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8 **SAVE THE PLASTIC BAG COALITION**

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF SAN FRANCISCO**
12

13	SAVE THE PLASTIC BAG COALITION,	)	Case No. CPF-12-511978
14	an unincorporated association,	)	
15		)	CEQA Case
16	Petitioner,	)	
17		)	VERIFIED PETITION FOR WRIT OF
18	v.	)	MANDATE UNDER THE CALIFORNIA
19		)	ENVIRONMENTAL QUALITY ACT;
20	CITY AND COUNTY OF SAN FRANCISCO,	)	COMPLAINT FOR INVALIDATION OF
21	a political subdivision of the State of California)	)	ORDINANCE BASED ON STATE RETAIL
22	and a municipal corporation; SAN	)	FOOD CODE PREEMPTION; REQUEST
23	FRANCISCO PLANNING DEPARTMENT,	)	FOR DECLARATORY AND INJUNCTIVE
24	an agency of the City and County of San	)	RELIEF
25	Francisco; SAN FRANCISCO	)	
26	DEPARTMENT OF THE ENVIRONMENT,	)	
27	an agency of the City and County of San	)	
28	Francisco; and DOES 1-100, inclusive,	)	
		)	
	Respondents.	)	

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Petitioner, SAVE THE PLASTIC BAG COALITION, alleges as follows:

PARTIES AND JURISDICTION

1. Petitioner SAVE THE PLASTIC BAG COALITION is an unincorporated association.
2. Respondent CITY AND COUNTY OF SAN FRANCISCO (the "City") is a political subdivision of the State of California and a municipal corporation.

1 3. Respondent SAN FRANCISCO PLANNING DEPARTMENT (the “Planning
2 Department”) is a department and agency of the CITY AND COUNTY OF SAN FRANCISCO.

3 4. Respondent SAN FRANCISCO DEPARTMENT OF THE ENVIRONMENT
4 (the “Environment Department”) is a department and agency of the CITY AND COUNTY OF
5 SAN FRANCISCO.

6 5. Petitioner seeks a judgment and writ of mandate to set aside, void, annul, and
7 repeal San Francisco Ordinance No. 33-12 (the “Ordinance”). The Ordinance bans plastic
8 carryout bags (“plastic bags”) at retail stores, restaurants, and other food establishments, and
9 requires that consumers pay a 10-cent fee for each paper carryout bag (“paper bag”) and each
10 compostable carryout bag (“compostable bag”). A true and correct copy of the Ordinance is
11 attached hereto as Exhibit A.

12 6. The Ordinance was finally adopted by the Board of Supervisors on February 14,
13 2012.

14 7. The Ordinance takes effect for all retail stores except food establishments on
15 October 1, 2012. It takes effect for food establishments on July 1, 2013.

16 8. The First Cause of Action herein alleges violation of the California
17 Environmental Quality Act (“CEQA”).

18 9. The Ordinance is a “project” that is subject to CEQA.

19 10. The Planning Department is the lead agency for the project, responsible for
20 compliance with CEQA, including but not limited to preparation of an Environmental Impact
21 Report (“EIR”).

22 11. The City and the Planning Department violated CEQA by claiming that the
23 Ordinance is exempt from CEQA and failing to complete an EIR prior to adopting the
24 Ordinance.

25 12. The claim of exemption contradicts and violates the California Supreme Court’s
26 express ruling that EIRs “will be required” before plastic bag bans may be adopted in cities
27 such as San Francisco. (*Save The Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52
28 Cal.4th 155, 174, n.10.)

13. The Environment Department is responsible for enforcement of the Ordinance and is a real party in interest.

14. The Second Cause of Action herein alleges that the Ordinance is invalid as it is preempted and prohibited by the California Retail Food Code. (Health and Safety Code, Div. 104, Part 7.)

15. Petitioner is ignorant of true names and capacities of DOES named herein as DOES 1-100, inclusive, and therefore sues said Respondents by such fictitious names. Petitioner will amend this Petition and Complaint to allege their true names and capacities when ascertained.

16. Petitioner is informed and believes and thereon alleges that some or all of these fictitiously named Respondents were, and continue to be, responsible in some manner for the acts or omissions alleged herein.

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

18. This Court has jurisdiction over the matters alleged in this Petition pursuant to Code Civ. Proc. § 1085, and/or § 1094.5, and Pub. Res. Code § 21167.

19. Venue is proper in this Court under Code Civ. Proc. §§ 393 and 394(a).

20. Petitioner has exhausted any and all administrative remedies.

21. Petitioner complied with Pub. Res. Code § 21177(a) and (b) by filing the Objections attached hereto as Exhibits C, D, and E prior to adoption of the Ordinance.

22. Petitioner complied with Pub. Res. Code § 21167.5 by mailing to all Respondents a written notice of the commencement of this action, identifying the project.

STANDING

23. At all times relevant to the allegations herein and at present, Petitioner's members have included Crown Poly, Inc. and Grand Packaging, Inc. (doing business as "Command Packaging"), which are California corporations in good standing. Said corporations

1 and other members of Petitioner market, sell, distribute, and supply plastic bags and plastic
2 reusable bags to retail stores, restaurants, and food establishments in San Francisco, including
3 bags that are banned by the Ordinance.

4 24. At all times relevant to the allegations herein and at present, Petitioner's counsel
5 Stephen L. Joseph has been a resident of San Francisco and a member of Petitioner.

6 25. Petitioner was formed in 2008 and exists for the purpose of responding to
7 environmental misinformation about plastic bags and ensuring that the environmental impacts
8 of banning plastic bags are made known to decision-makers and the public. Petitioner maintains
9 a website at www.savetheplasticbag.com.

10 26. Petitioner seeks to promote and enforce the informational purposes of CEQA in
11 this action, as set forth in CEQA Guidelines § 15002. Ascertaining the true facts about the
12 environmental impacts of projects and disclosing those true facts to decision-makers and the
13 public are within the zone of interests that CEQA is intended to preserve and protect.

14 27. The question in this action is one of public right and the object of this action is to
15 enforce a public duty in the public interest.

