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

ALAN KORWIN and TRAINMEAZ, LLC,	)	
	)	Case No.: CV2011-009838
Plaintiffs,	)	
	)	
vs.	)	<b>PLAINTIFFS' RESPONSE TO</b>
	)	<b>STATEMENT OF FACTS IN</b>
DEBBIE COTTON and CITY OF	)	<b>SUPPORT OF DEFENDANT'S</b>
PHOENIX,	)	<b>MOTION FOR SUMMARY</b>
	)	<b>JUDGMENT</b>
Defendants.	)	

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**PLAINTIFFS' RESPONSE TO STATEMENT OF FACTS:**

1. Plaintiff TrainMeAZ, LLC ("Plaintiff Company") is an Arizona limited liability company. Plaintiff Company is a for profit entity which was formed in 2010. Plaintiff Company was formed to mount a statewide campaign to sell marksmanship training, gun safety classes, ancillary supplies and books. Plaintiff Company was also formed for the purpose of pulling together the firearms industry in Arizona by creating an umbrella organization. (Amended Complaint ¶ 2, 9) (Ex. 1, Korwin depo 10:19-11:17)

**Plaintiffs' Response:**

**Admit.**

2. Plaintiff Alan Korwin ("Korwin") is the manager for Plaintiff Company. (Amended Complaint ¶ 1, 8)

**Plaintiffs' Response:**

**Admit.**

3. The City is a municipal corporation. (Amended Complaint ¶ 4)

**Plaintiffs' Response:**

**Admit.** (*See also* Plaintiffs' SOF ¶ 5.)

4. The City, through its Public Transit Department, operates a proprietary bus system, which includes hundreds of buses, thousands of bus shelters, and hundreds of benches (also known as transit furniture). The bus system generates revenues from riders, and advertising on the buses and at transit furniture. The bus system competes with other forms of public and non-public transportation. (Ex. 4, Chapple declaration ¶ 5) (Ex. 3, Cotton depo 21:11-19)

**Plaintiffs' Response:**

**Admit.**

5. The City has a history since 1996 of limiting advertising on its buses and at its bus shelters to commercial transactions. (Ex. 4, Chapple declaration ¶ 6)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 5 because it relies on self-serving testimony, see *Margaret H. v. Arizona Dept. of Econ. Sec.*, 214 Ariz. 101, 104, 148 P.3d 1174, 1177 (App. 2006) (citing *McDonnell v. Cournia*, 990 F.2d 963, 969 (7th Cir. 1993) (“Nor is a party's conclusory affidavit usually enough to defeat a motion for summary judgment”), and is unsupported by the record. See *Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996) (“[W]e strike the Statement of Facts . . . because it appears that some statements are completely unsupported by the trial court record”). The record shows that the City has not limited advertising on its buses and its bus shelters to commercial transactions, nor has the City produced record evidence of ads approved prior to 2009.**

Notwithstanding, Plaintiffs deny the statement. The record in fact establishes that on December 8, 2009, the City enacted Transit Advertising Standards (“TAS’s”) that provided in relevant part: “(B) The subject matter of transit bus, shelter, and bench advertising shall be limited to speech which proposes a commercial transaction.” (Chapple Dep. Exh. 4; Cotton Dep. Exh. 4.) But then, on March 7, 2011, the City enacted new standards that provided in relevant part: “(B) 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.” (Chapple Dep. Exh. 5; Cotton Dep. Exh. 5.)

The record further shows that the City has not limited advertising on its “buses and at its bus shelters to commercial transactions,” but has approved ads that do not propose a commercial transaction and that contain speech that does not propose a commercial transaction. (McCarthy Dep. 110:1-111:19, McCarthy Dep. Exh. 8 (City approved Fascinations ad containing the words “Love is Sensual” “Love is Binding,” and “Love is Sweet,” although those words on their own do not propose a commercial transaction); Chapple Dep. 283: 11-14, 292:16-296:10, Chapple Dep. Exh. 8 (City approved AM1360 ad containing the words, “Jesus Heals” and “Life, Perspective, and Answers,” although those words on their own do not propose a commercial transaction); Chapple Dep. 159:11-160:9, Chapple Dep. Exh. 16 (p. 3) (City approved Carpenter Union ad containing the words, “Build Your Future” because those words enhance the Union’s mission of membership); Chapple Dep. 138:20-

139:22, Chapple Dep. Exh. 11 (p. 4) (City approved Only DowntownPhoenix.com ad even though Chapple could not determine from the face of the ad whether there was a commercial transaction); Chapple Dep. 140:14-142:6, 317:15-25, Chapple Dep. Exh. 11 (p. 5, Bates K1785) (City approved a “Free Pregnancy Test” ad that only contains those words, a telephone number and a picture of a pregnant belly with two hands on the belly on the face of the ad); Chapple Dep. 142:7-143:9, Chapple Dep. Exh. 11 (p. 6) (City approved an HIV ad that contains the words, “Newly diagnosed with HIV and unsure of what to do next?” with contact numbers, even though Chapple could not determine from the face of the ad whether there was a commercial transaction); Cotton Dep. 85:22-25, Cotton Dep. Exh. 8; Chapple Decl. ¶ 36, Chapple Decl. Exh. 4, I; Chapple Dep. 127-24, Chapple Dep. Exh. 10 (Cotton said that the words “Guns Save Lives” do not constitute a commercial transaction, but the City approved an alternative version of Plaintiffs’ ad, which the City found complied with the City’s TSA’s, that maintained the same red heart containing the words “GUNS SAVE LIVES” as Plaintiffs’ original ad)).

6. The City has adopted a written policy, Transit Advertising Standards, which limits advertising on buses or at transit furniture to those which propose a commercial transaction. (Ex. 4, Chapple declaration ¶ 7) (Ex. 6, Mariscal depo 5:5-9, 6:20-9:17, 12:12-14:4)

**Plaintiffs’ Response:**

Plaintiffs object to and move to strike Chapple’s self-serving affidavit testimony, *see Margaret H. v. Arizona Dept. of Econ. Sec.*, 214 Ariz. 101, 104, 148 P.3d 1174, 1177 (App. 2006), because it is unsupported by the record, *see Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996), which in fact shows that the City has not limited advertising on its

buses and its bus shelters to commercial transactions. (Pls.' Resp. to Defs.' SOF ¶ 5 is incorporated herein in response to SOF ¶ 6.)

Notwithstanding, Plaintiffs admit that the City's 2009 TAS's provide: "(B) The subject matter of transit bus, shelter, and bench advertising shall be limited to speech which proposes a commercial transaction," but deny, based on the record, that in practice the City's enforcement of the 2009 TAS's was so limited. (Pls.' Resp. to Defs.' SOF ¶ 5 is incorporated herein in response to SOF ¶ 6.)

