

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

2002 OCT 11 PM 2:04

CLEAR OF COURT

EMPACADORA DE CARNES DE §
FRESNILLO, S.A. DE C.V., §
BELTEX CORPORATION, and §
DALLAS CROWN, INC. §
Plaintiffs §

VS. §

CIVIL ACTION NO. 4-02CV0804-A

TIM CURRY, District Attorney, §
Tarrant County, Texas, and §
BILL CONRADT, District Attorney, §
Kaufman County, Texas §
Defendants §

AND §

UNITED STATES DEPARTMENT OF §
AGRICULTURE, §
Party Needed for Just Adjudication §

TIM CURRY'S RESPONSE TO
PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

TO THE HONORABLE TERRY MEANS, UNITED STATES DISTRICT JUDGE:

Comes now TIM CURRY, the duly elected and qualified Criminal District Attorney of Tarrant County, Texas, a Defendant herein, [hereafter "DA" or "Defendant"] and files this expedited Response to Plaintiffs' Motion for Temporary Injunction.

Jurisdiction.

1. This Court has jurisdiction over the entire dispute. There is a genuine, imminent threat of prosecution against Plaintiffs. Neither the Federal Anti-Injunction Act nor the *Younger* abstention doctrine bar this Court from determining all the issues involved in this dispute.

Texas Attorney General.

2. The Office of the Texas Attorney General has, on October 7, 2002, chosen not to participate in this case. Attachment A to this Response.

Need For Brief Non-Evidentiary Hearing or Conference.

3. Plaintiffs Beltex and Dallas Crown have judicially confessed to violating the plain language of Texas Agriculture Code Chapter 149. The circumstances involving Beltex-affiliated Empacadora are less clear; Empacadora should be required to either unambiguously acknowledge facts which would confer standing or should not be considered further with regard to injunctive relief. Live testimony is not needed for the Temporary Injunction Motion. However, Defendant requests a brief non-evidentiary hearing or, alternatively, a brief conference. This would provide an opportunity for the attorneys to present succinct argument and to answer questions for the Court, which Defendant believes would be of particular use because of the complex interplay of the various state, federal, and international issues in this case.

Temporary Injunction Disputed.

4. Defendant DA is duty-bound to defend the statutes of the State of Texas and it is his privilege to do so, protecting Texans and the right of the Texas Legislature to pass such laws as it, in its discretion, finds to be in the best interests of Texas. Defendant does not agree to the imposition of a temporary injunction barring it from proceeding against Plaintiffs criminally insofar as they act within Tarrant County or are otherwise amenable to the prosecutorial jurisdiction of Defendant: to so agree would be to promise to refrain from enforcing a law that is presumed to be current and valid.

The Texas Attorney General has recently opined that Chapter 149 is enforceable criminally. Defendant declines to give Plaintiffs *carte blanche* to continue to violate Chapter 149.

5. As further set out in Defendant's Brief, Plaintiffs have not shown entitlement to the extraordinary relief they request, primarily because they have not shown a substantial likelihood of success on the merits of their arguments. A temporary injunction is not required to maintain the *status quo*, the *status quo* being that the State prosecutors are currently free to proceed with enforcement of Texas Agriculture Code Chapter 149. Defendant acknowledges that three courts (one or more state courts in Tarrant County, followed by the Second Court of Appeals in Fort Worth; one state court in Kaufman County, any case within Kaufman being subject to the time constraints and further issues set out in the Kaufman DA's Motion to Extend, followed by the Fifth Court of Appeals in Dallas; and this federal court) may very likely all soon become involved in this dispute in the absence of the issuance of a temporary injunction; concurrent litigation on related issues does not mandate that this Court grant the temporary relief requested since each of the courts are entrusted with deciding issues squarely within their respective jurisdictions. If this Court determines that justice or judicial efficiency requires consolidation of the issue before one court alone and further determines that temporary injunctive relief is appropriate and necessary to protect the Court's jurisdiction, a scheduling order should be entered that results in this matter being set for final resolution on the merits after a reasonable but shortened case preparation time, consistent with the needs of justice. An expeditious but

comprehensively presented case is in the interest of all: the people of Texas (whose law is being flaunted by the continued unlawful slaughter related activity) and the slaughterers and their associates (who currently claim to not know whether their activities are lawful business enterprises or criminal acts) all would benefit from a clear and binding judicial determination that the Texas law means what it says.

Chapter 149 Not Preempted Nor Repealed.

6. As the Texas Attorney General has recently opined, and as further set out in Defendant's Brief, Texas Agriculture Code Chapter 149 is the Law of Texas. It is not expressly or implicitly preempted by any law or laws presented by Plaintiffs. It does not unconstitutionally prohibit an activity over which the federal government has taken exclusive jurisdiction. It does not illegally interfere with interstate or foreign commerce. It has not been repealed.

