

**Scharf-Norton Center for Constitutional Litigation at the  
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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

**Plaintiffs' Response to Defendants'  
Additional Facts**

*Hon. Mark Brain*

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Plaintiffs Alan Korwin and TRAINMEAZ, LLC, submit the following responses to  
Defendants' Additional Facts.

55. Fascinations is a store which sells things that have to do with romance and love  
and sexual things. (Ex. 7, McCarthy depo 107:21-111:14)

**Plaintiffs' Response:**

**Admit.**

56. 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 “Its Valentines Day @ Fascinations”. (PCSOE Ex. N, p. 1) (Ex. 7, McCarthy depo 107:21-111:14)

**Plaintiffs’ Response:**

**Plaintiffs deny that the cited record states that Fascinations sells corsets or brasserie type garments with bindings. Plaintiffs admit that PSJExh. N, p. CBS 218, a copy of a Fascinations ad produced by CBS to Plaintiffs, states on its face, “Love is . . . *Binding,*” and, “It’s Valentine’s Day @ FASCINATIONS.”**

57. The “Love is Sensual” ad by Fascinations includes graphics (although it is difficult to make out what exactly they show), which may be of a type of merchandise sold at Fascinations, and “Its Valentine’s Day @ Fascinations”. (PCSOE Ex. N, p. 2) (Ex. 7, McCarthy depo 107:21-111:14)

**Plaintiffs’ Response:**

**Plaintiffs deny that the cited records states that the graphics on the “Love is Sensual” ad “may be of a type of merchandise sold at Fascinations.” Plaintiffs admit that PSJExh. N, p. CBS 219, a copy of a Fascinations ad produced by CBS to Plaintiffs, states on its face, “Love is . . . *Sensual,*” and, “It’s Valentine’s Day @ FASCINATIONS.”**

58. The “Love is Sweet” ad by Fascinations includes the graphics (although it is

difficult to make out what exactly they show), which may be of a type of merchandise sold at Fascinations, and “Its Valentines Day @ Fascinations”. (PCSOF Ex. N, p. 3) (Ex. 7, McCarthy depo 107:21-111:14)

**Plaintiffs’ Response:**

**Plaintiffs deny that the cited records states that the graphics on the “Love is Sweet” ad “may be of a type of merchandise sold at Fascinations.” Plaintiffs admit that PSJExh. N, p. CBS 220, a copy of a Fascinations ad produced by CBS to Plaintiffs, states on its face, “Love is . . . *Sweet*,” and, “It’s Valentine’s Day @ FASCINATIONS.”**

59. 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. (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’ Response:**

**Plaintiffs deny that the cited records support Defendants’ statement that the “‘Love is Binding,’ ‘Love is Sensual,’ and ‘Love is Sweet’ [ads] by Fascinations in the overall context promotes the sale of the store’s goods and constitutes a proposal for commercial transaction.” The cited records states that “Love is Binding” is eye-catching and “promotes the commercial transaction of coming in and purchasing the items that can be**

**found at Fascinations,” but the cited record states that the phrases “Love is Sensual” and “Love is Sweet,” do not propose a commercial transaction. Additionally, Defendants’ statement that, “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,” is not supported by the cited record, as the cited record is simply copies of the ads. (See PSJExh. N.)**

60. 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 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’ Response:**

**Plaintiffs deny that the cited record supports the statement that the words “JESUS HEALS” and “JESUS at WORK” propose a commercial transaction. The cited record states that “‘JESUS at WORK’ is the content of the radio station, what it sell. . . . to attract listeners to the content.” (Cotton Dep. 291:2-24.) According to the cited record, Cotton refused to answer the question and also said she could not answer the question without “tak[ing] it through a review process” as to whether the phrases “JESUS HEALS” and**

**“LIFE, PERSPECTIVE, and ANSWERS” propose a commercial transaction. (Cotton Dep. 292-21-294:13.)**

61. The Carpenters Union advertisement, which includes the phrase “Build Your Future” to attract members, is an example of an advertisement which proposes a commercial transaction whereby persons can build their future by joining the union as dues paying members. (PCSOE Ex. M) (PCSOE ¶ 74, 76) (PCSOE Ex. Q, Chapple depo 160:18-161:4)

**Plaintiffs’ Response:**

**Plaintiffs admit that the cited record shows that Chapple believes that PSJExh. M is compliant with the City’s transit advertising standards because of her own personal beliefs and knowledge about unions and that she believes the phrase “Build your future” indicates that “carpenters are people who are in an employment capacity” and that the organization is “a union and unions are membership organizations that have dues-paying members.”**

62. In 2011, effective January 1, 2012, CBS and the City entered into a new contract regarding advertising on the City’s transit furniture. This is the current contract. The current contract provides that CBS “on behalf of the City of Phoenix (CITY) will manage the out of home advertising program for the CITY’s transit advertising furniture.” (Ex. 9, 2011 Contract, ¶ 4.1 - CBS 128) The current contract provides that the purpose of the program is to generate revenue for the City (¶ 4.1 - CBS 128 and ¶ 4.2(E)(4) - CBS 132); the work will under the contract consists of the management of advertising, production, and installation of advertising

materials and ensuring the display space is in satisfactory condition (§ 4.1 - CBS 129); and for monthly review or as often as needed to discuss any previous or upcoming issues (§ 3.16 - CBS 0123). (Ex. 9, 2011 Contract)

**Plaintiffs' Response:**

**Plaintiffs admit that the contract, which took effect January 1, 2012, speaks for itself, but deny that the cited record establishes when the contract was entered into.**

63. The current 2011 contract (effective January 1, 2012) provides that CBS “shall use the current Transit Advertising Standards as a basis for accepting advertising content for posting.” (§ 4.2(E)(4) - CBS 132) The current contract also provides: “It is the intent of the CITY that all transit advertising panels on City transit furniture are non-public forums and are to be set aside for commercial advertisements or for transit information as provided by the CITY.” (§ 4.2(E)(4) - CBS 132) Any advertisement that may not meet Transit Advertising Standards (which are attached as Exhibit A to the current contract) “shall be submitted to the CITY for review and approval by the CITY and the CITY shall be given three (3) working days to respond.” (§ 4.2(E)(4) - CBS 132) If needed, the City’s response time can be extended by the City. (§ 4.2(E)(4) - CBS 132) The current contract also incorporates the Advertising Review Process (attached as Exhibit B to the current contract). (§ 4.2(E)(4) - CBS 133) The current contract also provides that CBS “shall submit all advertisement copy and client contracts to the CITY before installation of such advertisements.” (§ 4.2(E)(5) - CBS 133) The City can require

CBS to remove within 24 hours written or verbal notice any advertisements which “is in violation of CITY’s Transit Advertising Standards.” (§ 4.2(E)(7) - CBS 133) (Ex. 9, 2011 Contract)

**Plaintiffs’ Response:**

**Plaintiffs admit that the contract speaks for itself.**

64. Under the current 2011 contract (effective January 1, 2012), the City has approved gun show advertisements. (Ex. 8, CBS Advertisement records)

**Plaintiffs’ Response:**

**Plaintiffs deny that the cited records supports the statement that the City approved the ads in DSJExh. 8. Plaintiffs admit that CBS produced these documents to Plaintiffs (not Defendants) but deny they are material to any issue in this case.**

**DATED: June 19, 2012**

**RESPECTFULLY SUBMITTED,**

/s/ Diane S. Cohen

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