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

ALAN KORWIN and TRAINMEAZ, LLC,	)	
	)	
Plaintiffs,	)	Case No.: CV2011-009838
	)	
vs.	)	
	)	
DEBBIE COTTON and CITY OF	)	
PHOENIX,	)	
	)	<i>Hon. Mark Brain</i>
Defendants.	)	
	)	

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**PLAINTIFFS' 56.1 STATEMENT OF FACTS  
IN SUPPORT OF SUMMARY JUDGMENT**

Plaintiffs Alan Korwin and TRAINMEAZ, LLC, pursuant to Rule 56(c)(2) of the Arizona Rules of Civil Procedure, Plaintiffs submit the following undisputed statement of material facts in support of their Motion for Summary Judgment.

## **I. THE PARTIES**

1. Plaintiff TrainMeAZ, LLC (“TrainMeAZ”), is a for-profit limited liability corporation located in Scottsdale, Arizona, organized under the laws of Arizona. (Articles of Organization, attached as Pls.’ Summ. J. (“PSJ”) Exh. A.)<sup>1</sup> TrainMeAZ is supported in part by contributing sponsors, who are commercial entities that pay money to the organization. (Korwin Decl. ¶ 4.)
2. Plaintiff Alan Korwin (“Korwin”) is the manager of Plaintiff TrainMeAZ. (PSJExh. A, ¶ 5.)
3. TrainMeAZ operates a website to sell gun safety and marksmanship training, as well as advertise shooting ranges throughout the state of Arizona. (Korwin Dep. 16:1-22; 17:1-24; 18:1-21.)
4. To attract customers, TrainMeAZ engages in a variety of advertising campaigns, such as purchasing advertising space at bus shelters and on billboards. (Korwin Dep. 12:18-13:3.)
5. Defendant City of Phoenix (“City”) is a municipal corporation organized under the laws of the State of Arizona. (DSOF ¶ 3.)
6. Defendant City provides advertising space on transit shelters and benches, which it makes

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<sup>1</sup> Attached for the Court’s convenience are Plaintiffs’ summary judgment exhibits, which are a compendium of exhibits taken from the record. They are cross-referenced in footnotes for

available to the public by leasing the shelter and bench spaces to CBS Outdoor (“CBS”). CBS then leases these spaces to advertisers. (Cotton Dep. 41:2-5, 11-17; Chapple Decl. ¶¶ 19-20.)

7. Defendant Debbie Cotton is the former director of the City Department of Public Transit. During her tenure, Cotton was supposed to be the final decision maker on whether advertisements for City transit shelters and benches complied with the City’s Transit Advertising Standards (“TAS’s”). (Cotton Dep. 59:15-17; 62:23-63:25.)

8. The Public Transit Director is responsible for, among other things, planning, directing and coordinating activities related to administration, operation and maintenance for the City’s transit system. Phoenix City Code, Article XX § 2-501.

9. Marie Chapple is the Public Information Officer for the Department of Public Transit. (Chapple Dep. 8:15-19.) Chapple was not supposed to make any decisions regarding proposed transit advertising without Ms. Cotton’s approval. (Cotton Dep. 63:14-25.)

10. Since the summer of 2010, Chapple has been responsible for ensuring that the contract between the City and CBS is followed, including the contract provisions governing the transit advertising program and enforcement of the City’s “TAS’s”. (Chapple Dep. 9:4-8; 9:21-10:4; 213:2-216:4.)

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foundational purposes to the deposition and declaration exhibits from which they are taken.

11. Chapple does not know whether the contract that is incorporated into her Declaration was in effect in 2010 and 2011. (Chapple Dep. 230:1-231:23; Chapple Decl. ¶ 19, Decl. Exh. 4, F.)

12. Colleen McCarthy has been employed by CBS since May 2010, first as the Real Estate Administrative Assistant and then, beginning in July 2011, as the Real Estate/Transit Coordinator (“Transit Coordinator”). (McCarthy Dep. 5:3-6:2.) The difference between the Transit Coordinator and administrative assistant positions is mostly a title change. (McCarthy Dep. 6:3-8.) McCarthy’s job duties include reviewing proposed transit advertisements to determine whether they are compliant with the City’s TAS’s. (McCarthy Dep. 18:25-19:15.)

