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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PHILIP MORRIS USA INC.,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO; BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; and GAVIN NEWSOM, in his official capacity as MAYOR of the City and County of San Francisco,

Defendants.

CASE NO. C-_____

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF PHILIP MORRIS USA INC.'S *EX PARTE* MOTION FOR A TEMPORARY RESTRAINING ORDER

[Local Civ. R. 65-1(a)(2)]

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Philip Morris USA Inc. ("PM USA") respectfully moves *ex parte* for a temporary restraining order ("TRO"), enjoining enforcement of City Ordinance No. 194-08 ("the Ordinance") pending a hearing and ruling on whether to issue a preliminary injunction.[1] By enacting and threatening to enforce the Ordinance, Defendant City and County of San Francisco, through its Board of Supervisors and its Mayor (collectively "the City"), seek to ban cigarette sales in drugstores based on the City's conceded antipathy *towards the point-of-sale cigarette advertising that accompanies such sales*. Absent a TRO from this Court, PM USA will suffer irreparable injury to its First Amendment and federal rights by being forced to dismantle its product displays and their accompanying advertising from the 60 San Francisco drugstores (mostly Walgreens and Rite Aid stores) that currently sell cigarettes (among innumerable other consumer items) at their main retail counters—*not* at the separate pharmacy counter located at the rear of the store these stores. *See* Declaration of Kent Zerangue, ¶¶ 5-7; *id.*, Ex. A-B. Because the balance of equities tips sharply in PM USA's favor, and PM USA is likely to succeed on the merits of its claims, a TRO should issue ***before*** the Ordinance takes effect on October 1.

PM USA does not contest that the City possesses power to adopt appropriate regulations of cigarette sales for reasons that are unrelated to the suppression of communication (*e.g.*, to prevent access by youth, etc.). But at the same time, it is axiomatic that the government "may not proscribe particular conduct *because* it has expressive elements." *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (emphasis in original). "'[T]he more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription.'" *Id.* (emphasis in original) (citation omitted). The City has violated that bedrock principle here by seeking to ban cigarette sales in drugstores based on the City's conceded hostility towards the cigarette advertising that goes with those sales.

All 60 of the retail stores that will be affected by the Ordinance are participants in PM

[1] A copy of the Ordinance is attached as Exhibit A to the Declaration of Jason Rantanen ("Rantanen Decl."), filed concurrently herewith.

USA's "Retail Leaders" program, meaning that each of them has a prominent display of PM USA cigarettes and advertising directly behind the retail counter. *See infra* at 5-6. If the Ordinance goes into effect on October 1, all of these displays and advertising will necessarily be removed from these stores. And that is exactly what the City wants. As stated in the Ordinance itself, the City's announced purpose in prohibiting cigarette sales in such stores is that the overwhelming majority of San Francisco "pharmacies selling cigarettes *display[] tobacco advertising*," and the visible presence of tobacco for sale in pharmacies "convey[s] tacit approval of the purchase and use of tobacco products" and "sends a mixed message to consumers who generally patronize pharmacies for health care services." *See* S.F. Ordinance No. 194-08, § 1(7), (20). The City's effort to ban sales based on the advertising that accompanies those sales violates established First Amendment principles. A regulation (such as the Ordinance) that purports to regulate only conduct, but that imposes substantial incidental burdens on speech, may only be sustained if, *inter alia*, the government seeks to regulate "for reasons unrelated to the communication of ideas." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001). The Ordinance clearly fails this test, because its announced purpose is to limit and suppress "message[s]" of "tacit approval" of tobacco products that comes from the display of cigarettes and cigarette advertising. Likewise, the Ordinance cannot be sustained as a "time, place, and manner" restriction, because the First Amendment requires that such restrictions be *content-neutral* and unrelated to the suppression of communication. *See infra* at 11-12.