Plaintiffs further deny that the standards described in SOF ¶ 6 are currently in effect. (See Chapple Dep. Exh. 5; Cotton Dep. Exh. 5.)

7. On December 8, 2009, the City promulgated its then version of the Transit Advertising Standards. These standards, in pertinent part, provided:

- B. The subject matter of transit bus, shelter, and bench advertising shall be limited to speech which proposes a commercial transaction. The City's primary purpose for the transit advertising panel is generating revenue.

(Amended Complaint ¶ 15-16) (Ex. 2, Chapple depo 59:6-16 and ex. 4) (Ex. 3, Cotton depo 64:4-65:9 and ex. 4) (Ex. 4, Chapple declaration ¶ 9) (Ex. 6, Mariscal depo 26:23-27:25)

**Plaintiffs' Response:**

Plaintiffs object to and move to strike SOF ¶ 7 in part because the statement that the 2009 TAS's provide, "The City's primary purpose for the transit advertising panel is generating revenue," is not supported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). Plaintiffs admit that Section B of the City's 2009 TAS's provide in part: "(B) The subject matter of transit bus, shelter, and bench advertising shall be limited to speech which proposes a commercial transaction," but deny that Section B of

**the 2009 TAS's contains the language, "The City's primary purpose for the transit advertising panel is generating revenue." (Chapple Dep. Exh. 4; Cotton Dep. Exh. 4.)**

8. On March 7, 2011, the City promulgated new Transit Advertising Standards. These standards provide:

- A. It is the intent of the City that all transit advertising panels on city buses and transit furniture are non-public forums and are to be set aside for commercial advertisements or for transit information as provided by the City. The City's primary purpose for the transit advertising panel is generating revenue.
- B. 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.

The language of B (1) reflects the same intent as the 2009 standards, that an advertisement would be non-compliant and should not be accepted unless it proposes a commercial transaction. (Amended Complaint ¶ 32-33) (Ex. 2, Chapple depo 59:17-60:25, 86:11-88:10 and ex. 5) (Ex. 3, Cotton depo 70:20-75:8 and ex. 5) (Ex. 4, Chapple declaration ¶ 10) (Ex. 6, Mariscal depo 36:7-20)

#### **Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 8 for failing to conform to Ariz. R. Civ. P. 56(c)(2) because it is not concise and because part is immaterial, *see Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008) (citing *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir.1985)) (existence of factual issues that are immaterial to claims will not defeat summary judgment motion), and the statement that that "an advertisement would be non-compliant and should not be accepted unless it proposes a commercial transaction" is unsupported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). The record in fact shows that in applying the TAS's, the City has**

**approved ads that do not propose a commercial transaction and that contain speech that does not propose a commercial transaction. (See also PSOF ¶ 67.) Plaintiffs’ Response to Defendants’ SOF ¶ 5 is incorporated herein in response to ¶ 9.**

**Plaintiffs admit that SOF ¶ 8 accurately quotes in part the 2011 TAS’s.**

**Plaintiffs object to the self-serving affidavit statement that “[t]he language of B(1) reflects the same intent as the 2009 standards, that an advertisement would be non-compliant and should not be accepted unless it proposes a commercial transaction.” That statement is immaterial because the text of the 2011 TAS’ has been changed from the 2009 TAS’s.**

9. In evaluation of whether advertising proposes a commercial transaction under the Transit Advertising Standards, the City looks at the essential elements including copy words, graphics, pictorials, color, and design. The commercial proposal to be acceptable should generally be placed so as to be legible and noticeable. The words and graphics should be understandable by the reasonable reader or viewer to propose a commercial transaction. There are no particular words or graphics that have to be used to satisfy the standards. A commercial transaction is the exchange of goods or services for something of value. (Ex. 2, Chapple depo 61:1-63:17) (Ex. 3, Cotton depo 67:4-70:17, 75:4-76:2, 77:5-79:17) (Ex. 4, Chapple declaration ¶ 11)

**Plaintiffs’ Response:**

**Plaintiffs object to and move to strike SOF ¶ 9 for failing to conform to Ariz. R. Civ. P. 56(c)(2) because it is not concise and because it is contradicted by the record. See *Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). Plaintiffs deny that SOF ¶ 9 accurately reflects the City’s procedures for applying the TAS’s as established by the record. The record in fact establishes that according the Defendants’ own testimony, the City’s enforcement and application of the TAS’s vary from case to case. (See Cotton Dep. 85:22-25, 86:1-22, PSJExh. G, Chapple Decl. ¶ 36, Chapple Dep. 127:6-24, PSJExh. H (Cotton said that**

the words “Guns Save Lives” do not constitute a commercial transaction, nor do any of the words on the face of Plaintiffs’ ad, but the City-approved alternative ad maintained the same red heart containing the words “Guns Save Lives”); Chapple Dep. 266:16-267:12, 270:11-19 (The City-approved and revised ad does not direct readers to go to the website identified on the ad in order to get information on where to get firearms training, as did Plaintiffs’ original ad (which directs readers to go to TrainMeAZ.com to find training opportunities, shooting ranges and classes)); Cotton Dep. 111:18-23, 112:6-10 (Defendants give “controversial” ads “more scrutiny”); Cotton Dep. 109:18-110:8, 112:6-10, Korwin Decl. ¶ 8 (Cotton told Korwin that the TrainMeAZ advertisement was “controversial” and would get extra attention due to it being controversial); PSJExh. P (There are exceptions to the City’s rule that one must be able to tell by looking on the face of an ad whether that ad contains a commercial transaction, as is exhibited by Chapple’s asking CBS what the Better Business Bureau was promoting in its ad); McCarthy Dep. 110:15-111:19, McCarthy Dep. Exh. 8 (pp. 2-3), Chapple Dep. 284:1-11, 286:23-287:7, 289:8-22, 292:25-293:4, Chapple Dep. Exhs. 26-7, Chapple Dep. 159:11-160:9, Chapple Dep. Exh. 15 (p. 3), Chapple Dep. 138:20-139:22, Chapple Dep. Exh. 11 (p. 4-6), Chapple Dep. 140:14-142:6, 317:15-25, 142:7-143:9 (It is sometimes acceptable to have language on the face of the ad that does not propose a commercial transaction, such as “Love is Sensual,” “Love is Sweet,” “Jesus Heals,” “Life, Perspective, and Answers,” “Build Your Future,” “Free Pregnancy Test,” and “Newly diagnosed with HIV and unsure of what to do next?”); Chapple Dep. 163:19-164:7, 168:4-170, Chapple Dep. Exhs. 18 and 20 (p. Korwin0021) (Chapple was shown an ad produced in discovery that was rejected for failing to comply with



