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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CTIA - THE WIRELESS ASSOCIATION,

Plaintiff,

v.

CITY OF BERKELEY, et al.,

Defendants.

Case No. 15-cv-02529-EMC

**ORDER GRANTING DEFENDANTS’
MOTION TO DISSOLVE
PRELIMINARY INJUNCTION**

Docket No. 59

United States District Court
For the Northern District of California

Plaintiff CTIA – The Wireless Association has filed suit against Defendants the City of Berkeley and its City Manager (collectively, “City” or “Berkeley”), asserting that a Berkeley ordinance is preempted by federal law and further violates the First Amendment. Previously, CTIA moved for a preliminary injunction and, in September 2015, the Court granted CTIA relief, enjoining the ordinance “unless and until the sentence in the City notice regarding children safety is excised from the notice.” Docket No. 53 (Order at 35).

Subsequently, the City amended the ordinance to excise the language regarding children’s safety. Berkeley now moves for dissolution of the preliminary injunction. Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** Berkeley’s motion. The Court also **DENIES** CTIA’s request for a stay of dissolution pending appeal.

I. FACTUAL & PROCEDURAL BACKGROUND

In granting in part and denying in part CTIA’s motion for preliminary injunction, the Court found that Berkeley’s required notice warning about risk to children was preempted, but that the remainder of the required notice was not preempted because it was consistent with the FCC’s statements and testing procedures. The Court noted the “disclosure, for the most part, simply

1 refers consumers to the fact that there are FCC standards on RF energy exposure – standards
2 which assume a minimum spacing of the cell phone away from the body – and advises consumers
3 to refer to their manuals regarding maintenance of such spacing.” Docket No. 53 (Order at 14).
4 The notice was consistent with the FCC’s requirement that cell phone manufacturers disclose to
5 consumers information and advice about spacing between the body and a cell phone. *See* Docket
6 No. 53 (Order at 14).

7 The Court also concluded the notice (after omission of the statement regarding children’s
8 safety) did not violate the First Amendment, and noted the distinction drawn by cases between
9 *commercial* and *noncommercial* speech, between *restrictions* on and compelled *disclosures* of
10 commercial speech, and between compelling speech *by the speaker* and requiring disclosure of the
11 *government’s* speech. It found the City ordinance in this case was subject to rational basis review,
12 under both a general rational basis test (more particularly rational basis “with a bite”) and the
13 particularized test under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,
14 471 U.S. 626 (1985), and *Milavetz Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).
15 The Court found that *Zauderer* applied a species of the rational basis test and that *Zauderer* was
16 not limited to disclosures designed to prevent consumer deception, but extended to matters of
17 public health and safety. *See* Docket No. 53 (Order at 21-23). In applying *Zauderer*, the Court
18 adopted the Sixth Circuit’s analysis of the phrase “purely factual and uncontroversial” as used in
19 *Zauderer*, Docket No. 53 (Order at 18-19, 29-33) (*quoting Zauderer*, 471 U.S. at 651), and
20 concluded that the compelled disclosure must only be factual and accurate, not undisputed. *See*
21 Docket No. 53 (Order at 30). The Court found the information mandated by the ordinance met the
22 *Zauderer* test because the information that “the FCC has put limits on RF energy emission with
23 respect to cell phones and that wearing a cell phone against the body (without any spacer) may
24 lead the wearer to exceed the limits,” Docket No. 53 (Order at 31), was consistent with the FCC’s
25 directive. It was factual and accurate because “the FCC established certain limits regarding SAR
26 limits which have not been challenged as illegal. The mandated disclosure truthfully states that
27 federal guidelines may be exceeded where spacing is not observed,” Docket No. 53 (Order at 32-
28 33), and accurately advises users “to consult the manual wherein the FCC itself mandates

1 disclosures about maintaining spacing.” Docket No. 53 (Order at 33). The Court found that any
 2 burden on cell phone retailers was minimal because there likely was no First Amendment right
 3 violated, and retailers were authorized by the ordinance to add their own language clarifying or
 4 countering the City’s message on the required notice. *See* Docket No. 53 (Order at 33-34). The
 5 Court thus issued a preliminary injunction against the portion of the ordinance regarding
 6 children’s safety, but denied CTIA’s motion as to the remainder of the notice language.

