

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT  
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.:

FLORIDA RETAIL FEDERATION, INC.  
A Florida not for profit corporation; and  
Super Progreso Inc., a Florida  
For Profit Corporation,

Plaintiffs,

vs.

THE CITY OF CORAL GABLES, FLORIDA,  
a Florida municipality

Defendant.

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**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

Plaintiffs, THE FLORIDA RETAIL FEDERATION, INC. (“**FRF**”), and SUPER PROGRESO, INC. (SUPER PROGRESO”) (hereinafter jointly “**Plaintiffs**”) by and through their undersigned counsel, sue the Defendant, THE CITY OF CORAL GABLES, FLORIDA (hereinafter “**Coral Gables**” or “**Defendant**,”) and state as follows:

**GENERAL ALLEGATIONS**

1. This is an action for declaratory judgment pursuant to Chapter 86, Fla. Stat. (2014), and for injunctive relief.
2. FRF is a statewide not-for-profit 501(c)(6) Florida corporation and trade association representing the mutual interests of retail related businesses throughout the state of Florida and the municipality of Coral Gables, Florida, including the interests of its member SUPER PROGRESO.

3. SUPER PROGRESO has its principal address in the municipality of Coral Gables, and conducts business in Coral Gables, Florida.

4. Venue for this action is proper in Miami-Dade County, Florida, under §47.011 Fla. Stat., because this action accrued in this county and because the Defendant is located in this County.

5. This Court has jurisdiction pursuant to Article V, Section 5, of the Florida Constitution and Chapters 26 and 86 Florida Statutes.

### **GENERAL FACTUAL ALLEGATIONS**

#### **A. THE FRF AND ITS MEMBERSHIP**

6. Retailing is the second-largest industry in Florida. Florida retailers provide more than 25 billion in wages annually, provide one of every five jobs in the State, and collect and remit 19 billion dollars in sales and retail related taxes.

7. FRF is an advocate for the Florida retailing industry, including its member SUPER PROGRESO. The purpose of the FRF includes representing Florida's retailing industry before local, state, and national governmental bodies, to serve as a clearinghouse for information that is pertinent to retailers, to support education and youth groups to help foster better understanding of retailing and the many career opportunities in retailing, to help promote the free enterprise system and preserve an open marketplace, to provide opportunities for the retail community to come together for mutual benefit and allow the exchange of ideas, and to actively promote good law enforcement for the benefit of retailing. Included within the FRF is a service called "Ordinance Watch." The purpose of Ordinance Watch is to monitor and advise FRF's members on local

ordinance activity in Florida and local ordinance issues that directly affect FRF members, including SUPER PROGRESO.

8. The FRF consists of more than 5,000 retailers in the State of Florida, including many in the food distribution business. More than 40 FRF members are located in Coral Gables, and subject to the ordinances challenged in this action (as defined below).

9. A substantial number of the FRF members that are food vendors in Coral Gables (including without limitation SUPER PROGRESO), are directly affected by the ordinances challenged herein. The ordinances were within the FRF's general scope of interest and activity, and the relief requested is the type of relief appropriate for the FRF to obtain on behalf of its members.

10. There is a bona-fide, actual, present and practical need for the declaration sought in this action, and the FRF and a substantial number of its members' rights and privileges (including without limitation those of SUPER PROGRESO) are dependent upon a judicial declaration relating to the constitutionality of the ordinances, and the FRF and a substantial number of its members in Coral Gables have an actual, present, adverse, and antagonistic interest in the subject matter of this action. Plaintiff's rights, status or other equitable of legal relations are affected by the Coral Gables Ordinances at issue in this lawsuit.

11. SUPER PROGRESO is a member of the FRF, and a juridical person conducting business in Coral Gables, and as such is a person entitled to actual or constructive notice of Coral Gables commission meeting agendas listing the ordinances and resolutions being considered for adoption by Coral Gables.

