

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VANGUARD OUTDOOR, LLC, a
California limited liability
company,

Plaintiff-Appellant,

v.

CITY OF LOS ANGELES, a California
municipal corporation,

Defendant-Appellee.

No. 10-56635

D.C. No.
2:08-cv-06035-
ABC-JWJ

ORDER

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, Chief District Judge, Presiding

Argued and Submitted
May 2, 2011—Pasadena, California

Filed June 3, 2011

Before: John T. Noonan and Kim McLane Wardlaw, Circuit
Judges, and Edward R. Korman, Senior District Judge.*

COUNSEL

Benjamin P. Pugh (argued) and James S. Azadian, Enterprise
Counsel Group ALC, Irvine, California, for the plaintiff-
appellant.

*The Honorable Edward R. Korman, Senior District Judge for the U.S.
District Court for the Eastern District of New York, Brooklyn, sitting by
designation.

Carmen A. Trutanich, Kenneth T. Fong (argued), Michael J. Bostrom, and Kim Rodgers Westhoff, Los Angeles City Attorney's Office, Los Angeles, California, for the defendant-appellee.

ORDER

We affirm for the reasons stated by the district court in its September 27, 2010 Amended Order Re: Plaintiffs' Motion to Amend Complaint; Motion for a Preliminary Injunction, attached as Appendix A.

AFFIRMED.

APPENDIX A

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 VANGUARD OUTDOOR, LLC, a) CASE NO.: CV 08-6035 ABC (JWJx)
11 California limited liability)
company,)
12 Plaintiff,) AMENDED ORDER RE: PLAINTIFFS'
13 v.) MOTION TO AMEND COMPLAINT; MOTION
14) FOR A PRELIMINARY INJUNCTION
15 CITY OF LOS ANGELES, a)
California municipal)
16 corporation,)
17 Defendant.)
18
19 Pending before the Court is Plaintiff Vanguard Outdoor, LLC's
20 ("Plaintiff's") Motion for a Preliminary Injunction (Docket No. 37)
21 and Motion to Amend Complaint (Docket No. 40), filed on September 9,
22 2010, pursuant to leave of Court.¹ Defendant City of Los Angeles (the
23 "City") opposed both motions on September 16, 2010 (Docket Nos. 45,
24 46), and Plaintiff replied on September 21, 2010 (Docket Nos. 48, 49.)
25 The Court finds these matters appropriate for resolution without oral
26 argument and will not hear argument at the September 27, 2010 hearing.
27
28 ¹This Amended Order supercedes the Court's prior Order issued on
September 24, 2010. (Docket No. 51.)

1 Fed. R. Civ. P. 78; Local Rule 7-15. The parties are still ORDERED to
2 appear before the Court on Monday, September 27, 2010 at 11:00 a.m.
3 for a status conference. After considering the case file and
4 extensive briefing in this matter, the Court DENIES Plaintiff's motion
5 for a preliminary injunction and DENIES AS MOOT Plaintiff's motion to
6 amend because Plaintiff may amend its complaint without leave.

7 **BACKGROUND**

8 Plaintiff is a billboard company attempting to salvage litigation
9 to maintain three signs in the City, even after the Ninth Circuit has
10 twice in the last two years rebuffed First Amendment challenges to the
11 City's attempts to control sign proliferation throughout the City of
12 Los Angeles. See World Wide Rush, LLC v. City of Los Angeles, 606
13 F.3d 676 (9th Cir. 2010); Metro Lights, LLC v. City of Los Angeles,
14 551 F.3d 898 (9th Cir. 2009). This case was one of many "copycat"
15 lawsuits filed after this Court in World Wide Rush enjoined the City's
16 enforcement of its ban on offsite and supergraphic signs as an invalid
17 prior restraint on speech under the First Amendment and enjoined
18 enforcement of the City's Freeway Facing Sign Ban as a fatally
19 underinclusive restriction on commercial speech. See World Wide Rush,
20 606 F.3d at 683-84. After that decision, "well-traveled thoroughfares
21 that contained any sort of sizable building were soon pockmarked with
22 Supergraphic Signs." World Wide Rush, LLC v. City of Los Angeles, 605
23 F. Supp. 2d 1088, 1092 (C.D. Cal. 2009), rev'd, 606 F.3d at 689.

24 The Ninth Circuit reversed the judgment on both grounds, holding
25 that the City's offsite and supergraphic sign bans were not prior
26 restraints on speech and that two exceptions to the Freeway Facing
27 Sign Ban did not so undermine the City's stated interests in safety
28 and aesthetics to violate the First Amendment. World Wide Rush, 606

1 F.3d at 687-89. In the real world, that decision should have resolved
2 litigation in most, if not all, of the billboard cases. In the world
3 of billboard litigation, however, that was apparently an invitation
4 simply to be more creative.

