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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 TO DEFENDANTS' RESPONSE TO PLAINTIFFS' 56.1 STATEMENT OF FACTS IN SUPPORT OF SUMMARY JUDGMENT[1]

[1] **Plaintiffs recognize that Rule 56 does not provide for filing a Reply to a Rule 56(c)(2) Statement of Facts. However, because Defendants nevertheless submitted such a Reply; Defendants' Response to Plaintiffs' Statement of Facts ("SOF's") is replete with additional facts, unsupported argument and contradictory statements; and Defendants did not include Plaintiffs' original SOF's in their response document, Plaintiffs respectfully submit a Reply SOF's. The intent of this document is to provide the Court with one consolidated document, which Plaintiffs' recognize the Court may or may not accept pursuant to its**

Plaintiffs Alan Korwin and TRAINMEAZ, LLC, pursuant to Rule 56(c)(2) of the Arizona Rules of Civil Procedure, 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.)[2] TrainMeAZ is supported in part by contributing sponsors, who are commercial entities that pay money to the organization. (Korwin Decl. ¶ 4, **PSJExh. R.**[3])

Defendants' Response:
Admit. However, TrainMeAZ is also supported by entities such as the Arizona Citizens Defense League, the Arizona State Rifle and Pistol Association, GunLaws.com, Gunsight Second Amendment Sisters. (Ex 10, Korwin depo 8:13-9:11, 22:8-15) (DSOF ¶ 28) (PCSOF Ex. G) TrainMeAZ is also supported by donations which can be made on their website. (Ex 10, Korwin depo 22:8-22) Part of the purpose of TrainMeAZ, LLC was to pull the firearms industry together. (Ex 10, Korwin depo 11:10-17)

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discretion. Plaintiffs submit that it would be difficult at best to otherwise respond to Defendants' Rule 56(c)(2) response, short of preparing a motion to strike, which the Court expressly stated would not be allowed, due to the page limit constraints on Plaintiffs' Reply. For the Court's convenience, Plaintiffs have included all Reply statements and footnotes in boldface.

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

[3] The citation to Plaintiff Korwin's declaration, PSJExh. R, was inadvertently omitted from Plaintiffs' SOF's, but is corrected herein.

Plaintiffs' Reply:

PSOF ¶ 1 should be deemed admitted.

2. Plaintiff Alan Korwin ("Korwin") is the manager of Plaintiff TrainMeAZ. (PSJExh. A, ¶ 5.)

Defendants' Response:

Admit.

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.)

Defendants' Response:
Admit the cited evidence shows that the website has some features allowing one to learn about third persons or entities who provide firearms training and also the location of firearms shooting ranges. Dispute that the remainder of the purported fact is supported by the record cited. The website is also intended to and does present Arizona as a gun friendly state and to provide news. (Ex 10, Korwin depo 16:2-12) The website also promotes education. (PCSOF Ex. Q, Korwin affidavit ¶ 5)1 Korwin planned eventually to sell products on the website, but Plaintiff Company hasn't gotten to that yet. (Ex. 10, Korwin depo 16:9-11)

Plaintiffs' Reply:

PSOF ¶ 3 should be deemed admitted. Defendants fail to raise any genuine issue of material fact that disputes that TrainMeAz operates a website that facilitates the sale of gun safety and marksmanship training, as well as lists shooting ranges. Defendants offer

"additional facts" in their response, but omit from the cited record Plaintiffs' testimony that TrainMeAZ.com "facilitates" the sale of "training and ancillary products for gun safety and marksmanship." (Korwin Dep. 16:2-11.)

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.)

Defendants' Response:
Admit the cited evidence shows TrainMeAZ engages in advertising campaigns including billboards and at bus shelters. The remainder is not supported by the record. 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) (DSOF Ex. 1, Korwin depo 12:12-13:13, 33:11- 35:9)

Plaintiffs' Reply:

PSOF ¶ 4 should be deemed admitted. While Defendants state that the "remainder is not supported by the record," there is no remainder to PSOF ¶ 4 beyond what Defendants admit. Further, Defendants' additional facts contained herein are neither responsive nor do they raise a genuine issue of material fact. *See also*, Korwin Decl. ¶¶ 4-6, which Plaintiffs inadvertently omitted as a citation in support of the PSOF ¶ 4, which states that TrainMeAZ engages in advertising, such as on bus shelters, to promote the sale of products and services to customers. (PSJExh. R.)

5. Defendant City of Phoenix ("City") is a municipal corporation organized under the laws of the State of Arizona. (DSOF ¶ 3.)

Defendants' Response:
Admit.

6. Defendant City provides advertising space on transit shelters and benches, which it makes 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.)

Defendants' Response:
Admit the City allows advertising on certain transit furniture and has entered into a contract with CBS Outdoor to solicit and obtain proposed advertising to be posted at the city's furniture. The cited evidence does not support the claim the transit furniture is leased to CBS, who subleases it to advertisers. 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. (DSOF Ex. 3, Cotton depo 46:4-15) (DSOF Ex. 4, Chapple declaration ¶ 19 and ex. F)

Plaintiffs' Reply:

PSOF ¶ 6 should be deemed admitted. Defendants' response does not raise a genuine issue of material fact in disputing the term "lease"(the material fact is that the

City entered into a contract with CBS wherein the City granted CBS exclusive rights to sell advertising space on bus shelters and transit furniture). The remainder of Defendants' response regarding the submission of contracts and the City's purported review thereof is an attempt to offer additional facts that are neither relevant nor responsive to PSOF ¶ 6.

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.)

Defendants' Response:
Admit former Director Cotton, while Director, had the ultimate power to make decisions on proposed advertisements. However, advertisements could be posted without former Director Cotton's approval. (PCSOF Ex. Q, Cotton depo 59:11-19)

Plaintiffs' Reply:

PSOF ¶ 7 should be deemed admitted. Defendants' response (except "Admit") is nonresponsive and ambiguous argument (that "advertisements could be posted without" Cotton's approval). The record Defendants cite is the deposition transcript of Defendant Cotton, which states, "Q. (By Ms. Cohen) Who is the final decision maker on whether a proposed ad will be accepted? A. (By Ms. Cotton) Ultimately me. I'm the final decision maker." Cotton did testify that CBS could *post* advertisements without her (or the City's) approval (Cotton Dep. 60:16-61:4), when she was specifically asked whether CBS can

approve and post an ad without prior approval, and Cotton responded: "They may send it before they post it or after they post it."

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.

Defendants' Response:
Admit.

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.)

Defendants' Response:
Disputed. Advertisements could be posted without former Director Cotton's approval. (PCSOF Ex. Q, Cotton depo 59:11-19)

Plaintiffs' Reply:

PSOF ¶ 9 should be deemed admitted. *See* Plaintiffs' Reply to PSOF ¶ 7, which is incorporated herein.

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.)

Defendants' Response:
Admit.

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.)

Defendants' Response:
Admit that at her deposition, per the cited evidence, Chapple could not say at that time if the 2008 contract was extended until the current 2011 contract (which went into effect on January 1, 2012). The 2008 contract was extended until December 31, 2011. (Ex. 11, Contract Amendments)

Plaintiffs' Reply:

PSOF ¶ 11 should be deemed admitted. Defendants' response (except "Admit") should be stricken as unsupported, self-serving argument. The cited record establishes that the person in charge of enforcing the contract did not know what time period the contract covered, notwithstanding that she offered testimony about it in a declaration. (DSJExh. 4.)

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.)

Defendants' Response:
Admit.

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[4].)

Defendants' Response:
Admit.

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). (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).

Defendants' Response:
Objection the cited evidence is inadmissible hearsay. Without waving the objection, admit the fact.

