

GIBSON, DUNN & CRUTCHER LLP**LAWYERS**A REGISTERED LIMITED LIABILITY PARTNERSHIP
INCLUDING PROFESSIONAL CORPORATIONS

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RJustice@gibsondunn.com

September 8, 2008

Direct Dial
(415) 393-8296Fax No.
(415) 374-8427Client No.
T 98485-00001**VIA FACSIMILE**The City and County of San Francisco and
Mayor Gavin Newsom
Office of the Mayor
1 Dr. Carlton B. Goodlett Place, Rm. 200
San Francisco, CA 94102The Board of Supervisors of the City and
County of San Francisco
1 Dr. Carlton B. Goodlett Place, Rm. 244
San Francisco, CA 94102Re: *Walgreen Co. v. City & County of San Francisco, et al.*

Dear Sir or Madam:

This letter is to inform you that we intend to file the enclosed complaint later today against the City and County of San Francisco, the Board of Supervisors, and Mayor Gavin Newsom (in his capacity as Mayor) on behalf of our client, Walgreen Co. The lawsuit seeks declaratory and injunctive relief against the enforcement of San Francisco Ordinance 194-08.

I write to give you notice under rules 3.1150, 3.1203, and 3.1204, California Rules of Court, that I will be appearing tomorrow at 11 a.m. in the Law and Motion Department of the San Francisco Superior Court, to request an *ex parte* Order to Show Cause why our client's Application for a Preliminary Injunction should not be heard on or before September 30, 2008 (since the Ordinance takes effect on October 1). I will advise you of the specific department number later today and will serve you with copies of this Application for Preliminary Injunction and its supporting papers tomorrow.

Please advise us today whether you will oppose this request for an Order to Show Cause. Alternatively, if you would stipulate to a stay of the effective date of the Ordinance and issue a temporary tobacco permit pending resolution of our client's Application for Preliminary

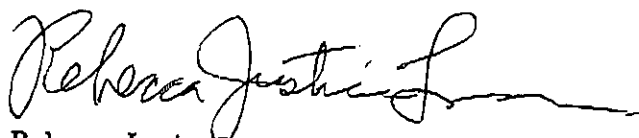
GIBSON, DUNN & CRUTCHER LLP

September 8, 2008
Page 2

Injunction so that a more comfortable briefing and hearing schedule can be set, we are amenable to such an arrangement.

Please contact me at the above-listed number or Daniel M. Kolkey (415-393-8240) at your earliest convenience to discuss this matter.

Very truly yours,



Rebecca Justice Lazarus

Enclosures

cc: Via Facsimile (w/enclosures)
Office of the City Attorney

RJL/rjl

100513592_1.DOC

SUMMONS (CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: (AVISO AL DEMANDADO):

THE CITY AND COUNTY OF SAN FRANCISCO; THE BOARD OF SUPERVISORS FOR THE CITY AND COUNTY OF SAN FRANCISCO; and GAVIN NEWSOM, in his capacity as Mayor of the City and County of San Francisco

YOU ARE BEING SUED BY PLAINTIFF: (LO ESTÁ DEMANDANDO EL DEMANDANTE):

WALGREEN CO.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court. There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia. Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):

CASE NUMBER:
(Número del Caso):

Superior Court of the State of California, County of San Francisco
400 McAllister Street
San Francisco, CA 94102

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Daniel M. Kolkey, SBN 79102, Brett Oberst, SBN 196219 Tel.: (415) 393-8200 Fax: (415) 986-5309

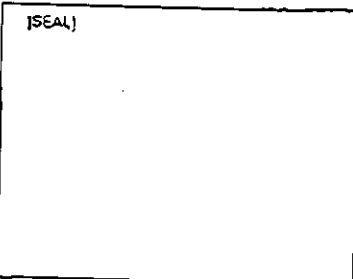
GIBSON, DUNN & CRUTCHER LLP
One Montgomery Street
San Francisco, CA 94104-4505

DATE:
(Fecha)

Clerk, by _____ Deputy
(Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served



1. as an individual defendant.
2. as the person sued under the fictitious name of (specify):
3. on behalf of (specify):
under:

<input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
4. by personal delivery on (date):

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): DANIEL M. KOLKEY, SBN 79102 BRETT OBERST, SBN 196219 GIBSON, DUNN & CRUTCHER LLP One Montgomery Street, San Francisco, CA 94102 TELEPHONE NO.: (415) 393-8200 FAX NO.: (415) 986-5309 ATTORNEY FOR (Name): Plaintiff Walgreen Co.		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: 400 McAllister Street CITY AND ZIP CODE: San Francisco, CA 94102-4514 BRANCH NAME: Civic Center Courthouse		
CASE NAME: THE CITY AND COUNTY OF SAN FRANCISCO: THE BOARD OF SUPERVISORS FOR THE CITY AND COUNTY OF SAN FRANCISCO; and GAVIN NEWSOM, in his capacity as Mayor of the City and County of San Francisco		
CIVIL CASE COVER SHEET <input checked="" type="checkbox"/> Unlimited (Amount demanded exceeds \$25,000) <input type="checkbox"/> Limited (Amount demanded is \$25,000 or less)	Complex Case Designation <input type="checkbox"/> Counter <input type="checkbox"/> Joinder Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)	CASE NUMBER: JUDGE: DEPT:

Items 1-6 below must be completed (see instructions on page 2).

