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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO COUNTY LODGING ASSOCIATION, CALIFORNIA EMPLOYMENT LAW COUNCIL,

Plaintiffs,

vs.

THE CITY OF SAN DIEGO,

Defendant.

CASE NO. **'20CV2151 WQHMDD**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Complaint Filed: November 3, 2020
Trial Date: None Set

NATURE OF ACTION

1. This Complaint seeks declaratory and injunctive relief to free the members of the San Diego County Lodging Association and California Employment Law Council ("Plaintiffs") from blatantly unconstitutional and preempted prohibitions recently imposed by the City of San Diego ("City," "San Diego," or "Defendant") pursuant to its ordinance entitled "City of San Diego COVID-19 Building Service and Hotel Worker Recall Ordinance," as added to Chapter 3, Article 11, Division 1 of the San Diego Municipal Code (the "Ordinance") (attached hereto as Exhibit A).

2. The Ordinance—hurriedly passed in a "special meeting"—violates core constitutional principles, runs counter to several federal and state laws, and is extremely vulnerable to abuse. While the Plaintiffs recognize these are unprecedented times, the answer to the devastation wrought by the COVID-19 pandemic does not lie in abrogating the rights of San Diego employers already struggling to stay afloat with this burdensome, novel, preempted, and unconstitutional law.

JURISDICTION

3. The case arises out of 42 U.S.C. § 1983, as the Plaintiffs base their claims on the United States Constitution and federal law—including, but not limited to, the rights guaranteed by Article 1 and the 5th and 14th Amendments of the United States Constitution; and the Labor Management Relations Act (29 U.S.C. § 141 *et. seq.*). Accordingly, the presence of these federal questions vests this Court with subject matter jurisdiction under 28 U.S.C. § 1331.

4. Furthermore, this Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a) as the causes of action arising under California's Constitution, Civil Code, and Labor Code are so closely related to the federal question claims that they form part of the same case or controversy under Article III of the United States Constitution.

5. The Plaintiffs have associational standing to bring this action as the representative of their respective members because (1) several of their members operate hotels with at least 200 guest rooms in San Diego and have terminated workers who would qualify as "laid-off employees" under the Ordinance, and therefore are either suffering—or are under the immediate threat of suffering—a direct and adverse impact from the Ordinance's application, providing them standing to sue in their own right; (2) the interests and rights that the Plaintiffs seek to protect is at the core of their respective missions; and (3) the declaratory relief sought does not require the participation of any individual members of the Plaintiffs' associations. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

6. The Declaratory Judgment Act (28 U.S.C. § 2201–2202) authorizes this Court to grant declaratory and injunctive relief.

VENUE

7. Pursuant to 28 U.S.C. § 1391, venue is proper in the Southern District of California because (1) the events giving rise to this lawsuit occurred in this District; (2) the City of San Diego resides and exists within this District; (3) the City adopted the Ordinance in this District; and (4) covered employees may seek to enforce this Ordinance against covered employers in this District.

THE PARTIES

8. The San Diego County Lodging Association ("SDCLA") is a federation of hotel and motel owners and operators representing approximately 21,000 rooms in lodging establishments throughout the county. The mission of the SDCLA is to serve the needs of its members with resources and communication on education, technology, human relations and other industry issues; and to provide advocacy and representation on legislative and regulatory issues at all levels of government. The SDCLA has members that operate hotels with over 200 guest

rooms within the City of San Diego, and are thus subject to the City's unlawful Ordinance.

9. The California Employment Law Council ("CELC") is a non-profit organization organized under the laws of the State of California. Its mission is to promote a better legal climate for its members, as well as all California employers. The CELC has members who are subject to the City's unlawful Ordinance.

10. The City of San Diego is, and at all relevant times has been, a municipality organized and constituted under the Constitution and laws of the State of California. It exercises local, municipal government powers under state law.

FACTUAL BACKGROUND REGARDING THE ORDINANCE

11. On September 3, 2020, the City of San Diego quietly announced that it would convene a special meeting to consider passing the Ordinance. On September 8, 2020—just five days later—the City passed the Ordinance, codifying it into Chapter 3, Article 11, Division 1 of the San Diego Municipal Code.

12. The Ordinance predominantly targets employers operating in the hospitality and commercial industries, including "Hotel Employers"—owners, operators, or managers of hotels with at least 200 guest rooms.[1] And it provides novel recall rights for any employee who (1) worked at least two hours a week for six of the twelve months preceding March 4, 2020, (2) for a covered hotel employer in San Diego that (3) subsequently terminated them on or after March 4, 2020, for "non-disciplinary" or "economic" reasons.