The Ordinance is invalid for the additional reason that it is expressly preempted by federal law. The Federal Cigarette Labeling and Advertising Act ("FCLAA") establishes "a comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard*, 533 U.S. at 541. FCLAA contains a "sweeping" preemption provision, *id.* at 542, which preempts any "requirement or prohibition based on smoking and health" that is "imposed under State law with respect to the advertising or promotion of any cigarettes ...." 15 U.S.C. § 1334(b). Here, the Ordinance indisputably imposes "requirements or prohibitions" that are "based on smoking and health." And although styled as only a regulation of "sales," the Ordinance plainly imposes prohibitions "*with respect to* ... advertising or promotion" of cigarettes. In assessing the

line between nonpreempted regulation of "conduct" concerning cigarettes and preempted regulation of cigarette advertising, the Supreme Court in *Lorillard* relied on the well-developed body of First Amendment law that addresses the directly analogous question of classifying a law as a regulation of conduct or a regulation of speech. 533 U.S. at 552. Because, as explained above, the Ordinance would be treated as a regulation of speech for purposes of the First Amendment, under *Lorillard* it should therefore be deemed to be a regulation "with respect to ... advertising and promotion" for purposes of FCLAA. As such, all of the requirements of § 1334(b) are met, and the Ordinance is preempted.

There can also be little doubt that the balance of hardships tips sharply in PM USA's favor. "'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for purposes of the issuance of a preliminary injunction." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (citation omitted). In addition, PM USA will be irreparably injured by the loss of prime advertising space in retail stores that currently account for a disproportionate share of PM USA's sales in San Francisco—over 20%— and PM USA may well be unable to regain that space if the Ordinance goes into effect only to be invalidated later. *See infra* at 8. The City, by comparison, will not be harmed by a brief delay in the enforcement of the Ordinance—sufficient to permit full briefing on an order to show cause concerning a preliminary injunction. Indeed, the City itself delayed the effective date of the Ordinance by a few weeks when it was enacted. For that reason, the balance of harms strongly favors issuance of a TRO.

II. BACKGROUND

A. The Challenged Ordinance

San Francisco's recently enacted Ordinance 194-08 amends the City's Health Code by adding a new Article 19J that generally bans the sale of tobacco products in any "pharmacy." *See* S.F. Health Code § 1009.91, *et seq*. Specifically, the Ordinance makes it "unlawful to sell tobacco products in a pharmacy," subject to certain exceptions. *Id.*, § 1009.92. The Ordinance, in turn, broadly defines a "pharmacy" to include any retail store that offers pharmaceutical services, even if the sale of pharmaceuticals is only a fraction of the store's overall business:

> Pharmacy shall mean a retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California in accordance with the Business and Professions Code is practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to prescription pharmaceuticals. For purposes of this Article, "pharmacy" includes retail stores commonly known as drugstores.

Id., § 1009.91(e). The Ordinance, however, contains an exemption for "General Grocery Stores" (such as supermarkets) and "Big Box Stores" (such as Costco). *Id.*, § 1009.93.[2] The Ordinance's prohibition does not take effect immediately, and retail stores covered by it may continue to sell tobacco products through September 30, 2008. *Id.*, § 1009.95.

The Board of Supervisors made several express "[f]indings" that explained the rationale for the Ordinance. Specifically, the Ordinance found that, "[t]hrough the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products," and "[t]his approval sends a mixed message to consumers who generally patronize pharmacies for health care services." *See* S.F. Ordinance No. 194-08, § 1(7). The Ordinance left no doubt that the source of this "mixed message" was not the mere physical presence of cigarettes for sale in the affected retail stores, but rather the *display* of cigarettes and of the *advertising* that invariably accompanies the offering of cigarettes for sale. Thus, the Ordinance specifically found that, "[i]n a 2003 study of San Francisco pharmacies' merchandising of cigarettes, 84% of pharmacies selling cigarettes displayed tobacco advertising." *Id.*, § 1(20). At the various hearings held by the Board of Supervisors in connection with the adoption of the Ordinance, witnesses similarly and repeatedly confirmed that the Ordinance was aimed at the cigarette advertising and displays that occur in such retail stores. *See infra* at 9-10. For example, witnesses complained about the attractive "colors and imagery" used in cigarette advertising, when in their view such stores should be conveying "the message that the pharmacy is here to support you in your attempt to