**the City's TAS's and testified that the ad did comply with the City's TAS's.)) (Plaintiffs'**

**Response to Defendants' SOF ¶ 5 is incorporated here in in response to SOF ¶ 9.)**

10. In determining if a proposed advertisement adequately displays a proposed commercial transaction the City looks at whether the reader must be able to determine from the graphics and wording that a product or service would be proposed to them in the advertisement. Adequately is synonymous with sufficiently. A proposed transaction should not be hidden. (Ex. 2, Chapple depo 88:11-89:18) (Ex. 3, Cotton depo 76:3-14, 80:10-81:1) (Ex. 4, Chapple declaration ¶ 12-13)

**Plaintiffs' Response:**

**Plaintiffs admit that SOF ¶ 10 is supported by the cited record but deny that SOF ¶ 10 is a complete recitation of the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). The record in fact establishes that the City's enforcement and application of the TAS's vary from case to case. Plaintiffs' Response to Defendants' SOF ¶ 9 is incorporated here in in response to ¶ 10.**

11. The City's policy of commercial only advertising is intended to serve several purposes:

- A. To maximize revenue and avoid intricate issues of fair balance and equal time by avoiding the appearance that the City is favoring or disfavoring any particular candidate, political view, or side in a debate over contentious issues of the day.
- B. To maximize revenue and avoid intricate issues of fair balance and equal time by avoiding the appearance that the City, advertisers or the forum (bus or shelter) is associated with any particular social cause, political cause, or viewpoint.
- C. Reducing the risk of vandalism and/or potential injury to users of the system as commercial speech does not arouse in people the same level of sentiment, emotion and spontaneous reaction as do political or social issues.

(Ex. 4, Chapple declaration ¶ 14, 17 and ex. A-D)

**Plaintiffs' Response:**

Plaintiffs admit that the purposes in SOF ¶ 11 are among the purposes Defendants claim as the reasons for their alleged "commercial only" ad policy, but deny that SOF ¶ 11 contains the complete purposes for the City's policy. The record establishes that the purposes also include: "Maintaining a position of neutrality on . . . religious issues," and "[n]ot violating the Establishment Clause." *Children of the Rosary*, 154 F.3d 972, 979 (9th Cir. 1998).

12. Effective October 1, 2006, City contracted with Clear Channel Outdoor, Inc. ("CCO"), whereby CCO was granted the exclusive right to solicit, place, administer, maintain and manage advertising on the interior and exterior of designated City owned or leased buses. The contract requires CCO to submit all advertising to the City for its review prior to posting. The contract in section 3.6.2 further provides:

Advertising accepted by CCO shall comply with CITY's Public Transit Department's advertising standards as such standards now exist or as they may be hereafter modified, revised, altered or amended. **Currently, the subject matter of bus advertising shall be limited to speech which proposes a commercial transaction.**

(bold added) (Ex. 4, Chapple declaration ¶ 18 and ex. E)

**Plaintiffs' Response:**

Plaintiffs admit SOF ¶ 12 but move to strike because it is immaterial, as Plaintiffs' lawsuit concerns an advertisement on a transit shelter and not a bus, which the City leased to CBS Outdoor, not Clear Channel Outdoor. *See Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008). (*See* Am. Compl. ¶¶ 15, 17.)

13. Effective June 1, 2008, City contracted with CBS Outdoor Group, Inc. ("CBS"), whereby CBS was granted "the exclusive right to design, fabricate, install, maintain, and sell advertising space upon bus shelters and transit furniture [located at bus stops] throughout the City." The contract allows the City to require CBS to submit all contracts for advertising space to the City for its review at least ten (10) days prior to posting. The contract further provides:

Advertisements deemed objectionable by the City's Public Transit Director or the Director's designee shall not be displayed and shall be removed immediately if posted. **The**

**subject matter of all shelter and transit furniture advertising shall be limited to speech or graphic images which propose a commercial transaction.**

(bold added) Under the contract CBS, all advertising is subject to the City's Transit Advertising Standards. (Ex. 3, Cotton depo 46:4-15) (Ex. 4, Chapple declaration ¶ 19 and ex. F)

**Plaintiffs' Response:**

Plaintiffs object to and move to strike SOF ¶ 13 in part because the statement that the June 1, 2008, contract between the City and CBS “allows the City to require CBS to *submit* all contracts for advertising space to the City for its review at least ten (10) days prior to posting” (emphasis added), is not supported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). The record in fact establishes that the June 1, 2008, contract between the City and CBS only requires that “[a]ll contracts for advertising space will be *made available* to the City for its review at least ten (10) days prior to posting.” (Chapple Decl. Exh. F, p. 13 Korwin01235 (emphasis added.))

Plaintiffs admit that there is a 2008 contract between the City and CBS whereby CBS was granted “the exclusive right to design, fabricate, install, maintain, and sell advertising space upon bus shelters and transit furniture [located at bus stops] throughout the City.”

Plaintiffs admit that the contract says that “Advertisements deemed objectionable by the City's Public Transit Director or the Director's designee shall not be displayed and shall be removed immediately if posted. The subject matter of all shelter and transit furniture advertising shall be limited to speech or graphic images which propose a commercial transaction,” but deny that the City applies the TAS's to limit ads to

those proposing a commercial transaction. (Plaintiffs' Response to Defendants' SOF ¶ 5 is incorporated herein in response to ¶ 13.

Plaintiffs further object to and move to strike SOF ¶ 13 because it is immaterial. *See Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008). Plaintiffs' lawsuit concerns how the City applies and enforces its Transit Advertising Standards, and that the City's contract with CBS requires CBS to make available to the City contracts for advertising space is immaterial.

14. Under the contract, CBS is responsible for soliciting potential advertising and working with the potential customer regarding proposed advertising. The customer does not typically directly interact with the City, just CBS. By contract, CBS is then supposed to submit the proposed advertising to the City to review. (Ex. 2, Chapple depo 51:4-18, 53:22-54:3) (Ex. 3, Cotton depo 41:2-20) (Ex. 4, Chapple declaration ¶ 20) (Ex. 6, Mariscal depo 41:1-21,43:3-20)

**Plaintiffs' Response:**

Plaintiffs object to and move to strike SOF ¶ 14 in part because the statement that “[b]y contract, CBS is then supposed to *submit* the proposed *advertising* to the City to review” (emphasis added), it is not supported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). The record in fact establishes that the June 1, 2008, contract between the City and CBS only requires that “[a]ll *contracts* for advertising space will be *made available* to the City for its review at least ten (10) days prior to posting.” (Chapple Decl. Exh. F, p. 13 Korwin01235 (emphasis added.))