5 Filed on September 15, 2009, this case involves supergraphic
6 signs at three locations: 10924 Le Conte Avenue, Los Angeles,
7 California 90024; 3000 South Robertson Boulevard, Los Angeles,
8 California 90034; and 5858 Wilshire Boulevard, Los Angeles, California
9 90036. The Court stayed litigation in this case pending the appeal in
10 World Wide Rush, and while that stay was in place, the Court
11 effectively enjoined the City from enforcing the offsite and
12 supergraphic sign bans, as well as the Freeway Facing Sign Ban,
13 against Plaintiff's supergraphic signs at those three locations.
14 (Docket No. 13.)

15 Once the Ninth Circuit's mandate issued in World Wide Rush, the
16 Court ordered the parties in all the billboard cases to file joint
17 status reports outlining what remained after that decision. (Docket
18 No. 16.) Plaintiff in this matter urged the Court to maintain the
19 current injunction so it might amend its complaint and seek a
20 preliminary injunction based on claims that, in its view, were not
21 decided by the Ninth Circuit in World Wide Rush. The Court agreed to
22 allow Plaintiff to file those motions, which are now pending.

23 . Meanwhile, on May 4, 2010, the City instituted a civil
24 enforcement action and, on July 9, 2010, instituted a criminal
25 misdemeanor complaint against Plaintiff and others involving one of
26 the sign properties at issue here. Those cases remain pending in
27 state court.

28 Plaintiff recognizes that the foundation of its claims in its

1 original complaint has been fatally undermined by the Ninth Circuit's
2 World Wide Rush decision. (Docket No. 21 at 4 (admitting that
3 "Vanguard itself did not previously assert [the proposed new] claims
4 in this case because its complaint was based on the same claims of the
5 then-successful complaint in the World Wide Rush case." (emphasis in
6 original).) Therefore, Plaintiff has moved to amend its complaint to
7 allege the following claims, which it believes were not resolved by
8 the World Wide Rush decision: (1) declaratory relief under the First
9 and Fourteenth Amendment because section 14.4.4.B.9, 14.4.4.B.11, and
10 14.4.6 of the City's sign ordinance and the entire California Outdoor
11 Advertising Act are facially unconstitutional and unconstitutional as
12 applied to Plaintiff; (2) declaratory relief pursuant to California
13 Constitution, Article I, section 1, because the sign ordinance and the
14 California Outdoor Advertising Act violate the California
15 Constitution's free speech clause; and (3) a claim by proposed
16 additional Plaintiff EJLC Robertson, LLC (apparently Vanguard's
17 principal and sole employee), that the City's actions directed at
18 Plaintiff's sign at 3000 South Robertson Blvd. constitute a taking
19 without just compensation under the California and Federal
20 Constitutions. In addition and notwithstanding the decision in World
21 Wide Rush, Plaintiff's proposed new complaint has, in fact, repeated
22 many of the allegations rejected by the Ninth Circuit.

23 Beyond simply breathing life back into this case by filing an
24 amended complaint, Plaintiff has also moved for a preliminary
25 injunction, ostensibly to extend the injunction against enforcement of
26 the offsite and supergraphic sign bans at Plaintiff's three sign
27 locations. Specifically, Plaintiff seeks preliminary injunctive
28 relief on three grounds: (1) that the City applies the supergraphic

1 and offsite sign bans to improperly prohibit Plaintiff's signs, while
2 allowing other signs, and that the City impermissibly distinguishes
3 between offsite and onsite signs, all in violation of Plaintiff's
4 Fourteenth Amendment equal protection rights; (2) that, whatever the
5 reach of the Federal Constitution, the California Constitution's free
6 speech clause does not tolerate a distinction between non-commercial
7 and commercial speech that would allow the City to prohibit
8 Plaintiff's signs; and (3) that the City's "aesthetics" rationale is a
9 pretext for content-based regulation of offsite and supergraphic
10 signs.

11 As the Court outlines below, Plaintiff has failed to demonstrate
12 that its federal claims have any merit in light of World Wide Rush and
13 Metro Lights. Similarly, Plaintiff's claim that the California
14 Constitution affords greater protection than the First Amendment fails
15 in light of California Supreme Court case law. As a result, Plaintiff
16 has failed to show even serious questions on the merits of its claims,
17 which alone defeats its request for a preliminary injunction.
18 However, because the City has not filed a responsive pleading,
19 Plaintiff is entitled to file its amended complaint without leave from
20 the Court. At the status conference, the parties should be prepared
21 to discuss the next steps in this case in light of the Court's ruling
22 herein.

23 MOTION FOR PRELIMINARY INJUNCTION

24 A. Legal Standard

25 "A plaintiff seeking a preliminary injunction must establish that
26 he is likely to succeed on the merits, that he is likely to suffer
27 irreparable harm in the absence of preliminary relief, that the
28 balance of hardships tips in his favor, and that an injunction is in

1 the public interest." Winter v. Natural Res. Defense Council, Inc.,
2 ___ U.S. ___, ___, 129 S. Ct. 365, 374 (2008). This recitation of the
3 requirements for a preliminary injunction did not completely erase the
4 Ninth Circuit's "sliding scale" approach, which provided that "the
5 elements of the preliminary injunction test are balanced, so that a
6 stronger showing of one element may offset a weaker showing of
7 another." Alliance for Wild Rockies v. Cottrell, ___ F.3d ___, ___, 2010
8 WL 3665149, at 4* (9th Cir. Sept. 22, 2010). In one version of the
9 "sliding scale," "a preliminary injunction could issue where the
10 likelihood of success is such that 'serious questions going to the
11 merits were raised and the balance of hardships tips sharply in
12 [plaintiff's] favor." Id. (brackets in original). This "serious
13 questions" test survived Winter. Id. at *4-5. Therefore, "'serious
14 questions going to the merits' and a hardship balance that tips
15 sharply in the plaintiff's favor can support issuance of an
16 injunction, so long as the plaintiff also shows a likelihood of
17 irreparable injury and that the injunction is in the public interest."
18 Id. at *8.

