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8 SAVE THE PLASTIC BAG COALITION

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SANTA CRUZ

12 SAVE THE PLASTIC BAG COALITION,) Case No. CV172379
13 an unincorporated association,)
14 Plaintiff,)
15 v.) **COMPLAINT FOR DECLARATORY AND**
16 COUNTY OF SANTA CRUZ, a political) **INJUNCTIVE RELIEF INVALIDATING**
17 subdivision of the State of California; and) **SANTA CRUZ COUNTY PLASTIC BAG**
18 DOES 1-10, inclusive,) **BAN ORDINANCE BASED ON STATE**
19 Defendants.) **LAW PREEMPTION AND VIOLATION**
20) **OF THE U.S. CONSTITUTION**
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29 Plaintiff, SAVE THE PLASTIC BAG COALITION, alleges as follows:

30 **PARTIES AND JURISDICTION**

31 1. Plaintiff SAVE THE PLASTIC BAG COALITION is an unincorporated
32 association.

33 2. Defendant COUNTY OF SANTA CRUZ (the "County") is a political
34 subdivision of the State of California.

35 3. This is an action regarding County Ordinance No. 5103 (the "Ordinance")
36 relating to the reduction of single-use plastic and paper carry-out bags. The Ordinance was
37 adopted by the County Board of Supervisors (the "Board") on September 20, 2011. A true and
38 correct copy of the Ordinance is attached hereto as Exhibit A and incorporated herein by

1 reference.

2 4. The Ordinance takes effect six months from the date of adoption.

3 5. The Ordinance bans plastic bags provided by restaurants and food vendors
4 (collectively “restaurants”) to customers for foods and beverages (“restaurant plastic bags”).
5 Such a ban is invalid and void for the reasons stated herein.

6 6. In addition, the entire Ordinance is preempted by AB 2449 (Pub. Res Code
7 §42250-57.)

8 7. Plaintiff seeks a declaratory judgment that the entire Ordinance is invalid and
9 void. In the alternative, Plaintiff seeks a declaratory judgment that the ban of restaurant plastic
10 bags in the Ordinance is invalid and void. Plaintiff also requests preliminary and permanent
11 injunctive relief to prevent the Ordinance from taking effect.

12 8. Plaintiff is ignorant of true names and capacities of DOES named herein as
13 DOES 1-10, inclusive, and therefore sues said Defendants by such fictitious names. Plaintiff
14 will amend this Complaint to allege their true names and capacities when ascertained.

15 9. The DOE Defendants include, but are not limited to, any and all cities in the
16 County that adopt similar ordinances.

17 10. Plaintiff is informed and believes that at all times relevant to the allegations
18 herein, each Respondent, including the DOE Defendants, were the employees, agents, or
19 partners of each of the other Defendants, and were at all times acting within the purpose and
20 scope of their, agency or partnership, or at the direction of the other Defendants.

21 11. No claim is made herein under the California Environmental Quality Act
22 (“CEQA”).

23 12. This Court has jurisdiction over the matters alleged herein pursuant to Code Civ.
24 Proc. §410.10.

25 13. This Court is the proper forum under Code Civ. Proc. §393(b) and §394.
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STANDING

14. Plaintiff is a non-profit campaign organization that was formed on June 3, 2008.

15. Plaintiff’s organizational purposes include, but are not limited to, the following:
- A. Responding to misinformation about plastic bags, paper bags, and reusable bags.
 - B. Ensuring that the impacts of banning plastic bags are made known to decision-makers and the public, in the public interest.
 - C. Ensuring that cities and counties do not infringe upon and violate the rights of manufacturers, distributors, retailers, restaurants, consumers, and the general public when plastic bags are banned or restricted.
 - D. Ensuring that cities and counties comply with CEQA prior to banning or restricting plastic bags.

16. Plaintiff’s members include manufacturers and distributors of restaurant plastic bags that are marketed, distributed, and/or used in Santa Cruz County, including but not limited to unincorporated parts of Santa Cruz County.

17. Plaintiff maintains a website at www.savetheplasticbag.com to respond to misinformation about plastic bags and to address the impacts of plastic, paper, and reusable bags, for the benefit of decision-makers and the public.

18. This case is filed on behalf of Plaintiff’s members and in the public interest.

19. Plaintiff has standing as an association to bring this action, because (i) its members would otherwise have standing to sue on their own behalf; (ii) the interests Plaintiff seeks to protect in this lawsuit are germane to the organization’s purpose; and (iii) neither the claims asserted herein, nor the relief requested, require participation of the members in this lawsuit.

20. Plaintiff has beneficial standing and citizen/public interest standing.

21. The California Supreme Court has ruled that Plaintiff has standing in cases of this nature. (*Save The Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155.)