Plaintiffs admit that “[u]nder the contract, CBS is responsible for soliciting potential advertising and working with the potential customer regarding proposed advertising. The customer does not typically directly interact with the City, just CBS.”

15. CBS has rejected proposed advertising which was not submitted to the City for review when it was deemed by CBS to not comply with the City's Transit Advertising Standards. (Ex. 2, Chapple depo 50:3-51:3) (Ex. 3, Cotton depo 41:2-42:6, 46:16-19) (Ex. 4, Chapple declaration ¶ 21)

**Plaintiffs' Response:**

**Admit and see further the record evidence Chapple Dep. 249:4-250:5 and McCarthy Dep. 23:17-21, which is incorporated herein in response to SOF ¶ 15.**

16. By contract, CBS is required to accept advertising which complies with the City's Transit Advertising Standards. (Ex. 2, Chapple depo 53:1-7) (Ex. 4, Chapple declaration ¶ 22)

**Plaintiffs' Response:**

**Plaintiffs admit that the City says it requires “CBS . . . to accept advertising which complies with the City's Transit Advertising Standards,” but object to and move to strike the statement that CBS is required to do this “[b]y contract” (emphasis added), because it is not supported by the record. See *Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). Plaintiffs deny that the June 1, 2008, contract between the City and CBS requires CBS to *accept* advertising that complies with the TAS's. The record in fact establishes that the 2008 contract states that “the Contractor shall use the current Transit Advertising Standards as a basis for accepting advertising content for posting.” (Chapple Decl. Exh. F, p. 13 Korwin01235.)**

17. Once CBS submits proposed advertising to the City for review, Marie Chapple and Matthew Heil reviews [sic] it for the City to determine if it complies with the City's Transit Advertising Standards. If it meets the Standards, it is accepted. Chapple and Heil may sometimes consult with the City's legal department. If not, Chapple discusses the issues with CBS to see if a modification can be made to make the proposed advertising compliant. (Ex. 2, Chapple depo 53:25-55:19) (Ex. 3, Cotton depo 40:10-41:1) (Ex. 4, Chapple declaration ¶ 23)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 17 in part because the statement that “Chapple discusses the issues with CBS to see if a modification can be made to make the proposed advertising compliant” is unsupported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). The record in fact shows that it is not the role of the Public Transit Department to tell people how to make their ads complaint. It is the job of CBS. (Cotton Dep. 88:9-13; Chapple Dep. 112:25-113:4 (“We typically talk with CBS to talk with their client” about how advertisers can revise their ads to make them compliant with the TAS’s.))**

**Plaintiffs admit the remainder of SOF ¶ 17.**

18. A review process procedure has been in place for proposed advertising on buses and transit furniture. The vendor (CBS or COO) is to initially apply the City's Transit Advertising Standards. The vendor is to forward to the City's contract manager (currently Chapple) proposed advertisements which may be questionable under the Transit Advertising Standards. All proposed advertisements are to be sent to the City before installation. The City's contract manager, who may consult the City's legal department, determines if the proposed advertisement meets the City's Transit Advertising Standards. If it does not, the contract manager may engage the vendor's liaison in discussions about modifying the proposed advertisement to meet the City's standards. The client may request in writing that the decision be reconsidered by the City's Director of Public Transit, whose decision will be final. (Ex. 3, Cotton depo 47:13-48:3, 52:25-53:11, 54:23-55:23, 56:17-57:19 and ex. 3) (Ex. 4, Chapple declaration ¶ 23)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 18 for failing to conform to Ariz. R. Civ. P. 56(c)(2) because it is not concise and because the statement that “[a]ll proposed advertisements are to be sent to the City before installation” is unsupported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). The record in**

fact shows that CBS can accept an ad and post it without prior City approval. (See Cotton Dep. 59:4-6; 60:8-61:4; Cotton Dep. Exh. 3; Chapple Dep. 248:23-249:2.)

Plaintiffs admit that there is a City document titled “Advertising Review Process” that has been in place and is the way the Department of Public Transit “does business.” (See Cotton Dep. 47:13-48:21; 52:24-54:19; Cotton Dep. Exh. 3.)

19. The City monitors its contract with CBS by viewing ads at transit furniture and taking pictures and matching those with billings and documents received from CBS. On a few occasions in 2010, the City discovered CBS posted advertisements which were not previously submitted to the City for review. Since then, the City goes over what has been submitted by CBS in monthly meetings and Chapple does a drive-by review of some of the transit furniture. (Ex. 2, Chapple depo 56:6-57:20) (Ex. 3, Cotton depo 42:7-44:5, 55:24-56:1) (Ex. 4, Chapple declaration ¶ 24)

**Plaintiffs’ Response:**

**Admit.**

20. There are approximately 1,000 bus shelters which can accommodate advertising. These bus shelters can accommodate up to approximately 2,000 advertisements. (Ex. 2, Chapple depo 57:21-58:2) (Ex. 4, Chapple declaration ¶ 25)

**Plaintiffs’ Response:**

**Admit.**

21. The City has rejected proposed advertisements as non-compliant with its advertising standards. In 2010-11, for example, the City rejected proposed advertising from Salt River Project ("SRP"), which sought to advertise a reforestation project, after SRP decided not to make modifications suggested by the City. During the same period of time, the City also rejected, without any suggestion of modification to make the proposed advertising compliant, proposed advertising from Playboy, the Federal Housing Administration, Maracay Homes, Building Arizona Families, SRP, WIC (Women Infants & Children), ASU Preparatory and Dos Equis. In this same period of time, the City was able to work out satisfactory modification of proposed advertisements, so they were compliant and could be posted, from Stingray Sushi, Veteran's Administration, Fascinations, SRP, the Dental Association, UFC and Columbia Pictures. (Ex. 4, Chapple declaration ¶ 26 and ex. G)

**Plaintiffs' Response:**

Plaintiffs admit that the City has rejected proposed advertisements as non-compliant with its advertising standards. Plaintiffs object to and move to strike SOF ¶ 21 because it is self-serving affidavit testimony, *see Margaret H. v. Arizona Dept. of Econ. Sec.*, 214 Ariz. 101, 104, 148 P.3d 1174, 1177 (App. 2006), which is immaterial because it does not state the nature of the rejected ads or the reasons behind those rejections. *See Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008).

