

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 WAYNE SNODGRASS, State Bar #148137
VINCE CHHABRIA, State Bar #208557
3 FRANCESCA GESSNER, State Bar #247553
Deputy City Attorneys
4 City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
5 San Francisco, California 94102
Telephone: (415) 554-4674
6 Facsimile: (415) 554-4699
E-Mail: vince.chhabria@sfgov.org
7

8 Attorneys for Defendants
CITY AND COUNTY OF SAN FRANCISCO;
9 BOARD OF SUPERVISORS OF THE
CITY AND COUNTY OF SAN FRANCISCO; AND
10 GAVIN NEWSOM
11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION
15

16 PHILIP MORRIS USA INC.,

17 Plaintiff,

18 vs.

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

23 Defendants.
24

Case No. C08-4482 CW

**DEFENDANTS' RESPONSE TO
ORDER TO SHOW CAUSE WHY A
PRELIMINARY INJUNCTION
SHOULD NOT ISSUE**

Hearing Date: October 30, 2008
Time: 2:00 p.m.
Place: Courtroom 2

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES ii

3 INTRODUCTION 1

4 BACKGROUND 2

5 LEGAL STANDARD..... 3

6 DISCUSSION..... 4

7 I. THE ORDINANCE DOES NOT IMPLICATE THE FIRST AMENDMENT..... 4

8 A. The Ordinance Restricts Only Sales, Not Advertising. 5

9 B. The Ordinance Was Not Based On "Antipathy" For Tobacco
10 Advertising, And Even If It Were, This Would Be No Ground For
11 Striking It Down. 6

12 C. The City's Purpose Of Preventing Young People From "Getting The
13 Wrong Message" Has Nothing To Do With The First Amendment. 8

14 II. THE ORDINANCE IS NOT PREEMPTED. 9

15 III. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN THE CITY'S
16 FAVOR. 10

17 CONCLUSION..... 11

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

Federal Cases

44 Liquormart, Inc. v. Rhode Island
517 U.S. 484 (1996)..... 4

Arcara v. Cloud Books, Inc.
478 U.S. 697 (1986)..... 10

Bond v. Floyd
385 U.S. 116 (1966)..... 7

Clark v. Community for Creative Non-Violence
468 U.S. 288 (1984)..... 7

Federal Trade Commission v. Affordable Media, LLC
179 F.3d 1228 (9th Cir. 1999) 3

Fund For Animals, Inc. v. Lujan
962 F.2d 1391 (9th Cir. 1992) 3

Golden Gate Restaurant Association v. City and County of San Francisco
512 F.3d 1112 (9th Cir. 2008) 4

Keller v. State Bar of California
496 U.S. 1 (1990)..... 6

Linmark Assoc. v. Township of Willingborow
431 U.S. 85 (1977)..... 7

Long Beach Area Peace Network v. City of Long Beach
522 F.3d 1010 (9th Cir. 2008) 7

Lopez v. Heckler
713 F.2d 1432 (1983)..... 4

Lorillard Tobacco Co. v. Reilly
533 U.S. 525 (2001)..... 4, 7, 9

Nordyke v. Santa Clara County
110 F.3d 707 (9th Cir. 1997) 4

Planned Parenthood of the Blue Ridge v. Camblos
116 F.3d 707 (4th Cir. 1997) 4

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.
547 U.S. 47 (2006)..... 1

United States v. Daas
198 F.3d 1167 (9th Cir. 1999) 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States v. O'Brien
391 U.S. 367 (1968).....1, 6, 7

Walczak v. EPL Prolong, Inc.
198 F.3d 725 (9th Cir. 1999)3

Ward v. Rock Against Racism
491 U.S. 781 (1989).....7

Wasson v. Sonoma County Junior College
203 F.3d 659 (9th Cir. 2000)9, 10

Federal Statutes

15 United States Code
Section 1334(b).....9

State Cases

Walgreen Co. v. City and County of San Francisco
S.F. Superior Court Case No. CGC 08-4795533