**B. STATE LAWS AND CORAL GABLES EFFORTS TO THWART STATE LAW**

12. As more fully alleged below in this Complaint for declaratory and injunctive relief, Coral Gables violated all of the following state laws when prohibiting the use of polystyrene (Styrofoam) containers by all businesses in the City:

- a. §403.708(9) Fla. Stat. (1974) (prohibiting governmental control of the packaging of products manufactured or sold in the state except as stated);
- b. §403.7033, Fla. Stat. (2008) (prohibiting all local governments from enacting rules or ordinances regulating the use, disposition etc. of auxiliary containers used by consumers to carry products from retail establishments); and
- c. § 500.90, Fla. Stat (2016) (preempting the regulation of the use or sale of polystyrene products in Florida to the Department of Agriculture)

13. **Section 403.708 Fla. Stat. Prohibition; penalty**, provides since 1974 in pertinent part:

(9) The packaging of products manufactured or sold in the state may not be controlled by governmental rule, regulation, or ordinance adopted after March 1, 1974, other than as expressly provided in this act.

Section 403.708 Fla. Stat. has been in full force and effect at all times material to this action.

14. Pursuant to **§403.7033, Fla. Stat.** local governments were prohibited effective July 1, 2008, from adopting any regulations of polystyrene auxiliary food containers in Florida. Section 403.7033, Fla. Stat. provides specifically:

The Legislature finds that prudent regulation of recyclable materials is crucial to the ongoing welfare of Florida's ecology and economy. As such, the Department of Environmental Protection shall undertake an analysis of the need for new or different regulation of

auxiliary containers, wrappings, or disposable plastic bags used by consumers to carry products from retail establishments. The analysis shall include input from state and local government agencies, stakeholders, private businesses, and citizens, and shall evaluate the efficacy and necessity of both statewide and local regulation of these materials. To ensure consistent and effective implementation, the department shall submit a report with conclusions and recommendations to the Legislature no later than February 1, 2010. *Until such time that the Legislature adopts the recommendations of the department, no local government, local governmental agency, or state government agency may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags.* (emphasis added)

While the Department of Environmental Protection has made its recommendations to the legislature, the latter has not yet adopted the same, so that the prohibition on local regulation of auxiliary containers used by consumers to carry products from retail establishments remains in full force and effect to date and at all times material to this action.

15. On December 8, 2015, Coral Gables' City Commission (the "**Commission**") considered at first reading Ordinance 15-4582 (the "**December Draft Ordinance**"), purporting to create section 2-801 of the City Code prohibiting, *inter alia*, the use of polystyrene containers by businesses in Coral Gables all together and declaring the "Sale, Use of Distribution [sic] of Polystyrene by Businesses within the City a nuisance." A copy of the December 8, 2015 meeting agenda, Commission cover memorandum and draft ordinance are attached as **Composite Exhibit 1**.

16. The December Draft Ordinance not only prohibited the sale or use or expanded polystyrene by City contractors and vendors under City contracts, and the use of polystyrene containers at special events of the City of Coral Gables (which prohibitions are not challenged in

this action), but also the sale, use, offer for sale or use, or provision of food or beverage in polystyrene containers by any other business in the City. *See* Article VIII of the December Draft Ordinance.

17. On January 27, 2016, prior to the second reading of the December Draft Ordinance, the Florida Legislature considered House Bill 7007 in the House State Affairs Committee, reserving to the State Department of Agriculture regulation of the use and distribution of polystyrene containers in Florida, but specifically grandfathering local regulation of polystyrene containers dating prior to January 1, 2016.

18. House Bill 7007 is a comprehensive legislation relating to the Department of Agriculture and Consumer Services, which repealed some 29 statutory sections, amended 34 statutory sections, and created 4 new provisions, including the reservation of regulation of the use of polystyrene containers to the state legislature.

