

CAUSE NO. _____

HILEX POLY CO.,	§	IN THE DISTRICT COURT OF
SUPERBAG OPERATING, LTD.,	§	
THE INTEPLAST GROUP, LTD.,	§	
AND ADVANCE POLYBAG, INC.,	§	
	§	
	§	
Plaintiffs,	§	DALLAS COUNTY, TEXAS
	§	
vs.	§	
	§	
CITY OF DALLAS, TEXAS,	§	
	§	
Defendant.	§	____ JUDICIAL DISTRICT

**PLAINTIFFS’ ORIGINAL PETITION FOR
DECLARATORY AND INJUNCTIVE RELIEF**

Hilex Poly Co. (“Hilex”), Superbag Operating, Ltd. (“Superbag”), the Inteplast Group, Ltd. (“Inteplast”), and Advance Polybag, Inc. (“API”) file this Original Petition against the City of Dallas (“Dallas” or “the City”) and in support show the Court as follows:

INTRODUCTION

Hilex, Superbag, Inteplast, and API are industry leaders in recycling and sustainability, and they support several of the City’s environmental initiatives and private-public partnerships that keep Dallas green. But while the City’s goals are laudable, the City’s ordinances implementing those goals must comport with Texas Statutes and the Texas Constitution. Unfortunately, the City’s ordinance regulating shopping bags—Dallas Ordinance 29307 (“the Ordinance”)—does not. Although the City was aware before the Ordinance was enacted that the Ordinance violated the Texas Health and Safety Code, the City nevertheless pressed on undeterred and enacted the Ordinance. Similarly, although the City was notified prior to the effective date of the Ordinance that the Ordinance also constituted an impermissible tax, the City

pressed forward with enforcing the Ordinance. Because the City's Ordinance conflicts with Texas law, it is preempted, invalid, and of no force or effect. Accordingly, by this Original Petition, Hilex, Superbag, Inteplast, and API seek a Declaratory Judgment invalidating the Ordinance and a permanent injunction prohibiting enforcement of the Ordinance.

DISCOVERY CONTROL PLAN

1. Discovery in this case should be conducted under Texas Rule of Civil Procedure 190.2 as a Level 2 case.

PARTIES

2. Plaintiff Hilex is a for-profit manufacturer of plastic retail bags organized and existing under the laws of the state of Delaware and with a place of business at 101 E. Carolina Ave., Hartsville, South Carolina, 29500. Hilex operates three manufacturing facilities in and around Dallas, employing hundreds of area residents in high-paying manufacturing jobs. Hilex sells plastic bags used by retailers in Dallas.

3. Plaintiff Superbag is a for-profit manufacturer of plastic retail bags organized and existing under the laws of the State of Texas and has a place of business at 9291 Baythorne Drive, Houston, Texas 77041. Superbag sells plastic bags used by retailers in Dallas

4. Plaintiff Inteplast is a for-profit manufacturer of plastic retail bags organized and existing under the laws of Texas and has a place of business at 9 Peach Tree Hill Road, Livingston, New Jersey 07039. Inteplast operates a 575-acre world class manufacturing facility in Lolita, Texas. Inteplast sells plastic bags used by retailers in Dallas.

5. Plaintiff API is a for-profit manufacturer of plastic retail bags organized and existing under the laws of the State of Texas and has a place of business at 12682 Cardinal Meadow Drive, Sugarland Texas, 77478. API sells plastic bags used by retailers in Dallas.

6. Defendant, the City of Dallas, is a home rule city located in Collin County, Dallas County, Denton County, Kaufman County, and Rockwall County, Texas. The City of Dallas may be served pursuant to Section 17.024(b) of the Texas Civil Practice and Remedies Code by serving the City's secretary, Rosa A. Rios, at the City's offices at 1500 Marilla Street, Dallas, Texas 75201.

JURISDICTION AND VENUE

7. This Court has jurisdiction over the City under Texas Civil Practice and Remedies Code § 37.004(a), which provides that “[a] person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder” and Texas Civil Practice and Remedies Code § 37.006(b), which requires a municipality be made a party to a proceeding under Texas Civil Practice and Remedies Code § 37.004(a). Together these provisions represent a waiver of sovereign immunity for cities in Texas where the construction or validity of an ordinance is in issue, as it is here. Plaintiffs seek monetary relief in excess of \$200,000 and non-monetary relief. The relief sought is within the jurisdictional limits of the court.

8. In accordance with §37.006(b) of the Texas Civil Practice and Remedies Code, the Attorney General has been served with a copy of this petition.