19 Importantly, a preliminary injunction may be denied on the sole
20 ground that the plaintiff has failed to raise even "serious questions"
21 going to the merits. See Guzman v. Shewry, 552 F.3d 941, 948 (9th
22 Cir. 2009) ("[A]t an irreducible minimum, the moving party must
23 demonstrate a fair chance of success on the merits, or questions
24 serious enough to require litigation."). If the Court so concludes,
25 it need not address the other preliminary injunction factors. See
26 Advertise.com, Inc. v. AOL Advertising, Inc., ___ F.3d ___, ___, 2010 WL
27 3001980, at *7 (9th Cir. Aug. 3, 2010).

28

1 **B. Discussion**

2 Before addressing each claim on which Plaintiff rests its request
3 for an injunction, the Court will briefly summarize the decisions in
4 World Wide Rush and Metro Lights.

5 1. World Wide Rush

6 The plaintiff in World Wide Rush raised two claims: first, the
7 plaintiff raised an as-applied claim that the Freeway Facing Sign Ban
8 was an unconstitutionally underinclusive ban on commercial speech
9 under Central Hudson Gas & Electric Corp. v. Public Services
10 Commission, 447 U.S. 557 (1980), "because the City had, in fact,
11 permitted some freeway facing billboards despite the Ban"; and second,
12 the plaintiff claimed that the City's blanket bans on supergraphic and
13 offsite sign bans were facially unconstitutional as prior restraints
14 on speech because exceptions to the bans vested the City Council with
15 unbridled discretion to select among preferred speakers without
16 objective criteria. World Wide Rush, 606 F.3d at 683. The Court
17 noted that the plaintiff had not initially raised a Central Hudson
18 challenge to the supergraphic and offsite sign bans, id., and rejected
19 the plaintiff's attempt to raise the issue on appeal, id. at 689-90.

20 For the Freeway Facing Sign Ban, the court explained that a four-
21 part test must be applied to assess a Central Hudson challenge:

22 (1) if the communication is neither misleading nor
23 related to unlawful activity, then it merits First
24 Amendment scrutiny as a threshold matter; in order
25 for the restriction to withstand such scrutiny,
26 (2) the State must assert a substantial interest
to be achieved by restrictions on commercial
speech; (3) the restriction must directly advance
the state interest involved; and (4) it must not
be more extensive than is necessary to serve that
interest.

27 Id. at 684 (internal quotation marks and alterations omitted) (quoting
28

1 Metro Lights, 551 F.3d at 903). The City's substantial interests in
2 safety and aesthetics were unquestionably advanced by restrictions on
3 billboards, so the critical question was whether the City "denigrates
4 its interest in . . . safety and beauty and defeats its own case by
5 permitting' freeway facing billboards at the Staples Center and in the
6 Fifteenth Street SUD [Supplemental Use District] while forbidding
7 other freeway facing billboards." Id. at 685 (ellipsis in original)
8 (quoting Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510-11
9 (1981)). "To put it in the context of the Central Hudson test, a
10 regulation may have exceptions that undermine and counteract the
11 interest the government claims it adopted the law to further; such a
12 regulation cannot directly and materially advance its aim,' and is,
13 therefore, unconstitutionally underinclusive." Id. (quoting Metro
14 Lights, 551 F.3d at 905).

15 The court found that two exceptions to the City's Freeway Facing
16 Sign Ban did not so undermine the City's interests in safety and
17 aesthetics as to render the ban unconstitutionally underinclusive.
18 Id. at 685-87. The court urged judicial deference to a
19 "municipality's reasonably graduated response to different aspects of
20 a problem'" and directed that a "holistic" approach must be taken when
21 assessing exceptions to the ban, rather than looking at each exception
22 in isolation. Id. at 685. The court found that the exception for the
23 Staples Center actually furthered the City's interests because it was
24 intended to remove blight and dangerous conditions from downtown Los
25 Angeles; similarly, the exception for the Fifteenth Street SUD
26 furthered the City's interests because it improved traffic flow on
27 Santa Monica Boulevard and resulted in a net reduction in signs. Id.

