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CALIFORNIA GROCERS ASSOCIATION

12
13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15
16 CALIFORNIA GROCERS ASSOCIATION,
a California non-profit organization,

17 Plaintiff,

18 v.

19 CITY OF MONTEBELLO, a general law
20 municipality,

21 Defendant.

Case No. 2:21-cv-1011-FLA-AGR

**FIRST AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

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23
24 Plaintiff California Grocers Association (“Plaintiff” or “CGA”) brings this
25 action against Defendant City of Montebello (“Defendant” or “City”) and alleges as
26 follows in this Complaint for declaratory and injunctive relief:
27
28

INTRODUCTION

1
2 1. At the onset of the COVID-19 pandemic, the State of California
3 and various counties, cities, and other regulatory bodies throughout the state issued
4 a series of emergency orders and regulations in an effort to stem the spread of the
5 virus and protect the public health and welfare. These early efforts—aimed at
6 balancing the public’s basic economic and social needs with a desire to minimize
7 COVID morbidity and mortality—came at a steep price, especially for essential
8 businesses, and the millions of employees and members of the public who rely on
9 them.

10 2. California grocers have stayed open to serve their communities
11 since day one. They understand that defeating this pandemic requires extraordinary
12 measures and have eagerly committed themselves to the task. Since March of 2020,
13 California grocers of all sizes have established rigorous and science-driven safety
14 measures, often at great expense, to adapt to this new environment and ensure that
15 they operate in a safe and hygienic manner in order to help slow the spread of the
16 virus, and protect their workers and the public.

17 3. Grocers have implemented comprehensive safety measures for
18 customers and employees and compensated frontline grocery employees for their
19 extra efforts in a difficult environment. Grocers have provided “appreciation pay,”
20 “hero bonuses,” and “thank you pay” to reward their associates. Additionally, in
21 terms of employee support, grocers have offered COVID-19 testing to employees
22 and provided emergency leave and paid time off to those affected by the virus or
23 experiencing symptoms.

24 4. For worker safety, grocers have provided supplies to employees
25 including face masks and protective gear in addition to encouraging employees to
26 stay home if feeling ill and implementing paid leave policies. Plexiglas shields,
27 physical distancing measures, and contactless payment and delivery services have
28 been implemented to protect employees. Some of California’s largest grocers such

1 as Kroger and Albertsons joined the United Food and Commercial Workers
2 International union just last year to urge federal and state governments to designate
3 grocery store employees as emergency first responders.

4 5. Yet on January 27, 2021, the City passed the “Premium Pay for
5 Grocery or Drug Store Workers Ordinance” (“Ordinance”) which requires
6 employers to pay a \$4 per hour premium on whatever the employees existing wage
7 is at the time of enactment, regardless of any existing bonus, incentive, or hero pay
8 program that the employer may have in place.

9 6. The Ordinance unreasonably singles out specific employee classes
10 in specific grocers and drug stores, while ignoring employers or essential frontline
11 workers outside the grocery and drug store industries. Plaintiff seeks a declaration
12 that the law is invalid and unconstitutional, and an injunction halting any action to
13 enforce the Ordinance on the grounds that it (1) is preempted by federal law
14 regulating collective bargaining and unfair labor practices as applied to CGA’s
15 members with retail operations in Montebello; (2) violates the equal protection and
16 contracts clauses of the U.S. and California constitutions as applied to CGA’s
17 members with retail operations in Montebello.

18 **JURISDICTION AND VENUE**

19 7. This Court has jurisdiction over the subject matter of this suit
20 pursuant to 28 U.S.C. §1331, as the Plaintiffs’ claims arise under federal laws;
21 namely, the National Labor Relations Act, 29 U.S.C. §141 *et seq.*; Article VI of the
22 U.S. Constitution which designates the Constitution and Laws of the United States
23 as the supreme law of the land; and the equal protection clause and contracts clause
24 of the U.S. Constitution.

25 8. This Court has supplemental jurisdiction over this subject matter
26 pursuant to 28 U.S.C. §1367(a), as the Plaintiffs’ claims arising under the
27 California Constitution are so closely related to the federal question claims that they
28 form part of the same case or controversy under Article III of the U.S. Constitution.

1 International Union, Local 770 (“UFCW”), and those employees are parties to
2 collective bargaining agreements that govern the terms of their employment,
3 including specific wage and bonus scales, which are subject to collective bargaining
4 renewal periods. For almost all of CGAs members with operations in Montebello,
5 they will not be up for renewal until March 2022. Other Members operate grocery
6 stores that do not employ unionized workers, but those employees are free to
7 organize and select a collective bargaining unit, should they choose to do so.