16 28. Petitioner is interested as a citizen in having the public duties and purposes in
17 CEQA enforced. Petitioner has a continuing commitment to the subject matter of the public
18 rights being asserted.

19 29. Petitioner is also interested in protecting the interests of its members, including
20 preventing their products from being unlawfully and invalidly banned.

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

25 31. As to the First and Second Causes of Action herein, Petitioner has beneficial and
26 citizen standing. Such standing was confirmed by the California Supreme Court in *Save The*
27 *Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166-171.

1 **STATEMENT OF FACTS**

2 32. On November 10, 2011, the Planning Department issued a Certificate of
3 Determination asserting that the proposed Ordinance was categorically exempt under CEQA
4 Guidelines §§ 15307 and 15308. A true and correct copy thereof is attached hereto as Exhibit B.

5 33. On November 16 and 18, 2011 and February 6, 2012, Petitioner submitted
6 objections to the proposed Ordinance to the Planning Department, the Board of Supervisors,
7 and the City Attorney (the "Objections"). True and correct copies of the Objections are attached
8 hereto as Exhibits C, D, and E respectively and incorporated herein by reference. Petitioner also
9 submitted therewith 137 documents in support of the Objections.

10 34. The Objections were timely submitted prior to the first reading of the Ordinance
11 by the Board of Supervisors which occurred on February 7, 2012.

12 35. In the Objections, Petitioner objected to the assertion of categorical exemptions.

13 36. In the Objections, Petitioner made a "fair argument" that the Ordinance may
14 have a significant negative effect on the environment.

15 37. In the Objections, Petitioner demanded that the City and the Planning
16 Department prepare and certify an EIR before adopting the Ordinance.

17 38. No CEQA Initial Study or EIR was prepared and no CEQA Negative
18 Declaration was adopted.

19 39. In the Objections, Petitioner also objected to the Ordinance based on California
20 Retail Food Code preemption.

21 40. None of the Respondents substantively responded to the Objections at any time.

22 41. In the Ordinance, the Board of Supervisors and the City expressly affirmed and
23 adopted the Certificate of Determination.

24 42. All of the objections to the Ordinance stated herein were asserted in the
25 Objections.

26 43. All of the evidence cited herein is part of the administrative record.

27 44. All of the Objections are hereby reasserted to the extent that they support the
28 First and Second Causes of Action herein.

1 **THE CITY AND THE PLANNING DEPARTMENT REFUSED TO COMPLY WITH**
2 **THE SUPREME COURT’S DECISION IN THE *MANHATTAN BEACH* CASE**

3 45. The California Supreme Court ruled in July 2011 that cities and counties larger
4 than the City of Manhattan Beach “will be required” to prepare EIRs before banning plastic
5 bags and that such projects “should not be allowed to escape review.” (*Manhattan Beach*,
6 *supra*, 52 Cal.4th 155, 174, n.10.)

7 46. The population of San Francisco in 2010 was 805,235, meaning that it is
8 approximately 24 times larger than the City of Manhattan Beach.

9 47. In addition, San Francisco hosted approximately 15.9 million visitors and
10 tourists in 2010.

11 48. Based on the decision of the Supreme Court in *Manhattan Beach*, the City or the
12 Planning Department was required to prepare an EIR before adopting the Ordinance.

13 **THE CITY AND THE PLANNING DEPARTMENT WERE NOT**
14 **ENTITLED TO RELY ON THE CATEGORICAL EXEMPTIONS**

15 49. The City and Planning Department could not rely on the categorical exemptions
16 in CEQA Guidelines §§ 15307 and 15308. Those sections read as follows:

17 **§ 15307. ACTIONS BY REGULATORY AGENCIES FOR**
18 **PROTECTION OF NATURAL RESOURCES**

19 Class 7 consists of actions taken by regulatory agencies as authorized by
20 state law or local ordinance to assure the maintenance, restoration, or
21 enhancement of a natural resource where the regulatory process involves
22 procedures for protection of the environment. Examples include but are
 not limited to wildlife preservation activities of the State Department of
 Fish and Game. Construction activities are not included in this
 exemption.

23 **§ 15308. ACTIONS BY REGULATORY AGENCIES FOR**
24 **PROTECTION OF THE ENVIRONMENT**

25 Class 8 consists of actions taken by regulatory agencies, as authorized by
26 state or local ordinance, to assure the maintenance, restoration,
27 enhancement, or protection of the environment where the regulatory
28 process involves procedures for protection of the environment.
 Construction activities and relaxation of standards allowing
 environmental degradation are not included in this exemption.

1 50. The categorical exemptions in §§ 15307 and 15308 only apply to “regulatory
2 agencies.” The Board of Supervisors is not a regulatory agency. It is a legislative agency.

3 51. The categorical exemptions in §§ 15307 and 15308 only apply to regulatory
4 actions that are “authorized by” a preexisting state law or local ordinance. There was no
5 preexisting state law or local ordinance that “authorized” the Ordinance in this case.

6 52. The categorical exemptions in §§ 15307 and 15308 only apply when there is a
7 preexisting “regulatory process [that] involves procedures for protection of the environment.”
8 There was no such preexisting “regulatory process” in this case.

9 53. According to the California Natural Resources Agency, which issues the CEQA
10 Guidelines:

11 Statutory exemptions are descriptions of *types* of projects for which the
12 California Legislature has provided a *blanket* exemption from CEQA
procedures and policies.

13 (<http://ceres.ca.gov/ceqa/flowchart/exemptions/index.html>, italics added.)

14 54. The Supreme Court ruled that comprehensive environmental review “will be
15 required” for cities and counties larger than the City of Manhattan Beach and that such projects
16 “should not be allowed to escape review.” (*Manhattan Beach, supra*, 52 Cal.4th 155, 174,
17 n.10.) Therefore, there is no *blanket* exemption for this *type* of project.

18 55. The City and the Planning Department misused the categorical exemptions in §§
19 15307 and 15308 to avoid CEQA’s procedures and environmental review.

