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CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any of the parties to this filing.

STATEMENT OF INTEREST

It is the role of the Rhode Island Department of Health to “do all in its power to ascertain the causes and the best means for the prevention and control of diseases or conditions detrimental to the public health, and adopt proper and expedient measures to prevent and control diseases and conditions detrimental to the public health in the state.”

R.I. Gen. Laws § 23-1-1. The Health Department works in collaboration with Rhode Island’s cities and towns to improve public health, safety and welfare. The Department fully supports ordinances of the type that were enacted by the City of Providence as improving the public health of our state’s citizens who live, work, shop and entertain in the capital city.

INTRODUCTION

The Plaintiffs claim irreparable harm will be suffered if this Honorable Court does not grant its motion for injunction. Your Amicus will dispute this claim by citing the deleterious effects of price discounting and flavoring of tobacco products on the public health.

The Plaintiffs’ motion for summary judgment should be denied, its motions for injunction denied, and this Honorable Court should grant the Defendant City of Providence’s Motion to Dismiss as a matter of law for Plaintiffs’ failure to state a claim on which relief can be granted.

I. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION AGAINST ENFORCEMENT OF THE ORDINANCES

1. Description of Ordinances

The Promotion Ordinance prohibits licensed tobacco retailers in the City of Providence from accepting – or offering to accept – any coupons for tobacco products, and from offering any discounts in exchange for the purchase of more than one pack of cigarettes or other tobacco products or for the purchase of another tobacco product. Providence Code of Ordinances, § 14-303.

It further forbids any licensed tobacco retailer to “accept or redeem, offer to accept or redeem * * * any coupon that provides any tobacco products without charge or for less than the listed or non-discounted price[]” and forbids them from offering “multi-pack discounts.” *Id.*, § 14-303 ¶ 3(1).

This ordinance impacts a major source of marketing expenditures for tobacco companies. According to a Federal Trade Commission report issued in 2011, the largest single category of such spending in both 2007 and 2008 was price discounts paid to cigarette retailers or wholesalers in order to reduce the price of cigarettes to consumers. This one category accounted for \$7.70 billion (70.9 percent of total advertising and promotional expenditures) in 2007, and \$7.17 billion (72.1 percent of total expenditures in 2008).¹

The Flavor Description Ordinance makes unlawful the sale or offer of sale “any flavored tobacco product to a consumer, except in a smoking bar.” *Id.*, § 14-309. It defines “flavored tobacco product” in part as “any tobacco product or any component part thereof that contains a constituent that imparts a characterizing flavor.” *Id.*, § 14-308. It

¹ See <http://www.ftc.gov/os/2011/07/110729cigarettereport.pdf> (last visited June 13, 2012).

defines “characterizing flavor” as “a distinguishable taste or aroma, other than the taste or aroma of tobacco, menthol, mint or wintergreen, imparted either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to any fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, herb or spice and concepts such as spicy, arctic, ice, cool, warm, hot, mellow, fresh and breeze[.]” *Id.*, § 14-308.

Although the term “cigarette” is defined in the Flavor Description Ordinance, *id.*, the ordinance does not apply to cigarettes but is defined only to distinguish that product from those that indeed are banned and are included in the definition of “tobacco product,” of which cigarettes might otherwise be deemed a subset.

The Flavor Description Ordinance allows that certain tobacco products will not be deemed “flavored” merely because a non-distinguishing additive or flavoring is used, or because ingredient information is provided, presumably on the packaging. *Id.* This suggests that tobacco products that contain a flavoring will not be deemed a “flavored tobacco product” based on ingredients alone, or based on the listing of such ingredients somewhere on the packaging. More simply, no tobacco retailer in Providence – other than a smoking bar – may sell cigars, pipe tobacco, snuff, chewing or dipping tobacco, bidis, snus, dissolvable tobacco or electronic cigarette cartridges if they or their component parts “impart” any “distinguishable taste or aroma” or “concept,” unless that taste or aroma is menthol, mint, wintergreen, or tobacco itself. If such a product happens to contain one of the flavors listed in the ordinance, it will not by itself become a banned “flavored tobacco product” if the flavor is not “distinguishable.” If its packaging lists

