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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 UNLIMITED JURISDICTION
13

14 SAVE THE PLASTIC BAG COALITION,
an unincorporated association,

15 Petitioner,
16 vs.

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

22 Respondents.
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Case No. CPF-12-511978

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
RESPONDENTS' DEMURRER TO SECOND
CAUSE OF ACTION IN WRIT PETITION
AND COMPLAINT**

Hearing Date: June 28, 2012
Hearing Judge: Hon. Teri Jackson
Time: 1:30 p.m.
Place: Dept. 503
Date Action Filed: February 29, 2012
Trial Date: Not set

Attached Documents: N/A

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES ii

3 INTRODUCTION 1

4 BACKGROUND 2

5 I. 2006: RECOGNIZING THE ENVIRONMENTAL DAMAGE PLASTIC

6 BAGS CAUSE, THE CALIFORNIA LEGISLATURE SEEKS TO

7 ENCOURAGE CONSUMERS TO INSTEAD USE REUSABLE BAGS 2

8 II. 2007: SAN FRANCISCO ENACTS ORDINANCE 81-07 TO REDUCE USE

9 OF NON-COMPOSTABLE PLASTIC BAGS AT SUPERMARKETS AND

10 PHARMACIES 2

11 III. 2012: SAN FRANCISCO ENACTS ORDINANCE 33-12 TO EXTEND ITS

12 BAN ON NON-COMPOSTABLE PLASTIC CHECKOUT BAGS TO OTHER

13 RETAIL STORES AND RESTAURANTS 3

14 IV. PETITIONER'S LAWSUIT 3

15 ARGUMENT 4

16 I. OVERVIEW OF CALIFORNIA'S RETAIL FOOD CODE 4

17 II. LEGAL STANDARDS GOVERNING THE CITY'S DEMURRER 5

18 III. MANUFACTURERS HAVE NOT STATED, AND CANNOT STATE, A

19 CAUSE OF ACTION FOR PREEMPTION UNDER THE CALIFORNIA

20 RETAIL FOOD CODE 6

21 A. General State Law Preemption Principles. 6

22 B. The Court Must Presume That The CRFC Does Not Expressly Preempt

23 The Ordinance, And Manufacturers Have The Burden Of Showing That

24 It Does. 7

25 C. The Retail Food Code Does Not Expressly Preempt San Francisco's

26 Ordinance. 8

27 1. Because the Ordinance creates no "health and sanitation

28 standards," it is not expressly preempted. 8

a. Health and Safety Code Section 113705. 9

b. The *California Grocers Assn.* holding. 9

2. The CRFC's food safety purpose underscores the fact that the

CRFC expressly preempts only *health and sanitation* standards,

not standards unrelated to health and sanitation. 11

3. That the CRFC and the Ordinance overlap by legislating on the

subject of bags does not show preemption. 12

4. The Legislature's subsequent adoption of AB 2449 shows that

the CRFC does not preempt local regulation of plastic carryout

bags at retail food facilities. 14

CONCLUSION 15

TABLE OF AUTHORITIES

State Cases

Action Apartment Ass'n, Inc. v. City of Santa Monica
(2007) 41 Cal.4th 12325

Aubry v. Tri-City Hospital District
(1992) 2 Cal.4th 9625

Barrett v. Dawson
(1998) 61 Cal.App.4th 104815

Big Creek Lumber Co. v. County of Santa Cruz
(2006) 38 Cal.4th 11396, 7, 8, 9, 11

Birkenfeld v. City of Berkeley
(1976) 17 Cal.3d 12911

Bronco Wine Co. v. Jolly
(2004) 33 Cal.4th 94314

California Grocers Assn. v. City of Los Angeles
(2011) 52 Cal.4th 1774, 7, 8, 9, 10, 11

California Rifle & Pistol Assn. v. City of West Hollywood
(1998) 66 Cal.App.4th 13026

California Veterinary Medical Assn. v. City of West Hollywood
(2007) 152 Cal.App.4th 53613

Candid Enterprises, Inc. v. Grossmont Union H.S. Dist.
(1985) 39 Cal.3d 8786

Great Western Shows, Inc. v. County of Los Angeles
(2002) 27 Cal.4th 8536, 7, 8, 14

Harrahill v. City of Monrovia
(2002) 104 Cal.App.4th 7611, 13

Hernandez v. City of Pomona
(2009) 46 Cal.4th 5015

People v. McGennis
(1966) 244 Cal.App.2d 52713

Rental Housing Ass'n of Northern Alameda County v. City of Oakland
(2009) 171 Cal.App.4th 7415, 11

Shea Homes Limited Partnership v. County of Alameda
(2003) 110 Cal.App.4th 12465

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Sherwin-Williams Co. v. City of Los Angeles
(1993) 4 Cal.4th 89311

