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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' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISSOLVE PRELIMINARY INJUNCTION

DATE: December 22, 2015
TIME: 1:00 PM
PLACE: Courtroom 5, 17th Floor, San Francisco

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Federal Cases**

**Other Authorities**

## INTRODUCTION

The FCC mandates that manufacturers of cell phones provide consumers with the information they need to know how to use their cell phones in a way that doesn't exceed FCC mandated RF limits — if they so choose. FCC Office of Eng'g and Tech. Lab. Div., *Mobile & Portable Devices RF Exposure Procedures and Equipment Authorization Policies*, FCC KDB No. 447498, General RF Exposure Guidance, § 4.2.2(4) (2014) (hereinafter "*FCC RF Exposure Guidance*").

After determining that its residents were not aware of this information, Berkeley required that local cell phone retailers provide the same type of information to consumers at the point of sale. Berkeley Municipal Code § 9.96.030(A)-(B).

CTIA has not challenged the FCC's rule. But it has challenged Berkeley's regulation. After careful review, this Court rejected CTIA's First Amendment arguments, while accepting, in a limited way, its argument about preemption as it related to one clause in Berkeley's original ordinance. Order, Dkt. No. 53.

Berkeley has now removed the challenged clause from its ordinance. Defs' Mot. to Dissolve Prelim. Inj., Decl. of Mark Numainville, Ex. A, Dkt. 59-2. Under the reasoning of this Court's original opinion, there is now no further legal justification for interfering with Berkeley's right to police its commercial vendors.

CTIA now tries to re-litigate the issues this Court has already decided. In its opposition to Berkeley's motion to dissolve the preliminary injunction, CTIA asserts again that Berkeley's ordinance is preempted, and it argues again that the ordinance violates the First Amendment.

CTIA has offered no new authority or argument to justify this Court revisiting the issue it so carefully determined just months ago. There is therefore no further justification for this Court to interfere with Berkeley's authority to regulate its residents.

## ARGUMENT

CTIA rightly states the standard this Court should apply in determining whether to dissolve its preliminary injunction blocking Berkeley from enforcing its amended ordinance. As the Ninth Circuit has held, "[a] party seeking modification or dissolution of an injunction bears

the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000).

CTIA rightly concedes that "circumstances have changed" — but only, CTIA submits, "somewhat." Pl.'s Opp'n to Defs.' Mot. to Dissolve Inj., Dkt. No. 63, at 1.

That qualification is surprising in the context of this Court's opinion.

This Court rejected every one of CTIA's arguments about the original Berkeley ordinance — except for one about preemption as it related to a clause about children. Berkeley has now removed that one clause. It may well be that under CTIA's view of the law, that change doesn't matter. But under the Court's opinion, that change has removed the only legal justification for interfering with Berkeley's reserved power to regulate its residents. CTIA's theories about the First Amendment and the law of preemption, carefully considered and rightly rejected by this Court, do not justify any further interference with Berkeley's sovereign authority, in a federal system, to regulate its commercial vendors.

Under the law of the First Amendment, and the doctrine of preemption, as they exist right now, Berkeley's ordinance is constitutional. This Court should therefore act on its carefully and correctly reasoned opinion by removing the remaining federal obstacle to Berkeley exercising its legitimate regulatory authority.

## I. The Amended Ordinance Is Not Preempted

This Court considered carefully CTIA's original argument about preemption. In CTIA's view, the whole of Berkeley's ordinance was preempted by FCC regulations. This Court rejected that argument. CTIA had argued "obstacle preemption." Order 11. Applying the rule in *Farina v. Nokia, Inc.*, 625 F.3d 97 (3rd Cir. 2010), as CTIA had asked this Court to do, the Court held that "the limited disclosure mandated by the Berkeley ordinance does not, with one exception, impose an obstacle to [the FCC's statutory] purposes." Order 13.

That "one exception" was a clause in the original ordinance that made special reference to children. Berkeley has now removed that "one exception." The remaining ordinance thus does not, as this Court held "impose an obstacle to [the FCC's statutory] purposes." Indeed, as this

Court concluded, "CTIA has not demonstrated a likelihood of success or even serious question on the merits in its preemption challenge to the main portion of the notice." Order 16. Under that reasoning, Berkeley's Amended ordinance is not preempted.

CTIA has offered no new authority to draw that conclusion into doubt. Nor has it given this Court any new argument to show why its earlier judgment was mistaken. There is therefore no reason to revisit it here.

