

OCT 03 2011

John A. Clarke, Executive Officer/Clerk
By A.E. LaFleur-Clayton, Deputy

1 NIELSEN MERKSAMER PARRINELLO
2 GROSS & LEONI, LLP
3 JAMES R. PARRINELLO (SBN 063415)
4 ERIC J. MIETHKE (SBN 133224)
5 SEAN P. WELCH (SBN 227101)
6 KURT R. ONETO (SBN 248301)
2350 Kerner Blvd., Suite 250
San Rafael, CA 94901
TELEPHONE: (415) 389-6800
FAX: (415) 388-6874

Email: jparrinello@nmgovlaw.com
Email: emiethke@nmgovlaw.com
Email: swelch@nmgovlaw.com
Email: koneto@nmgovlaw.com

7
8
9 *Attorneys for Petitioners/Plaintiffs*
Lee Schmeer, Salim Bana, Jeff
10 Wheeler, Chris Kucma, Hilex Poly Co. LLC

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA 705
13 COUNTY OF LOS ANGELES

14 LEE SCHMEER, SALIM BANA, JEFF)
15 WHEELER, CHRIS KUCMA, and)
16 HILEX POLY CO. LLC,)

17 *Petitioners/Plaintiffs,*

18 vs.

19 COUNTY OF LOS ANGELES,
20 CALIFORNIA; GAIL FARBER in her
21 official capacity as Los Angeles Co.
22 Director of Public Works; KURT
23 FLOREN in his official capacity as Los
24 Angeles Co. Director of the Dept. of
25 Agricultural Commissioner/Weights
26 and Measures; DR. JONATHAN
27 FIELDING in his official capacity as
28 Los Angeles Co. Director of Public
Health; and DOES 1-10,

Respondents/Defendants.

Case No.:

BC470705

**VERIFIED COMPLAINT FOR
WRIT OF MANDATE,
INJUNCTIVE RELIEF, AND
DECLARATORY RELIEF**

BY FAX

1 retail stores were not required to charge for such paper bags and routinely provided
2 them without charge.

3 6. Respondent GAIL FARBER is the Director of Public Works for the
4 COUNTY and has primary responsibility under Ordinance No. 2010-0059 for
5 enforcing the paper carryout bag special tax. (L.A. Co. Code § 12.85.080(A).)

6 7. Respondent KURT FLOREN is the Director of the Department of
7 Agriculture Commissioner/Weights and Measures for the COUNTY and is
8 responsible under Ordinance No. 2010-0059 for assisting in the enforcement of the
9 paper carryout bag special tax. (L.A. Co. Code § 12.85.080(A).)

10 8. Respondent DR. JONATHAN FIELDING is the Director of Public
11 Health for the COUNTY and is responsible under Ordinance No. 2010-0059 for
12 assisting in the enforcement of the paper carryout bag special tax. (L.A. Co. Code §
13 12.85.080(A).)

14 9. Petitioners are unaware of the true names and capacities of
15 Respondents DOES 1 through 10, and names such respondents/defendants by
16 fictitious names. Petitioners are informed, and believe, and based upon such
17 information and belief allege, that each of the fictitiously named Respondents is in
18 some manner responsible for the actions described in this Complaint. When the
19 true identities and capacities of these Respondents have been determined,
20 Petitioners will seek leave to amend this Complaint to insert such identities herein.

21 **The Ordinance**

22 10. On November 23, 2010, the COUNTY adopted Ordinance No. 2010-
23 0059 ("Ordinance"). The Ordinance added Chapter 12.85 to Title 12 of the L.A. Co.
24 Code relating to plastic and paper carryout bags and promoting the County policy in
25 support of reusable nonpaper carryout bags.

26 11. As a part of the scheme, the Ordinance bans stores from providing
27 plastic carryout bags to customers. (L.A. Co. Code § 12.85.020(A).)

28 ///

1 tax may be imposed, extended, or increased. Proposition 218 became operative on
2 November 6, 1996.

3 18. Proposition 218 defined “local government” as “any county, city, city
4 and county, including a charter city or county, any special district, or any other local
5 or regional governmental entity.” (Cal. Const., art. XIII C, § 1(c).) Furthermore,
6 Proposition 218 defined “general tax” as “any tax imposed for general governmental
7 purposes;” and “special tax” as “any tax imposed for specific purposes...” (Cal.
8 Const., art. XIII C, § 1(a) & (d).)