1. Check one box below for the case type that best describes this case:

Auto Tort <input type="checkbox"/> Auto (22) <input type="checkbox"/> Uninsured motorist (46) Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort <input type="checkbox"/> Asbestos (04) <input type="checkbox"/> Product liability (24) <input type="checkbox"/> Medical malpractice (45) <input type="checkbox"/> Other PI/PD/WD (23) Non-PI/PD/WD (Other) Tort <input type="checkbox"/> Business tort/unfair business practice (07) <input type="checkbox"/> Civil rights (08) <input type="checkbox"/> Defamation (13) <input type="checkbox"/> Fraud (16) <input type="checkbox"/> Intellectual property (19) <input type="checkbox"/> Professional negligence (25) <input type="checkbox"/> Other non-PI/PD/WD tort (35) Employment <input type="checkbox"/> Wrongful termination (36) <input type="checkbox"/> Other employment (15)	Contract <input type="checkbox"/> Breach of contract/warranty (06) <input type="checkbox"/> Rule 3.740 collections (09) <input type="checkbox"/> Other collections (09) <input type="checkbox"/> Insurance coverage (18) <input type="checkbox"/> Other contract (37) Real Property <input type="checkbox"/> Eminent domain/Inverse condemnation (14) <input type="checkbox"/> Wrongful eviction (33) <input type="checkbox"/> Other real property (26) Unlawful Detainer <input type="checkbox"/> Commercial (31) <input type="checkbox"/> Residential (32) <input type="checkbox"/> Drugs (38) Judicial Review <input type="checkbox"/> Asset forfeiture (05) <input type="checkbox"/> Petition re: arbitration award (11) <input type="checkbox"/> Writ of mandate (02) <input type="checkbox"/> Other judicial review (39)	Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403) <input type="checkbox"/> Antitrust/Trade regulation (03) <input type="checkbox"/> Construction defect (10) <input type="checkbox"/> Mass tort (40) <input type="checkbox"/> Securities litigation (28) <input type="checkbox"/> Environmental/Toxic tort (30) <input type="checkbox"/> Insurance coverage claims arising from the above listed provisionally complex case types (41) Enforcement of Judgment <input type="checkbox"/> Enforcement of judgment (20) Miscellaneous Civil Complaint <input type="checkbox"/> RICO (27) <input checked="" type="checkbox"/> Other complaint (not specified above) (42) Miscellaneous Civil Petition <input type="checkbox"/> Partnership and corporate governance (21) <input type="checkbox"/> Other petition (not specified above) (43)
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2. This case is is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

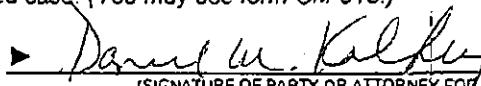
a. <input type="checkbox"/> Large number of separately represented parties	d. <input type="checkbox"/> Large number of witnesses
b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve	e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
c. <input type="checkbox"/> Substantial amount of documentary evidence	f. <input type="checkbox"/> Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. monetary b. nonmonetary; declaratory or injunctive relief c. punitive

4. Number of causes of action (specify): 3

5. This case is is not a class action suit.

6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)
 Date: September 8, 2008
 Daniel M. Kolkey


 (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you must complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check one box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the primary cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than \$25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