## II. The Amended Ordinance Does Not Violate the First Amendment

In rejecting CTIA's argument that the original ordinance violated the First Amendment, this Court held:

> CTIA has [not] established a strong likelihood of success on the merits . . . . Nor has it raised serious question on the merits. While the sentence in the Berkeley ordinance regarding the potential risk to children is likely preempted, the remainder of the City notice is factual and uncontroversial and is reasonably related to the City's interest in public health and safety. Moreover, th disclosure requirement does not impose an undue burden on CTIA or its members' First Amendment rights.

Order 34.

CTIA does not raise any substantial new argument to merit reconsideration of this Court's conclusions. The new arguments it does raise do not sustain its claim that the Amended Ordinance violates the First Amendment.

### A. CTIA's Effort To Reargue Its First Amendment Case Should Be Rejected

The bulk of CTIA's brief simply repeats the arguments this Court has already considered and rejected.

Once again, CTIA argues that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) has effectively abolished commercial speech doctrine, by requiring that every commercial speech regulation be subject to strict scrutiny. Pl.'s Opp'n 4.

Once again, it conflates cases involving *restrictions* on commercial speech with cases involving compelled commercial *disclosures*. *Compare Central Hudson Gas & Elect. Corp. v.*

*Pub. Serv. Comm'n of NY*, 447 U.S. 557 (1980), with *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) and *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).

Once again, it argues that, notwithstanding the overwhelming authority from this Circuit and others, *Zauderer* should be limited to cases of deception. Pl.'s Opp'n 5-7.

These arguments should again be rejected by this Court.

There is nothing to indicate the Supreme Court intended, *sub silentio*, to repeal 40 years of commercial speech doctrine.

There is an obvious reason why a constitutional rule forbidding the "abridg[ment]" of speech would distinguish between rules that *restrict* speech and rules that *require* speech. The former plainly "abridge" speech. The latter only do so if the actor has an autonomy right not to speak at all.

Yet the Supreme Court has made clear that commercial speech does not enjoy the same immunity from compelled disclosures that cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), secure to ordinary political speech.

There is a clear reason for this distinction. The *Wooley* line of cases defends the autonomy interest of individuals within a free society. But from the very beginning of the commercial speech doctrine, the Supreme Court has recognized the interest protected by commercial speech doctrine is the "value to consumers of the information such speech provides." *Zauderer*, 471 U.S. at 651. There is thus no right not to be compelled to publish factual and non-controversial commercial disclosures. There is only the right of a commercial entity to block regulation that forces it to utter such "unjustified or unduly burdensome" speech if doing so "chill[s] protected commercial speech." *Id.*

Finally, there is no reason for this Court to reject the authority that interprets *Zauderer* as extending beyond cases of deception alone. *See American Meat Institute v. USDA*, 760 F.3d 18, 21-22 (D.C. Cir. 2014) (en banc); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005)

(Boudin, C.J. & Dyk, J.); *id.* at 297-98 (per curiam) (noting opinion of Judges Boudin and Dyk is controlling on the First Amendment issue); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-16 (2d Cir. 2001); *see also generally CTIA-Wireless Ass'n v. City & Cnty. of San Francisco*, 494 Fed. Appx. 752 (9th Cir. 2012).

### B. CTIA's New First Amendment Arguments Do Not Draw This Court's Conclusion Into Doubt

Beyond the arguments this Court has already rejected, CTIA now advances two new arguments that this Court should also reject. First, CTIA insists that *Zauderer* should be limited not just to deception cases, but also only to deception cases affecting "voluntary advertising." Pl.'s Opp'n 6. Second, CTIA rejects this Court's sensible distinction between disclosures that clearly indicate the speaker is the government, and disclosures that hide that fact.

1.

There is no Supreme Court authority for the notion that *Zauderer* is limited to "voluntary advertising," whatever the scope of that phrase might be, and there is a raft of circuit level case law that confirms that *Zauderer* applies to a host of commercial speech contexts, including in-store signage and point of sale information. *See, e.g., American Meat Institute*, 760 F.3d 18 (applying *Zauderer* to regulation requiring upstream producers to provide country of origin information about meat products to retailers); *CTIA*, 494 Fed. Appx. 752 (applying *Zauderer* to ordinance that required cell phone retailers, in the words of the district court, "to prominently display an informational poster in the store, to provide every customer with an information fact-sheet, and to paste an informational sticker on all display literature for cell phones," 827 F. Supp. 2d 1054, 1056 (N.D. Cal. 2011)); *N.Y. State Rest. Ass'n*, 556 F.3d at 117, 131-34 (to regulation requiring disclosure of calorie information on menus and menu boards); *Pharm. Care Mgmt.*, 429 F.3d at 316 (Boudin, C.J. & Dyk, J.) (to provision requiring pharmacy benefit managers to disclosure information such as conflicts of interest to their clients, not the public); *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 113-16 (to statute requiring labeling of products and packaging).