[4] PSJExh. B is also in the record as Chapple and Cotton Dep. Exhs. 4.

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.[5])

Defendants' Response:
Admit. The "Transit Advertising Standards" also state in paragraph A that: "It is the intent of the City that all transit advertising panels on city buses and transit furniture are nonpublic forums and are to be set aside for commercial advertisements or for transit information as provided by the City." (PCSOF Ex. B) The 2009 and 2011 Transit Advertising Standards also disallowed advertisements, even which otherwise contained a proposal for a commercial transaction, if the advertisement was false, misleading or deceptive; relate to an illegal activity; advertise or depict use of tobacco or smoking products; advertise or depict the use of spirituous liquor in specified locations; represent violence or anti-social behavior; advertise or depict language or representations which are obscene, pornographic, vulgar, profane, or scatological; represent any nude or semi-nude person or the exposed buttocks of any person; or depict or relate to websites that relate to specified sexual activities and specified anatomical areas as defined in certain criminal statutes or ordinances. (PCSOF Ex. B-C)

Plaintiffs' Reply:

PSOF ¶ 15 should be deemed admitted. The remainder of Defendants' response is nonresponsive argument (*see, e.g.,* Defendants' argument that "[t]he 2009 and 2011 Transit Advertising Standards also disallowed . . . advertisements, even which otherwise contained a proposal for a commercial transaction, if the advertisement was false,

[5] PSJExh. C is also in the record as Chapple and Cotton Dep. Exhs. 5.

misleading or deceptive"), because it is not relevant nor does it dispute the facts stated in PSOF ¶ 15 (which only relate to one provision of the 2011 TAS's).

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.[6]) 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.)

Defendants' Response:
Dispute the characterizations. Although the Standards refer to "guidelines", they are the guidelines of how the City will determine whether to accept or reject proposed advertisements. (PCSOF Ex. Q, Cotton depo 73:19-74:15) Advertisers could still craft their messages, but the standards require that the messages be commercial in nature and comply with the standards. (PCSOF Ex. Q, Cotton depo 73:19-74:15) The 2009 and 2011 Transit Advertising Standards also disallowed advertisements, even which otherwise contained a proposal for a commercial transaction, if the advertisement was false, misleading or deceptive; relate to an illegal activity; advertise or depict use of tobacco or smoking products; advertise or depict the use of spiritous liquor in specified locations; represent violence or anti-social behavior; advertise or depict language or representations which are obscene, pornographic, vulgar, profane, or scatological; represent any nude or semi-nude person or the exposed buttocks of any person; or depict or relate to websites that relate to specified sexual activities and specified anatomical areas as defined in certain criminal statutes or ordinances. (PCSOF Ex. B-C)

Plaintiffs' Reply:

PSOF ¶ 16 should be deemed admitted. Defendants' response does not raise a genuine issue of material fact. Defendants dispute Plaintiffs' "characterization," without explanation as to what that means. Further, even Defendant Cotton called the TAS's

"guidelines" in her deposition testimony, as supported by the cited record. The remainder of Defendants' response (regarding what the 2009 and 2011 "disallowed") is non-responsive argument that does not relate to the statement of fact at issue and should be stricken.

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.)

Defendants' Response:
Disputed. The cited evidence does not support the purported fact in the first sentence. The cited evidence from Cotton shows she testified it must be clear from the entire advertisement (including words and other depictions) that the intent was to propose a commercial transaction. (PCSOF Ex. Q, Cotton depo 68:8-69:13) The cited testimony from Chapple is unclear as to its meaning - Chapple says on its face, which could be a question and not necessarily an answer. (PCSOF Ex. Q, Chapple depo 149:21-24) This is borne out by the ensuing testimony that an express proposal need not be made in an advertisement, as long as one will be understood by the viewer. (Ex. 12, Chapple depo 149:21-150:13)
Admit in considering the words in an ad, the City considers the font, location and placement of the speech. But words are not the only aspect evaluated. 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. (DSOF Ex. 2, Chapple depo 61:1-63:17) (DSOF Ex. 3, Cotton depo 67:4-70:17, 75:4-76:2, 77:5-79:17) (DSOF Ex. 4, Chapple declaration ¶ 11)

Plaintiffs' Reply:

PSOF ¶ 17 should be deemed admitted. Defendants' response does not raise any

[6] PSJExh. C is also in the record as Chapple and Cotton Dep. Exhs. 5.

genuine material fact that advertisements are supposed to be judged by what is on their "face." For example, Defendants dispute that "whether an advertisement contains a commercial transaction must be apparent on the face of an ad," by countering that the commercial transaction "must be clear from the entire advertisement"; that "the City considers the font, location and placement of the speech"; and that "the essential elements including copy words, graphics, pictorials, color, and design," and should be "legible and noticeable." These citations do not dispute that ads are viewed by what is on their face, but rather reinforce Chapple's express testimony that a commercial transaction must be apparent on an ad's face.

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.)

Defendants' Response:
Disputed. The cited evidence reflects that not every single word or phrase by itself need independently propose a commercial transaction, but the words and graphics must all support the proposed commercial transaction. (PCSOF Ex. Q, Chapple II depo 287:5-18) The radio station advertisements with "Jesus Heals" and "AM 1360" (both in the largest font) and "Jesus at Work" and "AM 1360" (both in the largest font) [which is the context of the testimony cited], when viewed in its entirety proposes a commercial transaction in the form of the radio station's Christian broadcasts. (PCSOF Ex. Q, Chapple II depo 287:3-291:1) (PCSOF Ex. J) The ads both also describe the type of radio programming with the words "Life", "Perspective" and Answers". (PCSOF Ex. J) (PCSOF Ex. Q, Chapple II depo 291:7-293:17)

Plaintiffs' Reply:

PSOF ¶ 18 should be deemed admitted. Defendants' response does not actually

dispute the statement but rather *supports* it by agreeing that ads can contain noncommercial speech, as long as the City believes the speech "support[s] the proposed commercial transaction," or when viewed "in its entirety proposes a commercial transaction in the form of the radio station's Christian broadcast."

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.)

Defendants' Response:
Disputed. The cited evidence reflects that not every single word or phrase by itself need independently propose a commercial transaction, but the words and graphics must all support the proposed commercial transaction. (PCSOF Ex. Q, Chapple II depo 287:5-18) The radio station advertisements with "Jesus Heals" and "AM 1360" (both in the largest font) and "Jesus at Work" and "AM 1360" (both in the largest font) [which is the context of the testimony cited], when viewed in its entirety proposes a commercial transaction in the form of the radio station's Christian broadcasts. (PCSOF Ex. Q, Chapple II depo 287:3-291:1) (PCSOF Ex. J) The ads both also describe the type of radio programming with the words "Life", "Perspective" and "Answers". (PCSOF Ex. J) (PCSOF Ex. Q, Chapple II depo 291:7-293:17)

Plaintiffs' Reply:

PSOF ¶ 19 should be deemed admitted. Defendants' response does not actually dispute the statement but rather *supports* it by agreeing that ads can contain noncommercial speech, as long as the City subjectively believes the speech "support[s] the proposed commercial transaction," or when viewed the City views the ad and determines that "in its entirety proposes a commercial transaction in the form of the radio station's

Christian broadcast." Defendants admit that "not every single word or phrase by itself need independently propose a commercial transaction, but the words and graphics must all support the proposed commercial transaction."