20 **THE CITY AND THE PLANNING DEPARTMENT WERE NOT**
21 **PERMITTED TO RELY ON THE 10-CENT PAPER AND COMPOSTABLE**
22 **BAG FEE AS A BASIS FOR ASSERTING CATEGORICAL EXEMPTIONS**

23 56. The Planning Department claimed in the Certificate of Determination that it
24 could rely on the categorical exemptions, because a fee on paper and compostable bags might
25 offset the greater negative impacts of paper and compostable bags. Paper and compostable bags
26 are significantly worse for the environment than plastic bags, as alleged below.

27 57. The City and Planning Department were not permitted to rely on the paper and
28 compostable bag fee in determining whether the categorical exemptions applied. In *Azusa Land*
Reclamation Co. v. Main San Gabriel Basin Watermaster (1997) 52 Cal.App.4th 1165, the

1 court stated: “Appellants cannot escape the law by taking a minor step in mitigation and then
2 find themselves exempt from the exception to the exemption.” (*Id.* at 1200.) In *Salmon*
3 *Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, the court
4 stated: “[T]he County erred in relying upon mitigation measures to grant a categorical
5 exemption from CEQA.... If a project may have a significant effect on the environment, CEQA
6 review must occur, and only then are mitigation measures relevant.... The County made a
7 premature and unauthorized environmental evaluation at the preliminary stage of considering
8 eligibility for a categorical exemption.” (*Id.* at 1107-08.)

9 **EVEN IF THE FEE COULD BE A BASIS FOR RELYING**
10 **ON CATEGORICAL EXEMPTIONS, THERE IS NO**
11 **CERTAINTY THAT A 10-CENT FEE IS HIGH ENOUGH**

12 58. In the Objections, without waiving the point that the paper and compostable bag
13 fee could not be used to determine whether the categorical exemptions in §§ 15307 and 15308
14 were applicable, Petitioner produced substantial evidence that a 10-cent paper and compostable
15 bag fee would not eliminate the reasonable possibility of significant negative environmental
16 impact caused by increased paper and compostable bag usage.

17 59. A 10-cent fee is, or may be, far too low to act as an effective incentive to
18 promote the use of reusable bags. No one will carry a reusable bag with them for unplanned
19 impulse buying. Very few people will carry a reusable bag to Macy’s or other department stores
20 to save a dime. Very few people will carry a large reusable bag to purchase one or two small
21 items such as earrings or a watch or a snack from Union Square or Chinatown. Very few
22 tourists will carry reusable bags when they visit Fisherman’s Wharf and tour the city.

23 60. In the original draft ordinance, the City was planning to increase the paper and
24 compostable bag fee to 25 cents on July 1, 2014. The Certificate of Determination is expressly
25 based on the assumption that the fee would increase to 25 cents on July 1, 2014. The fee in the
26 Ordinance as adopted is 10 cents with no increase. Therefore, the City and the Planning
27 Department based their decision to claim categorical exemptions on the wrong level of fee.

28 61. In the Certificate of Determination, the Planning Department conceded that it
could not be certain that even a 25-cent fee would be high enough. It stated therein as follows:

1 Because the Expansion of the Plastic Bag Reduction Ordinance would
2 not allow single-use plastic bags and other single-use bags and
3 eventually charge for all single-use bags, including recycled-content
4 paper and compostable bags, at “stores”, it is difficult to determine the
5 effects on user choice from these studies. Additional studies have
6 projected consumer behavior from fees on single-use plastic and paper
bags fees, but these projections have not been verified with actual
consumer behavior following the implementation of the single-use
plastic and paper bag fees.

7 **PETITIONER MADE A FAIR ARGUMENT, THEREBY**
8 **DEFEATING THE CATEGORICAL EXEMPTIONS**
9 **ASSUMING THAT THEY COULD BE RELIED UPON**

10 62. Even if the City and Planning Department could assert the categorical
11 exemptions in §§ 15307 and 15308, CEQA Guidelines § 15300.2(c) states that such exemptions
12 are unavailable in the following situation:

13 Significant effect. A categorical exemption shall not be used for an
14 activity where there is a reasonable possibility that the activity will have
a significant effect on the environment due to unusual circumstances.

15 63. If a member of the public such as Petitioner makes a “fair argument” that there is
16 a possibility that the project may have a significant negative effect on the environment, the
17 categorical exemptions in §§ 15307 and 15308 may not be relied upon by the agency. (*Banker’s*
18 *Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139
19 Cal.App.4th 249, 264-267.) Under the fair argument standard, “[i]f legitimate questions can be
20 raised about whether the project might have a significant impact and there is any dispute about
21 the possibility of such an impact, the agency cannot find with certainty that a project is
22 exempt.” The agency “must refute that claim to a *certainty* before finding that the exemption
23 applies.” (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117-118, emphasis
24 added.) Guidelines § 15064(f)(1) states: “[I]f a lead agency is presented with a fair argument
25 that a project may have a significant effect on the environment, the lead agency shall prepare an
26 EIR even though it may also be presented with other substantial evidence that the project will
27 not have a significant effect.”
28

1 **Fair argument regarding increased number of paper and compostable bags**

2 64. In the Objections, Petitioner made a “fair argument” based on substantial
3 evidence that the Ordinance may have a significant negative effect on the environment as a
4 result of increased numbers of paper and compostable bags.

5 65. Petitioner produced substantial evidence that paper and compostable bags are far
6 worse for the environment than plastic bags, including the Franklin Report, the Scottish Report,
7 the Boustead Report, the British Report, the ULS Report, and the Los Angeles County EIR on
8 banning plastic bags.

9 66. The Scottish Report includes findings that the life cycle of paper bags results in:

- 10 • 3.3 times *more* emissions of greenhouse gases than plastic bags;
- 11 • 1.1 times *more* consumption of nonrenewable primary energy than plastic bags;
- 12 • 4.0 times *more* consumption of water than plastic bags;
- 13 • 1.9 times *more* acid rain than plastic bags;
- 14 • 1.3 times *more* negative air quality than plastic bags;
- 15 • 14.0 times *more* water body eutrophication than plastic bags; and
- 16 • 2.7 times *more* solid waste production than plastic bags.