28 The court then distinguished Greater New Orleans Broadcasting

1 Ass'n, Inc. v. United States, 527 U.S. 173, 190-93 (1999), because
2 that case involved a prohibition on advertising for gambling in
3 private casinos while allowing advertising for gambling on
4 reservations, which simply channeled gamblers to the reservations
5 instead of advancing the government's interests asserted in the case.
6 Id. at 686. The exceptions to the Freeway Facing Sign Ban did not
7 channel the evils sought to be eliminated elsewhere; they were
8 entirely consistent with the City's asserted interests. Id. The
9 court also rejected the plaintiffs' reliance on other cases, including
10 Ballen v. City of Redmond, 466 F.3d 736, 743 (9th Cir. 2006), because
11 those cases involved content-based distinctions for commercial speech,
12 and the Freeway Facing Sign Ban, as well as the exceptions, were
13 content-neutral. Id. The court reasoned that Metro Lights was more
14 apposite because, as in that case, where the City's interest in
15 controlling the proliferation of signs by disparate private parties
16 was served by limiting signs to one party over which the City wielded
17 contractual control, the City's decision to allow some signs at the
18 Staples Center and within the Fifteenth Street SUD could serve a
19 similar purpose. Id.

20 The court was similarly unpersuaded by the plaintiff's facial
21 unfettered discretion challenge to the offsite and supergraphic sign
22 bans, which granted the City the prerogative to create special plans
23 and SUDs and to enter development agreements. Id. at 687-89. The
24 exceptions were not susceptible to the plaintiff's unfettered
25 discretion challenge because they involved the City's "regular and
26 well-recognized legislative power to regulate land use." Id. at 688.
27 This legislative authority, which was granted to the City elsewhere
28 and did not arise from the offsite and supergraphic sign bans,

1 therefore did not implicate a prior restraint concern under the First
2 Amendment. Id. at 688-89.

3 2. Metro Lights

4 Metro Lights involved a Central Hudson underinclusivity attack on
5 the City's ban on offsite signs that exempted signs at transit stops
6 and allowed the City to enter a contract with a sign company to
7 install thousands of signs at transit stops. 551 F.3d at 901.
8 Because the parties did not dispute that the advertising was lawful
9 and that the City had substantial interests in traffic safety and
10 aesthetics that supported the offsite sign ban, the court analyzed the
11 challenge under Central Hudson's third and fourth elements, namely,
12 "whether the City's restriction 'directly advances' the government
13 interest and whether the City's restriction is narrowly tailored to
14 its aim." Id. at 904. The court answered both questions
15 affirmatively.

16 With respect to advancing the City's interest, the court noted
17 that the inquiry must focus on "whether the City's ban advances its
18 interest in its general application, not specifically with respect to
19 Metro Lights." Id. It recognized that a ban may be
20 unconstitutionally underinclusive under Central Hudson when it has
21 "exceptions that 'undermine and counteract' the interest the
22 government claims it adopted the law to further" because "such a
23 regulation cannot 'directly and materially advance its aim.'" Id. at
24 905. The court then interpreted the Supreme Court's underinclusivity
25 decisions in Greater New Orleans and other cases to bar regulations in
26 two situations: (1) first, if the exception ensures that the
27 regulation will fail to achieve its end, it does not materially
28 advance its aim; and (2) second, exceptions that make distinctions

1 among different kinds of speech must relate to the interest the
2 government seeks to advance. Id. And the fourth Central Hudson
3 element of narrow tailoring does not demand that the government use
4 the least restrictive means to further its ends. Id. at 906.

5 The court undertook a lengthy analysis of the Supreme Court's
6 decision in Metromedia, Inc. v. City of San Diego, 453 U.S. 490
7 (1981), which upheld a ban on offsite commercial billboards, and found
8 it dispositive on the third element under Central Hudson. Id. at
9 907-11. Importantly, both Metromedia and Metro Lights emphasized
10 deference to the reasonable judgment of City officials to value one
11 type of commercial advertising - onsite signs - over another type of
12 commercial advertising - offsite signs; indeed, the court in Metro
13 Lights explained that Metromedia "exudes deference for a
14 municipality's reasonably graduated response to different aspects of a
15 problem." Id. at 907-08, 910.

16 The court concluded that the contract between the City and the
17 sign provider that allowed thousands of signs at transit stops did not
18 fatally undermine the City's interests in traffic safety and
19 aesthetics for several reasons: first, the sign ban still achieved its
20 aim to reduce signage in the city, id. at 910; second, the contract
21 gave the City power to control a single sign provider and exclude
22 others at transit stops, which prevented numerous disparate parties
23 from posting signs, id.; and third, the City's judgment that its
24 interests in a complete ban on signage should yield to controlled
25 signage at transit stops was a "classically legislative decision"
26 approved by Metromedia, id. at 910-11. In the end, unlike Greater New
27 Orleans, the City's contract did not work at "inexorable cross-
28 purposes" with the interests in banning signs because "a regime that

1 combines the Sign Ordinance and the [contract] still arrests the
2 uncontrolled proliferation of signage and thereby goes a long way
3 toward cleaning up the clutter, which the City believed to be a worthy
4 legislative goal." Id. at 911.