## **II. BACKGROUND**

### **A. City’s Transit Advertising Standards**

13. Effective December 8, 2009, the City implemented “TAS’s” that governed the sale of advertising on City buses, shelters and benches at City transit stops. Section B of those TAS’s stated that the subject matter of the transit bus, shelter and bench advertising “shall be limited to speech which proposes a commercial transaction.” (2009 TAS’s, PSJExh. B<sup>2</sup>.)

14. The City’s 2009 TAS’s were substantially similar to the City’s standards that were at issue in the *Children of the Rosary v. City of Phoenix* case. *See* 154 F.3d 972 (9th Cir. 1998).

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<sup>2</sup> PSJExh. B is also in the record as Chapple and Cotton Dep. Exhs. 4.

(Brief of Plaintiffs-Appellants at Addendum B, *Children of the Rosary v. City of Phoenix*, No. 97-16821 (9th Cir. Oct. 28, 1997), PSJExh. D).

15. Effective March 7, 2011, the City implemented revised TAS's that state in relevant part: "It is a guideline of the City of Phoenix Public Transit Department that no advertising will be accepted for use on any city bus or transit furniture that does not comply with the following standards: 1. A commercial transaction must be proposed and must be adequately displayed on the transit advertising panel." (2011 TAS's, Section B(1), PSJExh. C.<sup>3</sup>)

16. In 2011, the City changed the TAS's to "guidelines," eliminated the "limited to speech which proposes a commercial transaction" language, and replaced the "limited to" language with the requirement that the ad need only "adequately display[]" a proposed commercial transaction. (PSJExh. C.<sup>4</sup>) The City did this to allow advertisers to "craft their message" because the City "just want[ed] to ensure that [ads are] commercial in nature." (Cotton Dep. 72:6-74:21.)

17. Whether an advertisement contains a commercial transaction must be apparent on the face of an ad. (Chapple Dep. 149:21-24; Cotton Dep. 68:8-69:13.) Defendants consider the font, location and placement of the speech in determining whether a commercial transaction is adequately displayed. (Cotton Dep. 80:14-81:1.)

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<sup>3</sup> PSJExh. C is also in the record as Chapple and Cotton Dep. Exhs. 5.

18. The content of advertisements posted at City transit stops does not have to be limited to speech that proposes a commercial transaction. (Chapple Dep. 287:5-18.)

19. Noncommercial speech can be added to advertisements posted at City transit stops that supports the commercial transaction and/or indicates to readers what product is being sold. (Chapple Dep. 287:14-24; 288:7-12.)

20. Neither the 2009 nor 2011 TSA's expressly prohibit "public service announcements" from being contained in a transit advertisement, nor do they define what a "public service announcement" is. (Cotton Dep. 79:22-80:8; PSJExhs. B, C.)

21. Pursuant to the City's 2009 TSA's, speech governed by the standards could be graphics and/or pictures. (Cotton Dep. 77:1-15.)

22. "Adequately" means that which can be seen by a reasonable person. (Cotton Dep. 80:10-13.)

23. Whether a commercial transaction is adequately displayed is different every time, every ad is different. (Cotton Dep. 81:17-22.)

24. If the name of the company or its contact information is contained on an ad, then there is an adequate display of a commercial transaction. (McCarthy Dep. 86:1-17.)

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<sup>4</sup> PSJExh. C is also in the record as Chapple and Cotton Dep. Exhs. 5.

25. A commercial transaction could be in a phone number. (McCarthy Dep. 104:11-16.)
26. Defendants determine whether a commercial transaction is adequately displayed through a “collaborative effort.” (Chapple Dep. 89:21-90:7.)
27. Chapple looks at whether the speech “enhances the commercial transaction” in order to determine if the ad is compliant with the City’s standards. However, speech that does not enhance the commercial transaction is compliant with the City’s TAS’s depends on the ad. (Chapple Dep. 95:3-23.)
28. Advertising display spaces are “only to be used for commercial transaction(s), not to exchange ideas or share other information.” (Cotton Dep. 95:6-10.)
29. Language in advertisements that include an “exchange of ideas” is allowable on a case by case basis. (Cotton Dep. 97:20-25.)