19. On February 9, 2016, the Coral Gables Commission purported to adopt the December Draft Ordinance (i.e., Ordinance 15-4582) at second reading with some changes. The Commission also provided for an immediate (i.e., February 9, 2016) effective date for the Coral Gables prohibition on all uses by businesses of polystyrene containers (the “**February 2016 Ordinance**”). A copy of the February 9, 2016 meeting agenda, Commission cover memorandum and draft ordinance are attached as **Composite Exhibit 2**

20. On March 9, 2016, House Bill 7007 was passed by the State Senate, and the State House. It was signed into law by the Governor on March 16, 2016.

21. In pertinent part, House Bill 7007 provided:

Section 500.90, Florida Statutes, is created to read:

500.90 Regulation of polystyrene products preempted to [State Department of Agriculture and Consumer Services]. – The regulation of the use or sale of polystyrene products by entities regulated under Chapter 500 is preempted to the department. This preemption does not apply to local ordinances or provisions thereof enacted before January 1, 2016, and does not limit the authority of a local government to restrict the use of polystyrene by individuals on public property, temporary vendors on public property, or entities engaged in a contractual relationship with local government for the provision of goods or services, unless such use is otherwise preempted by law.

22. **Section 500.90 Fla. Stat.** became effective prospectively upon execution by the Governor on March 16, 2016, but grandfathered local regulations *enacted* prior to January 1, 2016. The state statute does not impact any vested substantive rights of the City of Coral Gables or any of its citizens.

23. Section 500.90 Fla. Stat. does not affect any individual rights in Florida, but instead concerns the powers within the hierarchy of state and local government.

24. While the legislature through § 500.90 Fla. Stat. could have trumped, and thus invalidated all local laws inconsistent with the section, it chose to grandfather inconsistent local laws enacted prior to January 1, 2016.

25. The inconsistent Coral Gables Ordinances were not *enacted* prior to January 1, 2016, and are thus ineffective and invalid.

26. The Coral Gables Ordinances also directly conflicted with § 403.708 Fla. Stat. and § 403.7033 Fla. Stat. at all times material to this action.

27. Being fully aware that its prohibition of all use of polystyrene containers by businesses in the City of Coral Gables was not grandfathered and was inconsistent with § 500.90

Fla. Stat. (enacted by the State Legislature on March 9, 2016 but not yet signed by the Governor), the Commission on March 15, 2016 attempted to time travel by resorting to a creative but ultimately illegal gamesmanship: it enacted an “Emergency Ordinance,” purporting to vacate the effective date of the earlier February 2016 Ordinance, and to introduce a new ‘effective date’ of the ordinance retroactive to December 8, 2015 (the “**March 2016 Emergency Ordinance**”). The March 2016 Emergency Ordinance provides that “[t]he Coral Gables City Commission finds that the effective date of Ordinance 2016-08 should be December 8, 2015, the date of first reading,” and “that the retroactive application of the Ordinance is merely procedural in nature.” A copy of the March 15, 2016 meeting agenda, Commission cover memorandum and draft ordinance are attached as **Composite Exhibit 3**.

28. Significantly, the March 2016 Emergency Ordinance, which replaced the February 2016 Ordinance, was itself *enacted* after January 1, 2016, but purported to provide for an ‘effective date’ prior to January 1, 2016. Moreover, the March 2016 Emergency Ordinance also included the other changes passed on second reading of the December Draft Ordinance on February 9, 2016, that *were not part of the December Draft Ordinance* considered on first reading. The March 2016 Emergency Ordinance was thus not the actual ordinance considered on first reading on December 8, 2015.

29. The Commission passed the March 2016 Emergency Ordinance as an emergency ordinance for no other reason than to avoid the dual-reading requirement of Florida Statutes and sneak in before the Governor’s execution of § 500.90 Fla. Stat. § 500.90 Fla. Stat. The City’s March 2015 Emergency Ordinance did not state the nature of the emergency, other than the



pragmatic desire to somehow qualify for grandfathering. When asked for an explanation what the nature of the “emergency” was, Coral Gables’ City Attorney simply stated:

The City also believes an emergency ordinance is warranted to give immediate notice to businesses that it intends to proceed with and enforce its polystyrene ordinance notwithstanding the attempted (and legally insufficient) effort to preempt the ordinance. Otherwise, businesses may think the City does not intend to enforce the ordinance and may cease efforts to comply with the ordinance in a timely manner prior to when the City starts issuing warnings and then citations.”

