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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

SAVE THE PLASTIC BAG COALITION, an unincorporated association,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a political subdivision of the State of California and a municipal corporation; SAN FRANCISCO PLANNING DEPARTMENT, an agency of the City and County of San Francisco; SAN FRANCISCO DEPARTMENT OF THE ENVIRONMENT, an agency of the City and County of San Francisco; and DOES 1-100, inclusive,

Respondents.

Case No. CPF-12-511978

SAN FRANCISCO'S OPPOSITION TO PETITIONER'S REQUEST TO STAY IMPLEMENTATION OF CHECKOUT BAG ORDINANCE

Hearing Date: September 18, 2012
Hearing Judge: Hon. Teri Jackson
Time: 2:00 p.m.
Place: 503

Date Action Filed: February 29, 2012
Trial Date: August 27, 2012

Attached Document: Declaration of Donald Oliveira

INTRODUCTION

On September 12, 2012, this Court rejected Petitioner Manufacturers' CEQA challenge and their preemption challenge to San Francisco's Checkout Bag Ordinance. Having lost this case on the merits, Manufacturers now ask the Court nevertheless to prohibit the City from implementing the ordinance that the Court has determined to be valid.

Manufacturers' motion for stay turns both law and equity on their heads. Even if Manufacturers prevailed on appeal, the City would be free to implement its Checkout Bag Ordinance as soon as it completed an EIR. Whatever the ultimate outcome of this action, San Francisco will join Los Angeles County, Marin County and the rest of California in banning single-use plastic checkout bags. Manufacturers would be better served to accept the inevitable trend away from single-use plastic checkout bags and diversify their production to meet the evolving needs of their customers.

This case simply does not present the extraordinary circumstances necessary to justify a stay pending appeal. Manufacturers cannot demonstrate irreparable harm. Nor can Manufacturers demonstrate that a delay in implementing this environmental measure would promote the public interest. Weighing Manufacturers' temporary loss of a few San Francisco customers against the City's extensive efforts to prepare for the Ordinance, the balance of hardships weighs against Manufacturers. Finally, after a two-day hearing on the merits and this Court's careful consideration of the parties' extensive briefing and the administrative record, Manufacturers cannot establish "substantial questions" on appeal. ***Each*** of these elements is necessary before the Court may grant a motion to stay. Manufacturers can establish ***none*** of the essential elements to support as stay.

County Sanitation Dist. No. 2 v. County of Kern (2005) 127 Cal.App.4th 1544 demonstrates the irony of Manufacturers' stay motion. In that case, the Court of Appeal invalidated a local ordinance restricting agricultural application of sewage sludge. The Court held that Kern County's mitigated negative declaration was inadequate and an EIR was required. The Court, though, allowed Kern County to continue to enforce the challenged ordinance pending completion of the required EIR. (*Id.*, at p. 1605 ["we hold that the heightened treatment standards may continue in effect provided that County prepares, in good faith without unnecessary delay, an EIR that complies with CEQA."].)

Manufacturers, by contrast, would prohibit implementation of the Checkout Bag Ordinance that this Court has expressly found to be valid.

ARGUMENT

I. MANUFACTURERS MUST ESTABLISH: THE PUBLIC INTEREST SUPPORTS THEIR MOTION, IRREPARABLE HARM, BALANCE OF HARDSHIPS, AND "SUBSTANTIAL QUESTIONS" ON APPEAL

After ruling on a writ petition, the Superior Court has authority to stay its order, but only if the stay promotes the public interest. "[T]he court in which proceedings under this section are instituted may stay the operation of the administrative order or decision . . . until the filing of a notice of appeal from the judgment. . . . However, no such stay shall be imposed or continued if the court is satisfied that it is against the public interest." (Cal. Code. Civ. Proc. § 1094.5(g).) This Court's authority is limited, and extends only until Manufacturers file their Notice of Appeal. To continue their stay pending appeal, Manufacturers will need to apply to the Court of Appeal for a Writ of Supersedeas. There is zero practical reason for this Court to grant Manufacturers' stay request. Manufacturers will need to apply to the Court of Appeal anyway for supersedeas, which they can do well before the Ordinance's October 1 implementation date.