1 **ALLEGATIONS SUPPORTING**
2 **CLAIM FOR ATTORNEY’S FEES**

3 22. Plaintiff will request an award of attorney’s fees against the County if the Court
4 grants any of the relief requested herein, as (i) this litigation is intended to result in enforcement
5 of an important public right affecting the public interest; (ii) a significant benefit will be
6 conferred on the general public or a large class of persons; and (iii) the necessity and financial
7 burden of private enforcement are such as to make an award of attorney’s fees appropriate.
8 (Code Civ. Proc. §1021.5.)

9 **STATEMENT OF FACTS**

10 **Objections And Exhibits Submitted**
11 **Prior To Adoption Of The Ordinance**

12 23. On or about March 16, 2011, Plaintiff submitted to the County written objections
13 to the proposed ordinance. A true and correct copy of those objections is attached hereto as
14 Exhibit B. All of the comments and objections stated and asserted therein are incorporated and
15 realleged herein by reference.

16 24. On or about September 6, 2011, the California Restaurant Association submitted
17 to the Board written objections to the inclusion of restaurant plastic bags in the draft Ordinance.
18 A true and correct copy of the letter is attached hereto as Exhibit C. All of the comments and
19 objections stated and asserted therein are incorporated and realleged herein by reference.

20 25. On or about September 9, 2011, Plaintiff submitted to the Board written
21 objections to the inclusion of restaurant plastic bags in the draft Ordinance. A true and correct
22 copy of the letter is attached hereto as Exhibit D. All of the comments and objections stated and
23 asserted therein are incorporated and realleged herein by reference.

24 26. On or about September 12, 2011, Plaintiff submitted to the Board written
25 objections to the proposed Findings in the draft Ordinance. A true and correct copy of the letter
26 is attached hereto as Exhibit E. All of the comments and objections stated and asserted therein
27 are incorporated and realleged herein by reference.

28 27. Plaintiff submitted approximately 107 documentary exhibits in support of its
objections.

1 37. David Laist, a senior policy analyst with the federal Marine Mammal
2 Commission, has stated:

3 “In their eagerness to make their case [against plastic bags], some of the
4 environmental groups make up claims that are not really supportable.”

5 (<http://www.npr.org/templates/story/story.php?storyId=127600685>)

6 38. The Chief Scientist of the Scripps 20-day expedition to study marine debris in
7 the Pacific Ocean including plastic bags has stated:

8 “Misinformation on this issue is rampant.”

9 (<http://seaplexscience.com/2010/08/09/recycled-island-not-cure-for-plastic-in-ocean/>)

10 39. The County made 13 “findings” that it included in Ordinance §5.48.010(B)
11 (“Findings and Intent”). The findings are based on misinformation, limited or no research or
12 verification, and are plainly wrong.

13 40. Ordinance §5.48.010(B)(1) states: “Globally, an estimated 500 billion to 1
14 trillion petroleum-based plastic bags are used which uses over 12 million barrels of oil.”

15 41. In its September 12, 2011 letter (Exhibit E), Plaintiff objected to the finding
16 stating as follows: “85% of plastic bags used in the United States are made in the United States.
17 Those bags are not made from oil. The 12 million barrels of oil figure, while often repeated, has
18 no basis whatsoever in fact.”

19 42. Ordinance §5.48.010(B)(2) states: “The production and disposal of plastic bags
20 causes ... the deaths of thousands of marine animals each year.”

21 43. In its September 12, 2011 letter (Exhibit E), Plaintiff objected to the finding
22 stating that it is not true. Plaintiff referred to an article in *The Times* (London) published on
23 March 8, 2008 that states as follows:

24 “Scientists and environmentalists have attacked a global campaign to ban
25 plastic bags which they say is based on flawed science and exaggerated
26 claims.

27 The widely stated accusation that the bags kill 100,000 animals and a
28 million seabirds every year are false, experts have told *The Times*. They
pose only a minimal threat to most marine species, including seals,
whales, dolphins and seabirds....

1 They “don’t figure” in the majority of cases where animals die from
2 marine debris, said David Laist, the author of a seminal 1997 study on
3 the subject. Most deaths were caused when creatures became caught up
4 in waste produce. “Plastic bags don’t figure in entanglement,” he said.
5 “The main culprits are fishing gear, ropes, lines and strapping bands.
6 Most mammals are too big to get caught up in a plastic bag.”

7 He added: “The impact of bags on whales, dolphins, porpoises and seals
8 ranges from nil for most species to very minor for perhaps a few species.
9 For birds, plastic bags are not a problem either.”

10 The central claim of campaigners is that the bags kill more than 100,000
11 marine mammals and one million seabirds every year. However, this
12 figure is based on a misinterpretation of a 1987 Canadian study in
13 Newfoundland, which found that, between 1981 and 1984, more than
14 100,000 marine mammals, including birds, were killed by discarded nets.
15 The Canadian study did not mention plastic bags.