22. Plaintiff Company engages in a variety of advertising campaigns, including billboards and public relations. Plaintiff Company also maintains a website for advertising purposes and sends out e-blasts/e-mails to promote the company. Plaintiff Company also created two maps which reference the name of Plaintiff Company. (Amended Complaint ¶ 12) (Ex. 1, Korwin depo 12:12-13:13, 33:11-35:9)

**Plaintiffs' Response:**

**Admit.**

23. Plaintiff Company has a website at TrainMeAZ.com. The website's was supposed to present Arizona as a gun-friendly state; to facilitate getting, training, and ancillary products for gun safety and marksmanship; it was a collecting place for trainers to list their services, as well as shooting ranges and stores; it provides news that's relevant to that goal; it was supposed to be pretty and colorful; and Korwin planned eventually to sell products on the website, but Plaintiff Company hasn't gotten to that yet. (Ex. 1, Korwin depo 13:10-13, 15:23-16:11)

**Plaintiffs' Response:**

**Admit.**

24. Plaintiff Company originally contacted CBS about billboard advertising. Plaintiff Company's contact at CBS was Cameron Bennett. (Ex. 1, Korwin depo 38:12-39:13)



**Plaintiffs' Response:**

**Plaintiffs admit but deny SOF ¶ 24 is material. *See Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008).**

25. On or about October 5, 2010, Company entered into an agreement with CBS for advertising at the City's bus shelters. The agreement provides:

**The character, design, text, and illustrations on advertising copy and the material used shall be subject to approval by Company and by location owner, transit company/authority or third party controlling location ("Owner").** If copy is rejected, Advertiser shall continue to be liable for the full term of the this Contract and Advertiser shall be responsible for providing an acceptable replacement copy within ten days of notification that a previous copy was rejected.

(bold added) (Amended Complaint ¶ 17) (Ex. 5, Plaintiffs' First Supplemental Disclosure excerpts and K37-40)

**Plaintiffs' Response:**

**Plaintiffs admit that SOF ¶ 25 contains and excerpt from Plaintiffs' October 5, 2010, agreement with CBS.**

26. Plaintiff Korwin does not recall discussing with CBS' representative whether its [sic] proposed advertisements [sic] would or would not meet City standards before the advertisements [sic] were posted. (Ex. 1, Korwin depo 39:13-40:15)

**Plaintiffs' Response:**

**Plaintiffs admit SOF ¶ 26 but deny that it is material, *see Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008), because Plaintiffs' lawsuit concerns how the City applies and enforces its TAS's; whether "Plaintiff Korwin does not recall discussing with CBS' representative whether its [sic] proposed advertisements [sic]**

**would or would not meet City standards before the advertisements [sic] were posted” is immaterial.**

27. On October 11-12, 2010, CBS placed Company's 50 posters in City's bus shelters without submitting the contract and advertising copy to the City for review. (Amended Complaint ¶ 19) (Ex. 1, Korwin depo 40:24-41:13) (Ex. 2, Chapple depo 56:6-13, 66:8-70:10) (Ex. 4, Chapple declaration ¶ 27)

### **Plaintiffs’ Response:**

#### **Admit.**

28. The Company's advertisement contains: (1) a large red heart graphic; (2) within the red heart graphic in the largest, all capital letters are the words "GUNS SAVE LIVES" in white lettering with black shadowing of the letters; (3) in the smallest black print are several paragraphs of text (quoted below) immediately to the side of the bottom portion of the red heart graphic; (4) in large, but not largest, black printed all capital letters are words "ARIZONA SAYS:"; (5) immediately below ARIZONA SAYS: in large, red printed all capital letters are the words "EDUCATE YOUR KIDS"; (6) immediately below EDUCATE YOUR KIDS in large, black printed letters is "TrainMeAZ.com" and (7) in the upper left hand corner of the ad is a QR code.

In the smallest print in the ad appears the following text on the left side of the heart:

In Arizona, marksmanship matters. "The Train-Me State" knows that a nation, trained to arms, is an American linchpin of freedom, and is respected in Arizona like nowhere else. The Arizona legislature has enacted vibrant protection of the Second Amendment right to keep and bear arms. We in Arizona seem destined to set models for the nation in this case, a shining example of gun rights for all free peoples of the earth.

The Grand canyon State has Constitutional Carry. This frees any law-abiding adult here - not just - residents - to discretely enjoy the right to bear arms envisioned in the Constitution. WE have a super-strong castle Doctrine, coupled with robust burden of proof, a defensive-display statute, statewide preemption law restricting local fiefdoms from gun-rights abuse, and a specious-lawsuit ban a true milestone protecting honest people rfrom false charges by criminals and their kin. We even have a High School-Marksmanship law on the books for one credit towards a diploma: now if we can just move the obstructionists out of the way. Our Arizona Firearms Freedom Act joins a growing nationwide movement to repel federal incursion on states' rights, and end intolerable abuse of the Interstate Commerce Clause. TrainMeAZ is a non-partisan, joint educational effort of the firearms community.

The TrainMeAZ Campaign is designed to teach and bring gun safety and knowledge to every Arizonan. In this state, we take it for granted that you know how to shoot, know how to handle guns safely, how to use guns for self defense and all legal purposes, and that you know and respect our laws. Criminals with guns receive harsh punishment, so be it. Citizens with guns earn respect, and help keep Arizona a safe and wonderful place to live. Robert Heinlein correctly noted that an armed society is a polite society, and in Arizona this is truth personified and exercised. Come to an "Open Carry Banquet", and see! Join the Arizona Buy-cott. See how we do it at [azcdl.org](http://azcdl.org) and [asrpa.com](http://asrpa.com) and for our sisters in arms, [2asisters.org](http://2asisters.org). Go to [TrainMeAZ.com](http://TrainMeAZ.com), download this statement, learn how you can participate and improve your skills.

In the smallest print in the ad appears the following text on the right side of the heart:

This is why the TrainMeAZ Campaign exists. Acting as one, the state rises up to encourage and enable gun-safety training, fun shoots, special training days at the range, a coordinating point for the state's thousand-plus certified trainers with a web-interactive and printed map for the people. Soak up family days where the shooting sports are honored and enjoyed, with that freedom smell of gunpowder and a good hot dog. Arizona is an American protectorate of the culture of marksmanship, where the decent, honorable and lawful pursuit of the shooting sports, and the precious right to keep and bear arms is honored and enjoyed. How do you think so many trainers and shooting schools thrive here? Should your state honor our rights this way?

Visit Arizona, and breathe free air. Come experience "*The Litmus Test of Freedom*" the right you have as an honest adult to enjoy your right to arms.

Use the [TrainMeAZ.com](http://TrainMeAZ.com) website to find training opportunities, shooting ranges, and classes for any level of skill from your first-time shooting experience (a thrill you will always remember, just like the rest of us do) to the kind of tactical training the world's elite special forces get an experience few of us get to experience. In Arizona, marksmanship matters. Learn to shoot straight. Teach your children well. Join us, a nation trained to arms, confident in our exercise of the Second Amendment right of the people to keep and bear arms, which shall not be infringed. Exercising liberty's teeth has a positive impact on the political environment.

