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FOR THE CCSF; EDWIN M. LEE,
9 in his official capacity as Mayor of the CCSF

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 SAFEWAY INC., a Delaware Corporation,

13 Plaintiff,

14 vs.

15 CITY AND COUNTY OF SAN
16 FRANCISCO; THE BOARD OF
SUPERVISORS FOR THE CITY AND
17 COUNTY OF SAN FRANCISCO; EDWIN
M. LEE, in his official capacity as Mayor of
18 the City and County of San Francisco

19 Defendant.
20

Case No. CV 11-0761 CW

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
COMPLAINT FOR FAILURE TO STATE A
CLAIM**
[Fed. R. Civ. P. 12(b)(6)]

Hearing Date: June 2, 2011
Time: 2:00 p.m.
Judge: Judge Claudia Wilken
Place: Oakland Courthouse,
Courtroom 2 - 4th Floor

Trial Date: None set

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1 **INTRODUCTION**

2 San Francisco has an ordinance banning tobacco sales by any store that contains a pharmacy.
3 Originally the ordinance included an exemption for grocery stores and big box stores that contain
4 pharmacies. In August 2010, however, the City's Board of Supervisors removed the exemption,
5 meaning all stores with pharmacies are treated equally, and precluded from selling cigarettes.

6 Some Safeway stores have pharmacies. Accordingly, Safeway has sued. The store whose
7 slogan is "Ingredients for Life" wants one of those ingredients to be cigarettes. The legal arguments
8 Safeway makes in support of its effort to have cigarettes on the shelves are: (i) San Francisco has
9 violated the "unconstitutional conditions" doctrine by making stores choose between having
10 pharmacies and selling cigarettes; (ii) San Francisco has violated equal protection by treating stores
11 with pharmacies differently from stores without pharmacies; (iii) San Francisco should have used
12 different words to effectuate its ban on the sale of tobacco products in stores with pharmacies; and (iv)
13 California law prevents local governments from doing more than the state in the fight against tobacco
14 addiction. These arguments speak for themselves. The Court should dismiss the complaint with
15 prejudice.

16 **BACKGROUND**

17 **A. The Original Ordinance.**

18 In 2008 the San Francisco Board of Supervisors passed, and the Mayor signed into law, an
19 ordinance banning the sale of tobacco products in stores that contain pharmacies. *See* Compl., Ex. A
20 (Ordinance No. 194-08). The ordinance was based on the opinions of groups like the American
21 Pharmacists Association, the California Pharmacists Association, and the California Medical
22 Association that local governments should take measures to: (i) prevent people (particularly young
23 people) from getting the wrong idea when a store that participates in the health care delivery system is
24 also willing to sell tobacco; and (ii) eliminate the conflict of interest created when the same store that
25 profits from selling pharmaceutical products also profits from deadly tobacco products. Compl., Ex. A
26 (Ordinance No. 194-08, Findings 1, 7, 8, 9).

1 At the outset, it bears noting that the City made a peculiar choice of words in crafting the
2 ordinance. The City could have effectuated a ban on the sale of tobacco products in stores that contain
3 pharmacies by stating simply, "no store that contains a pharmacy shall sell tobacco products." Instead,
4 it took more of a verbally circuitous route by: (i) stating that "no person shall sell tobacco products in a
5 pharmacy"; (ii) defining "pharmacy" as "a retail establishment" which has a practicing "pharmacist";
6 and (iii) specifying that this definition includes retail establishments that offer other retail goods.
7 Compl., Ex. A (S.F. Admin. Code §§ 1009.92, 1009.91(e)). There is no practical difference between
8 the two wording choices – in each instance it is clear that a store containing a pharmacy is prevented
9 from selling tobacco, even if it sells many other things.

10 Another wrinkle is that the original ordinance, while purporting to ban the sale of tobacco in
11 stores that contain pharmacies, included an exemption for grocery stores and big box stores. Compl.,
12 Ex. A (S.F. Admin. Code § 1009.93). As a practical matter, this meant that large drug stores (like
13 Walgreens) were precluded from selling cigarettes but grocery stores (like Safeway) could continue
14 selling cigarettes, even if those stores also had pharmacies in them.

