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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CTIA – THE WIRELESS ASSOCIATION®,

Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,

Defendant.

Case No. C10-03224 WHA

DEFENDANT CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: October 20, 2011
Time: 8:00 a.m.
Place: Courtroom 9

Date Action Filed: July 23, 2010
Trial Date: None set

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

Other Authorities

Other References

INTRODUCTION

After reading CTIA's brief, one could come away with the impression that San Francisco requires cell phone retailers to tell their customers "that FCC-compliant cell phones are dangerous." O.B. at 2. But the City requires no such thing. In fact, the City's disclosure materials direct consumers to the FCC's very own factsheet on RF energy emissions from cell phones. This is just one example of how the disclosure materials are designed, not to scare or mislead consumers, but to provide consumers with accurate information that allows them to make informed decisions about how to use their cell phones. The statement from the City's disclosure materials that the World Health Organization ("WHO") has classified RF energy from cell phones as a possible carcinogen is true. The statement that studies continue to assess the potential health effects of mobile phone use is true, and comes directly from the WHO's own factsheet on the topic.

Furthermore, the terms from the disclosure materials that CTIA complains so strenuously about, such as "RF energy," "precautions," "away from the body," and "concerned about exposure to RF energy," are terms used in the manufacturers' own user manuals. The pictures on the disclosure materials show, correctly, that the head and hip do absorb RF energy from cell phones – something the manufacturers also make clear in their user manuals. If these terms and concepts are inaccurate or misleading, why is the industry using them?

CTIA's true complaint is not with the actual language of the disclosure materials, but with where people's minds might go after seeing this information. CTIA clearly does not want people's minds to go in that direction. It may prefer that this kind of information remain buried in user manuals. But the wireless industry has no First Amendment right to prevent the government from helping cell phone purchasers make informed decisions about precautions they could take if they are concerned about a possible health risk.

A reader of CTIA's brief might also come away with an incomplete picture of First Amendment law. For example, this is a case about the provision of information, not the suppression of it. A company's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal," and therefore "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech . . . ." *Zauderer v. Office of*

Disciplinary Counsel, 471 U.S. 626, 651 (1985). Moreover, CTIA's brief omits one of the most recent Supreme Court cases on compelled speech, as well as *the* most recent Ninth Circuit case on compelled speech. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("FAIR"), and *Beeman v. Anthem Prescription Management*, __ F.3d __, 2011 WL 2803561 (9th Cir. July 19, 2011). These cases show that San Francisco's corporate disclosure requirement enjoys two related qualities that immunize it from First Amendment scrutiny. First, the disclosure requirement does not hinder or chill the cell phone retailers' ability to disseminate any message they want, including disagreement with any aspect of, or implication of, the City's message. Second, there is no risk that the City's message will be mistaken for the retailers' own opinions – the retailers are not being required to endorse the City's message as their own. "[N]ot all fact-based disclosure requirements are subject to First Amendment scrutiny. Instead, such requirements implicate the First Amendment only if they affect the content of the message or speech by forcing the speaker to endorse a particular viewpoint or by chilling or burdening a message that the speaker would otherwise choose to make." *Beeman*, 2011 WL 2803561 at *11.

If any First Amendment scrutiny were appropriate, it would be the scrutiny prescribed by *Zauderer* and its progeny, which is that the government may impose disclosure requirements on companies when they are reasonably related to a legitimate governmental purpose. San Francisco's effort to help consumers make informed decisions about how to use their cell phones furthers an eminently legitimate public purpose. Indeed, the architects of the "Interphone Study" (the study CTIA is fond of citing in support of its "cell phones are totally safe" argument), recently published a paper (which was before the Board of Supervisors when it considered this ordinance), stating: (i) there is a potential link between cell phones and brain tumors; (ii) cell phone use today is far heavier and more widespread, especially among children, than in the 1990's when most studies were conducted; (iii) if there turns out to be an actual link between cell phone use and brain tumors, this would become an important public health issue; and therefore (iv) "until definitive scientific answers are available, the adoption of . . . precautions, particularly among young people, is advisable." Cardis and Sadetski, *Indications of possible brain-tumour risk in mobile-phone studies: should we be concerned?*, Journal of Occupational and Environmental Medicine, Jan. 24, 2011. San Francisco is the health care provider

of last resort for its citizens. If the scenario posited by Cardis and Sadetski comes to pass, the City would suffer greatly, both in human terms and in terms of the impact on its health care system. The First Amendment does not require San Francisco to wait for conclusive "scientific proof" of the potential health effects of cell phone use before taking measures to ensure the populace is informed of potential health risks of this increasingly widespread technology and of ways to reduce such risks.

CTIA's preemption argument is even weaker. The FCC, in deciding to allow the sale of cell phones that fall below a specified RF energy threshold while disallowing phones that exceed the threshold, struck a balance between safety and efficiency. If San Francisco prohibited phones above a different threshold, or created a local cause of action allowing people to sue wireless companies for selling phones that satisfy the FCC's standard, that would arguably upset the balance struck by the FCC. But a mere consumer disclosure requirement that might cause consumers to use their phones differently does not disrupt that balance, and does not remotely interfere with the federal government's ability to regulate the wireless network.

Accordingly, not only does CTIA fail to demonstrate a strong likelihood of success on the merits; it fails to demonstrate even a remote chance of success.

BACKGROUND

A. The Debate About The Health Effects Of Cell Phones.

Cell phones emit Radiofrequency ("RF") energy. RF energy is a type of radiation, called non-ionizing radiation, which is similar to the radiation emitted from microwave ovens and smart meters. When people hold or place their switched-on cell phones close to their heads or bodies, they absorb RF energy from the phones. RF energy exposure decreases dramatically when the phone is kept further from the head or body.

There is a debate within the scientific community about whether exposure to this RF energy from cell phone use – particularly heavy cell phone use – causes adverse health effects. The City's Board of Supervisors had before it ample evidence of this debate. For example, the Board was aware that a working group from the International Agency for Research on Cancer ("IARC"), an agency within the World Health Organization ("WHO"), recently conducted a metastudy of all prior epidemiological studies of the health effects of cell phones. As a result of this study, the IARC

decided to classify RF energy from cell phones as "possibly carcinogenic to humans." City's Request for Judicial Notice in Opposition to Motion for Preliminary Injunction ("RJN"), Ex. A at 1 ("WHO Factsheet No. 193: *Electromagnetic fields and public health: mobile phones*"). *See also* RJN Ex. B at 1-6 (Transcript of Hearing Before San Francisco Board of Supervisors City Operations & Neighborhood Services Committee); RJN Ex. H (WHO Press Release).