7 Thereafter, the City amended the ordinance to excise the language regarding children’s
 8 safety. Berkeley now moves for dissolution of the preliminary injunction.

9 II. DISCUSSION

10 Given the Court’s prior ruling, the fact that the ordinance has now been amended should
 11 lead to dissolution of the preliminary injunction. However, CTIA has taken this opportunity to
 12 argue in its opposition brief that the Court’s analysis in its preliminary injunction order was
 13 erroneous. While CTIA has not technically asked the Court to reconsider its prior order (nor
 14 would it since the Court ultimately issued CTIA’s requested preliminary injunction), CTIA has
 15 asked the Court to stay dissolution of the preliminary injunction pending appeal because of the
 16 purported errors. Accordingly, evaluating CTIA’s request for a stay essentially requires this Court
 17 to retread ground already covered in its prior order.

18 A. Legal Standard

19 In *Hilton v. Braunskill*, 481 U.S. 770 (1987), the Supreme Court held that, in evaluating
 20 whether there should be a stay of an order pending appeal, a court should consider the following:

21
 22 (1) whether the stay applicant has made a strong showing that he is
 23 likely to succeed on the merits; (2) whether the applicant will be
 24 irreparably injured absent a stay; (3) whether issuance of the stay
 will substantially injure the other parties interested in the
 proceeding; and (4) where the public interest lies.

25 *Id.* at 776. “The ‘irreparably-injured’ and ‘likelihood-of-success’ factors are considered on ‘a
 26 sliding scale’” *Stormans Inc. v. Selecky*, 526 F.3d 406, 412 (9th Cir. 2008) (discussing
 27 applications for a stay pending appeal). That is, relief may be appropriate where the likelihood of
 28 success is such that serious questions going to the merits are raised and the balance of hardships

1 tips sharply in the stay applicant’s favor. *Cf. Alliance For The Wild Rockies v. Cottrell*, 632 F.3d
2 1127, 1131 (9th Cir. 2011) (holding that the serious questions approach survives in the context of
3 deciding whether a preliminary injunction should issue).

4 B. Likelihood of Success on the Merits or Serious Questions Going to the Merits

5 In its opposition, CTIA largely makes arguments that it previously made as part of the
6 briefing on the motion for preliminary injunction. The Court shall not re-address those arguments
7 but instead will focus on the arguments made by CTIA that are different from, or least slightly
8 different from, those made as part of the briefing on the preliminary injunction motion. CTIA’s
9 new arguments concern the First Amendment issue rather than the preemption issue.

10 1. Retail Digital

11 Post-briefing, CTIA provided the Court with a recent decision issued by the Ninth Circuit,
12 *Retail Digital Network, LLC v. Appelsmith*, No. 13-56069 (9th Cir. Jan. 7, 2016). *See* Docket No.
13 67 (statement of recent decision). CTIA asserts that *Retail Digital* supports its position that a
14 more demanding standard of review should apply in evaluating the City’s ordinance for
15 constitutionality.

16 In *Retail Digital*, the Ninth Circuit held that *Central Hudson*’s immediate scrutiny test
17 should *not* be applied when there are content- or speaker-based restrictions on nonmisleading
18 commercial speech regarding lawful goods or services; rather, under the Supreme Court’s decision
19 in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), heightened judicial scrutiny should apply.
20 *See Retail Digital*, slip. op. at 4, 16. The Ninth Circuit implicitly acknowledged that *Sorrell* did
21 not precisely define what heightened judicial scrutiny meant but indicated that it was something
22 less than strict scrutiny, *see* slip op. at 16 n.3, but more than intermediate scrutiny. In essence, the
23 Ninth Circuit suggested that a more exacting form of *Central Hudson* review would constitute
24 heightened judicial scrutiny within the meaning of *Sorrell*. *See also* slip. op. at 16-18 (stating that
25 “[h]eightedened judicial scrutiny may be applied using the familiar framework of the four-factor
26 *Central Hudson* test”).

