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Hotel & Lodging Association

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO**

CALIFORNIA HOTEL & LODGING
ASSOCIATION; HOTEL COUNCIL OF
SAN FRANCISCO; and AMERICAN
HOTEL & LODGING ASSOCIATION,

Plaintiffs,

v.

CITY AND COUNTY OF SAN
FRANCISCO; and Does 1 through 10,
Inclusive,

Defendants.

CASE NO.: **CGC-20-585465**
[Unlimited Jurisdiction]

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. On July 7, 2020, the Board of Supervisors of the City and County of San Francisco
passed an Emergency Ordinance, File No. 200638, titled "Cleaning and Disease Prevention

**FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO**

JUL 20 2020

CLERK OF THE COURT

BY: 
Deputy Clerk

ANGELICA SUNGA

Standards in Tourist Hotels and Large Commercial Office Buildings” or, in short form, the “Healthy Buildings Ordinance.” After ten days, Mayor London Breed did not return the legislation to the Board of Supervisors and the Healthy Buildings Ordinance passed into law. The Healthy Buildings Ordinance purportedly is necessary to “help contain COVID-19.” While the support of the Healthy Buildings Ordinance was unanimous by the Board of Supervisors, it is telling that City and County of San Francisco buildings that meet the square footage criteria are not subject to the law. More telling is that it appears that the City and County of San Francisco may not have even reached out to local and state health authorities to confirm that the measures in the Healthy Buildings Ordinance would achieve the stated goal of keeping the public safe from COVID-19 in hotel settings. The Healthy Buildings Ordinance is actually at odds with the well thought out industry guidance put out by the state of California to combat COVID-19. The Healthy Buildings Ordinance will do irreparable harm to a specific industry that has an outstanding safety record. The Healthy Buildings Ordinance also ignores various San Francisco environmental mandates.

2. Ironically, provisions within the Healthy Buildings Ordinance actually increase the risk of employee and customer exposure to COVID-19 in tourist hotels by mandating that hotel employees clean the hotel rooms of guests who are staying multiple nights every single night unless the guest affirmatively opts out of daily cleaning. During the COVID-19 pandemic, the hotel industry has leaned on federal, state, local and private scientific professionals to adopt best practices that will achieve employee and guest safety. The Healthy Buildings Ordinance actually increases employee and guest exposure to COVID-19 because it will inevitably lead to more employees being required to spend protracted periods in guest rooms for daily cleaning, increasing the risk of transference from employee to guest or guest to employee. This is why Industry Guidance from the California Department of Public Health (“CDPH”) and the California Division of Occupational Safety and Health (“Cal/OSHA”) suggests “leaving rooms vacant for 24 to 72 hours after a guest has departed.” (CDPH and Cal/OSHA, *COVID-19 Industry Guidance: Hotels, Lodging, and Short Term Rentals* at p. 10 (rev. July 2, 2020), <https://files.covid19.ca.gov/pdf/guidance-hotels-lodging-rentals.pdf>.) The Healthy Buildings

1 Ordinance therefore violates the rights to life and bodily integrity encompassed by the Due
2 Process Clauses of the United States and California Constitutions.

3 3. Additionally, the cost of these stringent measures and the vagueness of the
4 measures required violate the right to property encompassed by the Due Process Clauses of the
5 United States and California Constitutions. The City and County of San Francisco could
6 arguably construe and enforce the Healthy Buildings Ordinance to require the cleaning of literally
7 every surface in public and employee areas (including some areas where there is not "high
8 traffic"). If construed in this manner, the ordinance would have the net effect of shutting down
9 the hoteliers in San Francisco given the cost and inability to comply. Moreover, because a
10 violation of the Healthy Buildings Ordinance can be pursued as a misdemeanor nuisance, hotel
11 employers who interpret the various vague provisions of the Healthy Buildings Ordinance
12 incorrectly could potentially face criminal penalties. The Healthy Buildings Ordinance also
13 provides for private rights of action for alleged violations which will undoubtedly create a further
14 unfair financial burden for the industry to endure.

15 4. Further, the cleaning measures in the Healthy Buildings Ordinance are either
16 duplicative or in conflict with state law regulating occupational safety and health standards, and
17 they are therefore preempted. More specifically, under state law, Cal/OSHA has the exclusive
18 authority to regulate the health and safety of employees throughout the state. The Healthy
19 Building Ordinance seeks to invade Cal/OSHA's exclusive arena.

20 5. The California Hotel & Lodging Association, Hotel Council of San Francisco,
21 and American Hotel & Lodging Association ("Plaintiffs") therefore allege as follows:

22 **PARTIES**

23 6. The California Hotel & Lodging Association ("CHLA") is a trade association with
24 over 1,900 members representing the lodging industry in California. CHLA has members located
25 in the City and County of San Francisco that are subject to the Emergency Ordinance, File No.
26 200638, titled "Cleaning and Disease Prevention Standards in Tourist Hotels and Large
27 Commercial Office Buildings" ("Healthy Buildings Ordinance").

7. The Hotel Council of San Francisco is a non-profit trade association which advocates on behalf of the hotel and allied members to ensure economic vitality of the hospitality industry in San Francisco. The Hotel Council of San Francisco has members located in the City and County of San Francisco that are subject to the Healthy Buildings Ordinance.