TrainMeAZ is sponsored by:

**Arizona Citizens Defense League • Arizona State Rifle and Pistol Association • Caswells Crossroads of the West Gun Shows • Front Sight • [GalleryOfGuns.com](http://GalleryOfGuns.com) • [GunLaws.com](http://GunLaws.com)**

**• Gunsite Second Amendment Sisters • Wide World of Maps**

(italics and bold in ad) (Ex. 1, Korwin depo 23:7-24:10 and ex. 1) (Ex. 2, Chapple depo 77:13-80:12 and ex. 6) (Ex. 4, Chapple declaration ¶ 28 and ex. H) (Ex. 5, Plaintiffs' First Supplemental Disclosure excerpts and K1)

**Plaintiffs' Response:**

**Plaintiffs admit that SOF ¶ 28 is an accurate description of Plaintiffs' ad with the exception of immaterial typographical errors.**

29. After someone known to Matthew Heil, who worked on monitoring the transit advertising for the City, questioned the Company's advertising copy located at a bus shelter as to whether it involved a commercial transaction, the City through Marie Chapple asked CBS to provide the advertisement for review. Chapple was aware the advertisement referenced guns but could not recall the full extent of what she was told about the advertisement before she called CBS. (Ex. 2, Chapple depo 38:19-25,40:10-41:21, 66:8-72:22) (Ex. 4, Chapple declaration ¶ 29)

**Plaintiffs' Response:**

**Admit.**

30. CBS e-mailed to Chapple the Company's advertisement. (Ex. 2, Chapple depo 74:4-10) (Ex. 4, Chapple declaration ¶ 30)

**Plaintiffs' Response:**

**Plaintiffs admit that according to the cited record, "CBS e-mailed to Chapple [Plaintiffs'] [original] advertisement."**

31. Marie Chapple reviewed the advertising poster and, after consultation with legal counsel for the City, determined that it violated the City's 2009 Transit Advertising Standards and contract with CBS because the advertisement was determined to not propose a commercial transaction. Chapple testified that the advertisement was not compliant because: "there was no evidence of a product or service for commercial exchange and that there was other information or other elements in the ad that made it noncommercial" and "the exchange wasn't evident, that the service wasn't evident, and that there were noncommercial elements added to the advertisement." The small print language was viewed as not proposing or enhancing a commercial transaction, but rather covering many unrelated topics and issues. (Ex. 2, Chapple depo 8:15-10:4, 75:11-76:2,

81:13-82:7, 90:16-91:14, 92:13-94:3, 97:16-98:2, 102:15-18, 104:13-105:15 and ex. 7) (Ex. 4, Chapple declaration ¶ 32)

**Plaintiffs' Response:**

Plaintiffs object to and move to strike SOF ¶ 43 for failing to conform to Ariz. R. Civ. P. 56(c)(2) because it is not concise, and because the statement that “[t]he small print language was viewed as not proposing or enhancing a commercial transaction, but rather covering many unrelated topics and issues” is not supported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). The record in fact shows that language in the small print, in part, proposes or enhances the commercial transaction. (See Chapple Dep. 266:16-267:12, 270:11-19 (Although 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, Plaintiffs’ original ad directs readers to go to TrainMeAZ.com to find training opportunities, shooting ranges and classes.)) (See also Korwin Decl. ¶¶ 5-6.)

32. In evaluating any advertisement, the presence of a QR code does not affect whether the ad is or is not proposing a commercial transaction. If the QR code leads to a website which contains material which is inappropriate as violating Transit Advertising Standards applicable to sexual material, then the ad could be deemed non-compliant. (Ex. 2, Chapple depo 83:13-85:24) (Ex. 4, Chapple declaration ¶ 31)

**Plaintiffs' Response:**

**Admit.**

33. Since 2006, Marie Chapple was responsible for monitoring the City's advertising on its buses. Beginning in the summer of 2010 she also was assigned responsibility for monitoring advertising at the transit furniture. Prior to the summer of 2010, on occasion other staff would ask Chapple's opinion whether advertising was in compliance with the City's Transit Advertising Standards. (Ex. 2, Chapple depo 8:15-12:8, 48:18-50:2) (Ex. 4, Chapple declaration ¶ 8)

**Plaintiffs' Response:**

**Admit.**

34. Marie Chapple had experience and training in determining whether proposed advertisements were commercial or not. Before becoming employed by the City, she worked at KOY radio station, a non-governmental entity. Her duties at KOY radio included determining whether proposed announcements were commercial and would be aired by the station. When she was employed by the City, she received training and read publications or articles relating in part to advertising standards. Chapple also attended some meetings of the American Public Transit Association. Chapple also reviews the internet for information relevant to Transit Advertising standards. Chapple also has a subscription to Advertising Age magazine (Ex. 2, Chapple depo 22:22-27:18, 30:9-32:25 and ex. 1) (Ex. 3, Cotton depo 25:7-31:19) (Ex. 4, Chapple declaration ¶ 15-17 and ex. A-D)

**Plaintiffs' Response:**

Plaintiffs object to and move to strike SOF ¶ 34 in part because the statement that Chapple has “experience and training in determining whether proposed advertisements were commercial or not” is not supported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). The record in fact shows that Chapple does not have the expertise and training to determine whether a proposed or City-approved ad contains a commercial transaction. (See Chapple Decl. ¶ 36, Chapple Dep. 126:10-127:6, 129:6-130:23, 131:9-25, 133:6-134:24, 258:13-260:20, Chapple Decl. Exh. 4, I (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, constitutes a public service announcement, or complies with the City’s TAS’s; she would have to review it with legal before rendering an opinion); Chapple Dep. 133:13-20 (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. 279:24-280:19, Chapple Dep. Exhs. 26-7 (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. 286:6-21 (Chapple could not determine whether an ad that only depicted a blue cross taking up half of the transit advertising space would propose a commercial transaction pursuant to the City’s former or current TSA’s); Chapple Dep. 295:16-296:10 (Chapple could not state whether an ad that just had the words “AM1360” would comply with the City’s TAS’s); Chapple Dep. 142:7-143:9, Chapple Dep. Exh. 11 (p. 6) (Chapple would need to consult the City’s legal counsel and CBS before being able to make a determination of whether a City-approved and posted ad that states, “Newly diagnosed with HIV and unsure of what to do next?” complies with the City’s TAS’s); Chapple Dep. 163:19-164:7, 168:4-170:18, Chapple Dep. Exhs. 18, 20 (p. Korwin0021 (Chapple was shown an ad produced in discovery that was rejected for failing to comply with the City’s TAS’s and testified that the ad did comply with the TAS’s.))