Suter v. City of Lafayette
(1997) 57 Cal.App.4th 110914

Waste Resource Technologies v. Dept. of Public Health
(1994) 23 Cal.App.4th 2998

Westamerica Bank v. City of Berkeley
(2011) 201 Cal.App.4th 5985

State Legislations, Statutes & Codes

Assembly Bill
24492, 14, 15
2449, Section 1(a), (b)2

Health & Safety Code
§ 113700 *et seq.*4
§ 1137034, 12
§ 1137059, 10, 11
§ 11370911
§ 113789(c)(2)4
§ 11381611

Public Resources Code
§ 42254(b)(2)15

Senate Bill 1444

Stats. 2006, Ch. 845, at §1(b)11

Stats. 2006, Ch. 845, at §215

San Francisco Statutes, Codes & Ordinances

Environment Code
§ 1702(f)3
§ 1702(k)3
§ 17032
§ 1703.53
§ 17062

Ordinance
33-123
33-12, at §23
33-12, at §3, p. 63
81-072

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Constitutional Provisions

Cal. Const.
Article XI, Section 76

BACKGROUND

I. 2006: RECOGNIZING THE ENVIRONMENTAL DAMAGE PLASTIC BAGS CAUSE, THE CALIFORNIA LEGISLATURE SEEKS TO ENCOURAGE CONSUMERS TO INSTEAD USE REUSABLE BAGS

In September 2006 the California Legislature adopted Assembly Bill ("AB") 2449. AB 2449 amended the state's Public Resources Code to address in-store recycling of plastic bags, including at supermarkets. In enacting AB 2449, the Legislature made the following express findings:

- Global production of plastic bags "has significant environmental impacts each year, including the use of over 12 million barrels of oil, and the deaths of thousands of marine animals through ingestion and entanglement";
- An estimated 500 billion to 1 trillion plastic bags are used worldwide each year, "of which billions of bags end up as litter"; and
- "Most plastic bags do not biodegrade which means that the bags break down into smaller and smaller toxic bits that contaminate soil and waterways and enter into the food web when animals accidentally ingest those materials."

Based on these findings, the Legislature stated, it seeks "to encourage the use of reusable bags by consumers and retailers and to reduce the consumption of single-use bags." (AB 2449, Section 1(a), (b) [Respondents' Request for Judicial Notice ["RFJN"], Ex. A].)

II. 2007: SAN FRANCISCO ENACTS ORDINANCE 81-07 TO REDUCE USE OF NON-COMPOSTABLE PLASTIC BAGS AT SUPERMARKETS AND PHARMACIES

Following on the heels of AB 2449, San Francisco's Board of Supervisors in 2007 adopted Ordinance 81-07, the "Plastic Bag Reduction Ordinance." (Ord. 81-07 [RFJN, Ex. B].) In that legislation the Board found, *inter alia*, that plastic shopping bags cause significant local litter problems and significant environmental impacts, and make it harder for San Francisco to achieve its landfill diversion goals. (*Id.*, §1.) Ordinance 81-07 amended the City's Environment Code to state that while supermarkets and retail pharmacies may provide their customers with reusable checkout bags, or with checkout bags made of recyclable paper or compostable plastic, they are prohibited from providing their customers with checkout bags made of ordinary (that is, non-compostable) plastic. (*Id.* at p. 5 [new Env. Code § 1703].) Ordinance 81-07's requirements took effect for supermarkets in 2007, and for retail pharmacies in 2008. (*Id.*, p. 6 [new Env. Code § 1706].)

1 **III. 2012: SAN FRANCISCO ENACTS ORDINANCE 33-12 TO EXTEND ITS BAN ON**
2 **NON-COMPOSTABLE PLASTIC CHECKOUT BAGS TO OTHER RETAIL STORES**
3 **AND RESTAURANTS**

4 In February 2012 the Board of Supervisors adopted Ordinance 33-12 ("the Ordinance"), which
5 broadened the City's 2007 ban on plastic checkout bags to cover a wider range of retail establishments.

6 The Ordinance's findings show the Board adopted it to promote litter-related and
7 environmental goals. The Board found that plastic checkout bags are difficult to recycle, and
8 contaminate the City's recycled materials stream. It also found that "single-use checkout bags create
9 significant litter problems" in San Francisco, and their production and disposal causes "significant
10 environmental impacts ..." "Of all single-use checkout bags," the Board found, "plastic checkout bags
11 have the greatest impacts on litter and marine life." (Ord. 33-12, at §2 [RFJN, Ex. C].)

12 Based on these findings, the Ordinance amended the 2007 plastic bag ban in several ways.
13 First, it amended the Environment Code's term "store" – previously defined to mean only supermarkets
14 and retail pharmacies – so that upon the Ordinance's October 2012 effective date, "store" will mean
15 any "retail establishment." Second, beginning July 1, 2013, "store" also will include any restaurant or
16 other "food establishment" as defined by local law. (*Id.* at §3, p. 6 [definition of "Store" in new Env.
17 Code §1702(k), p. 4 [definition of "Food Establishment" in new Env. Code §1702(f)].) And third, the
18 Ordinance also will require retailers to charge \$0.10 for each compostable plastic or recyclable paper
19 checkout bag and for each reusable bag that they provide to customers. (*Id.*, p. 7 [new Env. Code
20 §1703.5].)