8. The American Hotel & Lodging Association (“AHLA”) serves, supports, and advocates on behalf of the American hospitality industry. The AHLA has over 27,000 members, and it represents all levels of hotel staff—from CEOs to team members who work in the front and back of house. The AHLA has members located in the City and County of San Francisco that are subject to the Healthy Buildings Ordinance.

9. Defendant City and County of San Francisco 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. (S.F. Charter, art. I, § 1.100.)

10. The true names and capacities, whether individual, corporate, associate, governmental, or otherwise, of Defendant Does 1 through 10 are unknown to Plaintiffs, who therefore sue Defendants by such fictitious names. Plaintiffs will seek leave of the Court to amend this Complaint when such names are ascertained. Plaintiffs are informed and believe and, on that basis, allege that each of the fictitiously-named defendants were responsible in some manner for, gave consent to, ratified, and/or authorized the conduct herein alleged and that Plaintiffs' damages, as alleged below, were proximately caused by them.

JURISDICTION AND VENUE

11. This Court has jurisdiction under *Code of Civil Procedure* §§ 410.10, 525–526, 526a, and 1060. This action is an unlimited civil case pursuant to *Code of Civil Procedure* § 580 because Plaintiffs seeks non-monetary relief that is not available under limited jurisdiction, including but not limited to declaratory relief and injunctive relief. Because Plaintiffs do not seek damages or other non-incidental monetary relief, there is no amount in controversy and no requirement to present a claim to Defendant City and County of San Francisco before pursuing judicial relief.

12. Venue is proper in the Superior Court of San Francisco County under *Code of Civil Procedure* §§ 393–395, because Defendant City and County of San Francisco is a public entity situated in San Francisco County, and also because all of the acts and omissions complained of in this Complaint took place in San Francisco County.

BACKGROUND REGARDING THE RISK OF SPREAD OF COVID-19

13. In December 2019, the World Health Organization (“WHO”) was informed of a pneumonia of an unknown cause which apparently originated in the city of Wuhan in Hubei province, China. That illness was COVID-19. Since then, it has proceeded to spread globally. On March 11, 2020, WHO officially characterized COVID-19 as a pandemic. (WHO, *Rolling updates on coronavirus disease* (updated July 7, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>.) On March 16, 2020, the City and County of San Francisco Health Officer issued a shelter-in-place order. Since then, the City and County of San Francisco has slowly started to reopen non-essential businesses. However, businesses which have wanted to reopen have needed to follow state guidance and the local public health order. As explained in the July 13, 2020 Order of the Health Officer:

[COVID-19] is easily transmitted, especially indoors or in group settings, and the disease can be extremely serious. It can require long hospital stays, and in some instances cause long-term health consequences or death. It can impact not only those who are older or have underlying health conditions and known to be at high risk but also other people, regardless of age. And a major risk remains the spread of the virus that causes COVID-19 through asymptomatic and pre-symptomatic carriers, people who can spread the disease but do not even know they are infected and contagious. The spread of the disease is global pandemic causing untold societal, social, and economic harm.

(Tomás J. Aragón, MD, DrPH, Health Officer of the City and County of San Francisco, *Order of the Health Officer No. C19-07f* at p. 1 (July 13, 2020), <https://www.sfdph.org/dph/alerts/files/C19-07f-Shelter-in-Place-Health-Order.pdf>.)

BACKGROUND REGARDING THE HEALTHY BUILDINGS ORDINANCE

14. On July 7, 2020, the San Francisco Board of Supervisors passed the Healthy Buildings Ordinance to address the reopening of hotels and other large commercial buildings.

(City and County of San Francisco Board of Supervisors, *Emergency Ordinance – Cleaning and Disease Prevention Standards in Tourist Hotels and Large Commercial Buildings* (“Healthy Buildings Ordinance”), File No. 200638, <https://sfgov.legistar.com/LegislationDetail.aspx?ID=4574930&GUID=8192125B-2F8D-4BFC-9EA9-9A0254034A45&Options=ID|Text|&Search=200638>.) After ten days, Mayor London Breed did not return the legislation to the Board of Supervisors and the Healthy Buildings Ordinance passed into law. (*Rules of Order – Board of Supervisors – City and County of San Francisco*, Board Rules 2.14 and 2.16 (Mar. 10, 2020), https://sfbos.org/sites/default/files/rules_of_order.pdf.) The Healthy Buildings Ordinance was passed as emergency legislation. Under the San Francisco Charter, “[a]n emergency ordinance may be passed in cases of public emergency affecting life, health, property, or for the uninterrupted operation of any City or County department or office required to comply with time limitations as established by law.” (S.F. Charter, § 2.107.) Emergency ordinances automatically terminate on the 61st day following passage. (*Ibid.*)

15. The Healthy Buildings Ordinance imposes numerous new regulations on hotels:

(1) All surfaces in Tourist Hotel guest rooms that have been occupied in the preceding 24 hours shall be cleaned and disinfected on a daily basis, unless the guest requests otherwise. Such surfaces include, without limitation, walls, windows, mirrors, desks, table tops, furniture, minibars, interior and exterior door handles, interior door locks, faucets, toilets, bed headboards and footboards, light switches, TV remote controls, telephones, keyboards, and touch screens. Porous surfaces such as carpeted floor, rugs, and drapes, shall be disinfected using Disinfectant where available for the item, or where not, appropriate cleaners indicated for use on these surfaces.

