, the company needed to immediately begin lining up that supply and altering its distribution processes and doing so would be extremely costly;

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[16] Tyson, Annual Report (Form 10-K) 4 (Nov. 12, 2019), https://s22.q4cdn.com/104708849/files/doc_financials/2019/ar/dcdf2f5b-689d-4520-afd6-69691cf580de.pdf (last visited Aug. 6, 2020).

[17] Tyson, Annual Report (Form 10-K) 3 (Nov. 21, 2016) ("We believe the supply of live hogs is adequate for our present needs."), https://s22.q4cdn.com/104708849/files/doc_financials/annual/TSN-FY16-Form-10-K.pdf (last visited Aug. 6, 2020); Tyson, Annual Report (Form 10-K) 3 (Nov. 13, 2017) (same as 2016 report), https://s22.q4cdn.com/104708849/files/doc_financials/annual/Tyson-2017-10K.pdf (last visited Aug. 6, 2020); Tyson, Annual Report (Form 10-K) 4 (Nov. 13, 2018) ("We believe the supply of live hogs is adequate for our present needs. . . . Although we generally expect adequate supply of live hogs in the regions we operate, there may be periods of imbalance in supply and demand.") https://s22.q4cdn.com/104708849/files/doc_financials/quartely/2018/q4/TSN-FY18-10-K.pdf (last visited Aug. 6, 2020).

[18] Neff Decl. ¶¶ 4, 8 (emphasis added).

and even if efforts had begun immediately, they might not have been sufficient.[19] The Declaration also states that if the company ends up unable or unwilling to secure an adequate supply of Prop 12-compliant pork products to sell in California, that also poses a severe financial threat to the company:

> The disappearance of Tyson's pork products from store shelves in California would harm Tyson's relationships with its customers. . . . Tyson will be forced to expend many millions of dollars and substantial time and effort ensuring compliance with Proposition 12 or suffer the harm of being forced out of the California market.[20]

In short, the company knows it faces an imminent and serious supply problem in the California market and that cannot be reconciled with its SEC filings' claims that "the supply of live hogs is adequate for our present needs."[21] Indeed, in its most recent earnings call on August 3, 2020, the company never mentioned Prop 12, or its problem with supplying the California market, but instead stated: "Tyson is well-positioned to respond to future market conditions. Our strong balance sheet, unique business model, diverse portfolio, and scale will allow us to meet the needs of the marketplace."[22] Again, this across-the-board affirmative claim that Tyson is able to supply its products cannot be reconciled with the sworn claims of the Declaration.

Tyson's misrepresentation (that it has an adequate supply of pigs to supply all the markets in which it operates) is unquestionably material in that there is more than "a substantial likelihood that a reasonable shareholder would consider it important." Ret. Bd. of Policemen's Annuity & Benefit Fund of Chicago on Behalf of Policemen's Annuity & Benefit Fund of Chicago v FXCM Inc , 333 F. Supp. 3d 338, 347 (S.D.N.Y. 2018) (citation and internal quotation marks omitted).[23] The dramatically contrasting depictions of supply conditions in Tyson's annual 10-K reports and in the Declaration cannot coexist without one or the other, violating the Commission's prohibition against misrepresentation or failure to fully disclose information necessary to prevent deception.

B. Tyson's material omissions in its public descriptions of Prop 12 and animal confinement issues

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[19] Id.
[20] Id. ¶¶ 12, 13.
[21] See supra notes 15-17 and accompanying text.
[22] See Tyson, 2020 Quarter 3 Earnings Call 10 (August 3, 2020), https://s22.q4cdn.com/104708849/files/doc_financials/2020/q3/Final-Transcript.pdf (last visited Aug. 10, 2020).
[23] Additionally, by "voluntarily touting the subject to investors" Tyson assumed the "duty to disclose all material information relating to" the adequacy of its pig supply. See FindWhat Investor Group, 658 F.3d at 1299 (quoting SEC v Merch Capital, LLC, 483 F.3d 747, 770 (11th Cir. 2007)).

Having chosen to discuss Prop 12 on its website, Tyson has a duty to provide the whole truth about the law's impact on the company, and it failed to discharge that duty. Tyson's lone public discussion of Prop 12 appears to be a brief mention on its "Top Issues" webpage.[24] In a few sentences, Tyson described the law as misguided and noted that two meat trade groups had filed lawsuits challenging it. The company said there was an "urgent" need to challenge the law because its veal-focused rules would take effect in January 2020. Tyson sells no retail veal products and appears to only offer veal products through its food service division, so a reasonable investor would have no reason to see the veal discussion as a matter of serious concern for the company or its shareholders.[25] On the other hand, according to the Declaration: "Tyson is one of the largest producers and processors of pork in the United States Tyson accounts for about 16% of hogs processed at federally-inspected plants in the United States. In 2018, the company processed approximately 21 million hogs . . . ."[26] Despite its massive investment in the pork market, all the company says about the timing of Prop 12's pig-regulating provisions is that they take effect on January 1, 2022.[27] In stark contrast to the Declaration, Tyson's website says nothing about the present and future impact of the law and Tyson's choice to comply or not on the company's bottom line.[28]

A comparison of the "Top Issues" website's scant Prop 12 mention with the Declaration's detailed description of the law's significant impacts on Tyson's bottom line reveals that the company did not tell stakeholders the whole truth on its website. The website says Prop 12 "create[es] new space requirements" and "[s]adly, science-based animal welfare standards were not used in the development of these space requirements."[29] Whether or not this description is literally true is irrelevant because it is certainly not the whole truth about Prop 12's impact on the company. A fuller description is set out in the Declaration and is based on non-public information about Tyson's supply and distribution of pigs and pork products and how the law will "cause severe harm to Tyson."[30]

Even assuming that Prop 12's requirements are widely publicly known, the impact of those requirements on Tyson is certainly not widely publicly known. As noted above, and in Tyson's October 2019 Declaration, the company has a choice to comply with

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[24] See Top Issues, Tyson, https://tyson.mmp2.org/top-issues (last visited Aug. 6, 2020) (screen capture attached as Exhibit B).
[25] Veal, Tyson Food Service, https://www.tysonfoodservice.com/search (last visited Aug. 6, 2020).
[26] Neff Decl. ¶ 2.
[27] See Top Issues, Tyson, https://tyson.mmp2.org/top-issues (last visited Aug. 6, 2020) (screen capture attached as Exhibit B).
[28] See id.
[29] Id
[30] See generally Neff Decl.

the law and incur certain costs associated with conversion or to not comply with the law and lose access to the California market. The company chose not to reveal that impact in its public description of Prop 12. This it cannot do. See In re WorldCom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 688 (S.D.N.Y. 2004) (finding omission of non-public aspects of a widely known DOJ decision recommending disapproval of a proposed merger may be an actionable material omission where it's "impact on [company]" was not widely known and addressed only in "boilerplate language.").

Unlike the October 2019 Declaration, the company's website does not disclose that Prop 12 severely and presently (as stated in 2019) impacts Tyson by, among other things, forcing it to spend millions or face complete or partial withdrawal from the California market. These facts certainly would be of keen interest to a reasonable investor, and the company was thus obligated to supply them to ensure the website discussion was not misleading.

On another webpage, which discusses Tyson's animal confinement practices, the company does not mention Prop 12, but it does describe the housing of the pigs that become Tyson products.[31] Tyson speaks of the importance of humane housing and "[r]aising animals in comfort," and describes the company's commitment to the same; yet the company never mentions any of the substance of its Declaration.[32] In other words, the company never explains that the confinement of the pigs it depends on falls short of California's animal welfare law, and as such, Tyson needs to presently spend millions of dollars or soon abandon selling pork in that state, in part or in full. Likewise, the company says nothing about the law's impact related to its veal products. Even if its statements here about pig and calf housing may be literally true, which is beside the point, they are legally deficient because they omit highly significant facts that would be material to a reasonable investor.

Finally, in its quarterly earnings calls and at its annual meetings of shareholders between 2018 and the present, the company has never specifically mentioned Prop 12 or the substance of the Declaration which describes the law's impact on the company.[33] During its earnings calls, supply issues are routinely inquired about and in response, the company has never sounded any kind of warning about its apparent (i.e. as described in the Declaration) supply problem in the California market and the possibility that it might have to abandon that market altogether.[34] Notably, Tyson

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[31] See Animal Housing, Tyson, https://www.tysonfoods.com/sustainability/animal-well-being/animal-housing (last visited Aug. 6, 2020) (screen capture attached as Exhibit C).
[32] Id.
[33] See generally Presentations, Tyson Foods (2018-2020) https://ir.tyson.com/presentations/default.aspx (last visited Aug. 10, 2020).
[34] See, e.g., Tyson, 2019 Quarter 4 Earnings Call 15-16 (November 12, 2019), https://s22.q4cdn.com/104708849/files/doc_financials/2019/q4/TSN-Q4'19-Earnings-Call-Transcript.pdf (last visited August 7, 2020); Tyson, 2019 Quarter 3 Earnings Call 7-8

said nothing about these matters even on the call held less than two weeks after it filed its sworn Declaration describing an immediate and costly California supply issue.[35]

Tyson's public statements described above were made with the required connection to the purchase or sale of securities. In an SEC enforcement action the "in connection with" requirement is met where the SEC shows that "the misrepresentations in question were disseminated to the public in a medium upon which a reasonable investor would rely, and that they were material when disseminated." Semerenko v. Cendent Corp , 223 F.3d 165,175–76 (3d Cir. 2000); see also Rana Research, Inc., 8 F.3d at 1362 (in an SEC enforcement action "[w]here the fraud alleged involves public dissemination in a document such as a press release, annual report, investment prospectus or other such document on which an investor would presumably rely, the 'in connection with' requirement is generally met by proof of the means of dissemination and the materiality of the misrepresentation or omission."); SEC v Texas Gulf Sulphur Co., 401 F.2d 833, 860–62 (2d Cir. 1968) (finding misrepresentations are made "in connection with" the purchase or sale of securities when the statements are made "in a manner reasonably calculated to influence the investing public"). The "severe harm[s]" the Declaration describes, including potential inability to sell pork products in the largest single U.S. market for those products, is material, and was material when each of the communications discussed herein occurred.[36] The material omission of this information occurred in media "reasonably calculated to influence the investing public." Texas Gulf Sulphur Co., 401 F.2d at 860–62. Quarterly earnings calls and annual shareholder meetings and Tyson's "Animal Housing" and "Top Issues" webpages are all sources investors would rely on when making investment decisions.[37]

C. Material omissions in Tyson's 10-K and 10-Q filings

Throughout its SEC 10-K and 10-Q filings, Tyson omits material information about Prop 12's impact on the company and speaks only in vague boilerplate language about

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(August 5, 2019), https://s22.q4cdn.com/104708849/files/doc_financials/quartely/2019/q3/TSN-Q3-19-Transcript.pdf (last visited August 7, 2020).

[35] Tyson, 2019 Quarter 4 Earnings Call 15-16 (November 12, 2019), https://s22.q4cdn.com/104708849/files/doc_financials/2019/q4/TSN-Q4'19-Earnings-Call-Transcript.pdf (last visited August 7, 2020).

[36] Neff Decl. ¶ 4.

[37] Commission Guidance on the Use of Company Websites, Exchange Act Release No. 34-58288, 73 Fed. Reg. 45,862, 45,869 (Aug. 7, 2008) ("The antifraud provisions of the federal securities laws apply to company statements made on the Internet in the same way they would apply to any other statement . . . ."). Courts routinely consider statements in press releases, websites, and earnings calls as statements made "in connection with purchase or sale of securities." See, e g , Mulligan v Impax Laboratories, Inc , 36 F. Supp. 3d 942, 957 (N.D. Cal. 2014) (considering earnings calls and press releases).

unidentified potential state law implications for the company. Thus, nowhere in the respective 10-K reports' *Management Discussion and Analysis*, *Legal Proceedings* or *Risk Factors* sections did the company discuss—let alone mention—the serious financial costs the Declaration states Tyson faces in the wake of Prop 12. For example, the only boilerplate language in the *Risk Factors* section that could be viewed as even vaguely speaking to Prop 12 has remained essentially unchanged between 2016 (before the Prop 12 campaign in 2017 and the law's November 2018 passage) and 2019. For example, in its 2016 10-K annual filing Tyson says:

> **New or more stringent domestic and international government regulations could impose material costs on us and could adversely affect our business**. Our operations are subject to extensive federal, state and foreign laws and regulations by authorities that oversee food safety standards and processing, packaging, storage, distribution, advertising, labeling and export of our products. See "Environmental Regulation and Food Safety" in Item 1 of this Annual Report on Form 10-K. Changes in laws or regulations that impose additional regulatory requirements on us could increase our cost of doing business or restrict our actions, causing our results of operations to be adversely affected. For example, increased governmental interest in advertising practices may result in regulations that could require us to change or restrict our advertising practices.
>
> **Legal claims, class action lawsuits, other regulatory enforcement actions, or failure to comply with applicable legal standards or requirements could affect our product sales, reputation and profitability**. We operate in a highly regulated environment with constantly evolving legal and regulatory frameworks. Consequently, we are subject to heightened risk of legal claims or other regulatory enforcement actions. Although we have implemented policies and procedures designed to ensure compliance with existing laws and regulations, there can be no assurance that our employees, contractors, or agents will not violate our policies and procedures. Moreover, a failure to maintain effective control processes could lead to violations, unintentional or otherwise, of laws and regulations. Legal claims or regulatory enforcement actions arising out of our failure or alleged failure to comply with applicable laws and regulations, including those contained in Item 3, Legal Proceedings and Part II, Item 8, and Notes to Consolidated Financial Statements, Note 19: Commitments and Contingencies in this Annual Report on Form 10-K, could subject us to civil and criminal penalties, including debarment from governmental contracts that could materially and adversely affect our product sales, reputation, financial condition and results of operations. Loss of or

> failure to obtain necessary permits and registrations could delay or prevent us from meeting current product demand, introducing new products, building new facilities or acquiring new businesses and could adversely affect operating results.[38]

In each subsequent year's 10-K filing the company uses substantially the same (verbatim or close thereto) boilerplate language, and never mentions Prop 12 or the impacts of Prop 12, as described in the Declaration.[39] Likewise, the company's quarterly reports between December 2017 and the present refer back to this boilerplate language (in the 10-K report of the most recent prior year) and add nothing about Prop 12 or its impacts.[40]

Thus, during the 2017 to 2018 California political campaign leading up to the vote on Prop 12—which would impose requirements for the sale of pork products in California—Tyson said nothing specific in its quarterly and annual reports about Prop 12 or the major risks it would pose for the company if it became law. Nor did the company say anything in its SEC filings after the law passed in November 2018. In fact, to date, Tyson has never specifically mentioned the law's impacts on the company in SEC filings. Prop 12's impacts were not unknown to the company as evidenced by the Declaration it filed in October 2019, which laid out the company's belief that the law imposed present and imminent severe financial and reputational impacts on Tyson. As noted above, where a public company knows of a specific material risk it cannot escape liability by obfuscating that risk using boilerplate language rather than a description of the specific risk.[41]

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[38] Tyson, Annual Report (Form 10-K) 10-11 (Nov. 21, 2016), https://s22.q4cdn.com/104708849/files/doc_financials/annual/TSN-FY16-Form-10-K.pdf (last visited Aug. 6, 2020).