CTIA notes that some seemingly-innocuous products appear on the WHO's list of possible carcinogens, such as coffee and pickled vegetables. But WHO's list also includes such items as DDT, Lead, and Trichloromethine.[1] Moreover, CTIA's emphasis on coffee is illustrative, because California law requires that consumers be warned about this product as well, at no apparent harm to companies like Starbucks.[2] In any event, far more important than whether cell phones are more like coffee or DDT is the WHO working group's bottom-line conclusion that, based on the available studies, "a causal interpretation between mobile phone RF-EMF exposure and glioma [i.e., brain tumors] is possible." City's RJN Ex. C at 2. Furthermore, as the working group stated, "[w]hen used by children, the average RF energy deposition is two times higher in the brain and up to ten times higher in the bone marrow of the skull, compared with mobile phone use by adults." *Id.* at 1.

The largest direct epidemiological study conducted to date on the health effects of cell phones is the "Interphone" study. This study was also coordinated by the WHO. *See* RJN Ex. A at 3. When members of the wireless industry engage in public debate about the health effects of cell phones, they frequently cite this study for the proposition that there is no evidence a health issue. *See, e.g.*, RJN Ex. D at 54-55. However, two key architects of the Interphone study, Elisabeth Cardis and Siegal Sadetski, recently published a paper in which they emphasized several significant points. First, the Interphone study (and many others) "were conducted at a time when mobile communication was still a relatively new phenomenon with low levels of use compared with today." City's RJN Ex. E at 1 ("Indications of possible brain-tumour risk in mobile-phone studies: should we be concerned?"). Second, even within the Interphone study, "an increased risk [of brain tumors] was seen among long-term users, with an indication of a trend for increasing risk with increasing time since start of use," and

[1] *See* http://monographs.iarc.fr/ENG/Classification/ClassificationsGroupOrder.pdf.

[2] *See* http://oehha.ca.gov/prop65/acrylamide.html.

"a 40% increase in risk was seen for glioma [for people] in the highest decile of cumulative call time." *Id.* Third and most importantly, the authors concluded that the potential health risks are significant enough to warrant precautionary measures to reduce RF energy exposure from cell phones:

> While more studies are needed to confirm or refute these results, indications of an increased risk in high- and long-term users from Interphone and other studies are of concern. There are now more than 4 billion people, including children, using mobile phones. Even a small risk at the individual level could eventually result in a considerable number of tumours and become an important public health issue. Simple and low-cost measures, such as the use of text messages, hands-free kits and/or the loud-speaker mode of the phone could substantially reduce exposure to the brain from mobile phones. Therefore, *until definitive scientific answers are available, the adoption of such precautions, particularly among young people, is advisable*.

Id. at 2 (emphasis added).[3]

B. San Francisco's Original Ordinance And CTIA's Challenge To It.

In July 2010, San Francisco adopted an ordinance designed to educate consumers about the ways they could reduce their exposure to RF energy from cell phones. Although the City has since amended that ordinance substantially, the original ordinance, and the circumstances that led to its amendment, illustrate how the City has addressed all reasonable legal objections raised by CTIA, and how CTIA is now grasping at straws. This history also shows that CTIA is wrong to cite past voluntary enforcement delays as justification for a court-ordered injunction.

The original ordinance contained two basic requirements. The first was that cell phone retailers post the "SAR values" of cell phones at the point of sale. RJN Ex. F. The SAR value is a measure of the maximum amount of RF energy a cell phone will cause the body to absorb, under certain specified conditions. The second requirement was that retailers provide information about cell phone radiation, by making a factsheet available upon request and by displaying either a poster in the store or individual stickers as part of cell phone displays. *Id.* The ordinance tasked the City's Department of the Environment ("DoE") with drafting the language to be contained in the factsheet, poster and stickers. *Id.*

[3] As mentioned, most of the materials cited herein were before the Board when it considered the legislation being challenged here, are part of the legislative file, and are attached as exhibits to the RJN. The City has also filed a Supplemental Request for Judicial Notice, which places in the record all the other studies considered by the Board but not discussed in this brief due to space limitations.

CTIA promptly filed suit to challenge the validity of the ordinance. CTIA's original complaint contained just a single cause of action for federal preemption. Dkt. 1.

On September 20, 2010, pursuant to its rulemaking authority, DoE released drafts of the sticker, poster and factsheet, and solicited public comment on the draft materials. Declaration of Caitlin Sanders in Opposition to Motion for Preliminary Injunction ("Sanders Dec.") at ¶ 3. These disclosure materials used the word "radiation" numerous times, provided tips for reducing radiation exposure, such as comparing radiation levels and buying a phone with a lower SAR value, using a headset, and texting instead of talking. *Id*. at Ex. A, B, C.

C. Changes To The FCC's Website.

The above-referenced suggestions contained in the City's original materials were taken directly from the FCC's website, which included its own factsheet entitled "Wireless Devices and Health Concerns." Sanders Dec. at ¶ 15. In a section titled "Recent Developments," the FCC's factsheet informed readers that "[r]ecent reports by some health and safety interest groups have suggested that wireless device use can be linked to cancer and other illnesses." *Id*. Ex. G. It explained that this issue has "become more pressing as more and younger people are using the devices, and for longer periods of time." *Id.* Although the FCC's factsheet emphasized that the available evidence establishes no "definite" link between cell phone use and adverse health effects, it stated that "almost all parties debating the risks of using wireless devices agree that more and longer-term studies are needed." *Id.* The FCC thus identified "precautions" that "some parties recommend taking," including: "Buy a wireless device with lower SAR"; "Use an earpiece or headset"; "keep wireless devices away from your body when they are on"; and "Consider texting rather than talking." *Id*.

Shortly after CTIA filed its lawsuit against San Francisco, the FCC changed its factsheet. The new factsheet omitted any suggestion to buy a phone with a lower SAR value, stating instead that SAR is not useful for comparing phones, and potentially misleading if used for that purpose. Sanders Dec. at ¶ 17 & Ex. H. The FCC's new factsheet continued to identify the other precautions listed on the previous version. It added: "**The FCC does not endorse the need for these practices**, but provides information on some simple steps that you can take to reduce your exposure to RF energy from cell phones." *Id.* at Ex. H (bold in original).