9 19. Proposition 218 states that no local government may impose, extend or
10 increase any general tax until the tax is submitted to the electorate and approved by
11 a majority vote. (Cal. Const., art. XIII C, § 2(b).) Proposition 218 states that no
12 local government may impose, extend, or increase any special tax until the tax is
13 submitted to the electorate and approved by a two-thirds vote. (Cal. Const., art.
14 XIII C, § 2(d).)

15 20. On November 2, 2010, the electors of the State of California approved
16 Proposition 26. Proposition 26 amended Article XIII C of the California
17 Constitution to define “tax” for local purposes as “any levy, *charge, or exaction of*
18 *any kind imposed by a local government*” subject to seven specified exemptions not
19 applicable here. (Emphasis added.)

20 21. Proposition 26 also changed the burden of proof in lawsuits
21 challenging any levy, charge or exaction at the local level. It requires the local
22 government imposing a levy, charge, or exaction to prove by a preponderance of the
23 evidence that the levy, charge, or other exaction is not a tax. (Cal. Const., art. XIII
24 C, § 1.)

25 **No Local Tax Can Be Imposed Unless Approved by the Voters**

26 22. It should come as no surprise that the paper carryout bag special tax
27 can only be imposed upon approval of the electors. Through a series of ballot
28 measures dating back more than thirty years, California voters have repeatedly

1 expressed their unambiguous intent that local taxes should not be imposed without
2 prior voter consent.

3 23. *First*, in 1978, voters adopted Proposition 13, which added Article XIII
4 A to the California Constitution. Section 4 of Article XIII A prohibits counties from
5 imposing special taxes without first obtaining a two-thirds vote of electors.

6 24. *Second*, eight years after Proposition 13's passage, Proposition 62 was
7 adopted to add a new article to the Government Code (§§ 5370-53730) originally
8 requiring that all new taxes imposed by counties be approved by local electors.

9 25. *Third*, California voters adopted the aforementioned Proposition 218 in
10 1996 to stop repeated efforts by local governments to evade Proposition 13's limits
11 on taxation without voter approval. Proposition 218 further states that its
12 provisions "shall be liberally construed to effectuate its purposes of limiting local
13 government revenue and enhancing taxpayer consent."

14 26. *Finally*, less than a year ago in November 2010, voters adopted the
15 aforementioned Proposition 26 to stop repeated attempts by local governments to
16 circumvent Proposition 218's voter approval requirements by labeling taxes as
17 "fees." Proposition 26's findings and declarations of purpose note that the
18 escalation in taxation

19 does not account for the recent phenomenon whereby the Legislature and
20 local governments have disguised new taxes as "fees" in order to extract even
21 more revenue from California taxpayers without having to abide by these
22 [Propositions 13 and 218's] constitutional voting requirements. Fees couched
23 as "regulatory" but which exceed the reasonable costs of actual regulation or
24 are simply imposed to raise revenue for a new program and are not part of
25 any licensing or permitting program are actually taxes and should be subject
26 to the same limitations applicable to the imposition of taxes.

27 27. Proposition 26 further found and declared that "In order to ensure the
28 effectiveness of these constitutional limitations," the measure "defines a 'tax' for
state and local purposes so that neither the Legislature nor local governments can
circumvent these restrictions on increasing taxes by simply defining new or
expanded taxes as 'fees'."

1 exemptions to the definition of a local “tax” in California Constitution, Article XIII
2 C, § 1(e), and is therefore a “tax” under the Constitution.

3 30. The \$0.10 paper carryout bag “charge” is precisely what Proposition 26
4 sought to prohibit—taxes characterized as “fees” or “charges” in order to do an end-
5 run around the California Constitution’s voter approval requirements.

6 **The “Charge” is a Special Tax and Must Be**
7 **Approved by a Two-Thirds Vote of the Electors**

8 31. The \$0.10 paper carryout bag “charge” is not covered by any of the
9 exemptions from the definition of “tax” under the California Constitution. Instead,
10 the “charge” is a tax imposed on retail store customers to support the COUNTY’S
11 program of promoting and encouraging the use of reusable nonpaper carryout bags.

12 32. Since the “charge” is a tax imposed to support the COUNTY’s program
13 of promoting and encouraging the use of reusable nonpaper carryout bags, it is a tax
14 imposed for a specific purpose.