San Francisco Statutes, Codes & Ordinances

San Francisco Health Code
Section 1009.925

1 **INTRODUCTION**

2 Philip Morris contends that the First Amendment forces San Francisco to allow drug stores to
3 sell cigarettes. This argument shows no respect for the Constitution, no respect for the power of cities
4 to protect the health of their citizens, and no respect for the Court's time. The sale of a product is
5 conduct, not speech. The protections of the First Amendment extend "only to conduct that is
6 inherently expressive." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47,
7 66 (2006). Cigarette sales are not inherently expressive. And that is the end of this very simple case.

8 In an attempt to evade the reality that San Francisco has the power to restrict the sale of
9 tobacco products, Philip Morris portrays the ordinance as something it is not. First, the company
10 argues that the ordinance deprives it of the ability to advertise. But nothing in the ordinance prevents
11 Philip Morris from continuing to pay Walgreens and Rite Aid to advertise tobacco products in any
12 way imaginable. The only thing drug stores may not do under the ordinance is sell the products.

13 Next, the company contends the ordinance was enacted out of "antipathy" for cigarette
14 advertising. Again, that is not true – advertising was mentioned only fleetingly in a fairly large
15 legislative history, and only to make a non-binding statement about the conflict of interest involved
16 when stores that are supposed to promote health also promote deadly tobacco products. Even if it
17 were true that the City intended by this ordinance to suppress advertising, the City did a poor job of
18 acting on this alleged "antipathy," given that the ordinance does not restrict advertising at all. And
19 that undeniable fact protects the ordinance from invalidation, because courts may "not strike down an
20 otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v.*
21 *O'Brien*, 391 U.S. 367, 383 (1968).

22 Finally, Philip Morris argues that the ordinance was designed to suppress First Amendment
23 expression, because its primary purpose was to prevent young people from getting the wrong
24 "message" about the acceptability of smoking. This argument is fatally superficial, as shown by the
25 following example: we often say that when professional baseball players use steroids, they "send the
26 wrong message" to young people. But it does not follow that when baseball players actually use
27 steroids, they are engaging in First Amendment expression. When we use the phrase "sends the
28 wrong message" in this colloquial sense, we mean only that a side-effect of steroid use by baseball

1 favor of the latter." *Golden Gate Restaurant Association v. City and County of San Francisco*, 512
2 F.3d 1112, 1126 (9th Cir. 2008) ("*GGRA I*") (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (1983)).

3 Finally, the public interest is harmed when a law duly enacted by the elected representatives
4 of the people is prevented from being implemented, absent a showing by the plaintiff of a
5 "substantial" likelihood of success on the merits. *Planned Parenthood of the Blue Ridge v. Camblos*,
6 116 F.3d 707, 721 (4th Cir. 1997); *see also GGRA I*, 512 F.3d at 1126-27.

7 DISCUSSION

8 I. THE ORDINANCE DOES NOT IMPLICATE THE FIRST AMENDMENT.

9 Philip Morris concedes, as it must, that San Francisco has the power to protect the health and
10 welfare of its citizens by regulating the sale of tobacco. TRO App. at 1. Philip Morris also appears to
11 concede (again, as it must) that the mere sale of a product does not implicate the First Amendment.
12 *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996) (plur. opn.) (recognizing the
13 First Amendment does not disturb a state's "power to ban the sale of liquor entirely"); *Nordyke v.*
14 *Santa Clara County*, 110 F.3d 707, 710 (9th Cir. 1997) ("the act of exchanging money for a gun is
15 not 'speech' within the meaning of the First Amendment"). *Cf. Lorillard Tobacco Co. v. Reilly*, 533
16 U.S. 525, 550 (2001) ("States remain free to enact generally applicable zoning regulations, and to
17 regulate conduct with respect to cigarette use and sales").