21 Effective October 1, 2012, therefore, retail establishments in San Francisco will generally be
22 prohibited from providing ordinary plastic checkout bags to their customers, but will be allowed to
23 provide their customers with reusable bags or with checkout bags made from compostable plastic or
24 recyclable paper at a charge of \$0.10 per bag. These requirements will apply to restaurants effective
25 July 1, 2013.

26 **IV. PETITIONER'S LAWSUIT**

27 Petitioner Save the Plastic Bag Coalition, a coalition of plastic bag distributors and
28 manufacturers (hereafter "Manufacturers"), initiated this suit by filing its writ petition and complaint
(the "Petition") on February 29, 2012.

1 Manufacturers challenge the Ordinance on two grounds. In their first cause of action,
2 Manufacturers claim that the City adopted the Ordinance without complying with the California
3 Environmental Quality Act ("CEQA"). And in their second cause of action – which is the subject of
4 this demurrer – Manufacturers claim that the Ordinance is preempted by California's Retail Food Code
5 (Cal.H&S Code §113700 *et seq.*; "CRFC"). (Petition, ¶¶ 137-151.)

6 **ARGUMENT**

7 **I. OVERVIEW OF CALIFORNIA'S RETAIL FOOD CODE**

8 The California Legislature enacted the CRFC in 2006. Its purpose is "to safeguard public
9 health and provide to consumers food that is safe, unadulterated, and honestly presented through
10 adoption of science-based standards." (H&S Code §113703.) The CRFC's legislative history makes
11 clear that the CRFC was intended to be a "food safety law," which would address problems of
12 "foodborne illness" and help to "ensur[e] safe food." (See 4/26/05 letter from sponsor of SB 144 to
13 Senate Health Committee Members and attached SB 144 Analysis at p. SP-2 [RFJN, Ex. E].)

14 To promote its food safety goals, the CRFC sets forth a detailed statutory scheme that
15 addresses innumerable aspects of food storage, handling, cooking, cleanup, and other activities
16 performed at restaurants, supermarkets, and other "retail food facilities." (The CRFC does not
17 regulate conduct by ordinary private persons; it specifically defines a retail "food facility" to *exclude*
18 "a private home." (H&S Code §113789(c)(2).)) Articles within the CRFC bear titles such as
19 "Employee Knowledge," "Employee Health," "Time Temperature Relationships," "Toilet Facilities,"
20 "Lighting," "Water," and "Linens." As the Supreme Court explained in *California Grocers Assn. v.*
21 *City of Los Angeles* (2011) 52 Cal.4th 177:

22 As examples of the sorts of concerns addressed and level of detail provided by
23 the Retail Food Code, the statutory scheme specifies, to the degree and minute,
24 the temperatures at which various foods must be stored and cooked, to the hour,
25 how long food contact surfaces may go between cleanings, and, to the inch, how
26 large food preparation sinks must be.

27 (*Id.*, 52 Cal.4th at p. 189 fn. 3 [cites omitted].)

28 Notably, the CRFC neither requires nor forbids any retail food facility to use any particular
type of carryout bag. Indeed, the CRFC does not require any retail food facility to use carryout bags at
all. Thus, a restaurant or other retail food facility does not violate the CRFC if it serves food –

1 including solid food, drinks, or even hot soup – to a customer without using a carryout bag of any
2 kind.

3 **II. LEGAL STANDARDS GOVERNING THE CITY'S DEMURRER**

4 A demurrer tests the legal sufficiency of the plaintiff's cause of action. (*Westamerica Bank v.*
5 *City of Berkeley* (2011) 201 Cal.App.4th 598, 606.) To determine whether the complaint states facts
6 sufficient to constitute a legally viable cause of action, the Court must "look to the properly pleaded
7 factual allegations of the operative complaint read in light of any judicially noticeable facts and factual
8 concessions of the plaintiff." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 505 fn. 1 [quotes
9 omitted].) The Court "gives the complaint a reasonable interpretation, and treats the demurrer as
10 admitting all material facts properly pleaded." (*Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th
11 962, 967.) The Court "does not, however, assume the truth of contentions, deductions or conclusions
12 of law." (*Id.*)

13 "Where a complaint's allegations are insufficient as a matter of law, the burden of proving a
14 reasonable possibility that an amendment can cure the defect is squarely on the plaintiff. Thus,
15 plaintiffs must identify some legal theory or state of facts they wish to add by way of amendment that
16 would change the legal effect of their pleading." (*Hernandez, supra*, 46 Cal.4th at p. 520 fn. 16
17 [citation, quotes omitted].)

18 State law preemption claims are particularly appropriate for resolution on demurrer, because
19 "[c]laims that a local ordinance conflict with a state statutory scheme implicate questions of law, not
20 fact." (*Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1259;
21 *Rental Housing Ass'n of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741,
22 752 ["[w]hether state law preempts a local ordinance is a question of law"].) Courts commonly
23 adjudicate state law preemption claims at the demurrer stage. (*See, e.g., Action Apartment Ass'n, Inc.*
24 *v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1240-41.) This Court can, and should, determine the
25 purely legal question of whether the CRFC preempts the Ordinance now, on the City's demurrer.