[39] Tyson, Annual Report (Form 10-K) 13 (Nov. 12, 2019), https://s22.q4cdn.com/104708849/files/doc_financials/2019/ar/dcdf2f5b-689d-4520-afd6-69691cf580de.pdf (last visited Aug. 6, 2020); Tyson, Annual Report (Form 10-K) 12-13 (Nov. 13, 2018),https://s22.q4cdn.com/104708849/files/doc_financials/quartely/2018/q4/TSN-FY18-10-K.pdf (last visited Aug. 6, 2020); Tyson, Annual Report (Form 10-K) 11 (Nov. 13, 2017), https://s22.q4cdn.com/104708849/files/doc_financials/annual/Tyson-2017-10K.pdf (last visited Aug. 6, 2020).

[40] See, e g , Tyson, Quarterly Report (Form 10-Q) 43 (Dec. 30, 2017), https://s22.q4cdn.com/104708849/files/doc_financials/quartely/2018/q1/TSN-Q1'18-10-Q.pdf (last visited Aug. 11, 2020).

[41] FindWhat Investor Group, 658 F.3d at 1305; see also Panther Partners, Inc v Ikanos Commc'ns, Inc , 538 F. Supp. 2d 662, 669 (S.D.N.Y. 2008) (explaining that forward-looking "risk disclosures must accurately characterize the scope and specificity of the risk, as understood at the time the statements are made"); see also In re Prudential Sec. Ltd. Pshps. Litig., 930 F. Supp. 68, 72 (S.D.N.Y. 1996) (explaining that securities fraud claim

The material omissions in Tyson's public SEC filings "were available to investors and potential investors in" Tyson's stock, which was, and remains, actively traded on the New York Stock Exchange. SEC v. Aly, No. 16 Civ. 3853 (PGG), 2018 WL 1581986, at *24 (S.D.N.Y. Mar. 27, 2018). Thus, the omissions described above occurred "in connection with the purchase or sale or offer off sale of a security under Rule 10b-5." Id ; see also SEC v Softpoint, Inc , 958 F. Supp. 846, 862 (S.D.N.Y. 1997) (explaining § 10(b) and Rule 10b–5 liability can flow from "misstatements and omissions in press releases, news articles, and quarterly and annual public filings" (quoting In re Ames Dep't Stores, Inc Stock Litig , 991 F.2d 953, 962 (2d Cir. 1993))).

D. Tyson's misrepresentations and omission of material facts were made with the required scienter

All of the misrepresentations and omissions discussed above were made with the requisite scienter. To establish a violation of Rule 10b-5, the SEC must show that a material omission was made with "a mental state embracing intent to deceive, manipulate, or defraud." Tellabs, Inc v Makor Issues & Rights, Ltd , 551 U.S. 308, 319 (2007). This "may be established through a showing of reckless disregard for the truth, that is, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care." SEC v. McNulty, 137 F.3d 732, 741 (2d Cir. 1998) (citations and internal quotation marks omitted). Scienter can be shown using circumstantial evidence. Thus, scienter is established where circumstantial evidence shows defendants "knew facts or had access to information suggesting that their public statements were not accurate" or "failed to check information they had a duty to monitor" SEC v. Fiore, 416 F. Supp. 3d 306, 324 (S.D.N.Y. 2019) (citation and internal quotation marks omitted).

Here, the Declaration makes clear that the company knew of highly material risks that render its online statements, its investor conference calls, and its annual and quarterly SEC-filed reports misleading, inaccurate and incomplete. Moreover, the company certainly had a duty to monitor the information comprising the substance of the Declaration (e.g., its ability to continue selling pork in California) and had a duty to report this potentially massive liability accurately and fully to investors in its online statements, annual earnings calls, annual shareholder meetings, and reports to the SEC.[42] Given the magnitude and immediacy of the risks described in the

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regarding forward-looking statements cannot be defeated at the pleadings stage by reliance on "[g]eneral risk disclosures in the face of specific known risks which border on certainties . . . even apparently specific risk disclosures . . . are misleading if the risks are professionally stamped in internal undisclosed analyses . . . as significantly greater or more certain than those portrayed.") (emphasis added) (citations and internal quotation marks omitted)).

[42] 15 U.S.C. § 7241(a)(2); see Tyson, Annual Report (Form 10-K) (Nov. 12, 2019), Exhibit

Declaration, the failure to accurately and fully disclose these severe threats is highly unreasonable conduct that shows a reckless disregard for the truth. See McNulty, 137 F.3d at 741. Thus, "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts" available. See Fiore, 416 F. Supp. 3d at 323.

II. Tyson's misrepresentations and omissions of material facts in apparent violation of section 13(a) of the Securities Exchange Act and Rule 12b-20

The Securities Exchange Act of 1934 requires securities issuers to file certain documents with the SEC, including the annual and quarterly reports discussed above. 17 U.S.C. § 78m(a). SEC Rule 12b–20 implements Section 13(a) and requires that "[i]n addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading." 17 C.F.R. § 240.12b–20.

To state a claim under Section 13(a) of the Exchange Act, and Rule 12b–20, the SEC must show that a person made "materially false" statements in her filings, or omitted material information needed to make other statements not misleading. SEC v Premier Holding Corporation, No. CV 18-00813-CJC(KESx), 2019 WL 8167920, at *5 (C.D. Cal. Dec. 10, 2019); see also SEC v Savoy Indus , Inc , 587 F.2d 1149, 1165 (D.C. Cir. 1978) ("The reporting provisions of the Exchange Act are clear and unequivocal, and they are satisfied only by the filing of complete, accurate, and timely reports."). The SEC need not establish that misrepresentations or omissions were made with any scienter. McNulty, 137 F.3d at 740–41 (scienter is not an element SEC must establish to prove violations arising under Section 13 of the Securities Exchange Act). In sum, the facts set forth above describing material misrepresentations and omissions in apparent violation of Rule 10b-5 also establish apparent violations of Rule 12b-20, as the essential elements of each rule overlap entirely except that no mental state showing is required to establish a violation of Rule 12b–20.

III. Conclusion

31.1 (certifying that "this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report" (emphasis added)), Exhibit 32.2 (certifying, pursuant to 18 U.S.C. § 1350, compliance with SEC Act section 13a and that "the information contained in the Report fairly presents, in all material respects, the financial condition and result of operations of the Company"), https://s22.q4cdn.com/104708849/files/doc_financials/2019/ar/dcdf2f5b-689d-4520-afd6-69691cf580de.pdf (last visited Aug. 6, 2020).

Under penalty of perjury, Tyson's Senior Vice President of Pork painted a very bleak picture of the company's ability to continue supplying pork to the most populous state in the United States unless it chooses to make substantial and costly changes to its practices. This is patently material information that is not widely known. Tyson was obligated to fully inform investors of the Declaration's substance, yet it apparently opted to never do so in any of its online postings, quarterly earnings calls, annual meetings of shareholders, and SEC-filed reports. Worse, just two weeks after the Declaration was filed, Tyson expressly stated in its annual report that it had no supply concerns in any of its operating regions. To proclaim a dire supply crisis in court testimony—while simultaneously assuring shareholders of no looming supply issues—implicates the core concerns the SEC's anti-deception laws aim to prevent. Accordingly, we respectfully ask that the Commission investigate these apparent repeated violations of federal laws aimed at protecting investors and the integrity of the market.

Sincerely,

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORTH AMERICAN MEAT INSTITUTE,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California, KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and SUSAN FANELLI, in her official capacity as Acting Director of the California Department of Public Health,

Defendants.

Case No. 2:19-cv-08569-CAS (FFMx)

DECLARATION OF TODD NEFF

The Honorable Christina A. Snyder

Date: November 18, 2019
Time: 10:00 a.m.
Location: Courtroom 8D

Complaint filed: October 4, 2019

[Filed concurrently with Plaintiff's Notice of Motion and Motion for Preliminary Injunction]

I, Todd Neff, do declare and state the following under penalty of perjury:

1. I am Senior Vice President for Tyson Fresh Meats, Inc., a wholly owned subsidiary of Tyson Foods, Inc. (collectively, "Tyson"), where I have worked since 1986. I am providing this declaration, based upon my personal knowledge and experience, in support of the motion for preliminary injunction filed by the North American Meat Institute ("Meat Institute"), of which Tyson is a member.

2. Tyson is a protein-focused food company with more than 134,000 employees. Tyson was founded in 1931 during the Great Depression by John W. Tyson. Tyson is one of the largest producers and processors of pork in the United States. Tyson accounts for about 16% of hogs processed at federally-inspected plants in the United States. In 2018, the company processed approximately 21 million hogs for market, in nine processing facilities across the country. Tyson sells pork and prepared food products through all retail distribution channels, including club stores, grocery stores, and discount stores throughout the United States, including California.

3. My understanding is that California's Proposition 12 prohibits the sale in California of whole pork meat that a business owner or operator knows or should know is the meat of a breeding sow confined not in compliance with Proposition 12's requirements, or the meat of such a sow's immediate offspring. I also understand that, subject to statutory and regulatory exceptions, the confinement standards prohibit (i) confining a breeding sow in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely, or (ii) after December 31, 2021, confining a breeding pig with less than 24 square feet of usable floor space per pig. And that Proposition 12 also requires the California Department of Food and Agriculture and the California Department of Public Health to promulgate rules and regulations for the implementation of Proposition 12 by September 1, 2019. I understand that those state agencies have not yet promulgated any draft or final regulations necessary to implement Proposition 12.

4. Proposition 12 will cause severe harm to Tyson. Although 100 percent of the market hogs that Tyson procures are raised in open pens, not all of the independent farmers who contract with Tyson house breeding sows in compliance with Proposition 12's 24-square-feet-per-sow requirement. To come into compliance with Proposition 12, Tyson will have to (i) incur significant costs to ensure an adequate supply of hogs that are compliant with Proposition 12, and (ii) implement expensive changes to its distribution system to ensure that only compliant meat is sold in California.

5. Tyson relies heavily on independent farmers, who raise the hogs that Tyson processes at its pork plants and provide hogs to meet customer demand for Tyson's pork products. The vast majority of these independent farmers do not confine breeding sows in compliance with Proposition 12's confinement standards. Under current practices, after breeding sows are inseminated, they are housed in individual stalls until pregnancy has been confirmed. Thereafter, some pregnant sows are housed as part of a group in open pens ("group sow housing") but a majority remain in individual gestation crates throughout their pregnancy. The group sow housing systems provide approximately 16–20 square feet of floor space per sow.

6. Compliance with Proposition 12 will be extremely burdensome for the independent farmers who sell their hogs to Tyson. To come into compliance, Tyson's contract farmers will have to invest significant capital to reconfigure existing barns or construct new ones to meet Proposition 12's confinement standards. Independent farmers will need to obtain financing to implement these changes. In addition to refitting costs and ongoing operating expenses, Proposition 12's square-footage requirements will lower farm productivity by decreasing the number of sows that can be kept on a farm. Proposition 12 may also prohibit a settling period for early bred sows which may result in increased embryonic death loss.

7. To persuade partner farmers to change their operations, Tyson will have to pay higher prices for hogs bred in compliance with Proposition 12. Tyson's ability to recover those increased costs will be highly constrained by the basic economics of pork

processing. Tyson's expenses will increase on the entire weight of each Proposition 12 compliant hog it purchases, but Tyson will only be able to charge an increased price on finished products that are both destined for California and subject to Proposition 12.

8. Efforts to come into compliance must begin immediately, and it is not clear that Tyson will be able to meet all of Proposition 12's requirements in time. Tyson must negotiate with independent farmers regarding the terms of agreements to produce Proposition 12 compliant hogs. The farmers, in turn, would have to arrange financing and begin construction of compliant facilities.

9. Proposition 12 will also make Tyson's processing and distribution operations significantly more complicated and costly. Tyson will have to segregate compliant meat from non-compliant meat to ensure the latter is not shipped into California. This segregation will add additional cost and complexity, at every step of the processing and distribution process, from slaughter to final delivery. California hogs will have to be segregated from non-California hogs during slaughter and processing. This will require segregating live animals before slaughter, either in time (by coordinating deliveries from hundreds of independent farmers spread over thousands of square miles), or in space (by constructing costly additional pen space). It will also require segregating carcasses as they are processed, necessitating processing floor downtime to ensure that non-compliant product is clear of the floor before California-compliant hogs are processed.

10. Proposition 12 also will increase Tyson's distribution costs. Tyson's distribution and inventory-management systems will have to maintain duplicate item codes and SKUs (stock keeping units)—one for California, and one for every other state—for every one of the company's uncooked pork products. Tyson also must set aside additional space in its warehouses and distribution centers to store pork specifically destined for the California market, and ensure that its products will be similarly segregated by third-party distributors who are likely to charge Tyson a premium.

11. Finally, when Tyson ships product to customers who do business in other states and California, it will have to segregate California product in shipment, forcing the company to make inefficient use of limited pallet and truck space.

12. In the alternative, Proposition 12 could force Tyson to exit, in whole or in part, from the California market for whole pork products. In doing so, Tyson would be harmed by losing millions of dollars in annual sales it makes into California. The forced exit from a major market such as California further would harm Tyson's relationships with its customers for whole pork products. Tyson depends on brand recognition and consumer goodwill to win and retain customers. The disappearance of Tyson's pork products from store shelves in California would harm Tyson's relationships with its customers and undercut Tyson's goodwill in the California marketplace.

13. Without preliminary relief, therefore, Tyson will be forced to expend many millions of dollars and substantial time and effort ensuring compliance with Proposition 12 or suffer the harm of being forced out of the California market.

Executed on this 30th day of September 2019, in Dakota Dunes, South Dakota.

By: _____
Todd Neff

EXHIBIT 4

ACTIONS AND SUPPORT
Hormel Foods COVID-19 Response →

< COMPANY NEWS

Responsibility

Hormel Foods Company Information About California Proposition 12

OCTOBER 6, 2020

Hormel Foods has assessed Proposition 12 and, while it is still awaiting final clarity on specific details and rules, the company is preparing to fully comply

when the law goes into effect on January 1, 2022. The company's Applegate portfolio of products already complies with Proposition 12.

Hormel Foods has confirmed that it faces no risk of material losses from compliance with Proposition 12. While Proposition 12 will add complexity to our supply chain, including costs associated with compliance, California is an important market for Hormel Foods and we will continue to meet the needs of our consumers and customers throughout the state.

As a global branded food company, we have a broad range of products that we currently sell in the state of California – from *SKIPPY®* peanut butter to *WHOLLY®* guacamole. Proposition 12 impacts the company's fresh pork business. Hormel Foods is currently working with its supply chain to implement internal processes for segregation and SKU expansion. We are currently working through supply and logistics planning surrounding affected products, but expect a full range of Proposition 12-compliant products to be available in both retail and foodservice. We understand that California voters feel strongly about this issue and as a company that cares about its consumers, we will continue to work closely with our customers to ensure that our consumers in the state of California will still be able to purchase the Hormel Foods products that they depend upon.

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TERMS & CONDITIONS

PRIVACY POLICY

CALIFORNIA PRIVACY POLICY

CALIFORNIA COLLECTIONS NOTICE

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HORMEL FOODS 45-DAY SATISFACTION GUARANTEE

VISITOR POLICY

Communities

ALUMNI

SUPPLIERS

October 1, 2020

Via Electronic Mail

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street NE
Washington, DC 20549

Re: Tyson Foods Inc. – Shareholder Proposal submitted by The Humane Society of the United States

Ladies and Gentlemen:

This letter is submitted by Tyson Foods, Inc., a Delaware corporation (the "Company"), pursuant to Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), to notify the Securities and Exchange Commission (the "Commission") of the Company's intention to exclude from its proxy materials for its 2021 Annual Meeting of Shareholders (the "2021 Annual Meeting") a shareholder proposal (the "Proposal") and statement in support thereof submitted by The Humane Society of the United States (the "Proponent") on August 14, 2020. This letter is being submitted to the Commission within the time period required under Rule 14a-8(j).