13. The Ordinance requires that Hotel Employers:

a. Provide covered, laid-off employees with written notice of their rights under the Ordinance at the time of lay-off; or, if laid-off prior to its passage, by October 8, 2020;

[1] The Ordinance also applies to "commercial property employers"—operators of non-residential property that employ 25 or more janitorial, maintenance, or security workers; and "event center employers"—operators of privately owned structures of over 50,000 square feet or 5,000 feet that host concerts, conventions, meetings, or other events.

b. First offer any previously laid-off employees their old position—or, alternatively, any position for which that worker can become qualified with the same training the employer would provide a new worker—before hiring any new applicants into an open position;

c. Hold that offer open for three business days; *and*

d. Retain record of each laid-off employee's name, job classification, date of hire, last know address, last known e-mail address, last known telephone number, and the date it provided them written notice of their rights for three years.

14. The Ordinance has also created novel seniority, or "bumping," rights as whenever two or more workers are entitled to the same position, the employer must first offer it to whoever worked there the longest.

15. Any covered employee who believes their employer violated the Ordinance can sue for hiring and reinstatement rights, the greater of actual or statutory damages, punitive damages, and attorneys' fees and costs.

16. The City patterned its Ordinance on California Assembly Bill 3216—parallel legislation that would have created a similar right of recall for all of California. San Diego originally drafted it as a gap-filler, designed to sunset automatically on January 1, 2021, should AB 3216 become effective; or, alternatively, after six months unless extended.

17. Governor Newsom vetoed AB 3216, finding "it would create a confusing patchwork of requirements" across California and place "too onerous a burden on [hospitality] employers navigating these tough challenges" having "been

hit hard by the economic impacts of the pandemic."[2] Accordingly, the Ordinance will remain in effect until March 8, 2021, unless extended by the City.

FIRST CAUSE OF ACTION

(For Declaratory Relief Based On Contracts Clause Of The United States And California Constitutions: Employment Contracts)

18. The Plaintiffs incorporate the allegations of paragraphs 1 through 17 above as though fully set forth herein.

19. Both the United States Constitution and California Constitution bar legislative bodies from passing any law impairing the obligation of pre-existing contracts. U.S. Const., Art. I, § 10, Cl. 1; Cal. Const., Art. I § 9.

20. Prior to the Ordinance's passage, there was no statutory right to recall, or a cause of action for violating that right. Rather, under California law and absent an agreement otherwise, all "employment may be terminated at the will of either party on notice to the other." Cal. Lab. Code § 2922.

21. Many of the Plaintiffs' members hired workers under an at-will employment agreement. These employers naturally assumed that, if an unforeseen event like the COVID-19 pandemic threatened their viability, they could lay off those workers *without* granting them a possible cause of action.

22. San Diego's Ordinance denies those employers the contractual right to terminate employees at-will as, absent good cause for the termination, they must re-hire anyone previously fired. San Diego's Ordinance is thus not a minor impairment to these pre-existing contracts—it fundamentally changes a foundational understanding of the nature of employment throughout California.

23. Further, the City's ostensible reason for the Ordinance—"to ensure that these workers enjoy a right to return to their previous jobs when business

[2] OFFICE OF THE GOVERNOR OF THE STATE OF CALIFORNIA, "Veto Message Regarding Assembly Bill 3216" (September 30, 2020), *available at* https://www.gov.ca.gov/wp-content/uploads/2020/09/AB-3216.pdf.

activity resumes in order to aid economic recovery," despite what their contract may say otherwise—is not a significant and legitimate public purpose. It is an illegitimate attempt pushed by special interests to readjust rights and obligations under those pre-existing contracts.[3]

24. But even assuming *arguendo* the Ordinance's stated purpose was legitimate, it is neither appropriately nor reasonably tailored to forward that purpose. The City could have only covered pre-existing employment contracts that lacked at-will or right of recall provisions, or it could have exempted pre-existing agreements in order to target just future contracts. It did neither, instead broadly adjusting the contractual rights and obligations of any employer that happened to fall in the Ordinance's arbitrary thresholds on industry and size.

25. Accordingly, the Ordinance's application violates the rights guaranteed by the Contracts Clauses in both the United States and California constitutions. The Plaintiffs and their members have no other adequate and speedy remedy at law to resolve this issue except for the instant action. A determination of this issue is necessary and appropriate at this time so that the Plaintiffs and their members may ascertain their rights. Thus, the Plaintiffs request declaratory relief as prayed for below.