27 While *Retail Digital* is undoubtedly a significant case, it does not address the critical issue
28 here which is what impact *Sorrell* should have on the *Zauderer* line of cases. *Retail Digital*

1 involved outright *restriction* on commercial speech based on content, and the court described
2 *Sorrell* as involving “content- or speaker-based restrictions” on non-misleading commercial
3 speech. Slip op. at 16. The court also described Eighth, Second, and Third Circuit opinions as
4 involving “restrictions” on speech as well. *See* slip. op. at pp. 18-19. Quoting *Sorrell*, the *Retail*
5 *Digital* court emphasized that heightened security was designed to check the raw paternalism of
6 laws which “keep people in the dark,” slip. op. at 18 (quoting *Sorrell*) and which allowed the
7 government to “silence truthful speech.” Slip. op. at 22.

8 As this Court indicated in its prior order, *Zauderer* and other cases have noted that laws
9 requiring *disclosure* of accurate information does not silence truthful speech or keep people in the
10 dark; disclosures are designed precisely to accomplish the opposite. Thus, nothing in *Retail*
11 *Digital*’s holding or reasoning suggests *Sorrell* did away with the Supreme Court’s distinction (as
12 articulated in *Zauderer* and embraced in *Milavetz*) between restrictions on commercial speech and
13 compelled disclosure of such speech. Unless and until *Zauderer* and *Milavetz* are overruled or
14 narrowed by the Supreme Court or Ninth Circuit, this Court adheres to its earlier analysis.

15 2. Rational Review

16 CTIA argues next that the Court erred in holding that “even the more forgiving
17 requirements of *Zauderer* do not apply because the compelled commercial speech in this case is
18 attributed to the City of Berkeley.” Opp’n at 7. In other words, according to CTIA, the Court
19 improperly applied rational review (with some bite) rather than *Zauderer*. But CTIA has not cited
20 any authority involving the combination of (1) commercial speech, (2) compelled disclosure (as
21 opposed to restriction or suppression), and (3) speech clearly and expressly attributed to the
22 government to support its position.

23 The CTIA’s reliance upon *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), is
24 misplaced. There, the Supreme Court was called upon to evaluate whether a mushroom producer
25 was fairly subject to a mandatory assessment under federal law (the Mushroom Act), where the
26 funds were used to sponsor an advertising message with which it did not agree. The message was
27 that “mushrooms are worth consuming whether or not they are branded,” and the mushroom
28 producer disagreed with this message because it wanted “to convey the message that its brand of

1 mushrooms is superior to those grown by other producers.” *Id.* at 411. The Supreme Court held
2 that there was a First Amendment violation. But it is not clear from the opinion whether the
3 advertising message was clearly attributed to the federal government in the first place. Moreover,
4 the Supreme Court did not evaluate the First Amendment issue under *Zauderer*. It simply stated
5 that its conclusion was not inconsistent with *Zauderer*. *See id.* at 416 (“There is no suggestion in
6 the case now before us that the mandatory assessments imposed to require one group of private
7 persons to pay for speech by others are somehow necessary to make voluntary advertisements
8 nonmisleading for consumers [as in *Zauderer*].”). Notably, the Supreme Court’s analysis was
9 guided by a different line of cases involving the compelled subsidization of speech with which the
10 speaker/contributor disagreed. *See id.* at 413 (“conclud[ing] . . . that the mandated support is
11 contrary to the First Amendment principles set forth in cases involving expression by groups
12 which include persons who object to the speech, but who, nevertheless, must remain members of
13 the group by law or necessity”) (citing, *inter alia*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209,
14 234 (1977) (agreeing that union members “may constitutionally prevent the Union’s spending a
15 part of their required service fees to contribute to political candidates and to express political
16 views unrelated to its duties as exclusive bargaining representative”).

