ATTORNEYS AT LAW

SWANKIN & TURNER

DAVID A. SWANKIN
JAMES S. TURNER, P.C.
BETSY E. LEHRFELD, P.C.
CHRISTOPHER B. TURNER, P.C.

SUITE 101 1400 16TH STREET, N.W. WASHINGTON, D.C. 20036 TEL. 202 462-8800 FAX 202 265-6564

STATEMENT OF JAMES S. TURNER ON LD 883
March 31, 2015

My name is James Turner. I am a partner in the Washington, DC, law firm of Swankin and Turner, which on June 1st of this year will begin its 42nd year of operations.

During that time the firm has represented, advised, and worked with businesses, including food companies such as Kraft, General Foods, and Safeway; drug companies such as Hoffman LaRoche; and others including Toyota, AT&T (before it went out of business and Cingular changed its name to AT&T), and Sun Microsystems.

The firm has also worked with consumer, environmental, and citizens groups, such as Consumers Union, Common Cause, and The Environmental Defense Fund; and governments, including the governor of Ohio, my home state, the Massachusetts legislature on retail drug price posting, and the City of San Francisco on cell phone labeling.

I am here today, as Board Chair of Citizens for Health, to offer my support for LD 883, the Cellular Telephone Labeling Act. Citizens for Health is a national consumer advocacy group with about 100,000 active supporters nationwide (about 200 of whom are in Maine) which believes that consumer access to useful information is essential to the workings of a free market. Information concerning health and safety is of particular importance to consumers because it directly affects their ability to make choices that they believe will advance their wellbeing and that of their families or protect them from harm.

Citizens for Health takes no position on the health debate about cell phone safety currently underway in academic, health research and government venues. Its supporters range across the spectrum from those who feel they are harmed by cell phones to those who are looking for more information before making up their minds. At the same time, the vast majority of the Citizens for Health constituency supports providing the kind of information to consumers that is proposed in LD 883.

I make the following three points in support of providing cell phone purchasers with the information set out in LD 883 in the manner described in the legislation.

First, our society, including its political and commercial systems, relies on the informed individual. Politics relies on informed voters. Free markets rely on informed consumers. LD 883 provides information that allows consumers to make informed choices.

Second, courts, including the courts in the San Francisco cell phone case and regulatory agencies, have recognized the value and legality of direct-to-consumer information as a

part of effective marketplace functioning. As an example, the Food and Drug Administration permits pharmaceuticals to be directly marketed to consumers, including on television, but only if full information, including appropriate warnings, is prominently included in all advertisements. LD 883 advances free market effectiveness in accordance with current legal and constitutional doctrine, as well as regulatory policy.

Third, in 1962 President Kennedy set a national consumer policy by establishing a "Consumer Bill of Rights," asserting that all consumers have the right to Information, Choice, Redress, and Safety. Since that time, and with these rights at its core, the American market has thrived and, not incidentally, technology has made tremendous strides. LD 883 takes an important next step in strengthening the role of informed consumers as a prime contributor to a thriving market. The more useful information consumers have, the more they can make choices that drive the market toward healthier and safer products and services.

Each of these points is important, but of most relevance to today's discussion may be point two, the legal status. Citizens for Health provided an amicus curiae brief supporting the City of San Francisco's municipal ordinance requiring posting information on cell phone safety at the point of purchase. The federal District Court judge in that case ruled that some parts of the information were appropriate and other parts were not. Both parties appealed to the federal Court of Appeals. That Court, in a decision to be cited as non-precedential, upheld the District Court opinion in part, reversed in part, and sent it back to the District Court for further proceedings. The Appeals Court Decision attached.

The District Court made clear that posting some of the information could be required under U.S. Supreme Court First Amendment law, while other parts could not. Rather than go forward to clarify the information required, and after a change of administration and citing budgetary concerns about continued litigation, San Francisco decided to drop defense of the ordinance.

With regard to LD 883, I believe this legislation meets the First Amendment criteria established by the courts at this time. As former Representative Boland has said, well-known Harvard law professor Larry Lessig has stated that should this legislation be adopted and subsequently attacked in court, he will provide pro bono services to defend it.