1 **III. MANUFACTURERS HAVE NOT STATED, AND CANNOT STATE, A CAUSE OF**
2 **ACTION FOR PREEMPTION UNDER THE CALIFORNIA RETAIL FOOD CODE**

3 **A. General State Law Preemption Principles.**

4 Article XI, Section 7 of the California Constitution authorizes each city to "make and enforce
5 within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with
6 general laws." (*Id.*) This Constitutional police power gives cities and counties "plenary authority to
7 govern, subject only to the limitation that they exercise this power within their territorial limits and
8 subordinate to state law. Apart from this limitation, the police power of a county or city under this
9 provision is as broad as the police power exercisable by the Legislature itself." (*Candid Enterprises,*
10 *Inc. v. Grossmont Union H.S. Dist.* (1985) 39 Cal.3d 878, 885 [cite, brackets and ellipses omitted].)

11 Because a city's police power arises directly from the Constitution, the question is not whether
12 the Legislature has given San Francisco the power to enact the Ordinance. Instead, the question is
13 "whether the Legislature has taken away the City's constitutional power" to do so, by enacting state
14 legislation with which the City's law conflicts. (*California Rifle & Pistol Assn. v. City of West*
15 *Hollywood* (1998) 66 Cal.App.4th 1302, 1310.)

16 There are four distinct ways in which a local ordinance can conflict with state law, and thus be
17 preempted. Preemption exists "if the ordinance [1] duplicates, [2] contradicts, or [3] enters an area
18 fully occupied by general law, either expressly or [4] by legislative implication." (*Big Creek, supra,*
19 *38 Cal.4th at p. 1150.*

20 Duplication, the first type of preemption, exists when a local ordinance "is coextensive" with a
21 state law – that is, when the ordinance prohibits "precisely the same acts" as the state law prohibits.
22 (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 860, 865.)

23 Contradiction, the second type of preemption, exists when a local ordinance is "inimical" to a
24 state law – a circumstance that exists only if the local law "mandate[s] what state law expressly
25 forbids," or "forbid[s] what state law expressly mandates." (*Id.*, 27 Cal.4th at pp. 860, 866.)

26 Contradiction thus exists only if it is impossible to comply with both the local ordinance and the state
27 law.
28

1 Express preemption, the third type of preemption, exists only "when the Legislature has
2 expressly manifested its intent to fully occupy" the field in which the local ordinance regulates. (*Big*
3 *Creek, supra*, 38 Cal.4th at p. 1150 [emphasis added]; *Great Western, supra*, 27 Cal.4th at p. 860-61.)

4 Implied preemption, the fourth type of preemption, exists only when the Legislature has
5 impliedly manifested its intent to fully occupy the field in which the local ordinance regulates, in light
6 of recognized indicia of legislative intent. (*Big Creek, supra*, 38 Cal.4th at p. 1150; *Great Western,*
7 *supra*, 27 Cal.4th at p. 860-61.) Implied preemption will not found unless

- 8 (1) the subject matter has been so fully and completely covered by general law
9 as to clearly indicate that it has become exclusively a matter of state concern;
10 (2) the subject matter has been partially covered by general law couched in such
11 terms as to indicate clearly that a paramount state concern will not tolerate
12 further or additional local action; or (3) the subject matter has been partially
13 covered by general law, and the subject is of such a nature that the adverse
14 effect of a local ordinance on the transient citizens of the state outweighs the
15 possible benefit to the locality.

16 (*Id.* at p. 861.)

17 In their Petition, Manufacturers argue only express preemption – that is, they assert only that
18 the Ordinance regulates within a field that the CRFC expressly occupies and reserves to the State.
19 (Petition, ¶¶ 147, 148 [quoting *California Grocers, supra*, 52 Cal.4th at pp. 189, 190, concerning
20 express preemption]; *id.*, ¶ 149 [alleging that the "Ordinance intrudes into an area that the State of
21 California has reserved to itself".]) But as explained below, the Legislature, in enacting the CRFC,
22 carefully and deliberately described the type of local ordinance that the CRFC expressly preempts –
23 essentially, ordinances that impose food safety standards. The Ordinance does not impose such
24 standards; it has no connection with food safety. It thus is not expressly preempted.

25 **B. The Court Must Presume That The CRFC Does Not Expressly Preempt The**
26 **Ordinance, And Manufacturers Have The Burden Of Showing That It Does.**

27 In analyzing Manufacturers' express preemption claim, the Court starts with the presumption
28 that San Francisco's Ordinance is valid. "The party claiming that general state law preempts a local
29 ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa*
30 *Cruz* (2006) 38 Cal.4th 1139, 1149.) California courts thus follow a "presumption *against*
31 preemption." (*Id.* [emphasis added].) And this presumption applies to all types of preemption claims,
32 including claims of express preemption such as this one. (*Big Creek, supra*, 38 Cal.4th at pp. 1149-

1 1150 [applying presumption against preemption in case involving express preemption claim].) This
2 Court must start with the presumption that the Ordinance does not fall within the CRFC's express
3 preemption clause, and Manufacturers have the burden of showing otherwise.