15 The policy goals of the health organizations that supported the ordinance were not merely
16 reflected in the findings to the ordinance; they were also set forth in legislative testimony by Dr. Mitch
17 Katz, then San Francisco's Director of Public Health. Although Dr. Katz primarily geared his
18 presentation towards justifying the exemption for grocery stores and big box stores (because that
19 aspect of the ordinance gave rise to the most questions), he also made clear that a ban on tobacco sales
20 by all stores with pharmacies would even more effectively advance the City's policy goals:

21 What I was trying to do in our work in fashioning the legislation was focusing
22 on that group where I thought the case was strongest Certainly in the future
23 if we have success and I believe we would, just like San Francisco was the
24 leader [*sic.*] and then broaden the legislation.

25 RJN Ex. A at 32 (Testimony of Dr. Katz to Full Board of Supervisors). *See also id.* at 5, 7 (Testimony
26 of Dr. Katz to Committee on City Operations and Neighborhood Services) (lamenting the "inherent
27 conflict of interest" present when a store makes money on both pharmaceutical products and tobacco
28 products).

1 The Board approved the legislation, and then-Mayor Gavin Newsom signed it into law.
2 Compl., Ex. A at 12. Although the ordinance was the first of its kind in the nation, many local
3 jurisdictions (particularly in Massachusetts) have since followed suit. *See, e.g.*, RJN Exs. B-G
4 (Boston, MA; Richmond, CA; Newton, MA; Everett, MA; Southborough, MA; Oxford, MA;).

5 **B. The Lawsuits By Philip Morris And Walgreens.**

6 The original ordinance prompted two lawsuits, one by Philip Morris and another by Walgreens.
7 The Philip Morris action, filed in this Court, alleged the ordinance violated the First Amendment by
8 punishing tobacco companies and drug stores for "sending a message" about tobacco. This Court
9 denied Philip Morris's application for a temporary restraining order, and later declined to preliminarily
10 enjoin the ordinance. *See Philip Morris USA v. City and County of San Francisco*, 2008 WL 5130460
11 (N.D. Cal.). Philip Morris appealed, and the Ninth Circuit affirmed in an unpublished decision. *See*
12 *Philip Morris USA v. City and County of San Francisco*, 345 Fed.Appx. 276 (9th Cir. 2009). On
13 remand, Philip Morris stipulated to a dismissal of its complaint.

14 The City did not fare as well in the Walgreens action, which was filed in state court.
15 Walgreens argued that the ordinance violated the equal protection provisions of the federal and state
16 constitutions. The company contended that the City's decision to distinguish between drug stores and
17 grocery stores was not rationally related to a legitimate governmental purpose, because there is no
18 practical difference between a Walgreens store (which has a pharmacy in the back, sells cigarettes in
19 the front, and sells numerous other products) and a Safeway store (which has a pharmacy in the back,
20 sells cigarettes in the front, and sells numerous other products). Although the trial court sustained the
21 City's demurrer, the California Court of Appeal reversed, holding that Walgreens' complaint pleaded
22 an equal protection violation. The court held that given the similarities between the modern-day drug
23 store and the modern-day grocery store, there was no basis for concluding people would be more
24 likely to get the wrong message from the sale of tobacco by a Walgreens than by a Safeway.
25 *Walgreen Co. v. City and County of San Francisco*, 185 Cal.App.4th 424, 437-42 (2010).¹ In reaching

26
27 ¹ The slip opinion of the court is attached to the complaint as Exhibit D, but this brief cites to
28 the published version.

1 its conclusion, however, the Court made clear it found no constitutional problem with the City's
2 general decision to ban tobacco sales in stores that contain pharmacies:

3 Walgreens attacks not only the exemption for general grocery stores and
4 big box stores but also claims the very premise of the legislation is questionable.
5 According to Walgreens, "It is simply not credible that 'pharmacies convey tacit
6 approval of the purchase and use of tobacco products' . . . given the decades of
7 anti-smoking media campaigns and warnings that would counteract any such
8 implied message." The premise underlying the prohibition on sales of tobacco
9 products in pharmacies may not be universally accepted. Nonetheless, the
10 government unquestionably has a legitimate interest in discouraging tobacco
11 use. Here, the City made a determination that prohibiting sales of tobacco
12 products in pharmacies furthers that legitimate interest, a determination
13 supported by numerous professional medical and pharmaceutical organizations.
14 While that assessment may be subject to debate – and indeed was debated by
15 members of the Board of Supervisors – it does not violate any constitutional
16 principle.