9. Venue is appropriate in Dallas County pursuant to Section 15.002(a) of the Texas Civil Practice and Remedies Code because all or a substantial part of the events giving rise to the claim occurred in Dallas County.

FACTUAL AND LEGAL BACKGROUND

10. The Ordinance, which is attached hereto as Exhibit A, was first distributed for review by the City's Council in May 2013, and was enacted nearly a year later on March 26, 2014. The Ordinance requires, among other things, that

- a. Single-use carryout bags “must have a thickness of at least 0.70 mil and be printed with the name of the business establishment and the thickness of the bag in mil.,” Ordinance No. 29307, Dallas City Code § 9C-3(c);
- b. Each businesses wishing to provide its customers with carryout bags to separately register each of their locations annually with the City, *id.* § 9C-4(a);
- c. A business must charge its customers \$0.05 for each bag provided and must remit to the City 90% of the amount collected, *id.* § 9C-4(b);
- d. Any reusable bags sold or provided by a business must display the business' name and describe the bag's ability to be reused or recycled, must be of a certain size, must have a handle, must be of a certain strength, must be constructed of certain materials, and, if made of paper, must be printed with the percentage of recycled material contained in the bag, *id.* § 9C-5; and
- e. Businesses erect multi-lingual signs of a specified size, both inside their stores and in the parking lots, stating whether the business is registered to sell carryout bags, what options are available for carrying items purchased from that business, encouraging customers to bring their own bags, and stating the environmental benefits of recycling, *id.* § 9C-6.

11. The Ordinance's requirements are punishable by monetary penalties. *Id.* § 9C-7.

12. The Ordinance injures Hilex, Superbag, Inteplast, and API in a specific and particularized way by

- a. Reducing sales of single-use carryout bags in the City of Dallas market;
- b. Depriving them of the value of their stock of single-use carryout bags;
- c. Requiring them to perform multiple “short” manufacturing runs (each of which imposes inefficiencies and adds considerable expense) to produce bags that comply with the Ordinance’s requirement that specific information (including the name of the retailer to whom the bags are destined) be printed on the bags;
- d. Imposing the additional expense to make printing plates to print the gauge of the bag and the name of the establishment, which are requirements unique to Dallas;
- e. Imposing on some or all of them the cost of additional employee training to comply with the heavy gauge extrusion (.70 mil) requirement;
- f. Requiring costly warehouse space to accommodate multiple SKUs (product identification codes) for bags specifically and only intended to be introduced into the Dallas market; and,
- g. Imposing on some or all of them the additional cost of independent testing of bags to comply with the ordinance.

13. In addition, although Dallas’ citizens and retailers are not parties to this suit, the citizens will be harmed by increased prices resulting from being charged for bags that were free of charge before the Ordinance was adopted and increased costs to retailers to comply with the Ordinance. Retailers are being harmed due to the loss of customers who choose to shop at stores outside Dallas (where they need not pay for carryout bags).

14. Section 361.0961 of the Texas Health and Safety Code states: “A local government or other political subdivision may not adopt an ordinance, rule, or regulation to: (1) prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law . . . or (3) assess a fee or deposit on the sale or use of a container or package.” Tex. Health & Safety Code § 361.0961.

15. The Ordinance provides, in part, “If single-use carryout bags are provided to a customer, a business establishment shall charge the customer an environmental fee of \$0.05 per bag.” Ordinance No. 29307, Dallas City Code § 9C-4(b)(1). This provision of the Ordinance is in direct conflict with § 361.0961 of the Texas Health & Safety Code.

16. The Ordinance is subject to and is in conflict with §361.0961 in the following ways:

- a. Dallas is “local government or other political subdivision.”
- b. The Ordinance is “an ordinance, rule, or regulation.”
- c. Single use bags are a type of “container or package.”
- d. The Ordinance “assess[es] a fee or deposit on the sale or use” of bags contrary to § 361.0961.
- e. The Ordinance “restrict[s], for solid waste management purposes, the sale or use of” bags contrary to §361.0961. The Ordinance manages solid waste. Section 9C-1(1) of the Ordinance states that one of its purposes is the reduction of “litter.” In turn, section 7A-2 of the Dallas City Code defines “litter” as “refuse and rubbish,” which are defined as “solid wastes.”

