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7 FOODS MARKET CALIFORNIA, INC.
and MRS. GOOCH'S NATURAL FOOD
8 MARKETS, INC.

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 WHOLE FOODS MARKET CALIFORNIA,
12 INC., a California corporation, and MRS.
GOOCH'S NATURAL FOOD MARKETS,
13 INC., a California corporation,

14 Plaintiffs,

15 v.

16 DIRECT ACTION EVERYWHERE, a
California corporation; DIRECT ACTION
17 EVERYWHERE SF BAY AREA, an
unincorporated association; WAYNE HSIUNG,
18 an individual; DOES 1 through 150; and DOE
ASSOCIATIONS 1-25, inclusive,

19 Defendants.
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Case No. RG18921253

*ASSIGNED FOR ALL PURPOSES TO:
JUDGE Robert McGuinness
DEPARTMENT 22*

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION TO EXPAND
PRELIMINARY INJUNCTION**

*Filed concurrently herewith:
1) Application; 2) Declarations of Anie
Summerland, Layne Cozza, Cindy Wirada,
Melanie Holt, Leonel Umanzor, Ryan
Rosprim, Frank Avila, Frank DePanise,
Christian Gonzalez and Brian R. Blackman;
3) [Proposed] Temporary Restraining Order;
and 4) [Proposed] Order to Show Cause*

Date: None Set
Time: None Set
Dept.: 22

Complaint Filed: September 19, 2018
Trial Date: February 18, 2020

1 I. INTRODUCTION

2 This Court’s December 28, 2018 order granting plaintiffs Whole Foods Market California,
3 Inc. (“WFM CA”) and Mrs. Gooch’s Natural Food Markets, Inc.’s. (“Mrs. Gooch’s”) (collectively
4 with WFM CA, “Whole Foods” or “Plaintiffs”) request for a preliminary injunction states that the
5 Court will “consider issuing a broader, potentially statewide preliminary injunction, by subsequent
6 application or motion, if there is specific, admissible evidence that Defendants [Wayne Hsiung,
7 Direct Action Everywhere and Direct Action Everywhere SF Bay Area (collectively “DxE” or
8 “Defendants”)] have engaged in disruptive protests or demonstrations at additional Whole Foods
9 stores beyond the stores addressed in the instant injunction.”

10 Since this Courts’ order, DxE has engaged in no less than ten protests within at least ten
11 different Whole Foods Market stores across California. For example, on August 27, 2019, a DxE
12 protester locked herself in a small cage at a Whole Foods Market in Petaluma, California. Upon
13 exiting the cage, the protester had to be physically blocked from entering the store’s non-public
14 meat preparation backroom – a potential safety and consumer health issue. The protester and her
15 companion refused to leave, placed numerous DxE stickers on store displays and damaged an item
16 of merchandise. In a separate incident, on August 18, 2019, a group of approximately fifty (50)
17 DxE protesters marched through a Whole Foods Market store in San Diego, California, and laid
18 down in the aisles of the store’s prepared foods section. Whole Foods’ customers were prevented
19 from accessing merchandise and were often forced to step over the prone bodies of the protesters.
20 Most recently, more than fifty (50) DxE protesters conducted a large-scale protest at the Noe
21 Valley Whole Foods Market store on September 30, 2019. During this protest, DxE’s activists
22 occupied the stores’ meat department and roof, glued and chained themselves to the store’s
23 entrances and exits, and took over the store parking lot for speeches and other demonstration
24 activities. Some customers had to exit the store through the emergency exit and the store was
25 closed for almost five hours.

26 Neither the Petaluma store, San Diego store, Noe Valley store nor any other store where
27 protests took place in the last nine months were included in this Court’s December preliminary
28 injunction. These protests have impeded Whole Foods’ regular business operations, detracted

1 from the hard-earned good will of Whole Foods' customers, and posed a significant safety risk to
2 customers, employees, and protesters alike.

3 In granting Whole Foods' original motion for preliminary injunction as to a select group of
4 Whole Foods Market stores, this Court has already found that Defendants do not have a right to
5 demonstrate on Plaintiffs' private property, and that Plaintiffs are likely to prevail on their trespass
6 and declaratory relief claims. Given these findings, and Defendants' continued protest activities
7 across the state of California, a statewide injunction is now warranted.