D. CTIA's New First Amendment Claim.

Although CTIA received notice of DoE's draft disclosure materials and was invited to comment, it did not do so. Sanders Dec. at ¶¶ 4-5. Instead, after those materials became final, CTIA filed a First Amended Complaint ("FAC"). The FAC retained CTIA's federal preemption claim, and added a First Amendment claim, which alleged that DoE's disclosure materials were inaccurate and misleading. Specifically, CTIA alleged: "The FCC's SAR standard was never intended and cannot be used as a comparative measure that consumers would use to shop for cell phones and is affirmatively misleading when portrayed as a measure of likely exposure in everyday use." FAC ¶ 6. *See also id.* at ¶ 132. Thus, CTIA argued, the materials violated retailers' free speech rights "by compelling them to communicate in a manner that is inaccurate and misleading, and that will harm consumers." FAC ¶ 10. CTIA also took issue with DoE's use of the word "radiation" in the disclosure materials, asserting that it was misleading to use that term without further qualification. Specifically, CTIA alleged that "[t]he word 'radiation' used by itself is generally understood to refer to ionizing radiation, such as X-rays, nuclear reactions, and other harmful radiation." FAC ¶ 32; *see also id.* at ¶ 131.[4]

E. San Francisco's Decision To Amend The Ordinance.

In late January 2011, after CTIA filed its FAC, the City announced it would delay enforcement of the ordinance so that it could consider further changes to the disclosure materials, and possible amendments to the ordinance. Dkt. 43, 46. The Board ultimately did amend the ordinance, addressing

[4] In an attempt to bolster these allegations, CTIA submitted a report from Ronald Peterson, who opined that providing customers with SAR values at the point of sale would mislead rather than help them choose a phone that exposes them to less radiation. Declaration of Vince Chhabria in Opposition to Motion for Preliminary Injunction ("Chhabria Dec.") Ex. A at 2. Mr. Peterson also contended that radiation should be described as RF energy, because the term "radiation" generally connotes ionizing radiation (such as nuclear radiation) rather than non-ionizing radiation (i.e., the RF energy that is emitted from things like cell phones and microwaves). *Id.* at 3. *See also id*. at Ex. B.

CTIA also provided a second expert report – this one from David Stewart. Dr. Stewart studied consumer reaction to the original disclosure materials, asking a series of leading questions that steered respondents into concluding that cell phones were dangerous. *See* Declaration of Carol Scott in Opposition to Motion for a Preliminary Injunction, Ex. A at 3-4. Dr. Stewart's central claim was that the use of the term "radiation" misled people into believing that cell phones actually do cause cancer, rather than just informing them of a possible link between cell phone use and adverse health effects. Scott Dec., Ex. A at 7, 88.

CTIA has now submitted new reports from both Dr. Stewart and Mr. Peterson, who have found other reasons to object to the new disclosure materials.

the most significant issues identified by CTIA's new First Amendment claim (and at the same time addressing the issues raised by the FCC's website changes). For example, the Board removed the requirement that retailers disclose SAR values to consumers at the point of sale, and removed all reference to the word "radiation." The findings to the new ordinance stated that the City's policy is not to wait for scientific proof of a potential health risk before taking action, that numerous studies have identified a potential link between cell phone use and health effects, that leading epidemiologists have recommended precautionary measures in cell phone use, and that the legislation was designed to advance an important health purpose. RJN Ex. F at 1-2.

The amended ordinance required DoE to develop new disclosure materials to "inform consumers of issues pertaining to radiofrequency energy emissions from cell phones and actions that can be taken by cell phone users to minimize exposure to radiofrequency energy . . ." RJN Ex. F (S.F. Env. Code § 1104(b)). The ordinance provided that retailers must disclose this information about radiofrequency energy on: (i) a poster displayed in the store at a prominent location selected at the retailer's discretion; (ii) a factsheet to be given to everyone who purchases a cell phone; and (iii) a sticker posted on any cell phone display materials the retailer may use. *Id.* at §§ 1103(a), (b), (c).

On September 16, 2011, DoE issued a public notice with draft disclosure materials, inviting public comment and announcing a hearing on the materials for September 26, 2011. Again, CTIA provided the City with no comments on the draft materials. Sanders Dec., ¶¶ 9-10. DoE issued final versions of the disclosure materials on September 30, 2011.

F. The New Disclosure Materials.

As before, DoE developed a poster to be displayed at the store, a factsheet to be kept behind the counter (and provided to anyone who purchases a cell phone), and a label to be included in any cell phone display materials. The materials omit all reference to the term "radiation," and omit mention of possible differences between phones. Instead, the materials, which are attached for convenience as Exhibit A to this brief, discuss tips for how consumers can use their phones if they are concerned about potential health effects.

The poster states at the top: "Cell Phones Emit Radio-frequency Energy." The official seal of the City and County of San Francisco appears prominently on either side of this statement. Below the

statement is a picture of two human figures, one with a cell phone near the ear and the other with a cell phone near the hip. Both phones show something emanating from the phone. Below the picture, the poster states:

> Studies continue to assess potential health effects of mobile phone use.
>
> If you wish to reduce your exposure, the City of San Francisco recommends that you:
>
> * Keep distance between your phone and body
> * Use a headset, speakerphone, or text instead
> * Ask for a free factsheet with more tips

A section below this text states "Learn More" and refers the reader to the web sites of DoE, the FCC, and the WHO. At both the top and bottom of the poster, there is a statement that "[t]his material was prepared solely by the City and County of San Francisco and must be provided to consumers under local law." *See* Ex. A, attached.

The front of the factsheet states at the top: "You can limit exposure to Radio-frequency (RF) Energy from your cell phone." As on the poster, the City Seal appears prominently on either side, and the same picture appears below the statement. The factsheet then states: "Although studies continue to assess potential health effects of mobile phone use, the World Health Organization has classified RF energy as a possible carcinogen." Below that appears the disclaimer that the material is prepared by the City and must be provided under local law. The second side of the factsheet states at the top: "If you are concerned about potential health effects from cell phone RF energy, the City of San Francisco recommends" five measures: "Limiting cell phone use by children," "Using a headset, speakerphone or text instead," "Using belt clips and purses to keep distance between your phone and body," "Avoiding cell phones in areas with weak signals (elevators, on transit, etc.)," and "Reducing the number and length of calls." Each recommendation contains subtext which elaborates on the reasons for the recommendations. And again, at the bottom of the second side of the factsheet, the websites for the DoE, FCC and WHO, the City Seal, and the disclaimer are all displayed. Ex. A, attached.