SECOND CAUSE OF ACTION

(For Declaratory Relief Based On Contracts Clause Of The United States And California Constitutions: Severance Agreements)

26. The Plaintiffs incorporate the allegations of paragraphs 1 through 25 above as though fully set forth herein.

27. At-will employment contracts are not the only pre-existing agreements substantially impaired by this Ordinance's operation. Several of the Plaintiffs' members offered severance packages to ex-employees impacted by the pandemic,

[3] *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 861 n.22 (8th Cir. 2002) (noting there "is no broad public policy interest in readjusting contractual rights and obligations in pre-existing contracts.").

with the understanding those employees would not be re-hired. These members paid substantial sums in consideration of a clean end to their employment relationships with the affected workers, and for a release of all possible claims.

28. The Ordinance substantially impairs the benefit of these severance contracts by creating novel, retroactive rights arising out of the workers' prior relationships with their employers. Rights that—in repudiation of any agreement otherwise—require these employers to recall employees who signed severance agreements without any possibility of recouping the material consideration already paid.

29. As before, the City's ostensible reason for the Ordinance—"to ensure that these workers enjoy a right to return to their previous jobs when business activity resumes in order to aid economic recovery," despite the presence of a severance agreement—is not a significant and legitimate public purpose. It is an illegitimate attempt pushed by special interests to readjust the rights and obligations under those pre-existing contracts.[4]

30. But even assuming *arguendo* the Ordinance's stated purpose was legitimate, it is neither appropriately nor reasonably tailored to forward that purpose. The City could have simply exempted any worker subject to a severance agreement. Instead, it broadly adjusted the contractual rights and obligations of any employer that happened to fall in the Ordinance's arbitrary thresholds on industry and size.

31. Accordingly, the Ordinance's application violates the rights guaranteed by the Contracts Clauses in both the United States and California constitutions. The Plaintiffs and their members have no other adequate and speedy remedy at law to resolve this issue except for the instant action. A determination of this issue is necessary and appropriate at this time so that the Plaintiffs and their

[4] *Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 861 n.22 (8th Cir. 2002) (noting there "is no broad public policy interest in readjusting contractual rights and obligations in pre-existing contracts.").

members may ascertain their rights. Thus, the Plaintiffs request declaratory relief as prayed for below.

THIRD CAUSE OF ACTION

(For Declaratory Relief Based On The Due Process Clause Of The United States Constitution And California Constitutions)

32. The Plaintiffs incorporate the allegations of paragraphs 1 through 31 above as though fully set forth herein.

33. Though the Ordinance went into effect on September 8, 2020, it grants new rights to any covered employee laid-off on or after March 4, 2020. And it provides a means of punishing past conduct that—until the Ordinance's passage—was completely lawful.

34. Many hotels in San Diego, for example, completely shut down in March 2020 due to closure orders issued by California, San Diego County, and the City. With the pandemic anticipated to impact business for years to come and with hundreds of millions of dollars in future bookings at San Diego hotels vanishing, almost all of these hotels laid-off a substantial portion of their workforces. These employers often offered laid-off workers severance agreements, paying a significant amount of consideration in order to sever their relationship with those workers completely. Yet, while legal just a few months ago, employers must now choose to either lose the value of the severance paid by re-hiring those workers, or hire someone new and face material liability from the laid-off associates.

35. Thus the Ordinance is retroactive, as is any law that "would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 247 (1994); *Myers v. Philip Morris Cos., Inc.*, 28 Cal. 4th 828, 839 (2002). Further, it carries the potential for massive penalties, given the availability of punitive damages. *See Landgraf*, 511 U.S. at 281 (noting the "[r]etroactive imposition of punitive damages would raise a serious constitutional

question"). By operating retroactively—and thereby exposing the Plaintiffs' members to significant potential damages for actions taken when their conduct carried no tort liability—the Ordinance threatens to deprive the Plaintiffs' members of their vested rights without due process of the law.[5]

36. Accordingly, the Ordinance violates the Fifth Amendment of the United States Constitution; as well as Article 1, Section 3 of the California Constitution. The Plaintiffs and their members have no other adequate and speedy remedy at law to resolve this issue except for the instant action. A determination of this issue is necessary and appropriate at this time so that the Plaintiffs and their members may ascertain their rights. Thus, the Plaintiffs request declaratory relief as prayed for below.