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[2] The Ordinance defines a "General Grocery Store" by reference to Section 790.102(a) of the San Francisco Planning Code, which in turn defines the phrase as referring to an "individual retail food establishment" that exceeds 5,000 square feet, "[o]ffers a diverse variety of unrelated non-complementary food and non-food commodities," prepares no more than minor amounts of food for immediate on-site consumption, and markets most of its merchandize at retail prices. *See* S.F. Health Code § 1009.91(c) (defining "General Grocery Store"); S.F. Planning Code § 790.102(a). The Ordinance defines a "Big Box Store" as a "single retail establishment occupying an area in excess of 100,000 gross square feet." *See* S.F. Health Code § 1009.91(a).

quit smoking." *See* Declaration of Emily Martinez ("Martinez Decl."), Ex. A, at 16.

The City has further confirmed, in related state-court litigation, that the purpose of the Ordinance is to limit and suppress "implicit message[s] that smoking is acceptable." In a pending suit brought by Walgreen Co. ("Walgreens") against the City in San Francisco Superior Court, Walgreens alleges that the exemption for big box stores and general grocery stores lacks any rational basis and therefore violates the Equal Protection Clause. *See* Rantanen Decl., Ex. B. In its written opposition to Walgreens' motion for a preliminary injunction, filed on September 18, 2008, the City stated that the rationale of the Ordinance is that "drug stores should not be selling tobacco, because when health-promoting businesses sell tobacco, it sends an implicit message that smoking is acceptable" and that the exception for Big Box Stores and General Grocery Stores was rational because the retail stores covered by the Ordinance "send[] that implicit message of acceptability more strongly than the sale of cigarettes by big box stores or grocery stores, even if those stores too have pharmacies in them." *See* Rantanen Decl., Ex. D at 7.

B. The Substantial Impact of the Ordinance on PM USA's Advertising and Promotional Activities

When the prohibitions of the Ordinance take effect on October 1, 2008, some 60 retail stores in San Francisco that currently sell PM USA cigarettes and that are covered by the Ordinance (59 of which are either Walgreens or Rite Aid stores) will be required to cease selling tobacco products. *See* Declaration of Peter Paoli ("Paoli Decl."), ¶ 22. They will remove their displays of PM USA products and, importantly, they will remove the advertising and promotional materials that accompany these displays. *Id.*, ¶¶ 22, 23.

All 60 of these stores are participants in PM USA's "Retail Leaders" program, which generally requires them to display specified amounts of PM USA advertising. *See* Paoli Decl., ¶ 22; *see also id.*, Ex. F. Under this program, PM USA requires retailers to display tobacco products in various types of non-self-service displays (*i.e.*, behind the counter), even in States where this is not legally required.[3] *Id.*, ¶ 20. The program also specifies parameters for the

[3] California law bans self-service displays of tobacco products. *See* Cal. Bus. & Prof. Code § 22962(b).

placement, size, and nature of PM USA advertising on the displays. *Id.*, ¶ 19.

By effectively eliminating PM USA's products and their accompanying advertising from these 60 stores, the Ordinance will significantly reduce the amount of physical retail space in San Francisco that is available for the display of PM USA advertising and promotional materials. Moreover, because the affected 60 stores account for a disproportionately large share of PM USA's entire sales volume in San Francisco—over 20%—the effect of the Ordinance will be to eliminate PM USA advertising and promotional materials from what has proved to be one of the most convenient and effective venues for reaching adult smokers. *See* Paoli Decl., ¶¶ 22-23.