20. Neither the 2009 nor 2011 TAS'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.)

Defendants' Response:
Admit, but such fact is not relevant or controlling. Since Plaintiffs are no longer challenging the requirement for the ad to propose a commercial transaction, this purported fact is of no consequence. Without waiving any objection, a public service announcement is just one type of advertisement which does not propose a commercial transaction. (DSOF Ex. 2, Chapple depo 100:15-101:25)

Plaintiffs' Reply:

PSOF ¶ 20 should be deemed admitted. The remainder of Defendants' response should be stricken because it is nonresponsive argument that contradicts the cited record testimony of Defendant Cotton. Defendants' response also incorrectly claims that Plaintiffs are "no longer challenging the requirement for the ad to propose a commercial transaction." Although it is not entirely clear what Defendants mean by that, to be sure, Plaintiffs' are challenging Defendants' application of the TAS's and that the 2011 standards are vague and ambiguous in requiring that ads "adequately display" a "proposed commercial transaction" (Am. Compl. ¶¶ 53-7; Pls.' Reply at 6-10.) While

Defendants argue that "a public service announcement is just one type of advertisement which does not propose a commercial transaction," the material fact is that neither the 2009 nor 2011 TAS's expressly *prohibit* them.

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.)

Defendants' Response:
Admit. The same is also true in the 2011 Transit Advertising Standards

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

Defendants' Response:
Admit that is how the former director defined the term. 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. (DSOF Ex. 2, Chapple depo 88:11-89:18) (DSOF Ex. 3, Cotton depo 76:3-14, 80:10-81:1) (DSOF Ex. 4, Chapple declaration ¶ 12-13)

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

Defendants' Response:
Admit that the determination of what is or is not adequately displayed varies with each proposed advertisement. The general formulation of what is adequately displayed does not change, just each advertisement must be evaluated individually as to all factors. Those factors include the

font, location, and placement of speech, the words used, and the graphics included in the advertisement. See Response to Fact no. 17 and 22 above.

Plaintiffs' Reply:

PSOF ¶ 23 should be deemed admitted. Defendants' response does not raise a genuine issue of material fact. The cited record states, "Q. (By Ms. Cohen) And you have not discussed with Ms. Chapple the factors that she considers in determining whether an advertisement adequately displays a commercial transaction? A. (By Ms. Cotton) We have discussed that many times, but they [the factors] are different every time, every ad is different."

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.)

Defendants' Response:
Disputed. Merely having a company or person's name does not mean an advertisement is proposing a commercial transaction. The City has rejected numerous proposed advertisements that had company names or contact information even from for profit businesses. (DSOF Ex. 4, Chapple declaration ¶ 26 and ex. G)

Plaintiffs' Reply:

PSOF ¶ 24 should be deemed admitted. The cited record testimony of CBS's Colleen McCarthy, who is the City's agent (*see* Defs.' Resp. PSOF ¶ 6 (contract grants CBS "exclusive right[s]")) states, "Q. (By Ms. Cohen)][T]hose standards require that an ad adequately display a commercial transaction, right?. A. (By Ms. McCarthy) Correct.

Q. What is your understanding of the word adequately? A. My understanding is that the ad proposes a commercial transaction in and of itself. So if it's the name of the company or their contact information, that, to me, is an adequate display of a commercial transaction. Q. Is there anything else you would add to that definition? A. No."

25. A commercial transaction could be in a phone number. (McCarthy Dep. 104:11-16.)

Defendants' Response:
Disputed. Merely having a company or person's name does not mean an advertisement is proposing a commercial transaction. The City has rejected numerous proposed advertisements that had company names or contact information. (DSOF Ex. 4, Chapple declaration ¶ 26 and ex. G) Further, the testimony relied upon came in the context of McCarthy, a CBS representative, viewing an advertisement for the Veterans Administration, one with which she had no involvement and which was actually rejected as non-compliant. (PCSOF Ex. Q, McCarthy depo 102:3-105:16) (RY-DSOF Ex. 7, McCarthy depo ex. 6-7)3 Veterans Administration advertisements, with modifications were approved as providing benefits for former military members. (Ex. 14, Chapple depo 145:13-147:22)

Plaintiffs' Reply:

PSOF ¶ 25 should be deemed admitted. Defendants' response consists of unsupported, self-serving argument that is not supported by the cited record.

26. Defendants determine whether a commercial transaction is adequately displayed through a "collaborative effort." (Chapple Dep. 89:21-90:7.)

Defendants' Response:
Admit.

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.)

Defendants' Response:
Disputed. The cited evidence does not support the fact as stated. Chapple testified if speech does not appear to support the commercial transaction, then the ad could be modified or clarification from the advertiser could be sought as to how the speech might comply with the standards. (PCSOF Ex. Q, Chapple depo 94:4-95:23)

Plaintiffs' Reply:

PSOF ¶ 27 should be deemed admitted. Defendants raise no genuine issue of material fact. The cited record states, "Q. (By Ms. Cohen) When do you consider whether language enhances an ad or not? A. (By Ms. Chapple) It depends on the ad. Q. So what do you look at? What is the question you ask yourself in terms of enhancement when reviewing the ad? A. Exactly that; does it enhance the commercial aspect of the ad. Q. And if it does not enhance the commercial aspect of the ad, what do you do? A. We could ask for a modification . . . clarification. It varies. Q. … If a topic or issue does not enhance the commercial transaction, does that mean the ad will not be compliant with the [TAS's]? A. Not necessarily. Q. So what does that mean . . . A. It depends. We have hundreds of ads. It depends on the ad."

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.)

Defendants' Response:
Admit.

29. Language in advertisements that include an "exchange of ideas" is allowable on a case by case basis. (Cotton Dep. 97:20-25.)

Defendants' Response:
Disputed. The cited evidence does not support the purported fact. The cited evidence shows Cotton merely testified she would need to see an ad before she could say an exchange of ideas would ever be allowable by the City in a transit advertisement.

Plaintiffs' Reply:

PSOF ¶ 29 should be deemed admitted. Defendants' response is unsupported argument that raises no genuine issue of material fact. The cited record states, "Q. (By Ms. Cohen) Can an advertiser use language that would exchange ideas if the ideas are to promote the commercial transaction? A. (By Ms. Cotton) I would need to see the ad . . . You have to look at the ad in its totality."

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.[7])

Defendants' Response:
Admit. This review process is part of the current 2011 contract (effective January 1, 2012). (RY-DSOF Ex 9, 2011 Contract, ¶ 4.2(E)(4) - CBS 133)

31. Pursuant to the "Advertising Review Process," CBS has the authority to review proposed advertisements and determine whether they are complaint 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.)

Defendants' Response:
Disputed. Cotton corrected her deposition testimony to clarify that the contract required prior approval of ads by the City before posting. (Ex. 13, Cotton correction pages) CBS has been producing the proposed ad and the contract to the City before posting under the 2008 contract, since at least the end of 2010, and under the newer 2011 contract (effective January 1, 2012). (RY-DSOF Ex 7, McCarthy depo 5:3-6:8, 8:8-10:15, 53:15-19, 54:2-12) The reporting process under the old 2008 contract, since at least the end of 2010, and the current 2011 contract is essentially the same, with the differences being CBS no longer reports about maintenance of the transit facilities and does not need to provide as much information at the end of each month. (RY-DSOF Ex 7, McCarthy depo 50:15-53:13) The current contract requires CBS to produce the advertisement to the City before it is posted. (RY-DSOF Ex 9, 2011 Contract, ¶ 4.2(E)(4) - CBS 132 and ¶ 4.2(E)(5) - CBS 133)

Plaintiffs' Reply:

PSOF ¶ 31 should be deemed admitted. In their response, Defendants incorrectly claim that Defendant Cotton "corrected" her deposition testimony to "clarify" her testimony. In fact, Cotton attempted to add to her testimony, and did so improperly, via her deposition errata sheet. In any event, this so-called clarification does nothing to

[7] PSJExh. I is also in the record as Cotton Dep. Exh. 3.

change or clarify Cotton's testimony on what the City's practice is, regardless of what the contract says. In her errata sheet, Cotton offers a self-described "clarification" to a line of questioning that specifically asked the following questions:

> **Q: (By Ms. Cohen) So an advertiser brings an ad to CBS Outdoor, CBS Outdoor reviews it and determines that it is compliant with the transit standards, and at that point CBS can approve it for posting, is that right?**
> **A: (By Ms. Cotton)Yes.**
> **Q: Need they do anything else after that point other than post the ad?**
> **A: Send it to us.**
> **Q. And when do they send it to you, prior to posting or after its posting, or does it matter?**
> **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.**
> **Q: And we are talking about the kinds of ads where they determine, CBS Outdoor determines comply with City of Phoenix standards, right?**
> **A: They may send it before they post it or after they post it.**

(PSOF ¶ 31 (Cotton Dep. Tr. 60:8-61:4.))

