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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA HOTEL & LODGING ASSOCIATION, Plaintiff, v. CITY OF OAKLAND, Defendant.	Case No: **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** Complaint Filed: March 7, 2019 Trial Date: None Set

INTRODUCTION

1. In November 2018, voters passed City of Oakland Measure Z ("Measure Z") which imposes numerous new requirements on operators of hotels in the City of Oakland. Measure Z added to the Oakland Municipal Code Chapter 5.93. Plaintiff seeks an injunction halting enforcement of Oakland Municipal Code sections 5.93.030(B) on the grounds that it is duplicative of or in conflict with state law regulating occupational safety and health standards and is therefore preempted.

Plaintiff further seeks an injunction halting enforcement of Section 5.93.040 of the City of Oakland Municipal Code on the grounds that the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1001 et seq., preempts Section 5.93.040. Plaintiff also seeks a declaration that ERISA preempts Section 5.93.040, as well as all other relief available under federal law.

JURISDICTION

2. The case arises out of 42 U.S.C. § 1983, as Plaintiff's claims are based on a number of federal laws, including Articles VI and XIV of the United States Constitution and 29 U.S.C. § 1001 *et seq.* *See also Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983). Accordingly, subject matter jurisdiction lies in the Court under 28 U.S.C. § 1331 (federal question jurisdiction).

3. Furthermore, this Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a) as Plaintiff's claims arising under Article I, section 1 of the California Constitution and the California Occupational Safety and Health Act of 1973 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.

4. Plaintiff has standing to pursue this action on behalf of its members who are all hotel employers because: the employers who are its members operate hotels in Oakland suffer a direct and adverse impact from the application of Oakland Municipal Code sections 5.93.030(B) and 5.93.040 and thus would have standing in their own right; the preemption interest Plaintiff seeks to protect is at the core of Plaintiff's mission; and the relief sought — which is injunctive and declaratory — does not require the participation of individual members. *See Hunt v. Wash. St. Advertising Comm'n* (1977) 432 U.S. 333, 343.

5. This Court is authorized to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

VENUE

6. Venue for this Complaint is proper in the Northern District of California pursuant to 28 U.S.C. § 1391 because the events giving rise to the suit occurred in this District, the City resides in this District and it adopted Oakland Municipal Code sections 5.93.030(B) and 5.93.040 in this District, and Sections 5.93.030(B) and 5.93.040 may be enforced against hotel employers in this District.

INTRADISTRICT ASSIGNMENT

7. Pursuant to Local Rule 3-2(c) and (d), a substantial part of the events or omissions which give rise to the claims in this Complaint occurred in the County of Alameda, and therefore this action may properly be assigned to the San Francisco or Oakland divisions of this Court.

THE PARTIES

8. The California Hotel & Lodging Association ("CHLA" or Plaintiff") is a trade association with over 1,900 members representing the lodging industry in California. CHLA has members located in the City of Oakland that are subject to the municipal code recently enacted by Measure Z.

9. Defendant City of Oakland is and at all relevant times has been a public entity duly organized and existing under and by virtue of the State of California as a charter municipality.

BACKGROUND REGARDING MEASURE Z

10. In November of 2018, City of Oakland voters passed Measure Z. The initiative results were certified on December 11, 2018. Any provisions within Measure Z which did not have a specific later effective date went into effect on December 21, 2018.

11. The ballot question proposed to voters was: "Shall the measure amending Oakland's Municipal Code to: (1) establish workplace protections and minimum hourly wage of $15 with benefits or $20 without benefits, increasing annually with inflation, for employees of Oakland hotels with 50 or more guest

rooms; (2) authorize administrative enforcement standards for hotel and non-hotel workers; and (3) create City department to administratively enforce Oakland's employment standards for hotel and non-hotel workers, be adopted?"