<p>Auto Tort</p> <ul style="list-style-type: none"> Auto (22)—Personal Injury/Property Damage/Wrongful Death Uninsured Motorist (46) (if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto) <p>Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort</p> <ul style="list-style-type: none"> Asbestos (04) <ul style="list-style-type: none"> Asbestos Property Damage Asbestos Personal Injury/Wrongful Death Product Liability (not asbestos or toxic/environmental) (24) Medical Malpractice (45) <ul style="list-style-type: none"> Medical Malpractice—Physicians & Surgeons Other Professional Health Care Malpractice Other PI/PD/WD (23) <ul style="list-style-type: none"> Premises Liability (e.g., slip and fall) Intentional Bodily Injury/PD/WD (e.g., assault, vandalism) Intentional Infliction of Emotional Distress Negligent Infliction of Emotional Distress Other PI/PD/WD <p>Non-PI/PD/WD (Other) Tort</p> <ul style="list-style-type: none"> Business Tort/Unfair Business Practice (07) Civil Rights (e.g., discrimination, false arrest) (not civil harassment) (08) Defamation (e.g., slander, libel) (13) Fraud (16) Intellectual Property (19) Professional Negligence (25) <ul style="list-style-type: none"> Legal Malpractice Other Professional Malpractice (not medical or legal) Other Non-PI/PD/WD Tort (35) <p>Employment</p> <ul style="list-style-type: none"> Wrongful Termination (36) Other Employment (15) 	<p>Contract</p> <ul style="list-style-type: none"> Breach of Contract/Warranty (06) <ul style="list-style-type: none"> Breach of Rental/Lease Contract (not unlawful detainer or wrongful eviction) Contract/Warranty Breach—Seller Plaintiff (not fraud or negligence) Negligent Breach of Contract/Warranty Other Breach of Contract/Warranty <p>Collections (e.g., money owed, open book accounts) (09)</p> <ul style="list-style-type: none"> Collection Case—Seller Plaintiff Other Promissory Note/Collections Case <p>Insurance Coverage (not provisionally complex) (18)</p> <ul style="list-style-type: none"> Auto Subrogation Other Coverage <p>Other Contract (37)</p> <ul style="list-style-type: none"> Contractual Fraud Other Contract Dispute <p>Real Property</p> <ul style="list-style-type: none"> Eminent Domain/Inverse Condemnation (14) Wrongful Eviction (33) Other Real Property (e.g., quiet title) (26) <ul style="list-style-type: none"> Writ of Possession of Real Property Mortgage Foreclosure Quiet Title Other Real Property (not eminent domain, landlord/tenant, or foreclosure) <p>Unlawful Detainer</p> <ul style="list-style-type: none"> Commercial (31) Residential (32) Drugs (38) (if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential) <p>Judicial Review</p> <ul style="list-style-type: none"> Asset Forfeiture (05) Petition Re: Arbitration Award (11) Writ of Mandate (02) <ul style="list-style-type: none"> Writ—Administrative Mandamus Writ—Mandamus on Limited Court Case Matter Writ—Other Limited Court Case Review Other Judicial Review (39) <ul style="list-style-type: none"> Review of Health Officer Order Notice of Appeal—Labor Commissioner Appeals 	<p>Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)</p> <ul style="list-style-type: none"> Antitrust/Trade Regulation (03) Construction Defect (10) Claims Involving Mass Tort (40) Securities Litigation (28) Environmental/Toxic Tort (30) Insurance Coverage Claims (arising from provisionally complex case type listed above) (41) <p>Enforcement of Judgment</p> <ul style="list-style-type: none"> Enforcement of Judgment (20) <ul style="list-style-type: none"> Abstract of Judgment (Out of County) Confession of Judgment (non-domestic relations) Sister State Judgment Administrative Agency Award (not unpaid taxes) Petition/Certification of Entry of Judgment on Unpaid Taxes Other Enforcement of Judgment Case <p>Miscellaneous Civil Complaint</p> <ul style="list-style-type: none"> RICO (27) Other Complaint (not specified above) (42) <ul style="list-style-type: none"> Declaratory Relief Only Injunctive/Relief Only (non-harassment) Mechanics Lien Other Commercial Complaint Case (non-tort/non-complex) Other Civil Complaint (non-tort/non-complex) <p>Miscellaneous Civil Petition</p> <ul style="list-style-type: none"> Partnership and Corporate Governance (21) Other Petition (not specified above) (43) <ul style="list-style-type: none"> Civil Harassment Workplace Violence Elder/Dependent Adult Abuse Election Contest Petition for Name Change Petition for Relief From Late Claim Other Civil Petition
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12 Attorneys for Plaintiff Walgreen Co.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 14 COUNTY OF SAN FRANCISCO

15 WALGREEN CO., an Illinois corporation,

16 Plaintiff,

17 v.

18 THE CITY AND COUNTY OF SAN
 19 FRANCISCO; THE BOARD OF
 20 SUPERVISORS FOR THE CITY AND
 21 COUNTY OF SAN FRANCISCO; and GAVIN
 22 NEWSOM, in his capacity as Mayor of the City
 23 and County of San Francisco,

24 Defendants.

25 CASE NO.

26 **COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

27 [Cal. Code. Civ. Proc. Section 1060]

INTRODUCTION AND SUMMARY

1
2 1. A recently enacted San Francisco ordinance (the "Ordinance") prohibits any retail
3 establishment in which the profession of pharmacy is practiced from selling tobacco products, unless
4 the retail establishment is a general grocery store or a big box store. (San Francisco Ordinance No.
5 194-08, amending San Francisco Health Code section 1009.53 and adding section 1009.60 and
6 Article 19J to the Health Code).

7 2. The Ordinance was enacted on August 7, 2008, and takes effect less than two months
8 later on October 1, 2008, providing little transition time for compliance.

9 3. Plaintiff Walgreen Co. ("Walgreens") shares San Francisco's goal of reducing
10 smoking. But this Ordinance does not purport to reduce the quantity of tobacco products sold in San
11 Francisco. Instead, it merely prohibits *some* pharmacies from selling tobacco products.

12 4. The premise underlying the Ordinance's restricted focus on pharmacies is
13 implausible. The Ordinance limits its tobacco sale prohibition to (some) pharmacies based on the
14 purported legislative finding that "[t]hrough the sale of tobacco products, pharmacies convey tacit
15 approval of the purchase and use of tobacco products" and that "[t]his approval sends a mixed
16 message to consumers who generally patronize pharmacies for health care services." (Ordinance,
17 § 1, finding 7.) But it is implausible that consumers receive a "mixed message" of "tacit approval"
18 for smoking simply because the tobacco products are sold in a retail establishment that has a
19 pharmacy, given the level of attention that anti-smoking efforts have received in the last decade,
20 including extensive anti-smoking public education campaigns.

21 5. In any event, regardless of the rationality of the premise underlying the Ordinance, the
22 Ordinance is anti-competitive and unconstitutional, only prohibiting tobacco product sales at some
23 pharmacies, but not others, favoring some retail establishments that have pharmacies, and not others.
24 The brunt of the Ordinance will fall on Walgreens, to the benefit of general grocery stores that can
25 continue to have pharmacies *and* sell tobacco products *and* the other types of products sold at
26 Walgreens.

27 6. The ordinance is invalid and should be struck down for the following reasons:
28

1 (a) The ordinance violates the Equal Protection guarantees of both the federal and
2 California Constitutions by arbitrarily and irrationally distinguishing between similarly situated retail
3 establishments with pharmacies. Although both the covered and exempted retail establishments
4 generally locate their pharmacies in a separate location of the store and offer a diverse variety of
5 goods, including perishable items, frozen foods, dry goods, household products, and paper goods,
6 general grocery stores and big box stores with pharmacies are exempt from the ordinance's coverage
7 while Walgreens is not. In short, the Ordinance differentiates between such establishments based on
8 little more than the name of the business.