18 Faced with this reality, Philip Morris attempts to recast the ordinance as one that suppresses
19 protected speech. Although the company's First Amendment argument is slippery, it appears to
20 involve three distinct contentions: (A) the ordinance, while purporting to restrict only sales, actually
21 restricts advertising; (B) even if the ordinance only restricts sales, it was enacted because of
22 "antipathy" for tobacco advertising; and (C) the ordinance is designed to suppress a First Amendment
23 "message" that smoking is acceptable. As set forth below, none of this is true. The ordinance merely
24 regulates conduct – the conduct of selling tobacco. And conduct only enjoys First Amendment
25 protection if it is "inherently expressive." *FAIR*, 547 U.S. at 66. Not even Philip Morris could argue
26 that the conduct of selling cigarettes is inherently expressive.

1 **A. The Ordinance Restricts Only Sales, Not Advertising.**

2 Philip Morris spends a good deal of time arguing that the ordinance restricts the company's
3 opportunity to advertise its products in drug stores like Walgreens and Rite-Aid. TRO App. at 5-6.
4 That is simply wrong. The ordinance states: "No person shall sell tobacco products in a pharmacy,
5 except [in grocery stores or big box stores]." S.F. Health Code § 1009.92 (Rantanen Decl., Exh. A).
6 Nothing in this sentence can possibly be construed as preventing Philip Morris from continuing to
7 pay stores like Walgreens and Rite Aid to advertise its products. Under the ordinance, Philip Morris
8 may continue to pay those stores to display colorful "Marlboro" signs, to advertise the price of Philip
9 Morris products, to announce where those products may be purchased, to display ads claiming that
10 Philip Morris products are better than other tobacco products, or even to hang banners that say
11 "smoking is healthy and great." Indeed, the ordinance would not prevent Philip Morris from
12 continuing to pay Walgreens and Rite Aid to display actual Philip Morris products in prominent parts
13 of the store. Although Philip Morris asserts that Walgreens and Rite Aid will, as a result of the
14 ordinance, remove all advertising displays of Philip Morris products,¹ that is speculation, and even if
15 the speculation were accurate, the decision to remove advertising would be a purely voluntary act on
16 the part of those drug stores. The only thing drug stores may not do under this ordinance is sell
17 tobacco products.

18 Philip Morris attempts to bolster its claim that the ordinance is really about advertising by
19 asserting that the it will prevent the company "from engaging in communication in these stores with
20 adult consumers through marketing communications that are delivered via the pack itself, such as
21 through packs with onserts and on-pack coupons." Paoli Decl. at ¶ 23. The suggestion appears to be
22 that because the company has cleverly combined the sale of its tobacco products with advertising, it
23 has converted what is otherwise unprotected conduct, namely product sales, into protected speech.
24 That is not how the First Amendment works. "If combining speech and conduct were enough to
25 create expressive conduct, a regulated party could always transform conduct into 'speech' simply by

26
27 ¹ See Declaration of Peter P. Paoli in Support of Application for Temporary Restraining Order
28 ("Paoli Decl.") at ¶ 22.

1 talking about it." *FAIR*, 547 U.S. at 66. *Cf. O'Brien*, 391 U.S. at 376 ("We cannot accept the view
2 that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging
3 in the conduct intends thereby to express an idea"). In any event, Philip Morris may continue to make
4 whatever communications are presently contained in cigarette packs; it simply cannot *sell* its packs at
5 drug stores. The ordinance does not restrict advertising.