The impact of this substantial reduction in the number of retail locations that will carry PM USA point-of-sale advertising and promotional materials is magnified by the lack of equally effective alternatives for PM USA to communicate with adult smokers, especially smokers of competing brands of cigarettes. *See* Paoli Decl., ¶¶ 9-13. For example, PM USA and other tobacco manufacturers have not advertised in radio or television since 1971, when a federal statute took effect making it "unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." *See* 15 U.S.C. § 1335; *see also* Paoli Decl., ¶ 11. Moreover, the Consent Decrees implementing the 1998 Master Settlement Agreement ("MSA") with the Attorneys General of 46 States (including California) impose wide-ranging restrictions on the advertising, promotion, and marketing of cigarettes and smokeless tobacco products. In particular, the MSA:

- prohibits virtually all forms of outdoor advertising, including billboards, stadiums, shopping malls, video game arcades, transit ads, and any exterior signage except on the premises of retail stores that sell cigarettes;
- prohibits merchandise bearing cigarette brand names (so-called "branded items");
- prohibits brand name sponsorship of concerts;
- places restrictions on brand name team sponsorships;
- places restrictions on marketing practices such as free product sampling; and
- prohibits paid product placement in movies or television.

See Paoli Decl., ¶ 10; Rantanen Decl., Ex. E.

PM USA's tobacco product advertising is also limited in other ways. In 2000, PM USA significantly limited the number of magazines in which it placed advertisements, so as to avoid placing advertisements in magazines that had substantial youth readership. *See* Paoli Decl., ¶ 12; *see also People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal. App. 4th 1253, 1281-83 (2004) (favorably discussing PM USA's 2000 magazine policy).[4] Notably, the California Attorney General brought suit in March 2001 against a competing cigarette manufacturer that initially declined to adopt restrictions on its print advertising that were similar to those adopted by PM USA in 2000. *Id.* at 1260. The California Attorney General's suit contended that the competing cigarette manufacturer's continued advertising in certain magazines constituted "targeting" of youth in violation of the MSA. The trial court ultimately enjoined the manufacturer, and the injunction was affirmed on appeal. *Id.* at 1291.

As a result of the limited avenues of communication left open to PM USA, in-store advertising and promotion is an important means of developing brand awareness in adult smokers. *See* Paoli Decl., ¶ 13.

III. ARGUMENT

A. Standard For Issuance of Temporary Restraining Order

"The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction." *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). In the Ninth Circuit, such interim injunctive relief

> is appropriate when a plaintiff demonstrates either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor. These two options represent extremes on a single continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor.

The Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (internal quotation marks, citations, and alterations omitted).

[4] PM USA subsequently stopped running magazine advertisements for any of its brands. *See* Paoli Decl., ¶ 12.

B. The Balance of Hardships Tips Sharply in PM USA's Favor

Because PM USA faces an imminent threat to both its First Amendment rights and important channels of business and communication—whereas the City has elaborated no urgent need for the Ordinance to take immediate effect—it is clear that the balance of harm tips sharply in PM USA's favor. It is well settled that "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for purposes of the issuance of a preliminary injunction.'" *Sammartano*, 303 F.3d at 973 (citation omitted). Because the Ordinance's purpose and effect is the removal of constitutionally protected advertising, PM USA has plainly established that it will suffer irreparable harm if the Ordinance goes into effect.

Additional considerations further establish that the balance of hardships tips sharply in PM USA's favor. Absent a TRO from this Court, PM USA product displays and advertising will be *physically removed* from 60 major retail stores in San Francisco. *See* Paoli Decl., ¶¶ 16-17, 22-23. Moreover, these stores are among the most effective venues for reaching adult smokers: as noted above, these five dozen stores alone yield over 20% of the sales volume of PM USA products in San Francisco. *Id.*, ¶ 22. Once these PM USA products displays and advertising are removed, there is no guarantee that, if the Ordinance is later invalidated, PM USA will be able to regain the valuable slots it currently has in these highly trafficked stores. *Id.*, ¶ 24. In addition, allowing the ban to go into effect, only later to have it invalidated, would cause significant confusion and disruption to San Francisco adult smokers who wish to find and purchase their preferred brands.