Other Uses Of Horsemeat Are Not In Legal Jeopardy.

7. Several hearsay letters from Plaintiffs' friends and supporters (P. Exs. 20 -29, 3 Apx. 434-456) and Plaintiffs' Motion at para. 2.7, pp. 4-6, attest to numerous uses of horsemeat and horse parts that are other than 'sale for human consumption'. None of those sending support letters to the Plaintiffs and none of the others referenced as alternative users of horse parts are parties before this Court, so their inconvenience if Plaintiffs fold is of no consequence to the issue of a Temporary Injunction for Plaintiffs. The various alternative uses of horsemeat and horse parts that are not 'sale for human consumption' are not in dispute and are not barred by Chapter 149. People throughout the world may proceed to make baseballs, feed their zoo animals,

learn to shoe horses, and engage in cardiac research and heart surgery without the slightest fear of prosecution under Texas Agriculture Code Chapter 149.

Parts of Plaintiffs' Motion, Declarations, and Exhibits Should be Limited.

8. The ability to present evidence by affidavit does not include the ability to present inadmissible evidence or evidence beyond the expertise or direct knowledge of the witness. Although the understanding of the Plaintiffs as to the law (specifically their understanding prior to being informed in writing of the Texas Attorney General's Opinion that Chapter 149 remains in force) is perhaps relevant for some purposes, it is not relevant or admissible for the purpose of determining what the law is. Such opinions should be limited to proper uses only and should not be considered for the purpose of determining what the law actually is or should be. Evidence is not proper as to what the law is; discerning the law is the province of the Court. Defendant MOVES to strike all opinion testimony about what the law is or should be to the extent that it is offered for that purpose.

Attachments.

9. Attached hereto and incorporated herein are the following:

| | |
|--------------|--|
| Attachment A | Letter, Office of the Texas Attorney General to David Broiles, with copy to Ann Diamond, October 7, 2002 |
| Attachment B | Texas Penal Code § 9.21, entitled "Public Duty" |
| Attachment C | 21 U.S.C. § 678 |

Prayer for Relief

Wherefore, Defendant Tim Curry prays that the Affidavits and Evidence of Plaintiffs be limited as set out above in Paragraph 8 of this Response, that Plaintiff Empacadora be required to plead specific standing facts or be denied further consideration in this Temporary Injunction matter, that this matter be set for a brief non-evidentiary hearing or conference at a time convenient to the Court, and that upon consideration the Court DENY the Plaintiffs' Motion for Temporary Injunction. If the Court grants a temporary injunction, Defendant prays for the entry of a scheduling order.

Respectfully submitted,



ANN DIAMOND
Chief, Litigation
Assistant Tarrant County
Criminal District Attorney
State Bar No. 05802400

ROBERT D. BROWDER
Assistant District Attorney
State Bar No. 03087975

401 W. Belknap Street, 9th Floor
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ATTORNEYS FOR DEFENDANT
TIM CURRY
TARRANT COUNTY CRIMINAL
DISTRICT ATTORNEY

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing "Tim Curry's Response to Motion for Temporary Injunction" along with attachments and the Brief in Support, was this day delivered by hand or faxed to Plaintiffs' counsel, and was also mailed, certified mail, return-receipt requested, on this date in compliance with the provisions of Rule 5, FED. R. CIV. P. to the following:

Mr. David Broiles

Attorney at Law

1619 Pennsylvania Avenue
Fort Worth, TX 76104

By fax to 817.335.7733 and
CMRRR # 7001 0320 0003 7152 9055

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Attorneys at Law

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By fax to 214.758.1550 and
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Hon. Bill Conradt

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Kaufman County District Attorney

100 W. Mulberry St.

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By fax to 972.932.0457, and
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Hon. Ann Veneman

Secretary of Agriculture

1400 Independence Ave. S.W.

Washington, D.C. 20250

By CMRRR # 7001 0320 0003 7152 9024

Mr. Andrew Tannenbaum

Trial Attorney

Department of Justice, Civil Division

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By fax to 202.616.8202 and
By CMRRR # 7001 0320 0003 7152 9017

Mr. Hal Reuben

Deputy Assistant General Counsel

USDA

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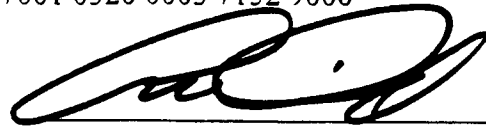
South Building, Room 2319

Washington, D.C. 20250

By Fax ONLY to 202.690.4322

Hon. John Cornyn
Attorney General of Texas
Attn.: Toni Hunter, Chief of Litigation
P.O. Box 12548
Austin, TX 78711-2548

By fax to 512.320.0667, and
CMRRR # 7001 0320 0003 7152 9000


ANN DIAMOND

10/11/02
Date signed

RECEIVED

OCT 08 2002

October 7, 2002

CIVIL DIVISION
DISTRICT ATTORNEY'S OFFICE

David Broiles
Attorney at Law
1619 Pennsylvania Avenue
Fort Worth, TX 76104

RE: *Empacadero de Carnes De Fresnillo, et al v. Tim Curry, et al*
Cause No. 4-02CV0804-A

Dear Mr. Broiles:

The Attorney General has just been served with a copy of Plaintiff's Original Complaint in the above referenced matter.