(2) Bed linens and towels shall be changed no less than daily, unless the guest requests otherwise. Bedscarves and bedspreads shall be changed upon each guest departure. All dirty linens and laundry shall be cleaned at high temperatures and according to CDC Guidelines for Environmental Infection Control in Health-Care Facilities.

[. . .]

(4) Restrooms in occupied Tourist Hotel guest rooms shall be cleaned and disinfected once per day, absent special circumstances requiring more frequent cleaning, unless the guest requests otherwise.

1 [. . .]

2 (6) No Covered Establishment may offer any incentive to any guest room
3 cleaning on a daily basis. Guests are presumed to elect daily guest room cleaning
4 unless the guest affirmatively indicates preferences not to receive daily room
5 cleaning.

6 (Healthy Buildings Ordinance, § 4, subd. (e).)

7 **THE HEALTHY BUILDINGS ORDINANCE IS MISGUIDEDED AND WILL**
8 **INCREASE THE RISK OF SPREAD OF COVID-19**

9 16. Hotels have long participated in programs which encourage environmental
10 sustainability, including programs to incentivize guests to forego daily room cleaning during
11 multiple-day stays. Such programs reduce the waste of resources such as water, chemicals, and
12 electricity, which in turn ultimately increases greenhouse gas emissions. However, the Healthy
13 Buildings Ordinance bars such incentive programs. (Healthy Buildings Ordinance, § 4, subd.
14 (e)(7).)

15 17. Problematically, the ordinance adopted by the San Francisco Board of Supervisors
16 (which was championed by UNITE HERE Local 2) is a transparent but unsafely misguided
17 attempt to create work for hotel employees, namely housekeepers. Increasing the number of
18 employees cleaning and having guest rooms deep-cleaned daily (regardless of whether guests are
19 checking out) puts employees and guests at heightened risk of contracting COVID-19 and is at
20 odds with how governmental agencies recommend stopping the spread of the disease.

21 18. According to the Centers for Disease Control and Prevention (“CDC”), one
22 mechanism for spreading COVID-19 is person-to-person through respiratory droplets. However,
23 person-to-person is not the only way in which COVID-19 may be spread. COVID-19 may be
24 passed along “by **touching a surface or object that has the virus on it** and then touching their
25 own mouth, nose, or possibly their eyes.” (CDC, *How It Spreads* (updated June 16, 2020)
26 (emphasis in original), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.)

27 19. As such, the CDC recommends that travelers wanting to inquire about a hotel’s
28 COVID-19 prevention practices focus on social distancing measures, face coverings, and the

1 cleaning and disinfecting or removing of frequently touched surfaces or items. Examples of such
2 frequently touched surfaces or items include “pens, room keys, tables, phones, doorknobs, light
3 switches, elevator buttons, water fountains, ATMs/card payment stations, business center
4 computers and printers, ice/vending machines, and remote controls.” (CDC, *Traveling overnight*
5 (updated June 15, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/daily-life-](https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html#hotel)
6 [coping/personal-social-activities.html#hotel](https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/personal-social-activities.html#hotel).) In other words, they are items that are likely to be
7 touched by multiple people in the course of a day.

8 20. CDPH and Cal/OSHA Industry Guidance have taken a strong interest in
9 preventing the transmission of COVID-19 between guests and hotel workers, including
10 housecleaners. Not only should room cleaning be done when guests are not in their rooms, but
11 CDPH and Cal/OSHA encourage room cleaners to keep rooms well ventilated and minimize
12 contact with guest belongings. (CDPH and Cal/OSHA, *COVID-19 Industry Guidance: Hotels,*
13 *Lodging, and Short Term Rentals* at pp. 7-8.)

14 21. In particular, CDPH and Cal/OSHA are concerned that COVID-19 can be spread
15 while housekeepers are cleaning hotel rooms. The Industry Guidance even includes the various
16 items that need to be cleaned in each room, including dishes, soap, and dirty linens. (*Id.* at p.
17 10.)

18 22. In order to minimize the risk of spread of COVID-19 through items in hotel
19 rooms, CDPH and Cal/OSHA Industry Guidance for hotels state that hotels should “[c]onsider
20 leaving rooms vacant for 24 to 72 hours after a guest has departed, if feasible.” (*Id.* at p. 14.
21 *Accord* CDPH and Cal/OSHA, *COVID-19 General Checklist for Hotels, Lodging, and Short-*
22 *Term Rentals* at p. 10 (rev. July 2, 2020) (“Consider leaving rooms vacant for 24 to 72 hours
23 between occupancy.”), <https://files.covid19.ca.gov/pdf/checklist-hotels.pdf>. See CDC, *Cleaning*
24 *and Disinfection for Community Facilities – Interim Recommendations for U.S. Community*
25 *Facilities with Suspected/Confirmed Coronavirus Disease 2019 (COVID-19)* (May 27, 2020) (“It
26 is unknown how long the air inside a room occupied by someone with confirmed COVID-19
27 remains potentially infectious.”), [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html)
28 [ncov/community/organizations/cleaning-disinfection.html](https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html).)

