

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

PORTLAND REGIONAL CHAMBER OF)
COMMERCE; ALLIANCE FOR)
ADDICTION AND MENTAL HEALTH)
SERVICES, MAINE; SLAB, LLC; NOSH,)
LLC; GRITTY MCDUFF’S; AND PLAY)
IT AGAIN SPORTS,)

Plaintiffs)

v.)

CITY OF PORTLAND; and)
JON JENNINGS, in his official capacity as)
City Manager for the City of Portland,)

Defendants)

**JOINT MOTION FOR RELIEF
FROM COURT ORDERS RELATED
TO COVID-19, FOR AN EXPEDITED
SCHEDULE, AND FOR RELIEF
FROM MANDATORY ADR
PURSUANT TO M.R. CIV. P.
16B(b)(9)**

Pursuant to Rule 57 of the Maine Rules of Civil Procedure and this Court’s authority to “order a speedy hearing of an action for declaratory judgment” and to “advance it on the calendar,” and based on the exceptional circumstances outlined below and in compliance with PMO-SJC-1 (last updated Oct. 8, 2020), the Parties jointly request that this Court **promptly schedule a telephonic conference with counsel** to discuss an expedited schedule for this declaratory judgment action, including but not limited to the following matters:

Relief from applicable Court Orders related to COVID-19;

Relief from mandatory ADR pursuant to M.R. Civ. P. 16B(b)(9);

Whether, based on the agreement thereto by all parties appearing, including as to all material facts leaving only questions of law of sufficient importance or doubt to justify a report to the Law Court for determination, and that the decision of the Law Court thereon would, in at least one alternative, finally dispose of this action, this Court should report this action to the Law Court pursuant to M.R. App. P. 24(a); and

In the alternative, an expedited schedule for Defendants’ responsive pleadings, and for briefing, argument, and decision of a dispositive motion pursuant to M.R. Civ. P. 12(c) by Plaintiffs.

BACKGROUND

This action for declaratory judgment challenges the constitutionality, validity, and effective date of a municipal citizens' initiative (the "Initiative") seeking to amend the City of Portland's Minimum Wage Ordinance (the "Ordinance"). A full recitation of the background in this matter is contained in Plaintiffs' Verified Complaint. A brief summary is contained herein for this Court's convenience.

The Ordinance, as originally enacted in 2016, raised the minimum wage payable by Portland-based employers to their Employees (a term defined by the Ordinance), to \$10.10 per hour, with another raise to \$10.68 per hour effective January 1, 2017. Portland Code § 33.7(i)-(ii). Thereafter, the minimum wage increased according to a percent increase in the Consumer Price Index for All Urban Consumers unless the minimum wage rate established by the State under 26 M.R.S. § 664 was equal to or greater than the minimum wage established by the Ordinance. *Id.* § 33.7(iii)-(iv). Currently, the state minimum wage under 26 M.R.S. § 664 of \$12.00 per hour is greater than the minimum wage rate established by the Ordinance. *Compare* Portland Code § 33.7, *with* 26 M.R.S. § 664.

By virtue of the Initiative approved by the voters in Portland on November 3, 2020, this Ordinance will be amended. The Initiative increases the minimum wage for Employees in Portland to \$13.00, effective January 1, 2022, with annual increases thereafter. In addition, the Initiative provides for a sharply escalated minimum wage during periods when either the Governor or the City declares a state of emergency. Compl. ¶ 36. In these circumstances, the minimum wage would rise to 1.5 times the regular minimum wage rate "established by this ordinance" to be paid to Employees for work performed during a declared emergency (the "Emergency Provision"). Compl. ¶ 36. These amendments to the Ordinance become effective thirty (30) days after the vote

on the Initiative was certified, or December 5, 2020.¹ See Portland Charter, Art. II, § 11; Portland Code § 9-42. The City Manager is the municipal officer responsible for enforcing Portland’s ordinances. Compl. ¶ 8.

In this action, Plaintiffs are challenging the Emergency Provision on three grounds: (1) that the Emergency Provision exceeds the scope of the direct initiative powers reserved to municipal voters under article IV, part 3, section 21 of the Maine Constitution because the Initiative does not relate to exclusively “municipal affairs”; (2) that the Emergency Provision of the Initiative exceeds the scope of authority granted to municipal voters under Portland’s ordinance authorizing citizens’ initiatives and referenda because it is administrative and not legislative in character; and, alternatively, (3) that the Emergency Provision of the Initiative is not operative before January 1, 2022, the earliest date by which there is a “minimum wage rate *established by this ordinance*” as amended by the Initiative. Compl. ¶ 36 (emphasis added). There are no material facts disputed by the Parties, and all of Plaintiffs’ challenges to the Initiative therefore present pure questions of law.