12. Measure Z codified Chapter 5.93 in the Oakland Municipal Code. Chapter 5.93 applies to "Hotel Employers" which is defined as "a person who owns, controls, and/or operates a hotel in the City of Oakland." Section 5.93.010. The rules regarding restrictions on the square footage room cleaners may clean went into effect on December 21, 2018. The rules regarding the minimum wage are effective July 1, 2019. Certain provisions of Measure Z apply to Hotel Employees, which is defined as including "any individual (1) who is employed directly by the hotel employer or by a person who has contracted with the hotel employer to provide services at a hotel in the City of Oakland; and (2) who was hired to or did work an average 5 hours/week for 4 weeks at one or more hotels." *Id*. The rules regarding restrictions on the square footage apply to "room cleaners." A "room cleaner" is defined as a hotel employee whose principal duties are to clean and put in order residential guest rooms in a hotel, regardless of who employs the person. *Id.*

Section 5.93.030(B)

13. Section 5.93.030(B) reads in its entirety as follows:

> B. A hotel employer shall not require a room cleaner to clean rooms amounting to more than 4,000 square feet of floorspace, or more than the maximum floor space otherwise specified in his Section, in any one, eight-hour workday unless the hotel employer pays the room cleaner twice his or her regular rate of pay for all hours worked by the room cleaner during the workday. If a room cleaner works fewer than eight hours in a workday, the maximum floor space shall be reduced on a prorated basis. When a room cleaner during a workday is assigned to clean any combination of seven or more checkout rooms or additional-bed rooms, the maximum floorspace to be cleaned shall be reduced by 500 square feet for each such checkout or additional-bed room over six. The limitations contained herein apply to any combination of spaces, including guest rooms and suites, meeting rooms or hospitality rooms, and apply regardless of the furniture, equipment or amenities in any room.

14. Further, Measure Z, specifically Municipal Code section 5.93.080,

applies an enforcement mechanisms which was previously enacted and codified in Oakland Municipal Code section 5.92.050. However, Measure Z amends and intensifies the enforcement mechanisms. These enforcement mechanisms include a $50 penalty per employee, per day, for violations of Oakland Municipal Code section 5.93.030, with the penalty amount to be updated annually for inflation. Oakland Municipal Code section 5.92.050(G)(2). It also creates a private right of action for hotel employees to seek damages and penalties for alleged violations, and recovery of attorneys' fees and costs if a hotel employee is the prevailing party in a civil action. *Id.* Section 592.050(G)(3).

Section 5.93.040

15. Section 5.93.040 states in its entirety:

> A. Effective July 1, 2019, hotel employers shall pay hotel employees a wage of no less than $15.00 per hour with health benefits, not including gratuities, service charge distributions, or bonuses, or $20.00 per hour without health benefits, not including gratuities, service charge distributions, or bonuses.
>
> B. Health benefits under this Section shall consist of the payment of the difference between the higher wage and lower wage under Section 5.93.040(A) towards the provision of hear care benefits for hotel employees and their dependents. Proof of the provision of these benefits must be kept on file by the hotel employer, if applicable.
>
> C. The wage rates set forth in this Section shall be adjusted for inflation annually in the manner set forth in Section 5.92.020(B).

16. Despite the intent to provide additional compensation to hotel employees for access to medical care, Chapter 5.93 contains no requirement or limitation that employees who receive the additional compensation must expend it only to obtain medical care. Payment of the additional compensation, which is made directly to the employee, could well result in the employee using the money for purposes other than to obtain medical care or coverage without accountability or recourse by the hotel employer or the City of Oakland.

17. The only way for hotel employers to comply with Section 5.93.040 is to provide hotel employees who work on average 5 hours a week for 4 weeks health benefits or to make payments to employees without any guidance as to the nature or timing of the payments.

18. Additionally, compliance with Chapter 5.93 requires hotel employers to maintain detailed records and "proof of health benefits" for three years and it goes on state that if the hotel employer does not provide access to these records "it shall be presumed . . . [that] the hotel employer paid the hotel employee no more than the applicable federal or minimum wage." *See* Section 5.93.050(D)(3).