17 In any event, the Court need not dwell on this argument because, in its prior order, the
18 Court did not take a firm position as to whether general rational basis review should in fact apply
19 – *i.e.*, rational review *without* the specific requirement in *Zauderer* that the compelled speech be
20 factual and uncontroversial. While the Court did note that there was a “persuasive argument” in
21 favor of such general rational review, Docket No. 53 (Order at 23, 26), ultimately, it applied both
22 general rational review and *Zauderer*.

23 3. Voluntary Advertising

24 In its papers, CTIA presents the new argument (not articulated in its briefing on the
25 preliminary injunction) that *Zauderer* is applicable only when a party has put out ““voluntary
26 advertisements”” and, here, “the Amended Ordinance does not ‘involve voluntary commercial
27 advertising.’” Opp’n at 6. In support of this argument, CTIA relies primarily on two cases:
28 *United Foods, Inc.*, 533 U.S. at 405, and *National Association of Manufacturers v. SEC*, 800 F.3d

1 518 (D.C. Cir. 2015) (hereinafter “*NAM*”).

2 *United Foods*, however, provides little support for CTIA’s position. *United Foods* simply
3 states that *Zauderer* was

4 a case involving attempts by a State to prohibit certain voluntary
5 advertising by licensed attorneys. The Court invalidated the
6 restrictions in substantial part but did permit a rule requiring that
7 attorneys who advertised by their own choice and who referred to
contingent fees should disclose that clients might be liable for costs.

8 *United Foods*, 533 U.S. at 416. But the rationale of *Zauderer*’s holding was not conditioned on
9 the fact that the plaintiff therein had engaged in voluntary advertising. Rather, it was based on the
10 reasoning that the plaintiff in *Zauderer* had a minimal constitutional interest in not disclosing
11 purely factual and uncontroversial information. *See, e.g., Zauderer*, 471 U.S. at 651 (stating that
12 “the interests at stake in this case are not of the same order as those discussed in [other cases;]
13 Ohio has not attempted to ‘prescribe what shall be orthodox in politics, nationalism, religion, or
14 other matters of opinion or force citizens to confess by word or act their faith therein’”). *United*
15 *Foods* did not purport to change the core rationale of *Zauderer*; as noted above, its analysis was
16 focused on *Abood*, not *Zauderer* and *Milavetz*.

17 CTIA’s citation to *NAM* does provide more support for its position. There, the D.C.
18 Circuit, in a divided opinion, considered certain SEC-required disclosures regarding “conflict
19 minerals” (*i.e.*, certain minerals such as gold, tantalum, tin, and tungsten which can be used by
20 armed groups, *e.g.*, in the Congo, to finance their war operations). *See NAM*, 800 F.3d at 522
21 (noting that “[c]onflict mineral disclosures are to be made on each reporting company’s website
22 and in its reports to the SEC”). The specific issue for the court was “whether *Zauderer* . . . reaches
23 compelled disclosures that are unconnected to advertising or product labeling at the point of sale.”
24 *NAM*, 800 F.3d at 521. The panel majority in *NAM* held that *Zauderer* does not:

25 [T]he Supreme Court’s opinion in *Zauderer* is confined to
26 advertising, emphatically, and, one may infer, intentionally. In a
27 lengthy opinion, the Court devoted only four pages to the issue of
28 compelled disclosures. Yet in those few pages the Court explicitly
identified advertising as the reach of its holding no less than thirteen
times. Quotations in the preceding footnote prove that the Court

1 was not holding that any time a government forces a commercial
 2 entity to state a message of the government's devising, that entity's
 3 First Amendment interest is minimal. Instead, the *Zauderer*
 Court . . . held that the advertiser's "constitutionally protected
 interest in *not* providing any particular factual information *in his*
advertising is minimal."