5 The court also found the City's effectively partial ban on
6 signage was narrowly tailored to its interests mainly because, if a
7 total ban was permissible, as Metromedia indicated, then a partial ban
8 must also be, and the supervision of a single sign provider at transit
9 stops could plausibly contribute to the interests in visual coherence
10 and aesthetic quality. Id. at 911-12. Importantly, as the court in
11 World Wide Rush did, the court rejected the plaintiff's reliance on
12 the Ninth Circuit's decision in Ballen because neither the sign ban
13 nor the transit stop exception were content-based, and if based upon
14 the identity of the speaker, the sign provider "doesn't say anything;
15 it only sells space to advertisers who say things." Id. at 912.

16 3. The Law After World Wide Rush and Metro Lights

17 Several points can be gleaned from the decisions in World Wide
18 Rush and Metro Lights. First, the City's sign ban can withstand a
19 Central Hudson attack so long as it is not "so pierced by exceptions
20 and inconsistencies," as to directly undermine the City's interests in
21 traffic safety and aesthetics. World Wide Rush, 606 F.3d at 686. And
22 those exceptions cannot be viewed in isolation or parsed too finely;
23 the exceptions must be looked at holistically in the context of the
24 entire regulatory scheme. Id. at 685-86. Second, a Central Hudson
25 challenge is not focused on the particular plaintiff; instead, the
26 Court must look at the "whether the City's ban advances its interests
27 in its general application, not specifically with respect to" a
28 particular speaker. Metro Lights, 551 F.3d at 904. Third, the court

1 must defer to the reasonable legislative judgments of the City on how
2 best to advance its own interests in aesthetics and traffic safety.
3 Id. at 910. To combat the proliferation of supergraphics that have
4 blanketed the City, the City may take a graduated response, even going
5 so far as granting exceptions for thousands of signs over which it can
6 exercise control. Id. at 910. That response unquestionably includes
7 exercising its classically legislative function of creating exceptions
8 to the sign bans for SUDs and development agreements, so long as those
9 judgments are reasonable in light of the City's interests. World Wide
10 Rush, 606 F.3d at 687-88.

11 4. Plaintiff's Equal Protection Claims

12 Recognizing the barriers now erected for its First Amendment
13 claims, Plaintiff argues that it still can pursue an as-applied equal
14 protection claim, albeit resting on Central Hudson. Because Plaintiff
15 is not a member of a suspect class, its equal protection claim is
16 subject to rational basis review unless its fundamental right of free
17 speech is implicated. See Rubin v. City of Santa Monica, 308 F.3d
18 1008, 1019 (9th Cir. 2002). Plaintiff does not contend that the
19 City's regulations fail rational basis review, so the dispositive
20 issue is whether Plaintiff has demonstrated a violation of its speech
21 rights.

22 Plaintiff is correct that World Wide Rush did not address an as-
23 applied Central Hudson challenge to the City's offsite and
24 supergraphic sign bans. See 606 F.3d at 687-88. It now attempts to
25 mount that as-applied challenge on three grounds: (1) no tolerable
26 distinction exists between approved supergraphic signs and Plaintiff's
27 prohibited supergraphic signs; (2) no tolerable distinction exists
28 between approved offsite signs and Plaintiff's prohibited offsite

1 signs; and (3) no tolerable distinction exists between permitted
2 onsite signs and Plaintiff's prohibited offsite signs. These claims
3 lack merit under World Wide Rush and Metro Lights.

4 a. Ban on Supergraphic Signs

5 Plaintiff argues that the City impermissibly distinguishes
6 between its supergraphic signs (which are prohibited) and identical
7 supergraphic signs elsewhere in the City (which may be permitted).
8 Plaintiff admits, however, that the permitted supergraphic signs are
9 located within City-created "Signage Supplemental Use Districts or
10 other special property development projects," and its own signs are
11 not. Because all the supergraphic signs to which Plaintiff points to
12 substantiate this claim are located within SUDs or approved through
13 special property development projects, Plaintiff's claim fails.

14 In World Wide Rush, the Ninth Circuit rejected an unfettered
15 discretion challenge to the exceptions in the sign ordinance that
16 allowed the City to create SUDs, to enact special plans, and enter
17 into development agreements because those exceptions derived from the
18 City's "regular and well-recognized legislative power to regulate land
19 use." 606 F.3d at 688. In turn, Metro Lights explained that if an
20 exception itself is permissible, "[i]t would be strange, then, if the
21 prohibition suddenly violated the Constitution because the
22 municipality made use of such an exception." 551 F.3d at 909 n.12.
23 The court wondered: "How can it be constitutional to make an exception
24 to a law, but unconstitutional for the exception to operate in
25 practice?" Id. If the City can validly enact SUDs to permit signs,
26 then certainly it may constitutionally permit sign owners to erect
27 signs in those districts without running afoul of Central Hudson. And
28 Plaintiff's conclusory argument that the City arbitrarily draws the

1 lines to create SUDs cannot save this claim, as the City's line-
2 drawing is assuredly a "classically legislative function" within the
3 meaning of both Metro Lights and World Wide Rush. Moreover, the
4 creation of SUDs is indistinguishable from the entering of a contract
5 over advertising at transit stops, as in Metro Lights, as both involve
6 the City's discretion to take a measured legislative response to sign
7 proliferation. Therefore, Plaintiff has not raised even serious
8 questions that its speech rights were violated if the City allows
9 supergraphics in SUDs, while prohibiting Plaintiff's signs located
10 outside of SUDs.