ERISA PREEMPTION

19. ERISA's coverage extends to any employee benefit plan established or maintained by an employer. 29 U.S.C. § 1003(a), (b). "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink* (1996) 517 U.S. 882, 887; *see also Conkright v. Frommert* (2010) 559 U.S. 506, 516 ("Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place."). Rather, ERISA leaves employers free "for any reason at any time, to adopt, modify, or terminate [benefit] plans." *Curtiss-Wright Corp. v. Schoonejongen* (1995) 514 U.S. 73, 78.

20. In enacting ERISA, Congress undertook "a careful balancing" to encourage the creation of employee benefit plans and "'to create a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'"*Conkright*, 559 U.S. at 517 (quoting *Parity Corp. v. Howe* (1996) 516 U.S. 489, 497). Thus, "ERISA 'induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.'" *Id*. (quoting

Rush Prudential HMO, Inc. v. Moran (2002) 536 U.S. 355, 379).

21. Uniformity and affordability in the regulation and administration of ERISA plans was paramount to Congress: "Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators — burdens ultimately borne by the beneficiaries." *Gobeille*, 136 S.Ct. at 944 (quoting *Egelhoff v. Egelhoff* (2001) 532 U.S. 141, 149-50, and citing *Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 142, and *Fort Halifax Packing Co. v. Coyne* (1987) 482 U.S. 1, 9).

22. Congress therefore adopted ERISA's preemption section, which states the broad preemptive effect of the statute, providing that "the provisions of [ERISA] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) and not exempt under section 1003(b)." 29 U.S.C. § 1144(a). "State law[s]" are defined to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State," with "State," in turn, including "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate directly or indirectly, the terms and conditions of employee benefit plans covered by [ERISA] ." *Id*. § 1144(c)(1)-(2).

23. The ERISA preemption section has a "broad scope" (*Gobeille v. Liberty Mut. Ins. Co.* (2016) 136 S.Ct. 936, 943), with the U.S. Supreme Court repeatedly emphasizing that the provision's text is "clearly expansive," has "an expansive sweep," is "conspicuous for its breadth," is "deliberately expansive," and is "broadly worded." *Cal. Div. of Labor Standards Enf't Dillingham Constr., NA.* (1997) 519 U.S. 316, 324 ("*Dillingham*") (internal quotation marks and citations omitted) (cataloging statements in prior precedents). ERISA's preemption provision is intended to make the regulation of employee benefit plans an "exclusively federal concern," so as to foster such plans' creation and growth.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). It applies to the laws of a state or any of its subdivisions, including municipalities. *See* 29 U.S.C. § 1144(c)(2).

24. ERISA's preemption section "indicates Congress's intent to establish the regulation of employee welfare benefit plans as exclusively a federal concern." *Gobeille*, 136 S.Ct. at 944 (internal quotation marks and citation omitted).

25. Under ERISA's preemption provision, a state law "relate[s] to" an employee benefit plan if it has a "reference to" ERISA plans or has a "connection with" ERISA plans, with either resulting in preemption. *Gobeille*, 136 S.Ct. at 943.

26. "To be more precise, '[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation . . ., that 'reference' will result in pre-emption.'" *Gobeille*, 136 S.Ct. at 943 (quoting Dillingham, 519 U.S. at 325).

27. In addition, a state law will have an impermissible "connection with" an ERISA plan if "'acute, albeit indirect, economic effects' of the state law' force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *Gobeille*, 136 S.Ct. at 943 (quoting *Travelers*, 514 U.S. at 668).

28. The health benefit plans contemplated under Section 5.93.040 are regulated by ERISA. As relevant, Oakland Municipal Code section 5.93.040.A. requires "hotel employers" to "pay hotel employees a wage of no less than $15.00 per hour with health benefits, not including gratuities, service charge distributions, or bonuses, or $20.00 per hour without health benefits, not including gratuities, service charge distributions, or bonuses."