Pursuant to Staff Legal Bulletin No. 14D (November 7, 2008), this letter and its exhibits are being submitted via email to *shareholderproposals@sec.gov*. A copy of this letter and its exhibits will also be sent to the Proponent.

The Company hereby respectfully requests that the staff of the Division of Corporation Finance (the "Staff") confirm that it will not recommend to the Commission that enforcement action be taken if the Company excludes the Proposal from its 2021 Annual Meeting proxy materials for the reasons set forth below.

THE PROPOSAL

The Proposal and the statement in support thereof read as follows:

Risk Disclosure Proposal

In 2018, California passed a law ("Proposition 12") requiring specific animal welfare standards for some pork produced or sold statewide.

In 2019, a Tyson Senior Vice President filed a declaration with the United States District Court for the Central District of California ("the declaration") testifying under penalty of perjury that Proposition 12 will "cause severe harm to Tyson" and "will increase Tyson's distribution costs," "add additional cost and complexity, at every step" and "make Tyson's processing and distribution operations significantly more complicated and costly." Tyson will have to "incur significant costs," "implement expensive changes" and "pay higher prices," the declaration claims, and Tyson's ability to recover some of "those increased costs will be highly constrained."

The declaration concludes: "Proposition 12 could force Tyson to exit, in whole or in part, from the California market for whole pork products. In doing so, Tyson would be harmed by losing millions of dollars in annual sales it makes into California. The forced exit from a major market such as California further would harm Tyson's relationships with its customers for whole pork products. Tyson depends on brand recognition and consumer goodwill to win and retain customers. The disappearance of Tyson's pork products from store shelves in California would harm Tyson's relationships with its customers . . . [and] Tyson will be forced to expend many millions of dollars and substantial time and effort ensuring compliance with Proposition 12 or suffer the harm of being forced out of the California market."

However, none of Tyson's 10-K or 10-Q reports mention Proposition 12, let alone disclose it as a risk to the company or its shareholders. Similarly, in those reports and on earnings calls, Tyson states that it has no supply-side issues with supplying pork to the markets in which it operates. These omissions and affirmative statements necessarily mean that, in fact, the company does not—despite the aforementioned declaration—face any material losses attributable to compliance or noncompliance with Proposition 12. After all, if the company did face the "severe harm" and losses described in the declaration, shareholders would have been entitled, under federal securities law, to a full risk disclosure from management.

RESOLVED: shareholders request that Tyson Foods confirm that the company faces no material losses from compliance or noncompliance with Proposition 12. If the company cannot so confirm, then shareholders request a risk analysis of any decision to comply or not to comply with Proposition 12, including the risks inherent in the company's failure to disclose such risks in its 10-K and 10-Q reports. These disclosures should be made within three months of the 2021 annual meeting, at reasonable cost, and omit proprietary information.

BASIS FOR EXCLUSION OF THE PROPOSAL

The Company believes that it may omit the Proposal from its proxy materials for the 2021 Annual Meeting under (i) Rule 14a-8(i)(4) because the Proposal relates to the redress of a personal claim or grievance against the Company and is meant to further a personal interest which is not shared by other shareholders at large and (ii) Rule 14a-8(i)(7) because the Proposal deals with a matter relating to the Company's ordinary business operations.

ANALYSIS

I. The Company may omit the Proposal pursuant to Rule 14a-8(i)(4) because it relates to the redress of a personal claim or grievance against the Company.

Under Rule 14a-8(i)(4), a proposal may be excluded if it (i) relates to the redress of a personal claim or grievance against the registrant or any other person or (ii) is designed to result in a benefit to the proponent or to further a personal interest, which other shareholders at large do not share. The Commission has stated that Rule 14a-8(i)(4) is designed to "insure that the security holder proposal process [is] not abused by proponents attempting to achieve personal ends that are not necessarily in the common interest of the issuer's shareholders generally." Exchange Act Release No 20091 (Aug. 16, 1983). Moreover, the Commission has noted that "[t]he cost and time involved in dealing with" a shareholder proposal involving a personal grievance or furthering a personal interest not shared by other shareholders is "a disservice to the interests of the issuer and its security holders at large." Exchange Act Release No. 19135 (Oct. 14, 1982).

As indicated in its supporting statement, the Proposal stems from a litigation matter pending in the District Court for the Central District of California. In October 2019, the North American Meat Institute, a trade organization of which the Company is a member, filed a complaint in the District Court for the Central District of California against certain California state government officials questioning the constitutionality of Proposition 12, a California initiative that imposes unprecedent regulations dictating the conditions of confinement for breeding sows and veal calves (the "Proposition 12 Litigation"). The Proponent filed a motion to intervene in the Proposition 12 Litigation. The motion was granted and the Proponent is now a

defendant in the Proposition 12 Litigation. A copy of the complaint is attached as **Exhibit A** hereto and a copy of the Proponent's motion to intervene and the order approving the motion are attached as **Exhibit B** hereto.

The Proponent is much more than simply an interested party in the Proposition 12 Litigation. Proponent injected itself as a defendant and is actively litigating the matter, including answering the complaint and asking the court for judgment in its favor on the pleadings (copies of both filings are attached as **Exhibits C** and **D**). Here, the Proponent impermissibly seeks to use the shareholder proposal process to gain advantage and further its personal litigation goals. To that end, the Proposal's supporting statement focuses almost entirely on a declaration filed by a Tyson representative in support of the Proposition 12 plaintiff's motion for a preliminary injunction ("Tyson Declaration"). The resolution portion of the Proposal requests that the Company address statements made in that Tyson Declaration. Statements made in litigation, however, should be addressed in the litigation rather than through the shareholder proposal process. The shareholder proposal process is intended to provide a method to voice issues common to shareholders generally, and not meant to be used as a mechanism to gain a strategic advantage in litigation. Specifically, the Proposal requests a confirmation from the Company that seeks to either undermine the Tyson Declaration or provide the Proponent with fodder that the Proponent will try to use to its advantage in the Proposition 12 Litigation. This is exactly the type of proposal that Rule 14a-8(i)(4) is meant to prevent. Company shareholders at large do not share the same interest as the Proponent in the Proposition 12 Litigation that underscores the Proposal. Any grievance the Proponent has concerning the Proposition 12 Litigation should be addressed with the court within the litigation itself.

The Proponent's Proposal is similar to other proposals for which the Staff concurred in exclusion under Rule 14a-8(i)(4) where "the facts presented by the issuer" demonstrate that "the proponent is using the proposal as a tactic designed to redress a personal grievance or further a personal interest." Exchange Act Release No. 19135 (Oct. 14, 1982). The Staff has repeatedly concurred in the exclusion of proposals that appeared to include a facially neutral resolution, but where the facts demonstrated that the proposal's true intent was to further a personal interest or redress a personal claim or grievance. *See, e.g., General Electric Company* (Feb. 28, 2020) (concurring in the exclusion of a proposal to hire an investment bank to explore the sale of the company submitted by a former employee who had a history of complaints against the company after the employment relationship was terminated); *State Street Corp.* (Jan. 5, 2007) (concurring in the exclusion of a proposal that the company separate the positions of chairman and CEO submitted by a former employee after that employee was ejected from the company's pervious annual meeting for disruptive conduct and engaged in a lengthy campaign of public harassment against the company and its CEO); *MGM Mirage* (Mar. 19, 2001) (concurring in the exclusion of a proposal that would require the company to adopt a written policy regarding political contributions and furnish a list of any of its political contributions submitted on behalf of a proponent who had filed a number of lawsuits against the company based on the company's

decisions to deny the proponent credit at the company's casino and, subsequently, to bar the proponent from the company's casino); *International Business Machines Corp.* (Jan. 31, 1995) (concurring in the exclusion of a proposal to institute an arbitration mechanism to settle customer complaints brought by a customer who had an ongoing complaint against the company in connection with the purchase of a software product).

By submitting this Proposal, the Proponent is using the shareholder process to both (i) redress a personal grievance that is being litigated in the District Court for the Central District of California and (ii) further a personal interest (gaining a strategic advantage in the Proposition 12 Litigation), which other shareholders at large do not share.

II. The Company may omit the Proposal pursuant to Rule 14a-8(i)(7) because it deals with matters related to the Company's ordinary business operations.

Rule 14a-8(i)(7) provides that a company may omit a shareholder proposal from its proxy materials if the proposal "deals with a matter relating to the company's ordinary business operations." According to the Commission, the term "ordinary business" in this context "refers to matters that are not necessarily 'ordinary' in the common meaning of the word," but instead "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018 (May 21, 1998). The Commission applies two central considerations for determining whether the ordinary business exclusion applies: (1) whether the subject matter of the proposal relates to a task so fundamental to management's ability to run a company on a day-to-day basis that it could not, as a practical matter, be subject to direct shareholder oversight; and (2) the degree to which the proposal seeks to micro-manage the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment. In seeking to (i) affect the Company's disclosures in its reporting and (ii) probe into the Company's legal compliance, both of which are squarely within management's exercise of business judgment, the Proposal implicates the two central considerations listed above.

A. Decisions Regarding Disclosures in a Company's SEC Filings are Ordinary Business Matters.

The Staff has consistently found that proposals seeking additional detailed disclosures or information around a company's disclosure strategy are excludable under Rule 14a-8(i)(7). *See, e.g., Eli Lilly & Co.* (Jan. 13, 2017) (concurring in the exclusion of a proposal to report all lawsuits the company has been involved in worldwide in the company's Form 10-K); *Union Pacific Corp.* (Jan. 28, 2005) (concurring in the exclusion of a proposal recommending that the board include revenue and on-time performance data from passenger operations in the annual report as relating to ordinary business matters (i.e., presentation of financial information));

Amerinst Insurance Group, Ltd. (Apr. 14, 2005) (concurring in the exclusion of a proposal requiring company to provide a full, complete and adequate disclosure of the accounting, each calendar quarter, of its line items and amounts of operating and management expenses as relating to ordinary business matters); *Otter Tail Corp.* (Jan. 13, 2004) (concurring in the exclusion of a proposal asking that the company prominently publish all statements referring to goodwill impairments in its annual financial reports); *Johnson Controls, Inc.* (Oct. 26, 1999) (concurring in the exclusion of a proposal recommending disclosure of "goodwill-net" in future consolidated statements of financial position as relating to ordinary business matters); *Baxter International, Inc.* (Feb. 20, 1992) (concurring in the exclusion of a proposal seeking disclosure regarding ongoing litigation as relating to ordinary business matters).

Here, as in the examples above, the Proposal relates to the Company's disclosure practices and strategies in its quarterly and annual reporting obligations to the Commission. The Proposal's supporting statement notes that "none of Tyson's 10-K or 10-Q reports mention Proposition 12" and then the Proposal goes on to request that the Company disclose the "risks inherent in the company's failure to disclose" risks related to compliance or non-compliance with Proposition 12 "in its 10-K and 10-Q reports." Taken as a whole, the Proposal is attempting to both (i) request that the Company disclose decisions and risks regarding Proposition 12 and (ii) seek an explanation from management as to its decision to not include certain disclosures in its quarterly and annual reports; neither of these matters is appropriate for a shareholder proposal as they both relate to ordinary business matters.

B. Decisions Regarding Compliance Matters are Ordinary Business Matters.

The Staff has repeatedly concurred in the exclusion of proposals relating to a company's legal compliance program on the grounds that a company's compliance with laws and regulations is a matter of ordinary business operations. *See, e.g., Corrections Corporation of America* (Mar. 18, 2013) (concurring in the exclusion of a proposal requesting that the board make disclosures concerning the company's potential conversion into a REIT and related compliance with IRS rules regarding REITs because the proposal relates to the company's legal compliance program); *Haliburton Company* (Mar. 10, 2006) (concurring in the exclusion of a proposal requesting a report addressing the potential impact of certain violations and investigations on the company's reputation and stock value and how the company intended to prevent further violations because the proposal dealt with the ordinary business of conducting a legal compliance program); *Refac* (Mar. 27, 2002) (concurring in the exclusion of a proposal requesting improved corporate disclosure practices, including disclosure of the number of shareholders of record of the company and the result of voting at the annual meeting because it dealt with ordinary business matters).

The Proposal requests that the Company "confirm" that it "faces no material losses from compliance or noncompliance with Proposition 12" and that it provide a risk analysis regarding

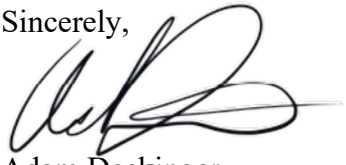
its decision on compliance or non-compliance with Proposition 12. The Proposal seeks oversight of judgment of the Company's compliance with laws as well as disclosure of the Company's decision-making process regarding matters of legal compliance. These are the very types of subject matters that cannot be made subject to direct shareholder oversight as they probe too deeply into matters of a complex nature upon which shareholders, as a group, are not in a position to make an informed judgment. The manner in which the Company decides to comply with various laws and regulations is, at its core, fundamental to management's ability to run the Company on a day-to-day basis and should not, as a practicable matter, be subject to stockholder oversight.

CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2021 Annual Meeting proxy materials.

We would be happy to provide you with any additional information and answer any questions that you might have regarding this subject. If we can be of any further assistance on this matter, please do not hesitate to call me at 479-200-4067 or email me at Adam.Deckinger@tyson.com.

Sincerely,



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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORTH AMERICAN MEAT INSTITUTE,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California, KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and SUSAN FANELLI, in her official capacity as Acting Director of the California Department of Public Health,

Defendants.

Case No. 2:19-cv-8569

COMPLAINT FOR DECLARATORY AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

Comes now Plaintiff North American Meat Institute ("Plaintiff" or the "Meat Institute"), by and through its attorneys, and states as follows:

INTRODUCTION AND SUMMARY

1. This is an action for declaratory, injunctive and other relief brought by Plaintiff against California's Attorney General, Xavier Becerra, the Secretary of the California Department of Food and Agriculture, Karen Ross, and the Acting Director of the California Department of Public Health, Susan Fanelli, in their official capacities. This case is about whether California can insulate its farmers from out-of-state competition and project its agricultural regulations beyond its borders in an effort to transform the interstate and international market for pork and veal by banning the sale of wholesome meats imported from other States and countries unless farmers in those States and countries comply with burdensome animal-confinement requirements that California voters adopted in Proposition 12. Under longstanding Supreme Court precedent, the answer to that question is no.

2. Plaintiff challenges Proposition 12's sales ban, California Health & Safety Code § 25990(b), as applied to pork and veal imported into California from other States and countries. Plaintiff seeks preliminary and permanent injunctive enjoining the implementation and enforcement of the sales ban, and a declaration that the sales ban is unlawful under federal law. Absent preliminary and permanent injunctive relief, Plaintiff's members will suffer irreparable harm.

3. Proposition 12 is a ballot initiative adopted by California voters in late 2018 that imposes unprecedented regulations dictating the conditions of confinement for breeding sows and veal calves produced throughout the country.