11 b. Ban on Offsite Signs

12 In contrast to its challenge to the supergraphic sign ban,
13 Plaintiff points to offsite signs not within any SUDs that have
14 allegedly been permitted by the City, even though Plaintiff claims
15 they should have been prohibited just as their own offsite signs were.
16 Plaintiff submits photographs of three offsite supergraphic signs it
17 claims should not be permitted under the sign ban: signs on the
18 Westwood Medical Plaza Building (Anderson Decl., Exs. 25-29); signs
19 atop the Wilshire La Brea Building (Anderson Decl., Ex. 24); and signs
20 on the outer walls of the Beverly Center (Anderson Decl., Ex. 31).
21 Plaintiff buttresses this showing by submitting photographs of seven
22 "mural" signs, which Plaintiff claims are actually signs that pose
23 precisely the same risks as supergraphic signs, but were permitted
24 anyway. (Anderson Decl., Exs. 37-44, Anderson Supp. Decl., Exs.
25 6-16.)

26 The City researched these signs and provided evidence that all of
27 them had some sort of permits, most of which predated the current
28 supergraphic sign ban enacted in 2002. (Zamparini Decl. ¶¶ 3-4, Exs.

1 1-10.) Plaintiff quibbles with this evidence, claiming that, among
2 other points, the current signs are not the types of signs that were
3 originally permitted and that some of the signs were permitted under
4 old regulations that would have prohibited the signs at the time.²

5 This claim fails for multiple reasons. First, as an evidentiary
6 matter, the City has demonstrated that Plaintiff's signs are different
7 from the signs to which Plaintiff points, as those signs were
8 permitted and most of them predated the offsite sign ban, while
9 Plaintiff's were not permitted and did not predate the ban. The City
10 is certainly entitled to treat signs permitted before the offsite and
11 supergraphic sign bans differently than other signs both because
12 preserving legally nonconforming billboards still "furthers the
13 [City's] significant interest in reducing blight and increasing
14 traffic safety,' even if all billboards are not eliminated," and
15 because the City may have to pay the owners to take legal
16 nonconforming billboards down. See Maldonado v. Morales, 556 F.3d
17 1037, 1048 (9th Cir. 2009) (rejecting equal protection claim of
18 billboard owner on this ground).

19 Second, to implicate the First Amendment in an underinclusivity
20 claim, Plaintiff must demonstrate that, when "evaluated in the
21 context of the entire regulatory scheme," the ban on signs is "so
22 pierced by exceptions and inconsistencies," as to be
23 unconstitutionally underinclusive. World Wide Rush, 606 F.3d at 686.
24 Plaintiff's showing comes nowhere close to meeting this standard.
25 Even if Plaintiff's evidence could create an inference of

26 _____
27 ²Plaintiff claims it can provide other examples of signs that
28 should be prohibited but are allowed, although the Court presumes that
Plaintiff has put its best evidence forward, after being given
multiple opportunities to do so.

1 discrimination at the ten locations cited, Plaintiff has pointed to
2 only ten locations in a City of thousands of billboards. The City
3 could have validly chosen to permit these signs because they improved
4 urban blight in the area (as with Hotel Figueroa) or were consistent
5 with the commercial character of the location (as with the Beverly
6 Center), which simply represents the City's judgment that its
7 interests in allowing (but controlling) the posting of signs in these
8 places outweighs the City's interests in traffic safety and
9 aesthetics. If neither allowing thousands of signs at transit stops,
10 as in Metro Lights, nor channeling signs from one part of the City to
11 another to reduce signage, as in World Wide Rush, undermines the
12 City's interest in reducing sign proliferation, then the ten signs to
13 which Plaintiff points likewise do not implicate Central Hudson.

14 To paraphrase World Wide Rush, Plaintiff has not demonstrated
15 that this handful of exceptions "break[s] the link between the
16 [offsite] Sign Ban and the City's objectives in traffic safety and
17 aesthetics." Id. at 687. Plaintiff has failed to raise serious
18 questions on this claim.

19 c. Onsite/Offsite Distinction

20 Plaintiff further argues that the City's distinction between
21 Plaintiff's prohibited offsite signs and permitted onsite signs
22 violates Plaintiff's rights. The distinction between offsite and
23 onsite signs has been repeatedly upheld as content-neutral and valid.
24 See Metromedia, 453 U.S. at 511; Clear Channel Outdoor, Inc. v. City
25 of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003) ("The Supreme Court,
26 the Ninth Circuit, and many other courts have held that the on-
27 site/off-site distinction is not an impermissible content-based
28 regulation."). Plaintiff relies on Foti v. Menlo Park, 146 F.3d 629,

1 636 (9th Cir. 1998), and Ballen v. City of Redmond, 466 F.3d 736, 744
2 (9th Cir. 2006), to suggest that the onsite/offsite distinction in the
3 area of supergraphic and offsite signs must be considered content-
4 based. However, Foti predated Clear Channel and Ballen, both of which
5 reaffirmed the Supreme Court's decision in Metromedia that the
6 distinction is not, in fact, content-based. To the extent Plaintiff
7 has relied on comments in Ballen that Metromedia's offsite/onsite
8 distinction was unique to the law of "fixed" billboards, the court in
9 Metro Lights had no trouble applying Metromedia to the City's offsite
10 sign ban and the court in World Wide Rush had no trouble applying
11 Metromedia to the Freeway Facing Sign Ban, and both courts rejected
12 the application of Ballen in this context. Therefore, Plaintiff has
13 not demonstrated serious questions on this claim.