9 (b) Second, the ordinance was enacted in violation of the requirements of the voter-
10 approved Proposition I, which requires the preparation of a report on all legislation that might have a
11 material economic impact on San Francisco before the San Francisco Board of Supervisors may hear
12 or enact any legislation. But here, despite the declining number of independent pharmacies in San
13 Francisco, no report was prepared. The decision not to prepare a report was an abuse of discretion.

14 7. As set forth herein, unless defendants are preliminarily and permanently enjoined from
15 enforcing the Ordinance, it will cause irreparable harm to Walgreens – and the public.

16 THE PARTIES

17 8. Plaintiff Walgreen Co. ("Walgreens" or "plaintiff") is a retail chain that sells
18 prescription and non-prescription drugs and general merchandise, including food, household
19 products, personal care items, dry goods, and paper goods. It is an Illinois corporation with its
20 principal place of business in Deerfield, Illinois, and is authorized to do business in California.
21 Plaintiff currently operates 54 full-service stores in San Francisco, 52 of which include a pharmacy.
22 As of the date of the filing of this complaint, all 54 full-service stores in San Francisco are licensed to
23 and do sell tobacco products.

24 9. Defendant City and County of San Francisco is a municipal corporation duly
25 organized under the laws of the State of California, and is a defendant in its official capacity. The
26 Ordinance has been enacted as part of the City and County of San Francisco's Health Code.
27
28

1 16. On or around August 5, 2008, the Board of Supervisors passed the Ordinance with a
2 vote of 8 in favor and 3 against its passage.

3 17. On August 7, 2008, the Mayor approved the Ordinance as Ordinance No. 194-08.

4 18. Plaintiff is informed and believes and thereon alleges that no report of the economic
5 impact of the Ordinance was prepared by the defendant City and County of San Francisco through its
6 Office of Economic Analysis ("OEA") before enactment, as required by the voter-approved
7 Proposition I, which requires the OEA to "identify and report on all legislation introduced at the
8 Board of Supervisors that might have a material economic impact on the City." Plaintiff is further
9 informed and believes and thereon alleges that the OEA initially concluded that an economic impact
10 report should be prepared, but declined to do so based on a wholly incomplete analysis of the relevant
11 economic factors.

12 The Ordinance

13 19. In relevant part, the Ordinance adds Article 19J, "Prohibiting Pharmacies From Selling
14 Tobacco Products," to the San Francisco Health Code, which article includes the following
15 provisions:

16 "Section 1009.92. Prohibition Against Tobacco Product Sales At Pharmacies.

17 No person shall sell tobacco products^[1] in a pharmacy^[2], except as provided in Sec. 1009.93.

18 Section 1009.93. Exceptions.

19 The prohibition against tobacco sales at pharmacies in Section 1009.92 shall not apply to:

20 (a) General Grocery Stores.^[3]

21
22 ¹ "Tobacco Product" is defined as "any substance containing tobacco leaf, including but not limited
23 to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco, and dipping tobacco." (San Francisco
Health Code § 1009.91(f).)

24 ² "Pharmacy" is defined as "a retail establishment in which the profession of pharmacy by a
25 pharmacist licensed by the State of California in accordance with the Business and Professions
Code is practiced and where prescriptions are offered for sale. A pharmacy may also offer other
26 retail goods in addition to prescription pharmaceuticals. For purposes of this Article, 'pharmacy'
includes retail stores commonly known as drugstores." (San Francisco Health Code
27 § 1009.91(e).)

28 ³ "General Grocery Store" is defined to have "the same meaning as set forth in Planning Code
Section 790.102(a) or any successor provisions." (San Francisco Health Code, § 1009.91(c).) In
[Footnote continued on next page]

(b) Big Box Stores.[4]

Section 1009.95. Expiration of Permit to Sell Tobacco.

Any permit to sell tobacco issued to a pharmacy pursuant to Article 19H shall expire on September 30, 2008, and shall not be renewed if sales of tobacco by that pharmacy are prohibited under this Article."

A copy of the Ordinance is attached to this Complaint as exhibit A.

The Ordinance's Findings

20. The Ordinance's "Findings" set forth the reasons behind its enactment, including concerns related to the negative health effects of tobacco. (Ordinance, Findings, ¶¶ 1-6.) However, the principal finding, upon which the Ordinance limits its tobacco sale prohibition to pharmacies, is as follows: "Through the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize pharmacies for health care services[.]" (Ordinance, § 1, Findings, ¶ 7.)

21. The Ordinance supports this "mixed message" finding on the grounds that "[p]harmacies and drugstores are among the most accessible and trusted sources of health information among the public" and that "[c]linicians can have a significant effect on smokers' probability of quitting smoking[.]" (*Id.*, ¶¶ 16-17.)

22. But the pharmacy section of Walgreens stores in San Francisco is physically separate from, and generally at an opposite end of, the section of the store at which tobacco products are sold. As a result, Walgreens pharmacists do not assist in the purchase of tobacco products.

[Footnote continued from previous page]

turn, Section 790.102(a) of the Planning Code defines "General groceries" as "An individual retail food establishment that: (A) Exceeds 5,000 gross square feet; (B) Offers a diverse variety of unrelated, non-complementary food and non-food commodities, such as beverages, dairy, dry goods, fresh produce and other perishable items, frozen foods, household products, and paper goods; (C) Prepares minor amounts or no food on-site for immediate consumption; and (D) Markets the majority of its merchandise at retail prices."