4. Proposition 12's sales ban violates the United States Constitution.

5. First, Proposition 12's sales ban violates the Commerce Clause by erecting a protectionist trade barrier whose purpose and effect are to shield California producers from out-of-state competition. The purpose of the sales ban is to "level the playing field" between California producers and out-of-state producers, and it does so by stripping away the competitive advantage out-of-state producers would have if they could sell their products in

California without complying with costly confinement requirements that apply directly to California producers. Moreover, as described below, Proposition 12 tilts the playing field markedly in favor of in-state producers and against out-of-state competitors.

6. Second, Proposition 12's sales ban violates the Commerce Clause and the federal structure of the United States Constitution by directly regulating interstate and foreign commerce and extraterritorial conduct, including the confinement conditions of animals located on farms outside of California. California lacks authority to regulate farming practices outside California, and it cannot condition access to its market as a means to control how farm animals are confined in other States and countries. That is precisely what Proposition 12's sales ban does—it projects California law worldwide by banning the in-state sale of wholesome veal and pork imported from other States and countries unless out-of-state producers comply with California's farm animal-confinement requirements outside of California.

7. Third, Proposition 12's sales ban violates the Commerce Clause by imposing substantial burdens on interstate commerce that are clearly excessive in relation to any legitimate local benefits. Because Proposition 12's confinement requirements for veal calves and breeding sows go well beyond current industry standards, the sales ban requires producers to spend millions of dollars building California-compliant facilities and/or slash output, or to abandon the California market. The resulting harms, which will be borne primarily by out-of-state businesses, are not justified by any legitimate local interest.

THE PARTIES

PLAINTIFF

8. The North American Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products. Meat Institute member companies account for more than 95% of the United States output of these products. The Meat Institute's purposes include, *inter alia*, advocacy on behalf of its members in connection with legislation and regulation affecting the meat industry. The Meat Institute's members sell pork and veal throughout California

and one or members has operations in Los Angeles, California.

9. The Meat Institute brings this suit on behalf of itself and its members. One or more of its members possesses standing to sue in its own right. Many of the Meat Institute's members own and raise hogs and veal calves in various States across the country and sell pork and veal to customers in California. Meat Institute members are regulated and harmed by Proposition 12's sales ban with respect to sales of pork and veal in California.

10. Proposition 12's regulation of the confinement of animals outside of California is of vital concern to the Meat Institute's members.

11. Neither the claims asserted nor the relief sought in the Complaint requires the participation of any individual member of the Meat Institute.

DEFENDANTS

12. Defendant Xavier Becerra is the Attorney General of the State of California. Defendant Becerra is responsible for the enforcement of Proposition 12 and is sued in his official capacity only.

13. Defendant Karen Ross is the Secretary of the California Department of Food and Agriculture, which is responsible for implementation of Proposition 12. Defendant Ross is sued in her official capacity only.

14. Defendant Susan Fanelli is the Acting Director of the California Department of Public Health, which is responsible for implementation of Proposition 12. Defendant Fanelli is sued in her official capacity only.

JURISDICTION AND VENUE

15. Subject matter jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343 because this case arises under the Constitution and laws of the United States.

16. The Court has authority to enjoin enforcement of Proposition 12's sales ban under 42 U.S.C. § 1983, and to grant preliminary and permanent injunctive relief and declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

17. Venue is proper in this Court under 28 U.S.C. § 1391(b). A substantial part of the events giving rise to the claims herein occurred within this judicial district because the

Meat Institute's members import pork and veal subject to Proposition 12 into this judicial district. Further, Defendants maintain their offices within this judicial district.

LEGAL AND FACTUAL BACKGROUND

A. Proposition 2 and Assembly Bill 1437

18. In November 2008, California voters enacted Proposition 2, a ballot initiative entitled the Prevention of Farm Animal Cruelty Act, to "prohibit the cruel confinement of farm animals."

19. Effective January 1, 2015, Proposition 2 prohibited California farmers from confining pregnant pigs, calves raised for veal, and egg-laying hens in a manner that prevented them from lying down, standing up, and fully extending their limbs, or from turning around freely. *See* Cal. Health & Safety Code § 25990 *et seq*.

20. California farmers were given six years to restructure their farming practices to come into compliance with the confinement standards of Proposition 2. *See* Prop. 2, Official Voter's Information Guide (reproducing proponents' argument that farmers would have "ample time" to comply).

21. In 2010, the California legislature enacted Assembly Bill 1437 ("AB 1437"), which extended Proposition 2's confinement requirements for egg-laying hens to out-of-state farmers by prohibiting the sale in California of a shelled egg for human consumption if it was the product of an egg-laying hen confined on a farm or place that was not in compliance with Proposition 2's confinement requirements. Cal. Health & Safety Code § 25996.

22. AB 1437's legislative history explained that "the intent of this legislation [was] to level the playing field so that in-state producers [we]re not disadvantaged" by competition from out-of-state farmers not subject to the same costly confinement requirements. *See* Cal. Assembly Comm. on Agriculture, Bill Analysis of AB 1437, at 1 (May 13, 2009).

B. Proposition 12

23. In November 2018, California voters enacted Proposition 12, a ballot initiative promoted by animal welfare groups.

24. Proposition 12's stated purpose is "to prevent animal cruelty by phasing out

extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California." Proposition 12, § 2.

25. Proposition 12 was not accompanied by any legislative findings and does not cite any evidence that meat from veal calves or breeding sows—or meat from the offspring of such sows—housed in a way that does not comply with Proposition 12 poses any increased risk of foodborne illness or other harms to California consumers.

26. Proposition 12's central prohibition applies only to California farmers. It provides that "[a] farm owner or operator within the state shall not knowingly cause any covered animal to be confined in a cruel manner." Health & Safety Code § 25990(a).

27. "Covered animal" means "any calf raised for veal, breeding pig, or egg-laying hen who is kept on a farm." *Id.* § 25991(f).

28. "Farm" means "the land, building, support facilities, and other equipment that are wholly or partially used for the commercial production of animals or animal products used for food or fiber." *Id.* § 25991(i).

29. The definition of "farm" excludes "live animal markets" and "establishments at which mandatory inspection is provided under the Federal Meat Inspection Act (21 U.S.C. Sec. 601 *et seq.*)." *Id.*

30. Under Proposition 12, "Confined in a cruel manner" means:

> (1) Confining a covered animal in a manner that prevents the animal from lying down, standing up, fully extending the animal's limbs, or turning around freely.
>
> (2) After December 31, 2019, confining a calf raised for veal with less than 43 square feet of usable floorspace per calf.
>
> (3) After December 31, 2021, confining a breeding pig with less than 24 square feet of usable floorspace per pig.

Id. § 25991(e)(1)–(3).

31. These confinement requirements are subject to a number of exceptions. They

do not apply during medical research, veterinary care, transportation, exhibitions, slaughter, or during temporary periods for animal husbandry. *Id.* § 25992(a)–(e), (g). And they do not apply to a breeding pig during the five-day period prior to its expected date of giving birth and during any day that it is nursing piglets. *Id.* § 25992(f).

32. Proposition 12 also includes a sales ban designed to extend the statute's housing requirements to out-of-state producers who sell products in California. As relevant here, the sales ban provides that "[a] business owner or operator shall not knowingly engage in the sale within the state" of any "(1) Whole veal meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner," or (2) "Whole pork meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal who was confined in a cruel manner." *Id.* § 25990(b)(1)–(2).

33. The term "sale" means "a commercial sale by a business that sells any item covered by this chapter, but does not include any sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act." *Id.* § 25991(o).

34. A "sale" is "deemed to occur at the location where the buyer takes physical possession of [a covered] item." *Id.* The sales ban applies to most uncooked pork and veal, but does not apply to "combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products." *Id.* § 25991(u)–(v).

35. Violation of the sales ban is a misdemeanor punishable by a fine of up to $1000 and up to 180 days' imprisonment in the county jail. *Id.* § 25993(b).

36. An action to enforce the sales ban is subject to a good-faith defense if the "business owner or operator relied in good faith upon a written certification by the supplier that the whole veal meat [or] whole pork meat … at issue was not derived from a covered animal who was confined in a cruel manner, or from the immediate offspring of a breeding pig who was confined in a cruel manner." *Id.* § 25993.1.

C. Legislative Analyst's Office Report For Proposition 12.

37. The Legislative Analyst's Office ("LAO") prepared a report on Proposition 12. *See* https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018.

38. The LAO observed that "agriculture is a major industry in California," (emphasis and capitalization omitted)," with "California farms produc[ing] more food—such as fruit, vegetables, nuts, meat, and eggs—than in any other state."

39. The LAO further observed that "Californians also buy food produced in other states, including most of the eggs and pork they eat." The LAO noted that the "sales ban applies to products from animals raised in California or out-of-state."

40. With regard to Proposition 12's fiscal impacts, the LAO concluded that "[t]his measure would likely result in an increase in prices for eggs, pork, and veal for two reasons." First, it "would result in many farmers having to remodel or build new housing for animals—such as by installing cage-free housing for hens. In some cases, this housing also could be more expensive to run on an ongoing basis. Much of these increased costs are likely to be passed through to consumers who purchase the products."

41. "Second, it could take several years for enough farmers in California and other states to change their housing systems to meet the measure's requirements. If in the future farmers cannot produce enough eggs, pork, and veal to meet the demand in California, these shortfalls would lead to an increase in prices until farmers can meet demand."

D. Implementing Regulations

42. Proposition 12 requires the California Department of Food and Agriculture ("CDFA") and the State Department of Public Health to promulgate implementing rules and regulations by September 1, 2019. Health & Safety Code § 25993. The Meat Institute submitted comments explaining, among other things, the sales ban's constitutional infirmity and the many harms it will cause to pork and veal producers and consumers.

43. On September 23, 2019, CDFA informed the Meat Institute that it planned to issue a Notice of Proposed Action by the end of 2019, and that regulations implementing Proposition 12 would be finalized between 6 to 12 months thereafter.

CLAIMS FOR RELIEF

FIRST CLAIM

(Discrimination in Violation of the Commerce Clause)

44. The prior paragraphs of the Complaint are incorporated by reference.

45. Proposition 12's sales ban violates the Commerce Clause of the United States Constitution by discriminating against out-of-state producers, distributers and sellers of pork and veal.

46. Proposition 12's sales ban violates the Commerce Clause because its purpose and effect are to protect in-state California producers from out-of-state competitors.

47. Proposition 12's sales ban confers a benefit on in-state producers by seeking to level the playing field. It imposes regulatory burdens on out-of-state producers so that in-state producers are not disadvantaged by competition from out-of-state producers who are not subject to Proposition 2's confinement requirements. Cal. Assembly Comm. on Agriculture, Bill Analysis of AB 1437, at 1 (May 13, 2009).

48. The intended and inevitable effect of Proposition 12's sales ban is to protect in-state California producers from bearing costs not borne by out-of-state competitors. It does so by subjecting those out-of-state competitors to Proposition 12's confinement standards as a condition of selling pork and veal in California.

49. Proposition 12's sales ban operates as an impermissible protectionist trade barrier, blocking the flow of goods in interstate commerce unless out-of-state producers comply with California's regulations. The sales ban neutralizes the cost advantage out-of-state producers would have if they could sell their products in California without complying with the confinement requirements that California imposes on its own producers.

50. Proposition 12's sales ban imposes significant burdens on the Meat Institute's members in connection with their conduct of interstate commerce.

51. Proposition 12's sales ban is discriminatory in two other respects because it tilts the playing field markedly in favor of in-state producers.

52. First, if Proposition 12's prohibition on confinement that prevents an animal

from "turning around freely" (the "turnaround" standard) is construed to take immediate effect, then the sales ban would disadvantage out-of-state producers, who were given no lead time to change their operations to come into compliance. In contrast, in-state producers were given more than six years' lead time to come into compliance with the "turnaround" standard when it was first imposed on California farmers by Proposition 2. Specifically, Proposition 2 was adopted in November 2008 but did not become effective until January 2015. *See* Prop. 2, Official Voter's Information Guide (reproducing proponents' argument that farmers would have "ample time" to comply).

53. Second, if Proposition 12's confinement restrictions do not apply to calves that are "culled" from California dairy farms for slaughter and marketed as "bob" veal (on the ground that such calves are not "raised for veal" by California dairy farmers), then the sales ban would give California bob veal producers a competitive advantage over out-of-state milk-fed veal producers.

54. Proposition 12's sales ban violates the Commerce Clause because California cannot carry its burden of demonstrating, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.

55. California cannot justify the sales ban as a means of ensuring regulatory parity for in-state and out-of-state producers whose products are sold in California.

56. Nor does California have a valid interest in protecting its producers from the competitive disadvantage its confinement requirements create by subjecting out-of-state competitors to those same standards.

57. Further, California has no legitimate local interest in how farm animals are housed in other States and countries. California has no authority to regulate the conditions under which farm animals are housed outside its borders.

58. California also cannot justify the sales ban as a consumer health and safety measure. No scientific evidence establishes a causal link between Proposition 12's confinement requirements and a diminished risk of foodborne illness from pork or veal. This is

especially true regarding Proposition 12's ban on the sale of "the meat of immediate offspring of a covered animal who was confined in a cruel manner." Health & Safety Code § 25990(b)(2). There is no connection between a sow's confinement conditions and any risk of foodborne illness from the meat of her offspring. Piglets spend only a few weeks with the sow while nursing, during which time Proposition 12's confinement requirements do not apply. *Id* § 25992(f) (providing that Proposition 12's requirements do not apply "[t]o a breeding pig during the five-day period prior to the breeding pig's expected date of giving birth, and any day that the breeding pig is nursing piglets").

59. Moreover, there is already an extensive scheme of federal regulation in place to ensure meat safety. The Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq*., requires the Department of Agriculture to inspect all cattle and swine slaughtered and processed for human consumption, and "establishes an elaborate system of inspecting live animals and carcasses in order to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455–56 (2012) (internal quotation marks and alterations omitted).

60. Attempts to justify Proposition 12's sales ban as a health and safety measure are further undermined by the exceptions to the ban. The sales ban applies to "whole pork meat" and "whole veal meat," Health & Safety Code § 25990(b)(1)–(2), which are defined to exclude "combination food products, including soups, sandwiches, pizzas, hotdogs, or similar processed or prepared food products," id. § 25991(u)–(v). In addition, the sales ban exempts "any sale undertaken at an establishment at which mandatory inspection is provided under the Federal Meat Inspection Act." *Id*. § 25991(o); *see also id*. § 25991(i) (defining "farm" to exclude such establishments). The confinement requirements also do not apply to live animal markets, *id*. § 25991(i); during medical research, veterinary care, transportation, exhibition, or slaughter, *id*. § 25992(a)–(e); during temporary periods for animal husbandry purposes, subject to specified caps, *id*. § 25992(g); or to a breeding pig during the five-day period prior to its expected date of giving birth and any day it is nursing piglets, *id*. § 25992(f). These numerous exceptions belie any notion that the prohibited sales pose a

genuine danger to public health or safety.

61. California also has nondiscriminatory alternatives to Proposition 12's sales ban. If it is concerned that the prohibited sales pose a health and safety risk not already adequately addressed by the federal inspection scheme, it can subject whole pork and veal meat imported into the State to additional inspection at the point of sale to consumers. *See, e.g.*, Health & Safety Code § 114035. And it can promote consumer education to help ensure the safe handling and cooking of raw meats. What it cannot do is ban interstate trade in pork and veal based on unfounded assertions that farming practices in other States and countries pose speculative risks to California consumers' health and safety.