14 d. Lax Safety Enforcement

15 Plaintiff further argues that the City's concern about the safety
16 of supergraphic signs is merely a guise for favoring some speakers
17 over others: "Vanguard has demonstrated that there is simply no
18 logical reason to conclude that the same supergraphics appearing
19 outside a City-carved SUD are more dangerous (or more distracting)
20 that similarly situated supergraphic signs that are found within an
21 SUD." (Mot. 25.) Of course, this contention fails for the same
22 reason Plaintiff's challenge to the City's supergraphic sign ban
23 fails, that is, because the City is permitted to create SUDs, the act
24 of allowing billboards in SUDs also passes constitutional muster.

25 Nevertheless, Plaintiff appears to be mounting an attack on the
26 City's enforcement of safety rules directly related to the civil and
27 criminal actions against Plaintiff in state court. To be frank, most
28 of Plaintiff's arguments in support of this point are inscrutable.

1 From what the Court can glean, Plaintiff offers only five photographs
2 of signs it claims are violating the same safety rules it has been
3 cited for, but that have not also been cited. (Anderson Decl., Exs.
4 8-9, 13, 19-20.) Beyond that, Plaintiff appears to be attempting to
5 litigate in this Court the safety issues involved in the state-court
6 proceeding. The Court declines to wade into that dispute and finds
7 that Plaintiff has not demonstrated that the City's safety enforcement
8 record against other sign companies demonstrates a pretext for
9 discrimination against Plaintiff for exercising its speech rights. At
10 most, the City may not be enforcing the safety regulations against all
11 sign companies at all times, but that alone does not create an
12 inference of invidious discrimination. Town of Atherton v. Templeton,
13 198 Cal. App. 2d 146, 155 (Ct. App. 1961) (laxity of enforcement alone
14 is insufficient to demonstrate a violation of equal protection); see
15 also People ex rel. Dept. of Pub. Works v. Golden Rule Church Ass'n,
16 49 Cal. App. 3d 773, 777 (Ct. App. 1975) (rejecting billboard owner's
17 discriminatory enforcement argument because, "[e]ven if it were
18 assumed that other known violators have not been prosecuted, this
19 factor alone would not establish the existence of illegal
20 discrimination."). Plaintiff has not raised serious questions on this
21 claim.

22 5. California Constitutional Claim

23 Plaintiff challenges the City's supergraphic and offsite sign
24 bans on the ground that they violate the California constitutional
25 guarantee of free speech. Cal. Const. art. I, § 2. Plaintiff relies
26 on dicta in a California Supreme Court decision that suggests, unlike
27 the First Amendment, the California Constitution does not afford any
28 lesser protection to commercial speech than non-commercial speech.

1 Plaintiff reasons that the banning of supergraphic offsite signs, a
2 prohibition on commercial speech, would not withstand scrutiny under
3 the California Constitution. Cf. Gerawan Farming, Inc. v. Lyons, 24
4 Cal. 4th 468, 497 (2000). Indeed, as a general matter, “the
5 California liberty of speech clause is broader and more protective
6 than the free speech clause of the First Amendment.” See Los Angeles
7 Alliance for Survival v. City of Los Angeles, 22 Cal. 4th 352, 366
8 (2000). The City argues that a decision after Gerawan, Kasky v. Nike,
9 Inc., 27 Cal. 4th 939, 959 (2002), recognized that the protections for
10 commercial speech under the California Constitution are co-terminus
11 with the protections under the First Amendment. Kasky, 27 Cal. 4th at
12 959. The City also claims that, notwithstanding any distinction
13 between commercial and noncommercial speech or any greater protection
14 afforded by the California Constitution, the California Constitution
15 requires the Court to apply the same standard as the First Amendment
16 for content-neutral time, place, and manner restrictions like the
17 supergraphic and offsite sign bans. See Los Angeles Alliance for
18 Survival, 27 Cal. 4th at 364–65. In the City’s view, then, the
19 supergraphic and offsite sign bans would pass muster under the
20 California Constitution as content-neutral restrictions.