⁴ "Big Box Stores" is defined as "a single retail establishment occupying an area in excess of 100,000 gross square feet." (San Francisco Health Code, § 1009.91(a).)

23. The Ordinance does not expressly set forth any reason for excluding General Grocery Stores and Big Box Stores from the definition of pharmacy.

The Store Layout And Merchandise At Walgreens and Competitors In San Francisco

24. Plaintiff is informed and believes and thereon alleges that its primary competitors in San Francisco are Safeway Stores, Rite Aid, Lucky Stores, and Longs Drug Stores. Plaintiff also competes with the one Costco store in San Francisco.

25. Plaintiff is informed and believes and thereon alleges that licensed pharmacies exist at the single locations of the San Francisco Costco and Longs Drugs, as well as the two San Francisco Lucky Supermarket stores, six San Francisco Safeway Stores, and six San Francisco Rite Aid stores.

26. Plaintiff is informed and believes and thereon alleges that generally speaking, these stores, like its stores, offer a mix of products, including prescription drugs, over-the-counter drugs, household products, personal care items, and food items. However, general grocery stores and big box stores are exempt from the prohibition in the Ordinance.

27. Plaintiff currently operates licensed pharmacies in 52 of its 54 full-service stores in San Francisco.

28. For the 52 Walgreens stores with operating pharmacies, the store layout is generally the same. The pharmacy is located in the back of the store and tobacco products are located at the front of the store behind the main checkout area and near the exit. As such, the pharmacy and tobacco products are at completely opposite ends of the store. Pharmacy purchases at these stores must be made at the pharmacy counter in the back of the store. Walgreens pharmacists do not sell tobacco products. Rather, tobacco products are "clerk served," meaning that a customer must ask a store clerk or checkout attendant to access any tobacco product.

29. Plaintiff is informed and believes and thereon alleges that the store layout at other retail establishments offering pharmacy services is similar in relevant respects. For example, at Safeway Stores and Lucky Stores in San Francisco, the pharmacy is located in the back of each store, and tobacco products are kept in a customer service area in front of the store. At the Costco in San Francisco, the pharmacy is located at the front of the store, but it is at the end of the checkout area

1 furthest from the entrance, whereas tobacco products are in a locked cage that is on the entrance side
2 of the checkout area.

3 **Actual and Irreparable Injury**

4 30. Plaintiff will suffer significant and irreparable injury if the Ordinance's ban on the sale
5 of tobacco products is permitted to take effect.

6 31. Once the Ordinance takes effect, each of plaintiff's affected stores will suffer lost
7 revenues and profits in amounts that cannot be fully determined or recovered. First, the affected
8 stores will suffer the loss of their tobacco product sales. The affected Walgreens stores will also have
9 to dismantle their display structures that contain the tobacco products and replace them with
10 something else at a cost not yet determined.

11 32. Second, once the Ordinance takes effect, each of plaintiff's affected stores will also
12 suffer the loss of ancillary purchases made by the customer at the time of the purchase of the tobacco
13 products. Lost ancillary sales among Walgreens' San Francisco stores will be in the millions of
14 dollars, the precise amount of which for future years will be difficult to ascertain for purposes of
15 ascertaining adequate relief.

16 33. The Ordinance will also cause plaintiff substantial and irreparable harm in the form of
17 lost customer goodwill. If Walgreens is forced to stop selling tobacco products, customers of those
18 products will begin shopping elsewhere for those items, and there is a substantial risk that a number
19 of them will begin to patronize those of Walgreens' competitors that have a pharmacy *and* offer
20 tobacco products *and* the same types of goods as Walgreens. The amount of these lost sales is
21 extremely difficult to ascertain.

22 34. If the ordinance takes effect, the public will also be irreparably harmed because unlike
23 some retail establishments that sell cigarettes, Walgreens also offers smoking cessation products, to
24 which tobacco product consumers are introduced when they shop at Walgreens. Once tobacco
25 products are no longer sold at Walgreens stores, consumers of those products may not be introduced
26 to similar smoking cessation products at the time of purchase.

FIRST CAUSE OF ACTION

Equal Protection Under the U.S. Constitution

(Against All Defendants)

35. Plaintiff incorporates by reference paragraphs 1 through 34, inclusive, as though fully set forth herein.

36. The Fourteenth Amendment to the United States Constitution provides, "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1.) The equal protection guarantee extends to corporations as well as persons.

37. The Ordinance prohibits some retail establishments with pharmacies from selling tobacco products, but arbitrarily exempts from this prohibition other retail establishments with pharmacies, namely, general grocery stores and big box stores, in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

38. As such, the Ordinance treats similarly situated entities differently and arbitrarily, and irrationally distinguishes between them.

39. Accordingly, plaintiff contends that the Ordinance violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and that it is therefore invalid and may not be enforced.

40. Plaintiff is informed and believes and thereon alleges that defendants contend that the Ordinance is valid and constitutional.

41. Consequently, there exists a present and actual controversy between the parties requiring this Court to adjudicate their respective rights and duties. Plaintiff seeks a declaration that the Ordinance violates the Equal Protection guarantee provided in the U.S. Constitution, and therefore is invalid and may not be enforced.