62. Defendants are purporting to act within the scope of their authority under State law in enforcing and implementing Proposition 12.

63. Defendants are liable to the Meat Institute for proper redress under 42 U.S.C. § 1983 because Proposition 12's sales ban deprives the Meat Institute's members of the rights, privileges, and immunities secured by the United States Constitution.

64. The Meat Institute has no adequate remedy at law.

SECOND CLAIM

(Impermissible Extraterritorial Regulation)

65. The prior paragraphs of the Complaint are incorporated by reference.

66. Proposition 12's sales ban violates the constitutional prohibition on extraterritorial state regulation.

67. The prohibition on extraterritorial regulation stems from both the Commerce Clause and the federal structure of the Constitution. Under the Commerce Clause and the federal structure of the Constitution, States and localities may not attach restrictions to imports in order to control commerce in other States and countries because doing so would extend their police power beyond their jurisdictional bounds.

68. Proposition 12 violates that restriction because it bans the sale of imported products based on the conditions under which those products were produced in other states and countries. Proposition 12 dictates farming practices in other States by conditioning the

sale of imported pork and veal in California on adherence to California's confinement requirements upon pain of criminal or civil penalty.

69. California may not regulate out-of-state farming practices by banning the sale in California of wholesome meats imported from other States unless the producer complied with California's confinement regulations.

70. California cannot use the in-state sale of a product as a jurisdictional "hook" to regulate upstream commercial practices that occur in other States simply because California finds those practices objectionable.

71. The unconstitutionality of Proposition 12's sales ban is further confirmed because if every State enacted a similar sales ban, producers would be forced to choose between complying with the most restrictive confinement regulation, segregating their operations to serve different States, or abandoning certain markets altogether.

72. Proposition 12's sales ban, on its face and in its practical effect, regulates the channels of interstate and foreign commerce and the use of these channels of interstate and foreign commerce.

73. By regulating interstate and foreign commerce that occurs wholly outside of California, Proposition 12's sales ban violates the Commerce Clause of the United States Constitution and the principles of interstate federalism embodied in the federal structure of the United States Constitution.

74. Defendants are purporting to act within the scope of their authority under State law in enforcing and implementing Proposition 12.

75. Defendants are liable to the Meat Institute for proper redress under 42 U.S.C. § 1983 because Proposition 12's sales ban deprives the Meat Institute's members of the rights, privileges, and immunities secured by the United States Constitution.

76. The Meat Institute has no adequate remedy at law.

THIRD CLAIM

(Excessive Burden in Violation of the Commerce Clause)

77. The prior paragraphs of the Complaint are incorporated by reference.

78. Proposition 12's sales ban violates the Commerce Clause by imposing unreasonable burdens on interstate and foreign commerce that are clearly excessive when measured against any legitimate local benefits.

79. Proposition 12's sales ban substantially burdens the interstate and international market for veal and pork. Compliance with Proposition 12's confinement requirements would require extensive and costly changes to current industry practices regarding the production, processing and distribution of veal and pork.

80. Plaintiff's members will be required to restructure their facilities to comply with Proposition 12's confinement standards at great cost. Further, Plaintiff's members will be required to modify their own farms and to ensure that the facilities of the farmers upon whom they rely for pork and veal comply with Proposition 12's confinement standards.

81. The sales ban will cost the veal and pork industries hundreds of millions of dollars, and compliance would require independent farmers, packers, and distributors to restructure operations from coast to coast.

82. To compensate producers for their increased costs, processers and distributors will have to pay a premium for Proposition 12-compliant animals, and those that do not wish to follow Proposition 12 on a nationwide basis will have to reorganize slaughter, packing, and distribution operations to segregate animals and products that comply with the law from those that do not.

83. Proposition 12's sales ban imposes a substantial barrier to interstate commerce and may close off the California market to a large swath of integrated producers and the independent farmers upon which they rely to provide whole pork to their customers in California.

84. Proposition 12's sales ban presents out-of-state veal and pork producers with

a Hobson's choice: either comply with Proposition 12's confinement requirements by making costly alterations to their facilities or slashing output, or be forced from the California market. Either way, the result will be less veal and pork, produced, processed, and distributed less efficiently, to fewer customers, at higher prices.

85. The burdens impose by Proposition 12's sales ban clearly exceed any legitimate local benefit as the sales ban is not justified by any valid public welfare, consumer protection or pro-competitive purpose.

86. First, California has no legitimate local interest in regulating farming conditions in other States and countries, or in preventing California consumers from buying imported products that are produced under conditions California disfavors.

87. Second, the sales ban's purported role in preventing foodborne illness is illusory as there is no scientific causal link between Proposition 12's confinement requirements and the risk of foodborne illness from whole pork or veal meat imported into California

88. Defendants are purporting to act within the scope of their authority under State law in enforcing and implementing Proposition 12's sales ban.

89. Defendants are liable to the Meat Institute for proper redress under 42 U.S.C. § 1983 because Proposition 12's sales ban deprives Plaintiff's members of the rights, privileges, and immunities secured by the United States Constitution.

90. The Meat Institute has no adequate remedy at law.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests the following relief:

A. A declaratory judgment, pursuant to 28 U.S.C. § 2201, that Proposition 12's sales ban, as applied to veal and pork from outside California, violates the United States Constitution and is unenforceable;

B. A preliminary and permanent injunction enjoining the Defendants from implementing or enforcing the sales ban as applied to veal or pork from outside of California;

C. An order awarding Plaintiff its costs and attorneys' fees pursuant to 42 U.S.C.

§ 1988; and

D. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

DATED: October 4, 2019

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/s/ Sean A. Commons

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORTH AMERICAN MEAT INSTITUTE,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California, KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and SONIA ANGELL, in her official capacity as Acting Director of the California Department of Public Health,

Defendants.

Case No. 2:19-cv-08569-CAS (FFMx)

PROPOSED DEFENDANT-INTERVENORS' MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE

The Honorable Christina A. Snyder
Date: November 18, 2019
Time: 10:00 a.m.
Location: Courtroom 8D

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, The Humane Society of the United States ("HSUS"), the Animal Legal Defense Fund ("ALDF"), Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Compassion Over Killing ("COK") (collectively "Proposed Defendant-Intervenors") respectfully request leave to intervene in the above-captioned matter, a constitutional challenge to a California animal cruelty law which Proposed Defendant-Intervenors were instrumental in passing and which, if overturned, will cause them and their members immediate and certain harm to their particular organizational interests in preventing animal cruelty.

Proposed Defendant-Intervenors will be directly affected by the outcome of this case. They can also provide critical and unique legal and factual perspectives on the matter, as many have done in prior similar matters.[1] Accordingly, as described more fully below, Proposed Defendant-Intervenors satisfy the standards for both intervention as a matter of right and permissive intervention, and request that their intervention be granted.

II. BACKGROUND

A. Passage of Proposition 12.

On November 6, 2018, California Proposition 12, codified as the Prevention of Cruelty to Farm Animals Act ("Proposition 12" or "the Act"), was on the ballot in California as an initiated state statute and was overwhelmingly approved. Cal.

[1] For example, Proposed Defendant-Intervenor HSUS has previously participated in many other federal and state cases that challenged animal protection laws in California on Constitutional grounds, in cooperation with and without duplicating the State defendants' efforts. *See, e.g.*, *National Meat Ass'n v. Harris, et al.,* No. 1:08-cv-01963 (E.D. Cal.); *JS West Milling Co., Inc. v. California*, No. 10-04225 (Cal. Sup. Ct. Fresno County); *Cramer v. Brown, et al.*, No. 2:12-cv-03130 (C.D. Cal.); *Asian Am. Rights Comm. v. Brown et al.*, No. 12-517723 (Cal. Sup. Ct., San Francisco County); *Nat'l Audubon Soc'y, et al. v. Gray Davis, et al.*, No. 3:98-cv-04610 (N.D. Cal.); *Mary Mendibourne, et al. v. John McCamman, et al.*, No. 46349 (Cal. Sup. Ct. Lassen County); *Chinatown Neighborhood Assoc. et al., v. Edmund Brown, et al.*, No. 4:12-cv-03759 (N.D. Cal.); *State of Missouri, et al. v. Kamala D. Harris, et al.*, No. 2:14-cv-00341 (E.D. Cal.).

Health & Safety Code §§ 25990-25994. The Act bans the confinement of pregnant pigs, calves raised for veal, and egg-laying hens in a manner that does not allow them to turn around freely, lie down, stand up, or fully extend their limbs, and prohibits the sale of products from animals raised in this manner. *Id*. The Act enhances the welfare of animals otherwise subjected to extreme confinement for their entire lives by prohibiting the production and sale of food products from animals confined in a cruel manner, as defined by the Act. *Id.* § 25991. The Act's effective dates are staggered, with prohibitions on the confinement of veal calves and egg-laying hens beginning in 2020 and restrictions on the confinement of breeding pigs and additional standards for egg-laying hens beginning in 2022. *Id.* § 25991.

The express purpose of Proposition 12 is to prevent cruelty associated with extreme confinement practices. The Act states:

> The purpose of this Act is to prevent animal cruelty by phasing out extreme methods of farm animal confinement, which also threaten the health and safety of California consumers, and increase the risk of foodborne illness and associated negative fiscal impacts on the State of California.

2018 Cal. Legis. Serv. Prop. 12 SEC. 2.

B. <u>The Interests of the Proposed Defendant-Intervenors.</u>

Proposed Defendant-Intervenor HSUS is a national nonprofit animal protection organization headquartered in Washington, D.C., with millions of members and constituents, including over one million members and constituents in California. Declaration of Josh Balk ("Balk Decl.") ¶ 3. The HSUS actively advocates against inhumane practices that harm farm animals, including veal calves, breeding pigs, and egg-laying hens, *id.* ¶ 4, and HSUS' Farm Animal Protection campaign works to inform its members and the public about the threats caused by such practices. *Id*. To advance these goals, HSUS was the primary author and a chief proponent of Proposition 12. *Id*. ¶ 6.

Proposed Defendant-Intervenor ALDF was a registered supporter and active proponent of Proposition 12. Declaration of Stephen Wells ("Wells Decl.") ¶¶ 7-8. ALDF is a national nonprofit animal protection organization founded in 1979 that uses education, public outreach, investigations, legislation, and litigation to protect the lives and advance the interests of animals, including those raised for food. *Id.* ¶ 2. Headquartered in Cotati, California, ALDF is supported by hundreds of dedicated volunteer attorneys and more than 200,000 members and supporters nationwide, including approximately 35,000 in California. *Id.* ALDF files high-impact lawsuits to protect animals from harm, provides free legal assistance and training to prosecutors in their fight against animal cruelty, supports animal protection legislation, and provides resources and opportunities to law students and professionals to advance the field of animal law. *Id.* For decades, ALDF has been actively involved in matters pertaining to the protection and humane treatment of animals used for meat, eggs, and dairy products in California. *Id.* ¶¶ 3-6. ALDF has directed substantial time and organizational resources towards this goal, up to and including its significant devotion of resources and staff time to supporting Proposition 12. *Id.* ¶¶ 7-8.

Proposed Defendant-Intervenor Animal Equality is an international nonprofit animal protection organization with its U.S. headquarters in Los Angeles, California. Declaration of Sarah Hanneken ("Hanneken Decl.") ¶ 2. The organization has over 1,700 members and supporters nationwide, roughly one-third of whom reside in California. *Id.* Animal Equality's mission is to end cruelty to farmed animals. *Id.* ¶ 3. To that end, Animal Equality expends significant resources to educate consumers about the inhumane treatment of animals inside industrial agriculture operations and to urge governments and corporations to implement meaningful protections for these animals—particularly in regard to the conditions in which they are confined. *Id.* ¶ 4. Recognizing that cruel conditions of confinement are especially widespread in the egg, pork, and veal industries, Animal

Equality has dedicated special attention to legal and political reform in these sectors. *Id.* ¶ 5. Through petitions, social media, films, newsletters, undercover investigations, email alerts, and legal advocacy, Animal Equality mobilizes its supporters to manifest a world in which all animals are respected and protected. *Id.* ¶ 3.

Proposed Defendant-Intervenor The Humane League is a nonprofit animal protection organization organized under the laws of Pennsylvania, with over 275,000 supporters across the United States, including over 30,000 supporters in California. Declaration of Wendy Watts ("Watts Decl.") ¶ 2. The Humane League exists to end the abuse of animals raised for food through institutional and individual change. *See id.* ¶ 3. Institutionally, The Humane League works to influence the world's largest food companies to create and implement animal welfare policies that abolish the worst forms of abuse and reduce the suffering of billions of animals. *Id.* ¶ 3. The Humane League also works to enact laws that ban the confinement and inhumane treatment of farm animals. *Id.* Individually, The Humane League educates its supporters, consumers, and the general public about the impact of farming practices on animal welfare, individual and public health, and the environment. *Id.*

Proposed Defendant-Intervenor Farm Sanctuary is a national non-profit corporation organized pursuant to the laws of the state of Delaware, with its principal place of business in Watkins Glen, New York. Declaration of Gene Baur ("Baur Decl.") ¶ 3. Farm Sanctuary is a farm animal rescue and protection organization dedicated to ending the suffering of animals raised for food. *Id.* ¶ 4. The organization has over 800,000 nationwide members and supporters, including over 38,000 California residents. *Id.* ¶ 3. It also operates a farm animal sanctuary in southern California. Farm Sanctuary invests considerable resources advocating for farm animal health and welfare, educating its members, visitors, and the public about farm animal issues, and rescuing farm animals from cruelty. *Id.* ¶ 5. Farm

Sanctuary has committed resources to farm animal protection ballot initiatives, including California's Proposition 12. *Id.* In addition to gathering signatures to qualify Proposition 12 for the ballot and urging its supporters to help gather signatures, Farm Sanctuary committed human and financial resources to producing videos encouraging voters to support Proposition 12, which were promoted across Farm Sanctuary's social media platforms. *Id.* Farm Sanctuary also committed resources to educating its constituents and members of the public about Proposition 12 through e-mail communications and social media posts encouraging support of Proposition 12. *Id.*

Proposed Defendant-Intervenor Compassion in World Farming USA is a national non-profit corporation organized pursuant to the laws of Georgia with its principal place of business in Decatur, Georgia. Declaration of Cynthia von Schlichten ("von Schlichten Decl.") ¶ 2. Compassion in World Farming USA is an animal protection organization dedicated to ending factory farming and the most inhumane farming practices. *Id.* ¶ 3. The organization has over 200,000 members and supporters, including over 10,000 California residents. *Id.* ¶ 2. Compassion in World Farming USA works to instill and promote more humane farming practices through corporate engagement and by providing public awareness on legislative, regulatory, and industry issues relevant to its mission. *Id.* ¶ 3.

Proposed Defendant-Intervenor Compassion Over Killing ("COK") is a nonprofit organization incorporated in Delaware with its principal place of business in the District of Columbia and an office in Los Angeles, California. Declaration of Will Lowrey ("Lowrey Decl.") ¶ 3. Founded in 1995, COK's organizational mission is to end cruelty to farmed animals and promote vegan eating as a way to build a kinder world for all creatures, human and nonhuman. *Id.* ¶ 5. In furtherance of that goal, COK advocates against government policies that encourage or allow cruelty to farmed animals; conducts public education on the realities of industrialized animal agriculture; and coordinates public campaigns to

encourage the adoption of vegan diets. *Id.* ¶ 6. COK has more than 55,000 members and supporters across the United States, including in California. *Id.* ¶ 4.