ingredients that include, for example, fruity, chocolate or vanilla flavors, but does not entitle the product adjectively as “flavored,” “fruity,” “chocolate,” “vanilla,” etc., it will not by itself be considered flavored. If the packaging lists in its ingredients any adjectives suggesting non-mint spices or ambient temperatures, but does not contain the additive to such a degree that the flavor or aroma is predominant, the mere listing of the flavor will not classify the product as flavored.

This reading is consistent with the remainder of the definition of “flavored tobacco product,” which establishes the evidentiary presumption that a tobacco product is a flavored, and thus banned, product if the manufacturer or its agent makes any statement that the product has or produces a characterizing flavor other than menthol, mint or wintergreen. *Id.* This ordinance does not ban the sale of cigarettes or cigars in general, nor does it ban the sale of cigarettes that may contain an indistinct amount of flavoring or aroma.

2. The Threatened Hardship To Plaintiffs Does Not Outweigh Any Potential Harm to Defendants Or Third Parties; And The Public Interest Does Not Require A Preliminary Injunction

While this Honorable Court need not consider the issue of the Plaintiffs’ motion for injunction if the Court dismisses the complaint for failure to state a claim, Your Amicus presents that no irreparable harm will come to the Plaintiffs if the injunction request is denied. Irreparable harm may come to the public’s health in Providence if it is granted.

There is irony, of course, in the Plaintiffs stating that the restrictions on their aggressive marketing of tobacco and on their emerging line of flavored smokeless

tobacco will cause them irreparable harm. Their products have long caused, and continue to cause, irreparable harm to the public health. To the extent that the Providence ordinances cause irreparable harm to the Plaintiffs, it can only be a good thing for the health of the public to decrease -- as much as legally permissible -- the prevalence of tobacco use, especially among younger "replacement" users attracted by the lure of cheaper and more flavorful tobacco.

Every year tobacco kills 443,000 Americans² — one-fifth of all deaths³ in the United States, more than 1,200 people every day.⁴ Tobacco is the nation's greatest preventable cause of death;⁵ it kills ten times as many people as die in automobile accidents⁶ and thirty times the number of people who die from HIV/AIDS.⁷ Forty-five million Americans still smoke.⁸

Tobacco products are unique among consumer goods: they kill up to one-half of

² Centers for Disease Control. Annual Smoking-Attributable Mortality, Years of Potential Life Lost and Productivity Losses-United States, 2000-2004. MMWR 2008; 57(45): 1226-8 (<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm>)

³ <http://www.cdc.gov/nchs/fastats/deaths.htm>

⁴ See footnote 11 herein.

⁵ http://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/ cites to World Health Organization, report of the global tobacco epidemic 8 (2008) (WHO 2008) at 7.

⁶ <http://www.nhtsa.gov/About+NHTSA/Press+Releases/2012/U.S.+Transportation+Secretary+LaHood+Announces+Lowest+Level+Of+Annual+Traffic+Fatalities+In+More+Than+Six+Decades>

⁷ <http://aids.gov/hiv-aids-basics/hiv-aids-101/overview/statistics/>

⁸ http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6035a5.htm?s_cid=%20mm6035a5.htm_w

the people who use them as they are intended to be used.⁹ Tobacco causes ninety percent of all deaths from lung cancer in the United States.¹⁰ It also kills by causing numerous other kinds of cancer, including oral cancer, laryngeal cancer, pancreatic cancer, cervical cancer, stomach cancer, and acute myeloid leukemia.¹¹ However, seventy percent of all tobacco-related deaths occur from diseases *other* than cancer, such as cardiovascular disease (including heart attacks), coronary heart disease, emphysema, and aortic aneurysms.¹²

Tobacco smoking costs the nation \$193 billion per year in health care spending and loss of productivity due to disease and premature death resulting from smoking-related disease.¹³

Eighty-eight percent of long-term tobacco users start using tobacco — and become addicted — by the time they are 18.¹⁴ If young people avoid tobacco when they are underage, there is a strong likelihood that they will never become regular tobacco users. The prime objective of public health policy is therefore to keep young people from

⁹ World Health Organization, Report on the Global Tobacco Epidemic 8 (2008) (WHO 2008 Report); President's Cancer Panel Report at 6.