Cotton's errata sheet addresses what the contract purportedly says, not what her and the City's practice *is*. Defendants' response is not only factually incorrect,[8] it appears to be an attempt to completely change Cotton's very clear and unequivocal testimony elicited from six deposition questions, as cited in support of PSOF ¶ 31. Moreover, the "agreement"

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[8] The "agreement" Cotton was ostensibly referring to in her errata sheet, the 2008 agreement (which is also the only agreement Defendants disclosed at that time and the one in effect during Cotton's tenure) does not "require" CBS to send the City ad copy prior to posting but only refers to contracts, and even there says they must only be "made available" to the City prior to posting. The agreement does not require "prior approval"

Cotton referred to in her errata sheet, ostensibly the 2008 agreement (which is also the only agreement Defendants had disclosed at that time and the one in effect during Cotton's tenure) does not "require" CBS to send the City ad copy prior to posting but only refers to contracts, and even there says only that ads must be "made available" to the City prior to posting. The agreement does not require "prior approval" from the City. (Defs.' SJExh. F, Korwin 1235).

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

Defendants' Response:
Disputed. The cited testimony is taken out of context because sometimes an employee will be on vacation, so literally no single employee reviews all advertisements. Decisions by the City on proposed advertisements are collaborative among the employees. See PCSOF fact 26.

Plaintiffs' Reply:

PSOF ¶ 32 should be deemed admitted. Plaintiffs admit that the cited record, without the testimony that follows, makes it appear that the testimony is taken out of context. Plaintiffs also should have included a citation to Cotton Dep. 59:4-6 in support of PSOF ¶ 32, which puts the testimony in the context that there are occasions when CBS will accept an ad and post it without a City employee reviewing it first.

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.)

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from the City. (Defs.' SJExh. F, Korwin 1235).

Defendants' Response:
Admit that is the current system under the 2011 contract (effective January 1, 2012).

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.)

Defendants' Response:
Disputed. CBS has been producing the proposed ad and the contract to the City before posting under the 2008 contract, since at least the end of 2010, and under the newer 2011contract (effective January 1, 2012). (RY-DSOF Ex 7, McCarthy depo 5:3-6:8, 8:8-10:15, 53:15-19, 54:2-12) The reporting process under the old 2008 contract, since at least the end of 2010, and the current 2011 contract is essentially the same, with the differences being CBS no longer reports about maintenance of the transit facilities and does not need to provide as much information at the end of each month. (RY-DSOF Ex 7, McCarthy depo 50:15-53:13) The current contract requires CBS to produce the advertisement to the City before it is posted. (RY-DSOF Ex 9, 2011Contract, ¶ 4.2(E)(4) - CBS 132 and ¶ 4.2(E)(5) - CBS 133) The purported fact is also contradicted by PCSOF 33.

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. (DSOF Ex. 3, Cotton depo 46:4-15) (DSOF Ex. 4, Chapple declaration ¶ 19 and ex. F)

Once CBS submits proposed advertising to the City for review, Marie Chapple and Matthew Heil reviews 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. (DSOF Ex. 2, Chapple depo 53:25-55:19) (DSOF Ex. 3, Cotton depo 40:10-41:1) (DSOF Ex. 4, Chapple declaration ¶ 23)

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. (DSOF Ex. 3, Cotton depo 47:13-48:3, 52:25-53:11, 54:23-55:23, 56:17-57:19 and ex. 3) (DSOF Ex. 4, Chapple declaration ¶ 23)

Plaintiffs' Reply:

PSOF ¶ 34 should be deemed admitted. In their response, Defendants contradict the express deposition testimony of Chapple, after she was specifically asked whether the City's policies and practices require CBS to receive approval prior to posting. (Chapple Dep. 248:23-249:2.) Further, language that requires ads to be made available is not equivalent to a requirement that an ad made available must receive approval prior to posting. Finally, CBS's practice is irrelevant to PSOF ¶ 34, which merely discusses what the *contract* requires.

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)

Defendants' Response:
Admit that when proposed advertisements do not meet the Transit Advertising Standards, CBS has authority to reject them. They are required to reject them. (DSOF Ex. 4, Chapple declaration ¶ 19 and ex. F) (RY-DSOF Ex 9, 2011 Contract, ¶ 4.2(E)(4) - CBS 132)

Plaintiffs' Reply:

PSOF ¶ 35 should be deemed admitted. Defendants' explanation (except "Admit") does not raise any genuine issue of material fact. The cited record in PSOF ¶ 35 states that CBS can reject ads without ever showing them to the City and that CBS does this.

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.)

Defendants' Response:
Disputed. CBS does deal directly with advertisers, but the City also screens all proposed advertisements for compliance with Transit Advertising Standards. CBS has been producing the proposed ad and the contract to the City before posting under the 2008 contract, since at least the end of 2010, and under the newer 2011 contract (effective January 1, 2012). (RY-DSOF Ex 7, McCarthy depo 5:3-6:8, 8:8-10:15, 53:15-19, 54:2-12) The reporting process under the old 2008 contract, since at least the end of 2010, and the current 2011 contract is essentially the same, with the differences being CBS no longer reports about maintenance of the transit facilities and does not need to provide as much information at the end of each month. (RYDSOF Ex 7, McCarthy depo 50:15-53:13) The current contract requires CBS to produce the advertisement to the City before it is posted. (RY-DSOF Ex 9, 2011 Contract, ¶ 4.2(E)(4) – CBS 132 and ¶ 4.2(E)(5) - CBS 133) See also PCSOF 33 and response to PCSOF ¶ 34. The contract between CBS and Plaintiff confirms the City must approve of the advertisement. (DSOF Ex. 4, Chapple declaration ¶ 23) (RY-DSOF Ex 9, 2011 Contract, ¶ 4.2(E)(4) - CBS 132 and ¶ 4.2(E)(5) - CBS 133) This is reflected in the contract Plaintiffs signed with CBS. 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) (DSOF Ex. 5, Plaintiffs' First Supplemental Disclosure excerpts and K37-40)

Plaintiffs' Reply:

PSOF ¶ 36 should be deemed admitted. In their response, Defendants are attempting to dispute Defendant Cotton's testimony with nonresponsive argument about the review process.

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.)

Defendants' Response:
Disputed. The evidence cited (DSOF ¶ 51) does not support the conclusion or purported fact. The cited letter stated:

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 (DSOF ¶ 51) (bold and italics added) (DSOF Ex. 2, Chapple depo 156:22-157:22 and ex. 15)

Plaintiffs' Reply:

PSOF ¶ 37 should be deemed admitted. Defendants' Response is nonresponsive and immaterial because in reviewing proposed ads, CBS outdoor is acting as the City's agent (*see* Defs.' Resp. PSOF ¶ 6 (contract grants CBS "exclusive right[s]."))

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[9]; Chapple Decl. ¶ 27.)