4 *Id.* at 522 (emphasis in original). But CTIA has read too much into the statements from *NAM*
 5 above. *NAM* understandably focused on advertising because of the specific issue presented before
 6 it – *i.e.*, whether *Zauderer* should apply to SEC disclosures, a context entirely different from the
 7 typical case which involves speech directed at consumers which lies at the core of the definition of
 8 commercial speech – proposal of a commercial transaction. *See Retail Digital*, slip op. at 12.
 9 Although the Court in *Zauderer* may have referred repeatedly to advertising (as noted by the court
 10 in *NAM*), these references were contextual and not the *sine qua non* of *Zauderer*'s reasoning.
 11 *Zauderer* did not base its holding on any notion of estoppel or equity, but on the lack of a
 12 significant constitutional interest in not disclosing factual and noncontroversial information to
 13 consumers.

14 In any event, the *NAM* majority opinion did not restrict *Zauderer*'s reach to advertising
 15 only. Indeed, as indicated above, the court noted that *Zauderer* required a connection to either
 16 advertising *or* a point-of-sale disclosure. *See also id.* (stating that the SEC "recognized that this
 17 case does not deal with advertising *or with point of sale disclosures*") (emphasis added). In
 18 restricting *Zauderer*'s reach, the majority in *NAM* accepted the D.C. Circuit's *en banc* decision in
 19 *America Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (en banc),
 20 which applied *Zauderer* to a law requiring disclosure of country-of-origin information about meat
 21 products at the time of sale, even though there had been no voluntary advertising to the contrary.
 22 *See id.* at 20.

23 In the instant case, the ordinance requires a point-of-sale disclosure: "The notice required
 24 by this Section shall either be provided to each customer who buys or leases a Cell phone or shall
 25 be prominently displayed at any point of sale where Cell phones are purchased or leased."

26 Berkeley Mun. Code § 9.96.030(B). Like the disclosure in *AMI*, and unlike the disclosure in
 27 *NAM*, the notice in the case at bar occurs at the time of sale and is targeted directly at the
 28 consumer who has a direct interest in the matter. Accordingly, even under *NAM*, *Zauderer* is

1 applicable to the instant case.

2 **Finally, no other circuit court has limited *Zauderer*'s holding to voluntary advertising.**
 3 *See, e.g., Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 518 (6th Cir. 2012)
 4 (addressing, *inter alia*, statute's requirement that "tobacco manufacturers reserve significant
 5 packaging space for textual health warnings"); *Nat'l Elec. Mfrs. v. Sorrell*, 272 F.3d 104, 107 (2d
 6 Cir. 2001) (addressing statute that required "manufacturers of some mercury-containing products
 7 to label their products and packaging to inform consumers that the products contain mercury and,
 8 on disposal, should be recycled or disposed of as hazardous waste"). *NAM* does not state the
 9 prevailing view.

10 4. *Zauderer*'s "Uncontroversial" Requirement

11 According to CTIA, even if *Zauderer* is applicable, the Court has not properly interpreted
 12 *Zauderer*'s "factual and uncontroversial" requirement. More specifically, CTIA contends that the
 13 Court improperly construed "uncontroversial" to mean accurate. According to CTIA, this
 14 position, although endorsed by the Sixth Circuit, is a minority position.

15 CTIA's argument is problematic for several reasons. First, although CTIA claims that the
 16 majority of cases go against the Sixth Circuit, it has cited only one case in support of its position –
 17 *i.e., NAM*, where the majority opinion stated that "'uncontroversial,' as a legal test, must mean
 18 something different than 'purely factual.'" *NAM*, 800 F.3d at 528. As the sole circuit opinion so
 19 holding, *NAM* hardly represents the majority view on this issue.

20 **Second, even in *NAM*, the court did not come up with a clear definition for the term**
 21 **"uncontroversial" and even suggested that uncontroversial should not necessarily be equated with**
 22 **undisputed.** *See id.* at 529 (noting that "[a] controversy, the dictionaries tell us, is a dispute,
 23 especially a public one" but, under that definition, it was difficult to understand an earlier court
 24 decision that certain country-of-origin disclosures were "uncontroversial" because there was a
 25 public dispute over such).