8 For these reasons and those detailed below, Plaintiffs respectfully request this Court grant
9 its request and issue a temporary restraining order and order to show cause why a preliminary
10 injunction prohibiting Defendants from entering Plaintiffs' stores in California and from
11 continuing their trespass activity on Plaintiffs' property should not issue.

12 II. FACTUAL & PROCEDURAL BACKGROUND

13 On December 21, 2018, this Court entered its Order Granting Preliminary Injunction. (Ex.
14 A to Declaration of Brian Blackman ("Blackman Decl.")). In the order, the Court granted Whole
15 Foods' request for an injunction preventing DxE from protesting in four Whole Foods Market
16 stores (Berkeley, Gillman, Walnut Creek, and West Hollywood), but denied Plaintiffs' request for
17 a statewide injunction. (*Id.*) The Court's order, however, went on to state:

18 Plaintiffs are not precluded from filing a subsequent application or motion
19 to broaden the scope of the injunction, **including seeking statewide**
20 **injunctive relief as to all Whole Foods Market stores in California**,
21 supported by evidence of additional protests or demonstrations... The
22 court would expect such motion or application to be supported by specific,
23 admissible evidence as to protests, demonstrations or related activities that
24 disrupt Plaintiffs' or their customers' retail activities and were contrary to
25 a publicized non-solicitation policy and/or requests for such protestors to
26 desist from such activities and/or leave the store.

24 (*Id.* at p. 12:7-14.) (emphasis added).

25 This Court's holding was supported by several key findings. First, the Court found that
26 Defendants' protest activity inside Plaintiffs' stores constitutes "relevant credible evidence
27 supporting a likelihood that [Plaintiffs] can prevail on their Second Cause of Action for trespass
28 (as well as their First Cause of Action for declaratory relief)." (Ex. A at p. 4:18-20 to Blackman

1 Decl.) The Court supported this holding by relying on evidence showing that Defendants' protest
2 activities have:

3 disrupted Plaintiffs' business operations, impaired the use of Plaintiffs'
4 private property, interfered with customers' shopping experiences, placed
5 the safety of Plaintiffs' customers and team members at risk and caused a
6 loss of goodwill, including by blocking aisles and registers, blocking
7 product areas and obstructing ingress and egress in the stores. Such
8 evidence also supports the allegations that there is a credible threat that
9 additional activities of that same nature will continue unless enjoined.

8 (*Id.* at p.6:7-14.) (internal citations omitted).

9 Second, after review of the extensively briefed free-speech issues presented by this case,
10 the Court found that "Plaintiffs have shown a likelihood of success of their contention that the
11 inside of, and walkways leading to, the Whole Foods Market stores are analogous to the retail
12 establishments found in the above cases not to constitute a 'public forum' where First Amendment
13 speech rights attach." (Ex. A at p. 8:21-24 to Blackman Decl.)

14 Since the preliminary injunction issued, Defendants have continued to engage in protesting
15 and demonstrating activities inside and walkways immediately outside the entrances and exits of
16 Whole Foods Market stores across California. For example, Defendants have engaged in the
17 following:

18 1. On November 17, 2018, roughly twenty (20) DxE protesters marched
19 through the Whole Foods Market stores, located at 3761 State Street in Santa Barbara (the "Santa
20 Barbara Store"), carrying signs and pictures, and shouting loud speeches regarding animal cruelty.
21 The protesters later formed up in front of the meat cases and continued their speeches. One
22 protester told the store Teamer Leader to "back off" when he asked them to leave. Some
23 customers in the store confronted the protesters, which created a safety issue. Police were called,
24 but never responded.¹ (*See* Declaration of Frank DePanise, ¶7.)

25
26 ¹ Although this occurred shortly before the Court entered its preliminary injunction, the protest
27 was almost two months after this Court issued its Order to Show Cause, and one month after the
28 Court heard argument on the issue. DxE organizers were well aware of Whole Foods' request to
this Court when they invaded the Santa Barbara Store.

1 2. On January 21, 2019, DxE members entered the Whole Foods Market store,
2 located at 1765 California Street in San Francisco (the “Franklin Store”), and placed stickers on
3 various products in the store. (Declaration of Anie Summerland (“Summerland Decl.”), ¶13.)