4 Moreover, this presumption against preemption is especially strong in areas that are
5 traditionally subject to local regulation, and in which local interests vary. Courts must be "particularly
6 reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a
7 significant local interest to be served that may differ from one locality to another." (*Id.*; *Great*
8 *Western, supra*, 27 Cal.4th at pp. 866-67.) Similarly, "when local government regulates in an area over
9 which it traditionally has exercised control ... California courts will presume, absent a *clear indication*
10 of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." (*Big*
11 *Creek, supra*, 38 Cal.4th at p. 1149 [first emphasis added].)¹

12 San Francisco's Ordinance is a refuse control and environmental protection measure. It thus
13 addresses matters of strong local concern, regulating in a field in which cities have long regulated.
14 (*See, e.g., Waste Resource Technologies v. Dept. of Public Health* (1994) 23 Cal.App.4th 299, 304
15 [noting longstanding "substantial body of law" upholding municipal police power "to legislate on the
16 issue of refuse"]. Cities routinely adopt such laws: indeed, many California cities restrict merchants
17 from dispensing plastic carryout bags much as the Ordinance does. (Petition at ¶¶ 107-111.)
18 Manufacturers thus face a particularly heavy burden of showing the Ordinance is preempted.

19 **C. The Retail Food Code Does Not Expressly Preempt San Francisco's Ordinance.**

20 **1. Because the Ordinance creates no "health and sanitation standards," it is not expressly preempted.**

21 To determine whether a state law expressly preempts a local measure, the Court asks what type
22 of local law the Legislature has said it wishes to preclude. "Express field preemption turns on a
23 comparative statutory analysis: What field of exclusivity does the state preemption clause define, what
24 subject matter does the local ordinance regulate, and do the two overlap?" (*California Grocers Assn.*,
25

26 ¹ California's presumption against preemption is "analogous" to the federal principle that in
27 areas traditionally subject to State regulation, courts "start with the assumption that the historic police
28 powers of the States were not to be superseded by the Federal Act unless that was the clear and
manifest purpose of Congress." (*Big Creek, supra*, 38 Cal.4th at p. 1150, fn. 7.) As the Supreme Court
pointedly noted, the presumption "applies both to the existence of preemption and to the scope of
preemption." (*Id.*, 38 Cal.4th at p. 1150 fn.7.)

1 *supra*, 52 Cal.4th at p. 188.) As the Court held in *Big Creek*, "express preemption turns on whether the
2 field the Legislature has occupied ... encompasses the [local] ordinance." (*Id.*, 38 Cal.4th at p. 1152.)

3 Therefore, a local ordinance is not expressly preempted merely because it overlaps in some
4 manner with some part of a state statutory scheme. Instead, to be expressly preempted, the local
5 ordinance must overlap with the state statutory scheme's *express preemption clause*. This makes
6 perfect sense: express preemption is a question of legislative intent, and "the words the Legislature
7 chose" to put in the express preemption clause are "the best indicators of its intent" about precisely
8 what field it wanted to occupy. (*Big Creek, supra*, 38 Cal.4th at p. 1152.) Thus, the touchstone of
9 express preemption is the text of the statutory scheme's express preemption clause.

10 **a. Health and Safety Code Section 113705.**

11 In enacting the CRFC, the Legislature was "clear and precise" in "defin[ing] ... the regulatory
12 field it reserves for the state." (*California Grocers Assn., supra*, 52 Cal.4th at p. 189.) The CRFC's
13 express preemption clause, found at Health and Safety Code Section 113705, shows that the
14 Legislature has occupied only the field of *health and sanitation standards*:

15 [I]t is the intent of the Legislature to occupy the whole field of *health and*
16 *sanitation standards for retail food facilities*, and the standards set forth in this
17 part and regulations adopted pursuant to this part shall be exclusive of all local
18 *health and sanitation standards relating to retail food facilities*.

19 (H&S Code §113705 [emphases added] ["Section 113705"].)

20 Thus, the fact that a local law might impose *some type of standard* for retail food
21 establishments is not enough to show express preemption; the CRFC expressly "preempts only those
22 [local laws] that establish '*health and sanitation standards*' for retail food establishments." (*California*
23 *Grocers Assn., supra*, 52 Cal.4th at p. 191 [emphasis added].)

24 **b. The California Grocers Assn. holding.**

25 The holding of *California Grocers Assn.* demonstrates this point. That case involved a Los
26 Angeles ordinance that imposed certain worker retention mandates on grocery stores, such as a
27 requirement that for 90 days after a change in ownership, a grocery store could not discharge its
28 nonmanagerial employees who had worked at the store for at least six months before the ownership
change, except for cause. (*Id.*, 52 Cal.4th at p. 187.) The CRFC did not preempt the Los Angeles

1 ordinance, the Supreme Court held, because that ordinance "imposes no substantive food safety
2 standards." (*Id.* at p. 189.) As the Court held, "[t]he face of the Ordinance ... discloses no incursion
3 into the exclusive realm [of health and sanitation standards] reserved for the state by Health and Safety
4 Code section 113705." The local ordinance, the Court explained, "regulates employment not food
5 safety," while Health and Safety Code Section 113705 "regulates food safety, not employment." (*Id.*
6 at p. 189.) .)