29. Section 5.93.040.B. goes on to state that "Health benefits under this Section shall consist of the payment of the difference between the higher wage and lower wage under Section 5.93.040(A) towards the provision of health care benefits for hotel employees and their dependents." As such, if a hotel employer does not

offer "health benefits" it is required to make additional payments to employees. Under Measure Z, a hotel employer who does not provide benefits to employees effective July 1, 2019 will have to make additional payments to employees. The statute does not indicate how frequently these payments must be made.

30. Section 5.93.040 "relate[s] to" and makes "reference to" ERISA plans, and is therefore preempted because the employee's wages are dependent on whether they have been offered health benefits by their employer. By definition under ERISA an "employee welfare benefit plan" is a "plan, fund or program . . . established or maintained by an employer" to provide medical benefits. This is exactly the type of "health benefits" Measure Z is describing.

31. Section 5.93.040 also is preempted under the "connection with" prong of ERISA preemption — i.e., a state law "relate[s] to" an ERISA plan if it has an impermissible "connection with" an ERISA plan. *Gobeille*, 136 S.Ct. at 943. State laws have an impermissible connection with ERISA plans where they "force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers." *Id*. (quoting *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*. (1995) 514 U.S. 645, 656 ("*Travelers*")).

32. Section 5.93.040 does not provide guidance regarding how this additional compensation should be paid or what qualifies as "health benefits." It does not state how often these additional payments should be made. In the absence of such guidance, it forces employers to offer health benefits in order to avoid the ambiguous and vague direct payment requirement of Measure Z.

33. On these and other bases, ERISA squarely and straightforwardly preempts Section 5.93.040, and the Court should enjoin the enforcement of Section 5.93.040 and declare Section 5.93.040 null and void. Hotel employers in the City, like all private employers in Oakland and everywhere else in the Nation, are subject to exclusively federal rules in the provision of health benefits for their employees.

/ / /

FIRST CAUSE OF ACTION

(For Declaratory Relief and Injunction Based on Preemption by State Law)

34. Plaintiff incorporates herein by this reference the allegations contained in Paragraphs 1 through 33, inclusive.

35. California employers, including those in the City of Oakland, are subject to the California Occupational Safety and Health Act of 1973 ("the Act") (California *Labor Code* § 6300, *et. seq*.).

36. The Act is enforced by the California Division of Occupational Safety and Health, also referred to as "Cal/OSHA."

37. Occupational safety and health standards are established by the California Occupational Safety and Health Standards Board (the "Standards Board").

38. California *Labor Code* section 142.3 provides that the Standards Board "shall be the only agency in the state authorized to adopt occupational safety and health standards." This language evidences the legislature's intent to expressly occupy the field of occupational safety and health.

39. Oakland Municipal Code section 5.93.030(B) establishes occupational safety and health standards required to be followed by hotel employers in the City of Oakland that differ from those found in the Act or established by the Standards Board.

40. The Act and *Labor Code* section 142.3 expressly preempts regulation by Defendant City of Oakland, and thus Oakland Municipal Code section 5.93.030(B) is void.

41. In addition, a very recent pattern of Standards Board regulation evidences an intent to occupy the field of occupational safety and health, particularly with respect to hotel housekeepers and issues addressed by Oakland Municipal Code section 5.93.030(B).

/ / /

42. On January 23, 2012, the labor union UNITE HERE filed a petition with the Standards Board entitled, "Petition for the Promulgation of a Safety and Health Standard For the Protection of Hotel Housekeepers." In a cover letter accompanying the petition, UNITE HERE described itself as "a labor organization that represents thousands of California workers who are employed in the hotel and hospitality industry through its affiliated local unions."

43. The petition filed by UNITE HERE stated that a "comprehensive standard" was needed to mitigate a number of specific hazards that housekeepers confront, including "workload and work pacing."

44. The petition filed by UNITE HERE contained a specific section entitled, "Safe workload and work pacing." Among other things, this section of the petition by UNITE HERE stated, "Work pacing is a significant factor in the hazards of housekeeping. Tasks that may be less hazardous when performed at a moderate pace become more hazardous when performed under intense time pressure." (p. 14).