Defendants' Response:
Admit. But the advertisement was subject to the City's approval, which was not given. See Response to PCSOF ¶ 34, 36-37 above.

Plaintiffs' Reply:

PSOF ¶ 38 should be deemed admitted. Defendants' response contains improper argument that does not raise a genuine issue of material fact that disputes that Plaintiffs' ad was approved and posted by CBS.

[9] PSJExh. F is also in the records as Cotton Dep. Exh. 8.

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.[10])

Defendants' Response:
Admit (although the fact as stated is ambiguous - the largest lettering is the Guns Save Lives, not any other language as could be implied from the language used)

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 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.)

Defendants' Response:
Disputed. See the actual advertisement or DSOF 28. Plaintiffs ignore the vast amount of words and sentences which they do not claim to enhance the purported commercial transaction. Defendants also disagree with the characterizations and conclusions stated in the purported fact.

[10] PSJ Exh. G is also in the record as Chapple Dep. Exh. 6 and Cotton Dep. Exh. 8.

Plaintiffs' Reply:

PSOF ¶ 40 should be deemed admitted. Defendants' response should be stricken because it attempts to dispute that the ad complies with the TAS's through immaterial argument. The cited record supports that Plaintiffs' ad contained the items identified in PSOF ¶ 40.

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.)

Defendants' Response:
Admit.

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.)

Defendants' Response:
Chapple reviewed the advertising poster and, after consultation with staff and legal counsel for the City, she 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. (DSOF 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) (DSOF Ex. 4, Chapple declaration ¶ 32)

Plaintiffs' Reply:

PSOF ¶ 42 should be deemed admitted. Defendants raise no genuine issue of material fact that disputes PSOF ¶ 42.

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.)

Defendants' Response:
Disputed. First, Chapple, not Cotton, rejected Plaintiffs' advertisement. See PCSOF ¶ 41 and Response to PCSOF ¶ 42. See also fact no. ___ **[*sic* 31, 35]** (DSOF Ex. 4, Chapple declaration ¶ 32) Admit that "Guns Save Lives" by itself does not propose a commercial transaction, but those words can enhance a proposal for a commercial transaction. The City was willing to allow an advertisement with the words "Guns Save Lives", so those words were not the ultimate problem. See PCSOF ¶ 47.

Plaintiffs' Reply:

PSOF ¶43 should be deemed admitted. Defendants' response raises no genuine issue of material fact and contradicts Defendant Cotton's sworn testimony and Defendants' sworn interrogatory answers that state that Cotton was the final decision maker regarding Plaintiffs' ad, and that Chapple said it "looked like public service announcement."

(PSJExh. E, Resp. Int. 8.) Moreover, Defendants' response that "Chapple, not Cotton, rejected Plaintiffs' advertisement," is immaterial to PSOF ¶ 43.

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.)

Defendants' Response:
Disputed. The evidence cited does not establish that Cotton made the decision that Plaintiffs' advertisement was non-compliant. Chapple made the decision. See PCSOF ¶ 41 (DSOF Ex. 4, Chapple declaration ¶ 32). Chapple reviewed the advertising poster and, after consultation with staff ands 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. (DSOF 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) (DSOF Ex. 4, Chapple declaration ¶ 32) Cotton does not make the decision every day as to whether proposed advertisements comply with the Transit Advertising Standards. (PCSOF Ex. Q, Cotton depo 107:3-108:5)

Plaintiffs' Reply:

PSOF ¶ 44 should be deemed admitted. Defendants' response attempts to revise their own testimony in their interrogatory responses, which state that Cotton was the final decision maker regarding Plaintiffs' ad. (PSJExh. E, Resp. Int. 8.) Defendants' response should be stricken.

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.)

Defendants' Response:
Disputed. 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. (DSOF Ex. 1, Korwin depo 46:7-53:22)

Plaintiffs' Reply:

PSOF ¶ 45 should be deemed admitted. Defendants' response contradicts the express testimony of Defendant Cotton in the cited record (Cotton Dep. 87:22-88:23), and includes unsupported argument, which should be stricken.

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.[11])

Defendants' Response:
Admit.

[11] PSJExh. H is also in the record as Chapple Dep. Exh. 10 and Chapple Decl. Exh. 4, I.

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 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.)

Defendants' Response:
Admit.

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.)

Defendants' Response:
Objection, not relevant since Plaintiffs did not submit any advertisement other than the original one. The City was only asked to evaluate the original advertisement and a modified ad submitted by CBS (which Plaintiffs rejected). See PCSOF ¶ 38-39, 50. Without waiving the objection, disputed. Education can include firearms training.

Plaintiffs' Reply:

PSOF ¶ 48 should be deemed admitted. Defendants' response should be stricken because it contradicts their own admission that Plaintiffs' ad would "not have satisfied the 2009 or 2011 Transit Advertising Standards." DSOF ¶ 44. The remainder of Defendants response is nonresponsive and unsupported argument. (*See e.g.*, "Education can include

firearms training.") Further, Defendants' Reply brief expressly states that the City "suggested it would accept an ad which made clear that the website offered a place to go to get firearms training." (Defs.' Reply 8.) Plaintiffs' ad already did that (*see* PSJExh. G, which states, "Use the TrainMeAz website to find training opportunities, shooting ranges, and classes"), while the City-approved revised ad omitted that language.

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.)

Defendants' Response:
Admit that buried in the small print is language referencing training opportunities, shooting ranges, and classes. But see DSOF ¶ 28 for the entire language of the small printed text in the advertisement.

Plaintiffs' Reply:

PSOF ¶ 49 should be deemed admitted. Defendants' unsupported, non-responsive argument after "Admit" should be stricken.

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.)

Defendants' Response:
Admit Plaintiffs were unwilling to use the modified advertisement submitted by CBS and approved by the City. Dispute the reasons for the refusal. The idea that the City would re-write Plaintiff Company's advertisement was anathema to Korwin and the sponsors. (DSOF Ex. 1,

Korwin depo 54:18-25) Korwin would not agree to remove the small print narrative from any proposed advertisement for Plaintiff Company. (DSOF Ex. 1, Korwin depo 61:2-62:7) (DSOF Ex. 2, Chapple depo ex. 9) Yet, Plaintiffs had used substantially similar advertisements themselves. Plaintiff Company's website shows billboard advertisements without any of the small print text from the non-compliant original advertisement at issue here. (DSOF Ex. 4, Chapple declaration ¶ 38 and ex. J)

Plaintiffs' Reply:

PSOF ¶ 50 should be deemed admitted. Defendants' response fails to raise any genuine issue as to the reason Plaintiffs did not accept Defendants' revised version. Defendants' response also contains immaterial and nonresponsive argument and should be stricken.

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.)

Defendants' Response:
Disputed. The cited evidence shows only that Cotton testified she would confer with her staff who are the technical experts before a final decision would be made about any particular advertisement. The cited evidence shows that Cotton does not make the decision everyday whether any advertisements comply with the Transit Advertising Standards.

Plaintiffs' Reply:

PSOF ¶ 51 should be deemed admitted. Defendants' response consists of unsupported argument contradicts Cotton's testimony in the cited record that states, "A. (By Cotton) I do not have the expertise. It's not part of my responsibility to do this every day." Cotton gave this answer when she was asked to opine on whether an ad she was shown complies with the City's TAS's.

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.)