17 *Id.* at 439. *See also id.* at 441 ("That perception may justify the prohibition against sales of tobacco
18 products by pharmacies *in general*, but it does not justify treating stores such as Walgreens different
19 from general grocery stores and big box stores) (emphasis in original).²

20 **C. The Revised Ordinance.**

21 On remand, the question remained whether the trial court should remedy the equal protection
22 violation by striking down the ordinance entirely (thereby allowing Walgreens and other covered
23 stores to resume selling cigarettes), or by striking down the exemption for grocery stores and big box
24 stores (thereby extending the ban to stores like Safeway and Costco). However, the Board took
25 legislative action which mooted this interesting legal question. It amended the ordinance to remove
26 the exemption for grocery stores and big box stores, thereby equalizing its treatment of all stores that
27 contain pharmacies. Compl., Ex. E. This lawsuit by Safeway followed.

28 **LEGAL STANDARD**

When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim,
dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally
cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555

² It is clear from this language that the Court of Appeal was using the nomenclature of the ordinance – that is, the court referred to stores with pharmacies in the shorthand as "pharmacies," including stores like Walgreens and Safeway.

1 (2007). In considering whether the complaint is sufficient to state a claim, the Court will take all
2 material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus.,*
3 *Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal
4 conclusions; "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
5 statements," are not taken as true. *Ashcroft v. Iqbal*, *U.S.*, 129 S. Ct. 1937, 1949 (2009) (citing
6 *Twombly*, 550 U.S. at 555).

7 ARGUMENT

8 I. THE ORDINANCE DOES NOT IMPLICATE THE "UNCONSTITUTIONAL 9 CONDITIONS" DOCTRINE.

10 The second cause of action alleges that the ordinance imposes an "unconstitutional condition"
11 on Safeway under both federal and state law.³ The allegation appears to be that Safeway has some
12 constitutional right to engage in the pharmacy business or the tobacco business, and that San Francisco
13 may not force Safeway to choose between the exercise of these two alleged constitutional rights.
14 Compl. at ¶¶ 76-80.

15 The unconstitutional conditions doctrine is only implicated when a plaintiff can show it was
16 required to relinquish an actual constitutional right. *See Sanchez v. County of San Diego*, 464 F.3d
17 916, 930-31 (9th Cir. 2006) (state law); *Vance v. Barrett*, 345 F.3d 1083, 1088 (9th Cir. 2003) (federal
18 law).⁴ Safeway cannot make that showing, because it has no right under the state constitution (and
19 certainly not under the federal constitution) to operate a pharmacy or to sell cigarettes. To be sure, the
20 government may not deprive an individual business of a license to operate a pharmacy or sell tobacco
21 without following proper procedures. But it is indisputable that the government may restrict the

22 ³ The first cause of action seeks declaratory and injunctive relief but does not appear to assert
23 an actual legal theory. Thus it stands or falls with the second, third, fourth and fifth causes of action,
24 each of which raises a substantive claim.

25 ⁴ Unconstitutional conditions cases traditionally involve the relinquishment of such
26 fundamental constitutional rights as the right to free speech, *see, e.g., Rumsfeld v. Forum for Academic*
27 *and Institutional Rights, Inc.*, 574 U.S. 47 (2006), the right to abortion, *see Rust v. Sullivan*, 500 U.S.
28 173 (1991); *Comm. to Defend Reprod. Rights*, 29 Cal. 3d 252, the privilege against self-incrimination,
see Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998), the right to be free from unreasonable
searches and seizures, *see Sanchez*, 464 F.3d 916, and the right to just compensation when the
government takes real property, *see, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Vance*, 345
F.3d 1083.