4 3. On January 27, 2019, two (2) DxE members again entered the Franklin
5 Store and disrupted customers and employees by blocking the meat case and seafood counter and
6 “live streaming” their experience while other activists protested in the store’s parking area. (See
7 Summerland Decl., ¶14.)

8 4. On January 27, 2019, a group of DxE members, including defendant Wayne
9 Hsiung, entered the Whole Foods Market store located at 399 4th Street in San Francisco (the
10 “SOMA Store”), carrying DxE signs and blocked the meat cases. The DxE members were asked
11 to leave, but refused to do so, instead proceeding to sing several protest-style songs in the store.
12 After about 15 minutes, Mr. Hsiung and the other DxE members left the store and continued their
13 activities on the sidewalk directly outside the SOMA Store entrance. (See Declaration of Ryan
14 Rosprim, ¶13.)

15 5. On August 18, 2019, a group of approximately fifty (50) DxE protesters
16 entered a Whole Foods Market store, located at 711 University Avenue, San Diego (the “Hillcrest
17 Store), and laid down in the aisles of the store’s prepared foods section. Whole Foods’ customers
18 were prevented from accessing merchandise and were often forced to step over the prone bodies of
19 the protesters. (See Declaration of Cindy Wirada, ¶12.)

20 6. On August 10, 2019, approximately twenty (20) DxE protesters entered the
21 Whole Foods Market store, located at 621 E. Washington Street, Petaluma (the “Petaluma Store”),
22 and converged on the meat department. The protesters set up an easel and used a microphone and
23 speaker system to hold a “class” detailing purported animal rights abuses perpetrated by Whole
24 Foods Market meat suppliers. (Declaration of Layne Cozza (“Cozza Decl.”), ¶13; Declaration of
25 Frank Avila (“Avila Decl.”), ¶13.)

26 7. On August 27, 2019, a DxE protester locked herself in a small cage inside
27 the Petaluma Store. Upon exiting the cage, the protester had to be physically blocked from
28 entering the store’s non-public meat preparation backroom, which would have created a safety and

1 public health issue had she succeeded. The protester and her companion refused to leave, placed
2 numerous DxE stickers on store displays and damaged an item of merchandise. (*See* Cozza Decl.,
3 ¶14; Avila Decl., ¶14.)

4 8. On September 22, 2019, roughly thirty (30) DxE protesters marched
5 through the Whole Foods Market store, located at 18700 Ventura Blvd. in Tarzana, California (the
6 “Tarzana Store”) carrying signs and pictures and shouting animal rights slogans. The protesters
7 stopped in front of the meat cases and blocked customer access while they gave loud speeches in
8 support of animal rights. The protesters refused to leave until their speeches were completed.
9 (*See* Declaration of Christian Gonzales, ¶6.)

10 9. On September 30, 2019, a large group of more than fifty (50) DxE
11 protesters took over the meat department inside the store, and the roof, parking lot, and entrance
12 and exit area immediately outside of the Whole Foods Market store, located at 3950 24th Street,
13 San Francisco (the “Noe Valley Store”). When the store initially opened, forty or so protesters
14 forced their way past a store representative, breaking the front door in the process, and made a
15 human barrier in front of the meat cases inside the store. Several protesters used a ladder to access
16 the store’s roof to display large signs in support of their mission, often times walking along the
17 edge of the roof. These protesters also locked the roof access door from the outside, which
18 prevented authorities from accessing the roof. Other protesters setup a large sound system in the
19 parking area for speak outs and speeches. Another protester climbed onto the store’s signage and
20 hung from the signage while wrapping it in chains. At least two protesters superglued their hands
21 to the ground and chained themselves, together with several other protesters, to the entrances and
22 exits to prevent ingress and egress to the store. Some customers were forced to climb over the
23 protesters to exit; other customers were evacuated through the emergency exit. Plaintiffs were
24 forced to close the store for several hours. *See* Declaration of Leonel Umazor, ¶¶4-14;
25 Declaration of Melanie Holt, ¶¶4-13.)

26 None of these Whole Foods Market stores, nor other stores where protests have taken place
27 in the last nine months, are covered by the existing preliminary injunction. (*See* Ex. A to
28 Blackman Decl.)