The sticker states in full: "Your head and body absorb RF Energy from cell phones. If you wish to reduce your exposure, ask for San Francisco's free factsheet." Ex. A, attached.

G. CTIA's Second Amended Complaint.

On October 4, 2011, CTIA filed a second amended complaint ("SAC"), and simultaneously filed this motion for a preliminary injunction. CTIA again argues that the ordinance is preempted, and that the disclosure materials violate the First Amendment. A side-by-side comparison of the FAC and the SAC (as well as a side-by-side comparison of the prior disclosure materials and the new ones) show just how far the City has come in responding to all reasonable concerns raised by CTIA.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365, 376 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* If the plaintiff can establish "serious questions" going to the merits, he may obtain preliminary relief only if the balance of hardships tips *sharply* in his favor *and* if an injunction would be in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

DISCUSSION

I. CTIA WILL NOT SUCCEED IN ITS FIRST AMENDMENT CLAIM.

A. The Distinction Between Disclosure Requirements And Speech Restrictions Is Critical To The First Amendment Analysis.

At times, CTIA blurs the distinction between restrictions on speech (which are almost always subject to heightened scrutiny) and disclosure requirements (which are virtually never subject to heightened scrutiny). For example, CTIA quotes a case involving major speech restrictions, *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 474 (2007), for the proposition that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." O.B. at 8. But there is no "censor" in cases involving corporate disclosure requirements. And that distinction is critical to the First Amendment analysis. After all, in the commercial context the First Amendment's primary purpose is to ensure that relevant information is *not* withheld from consumers. As the Supreme Court explained in 1976, rejecting the State of Virginia's argument that the public would be better off not receiving information on the price of prescription drugs,

> [t]here is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

And as the Supreme Court later explained, this foundational principle – that the commercial speech doctrine helps ensure that consumers are not *prevented* from receiving helpful information – underlies any inquiry into the validity of disclosure requirements. A company's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal," and therefore "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech . . . ." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). *See also id.* at 651 & n.14 ("Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized").

B. The Disclosure Materials Are Not Inaccurate Or Misleading, And Do Not Convey A "Conclusion That FCC-Compliant Cell Phones Are Dangerous."

If San Francisco's disclosure materials conveyed the "conclusion that FCC-compliant cell phones are dangerous," O.B. at 2, CTIA might be right to question the factual basis for the materials. But the disclosure materials do no such thing. They state that cell phones emit RF energy – which is true, and which the cell phone companies state in their own user manuals. Sanders Dec., Exs. D, E and F. The disclosure materials also convey that the human body is "exposed" to RF energy from cell phones – which is also true, and which the cell phone companies also convey in their user manuals. *Id*. The disclosure materials state that if a user wishes to reduce exposure, he may "keep distance" from the phone, which the user manuals say as well. *Id*.

That the wireless industry itself uses much of the language it complains of in this lawsuit is perhaps best exemplified by the user manual for Apple iPhone 4:

> "If you are still concerned about exposure to RF energy, you can further limit your exposure by limiting the amount of time using iPhone, since time is a factor in how much exposure a person receives, and by using a hands-free

> device and placing more distance between your body and iPhone, since exposure level drops off dramatically with distance."

Sanders Dec., Ex. E.[5]

It is also accurate that "although studies continue to assess potential health effects of mobile phone use, the World Health Organization has classified RF Energy as a possible carcinogen." And far from being alarmist or misleading, this makes clear that no conclusion has been reached: the link between cell phones and cancer is merely possible, not certain, and any definitive answer must await further study. The WHO factsheet itself states that "studies are ongoing to more fully assess the potential long-term effects of mobile phone use." RJN, Ex. A at 1.

CTIA's real complaint is not with what the City's disclosure materials say, but with the conclusions people *might* draw from them. But CTIA has cited no First Amendment case – and the City is aware of none – in which the compelled corporate disclosure of factual material is constitutionally problematic because of conclusions it might provoke in consumers' minds. Indeed, CTIA's approach seems quite inconsistent with the First Amendment, whose primary purpose promote the marketplace of ideas and allow people reach their own informed decisions.

As such, the report CTIA submits from David Stewart, which does not question the factual accuracy of the materials but merely speculates about how people might *react* to them, is irrelevant to the purely legal question presented here. And even if such a report could theoretically be relevant, Stewart's particular brand of speculation is worthless. As an initial matter, the survey he conducted about the City's prior disclosure materials was fundamentally flawed – he asked leading questions designed to move respondents in the direction of concluding cell phones were dangerous. *See* Declaration of Carol Scott in Opposition to Motion For A Preliminary Injunction, Ex. A at 3-4. Thus any reliance on his old survey results to speculate about consumer reaction to the new materials is inherently useless. *Id*. at 6. What's more, Stewart barely acknowledges the significant differences

[5] Indeed, some of the language in the user manuals is more alarming than what is in the City's disclosure materials. For example, BlackBerry users are told that "[u]se of holsters that have not been approved by Rim might, in the long term, present a risk of serious harm," and that "[t]he long term effects of exceeding radiofrequency exposure standards might present a risk of serious harm." Sanders Dec., Ex. F. They are told to "keep the BlackBerry device at least 0.98 inches (25mm) from your body when the device is connected to a wireless network." *Id*. Instructions like these are typically provided under bolded headings such as "**Important safety precautions**," or "**Exposure to Radio Frequency energy**." *Id*. at Exs. F & D.

between the old materials and the new ones. For example, Stewart's conclusion about the prior materials was based almost exclusively on the fact that the materials repeatedly used the term "radiation," whereas the new materials use the parlance used by the wireless industry. *Id*. at 5-6, 88. Stewart's new objection (and CTIA's new objection) to the use of the term "Radiofrequency energy" is particularly vexing since CTIA's other expert, Ronald Peterson, previously testified that *this is exactly the term the City should have used*, instead of "radiation." Chhabria Dec., Ex. B at 135, 140-41 and 143. In short, CTIA's expert presentation lacks credibility and should be disregarded.[6]

C. The Disclosure Materials Do Not Interfere With The Ability Of Cell Phone Retailers To Communicate, Nor Do They Require Cell Phone Retailers To Endorse San Francisco's Message.