1 ability of companies to obtain or retain a license in the exercise of its police power to promote the
2 health and welfare. "The general right to engage in a trade, profession or business is subject to the
3 power inherent in the state to make necessary rules and regulations No person can acquire a
4 vested right to continue, when once licensed, in a business, trade or occupation which is subject to
5 legislative control under the police powers." *Hughes v. Bd. of Architectural Examiners*, 17 Cal.4th
6 763, 790 (1998) (citations and internal quotations omitted). *See also Davidson v. County of San*
7 *Diego*, 49 Cal.App.4th 639, 642 (1996) ("vested rights may be impaired by subsequent police power
8 enactments reasonably necessary to protect the public's health and safety.").

9 Indeed, the California Court of Appeal made this point more than 60 years ago in the specific
10 context of pharmacies – a point that may have been novel at the tail end of the *Lochner* era but is
11 obvious now:

12 It is conceded that every citizen has a right to follow any lawful business or
13 profession which is not injurious to the public or a menace to the health, safety
14 or welfare of society, free from regulation by the exercise of the police power of
15 the state except in cases of necessity for such health, safety or welfare, and
16 when its authority is so interposed in behalf of the public it must be by means
17 reasonably necessary for the accomplishment of that purpose. A determination
18 of what is reasonably necessary for the public health, safety or welfare is a
19 legislative function and should not be interfered with, only in case of clear
20 abuse. Where a statute is clearly such a measure, the fact that rights may be
21 affected does not invalidate the act A license obtained by compliance with
22 the statutes relating to any one of the many businesses and professions set forth
23 in said code may become of great value to the possessor and cannot be
24 arbitrarily taken from him any more than his real or personal property can thus
25 be taken. But there is no arbitrary deprivation of such right where its exercise is
26 not permitted because of a failure to comply with conditions imposed by the
27 state for the protection of society If, then, the Legislature had the right
28 under the police power of the state to impose restrictions upon assistant
pharmacists to practice in the first instance, and it cannot be denied that such a
subject is a proper one for legislative regulation . . . it necessarily must follow
that the correlative right to impose further restrictions for the same purpose is a
necessary consequence of the initial power A license has none of the
elements of a contract and does not confer an absolute right but a personal
privilege to be exercised under existing restrictions and such as may thereafter
be reasonably imposed The license received by petitioner as an assistant
pharmacist was not for the benefit of himself but for the protection of the public,
and was so accepted by him subject at all times to the paramount right of the
state at any time that the public good demanded, to further restrict his activities
thereunder. If such restrictions and regulations were reasonably adopted for
those purposes, they will be upheld even though they actually may prohibit him
from further engaging in an occupation or profession under a license previously
granted.

1 *Rosenblatt v. California State Bd. of Pharmacy*, 69 Cal. App. 2d 69, 72-75 (1945) (quotations,
2 citations and footnotes omitted).

3 Because Safeway does not have a substantive constitutional right either to operate a pharmacy
4 or to sell tobacco products, the unconstitutional conditions doctrine is not implicated by the City's
5 requirement that it choose between the two.

6 **II. THE ORDINANCE DOES NOT VIOLATE EQUAL PROTECTION.**

7 The third cause of action alleges that the ordinance violates the equal protection provisions of
8 the state and federal constitutions because it treats stores with pharmacies differently from those
9 without pharmacies. An equal protection challenge of this kind raises two questions. First, the Court
10 must determine whether the challenged law treats similarly situated groups differently. If the groups
11 are not similarly situated, equal protection simply is not implicated. *See Fraley v. U.S. Bureau of*
12 *Prisons*, 1 F.3d 924, 926 (9th Cir. 1993) (stating that the court "must first determine whether [the
13 plaintiff] is 'similarly situated' to post-sentence prisoners," and ending the equal protection analysis
14 after finding she was not); *Cooley v. Super. Ct. of Los Angeles Cnty.*, 29 Cal. 4th 228, 254 (2002)
15 (holding that because the plaintiff was not similarly situated to the relevant class, he failed to satisfy
16 this "preliminary requirement" and therefore his equal protection argument "must fail"); *see also U.S.*
17 *v. Woods*, 888 F.2d 653, 656 (10th Cir. 1989) ("If the groups are not similarly situated, there is no
18 equal protection violation.").