As soon as December 5, 2020, Plaintiffs will be forced to make a Hobson’s choice: either some combination of paying the increased wages under the Emergency Provision, laying off employees and reducing services, or shuttering their doors entirely; or instead declining to pay the increased wages under the Emergency Provision and face the significant risk of exposure to both the Initiative’s enforcement by the City Manager and private actions brought by Employees for unpaid wages. See Compl. ¶¶ 43-45; Affidavit of Portland Regional Chamber of Commerce

¹ The City of Portland’s official election results on the Initiative were first certified on November 5, 2020, with an amended official result certified on November 6, 2020. See Amended Official Referendum Results, *available at* <https://www.portlandmaine.gov/Search?searchPhrase=Amended%20Official%20Referendum%20Results%20Nov%203%202020%20Election> (last visited Nov. 29, 2020). The Parties therefore calculate the earliest possible effective date as December 5, 2020 (thirty (30) calendar days from the first certification of the vote on the Initiative).

(“Chamber Aff.”) ¶ 8; Affidavit of Alliance for Addiction and Mental Health Services, Maine (“Alliance Aff.”) ¶¶ 8-9; Affidavit of Slab, LLC (“Slab Aff.”) ¶¶ 4-7; Affidavit of Nosh, LLC (“Nosh Aff.”) ¶¶ 4-7; Affidavit of Gritty McDuff’s (“Gritty’s Aff.”) ¶¶ 4-5; Affidavit of Play it Again Sports (“PIAS Aff.”) ¶ 5. Both choices threaten Plaintiffs’ ability to continue their level of service and even their operations, some of which are a critical part of the infrastructure needed during the Governor-declared State of Emergency to respond to and protect against the significant impacts of COVID-19 in Maine, and further threaten the continued sustainability of Portland’s business community during and after the economic crisis caused by COVID-19, *see* Alliance Aff. ¶¶ 8-9; Chamber Aff. ¶¶ 9-10, and therefore justify an expedited schedule in this Court, if not a direct report to the Law Court, to resolve as promptly as possible the important legal questions raised.

ARGUMENT

1. *Request for Relief from COVID-19 Orders*

PMO-SJC-1 (last updated Oct. 8, 2020), an emergency order issued to adhere to the guidance provided by the Maine and United States Centers for Disease Control to address public health concerns arising from the coronavirus pandemic, permits courts to hold hearings and otherwise to proceed on civil matters upon motion and entry of an order from this Court determining that:

- The nature of the matter for which a hearing or other court action has been requested is urgent and compelling;
- The hearing can be held without requiring the presence of additional court staff; and
- The proceeding can be undertaken without requiring the physical proximity of any participants or placing undue stress on those necessary to the proceeding.

All of the foregoing criteria can be met here.

First, the need for this case to move expeditiously in the circumstances is urgent and compelling. Plaintiffs’ challenges to the Emergency Provision of the Initiative are that it exceeds the scope of the municipal voters’ direct initiative power under the Maine Constitution and the Portland ordinance authorizing direct initiatives, and that its effective date is unclear. These are pure legal issues; there are no material factual issues in dispute. For all parties and non-parties within the greater Portland business community—the City, employers, and employees alike—there are legal, economic, and practical reasons that the Court should resolve the significant and novel constitutional issues at stake in this matter as expeditiously as possible. For Plaintiffs that start paying wages at 1.5 times the state minimum wage rate on December 5, 2020, they will immediately face difficult decisions regarding whether to lay off their workforce, compromise operations, or otherwise shut down completely given the severe economic impacts of the Initiative. Chamber Aff. ¶¶ 8-10; Alliance Aff. ¶¶ 8-9; Slab Aff. ¶¶ 4-7; Nosh Aff. ¶¶ 4-7; Gritty’s Aff. ¶¶ 4-5; PIAS Aff. ¶ 5. Non-party employees of these Plaintiffs will necessarily suffer the consequences of those decisions. For Plaintiffs who do not pay wages at 1.5 times the state minimum wage rate on December 5, 2020, they immediately risk lawsuits being brought against them by their employees or the City Manager to enforce the Ordinance as amended by the Initiative. Compl. ¶¶ 44, 49, 53, 61, 65, 68.

Either way, Plaintiffs, and indeed Portland businesses generally, will suffer immediate adverse impacts regardless of their decision, in addition to significant business disruption; employees in Portland will suffer consequences if employers are forced to lay off their workforce or close down entirely; and the courts could be flooded with litigation brought on behalf of employees or the City Manager to enforce the Emergency Provision of the Initiative. *See* Chamber Aff. ¶ 9 (stating that, in response to a survey of the Chamber’s member constituents regarding the

Initiative, 89% of respondents stated that the Emergency Provision of the Initiative would have a “negative” or “extremely negative” impact on their business or organization, including closures, layoffs, reducing hours for employees, reducing other benefits for employees, or leaving Portland). Most importantly, the compromise or closure of Plaintiffs’ businesses will affect necessary infrastructure for Portland communities to sustain themselves throughout the course of the pandemic, limiting or even eliminating essential services, including mental health services, upon which members of the Portland community and essential workers rely. *See Alliance Aff.* ¶¶ 5, 8; *Chamber Aff.* ¶¶ 9-10.

Many of these adverse and unintended consequences can be avoided or significantly mitigated with prompt resolution of the legal issues in dispute.