45. The petition filed by UNITE HERE included proposed occupational safety and health standard language. In the petition, UNITE HERE described the proposed standard language as follows:

> "The proposed standard addresses the need for safe work pacing in two ways. First, it requires employees [sic] to perform a written evaluation with the opportunity for employee input to determine what the appropriate expectation should be for room credits considering an array of factors, including the number of check out versus stay over rooms, the number of rooms requiring additional work, and other factors that contribute to work load variation…
>
> …Second, the proposed standard also places a ceiling of 5,000 square footage of total room space that an employer may regularly assign housekeepers to clean during an 8-hour shift. This requirement is prorated for housekeepers who work shifts of less than 8 hours, and is reduced when the housekeeper has additional factors such as a high number of checkout rooms or rooms with cots and rollaway beds to

> clean…This will allow housekeepers exposed to these conditions greater time to clean rooms safely while limiting their exposure to hazards." (p.15).

46. On June 21, 2012, the Standards Board granted the petition to the extent that Cal/OSHA was "requested to convene an advisory committee to determine whether a rulemaking action should be initiated and what control measures may be necessary to address musculoskeletal injury hazards to hotel housekeeping employees."

47. Beginning in October 2012, Cal/OSHA convened the first of five separate advisory committee meetings with stakeholders to discuss promulgation of rulemaking related to hotel housekeeping employees. These advisory committee meetings took place over the course of several years.

48. During this advisory committee process, Cal/OSHA prepared a number of "discussion drafts" of potential occupational safety and health standard language to address this issue. One such "discussion draft" (dated August 8, 2015) proposed to require hotel employers to conduct a job hazard analysis that addressed potential injury risks to hotel housekeepers, including "excessive work-rate." This discussion draft also required the job hazard analysis to include a "safe work-rate for housekeepers expressed in the number of rooms cleaned per shift. The safe work-rate may vary depending on the number of checkout rooms cleaned and other factors." This language was deleted from subsequent versions of the "discussion draft."

49. On May 31, 2016, a final draft proposed standard was presented by Cal/OSHA to the Standards Board, and was heard at a public hearing on May 18, 2017. The notice and informative digest for this public hearing stated:

> "This proposal is part of a system of occupational safety and health regulations. The consistency and compatibility of that system's component regulations is provided by such things as: (1) the

> requirement of the federal government and the Labor Code that state regulations be at least as effective as their federal counterparts, and (2) the requirement that all state occupational safety and health rulemaking be channeled through a single entity (the Standards Board)."

50. The proposed standard that was presented to the Standards Board required hotels and other lodging establishments to establish, implement, and maintain an effective, written, musculoskeletal injury prevention program ("MIPP"). The MIPP was required to include procedures for identifying and evaluating housekeeping hazards through a worksite evaluation. The worksite evaluation was required to identify and address potential risks to housekeepers, including "excessive work-rate."

51. The draft standard presented by Cal/OSHA to the Standards Board did not include a room or square footage ceiling or quota.

52. The proposed state standard was unanimously adopted without changes by the Standards Board on January 18, 2018. The standard was filed with the California Secretary of State on March 9, 2018, and became effective July 1, 2018.

53. Oakland Municipal Code section 5.93.030(B) establishes occupational safety and health standards required to be followed by hotel employers in the City of Oakland that differ from those found in the Act or recently established by the Standards Board. As a result, Oakland Municipal Code section 5.93.030(B) duplicates and/or contradicts general law, and is void.

54. This pattern of Cal/OSHA and Standards Board regulation is so pervasive as to indicate that the provisions of Oakland Municipal Code section 5.93.030(B) related to work rate requirement are completely covered by the regulations the Standards Board is authorized by general law to issue.

55. This pattern of regulation impliedly preempts regulation by the City of Oakland and thus Oakland Municipal Code section 5.93.030(B) is void.