Plaintiffs admit that the remainder of SOF ¶ 34 is consistent with Chapple’s testimony, but it is immaterial. *See Nat’l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008).

35. Chapple, after her review, asked that the Company’s advertisement be modified or changed to make it compliant with the City’s standards. It was indicated to CBS that the advertisement read too much like a public service announcement and asked CBS to work with the customer to bring out the commercial aspect. (Ex. 2, Chapple depo 98:11-18, 100:15-101:6, 105:16-106:13) (Ex. 4, Chapple declaration ¶ 33)

**Plaintiffs' Response:**

**Admit. Plaintiffs further admit that according to the cited record, it was *Chapple* who “indicated to CBS that the advertisement read too much like a public service announcement and asked CBS to work with the customer to bring out the commercial aspect.”**

36. CBS notified Korwin that the City had a problem with the advertisement. (Ex. 1, Korwin depo 41:14-42:21)

**Plaintiffs' Response:**

**Admit.**

37. At some point in time, CBS representative Steve Chatham indicated to Chapple the customer's business was selling books. (Ex. 2, Chapple depo 107:10-24)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 37 because it is inadmissible hearsay. *See Patton v. Paradise Hills Shopping Ctr., Inc.*, 4 Ariz. App. 11, 18, 417 P.2d 382, 389 (1966) (“hearsay statements contained in . . . deposition . . . do not measure up to the requirement of Rule 56(e)”).**

38. A telephone call was than [sic] set up with Korwin, Chapple, City Assistant Attorney Ted Mariscal, and CBS representative Steve Chatham to discuss the problems with the original advertisement. The compliancy issues still remained at [sic] end of the conversation. A transcript was made of this phone call. (Ex. 1, Korwin depo 42:22-43:7, 44:18-22, 45:20-23) (Ex. 2, Chapple depo 106:19-107:3, 112:6-24) (Ex. 6, Mariscal depo 40:10-16, 58:18-25, 59:18-24, 75:25-79:15)

**Plaintiffs' Response:**

**Plaintiffs admit that “a telephone call was than [sic] set up with Korwin, Chapple, City Assistant Attorney Ted Mariscal, and CBS representative Steve Chatham to discuss the**



problems with the original advertisement,” and that “[a] transcript was made of this phone call” by Plaintiffs’ counsel.

Further, Plaintiffs admit that Defendants *believed* that “compliance issues remained at [the] end of the conversation.”

39. On or about October 19-20, 2010, CBS removed Plaintiff Company's posters from the transit shelters. (Amended Complaint ¶ 26) (Ex. 1, Korwin depo 56:16-25) (Ex. 2, Chapple depo 76:23-77:9)

**Plaintiffs’ Response:**

**Admit.**

40. CBS indicated it was willing to redesign a compliant ad, and pay for it to be posted. (Ex. 3, Cotton depo 101:3-13 and ex. 6) (Ex. 4, Chapple declaration ¶ 34)

**Plaintiffs’ Response:**

Plaintiffs object to and move to strike SOF ¶ 40 because it is hearsay, *see Jabczenski v. S. Pac. Mem’l Hospitals*, 119 Ariz. 15, 18, 579 P.2d 53, 56 (App. 1978) (Ariz. R. Civ. P. 56(e) provides that an “affidavit, based upon hearsay, cannot be considered” for purposes of summary judgment), and not supported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996).

Further, Plaintiffs deny that SOF ¶ 40 is supported by Defendants’ citation to Debbie Cotton’s deposition (Ex. 3, Cotton depo 101:3-13 and ex. 6).

The statement that “CBS indicated it was willing to . . . pay for [a compliant ad] to be posted” is immaterial. *See Nat’l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008). Plaintiffs’ lawsuit concerns how the City applies and enforces its Transit

**Advertising Standards, and whether CBS was willing to pay for a new ad to be posted is immaterial.**

41. On October 22 through 25, 2010, Marie Chapple and CBS representative Steve Chatham had e-mail communications about a possible revised advertisement for the Company. Chapple indicated a revised ad would be acceptable to the City and comply with the City standards. Chapple did not make the decision that the revised advertisement would be acceptable, she was advised of the decision by Debbie Cotton, who as the City's Public Transit Director served as Chapple's superior at the time. Cotton is the final decision maker for the City transit advertising. (Ex. 2, Chapple depo 115:20-118:19, 126:2-128:19, 132:11-23 and ex. 8, 10) (Ex. 3, Cotton depo 5:17-6:2, 6:17-7:16, 23:1-25, 59:15-17, 63:14-25) (Ex. 4, Chapple declaration ¶ 35 and ex. I)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 41 for failing to conform to Ariz. R. Civ. P. 56(c)(2) because it is not concise.**

**Plaintiffs admit that according to the record, "Chapple indicated a revised ad would be acceptable to the City and comply with the City standards."**

**Plaintiffs further admit that according to the cited record, "Cotton is the final decision maker for the City transit advertising"; however, this is contradicted by other parts of the record. (See Cotton Dep. 107:3-108:5, 113:11-17 (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. 59:1-3 (No employee reviews every ad before it is posted.))**

42. Debbie Cotton read publications or articles relating in part to advertising standards. (Ex. 3, Cotton depo 13:12-25, 16:9-17:8)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 42 because it immaterial. *See Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008).**

43. The City was willing to accept an advertisement submitted by CBS which stated: "TO EDUCATE YOUR KIDS ON HOW GUNS SAVE LIVES go to TrainMeAZ.com". The "GUNS SAVES LIVES" would have been in the same red heart as the rejected advertisement. This alternative advertisement removed the small text print which part of the original non-compliant advertisement. (Ex. 2, Chapple depo 126:2-9 and ex. 6,10) (Ex. 3, Cotton depo 92:10-24, 99:17-100:4 and ex. 6, 10) (Ex. 4, Chapple declaration ¶ 35-36 and ex. 1) (Ex. 6, Mariscal depo 65:2-19)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 43 for failing to conform to Ariz. R. Civ. P. 56(c)(2) because it is not concise.**

**Plaintiffs admit that on October 25, 2010, the City approved an alternative version of Plaintiffs' ad, which the City found complied with the City's TSA's. (Chapple Decl. ¶ 35 Exh. 4, I; Chapple Dep. Exh. 10.) 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 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 the City moved above the heart, with the words "go to TrainMeAZ.com," below the heart. (Chapple Decl. ¶ 36; Chapple Dep. 127:6-24; Chapple Dep. Exh. 10.)**

**Plaintiffs admit that it is Defendants' position that Plaintiffs' original ad is a "non-compliant advertisement."**

44. Debbie Cotton told Korwin in a telephone call that the City wanted to do business

with his company and wanted him to work with CBS so that a commercial transaction was clearly displayed in an advertisement. (Ex. 3, Cotton depo 83:14-25, 87:16-21)