In furtherance of these organizations' interests, Proposed Defendant-Intervenors expended time and resources toward the passage of Proposition 12, a measure of which Proposed Defendant-Intervenor HSUS was the primary author. Balk Decl. at ¶ 6. Proposed Defendant-Intervenors invested substantial organizational resources into drafting the Act, collecting ballot initiative signatures, and mobilizing support for its passages. *See, e.g.*, Balk Decl. ¶ 6; Wells Decl. ¶¶ 7-8; Hanneken Decl. ¶¶ 6-7; Watts Decl. ¶ 4; Baur Decl. ¶ 5; von Schlichten Decl. ¶¶ 4-5; Lowrey Decl. ¶¶ 7-9. Invalidation of Proposition 12 would impede these organizations' efforts to support state laws banning the sale of other cruelly produced goods, including shark fins, foie gras, fur, and horse meat—all of which HSUS and many of the other Proposed Defendant-Intervenors have repeatedly defended in public campaigns and court. Balk Decl. ¶ 6; Wells Decl. ¶¶ 3-5; Hanneken Decl. ¶¶ 3-5; Watts Decl. ¶ 3. A loss here for California would require Proposed Defendant-Intervenors to expend considerable financial and human resources promoting substitute legislation or administrative action at the federal level to address these concerns. Balk Decl. ¶ 8; Wells Decl. ¶ 10; Hanneken Decl. ¶ 8; Watts Decl. ¶ 6; Baur Decl. ¶ 6; von Schlichten Decl. ¶ 6; Lowrey Decl. ¶ 10. Proposed Defendant-Intervenors thus have direct and substantial interests in the outcome of this litigation.

Further, Proposed Defendant-Intervenors' interests in the subject matter of this litigation may not be adequately represented by California, which represents all stakeholders, including the agriculture industry. That is, while Proposed Defendant-Intervenors' entry into the case will not in any way enlarge the issues before the Court, Proposed Defendant-Intervenors will likely make arguments that California will not make. California must balance competing political and economic constraints in defending the law. For example, California may not want

to argue that selling veal from calves raised in veal crates with less than 43 square feet of floor space is inherently cruel, since the State is allowing the sale of those products until the end of this year. *See* Cal. Health & Safety Code § 25991. By contrast, Proposed Defendant-Intervenors have supported laws like Proposition 12 and can bring a perspective on those laws that the State may not have. Proposed Defendant-Intervenors also can assist the Court in its analysis because they have extensive experience, not shared by California, regarding the right of states to restrict the sale of cruelly produced goods and in preventing cruelty to pregnant pigs, calves raised for veal, and egg-laying hens. As advocates for farm animals for several decades, Proposed Defendant-Intervenors will also bring a wealth of expertise with respect to animal cruelty legislation like Prop 12, and also have a wealth of knowledge on animal welfare and pig, calf, and hen welfare issues that the State may not possess. *See, e.g.*, Balk Decl. ¶¶ 4-5; Wells Decl. ¶¶ 2, 11; Hanneken Decl. ¶¶ 3-5; Watts Decl. ¶ 3; Baur Decl. ¶ 4; von Schlichten Decl. ¶ 3; Lowrey Decl. ¶¶ 5-6. Thus, Proposed Defendant-Intervenors will bring important facts and unique legal arguments to the Court in this litigation.

III. ARGUMENT

A. Proposed Defendant-Intervenors Are Entitled to Intervene As a Matter of Right.

Proposed Defendant-Intervenors easily meet the standard for intervention as of right. In the Ninth Circuit, an application for intervention under Rule 24(a)(2) is governed by a four-part test:

> (1) [T]he motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

California ex rel. Lockyer v. United States, 450 F.3d 436, 440-41 (9th Cir. 2006)

(quoting *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)). The requirements of Rule 24 are to be "construed broadly in favor of intervention." *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996).

1. The Motion to Intervene is Timely.

"In determining whether a motion for intervention is timely, we consider three factors: '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.'" *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986) (quoting *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997)). Proposed Defendant-Intervenors easily satisfy the "timeliness" factor, as the motion to intervene was filed within one month after Plaintiff commenced this action and before the State Defendants have filed a responsive pleading, and before any substantive decisions have been rendered. Upon learning of the lawsuit, Proposed Defendant-Intervenors acted as quickly as possible to seek party status so that they might protect their substantial interests in this matter. In order to conserve the Court's and the parties' resources, Proposed Defendant-Intervenor HSUS then assembled a coalition of six other groups to file together and avoid multiple intervention motions. Moreover, there is clearly no prejudice to any party by granting Proposed Defendant-Intervenors' motion to intervene at this early stage in the proceedings. Plaintiff filed this lawsuit and request for injunction on October 4, 2019. No hearing has been held on the injunctive relief, and the State Defendants' response to the request was filed just one day ago on October 28, 2019.[2]

[2] A hearing on Plaintiff's motion for preliminary injunction has been set for November 18, 2019 at 10:00 AM before this Court. *See* Dkt. No. 15. The State Defendants' responsive pleading is due November 27, 2019 pursuant to an order granting a stipulated extension. *See* Dkt. No. 22.

2. Proposed Defendant-Intervenors Have a Significantly Protectable Interest in Defending Proposition 12.

Proposed Defendant-Intervenors also have a "significantly protectable interest relating to the . . . transaction which is the subject of the action." *California ex rel. Lockyer*, 450 F.3d 440-41, *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d 1173. The interest requirement "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process," *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (quotation omitted), and applicants need not demonstrate a "specific legal or equitable interest" in the suit. *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002). Instead, a proposed intervenor need only show: "(1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims," *i.e.*, that the "resolution of the plaintiff's claims actually will affect the applicant." *Id.* (quotation omitted).

Here, Proposed Defendant-Intervenors undeniably have a "significant protectable interest" in upholding Proposition 12 because Proposed Defendant-Intervenors were architects, supporters, and chief proponents of the initiative. *See* Balk Decl. ¶¶ 7-8; Wells Decl. ¶¶ 7-9; Hanneken Decl. ¶¶ 6-8; Watts Decl. ¶¶ 4-6; Baur Decl. ¶¶ 5-6; von Schlichten Decl. ¶¶ 4-6; Lowrey Decl. ¶¶ 7-10. As the Ninth Circuit and other federal courts have repeatedly held, proponents and active supporters of legislative measures, like Proposed Defendant-Intervenors here, have a sufficient "protectable interest" to intervene to defend those measures. Specifically, a "public interest group [i]s entitled as a matter of right to intervene in an action challenging the legality of a measure which it has supported." *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983); *see also Prete v. Bradbury*, 438 F.3d 949, 955 (9th Cir. 2006) (same; "main supporter" of legislation); *Wash. State Bldg. & Const. Trades Council, AFL-CIO v. Spellman*,

684 F.3d 627, 630 (9th Cir. 1982) ("public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a)"); *Vivid Entertainment, LLC v. Fielding*, 2013 WL 1628704, at *4 (C.D.Cal. 2013). There is no reason to depart from this Circuit's precedent here.

Proposed Defendant-Intervenors were undoubtedly the "main supporter[s] and chief proponents of the law." *Prete*, 438 F.3d at 955. They directly assisted in both drafting the language and promoting passage of the initiative, and expended substantial resources to assist in its passage. *See* Balk Decl. ¶ 6; Wells Decl. ¶¶ 7-9; Hanneken Decl. ¶¶ 6-8; Watts Decl. ¶¶ 4-5; Baur Decl. ¶ 5; von Schlichten Decl. ¶¶ 4-5; Lowrey Decl. ¶¶ 7-9. Proposed Defendant-Intervenors were all active supporters of Proposition 12 in the months leading up to and well after the passage of the Act. *Id*.

3. Proposed Defendant-Intervenors' Interests Will Be Impaired If Plaintiff Succeeds in Invalidating Section 25990(b).

Proposed Defendant-Intervenors also satisfy the intervention requirements because the "disposition of the action may as a practical matter impair or impede" Proposed Defendant-Intervenors' "ability to protect [their] interest." *Wetlands Action Network*, 222 F.3d at 1113; Fed. R. Civ. P. 24(a). Rule 24(a) does not require that the applicant's interest be actually or legally impaired, only that the applicant "be substantially affected in a practical sense." *Southwest Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2011) (quotation omitted). Here, Plaintiff's lawsuit threatens to undo the results of Proposed Defendant-Intervenors' extensive and costly advocacy efforts with respect to the passage of Proposition 12.

Section 25990(b) is a critical component of the Proposed Defendant-Intervenors' broader campaign to eradicate extreme confinement practices. Protecting farm animals is central to each of their missions, and in furtherance of these missions the Proposed Defendant-Intervenors spent significant time and

resources to secure passage of Proposition 12. *See, e.g.*, Balk Decl. ¶¶ 4-6; Wells Decl. ¶¶ 7-9; Hanneken Decl. ¶¶ 3-7; Watts Decl. ¶¶ 3-5; Baur Decl. ¶¶ 4-5; von Schlichten Decl. ¶ ¶3-5; Lowrey Decl. ¶¶ 5-9. If the Court enjoins section 25990(b), extensive advocacy, legal, staffing, and monetary commitments to the passage and preservation of Proposition 12 would be nullified. *See, e.g.*, Balk Decl. ¶¶ 7-8; Wells Decl., ¶¶ 7-10; Hanneken Decl. ¶ 8; Watts Decl. ¶ 6; Baur Decl. ¶ 6; von Schlichten Decl. ¶ 6; Lowrey Decl. ¶ 10; *see also Sagebrush Rebellion*, 713 F.2d at 528 (finding there was "no serious dispute" that applicant's interest might be impaired if proponents of measure were not allowed to intervene in challenge to that measure); *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (finding impairment where action could lead to reversal of administrative decision actively supported by applicants for intervention).

If the Court entered the requested injunction, Proposed Defendant-Intervenors would need to expend additional resources to secure alternative farm animal protections. *See, e.g.*, Balk Decl. ¶¶ 7-8; Wells Decl., ¶¶ 8-10; Hanneken Decl. ¶ 8; Watts Decl. ¶ 6; Baur Decl. ¶ 6; von Schlichten Decl. ¶ 6; Lowrey Decl. ¶ 10. These efforts could include drafting and advocating for new legislation, reactivating grassroots engagement of members and supporters, and conducting investigations into farm animal practices to expose cruel confinement practices and generate support for protective measures. *Id.*

The loss of section 25990(b) could also harm the Proposed Defendant-Intervenors' efforts to pass and preserve sales bans in other states, which would undercut Proposed Defendant-Intervenors' institutional campaigns and could lead to additional cruel treatment of farm animals who are raised in extreme confinement. *See California Trucking Ass'n v. Becerra*, No. 318-CV-02458-BENBLM, 2019 WL 202313, at *2 (S.D. Cal. Jan. 14, 2019) (citing *Allied Concrete,* 904 F.3d 1053, 1068 (S.D. Cal. 2018); *Californians for Safe and Competitive Dump Truck Trans. v. Mendonca,* 152 F.3d 1184, 1190 (9th Cir. 1998)

("invalidation of the . . . law being challenged would impair [intervenor] and its members' interests.").

For example, a negative outcome here could impact the implementation and enforcement of similar laws in other states, such as Question 3 in Massachusetts, a ballot initiative passed in 2016 that, like Proposition 12, prohibits the sale of pork, veal, or eggs from animals held in extreme confinement. *See* Mass. Gen. Laws Ann. ch. 129 App. §§ 1 *et seq*.

4. Proposed Defendant-Intervenors Interests Are Not Adequately Represented by Any of the Parties.

Proposed Defendant-Intervenors' interests diverge in important respects from those of State Defendants, and are not "adequately represented by existing parties." Fed. R. Civ. P. 24(a). Specifically, while the State Defendants' interest is in the administration of their legal obligations on behalf of the general public, including the meat industry, Proposed Defendant-Intervenors have a narrower interest in advocating for prevention of cruelty to animals and the interests of their members.

This test is a low bar to intervention: an applicant need only demonstrate that representation of its interest by existing parties "may be" inadequate. *Trbovich v. United Mine Workers of Am*., 404 U.S. 528, 528 n.10 (1972). "The burden of making this showing is minimal." *Sagebrush Rebellion*, 713 F.2d at 528. In determining whether a proposed intervenor is adequately represented, the Court should

> consider whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; whether the present party is capable and willing to make such arguments; and whether the intervenor would offer any necessary elements to the proceeding that the other parties would neglect.

Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1498-99 (9th Cir. 1995), *abrogated on other grounds* by *Wilderness Soc'y*, 630 F.3d 1173.

The Ninth Circuit has granted intervention in many instances where, as here,

the proposed intervenors have an interest that is different than that of the government, the result of which is that the government may not make all the proposed intervenor's arguments. *California ex rel. Lockyer*, 450 F.3d at 440-41, *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d 1173 (granting intervention where government defendant could offer limiting construction in defense of state); *Southwest Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2011) (government did not adequately represent interests of building trade association because of government's broader range of considerations); *Forest Conservation Council*, 66 F.3d at 1499, *abrogated on other grounds by Wilderness Soc'y*, 630 F.3d 1173 (noting that the federal government represents a "broader view" than the interest of a state and county).

Proposed Defendant-Intervenors' interests are not coextensive with those of State Defendants in this litigation. State Defendants' interests are in the administration of their legal obligations, as they are charged with enforcing the laws enacted by the California legislature on behalf of the public at large, which includes the meat industry. But they have no specific mandate to advocate for the humane treatment of animals, nor do they represent humane interests above others. State Defendants' interests may also be motivated by unrelated factors, including financial, political, or other pressures. On the other hand, defense of Proposition 12 is central to the basic missions of Proposed Defendant-Intervenors to ensure that egregious animal cruelty is prevented and prohibited.

While both the Defendants and the Proposed Defendant-Intervenors have an interest in preserving Proposition 12, the Proposed Defendant-Intervenors' interests are broader. As described above, the outcome of this litigation has implications for the Proposed Defendant-Intervenors' efforts to preserve and support existing state farm animal protections and sales bans and to continue to advocate for other similar bans – interests that Defendants do not possess. Thus, beyond mere defense of the law, the Proposed Defendant-Intervenors are intervening because of the

potentially precedential nature of this case and the impact it could have on their work elsewhere. While Defendants would understandably advocate for any ruling that preserves Proposition 12, the Proposed Defendant-Intervenors may advocate for specific rulings that would help preserve other (similar but not necessarily identical) laws. *See California Trucking Ass'n v. Becerra*, No. 318-CV-02458-BENBLM, 2019 WL 202313, at *3 (S.D. Cal. Jan. 14, 2019) ("courts recognize that the interests of . . . intervenors in protecting their members are more "narrow" and "parochial" than California State officials' broad and more abstract interest in defending the laws of the State").

Additionally, due to decades of experience both litigating and advocating for the humane treatment of farm animals, and working to enforce anti-cruelty laws, Proposed Defendant-Intervenors bring to bear extensive factual and legal knowledge that may not be shared in full by State Defendants. Since Proposed Defendant-Intervenors meet the "minimal" showing necessary on this factor, *Trbovich*, 404 U.S. at 538 n.10, and also satisfy all other requirements under Rule 24(a), this Court should grant their motion to intervene as of right.