1 23. The Healthy Buildings Ordinance ignores that CDPH and Cal/OSHA have
2 recognized that guest rooms themselves are potentially vectors of spreading disease to room
3 cleaners. Instead, the Healthy Buildings Ordinance requires that room cleaners increase their
4 risk of exposure to COVID-19 by undertaking extensive deep daily room cleanings on days in
5 which the guest is staying over for another night. (*See CDC, CDC/EPA Cleaning & Disinfecting*
6 *Guidance* (May 7, 2020) (Custodial staff and other people who carry out cleaning “are at
7 increased risk of being exposed to the virus and to any toxic effects of the cleaning chemicals.”),
8 <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>.)

9 24. A. Lennox Welsh, the former Chief of Cal/OSHA, explained that the daily guest
10 room cleanings are “unnecessary and likely to *increase* the risk of disease transmission.” (Letter
11 from A. Lennox Welsh to Lynn S. Mohrfeld, President and CEO of CHLA (July 6, 2020) at p. 2
12 (emphasis in original).)

13 25. Mr. Welsh summed up his opinion as follows: “[I]t is generally a prudent practice
14 to be cleaning surfaces where there is a significant chance the surface may be contaminated and
15 that the surface will be contacted in a way that transmits the virus if not cleaned. Cleaning
16 surfaces that are not likely to transmit the virus is not advisable, because the act of cleaning
17 carries some likelihood that the person doing it will be doing so with the other people in proximity
18 who may be symptom free but still infected.” (*Id.* at p. 3.)

19 26. Despite that CDPH and Cal/OSHA guidance recommends *minimizing* contact
20 between individuals (including items that other individuals who have COVID-19 may have been
21 in contact with) is the best way to avoid COVID-19, the Healthy Buildings Ordinance passed by
22 Defendant takes the opposite measure of *increasing* contact between guests and hotel employees.
23 In doing so, Defendant City and County of San Francisco relied on older March of 2020 Guidance
24 from the World Health Organization that is at odds with recommendations and guidance from
25 the CDC, Cal/OSHA, and CDPH. (WHO, *Operational considerations for COVID-19 management in*
26 *the accommodation sector – Interim Guidance* at p. 5 (Mar. 31, 2020),
27 [https://apps.who.int/iris/bitstream/handle/10665/331638/WHO-2019-nCoV-Hotels-2020.1-](https://apps.who.int/iris/bitstream/handle/10665/331638/WHO-2019-nCoV-Hotels-2020.1-eng.pdf?)
28 [eng.pdf?](https://apps.who.int/iris/bitstream/handle/10665/331638/WHO-2019-nCoV-Hotels-2020.1-eng.pdf?))

1 27. This risk is not one-way where employees are the only individuals at risk of
2 contracting COVID-19. An employee who is infected can spread the infection into any room in
3 which he or she enters to clean (or enters for any other purpose), thereby infecting guests.
4 Moreover, a housekeeper who comes into contact with infected items in one guest room may
5 spread COVID-19 into other rooms.

6 28. Given the risk of infection by asymptomatic and presymptomatic carriers
7 (Aragón, *Order of the Health Officer No. C19-07f* at p. 1), screening employees and guests cannot
8 eliminate all risk of the transmission of COVID-19—limiting the interaction between people is
9 still critical.

10 29. When explaining why the Healthy Buildings Ordinance was necessary, Chair
11 Peskin pointed to unsuccessful hotel reopenings in other states which were not subject to and did
12 not follow the CDPH and Cal/OSHA Industry Guidance. However, despite that
13 California hotels have been reopening (although not in the City and County of San Francisco),
14 Chair Peskin was unable to point to any hotels located in California
15 that have caused the spread of COVID-19. (Peskin (June 29, 2020),
16 http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=36096&meta_id=813
17 950.)

18 30. Despite claiming a motivation to prevent the spread of COVID-19, that is not
19 actually the chief goal of the Healthy Buildings Ordinance’s proponents. Rather, it is to make
20 work for housekeepers, which would lead to more individuals paying dues to UNITE HERE
21 Local 2. This is underscored by the fact that the City and County of San Francisco has exempted
22 any and all governmental entities from needing to comply with the requirements of the Healthy
23 Buildings Ordinance—including the City and County itself. (Healthy Buildings Ordinance, § 3.)

24 31. As written, the Healthy Buildings Ordinance use of the phrase “[a]ll surfaces”
25 could be interpreted literally by Defendant City and County of San Francisco to mean just that—
26 all surfaces, including: ceilings, windows or walls in a room which is multiple stories tall and
27 would be considered in a second or third story, chandeliers or other lighting fixtures, the tops of
28 cabinets, the undersides of chairs or tables, the outside portions of elevators (not just including

1 the public-facing door), valences, emergency exit doors where opening the door could set off an
2 alarm, security cameras, and the outsides of pots of potted plants and even the plants themselves.
3 Such minutia in cleaning is not feasible and would be so financially prohibitive hotels would be
4 unable to open.

5 32. Even when hotels do reopen, it would be wildly optimistic to believe that they
6 would be operating at normal capacity given the continued prevalence of COVID-19 in the
7 community. The Healthy Buildings Ordinance was clearly designed with the hopes that the non-
8 sensical standards imposed by the Healthy Buildings Ordinance would artificially boost
9 employment.

10 33. While job creation is important, it cannot be at the expense of employee and guest
11 health—and not under the guise of an ordinance whose goal is to promote the public health while
12 actually undermining it.