**Plaintiffs' Response:**

**Admit.**

45. At a meeting in October 2010, Debbie Cotton presented to Korwin an alternative advertisement which the City indicated would be acceptable. The proposed alternative ad removed the small print text, rearranged the larger words, and added some words not in the original advertisement. The alternative ad proposed a message, according to Korwin, to educate your kids that guns save lives. The alternative ad was not acceptable to Korwin or some sponsors who were present at the meeting. (Ex. 1, Korwin depo 46:7-53:22)

**Plaintiffs' Response:**

**Admit and *see also* PSOF ¶¶ 46-50.**

46. Education of people or kids that guns save lives was not the purpose of Plaintiff Company's advertisement. It was supposed to sell marksmanship training and gun safety classes. (Ex. 1, Korwin depo 51:23-52:3)

**Plaintiffs' Response:**

**Plaintiffs admit that the purpose of Plaintiffs' ad was "to sell marksmanship training and gun safety classes," among other things and *see also* PSOF ¶ 40.**

47. The idea that the City would re-write Plaintiff Company's advertisement was anathema to Korwin and the sponsors. (Ex. 1, Korwin depo 54:18-25)

**Plaintiffs' Response:**

**Plaintiffs admit SOF ¶ 47, but deny that it is material. *See Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008).**

48. Korwin would not agree to remove the small print narrative from any proposed advertisement for Plaintiff Company. (Ex. 1, Korwin depo 61:2-62:7) (Ex. 2, Chapple depo ex. 9)

**Plaintiffs' Response:**

Plaintiffs object to and move to strike SOF ¶ 48 because the phrase “any proposed advertisement” is vague and ambiguous as to which ad(s) Defendants are referring, and SOF ¶ 48 is immaterial, *see Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008), and unsupported by the record. *See Ashton-Blair v. Merrill*, 187 Ariz. 315, 316, 928 P.2d 1244, 1245 (App. 1996). SOF ¶ 48 is not supported by the record because the record in fact shows that Alan Korwin expressed interest in continuing to work with the City toward a resolution. (*See* Korwin Dep. 54:25-55:21; 56:20-58:11.)

Plaintiffs' lawsuit concerns how the City applies and enforces its Transit Advertising Standards, and whether Plaintiff Korwin rejected a City-proposed or approved alternative advertisement is immaterial.

Furthermore, during the deposition, at the cited record Plaintiffs' counsel asserted a form objection to this question because it called for speculation.

49. Plaintiff Company's website shows billboard advertisements without any of the small print text from the non-compliant original advertisement at issue here. (Ex. 4, Chapple declaration ¶ 38 and ex. J)

**Plaintiffs' Response:**

Plaintiffs object to and move to strike SOF ¶ 49 because it is immaterial. *See Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008).

Plaintiffs' advertisement that is the subject of this lawsuit is a transit shelter advertisement, not a billboard (Am. Compl. ¶ 17), and both the 2009 and 2011 advertising

**standards only apply to “transit bus, shelter, and bench advertising” and “advertising panels on city buses and on transit furniture,” respectively. (See Cotton Exh. 4; Exh. 5.)**

50. Korwin was provided a copy of the City's written Transit Advertising Standards. (Ex. 1, Korwin depo 55:10-17)

**Plaintiffs' Response:**

**Plaintiffs admit that Plaintiff Korwin was provided with the transit advertising guidelines, but not the controversy guidelines, the public service announcement guidelines or the proposal of a commercial transaction guidelines. (Korwin Dep. 55:10-17.)**

51. On November 2, 2010, Kim Gathers on behalf of the City wrote to CBS that the advertisement posted for Plaintiff Company was non-compliant:

The TrainMeAZ.com advertisement was found in non-compliance because it did not propose a commercial transaction such as the sale of a commodity or service. The components of the advertisement stated: Guns Save Lives. Arizona ays: Educate Your Kids. TrainMeAZ.com supported by a long commentary of various topics including Second Amendment Rights. The major statements with or without the commentary are deemed an exchange of ideas which falls into the category of a public service announcement.

A revised advertisement submitted to the Department by CBS Outdoor was accepted because it removed the supporting commentary and converted the major statements of possible ideology to a form that promotes the commercial service aspect: To Educate Your Kids on How Gun Save Lives Go To TrainMeAZ.com

\*\*\*

Had there been an adequate internal review in place [by CBS Outdoor] and proper documentation sent to the City, the advertisement compliance issues could have been worked out prior to posting with the possibility of coming to mutually-agreeable changes. As it is, it was a more difficult process than necessary and did not serve either customer the City nor your client.

We expect that CBS Outdoor will comply with our Agreement and follow the Transit Advertising Standards: that are posted online at <http://phoenix.gov/publictransit/advertising.html>

(Ex. 2, Chapple depo 156:22-157:22 and ex. 15)

**Plaintiffs' Response:**

**Plaintiffs admit that SOF ¶ 51 is an excerpt of the referenced letter.**

52. The City has approved and have [sic] permitted advertisement on transit furniture about gun shows in the past. (Ex. 4, Chapple declaration ¶ 37)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 52 because it is conclusory and does not cite to the record other than self-serving affidavit testimony. *See Margaret H. v. Arizona Dept. of Econ. Sec.*, 214 Ariz. 101, 104, 148 P.3d 1174, 1177 (App. 2006).**

53. Governmental bus and transit furniture advertising have sparked a number of protests across the country. (Ex. 4, Chapple declaration ¶ 17 and ex. A-D)

**Plaintiffs' Response:**

**Plaintiffs object to and move to strike SOF ¶ 53 because it is self-serving hearsay, *see Margaret H. v. Arizona Dept. of Econ. Sec.*, 214 Ariz. 101, 104, 148 P.3d 1174, 1177 (App. 2006); *Jabczenski v. S. Pac. Mem'l Hospitals*, 119 Ariz. 15, 18, 579 P.2d 53, 56 (App. 1978), and immaterial. *See Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 118, 180 P.3d 977, 983 (App. 2008).**

**Further, SOF ¶ 53 is immaterial because Plaintiffs' lawsuit challenges the constitutionality of the City's TAS's their application of those Standards.**

54. The original advertisement posted by CBS would not have satisfied the 2009 or 2011 Transit Advertising Standards.

**Plaintiffs' Response:**

**Plaintiffs admit that Defendants' *position* is that Plaintiffs' original advertisement would not have satisfied the 2009 or 2011 Transit Advertising Standards.**

**DATED: MAY 1, 2012**

**RESPECTFULLY SUBMITTED,**

/s/ Diane S. Cohen

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BY: /s/ Diane Cohen