Accepting the inaccurate argument that the Commerce Clause of the U.S. Constitution precludes state action like LD 883 means accepting the argument that the federal government has more power to decide what choices Maine consumers will have than those consumers have and that the state is powerless in the face of the federal government to empower its own consumers. Under today's Supreme Court both the doctrines of commercial free speech and interstate commerce are in great flux. In my view, LD 883 meets the current constitutional requirements set by the Supreme Court.

Regarding points one and three above, the informed consumer is essential to the effective operation of a free market, and as Adam Smith, the premier free market theorist, said,

"Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer."

In today's technology market, we stand at the edge of an ocean of potential. Researchers are looking for new and better technological products and it may well be that technology can resolve today's safety debates with new frequencies, better communicating media (perhaps light), and many other innovations underway in laboratories. Across the country and around the world, informed consumers will hasten the day when more efficient, safer, more valuable communication technology options will become available. LD 883 takes a major step in this direction for Maine consumers and the communications technology market as a whole.

President Kennedy's Consumer Bill of Rights, which has been so powerful for so many business innovations in other industries – Whole Foods Market, Southwest Airlines, Costco, etc. – can be a boon to the communications technology market. Passing LD 883 will be a big step in this direction.

Thank you for your consideration.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CTIA - THE WIRELESS ASSOCIATION, Plaintiff - Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, California, Defendant - Appellee.	No. 11-17707 D.C. No. 3:10-cv-03224-WHA MEMORANDUM*

CTIA - THE WIRELESS ASSOCIATION, Plaintiff - Appellee, v. CITY AND COUNTY OF SAN FRANCISCO, California, Defendant - Appellant.	No. 11-17773 D.C. No. 3:10-cv-03224-WHA

Appeal from the United States District Court
for the Northern District of California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

William Alsup, District Judge, Presiding

Argued and Submitted August 9, 2012
San Francisco, California

Before: SCHROEDER and CALLAHAN, Circuit Judges, and KORMAN, Senior District Judge.**

This is an appeal and cross appeal from the district court's order preliminarily enjoining, in part, provisions of a San Francisco ordinance requiring cell phone sellers to make certain disclosures to consumers about radiofrequency energy emissions from cell phones. S.F. Ordinance 156-11 (1022). Under the standard established in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1986), any governmentally compelled disclosures to consumers must be "purely factual and uncontroversial." *Id.* at 651.

The district court found the factual statements in the revised fact sheet were accurate and not misleading. Appellant CTIA correctly points out, however, that the revised fact sheet contains more than just facts. It also contains San Francisco's recommendations as to what consumers should do if they want to reduce exposure to radiofrequency energy emissions. This language could prove to be interpreted by consumers as expressing San Francisco's opinion that using

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** The Honorable Edward R. Korman, Senior United States District Judge for the Eastern District of New York, sitting by designation.

cell phones is dangerous. The FCC, however, has established limits of radiofrequency energy exposure, within which it has concluded using cell phones is safe. *See, e.g., Guidelines for Evaluating the Envt'l Effects of Radiofrequency Radiation*, 11 F.C.C.R. 15123, 15184 (1996). Moreover, the findings made by the San Francisco Board of Supervisors on which the challenged ordinance is predicated acknowledges that "[t]here is a debate in the scientific community about the health effects of cell phones," and the district court observed that "San Francisco concedes that there is no evidence of cancer caused by cell phones." We cannot say on the basis of this record that the fact sheet, as modified by the district court, is both "purely factual and uncontroversial." *Zauderer*, 471 U.S. at 651. The court therefore erred in holding the city could compel distribution of the revised fact sheet.

The district court enjoined the original ordinance compelling distribution of broader materials. *Id.* San Francisco cross-appeals that order, seeking to enforce the ordinance in its entirety. Since the ordinance compels statements that are even more misleading and controversial than the revised fact sheet, the original injunction must be affirmed.

The order preliminarily enjoining enforcement of the ordinance is AFFIRMED. The court's subsequent order modifying the injunction is VACATED.

The City and County of San Francisco's motion for judicial notice filed on January 25, 2012, is granted.

Costs will be awarded to the plainiff-appellant.

AFFIRMED in part, **VACATED** in part, and **REMANDED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. **Purpose (Panel Rehearing):**

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. **Purpose (Rehearing En Banc)**

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... *(Rev. 12-1-09)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____, Deputy Clerk