13 FIRST CAUSE OF ACTION

14 (For Declaratory Relief and Injunction Based on the Due Process Clause of the United 15 States Constitution – Rights to Life and Bodily Integrity)

16 34. Plaintiffs incorporate herein by this reference the allegations contained in
17 Paragraphs 1 through 33, inclusive.

18 35. Plaintiffs hereby seek declaratory and injunctive relief to prevent Defendant City
19 and County of San Francisco from depriving Plaintiffs' members' employees and customers of
20 the protections afforded to them under the Due Process Clause of the United States Constitution,
21 which states: "No state shall make or enforce any law or enforce any law which shall abridge the
22 privileges or immunities of citizens of the United States; nor shall any state deprive any person
23 of life, liberty, or property, without due process of law . . ." U.S. Const., amend. XIV, § 1.

24 36. Substantive due process bars certain governmental actions regardless of their
25 fairness. One of the common-law privileges recognized by the United States Supreme Court is
26 bodily integrity. *E.g.*, *Winston v. Lee*, 470 U.S. 753, 764-66 (1985) (requiring a robbery suspect
27 to undergo surgery to remove a bullet fired by the victim from his body); *Cruzan v. Director,*
28 *Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) (refusing unwanted medical treatment);

1 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (right to abortion). *See*
2 *Albright v. Oliver*, 510 U.S. 266, 272 (Rehnquist, C.J., concurring) (“The protections of
3 substantive due process have for the most part been accorded to matters relating to marriage,
4 family, procreation, and the right to bodily integrity.”).

5 37. The Healthy Buildings Ordinance invokes the rights of life and bodily integrity as
6 the reason for passing the Healthy Buildings Ordinance on an emergency basis, stating in
7 Section 2, subdivision (a) that “Section 2.107 of the Charter authorizes passage of an emergency
8 ordinance in cases of public emergency affecting life, health, or property . . . The Board of
9 Supervisors hereby finds and declares that an actual emergency exists that requires the passage
10 of this emergency ordinance.” Section 2, subdivision (e) goes on to explain: “It is a top priority
11 of the Board of Supervisors that hotels and commercial buildings reopen in the safest manner
12 possible, and as quickly as possible. Key to accomplishing these twin goals is ensuring that these
13 facilities implement cleaning standards that minimize the risks of contracting highly contagious
14 diseases especially a deadly disease like COVID-19.”

15 38. Section 4, subdivisions (e)(1), (e)(2), and (e)(4) of Defendant City and County of
16 San Francisco’s Healthy Buildings Ordinance unconstitutionally deprive Plaintiffs’ members’
17 employees and customers of their rights to life and bodily integrity. By requiring Plaintiffs’
18 members’ employees to clean guest rooms every day regardless of whether a guest is checking
19 out (unless the guest affirmatively opts out of such a cleaning), Defendant City and County of
20 San Francisco is increasing the risk that employees and guests will be exposed to and contract
21 COVID-19.

22 39. In light of scientific knowledge regarding COVID-19 and CDPH and Cal/OSHA
23 Industry Guidance, Defendant City and County of San Francisco’s decision to mandate daily
24 cleaning of guest rooms even when the same guests are staying multiple nights unless the guest
25 opts out of such cleaning is clearly arbitrary and unreasonable.

26 ///

27 ///

28 //

40. By virtue of the foregoing, the application of the Healthy Buildings Ordinance to Plaintiffs' members and guests within the City and County of San Francisco violates 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.

SECOND CAUSE OF ACTION

**(For Declaratory Relief and Injunction Based on the Due Process Clause of the California
Constitution – Rights to Life and Bodily Integrity)**

41. Plaintiffs incorporate herein by this reference the allegations contained in Paragraphs 1 through 40, inclusive.

42. Plaintiffs hereby seek declaratory and injunctive relief to prevent Defendant City and County of San Francisco from depriving Plaintiffs' members' employees and customers of the protections afforded to them under the Due Process Clause of the California Constitution, which affirms: "A person may not be deprived of life, liberty, or property without due process of law . . ." Cal. Const., art. I, §§ 1 and 7.

43. Substantive due process bars certain governmental actions regardless of their fairness. One of the common-law privileges recognized by the California Courts is bodily integrity. *Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 459; *Bartling v. Superior Court* (1984) 163 Cal.App.3d 186, 195.

44. The Healthy Buildings Ordinance invokes the rights of life and bodily integrity as the reason for passing the Healthy Buildings Ordinance on an emergency basis, stating in Section 2(a) that “Section 2.107 of the Charter authorizes passage of an emergency ordinance in cases of public emergency affecting life, health, or property . . . The Board of Supervisors hereby finds and declares that an actual emergency exists that requires the passage of this emergency ordinance.” Section 2, subdivision (e) goes on to explain: “It is a top priority of the Board of Supervisors that hotels and commercial buildings reopen in the safest manner possible, and as quickly as possible. Key to accomplishing these twin goals is ensuring that these facilities implement cleaning standards that minimize the risks of contracting highly contagious diseases especially a deadly disease like COVID-19.”

45. Section 4, subdivision (e)(1), (e)(2), and (e)(4) of Defendant City and County of San Francisco's Healthy Buildings Ordinance unconstitutionally deprive Plaintiffs' members' employees and customers of their rights to life and bodily integrity. By requiring Plaintiffs' members' employees to clean guest rooms every day regardless of whether a guest is checking out, Defendant City and County of San Francisco is increasing the risk that employees and guests will be exposed to and contract COVID-19.