21 The Court will follow Kasky, which defeats Plaintiff’s argument
22 that the protections for commercial speech under the California
23 Constitution are different than the protections under the First
24 Amendment. In that case, the California Supreme Court addressed
25 whether allegedly false statements by a corporation could be subject
26 to false advertising and unfair competition claims without running
27 afoul of either the First Amendment or the California Constitution.
28 Kasky, 27 Cal. 4th at 946. In order to decide the question, the court

1 had to determine whether the speech at issue was commercial or non-
2 commercial because "commercial speech receives a lesser degree of
3 constitutional protection than many other forms of expression, and
4 because governments may entirely prohibit commercial speech that is
5 false or misleading." Id. The court extensively analyzed the
6 distinction between commercial and non-commercial speech under the
7 First Amendment, id. at 951-58, and explained that the scope of the
8 free speech clause in the California Constitution was co-extensive
9 with the First Amendment: "[t]his court has never suggested that the
10 state and federal Constitutions impose different boundaries between
11 the categories of commercial and noncommercial speech," id. at 959
12 (emphasis in original). The court cited the dicta from Gerawan that
13 Plaintiff relies on, namely, that the free speech clause of the
14 California Constitution is at least as broad in scope as the First
15 Amendment, but the court nevertheless drew a distinction in Kasky
16 between protection for commercial speech and non-commercial speech in
17 order to determine whether the defendant's false advertising was
18 actionable. Id.

19 The court then extensively analyzed the issue under the First
20 Amendment and concluded that the defendant's allegedly false
21 advertising was commercial speech that could be subject to false
22 advertising and unfair competition claims without violating the First
23 Amendment. Id. at 960-69. Importantly, the court also reached the
24 same conclusion under the California Constitution in a brief passage,
25 explaining that, "[i]n the few cases in which this court has addressed
26 the distinction between commercial and non-commercial speech, we have
27 not articulated a separate test for determining what constitutes
28 commercial speech under the state Constitution, but instead we have

1 used the tests fashioned by the United States Supreme Court." Id. at
2 969. Thus, the court's holding under the First Amendment was
3 dispositive of the issue under the California Constitution. Id.

4 In light of Kasky, Plaintiff's argument that enhanced protection
5 exists for commercial speech under the California Constitution is
6 unpersuasive and Plaintiff's California constitutional claim fails for
7 the same reasons his First Amendment claims fail. Plaintiff has not
8 raised serious questions on the merits of this claim to justify
9 issuance of a preliminary injunction.

10 6. "Aesthetics" as Pretext for Discrimination

11 Plaintiff argues that the City's aesthetics rationale is a
12 pretext for discriminating against it because the City has allowed
13 other, similar signs, but has prohibited Plaintiff's signs. This
14 conclusory argument rests on the same exceptions to the sign bans
15 identified above, and, for the reasons already discussed, it also
16 fails.

17 D. Conclusion and Stay³

18 Plaintiff has not raised even serious questions on the merits of
19 any of its claims. Because that defeats its request for a preliminary
20 injunction, the Court need not address any other factor and the motion
21 is DENIED. See Advertise.com, 2010 WL 3001980, at *7; Guzman, 552
22 F.3d at 948. The Court previously dissolved the present injunction in
23 light of this Order. (Docket No. 51.) The portion of the Court's
24 prior Order dissolving the injunction is VACATED.

25 At a status conference on Monday, September 27, 2010, Plaintiff

26 _____
27 ³Although the Court raised the issues of Younger and Pullman
28 abstention, the Court need not address those issues. The City is free
to raise them again at a later time. The Court will not enjoin the
state court proceedings, as Plaintiff requests.

1 requested that the Court refrain from dissolving the present
2 injunction for twenty-one days to provide it the opportunity to move
3 for a stay of the Court's order pending an immediate appeal. The
4 Court granted the request and set the following briefing schedule on a
5 motion to stay:

- 6 • Plaintiff must file its motion **no later than Monday, October**
7 **4, 2010.**
- 8 • The City may oppose no later than **Tuesday, October 12, 2010,**
9 but, to the extent the City can file its opposition by
10 Friday, October 8, 2010, that would greatly expedite the
11 Court's resolution of the issue.
- 12 • Plaintiff may file a reply **no later than Thursday, October**
13 **14, 2010.**

14 A hearing on this matter may be held on **Monday, October 18, 2010**
15 **at 10:00 a.m.,** but the Court will notify the parties if the Court will
16 resolve the issue without holding oral arguments on that date.

17 **MOTION TO AMEND**

18 Federal Rule of Civil Procedure 15(a) provides that a party may
19 amend once "as a matter of course" within twenty-one days after the
20 pleading is served if no responsive pleading is allowed, or twenty-one
21 days after service of either a responsive pleading or a motion under
22 Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P.
23 15(a)(1). "In all other cases, a party may amend its pleading only
24 with the opposing party's written consent or the court's leave. The
25 court should freely give leave when justice so requires." Fed. R.
26 Civ. P. 15(a)(2).

27 The City did not file a Rule 12(b) motion or an answer before
28 this case was stayed and still has not filed a responsive pleading.

1 Therefore, Plaintiff may file its amended complaint without leave of
2 Court. Plaintiff's motion to amend is DENIED AS MOOT.

3 **IT IS SO ORDERED.**

4

5 DATED: 9/27/10

Audrey B. Collins

AUDREY B. COLLINS

UNITED STATES DISTRICT JUDGE

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