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SECOND CAUSE OF ACTION

(For Declaratory Relief and Injunction Based on the Due Process Clause of the United States Constitution)

56. Plaintiff incorporates herein by this reference the allegations contained in Paragraphs 1 through 55, inclusive.

57. Plaintiff hereby seeks declaratory and injunctive relief to prevent Defendant City of Oakland from depriving Plaintiff's members of protections afforded to them under the Due Process Clause of the United States Constitution, which provides that no state or local government shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1. This claim is also brought pursuant to 42 U.S.C. sections 1983 and 1988(b).

58. Defendant City of Oakland's application and enforcement of Oakland Municipal Code sections 5.93.030(B) and 5.93.040 unconstitutionally deprive Plaintiff's members of their property and contractual rights without due process of the law because it is unconstitutionally vague. Under this clause, a law is void for vagueness if it: (a) fails to give a person of ordinary intelligence a reasonable opportunity to know what it prohibits, or (b) impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Here, Oakland Municipal Code sections 5.93.030(B) and 5.93.040 cannot pass either test.

59. Oakland Municipal Code section 5.93.030(B) fails to give a person of ordinary intelligence a reasonable opportunity to know what it prohibits because, *inter alia*, it does not reasonably inform as to which employers the Municipal Code applies to, which "room cleaners" are covered by the Municipal Code, the proper method for calculating square feet of floorspace, and what constitutes "checkout rooms" or "additional-bed rooms" which may reduce the square feet floorspace limit of 4,000 square feet. More importantly, the initiative fails to define what constitutes the act of cleaning a room. What if a room cleaner only performs a

single cleaning service or very basic cleaning services—*e.g*. emptying a garbage receptacle, replacing the linen, replacing the toiletries, performing a turndown service, does that constitute cleaning a room subject to the 4,000 square foot floorspace limitation? The initiative also fails to address the square foot floorspace limitation in a common scenario where employees work together cleaning rooms in teams. Oakland Municipal Code section 5.93.030(B) clearly fails the first test for vagueness.

60. Similarly, Oakland Municipal Code section 5.93.040 fails the first test of vagueness because it does not define what qualifies as a "health benefit." Thus, even hotel employers who do offer some sort of health benefit to their employees will be left wondering which wage rate applies. Further, a hotel employer who wishes to avoid paying the higher wage rate shall not be certain whether the health benefits they plan to offer will satisfy Section 5.93.040. Moreover, Municipal Code section 5.93.040 does not provide guidance regarding how this additional compensation should be paid.

61. These vague aspects of Oakland Municipal Code sections 5.93.030(B) and 5.93.040 necessarily leave it to the persons who enforce it, and persons who decide whether it has been violated, to determine the vagaries of Oakland Municipal Code sections 5.93.030(B) and 5.93.040 on an *ad hoc* and subjective basis; as a result, Oakland Municipal Code sections 5.93.030(B) and 5.93.040 fail the second test for vagueness.

62. The above-mentioned vagaries makes compliance very difficult, if not impossible. Employers are left with guessing as to how to comply with Oakland Municipal Code sections 5.93.030(B) and 5.93.040, and if they guess wrong, the potential penalties can be enormous. In fact, the penalty provision of the initiative violates well-settled due process norms. Employees may try to aggregate many individual claims, which will expand the statutory penalties so far beyond any actual damages suffered that the penalties will be punitive in nature, which clearly

violates Plaintiff's member's due process rights.

63. By virtue of the foregoing, the application of Oakland Municipal Code sections 5.93.030(B) and 5.93.040 to Plaintiff's members within the City of Oakland violate the due process guarantees of the United States Constitution. Such application will cause those members to suffer irreparable harm for which they have no adequate remedy at law.