46. Legislation violates the California Due Process Clause when it does not “reasonably relate[] ‘to a proper legislative goal.’” *Coleman v. Dep’t of Personnel Admin.* (1991) 52 Cal.3d 1102, 1125. In light of scientific knowledge regarding COVID-19 and CDPH and Cal/OSHA Industry Guidance, Defendant City and County of San Francisco’s decision to mandate daily cleaning of guest rooms does not “have ‘a real and substantial relation to the object sought to be attained.’” *Ibid.* Instead of stopping the spread of COVID-19, as Defendant contends, the Healthy Buildings Ordinance instead will lead to the increased spread of COVID-19. In other words, Defendant City and County of San Francisco’s cleaning requirements are clearly arbitrary and unreasonable.

47. By virtue of the foregoing, the application of the Healthy Buildings Ordinance to Plaintiffs' members and guests within the City and County of San Francisco violates 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.

THIRD CAUSE OF ACTION

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

48. Plaintiffs incorporate herein by this reference the allegations contained in Paragraphs 1 through 47, inclusive.

49. Plaintiffs hereby seek declaratory and injunctive relief to prevent Defendant City and County of San Francisco from depriving Plaintiffs' members of the protections afforded to them under the Due Process Clause of the United States Constitution, which states: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the"

1 United States; nor shall any state deprive any person of life, liberty, or property, without due
2 process of law . . .” U.S. Const., amend. XIV, § 1.

3 50. The Healthy Buildings Ordinance invokes the right to property as the reason for
4 passing the Healthy Buildings Ordinance on an emergency basis, stating in Section 2, subdivision
5 (a) that “Section 2.107 of the Charter authorizes passage of an emergency ordinance in cases of
6 public emergency affecting life, health, or property . . . The Board of Supervisors hereby finds
7 and declares that an actual emergency exists that requires the passage of this emergency
8 ordinance.” Section 2, subdivision (e) goes on to explain: “It is a top priority of the Board of
9 Supervisors that hotels and commercial buildings reopen in the safest manner possible, and as
10 quickly as possible. Key to accomplishing these twin goals is ensuring that these facilities
11 implement cleaning standards that minimize the risks of contracting highly contagious diseases
12 especially a deadly disease like COVID-19.”

13 51. Section 4, subdivision (e)(1), (e)(2), and (e)(4) of Defendant City and County of
14 San Francisco’s Healthy Buildings Ordinance unconstitutionally deprives Plaintiffs’ members of
15 their right to property. By imposing such stringent cleaning standards on every single occupied
16 guest room, Defendant City and County of San Francisco is simultaneously significantly
17 increasing the operational costs of hotels within the City and County of San Francisco while
18 significantly decreasing the safety of those same hotels.

19 52. The Healthy Buildings Ordinance does not protect against COVID-19—it in fact
20 increases the risk that employees and guests will be exposed to COVID-19. In light of scientific
21 knowledge regarding COVID-19 and CDPH and Cal/OSHA Industry Guidance, Defendant City
22 and County of San Francisco’s decision to mandate daily cleaning of guest rooms even when the
23 same guests are staying multiple nights unless the guest opts out of such cleaning is clearly
24 arbitrary and unreasonable.

25 53. Moreover, the Healthy Buildings Ordinance is unconstitutionally vague. A law
26 is void for vagueness if it: (a) fails to give a person of ordinary intelligence a reasonable
27 opportunity to know what it prohibits, or (b) impermissibly delegates basic policy matters to

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1 policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant
2 dangers of arbitrary and discriminatory application.

3 54. The Healthy Buildings Ordinance fails to give a person of ordinary intelligence a
4 reasonable opportunity to know what it prohibits because, *inter alia*:

5 a. The Healthy Buildings Ordinance repeatedly requires that “[a]ll surfaces”
6 be cleaned in areas such as lobbies, elevators, stairways, restrooms, and meeting rooms.
7 (Healthy Buildings Ordinance, § 4, subd. (d)(1)-(d)(5), (e)(1); *see id.* § 4, subd. (d)(8)-
8 (d)(9), (e)(4).) The Healthy Buildings Ordinance could be interpreted to require the
9 cleaning of ceilings, windows or walls in a room which is multiple stories tall and would
10 be considered in a second or third story, chandeliers or other lighting fixtures, the tops of
11 cabinets, the undersides of chairs or tables, the outside portions of elevators (not just
12 including the public-facing door), valences, emergency exit doors where opening the door
13 could set off an alarm, security cameras, and the outsides of pots of potted plants and
14 even the plants themselves. Such cleaning addresses parts of hotels that create little or
15 no risks to employees or guests, puts employees at physical risk as they attempt to clean
16 remote, inaccessible parts of hotels, and are so financially prohibitive that many hotels
17 would be unable to open if forced to comply with them.

18 b. The Healthy Buildings Ordinance appears to classify “[m]eeting rooms”
19 including “convention spaces” as high-contact areas. (Healthy Buildings Ordinance, § 4,
20 subd. (d)(5).) Defendant City and County of San Francisco could assume that this section
21 requires multiple cleanings a day of such areas even on days in which the rooms are not
22 being used or if the rooms have been taken out of circulation by the hotel altogether.