Manufacturers must demonstrate irreparable harm. (*See, e.g. Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *California Table Grape Com. v. Dispoto* (1971) 14 Cal.App.3d 314, 316-17.) Manufacturers must show that absent a stay, they would "lose the fruits of a meritorious appeal." (*Dry Cleaners & Dyers Inst. of San Francisco & Bay Counties, Inc. v. Reiss* (1936) 5 Cal.2d 306, 310.) A stay is proper only "where to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him." (*People ex rel. San Francisco Bay Conservation & Dev. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 537.) The Supreme Court has cautioned that the power to grant supersedeas relief "should be sparingly employed and reserved for the exceptional situation." (*Id.* at p. 537.)

The petitioner should also show that the balance of hardships weighs in its favor, that prejudice to the respondent from not granting the stay would outweigh the harm to respondent from granting it. (J. Eisenberg, *California Practice Guide: Civil Writs & Appeals* (Rutter Group 2011) § 7:281 [citing *Mills, supra,*.)

"It is incumbent upon the petitioner to show that substantial questions will be raised upon the appeal. Affirmances must be contemplated as well as reversals and the presumption is in favor of the lower court's decision." (*Deepwell Homeowners' Protective Assn., supra*, 239 Cal.App.2d at p. 67 [citation omitted].) A Court of Appeal "must presume the truth of the findings of the trial court," and the court will not grant a Writ of Supersedeas "unless there is a probability that error has been committed." (*Id.* at pp. 67-68; *Milne v. Goldstein* (1961) 194 Cal.App.2d 552, 555.)

A. Delaying The Checkout Bag Ordinance Would Harm The Public Interest

The requested stay will not promote the public interest. First, as noted above, there is no practical necessity for this Court to enter a stay for the short period until Manufacturers file a notice of appeal. Nothing will happen between now and October 1. The lack of urgency is especially true with respect to the 2013 implementation date for retail food establishments.

Furthermore, delaying implementation of this environmental ordinance will cause public harm. San Franciscans are entitled to the benefits of the Checkout Bag Ordinance, which will reduce litter, clean up the Bay, and advance the City's zero waste goals.

B. Manufacturers Cannot Show Irreparable Harm

Manufacturers must demonstrate irreparable harm to justify their requested stay. First, there can be no harm at all to Manufacturers during the limited period that this Court has jurisdiction to impose a stay. Manufacturers have plenty of time before October 1 to seek a Writ of Supersedeas from the Court of Appeal.

In any event, Manufacturers cannot demonstrate irreparable harm for the entire duration of their anticipated appeal. Manufacturers can show only a short-term marginal economic disadvantage from timely implementation of San Francisco's Checkout Bag Ordinance. Even if Manufacturers prevail on appeal, they will have only bought themselves a little time. San Francisco will simply complete an EIR and then implement its Ordinance.

San Francisco represents only a small percentage of Manufacturers' customers. Los Angeles County, Marin County and numerous California jurisdictions have already banned single-use plastic checkout bags. San Francisco's Ordinance alone will cause no serious harm to Manufacturers. Manufacturers have not shown they are unable to produce and sell compliant reusable bags or

compliant compostable bags. Given the broader movement to ban plastic bags, Manufacturers would be better served by adapting to their customers' needs than by pursuing this extreme effort to delay implementation of San Francisco's valid (and inevitable) Checkout Bag Ordinance.

C. The Balance Of Hardships Favors San Francisco

Manufacturers can show only a short-term loss of an unquantifiable opportunity to sell single-use plastic checkout bags in San Francisco. And this loss would be negated entirely if Manufacturers are able to meet the growing demand for compliant reusable or compostable checkout bags.

San Francisco, on the other hand, has invested more than 3000 hours in staff time performing education and outreach to prepare San Francisco for a smooth and successful October 1 implementation of the Checkout Bag Ordinance. In addition to those 300 hours, San Francisco has incurred over $50,000 in expenses, distributing an informational mailer to over 9000 businesses, procuring thousands of reusable bags to give away to the public, and producing posters, placards and other material for stores to use in educating their customers. (See Oliviera Decl., filed herewith.) If the courts delay implementation of San Francisco's Checkout Bag Ordinance, all this work will have to be repeated to support a later implementation date.

