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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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. 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

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INTRODUCTION

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

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

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

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

players is *confusion* among young people about the acceptability of steroids. And government could prohibit baseball players for using steroids for the sole purpose of preventing this confusion. Such a ban would not implicate the First Amendment, just as a ban on the sale of cigarettes by health-promoting businesses, for the purpose of preventing young people from getting the wrong idea about smoking, does not implicate the First Amendment.

Once it is acknowledged that this case has nothing to do with speech, the remaining arguments advanced by Philip Morris fall apart. The company's contention that the ordinance is preempted by federal law depends entirely on the assumption that it regulates speech. Similarly, the contention that the balance of harms tips in the company's favor largely depends on the assumption that its speech is being suppressed. Because no speech is being suppressed, the balance of harms actually weighs heavily in favor of the City and the public. If timely implementation of the ordinance helps prevent even a few young San Franciscans from becoming addicted to cigarettes and developing cancer, that is well worth any speculative, minimal financial loss that the tobacco industry might incur. Accordingly, a preliminary injunction should not issue.

BACKGROUND

On July 29, 2008, the San Francisco Board of Supervisors passed Ordinance No. 194-08, which bans the sale of tobacco in stores containing pharmacies, except for grocery stores and big box stores. Almost two months later, on September 24, 2008, Philip Morris USA, Inc. ("Philip Morris" or "PM USA") filed a complaint in this case, and sought an "emergency" temporary restraining order to prevent the ordinance from taking effect as scheduled on October 1, 2008. Philip Morris argued that a temporary restraining order was needed because the ordinance violated its First Amendment rights, and because it was preempted by federal law. Philip Morris also included an equal protection claim in its complaint, but did not assert that claim as a basis for emergency relief.

On September 26, 2008, this Court denied the application for a temporary restraining order. The Court ruled that Philip Morris "failed to make a sufficient showing of likely success on the merits and of irreparable harm to justify granting the *ex parte* relief it seeks." Order Denying Plaintiff's Application For A Temporary Restraining Order And Requiring Defendants to Show Cause Why A Preliminary Injunction Should Not Issue, at p. 2. The Court further noted that PM USA's

"unexplained delay in filing its application for a temporary restraining order until days before the enforcement of the Ordinance belies its claim of irreparable hardship." *Id*. The Court ordered defendants City and County of San Francisco, et al. ("City") to show cause on October 30, 2008, why a preliminary injunction should not issue. *Id*.

Meanwhile, on September 30, 2008, a hearing took place in San Francisco Superior Court in a separate challenge to the ordinance by Walgreen Company ("Walgreens"). In that lawsuit, Walgreens sought a preliminary injunction on the theories that: (1) the ordinance violated its equal protection rights; and (2) the ordinance was enacted in contravention of Proposition I, a local ordinance requiring that the San Francisco Controller's Office prepare an economic impact report on certain legislation. *See Walgreen Co. v. City and County of San Francisco*, S.F. Superior Court Case No. CGC 08-479553. The trial court denied the motion for a preliminary injunction. *See* City's Request for Judicial Notice ("RJN"), Exh. A. In its lawsuit, Walgreens opted not to assert a First Amendment claim.

LEGAL STANDARD

Under the general standard for a preliminary injunction, the plaintiff is "required to demonstrate 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 its favor." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999); *Fund For Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992).

However, when the public interest is involved, the plaintiff must make a greater showing. The plaintiff must not only show that the balance of hardships tips in its favor, but more importantly, that a preliminary injunction is in the *public* interest. *Fund for Animals*, 962 F.2d at 1400. "[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight." *Federal Trade Commission v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999).

Furthermore, when faced with "a conflict between financial concerns and preventable human suffering, [the courts] have little difficulty concluding that the balance of hardships tips decidedly in

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

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

DISCUSSION

I. THE ORDINANCE DOES NOT IMPLICATE THE FIRST AMENDMENT.

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

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

A. The Ordinance Restricts Only Sales, Not Advertising.

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

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

[1] *See* Declaration of Peter P. Paoli in Support of Application for Temporary Restraining Order ("Paoli Decl.") at ¶ 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. THE ORDINANCE IS NOT PREEMPTED.

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

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

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

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

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

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

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

[2] The complaint also includes a cause of action alleging that the ordinance violates the federal Equal Protection Clause. However, Philip Morris did not assert this cause of action as a basis for emergency relief. Perhaps that is because Philip Morris has no standing to assert the equal protection rights of drug stores. *Wasson*, 203 F.3d at 663. And as the City has already demonstrated in state 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.

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

CONCLUSION

The Court should decline to enter a preliminary injunction.

Dated: October 9, 2008

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