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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ALAN KORWIN and TRAINMEAZ, LLC, Plaintiffs, vs. DEBBIE COTTON and CITY OF PHOENIX, Defendants.	)	Case No.: CV2011-009838 *Hon. Mark Brain* **PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

Pursuant to Ariz. R. Civ. P. 56(c), Plaintiffs submit a reply in support of their Motion.

I. Introduction

Defendants' Combined Reply ("Reply") is significant for what it does not contest: this case is not factually or legally similar to *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998) ("COR"), upon which Defendants relied heavily in their Motion (Defs.' Mot. 6-10; 12-13), but mostly abandoned in their Reply. Conceding through omission that *COR* does not control, Defendants try a new strategy of enlisting third parties to explain what Defendants could not, a patent admission that Defendants

cannot account for their own enforcement of their Transit Advertising Standards ("TAS's").

Additionally, Defendants' Response to Plaintiffs' Rule 56 (c)(2) Statement of Facts ("SOF") is replete with unsupported arguments and nonresponsive editorial explanations unsupported by the cited record, to the extent the record is cited at all. It contains statements that fly contradict Defendants' own testimony.[1] As such, PSOF ¶¶ 1, 3, 4, 9, 11, 15, 17-19, 22, 24, 32, 34-35, 38-39, 65-70, and 77-79 should be deemed admitted and Defendants' responses, which contain nonresponsive additional facts, should be stricken. PSOF ¶¶ 16, 20, 22, 25, 27, 29, 31-32, 34-37, 40, 42-45, 48-49, 50-57, 59-60, 62-76, and 80, should be deemed admitted and Defendants' responses, which contain immaterial and/or unsupported argument, should be stricken.

II. Plaintiffs' Ad Complies with the City's TAS's

In March 2011, the City eliminated the "limited to speech that proposes a commercial transaction" language from the 2009 TAS's and replaced it with a less-restrictive standard allowing all advertising (with specific enumerated exceptions[2]), as long as a "proposed commercial transaction" is "adequately displayed" *"on the transit advertising panel*." (PSOF ¶ 15; PSJExhs. B, C (emphasis added.)) There are no prohibitions on religious or political speech, or public service announcements ("PSA's").

[1] Rule 56 does not provide for a Reply to a 56(c)(2) SOF. However, because Defendants nonetheless submitted one; Defendants' Response to Plaintiffs' SOF is replete with additional facts, unsupported argument and contradictory statements; Defendants did not include Plaintiffs' SOF in their response; and due to space limitations in the brief. Plaintiffs recognize the Court may or may not accept this Reply pursuant to its discretion.

[2] *E.g.*, false, misleading or deceptive ads; ads relating to illegal activity; and ads depicting tobacco, violence and seminude persons. (PSJExh. C, § B.2 (a) – (h.)).

Thus, even if Plaintiffs' ad *does* contain noncommercial speech, the 2011 TAS's do not prohibit this as long as the ad adequately displays a proposed commercial transaction. As such, Plaintiffs' ad complies with the City's TAS's and should not have been rejected.

III. The Shifting Sands of Defendants' TAS Enforcement

When Defendants' inconsistencies are brought to light, they switch justifications for accepting and rejecting ads: from requiring ads to adequately display a proposed commercial transaction (Defs.' Reply 3), to requiring only that there is no evidence an ad is *not* a business seeking customers (*id.* at 14), to rejecting ads because they read like PSAs. (PSJExh. E, Defs.' Resp. Int. 9.) Ad-hoc third-party opinions do not excuse Defendants' arbitrary enforcement, as illustrated in permitting ads that evangelize Christianity while rejecting ads that encourage readers to take commercial advantage of Arizona gun laws. Moreover, it is what Defendants knew about an ad *before* it was approved for posting that is material, not what third parties say about the ad *after*. Enlisting third-party declarations to explain approval of ads (*e.g.*, the "Downtown Phoenix," "Free Pregnancy Test" and "persons diagnosed with HIV" ads (*see* Defs. SJExh. 15, McCarthy Decl. 8)), is thus a stark admission that Defendants cannot perform that task. The declarations are akin to using parole evidence, which should not be necessary if ads adequately display a commercial transaction. Certainly if Defendants, enforcing the TAS's for the nation's fifth-largest city and working with transit advertising daily, cannot determine by viewing an ad whether it adequately displays a proposed commercial transaction, then they are seriously undertrained, not of common intelligence

and/or applying unconstitutionally-vague standards. (*See* Defs.' Mot. 11; Defs.' Reply 6, 16.)