17 67. The Scottish Report also includes the following finding:

18 [A] paper bag has a more adverse impact than a plastic bag for most of
19 the environmental issues considered. Areas where paper bags score
20 particularly badly include water consumption, atmospheric acidification
21 (which can have effects on human health, sensitive ecosystems, forest
decline and acidification of lakes) and eutrophication of water bodies
(which can lead to growth of algae and depletion of oxygen).

22 68. The Boustead Report is a comprehensive life cycle assessment of the
23 environmental impacts of the types of plastic, paper, and compostable carryout bags used in the
24 United States. It takes into account that a paper bag holds more than a plastic bag and applies an
25 adjustment factor of 1 paper bag = 1.5 plastic bags. The Boustead Report findings are as
26 follows:

Carrying Capacity of paper and plastic bags equivalent to 1000 paper bags	Paper bags (30% recycled fiber)	Compostable bags	Plastic bags
Total Energy Used (MJ)	2622	2070	763
Fossil Fuel Use (kg)	23.2	41.5	14.9
Municipal Solid Waste (kg)	33.9	19.2	7.0
Greenhouse Gas Emissions (CO ₂ Equiv. Tons)	0.08	0.18	0.04
Fresh Water Usage (Gal)	1004	1017	58

69. The Boustead Report analyzes paper bags with 30% post-consumer recycled content. The Ordinance requires that paper bags have 40% post-consumer recycled content. An additional 10% of recycled content would not result in a 10% improvement in environmental impacts. Even if an extra 10% of recycled content decreased all environmental impacts of paper bags by a full 10%, paper bags are still far worse than plastic bags in every environmental category. For example, instead of consuming 2622 megajoules of total energy, 1000 paper bags would consume 2360 megajoules. Plastic bags with the same carrying capacity consume only 763 megajoules.

70. The ULS Report concluded as follows regarding compostable bags:

By definition, composting and biodegradation release carbon dioxide (CO₂), a greenhouse gas, into the atmosphere, increasing the potential for climate change. For example, composted paper produces approximately twice the CO₂ emissions produced by non-composted paper.

71. Los Angeles County completed and certified an EIR before it banned plastic and compostable bags. It determined in its EIR that even imposing a 10-cent fee on paper bags, requiring that paper bags be made of at least 40 percent post-consumer material, and promoting and distributing reusable bags would not ensure that there would be no significant negative environmental impacts caused by its ordinance. The EIR contains a section entitled “Significant Unavoidable Adverse Impacts That Cannot Be Mitigated To Below The Level Of Significance” which states:

1 Based on a conservative analysis, [Los Angeles] County has determined
2 that cumulative indirect GHG emissions resulting from implementation
3 of the recommended ordinances will have the potential to result in
4 significant unavoidable impacts even with implementation of mitigation
5 measure GHG-1, which will be expected to reduce significant adverse
6 impacts to GHG emissions to the maximum extent feasible.
7 Consequently, in accordance with Section 15093 of the State CEQA
8 Guidelines, a Statement of Overriding Considerations has been prepared
9 (see Section IX of this document) to substantiate the County's decision
10 to accept this potential unavoidable adverse environmental effect
11 because it is outweighed by the potential benefits afforded by the
12 recommended ordinances.

13 72. In November 2010, the Los Angeles County Board of Supervisors adopted a
14 Statement of Overriding Considerations to enable it to pass its plastic bag ban ordinance,
15 notwithstanding the findings in the EIR.

16 73. Even Heal the Bay, which is a leading campaigner for the banning of plastic
17 bags, agrees that paper bags cause significant negative environmental impacts. In 2008, Heal
18 the Bay told the City of Manhattan Beach as follows:

19 As the most ubiquitous alternative to plastic, paper bags are themselves
20 fraught with environmental impacts. The production of paper bags
21 contributes to natural resource depletion, greenhouse gas emissions and
22 additional waterborne wastes from the pulping and paper making
23 process.

24 **Fair argument regarding increased number of reusable bags**

25 74. In the Objections, Petitioner made a "fair argument" based on substantial
26 evidence that the Ordinance may have a significant negative effect on the environment as a
27 result of increased numbers of reusable bags.

28 75. The overwhelming majority of reusable bags used in California are made of
polypropylene or cotton.

76. The United Kingdom Government's Environment Agency prepared a life cycle
assessment of plastic, paper, and reusable bags. The study includes the finding that a cotton
reusable bag must be used at least 131 times before it offsets its greater negative environmental
impacts compared to a plastic bag, assuming that plastic bags are never reused as bin-liners. If
40.3% of plastic bags are reused as bin-liners, which the study found to be the average figure

1 based on its survey, a cotton reusable bag must be used at least 173 times before it offsets its
2 greater greenhouse gas impacts compared to a plastic bag. The study finds that the global
3 warming impact of a cotton reusable bag “is more than ten times that of any other carrier bag.”

4 77. Los Angeles County in its EIR determined that each and every polypropylene
5 and cotton reusable bag distributed in Los Angeles County must be used at least 104 times
6 before it offsets its greater negative environmental impacts compared to a plastic bag.

7 78. If a consumer receives two reusable bags and discards one without using it, the
8 other bag must be used at least 208 times to offset the negative environmental impacts
9 compared to a plastic bag.

10 79. The fact that a reusable bag can be used 104 or more times does not mean that it
11 will be used that many times, especially as reusable bags become filthy and unhygienic after far
12 fewer uses than that.

13 80. The overwhelming majority of consumers do not clean their reusable bags and
14 replace rather than wash them. The University of Arizona asked consumers how often they
15 wash their reusable bags. The responses indicate that 97% of consumers do not regularly wash
16 reusable bags.

17 81. Polypropylene, cotton, and PET reusable bags are not recyclable at all. All such
18 reusable bags must be disposed of in landfills. In Australia, unused and underused reusable bags
19 are piling up in landfills at a rapid rate.

20 82. In contrast, plastic bags are readily recyclable if they are deposited in plastic bag
21 recycling bins that are located at all supermarkets and large drug stores in California. (Pub. Res.
22 Code §§ 42250-57.) All bags deposited in such bins must be recycled. (Pub. Res. Code
23 §§42252(c).) There are many recycling companies that buy plastic bags deposited in the bins,
24 including Trex, AERT, and Hilex.