19 Second, if the two groups are similarly situated, the Court must apply the appropriate level of
20 equal protection scrutiny. *See People v. Hofsheier*, 37 Cal. 4th 1185, 1200 (2006); *see also U.S. v.*
21 *Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995) ("[I]f it is demonstrated that a cognizable class is
22 treated differently, the court must analyze under the appropriate level of scrutiny whether the
23 distinction made between the groups is justified.").

24 **A. There Is No Cognizable Equal Protection Claim Because The Ordinance Does Not** 25 **Treat Similarly Situated Groups Differently.**

26 On the question whether groups are similarly situated for equal protection purposes, courts
27 must not merely inquire whether the groups are similarly situated in the abstract, but rather whether
28 they are similarly situated with respect to the goals of the law being challenged. *Cooley*, 29 Cal. 4th at

1 253; *see Williams v. Field*, 416 F.2d 483,486 (9th Cir. 1969). As set forth at pages 1-2, there are two
2 basic goals of the ordinance, as articulated both in the legislative proceedings and by the health
3 organizations that have advocated for the measure. First, it sets out to prevent the public, especially
4 young people, from getting the wrong idea when a store that acts as a healthcare provider is also
5 willing to sell cigarettes (much as people would get the wrong idea if a doctor's office or hospital sold
6 cigarettes). Second, it aims to eliminate the inherent conflict of interest created when the same store
7 that profits from selling pharmaceutical products also profits from deadly tobacco products. Both
8 purposes are premised on the basic notion that when a store contains a pharmacy, it is participating in
9 the health care delivery system, not unlike doctors and hospitals. Simply put, the ordinance posits that
10 participants in our health care delivery system should not be selling deadly tobacco products.

11 Stores without pharmacies are not participants in our health care delivery system. It is
12 therefore clear that they are not similarly situated to stores that contain pharmacies with respect to the
13 purposes of this ordinance. Accordingly, equal protection is not implicated, and Safeway's claim must
14 fail.

15 **B. Even If Stores With Pharmacies Were Similarly Situated To Stores Without**
16 **Pharmacies, The City's Differential Treatment Of The Two Is Rationally Related**
To The Legitimate Purposes Of The Ordinance.

17 Even if stores with pharmacies and stores without pharmacies could be deemed similarly
18 situated, that would not ultimately help Safeway. Equal protection does not require that the
19 government treat similarly situated parties in precisely the same manner. Rather, it allows for
20 differential treatment so long as it satisfies the relevant level of scrutiny. *See Engquist v. Oregon*
21 *Dep't of Agric.*, 553 U.S. 591, 602 (2008) ("When those who appear similarly situated are nevertheless
22 treated differently, the Equal Protection Clause requires at least a rational reason for the difference.");
23 *In re Ricky H.*, 2 Cal. 3d 513, 522 (1970) ("Although statutes which affect a particular class must be
24 based upon rational distinctions or classifications, there is no constitutional requirement of uniform
25 treatment.") (citations omitted).

1 Here, there is no question the ordinance is economic legislation subject only to rational basis
2 review. *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1031(9th Cir. 2010);
3 *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298-99 (2007). This level of scrutiny
4 manifests restraint by the judiciary in relation to the discretionary act of a co-
5 equal branch of government; in so doing it invests legislation involving such
6 differentiated treatment with a presumption of constitutionality and "requir[es]
7 merely that distinctions drawn by a challenged statute bear some rational
8 relationship to a conceivable legitimate state purpose."
9 *Hernandez*, 41 Cal. 4th at 298-99 (quoting *Warden v. State Bar of California*, 21 Cal.4th 628, 640-
10 41) (citations omitted in original); *see also Berger v. City of Seattle*, 512 F.3d 582, 607 (9th Cir.
11 2008) ("[T]he general rule is that legislation is presumed to be valid and will be sustained if the
12 classification drawn by the statute is rationally related to a legitimate state interest.") (quoting *City of*
13 *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).⁵

14 "[T]he burden of demonstrating the invalidity of a classification under this standard rests
15 squarely upon the party who assails it." *Warden*, 21 Cal.4th at 641. The legislation "must be upheld
16 against equal protection challenge *if there is any reasonably conceivable state of facts that could*
17 *provide a rational basis for the classification*. Where there are plausible reasons for the
18 classification, our inquiry is at an end." *Warden* 21 Cal.4th at 644 (quoting *FCC v. Beach Commc'ns,*
19 *Inc.*, 508 U.S. 307, 313 (1993) (emphasis in original)).