16 Fifteen years later in 2002, when the Australian Government
17 commissioned a report into the effects of plastic bags, its authors
18 misquoted the Newfoundland study, mistakenly attributing the deaths to
19 “plastic bags”.

20 The figure was latched on to by conservationists as proof that the bags
21 were killers. For four years the “typo” remained uncorrected. It was only
22 in 2006 that the authors altered the report, replacing “plastic bags” with
23 “plastic debris”. But they admitted: “The actual numbers of animals
24 killed annually by plastic bag litter is nearly impossible to determine.”

25 In a postscript to the correction they admitted that the original Canadian
26 study had referred to fishing tackle, not plastic debris, as the threat to the
27 marine environment.

28 Regardless, the erroneous claim has become the keystone of a widening
campaign to demonise plastic bags.

David Santillo, a marine biologist at Greenpeace, told The Times that
bad science was undermining the Government’s case for banning the
bags. “It’s very unlikely that many animals are killed by plastic bags,” he
said. “The evidence shows just the opposite. We are not going to solve
the problem of waste by focusing on plastic bags....

A 1968 study of albatross carcasses found that 90 per cent contained
some form of plastic but only two birds had ingested part of a plastic
bag.

1 Professor Geoff Boxshall, a marine biologist at the Natural History
2 Museum, said: "I've never seen a bird killed by a plastic bag. Other
3 forms of plastic in the ocean are much more damaging. Only a very
small proportion is caused by bags."

4 44. The U.S. National Oceanic and Atmospheric Administration states as follows:

5 Question: "Is it true that 100,000 marine mammals and/or sea turtles die
6 each year due to marine debris/plastics/plastic bags?"

7 Answer: "We were able to find no information to support this statement.
8 An erroneous statement attributing these figures to plastic bags was
9 published in a 2002 report published by the Australian Government; it
was corrected in 2006."

10 Question: "Is it true that marine debris kills a million seabirds each
11 year?"

12 Answer: "This statement is currently unknown. We are so far unable to
13 find a scientific reference for this figure. The closest we have found is
14 "214,500 to 763,000 seabirds are killed annually incidental to driftnet
fishing by Japanese fishermen in the North Pacific Ocean (US
Department of Commerce, 1981)" from Laist, 1987."

15 (<http://marinedebris.noaa.gov/info/faqs.html>)

16 45. Ordinance §5.48.010(B)(3) states: "Toxic substances present in plastics are
17 known to cause death or reproductive failure in fish, shellfish, wildlife, and in the humans
18 ingesting the fish."

19 46. In its September 12, 2011 letter (Exhibit E), Plaintiff objected to the finding
20 stating as follows: "The statement refers to "plastics." The subject matter of the ordinance is
21 plastic bags, not "plastics." Hard plastics may contain toxic substances, but plastic film used in
22 plastic bags do not. You are defaming a product for ideological reasons, not based on fact."

23 47. Ordinance §5.48.010(B)(4) states: "Plastic bits absorb dangerous compounds
24 such as dichlorodiphenyldichloroethylene (DDE), polychlorinated biphenyls (PCB), and other
25 toxic materials present in ocean water. Plastics have been found to concentrate these toxic
26 chemicals at levels of up to 1 million times the levels found in seawater. Plastic bits have
27 displaced plankton in the Pacific Gyre."

28 48. In its September 12, 2011 letter (Exhibit E), Plaintiff objected to the finding

1 stating as follows: “Plastic bits cannot absorb anything. Tying plastic bags into dangerous
2 chemicals is mischievous, intellectually dishonest, and ideology run amok. And plastic bits
3 have not displaced plankton in the Pacific Gyre.”

4 49. Ordinance §5.48.010(B)(5) states: “The U.S. Marine Mammal Commission
5 estimates that 267 marine species have been reported entangled in or having ingested marine
6 debris. Plastic can constrict the animals' movements or block their digestive system, killing the
7 animals through starvation, exhaustion, or infection from deep wounds caused by tightening
8 material.”

9 50. In its September 12, 2011 letter (Exhibit E), Plaintiff objected to the finding
10 stating as follows: “There is no such report about 267 marine species of which we are aware
11 and if such a report exists it is wrong.”

12 51. Ordinance §5.48.010(B)(9) states: “According to Californians Against Waste,
13 Californians pay up to \$200 per household each year in State and Federal taxes to clean up litter
14 and waste associated with single-use bags, on top of the \$40 per household per year in hidden
15 grocery costs to offset the expense of the nearly 1,000 "free" bags received from grocers.”

16 52. In its September 12, 2011 letter (Exhibit E), Plaintiff objected to the finding
17 stating as follows:

18 “According to the U.S. Census, there are 12.1 million households in
19 California. 12.1 multiplied by 200 is approximately \$2.4 billion. Is that
20 the amount that public agencies in California spend cleaning up plastic
bags?”