25 **Fair argument regarding loss of plastic bags for reuse**

26 83. In the Objections, Petitioner made a “fair argument” based on substantial
27 evidence that the Ordinance may have a significant negative effect on the environment as a
28 result of the loss of plastic bags for reuse.

1 84. So-called “single-use” plastic bags are not really single use at all. People reuse
2 plastic bags for bin liners, dog litter, used diapers, and other purposes. When a fee was imposed
3 on plastic bags in Ireland, there was a huge increase in the sale of plastic bags for bin liners,
4 used diapers, and other purposes. The loss of reuse of plastic bags must be taken into account in
5 determining the impact of a plastic bag ban.

6 85. If plastic bags are banned, there may be a substantial increase in the amount of
7 dog litter on public sidewalks and parks, as people may not have plastic bags available. This is a
8 significant negative environmental impact.

9 **Fair argument regarding impact on citywide**
10 **recycling if there is a 10-cent fee for paper bags**

11 86. In the Objections, Petitioner made a “fair argument” based on substantial
12 evidence that the Ordinance may have a significant negative effect on the environment by
13 causing a major reduction in citywide recycling.

14 87. Petitioner pointed out that paper bags are used throughout San Francisco to
15 collect all kinds of recyclables at homes and offices. The filled paper bags are deposited in blue
16 recycling bins.

17 88. Free paper bags are essential to successful recycling in San Francisco. More
18 reusable bag use will inevitably mean less recycling.

19 89. There is no good substitute for paper bags to collect and dispose of recyclables
20 for three reasons. First, paper bags are themselves recyclable. The bag used to contain
21 recyclables must be recyclable. Second, paper bags have flat bases and can stand up on their
22 own, making it convenient to deposit items in the bag. Third, paper bags are free.

23 90. At the present time, there is no charge for paper bags in San Francisco. If people
24 cannot obtain free paper bags, many people will put recyclables in the trash. The result would
25 be that those recyclables would go to a landfill instead of being recycled. This is a highly
26 significant and very serious negative environmental impact that the City has failed and refused
27 to even acknowledge or address.
28

1 **SAN FRANCISCO IS A SPECIAL CASE BECAUSE**
2 **IT RECEIVES A HUGE NUMBER OF VISITORS AND TOURISTS**

3 91. The City and the Planning Department failed to address or take into account the
4 impacts of visitors and tourists.

5 92. As alleged above, San Francisco received 15.9 million visitors in 2010,
6 including hotel guests, those staying with friends and relatives, those staying in
7 accommodations outside the City but whose primary destination was San Francisco, and
8 regional visitors driving in or arriving by BART or ferry for the day, including commuters.
9 During the tourist season, visitors from all over the world flock to Fisherman's Wharf, North
10 Beach, Chinatown, and Union Square. When they come to San Francisco, they buy all kinds of
11 items. In addition, millions of people are expected to visit San Francisco for the America's Cup
12 in 2013.

13 93. The City proposes to penalize tourists for not carrying reusable bags as they tour
14 San Francisco.

15 94. It is unreasonable to expect tourists to carry reusable bags with them all the time.

16 95. Reusable bags (except polyethylene reusable bags) are not recyclable. To the
17 extent that visitors and tourists purchase reusable bags, they are likely to use them once or only
18 a few times before they leave. San Francisco will be flooded with millions of underused non-
19 recyclable environment-unfriendly reusable bags that tourists throw in the trash in their hotel
20 rooms and other places. All of those reusable bags will go to landfills.

21 96. 10 cents is such a low fee for a visitor or tourist that it is likely that the
22 overwhelming majority (perhaps over 98%) will choose to pay the fee. As paper and
23 compostable bags are far worse for the environment than plastic bags, that will cause significant
24 environmental harm.

25 **GREENHOUSE GAS EMISSIONS MUST BE CALCULATED**

26 97. Under CEQA Guidelines § 15064.4, the City or the Planning Department was
27 required in an Initial Study or EIR to "make a good-faith effort, based to the extent possible on
28 scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas
emissions resulting from a project." The City and the Planning Department violated CEQA by

1 failing to comply with said requirement regarding paper, compostable, and reusable bags. In
2 contrast, the Los Angeles County EIR includes comprehensive greenhouse gas calculations.

3 **CUMULATIVE IMPACTS MUST BE ASSESSED**

4 98. Environmental review must be based on cumulative impacts, taking into account
5 adopted and pending plastic bag bans in other cities and counties. The Supreme Court
6 confirmed in *Manhattan Beach* that “cumulative impacts should not be allowed to escape
7 review when they arise from a series of small-scale projects.” (*Manhattan Beach, supra*, 52
8 Cal.4th at 174, n.10.) The City and the Planning Department violated CEQA by refusing and
9 failing to make a cumulative impact assessment.

10 **THE CITY AND ITS CITIZENS NEED AN EIR**

11 99. As stated in CEQA Guidelines § 15002, the purposes of CEQA are to:

- 12 • Inform governmental decision makers and the public about the potential,
13 significant environmental effects of proposed activities.
- 14 • Identify the ways that environmental damage can be avoided or significantly
15 reduced.
- 16 • Prevent significant, avoidable damage to the environment by requiring changes
17 in projects through the use of alternatives or mitigation measures when the
18 governmental agency finds the changes to be feasible.
- 19 • Disclose to the public the reasons why a governmental agency approved the
20 project in the manner the agency chose if significant environmental effects are
21 involved.

22 100. Such alternatives would include (without limitation) (i) more effective litter
23 cleanup; and (ii) requiring more stores to install plastic bag recycling bins, greatly improving
24 signage, and educating consumers to use them.

25 101. As stated in CEQA Guidelines § 15003(e), an EIR “will enable the public to
26 determine the environmental and economic values of their elected and appointed officials thus
27 allowing for appropriate action come election day should a majority of the voters disagree.”
28

102. The City and the Planning Department simply brushed aside the legitimate environmental concerns raised by Petitioner, without even responding.