26 **Third, *NAM* is not irreconcilable with the Court's ruling. There is a difference, under this**
 27 **Court's interpretation, between "factual" and "uncontroversial." "Uncontroversial" should**
 28 **generally be equated with the term "accurate"; in contrast, "factual" goes to the difference**

1 between a “fact” and an “opinion.” Notably, in the San Francisco CTIA case, the Ninth Circuit
 2 made that distinction between fact and opinion in discussing *Zauderer*. See *CTIA – Wireless*
 3 *Ass’n v. City & County of San Francisco*, 494 Fed. Appx. 752, 753-54 (9th Cir. 2012) (stating that
 4 the city’s “fact sheet contains more than just facts” – *i.e.*, it also contained the city’s
 5 “recommendations”; the “language could prove to be interpreted by consumers as expressing San
 6 Francisco’s opinion that using cell phones is dangerous”). The Seventh Circuit also made that
 7 same distinction in *Entertainment Software Association v. Blagojevich*, 469 F.3d 641, 652-53 (7th
 8 Cir. 2006) (stating that “[t]he State’s definition of this term [*i.e.*, sexually explicit] is far more
 9 opinion-based than the question of whether a particular chemical is within any given product”).

10 Finally, the Court finds CTIA’s interpretation of “uncontroversial” untenable. A
 11 “controversy” cannot be created any time there is a disagreement between the parties because
 12 *Zauderer* would never apply, especially where there are health and safety risks, which invariably
 13 are dependent in some degree on the current state of science and research. A “controversy” cannot
 14 automatically be deemed created any time there is a disagreement about the science behind a
 15 warning because science is almost always debatable at some level (*e.g.*, even if there is agreement
 16 that there is a safety issue, there is likely disagreement about at what point a safety concern is
 17 fairly implicated). Under CTIA’s position, any science-based warning required by a governmental
 18 agency would automatically be subject to heightened scrutiny under the First Amendment. See
 19 *Nat’l Elec.*, 272 F.3d at 116 (taking note of “the potentially wide-ranging implications of NEMA’s
 20 First Amendment complaint” as “[i]nnumerable federal and state regulatory programs require the
 21 disclosure of product and other commercial information,” including tobacco and nutritional
 22 labeling and reporting of toxic substances and pollutants).

23 5. Misleading

24 CTIA asserts that, even if *Zauderer*’s “uncontroversial” requirement simply demands
 25 accuracy, here, there is inaccuracy or, more specifically, the compelled disclosure is misleading
 26 because it claims there is a safety issue when, in fact, there is none. This argument is predicated
 27 on the fact that the FCC’s standards have built in a substantial safety margin (at least for thermal
 28 effects of RF radiation). See 2013 FCC Reassessment, 28 F.C.C. Rcd. 3498, 3588 (2013) (“The

1 limits were set with a large safety factor, to be well below a threshold for unacceptable rises in
 2 tissue temperature. As a result, exposure well above the specified SAR limit should not create an
 3 unsafe condition.”).

4 CTIA’s argument is not persuasive, particularly when the actual text of the notice required
 5 by the amended ordinance is taken into account. The notice provides:

6
 7 To assure safety, the Federal Government requires that cell phones
 8 meet radio frequency (RF) exposure guidelines. If you carry or use
 9 your phone in a pants or shirt pocket or tucked into a bra when the
 10 phone is ON and connected to a wireless network, you may exceed
 the federal guidelines for exposure to RF radiation. Refer to the
 instructions in your phone or user manual for information about how
 to use your phone safely.

11 The first two sentences are undisputedly accurate. The FCC promulgated guidelines for safety
 12 reasons. Even though the FTC built a large margin into its RF exposure guidelines, it did set
 13 specific limits and did so in order to assure safety. CTIA does not challenge those guidelines.
 14 Furthermore, carrying or using a phone in the above-identified manner (without spacing) could
 15 lead a person to exceed the FCC guidelines for exposure.