6 **B. The Ordinance Was Not Based On "Antipathy" For Tobacco Advertising, And**
7 **Even If It Were, This Would Be No Ground For Striking It Down.**

8 Philip Morris also appears to contend that even if the ordinance restricts only sales, it violates
9 the First Amendment because the Board enacted this restriction on conduct with an illicit motive,
10 namely, "antipathy" for tobacco advertising. TRO App. at 1. The company emphasizes that the
11 Board, in addition to making numerous findings about the health effects of smoking and the special
12 need to ban cigarette sales at pharmacies, made a finding noting that drug stores frequently advertise
13 cigarettes as well. *See Rantanen Decl. Exh. A at 3 (Finding No. 20)*. The suggestion, apparently, is
14 that the Board's true intent was to crack down on advertising. But there is a far more plausible
15 explanation for the Board's findings about advertising: the Board simply sought, in the context of its
16 ongoing effort to prevent young people from becoming addicted to cigarettes, to make a statement
17 about the conflict of interest involved when a health-promoting store also promotes deadly tobacco
18 products. That this explanation is the most plausible is evidenced by the legislative history Philip
19 Morris does not cite in its brief – testimony by the Director of Public Health that the sale of tobacco
20 by health promoting businesses creates a conflict of interest. *See, e.g., Declaration of Emily V.*
21 *Martinez in Support of Philip Morris USA Inc's Ex Parte Motion for a Temporary Restraining Order,*
22 *Exh. A at 1, 3.* That is all the Board was doing in Finding No. 20: making a statement expressing
23 disapproval of the conflict of interest drug stores create by promoting tobacco products.

24 Legislators are free, of course, to exercise their First Amendment rights in this fashion. *See,*
25 *e.g., Keller v. State Bar of California*, 496 U.S. 1, 12 (1990) ("Government officials are expected as a
26 part of the democratic process to represent and espouse the views of a majority of their constituents.
27 With countless advocates outside of the government seeking to influence its policy, it would be ironic
28 if those charged with making governmental decisions were not free to speak for themselves in the

1 process."); *Bond v. Floyd*, 385 U.S. 116, 136 (1966) ("The manifest function of the First Amendment
2 in a representative government requires that legislators be given the widest latitude to express their
3 views on issues of policy"). Such speech by the Board, pointing out the conflict of interest created by
4 health promoting businesses that also promote tobacco, does not subject an otherwise valid ordinance
5 – one that imposes no restrictions on advertising at all – to First Amendment scrutiny.

6 What's more, PM USA's suggestion that the Board's finding criticizing the advertisement of
7 tobacco products by pharmacies evinces an illicit motive to suppress advertising ignores two cardinal
8 rules of statutory interpretation and constitutional adjudication. First, legislative purpose is
9 determined above all else with reference to the terms of the statute. *United States v. Daas*, 198 F.3d
10 1167, 1174 (9th Cir. 1999). Here the statute simply does not restrict advertising, which belies the
11 contention that the Board acted based on antipathy for advertising. Second, in any event, courts may
12 "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative
13 motive." *O'Brien*, 391 U.S. at 383. Thus, even if the Board's true desire was to restrict advertising
14 (which it was not), its failure to *actually* restrict advertising prevents the Court from striking it down.

15 None of the cases cited by Philip Morris stands for the proposition that the regulation of non-
16 expressive conduct can be struck down because legislators concurrently happened to voice
17 displeasure with speech that sometimes might accompany that conduct. Rather, PM USA's cases
18 stand for a far less remarkable proposition: when the government *does* regulate expression (i.e., by
19 restricting advertising or imposing volume restrictions on music), it has entered First Amendment
20 territory and the regulation can only be upheld if it was enacted for a purpose other than suppressing
21 the expression that is, in fact, being restricted. *See, e.g., Lorillard*, 533 U.S. at 566-69 (advertising);
22 *Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989) (volume restrictions on music); *Clark v.*
23 *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (protest in public park); *Linmark*
24 *Assoc. v. Township of Willingborow*, 431 U.S. 85, 93-94 (1977) (advertising); *Long Beach Area*
25 *Peace Network v. City of Long Beach*, 522 F.3d 1010, 1026 (9th Cir. 2008) (public assembly). This
26 ordinance, of course, does not regulate expression at all, and therefore it is nonsensical to say that it
27 regulates expression for the purpose of suppressing that expression. The cases cited by Philip Morris
28 are simply not applicable.