7 Moreover, the Court emphasized that only laws that regulated within the field that Health and
8 Safety Code Section 113705 reserved to the State would be expressly preempted. It explained that the
9 CRFC "does not preempt all laws that have as their purpose the promotion of food health and safety; it
10 preempts *only those that establish 'health and sanitation standards' for retail food establishments[.]*"
11 (*Id.* at p. 191 [emphasis added].) Because Los Angeles' ordinance did not establish any health and
12 sanitation standards, it was not preempted.

13 San Francisco's Ordinance, likewise, does not establish "health and sanitation standards," and
14 does not regulate food safety. While the CRFC does not define its terms "health" and "sanitation," the
15 ordinary meanings of both terms show that they clearly relate to the cleanliness and purity of food and
16 the food establishment. And the Supreme Court construed them that way, holding that to impose
17 "health and sanitation standards," a local ordinance had to "impose[] substantive food safety
18 standards" and "regulate[] food safety." (*California Grocers Assn., supra*, 52 Cal.4th at p. 189.) The
19 Ordinance does not address, or even mention, food contamination, purity, cleanliness, spoilage, or any
20 other topic connected to health or sanitation in relation to food facilities. Nor does it impose
21 "substantive food safety standards," or "regulate food safety." Under *California Grocers Assn.*,
22 therefore, San Francisco's Ordinance does not impose "health and sanitation standards."

23 Instead, the Ordinance imposes refuse control and environmental standards. It addresses
24 environmental goals such as litter reduction, wildlife conservation, and waste diversion (which are
25 manifested outdoors, outside of retail food facilities), and does not address or mention the cleanliness
26 and purity of food or the sanitary conditions within such facilities.² To reduce the number of single-

27 ² The fact that San Francisco's Ordinance was enacted for purposes entirely distinct from those
28 that underlie the CRFC further shows that the Ordinance is not preempted. A local ordinance is not
preempted by a state statute "if the purpose of the statute[] is sufficiently distinct from that of" the

1 use carryout bags (particularly noncompostable plastic bags) in the City's waste stream, and thus to
2 help San Francisco meet its landfill diversion goals and otherwise improve environmental quality and
3 reduce litter problems, the Ordinance bars retail stores of all kinds from using noncompostable plastic
4 carryout bags – while allowing retailers to provide their customers, for a small charge, with carryout
5 bags made of paper or compostable plastic, or with reusable carryout bags. The Supreme Court's
6 conclusion with respect to Los Angeles' law applies with equal force to San Francisco's Ordinance:
7 "[t]he face of the Ordinance ... discloses no incursion into the exclusive realm reserved for the state by
8 Health and Safety Code section 113705." (*California Grocers Assn.*, *supra*, 52 Cal.4th at p. 189.) San
9 Francisco's Ordinance, like that of Los Angeles, is not expressly preempted.³

10 **2. The CRFC's food safety purpose underscores the fact that the CRFC**
11 **expressly preempts only *health and sanitation* standards, not standards**
12 **unrelated to health and sanitation.**

13 Because it is clear from the text of Health and Safety Code Section 113705 (the CRFC's
14 express preemption clause) and from *California Grocers Assn.* that the CRFC only occupies the field
15 of "*health and sanitation* standards for retail food facilities," Manufacturers' express preemption claim
16 fails as a matter of law, without further inquiry or analysis. But even if the Court were to also look to
17 the CRFC's underlying legislative purpose, that purpose would confirm the conclusion that the CRFC

18 [ocal ordinance. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 149 [holding that local charter
19 amendment regulating permissible grounds for eviction of residential tenants, and forbidding landlords
20 from recovering possession of units on expiration of residential tenancy, is not preempted by state
21 unlawful detainer statutes because "[t]he purpose of the unlawful detainer statutes is *procedural*,"
22 while city charter amendment's purpose was *substantive*] [emphasis added]; *Rental Housing Assn. of
23 Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741, 753 [explaining that in
24 *Birkenfeld*, "[t]he Supreme Court held that the unlawful detainer statutes and Berkeley's charter
25 amendments did not conflict because they each served separate purposes ..."].)