8 14. Each of the agreements between CGA’s Members and UFCW 770
9 set forth specific requirements for vacation time, meals, and all other forms of
10 compensation. Those contracts set forth specific provisions regarding hours and
11 seniority, and prohibit the alteration of wages or other compensation unless
12 expressly permitted by the terms of the agreement, or agreed to by the collective
13 bargaining unit. The contracts requires CGA members to contribute to benefits
14 funds on a pre-arranged schedule in specified amounts. CGA’s members cannot
15 unilaterally alter the terms of these agreements, or fail to meet its obligations under
16 these agreements, without potentially being in breach of the agreements.

17 15. Members have suffered or will continue to suffer economic and
18 non-economic harm as a result of the enactment of the Ordinance, and its
19 foreseeable consequences on union organizing, ongoing collective bargaining, and
20 labor relations for both unionized and non-union grocery stores in the City of
21 Montebello. Members are required to alter the wage scales and other terms of their
22 existing collective bargaining agreements, regardless of any additional hero pay,
23 bonuses, or other non-monetary compensation provided to their employees to ease
24 the burden of the COVID-19 pandemic.

25 16. The Ordinance prohibits an employer from taking any action
26 related to the Ordinance that could impact any employee’s “earning capacity,”
27 effectively preventing the employer from taking any action to control labor costs,
28 despite the government-mandated wage increases, as the contracts with UFCW

1 cannot be unilaterally modified by CGAs members. Failure to immediately
2 comply with the Ordinance will expose the Members to civil sanctions, loss of
3 goodwill, and other irreparable harm.

4 17. Both UFCW 770 and the national UFCW organization have been
5 active in promoting and negotiating with employers for hero pay. Over the last two
6 months, the national UFCW has made numerous statements in the press that hazard
7 pay bonuses and other compensation are appropriate topics for bargaining, even
8 announcing recent “victories” in negotiations with other grocery retailers in
9 California, New Jersey, New York, and around the country where employers have
10 agreed to pay supplemental hazard pay premiums, some of which are being paid
11 currently.

12 18. By design, the Ordinance picks winners and losers. It singles out
13 large grocery companies with unionized workforces (i.e., UFCW 770’s members)
14 without providing any reasonable justification for the exclusion of other employers
15 or frontline retail workers. The Ordinance arbitrarily and improperly targets certain
16 grocery store businesses in Montebello for disparate treatment while not requiring
17 the same commitments from similarly situated businesses, or conferring *any*
18 benefits on similarly situated employees. There is no support for any of the City’s
19 statements that the Premium Pay will protect public health, address economic
20 insecurity, and promote job retention.

21 THE ORDINANCE

22 19. The Premium Pay for Grocery Workers Ordinance codified in
23 Chapter 5.10 in the Montebello Municipal Code is attached hereto as **Exhibit A**. It
24 applies to “grocery stores” which is defined as a store that devotes seventy percent
25 (70%) or more of its business to retailing a general range of food products, which
26 may be fresh or packaged. Section 5.10.030. Specifically, the ordinance applies to
27 those grocery store “hiring entit[ies]” that employ three hundred (300) or more
28 grocery workers nationally and employ more than fifteen (15) employees per

1 grocery store in the City of Montebello. *Id.*

2 20. Grocery stores meeting this minimum threshold of employees are
3 required to provide each employee with premium pay consisting of an additional
4 four dollars (\$4.00) per hour for each hour worked. Section 5.10.060. The
5 Ordinance is set to expire in 180 days. *Id.*

6 21. The Ordinance prohibits reducing a grocery employee's
7 compensation or limiting a grocery employee's earning capacity unless the
8 employer can prove the decision would have happened in absence of the Ordinance.
9 Section 5.91.070.

10 22. Grocery stores are required to provide a notice of rights established
11 by the Ordinance. Section 5.91.080.

12 **FIRST CAUSE OF ACTION**

13 **Declaratory and Injunctive Relief**

14 **(NLRA Preemption)**

15 23. CGA incorporates herein by this reference the allegations contained
16 in Paragraphs 1 through 21, inclusive.

17 24. Enacted in 1935, the National Labor Relations Act ("NLRA"), as
18 amended, 29 U.S.C. § 151, *et seq.*, creates a uniform federal body of law governing
19 union organizing, collective bargaining, and labor-management relations applicable
20 to employers engaged in interstate commerce. It established various rules
21 concerning collective bargaining and defined a series of banned unfair labor
22 practices, including bans on interference with the formation or organization of labor
23 unions by employers. The NLRA does not apply to certain workers, including
24 supervisors, managerial employees and confidential employees – all categories
25 specifically excluded from the Ordinance.