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III. LEGAL ARGUMENT

A. Standard for Issuing a Preliminary Injunction

A preliminary injunction may be issued when the affidavits submitted in support of the application satisfactorily show that sufficient grounds exist for its issuance. (Code of Civ. Proc. § 527(a).) “The law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court.” (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.)

Trial courts “evaluate two interrelated factors when deciding whether or not to issue a [preliminary injunction]. The **first** is the likelihood that the plaintiff will prevail on the merits at trial. The **second** is the interim harm that the plaintiff is likely to sustain if the [injunction] were denied as compared to the harm that the defendant is likely to suffer if the [preliminary injunction] were issued.” (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251 (emphasis added) (quoting *IT Corp., supra*, 35 Cal.3d at 69-70).) “The trial court’s determination must be guided by a ‘mix’ of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on one, the less must be shown on the other to support an injunction.” (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.) Injunctive relief is permitted in cases of continuous trespass. (Code Civ. Proc. § 526(a)(6); *Aspen Grove Condominium Ass’n v. CNL Income Northstar LLC* (2014) 231 Cal.App. 4th 53, 62-64.)

B. Whole Foods has Already Demonstrated a Likelihood of Success on its Trespass and Declaratory Relief Causes of Action

This Court has already held that Defendants’ protest activity inside Plaintiffs’ stores and the walkways immediately outside those stores constitutes “relevant credible evidence supporting a likelihood that [Plaintiffs] can prevail on their Second Cause of Action for trespass (as well as their First Cause of Action for declaratory relief).” (Ex. A to Blackman Decl.) Moreover, this Court has also found Defendants’ free-speech arguments to be unavailing: “Plaintiffs have shown a likelihood of success of their contention that the inside of, and walkways leading to, the Whole Foods Market stores are analogous to the retail establishments found in the above cases not to constitute a ‘public forum’ where First Amendment speech rights attach.” (*Id.* at p. 8:21-24.)

1 Plaintiffs' additional evidence submitted with this motion warrant the same conclusions.
2 Defendants are still trespassing on Plaintiffs' private property (indeed, they are doing so on a
3 greater scale than before), and there is still no protected right to speech on Plaintiffs' property.
4 Importantly, this Court made no mention of an additional showing as to either of the above factors
5 when outlining the requirements for an expanded injunction; instead only requiring concrete
6 evidence as to Defendants' continued statewide protests. (Ex. A to Blackman Decl. at p. 12:7-14.)
7 Plaintiffs have provided this evidence, and a statewide injunction should issue.

8 **C. The Balance of Harms Favors Issuing a Preliminary Injunction**

9 In addition to Plaintiffs' established likelihood of success on the merits of its causes of
10 action, the balance of harm tips heavily in their favor and in favor of issuing the requested
11 preliminary injunction. Absent the issuance of an expanded injunction, Plaintiffs' stores,
12 employees and customers will continue to suffer from Defendants' wrongful, illegal, unsafe and
13 disruptive behavior. This is not a dispute over free speech. Rather, this is a dispute over
14 Defendants' repeated and continuous trespassing in Plaintiffs' stores and on their private property.
15 Each time Defendants trespass on Plaintiffs' property, Plaintiffs' property and business interests
16 are demonstrably and irreparably harmed by:

- 17 • Substantially interfering with the stores' most basic purpose of providing customers
18 a pleasant and inviting shopping experience, without which Whole Foods Markets
19 cannot successfully operate, damaging its reputation among its team members and
20 customers;
- 21 • Increasing security risks associated with potential altercation and/or breaches of the
22 peace due to the proximity of the protesters confronting customers and team
23 members;
- 24 • Increasing potential exposure to liability from protesters locking themselves in
25 cages, climbing on roofs, gluing themselves to doorways and lying in and
26 obstructing aisles;
- 27 • Loss of productivity caused by the disruptions and having to spend valuable
28 resources monitoring and controlling Defendants' in-store activities; and

- 1 • Harming Whole Foods Market’s relationship with its customers, by, among other
2 things, Defendants shouting at and confronting customers, impairing their ingress
3 and egress, and obstructing their freedom of movement inside and immediately
4 outside of the stores.

5 (See Cozza Decl., ¶¶15-19; Rosprim Decl., ¶¶14-18; Holt Decl., ¶14; Summerland Decl., ¶¶16-20;
6 Gonzalez Decl., ¶¶7-8, Avila Decl., ¶¶15-19, DePanise Decl., ¶8, and Wirada Decl., ¶¶14-17.)