Perhaps the most serious flaw in CTIA's presentation is its failure to mention one of the Supreme Court's most recent compelled speech decisions, or *the* most recent compelled speech decision to come out of the Ninth Circuit. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006) ("FAIR"), and *Beeman v. Anthem Prescription Management*, __ F.3d __, 2011 WL 2803561 (9th Cir. July 19, 2011). These two recent authorities show that San Francisco's ordinance enjoys two important, related qualities that distinguish it from CTIA's cases: it does not interfere with the ability of cell phone retailers to disseminate their own message, and it does not require the retailers to endorse San Francisco's message. And because the ordinance enjoys these two qualities, it does not implicate the First Amendment. *Beeman*, 2011 WL 2803561 at *11.

In *FAIR*, the Court considered a contention by law schools that the Solomon Amendment, which required schools to allow military recruiters on campus and disseminate information for them as they would any other recruiter, violated the First Amendment by compelling them to speak on behalf of the military and to accommodate the military's speech. 547 U.S. at 60. The Court recognized that the Solomon Amendment required the law schools to speak when they objected to doing so, but rejected the First Amendment argument, distinguishing the prior compelled-speech cases relied upon

[6] Incidentally, Peterson now takes issue with the accuracy of one of the statements in the disclosure materials, namely, that "developing brains and thinner skulls lead to higher absorption in children." O.B. at 13 n.17. However, the WHO working group that classified RF energy from cell phones as a possible carcinogen has stated: "When used by children, the average RF energy deposition is two times higher in the brain and up to ten times higher in the bone marrow of the skull, compared with mobile phone use by adults." RJN Ex. C at 1.

by CTIA here, because the compelled speech requirements in those cases chilled the ability of the speaker to disseminate his own message, whereas the Solomon Amendment did not prevent the law schools from expressing their disagreement with military policy. *Id*. at 63 ("The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate").

In *Beeman*, the Ninth Circuit considered a First Amendment challenge by "pharmacy benefit managers" ("PBMs") to a state law requiring them to disclose information about drug pricing to insurance companies. The Court explained that the pricing disclosure requirements did not "alter, chill, or otherwise affect a PBM message that enjoys First Amendment protection," and did not "burden a PBM's ability to say whatever it chooses about pharmacy reimbursements." 2011 WL 2803561 at *10. "Simply put, PBMs remain free, in reporting [price] survey results under [California Civil Code] § 2527, to assert any viewpoint they would like. They may encourage action or inaction on the basis of the statistics, or they may say that the report is worthless, sent only under government mandate." *Id. See also Envtl. Def. Ctr., Inc. v. E.P.A.*, 344 F.3d 832, 850 (9th Cir. 2003) (Informing public about environmental and safety issues with a product "does not prohibit the MS4 from stating its own views about the proper means of managing toxic materials . . . . Nor is the MS4 prevented from identifying its dissemination of public information as required by federal law . . . .").

Here too, the cell phone retailers remain free to say anything they like about cell phones. They may tell their customers that the disclosure materials are "worthless" and are provided "only under government mandate." *Beeman*, 2011 WL 2803561 at *10. They may hand consumers their own "factsheet" which expresses this disagreement with San Francisco's message, or they may explain this to customers orally, or both. They may communicate to their customers that the WHO's decision to classify cell phones as a "possible carcinogen" is not important. They may argue that cell phones are absolutely safe, and that no further study is needed on the health effects of cell phone use. They may tell customers that there is no reason to reduce exposure to RF energy by using a headset or keeping the phone away from the body, or no reason to worry about kids.

CTIA seems to suggest that the physical spaces occupied by cell phone retailers are so small that, if required to provide the disclosure materials, they would be unable to effectively communicate

messages. O.B. at 7. But the factsheet may be kept behind the counter and given to customers when they purchase phones. The single "poster" that must be placed somewhere in the store (at the discretion of the retailer) must be 11 x 17 inches – not much larger than the piece of paper the words of this brief are printed on. The labels must be 1 x 1.625 inches. It is simply not credible to suggest that display of these materials would interfere with any message retailers may wish to communicate.

Relatedly, a disclosure requirement may trigger First Amendment scrutiny if the company is required to adopt the message as its own. Conversely, however, if it is clear that the information being disclosed does not represent the company's message, this militates heavily in favor of the disclosure requirement. As the Ninth Circuit explained in *Beeman*:

> Indeed, most disclosure requirements, from nutritional facts on packaged foods to the financial details of publicly traded companies, are designed to remedy information asymmetries and potentially alter individuals' behavior as they become more well-informed market participants. As long as those who are compelled to disclose are not required to *endorse* the possible result of a better-informed market, just as the law schools in *FAIR* were not required to "endorse" the military's hiring policies, the fact that legislators may desire the resulting behavior is irrelevant.

Beeman, 2011 WL 2803561 at *10 & n.16. *See also FAIR*, 547 U.S. at 65 ("We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy . . . . Surely students have not lost that ability by the time they get to law school"). *See also id*. (discussing the applicability of *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) to this issue).

Here, the message is San Francisco's, and it is clear from the materials that retailers are required by law to provide them. The materials carry the City Seal prominently, they specify that the recommendations for reducing RF energy exposure are from the City, and they state repeatedly that they were "prepared solely by the City and County of San Francisco and must be provided to consumers under local law." In this age of government-required disclosures, surely consumers will not mistake these materials as a message from the cell phone industry.[7]

[7] In the current iteration of its challenge to the City's ordinance, CTIA argues that the materials will be more alarming to consumers because they convey a message from the government, rather than a private message. O.B. at 9 & n.11. In its prior complaint, however, CTIA complained that the disclosure materials required the retailers to *endorse* the message. FAC ¶ 10. Which is it? CTIA's willingness to freely swap one objection for its doctrinal opposite speaks volumes about the substance of their challenge to the current version of the ordinance.