The City, for its part, faces no imminent harm if the Ordinance is temporarily prevented from going into effect. The City has stated that it does not expect the Ordinance to reduce tobacco sales, *see infra* at 10, and so it cannot claim that the Ordinance will produce that result if allowed to go into effect. Most importantly, the City has already delayed the effective date of the Ordinance on its own, *see* S.F. Health Code § 1009.95, and it is difficult to see what harm the City would suffer (much less irreparable harm) if the Ordinance's effective date is temporarily deferred for the short additional period of time necessary to allow this Court to hear and decide a motion for a preliminary injunction.

C. PM USA Is Likely to Succeed on the Merits and, at a Minimum, Has Raised "Serious Questions" Going to the Merits

Because the balance of hardships tips sharply in PM USA's favor, PM USA need only show at this stage that it has raised "serious questions" going to the merits. *McNair*, 537 F.3d at 987. That standard is unquestionably satisfied here. Indeed, even if PM USA were required to show a likelihood of success on the merits, it has done so.

1. The Ordinance Violates the First Amendment

The Supreme Court has held that the "First Amendment ... constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult consumers have an interest in receiving that information." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001). Here, the City has plainly violated the First Amendment by proscribing sales of tobacco based on antipathy to the advertising that accompanies the offering of tobacco for sale. Indeed, the City has made unambiguously clear that the purpose and intended effect of the Ordinance is to limit and suppress what it calls "mixed message[s]" concerning the acceptability of tobacco use. *See* S.F. Ordinance No. 194-08, § 1(7). Given this impermissible purpose and effect, and given that the communication at issue does not fall into any exception to the First Amendment's protection, the Ordinance must be struck down.

a. The Ordinance's Explicit Purpose is to Suppress Speech

The City has candidly and repeatedly acknowledged that the predominate purpose and intended effect of the Ordinance is to limit and suppress disfavored messages concerning tobacco.

First, the Ordinance itself states in its findings that "[t]hrough the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products." S.F. Ordinance No. 194-08, § 1(7). This, in turn, sends a "mixed message" to consumers. *Id.* Nothing in the Ordinance's findings suggests that the City believed this measure would reduce the number of cigarette sales or directly combat smoking in the City. On the contrary, as one City Supervisor summarized the comments made at a July 17, 2008 hearing on the proposed ordinance: "This was originally presented to me as something that was going to decrease

smoking and I think we are hearing now that *that's not really the true intent, it's more to prevent ... folks from thinking that maybe smoking is healthy* by it being sold in a healthy place or something to that effect." *See* Martinez Decl., Ex. A at 23-24 (emphasis added). No evidence was ever presented at that hearing, however, that even remotely demonstrated that the mere availability of cigarettes for sale at Walgreens and Rite Aid causes anyone to believe that smoking is "healthy."

Second, the legislative history contains numerous statements by proponents of the Ordinance and by the Board of Supervisors that reinforce what the text of the law already makes clear: suppressing the message that smoking is acceptable is the Ordinance's *raison d'etre*. In explaining why the Ordinance should be enacted, Dr. Mitchell Katz, the City's Director of Public Health, insisted that "selling tobacco at pharmacies influences social acceptability of smoking" and that "when we see tobacco being sold [at a pharmacy], that's a mixed message." *See* Martinez Decl., Ex. A at 1-2. The decision to enact the Ordinance "just comes down to ... what the message is to people who are not yet smoking." *Id.* at 22. Other proponents agreed: "The sale of [cigarettes] side by side with the sale of medicine used to treat addiction to tobacco conveys a very disturbing message." *Id.* at 13. "[Customers] are not getting the message that the pharmacy is here to support you in your attempt to quit smoking. No, they're getting the message that the pharmacy doesn't care where its profits are coming from.... [Cigarette sales in pharmacies] send a subtle message to the public ... that tobacco products can't be all that bad." *Id.* at 17. As one witness put it, preventing cigarettes from being sold in pharmacies would eliminate "their brightly colored displays" whose "colors and imagery"—particularly "iconic images such as the red triangles on the Marlboro pack"—"are triggers themselves for smoker[s] to want their next cigarette." *Id.* at 16-17. Indeed, even opponents accepted that the goal of the Ordinance was to discourage "sending messages to consumers approving the use of tobacco." *Id.* at 8.