21 The Los Angeles County EIR states: “Public agencies in California
22 spend more than \$375 million each year for litter prevention, cleanup,
and disposal.” (EIR at page I-4.)

23 We sent to you the litter statistics prepared by Keep America Beautiful,
24 the State of Florida, the State of Washington, the City and County of San
25 Francisco., and the City of Toronto.

26 The San Francisco Department of the Environment litter audit conducted
27 before plastic bags were banned in that city showed that plastic retail
bags were 0.6% of all litter.

28 The Florida figure is 0.72%.

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The Toronto figure is 0.13% (see page 35 of Toronto study).

The worst figure that we have found is in the Keep America Beautiful litter audit. That figure is 5%. The figure in that audit for plastic bags at storm drains is 0.9%. However, the definition of plastic bags in that audit (at page A-2) is as follows: “Plastic trash bags, and plastic grocery, and other merchandise shopping bags used to contain merchandise to transport from the place of purchase, given out by the store with the purchase (including dry cleaning bags). This category includes full bags....”

Let’s take the worst figure: 5%. That means the litter and cleanup for plastic bags would be \$1.54 per household per year. Of course, litter cleanup crews have to cleanup the same areas anyway, so having one extra kind of litter does not actually increase the litter budget.

\$375 million x 5%
12.1 million households

The Los Angeles County EIR found that no more than \$4 million would be saved by banning plastic bags. Los Angeles County has 3.1 million households. That is \$1.29 per household.

Santa Cruz County has transformed \$1.29 per household into \$200 per household, just because Californians Against Waste says so. Californians Against Waste is spreading misinformation and you are failing to question it. You have not done even the most basic fact checking.”

53. The foregoing examples are not an exhaustive list of the County’s inaccurate or erroneous findings. Plaintiff challenges and disputes all of the County’s findings.

Objections Submitted By Plaintiff And
The California Restaurant Association Regarding
The Banning Of Restaurant Plastic Bags

54. In its September 12, 2011 letter, Plaintiff pointed out that Santa Cruz County would be the only place in the United States to ban such bags. Plaintiff further stated as follows:

“Unlike supermarkets that sell packaged foods, restaurants sell freshly cooked foods that are usually hot and contain liquids including items fried in oil. Plastic is obviously safer than paper for transporting hot and liquid foods. Plastic is a waterproof and greaseproof material. Paper is not.

1 Also, plastic bag handles can be tightly tied. Paper bags cannot be tied at
2 the top. Liquids are far less likely to seep out of plastic bags.

3 The lady who sued in the McDonald's hot coffee case was burned so
4 severely on her thighs and legs that her doctors didn't think she would
5 live. If you watch the full movie about the hot coffee case, you will see
6 horrific photographs of her injuries.

7 <http://hotcoffeethemovie.com/>

8 Take-out bags are often opened in cars, including moving cars, so proper
9 packaging is essential. One can imagine the impact on a young child of
10 hot liquid, hot oil, or hot grease seeping or spilling from a paper bag in a
11 car. Scalding injuries are serious.

12 A restaurant owner has the legal right and duty to take all reasonable
13 steps to prevent such injuries. Restaurant owners have liability issues. It
14 is for the restaurant owner, not the County, to decide whether plastic or
15 paper is the safest for its food. Denying restaurant owners the safest
16 option could have disastrous consequences. It just takes one incident!"

17 55. Plaintiff also pointed out in its September 12, 2011 letter that the City of Santa
18 Monica banned all kinds of plastic carryout bags -- except restaurant plastic bags. The City of
19 Santa Monica stated:

20 "Restaurants and other food vendors may provide single-use plastic
21 carryout bags to customers only for the transportation of take-out food
22 and liquids intended for consumption off of the food provider's
23 premises. This exemption is included as a public health safeguard based
24 on input from restaurant owners who expressed concern that some hot
25 and liquid foods could leak from take-out containers and potentially
26 cause paper bags to weaken and fail."

27 (http://www.smgov.net/uploadedFiles/Departments/OSE/Business/Bag_Ban_Summary.pdf)

28 56. Plaintiff also pointed out that banning restaurant plastic bags would be legally
invalid. The legal basis for invalidity are addressed in the Causes of Action below.

57. In its September 6, 2011 letter to the Board (Exhibit C), the California
Restaurant Association stated as follows:

"Restaurants should have the freedom of choice to determine what type
of bag works best to maintain the integrity of their product. Paper bags
are not always the most practical choice for restaurants.

1 Plastic bags are superior to paper bags in protecting against accidental
2 spills and leaks during transport, whereas the content would just seep
3 through a paper bag. Customers become disgruntled when food from the
bag leaks onto their car, carpet, clothes, etc.

4 In addition, some types of containers don't fit as well in paper bags.
5 Whereas plastic bags conform to the size of the container, paper bags do
6 not. The bottom of paper bags is generally rectangular-shaped which
doesn't work when you have a standard, large square container.