Thus, *FAIR* and *Beeman* show why the cases emphasized in CTIA's brief – such as the plurality opinion in *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1985) ("*PG&E*"), and the opinions of the Court in *Wooley v. Maynard*, 530 U.S. 705 (1977), *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988) – are of no help to CTIA. In each of those cases, the government regulation either required the speaker to endorse a message they disagreed with or significantly interfered with the ability of the speaker to effectively disseminate a message. In *Wooley*, the government required people to endorse the slogan "Live Free or Die." 430 U.S. at 714-15. In *Riley*, the government required people soliciting charitable contributions to include detailed language in their message, thereby interfering with their ability to receive contributions. 487 U.S. at 800. In *Tornillo*, the government required a newspaper to print "reply articles" written by others, in response to the speech that the newspaper had uttered. 418 U.S. at 256. And in *PG&E*, the government required a utility company to put the newsletter of its *competitor* in its monthly bills four times a year. 475 U.S. at 8-9. It is one thing to require someone to endorse speech with which he disagrees, or to force someone to speak in a way that chills his own message, or to condition a person's speech on the inclusion of other speech. It quite another thing – and far more commonplace – to simply require that a company provide information about a product that it happens to be selling. "There is nothing in this case approaching a Government-mandated pledge or motto that the [retailers] must endorse." *FAIR*, 547 U.S. at 62. "A [retailer's phone sales] lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Id*. *See also Beeman*, 2011 WL 2803561 at *9, 12 (discussing *PG&E*, *Tornillo* and *Riley*).[8]

In sum, as the Ninth Circuit held in *Beeman*, "not all fact-based disclosure requirements are subject to First Amendment scrutiny. Instead, such requirements implicate the First Amendment only if they affect the content of the message or speech by forcing the speaker to endorse a particular viewpoint or by chilling or burdening a message that the speaker would otherwise choose to make." 2011 WL 2803561 at *11. Because San Francisco's ordinance possesses these two related qualities –

[8] CTIA's reliance on *PG&E*, while omitting the Court's discussion of *PG&E* in *FAIR*, is curious, since the unanimous *FAIR* Court's discussion of the legal issues implicated by *PG&E* is binding precedent, while the plurality opinion in *PG&E* is not.

it does not interfere with the retailers' ability to express their message and it does not require the retailers to endorse the City's message – it does not implicate the First Amendment at all.

D. The Disclosure Materials Are Reasonably Related To San Francisco's Interest In Protecting The Health Of Its Residents.

As discussed in Subsection B above, the materials provide only factual information to the consumers. Thus, to the extent any level of First Amendment scrutiny should be applied, it would certainly not be the heightened scrutiny CTIA proposes. Rather, San Francisco's disclosure requirement would be subject to the "reasonable relationship" test applied in *Zauderer* and subsequent cases – a test the City easily meets.

As stated in *Zauderer*, "because disclosure requirements trench much more narrowly on the advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." 471 U.S. at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982) (brackets and ellipses in original)). Thus, as the courts have explained, such disclosure requirements are valid if reasonably related to the furtherance of a legitimate public purpose.

Litigants have sometimes argued (and CTIA tepidly makes this suggestion) that the only public purpose governments may further with corporate disclosure requirements is the one that happened to be at issue in *Zauderer*: "preventing deception of consumers." 471 U.S. at 651. This makes no sense. What if a product, when used by pregnant women, will cause birth defects? If "preventing deception of consumers" were the only basis for imposing corporate disclosure requirements, the First Amendment would preclude governments from requiring companies to disclose that their products cause birth defects if used by pregnant women. The notion that the government may impose disclosure requirements to prevent consumer deception, but not to promote public health, is absurd.

That is why courts having occasion to apply *Zauderer* in a context where some other legitimate governmental interest is at stake – like protecting public health or protecting the environment – have concluded that these too are interests the government may promote with disclosure requirements. For example, in *Nat'l Elec. Mfrs. Assoc. v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001), the Second Circuit considered a Vermont requirement that fluorescent light bulb manufacturers "inform consumers that

the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste." Rejecting the argument that disclosure requirements may only be imposed to combat consumer deception, the court explained:

> To be sure, the compelled disclosure at issue here was not intended to prevent "consumer confusion or deception" per se, *Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265 (internal quotation marks omitted), but rather to better inform consumers about the products they purchase. Although the overall goal of the statute is plainly to reduce the amount of mercury released into the environment, it is inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products. Accordingly, we cannot say that the statute's goal is inconsistent with the policies underlying First Amendment protection of commercial speech, described above, and the reasons supporting the distinction between compelled and restricted commercial speech. We therefore find that it is governed by the reasonable-relationship rule in *Zauderer*.

Id. at 115.

Similarly, in *NYSRA v. New York City Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009), the court rejected the argument that "all other disclosure requirements are subject to heightened scrutiny" and applied the "reasonable relationship" test to a local law requiring disclosure of calorie counts on menus. The court went on to uphold the disclosure requirement on the ground that it was rationally related to promotion of public health:

> NYSRA does not contend that disclosure of calorie information is not "factual"; it only claims that its member restaurants do not want to communicate to their customers that calorie amounts should be prioritized among other nutrient amounts, such as those listed in Section 343(q)'s Nutrition Fact panel. However, the First Amendment does not bar the City from compelling such "under-inclusive" factual disclosures, *see Zauderer*, 471 U.S. at 651 n. 14, 105 S.Ct. 2265, where as discussed below, the City's decision to focus its attention on calorie amounts is rational.

Id. at 134. *See also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir. 2005) ("we have found no cases limiting *Zauderer* in such a way"); *Envtl. Def. Ctr., Inc. v. E.P.A.*, 344 F.3d 832, 850 (9th Cir. 2003) (holding that disclosure requirement was reasonably related to environmental protection and public health); *Dex Media W., Inc. v. City of Seattle*, 2011 WL 2559391 (W.D. Wash. June 28, 2011) ("While consumer deception was at issue in *Zauderer*, the rule has not been limited to those facts, and Plaintiffs have articulated no sound basis for doing so").[9]

[9] CTIA is wrong to say "the Supreme Court and Ninth Circuit have strongly suggested" that the reasonable relationship test only applies when the government is preventing consumer deception. O.B.

San Francisco's effort to help consumers make informed decisions about the way to use their cell phones is clearly reasonably related to a legitimate – indeed vital – public health goal. If it turns out that cell phone use causes adverse health effects, this could be a serious public health issue for the City, given the ubiquity of cell phones and the frequency with which people use them. It is reasonable for the City to act now rather than waiting for the conclusive scientific proof CTIA seems to believe is necessary. Indeed, it would be *un*reasonable to wait until all opposition arguments have been disproven, given the ease with which such arguments can be concocted, and given the potential public health consequences of inaction.