1 **C. The City's Purpose Of Preventing Young People From "Getting The Wrong**
2 **Message" Has Nothing To Do With The First Amendment.**

3 Next, Philip Morris contends that even if the ordinance does not restrict advertising, it is
4 invalid because: (1) the primary goal of the sales ban is to undercut the "message" that cigarette
5 smoking is healthy or acceptable; and (2) the City's effort to undercut this "message" amounts to
6 suppression of First Amendment expression. This argument, while perhaps superficially clever,
7 easily crumbles upon further scrutiny.

8 It is true that the primary purpose of the ordinance is to prevent young people from "getting
9 the wrong message" from the sale of cigarettes by drug stores. As the City explained in its opposition
10 to Walgreens' motion for a preliminary injunction, if a doctor's office or a hospital were to sell
11 tobacco, there is clearly a risk that people would get the wrong idea about the health risks of smoking.
12 Stores like Walgreens and Rite Aid, while not doctor's offices, are nonetheless in the business of
13 promoting health. Accordingly, their sale of cigarettes also creates a risk that people will get the
14 wrong idea about smoking.

15 But the phrase "sends a message," as used in this context, does not implicate the First
16 Amendment. To elaborate on the illustration used on page one, people often say that professional
17 baseball players should not use steroids because this "sends the wrong message" to young people. It
18 does not follow that when baseball players use steroids, they are engaging in "expression" that is
19 protected by the First Amendment. These baseball players are not trying to send a message to young
20 people that using steroids is acceptable. They are simply using steroids. It just so happens that this
21 conduct, which is clearly not protected by the First Amendment, threatens to create confusion among
22 young people about the appropriateness of using steroids. The government can ban the use of
23 steroids by baseball players for the sole purpose of preventing this confusion, but such a ban does not
24 implicate the First Amendment.

25 The same is true here. When Walgreens sells cigarettes, it is not *trying* to express a message
26 to young people that smoking is healthy. It is simply selling cigarettes, and it just so happens that this
27 conduct by a health-promoting store like Walgreens threatens to create confusion about the
28 acceptability of smoking. Walgreens is engaging in conduct – a commercial transaction. The fact

1 that this commercial transaction happens to send the wrong "message," in the colloquial sense of the
2 term, does not magically convert unprotected conduct into protected First Amendment expression.

3 As if this were not enough to defeat PM USA's novel First Amendment claim, there is more:
4 even assuming that the sale of cigarettes by health promoting businesses all of a sudden becomes
5 "expressive" just because the conduct threatens to create confusion among young people, it is *the*
6 *drug store* that engages in this alleged expression, not the tobacco company. Philip Morris does not
7 have the standing to assert the alleged First Amendment right of Walgreens to send young people a
8 message that smoking is healthy or acceptable. Only in rare circumstances can a litigant obtain
9 standing to assert the constitutional rights of a third party, and one prerequisite is that "there must be
10 some hindrance to the third party's ability to protect his or her own interests." *Wasson v. Sonoma*
11 *County Junior College*, 203 F.3d 659, 663 (9th Cir. 2000). As this Court has already been made
12 aware, Walgreens has filed its own lawsuit challenging the sales ban on equal protection grounds.
13 True, Walgreens did not assert a First Amendment claim. However, there was no "hindrance" to its
14 ability to do so (aside from, perhaps, the claim's frivolity).

15 In sum, PM USA's attempt to manufacture a First Amendment issue by portraying the
16 ordinance as an effort to suppress First Amendment expression fails on every level. The company
17 has no chance of success on this claim.