20 Safeway contends the ordinance violates equal protection because it discriminates between
21 stores "based solely on whether or not there is a licensed pharmacy somewhere on their premises."
22 Compl. ¶ 84. However, this differential treatment is rationally related to the legitimate purposes of the
23 ordinance. The ordinance's basic purpose is to prevent people from becoming addicted to tobacco and
24 to help those already addicted to stop smoking. This is not merely a legitimate purpose; it is a
25 compelling one. The measure accomplishes this goal by helping to prevent people (particularly young
26 people) from getting the wrong idea about cigarettes when a key participant in the health care delivery
27 system sells deadly tobacco products. It also ensures that when patients go to a pharmacy to obtain a

28 ⁵ The test for rational basis review is the same under both state and federal law. *See Kasler v. Lockyer*, 23 Cal. 4th 472, 481-82 (2000).

1 prescription given by their doctors (say, a prescription for a heart or lung problem), they will not be
2 tempted to purchase a product that is at cross-purposes with the treatment they are receiving.
3 Furthermore, it is also entirely legitimate for the government to want to protect entities that participate
4 in the health care delivery system from the conflict of interest inherent in simultaneously treating
5 people's health problems and selling them tobacco.

6 The rationality of San Francisco's measure is underscored by its support from major health care
7 organizations. In 2007, the AMA passed a resolution which opposes "the sale and marketing of
8 tobacco products, including cigarettes, in a pharmacy," and expresses commitment to "work to pass
9 legislation at the local, state and federal levels to accomplish the goal of banning tobacco sales in
10 pharmacies nationwide."⁶ This resolution did not merely apply to actual pharmacies within stores,
11 but to "any facility where health services are provided."⁷ In its findings, the AMA provided reasons
12 similar to those provided by the Board for its ban, stating: "[t]hose pharmacies that sell cigarettes and
13 other tobacco products, do so to generate additional profits, while making it convenient and
14 sometimes subtly enticing their customers to use a product which can only harm the health of the user
15 and those around him/her."⁸

16 Similar sentiments have also been expressed by the California Medical Association,⁹ the
17 National Community Pharmacists Association,¹⁰ the San Francisco Medical Society,¹¹ the
18

19 ⁶ AMA, 2009 Annual Meeting, 552-53 (available at [http://www.ama-](http://www.ama-assn.org/resources/doc/hod/a-09-resolutions.pdf)
20 [assn.org/resources/doc/hod/a-09-resolutions.pdf](http://www.ama-assn.org/resources/doc/hod/a-09-resolutions.pdf)).

21 ⁷ Memorandum from Jeremy A. Lazarus, M.D., Speaker, House of Delegates, to Delegates at
22 Resolution 419 (June 2, 2009) (available at [http://www.ama-assn.org/ama1/pub/upload/](http://www.ama-assn.org/ama1/pub/upload/mm/475/handbookaddendum.pdf)
23 [mm/475/handbookaddendum.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/475/handbookaddendum.pdf)).

24 ⁸ *Id.*

25 ⁹ Resolution 719-08 (supporting a prohibition on the sale of tobacco products "in any store that
26 contains a pharmacy") (available at <http://www.calphys.org/html/alert101308.asp>).

27 ¹⁰ Resolution #2 (2008) ("any law or regulation prohibiting the sale of tobacco products should
28 apply to all entities operating a pharmacy") (available at [http://www.ncpanet.org/pdf/](http://www.ncpanet.org/pdf/2008ncpa_resolutions20081014.pdf)
29 [2008ncpa_resolutions20081014.pdf](http://www.ncpanet.org/pdf/2008ncpa_resolutions20081014.pdf))

30 ¹¹ *San Francisco Expands Tobacco Ban, Nullifies Walgreens Lawsuit*, 83 S.F. Med., Nov.
31 2010 at 5, (SFMS "has supported [San Francisco's ordinance] from the outset, including filing legal
32 briefs in support") (available at [http://www.sfms.org/AM/Template.cfm?Section=Home&](http://www.sfms.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3186)
33 [TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3186](http://www.sfms.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3186)).