7 If a statewide injunction is granted, the effect on Defendants would be negligible. They
8 have no right to trespass on Plaintiffs’ property. They can freely conduct their protesting activities
9 outside of Plaintiffs’ stores and property on the public sidewalks and peacefully achieve their
10 goals without entering the stores and interfering with Plaintiffs’ operations, blocking aisles,
11 counters, registers, entrances and exits, and annoying and harassing customers and employees.
12 Indeed, the restraining order and four-store preliminary injunction already issued in this case did
13 not harm Defendants or impede their protest or expressive activities; it only stopped them from
14 trespassing. Defendants have been able to conduct their demonstrations and protests on the public
15 sidewalks outside of the four stores subject to the current injunction at no recognizable loss to
16 their constitutional right to speech.

17 Defendants’ continued conduct, including protest acts perpetrated as recently as September
18 30, 2019, reflects their intent to continue their unlawful acts inside Whole Foods Market stores
19 and on Plaintiffs’ property. Defendants’ repeated trespasses cannot be remedied by literally
20 requiring hundreds of individual damage actions for each separate trespass, nor can Plaintiffs be
21 made whole for their loss of customer goodwill and the disruption of their business. Thus, the
22 balance of harm favors Plaintiffs and favors issuance of a preliminary injunction.

23 **D. Plaintiffs Are Entitled to Statewide Relief**

24 California courts may issue statewide injunctions to prevent a multiplicity of lawsuits that
25 would grant the same relief based on a continuing harm. (Code Civ. Proc. § 526(a)(6); *see, e.g.,*
26 *Westside Sane/Freeze v. Ernest W. Hahn, Inc.* (1990) 224 Cal.App.3d 546 (appellate court upheld
27 statewide injunction to prevent wasting of judicial resource and to provide interim relief).) Indeed,
28 this Court’s Order Granting Preliminary Injunction suggests statewide injunctive relief may be

1 appropriate if Defendants activities continued at other Whole Foods Market stores in California.
2 (Ex. A at p. 12:7-14 to Blackman Decl.)

3 Plaintiffs have provided significant evidence that, throughout California, Defendants have
4 trespassed inside Whole Foods Market stores and engaged in other unlawful acts causing Plaintiffs
5 irreparable harm. Without a statewide injunction, Defendants can simply relocate their activities
6 from one Whole Foods Market store to another, requiring Plaintiffs to seek serial injunctions
7 throughout the State, wasting judicial resources and incurring high fees and costs. Whole Foods
8 should not be required to go store-by-store, county-by-county to obtain injunctive relief, unduly
9 burdening the courts and parties involved. (*See* Cal. Rule of Court 3.700 (“The rules in this [civil
10 case management] division are to be construed and administered to secure the fair, timely, and
11 efficient disposition of every civil case.”).)

12 Importantly, Defendants do not have a right to trespass inside or on Plaintiffs’ property
13 anywhere in California. Plaintiffs have the right to exclude from their private property any person
14 not there for the purpose of shopping, including the Defendants. A statewide injunction is
15 necessary to provide Plaintiffs “complete interim relief from [Defendants’] extensive threatened
16 infringement” of its fundamental right to control its private property. (*Westside Sane/Freeze*,
17 *supra*, 224 Cal.App.3d at 560.)

18 IV. CONCLUSION

19 For all of the foregoing reasons and supporting facts and authorities, plaintiffs Whole
20 Foods Market California, Inc. and Mrs. Gooch’s Natural Food Markets, Inc. respectfully request
21 the Court issue a temporary restraining order, enjoining Defendants from entering Plaintiffs’ stores
22 in California, and from directly or indirectly using Plaintiffs’ property for their protests and
23 demonstrations in violation of Plaintiffs’ non-solicitation policy, right to control their property and
24 their right to operate their businesses free from Defendants’ harassment inside all of their
25 California stores. Plaintiffs further request the Court issue an Order to Show Cause why a
26 preliminary injunction covering the same relief should not issue.

1 DATED: October 1, 2019

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3
4 By: 

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5
6 WHOLE FOODS MARKET CALIFORNIA,
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