The entire statement of the Coral Gables City Attorney is attached as **Exhibit 4**.

30. To add insult to injury, on April 12, 2016, the Coral Gables Commission issued its own quasi-declaratory-judgment by passing another Ordinance after the fact, now declaring the §500.90 Fla. Stat. was an improper local, special or general law conflicting with the Dade County Home Rule Charter, and determining that therefore the City’s polystyrene prohibition was not preempted by State law, and remains applicable in Coral Gables. A copy of the April 12, 2016 meeting agenda, Commission cover memorandum and draft ordinance are attached as **Composite Exhibit 5**. Of course, none of Coral Gables’ legislative calisthenics at all complied with the prohibitions of §403.704 Fla. Stat. and §403.7033 Fla. Stat.

31. Apparently no longer sensing an emergency, the Commission, upon second reading on April 26, 2016, passed the ordinance with its declaration of §500.90 Fla. Stat. as an improper local, special or general law (the “**April 2016 Home Rule Ordinance**”). A copy of the April 26, 2016 meeting agenda is attached as **Exhibit 6**.

**COUNT I (declaratory relief)**  
**DECLARATORY JUDGMENT THAT THE FEBRUARY 9, 2016 ORDINANCE**  
**WAS INEFFECTIVE TO PROHIBIT THE SALE USE AND DISTRIBUTION OF**  
**POLYSTYRENE PRODUCTS IN CORAL GABLES**

32. Plaintiffs hereby reallege and reaver their allegations in paragraphs 1 through 31 above as though fully set forth herein.

33. This is an action for declaratory judgment pursuant to §86.021 Fla. Stat.

34. Plaintiffs have a *bona fide*, actual, present and practical need for a declaratory judgment in light of the February 2016 Ordinance in force in Coral Gables. Plaintiffs are in doubt as to their rights with respect to the February 2016 Ordinance in Coral Gables.

WHEREFORE, for the foregoing reasons, Plaintiffs request a declaratory judgment that:

- (a) Article VIII of the February 2016 Ordinance violates § 403.708(9) Fla. Stat. in that it purports to regulate packaging of products manufactured or sold in the state.
- (b) Article VIII of the February 2016 Ordinance violates § 403.7033, Fla. Stat. in that it purports to regulate polystyrene auxiliary containers.
- (c) Article VIII of the February 2016 Ordinance was preempted by §500.90 Fla. Stat and is ineffective to ban the sale, use and distribution of polystyrene containers in Coral Gables as stated, as it was enacted after January 1, 2016;
- (d) Article VIII of the February 2016 Ordinance is unconstitutional and thus ineffective to prohibit the sale, use and distribution of polystyrene containers by businesses in Coral Gables; and

- (e) Plaintiffs are entitled to such other and further relief (including without limitation Plaintiffs' costs and expenses for bringing this action) as the Court deems necessary and proper.

**COUNT II (declaratory relief)**  
**DECLARATORY JUDGMENT THAT THE MARCH 15, 2016 EMERGENCY**  
**ORDINANCE WAS INEFFECTIVE TO PROHIBIT THE SALE USE AND**  
**DISTRIBUTION OF POLYSTYRENE PRODUCTS IN CORAL GABLES**

35. Plaintiffs hereby reallege and reaver their allegations in paragraphs 1 through 31 above as though fully set forth herein.

36. This is an action for declaratory judgment pursuant to §86.021 Fla. Stat.

37. Plaintiffs have a bona-fide, actual, present and practical need for a declaratory judgment in light of the March 2016 Emergency Ordinance in force in Coral Gables. Plaintiffs are in doubt as to their rights with respect to the March 2016 Emergency Ordinance in Coral Gables.