**B. The City’s Advertising Review Process**

30. The City document titled “Advertising Review Process” was created to memorialize in a clear format a process that has been in place and is the way the Department of Public Transit “does business.” (Cotton Dep. 47:13-48:21; 52:24-54:19; PSJ Exh. I.<sup>5</sup>)

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<sup>5</sup> PSJExh. I is also in the record as Cotton Dep. Exh. 3.

31. Pursuant to the “Advertising Review Process,” CBS has the authority to review proposed advertisements and determine whether they are compliant with the City’s TAS’s. CBS Outdoor can accept an ad and post it without any prior City approval. (Cotton Dep. 59:4-6; 60:8-61:4; PSJExh. I.)

32. No City employee reviews every ad before it is posted. (Cotton Dep. 59:1-3.)

33. If CBS submits an ad to the City for review, CBS may post the ad if they hear nothing back from the City after three days pass. (McCarthy Dep. 94:11-22.)

34. The contract does not require CBS to get approval from the City prior to posting an ad at City transit stops. (Chapple Dep. 248:23-249:2.)

35. CBS has the authority to and does reject proposed advertisements without informing the City. (Chapple Dep. 50:24- 51:3; 249:4-250:5; Cotton Dep. 41:21-24; 42:2-6; McCarthy Dep. 23:17-21)

36. The City delegated to CBS the role of helping advertisers understand and make their advertisements compliant with the City’s transit advertising standards. (Cotton Dep. 88:11-23; 98:1-20.)



37. At the time CBS accepted Plaintiffs' ad and posted it, the City did not have an adequate review process in place to ensure CBS Outdoor and the City properly enforced the TAS's. (DSOF ¶ 51.)

### **C. Plaintiffs' Advertisement**

38. On October 5, 2010, CBS and Plaintiff Korwin entered into an Advertiser Agreement to post 6' x 4' promotional advertisements at 50 City of Phoenix transit shelter locations in two four-week segments. Plaintiffs' advertisement ("Plaintiffs' ad" or the "original ad"), was posted over a two-day period from October 11-12, 2010. (CBS Outdoor Advertiser Agreement, PSJExh. F<sup>6</sup>; Chapple Decl. ¶ 27.)

39. Plaintiffs' ad contains a red heart with the words "Guns Save Lives," smaller text on both sides of the heart, and larger language at the bottom that says, " ARIZONA SAYS: EDUCATE YOUR KIDS TrainMeAZ.com." (PSJExh. G.<sup>7</sup>)

40. Plaintiffs' ad lists several gun ranges and places that offer firearms training. The ad also directs readers to "Go to TrainMeAZ" to learn how they can participate and improve their firearm skills, get gun-safety training, participate in fun shoots and special training days at the range, and attend gun shows and classes. (PSJExh. G.) The ad promotes the state's largest

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<sup>6</sup> PSJExh. F is also in the records as Cotton Dep. Exh. 8.

<sup>7</sup> PSJ Exh. G is also in the record as Chapple Dep. Exh. 6 and Cotton Dep. Exh. 8.

promoter of gun shows (Korwin Dep. 32:8-12), among others, and is aimed at selling marksmanship training and gun safety classes (Korwin Dep. 52:1-3), and lists sponsors who provide firearms training. (PSJExh. G; Korwin Dep. 25:15-23; 27:1-9.) Some of the language in small print on either side of the heart in the original TrainMeAZ ad, *e.g.*, “In Arizona marksmanship matters,” and “The Grand Canyon State has constitutional carry,” was used to enhance the proposed commercial transaction of promoting the sale of firearms training, education, and gun range services. (Korwin Decl. ¶ 6.)

41. After the City received a complaint about Plaintiffs’ ad from a friend of Chapple’s City of Phoenix colleague Matthew Heil, Chapple reviewed Plaintiffs’ ad for the first time and determined that it was not compliant with the City’s TAS’s. Chapple advised CBS that there was a problem with the ad and it was removed from all transit locations where it was posted. (Chapple Decl. ¶ 29; Chapple Dep. 70:14-22; 76: 23-77:9.)