THIRD CAUSE OF ACTION

(For Declaratory Relief and Injunction Based on the Due Process Clause of the California Constitution)

64. Plaintiff incorporates herein by this reference the allegations contained in Paragraphs 1 through 63, inclusive.

65. Plaintiff hereby seeks declaratory and injunctive relief to prevent Defendant City of Oakland from depriving Plaintiff's members of the protections afforded to them under the Due Process Clause of the California Constitution, which guarantees each and all of them the right not to be deprived of their property and contractual rights without due process of the law. Cal. Const., Art. I, § 7 and § 15, cl. 7.

66. Defendant City of Oakland's application and enforcement of Oakland Municipal Code sections 5.93.030(B) and 5.93.040 unconstitutionally deprive Plaintiff's members of their property and contractual rights without due process of the law because it is unconstitutionally vague. Under this clause, a law is void for vagueness if it: (a) fails to give a person of ordinary intelligence a reasonable opportunity to know what it prohibits, or (b) impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Here, Oakland Municipal Code section 5.93.030(B) cannot pass either test.

67. Oakland Municipal Code section 5.93.030(B) fails to give a person of ordinary intelligence a reasonable opportunity to know what it prohibits because,

inter alia, it does not reasonably inform as to which employers the Municipal Code applies to, which "room cleaners" are covered by the Municipal Code, the proper method for calculating square feet of floorspace, and what constitutes "checkout rooms" or "additional-bed rooms" which may reduce the square feet floorspace limit of 4,000 square feet. More importantly, the initiative fails to define what constitutes the act of cleaning a room. What if a room cleaner only performs a single cleaning service or very basic cleaning services—*e.g*. emptying a garbage receptacle, replacing the linen, replacing the toiletries, performing a turndown service, does that constitute cleaning a room subject to the 4,000 square foot floorspace limitation? The initiative also fails to address the square foot floorspace limitation in a common scenario where employees work together cleaning rooms in teams. Oakland Municipal Code section 5.93.030(B) clearly fails the first test for vagueness.

68. Similarly, Oakland Municipal Code section 5.93.040 fails the first test of vagueness because it does not define what qualifies as a "health benefit." Thus, even hotel employers who do offer some sort of health benefit to their employees will be left wondering which wage rate applies. Further, a hotel employer who wishes to avoid paying the higher wage rate shall not be certain whether the health benefits they plan to offer will satisfy section 5.93.040. Moreover, Municipal Code section 5.93.040 does not provide guidance regarding how this additional compensation should be paid.

69. These vague aspects of Oakland Municipal Code sections 5.93.030(B) and 5.93.040 necessarily leave it to the persons who enforce it, and persons who decide whether it has been violated, to determine the vagaries of Oakland Municipal Code sections 5.93.030(B) and 5.93.040on an *ad hoc* and subjective basis; as a result, Oakland Municipal Code sections 5.93.030(B) and 5.93.040 fails the second test for vagueness.

70. The above-mentioned vagaries makes compliance very difficult, if not

impossible. Employers are left with guessing as to how to comply with Oakland Municipal Code sections 5.93.030(B) and 5.93.040, and if they guess wrong, the potential penalties can be enormous. In fact, the penalty provision of the initiative violates well-settled due process norms. Employees may try to aggregate many individual claims, which will expand the statutory penalties so far beyond any actual damages suffered that the penalties will be punitive in nature, which clearly violates Plaintiff's member's due process rights.

71. By virtue of the foregoing, the application of Oakland Municipal Code sections 5.93.030(B) and 5.93.040 to Plaintiff's members within the City of Oakland violate the due process guarantees of the California Constitution. Such application will cause those members to suffer irreparable harm for which they have no adequate remedy at law.

FOURTH CAUSE OF ACTION

(For Declaratory Relief and Injunction Based on Preemption by ERISA)

72. Plaintiff incorporates herein by this reference the allegations contained in Paragraphs 1 through 71, inclusive.

73. ERISA preempts state and local laws that "relate to" ERISA plans. 29 U.S.C. § 1144(a). State and local laws that have a "reference to" or "connection with" ERISA plans "relate to" them and are preempted. *Gobeille*, 136 S.Ct. at 943.