B. In the Alternative, Proposed Defendant-Intervenors Should Be Granted Permissive Intervention.

Although Proposed Defendant-Intervenors satisfy the criteria for intervention of right under Rule 24(a), in the alternative, this Court should exercise its discretion and allow the applicants to intervene permissively under Rule 24(b). A court may grant permissive intervention "where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *United States v. City of Los Angeles*, 288 F.3d at 403 (citations omitted). This Court has an independent ground for jurisdiction based on the federal questions raised in the complaint, *see* 28 U.S.C. § 1331, and as discussed above, Proposed Defendant-Intervenors' application is timely and will

not prejudice the parties or cause any undue delay. *See Freedom from Religion Foundation, Inc. v. Geithner,* 644 F.3d 836, 844 (9th Cir. 2011) ("the independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims.").

Most importantly, Proposed Defendant-Intervenors' defenses and the main action have more than a "question of law or a question of fact in common." *Id.* Indeed, Proposed Defendant-Intervenors' defenses are based solely on legal arguments as to the insufficiency of the claims raised by the Plaintiff. Thus, Proposed Defendant-Intervenors should be allowed to intervene permissively under Rule 24(b) even if intervention as of right is not granted.

IV. CONCLUSION

For the foregoing reasons, Proposed Defendant-Intervenors' motion to intervene should be granted.

Dated: October 29, 2019

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/s/ Bruce A. Wagman

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A. Proposed Intervenors' Motion To Intervene

Intervenors propose to intervene in this action as of right, and permissively. See MTI. NAMI does not oppose the motion to intervene, subject to certain conditions regarding case management to which the intervenors have agreed. See ECF No. 38.

The Court finds and concludes that intervenors have established the three elements necessary to intervene with the Court's permission pursuant to Rule 24(b): (1) intervenors' application—filed 25 days after the action commenced—is timely, and NAMI's consent indicates that intervenors' participation in the case will not cause prejudice to any opposing party; (2) there are independent grounds for jurisdiction because this is a federal question case and intervenors do not propose to raise any new claims, see Freedom from Religion Foundation, Inc. v. Geithner, 644 F.3d 836, 844 (9th Cir. 2011); and (3) the intervenors' represent that their defenses are based on the same legal arguments that the state has raised, such that there are questions of law and fact in common between their defense and the main action. See San Jose Mercury News, Inc., 187 F.3d at 1100.

The intervenors' motion is accordingly **GRANTED**. The intervenors shall be permitted to intervene in this action pursuant to parties' stipulated conditions: (1) the intervenors will abide by the same deadlines applicable to the original defendants; (2) the intervenors will make joint filings (rather than separate, individual filings); and (3) the proposed intervenors will not seek discovery from NAMI or its members, and NAMI will not seek discovery from the proposed intervenors or their members, except that both NAMI and the intervenors may ask questions at depositions, if any.

B. NAMI's Motion For A Preliminary Injunction

NAMI moves for a preliminary injunction on all three of its asserted claims for relief pursuant to the Commerce Clause. See PI at 7-23. According to NAMI, unless the Court enjoins Proposition 12, its members will suffer irreparable harm in the form of constitutional injury, and noncompensable money damages. Id. at 24-25. California opposes on grounds that NAMI is unlikely to succeed on its claims because it lacks associational standing, see PI Opp. at 5-6, because the Ninth Circuit and the Supreme Court has rejected each of its substantive theories of relief, id. at 6-18, and because NAMI's members injuries would not, in any event, be irreparable, id. at 18-20.

Exhibit C

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12-10-2019

PG

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORTH AMERICAN MEAT INSTITUTE,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California, KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and SONIA ANGELL, in her official capacity as Acting Director of the California Department of Public Health,

Defendants,

and

Case No. 2:19-cv-08569-CAS (FFMx)

ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT

THE HUMANE SOCIETY OF THE UNITED STATES, ANIMAL LEGAL DEFENSE FUND, ANIMAL EQUALITY, FARM SANCTUARY,

COMPASSION IN WORLD FARMING USA, THE HUMANE LEAGUE, and COMPASSION OVER KILLING,

Defendant-Intervenors.

ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT-INTERVENORS

Pursuant to Federal Rule of Procedure 24(c), the Humane Society of the United States, the Animal Legal Defense Fund, Animal Equality, Farm Sanctuary, Compassion in World Farming USA, The Humane League, and Compassion Over Killing (collectively, "Defendant-Intervenors") submit this Answer and Affirmative Defenses to Plaintiff's Complaint to accompany Defendant-Intervenors' Motion for Leave to Intervene.

INTRODUCTION AND SUMMARY

1. This paragraph sets forth Plaintiff's characterization of the nature and basis of Plaintiff's action to which no response is required. In addition, to the extent that the second sentence contains Plaintiff's characterization of Section 25990 of Title 13.8 of the California Health & Safety Code ("Proposition 12") no response is required and the Court is referred to that act for a full and accurate statement of its provisions. Cal. Health & Safety Code § 25990. To the extent an answer is required for these allegations, Intervenor-Defendants deny them.

2. This paragraph sets forth Plaintiff's characterization of the nature and basis

of Plaintiff's action to which no response is required. To the extent that the second sentence contains Plaintiff's characterization of Section 25990(b), no response is required and the Court is referred to this act for a full and accurate statement of their provisions. Cal. Health & Safety Code § 25990. To the extent an answer is required for these allegations, Intervenor-Defendants deny them.

3. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required. Defendant-Intervenors refer the Court to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990. To the extent an answer is required for these allegations, Intervenor-Defendants deny them.

4. This paragraph contains Plaintiff's characterization of Proposition 12 and legal conclusions, to which no response is required. Defendant-Intervenors refer the Court to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990. To the extent an answer is required for these allegations, Intervenor-Defendants deny that Proposition 12 violates the United States Constitution.

5. This paragraph contains Plaintiff's characterization of Proposition 12 and legal conclusions and baseless conclusions of fact, to which no response is required. Defendant-Intervenors refer the Court to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990. To the extent an answer is required for these allegations, Intervenor-Defendants deny each allegation in this paragraph.

6. This paragraph contains Plaintiff's characterization of Proposition 12, and legal conclusions to which no response is required. Defendant-Intervenors refer the Court to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990. To the extent an answer is required for these allegations, Intervenor-Defendants deny each allegation in this paragraph.

7. This paragraph contains Plaintiff's characterization of Proposition 12, and

legal conclusions to which no response is required. Defendant-Intervenors refer the Court to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990. To the extent an answer is required for these allegations, Defendant-Intervenors deny each allegation in this paragraph.

///

///

THE PARTIES

PLAINTIFF

8. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny this allegation.

9. The second sentence of this paragraph contains a legal conclusion to which no response is required. In addition, Defendant-Intervenors are without knowledge or information sufficient to confirm or deny the allegations in the first, third and fourth sentences of this paragraph, and to the extent an answer is required for these allegations, Intervenor-Defendants deny each.

10. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny this allegation. This allegation contains a legal conclusion to which no response is required. To the extent an answer is required for these allegations, Defendant-Intervenors deny each.

11. This paragraph contains legal conclusions to which no response is required.

DEFENDANTS

12. Admit.

13. Admit.

14. Admit.

JURISDICTION AND VENUE

15. This paragraph contains a legal conclusion to which no response is required.

16. This paragraph contains legal conclusions to which no response is

required.

17. The first sentence of this paragraph contains a legal conclusion to which no response is required. In addition, Defendant-Intervenors are without knowledge or information sufficient to confirm or deny the allegations in the second sentence of this paragraph.

///

LEGAL AND FACTUAL BACKGROUND

A. Proposition 2 and Assembly Bill 1437

18. Admit.

19. Admit.

20. This paragraph contains Plaintiff's characterization of Proposition 2, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25996. To the extent an answer is required for these allegations, Defendant-Intervenors deny each.

21. This paragraph contains Plaintiff's characterization of AB 1437, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25996. To the extent an answer is required for these allegations, Defendant-Intervenors deny each.

22. This paragraph contains Plaintiff's characterization of AB 1437, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25996. To the extent an answer is required for these allegations, Defendant-Intervenors deny each.

B. Proposition 12

23. Admit.

24. Admit.

25. Deny.

26. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that act for a full and

accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990. To the extent an answer is required for these allegations, Defendant-Intervenors deny each.

27. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25991.

28. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25991.

29. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25991.

30. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25991.

31. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25992.

32. The first sentence contains a legal conclusion to which no response is required, to the extent a response is required, this allegation is denied. The second sentence of this paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990.

33. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25991.

34. The first and second sentences of this paragraph contain legal conclusions and Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that section for a full and accurate statement of its

provisions. *See* Cal. Health & Safety Code § 25991. To the extent a response to these allegations is required, Defendant-Intervenors deny each.

35. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25993.

36. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25993.

C. Legislative Analyst's Office Report For Proposition 12.

37. Admit.

38. Admit.

39. Admit.

40. This paragraph contains Plaintiff's characterization of a Legislative Analyst's Office report, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018.

41. This paragraph contains Plaintiff's characterization of a Legislative Analyst's Office report, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* https://lao.ca.gov/BallotAnalysis/Proposition?number=12&year=2018.

D. Implementing Regulations

42. The first sentence of this paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that section for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25993. In addition, Defendant-Intervenors are without knowledge or information sufficient to confirm or deny the allegations in the second sentence of this paragraph, to the extent a response is required Defendant-Intervenors deny this allegation.

43. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny this allegation.

CLAIMS FOR RELIEF

FIRST CLAIM

(Discrimination in Violation of the Commerce Clause)

44. To the extent Plaintiff realleges and incorporates all preceding paragraphs, Defendant-Intervenors refer the Court to their responses to the specific preceding paragraphs.

45. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

46. his paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

47. Defendant-Intervenors deny the allegations in the first sentence. This paragraph includes Plaintiff's characterization of Proposition 12, to which no response is required and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*. This paragraph also includes Plaintiff's characterization of legislative documents pertaining to a law (AB 1437) not challenged by Plaintiff to which no response is required and the Court is referred to those documents for a full and accurate statement of their provisions. *See* Cal. Assembly Comm. On Agriculture, Bill Analysis of AB 1437, at 1 (May 13, 2009).

48. This paragraph includes Plaintiff's characterization of Proposition 12, to which no response is required and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*.

49. The first sentence includes legal conclusions to which no response is required, to the extent a response is required, Defendant-Intervenors deny these allegations. Defendant-Intervenors deny the allegations in the second sentence of this paragraph. This paragraph includes Plaintiff's characterization of Proposition

12, to which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*.

50. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny this allegation. To the extent a response is required to these allegations, Defendant-Intervenors deny each.

51. This paragraph includes legal conclusions to which no response is required, to the extent a response is required, Defendant-Intervenors deny these allegations. This paragraph includes Plaintiff's characterization of Proposition 12, to which no response is required and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*.

52. This paragraph includes Plaintiff's characterization of Proposition 12, to which no response is required and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*.

53. This paragraph includes Plaintiff's characterization of Proposition 12, to which no response is required and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*.

54. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

55. Deny.

56. Deny.

57. Deny.

58. Deny.

59. The first sentence of this paragraph is denied. The second sentence of this paragraph includes Plaintiff's characterization of the FMIA, to which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* 21 U.S.C. § 601 *et seq*.

60. This paragraph includes Plaintiff's characterization of Proposition 12, to

which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*. Defendant-Intervenors deny the last sentence of this paragraph.

61. This paragraph contains legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

62. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny this allegation.

63. This paragraph contains legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

64. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

SECOND CLAIM

(Impermissible Extraterritorial Regulation)

65. To the extent Plaintiff realleges and incorporates all preceding paragraphs, Defendant-Intervenors refer the Court to their responses to the specific preceding paragraphs.

66. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

67. This paragraph contains legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenors deny each allegation.

68. This paragraph contains legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

69. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

70. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

71. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

72. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

73. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

74. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny this allegation.

75. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

76. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

THIRD CLAIM

(Excessive Burden in Violation of the Commerce Clause)

77. To the extent Plaintiff realleges and incorporates all preceding paragraphs, Defendant-Intervenors refer the Court to its responses to the specific preceding paragraphs.

78. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

79. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that regulation for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*. To the extent a response is required, Defendant-Intervenors deny the allegations. Defendant-Intervenors deny the allegations in the second sentence.

80. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny these allegations.

81. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny these allegations.

82. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny these allegations.

83. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*.

84. This paragraph contains Plaintiff's characterization of Proposition 12, to which no response is required, and the Court is referred to that act for a full and accurate statement of its provisions. *See* Cal. Health & Safety Code § 25990, *et seq*. Defendant-Intervenors deny the allegations in the second sentence.

85. This paragraph contains legal conclusions to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

86. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

87. Deny.

88. Defendant-Intervenors are without sufficient knowledge or information to confirm or deny this allegation.

89. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

90. This paragraph contains a legal conclusion to which no response is required. To the extent a response is required, Defendant-Intervenors deny the allegations.

RELIEF REQUESTED

The balance of the Complaint constitutes a prayer for relief to which no answer is required. Defendant-Intervenors deny that Plaintiff is entitled to the relief requested, or to any relief whatsoever.

Defendant-Intervenors hereby deny all allegations not expressly admitted or denied.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim on which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's action and request for injunctive relief are barred because Plaintiff

has an adequate remedy at law.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's action and request for injunctive relief are barred by the doctrine of waiver.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's action and request for injunctive relief are barred by the doctrine of estoppel.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's Complaint is barred because plaintiff has not suffered any injury or damage.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's Complaint is barred because its action is not ripe for adjudication.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff knowingly, voluntarily and unreasonably undertook to encounter each of the risks and hazards, if any, referred to in the Complaint and each alleged cause of action, and this undertaking proximately caused and contributed to any loss, injury or damages incurred by Plaintiff.

THEREFORE, having fully answered, Defendant-Intervenors assert that Plaintiff is not entitled to the relief requested, or to any relief whatsoever, and requests that this action be dismissed with prejudice and that Defendant-Intervenor be given such other relief as the Court deems just and proper.

Dated: October 29, 2019

RILEY SAFER HOLMES & CANCILA LLP

/s/ Bruce A. Wagman

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Exhibit D

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Attorneys for Defendant-Intervenors The Humane Society of the United States, Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, Compassion Over Killing

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NORTH AMERICAN MEAT INSTITUTE,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California, KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and SONIA ANGELL, in her official capacity as Acting Director of the California Department of Public Health,

Defendants,

Case No. 2:19-cv-08569-CAS (FFMx)

NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES

The Honorable Christina A. Snyder
Date: February 24, 2020
Time: 10:00 a.m.
Location: Courtroom 8D

The Humane Society of the United States, Animval Legal Defendant Fund, Animval Equlaity, The Human League, Farm Sanctuary, Compassion in World Farming USA, Compassion Over Killing,

Defendant-Intervenors.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 24, 2020, at 10 a.m., or as soon thereafter as the matter may be heard before the Honorable Christina A. Snyder in courtroom 8D of the United States District Court for the Central District of California located at First Street Court House, 350 W. First Street, 8th Floor, Los Angeles, CA 90012, The Humane Society of the United States, the Animal Legal Defense Fund, Animal Equality, The Humane League, Farm Sanctuary, Compassion in World Farming USA, and Compassion Over Killing (collectively "Defendant-Intervenors") will move this Court pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for an order dismissing Plaintiff's complaint with prejudice. The grounds for this motion are that Plaintiff fails to state a claim upon which relief can be granted.

This Motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, records and papers filed in this action, such matters as the Court may judicially notice, and such further evidence or argument as may be presented at or before the hearing of this motion.