103. The City and the citizens are entitled to an informative environmental review, in accordance with CEQA.

104. Alameda County, Los Angeles County, the City of Santa Monica, and the City of San Jose prepared and certified EIRs before banning plastic bags. Petitioner has not legally challenged any certified EIR. There is no justification whatsoever for San Francisco to exempt itself from preparing its own EIR.

105. Even Heal the Bay, which is a major proponent of banning plastic bags, criticized San Francisco for not preparing an EIR when it adopted a more limited ban of plastic bags at large stores in 2007. Heal the Bay said that San Francisco's failure to prepare an EIR prior to the 2007 ban was a "huge mistake."

**HEALTH AND SAFETY CONCERNS REGARDING
BANNING PLASTIC BAGS AT RESTAURANTS**

106. Effective July 1, 2013, the Ordinance bans plastic bags at restaurants and other food establishments.

107. All other jurisdictions, except one, that have banned plastic bags have exempted restaurants, including Alameda County, Los Angeles County, Marin County, Santa Clara County, Santa Cruz County, the City of Long Beach, the City of San Jose, and the City of Santa Monica.

108. The City of Santa Monica explained its restaurant exemption as follows:

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

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

109. The City of San Jose explained its restaurant exemption in its plastic bag ban as follows:

1 Restaurants and food establishments would not be subject to the ban for
2 public health reasons. Reusable bags are considered impractical for these
3 purposes.

4 (City of San Jose Bag Ordinance Development, February 2010.)

5 110. Santa Cruz County did initially ban plastic bags at restaurants, but it has repealed
6 that ban.

7 111. The City of Manhattan Beach is the only other place that has banned plastic bags
8 at restaurants. Petitioner plans to sue that city to invalidate that restaurant bag ban.

9 112. Restaurants prepare and sell freshly cooked foods that may contain extremely
10 hot liquid, grease, oil, sauce, or soup. Oil is heated in fryers to 375 degrees or more. Hot soup
11 and other foods may be served at 180 degrees or more.

12 113. Plastic is obviously safer than paper for transporting such foods.

13 114. Plastic bags are waterproof and greaseproof. Paper bags are not.

14 115. When liquids spill inside a paper bag, the bag can break. That does not happen to
15 a plastic bag.

16 116. The Ordinance allows free plastic bags to “contain unwrapped prepared foods or
17 bakery goods.” However, prepared food is rarely placed “unwrapped” into a plastic bag. Food is
18 initially “wrapped” as follows:

- 19 • In a box (especially Chinese food including steamed or fried rice and noodles,
20 Thai food, and Indian food)
- 21 • In an aluminum container with a cardboard lid (all kinds of hot prepared food)
- 22 • In a paper holster (French fries, onion rings)
- 23 • In wrapping paper (sandwiches, hamburgers, hot dogs, tacos, burritos,
24 enchiladas),
- 25 • In a cup (hot and cold beverages, soups, sauces)

26 117. The “wrapped” food is placed in a plastic carryout bag to prevent the escape of
27 spillages from those “wrapped” items. As the City of Santa Monica stated: “This exemption is
28 included as a public health safeguard based on input from restaurant owners who expressed
concern that some hot and liquid foods could leak from take-out containers and potentially

1 cause paper bags to weaken and fail.”

2 118. For example, dim sum is usually placed in cardboard or other containers that do
3 not fully protect against spillages. The containers are placed in plastic carryout bags that are
4 often tied at the top to prevent hot soups and juices from spilling and causing burns. A paper
5 bag cannot be tied at the top and may break if liquids spill inside the bag. When President
6 Obama visited San Francisco in February 2012, he purchased dim sum from the Great Eastern
7 Chinese Restaurant. The dim sum was provided to him in cardboard or other containers. The
8 containers were placed inside plastic bags, which he carried into a waiting limousine.

9 119. In addition, the word “unwrapped” in the Ordinance is vague and ambiguous as
10 there may be differences of opinion as to whether a particular item is “wrapped.” For example,
11 some items may be partially wrapped. The use of the vague term “unwrapped” may have a
12 chilling effect in that it could cause restaurants and other food establishments to reject plastic
13 bags to avoid disputes with the City and the costly imposition of fines.

14 120. Carryout bags from food establishments are often transported or opened in
15 moving vehicles, so safe and secure packaging is essential. The impact on a young child of hot
16 liquid or hot oil seeping or spilling from a paper bag onto his or her lap or legs could be
17 disastrous.

18 121. Under the Ordinance, restaurants are permitted to use compostable bags.
19 However, compostable bags are not suitable for hot liquids. BioBag is a major supplier of such
20 bags in San Francisco. It advises consumers: “DON'T put hot liquids inside bag.”
21 (<http://www.biobagusa.com/biodegradable-bags.html>.)

22 122. Compostable bags break very easily with light loads. They feel like plastic bags,
23 which could cause people to believe that they are in fact plastic bags with similar properties,
24 especially people from out-of-town who have never seen and used a compostable bag.

25 123. The Burn Center at the University of Florida states:

26 Examples of hot liquids which can cause burns include hot water, coffee,
27 grease and hot soup.
28

1 124. The Burn Center at Saint Francis Memorial Hospital in San Francisco states as
2 follows on its website:

3 Hot liquids can cause life threatening burn injuries and are the leading
4 cause of burn injuries in children under the age of 4 years. The experts in
5 burn treatment at Saint Francis Memorial Hospital's Both Burn Center
6 want you to know:

7 Coffee, tea, soup and hot tap water can be hot enough to cause serious
8 burn injury....

9 60-70% of all pediatric patients seen in the Bothin Burn Center have a
10 scald injury.

11 125. The lady who sued in the McDonald's hot coffee case was burned so severely
12 that her doctors thought that she would die. The movie about the hot coffee case shows horrific
13 photographs of her injuries. (<http://hotcoffeethemovie.com/>.) The photographs are part of
14 Exhibit C attached hereto. Her cotton sweatpants absorbed the coffee and held it against her
15 skin, burning her thighs, buttocks, and groin. She suffered third-degree burns on 6% of her skin
16 and lesser burns over 16%. She remained in the hospital for eight days while she underwent
17 skin grafting. During this period, she lost 20 pounds (nearly 20% of her body weight), reducing
18 her down to 83 pounds. Two years of medical treatment followed.