42. Chapple believed that Plaintiffs’ ad was not compliant because there was no evidence of a product or service for commercial exchange, there was other information or other elements in the ad that made it non-commercial and because of the indeterminate nature of what was the product or service. (Chapple Dep. 80:20-23; 91:9-14.)

43. Cotton said that the words “Guns Save Lives” do not constitute a commercial transaction (Cotton Dep. 85:22-25), nor do any of the words on the face of Plaintiffs’ ad. (Cotton Dep. 86:1-22; PSJExh. G.)

44. Cotton made the final decision that Plaintiffs’ TrainMeAZ advertisement was noncompliant with the City’s TAS’s. (Cotton Dep. 59:15-17, 63:14-25; Defs.’ Resp. Interrog. No. 8, PSJExh. E.)

45. Cotton told Korwin to work with CBS to modify the TrainMeAZ ad so that a commercial transaction was clearly displayed but she did not suggest any changes Korwin could make to have his advertisement comply with the TAS’s because it is not the City’s role to do so, it is CBS’s role. (Cotton Dep. 87:22-88:23.)

#### **D. Defendants’ Alternative to Plaintiffs’ Advertisement**

46. On October 25, 2010, Defendants approved an alternative version of Plaintiffs’ ad, which the City found complied with the City’s TSA’s. (Chapple Decl. ¶ 35, Decl. Exh. 4, I; PSJExh. H.<sup>8</sup>)

47. The City-approved alternative ad maintained the same red heart containing the words “GUNS SAVE LIVES” as Plaintiffs’ original ad and eliminated the smaller text on either side of

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<sup>8</sup> PSJExh. H is also in the record as Chapple Dep. Exh. 10 and Chapple Decl. Exh. 4, I.

the heart. The City also changed the original text that was under the heart from, “ARIZONA SAYS: EDUCATE YOUR KIDS TrainMeAZ.com,” to “To EDUCATE YOUR KIDS ON HOW,” which Defendants moved above the heart, with the words “go to TrainMeAZ.com,” below the heart. (Chapple Decl. ¶ 36; Chapple Dep. 127:6-24, PSJExh. H.)

48. The City-approved and revised ad does not direct readers to go to the website on the ad in order to get information on where to get firearms training. (Chapple Dep. 266:16-267:12; PSJExh. H.)

49. Plaintiffs’ original ad directs readers to go to TrainMeAZ.com to find training opportunities, shooting ranges and classes. (Chapple Dep. 270:11-19; PSJExh. G.)

50. Plaintiffs did not accept the Defendants’ revised version of their ad because it changed the meaning of the original ad from one that was designed to sell marksmanship training and gun safety classes to one that promoted a philosophy to educate kids that guns save lives, which is not what Plaintiffs are trying to sell. (Korwin Dep. 51:15- 52:5; 53:2-20.)

### **III. Defendants’ Unconstitutional Standards**

#### **A. The City’s TAS’s Are Vague and/or Defendants are not “Reasonable Persons”**

51. Defendant Cotton cannot judge by looking at an ad whether it complies with the City’s

TAS's because she "does not have the expertise" to do so. Instead, she would have to confer with her staff. (Cotton Dep. 107:3-108:5; 113:11-17.)

52. At her deposition, Cotton was shown Plaintiffs' original ad but could not say whether or not it complied with the City's TAS's. (Cotton Dep. 107:1-108:5; PSJExh. G.)

53. Chapple could not look at the City-approved revised ad proposed to Plaintiffs, which she stated in her Declaration "the City was willing to accept," and determine whether it proposes a commercial transaction. (Chapple Decl. ¶ 36; Chapple Dep. 258:13-260:20; PSJExh. H.)

54. Neither Cotton nor Chapple could look at the City-approved revision of Plaintiffs' ad and state whether it complies with the City's TAS's, constitutes a public service announcement or proposes a commercial transaction. (Cotton Dep. 113:1-17, PSJExh. H; Chapple Dep. 126:25-127:5; 129:18-22, PSJExh. H.)