Defendants' Response:
Objection, not relevant, as Chapple determined that Plaintiffs advertisement was non-compliant, not Cotton. See PCSOF ¶ 41. (DSOF Ex. 4, Chapple declaration ¶ 32) 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. (DSOF 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) (DSOF Ex. 4, Chapple declaration ¶ 32)

Without waiving any objection, disputed. The cited evidence shows only that Cotton testified she would confer with her staff who are the technical experts before a final decision would be made about any particular advertisement. The cited evidence shows that Cotton does not make the decision everyday whether any advertisements comply with the Transit Advertising Standards. (PCSOF Ex. Q, Cotton depo 107:3-108:5)

Plaintiffs' Reply:

PSOF ¶ 52 should be deemed admitted. Defendants' response contradicts their own sworn interrogatory answers where they identified Cotton as the final decision maker on

whether Plaintiffs' ad was compliant with the TAS's. (PSJExh. E, Resp. Int. 8: "Cotton would have given final approval" that Plaintiffs' ad was not compliant.")

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.)

Defendants' Response:
Objection, not relevant, as Cotton decided and determined that the CBS proposed modified advertisement would be acceptable to the City. (DSOF Ex. 2, Chapple depo 126:1- 127:12) (DSOF Ex. 3, Cotton depo 99:17-100:4) The cited evidence shows only that Chapple testified she would confer with her staff before a final decision would be made about any particular advertisement.

Plaintiffs' Reply:

PSOF ¶ 53 should be deemed admitted. Defendants' response raises no genuine issue of material fact that Chapple was unable to look at the City-approved and revised version of Plaintiffs' ad and determine whether it was compliant with the TAS's.

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.)

Defendants' Response:
Disputed. Cotton reviewed the CBS proposed modified advertisement and approved it for the City. (DSOF Ex. 3, Cotton depo 99:17-100:4) Cotton even provided the modified proposed ad to Korwin, but he would not consider it. (DSOF Ex. 1, Korwin depo 46:7-53:22)

Plaintiffs' Reply:

PSOF ¶ 54 should be deemed admitted. The cited record shows that at their depositions Cotton and Chapple were asked to review the City-approved and revised ad and opine whether it complied with the City's TAS's. The cited record establishes that they could not do that.

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.)

Defendants' Response:
Objection, not relevant, as Cotton decided and determined that the CBS proposed modified advertisement would be acceptable to the City. (DSOF Ex. 2, Chapple depo 126:1- 127:12) (DSOF Ex. 3, Cotton depo 99:17-100:4) The cited evidence and that in PCSOF ¶ 53 shows only that Chapple testified she would confer with her staff and legal counsel before a final decision would be made about any particular advertisement.

Plaintiffs' Reply:

PSOF ¶ 55 should be deemed admitted. Defendants' response does not dispute the record evidence that Chapple was unable to look at the City-approved revised ad and determine whether it was compliant with the TAS's.

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.)

Defendants' Response:
Objection, not relevant, as Cotton decided and determined that the CBS proposed modified advertisement would be acceptable to the City. (DSOF Ex. 2, Chapple depo 126:1- 127:12) (DSOF Ex. 3, Cotton depo 99:17-100:4) The cited evidence shows only that Chapple testified she would confer with her staff before a final decision would be made about any particular advertisement. (See also DSOF Ex. 2, Chapple depo 132:14-133:20)

Plaintiffs' Reply:

PSOF ¶ 56 should be deemed admitted. Defendants' response does not dispute the record evidence that Chapple was unable to look at the City-approved revised ad and determine whether it was compliant with the TAS's.

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.)

Defendants' Response:
Objection, not relevant, as Cotton decided and determined that the CBS proposed modified advertisement would be acceptable to the City. (DSOF Ex. 2, Chapple depo 126:1- 127:12) (DSOF Ex. 3, Cotton depo 99:17-100:4) The cited evidence shows only that Chapple testified she would confer with her staff or legal before a final decision would be made about any particular advertisement and she had no opinion to offer about the proposed modified ad.

Plaintiffs' Reply:

PSOF ¶ 57 should be deemed admitted. Defendants' response does not dispute the record evidence that Chapple was unable to look at the City-approved revised ad and determine whether it was compliant with the TAS's.

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.)

Defendants' Response:
Admit.

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.)

Defendants' Response:
Objection, not relevant, as what is or is not a public service announcement is not the standard. The reference to public service announcement is just to a type of non-commercial advertisement. (DSOF Ex. 2, Chapple depo 100:15-101:25)

Plaintiffs' Reply:

PSOF ¶ 59 should be deemed admitted. Defendants' response is nonresponsive and contradicts their own sworn testimony in their response to Interrogatory 9, which states, "Marie Chapple stated that the ad read like a public service announcement." (PSJEX. E.)

Further, PSOF ¶ 59 is relevant because it was the basis for Defendants' rejecting Plaintiffs' ad.

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.)

Defendants' Response:
Objection, not relevant, as what is or is not a public service announcement is not the standard. The reference to public service announcement is just to a type of non-commercial advertisement. (DSOF Ex. 2, Chapple depo 100:15-101:25)

Plaintiffs' Reply:

PSOF ¶ 60 should be deemed admitted. *See* Plaintiffs' replies to Defendants' responses to PSOF 59. Defendants' response contradicts their own sworn testimony found in their response to Interrogatory 9, which states, "Marie Chapple stated that the ad read like a public service announcement." (PSJEX. E.) Further, PSOF ¶ 59 is relevant because it was the basis for Defendants' rejecting Plaintiffs' ad. Plaintiffs' Reply to PSOF ¶ 59 is incorporated herein.

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.)

Defendants' Response:
Admit.

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

Defendants' Response:
Disputed. The cited evidence does not support the purported fact. Instead it showed shows that Cotton testified that when non-compliant ads are brought to the City's attention by CBS they are subject to more scrutiny to try to make them compliant.

Plaintiffs' Reply:

PSOF ¶ 62 should be deemed admitted. Defendants' response misstates the cited record testimony, which states as follows:

> **Q. (By Ms. Cohen) Do you ever recall having a conversation with Mr. Korwin where you discussed ads that come across the department, or that the department comes across that are controversial?**
> **A. (By Ms. Cotton) Yes.**
> **Q. Can you explain what that conversation included?**
> **A. I don't recall specifically.**
> **Q. can you tell me the sum and substance of this conversation?**
> **A. Yes. Generally I told Mr. Korwin that, if our vendor comes across ads that are controversial, that may cause concern, that our policy is for them to review them with the department.**
> **Q. Did you tell Mr. Korwin that you give extra care in reviewing ads that are controversial?**
> **A. I don't recall my exact conversation with Mr. Korwin.**

(PSOF ¶ 63.)

. . .

> **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.)

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.)

Defendants' Response:
Disputed. Cotton denied telling Korwin controversial ads were subject to extra attention. (PCSOF Ex. Q, Cotton depo 110:23-111:1) Cotton initially mentioned she had said if CBS brought them an ad that CBS deemed controversial it would be given extra attention to make it compliant with Transit Advertising Standards, but Cotton clarified her testimony a few lines later than she meant non-compliant and not controversial. (PCSOF Ex. Q, Cotton depo 110:23-111:17)

Plaintiffs' Reply:

PSOF ¶ 63 should be deemed admitted. Plaintiffs' Reply to Defendants' response to PSOF ¶ 62 is incorporated herein.

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

Defendants' Response:
Admit, but Cotton never said anything to CBS or Korwin about controversy, just non-compliancy. (PCSOF Ex. Q, Cotton depo 110:23-111:17)

Plaintiffs' Reply:

PSOF ¶ 64 should be deemed admitted. Plaintiffs' Reply to Defendants' response to PSOF ¶ 62 is incorporated herein.

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.[12])

Defendants' Response:
Objection, not relevant since the ad is not at issue. Without waiving the objection, disputed. The cited evidence shows only that Chapple merely said it is possible a commercial transaction could be proposed depending upon the circumstances of the operation of the entity on whose behalf the ad was posted. No approval of this ad was given by Chapple.