23 c. The Healthy Buildings Ordinance requires that exterior doors which
24 cannot be automatically opened either be propped open or that the employer assign a
25 gloved employee to open them. (Healthy Buildings Ordinance, § 4, subd. (d)(7).)
26 Defendant City and County of San Francisco could assume that this section means every
27 single door—not just ones that are frequently trafficked—is required to be meet these
28 requirements. For safety reasons, employers may not want every external entrance to

1 have propped open doors. Under such an interpretation, employers could be required to
2 have employees man every single door—an expensive endeavor.

3 55. The above-mentioned vagaries make compliance very difficult, if not impossible.
4 Employers are left with guessing as to how to comply with the Healthy Buildings Ordinance,
5 and, if they guess wrong, the hotel could be shut down in addition to facing civil and
6 administrative penalties. (Healthy Buildings Ordinance, § 7, subd. (a)-(b); S.F. Health Code §§
7 596, 600.) Moreover, the Healthy Buildings Ordinance permits employees to refuse to work if
8 they believe that their employer is failing to adhere to the requirements of the Healthy Buildings
9 Ordinance. (Healthy Buildings Ordinance, § 6, subd. (a)-(b).) Without clarity of what is or is
10 not required, employers will be unable to make a reasonable determination of whether an
11 employee is being insubordinate or if the employee's refusal to work could be protected activity
12 that would open an employer to a civil action with significant financial damages, including actual
13 damages, exemplary damages, and attorneys' fees and costs. (*Id.* § 7, subd. (c).)

14 56. These vague aspects of the Healthy Buildings Ordinance necessarily leave it to
15 the persons who enforce it to decide whether it has been violated on an *ad hoc* and subjective
16 basis; as a result, the Healthy Buildings Ordinance fails the second test for vagueness.

17 57. Additionally, violation of the Healthy Buildings Ordinance opens employers and
18 their agents to criminal liability. The Healthy Buildings Ordinance states that a violation of the
19 ordinance is a nuisance under San Francisco Health Code section 581. (Healthy Buildings
20 Ordinance § 7, subd. (b).) Such nuisances are a misdemeanor which can expose persons to
21 between 10 days and three months of imprisonment along with a criminal penalty. (S.F. Health
22 Code § 600, subd. (a).) The Constitution tolerates less vagueness when an ordinance imposes
23 criminal penalties, as here. *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 940 (9th Cir.
24 1997); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 489-499
25 (1982).

26 58. These ambiguities will inevitably result in scores of lawsuits against hotels. The
27 Healthy Buildings Ordinance creates a private right of action for employees and former
28 employees. (Healthy Buildings Ordinance, § 7, subd. (c).) Additionally, the Ordinance allows

1 “any person” to bring a civil action based on a violation of the Ordinance “where such a civil
2 action is otherwise recognized under the law.” (*Id.* § 7, subd. (d).)

3 59. By virtue of the foregoing, the application of the Healthy Buildings Ordinance to
4 Plaintiffs’ members and guests within the City and County of San Francisco violates the due
5 process guarantees of the United States Constitution. Such application will cause those members
6 to suffer irreparable harm for which they have no adequate remedy at law.

7 **FOURTH CAUSE OF ACTION**

8 **(For Declaratory Relief and Injunction Based on the Due Process Clause of the California**
9 **Constitution – Right to Property)**

10 60. Plaintiffs incorporate herein by this reference the allegations contained in
11 Paragraphs 1 through 59, inclusive.

12 61. Plaintiffs hereby seek declaratory and injunctive relief to prevent Defendant City
13 and County of San Francisco from depriving Plaintiffs’ members of the protections afforded to
14 them under the Due Process Clause of the California Constitution, which guarantees each and all
15 of them the right not to be deprived of their property and contractual rights without due process
16 of the law. Cal. Const., Art. I, §§ 1 and 7.

17 62. The Healthy Buildings Ordinance invokes the right to property as the reason for
18 passing the Healthy Buildings Ordinance on an emergency basis, stating in Section 2, subdivision
19 (a) that “Section 2.107 of the Charter authorizes passage of an emergency ordinance in cases of
20 public emergency affecting life, health, or property . . . The Board of Supervisors hereby finds
21 and declares that an actual emergency exists that requires the passage of this emergency
22 ordinance.” Section 2, subdivision (e) goes on to explain: “It is a top priority of the Board of
23 Supervisors that hotels and commercial buildings reopen in the safest manner possible, and as
24 quickly as possible. Key to accomplishing these twin goals is ensuring that these facilities
25 implement cleaning standards that minimize the risks of contracting highly contagious diseases
26 especially a deadly disease like COVID-19.”

27 63. Section 4, subdivision (e)(1), (e)(2), and (e)(4) of Defendant City and County of
28 San Francisco’s Healthy Buildings Ordinance unconstitutionally deprives Plaintiffs’ members of

1 their right to property. By imposing such stringent cleaning standards on every single occupied
2 guest room, Defendant City and County of San Francisco is simultaneously significantly
3 increasing the operational costs of hotels within the City and County of San Francisco while
4 significantly decreasing the safety of those same hotels.

5 64. The Healthy Buildings Ordinance does not protect against COVID-19—it in fact
6 increases the risk that employees and guests will be exposed to COVID-19. In light of scientific
7 knowledge regarding COVID-19 and CDPH and Cal/OSHA Industry Guidance, Defendant City
8 and County of San Francisco’s decision to mandate daily cleaning of guest rooms even when the
9 same guests are staying multiple nights unless the guest opts out of such cleaning is clearly
10 arbitrary and unreasonable.