II. CTIA WILL NOT SUCCEED IN ITS PREEMPTION CLAIMS.

A. There Is No Conflict Preemption.

Although CTIA's Second Amended Complaint alleges the ordinance is invalid both under principles of field preemption and conflict preemption, its moving papers address only the issue of conflict preemption. Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). The City's requirement that retailers provide information to their customers creates no obstacle to the accomplishment of the federal government's goal of promoting a uniform and efficient wireless network.

The framework for conflict preemption analysis is fully provided by *Farina v. Nokia*, 625 F.3d 97 (3d Cir. 2010), and *Murray v. Motorola, Inc.*, 982 A.2d 764, 785 (D.C. Ct. App. 2009). These cases recognize that the FCC, in deciding to allow the sale of phones with SAR values of 1.6 W/kg or less, and to disallow the sale of phones with SAR values of higher than 1.6 W/kg, struck a balance between the need to promote safety and the need to allow the nationwide market for wireless

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at 12. The cases it cites simply happened to involve an effort by the government to prevent consumer deception. Particularly off point is *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009). There, the Ninth Circuit struck down a ban on the sale of violent video games to minors, and after doing so inquired whether any governmental interest was served by the statute's remaining requirement that the video game manufacturers affix an "18" label on the games. No interest was served by a label that referenced a ban that was no longer valid, and the label was factually inaccurate because of the decision to strike down the ban. *Id*. at 966-67.

telecommunications to grow efficiently. *See In the Matter of Procedures for Reviewing Requests for Relief from State & Local Regulations Pursuant to Section 332(c)(7)(b)(v) of the Communications Act of 1934 in the Matter of Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation*, ¶29 12 F.C.C.R. 13494 (1997) ("*RF Order II*") ("We continue to believe that these RF exposure limits provide a proper balance between the need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands.") *Farina* and *Murray* show that local laws which disrupt that balance are preempted, and those which don't disrupt the balance are not.

Farina was a putative class action, on behalf of current and future purchasers of cell phones, which alleged that "the marketing of cell phones as safe for use without headsets violates several provisions of Pennsylvania law." 625 F.3d at 104. The named plaintiff sought to impose liability under state law based on the argument that "these phones were, in fact, unsafe to operate without headsets because of their emission of RF radiation – despite the fact that their emission levels were in compliance with FCC standards." *Id*. at 122. "In order for Farina to succeed," the court explained, "he necessarily must establish that cell phones abiding by the FCC's SAR guidelines are unsafe to operate without a headset. In other words, Farina must show that these standards are inadequate – that they are insufficiently protective of public health and safety." *Id.* Allowing state law causes of action of this sort, with plaintiffs recovering damages against cell phone manufacturers for engaging in conduct the FCC expressly permitted, would upset the balance struck by the FCC when it decided to impose a SAR limit of 1.6 W/kg. *Id.* at 125-26.

The plaintiffs' state-law cause of action also conflicted with federal law because "the resulting state-law standards could vary from state to state, eradicating the uniformity necessary to regulating the wireless network." *Id.* That network, the court explained, "is an inherently national system." *Id.* "In order to ensure the network functions nationwide and to preserve the balance between the FCC's competing regulatory objectives, both Congress and the FCC recognized uniformity as an essential element of an efficient wireless network." *Id.* Emissions standards that varied from state to state "would hinder the accomplishment of the full objectives behind wireless regulation." *Id.*

Similarly, in *Murray* the District of Columbia Court of Appeals held preempted a state law cause of action that sought to impose liability on cell phone manufacturers for selling "unsafe" phones, even though the phones complied with FCC standards. The court explained: "[g]iven the FCC's contemporaneous explanations of the balance it sought to achieve by rejecting a more stringent safety standard, we conclude that state regulation that would alter the balance is federally preempted." 982 A.2d at 776. In contrast, the court held that other claims against the cell phone manufacturers, for providing false or misleading *information* to consumers, were *not* conflict-preempted because they did not threaten to upset the regulatory balance struck by the FCC: "Defendants could be held liable for providing plaintiffs with false and misleading information about their cell phones, or for omitting to disclose material information about the phones, without plaintiffs having to prove that cell phones emit unreasonably dangerous levels of radiation." *Id.* at 783. Because these state law claims did not conflict with the FCC's regulatory regime, they could only be preempted if the federal government had *occupied the field* of consumer disclosures. And the *Murray* court concluded that the federal government only occupies the field of *technical standards* relating to RF energy emissions from cell phones, not "the field of consumer disclosures to cell-phone purchasers." *Murray*, 982 A.2d at 788. *See also id*. (no basis to conclude that "there needs to be uniformity with respect to such matters as what disclosures must be made to consumers").[10]

CTIA makes vague assertions about how San Francisco's disclosure requirements interfere with the balance struck by the FCC, but there is nothing behind those assertions. CTIA apparently believes the balance will be disrupted because the disclosure requirements might cause some people to change the way they use their phones – for example, they may use a headset more often, they may encourage their children to do the same, or they may turn their phones off more frequently. And CTIA argues that it is helpful for people to keep their cell phones on, because this will make it more likely

[10] Incidentally, the FCC filed an amicus brief in the trial court in *Murray*, arguing that the cause of action was conflict preempted. *See* Br. of Amicus Curiae Federal Communications Commission, *Murray v. Motorola*, No. 01-8479 (D.C. Sup. Ct. Nov. 21, 2005). This indicates that when the FCC believes a local government is interfering with the ability of the federal government to regulate the nation's wireless network, it will step in quickly.

they will receive important phone calls promptly, and it will allow wireless carriers to track their customers' physical locations.