*United States v. United Foods, Inc.*, 533 U.S. 405 (2001), on which CTIA relies, simply distinguished *Zauderer* on its facts; it did not provide that all other commercial disclosure

requirements are subject to heightened scrutiny. *United Foods* involved compelled subsidy of *opinion* advertising espousing that "mushrooms are worth consuming whether or not they are branded," *id*. at 411. The rule of that case does not apply in the context of the factual disclosures governed by *Zauderer*.

Regardless, even if *Zauderer* were so limited, it would still apply here. Berkeley's ordinance requires disclosure at the point of sale, a context at the core of the commercial speech doctrine. It strains credulity for CTIA to suggest its members are not engaged in "voluntary advertising" at the point of sale. CTIA itself contests that the ordinance is unduly burdensome because it "supplants CTIA's members' carefully considered messages . . . at a crucial moment: the point of sale." Pl.'s Opp'n 15. The D.C. Circuit's recent opinion in *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), upon which CTIA relies heavily, explicitly did not contest that "point of sale disclosures," as here, are subject to *Zauderer* review. *Id*. at 522. "Point of sale" speech is plainly "voluntary advertising," whatever else that vague term might include. It therefore covers the speech at issue in this case.

2.

CTIA's attack on this Court's sensible distinction between disclosures clearly indicating the government is the speaker and disclosures hiding that fact is also without merit. CTIA's argument is irrelevant here, because, as this Court properly held, Berkeley could have required its disclosure even without explicitly identifying itself as the author of the warning. This is exactly what the FCC did when it required manufacturers to include information in cell phone manuals that provide consumers with information necessary for avoiding exceeding federally set RF exposure limits. *See FCC RF Exposure Guidance* § 4.2.2(4). One cannot know from the information contained in the manuals of CTIA's members whether this information is presented in their own voice, or that of the FCC. But the FCC requires this information to be disclosed nevertheless, and CTIA has not challenged that requirement. Surely Berkeley's ordinance does not warrant greater constitutional scrutiny because it requires the same information to be disclosed in order to serve precisely the same government interest, but does so in a manner that is less intrusive on the autonomy of CTIA's members. If anything, Berkeley's ordinance is more

akin to government speech, because it explicitly identifies Berkeley as the author of the audience. And government speech is given a wide constitutional berth. *See, e.g. Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245-46 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-69 (2009).

Commercial actors are certainly entitled to complain about the economic burdens of regulations. Berkeley believes the economic burden of its ordinance — providing flyers at a point of sale — is small. No doubt, some burden may exist, but it does not risk "chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. CTIA is thus wrong to suggest that this Court "deprived respondent of all First Amendment protection." Pl.'s Opp'n 7 (quoting *United Foods*, 533 U.S. at 410). This Court afforded CTIA the opportunity to demonstrate that its commercial speech was "chilled" by the government's disclosure requirement. It gave CTIA the opportunity to demonstrate that Berkeley's ordinance required the disclosure of non-factual or controversial information. CTIA failed to do either.

## III. Having Failed To Establish Either A Strong Likelihood Of Prevailing On The Merits Or Serious Question On The Merits, Ctia Is Not Entitled To Either The Continuation Of A Preliminary Injunction Or A New Injunction Pending Appeal

The ordinary rule within a federal system reserves to the states, and their localities, the freedom to regulate — unless those regulations are shown to conflict with federal power or infringe on federal rights. This Court has concluded that CTIA has no "strong likelihood of prevailing" on the merits. It has concluded that CTIA's claims raise no "serious question" on the merits. Those two findings erase any possible basis for issuing an injunction interfering with Berkeley's reserved power to regulate.

CTIA obviously has ambitious plans to remake First Amendment law. No doubt it has recruited appropriate legal counsel for that remaking. But this Court has properly rendered existing law to conclude that Berkeley's ordinance — as amended — is constitutional. There can be no irreparable harm from now permitting Berkeley to enforce its ordinance, especially when the information Berkeley seeks to assure its residents know is information that is already contained (if obscurely) within the manuals that CTIA's members provide.

## CONCLUSION

For the foregoing reasons, this Court should GRANT Defendants' motion and dissolve the preliminary injunction, and DENY Plaintiff's motion to grant an injunction pending appeal.

Dated: December 8, 2015.

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