1 International Pharmaceutical Federation,¹² the Medical Faculty Associates of George Washington
2 University,¹³ and the Metropolitan DC Thoracic Society.¹⁴ It cannot be that so many of the major
3 public health organizations in the nation are irrational. And that is why the California Court of
4 Appeal acknowledged in the Walgreens litigation that even if it were debatable that a ban on tobacco
5 sales in stores with pharmacies would reduce tobacco addiction, such a ban – so long as it did not
6 distinguish between different kinds of stores with pharmacies – "does not violate any constitutional
7 principle." *Walgreen*, 185 Cal. App. 4th at 439. *See also* discussion of Court of Appeal decision at
8 pp. 3-4, *supra*. Because the California Court of Appeal was not wrong on this point, this Court
9 should dismiss Safeway's equal protection claim.

10 **III. THE CITY'S CHOICE OF LANGUAGE TO EFFECTUATE A BAN ON TOBACCO**
11 **SALES IN STORES WITH PHARMACIES DOES NOT RENDER IT INVALID.**

12 Safeway's fourth cause of action alleges the ordinance violates due process. It argues that the
13 City's decision to define a "pharmacy," for purposes of the ordinance, as any store that contains a
14 licensed pharmacy is "arbitrary and capricious." Compl. at ¶ 91. In other words, Safeway contends
15 the City's decision to classify grocery stores like Safeway as "pharmacies" for purposes of the
16 ordinance constitutes a constitutional violation.

17 A legislature's choice of nomenclature, in and of itself, cannot possibly violate due process. To
18 be sure, an ordinance must not be unconstitutionally vague, but Safeway cannot possibly mean to
19 argue that the ordinance fails to put a reasonable person on notice of the conduct prohibited and the
20

21 ¹² Press Release, International Pharmaceutical Federation, FIP Calls for Ban on Tobacco Sales
22 and Smoking in Pharmacies (Sep. 8, 2004) ("pharmaceutical organizations [should] diligently pursue
23 policies that tobacco products are not sold in pharmacies, and that licensing bodies should not license
24 pharmacies that are located in premises in which such products are sold") (available at
25 <http://www.fip.org/projectsfip/pharmacistsagainsttobacco/20040908PressReleaseFIP.pdf>).

26 ¹³ Letter from Alan G. Wasserman, M.D., Chairman, George Washington Univ. Dep't of Med.,
27 to the Council of the District of Columbia (July 15, 2010) (urging the Council of the District of
28 Columbia to "promptly pass legislation that eliminates tobacco sales in any establishment in
Washington, D.C. that operates a pharmacy") (available at http://www.tobaccofreerx.org/images/GW_University_Medical_Faculty_Associates_endorsement.pdf).

¹⁴ Letter from Robin L. Gross, M.D., President, Metropolitan D.C. Thoracic Soc'y, to the
Council of the District of Columbia (June 14, 2010) (same) (available at
http://www.tobaccofreerx.org/images/Metropolitan_DC_Thoracic_Society_endorsement.pdf).

1 entities covered. It is quite clear that any store containing a pharmacy may not sell tobacco; there is no
2 confusion about which stores the ordinance covers and which it does not.

3 Safeway's due process cause of action appears to assume there would be no due process issue
4 had the ordinance stated it was banning tobacco sales in "stores with pharmacies." But that is exactly
5 what the ordinance does. It uses language that takes a bit longer to read, but accomplishes exactly the
6 same thing. Safeway demeans the Constitution by arguing that this word choice, which is utterly
7 inconsequential from a practical standpoint, creates a due process problem.

8 **IV. THE ORDINANCE IS NOT PREEMPTED.**

9 **A. State Tobacco Control Laws Do Not Preempt The Ordinance.**

10 Safeway's fifth cause of action asserts that an unidentified provision of the California Business
11 and Professions Code, relating to tobacco permits, preempts local governments from enacting
12 measures like San Francisco's. Compl. at ¶ 99.

13 Article XI, section 7 of the California Constitution provides: "A county or city may make and
14 enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict
15 with general laws." A local measure is "in conflict with general laws" if it "duplicates, contradicts, or
16 enters an area fully occupied by general law, either expressly or by legislative implication." *O'Connell*
17 *v. City of Stockton*, 41 Cal.4th 1061, 1067 (2007) (citations and internal quotations omitted).