¹⁰ http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/ -- cites to "2004 Surgeon General's Report—The Health Consequences of Smoking."

¹¹ <http://www.cancer.gov/cancertopics/pdq/prevention/control-of-tobacco-use/Patient/page2/Print> National Cancer Institute at the National Institutes of Health, Cigarette Smoking: Health Risks and How to Quit (PDQ®) Patient Version

¹² http://www.cdc.gov/chronicdisease/resources/publications/AAG/osh_text.htm#chart1

¹³ See footnote 11 herein.

¹⁴ HHS, Report of the Surgeon General (2012) at 134.

initiating tobacco use.

Tobacco is enormously addictive. Young people begin to experiment with tobacco and become addicted while they believe they are still only experimenting. The decision to initiate experimentation with tobacco has fateful consequences: close to half of adolescents who become regular smokers will die prematurely from tobacco-related disease¹⁵ and they will lose an average of 14 years of life.¹⁶

Each day in the United States, over 3,800 people under 18 smoke their first cigarette¹⁷ and over 1,000 young people under 18 become daily cigarette smokers.¹⁸ Despite the fact that it is illegal in every state for people under 18 to buy tobacco products, approximately twenty percent of adolescents between 12 and 17 may have used tobacco in the past 30 days.¹⁹ Moreover, youth smoking rates that had been dropping for

¹⁵ CDC, Sustaining State Programs for Tobacco Control, Data Highlights, 2006, Table 1 *Smoking Prevalence (Adult and Youth), Percentage of Smokers Who Tried to Quit Past Year, Smoking-Attributable Deaths, Projected Deaths*. http://www.cdc.gov/tobacco/data_statistics/state_data/data_highlights/2006/pdfs/dataHighlights06table1.pdf

¹⁶ <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5114a2.htm>

¹⁷

http://www.cdc.gov/tobacco/data_statistics/sgr/2012/consumer_booklet/pdfs/consumer.pdf page 16, "Preventing Tobacco Use Among Youth and Young Adults, a Report of the Surgeon General, U.S. Department of Health and Human Services (2012).

¹⁸ Results from the 2010 National Survey on Drug Use and Health: Summary of National Findings, U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Center for Behavioral Health Statistics and Quality, at 56 <http://www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.pdf>

¹⁹ Centers for Disease Control and Prevention. Youth Risk Behavior Surveillance—United States, 2007. Morbidity and Mortality Weekly Report. June 6, 2008; 57(SS-04), Table 27 <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5704a1.htm#tab27>

many years have stalled.²⁰ And the usage rate for smokeless tobacco in that crucial age group has actually risen.²¹

Tobacco profits are propelled by an industry that depends on continuing to addict young people. After hearing testimony from hundreds of witnesses and examining thousands of exhibits, the U.S. District Court for the District of Columbia issued a decision that systematically exposes an unparalleled record of wrongdoing. The Court made specific findings with regard to the industry's efforts to addict young people.

“Defendants knew that youth were highly susceptible to marketing and advertising appeals, would underestimate the health risks and effects of smoking, would overestimate their ability to stop smoking, and were price sensitive. Defendants used their knowledge of young people to create highly sophisticated and appealing marketing campaigns targeted to lure them into starting smoking and later becoming nicotine addicts.” U.S. v. Philip Morris USA, Inc., 449 F.Supp.2d 1, 61 (D.D.C., 2006).