19 126. From 1982 to 1992, McDonald's received more than 700 reports of people
20 burned by its coffee.

21 127. Another incident is related in the following news story:

22 A Miami-Dade woman says that the soup she bought from Subway
23 scalded her thigh, hip, and buttocks so extensively that she had to rush to
24 the hospital -- and undergo emergency treatment for second-degree
25 burns, according to a recently filed lawsuit.

26 On July 30, Claudia Vargas purchased soup and a sub from the
27 Hollywood sandwich store, located at 6582 Taft St.

28 *When she returned to her car, she tried to take the soup out of the bag.
But the container was too full and the lid was not attached correctly, so
the soup spilled on her lap, Vargas says.*

1 Because the soup was extremely hot, 23-year old Vargas says that she
2 suffered from second-degree burns that will leave her with permanent
3 scarring.

4 Richard Lydecker, the lawyer representing Subway, says that his client
5 did nothing wrong.

6 “The investigation is still ongoing, but this soup was not any hotter than
7 soup served normally,” Lydecker tells the Pulp. “There was nothing
8 special about this soup.”

9 Lydecker insists that the soup was cooked and served at a reasonable
10 temperature.

11 “I mean, soup is hot. And people want their soup hot. You’re not
12 supposed to spill it on yourself. My client just wanted to serve a good
13 tasting, hot soup. He looks forward to exonerating himself in court.”

14 Still, Vargas stands by her claim, and insists that Subway was negligent
15 in how it prepped, marketed, and served her the soup.

16 Medical records furnished to the Pulp by Vargas’ representative confirm
17 that Vargas had to go to the emergency room after the accident, where
18 she was given antibiotics, a tetanus shot, and topical ointment for the
19 wounds.

20 Vargas thinks that this could have been avoided if Subway hadn’t served
21 overly hot soup -- or if she’d had some kind of warning that the soup
22 would be scalding and hazardous.

23 Vargas is suing Subway, in hopes of getting money for her medical bills.

24 A plastic surgeon who examined Vargas shortly after the accident has
25 said that chances for full recovery are grim: The burns will take at least 6
26 months to heal. And, “despite laser intervention, the patient will always
27 have some residual scarring,” medical documents note.

28 The news article relating the story about Claudia Vargas, including a photograph of her
extensive burn injury, is attached hereto as Exhibit F.

128. A restaurant owner has the legal right and duty and the moral responsibility to
take all reasonable steps to prevent such injuries. It is for the restaurant owner, not a
government entity, to decide whether a plastic or paper bag is the safest for its food. Denying
restaurant owners what they believe to be the safest option for transporting a particular type of

1 food could have disastrous consequences.

2 129. It is not just the banning of plastic bags that creates a danger. Requiring
3 restaurants and other food establishments to charge 10 cents for a paper or compostable
4 carryout bag is an incentive for customers to either:

- 5 • choose to take no bag at all, thereby substantially increasing the likelihood of
- 6 injuries from spillages of hot liquids or oils; or
- 7 • use a reusable bag.

8 130. The Ordinance states that the purpose of the fee, including at restaurants and
9 other food establishments, is to “increase customers’ use of reusable bags.” (Ordinance § 2,
10 Finding 8.) This is a major health risk as the bag may have been used to carry dirty items that
11 could contaminate food and cause severe illness. Many reusable bags contain dangerous
12 bacteria.

13 131. The California Restaurant Association has expressed serious concerns and has
14 objected to the banning of plastic bags and the use of reusable bags at restaurants and other food
15 establishments, including in San Francisco. It has stated as follows regarding the Ordinance:

16 Charging a fee is designed to steer customers to use reusable bags.
17 Encouraging customers to bring dirty reusable bags in restaurants for use
18 places public health and safety at risk. Let the supervisors know this is a
19 risk restaurants shouldn’t have to take. Other jurisdictions have
20 recognized that reusable bags pose a food safety risk in a prepared food
environment and have exempted restaurants from their respective
ordinances.

21 (<http://tinyurl.com/6n4nvqb>)

22 **FIRST CAUSE OF ACTION**
23 **AGAINST ALL RESPONDENTS**
24 **(CEQA – FAILURE TO PREPARE AND CERTIFY AN EIR)**

25 132. Petitioner realleges and incorporates herein every allegation made above.

26 133. The refusal and failure to prepare and certify an EIR prior to adopting the
27 Ordinance was a prejudicial abuse of discretion in that the City, the Planning Department, and
the Board of Supervisors did not proceed in the manner required by CEQA.

28 134. The Ordinance is void and invalid as a result of the violation of CEQA.

1 135. This action is timely filed within 35 days of the filing of any Notice of
2 Exemption or within 180 days of the final adoption of the Ordinance. (Pub. Res. Code §
3 21167(d).)

4 136. The environment will suffer irreparable harm if enforcement of the Ordinance is
5 not enjoined by a preliminary injunction during the pendency of this action.

6 **SECOND CAUSE OF ACTION**
7 (INVALIDATION OF ORDINANCE BASED ON
8 STATE RETAIL FOOD CODE PREEMPTION)

9 137. Petitioner realleges and incorporates herein every allegation made above.

10 138. The State of California regulates food packaging in the California Retail Food
11 Code, which is part of the California Health and Safety Code. (California Health and Safety
12 Code Div. 104, Part 7.)

13 139. Health and Safety Code § 113705 states as follows:

14 **Legislative Intent To Preempt Local Standards**

15 The Legislature finds and declares that the public health interest requires
16 that there be uniform statewide health and sanitation standards for retail
17 food facilities to assure the people of this state that the food will be pure,
18 safe, and unadulterated. Except as provided in Section 113709, it is the
19 intent of the Legislature to occupy the whole field of health and
20 sanitation standards for retail food facilities, and the standards set forth
21 in this part and regulations adopted pursuant to this part shall be
22 exclusive of all local health and sanitation standards relating to retail
23 food facilities.