42. In addition, unless defendants are preliminarily and permanently enjoined from enforcing the Ordinance, Plaintiff will suffer grave and irreparable injury to its property.

1 52. In November of 2002, the voters of San Francisco passed Proposition I, which
2 added sections to the San Francisco Administrative Code that required that San Francisco create an
3 Office of Economic Analysis ("OEA") to analyze the economic impact of prospective legislation.
4 (San Francisco Administrative Code, Ch. 10, Art. IV, § 10.31, *available at*
5 http://www.sfgov.org/site/economic_page.asp?id=37966.) Proposition I sets forth that "The Office
6 of Economic Analysis . . . shall identify and report on all legislation introduced at the Board of
7 Supervisors that might have a material economic impact on the City; as determined by the Office[.]"
8 and requires that the analysis be submitted to the defendant Board of Supervisors prior to the
9 legislation being heard in committee. (*Id.*, § 10.32.)

10 53. The principal purpose of Proposition I is to analyze the likely impacts of the proposed
11 legislation on "business attraction and retention, job creation, tax and fee revenues to the City, and
12 other matters relating to the overall economic health of the City." (San Francisco Administrative
13 Code, Ch. 10, Art. IV, § 10.32.)

14 54. In the case of the Ordinance, the OEA did not issue a report on the Ordinance's likely
15 economic impact on the City and County of San Francisco, notwithstanding, *inter alia*, that the
16 number of independent pharmacies in San Francisco has been diminishing and the likelihood that
17 they will not increase if a material source of sales is prohibited.

18 55. Plaintiff is further informed and believes that in determining that there would be no
19 economic impact and thus no need for a report, the OEA only considered the Ordinance's effect on
20 the pricing of cigarettes and failed to consider the Ordinance's impact on business attraction and
21 retention, job creation and retention, or the total loss of tax and fee revenues to the City and County
22 of San Francisco.

23 56. The OEA's incomplete evaluation was an abuse of discretion and led to an arbitrary
24 conclusion that it did not have to prepare a report.

25 57. As a result, the Ordinance was enacted in violation of Proposition I such that the
26 relevant information involving the Ordinance's economic impact was not placed before the defendant
27 Board of Supervisors before passage. Accordingly, the Ordinance is invalid by reason of its
28 enactment in violation of voter-approved Proposition I.

- 1 4. An award of attorney fees to the extent permitted by applicable statute; and
- 2 5. Such other and further relief as this Court may deem just and proper.

3
4 DATED: September 8, 2008

5 GIBSON, DUNN & CRUTCHER LLP
6 DANIEL M. KOLKEY
7 BRETT H. OBERST
8 REBECCA JUSTICE LAZARUS

9 By: *Daniel M. Kolkey*
10 Daniel M. Kolkey

11 Attorneys for Plaintiff Walgreen Co.

12 100503361_2.DOC

Exhibit A

FILE NO. 080594

ORDINANCE NO.

194-08

1 [Prohibiting Pharmacies From Selling Tobacco Products.]

2
3 **Ordinance amending the San Francisco Health Code by amending Section 1009.53 and**
4 **adding Section 1009.60 and Article 19J, to prohibit pharmacies from selling tobacco**
5 **products.**

6 Note: Additions are single-underline italics Times New Roman;
7 deletions are ~~strikethrough-italics Times New Roman~~.
8 Board amendment additions are double underlined.
9 Board amendment deletions are ~~strikethrough-normal~~.

9 Be it ordained by the People of the City and County of San Francisco:

10 Section 1. Findings.

11 The Board of Supervisors hereby finds and declares as follows:

12 1. Tobacco is the leading cause of preventable death in the United States and the
13 leading risk factor contributing to the burden of disease in the world's high-income countries;

14 2. In addition to its health impact, tobacco related death and disease has an
15 economic impact. In 1999, the economic costs of smoking in California were estimated to be
16 \$475 per resident or \$3,331 per smoker, for a total of nearly \$15.8 billion in smoking-related
17 costs (1999 dollars). Those same costs in 2008 dollars would be \$614 per resident or \$4,310
18 per smoker for a total of nearly \$20.4 billion dollars;

19 3. Twenty-three percent of San Franciscans have been diagnosed with high blood
20 pressure. The National Heart Lung and Blood Institute's guidelines for the use of prescription
21 drugs in the treatment of high blood pressure call for smoking cessation;

22 4. Twenty percent of San Franciscans have been diagnosed with high cholesterol.
23 The National Heart Lung and Blood Institute's guidelines for the use of prescription drugs in
24 the treatment of high cholesterol call for smoking cessation;

25
Mayor Newsom, Supervisors Peskin, McGoldrick
BOARD OF SUPERVISORS

1 5. The American Diabetes Association's standards of medical care in diabetes call
2 for smoking cessation as well as prescription drug therapy;

3 6. Thirteen percent of San Franciscans have asthma. The National Heart Lung
4 and Blood Institute's guidelines for the use of prescription drugs in the treatment of asthma
5 call for avoidance of tobacco smoke;

6 7. Through the sale of tobacco products, pharmacies convey tacit approval of the
7 purchase and use of tobacco products. This approval sends a mixed message to consumers
8 who generally patronize pharmacies for health care services;

9 8. In 1970, The American Pharmaceutical Association stated that mass display of
10 cigarettes in pharmacies is in direct contradiction to the role of a pharmacy as a public health
11 facility;