55. While the City was willing to accept a revised version of Plaintiffs' ad that contained language, "TO EDUCATE YOUR KIDS ON HOW GUNS SAVE LIVES go to TrainMeAZ.com," with the same "GUN SAVES LIVES" in the red heart on the face of it (DSOF ¶ 43), Chapple cannot look at the ad and determine whether it complies with the City's TAS's; she would have to review it with legal before rendering an opinion on it. (Chapple Dep. 126:10-127:6; 129:6-130:23; 131:9-25; 133:6-134:24; PSJExh. H.)

56. Chapple does not know whether the words “To educate your kids on how guns save lives go to TrainMeAZ.com,” propose a commercial transaction. (Chapple Dep. 133:13-20.)

57. Chapple does not know whether the City-approved revised version of Plaintiffs’ ad (PSJExh. H), describes the nature of the product or service that is being advertised or whether it rises to the level a public service announcement. (Chapple Dep. 133:21-134:24.)

58. Defendants gave Plaintiff Korwin a copy of the TAS’s but did not provide Plaintiffs any guidelines that defined a public service announcement or “how to write [an ad that] would be acceptable to [Defendants].” (Korwin Dep. 54:18-55:17.)

59. Chapple has not communicated to CBS what the definition of public service announcement is or how PSA reads. (Chapple Dep. 102:1-14.) McCarthy asked Chapple how the City defines what a “public service announcement” is but Chapple did not provide a clear definition of what it means. (McCarthy Dep. 74:3-6.)

60. Chapple has not memorialized the definition of the term “public service announcement,” as that term is used in the TAS review process. (Chapple Dep. 101:3-25.)

61. Korwin asked for a definition of a public service announcement but the City did not provide one to him. (Chapple Dep. 108:21-109:11; Korwin Dep. 43:23-44:17.)

62. Defendants give “controversial” advertisements “more scrutiny.” (Cotton Dep. 111:18-23; 112:6-10.)

63. Cotton told Korwin that the TrainMeAZ advertisement was “controversial” and would get extra attention due to it being controversial. (Cotton Dep. 109:18-110:8; 112:6-10; Korwin Decl. ¶ 8.)

64. Defendants did not provide guidelines as to what would make an advertisement “controversial.” (Korwin Dep. 55:14-17.)

65. Chapple was shown an ad the City produced in discovery that was rejected for failing to comply with the City’s TAS’s but she reviewed it and determined that it did comply with the City’s TAS’s. (Chapple Dep. 163:19-164:7; 168:4-170:18; PSJExh. L.<sup>9</sup>)

## **B. Defendants Are Enforcing the TAS’s in an Arbitrary Manner**

66. Pursuant to the City’s TAS’s, it is acceptable to have language on the face of the ad that does not propose a commercial transaction. (McCarthy Dep. 110:15-111:19; PSJExh. N (Fascinations ads), pp. 2-3.<sup>10</sup>)

67. Defendants approve the posting of ads that contain language on the face of the ad that

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<sup>9</sup> PSJExh. L is also in the record as Chapple Dep. Exhs. 18, 20 (p. Korwin0021).

does not propose a commercial transaction. (McCarthy Dep. 110:1-111:19; PSJExh. N (Fascinations ads), pp. 1-3.<sup>11</sup>)

68. Defendants approved the posting of ads that contain religious speech including the words “JESUS at WORK” and “JESUS HEALS,” in the largest font size on the ads. The “JESUS HEALS” ad contains a graphic of a blue cross that runs across the width of the ad, taking up an estimated half of the approximately 72” by 48” ad’s space. (Chapple Dep. 284:1-11; 286:23-287:7; 289:8-22; PSJExh. J.<sup>12</sup>) The “JESUS at WORK” ad contains a yellow yield shaped traffic sign with the words “JESUS at WORK, which takes up nearly half the ad space as well. (PSJExh. J.)

69. Despite the fact that Chapple took the “JESUS HEALS” ad to the “team” for review before it was approved, when asked at her deposition, she could not determine if the ad would have been compliant with the City’s 2009 TAS’s. (Chapple Dep. 279:24-280:19; PSJExh. J, pp. 1-2.)