The Attorney General believes that the real parties in interest can adequately present the issues to the court. For this reason, the Attorney General respectfully declines to participate in this case.

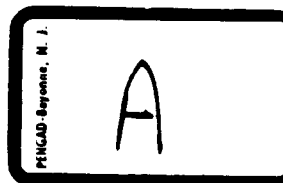
If I can be of further assistance, please do not hesitate to call.

Sincerely,



Toni Hunter, Chief
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2120

cc: ✓ Ann Diamond, Chief, Litigation
Assistant Tarrant County
Criminal District Attorney
401 W. Belknap Street, 9th Floor
Fort Worth, TX 76196-0401



*** THIS DOCUMENT IS CURRENT THROUGH THE 2002 SUPPLEMENT (2001 SESSION) ***
*** September 2002 Annotation Service ***

PENAL CODE

TITLE 2. GENERAL PRINCIPLES OF CRIMINAL RESPONSIBILITY

CHAPTER 9. JUSTIFICATION EXCLUDING CRIMINAL RESPONSIBILITY

SUBCHAPTER B. JUSTIFICATION GENERALLY

GO TO TEXAS CODE ARCHIVE DIRECTORY

Tex. Penal Code § 9.21 (2002)

§ 9.21. Public Duty

(a) Except as qualified by Subsections (b) and (c), conduct is justified if the actor reasonably believes the conduct is required or authorized by law, by the judgment or order of a competent court or other governmental tribunal, or in the execution of legal process.

(b) The other sections of this chapter control when force is used against a person to protect persons (Subchapter C), to protect property (Subchapter D), for law enforcement (Subchapter E), or by virtue of a special relationship (Subchapter F).

(c) The use of deadly force is not justified under this section unless the actor reasonably believes the deadly force is specifically required by statute or unless it occurs in the lawful conduct of war. If deadly force is so justified, there is no duty to retreat before using it.

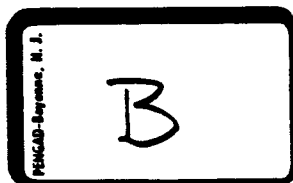
(d) The justification afforded by this section is available if the actor reasonably believes:

(1) the court or governmental tribunal has jurisdiction or the process is lawful, even though the court or governmental tribunal lacks jurisdiction or the process is unlawful; or

(2) his conduct is required or authorized to assist a public servant in the performance of his official duty, even though the servant exceeds his lawful authority.

LexisNexis (TM) Notes: CASE NOTES TREATISES AND ANALYTICAL MATERIALS LAW REVIEWS

CASE NOTES



LEXSTAT 21 U. S. C. 678

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH P.L. 223, APPROVED 8/21/02 ***
*** WITH A GAP OF P.L. 107-217 ***

TITLE 21. FOOD AND DRUGS

CHAPTER 12. MEAT INSPECTION

AUXILIARY PROVISIONS

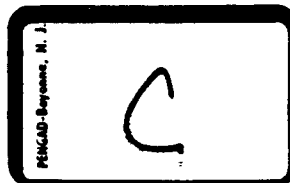
GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

21 USCS § 678 (2002)

§ 678. Non-Federal jurisdiction of federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this Act with respect to premises, facilities and operations of any establishment at which inspection is provided under title I of this Act [21 USCS § § 601 et seq.], which are in addition to, or different than those made under this Act may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 202 of this Act [21 USCS § 642], if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under title I of this Act [21 USCS § § 601 et seq.], but any State or Territory or the District of Columbia may, consistent with the requirements under this Act, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said title [21 USCS § § 601 et seq.], for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This Act shall not preclude any State or Territory or the District of Columbia from making requirement [requirements] or taking other action, consistent with this Act, with respect to any other matters regulated under this Act.

HISTORY: (March 4, 1907, ch 2907, Title IV, § 408, as added Dec. 15, 1967, P.L. 90-201, § 16, 81 Stat. 600.)



HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act March 4, 1907, ch 2907, which appears generally as 21 USCS § § 601 et seq. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed word "requirements" has been inserted to indicate the word probably intended by Congress.

Effective date of section:

This section became effective on enactment, pursuant to § 20 of Act Dec. 15, 1967, P.L. 90-201, which appears as 21 USCS § 601 note.