WHEREFORE, for the foregoing reasons, Plaintiffs request a declaratory judgment that Article VIII of the March 2016 Emergency Ordinance:

- (a) violates §166.041 Fla. Stat.;
- (b) violates §166.021 Fla. Stat.;
- (c) violates § 403.708(9) Fla. Stat. in that it purports to regulate packaging of products manufactured or sold in the state.
- (d) violates § 403.7033, Fla. Stat. in that it purports to regulate polystyrene auxiliary containers.

- (e) was not passed due a true emergency, so that it that to comply with the dual reading requirement under Florida Law for the adoption of municipal ordinances, which it did not do;
- (f) violates the constitutional prohibition against *ex post facto* laws.
- (g) violate state constitutional provisions that limit municipal powers.
- (h) improperly attempts to frustrate the purpose of a lawfully enacted Florida Statute;
- (i) improperly attempts to apply a change first passed in the February 2016 Ordinance on second reading because it “could have been passed as an Emergency” on December 8, 2015; and
- (j) and Plaintiff further requests such other and further relief (including without limitation Plaintiffs’ costs and expenses for bringing this action) as the Court deems necessary and proper.

**COUNT III (declaratory relief)**  
**DECLARATORY JUDGMENT THAT THE APRIL 26, 2016 ORDINANCE WAS**  
**INEFFECTIVE TO PROHIBIT THE SALE USE AND DISTRIBUTION OF**  
**POLYSTYRENE PRODUCTS IN CORAL GABLES**

38. Plaintiffs hereby reallege and reaver their allegations in paragraphs 1 through 31 above as though fully set forth herein.

39. This is an action for declaratory judgment pursuant to §86.021 Fla. Stat.

40. Plaintiffs have a bona-fide, actual, present and practical need for a declaratory judgment in light of the April 2016 Ordinance in force in Coral Gables. Plaintiffs are in doubt as to their rights with respect to the April 2016 Ordinance in Coral Gables.

WHEREFORE, for the foregoing reasons, Plaintiffs request a declaratory judgment that:

- (a) the April 2016 Home Rule Ordinance is an improper usurpation of this Court's jurisdiction to declare the validity *vel non* of State Statutes in light of contradictory local laws;
- (b) Section 500.90 Fla. Stat. does not violate the Dade County Charter;
- (c) Section 500.90 Fla. Stat is not an improper special law pertaining solely to Coral Gables;
- (d) Section 500.90 Fla. Stat is a general law pertaining to all Florida municipalities attempting to regulate the use of polystyrene containers;
- (e) Section 500.90 Fla. Stat supersedes conflicting local ordinances passed after January 1, 2016 and attempting to regulate the use, sale and distribution of polystyrene containers in violation of Section 500.90;
- (f) The Commission was without jurisdiction to make declarations as to the validity or invalidity of state laws.
- (g) Plaintiffs are entitled to such other and further relief (including without limitation Plaintiffs' costs and expenses for bringing this action) as the Court deems necessary and proper.

**COUNT IV (Injunctive relief)**  
**INJUNCTIVE RELIEF AGAINST CORAL GABLES PROHIBITING THE  
ILLEGAL PROHIBITION ON BUSINESSES USING, SELLING OR DISTRIBUTING  
POLYSTYRENE CONTAINERS AS PROVIDED AT ARTICLE VIII OF THE CORAL  
GABLES ORDINANCE**

41. Plaintiffs hereby reallege and reaver their allegations in paragraphs 1 through 40 above as though fully set forth herein.

42. This is an action for injunctive relief pursuant to §26.012(3) Fla. Stat. against Coral Gables' enforcement of the February 2016 Ordinance, March 2016 Emergency Ordinance, and April 2016 Home Rule Ordinance.

43. As set forth above, the various attempts by Coral Gables to circumvent the clear will and purpose of the Florida legislature are invalid and violate various laws.