18 **II. THE ORDINANCE IS NOT PREEMPTED.**

19 The Federal Cigarette Labeling and Advertising Act ("FCLAA") only preempts state and local
20 laws respecting the "advertising or promotion" of cigarettes. 15 U.S.C. § 1334(b). PM USA's
21 argument that the ordinance involves "advertising or promotion" rests entirely on its assertion that the
22 ordinance regulates speech. *See* TRO App. at 15 ("any regulation that would be consider [*sic.*] a
23 regulation of *speech* for First Amendment purposes is one that imposes obligations 'with respect to . .
24 . advertising or promotion' for purposes of FCLAA"). However, as discussed above, the ordinance
25 does not regulate speech; it only regulates sales. And the Supreme Court has made crystal clear that
26 restrictions on the sale of cigarettes are not preempted by the FCLAA. *Lorillard*, 533 U.S. at 550
27 ("States remain free to enact generally applicable zoning regulations, and to regulate conduct with
28

1 respect to cigarette use and sales"). Accordingly, the preemption claim falls with the First
2 Amendment claim.²

3 **III. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN THE CITY'S FAVOR.**

4 PM USA's argument that the balance of hardships justifies a preliminary injunction suffers
5 from several defects, including the complete failure to take the public interest into account.

6 The principal harm the company asserts is the "loss of First Amendment freedoms." TRO
7 App. at p. 8. But as discussed above, the ordinance deprives Philip Morris of no First Amendment
8 freedom – the company retains the freedom to pay drug stores as much as it wants to advertise
9 cigarettes in any fashion.

10 Philip Morris then cites "additional considerations," namely, that the Walgreens and Rite Aid
11 stores in the City "yield over 20% of the sales volume of PM USA products in San Francisco." *Id.*
12 However, "[t]he severity of this burden is dubious at best, and is mitigated by the fact that [Philip
13 Morris] remain[s] free to sell the same materials at another location." *Arcara v. Cloud Books, Inc.*,
14 478 U.S. 697, 705 (1986). People who are already addicted to Philip Morris products will
15 presumably purchase those products elsewhere, rendering the company's claim of a 20% loss illusory.

16 Compared to the lack of constitutional and financial harm suffered by Philip Morris, the harm
17 a preliminary injunction would inflict upon the City and the public is significant. First, as discussed
18 at page 3, the City and the public have a substantial interest in seeing the timely implementation of
19 laws duly enacted by the public's elected representatives. Second, even though people already
20 addicted to cigarettes will presumably continue to buy them elsewhere, the City's policymakers
21 enacted Ordinance No. 194-08 with the hope that it, along with other governmental anti-tobacco
22 programs, would diminish the likelihood that teenagers will become addicted to cigarettes in the first
23 place. *See Rantanen Decl.*, Exh. D at 2-6. If the timely implementation of the ordinance helps

24 ² The complaint also includes a cause of action alleging that the ordinance violates the federal
25 Equal Protection Clause. However, Philip Morris did not assert this cause of action as a basis for
26 emergency relief. Perhaps that is because Philip Morris has no standing to assert the equal protection
27 rights of drug stores. *Wasson*, 203 F.3d at 663. And as the City has already demonstrated in state
28 court, the ordinance does not violate the equal protection rights of Walgreens. *See Rantanen Decl.*
Exh. D. The San Francisco Superior Court declined to preliminarily enjoin the ordinance, holding
that Walgreens failed to show a likelihood of success on its equal protection claim. *See RJN*, Exh. A.

1 prevent even just a few young people from taking up smoking, becoming addicted to nicotine, and
2 developing cancer, that would greatly outweigh any minimal, speculative financial loss that might be
3 incurred by the tobacco industry. *See GGRA I*, 512 F.3d at 1126 (conflict between financial concerns
4 and preventing human suffering should be resolved in favor of the latter). *See also supra* at pp. 3-4.

5 **CONCLUSION**

6 The Court should decline to enter a preliminary injunction.

7 Dated: October 9, 2008

8 DENNIS J. HERRERA
9 City Attorney
10 WAYNE SNODGRASS
11 VINCE CHHABRIA
12 FRANCESCA GESSNER
13 Deputy City Attorneys

14 By: _____ /s/_____
15 VINCE CHHABRIA

16 Attorneys for Defendants
17 CITY AND COUNTY OF SAN FRANCISCO, ET AL.
18
19
20
21
22
23
24
25
26
27
28