Second, a direct report to the Law Court or expedited treatment in the Superior Court can be accomplished without the presence of additional court staff. This case presents for decision pure issues of law, without the need to adjudicate contested material facts. The Court can hold a hearing on Plaintiffs’ forthcoming dispositive motion remotely through Zoom, which is the presumptive format for this action under PMO-SJC-7 (last revised Nov. 3, 2020). This hearing will consist of legal argument only, without live testimony or other contested proof.

Third, because the hearing could be held virtually, it can be undertaken without requiring the physical proximity of any participants or placing undue stress on anyone who must participate in the hearing.

Accordingly, and based on the demonstrated showing of urgent and compelling reasons for this case to be heard, Plaintiffs request relief from PMO-SJC-1.

2. *Request for Report to the Law Court pursuant to M.R. App. P. 24(a) or, in the Alternative, for Expedited Responsive Pleading Deadline and Schedule for Briefing, Argument, and Decision of Dispositive Motion in this Court*

As described above and as set forth fully in the Verified Complaint, the need for an expedited schedule to fully and finally resolve the legal issues presented in this case is significant. Based on the urgent and compelling circumstances Plaintiffs are confronted with, Plaintiffs request that this Court schedule a conference with counsel on the earliest date available, to discuss with this Court the schedule for this action, including the following:

- A direct report to the Law Court pursuant to M.R. App. P. 24(a);
- Alternatively, an expedited deadline for responses to Plaintiffs' Verified Complaint, and an expedited schedule for briefing, argument, and decision on a dispositive motion to be filed by Plaintiffs.

See M.R. Civ. P. 57 ("The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."). Consistent with M.R. Civ. P. 57 and M.R. Civ. P. 16(a)(2), and in the absence of a direct report to the Law Court, an expedited schedule is necessary to allow this case to proceed as quickly as possible through the Superior Court to final judgment.

Accordingly, the Parties request a prompt telephonic conference with this Court to discuss an expedited schedule for this action based on the urgent need to fully and finally resolve this matter as quickly as possible.

3. *Request for Exemption from M.R. Civ. P. 16B*

Finally, the Parties ask this Court to exempt the Parties from the alternative dispute requirements of M.R. Civ. P. 16B. There is no compromise resolution that the Parties are capable of reaching through a settlement or other mediated resolution. Absent declaratory relief, Plaintiffs will each have to make individual business choices regarding the future sustainability of their businesses in light of the Initiative and risk of exposure to litigation from their employees and the

City Manager. Accordingly, and for good cause shown, the Parties request that this Court exempt the Parties from mandatory alternative dispute resolution pursuant to M.R. Civ. P. 16B(b)(9).

CONCLUSION

As described above, given the alleged constitutional and other defects of the Emergency Provision of the Initiative and the corresponding adverse business impacts on Plaintiffs, the necessary conditions exist for this Court to proceed expeditiously as authorized by M.R. Civ. P. 57. Accordingly, Plaintiffs request relief from the pandemic-related order PMO-SJC-1, and **request that this Court promptly schedule a telephone conference with counsel** to discuss (1) the viability of a report to the Law Court pursuant to M.R. App. P. 24(a); and (2) in the alternative, an expedited deadline for Defendants to answer or otherwise respond to Plaintiffs' Verified Complaint, and an expedited schedule for briefing, argument, and decision on a dispositive motion filed by Plaintiffs. Plaintiffs further move for an order from this Court, for good cause shown, exempting the parties from mandatory alternative dispute resolution pursuant to M.R. Civ. P. 16B(b)(9).

Dated this 1st day of December, 2020



John J. Aromando (Bar No. 3099)

James R. Erwin (Bar No. 1856)

Sara A. Murphy (Bar No. 5423)

PIERCE ATWOOD LLP

Merrill's Wharf

254 Commercial Street

Portland, ME 04101

Tel: (207) 791-1100

jaromando@pierceatwood.com

jerwin@pierceatwood.com

smurphy@pierceatwood.com

Attorneys for Plaintiff Portland Regional Chamber of Commerce, Alliance for Addiction And Mental Health Services, Maine; Slab, LLC; Nosh, LLC; Gritty McDuff's; and Play it Again Sports.

/s/ Danielle P. West-Chuhta
Danielle P. West-Chuhta (Bar No. 9532)
CITY OF PORTLAND
389 Congress Street
Portland, ME 04101
Tel: (207) 874-8480
dwchuhta@portlandmaine.gov

*Attorney for Defendant City of Portland and
Jon Jennings, in his official capacity as City
Manager for the City of Portland*

NOTICE

Pursuant to PMO-SJC-1, notice is hereby provided that matters in opposition to Plaintiffs' request for relief from PMO-SJC-1 must be filed within three (3) days after the filing of this Motion.

NOTICE

Pursuant to M.R. Civ. P. 7(c), notice is hereby provided that matters in opposition to the remaining aspects of Plaintiffs' Motion must be filed not later than 21 days after the filing of this Motion unless another time is provided by the Maine Rules of Civil Procedure or by the Court. Failure to file timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.