FOURTH CAUSE OF ACTION

(For Declaratory Relief Based On Federal Preemption Of The Ordinance By The Labor Management Relations Act)

37. The Plaintiffs incorporate the allegations of paragraphs 1 through 36 above as though fully set forth herein.

38. The National Labor Relations Act, as amended by the Labor Management Relations Act (the "LMRA"), creates a uniform federal body of law governing union organizing, collective bargaining and the rights of labor organizations, employees and employers engaged in interstate commerce; such as those working in the tourism and hospitality industry. The LMRA preempts any local law purporting to regulate conduct that falls within its scope, including rights negotiated under a collective bargaining agreement.

[5] *See E. Enters. v. Apfel*, 524 U.S. 498, 548-49, (1998) (J. Kennedy Concurring with plurality) ("If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership. As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity.").

39. Some of the Plaintiffs' members operate hotels with unionized workers operating under collective bargaining agreements containing specific, negotiated seniority and recall rights—rights that may be expressly at-odds with the bumping and 3-day notice rules in the Ordinance.

40. Additionally, the LMRA preempts any claim that "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). The Ordinance gives novel rights to any employee laid-off after March 4, 2020, for any "economic, non-disciplinary reason," but never defines those phrases. Phrases that are terms-of-art in many collective bargaining agreements, due to the vague and amorphous nature of "disciplinary" or "for cause" standards.

41. As a result, any of Plaintiffs' members with a unionized workforce may be forced to prove "for cause" termination was warranted under the collective bargaining agreement in order to attack an ex-employees' ability to bring a claim. That, in turn, requires courts to interpret the collective bargaining agreement; an act courts cannot perform due to the preemptive effect of the LMRA.

42. Accordingly, the LMRA preempts the Ordinance. The Plaintiffs and their members have no other adequate and speedy remedy at law to resolve this issue except for the instant action. A determination of this issue is necessary and appropriate at this time so that the Plaintiffs and their members may ascertain their rights. Thus, the Plaintiffs request declaratory relief as prayed for below.

FIFTH CAUSE OF ACTION

(For Declaratory Relief Based On Violation Of Article XI, §7 Of The California Constitution: Cal. Lab. Code § 2922)

43. The Plaintiffs incorporate the allegations of paragraphs 1 through 42 above as though fully set forth herein.

44. Under the California Constitution, "[a] county or city may make and enforce within its limits" any laws "*not* in conflict with general laws" of the state.

Cal. Const., Art. XI, § 7. Thus, where "local legislation conflicts with state law, it is preempted by such law and is void." *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1067 (2007) (internal quotation omitted). And such a conflict exists if the local legislation "contradicts, or enters an area fully occupied by" California law. *Id.*

45. California Labor Code Section 2922 states that "employment, [with] no specified term, may be terminated at the will of either party on notice to the other." The Plaintiffs' members thus have a statutory right to terminate an employee for any non-protected reason. Additionally, the California Supreme Court has held that "the declared public policy of this state" favors that right. *Hejmadi v. AMFAC, Inc.*, 202 Cal. App. 3d 525, 544-45 (1988)

46. The Ordinance cannot co-exist with Labor Code Section 2922. Nothing within the Ordinance limits recall rights to workers terminated during the pandemic. Instead, the Plaintiffs' members would have to re-offer work to *any* worker laid-off for "economic, non-disciplinary" reasons after March 4, 2020; abrogating their well-established right to terminate at-will.

47. Accordingly, as the Ordinance "is inimical to [and] cannot be reconciled with state law" establishing the presumption of, and right to, at-will employment, it is preempted. *O'Connell*, 41 Cal. 4th at 1068. The Plaintiffs and their members have no other adequate and speedy remedy at law to resolve this issue except for the instant action. A determination of this issue is necessary and appropriate at this time so that the Plaintiffs and their members may ascertain their rights. Thus, the Plaintiffs request declaratory relief as prayed for below.

SIXTH CAUSE OF ACTION

(For Declaratory Relief Based On Violation Of Article XI, §7 Of The California Constitution: Cal. Civ. Code § 3294)

48. The Plaintiffs incorporate the allegations of paragraphs 1 through 47 above as though fully set forth herein.

49. Again, the California Constitution bars cities from making laws that conflict with the general laws of the state. Cal. Const., Art. XI, § 7. Thus, where "local legislation conflicts with state law, it is preempted by such law and is void." *O'Connel'*, 41 Cal. 4th at 1067 (internal quotation omitted).

50. Under California Civil Code Section 3294, punitive damages are *only* available "for the breach of an obligation not arising from contract." Yet the Ordinance allows courts to award punitive damages for a claim that *could not* exist absent an underlying employment contract. Laid-off workers, after all, could only sue a covered employer for which they previously worked.