16 CTIA contends that, even if the two sentences are technically accurate, the juxtaposition of
 17 the two gives rise to the implication that carrying or using your phone in a pants or shirt pocket or
 18 tucked into a bra when the phone is on and connected to a wireless network is unsafe.¹ **But even**
 19 **though the FCC has indicated that such *should* not be unsafe (at least from a thermal effects**
 20 **perspective), the fact remains that the FCC still decided to set the guidelines at particular levels**

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 22 _____
 23 ¹ CTIA indicated at the hearing that it would take the same position *even if* the safety-related
 words (*e.g.*, “safety,” “radiation”) were removed from the notice or modified so as to read:

24 The Federal Government requires that cell phones meet radio
 25 frequency (RF) exposure guidelines. If you carry or use your phone
 26 in a pants or shirt pocket or tucked into a bra when the phone is ON
 27 and connected to a wireless network, you may exceed the federal
 guidelines for exposure to RF energy. Refer to the instructions in
 your phone or user manual for information about how to use your
 phone.

28 CTIA’s position borders on the extreme.

1 because of its safety concerns. Thus, ultimately, CTIA's beef should be with the FCC. If CTIA
 2 believes that the safety margin is too generous because there is no real safety concern at that level,
 3 it should take that matter up with the FCC administratively. It has not done so. Berkeley's
 4 reference to these unchallenged FCC guidelines does not violate the First Amendment.

5 6. Government Interest

6 Finally, CTIA reiterates its prior argument that, even if *Zauderer* were to apply, there is no
 7 legitimate governmental interest here because "courts have consistently held that the public's right
 8 to know is insufficient to justify compromising protected constitutional rights." Docket No. 4
 9 (Mot. at 11) (internal quotation marks omitted). But the authority cited by CTIA is not on point.
 10 For example, in *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), the
 11 state did not claim that health or safety concerns prompted the passage of its labeling law but
 12 instead defended the statute simply on the basis of strong consumer interest and the public's right
 13 to know. *See id.* at 73 (also stating, that, "[a]bsent . . . some indication that this information bears
 14 on a reasonable concern for human health or safety . . . , the manufacturers cannot be compelled to
 15 disclose it"). Here, Berkeley's ordinance specifically identifies safety as an animating concern in
 16 the stated findings and purpose behind the notice requirement. *See, e.g.*, Berk. Mun. Code §
 17 9.96.010(E) ("Consumers are not generally aware of these *safety recommendations*." (emphasis
 18 added). Because the ordinance is ultimately anchored in consumer awareness of FCC guidelines
 19 designed to insure safety, the Court concludes that there is a legitimate, indeed substantial,
 20 government interest here.

21 C. Irreparable Injury

22 As it did before, CTIA claims irreparable injury because it could not "undo the damage to
 23 its reputation and customer goodwill from having put out a misleading disclosure that generated
 24 fear in consumers about 'exposure' to cell phone 'radiation.'" Opp'n at 16. However, CTIA has
 25 generated no evidence to substantiate any such damage. Moreover, CTIA could prevent or
 26 substantially mitigate any such damage by engaging in counterspeech as the ordinance authorizes.
 27 While CTIA argues that forced counterspeech itself inflicts a First Amendment injury, that
 28 depends on there being a First Amendment violation in the first place. As the Court noted in its

1 preliminary injunction order, the claim of irreparable harm is ultimately “predicated on the First
2 Amendment argument,” an argument which has no merit. Docket No. 53 (Order at 34 n.13).

3 The Court again concludes that, even if serious questions going to the merits were raised
4 here (and the Court finds that there are not), the balance of hardships does not tip *sharply* in
5 CTIA’s favor.

6 **III. CONCLUSION**

7 For the foregoing reasons, the Court grants the City’s motion to dissolve the preliminary
8 injunction. The Court further denies CTIA’s request that this order dissolving the preliminary
9 injunction be stayed pending appeal.

10 This order disposes of Docket No. 59.

11
12 **IT IS SO ORDERED.**

13
14 Dated: January 27, 2016



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16 _____
EDWARD M. CHEN
United States District Judge