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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BAY AREA SMALL MERCHANTS)	CASE NO.
CHAMBER OF COMMERCE,)	
)	
Plaintiff,)	COMPLAINT FOR DAMAGES AND
)	FOR INJUNCTIVE AND
v.)	DECLARATORY RELIEF
)	[42 U.S.C. §§ 1983, 1985, 1986]
LIBBY SCHAFF and the)	
CITY OF OAKLAND)	
)	
Defendants.)	
)	
)	
_____)	

PARTIES

1. Plaintiff BAY AREA SMALL MERCHANTS CHAMBER OF COMMERCE (hereinafter "BASMCC") is a non-profit, California Mutual Benefit Corporation representing a membership of small business retailers who sell tobacco and who presently, and for all purposes

relevant herein, reside and do business in the City of Oakland, California.

2. Defendant LIBBY SCHAFF is sued in her official and individual capacities as the Mayor of the City of Oakland.

3. Defendant CITY OF OAKLAND is a chartered and incorporated city in the State of California.

JURISDICTION AND VENUE

4. Federal Question Jurisdiction exists pursuant to Sections 1331 and 1343 of Title 28 of the United States Code and is premised on allegations made pursuant to Section 1983 of Title 42 of the United States Code.

5. Venue in the Northern District of California is proper pursuant to Section 1391(b)(2) in that all of the parties reside and/or do business in and have minimum contacts with the Northern District of California and a substantial part of the events or omissions giving rise to the claim occurred in said District.

FACTUAL ALLEGATIONS

6. Plaintiff BASMCC is informed and believe, and thereon alleges, that at all times mentioned herein, unnamed defendants conspired and acted in concert with and under the instructions and orders of each other as agents of each other in the matter pleaded herein.

7. Plaintiff BASMCC is composed of member store owners who sell, among other things, tobacco products, including so-called “flavored” tobacco products.

8. On July 1, 2018, Defendant SCHAFF began enforcement of Ordinance no. 13452 (hereinafter the “Ordinance”) which, among other things, banned the sale of so-called “flavored” tobacco products within the city limits of Oakland, described in the ordinance as “any tobacco product which contains an ingredient that imparts a *characterizing flavor*.” [Emphasis added]. The stated purpose of the Ordinance was specifically to prevent underage youth in Oakland from

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3 using said products. However, there were no adequate impact studies performed by defendants to
4 observe or assess the intended result of removing such products, nor was the Ordinance passed by
5 the voting public through the initiative process.

6 9. Included within this ban is an exception created for so-called “Tobacco Stores,”¹
7 which in fact describes boutique tobacco retailers, such as ‘tobacconists’ who exclusively sell
8 tobacco products, primarily to a predominantly White, upper-middle and upper-income clientele.
9 This exception created by the Ordinance has a disparate impact on persons who sell or purchase
10 the so-called “flavored” tobacco products, persons who primarily belong to the constitutionally
11 protected class of ethnic and/or racial minority groups.

12 10. In addition, the term “flavored tobacco” is impermissibly vague, preventing
13 Plaintiffs from readily ascertaining the parameters of the Ordinance, and allowing for an
14 unfettered and selective discretion in the enforcement of the Ordinance. This unfettered and
15 selective enforcement is a pattern and practice of the defendants and violates the civil rights of
16 store owners and customers.
17

18 11. Finally, the Ordinance impermissibly chills commercial speech by preventing store
19 owners from advertising their products. By choosing a complete ban over other methods of
20 enforcement, the defendants have not used the least restrictive alternative and have violated
21 plaintiffs’ civil rights.

22 12. In addition to the aforementioned, defendants, and each of them, have perpetrated
23 a pattern and practice of selective enforcement, harassment, bullying, and other unlawful
24 behaviors that have deprived the plaintiffs of one or more of their constitutionally protected rights
25 to their harm and detriment.
26

27 ¹Confusingly, “Tobacco Retailers” are contrasted with Tobacco Stores who are not subject to the
28 artificial distinction drawn by defendants.