74. Section 59.3.040 requires large hotel employers, to provide "health and benefits" and keep records of them or else it has to pay the equivalent of $5 an hour for every hour that the hotel employee works.

75. Section 59.3.040, in effect, mandates hotel employers to amend existing ERISA employee benefit plans and if they do not currently provide coverage to employees they must establish ERISA employee benefit plans. If hotel employers do not establish ERISA employee benefit plans, the hotel employer must make direct payments to the employee, without any constraint on the employee's use of the money or any guidance on what constitutes "health benefits." In order

to comply with Section 59.3.040, hotel employers will need to — at great expense — offer health benefits. Hotel employers would incur even greater expense in the event they were to make direct payments to the employees in accordance with Section 59.3.040, rather than providing health benefits through an ERISA plan.

76. Section 59.3.040 has a "reference to" ERISA plans, acting immediately and exclusively upon ERISA plans and with the existence of ERISA plans being essential to the law's operation, because Section 59.3.040's operation depends on ERISA coverage or "health benefits." It explicitly mentions ERISA "health benefits" in its terms, and hinges direct payment to the employee on whether health benefits are provided. *District of Columbia v. Greater Washington Bd. of Trade* (1992) 506 U.S. 125, 130 (a state law "specifically refers to welfare benefit plans regulated by ERISA" when the state law's operation "is measured by reference to 'the existing health insurance coverage' provided by the employer") (quoting local law's terms).

77. Section 59.3.040 has an impermissible "connection with" ERISA plans because it forces hotel employers to adopt health benefits and it imposes reporting requirements such as maintaining and making available, upon request, records for every current and former employee, including their regular hourly rate of pay and, for each month of full-time employment, the amount of additional wages or salary paid as additional compensation reflective of the cost of medical coverage, as required by Section 59.3.040. Such a requirement subjects hotel employers to reporting requirements that are unique in this locality for the maintenance of their ERISA-governed plans and interferes with nationally uniform ERISA plan administration. ERISA's preemption provision seeks to protect ERISA plan sponsors from the burdens of complying with a multiplicity of varying state regulatory requirements. *See Gobeille*, 136 S.Ct. at 943-44 (stating that "ERISA does not guarantee substantive benefits," but does "seek[] to make the benefits promised by an employer more secure by mandating certain oversight

systems and other standard procedures . . . . intended to be uniform").

78. Section 59.3.040 is, accordingly, preempted by ERISA insofar as they apply to hotel employers that sponsor ERISA employee benefit plans for employees in the City. Section 59.3.040 undermines the regime of nationally-uniform employee benefit plans envisioned in ERISA and protected by ERISA's preemption provision.

PRAYER FOR RELIEF

Plaintiff requests the following relief:

1. Declaratory judgment that Oakland Municipal Code section 5.93.030(B) is preempted by Cal/OSHA and the Standards Board regulation and is thus void;

2. Declaratory judgment that Oakland Municipal Code section 5.93.030(B) violates the Due Process Clause of the United States Constitution and is thus void;

3. Declaratory judgment that Oakland Municipal Code section 5.93.030(B) violates the Due Process Clause of the California Constitution and is thus void;

4. Declaratory judgment that Oakland Municipal Code section 5.93.040 is preempted by ERISA pursuant to 28 U.S.C. § 2201 and is thus void;

5. Enjoin the City and its officers, agents, subordinates, and employees and hotel employees or representatives of hotel employees from enforcing any requirements under Section 5.93.030(B) and associated recordkeeping obligations or assessing penalties against Plaintiff's members who are otherwise subject to Section 5.93.030(B);

6. Enjoin the City and its officers, agents, subordinates, and employees from implementing or enforcing any requirements under Section 5.93.040 and associated recordkeeping obligations or assessing penalties against Plaintiff's

members who are otherwise subject to Section 5.93.040;

7. 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

8. Such other relief as this Court deems just and equitable.

Dated: March 7, 2019

Respectfully submitted,

FISHER & PHILLIPS LLP

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