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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

AMERICAN HOTEL & LODGING ASSOCIATION and ASIAN AMERICAN HOTEL OWNERS ASSOCIATION Plaintiffs, vs. CITY OF LOS ANGELES, Defendant.	CASE NO. 2:14-cv-09603-AB-SS Assigned to Hon. Andre Birotte Jr. **PLAINTIFFS' OBJECTION AND REPLY TO DEFENDANTS' UNAUTHORIZED "JOINT SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION" [*DKT. NO 82*]** Date: April 6, 2015 Time: 10:00 am Courtroom: 4-Spring Street Complaint Filed: December 16, 2014

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PLAINTIFFS' OBJECTION AND REPLY TO DEFENDANTS' UNAUTHORIZED JOINT BRIEF

Plaintiffs hereby object to and respectfully request that the Court disregard in its entirety the last-minute "Joint Supplemental Brief In Opposition To Plaintiffs' Motion For Preliminary Injunction," as filed in this matter on April 1, 2015, by Defendant City of Los Angeles (the "City") and Intervenor-Defendant UNITE HERE Local 11 ("Local 11"), which is located in the Court's Docket as Document No. 82. The filing contains substantive arguments and, therefore, constitutes an unauthorized and impermissible "sur-reply".

Neither the Federal Rules of Civil Procedure nor the Local Rules provide for the filing of a "sur-reply"—or "supplemental brief"—in opposition to a motion. Indeed, absent a court order to the contrary, sur-replies are not allowed. *See* Local Rule 7-10.[1] Here, neither Local 11 nor the City sought leave of this Court before filing their joint sur-reply, nor have they even attempted to establish good cause for unilaterally contravening the rules. With Plaintiffs' Motion For Preliminary Injunction set to be heard ***in less than two business days***, this sur-reply is exactly the type of "sand-bag" pleading that our Local Rules forbid.

Further, there is no substantive basis for allowing a sur-reply here. Local 11 and the City claim that their "supplemental" brief is appropriate in order to direct the Court's attention to the Second Circuit Court of Appeal's decision in *Concerned Home Care Providers, Inc. v. Cuomo*, No. 13-3790-CV, 2015 WL 1381380 (2d Cir. Mar. 27, 2015) ("*Concerned Home Care*"). But the *Concerned Home Care* decision is neither controlling precedent nor apposite to the issues in this case. Moreover, the filing does more than just give notice to the Court of a new decision (which Plaintiffs

[1] *See also Giovanazzi v. Schuette*, No. 09-0496 AHM, 2009 WL 649187, at *2 n.6 (C.D. Cal. Mar. 10, 2009) (striking unauthorized sur-reply); *Naufahu v. City of San Mateo*, No. C 07-4517 MMC, 2008 WL 2323869, at *1 n.1 (N.D. Cal. May 14, 2008) (construing pleading as a sur-reply, and noting that "the document is not properly before the court, for the reason that plaintiff failed to obtain Court approval prior to its filing").

have already referred to in their reply (*see* Dkt No. 81) to Local 11's opposition memorandum). Moreover, the "supplement brief" improperly repeats arguments that were already made, all while failing to fairly reflect the Second Circuit's true reasoning or that the case is readily distinguishable from the Ninth Circuit's decision in *Chamber of Commerce v. Bragdon*, 64 F.3d 497 (9th Cir. 1995), which the *Concerned Home Care* decision itself acknowledges, *see id.* at *6 n. 8. It is *Bragdon* which is directly applicable here and, therefore, controls.

The "Wage Parity Law" at issue in *Concerned Home Care* was enacted as part of a Medicaid reform package and sought to regulate *only* businesses that received government funds under New York's Medicaid program, a spending arena that is highly regulated and in which state governments are given wide latitude by Congress to create conditions for payment. The Second Circuit said exactly that: "By applying only to Medicaid-reimbursed care [. . .] the Wage Parity Law is limited to funds over which Congress has granted the state a special 'measure of discretion' to craft 'programs that are responsive to the needs of [its] communities.'" *Concerned Home Care*, 2015 WL 1381380 at *5 (internal citation omitted). This "special measure of discretion" given to states to regulate in the Medicaid reimbursement arena was key in finding that the law is not preempted by the NLRA because a "State's interest in regulating *a certain kind of conduct*" can be "relevant in determining whether Congress in fact intended *the conduct* to be unregulated." *Id.* (emphasis added) (*quoting Metro. Life Ins. Co. v. Massachusetts* ("*MetLife*"), 471 U.S. 724, 749 n. 27 (1985). No such "special measure of discretion" was at play in *Bragdon*, which *Concerned Home Care* itself clearly states, *id.* at *6 n. 8 ("[U]nlike the ordinance in *Bragdon*, which applied to all *private* industrial construction, the Wage Parity Law applies only to Medicaid-reimbursed care") (emphasis in original).

The Second Circuit's dicta that the Supreme Court "has never applied *Machinists* preemption to a state law that does not regulate the mechanics of labor dispute resolution" (*id.* at *6), appears to ignore *N.Y. Tel. Co. v. N.Y. Dep't of Labor*,

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440 U.S. 519, 527 (1979) and the Supreme Court's guidance in *MetLife*, *see* 471 U.S. at 749, n. 27. It is also of no moment because this Ninth Circuit *has* applied *Machinists* preemption to a law that "does not regulate the mechanics of labor dispute resolution." It did so in *Bragdon*!

Lastly, as is recognized in *Concerned Home Care*, a law that seeks to set minimum wage "is ***not*** preempted under the *Machinists* doctrine [when] it does not favor or disfavor collective bargaining, 'eliminate particular bargaining tools,' or dictate the details of particular contract negotiations." *Id.* at *5 (emphasis added). But, as fully set forth in Plaintiffs' Motion For Preliminary Injunction and supporting Reply brief, that is ***exactly*** what the Hotel Workers Act does and exactly why it is "preempted under the *Machinists* doctrine."

For the reasons set forth above, the supplemental brief filed by Local 11 and the City is improper and should be disregarded. Plaintiffs also submit that the facts and reasoning of *Concerned Home Care* are distinguishable and should not be treated as controlling because, *inter alia*, there is Ninth Circuit precedent, *viz. Bragdon*, that directly applies.

DATED: April 2, 2015

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 400 S. Hope St., 8th Floor, Los Angeles, California 90071. On April 2, 2015, I served the document described as **PLAINTIFFS' OBJECTION AND REPLY TO DEFENDANTS' UNAUTHORIZED "JOINT SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION" [DKT. NO 82]** on the interested parties in this action as follows:

> **[X]** (**BY Electronic Transfer to the CM/ECF System**) In accordance with Federal Rules of Civil Procedure 5(d) (3), Local Rule 5-4, and the U.S. District Court of the Central District's General Order governing electronic filing, I uploaded via electronic transfer a true and correct copy scanned into an electronic file in Adobe "pdf" format of the above-listed documents to the United States District Court Central District of California' Case Management and Electronic Case Filing (CM/ECF) system on this date. It is my understanding that by transmitting these documents to the CM/ECF system, they will be served on all parties of record according to the preferences chosen by those parties within the CM/ECF system. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Dated: April 2, 2015, Los Angeles, California.

By: //S//
John A. Canale

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