18 San Francisco's ordinance does not fall within these preemption categories. To the contrary,
19 the pertinent statutes show that the California legislature has authorized local governments to go
20 beyond state law, to further protect their citizens from the health threat posed by tobacco products.

21 The Cigarette and Tobacco Products Licensing Act, which is presumably the Business and
22 Professions Code provision Safeway means to invoke, creates a licensing scheme and uses local
23 governments to help administer it. However, far from preventing local governments from doing more,
24 this provision states, "[n]othing in this division preempts or supersedes any local tobacco control law
25 other than those related to the *collection of state taxes*." Cal. Bus. & Prof. Code § 22971.3 (emphasis
26 added).

1 California Health and Safety Code Section 118950(b) makes it unlawful for those who sell
2 tobacco to distribute free tobacco products to people in specified areas. However, that statute also
3 provides: "An ordinance that imposes greater restrictions on the sale or distribution of tobacco than
4 this section shall govern, to the extent of any inconsistency between it and this section." Cal. Health &
5 Safety Code § 118950(e).

6 Finally, the Stop Tobacco Access To Kids Enforcement Act ("STAKE Act") contains
7 numerous provisions designed to ensure local governments have supplemental power to regulate
8 tobacco sales and promotion. *See* Cal. Bus. & Prof. Code § 22950 *et. seq.* For example, the STAKE
9 Act restricts cigarette vending machines, but specifies that "[a] local standard that further restricts or
10 imposes a complete ban on the sale of cigarettes or tobacco products from vending machines or
11 devices shall control in the event of an inconsistency between this section and a local standard." Cal.
12 Bus. & Prof. Code § 22960(c). The Act restricts tobacco advertising on billboards, but states that "[a]
13 local standard that imposes a more restrictive or complete ban on billboard advertising or on tobacco-
14 related billboard advertising shall control in the event of any inconsistency between this section and a
15 local standard." Cal. Bus. & Prof. Code § 22961(b). And the Act restricts self-service displays of
16 tobacco products, but makes clear that when a local standard "imposes greater restrictions on the
17 access to tobacco products, the greater restriction on the access to tobacco products in the local
18 standard shall prevail." Cal. Bus. & Prof. Code § 22962(e).

19 None of this could possibly lead to the conclusion that San Francisco is prohibited from
20 banning tobacco sales in stores with pharmacies. To the contrary, at every turn the Legislature has
21 made clear that local governments have broad authority to take action, over and above what the State
22 has already done, in furtherance of the battle against tobacco addiction.

23 **B. State Laws Governing Pharmacies Do Not Preempt The Ordinance.**

24 Safeway's fifth cause of action also asserts that state statutes regulating pharmacies preempt the
25 ordinance. Again, Safeway has chosen not to identify the specific provisions it believes have this
26 preemptive effect. In any event, this preemption claim appears to depend on Safeway's argument that
27 San Francisco may not use a verbally circuitous route to effectuate its ban on tobacco sales in stores
28

1 with pharmacies. *See* Compl. at ¶ 98 ("The Business and Professions Code does not permit the City to
2 define a "pharmacy" as any place in the same building where general retail goods are sold outside the
3 physical premises of a pharmacy where prescriptions are filled by licensed pharmacists"). As
4 discussed in Section III above, Safeway's contention about the City's choice of words is preposterous.

5 To the extent this cause of action argues something more, it is baseless. To be sure, California
6 law extensively regulates actual pharmacies. *See* Cal. Bus. & Prof. Code § 4000 *et seq.* Had San
7 Francisco enacted an ordinance regulating, say, the manner in which actual pharmacies store their
8 medicine, or the manner in which they sell their pharmaceutical products, that would present a serious
9 preemption question. This ordinance, however, does not, because it in no way operates in the area
10 covered by the state statutes regulating actual pharmacies.

11 **CONCLUSION**

12 Because the complaint fails to state a claim, and because no amendment could cure its legal
13 deficiencies, the Court should dismiss it with prejudice.

14
15 Dated: April 15, 2011

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