26 25. The NLRA prohibits state and local regulation of conduct that
27 Congress intended to be left to be controlled by the free-play of economic forces.
28 Legislation that interferes with the "balanced state of collective bargaining" is

1 preempted by the NLRA. *See Machinists v. Wisconsin Employment Relations*
2 *Comm'n*, 427 U.S. 132 (1976).

3 26. In particular, the NLRA preempts any and all state and local
4 enactments that, by design or consequence, regulate or interfere with the then-
5 existing balance of economic power between labor and management with respect to
6 zones of activity that, under federal labor law, are intended to be left to the free play
7 of economic forces. Laws subject to NLRA preemption include laws that interfere
8 with or attempt to regulate the economic tools available to labor or management
9 during the course of collective bargaining or that otherwise interfere with the
10 collective bargaining process, such as those that alter the parties' rights and
11 economic alternatives during collective bargaining, or the processes and procedures
12 utilized for union organizing.

13 27. Application of the Ordinance to the activities of the Montebello
14 Members unequivocally intrudes upon zones of activity in the areas of labor
15 relations, union organizing, and collective bargaining that is reserved under federal
16 labor law and policy to the free play of economic forces. The Ordinance establishes
17 premium pay standards that, by design or consequence, empower the UFCW or
18 other collective bargaining units to secure a wage rate they could not otherwise
19 have obtained from the employer at a unionized or non-union grocery store. This
20 undermines the collective bargaining process and disrupts the process of union
21 organizing.

22 28. While the City has the ability to enact ordinances to further the
23 health and safety of its citizens, the Ordinance here bears no relation to those goals.
24 Local minimum wage laws, for example, seek to lessen the burden on public
25 welfare services. This ordinance is not a minimum labor standard. It is a mandatory
26 hourly bonus for a specific group of workers, regardless of the wage negotiated in
27 the current collective bargaining agreements or other employment agreements.

28 29. The Ordinance is preempted by the NLRA as it regulates zones of

1 activity that Congress intentionally left to be controlled by the free play of
2 economic forces.

3 30. The City's application and enforcement of the Ordinance will cause
4 CGA's Members to suffer irreparable harm for which they have no adequate
5 remedy at law, even if the Ordinance is later declared by this Court to be void and
6 unenforceable. This claim is also brought pursuant to 42 U.S.C. §1983 and
7 §1988(b).

8 31. CGA is entitled to judgment declaring the Ordinance, as applied to
9 CGAs members with operations in Montebello, to be void and unenforceable under
10 the Supremacy Clause of the U.S. Constitution and equitable and injunctive relief to
11 prevent the City of Montebello or any other private enforcer from attempting to
12 enforce or give effect to the Ordinance as applied to CGAs members with retail
13 operations in Montebello.

14 **SECOND CAUSE OF ACTION**

15 **Declaratory and Injunctive Relief**

16 **(Equal Protection Clause of the United States Constitution)**

17 32. CGA incorporates herein by this reference the allegations contained
18 in Paragraphs 1 through 30, inclusive.

19 33. CGA hereby seeks declaratory, equitable and injunctive relief to
20 prevent the City from depriving Plaintiff's members of the protections afforded to
21 them under the Equal Protection Clause of the U.S. Constitution, which guarantee
22 each and all of them equal protection of the laws. (U.S. Const., Amend. XIV, § 1).
23 This claim is also brought pursuant to 42 U.S.C. §1983 and §1988(b).

24 34. The Equal Protection Clause requires that persons who are similarly
25 situated receive like treatment under the law, and that statutes may single out a class
26 for distinction only if that classification bears a rational relationship to the purpose
27 of the statute. As such, the City may not irrationally single out one class of
28 individuals for discriminatory treatment.

1 the U.S. Constitution, guarantees each and all of them equal protection of the laws.
2 (Cal. Const., Art. I § 7.)

3 41. For the same reasons set forth in Paragraphs 31 through 37 above,
4 the Ordinance violates the Equal Protection Clause of the California. Such
5 application will cause CGA’s Members to suffer irreparable harm for which they
6 have no adequate remedy at law.

7 **FOURTH CAUSE OF ACTION**

8 **For Declaratory and Injunctive Relief**

9 **(Contracts Clause of the U.S. Constitution)**

10 42. CGA incorporates herein by this reference the allegations contained
11 in Paragraphs 1 through 40, inclusive.