26 ³ Manufacturers wisely do not argue other types of preemption. The Ordinance does not
27 regulate within any field the Legislature has occupied by implication. "The Legislature's preemptive
28 action in specific and expressly limited areas weighs against an inference that preemption by
implication was intended elsewhere" (*Big Creek*, *supra*, 38 Cal.4th at p. 1157), and implied preemption
also will not be found where the Legislature has expressed its intent to permit local regulations." (*Id.*;
H&S Code §§ 113709, 113816 [CRFC provisions permitting local regulations].) The Ordinance also
does not contradict the CRFC, because it "does not prohibit what [the CRFC] commands or command
what [the CRFC] prohibits." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 902.)
The CRFC does not require a retail food facility to use any carryout bag at all, much less a
noncompostable plastic bag. And the Legislature has expressly stated its desire "to encourage the use
of reusable bags by consumers and retailers and to reduce the consumption of single-use bags." (Stats.
2006, Ch. 845, at §1(b) [findings accompanying AB 2449, enacted just months after the enactment of
CRFC] [Request for Judicial Notice, Ex. A].) Finally, the Ordinance does not duplicate the CRFC.

1 expressly preempts only health and sanitation standards, not standards unrelated to health and
2 sanitation, and does not preempt San Francisco's Ordinance.

3 The Legislature enacted the CRFC "to safeguard public health and provide to consumers food
4 that is safe, unadulterated, and honestly presented through adoption of science-based standards."
5 (H&S Code §113703.) The CRFC's central purpose is to reduce the chances of contamination and
6 food-borne illness and ensure that the food consumers purchase at restaurants grocery stores is clean,
7 safe and pure. Given this undisputed statutory purpose, it is entirely logical that the Legislature would
8 want to prevent cities from enacting their own food safety laws that imposed their own health and
9 sanitation standards, since such laws could lead to reduced cleanliness and greater food contamination
10 in retail food facilities, and thereby undercut the Legislature's food safety goals.

11 Equally important, the CRFC's food safety purpose makes it highly unlikely that the
12 Legislature would have wanted to expressly preempt local laws that had nothing to do with food purity
13 and the cleanliness of food facilities. Such local laws would not impose conflicting food safety
14 standards or otherwise threaten to undermine the CRFC's food safety goals.⁴ The CRFC's express
15 statement of legislative purpose and legislative history bolster the conclusion that the CRFC only
16 preempts local health and sanitation standards for retail food facilities – essentially, local laws that
17 regulate food safety – and thus does not preempt San Francisco's checkout bag Ordinance.

18 **3. That the CRFC and the Ordinance overlap by legislating on the subject of**
19 **bags does not show preemption.**

20 In their opposition to this demurrer, Manufacturers will likely argue that the Ordinance must be
21 preempted because it and the CRFC both legislate on the same subject – namely, checkout bags that
22 restaurants and other retail food facilities provide to their customers. Such a contention, however,
23 would misstate the nature of preemption under California law.

24 "[I]t is well-settled that *the preemption doctrine does not preclude a city from exercising its*
25 *police power on a subject simply because the Legislature has also enacted a law on the same subject.*"

26 ⁴ For example, imagine that a city were to prohibit the use of a particular type of light fixture,
27 or impose energy consumption standards for all light fixtures used within retail establishments, in
28 order to promote energy conservation. Such a local law would impose conservation and energy
efficiency standards, not health and sanitation standards. Allowing it to be applied to restaurants and
other retail food facilities would not threaten the CRFC's food safety goals.

1 (*Harrhill v. City of Monrovia* (2002) 104 Cal.App.4th 761, 767 [emphasis added].) To the contrary,
2 California courts have long recognized that "[t]here are many situations wherein municipal police
3 power may operate on the same subject matter embraced in state legislation." (*People v. McGennis*
4 (1966) 244 Cal.App.2d 527, 531 [holding that municipal ordinances regulating gambling are valid,
5 even though subject of gambling is also regulated by multiple state statutes].) For example:

- 6 • In *Harrhill*, the court held that a local ordinance that prohibited school-age children who
7 are subject to state compulsory education laws from being in public places other than
8 school, on days and times when school was in session, was not preempted by state laws
9 that compelled such children to attend school. The court held that "the fact that both laws
10 concern the same subject matter" did not mean that the local ordinance was preempted.
11 (*Harrhill, supra*, 104 Cal.App.4th at p. 770.)
- 12 • In *California Veterinary Medical Assn. v. City of West Hollywood* (2007) 152 Cal.App.4th
13 536, 561-62, the court held that a local ordinance that banned certain feline declawing
14 procedures in order to prevent cruelty to animals was not preempted by state statutes that
15 regulated veterinary medicine. Even though the declawing procedures banned by West
16 Hollywood were "currently part of the practice of veterinary medicine" regulated under
17 state law, the court explained that "the fact that the state has legislated on the same subject
18 does not necessarily preclude the exercise of local authority: A city or county may make
19 additional regulations, different from those established by the state, if not inconsistent with
20 the purpose of the general law." (*Id.*, 152 Cal.App.4th at pp. 557, 558, 562.) It also held
21 that even if the state had occupied the field of regulation of veterinary procedures, the local
22 ordinance was not preempted because it had "only a secondary or incidental effect" on that
23 field, and its "incidental restriction of a particular form of surgical procedure ... does not
24 materially interfere with any legislative purpose expressed" in the state law. (*Id.* at p. 562.)