70. Chapple could not determine whether an ad that only depicted a blue cross taking up half of the transit advertising ad space would propose a commercial transaction pursuant to the City’s former or current TSA’s. (Chapple Dep. 286:6-21.)

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<sup>10</sup> PSJExh. N is also in the record as McCarthy Dep. Exh. 8.

<sup>11</sup> PSJExh. N is also in the record as McCarthy Dep. Exh. 8.

<sup>12</sup> PSJExh. J is also in the record as Chapple Dep. Exhs. 26, 27.



71. “JESUS HEALS,” “Life,” “Perspective,” and “Answers” are not speech that propose a commercial transaction. (Chapple Dep. 292:25-293:4.)
72. Chapple determined that the words “AM 1360” constituted an adequate display of a commercial transaction on the “JESUS HEALS” ad. (Chapple Dep. 294:24-295:5.) However, Chapple could not state whether an ad that just had the words: “AM 1360” would comply with the City’s TAS’s. (Chapple Dep. 295:16-296:10.)
73. The City has approved ads that say, “AM1360; Get connected – Get Inspired,” “Jesus Heals” and “Jesus at Work,” but rejected ads that say “AM1360; Jesus at Work – Get Inspired” and “AM1360; Jesus Heals – Get Inspired.” (PSJExh. O.)
74. Chapple believes an ad for an organization with members that contribute financially to the organization indicates a commercial transaction. (Chapple Dep. 159:14-18; 160:18-161:4; PSJExh. M (Carpenters Union ad).<sup>13</sup>)
75. Chapple knows that a union is a membership organization with dues-paying members, but she does not know whether TrainMeAZ has sponsors or whether they pay to be a part of TrainMeAZ. (Chapple Dep. 160:21-161:21.)
76. Because Chapple believes the words, “Build Your Future” enhance the Carpenter Union’s

mission of membership, she believes that language proposes a commercial transaction and the Defendants approved the posting of the ad in 2010 at a City transit stop. (Chapple Dep. 159: 11-160:9; PSJExh. M.<sup>14</sup>)

77. In 2009, Defendants approved and posted the ad, “Only DowntownPhoenix.com,” despite the fact that a proposed commercial transaction is not displayed on the face of the ad. (Chapple Dep. 138:20-139:22; PSJExh. K, p. 1.<sup>15</sup>)

78. In 2009, Defendants approved and posted at a City of Phoenix transit bench in an ad that contains the words “Free Pregnancy Test,” with a telephone number and picture of a pregnant belly with two hands on the belly, despite the fact a proposed a commercial transaction is not displayed on the face of the ad. (Chapple Dep. 140:14-142:6; 317: 15-25, PSJExh. K, p. 2<sup>16</sup>)

79. In 2009, Defendants approved and posted an ad that states: “Newly diagnosed with HIV and unsure of what do to do next,” with contact numbers, despite the fact that a proposed commercial transaction is not apparent on its face. Chapple looked at it and said she would need to consult the City’s legal counsel and CBS before being able to make that determination of whether it complied with the City’s TAS’s. (Chapple Dep. 142:7-143:9; PSJExh. K, p. 3.<sup>17</sup>)

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<sup>13</sup> PSJExh. M is also in the record at Chapple Dep. Exh. 16 (p. 3).

<sup>14</sup> PSJExh. M is also in the record at Chapple Dep. Exh. 16 (p. 3).

<sup>15</sup> PSJExh. K is also in the record at Chapple Dep. Exh. 11 (p. 4).

<sup>16</sup> PSJExh. K is also in the record as Chapple Dep. Exh. 11 (p. 5, Bates K1785).

<sup>17</sup> PSJExh. K is also in the record as Chapple Dep. Exh. 11 (p. 6).

80. On March 16, 2011, Chapple contacted CBS Outdoor because she was reviewing an ad and could not determine from the face of the ad whether it was selling a product or providing information. CBS advised her that they contacted the advertiser and the advertiser explained that the ad was intending to promote “business owners and drive them to the website to get them to become member of the [Better Business Bureau].” After receiving CBS’s explanation, Chapple approved the ad. (PSJExh. P (Better Business Bureau ad).)

**DATED: MAY 1, 2012**

**RESPECTFULLY SUBMITTED,**

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