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Attorneys for Defendants
CITY OF BERKELEY and CHRISTINE DANIEL

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CTIA – THE WIRELESS ASSOCIATION,

Plaintiff,

vs.

CITY OF BERKELEY, CHRISTINE
DANIEL, CITY MANAGER OF CITY OF
BERKELEY,

Defendants.

NO. C15-02529 EMC

DEFENDANTS' NOTICE OF MOTION
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
TO DISSOLVE PRELIMINARY
INJUNCTION

DATE: December 22, 2015
TIME: 2:30 p.m.
CTRM: 5, 17th Flr., San Francisco

TO PLAINTIFF CTIA – THE WIRELESS ASSOCIATION:

NOTICE IS HEREBY GIVEN that on Tuesday, December 22, 2015 at 2:30 p.m., or as
soon thereafter as counsel may be heard by the above-entitled Court, located at 450 Golden Gate

Avenue, Courtroom 5, 17th Floor, San Francisco, California, defendants the City of Berkeley and Christine Daniel will and hereby do move the Court for an order dissolving the preliminary injunction issued in this case on September 21, 2015, on the ground that the City of Berkeley City Council has deleted the sentence in Berkeley Municipal Code section 9.96.030 on which the preliminary injunction was based.

This motion is based upon this Notice, the Memorandum of Points and Authorities, the Declaration of Mark Numainville filed herewith, the complete files and records of this action, and on such evidence and argument as may be presented at the hearing.

Dated: November 17, 2015.

ZACH COWAN, City Attorney
LESTER LAWRENCE LESSIG, III
ROBERT CHARLES POST
AMANDA SHANOR

By: /s/ Zach Cowan
ZACH COWAN
Attorneys for Defendants City of Berkeley and
CHRISTINE DANIEL

MEMORANDUM OF POINTS AND AUTHORITIES

The City of Berkeley adopted an ordinance requiring cell phone retailers in Berkeley to provide a notice with every sale or lease of a cell phone. Plaintiff CTIA sought a preliminary injunction against its enforcement. On September 21, 2015, this Court issued an order enjoining the ordinance “unless and until” a specific sentence in the City notice was deleted. (Doc. #53, p. 35.) The City of Berkeley has now amended the ordinance to delete that sentence, and files this motion to dissolve the injunction.¹

ARGUMENT

On May 12, 2015, the Council adopted the first reading of an ordinance² requiring cell phone retailers in Berkeley to provide a notice with every sale or lease of a cell phone that warns customers to maintain a minimum separation between their bodies and their cell phones. Plaintiff

¹ Defendant Christine Daniel is no longer employed by the City of Berkeley.

² Berkeley Municipal Code Chapter 9.96 (Doc. #1, Exh. A).

1 CTIA filed this case alleging that the ordinance was preempted and abridged its members' First
2 Amendment rights, and sought a preliminary injunction against its enforcement.

3 As originally adopted, the operative language of the ordinance read as follows (emphasis
4 supplied):

5 **Section 9.96.030 Required notice**

6 A. A Cell phone retailer shall provide to each customer who buys or leases a Cell
7 phone a notice containing the following language:

8 The City of Berkeley requires that you be provided the following notice: To
9 assure safety, the Federal Government requires that cell phones meet radio
10 frequency (RF) exposure guidelines. If you carry or use your phone in a pants or
11 shirt pocket or tucked into a bra when the phone is ON and connected to a
wireless network, you may exceed the federal guidelines for exposure to RF
radiation. **This potential risk is greater for children.** Refer to the instructions in
your phone or user manual for information about how to use your phone safely.

12 On September 21, 2015, this Court issued an order enjoining the ordinance "unless and
13 until the sentence in the City notice regarding children safety is excised from the notice." (Doc.
14 #53, p. 35.) The City of Berkeley has now amended the ordinance to delete that sentence.³ The
15 operative language now reads:

16
17 **Section 9.96.030 Required notice**

18 A. A Cell phone retailer shall provide to each customer who buys or leases a Cell
19 phone a notice containing the following language:

20 The City of Berkeley requires that you be provided the following notice: To
21 assure safety, the Federal Government requires that cell phones meet radio
22 frequency (RF) exposure guidelines. If you carry or use your phone in a pants or
23 shirt pocket or tucked into a bra when the phone is ON and connected to a
wireless network, you may exceed the federal guidelines for exposure to RF
radiation. [Deleted sentence.] Refer to the instructions in your phone or user
manual for information about how to use your phone safely.

24 Under the Court's analysis as reflected in its September 21, 2015, Order, as well as the
25 City's analysis as set forth in its opposition to Plaintiff's motion for a preliminary injunction,
26 there is no basis to enjoin the ordinance. Accordingly, the City requests that the Court dissolve
27 the injunction.

28
³ See Exhibit A to Declaration of Mark Numainville, filed herewith.

1 While the injunction could be read as “self-terminating”, the parties have agreed that it
2 would be nevertheless be appropriate for the Court to explicitly dissolve the injunction if that is
3 its intention, thus allowing plaintiffs to take an appeal.

4
5 Dated: November 17, 2015.

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7
8 By: /s/ Zach Cowan

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