D. Manufacturers Cannot Demonstrate "Substantial Questions" On Appeal

This Court thoroughly analyzed the parties' merits briefs and the administrative record. This Court heard five hours of attorney argument on the merits, over two days. After careful deliberation, the Court rejected each of Manufacturers' contentions. The Court held that San Francisco is a regulatory agency entitled to invoke the Class 7 and Class 8 Categorical Exemptions. Manufacturers provided absolutely no contrary case authority to support their novel argument that local ordinances may ***never*** rely on these Categorical Exemptions. The Court held that the Ordinance's 10 cent bag fee is not a mitigation measure, but rather is an integral element of the Ordinance that was intended to address an existing problem, namely, a proliferation of single use bags, including single use paper bags. The Court recognized that substantial evidence supported the City's reliance on the Categorical Exemptions, and that Manufacturers had failed to present a fair argument based on substantial evidence of significant adverse environmental effects due to unusual circumstances. Finally, the Court applied the Retail Food Code's express preemption clause to San Francisco's Ordinance and

recognized that the Ordinance is an environmental measure (as Manufacturers conceded in their briefs), not a health or sanitation measure.

Manufacturers have not demonstrated a probability that this Court erred. Manufacturers have not demonstrated "substantial questions" on appeal.

II. IF THE COURT PROHIBITS IMPLEMENTATION OF THE CHECKOUT BAG ORDINANCE, THE COURT SHOULD REQUIRE A BOND

If the Court nevertheless grants Manufacturers' motion, the Court should require Manufacturers to post a bond to compensate the City for delays in implementation of the Ordinance. A bond or other surety is a common means of protecting a party from a stay or injunction if that party prevails. (Cf . *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 10; see *also Yellen v. Fidelity & Cas. Co. of New York* (1931) 115 Cal.App. 434 [the law requires an undertaking upon issuance of a preliminary injunction].) In this case, to compensate the City for 3000 hours in lost staff time, $18,000 in costs for the informational mailer and $25,000 the City has spent procuring give-away reusable bags (see Oliviera Decl., filed herewith.), the Court should require a bond in the minimum amount of $200,000.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's request to stay implementation of the City's Checkout Bag Ordinance.

Dated: September 17, 2012

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
JAMES M. EMERY
Deputy City Attorneys

By: ______________________
JAMES M. EMERY
Attorneys for Respondents
CITY AND COUNTY OF SAN FRANCISCO, et al.

PROOF OF SERVICE

I, Voneciel J. Gaines declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On September 17, 2012, I served the attached:

SAN FRANCISCO'S OPPOSITION TO PETITIONER'S REQUEST TO STAY IMPLEMENTATION OF CHECKOUT BAG ORDINANCE

on the following persons at the locations specified:

Stephen L. Joseph
350 Bay Street, Suite 100-328
San Francisco, California 94133

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) and served the named document in the manner indicated below:

☒ **BY UNITED STATES MAIL**: I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, City and County of San Francisco, CA 94102, for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

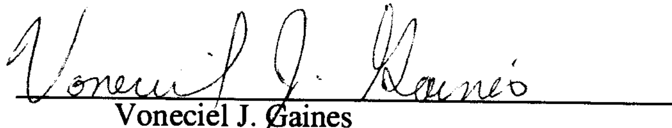
☐ **BY PERSONAL SERVICE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

☒ **BY ELECTRONIC MAIL**: I caused a copy of such document to be transmitted via electronic mail in Portable Dcoument Format ("PDF") Adobe Acrobate from the electrnoic address: *voneciel.gaines@sfgov.org*. The electronic transmission was reported as complete and without error.

☐ **BY FACSIMILE**: I caused a copy(ies) of such document(s) to be transmitted via facsimile machine. The fax number of the machine from which the document was transmitted was (415)554-4757. The fax number(s) of the machine(s) to which the document(s) were transmitted are listed above. The fax transmission was reported as complete and without error. I caused the transmitting facsimile machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed September 17, 2012, at San Francisco, California.



Voneciel J. Gaines