

Theodore B. Olson (#38137)
TOlson@gibsondunn.com
Helgi C. Walker (Admitted *Pro Hac Vice*)
HWalker@gibsondunn.com
Michael R. Huston (#278488)
MHuston@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Telephone: 202.955.8668
Facsimile: 202.530.9575

Joshua S. Lipshutz (#242557)
JLipshutz@gibsondunn.com
Joshua D. Dick (#268853)
JDick@gibsondunn.com
Gibson, Dunn & Crutcher LLP
555 Mission Street
San Francisco, CA 94105-0921
Telephone: 415.393.8233
Facsimile: 415.374.8469

Attorneys for Plaintiff
CTIA – The Wireless Association®

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CTIA – THE WIRELESS ASSOCIATION®,

Plaintiff,

v.

THE CITY OF BERKELEY, CALIFORNIA,
and CHRISTINE DANIEL, CITY
MANAGER OF BERKELEY, CALIFORNIA,
in her official capacity,

Defendants.

CASE NO. 3:15-cv-02529-EMC

**FURTHER JOINT CASE MANAGEMENT
STATEMENT ; ORDER**

Date: March 23, 2017

Time: 10:30 AM

Place: Courtroom 5, 17th Floor, San Francisco

Pursuant to Local Rule 16-10 and this Court's Standing Order, Plaintiff CTIA – The Wireless Association® (“CTIA”) and Defendants the City of Berkeley, California, (“the City”) and Christine Daniel, in her official capacity as City Manager of Berkeley, California, (collectively, “Defendants”) file this Further Joint Case Management Statement. As an initial matter, and as described below, the parties note that no activity in this case has taken place since the last case management conference was held on November 22, 2016, as the parties continue to await a decision from the United States Court of Appeals for the Ninth Circuit (the “Ninth Circuit”), which they believe will provide direction on the future course of this litigation.

1. Jurisdiction and Service.

This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1337. There is no dispute regarding personal jurisdiction or venue. All parties have been served.

2. Facts.

This action challenges the City's Ordinance “REQUIRING NOTICE CONCERNING RADIO FREQUENCY EXPOSURE OF CELL PHONES,” Berkeley Municipal Code Chapter 9.96 (“Ordinance”), which requires cell phone retailers to distribute to their customers or post a notice stating that:

The City of Berkeley requires that you be provided the following notice:

To assure safety, the Federal Government requires that cell phones meet radio frequency (RF) exposure guidelines. If you carry or use your phone in a pants or 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.

Berkeley Municipal Code § 9.96.030(A).

On June 8, 2015, CTIA filed a motion for preliminary injunction (Dkt. 4) asking this Court to enjoin enforcement of the Ordinance on a preliminary basis as preempted by federal law and violating the First Amendment. This Court on September 21, 2015, “grant[ed] in part and denie[d] in

part CTIA's motion for a preliminary injunction," enjoining the Ordinance "unless and until the sentence in the City notice regarding children safety is excised from the notice." (Dkt. 53).

On November 17, 2015, Defendants filed a motion to dissolve the preliminary injunction based on the Berkeley City Council's amendment of the Ordinance to remove the sentence regarding children safety. CTIA filed its opposition to Defendants' motion on December 1, 2015, Defendants filed their reply on December 8, 2015, and oral argument was heard on January 21, 2016. On January 27, 2016, the Court granted Defendants' motion, which incorporated the holding and reasoning of the Court in its prior ruling on CTIA's motion for preliminary injunction, and also denied CTIA's request for a stay of dissolution pending appeal. (Dkt. 74).

On February 1, 2016, CTIA appealed to the Ninth Circuit from this Court's Order granting Defendants' motion to dissolve the preliminary injunction. (Dkt. 76). CTIA filed its opening brief with the Ninth Circuit on February 29, 2016, Defendants filed their answering brief on April 4, 2016, CTIA filed its reply brief on May 9, 2016, and oral argument was heard on September 13, 2016. The parties are presently awaiting a decision from the Ninth Circuit.

The City of Berkeley began enforcing the Ordinance on March 21, 2016.

3. Legal Issues.

The legal issues in this case are: (1) whether the Ordinance violates the First Amendment; (2) whether the Ordinance violates the Supremacy Clause and is preempted by federal law; and (3) whether Defendants have violated CTIA's members constitutional rights in violation of 42 U.S.C. § 1983.

4. Motions.

A. Pending Motions

There are no pending motions before this Court. As noted above, CTIA's appeal to the Ninth Circuit is currently pending.

B. Prior Motions

All prior motions filed in this case, listed below, have been resolved. The parties note that no motions have been filed with the Court since the last case management conference was held on November 22, 2016.