Plaintiffs' Reply:

PSOF ¶ 65 should be deemed admitted. The cited record indisputably establishes that Chapple looked at Chapple Dep. Exh. 18 (PSJExh. L) and testified, "[I]t could propose a commercial transaction . . . . They'll buy your rent, food, electricity, water, bus passes, cell phones, things that are a value and cost money." Chapple answered "yes" when asked whether she thought the ad proposed the commercial transaction. (Chapple Dep. 168:4-170:18.)

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.[13])

Defendants' Response:
Disputed. The cited evidence fails to support the purported fact and fails to acknowledge the full context of the testimony and the ads involved. Fascinations is a store which sells things that have

[12] PSJExh. L is also in the record as Chapple Dep. Exhs. 18, 20 (p. Korwin0021).
[13] PSJExh. N is also in the record as McCarthy Dep. Exh. 8.

to do with romance and love and sexual things. (RY-DSOF Ex. 7, McCarthy depo 107:21-111:14) The "Love is Binding" ad by Fascinations includes the graphics of a corset or brasserie type garment with bindings, which is a type of specific merchandise sold at Fascinations, and the slogan "Its Valentines Day @ Fascinations". (PCSOF Ex. N, p. 1) (RYDSOF Ex. 7, McCarthy depo 107:21-111:14) The "Love is Sensual" ad by Fascinations includes graphics (but which are hard to discern because of xeroxing and so it may also reflect a type of specific merchandise sold at Fascinations), and the slogan "Its Valentines Day @ Fascinations". (PCSOF Ex. N, p. 2) (RY-DSOF Ex. 7, McCarthy depo 107:21-111:14) The "Love is Sweet" ad by Fascinations includes the graphics (but which are hard to discern because of xeroxing and so it may also reflect a type of specific merchandise sold at Fascinations) and the slogan "Its Valentines Day @ Fascinations". (PCSOF Ex. N, p. 3) (RY-DSOF Ex. 7, McCarthy depo 107:21-111:14) The ads with "Love is Binding", "Love is Sensual", and "Love is Sweet" by Fascinations in the overall context promote the sale of the store's goods and constitutes a proposal for commercial transaction at or near Valentine's Day. (RY-DSOF Ex. 7, McCarthy depo 109:21-111:19) The three ads in total, and in full context, propose that viewers go to Fascinations for goods to be purchased and then be given as gifts for Valentine's Day. (PCSOF Ex. N)

Plaintiffs' Reply:

PSOF ¶ 66 should be deemed admitted. Defendants' response does not raise a genuine issue of material fact that Defendants permit speech on an ad that is not limited to that which proposes a commercial transaction and contains self-serving argument that is contrary to the cited record (the deposition testimony of CBS employee Colleen McCarthy).

67. Defendants approve the posting of ads that contain language on the face of the ad that does not propose a commercial transaction. (McCarthy Dep. 110:1-111:19; PSJExh. N (Fascinations ads), pp. 1-3. [14])

Defendants' Response:

[14] PSJExh. N is also in the record as McCarthy Dep. Exh. 8.

Disputed. The cited evidence fails to support the purported fact and fails to acknowledge the full context of the testimony and the ads involved. Fascinations is a store which sells things that have to do with romance and love and sexual things. (RY-DSOF Ex. 7, McCarthy depo 107:21-111:14) The "Love is Binding" ad by Fascinations includes the graphics of a corset or brasserie type garment with bindings, which is a type of merchandise sold at Fascinations, and the slogan "Its Valentines Day @ Fascinations". (PCSOF Ex. N, p. 1) (RY-DSOF Ex. 7, McCarthy depo 107:21-111:14) The "Love is Sensual" ad by Fascinations includes graphics (a day renowned for romance and lovers) and the slogan "Its Valentines Day @ Fascinations". (PCSOF Ex. N, p. 2) (RY-DSOF Ex. 7, McCarthy depo 107:21-111:14) The "Love is Sweet" ad by Fascinations includes the graphics (a day renowned for romance and lovers) and the slogan "Its Valentines Day @ Fascinations". (PCSOF Ex. N, p. 3) (RY-DSOF Ex. 7, McCarthy depo 107:21-111:14) Ads with "Love is Binding", "Love is Sensual", and "Love is Sweet" by Fascinations in the overall context promotes the sale of the store's goods and constitutes a proposal for commercial transaction at or near Valentine's Day. (RY-DSOF Ex. 7, McCarthy depo 109:21-111:19) The three ads in total, and in full context, propose that viewers go to Fascinations for goods to be purchased and then be given as gifts for Valentine's Day. (PCSOF Ex. N)

Plaintiffs' Reply:

PSOF ¶ 67 should be deemed admitted. Defendants' response does not raise a genuine issue of material fact that disputes that Defendants' permit speech on an ad that does not propose a commercial transaction and contains self-serving argument that is contrary to the cited record (the deposition testimony of Colleen McCarthy).

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.[15]) 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.)

Defendants' Response:
Disputed. The cited evidence fails to support the purported fact and fails to acknowledge the full context of the testimony and the ads involved. The radio station advertisement with "Jesus Heals" and "AM 1360" (both in the largest font) and "Jesus at Work" and "AM 1360" (both in the largest font), when viewed in their entirety proposes a commercial transaction in the form of the radio station's Christian broadcasts. (PCSOF Ex. Q, Chapple II depo 287:3-291:1) (PCSOF Ex. J) The ads both also describe the type of radio programming with the words "Life", "Perspective" and "Answers". (PCSOF Ex. J) (PCSOF Ex. Q, Chapple II depo 291:7-293:17)

Plaintiffs' Reply:

PSOF ¶ 68 should be deemed admitted. Defendants' response raises no genuine issues of material fact to dispute the paragraph and contains self-serving argument.

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.)

Defendants' Response:
Objection, not relevant as the radio station ads were not submitted or reviewed under the 2009 standards. (PCSOF Ex. J) Without waiving any objected, disputed. The cited evidence fails to support the purported fact. The cited evidence merely showed that Chapple would have reviewed it with her team before making a final decision on a hypothetical situation if it had been submitted under the 2009 standards.

[15] PSJExh. J is also in the record as Chapple Dep. Exhs. 26, 27.

Plaintiffs' Reply:

PSOF ¶ 69 should be deemed admitted. Defendants' response consists of unsupported argument that does not contradict the cited record that Chapple on her own is not able to look at an ad, even one that has been approved and posted, and determine whether they would be compliant with the former TAS's.

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.)

Defendants' Response:
Objection, not relevant as the radio station ads were not submitted or reviewed under the 2009 standards. (PCSOF Ex. J) Without waiving any objected, disputed. The cited evidence fails to support the purported fact. The cited evidence merely showed that Chapple would have reviewed it with her team before making a final decision on a hypothetical situation if a hypothetical ad had been submitted under the 2009 or 2011 standards.

Plaintiffs' Reply:

PSOF ¶ 70 should be deemed admitted. Defendants' response consists of unsupported argument that does not contradict the cited record that Chapple on her own is not able to look at an ad, even one that has been approved and posted, and determine whether they would be compliant with the former TAS's.

71. "JESUS HEALS," "Life," "Perspective," and "Answers" are not speech that propose a

commercial transaction. (Chapple Dep. 292:25-293:4.)