12 9. The Tobacco Education and Research Oversight Committee for California, as
13 well as the American Pharmacists Association, the California Pharmacists Association, and
14 the California Medical Association have called for the adoption of state and local prohibitions
15 of tobacco sales in drugstores and pharmacies;

16 10. A majority (78%) of independently owned pharmacies in California have become
17 tobacco free; however, tobacco products are still sold by 94% of chain drugstores;

18 11. Of the independently owned pharmacies that are tobacco-free, 88% report they
19 have experienced either no loss or an increase in business since removing tobacco from their
20 shelves;

21 12. An overwhelming percentage of California consumers (96.8%) indicate that they
22 would continue to patronize their pharmacy or drugstore as often or more often if it stopped
23 selling tobacco products;

1 13. A large majority (72.3%) of California consumers are opposed to the sale of
2 tobacco products in drugstores and nearly one-half of California smokers (49.7%) disagree or
3 strongly disagree that tobacco products should be sold through drugstores;

4 14. Only 13.2% of chain drugstore pharmacists are in favor of the sale of tobacco
5 products in drugstores;

6 15. In a 2003-2004 national survey of pharmacy students, nearly three-quarters
7 (71%) of those surveyed were against tobacco sales in pharmacies. These findings were
8 aligned with the 2003 resolution of the American Association of Colleges of Pharmacy that
9 encourages pharmacy schools to use only training sites that do not sell tobacco products;

10 16. Pharmacies and drugstores are among the most accessible and trusted sources
11 of health information among the public;

12 17. Clinicians can have a significant effect on smokers' probability of quitting
13 smoking;

14 18. Most health care institutions have adopted policies that have banned tobacco
15 sales and created smoke-free environments. In spite of numerous resolutions and
16 recommendations by state and national pharmacy organizations calling for pharmacies to stop
17 selling tobacco, some community pharmacies in the United States continue to sell tobacco
18 products.

19 19. A study of 100 randomly selected San Francisco pharmacies found that in 2003,
20 61% of pharmacies sold cigarettes, significantly less compared to 89% of pharmacies in 1976.
21 Most of this decrease was among independently owned pharmacies.

22 20. In a 2003 study of San Francisco pharmacies' merchandising of cigarettes, 84%
23 of pharmacies selling cigarettes displayed tobacco advertising.
24
25

1 21. Prescription drug sales for chain drugstores represent a significantly higher
2 percentage of total sales than for grocery stores and big box stores that contain pharmacies.
3 According to the 2007 Rite Aide Annual Report, prescription drugs sales represented 63.7%
4 of total sales in fiscal 2007. Walgreen's 2007 Annual Report documented prescription sales as
5 approximately 65% of net sales that year. Pharmacy sales at Safeway have been estimated
6 at 7.5% of annual volume. Costco's prescription sales generated 1.5% of total revenue in
7 2002.

8 Section 2. The San Francisco Health Code is hereby amended by amending Section
9 1009.53 and adding Section 1009.60 and Article 19J, to read as follows:

10 **SEC. 1009.53. APPLICATION PROCEDURE: INSPECTION OF PREMISES;**
11 **ISSUANCE AND DISPLAY OF PERMIT.**

12 (a) Application. An application for a tobacco sales permit shall be submitted in the
13 name of the person(s) proposing to engage in the sale of tobacco products and shall be
14 signed by each person or an authorized agent thereof. The application shall be accompanied
15 by the appropriate fees as described in section 35 of the San Francisco Business and Tax
16 Regulations Code. A separate application is required for each location where tobacco sales
17 are to be conducted. All applications shall be submitted on a form supplied by the Department
18 and shall contain the following information:

- 19 1. The name, address, and telephone number of the applicant;
- 20 2. The establishment name, address, and telephone number for each location for
21 which a tobacco sales permit is sought;
- 22 3. Such other information as the Director deems appropriate, including the applicant's
23 type of business, and whether the applicant has previously been issued a permit under this
24 Article that is, or was at any time, suspended or revoked.

1 (b) Inspection by Director. Upon receipt of a completed application and fees, the
2 Director may inspect the location at which tobacco sales are to be permitted. The Director
3 may also ask the applicant to provide additional information that is reasonably related to the
4 determination whether a permit may issue.

5 (c) Issuance of Permit. If the Director is satisfied that the applicant has met the
6 requirements of this Article and that issuance of the permit will not violate any law, the
7 Department shall issue the permit. No permit shall issue if the Director finds that the applicant
8 is in violation of San Francisco Health Code section 1009.1 (regulating cigarette vending
9 machines), ~~or~~ San Francisco Police Code section 4600.3 (regulating the self-service
10 merchandising of tobacco products), or if the applicant is a pharmacy prohibited from selling
11 tobacco products under Article 19J. No permit shall issue if the application is incomplete or
12 inaccurate.

13 (d) Display of Permit. Each permittee shall display the permit prominently at each
14 location where tobacco sales occur. No permit that has been suspended shall be displayed
15 during the period of suspension. A permit that has been revoked is void and may not be
16 displayed.