1 1) CTIA's Motion for Preliminary Injunction (Dkt. 4), filed on June 8, 2015; granted in
2 part and denied in part by order (Dkt. 53), filed on September 21, 2015.

3 2) Motions for leave to appear Pro Hac Vice, filed on June 8, 2015 (Dkt. 8, 9),
4 June 22, 2015 (Dkt. 27), and July 1, 2015 (Dkt. 32), respectively; all granted by orders, filed on
5 June 22, 2015 (Dkt. 28, 29), June 24, 2015 (Dkt. 30), and July 7, 2015 (Dkt. 35), respectively.

6 3) National Resources Defense Council's Motion to File Amicus Brief in Opposition to
7 CTIA's Motion for Preliminary Injunction (Dkt. 36); granted by order (Dkt. 53), filed on
8 September 21, 2015.

9 4) Defendants' Motion to Dissolve Preliminary Injunction (Dkt. 59), filed on December
10 8, 2015; granted by order (Dkt. 74), filed on January 27, 2016.

11 5. Amendment of Pleadings.

12 CTIA does not currently anticipate amending its complaint, but reserves all rights to do so.

13 6. Evidence Preservation.

14 Although the parties do not anticipate seeking any discovery, they are aware of and have
15 complied with their evidence preservation obligations.

16 7. Disclosures.

17 The parties have agreed to defer any initial disclosures until such time as they may become
18 relevant.

19 8. Discovery.

20 The parties do not anticipate that any discovery will be necessary. The parties agree that,
21 should either party wish to take discovery, the parties will meet and confer regarding the prompt
22 scheduling of such discovery.

23 9. Class Actions.

24 This case is not a class action.

25 10. Related Cases.

26 The parties are not aware of any related cases or proceedings, except for CTIA's currently
27 pending appeal to the Ninth Circuit, as discussed above.
28

11. Relief.

CTIA seeks the relief set forth in its complaint.

12. Settlement and ADR.

The parties have conferred and agree that the validity of the Ordinance is an issue of broad importance that is not amenable to resolution through settlement or ADR.

13. Consent to Magistrate Judge For All Purposes.

The parties do not consent to assignment to a Magistrate Judge for all purposes.

14. Other References.

This case is not suitable for assignment to binding arbitration, to a Special Master, or to the Judicial Panel on Multidistrict Litigation.

15. Narrowing of Issues.

The parties believe that the issues are adequately framed by the complaint and that no further narrowing of the issues or bifurcation of the case is necessary or advisable.

16. Expedited Trial Procedures.

The parties agree that this is not the type of case that can be handled under the Expedited Trial Procedure of General Order No. 64 Attachment A.

17. Scheduling.

The parties do not believe that any dates need to be scheduled at this time given CTIA's currently pending appeal to the Ninth Circuit of this Court's Order granting Defendants' motion to dissolve the preliminary injunction, which incorporated the holding and reasoning of the Court in its prior ruling on CTIA's motion for preliminary injunction.

18. Trial.

The parties expect this case to be resolved through motions practice, without the need for any trial.

19. Disclosure of Non-party Interested Entities or Persons.

CTIA filed its Certification of Interested Entities or Persons on June 8, 2015. As stated in that Certification, CTIA is a nonprofit membership organization that represents the wireless communications industry. Membership in the association includes wireless carriers and their

suppliers, as well as providers and manufacturers of wireless data services and products. The current membership list is available at <http://www.ctia.org/about-us/current-members>.

20. Professional Conduct.

All attorneys of record for the parties have reviewed the Guidelines for Professional Conduct for the Northern District of California.

March 16, 2017

By: /s/ Theodore B. Olson

Theodore B. Olson
Helgi C. Walker
Joshua S. Lipshutz
Joshua D. Dick
Michael R. Huston

GIBSON, DUNN & CRUTCHER LLP

Attorneys for Plaintiff
CTIA – The Wireless Association®

March 16, 2017

By: **/s/ Zachary D. Cowan

Zach Cowan, City Attorney (#96372)
CITY OF BERKELEY
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Telephone: 510.981.6998
Facsimile: 510.981.6960

Attorney for Defendants
City of Berkeley, California and
Christine Daniel, City Manager of
Berkeley, California

** Pursuant to Civ. L.R. 5-1(i)(3), the electronic signatory has obtained approval from this signatory.

IT IS SO ORDERED that the
Further CMC is reset from 3/23/17
to 6/22/17 at 10:30 a.m. An updated
joint CMC statement shall be filed
by 6/15/17.