7 Restaurants will tightly pack up food in a plastic bag and use the handles
8 to tie the bag so as to prevent the food from moving around and spilling.
You can't do this with a paper bag.”

9 58. The California Restaurant Association noted in its letter that the City of San Jose
10 had determined as follows: “Restaurants and food establishments would not be subject to the
11 [plastic bag] ban for public health reasons. Reusable bags are considered impractical for these
12 purposes.”

13 59. The California Restaurant Association also noted in its letter that the purpose of
14 the Ordinance is to cause a shift from plastic bags to reusable bags, including at restaurants, and
15 expressed strong health and safety concerns about the use of reusable bags for take-out food.

16 60. The California Restaurant Association has taken no official position regarding
17 this lawsuit. However, Plaintiff’s objections to the Ordinance and this lawsuit are fully
18 consistent with the objections of the California Restaurant Association.

19 **The McDonald’s Hot Coffee Case**

20 61. Four true and correct images from the Hot Coffee movie are attached hereto as
21 Exhibit F. (<http://hotcoffeethemovie.com>) They show the horrific injuries suffered by the
22 plaintiff in the Hot Coffee case against McDonald’s.

23 62. The plaintiff in that case, Stella Liebeck, was a 79-year-old woman who was in
24 the passenger seat in a stationary vehicle in a parking lot, attempting to remove the lid from a
25 McDonald’s paper coffee cup. She placed the coffee cup between her knees and pulled the far
26 side of the lid toward her to remove it. In the process, she spilled the entire cup of coffee on her
27 lap. Her cotton sweatpants absorbed the coffee and held it against her skin, scalding her thighs,
28 buttocks, and groin. She was taken to the hospital where it was determined that she had suffered

1 third-degree burns on six percent of her skin and lesser burns over sixteen percent. She
2 remained in the hospital for eight days while she underwent skin grafting. During this period,
3 she lost 20 pounds (nearly 20% of her body weight), reducing her down to 83 pounds. Two
4 years of medical treatment followed.

5 63. A twelve-person jury reached its verdict on August 18, 1994. They awarded
6 Liebeck \$200,000 in compensatory damages, which was then reduced by 20% to \$160,000. In
7 addition, they awarded her \$2.7 million in punitive damages. The judge reduced the punitive
8 damages to \$480,000, three times the compensatory amount, for a total of \$640,000. The
9 decision was appealed by both McDonald's and Liebeck, but the parties settled out of court for
10 an undisclosed amount less than \$600,000.

11 64. From 1982 to 1992, McDonald's company received more than 700 reports of
12 people burned by its coffee to varying degrees of severity and had settled claims arising from
13 scalding injuries for more than \$500,000.

14 65. If the paper cup in the Hot Coffee case had been in a plastic bag when Liebeck
15 was attempting to remove the lid, she would not have suffered any injuries, no matter how hot
16 the coffee. A plastic bag would have completely contained the spill. For this reason, Chinese
17 food is often placed in cardboard containers which are placed in plastic carryout bags that are
18 tied at the top to prevent hot juices from spilling and causing burns.

19 **FIRST CAUSE OF ACTION**

20 (STATE LAW PREEMPTION – RETAIL FOOD CODE)

21 66. Plaintiff realleges and incorporates herein each and every allegation made above.

22 67. State of California regulates food safety in the California Retail Food Code.
23 (Health and Safety Code Div. 104, Part 7.)

24 68. Health and Safety Code §113705 states as follows:

25 **Legislative intent to preempt local standards**

26 “The Legislature finds and declares that the public health interest
27 requires that there be uniform statewide health and sanitation standards
28 for retail food facilities to assure the people of this state that the food will
be pure, safe, and unadulterated. Except as provided in Section 113709,
it is the intent of the Legislature to occupy the whole field of health and
sanitation standards for retail food facilities, and the standards set forth

1 in this part and regulations adopted pursuant to this part shall be
2 exclusive of all local health and sanitation standards relating to retail
3 food facilities.”

4 69. Health and Safety Code §113709 states as follows:

5 **Authority to establish local requirements**

6 “This part does not prohibit a local governing body from adopting an
7 evaluation or grading system for food facilities, from prohibiting any
8 type of food facility, from adopting an employee health certification
9 program, from regulating the provision of consumer toilet and
10 handwashing facilities, or from adopting requirements for the public
11 safety regulating the type of vending and the time, place, and manner of
12 vending from vehicles upon a street pursuant to its authority under
13 subdivision (b) of section 22455 of the Vehicle Code.”

14 70. Only the state Legislature, not a city or county, may enact a law regarding
15 whether restaurants can take actions that affect whether the way food is served is “sanitary” or
16 “safe” or “healthy.”