15 33. Since the “charge” is a tax imposed for a specified purpose, it is a
16 special tax under the California Constitution and can only be legally imposed upon
17 approval by two-thirds of the electors in the COUNTY.

18 34. Under the California Constitution, the COUNTY bears the burden of
19 proving by a preponderance of the evidence that the “charge” is not a special tax
20 subject to two-thirds voter approval.

21 **FIRST CAUSE OF ACTION**
22 **(Writ of Mandate and Injunctive Relief)**

23 35. The allegations of paragraphs 1 through 34 above are incorporated by
24 reference as though fully set forth herein.

25 36. For the reasons set forth herein, the so-called “charge” on paper
26 carryout bags imposed by the Ordinance constitutes a special tax under California
27 Constitution, Article XIII C.

28 ///

1 unconstitutional because it did not receive approval by a two-thirds vote of qualified
2 electors.

3 45. It is necessary and appropriate for this Court to declare that the so-
4 called "charge" on paper carryout bags imposed by the Ordinance is a special tax
5 subject to the requirement of approval by a two-thirds vote of qualified electors; and
6 that the Ordinance and the special tax that it imposes are therefore invalid, illegal,
7 and unconstitutional.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Petitioners pray that this Court enter judgment in favor of
10 Petitioners and against Respondents as set forth below:

11 1. A Declaration that the Ordinance including without limit the special tax
12 on paper carryout bags, is invalid, illegal, and unconstitutional in its entirety.

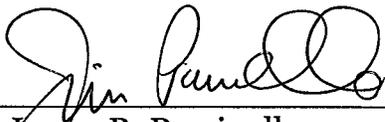
13 2. Writ of Mandate, Injunctive relief and/or other appropriate relief
14 against implementation and enforcement of the Ordinance by Respondents and
15 their agents and all persons acting under their direction, including without limit
16 from enforcing the Ordinance in its entirety including the special tax on paper
17 carryout bags.

18 3. For costs of suit and attorneys fees.

19 4. For such other and further relief as the Court shall deem appropriate.
20

21 Dated: October 3, 2011

NIELSEN MERKSAMER PARRINELLO
GROSS & LEONI, LLP

22
23 By: 
24 James R. Parrinello
25 *Attorneys for Petitioners*
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I, James R. Parrinello, declare as follows:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at 2350 Kerner Blvd., Suite 250, San Rafael, CA 94901.

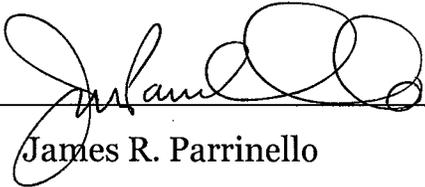
I am the attorney of record for Petitioners/Plaintiffs in this action. Petitioners are absent from the county in which I have my office and for that reason I am making this verification on their behalf.

I have read the foregoing Verified Complaint for Writ of Mandate, Injunctive Relief, and Declaratory Relief and know the content thereof.

I am informed and believe that the matters stated therein are true and, on that ground, I allege that the matters stated therein are true.

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

Executed on October 3, 2011, at San Rafael, California.


James R. Parrinello

Chapter 12.85 CARRYOUT BAGS

12.85.010 Definitions.

The following definitions apply to this Chapter:

- A. "Customer" means any person purchasing goods from a store.
- B. "Operator" means the person in control of, or having the responsibility for, the operation of a store, which may include, but is not limited to, the owner of the store.
- C. "Person" means any natural person, firm, corporation, partnership, or other organization or group however organized.
- D. "Plastic carryout bag" means any bag made predominantly of plastic derived from either petroleum or a biologically-based source, such as corn or other plant sources, which is provided to a customer at the point of sale. "Plastic carryout bag" includes compostable and biodegradable bags but does not include reusable bags, produce bags, or product bags.
- E. "Postconsumer recycled material" means a material that would otherwise be destined for solid waste disposal, having completed its intended end use and product life cycle. "Postconsumer recycled material" does not include materials and by-products generated from, and commonly reused within, an original manufacturing and fabrication process.
- F. "Produce bag" or "product bag" means any bag without handles used exclusively to carry produce, meats, or other food items to the point of sale inside a store or to prevent such food items from coming into direct contact with other purchased items.
- G. "Recyclable" means material that can be sorted, cleansed, and reconstituted using available recycling collection programs for the purpose of using the altered form in the manufacture of a new product. "Recycling" does not include burning, incinerating, converting, or otherwise thermally destroying solid waste.
- H. "Recyclable paper carryout bag" means a paper bag that meets all of the following requirements: (1) contains no old growth fiber, (2) is one hundred percent (100%) recyclable overall and contains a

minimum of forty percent (40%) post-consumer recycled material; (3) is capable of composting, consistent with the timeline and specifications of the American Society of Testing and Materials (ASTM) Standard D6400; (4) is accepted for recycling in curbside programs in the County; (5) has printed on the bag the name of the manufacturer, the location (country) where the bag was manufactured, and the percentage of postconsumer recycled material used; and (6) displays the word "Recyclable" in a highly visible manner on the outside of the bag.