11 65. Moreover, the Healthy Buildings Ordinance is unconstitutionally vague. A law
12 is void for vagueness if it: (a) fails to give a person of ordinary intelligence a reasonable
13 opportunity to know what it prohibits, or (b) impermissibly delegates basic policy matters to
14 policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant
15 dangers of arbitrary and discriminatory application.

16 66. The Healthy Buildings Ordinance fails to give a person of ordinary intelligence a
17 reasonable opportunity to know what it prohibits because, *inter alia*:

18 a. The Healthy Buildings Ordinance repeatedly requires that “[a]ll surfaces”
19 be cleaned in areas such as lobbies, elevators, stairways, restrooms, and meeting rooms.
20 (Healthy Buildings Ordinance, § 4, subd. (d)(1)-(d)(5), (e)(1); *see id.* § 4, subd. (d)(8)-
21 (d)(9), (e)(4).) The Healthy Buildings Ordinance could be interpreted to require the
22 cleaning of ceilings, windows or walls in a room which is multiple stories tall and would
23 be considered in a second or third story, chandeliers or other lighting fixtures, the tops of
24 cabinets, the undersides of chairs or tables, the outside portions of elevators (not just
25 including the public-facing door), valences, emergency exit doors where opening the door
26 could set off an alarm, security cameras, and the outsides of pots of potted plants and
27 even the plants themselves. Such cleaning addresses parts of hotels that create little or
28 no risks to employees or guests, puts employees at physical risk as they attempt to clean

1 remote, inaccessible parts of hotels, and are so financially prohibitive that many hotels
2 would be unable to open if forced to comply with them.

3 b. The Healthy Buildings Ordinance appears to classify “[m]eeting rooms”
4 including “convention spaces” as a high-contact area. (Healthy Buildings Ordinance, § 4,
5 subd. (d)(5).) Defendant City and County of San Francisco could assume that this section
6 requires multiple cleanings a day of such areas even on days in which the rooms are not
7 being use or if the rooms have been taken out of circulation by the hotel altogether.

8 c. The Healthy Buildings Ordinance requires that exterior doors which
9 cannot be automatically opened either be propped open or the employer assigned a gloved
10 employee to open them. (Healthy Buildings Ordinance, § 4, subd. (d)(7). Defendant City
11 and County of San Francisco could assume that this section means every single door—
12 not just ones that are frequently trafficked—is required to be meet these requirements.
13 For safety reasons, employers may not want every external entrance to have propped open
14 doors. Under such an interpretation, employers could be required to have employees man
15 ever single door—an expensive endeavor.

16 67. The above-mentioned vagaries make compliance very difficult, if not impossible.
17 Employers are left with guessing as to how to comply with the Healthy Buildings Ordinance, and
18 if they guess wrong, the hotel could be shut down. (Healthy Buildings Ordinance, § 7, subd. (a)-
19 (b).) Moreover, the Healthy Buildings Ordinance permits employees to refuse to work if they
20 believe that their employer is failing to adhere to the requirements of the Healthy Buildings
21 Ordinance. (*Id.* § 6, subd. (a)-(b).) Without clarity of what is or is not required, employers will
22 be unable to make a reasonable determination of whether an employee is being insubordinate or
23 if the employee’s refusal to work could be protected activity that would open an employer to a
24 civil action with significant financial damages, including actual damages, exemplary damages,
25 and attorneys’ fees and costs. (*Id.* § 7, subd. (c).)

26 68. These vague aspects of the Healthy Buildings Ordinance necessarily leave it to
27 the persons who enforce it to decide whether it has been violated on an *ad hoc* and subjective
28 basis; as a result, the Healthy Buildings Ordinance fails the second test for vagueness.

1 76. *Labor Code* section 142.3 provides that the Standards Board “shall be the only
2 agency in the state authorized to adopt occupational safety and health standards.” This language
3 evidences the legislature’s intent to expressly occupy the field of occupational safety and health.

4 77. The Healthy Buildings Ordinance establishes occupational safety and health
5 standards required to be followed by hotel employers in the City and County of San Francisco
6 that differ from those found in the Act or established by the Standards Board.

7 78. The Act and *Labor Code* section 142.3 expressly preempt regulation by
8 Defendant City and County of San Francisco, and thus the Healthy Buildings Ordinance is void.

9 **PRAYER FOR RELIEF**

10 Plaintiffs request the following relief:

11 1. Declaratory judgment that the Healthy Buildings Ordinance violates the Due
12 Process Clauses of the United States and California Constitutions and is thus void;

13 2. Declaratory judgment that the Healthy Buildings Ordinance is preempted and is
14 thus void;

15 3. Permanent injunction preventing the City and County of San Francisco, hotel
16 employees, or representatives of hotel employees from enforcing the Healthy Buildings
17 Ordinance that has been declared void or unconstitutional;

18 4. For an award of attorneys’ fees and costs of suit herein pursuant to *Code of Civil*
19 *Procedure* § 1021.5; and

20 5. Such other relief as this court deems just and equitable.

21
22 DATE: July 19, 2020

FISHER & PHILLIPS LLP

23
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