17 71. For example, Health and Safety Code §114063(c) states that “French style,
18 hearth-baked, or hard-cruste d loaves and rolls shall be considered properly wrapped if
19 contained in an open-end bag of sufficient size to enclose the loaves or rolls.”

20 72. By banning restaurant plastic bags, the County was implicitly and effectively
21 determining that eliminating restaurant plastic bags is a sanitary, safe, and healthy food
22 practice. This determination is preempted by the California Retail Food Code. It is not covered
23 by any of the exemptions in §113709.

24 73. Based on the foregoing allegations, the ban of restaurant plastic bags in the
25 Ordinance is preempted and invalid.

26 **SECOND CAUSE OF ACTION**
27 (STATE LAW PREEMPTION – AB 2449)

28 74. Plaintiff realleges and incorporates herein each and every allegation made above.

75. In 2006, the Legislature enacted AB 2449. (Pub. Res. Code §§42250-57.)

76. The Legislature declared its intent in AB 2449 as follows:

“It is the intent of the Legislature, in enacting Chapter 5.1 (commencing with section 42250) Part 3 of Division 30 of the Public Resources Code, to encourage the use of reusable bags by consumers and retailers and to

1 reduce the consumption of single-use bags.”

2 77. The Governor’s signing statement includes the following language:

3 “I am signing Assembly Bill 2449 that implements a statewide plastic
4 bag recycling program.

5 While this bill may not go as far as some local environmental groups and
6 cities may have hoped, this program will make progress to reduce
7 plastics in our environment. This measure requires every retail
8 establishment that provides its customers plastic bags to have an in store
9 plastic bag recycling program, a public awareness program promoting
10 bag recycling, post recycling requirements, record keeping and penalties.

11 Because this is a statewide program the bill precludes locals from
12 implementing more stringent local requirements. The bill sunsets in six
13 years and this will allow locals time to develop additional programs or
14 the legislature to consider a more far reaching solution.”

15 78. AB 2449 sunsets and expires on January 1, 2013, one year after the Ordinance
16 takes effect on January 1, 2012. (Pub. Res. Code §42257.)

17 79. AB 2449 only applies to “stores.” (Pub. Res. Code §42251.) A “store” is defined
18 as a supermarket or large retail store “that provides plastic carryout bags to its customers.”
19 (Pub. Res. Code §42250(e).) If plastic bags are banned by local ordinances, then stores in those
20 localities would not be subject to AB 2449 and the statewide statutory scheme of AB 2449
21 would be defeated.

22 80. Under AB 2449, stores that provide plastic bags to customers must install plastic
23 bag collection bins “for the purpose of collecting and recycling plastic carryout bags.” (Pub.
24 Res. Code §42252(b).) Any member of the public may use those bins to deposit any discarded
25 plastic carryout bags. If stores in the County are prohibited from handing out plastic bags, then
26 all such stores would be permitted to remove their plastic bag recycling bins. Such bins are used
27 to collect and recycle all types of plastic bags, including bags that are not prohibited under the
28 Ordinance, including but not limited to retail bags, produce bags, newspaper bags, and dry
cleaning bags. There would be no way to recycle such bags as they are not accepted in curbside
recycling programs in the County. The statewide statutory scheme of AB 2449 would be
defeated.

1 81. AB 2449 states that “[t]he operator of the store shall make reusable bags
2 available to customers within the store, which may be purchased and used in lieu of using a
3 plastic carryout bag or paper bag.” (Pub. Res. Code §42252(e).) If plastic bags are banned by
4 local ordinances, such stores will not be subject to the state law requirement to make reusable
5 bags available to customers in lieu of paper bags. Therefore, the declared legislative intent of
6 AB 2449 “to encourage the use of reusable bags by consumers and retailers and to reduce the
7 consumption of single-use bags,” including paper bags, would be defeated. Although a city or
8 county ordinance banning plastic bags may require such stores to make reusable bags available
9 in lieu of paper bags, there is no guarantee that a city or county will include such a requirement
10 in an ordinance.

11 82. Based on the foregoing, if cities and counties may enact plastic bag bans that
12 take effect before AB 2449 sunsets on January 1, 2013, the comprehensive and integrated
13 statewide plastics reduction, recycling, and reusable bag scheme of AB 2449 would be
14 defeated.

15 83. It is the intent of the Legislature in enacting AB 2449 that it precludes and
16 preempts local plastic bag ban ordinances that take effect prior to January 1, 2013.

17 84. Based on the foregoing, the Ordinance is preempted and invalid.

18 85. Plaintiff asserted this ground for invalidity in its objections submitted to the
19 County on March 16, 2011. (Exhibit B.)

20 **THIRD CAUSE OF ACTION**
21 **(ORDINANCE VIOLATES FOURTEENTH AMENDMENT**
22 **TO THE U.S. CONSTITUTION - VOID FOR VAGUENESS)**

23 86. Plaintiff realleges and incorporates herein each and every allegation made above.