Finally, when faced with a challenge from Walgreens that the Ordinance lacked any rational purpose, the City argued that the Ordinance did have a purpose, namely to limit "mixed messages" about the acceptability of tobacco use. "The sale of tobacco by health-promoting

businesses like Walgreens sends an implicit message that smoking is acceptable.... Cigarette addiction ...has declined ... due to governmental efforts, *like this one*, to undercut the message that smoking is acceptable." *See* Rantanen Decl., Ex. D at 1. The elimination of this "implicit message" was the law's purpose, the City insisted, repeatedly. *Id.* at 4, 7. According to the City, even if the Ordinance did not target stores that sold the most cigarettes, that did not show irrationality because the goal was not to prevent sales but to prevent a message; accordingly, the Ordinance targeted those stores that "send[] that implicit message of acceptability more strongly." *Id.* at 7.

It is difficult to conceive of a record that more clearly establishes an "'improper censorial motive.'" *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1023 (9th Cir. 2008) (citation omitted).

b. The Ordinance Cannot Be Justified Under Any Conceivably Applicable First Amendment Standard

The Ordinance's substantial burdens on PM USA's speech cannot be justified under the First Amendment.

First, the Ordinance cannot be recast as a regulation of conduct with only an incidental burden on expressive activity. For a regulation to be sustained on such grounds, the regulation, and the governmental interests advanced in support of it, must be unrelated to the suppression of free expression. *United States v. O'Brien*, 391 U.S. 367 (1968); *Lorillard*, 533 U.S. at 567; *see also Long Beach Area Peace Network*, 522 F.3d at 1022-23 ("A law is content-based rather than content-neutral if 'the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face.'") (quoting *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006)). But as the record makes clear, the Ordinance is deliberately designed to relate to expression and to suppress a particular message. *See supra* at 9-11. It thus cannot be deemed a content-neutral restriction on conduct.

Neither can the Ordinance be defended as a time, place, or manner restriction: such restrictions must be content-neutral, which the Ordinance plainly is not. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[The] principal inquiry in determining content

neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); *Long Beach Area Peace Network*, 522 F.3d at 1022-23. Far from being "justified without reference to the content of the regulated speech," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), the Ordinance's restriction is justified precisely on the basis of the message sent by tobacco sales in pharmacies. *See Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977).

Nor can the Ordinance be justified as attacking the "secondary effects" of pharmacies' alleged implicit endorsement of tobacco products, because the consequences of speech's persuasive effects are *primary*, not secondary effects. The City "has proscribed particular types of [sales] ... because it fears [the implicit message's] 'primary' effect—that [it] will cause those receiving the information to act upon it." *Linmark*, 431 U.S. at 94. *See also Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that "[l]isteners' reactions to speech are not the type of 'secondary effects'" the government may permissibly regulate). Only where the government's predominate motive is unrelated to the expressive content of the speech will a secondary effect justification suffice. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) ("The District Court's finding as to 'predominate' intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression."). Here, the evidence is clear that the predominate motive was not merely *related* to the suppression of free expression, but *was* such suppression.

Finally, the Ordinance cannot be sustained as a valid regulation of commercial speech. Restrictions on commercial speech are governed by the four-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980):

> [1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Id. at 566. As to the first prong, PM USA's advertising and promotional activities in the affected

stores are truthful and nonmisleading. Indeed, the legislative record leading up to the enacting of the Ordinance contains no evidence to establish that consumers are misled by the targeted cigarette advertising. Accordingly, as the Supreme Court has held, PM USA's cigarette advertising is protected by the First Amendment, and any restrictions on that speech must satisfy the remaining three prongs of the *Central Hudson* test. "[S]o long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult consumers have an interest in receiving that information." *Lorillard*, 533 U.S. at 571.