51. This Ordinance, then, is effectively imposing an additional obligation—a "right of recall"—on previous and pre-existing employment contracts. "[W]hen a statute imposes additional obligations on an underlying contractual relationship, a breach of the statutory obligation is a breach of contract that will not support tort damages beyond those contained in the statute." *Brewer v. Premier Golf Props., LP*, 168 Cal. App. 4th 1243, 1255 (2008).[6]

52. Accordingly, as the Ordinance "is inimical to [and] cannot be reconciled with state law" establishing the grounds for which punitive damages may be awarded, it is preempted. *O'Connell*, 41 Cal. 4th at 1068. The Plaintiffs and their members have no other adequate and speedy remedy at law to resolve this issue except for the instant action. A determination of this issue is necessary and appropriate at this time so that the Plaintiffs and their members may ascertain their rights. Thus, the Plaintiffs request declaratory relief as prayed for below.

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[6] The *Brewer* court explained that, because "claims for unpaid wages and unprovided meal/rest breaks arise from rights based on [an] employment contract," they did not allow for a punitive damages award).

SEVENTH CAUSE OF ACTION

(For Declaratory Relief Based On Violation Of Article XI, §7 Of The California Constitution: Cal. Code Civ. Proc. § 1002.5)

53. The Plaintiffs incorporate the allegations of paragraphs 1 through 52 above as though fully set forth herein.

54. Again, the California Constitution bars cities from making laws that conflict with the general laws of the state. Cal. Const., Art. XI, § 7. Thus, where "local legislation conflicts with state law, it is preempted by such law and is void." *O'Connell*, 41 Cal. 4th at 1067 (internal quotation omitted).

55. "California's public policy is to encourage settlement." *Tower Acton Holdings v. L.A. Cnty. Waterworks Dist. No. 37*, 105 Cal. App. 4th 590, 602 (2002). Recognizing this, its legislature has codified the *only* restrictions it felt necessary to place on settlement agreements, showing an intent to fully occupy that field of law.

56. One such restriction exists in California's Code of Civil Procedure Section 1002.5, which states settlement agreements between an employee and their employer cannot "contain a provision prohibiting, preventing, or otherwise restricting a settling party . . . from obtaining future employment with [their] employer" unless there was "a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship."

57. The Ordinance directly conflicts with that law by implicitly barring no-rehire provisions—even when there is a legitimate non-discriminatory or non-retaliatory reason for terminating the employment relationship—for workers terminated by a covered employer in San Diego "due to a government shutdown order, lack of business, a reduction in force or other, economic, non-disciplinary reason."[7]

[7] Though the Ordinance never expressly bars waiver, the City ostensibly passed it for the public's benefit. And "a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513.

58. Accordingly, as the Ordinance "is inimical to [and] cannot be reconciled with state law" establishing when settlement agreements may contain no-rehire provisions, it is preempted. *O'Connell*, 41 Cal. 4th at 1068. The Plaintiffs and their members have no other adequate and speedy remedy at law to resolve this issue except for the instant action. A determination of this issue is necessary and appropriate at this time so that the Plaintiffs and their members may ascertain their rights. Thus, the Plaintiffs request declaratory relief as prayed for below.

PRAYER FOR RELIEF

The Plaintiffs request the following relief:

1. Declaratory Judgment that the Ordinance violates the Contracts Clause of the United States Constitution, and is thus void;

2. Declaratory Judgment that the Ordinance violates the Contracts Clause of California's Constitution, and is thus void;

3. Declaratory Judgment that the Ordinance violates the Due Process Clause of the United States Constitution, and is thus void;

4. Declaratory Judgment that the Ordinance violates the Due Process Clause of California's Constitution, and is thus void;

5. Declaratory Judgment that the LMRA preempts the Ordinance, and the Ordinance is thus void;

6. Declaratory Judgment that California Labor Code Section 2922 preempts the Ordinance, and the Ordinance is thus void;

7. Declaratory Judgment that California Civil Code Section 3294 preempts Section 311.0106(a)(3) of the Ordinance, and that section is thus void;

8. Declaratory Judgment that California Code of Civil Procedure Section 1002.5 preempts the Ordinance, and the Ordinance is thus void;

9. Permanently enjoin "laid-off employee[s]"—as that term is defined in the Ordinance—from taking any action under, enforcing any provisions of, or demanding a covered employer abide by the requirements set by, the Ordinance;

10. For an award of attorneys' fees and costs of suit herein pursuant to 42 U.S.C. § 1988(b) and California Code of Civil Procedure § 1021.5; *and*

11. Any other such relief as this Court deems just and equitable.

DATED: November 3, 2020

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