I. "Reusable bag" means a bag with handles that is specifically designed and manufactured for multiple reuse and meets all of the following requirements: (1) has a minimum lifetime of 125 uses, which for purposes of this subsection, means the capability of carrying a minimum of 22 pounds 125 times over a distance of at least 175 feet; (2) has a minimum volume of 15 liters; (3) is machine washable or is made from a material that can be cleaned or disinfected; (4) does not contain lead, cadmium, or any other heavy metal in toxic amounts; (5) has printed on the bag, or on a tag that is permanently affixed to the bag, the name of the manufacturer, the location (country) where the bag was manufactured, a statement that the bag does not contain lead, cadmium, or any other heavy metal in toxic amounts, and the percentage of postconsumer recycled material used, if any; and (6) if made of plastic, is a minimum of at least 2.25 mils thick.

J. "Store" means any of the following retail establishments located within the unincorporated area of the County:

A full-line, self-service retail store with gross annual sales of two million dollars (\$2,000,000), or more, that sells a line of dry grocery, canned goods, or nonfood items and some perishable items;

A store of at least 10,000 square feet of retail space that generates sales or use tax pursuant to the Bradley-Burns Uniform Local Sales and Use Tax Law (Part 1.5 (commencing with Section 7200) of Division 2 of the Revenue and Taxation Code) and that has a pharmacy licensed pursuant to Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code; or

A drug store, pharmacy, supermarket, grocery store, convenience food store, foodmart, or other entity engaged in the retail sale of a limited line of goods that includes milk, bread, soda, and snack foods, including those stores with a Type 20 or 21 license issued by the Department of Alcoholic Beverage Control. (Ord. 2010-0059 § 1, 2010.)

12.85.020 Plastic carryout bags prohibited.

- A. No store shall provide to any customer a plastic carryout bag.
- B. This prohibition applies to bags provided for the purpose of carrying away goods from the point of sale and does not apply to produce bags or product bags. (Ord. 2010-0059 § 1, 2010.)

12.85.030 Permitted bags.

All stores shall provide or make available to a customer only recyclable paper carryout bags or reusable bags for the purpose of carrying away goods or other materials from the point of sale, subject to the terms of this Chapter. Nothing in this Chapter prohibits customers from using bags of any type that they bring to the store themselves or from carrying away goods that are not placed in a bag, in lieu of using bags provided by the store. (Ord. 2010-0059 § 1, 2010.)

12.85.040 Regulation of recyclable paper carryout bags.

- A. Any store that provides a recyclable paper carryout bag to a customer must charge the customer 10 cents (\$0.10) for each bag provided, except as otherwise provided in this Chapter.
- B. No store shall rebate or otherwise reimburse a customer any portion of the 10-cent (\$0.10) charge required in Subsection A, except as otherwise provided in this Chapter.
- C. All stores must indicate on the customer receipt the number of recyclable paper carryout bags provided and the total amount charged for the bags.
- D. All monies collected by a store under this Chapter will be retained by the store and may be used only for any of the following purposes: (1) costs associated with complying with the requirements of this Chapter, (2) actual costs of providing recyclable paper carryout bags, or (3) costs associated with a store's educational materials or education campaign encouraging the use of reusable bags, if any.
- E. All stores must report to the Director of Public Works, on a quarterly basis, the total number of recyclable paper carryout bags provided, the total amount of monies collected for providing recyclable paper carryout bags, and a summary of any efforts a store has undertaken to promote the use of reusable bags by customers in the prior quarter. Such reporting must be done on a form prescribed by the Director of Public Works, and must be signed by a responsible agent or officer of the store confirming that the information provided on the form is accurate and complete. For the periods from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31, all

quarterly reporting must be submitted no later than 30 days after the end of each quarter.