The Ordinance fails to satisfy the second prong of *Central Hudson* because, far from asserting a "substantial" governmental interest, the City has invoked an invalid one: it is well-established that regulation the expression of a particular viewpoint based on hostility to its message is not a legitimate, let alone a substantial, government interest. *See, e.g., Gerritsen v. City of Los Angeles*, 994 F.2d 570, 577-78 (9th Cir. 1993).

To the extent that the City were now to try to invoke some other interest that is less facially illegitimate and insubstantial, the legislative record contains no evidence that could justify the Ordinance's restrictions on such a basis. As a result, any attempt to sustain the Ordinance on such an alternative basis—as opposed to the illegitimate ground that actually motivated enactment of the Ordinance—would necessarily rest on speculative inferences. The third prong of *Central Hudson* plainly requires more. It requires that:

> the speech restriction direct and materially advance the asserted governmental interest. "*This burden is not satisfied by mere speculation or conjecture*; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harm it recites are real *and that its restriction will in fact alleviate them to a material degree*."

Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 188 (1999) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)) (emphasis added).

And even if the City could satisfy these requirements, it would still fail at the fourth prong of *Central Hudson* because the Ordinance is plainly overbroad. There is simply no evidence that the City "carefully calculat[ed] the costs and benefits associated with the burdens imposed" by the Ordinance, as the fourth prong requires. *Lorillard*, 533 U.S. at 561 (internal quotation marks

omitted). Likewise, there is simply no evidence that the City considered more properly tailored restrictions that would avoid burdening PM USA's speech. Moreover, because cigarette manufacturers "use few avenues of communications"—because of other, already existing restrictions—the burdens imposed by the Ordinance are more substantial and require more careful tailoring so as to leave available adequate means of communication. *Id.* at 564-65.

Because the Ordinance thus fails any conceivable First Amendment test that the City might invoke, it is plainly unconstitutional. At a minimum, PM USA has shown "serious questions" going to the merits of its First Amendment claim, and thus has satisfied the standard for a temporary restraining order.

2. FCLAA Preempts the Ordinance As Applied to Cigarettes

The Ordinance is also invalid for the additional reason that it is expressly preempted by federal law. FCLAA creates "a comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard*, 533 U.S. at 541. That federal regulatory scheme includes labeling requirements, a ban on television and radio advertising, and a preemption provision that prohibits, *inter alia*, state "regulations targeting cigarette advertising." *Id.* at 550; *see also id.* at 548 ("[T]o the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC," not in the States). Specifically, FCLAA's express preemption provision states that "[n]o requirement or prohibition *based on smoking and health* shall be imposed under State law *with respect to the advertising or promotion of any cigarettes* the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1344(b) (emphasis added). The text and history of the Ordinance, along with the City's concessions as to its purpose, make clear that the Ordinance's prohibitions are (a) "based on smoking and health" and (b) "with respect to … the advertising or promotion of … cigarettes." Accordingly, under basic principles of statute construction and Federal supremacy, the Ordinance is preempted.

a. The Ordinance Is "Based on Smoking and Health"

The Ordinance is unquestionably "based on smoking and health." As the Supreme Court held in *Lorillard*, "regulations targeting cigarette advertising" are "inevitably motivated by

concerns about smoking and health" and are therefore "based on smoking and health" within the meaning of FCLAA. 533 U.S. at 550. The legislative record also overwhelmingly confirms the point. The first six findings of the Ordinance elaborate health concerns with tobacco and financial burdens allegedly incurred by California as a result. *See* S.F. Ordinance No. 194-08, § 1(1)-(6). The Ordinance's lead proponent, Dr. Katz, began his first presentation in support of the Ordinance by stating, "I don't have to tell you what an impact tobacco has on health." *See* Martinez Decl., Ex. A at 1. Finally, in its opposition to Walgreens' effort to obtain a temporary restraining order, the City argued that "[t]obacco addiction is still a major public health crisis, and governments continue to struggle to find ways to prevent people from becoming addicted." *See* Rantanen Decl., Ex. D at 3.