24 87. The Ordinance is a penal statute. It provides that a violation shall constitute an
25 infraction and imposes fines. (Ordinance §5.48.035 and §5.48.040.)

26 88. Ordinance §5.48.020(F) states as follows:

27 “The ban on single-use plastic bags and the charge on single-use paper
28 bags “would not apply to plastic or paper bags used to protect produce,
meat, or otherwise used to protect items as they are put into a carryout
bag at checkout. Other examples include: paper bags to protect bottles,

1 plastic bags around ice cream or other wet items, paper bags used to
2 weigh candy, paper pharmacy bags or paper bags to protect greeting
cards.”

3 89. The Ordinance does not define “protect” which is a vague and ambiguous term.

4 90. The Ordinance does not define “other items” which is a vague and ambiguous
5 term.

6 91. The Ordinance does not define “wet items” which is a vague and ambiguous
7 term.

8 92. Ordinance §5.48.020(F) gives five non-exhaustive examples: “paper bags to
9 protect bottles, plastic bags around ice cream or other wet items, paper bags used to weigh
10 candy, paper pharmacy bags or paper bags to protect greeting cards.” However, these examples
11 do not constitute a definition and do not narrow the broad potential meaning of the wording at
12 all. All plastic carryout bags “protect” items, including but not limited to those in the
13 aforementioned examples.

14 93. It is impossible to ascertain its meaning of “wet items” in the context of food and
15 beverages. The following items may or may not be “wet items”:

- 16 • A hot coffee container that might become “wet” as a result of spillage of the
17 contents over the outside of the cup
- 18 • Oily French fries
- 19 • Cooked hamburger from which meat juices drip
- 20 • Pizza
- 21 • A container of Chinese, Thai, or Indian food which may become “wet” from
22 dripping or spilled sauce or curry
- 23 • Tacos with moist dripping ground beef and gravy filling
- 24 • Sandwiches from which juices seep, such as sandwiches containing tomatoes,
25 pickles, peppers, mustard, mayonnaise, or ketchup
- 26 • Hot steaming food that creates “wet” condensation inside a bag
- 27 • Moist foods that could be considered “wet” such as cooked vegetables
- 28 • “Wet” fresh fruits or vegetables such as washed whole apples, apple or peach

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- slices, or wet raw carrots
- Pickles
- Soups
- Creamy foods such as icing on cupcakes
- Melting chocolate
- Jam/jelly
- Apple pie
- Milk shakes
- Bags that contain both wet and dry items (a beverage and a dry cookie for example)
- Any item that unintentionally or accidentally could become a “wet item.”

94. Legislation “may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.” (*Musser v. Utah*, 333 U.S. 95, 97 (1948).) “Men of common intelligence cannot be required to guess at the meaning of [an] enactment.” (*Winters v. New York*, 333 U.S. 507, 515-16 (1948).) “[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson* (1983) 461 U.S. 352, 357.”

95. The Ordinance fails to give fair notice of the acts to be avoided and fails to give adequate safeguards to guide law enforcement in order to avoid abusive and arbitrary practices. The Ordinance is therefore void for vagueness on its face under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

96. Based on the foregoing allegations, the Ordinance is unconstitutional and invalid.

1 **FOURTH CAUSE OF ACTION**
2 (ORDINANCE EXCEEDS THE POLICE POWER AND VIOLATES
3 THE FOURTEENTH AMENDMENT TO U.S. CONSTITUTION)

4 97. Plaintiff realleges and incorporates herein each and every allegation made above.

5 98. The police power of cities and counties to promote the general welfare is not
6 unlimited. Insofar as the police power is utilized by a State, the means employed to effect its
7 exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to
8 an end which is public, specifically, the public health, public safety, or public morals, or some
9 other phase of the general welfare. (*Liggett Co. v. Baldridge*, 278 U.S. 105, 111-12 (1928);
10 *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189, 197 (1936).)

11 99. The scope of the police power does not extend to the removal or infringement of
12 fundamental personal rights and liberties that are protected by the Due Process Clause of the
13 Fourteenth Amendment to the U.S. Constitution.

14 100. Citizens have a fundamental and inalienable right to have their food served and
15 packaged using plastic bags, so that they will not be exposed to personal injury and property
16 damage. This is a fundamental liberty that may not be removed absent a legitimate, compelling,
17 necessary, urgent, and overriding interest.

18 101. Restaurants also have a fundamental and inalienable right to serve and package
19 their food using plastic bags, so that they will not expose their customers to personal injury and
20 property damage. This is a fundamental liberty that may not be removed absent a compelling,
21 legitimate, necessary, urgent, and overriding public interest.

22 102. Restaurants also have a fundamental and inalienable right to provide plastic bags
23 to avoid liability for personal injury and property damage.