But the FCC's decision to allow the sale of phones with a SAR value of 1.6 W/kg or less does not reflect a federal determination that people should keep their cell phones on so that they can receive important calls, or so that their wireless carrier can find them. It reflects a balancing of the "need to protect the public and workers from exposure to excessive RF electromagnetic fields and the need to allow communications services to readily address growing marketplace demands." *RF Order II* at ¶ 29. San Francisco's ordinance does not upset that balance, because, in contrast to the state-law causes of action at issue in *Farina* and *Murray*, it does not even come close to interfering with the ability of the wireless industry to manufacture and sell phones as they have always done. The ordinance does not impose a different emissions standard from the one adopted by the FCC. It does not impose liability for conduct that the FCC expressly allows. The existence of multiple ordinances of this kind would not subject the wireless industry to varying emissions standards. It would not require them to change they way they manufacture or market their phones. It would not affect the operation of the nationwide wireless network. In short, the ordinance in no way upsets the regulatory balance struck by the FCC, and as such it does not stand as "an obstacle to the accomplishment of the objectives of Congress." *Farina*, 625 F.3d at 122.[11]

B. CTIA Does Not Account For The Presumption Against Preemption.

For the reasons provided above, the preemption question in this case is an easy one. But even if the question were close, CTIA would not be entitled to relief, because of the presumption against

[11] It also bears noting that Congress has demonstrated an acute awareness of preemption issues in the telecommunications context, knowing full well how to preempt local regulation in areas where it felt such regulation would interfere with federal uniformity, and how to avoid preemption in other areas. For example, Congress has explicitly divested state and local governments of the authority to regulate "entry of and rates charged by any commercial mobile service . . ." 47 U.S.C. § 332(c)(3)(A). And it has divested them of the authority to regulate the placement or construction of cell towers "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(iv). Conversely, Congress included in the Telecommunications Act of 1996 provisions both preserving state and local authority over certain aspects of telecommunications regulation, *see* 47 U.S.C. §§ 253, 332(c)(7)(A), and stating that it "shall not be construed to modify, impair, or supersede Federal, State or local law *unless expressly so provided*." Pub.L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (codified as Note to 47 U.S.C. § 152).

preemption. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). This is particularly so when a local government acts to protect the health of its residents – a matter that falls squarely within the historic police powers of the state and local governments. In these cases, the courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). *See also Farina*, 625 F.3d at 116; *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1120 (9th Cir. 2008) ("*Golden Gate I*").

CTIA may argue that the presumption against preemption does not apply because local governments traditionally have not regulated in the area of communications between cell phone retailers and customers about RF energy. But even "a novel approach" to protecting public health enjoys the presumption against preemption, so long as it is indeed an exercise of the police power to protect the public health and safety. *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 546 F.3d 639, 648 (9th Cir. 2008) ("*Golden Gate II*"). After all, the placement of automated cameras at intersections to catch red-light runners is a relatively new invention, but it is still an exercise of the traditional police power of a local government to promote traffic safety.

CTIA may also argue that the presumption against preemption "usually" does not apply in areas where the federal government has long had a "significant presence." *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (holding that presumption does not apply in the context of long-distance telecommunications). But "the presence of federal regulation, however longstanding, does not by itself defeat the application of the presumption." *Farina*, 625 F.3d at 116. And this case involves something that is right in the wheelhouse of the local police power: protection of the public health. "While Congress has long exerted control over radio communications, state governments have traditionally regulated the field of public health and welfare. State-law actions based on the risks associated with RF emissions fall squarely within the traditional police power." *Id.*

In short, although the preemption question presented by this case is easy to resolve even without a presumption, the presumption against preemption makes the answer even more clear.

III. CTIA CANNOT ESTABLISH IRREPARABLE HARM BASED ON ITS PREEMPTION CLAIMS.

In the preemption context, CTIA has made no showing of irreparable harm. CTIA's suggestion that the disclosure materials would harm the goodwill of the retailers' businesses in some immeasurable way is unfounded. The disclosure materials do not criticize the retailers or accuse them of being dishonest. They do not suggest (as the previous disclosure materials did) that one cell phone is better than the other. And in this age of cell phone ubiquity, it strains credulity to speculate (as CTIA does) that the materials would cause consumers to forego cell phones altogether. After all, the materials inform people how to mitigate possible risks, so why, armed with these tips, would people want to forego the phones?

IV. THE PUBLIC INTEREST WEIGHS AGAINST PRELIMINARY RELIEF.

Although at least some irreparable harm is presumed if the government interferes with the First Amendment rights of a litigant, the degree of that harm must still be balanced against the public interest. Indeed, "when a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight." *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999). And "[t]he public interest in maintaining a free exchange of ideas, though great, has in some cases been found to be overcome by a strong showing of other competing public interests, especially where the First Amendment activities of the public are only limited, rather than entirely eliminated." *Sammartano v. First District Judicial Court*, 303 F.3d 959, 974 (9th Cir. 2002).

As discussed previously, to the extent the retailers' First Amendment rights were thought to be implicated at all, this case involves a corporate disclosure requirement that does not go to core free speech concerns. The retailers can continue to say whatever they want. Thus, the First Amendment implications are "limited." *Id*. And therefore, by definition, the balance of hardships does not tip "sharply" in CTIA's favor, which means an injunction may not issue. *Cottrell*, 632 F.3d at 1135.

Furthermore, cutting against any limited First Amendment intrusion is the interest San Francisco has in helping its residents make informed decisions about how to use a relatively new form of technology that has penetrated the consumer market at breakneck speed, but that might pose health risks. Given the consequences that could result if there were a health issue with cell phones, the public interest in allowing these disclosures is great. Nor, contrary to CTIA's suggestion, do the delays that

have already occurred in implementing the ordinance provide cause to denigrate the importance of the issue. As should now be clear, the delays were the result of a conscientious public entity responding to reasonable objections raised by its opponents in litigation. *See supra* at 6-9.

Indeed, 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). To delay enforcement of the measure at this point would be to disrupt the status quo, not to maintain it. *Id*. ("In this context, the status quo is that which the People have wrought . . .."). Or as the Ninth Circuit put it in a statement that applies word-for-word to this case:

> Finally, our consideration of the public interest is constrained in this case, for the responsible public officials in San Francisco have already considered that interest. Their conclusion is manifested in the Ordinance that is the subject of this appeal. The San Francisco Board of Supervisors passed it unanimously, and the mayor signed it . . . . We are not sure on what basis a court could conclude that the public interest is not served by an ordinance adopted in such a fashion. Perhaps it could so conclude if it were obvious that the Ordinance was unconstitutional or preempted by a duly enacted federal law, in which elected federal officials had balanced the public interest differently; but, as evidenced by our analysis above, we think the opposite is likely to be held true in this case..

Golden Gate I, 512 F.3d at 1126-27.

CONCLUSION

The Court should deny the motion for a preliminary injunction.

Dated: October 7, 2011

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