17
18 **SEC. 1009.60. CONDUCT VIOLATING TOBACCO CONTROL LAWS**

19 (a) Upon a decision by the Director that the permittee or the permittee's agent or employee has
20 engaged in any conduct that violates local, state, or federal law applicable to tobacco products or
21 tobacco sales, the Director may suspend a tobacco sales permit as set forth in section 1009.66, impose
22 administrative penalties as set forth in section 1009.67, or both suspend the permit and impose
23 administrative penalties.
24
25

1 **(b) The Director shall commence enforcement of this section by serving either a notice of**
 2 **correction under section 1009.68 of this Article or a notice of initial determination under section**
 3 **1009.69 of this Article.**

5 **ARTICLE 19J: PROHIBITING PHARMACIES FROM SELLING TOBACCO PRODUCTS**

6 **SEC. 1009.91. DEFINITIONS.**

7 **(a) "Big Box Store" shall mean a single retail establishment occupying an area in excess of**
 8 **100,000 gross square feet.**

9 **(b) "Director" shall mean the Director of the Department of Public Health or his or her**
 10 **designee.**

11 **(c) "General Grocery Store" shall have the same meaning as set forth in Planning Code**
 12 **Section 790.102(a) or any successor provisions.**

13 **(d) "Person" shall mean any individual person, firm, partnership, association, corporation,**
 14 **company, organization, or legal entity of any kind.**

15 **(e) "Pharmacy" shall mean a retail establishment in which the profession of pharmacy by a**
 16 **pharmacist licensed by the State of California in accordance with the Business and Professions Code is**
 17 **practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods**
 18 **in addition to prescription pharmaceuticals. For purposes of this Article, "pharmacy" includes retail**
 19 **stores commonly known as drugstores.**

20 **(f) "Tobacco Product" shall mean any substance containing tobacco leaf, including but not**
 21 **limited to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco, and dipping tobacco.**

23 **Sec. 1009.92. PROHIBITION AGAINST TOBACCO PRODUCT SALES AT**
 24 **PHARMACIES.**

1 No person shall sell tobacco products in a pharmacy, except as provided in Sec. 1009.93.

2
3 Sec. 1009.93. EXCEPTIONS.

4 The prohibition against tobacco sales at pharmacies in Section 1009.92 shall not apply to:

5 (a) General Grocery Stores.

6 (b) Big Box Stores.

7
8 Sec. 1009.94. PENALTIES AND ENFORCEMENT.

9 Administrative penalties shall be assessed and collected by the Director in accordance with San
10 Francisco Administrative Code Chapter 100, a copy of which is on file in Board of Supervisors File No.
11 _____ and which is hereby incorporated by reference.

12
13 SEC. 1009.95. EXPIRATION OF PERMIT TO SELL TOBACCO.

14 Any permit to sell tobacco issued to a pharmacy pursuant to Article 19H shall expire on
15 September 30, 2008, and shall not be renewed if sales of tobacco by that pharmacy are prohibited
16 under this Article.

17
18 SEC. 1009.96. AUTHORITY TO ADOPT RULES AND REGULATIONS.

19 The Director may issue and amend rules, regulations, standards, guidelines, or conditions to
20 implement and enforce this Article.

21
22 SEC. 1009.97. PREEMPTION.

23 In adopting this Article, the Board of Supervisors does not intend to regulate or affect the rights
24 or authority of the State to do those things that are required, directed, or expressly authorized by
25

1 federal or state law. Further, in adopting this Article, the Board of Supervisors does not intend to
2 prohibit that which is prohibited by federal or state law.

3
4 **SEC. 1009.98. CITY UNDERTAKING LIMITED TO PROMOTION OF GENERAL**
5 **WELFARE.**

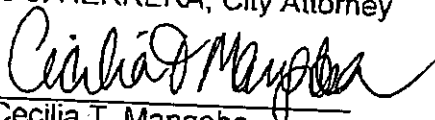
6 In undertaking the adoption and enforcement of this Article, the City and County is assuming an
7 undertaking only to promote the general welfare. The City does not intend to impose the type of
8 obligation that would allow a person to sue for money damages for an injury that the person claims to
9 suffer as a result of a City officer or employee taking or failing to take an action with respect to any
10 matter covered by this Article.

11
12 **SEC. 1009.99. SEVERABILITY.**

13 If any of the provisions of this Article or the application thereof to any person or circumstance
14 is held invalid, the remainder of this Article, including the application of such part or provisions to
15 persons or circumstances other than those to which it is held invalid, shall not be affected thereby and
16 shall continue in full force and effect. To this end, the provisions of this Article are severable.

17
18 APPROVED AS TO FORM:
19 DENNIS J. HERRERA, City Attorney

20 By:


21 Cecilia T. Mangoba
22 Deputy City Attorney
23
24
25

Mayor Newsom
BOARD OF SUPERVISORS



City and County of San Francisco
Tails
Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 080594

Date Passed:

Ordinance amending the San Francisco Health Code by amending Section 1009.53 and adding Section 1009.60 and Article 19J, to prohibit pharmacies from selling tobacco products.

July 29, 2008 Board of Supervisors — PASSED ON FIRST READING

Ayes: 8 - Alioto-Pier, Ammiano, Daly, Maxwell, McGoldrick, Mirkarimi, Peskin,
Sandoval

Noes: 3 - Chu, Dufty, Elsbernd

August 5, 2008 Board of Supervisors — FINALLY PASSED

Ayes: 8 - Alioto-Pier, Ammiano, Daly, Maxwell, McGoldrick, Mirkarimi, Peskin,
Sandoval

Noes: 3 - Chu, Dufty, Elsbernd

File No. 080594

I hereby certify that the foregoing Ordinance was **FINALLY PASSED** on August 5, 2008 by the Board of Supervisors of the City and County of San Francisco.

Angela Calvillo

Angela Calvillo
Clerk of the Board

8-7-08
Date Approved

Gavin Newsom

Mayor Gavin Newsom