44. Plaintiffs have a clear legal right to the relief requested. Plaintiffs would be irreparably harmed if an injunction against enforcement of the violating Ordinances is not entered. Plaintiffs would have no adequate remedy at law if Coral Gables is not enjoined from enforcing its invalid Ordinances.

45. The public interest requires that the enforcement of the violative Ordinances be enjoined.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request injunctive relief, both temporary and permanent, enjoining Coral Gables from enforcing its illegal ordinances; together with such other and further relief (including without limitation Plaintiffs' costs and expenses for bringing this action) as the Court deems necessary and proper.

Dated this 18<sup>th</sup> day of July, 2016.

*Florida Retail Federation, Inc., et al. v. The City of Coral Gables, Florida.*

Respectfully submitted,

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FORM 1.997. CIVIL COVER SHEET

I. CASE STYLE

IN THE CIRCUIT COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT  
FOR MIAMI-DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

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vs.

THE CITY OF CORAL GABLES, FLORIDA,  
a Florida municipality

Defendant.

II. TYPE OF CASE

(If the case fits more than one type of case, select the most definitive category.)  
If the most descriptive label is a subcategory (is indented under a broader category), place an x in both the main category and subcategory boxes.

- Condominium
- Contracts and indebtedness
- Eminent domain
- Auto negligence
- Negligence—other
  - Business governance
  - Business torts
  - Environmental/Toxic tort
  - Third party indemnification
  - Construction defect
  - Mass tort
  - Negligent security
  - Nursing home negligence
  - Premises liability—commercial
  - Premises liability—residential
- Products liability
- Real property/Mortgage foreclosure
  - Commercial foreclosure \$0 - \$50,000
  - Commercial foreclosure \$50,001 - \$249,999
  - Commercial foreclosure \$250,000 or more
- Constitutional challenge—proposed amendment
- Corporate trusts
- Discrimination—employment or other
- Insurance claims
- Intellectual property
- Homestead residential foreclosure \$0 - \$50,000
- Homestead residential foreclosure \$50,001 - \$249,999
- Homestead residential foreclosure \$250,000 or more
- Nonhomestead residential foreclosure \$0 - \$50,000
- Nonhomestead residential foreclosure \$50,001 - \$249,999
- Nonhomestead residential foreclosure \$250,000 or more
- Other real property actions \$0 - \$50,000
- Other real property actions \$50,001 - \$249,999
- Other real property actions \$250,000 or more
- Professional malpractice
  - Malpractice—business
  - Malpractice—medical
  - Malpractice—other professional
- Other
  - Antitrust/Trade regulation
  - Business transactions
  - Constitutional challenge—statute or ordinance
  - Libel/Slander
  - Shareholder derivative action
  - Securities litigation
  - Trade secrets
  - Trust litigation

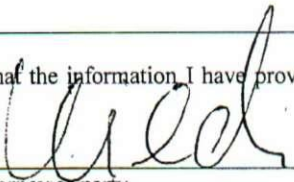


- III. **REMEDIES SOUGHT** (check all that apply):  
▶ nonmonetary declaratory or injunctive relief; *Declaratory* and *Injunctive*
- IV. **NUMBER OF CAUSES OF ACTION:** [4]  
Violation of Florida Statutes
- V. **IS THIS CASE A CLASS ACTION LAWSUIT?**  
 yes  
▶ no
- VI. **HAS NOTICE OF ANY KNOWN RELATED CASE BEEN FILED?**  
▶ no  
yes If "yes," list all related cases by name, case number, and court.
- VII. **IS JURY TRIAL DEMANDED IN COMPLAINT?**  
 yes  
▶ no

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I CERTIFY that the information I have provided in this cover sheet is accurate to the best of my knowledge and belief.

Signature

  
Attorney or party

Claudio Riedi, Esq.  
(type or print name)

Fla. Bar # 0984930  
(Bar # of attorney)

7-18/2016  
Date