24 140. Health and Safety Code § 113709 states as follows:

25 **Authority To Establish Local Requirements**

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

1 141. California Health and Safety Code § 113789 defines “food facility” as follows:

2 (a) “Food facility” means an operation that stores, prepares, packages,
3 serves, vends, or otherwise provides food for human consumption at the
4 retail level, including, but not limited to, the following:

5 (1) An operation where food is consumed on or off the premises,
6 regardless of whether there is a charge for the food.

7 (2) Any place used in conjunction with the operations described in this
8 subdivision, including, but not limited to, storage facilities for food-
9 related utensils, equipment, and materials.

10 (b) “Food facility” includes permanent and nonpermanent food facilities,
11 including, but not limited to, the following:

12 (1) Public and private school cafeterias.

13 (2) Restricted food service facilities.

14 (3) Licensed health care facilities.

15 (4) Commissaries.

16 (5) Mobile food facilities.

17 (6) Mobile support units.

18 (7) Temporary food facilities.

19 (8) Vending machines.

20 (9) Certified farmers’ markets, for purposes of permitting and
21 enforcement pursuant to Section 114370.

22 (10) Farm stands, for purposes of permitting and enforcement pursuant
23 to Section 114375.

[§ 113789(c) contains exclusions from the above definition.]

24 142. Health and Safety Code § 113914 defines “single-use” articles as including
25 single-use “carry-out utensils” and “bags” and “wrappers.” The words “carry-out” and “bags”
26 leave no room for doubt that local bans and fees on carryout bags are preempted.

27 143. “Carryout-out utensils” (the term used in § 113914) includes any “container”
28 used in the storage, preparation, transportation, dispensing, sale, or service of food.” (Health
and Safety Code § 113934.)

1 144. Health and Safety Code § 114081 states: “Single-use articles [including carryout
2 bags] shall not be reused.” This bans the use of reusable bags at restaurants.

3 145. Health and Safety Code § 114130.2 states: “Materials that are used to make
4 single-use articles [including bags] shall not allow the migration of deleterious substances or
5 impart colors, odors, or tastes to food, and shall be safe and clean.”

6 146. Based on the foregoing, the Retail Food Code regulates the “material” from
7 which carryout bags are made (plastic or paper) and bans reusable bags.

8 147. The California Supreme Court has confirmed that “food transportation, storage,
9 and preparation” and “food display and service” are among the subject matters and fields
10 preempted by the California Retail Food Code. (*California Grocers Assn. v. City of Los Angeles*
11 (2011) 52 Cal.4th 177, 189.)

12 148. The fact that the Ordinance has an environmental purpose is irrelevant. The only
13 relevant consideration is “whether the *effect* of the local ordinance is in fact to regulate in the
14 very field the state has reserved to itself.” (*California Grocers, supra*, 52 Cal.4th at 190, italics
15 added.)

16 149. Based on the foregoing, the Ordinance is invalid as it bans plastic bags at “food
17 facilities” (as defined by § 113789), requires such food facilities to charge a fee for paper and
18 compostable bags, and incentivizes the use of reusable bags at food facilities. The Ordinance
19 intrudes into an area that the State of California has reserved to itself.

20 150. Consumers could suffer severe physical injuries, including burns, and property
21 damage if enforcement of the Ordinance is not enjoined by a preliminary injunction during the
22 pendency of this action.

23 151. Petitioner’s members that manufacture or supply plastic bags for restaurants and
24 food establishments in San Francisco, including but not limited to Command Packaging, will
25 suffer irreparable damage if their products are banned. They have no adequate remedy at law to
26 obtain compensation for such losses as the City is immune from liability for compensatory
27 damages for adopting an invalid ordinance.
28

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Petitioner prays for all of the following:

- 3 A. A judgment declaring that the Ordinance is invalid as no EIR was prepared and
4 certified.
- 5 B. A peremptory writ of mandate directing the City to repeal the Ordinance for failure
6 to comply with CEQA, in accordance with Pub. Res. Code § 21168.9.
- 7 C. A judgment declaring that the Ordinance is invalid as it is preempted and prohibited
8 by the California Retail Food Code.
- 9 D. An order directing the City to repeal the Ordinance as it is preempted and prohibited
10 by the California Retail Food Code.
- 11 E. A preliminary injunction suspending the Ordinance and prohibiting all Respondents
12 from implementing and enforcing the Ordinance in any manner during the pendency
13 of this action and any appeal or any potential or actual Supreme Court review.
14 Petitioner will file a motion requesting a preliminary injunction.
- 15 F. Costs of this action.
- 16 G. Such other or further relief as the Court may deem just and proper.
- 17

18 DATED: February 28, 2012 **STEPHEN L. JOSEPH**

19
20
21 

22
23 _____
24 Attorney for Petitioner
25 SAVE THE PLASTIC BAG COALITION
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VERIFICATION

I, Stephen L. Joseph, declare:

1. I am an attorney at law, duly admitted and licensed to practice in the State of California.
2. I am the attorney of record for Petitioner, SAVE THE PLASTIC BAG COALITION, in the above-entitled matter.
3. Petitioner was formed on June 3, 2008.
4. At all times since June 3, 2008, I have been sole counsel and manager of Petitioner. In those capacities, I have been involved in and have been aware of all actions taken by Petitioner since that time.
5. I am authorized by Petitioner to make this verification for and on its behalf.
6. I have read the VERIFIED PETITION FOR WRIT OF MANDATE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT; COMPLAINT FOR INVALIDATION OF ORDINANCE BASED ON STATE RETAIL FOOD CODE PREEMPTION; REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF and know its contents.
7. The matters stated therein are true of my own knowledge, except as to those matters that are stated on information and belief, and as to those matters I believe them to be true.
8. If called upon as a witness to this proceeding, I would and could competently testify thereto under oath.

I declare under penalty of perjury under the laws of the State of California that I have read the forgoing, that the foregoing is true and correct, and that I would be competent to so testify.

Executed on February 28, 2012 at San Francisco, California.



STEPHEN L. JOSEPH



**CLAUDIA VARGAS'S BURNS CAUSED
WHEN TAKING HOT SOUP OUT OF A CARRYOUT BAG**