12 43. CGA hereby seeks declaratory, equitable and injunctive relief to
13 prevent the City from depriving CGA’s Members of the protections afforded to
14 them under the Contracts Clause of the U.S. Constitution, which provides in
15 pertinent part that: “No State shall . . . pass any . . . Law impairing the Obligation of
16 Contracts” (U.S. Const., Art. I, § 10, cl. 1). The Contract Clause imposes
17 limits upon the power of a State, and Municipalities operating under the color of
18 State law, to abridge existing contractual relationships, even in the exercise of its
19 otherwise legitimate police power.

20 44. The Ordinance substantially interferes with Members’ contracts,
21 including its collective bargaining agreements with its employees, without any
22 significant or legitimate public purpose. The City’s stated objectives are to protect
23 public health, address economic insecurity, and promote job retention. None of
24 these justifications support this measure, because the City’s stated objectives are
25 merely an attempt to impose a public policy rationale on interest-group driven
26 legislation for labor unions and, in particular, for UFCW.

27 45. Even if the City could show a significant and legitimate public
28 purpose behind the regulation, the substantial impairment to the Members’

1 contractual rights and obligations (i.e., the terms of the Members’ existing
2 collective bargaining agreements) are neither reasonable nor necessary to fulfill any
3 such public purpose.

4 46. By virtue of the foregoing, application of the Ordinance to CGA’s
5 members constitutes a substantial and unconstitutional impairment of those
6 members existing contractual relationships that will cause them to suffer irreparable
7 harm for which they have no adequate remedy at law.

8 **FIFTH CAUSE OF ACTION**

9 **Declaratory and Injunctive Relief**

10 **(Contracts Clause of the California Constitution)**

11 47. CGA incorporate herein by this reference the allegations contained
12 in Paragraphs 1 through 45, inclusive. Plaintiffs hereby seek declaratory and
13 injunctive relief to prevent the City from violating, and continuing to violate, the
14 Contract Clause of the California Constitution, which provides in pertinent part
15 that: “A ... law impairing the obligation of contracts may not be passed.” (Cal.
16 Const., Art. I, § 9.)

17 48. Like the Federal Contracts Clause, the California Contracts Clause
18 also imposes limits upon the State of California, and its municipalities, to abridge
19 existing contractual relationships, even in the exercise of its otherwise legitimate
20 police power. For the same reasons set forth in Paragraphs 41 through 45 above,
21 application of the Ordinance to CGA’s members within the City constitutes a
22 substantial and unconstitutional impairment of those members existing contractual
23 relationship in violation of the California Contract Clause. Such application will
24 cause those members to suffer irreparable harm for which they have no adequate
25 remedy at law.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiff prays for the following relief:

- 28 1. On the first cause of action, a judgment declaring that the

1 Ordinance, as well as any act taken in furtherance of the Ordinance by any person,
2 is preempted by the National Labor Relations Act, and its implementing regulations
3 and guidance, and are therefore void and unenforceable as applied to CGAs
4 members with operations in Montebello, and entering a preliminary and permanent
5 injunction enjoining the City from enforcing or taking any action under the
6 Ordinance as applied to CGAs members with operations in Montebello;

7 2. On the second and third causes of action, enter a judgment declaring
8 that the Ordinance, as well as any act taken in furtherance of the Ordinance by any
9 person, violate state and federal equal protection guarantees, and are therefore void
10 and invalid as applied to CGAs members with operations in Montebello, and
11 entering a preliminary and permanent injunction enjoining the City from enforcing
12 or taking any action under the Ordinance as applied to CGAs members with
13 operations in Montebello;

14 3. On the fourth and fifth causes of action, enter a judgment declaring
15 that the Ordinance, as well as any act taken in furtherance of the Ordinance by any
16 person, violate the contracts clauses of the state and federal constitution, and are
17 therefore void and invalid as applied to CGAs members with operations in
18 Montebello, and entering a preliminary and permanent injunction enjoining the City
19 from enforcing or taking any action under the Ordinance as applied to CGAs
20 members with operations in Montebello;

21 4. For an award of attorneys' fees and costs of suit herein pursuant to
22 California Code of Civil Procedure § 1021.5, 42 U.S.C. §1988, or any other
23 applicable law; and

24 5. For such other and further relief as the Court may deem just and
25 proper.

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Dated: May 5, 2021

MORRISON & FOERSTER LLP

By: /s/ William F. Tarantino
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CALIFORNIA GROCERS
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