- f. The Texas Attorney General agrees with Plaintiffs, having concluded that municipal ordinances regulating plastic bags in the manner the Ordinance does violates § 361.0961. Tex. Att’y Gen. Op. No. GA-1078 (2014).
17. Under Texas law, home rule municipalities are authorized to impose only certain taxes in specified amounts or percentages. Tex. Const., Art. XI, § 5; Tex. Tax Code §§ 321.101, 321.103, 327.003-004, 351.002-003, 351.0025, 334.252, 334.254; Tex. Local Gov. Code §§ 34.102-103, 334.081, 334.083, 334.151-152, 334.302-303, 334.201-202; Tex. Transp. Code § 453.401; Tex. Occupations Code § 2153.451.
18. The \$0.05-per-bag “fee” imposed by the Ordinance, despite being labeled a “fee,” is in fact an impermissible tax. It raises more revenue than is reasonably necessary to subsidize the City’s efforts to insure compliance with the Ordinance.
19. The tax imposed by the Ordinance is not authorized by the Texas Constitution or Texas Statutes. It is not a property tax, a hotel occupancy tax, or one of the miscellaneous other taxes a city may impose. Nor is it a permissible sales tax. A city may impose a sales and use tax only if approved by a majority of voters in an election. *See* Tex. Tax Code § 321.101(a); *id.* § 327.003(a); Tex. Local Gov. Code § 334.081(c); Tex. Transp. Code § 453.401(a). Here, the question of whether to impose a plastic bag sales tax was never submitted to the voters in an election and has never been approved by a majority of qualified voters. Moreover, the City has already imposed the maximum amount of sales tax allowed by law.

CAUSES OF ACTION

Count I—Declaratory Judgment

20. Hilex, Superbag, Inteplast, and API seek a declaratory judgment pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, generally, and Section 37.004

thereof, in particular, which provides: “A person . . . whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.” Tex.. Civ. Prac. & Rem. Code § 37.004.

21. Specifically, Hilex, Superbag, Inteplast, and API seek a declaration that the Ordinance, codified at Dallas City Code §§ 9C-1 through 9C-7, violates Tex. Const. Art. XI, § 5 because it conflicts with § 361.0961 of the Texas Health and Safety Code and seeks to regulate in a field occupied by general legislative enactments. Additionally, the Ordinance violates Tex. Const., Art. XI, § 5 by imposing a tax not authorized by statute. The Plaintiffs request that the court declare the Ordinance is illegal, invalid, and unenforceable.

Count II—Request for Injunctive Relief

22. The Plaintiffs have no adequate remedy at law and will suffer irreparable harm, including being injured by an illegal and invalid ordinance if enforcement of the Ordinance is not enjoined.

23. The equities in this matter weigh heavily in favor of the Plaintiffs. Further, the injury they are suffering due to the Ordinance heavily outweighs whatever hardship the City could allege or prove from being restrained and the granting of injunctive relief would not adversely affect public policy or public interest.

24. The City will not be harmed by issuance of an injunction.

Count III—Request for Attorneys’ Fees

25. Hilex, Superbag, Inteplast, and API seek recovery of their attorneys’ fees pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, in general, and Section 37.009

thereof, in particular. Section 37.009 provides: “In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney’s fees as are equitable and just.” Tex. Civ. Prac. & Rem. Code §37.009.

JURY DEMAND

26. Hilex, Superbag, Inteplast, and API request a trial by jury.

REQUEST FOR DISCLOSURE

27. Pursuant to Texas Rule of Civil Procedure 194, Hilex, Superbag, Inteplast, and API request that the City disclose within 50 days of service of this request, the information or material described in Rule 194.2(a)-(1).

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Hilex, Superbag, Inteplast, and API respectfully request the following relief:

- (1) That the defendant be cited to appear and answer;
- (2) That this matter be set for a jury trial;
- (3) That the Court enter a Declaratory Judgment that the Ordinance is preempted by state law and is illegal, invalid and unenforceable in its entirety because it conflicts with Texas Health & Safety Code § 361.0961;
- (4) That the Court enter a Declaratory Judgment that the Ordinance imposes an impermissible tax and is illegal, invalid and unenforceable.
- (5) That the Court enter a permanent injunction prohibiting the City from enforcing Dallas Ordinance.
- (6) That the Court award Hilex, Superbag, Inteplast, and API their reasonable attorneys’ fees as permitted by law, including reasonable fees for the cost of successfully making or responding to an appeal to the court of appeals and the Texas Supreme Court; and
- (7) That the Court award Hilex, Superbag, Inteplast, and API their costs of court; and

- (8) For all such other relief, at law or equity, to which Hilex, Superbag, Inteplast, and API may show themselves entitled.

Respectfully submitted,

THOMPSON & KNIGHT LLP

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