Even worse, a new standard has emerged from Defendants which provides: as long as "there is no evidence that there is no commercial transaction [in an ad]," Defendants assume that one exists. (Defs.'Reply 14.) Defendants advance this new standard to justify approving an ad for a "free" service because Chapple could not explain it at her deposition, stating she had to review it with legal.[3] (PSOF ¶ 77; Chapple Dep. 138:20-139:22.) Defendants go so far in attempting to rehabilitate Chapple's testimony that they sent CBS's Colleen McCarthy on an after-the-fact task to determine what the ad was promoting. (Defs.' Reply 13-14; DSJExh. 15.) She explains the ad was "placed by an ObGyn medical doctor" (DSJExh. 15, ¶ 6), who Defendants argue (without support) was "*clearly* looking for potential patients and the free test was just to the attraction to get them to see the doctor." (Defs.' Reply 14 (emphasis added.)) This cannot excuse Defendants' inability to apply the rules.[4]

Defendants' use of Deputy City Manager David Krietor's declaration, never before disclosed, raises more problems. It implies that all Plaintiffs needed to get their ad posted was for someone in a City power position to serve on the TrainMeAZ board of directors, as Krietor served on the board of the Downtown Phoenix Partnership ("DPP") advertisers. (*See* Defs.' SJExh. 16.) The Krietor declaration also evinces disparate

[3] Cotton and Chapple also were shown other ads and were likewise unable to opine on whether they were TAS-complaint. (PSOF ¶¶ 77, 51-57, 65, 70.)
[4] Chapple gave the same responses when asked about the HIV awareness ad. (PSOF ¶ 79, PSJEx. K, Chapple Dep. 142:13-143:9.)

treatment of Plaintiffs, who were not afforded this same opportunity to explain their business. (*See* PSOF ¶ 77; Defs.' Resp. ¶ 77; Defs.' SJExh. 16 ¶ 2). According to Defendants' own explanation in their Response to PSOF ¶ 3, Plaintiffs' website is just like the DDP's in that it has "some features allowing one to learn about third persons or entities" and it "attract[s] potential customers" to buy services and products on the website. (*See also* DSJExh. 16, Krietor Declaration ¶ 6.) Nonetheless, Defendants treated Plaintiffs differently from the similarly-situated DDP.

In addition to using third parties to explain what they cannot, Defendants also rewrite record testimony. A flagrant example of this is Defendants' revising Cotton's testimony on scrutiny of "controversial" ads (*see* Defs.' Resp. PSOF ¶¶ 63-64), by chalking up her testimony to a "simple misstatement." (Defs.' Reply 8.) The following is the relevant excerpt from Cotton's deposition:

> Q. (Ms. Cohen) Did you tell Mr. Korwin that you give extra care in reviewing ads that are controversial?
> A. (Ms. Cotton) I don't recall my exact conversation with Mr. Korwin. . . .
> Q. Did you ever tell Mr. Korwin that controversial ads get extra scrutiny?
> A. I do not recall.
> Q. Would you deny that you told that to Mr. Korwin?
> A. No.

(PSOF ¶¶ 62-63.) Korwin however submitted sworn testimony that Cotton told him controversial ads get extra scrutiny. (PSOF ¶62, Korwin Decl.¶8, PSJExh.R; PSOF ¶63.)

In another instance, Cotton submitted an errata sheet to her deposition that Defendants are now claiming "clarify[ies] her deposition testimony regarding the review process [or lack thereof] for ads." (Defs.' Resp. Plfs.' SOF ¶ 31.)

> Q: (Ms. Cohen) [A]n advertiser brings an ad to CBS Outdoor, [which] reviews it

and determines . . . it is compliant . . . can approve it for posting, is that right?
A: (Ms. Cotton) Yes.
Q: Need they do anything else after that point other than post the ad?
A: Send it to us.
Q. [W]hen do they send it … prior to posting or after . . . ?
A: It does not matter. We have gotten them both, both ways.
Q. So they can post it and send it you, right?
A: Yes.
Q: They can send it to you and then wait for your approval and then post it?
A: It may not require our approval . . . they may send it before they post it or after.