Defendants' Response:
Disputed. The so called fact is just Plaintiffs' conclusion. The cited evidence fails to support the purported fact and fails to acknowledge the full context of the testimony and the ads involved. The radio station advertisement with "Jesus Heals" and "AM 1360" (both in the largest font) and "Jesus at Work" and "AM 1360" (both in the largest font), when viewed in its entirety proposes a commercial transaction in the form of the radio station's Christian broadcasts. (PCSOF Ex. Q, Chapple II depo 287:3-291:1) (PCSOF Ex. J) The ads both also describe the type of radio programming with the words "Life", "Perspective" and "Answers". (PCSOF Ex. J) (PCSOF Ex. Q, Chapple II depo 291:7-293:17)

Plaintiffs' Reply:

PSOF ¶ 71 should be deemed admitted. Defendants' response contradicts the cited record, Chapple's testimony, that "Jesus Heals" and Life, Perspective and Answers," are words that do not propose a commercial transaction.

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.)

Defendants' Response:
Objection, not relevant as the radio station ads were not submitted or review under the 2009 standards. (PCSOF Ex. J) Without waiving any objected, disputed. The cited evidence fails to support the purported fact. The cited evidence merely showed that Chapple would have reviewed it with her team before making a final decision on a hypothetical situation.

Plaintiffs' Reply:

PSOF ¶ 72 should be deemed admitted. Defendants' response relies on unsupported argument.

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.)

Defendants' Response:
Disputed. As explained in PCSOF Ex. O, the ads with the phrase "Get Connected - Get Inspired" was approved because it asked the viewer of the ad to connect to the radio station to get inspired. In contrast, as explained in the e-mail, the rejected proposed ad language did not engage a viewer to listen to the radio station. (PCSOF Ex. O) Further, without the benefit of the entire ad, it is not possible to fairly evaluate different hypothetical ads.

Plaintiffs' Reply:

PSOF ¶ 73 should be deemed admitted. Defendants' response consists entirely of unsupported, self-serving argument that fails to raise a genuine issue of material fact regarding speech Defendants have approved and rejected.

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).[16])

Defendants' Response:
Admit that organizations who advertise for members who will have to pay dues is a proposed commercial transaction. The Carpenters Union advertisement, which includes the phrase "Build

[16] PSJExh. M is also in the record at Chapple Dep. Exh. 16 (p. 3).

Your Future" to attract members, is an example of an advertisement which proposes a commercial transaction for persons to build their future by joining the union as dues paying members. (PCSOF Ex. M) (PCSOF ¶ 74, 76) (PCSOF Ex. Q, Chapple depo 160:18-161:4)

Plaintiffs' Reply:

PSOF ¶ 74 should be deemed admitted. Defendants' Response does not dispute PSOF ¶ 74 and raises additional facts.

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.)

Defendants' Response:
Admit Chapple is aware, as are most people, that unions charge dues to its members. There is no evidence that Plaintiffs charge dues to members, although it does have sponsors. However, Plaintiffs' advertisement were not directed at getting members or sponsors.

Plaintiffs' Reply:

PSOF ¶ 75 should be deemed admitted. Defendants' response contains self-serving, immaterial argument that is not supported by the cited record and should be stricken.

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. [17])

[17] PSJExh. M is also in the record at Chapple Dep. Exh. 16 (p. 3).

Defendants' Response:
Admit that the entire Carpenters Union advertisement, which includes the phrase "Build Your Future", proposes a commercial transaction for persons to build their future by joining the union, which involves paying dues. (PCSOF Ex. M) (PCSOF ¶ 74, 76) (PCSOF Ex. Q, Chapple depo 160:18-161:4)

Plaintiffs' Reply:

PSOF ¶ 76 should be deemed admitted. Defendants' response contains self-serving, immaterial argument and should be stricken.

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.[18])

Defendants' Response:
Disputed. The purported fact is mostly just Plaintiffs' unsupported conclusion. The quality of the copy of the ad is too poor to make out all of the advertisement clearly. Admit Chapple had concerns about what was being advertised and how the words and graphics portrayed a proposal for a commercial transaction. The ad - which references Downtown Phoenix as the urban heart of Arizona and shows a family having a good time by a building, indicates it is asking people to come to downtown Phoenix where business are located, so it proposes people come to entice them for potential commercial transactions. (PCSOF Ex. K, p. 1) The ad was placed on behalf of the Downtown Phoenix Partnership. (Ex. 15, McCarthy declaration ¶ 7 and ex. C-D) The Downtown Phoenix Partnership places advertisements and operates a website to attract people to the downtown area of Phoenix where businesses, city offices, and county offices are located. (Ex. 16, Krietor declaration ¶ 2-3, 6-8) The ad seeks to attract customers for all of the business entities located in the improvement district. (Ex. 16, Krietor declaration ¶ 6-8 and ex. A) Just like when a shopping mall or district advertises for all businesses, the ad here sought to create the opportunity for customers for a multitude of businesses.

Plaintiffs' Reply:

[18] PSJExh. K is also in the record at Chapple Dep. Exh. 11 (p. 4).

PSOF ¶ 77 should be deemed admitted. Defendants' response is purely unsupported argument, including their contention that they could not read copy of an ad that they: 1) supposedly already reviewed, 2) had copies in their possession, and 3) produced to Plaintiffs in discovery. Defendants' response should be stricken because it relies on immaterial, self-serving testimony from a third party, who was also never previously disclosed to Plaintiffs.

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[19])

Defendants' Response:
Disputed. Admit Chapple testified she would want to review this ad about a pregnancy test with CBS and her staff and legal to see if it was compliant. There is no evidence a commercial transaction is not being proposed, as customers to businesses can be enticed to buy goods or services by free offers. The ad was placed by a medical doctor named Stephen Plimpton located at 515 E. Thomas Rd, Phoenix. (Ex. 15, McCarthy declaration ¶ 6 and ex. A-B) The court can and should take judicial notice (under Arizona Rule of Evidence 201) that according to the Arizona Medical Board website, www.azmd.gov, Charles S. Plimpton, M.D. practices at that location, his phone number is the same one listed in the advertisement, and his listed area of interest is obstetrics and gynecology for which he was board certified. (Ex. 17, Plimpton records) (Judicial Notice) It would not be surprising for an ObGyn doctor to try to attract paying patients (either by cash or through insurance or government provided coverage) by getting them to come in for a free pregnancy test.

Plaintiffs' Reply:

[19] PSJExh. K is also in the record as Chapple Dep. Exh. 11 (p. 5, Bates K1785).

PSOF ¶ 78 should be deemed admitted. Defendants' response should be stricken because it consists of unsupported argument that raises no genuine issue of material fact that disputes the paragraph. Defendants also rely on immaterial, third-party testimony, and after-the-fact explanations that do not contradict the cited record testimony of Marie Chapple.

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.[20])

Defendants' Response:
Admit. However, the advertisement entices viewers with HIV to contact the advertiser by text, phone or website. (PCSOF Ex. K, p. 3) There is no evidence this is not a commercial transaction being proposed. The ad was placed by an entity known as Inclinix. (Ex. 15, McCarthy declaration ¶ 8 and ex. E-F) Inclinix conducts medical research studies. (18, Inclinix records)

Plaintiffs' Reply:

PSOF ¶ 79 should be deemed admitted. Defendants' response should be stricken because it consists of unsupported argument that raises no genuine issue of material fact that disputes the paragraph. Defendants also rely on immaterial, third-party testimony, and after-the-fact explanations that do not contradict the cited record testimony of Marie Chapple.

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).)

Defendants' Response:
Admit. Organizations who charge their members dues or fees (like the union in PCSOF ¶ 74-76 or the better Business Bureau) can advertise by proposing that persons or entities join as a member of the business.

Plaintiffs' Reply:

PSOF ¶ 80 should be deemed admitted. Defendants' response after "Admit" should be stricken because it consists of unsupported argument that raises no genuine issue of material fact that disputes the paragraph and is only self-serving, immaterial argument.

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Respectfully submitted**,**

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[20] PSJExh. K is also in the record as Chapple Dep. Exh. 11 (p. 6).

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