FIRST COUNT

42 U.S.C. § 1983

Declaratory Relief (28 U.S.C. §§ 2201, 2202)

13. All allegations stated previously in this complaint are incorporated herein as though fully set forth.

14. This action arises under the United States Constitution, particularly under the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, pursuant to Section 1983 of Title 42 of the United States Code, in that plaintiffs, and each of them, suffered a deprivation of a Constitutionally guaranteed civil right because plaintiffs, and their associates, were not provided Due Process and Equal Protection at the time of the enactment and selective enforcement of the Ordinance which, among other things, bans the sale of “flavored tobacco” products within the city limits of Oakland.

15. In so doing defendants and their agents acted under color of the statutes, ordinances, regulations, customs, and usages of the State of California when they deprived plaintiffs, and each of them, of their rights to Due Process and Equal Protection under the Fifth and Fourteenth Amendments to the United States Constitution, for the reasons stated in the previous paragraph.

16. By their actions, the defendants and their agents caused a deprivation of rights to the plaintiffs that is actionable as a suit in equity for declaratory relief under Sections 2201 and 2202 of Title 28 of the United States Code.

SECOND COUNT

42 U.S.C. § 1983

Injunctive Relief (F.R.Civ.P. Rule 65)

17. All allegations stated previously in this complaint are incorporated herein as

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3 though fully set forth.

4 18. Because of the plaintiffs' deprivation of rights under the Fifth and Fourteenth
5 Amendments to the United States Constitution due to the State Action of the defendants, and each
6 of them, as previously stated in this Complaint, plaintiffs, and each of them, have been and will
7 be irreparably harmed the defendants' actions. Furthermore, plaintiffs, and each of them, do not
8 have an adequate remedy at law where the equities weigh in favor of the plaintiffs such that they
9 are entitled to injunctive relief against the enforcement of the Ordinance and the defendants'
10 other unlawful activities, pursuant to Rule 65 of the Federal Rules of Civil Procedure.

11 THIRD COUNT

12 **42 U.S.C. § 1983**

13 **Damages**

14 19. All allegations stated previously in this complaint are incorporated herein as
15 though fully set forth.

16 20. Because of the plaintiffs' deprivation of rights under the Fifth and Fourteenth
17 Amendments to the United States Constitution due to the State Action of the defendants, and each
18 of them, as previously stated in this Complaint, plaintiffs, and each of them, have been and will
19 suffer damages as proximately caused by defendants' actions.

20 FOURTH COUNT

21 **42 U.S.C. § 1985**

22 **Damages, Injunctive and Declaratory Relief for Conspiracy to Violate Civil Rights**

23 21. All allegations stated previously in this complaint are incorporated herein as though
24 fully set forth.

25 22. In any case of conspiracy to commit any of the wrongs previously alleged in this
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27
28 Complaint, one or more persons engaged herein caused to be done an act or acts in furtherance of

the object of such conspiracy, whereby plaintiffs were injured in their persons or property, and were deprived of having and exercising any right or privilege of a citizen of the United States, thereby proximately causing damages to the plaintiffs..

FIFTH COUNT

42 U.S.C. § 1986

Damages, Injunctive and Declaratory Relief for Neglect to Prevent Violation of Civil Rights

23. All allegations stated previously in this complaint are incorporated herein as though fully set forth.

24. Defendants, and each of them, having knowledge that any of the wrongs conspired to be done, and stated above in this Complaint, which were about to be committed, and having power to prevent or aid in preventing the commission of the same, neglected or refused so to do, are liable for all damages caused by such wrongful act, which such persons by reasonable diligence could have prevented.

PRAYER FOR RELIEF

1) The plaintiffs hereby pray for the following relief by order of this Court:

a) For a declaration of the rights and duties of the parties according to the issues raised by plaintiff in this Complaint – to wit, that the plaintiffs’ rights under federal law and the Constitution of the United States are violated by defendants’ enforcement of the Ordinance;

b) For injunctive relief against the enforcement of the Ordinance and for other unlawful acts perpetrated by defendants against the plaintiffs;

c) For damages in an amount to be proved; and

d) For attorney’s fees and costs in an amount to be determined by this Court.

JURY DEMAND

Insofar as there might be contested facts, and where said facts might be heard by a jury of the parties' peers, a jury trial is demanded in this case.

Dated: July 1, 2018

By: /s/ Beilal Chatila
Beilal Chatila,
Attorney for all Plaintiffs

/s/ Anthony J. Palik
Anthony J. Palik,
Attorney for all Plaintiffs