The policy aims of the Providence ordinances are experientially based. The pricing ordinance is an adaptation of one of the most successful tobacco-control policies: maintaining higher prices for cigarettes reduces cigarette consumption — and reduces consumption by young people disproportionately.²² Frequently, taxation is used to

²⁰ Tobacco Use Among Middle and High School Students --- United States, 2000—2009 MMWR August 27, 2010 / 59(33);1063-1068, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5933a2.htm>

²¹ <http://monitoringthefuture.org/pubs/monographs/mtf-overview2010.pdf>; and “Monitoring the Future” National Results on Adolescent Drug Use, Overview of Key Findings 2010” Lloyd Johnston, PhD, et al., at 40.

²² The inverse relationship between price and cigarette sales is discussed in the most recent Surgeon General's Report, Preventing Tobacco Use Among Youth and Young Adults, <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf>.

implement this policy: in the last twenty years every single state in the United States has increased its tax on tobacco—most of them very substantially.²³ These tax increases have been implemented to raise revenue, but the larger reason for these increases has been the conviction that tobacco product manufacturers will pass on tax increases in the form of higher prices and that the increase in prices will reduce consumption — in particular, consumption by young people.²⁴

Rhode Island has been in the forefront of the States using tax policy as a tobacco control strategy. Its cigarette tax of \$3.50 per pack was the highest in the nation for several years and still ranks as among the very highest.²⁵ The prevalence of cigarette smoking in Rhode Island ranges from 9.3% to 26.5%. Rhode Island ranks 17th among the states.²⁶ Tobacco companies responded to tax policies that sharply increased the price of cigarettes by instituting programs of selective, targeted discounts to counteract the effect of those policies.²⁷ For all the same reasons that increasing the price of tobacco products is an effective tobacco control policy, targeted discounting as a counter-strategy works to frustrate that policy. If price-conscious consumers smoke less in response in high prices, then policies that dilute or nullify price increases make them smoke more. If

²³ http://www.cdc.gov/tobacco/data_statistics/tables/economics/trends/

²⁴ http://www.tobaccofreekids.org/what_we_do/state_local/taxes/;
<http://www.tobaccofreekids.org/research/factsheets/pdf/0097.pdf>

²⁵ <http://www.businessweek.com/ap/2012-06/D9VBKVTG3.htm>

²⁶ http://www.cdc.gov/tobacco/data_statistics/state_data/state_highlights/2010/states/rhode_island/index.htm

²⁷ http://bmj-tobacco.highwire.org/content/11/suppl_1/i62.full

the target of those price reductions is an adolescent who is experimenting with cigarettes and is not yet addicted, the consequence of that targeted price reduction may well be the difference between his becoming addicted or not.

In U.S. v. Philip Morris, *supra*, the Court specifically found that tobacco companies use strategic price reduction strategies such as coupons and multi-pack discounts to target young people.

Defendants recognize that youth and young adults are more responsive to increases in cigarette and other tobacco prices and will not try smoking or continue to smoke if cigarette prices rise. Despite that recognition, Defendants continue to use price-based marketing efforts as a key marketing strategy.. . Defendants price-related marketing efforts, including coupons [and] multi-pack discounts, have partially offset the impact of higher list prices for cigarettes, historically and currently, particularly with regard to young people. *Defendants could significantly reduce adolescent smoking by ... stopping all price related marketing* (i.e., discounting and value added offers of cigarettes, especially in convenience stores, where this kind of marketing is concentrated and where young people are more likely to purchase cigarettes.” U.S. v. Philip Morris, 449 F. Supp. 2d at 639-40. (emphasis added)

With one of the highest cigarette taxes in the nation, Rhode Island is a prime target for this strategy — and kids in Rhode Island, who the tobacco companies hope will pay less for cigarettes now, will pay a much higher price in terms of their health. Coupons and multi-pack discounts are two effective ways to implement targeted price discounts.²⁸ Both have the effect of reducing the actual price of cigarettes. Some children obtain cigarettes illegally at convenience stores; some may ask an older friend or a sibling to buy them for them; some get cigarettes from parents or friends.²⁹ But regardless of how, the lower the price the more of them he or she is likely to obtain. If

²⁸ http://bmj-tobacco.highwire.org/content/11/suppl_1/i62.full

²⁹ <http://www.tobaccofreekids.org/research/factsheets/pdf/0073.pdf>

the forms of price reduction that the City has chosen to prohibit reduces the addiction of young people, it is more than sufficient to sustain the validity of their prohibition.