(PSOF ¶ 31 (Cotton Dep. Tr. 60:8-61:4.)) The errata sheet (DSJExh. 13), which claims that "the agreement . . . requires that ads be submitted to the City before posting," does not clarify anything nor does it address Defendants' *actual practices,* as does Cotton.

IV. Defendants' Arbitrary Enforcement of the TAS's

Under Defendants' own theory, they are either not persons of common intelligence because they cannot even determine whether *posted* ads comply, and/or the standards are too vague to understand. (Plfs.' Mot. 12.) While Defendants claim they would have accepted Plaintiffs' ad if it made clear that the website offered a place to go to get firearms training (Defs.' Reply 8), the ad *did* contain that information. (*See, e.g.*, PSJExh. G, PSOF ¶ 49 ("Use theTrainMeAZ.com website to find training opportunities, shooting ranges and classes.")) The City-approved revised version of the ad removed that language. (PSOF ¶ 48, Chapple Dep. 266:16-267:12, PSJExh. G, H.)[5]

Defendants' constitutional infirmity results both from an inability to apply the standards and arbitrarily picking and choosing the subject matter and amount of noncommercial speech they permit. Plaintiffs do not argue that Defendants are "judging

[5] Chapple conceded this, after being asked five times whether the City's version directs readers to the website to find firearms training. (Chapple Dep. 266:16-277:1.)

whether an advertisement 'adequately displays' a proposal for a commercial transaction" based on "individual words." (Defs.' Reply 14.) Instead, the evidence shows that Defendants allow eye-catching enhancements or otherwise noncommercial speech, such as the "JESUS HEALS" and "JESUS at WORK" ads, while rejecting ads for containing allegedly noncommercial speech. Defendants' arbitrary enforcement is epitomized by their explanation as to why those ads are compliant but Plaintiffs' is not:

> These advertisements [JESUS HEALS and JESUS SAVES] unquestionably present an adequate display of a commercial proposal to listen to the Christian radio station where one will hear discussion of "Life. Perspective. Answers." Just as proclaimed in the advertisement. The reference to Jesus and the cross pictured tell a viewer that the radio station is a Christian station. Unlike the Plaintiffs' advertisement, there is no discussion in these advertisements of the need for and the virtue of religion in general or the First Amendment.

(Defs.' Reply 12.)

But if this same reasoning were applied to Plaintiffs' ad, it would be compliant as well:

> [Plaintiffs' ad] unquestionably present[s] an adequate display of a commercial proposal to [go to the TrainMeAZ.com website] where one will [see] a discussion of [resources for firearms training in Arizona] just as proclaimed in the advertisement. The reference to [the Second Amendment and constitutional carry] tell a viewer that the [advertiser] is a [gun training and education website].

Defendants' argument that "JESUS HEALS," "JESUS at WORK," the phrase "Life. Perspective. Answers," and a cross composing over half the ad space do not extol the virtues of Christianity defies reality. Likewise, Defendants do not meaningfully distinguish the Fascinations ads from Plaintiffs' ad. (*See e.g.*, Defs.' Reply 12-14.)

While Defendants claim they may prohibit speech that "blur[s] the distinction between types of speech by blending an 'ideological communication' . . . with an offer to purchase" (Defs.' Reply 15), Defendants permit such "blending" for some advertisers

(*e.g.*, AM 1360 and the JESUS HEALS and JESUS at WORK ads), but not for Plaintiffs. Defendants attempt to distinguish *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001), by arguing that case was "markedly different" because the City of Pasco did not "pre-screen[] works put into its space," while here, "the City [of Phoenix] pre-screened all advertisements since 2010 and all under the 2011 standards and the current 2011 contract." (Defs.' Reply 11.) But the City does not pre-screen all ads because CBS has the power to reject ads without showing them to the City. (PSOF ¶ 35; DSOF ¶ 15.) Defendants also argue that the policy in *Hopper* was "not to allow 'controversial' art" but that controversial art was allowed anyway, whereas in this case, "the written standards and contract with CBS require in each advertisement a proposal of a commercial transaction which is adequately displayed." (Defs.' Reply 11.) Again, Defendants' argument only works if the City actually prescreened all ads (it is does not), and did not approve ads with noncommercial speech (which it does.) (PSOF ¶¶ 66-73; 77-79.)