25 Even if the CRFC and the Ordinance do both legislate on the same subject – carryout bags
26 provided by restaurants, supermarkets and other retail food facilities – that slight overlap in subject is
27 legally permissible, and does not show that the CRFC preempts the Ordinance. As a matter of law,
28

1 any argument by Manufacturers that the overlap in subject matter between the two laws gives rise to
2 preemption would simply be wrong.⁵

3 **4. The Legislature's subsequent adoption of AB 2449 shows that the CRFC**
4 **does not preempt local regulation of plastic carryout bags at retail food**
5 **facilities.**

6 When the Legislature enacts one statutory scheme, and then later enacts another, separate
7 statutory scheme addressing a related subject, the fact that the Legislature believed it necessary *in its*
8 *second statutory scheme* to expressly preempt local laws on that subject is evidence that the
9 Legislature had not already preempted local laws on that subject as part of its earlier enactments. In
10 *Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, for example, the Supreme Court held that the fact that
11 Congress acted in 1988 to expressly preempt the field of health warnings on wine bottle labels showed
12 that Congress, in statutes enacted prior to 1988, had *not* expressly preempted state regulation of wine
13 labels. As the Court held, "if Congress ... by enactment of the FAA Act in 1935, already had
14 generally preempted state regulation of wine labels, there would have been no need for any express
15 preemption clause or preemption regulation with respect to the 1988 health warnings for wine labels."
16 (*Id.*, 33 Cal.4th at p. 989; *see also Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 [fact that
17 Legislature saw a need to expressly preempt local laws requiring licenses for possession of handguns
18 in private homes shows that Legislature's other gun-related enactments did not "preempt the entire
19 field of weapons control"].)

20 This common-sense principle applies here. Manufacturers' preemption cause of action rests on
21 their assertion that when the Legislature adopted the CRFC in April 2006, it expressly preempted all
22 local ordinances concerning the use of plastic checkout bags in supermarkets (as well as other retail
23 food facilities). But just a few months after that, in September 2006, the Legislature adopted AB
24 2449, which – in addition to stating Legislature's desire to discourage plastic bag use and to promote

25 ⁵ Of course, if the Ordinance's requirements for carryout bags *contradicted* those of the CRFC,
26 then the Ordinance would be preempted under the "contradiction" branch of preemption analysis. But
27 it is not, because the Ordinance "does not mandate what state law expressly forbids, nor does it forbid
28 what state law expressly mandates." (*Great Western, supra*, 27 Cal.4th at p. 866.) The CRFC does not
expressly mandate that restaurants or other retail food facilities use plastic carryout bags, or indeed
that they use carryout bags of any kind. Thus, a restaurant or supermarket can readily comply with
both the CRFC and the Ordinance by providing its customers with checkout bags made of
compostable plastic or recyclable paper; with reusable bags; or with no checkout bags at all.

1 use of reusable bags – amended the Public Resources Code to expressly preempt local ordinances
2 "[i]mpos[ing] a plastic carryout bag fee upon a store," specifically including a supermarket.
3 (Pub.Res.Code §42254(b)(2); see Stats. 2006, Ch. 845, at §2, pp. 3-4 [RFJN, Ex. A].)

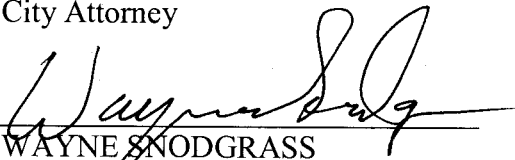
4 Courts "will not presume the Legislature engaged in a futile act." (*Barrett v. Dawson* (1998)
5 61 Cal.App.4th 1048, 1054.) Yet Manufacturers ask this Court to do just that. If Manufacturers were
6 correct that the Legislature had expressly preempted local supermarket plastic checkout bag
7 ordinances in April 2006, when it enacted the CRFC, then it would have been entirely unnecessary for
8 the Legislature, in September 2006, to expressly preempt local ordinances imposing a fee on
9 supermarkets' use of plastic carryout bags. That field (according to Manufacturers) would already
10 have been preempted under the CRFC, enacted five months earlier. The fact that the Legislature saw a
11 need, in September 2006, to expressly preempt plastic carryout bag fees is powerful proof that the
12 Legislature – which presumably knew which fields it had and had not expressly occupied in legislation
13 adopted mere months earlier – did not believe that the earlier-enacted CRFC had preempted
14 ordinances regulating supermarkets' and other retail food facilities' use of plastic carryout bags. Or, to
15 state the point slightly differently: the Legislature's enactment of AB 2449 in September 2006 is
16 powerful proof that the CRFC does not have the preemptive reach that Manufacturers claim it does,
17 and does not preempt local environmental measures that regulate retail food facilities' use of plastic
18 checkout bags.

19 **CONCLUSION**

20 Manufacturers have not stated, and cannot state, a viable cause of action for preemption under
21 the California Retail Food Code. The City respectfully requests that its demurrer be sustained without
22 leave to amend.

23 Dated: June 6, 2012

24 DENNIS J. HERRERA
25 City Attorney

26 By: 
27 WAYNE SNODGRASS

28 Attorneys for Respondents
CITY AND COUNTY OF SAN FRANCISCO, et al.