The second measure at issue in this case would prohibit the sale of flavored smokeless tobacco products except in smoking bars. This provision is also a reasonable measure designed to protect adolescents from becoming addicted to tobacco. Smokeless tobacco is a dangerous product that causes many kinds of cancer and other serious and potentially fatal health problems; it contains nicotine and is highly addictive.³⁰ As with cigarettes, the target of much of its promotion is the youth market.³¹

According to data from the Monitoring the Future Study presented by Professor Reynolds in his affidavit, in recent years the prevalence of smokeless tobacco use among tenth-graders and twelfth-graders nationally has either increased or not declined at all since 2003. According to this data, in 2003 14.6 percent of tenth graders reported using smokeless tobacco, while in 2011 the percentage had risen to 15.6 percent. Nor was 2011 an isolated year. Usage by tenth graders exceeded the 2003 level in four of the last five years. For twelfth-graders, prevalence in 2011 was 16.9 percent, compared with a level of 17.0 percent in 2003. The prevalence of smokeless usage in 2011 was higher than in all but two years since 2003.³² By contrast, smoking prevalence in both tenth and twelfth

³⁰ <http://www.cancer.gov/cancertopics/factsheet/Tobacco/smokeless>;
<http://cro.sagepub.com/content/15/5/252.full>

³¹ http://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm

³² The Monitoring the Future data also include figures for eighth graders. While the prevalence of smokeless usage for eighth graders had declined from 11.3% in 2003 to 9.7% in 2011 (a decline of about 14.1%), that entire decline occurred between 2003 and 2007 and prevalence has exceeded the 2007 level in every year since then.

grade levels declined appreciably during the same period.

There is substantial evidence that tobacco product manufacturers recognized that the addition of characterizing flavors, particularly sweet characterizing flavors, would have particular appeal to underage users.³³ Some of this evidence relates to the flavoring of cigarettes, but some relates to the flavoring of smokeless tobacco.³⁴

The ordinance at issue in this case provides that smokeless tobacco products with flavors other than menthol may be sold only in smoking bars (i.e., locales that could not be attended by underage consumers).

The affidavit of Professor Reynolds and the Memorandum of the Plaintiffs pose a question as to the scientific basis for finding that flavored tobacco products are disproportionately attractive to youth. The appropriate question is whether the availability of smokeless tobacco products at outlets easily accessible to children creates a serious public health problem. If the answer to that question is yes, then a measure that removes the easy availability of at least a portion of the products in question is appropriate.

³³ Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General, at 537, <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf>

³⁴ Preventing Tobacco Use Among Youth and Young Adults, A Report of the Surgeon General, page 539, <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf>; New types of smokeless tobacco present growing risks for youth: Survey: Products mistaken for candy, *The Nation's Health*, <http://thenationshealth.aphapublications.org/content/40/6/1.2.full>

II. CONCLUSION

The Department of Health believes that the provisions of both ordinances are designed to protect the public health and that these measures are likely to advance important public health objectives. Invalidation of these measures would harm the public health and would set back the achievement of public health goals at the state and municipal level.

Respectfully Submitted,

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CERTIFICATION

I, Jacqueline G. Kelley, of the Rhode Island Executive Office of Health and Human Services, certify that on June 15, 2012, this Amicus Curiae Brief was filed and served electronically through the Court's CM/EDF System on all counsel of record, including:

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