Dated: November 27, 2019

RILEY SAFER HOLMES & CANCILA LLP

By: */s/ Bruce A. Wagman*
BRUCE A. WAGMAN (CSB #159987)
bwagman@rshc-law.com
Attorneys for Defendant-Intervenors

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In light of the Court's November 22, 2019 ruling on Plaintiff's motion for a preliminary injunction, this case is ripe for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, as a matter of law. In order to ease the paperwork burden on the Court, this memorandum will not repeat arguments from the preliminary injunction briefing, and will instead focus on the key facts and legal issues relevant to dismissal under the standard of review applicable to motions for judgment on the pleadings.

As discussed in this Court's ruling, Proposition 12 "is intended to prevent animal cruelty by phasing out extreme methods of farm animal confinement." Dkt. # 66 at 4 (internal citation omitted). Proposition 12 "does not have a discriminatory purpose that would invalidate it per se" and "does not, in its contemplated application, impose 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Dkt. # 66 at 13. Thus, it does not discriminate against out-of-state commerce. Proposition 12 simply evenhandedly "applies to in-state conduct—sales of meat products in California—not conduct that takes place wholly outside of California," and therefore does not regulate extraterritorially. *Id.* at 21-22. And there simply "is no serious argument that Proposition 12 imposes any substantial burden on interstate commerce." *Id.* at 25. Indeed, Proposition 12 is "directed to *how* meat products are produced, not *where*, and compliance with Proposition 12 does not require a farmer, packer, or processor to move its operations to California." *Id.* Therefore, even taking all of the allegations in the complaint as true, Plaintiff's claim fails as a matter of law.

II. STATEMENT OF FACTS

A more complete background of the facts of this matter is provided in Intervenors' Memorandum of Points & Authorities In Opposition to Plaintiff's Motion for A Preliminary Injunction (Dkt. #25), and, therefore, only a few key facts

relevant to this motion are provided here.

A. California's Prior Animal Welfare Legislation

In 2008 and 2010 California took the first steps toward excluding cruel products from its marketplace through the enactment of two laws—Proposition 2 and AB 1437, respectively. Proposition 2 had the primary purpose of "prevent[ing] animal cruelty by phasing our extreme methods of farm animal confinement." Cal. Health & Safety Code § 25990. Proposition 2 also generally required covered animals (including egg-laying hens, calves raised for veal, and pigs during pregnancy) in California to be able to lie down, stand up, fully extend their limbs and turn around freely. Cal. Health & Safety Code § 25991.

Proposition 2 did not include any numeric space requirement for covered animals, nor did it include any sales restrictions; the 2008 ballot initiative prohibited producers in the state from tethering or confining covered animals in a way that prevented the animals from being able to engage in those behaviors described in Section 25991.

In 2010, California's Legislature passed AB 1437 to require that all eggs sold in the state come from Proposition 2-compliant conditions—wherever the eggs were produced. Cal. Health & Safety Code § 25996. As the Act's official findings explain, the Legislature passed AB 1437 "to protect California consumers from the deleterious health, safety, and welfare effects of the sale and consumption of eggs derived from egg-laying hens that are exposed to significant stress and may result in increased exposure to disease and pathogens including salmonella." *Id.* at § 25995(e).

Thus, prior to the 2018 passage of Proposition 12 and via combination of the 2008 ballot initiative and the 2010 legislative action, California required behavioral (not numeric minimum space requirement) standards for animals raised by in-state producers, and required that all eggs sold in the state—regardless of where they were produced—were sourced from hens raised in Proposition 2-compliant

conditions.

B. Voters Upgrade California's Humane Legislative Framework

In November of 2018, California voters again took humane legislation into their own hands and enacted Proposition 12, which for the first time sets a higher bar than Proposition 2 for animal welfare for both in-state and out-of-state producers. Proposition 12 provides that "farm owner[s] or operator[s] *within the State of California"* not knowingly confine covered animals "in a cruel manner." Cal. Health & Safety Code§ 25990(a) (emphasis added). "Confined in a cruel manner" is defined to mean not only the same behavioral standards of Proposition 2 (*i.e.*, lying down, standing up, fully extending limbs, turning around freely), but also requires explicit amounts of usable floor space per animal: confinement with at least 43 square feet of usable floor space for calves raised for veal and at least 24 square feet of usable floorspace per pig after December 31, 2019 and December 31, 2021, respectively. *Id.* § 25991(e)(1)-(3).

Thus, prior to Proposition 12's enactment, California imposed no numeric space allotment per animal, and Proposition 12 added those standards to the existing behavior-based standards. After Proposition 12 goes into effect, in-state and out-of-state producers that wish to sell their products in California will have the same amount of time to make any changes necessary to production practices in order to comply with Proposition 12's new requirements. Proposition 12's sales provision—as relevant here—requires business owners and operators to not knowingly engage in the sale *within the state* of any "(1) Whole veal meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner," or "(2) Whole pork meat that the business owner or operator knows or should know is the meat of a covered animal who was confined in a cruel manner, or is the meat of immediate offspring of a covered animal who was confined in a cruel manner." *Id.* § 25990(b)(1)-(2). Like the production provision, "confined in a cruel manner" includes both the behavioral

standards established by Proposition 2 (which did not formerly apply to sales of pork or veal products) and numeric usable space requirements for covered animals described above.

The dates for implementation of Proposition 12's production and sales requirements apply to all covered products sold in California, regardless of where those products originate. Moreover, in-state and out-of-state businesses all have the same interval of time (from Proposition 12's passage to the effective dates for each type of covered product) to implement the Proposition 12 requirements if they wish to sell their products in the California market.

Proposition 12 directs the California Department of Food and Agriculture and the California Department of Public Health to "jointly promulgate rules and regulations for the implementation of [Proposition 12] by September 1, 2019" *Id.* § 25993. These regulations have not yet been promulgated. While the provision does not specify what these regulations must ultimately contain, it does not give the agencies the authority to change the even-handed effective dates of Proposition 12 that are explicitly stated in Section 25991(e)(1)-(3).

III. LEGAL STANDARD

"Because a Rule 12(c) motion is functionally identical to a Rule 12(b)(6) motion, the same standard of review applies to motions brought under either rule." *Gregg v. Hawaii, Dep 't of Pub. Safety*, 870 F .3d 883, 887 (9th Cir. 2017) (internal citations and quotations omitted). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Id*.

IV. ARGUMENT

As described in the Court's ruling on Plaintiff's motion for a preliminary injunction, Plaintiff has not raised a valid dormant Commerce Clause claim because Plaintiff "fail[ed] to raise any questions on the merits of its three commerce claims." Dkt. # 66 at 25. *See Pacific Northwest Venison Producers v. Smitch*, 20

F.3d 1008, 1012 (9th Cir. 1994). The test for whether a law runs afoul of the dormant Commerce Clause has two parts. First, the court must determine if the law at issue "directly regulates or discriminates against interstate commerce" or if "its effect is to favor in-state economic interests over out-of-state interests." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 579 (1986); *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994) (discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter").

If the law regulates in-state and out-of-state activities equally, and only indirectly affects interstate commerce, the Court must then examine whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Proposition 12 is entirely permissible under this standard. Indeed, this Court has already found that Plaintiff failed to raise any serious questions on the merits of its dormant Commerce Clause claims. Dkt. # 66.

Plaintiff has split its dormant Commerce Clause argument into three separate claims, all of which rely on a misreading of controlling law. Whether Plaintiff has one Commerce Clause claim or three, though, it has not alleged what it must in order to move this case forward, nor could it, and thus its claims are ripe for dismissal.

A. Proposition 12 Does Not Have a Discriminatory Purpose

There are no facts in existence with which Plaintiff could show a discriminatory purpose of Proposition 12. As the Court noted in its ruling, there is no evidence "to justify an inference that the alleged 'bad intent' behind AB1437," a California law not at issue here upon which Plaintiff relies, "is the same 'bad intent' that motivated Proposition 12." Dkt. # 66 at 11. Rather, the Court concluded that "Proposition 12 does not have a discriminatory purpose that would invalidate it *per se*." *Id.* at 13. Indeed, as the Court noted, it is obligated to "assume that the

objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation." *Id.*, citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (internal citation and marks omitted). Because Plaintiff could not produce anything to show California voters did not have animal welfare goals in enacting Proposition 12, Plaintiff has not and could not show a discriminatory purpose.

B. Proposition 12 Does Not Have a Discriminatory Effect

Plaintiff's claim as to differential treatment, which is really improperly focused on the irremediable cost to its individual members, fails as a matter of law. The Court already found that there is no impermissible discriminatory effect because "Proposition 12 does not, in its contemplated application, impose 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Dkt. # 66 at 13, citing *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994). The Court noted that "Proposition 12 is nearly analogous to the in-state sales prohibition on food products derived from force-fed birds that the Ninth Circuit refused to enjoin" in *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F. 3d 937, 948-49 (9th Cir. 2013), *cert. denied*, 135 S. Ct 398. (2014). Dkt. # 66 at 13-14 (citing that court's determination that "the sales prohibition's economic impact does not depend on *where* the items were produced, but rather *how* they were produced" and noting that *"Eleveurs* is, in every material respect, on all fours with the instant challenge, and its holding directs the Court to the conclusion that Proposition 12 does not have a discriminatory effect that requires *per se* invalidation"). The Court also found that "what NAMI characterizes as a competitive advantage is ultimately just a preferred method of production," which is not a constitutional right and is not guaranteed by the Commerce Clause. Dkt. # 66, citing *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1151

(9th Cir. 2012; *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 123-27 (1978). Because costs of complying with Proposition 12 do not amount to a violation of the Commerce Clause, Plaintiff's discriminatory effect claim fails as a matter of law and the Court need go no further.

Although Plaintiff alleges that Proposition 12 somehow provided problematic "lead time" to in-state producers, this issue can also be decided as a matter of law, because it is simply does not amount to a violation of the Commerce Clause for the state's health, safety, and moral laws to evolve over time. As this Court noted, Plaintiff "cites no case law for the proposition that a statute can have a discriminatory effect if a prior statute, imposing the same regulatory obligations, gives in-state entities more time to comply." Dkt. # 66 at 19 n.9. In enacting Proposition 12, California built upon its long history of animal protection, most recently reflected in laws like Proposition 2, and the new law(the only law at issue in this case) requires a wholly new set of standards that are in addition to those established in 2008 by Proposition 2. The numeric/space standards of Proposition 12 create a new baseline—they guarantee a new minimum space standard never suggested or addressed by Proposition 2. So even if California producers are now fully compliant with Proposition 2, they will need to ensure that their confinement practices are compliant with the new Proposition 12 standards, and have the same amount of time to do it as out-of-state producers. Simply put, Proposition 12 is the first time that veal and pork producers—whether in-state or out-of-state—must refrain from cruelly confining animals in spaces smaller than the standards set forth in Proposition 12 in order to sell their products in the state. Plaintiff's claim that this creates a constitutional problem proves too much, because were Plaintiff correct, it would be a constitutional problem every time a state builds upon protections for its citizens it had previously enacted. For example, the state's 1971 law requiring adequate exercise area could be said to have given in-state producers lead-time when it comes to Proposition 12. Cal. Penal Code § 597t. And any

health and safety laws involving toxic chemicals or other harmful substances could constitute "lead time" over states with lesser standards. Thus, to cry unconstitutional foul any time certain compliance obligations fall on in-state entities before additional obligations fall on out-of-state entities leads to absurd results.

Because the undisputed facts show that all producers who wish to sell in the state have to comply with the new standards of Proposition 12 at the same time, Plaintiff's allegation that there is a constitutional problem with some fabricated "lead time" injury fails as a matter of law.

C. Proposition 12 Does Not Directly Regulate Extraterritorial Conduct

Plaintiff's extraterritoriality theory fails as a matter of law, because Proposition 12 simply does not regulate out-of-state activity. As the Court noted in its prior ruling, "NAMI has not raised any serious questions on the merits of its extraterritoriality claim." Dkt. # 66 at 23. Plaintiff "does not contend that Proposition 12 attempts to control the price of veal or pork, or link prices paid for veal or pork in California to those paid out of state." *Id.* at 20. And the Supreme Court has "indicated that the extraterritoriality doctrine's application is essentially limited to cases involving the sorts of price-setting statutes that those cases addressed." *Id.* at 19, citing *Pharm. Research & Mfrs. Of Am. v. Walsh*, 538 U.S. 644, 669 (2003); *Chinatown Neighborhood Ass'n v. Harris*, 794 F. 3d 1136, 1146 (9th Cir. 2015) (noting that the extraterritoriality doctrine is "not applicable to a statute that does not dictate the price of a product and does not tie the price of its in-state products to out-of-state prices"). The Court further noted that even if the extraterritoriality doctrine were applied to non-price regulations such as Proposition 12, its "in-state sales prohibition only applies to 'in-state conduct'—sales of meat products in California— not conduct that takes place 'wholly outside of California'" and that Proposition 12 is "accordingly a perfectly lawful exercise of California's 'state sovereignty protected by the Constitution.'" Dkt. # 66 at 21-22,

citing *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 952 (9th Cir. 2019) (internal citations omitted).

As with its other efforts to squeeze a Commerce Clause claim out of the fair application of a law to in-state conduct, Plaintiff fails to establish that the law regulates in an impermissible extraterritorial manner.

D. Proposition 12 Does Not Levy a Substantial Burden on Interstate Commerce

Plaintiff's claim that there is a substantial burden on interstate commerce fails as a matter of law, because the impacts they are claiming are only on individual companies, and not on the market as a whole, as the Ninth Circuit requires. Under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), a plaintiff "must first show that the statute imposes a substantial burden before the court will determine whether the benefits of the challenge laws are illusory," or otherwise inadequate to justify the burden. *Eleveurs*, 729 F.3d at 951-52 (internal quotation omitted). As the Court noted in its ruling, however, "there is no serious argument that Proposition 12 imposes any substantial burden on interstate commerce, as that term is understood." Dkt. # 66 at 25. The Court very clearly found that "Proposition 12 does not present the potential for inconsistent regulation of activities that require a uniform system of regulation" and that the alleged burdens pled by Plaintiff "do not demonstrate that Proposition 12 will interfere with the flow of veal or pork products into California inasmuch as they demonstrate NAMI's disappointment that Proposition 12 'precludes a preferred, more profitable method of operating in a retail market.'" *Id.,* citing *Optometrists*, 682 F.3d at 1155. The Court further found that Proposition 12 does not impose barriers to conducting commerce across state lines similar to those in *Pike* because "it is directed to *how* meat products are produced, not *where*, and compliance with Proposition 12 does not require a farmer, packer, or processor to move its operations to California." Rather, Proposition 12 "applies evenly no matter where production takes place" and

Plaintiff's allegations as to a "substantial burden" are "ultimately a complaint about the cost of complying with Proposition 12's requirements." Dkt. # 66 at 25. This is insufficient under *Pike*, as the Court noted. *Id*., citing *S. Pac. Transp. Co. v. Pub. Utilities Comm'n of State of Cal.,* 647 F. Supp. 1220, 1227 (N.D. Cal. 1986), *aff'd*, 820 F. 2d 1111 (9th Cir. 1987).

Because Plaintiff can only at most point to impacts on individual producers, rather than the market as a whole, its claim that there is a substantial burden on interstate commerce fails as a matter of law.

V. CONCLUSION

For the foregoing reasons, Plaintiff's claim is ripe for dismissal as a matter of law and the Court should dismiss Plaintiff's complaint with prejudice.

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