Defendants also claim *Lewis v. Wilson* is unhelpful in analyzing Plaintiffs' claims. (Defs.' Reply 9 (citing 253 F.3d 1077 (8th Cir. 2011.)) The principles are the same, but Defendants' actions here are in fact worse. Although Defendants attempt to distinguish *Lewis* based on the government's proprietary role (Defs.' Reply 10), the court did not reach the question of what level of deference should be afforded because the law was unconstitutional in *any forum*. *Lewis*, 253 F.3d at 1079. *Lewis* holds that arbitrary enforcement can evince a law's vagueness problems and give the appearance of viewpoint discrimination. *See id.* at 1080 ("[S]witch[ing] justifications. . . illustrates the constitutional difficulty with the statute," and "certainly could reasonably appear to have

been based on the viewpoint of the speaker"). Here, Defendants' morphing justifications for rejecting ads extend far beyond Plaintiffs' own ad, and at times are simply nonexistent. (*See* Pls.' Mot 7-14.) Thus, Defendants' "actions have themselves supplied proof that the phrase is unconstitutional[]." *Lewis*, 253 F.3d at 1080.

V. Defendants' Arbitrary Enforcement Evinces the TAS's Vagueness

As a threshold matter, Defendants incorrectly claim that Plaintiffs did not raise a vagueness claim based on the "adequately displayed" language until Summary Judgment. (Defs.' Reply 3.) Defendants fail to acknowledge the Amended Complaint's express language, ¶¶ 49-54, which states a claim based on § (B)(1) of the 2011 TSA's.[6] Notwithstanding, the Amended Complaint is sufficient under Ariz. R. Civ. P. 8(a), which requires a short and plain statement of the claim. *See Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 189 P.3d 344 (2008).

While Defendants correctly note that all other things equal, courts will tolerate a greater degree of vagueness in laws that do not involve criminal penalties (Defs.' Mot. 3), they neglect to mention "the *most important factor*" in a vagueness analysis, which is "whether [a law] threatens to inhibit the exercise of constitutionally protected rights, in which case a more stringent vagueness test applies." *Craft v. Nat'l Park Serv.*, 34 F.3d 918, 922 (9th Cir. 1994) (emphasis added). Of course, Plaintiffs' constitutional rights to free speech, due process, and equal protection are directly implicated in this case.

Defendants' search for the words "display" and adequate" (as used separately) in

[6] Further, Plaintiffs did not amend their complaint "because the new standards do not define what it means to propose a commercial transaction" (Defs.' Reply 3), but to incorporate the new standards.

Arizona statutes (*see* Defs.' Mot 4-6), but the results provide no guidance as to whether the TAS's are vague. *See United States v. Dacus*, 634 F.2d 441, 444 (9th Cir. 1980) ("vague[ness] must be assessed in the context"); *State v. Baldwin*, 184 Ariz. 267, 270, 908 P.2d 483, 486 (App. 1995). Moreover, the very fact that the legislature chose to use a word does not mean that it is constitutional. Indeed, while Defendants reference cases where the words "display" and "adequate" have, separately and in other contexts, survived vagueness challenges (*see* Defs.' Mot 4-6), Defendants fail to cite (nor could Plaintiffs' locate) cases in any jurisdiction addressing whether the term "adequately displayed" is vague in any context. *See United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (phrase was vague because courts never narrowed its scope in context).

VI. Conclusion

Defendants' vague standards and arbitrary enforcement have opened the transit advertising forum to designated public forum status.[7] (Plfs.' Mot. 14.) Defendants exhibit a pattern of approving ads containing noncommercial speech and are and have been arbitrarily applying the TAS's. Plaintiffs respectfully request that their Motion be granted and that Defendants' Motion be denied. Plaintiffs also request that the Court enter an order for injunctive relief, as set forth in the proposed order (PSJExh. S).

DATED: JUNE 19, 2012

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[7]Defendants incorrectly claim that Plaintiffs' "abandoned" this claim. (Defs.' Reply 2.)

CERTIFICATE OF SERVICE

I, Diane Cohen, an attorney, hereby certify that on June 19, 2012, I caused to be sent via regular United States mail and via email transmission, Plaintiffs' Reply in Further Support of their Motion for Summary Judgment, Plaintiffs' Reply to Defendants' Response to Plaintiffs' Rule 56(c)(2) Statement of Facts, and Plaintiffs' Responses to Defendants' Additional Facts, to:

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