24 103. Children are entitled to extra protection from potential physical injury or distress
25 as a result of contact with hot burning or scalding liquids. One incident could be disastrous.

26 104. In addition, plastic bags may be transparent. Paper bags are never transparent. It
27 may be important for consumers to be able to see what is inside a bag without opening it,
28 especially if there are hot liquids, sauces, grease, or oils which could cause scalding or burns.

105. The Ordinance is arbitrary and oppressive as the County made no findings

1 whatsoever regarding the dangers of banning restaurant plastic bags.

2 106. In addition, the Ordinance is arbitrary and oppressive as it is based on erroneous
3 “findings” regarding all plastic bags.

4 107. The purpose of the Ordinance is to reduce litter. Any item can become litter.
5 There are common sense and constitutional limits on what items can be banned in the name of
6 litter reduction, especially when personal safety is threatened.

7 108. Avoidance of litter is not a legitimate, compelling reason for banning restaurant
8 plastic bags and exposing people to the risk of personal injury and property damage. It is an
9 excessive and overbroad response to litter to ban such bags. There are other more narrowly
10 tailored means to prevent such litter, including education, more trash receptacles, and more
11 effective cleaning of public areas.

12 109. Based on the foregoing allegations, the ban of restaurant plastic bags in the
13 Ordinance is unconstitutional and invalid.

14 **FIFTH CAUSE OF ACTION**
15 **(ORDINANCE VIOLATES DORMANT**
16 **COMMERCE CLAUSE OF U.S. CONSTITUTION)**

17 110. Plaintiff realleges and incorporates herein each and every allegation made above.

18 111. If the burden imposed on interstate commerce is clearly excessive in relation to
19 the putative local benefits, it is invalid under the Commerce Clause of the U.S. Constitution. If
20 a legitimate local purpose is found, then the question becomes one of degree. The extent of the
21 burden that will be tolerated depends on the nature of the local interest involved, and on
22 whether it could be promoted as well with a lesser impact on interstate activities. (*Pike v. Bruce*
23 *Church*, 397 U.S. 137, 142 (1970).)

24 112. The Ordinance is clearly excessive in that it penalizes every restaurant and every
25 consumer that disposes of restaurant plastic bags in a proper manner by placing them in the
26 trash. Only a tiny percentage of restaurants and consumers dispose of bags improperly, which is
27 not a reason to penalize everyone else.

28 113. The Ordinance is also clearly excessive because only about 0.0003% of the
contents of landfills are restaurant plastic bags. (Approximately 0.03% of landfills are

1 comprised of all kinds of plastic bags. The 0.0003% figure is based on the reasonable
2 assumption that restaurant bags constitute 1% of all plastic bags that go to a landfill.)

3 114. Nationwide or interstate chain restaurants in the County are subject to the ban on
4 restaurant plastic bags in the Ordinance.

5 115. The only jurisdictions in the nation to ban restaurant plastic bags are Santa Cruz
6 County and the City of Manhattan Beach. (All rights are reserved against the City of Manhattan
7 Beach regarding restaurant plastic bags.) All other jurisdictions that have banned plastic bags
8 have excluded restaurant plastic bags, including but not limited to Los Angeles County, Santa
9 Monica, the City of San Jose, the City and County of San Francisco, the City of Long Beach,
10 and the City of Calabasas.

11 116. The County's ban on plastic bags requires chain restaurants to make a disruptive
12 exception in their nationwide or interstate supply chains.

13 117. If cities and counties can each adopt their own plastic bag reduction and
14 elimination initiatives, the result will be economic chaos. Some cities and counties may ban
15 biodegradable or compostable bags, as Santa Cruz County has done. Other some cities or
16 counties may require that only biodegradable or compostable bags be used.

17 118. Such a chaotic patchwork of local laws and regulations applied to nationwide
18 and interstate chain restaurants, especially if local laws conflict with each other, would
19 unreasonably and excessively impede and burden interstate commerce.

20 119. There are other more narrowly tailored means to prevent restaurant plastic bag
21 litter, including education, more trash receptacles, and more effective cleaning of public areas.

22 120. Based on the foregoing allegations, the ban of restaurant plastic bags in the
23 Ordinance is unconstitutional and invalid.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for all of the following:

- A. A declaratory judgment that the Ordinance is void and invalid.
- B. An order directing the County to repeal the Ordinance.
- C. A preliminary injunction prohibiting the County from implementing and enforcing the Ordinance during the pendency of this action.
- D. A permanent injunction prohibiting the County from adopting a similar invalid ordinance.
- E. Attorney’s fees pursuant to Code. Civ. Proc. §1021.5.
- F. Costs of this action.
- G. Such further relief as the Court may deem just and proper.

DATED: October 17, 2011

STEPHEN L. JOSEPH



Attorney for Plaintiff
SAVE THE PLASTIC BAG COALITION