F. If the reporting required in Subsection E is not timely submitted by a store, such store shall be subject to the fines set forth in Section 12.85.080. (Ord. 2010-0059 § 1, 2010.)

12.85.050 Use of reusable bags.

A. All stores must provide reusable bags to customers, either for sale or at no charge.

B. Each store is strongly encouraged to educate its staff to promote reusable bags and to post signs encouraging customers to use reusable bags. (Ord. 2010-0059 § 1, 2010.)

12.85.060 Exempt customers.

All stores must provide at the point of sale, free of charge, either reusable bags or recyclable paper carryout bags or both, at the store's option, to any customer participating either in the California Special Supplemental Food Program for Women, Infants, and Children pursuant to Article 2 (commencing with Section 123275) of Chapter 1 of Part 2 of Division 106 of the Health and Safety Code or in the Supplemental Food Program pursuant to Chapter 10 (commencing with Section 15500) of Part 3 of Division 9 of the Welfare and Institutions Code. (Ord. 2010-0059 § 1, 2010.)

12.85.070 Operative date.

This Chapter shall become operative on July 1, 2011, for stores defined in Subsections J(1) and J(2) of Section 12.85.010. For stores defined in Subsection J(3) of Section 12.85.010, this Chapter shall become operative on January 1, 2012. (Ord. 2010-0059 § 1, 2010.)

12.85.080 Enforcement and violation--penalty.

A. The Director of Public Works has primary responsibility for enforcement of this Chapter. The Director of Public Works is authorized to promulgate regulations and to take any and all other actions reasonable and necessary to enforce this Chapter, including, but not limited to, investigating violations, issuing fines, and entering the premises of any store during business hours. The Director of the Department of Agricultural Commissioner/Weights and Measures and the Director of Public Health may assist with this enforcement responsibility by entering the premises of a store as part of their regular inspection functions and reporting any alleged violations to the Director of Public Works.

B. If the Director of Public Works determines that a violation of this Chapter has occurred, he/she will issue a written warning notice to the operator of a store that a violation has occurred and the potential

penalties that will apply for future violations.

C. Any store that violates or fails to comply with any of the requirements of this Chapter after a written warning notice has been issued for that violation shall be guilty of an infraction.

D. If a store has subsequent violations of this Chapter that are similar in kind to the violation addressed in a written warning notice, the following penalties will be imposed and shall be payable by the operator of the store:

A fine not exceeding one hundred dollars (\$100.00) for the first violation after the written warning notice is given;

A fine not exceeding two hundred dollars (\$200.00) for the second violation after the written warning notice is given; or

A fine not exceeding five hundred dollars (\$500.00) for the third and any subsequent violations after the written warning notice is given.

E. A fine shall be imposed for each day a violation occurs or is allowed to continue.

F. All fines collected pursuant to this Chapter shall be deposited in the Solid Waste Management Fund of the Department of Public Works to assist the department with its costs of implementing and enforcing the requirements of this Chapter.

G. Any store operator who receives a written warning notice or fine may request an administrative review of the accuracy of the determination or the propriety of any fine issued, by filing a written notice of appeal with the Director of Public Works no later than 30 days after receipt of a written warning notice or fine, as applicable. The notice of appeal must include all facts supporting the appeal and any statements and evidence, including copies of all written documentation and a list of any witnesses, that the appellant wishes to be considered in connection with the appeal. The appeal will be heard by a hearing officer designated by the Director of Public Works. The hearing officer will conduct a hearing concerning the appeal within 45 days from the date that the notice of appeal is filed, or on a later date if agreed upon by the appellant and the County, and will give the appellant 10 days prior written notice of the date of the hearing. The hearing officer may sustain, rescind, or modify the written warning notice or fine, as applicable, by written decision. The hearing officer will have the power to waive any portion of the fine in a manner consistent with the decision. The decision of the hearing officer is final and effective on the date

of service of the written decision, is not subject to further administrative review, and constitutes the final administrative decision. (Ord. 2010-0059 § 1, 2010.)

12.85.090 Severability.

If any section, subsection, sentence, clause, or phrase of this ordinance is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision will not affect the validity of the remaining portions of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of this ordinance would be subsequently declared invalid. (Ord. 2010-0059 § 1, 2010.)

12.85.100 No conflict with federal or state law.

Nothing in this ordinance is intended to create any requirement, power or duty that is in conflict with any federal or state law. (Ord. 2010-0059 § 1, 2010.)