b. The Ordinance Imposes Prohibitions "With Respect to ... the Advertising or Promotion of ... Cigarettes"

On its face, FCLAA not only preempts state laws that explicitly regulate advertising, but also extends to those regulations that operate "*with respect to* ... advertising or promotion" of cigarettes. 15 U.S.C. § 1344(b) (emphasis added). As the Supreme Court has noted, the insertion of this italicized phrase when FCLAA was amended in 1970 represented a substantial broadening of the sweep of the preemption provision: "although the former statute reached only statements '*in* the advertising,' the current provision governs 'with respect to the advertising or promotion' of cigarettes." *Lorillard*, 533 U.S. at 545 (emphasis added). Because the regulations at issue in *Lorillard* expressly targeted and regulated cigarette advertising, the Court there had no occasion to examine fully what types of indirect regulations of cigarette advertising are preempted. *Id.* at 547 ("Here, ... there is no question about an indirect relationship between the regulations and cigarette advertising because the regulations expressly target cigarette advertising.").

Lorillard's analysis of FCLAA is nonetheless highly instructive, and makes clear that any regulation that would be consider a regulation of *speech* for First Amendment purposes is one that imposes obligations "with respect to ... advertising or promotion" for purposes of FCLAA. In examining the areas of state regulation that FCLAA did *not* preempt, the Court articulated the line between non-preempted "sales" regulations and preempted advertising regulations, and in doing

so, the Court sensibly looked to the First Amendment's directly analogous line between the regulation of conduct and the regulation of speech. 533 U.S. at 552 (citing cases holding that *advertising* that solicits illegal sales is "*conduct*" not entitled to any First Amendment protection, and that prohibitions of such "conduct" are not preempted) (emphasis added). Accordingly, *Lorillard* confirms that, at a minimum, a law should be considered to operate "with respect to ... advertising or promotion" if, for First Amendment purposes, it would be treated as regulation of speech rather than conduct.

That standard is satisfied here. As explained above, *see supra* at 11, for a regulation to be deemed to a regulation of "conduct" with only an incidental burden on speech, the government's interest must not be "related to the suppression of free expression." *Texas v. Johnson*, 491 U.S. at 403; *see also Lorillard*, 533 U.S. at 567, 569. Likewise, a regulation cannot be treated as a "time, place, and manner" restriction unless is it "justified" without reference to the content of the regulated speech. *Ward v. Rock Against Racism*, 491 U.S. at 791-92. *Lorillard* itself reaffirms this point in its First Amendment discussion upholding Massachusetts' restrictions on self-service display of tobacco products. 533 U.S. at 569 (applying intermediate scrutiny of *O'Brien* because "Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas"). Here, although cast only in terms of a prohibitions on "sales" in certain retail establishments, the Ordinance's intended effect and predominate purpose is to remove the advertising and promotion that go hand-in-hand with retail-level tobacco sales. Because the Ordinance's professed justification is related to the suppression of communication and is based on the content of communications, it would be treated as a regulation of speech for purposes of the First Amendment. *See supra* at 11-12. Under *Lorillard*, it therefore imposes prohibitions "with respect to ... advertising and promotion" for purposes of FCLAA. *See also Jones v. Vilasck*, 272 F.3d 1030, 1036 (8th Cir. 2001) (broadly construing "promotion" includes "the furtherance of the acceptance and sale of merchandise through advertising[or] publicity").

The Ordinance is thus clearly preempted by FCLAA. At the very least, PM USA has demonstrated that there are "serious questions" going to the merits of its preemption claim, and thus has justified the issuing of a temporary restraining order.

IV. CONCLUSION

For all the foregoing reasons, PM USA respectfully requests that the Court grant this motion and enter a temporary restraining order in the form of the proposed order submitted herewith.

DATED: September 24, 2008

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