IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

VICKEE BYRUM et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. A07CA344 LY**
	§	
GORDON E. LANDRETH, et al.	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION MOTIONS

The government carries a heavy burden when it censors speech. Defendants cannot meet that burden because the speech at issue in this case is not misleading and Texas' interior design Registration Law fails every prong of the Supreme Court's *Central Hudson* test. Several courts have considered the same issue presented here and they have all rejected this kind of occupational speech licensing. By contrast, Defendants have not cited a single case that genuinely supports their position.

This response makes three basic points. First, the bulk of Defendants' summary judgment evidence is inadmissible and irrelevant. Second, Defendants' contention that it is misleading for people who lawfully perform interior design services in Texas to refer to themselves as "interior designers" simply because they are not licensed to use that term is both circular and demonstrably false. Finally, the Registration Law fails each and every prong of the *Central Hudson* test and flies in the face of unanimous legal authority.

I. OBJECTIONS TO DEFENDANTS' SUMMARY JUDGMENT EVIDENCE

There are two basic problems with Defendants' summary judgment evidence: first, the "ICR study" upon which they principally rely is inadmissible and irrelevant; second, few if any of the "facts" set forth in the affidavits of Gordon Landreth and Gene Green are based on personal knowledge as required by Fed. R. Civ. P. 56(e) and Fed. R. Evid. 602. Plaintiffs therefore object to the ICR study in its entirety and to the specific portions of the Landreth and Green affidavits and exhibits listed below. *See Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1003 (9th Cir. 2002) (motion to strike unnecessary so long as objecting party "adequately put[s] the district court on notice" of its objections).

A. Defendants' ICR Study Is Not a Business Record and Does Not Meet the Necessary Criteria for the Admission of Survey Evidence.

Surveys like the ICR study attached as Exhibit C to Defendants' summary judgment brief present significant concerns regarding accuracy, reliability, and fairness. Courts have therefore developed specific criteria for the admission of survey evidence, each of which must be met for the survey to be admissible. The ICR study meets none of them.

As a threshold matter, the ICR study is inadmissible hearsay because it does not fall within the Rule 803(6) exception for "business records." First, there has been no showing that commissioning surveys of this kind is genuinely part of the "regularly conducted business activity" of the Texas Board of Architectural Examiners (TBAE). To the contrary, far from being generated in the regular course of TBAE's business, it seems clear that the ICR survey was commissioned specifically for the purpose of defending this lawsuit. That presents a second problem, because courts have consistently interpreted Rule 803(6) to exclude documents created for litigation. *E.g.*, *U.S. v. Fendley*, 522 F.2d 181, 184 (5th Cir. 1975) (business records must be "created for motives that would tend to assure accuracy"—"preparation for litigation . . . is not

such a motive"); *U.S. v. Gwathney*, 465 F.3d 1133, 1141 (10th Cir. 2006) ("[i]t is well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business"); *Clark v. Los Angeles*, 650 F.2d 1033, 1037 (9th Cir. 1981) ("a document prepared for purposes of litigation is not a business record because it is lacking in trustworthiness"). Finally and relatedly, the Rule 803(6) exception does not apply where "the method or circumstances of preparation" of the document "indicate lack of trustworthiness." That is certainly the case here, where the ICR study was conducted "under contract" with the American Society of Interior Design (ASID), a private industry group devoted to legislating[1] its competitors out of business by enacting its own membership credentials into law, as it managed to do in Texas.[2] Shortly after this lawsuit was filed, ASID's chief representative in Texas, Marilyn Roberts, sent an email to her membership with a subject line that read "**help us defend our Title Act against lawsuit**" and advised recipients that in defending the Registration Law, TBAE is "**fighting for us and we need to give them ammunition!**"[3] *Cf. Hoffman v. Palmer*, 129 F.2d 976, 991 (2nd Cir. 1942) (finding an engineer's report prepared after an accident and with knowledge of impending litigation to be "dripping with motivations to misrepresent").

The ICR study is inadmissible for another reason besides hearsay. Surveys of public perception are frequently used in trademark and other intellectual property cases, and the standards for admitting them are well established. Thus, admissibility depends on "foundation evidence" (normally supplied by someone who actually conducted the survey) which shows that:

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[1] *See, e.g.*, Exh. 1 at 1(ASID levies $15-per-member annual lobbying assessment and is "proud to spearhead this critical legislative effort for our profession").

[2] *Compare, e.g.*, Exh. 2 ("Professional Membership" in ASID requires accredited course of education, specific work experience, and passage of the NCIDQ exam) *with* 22 Tex. Admin. Code §§ 5.31(a), § 5.51 (same requirements to be licensed interior designer in Texas).

[3] Exh. 3 (email from M. Roberts ["ASID_TEXAS"] to txasid@airmail.net) (emphases added). Because it is being offered to challenge the admissibility of evidence proffered by the Defendants, this document is properly reviewable under Fed. R. Evid. 104(a) notwithstanding any potential evidentiary objections. Also, the document is not hearsay because it is being offered for the *significance* of the matters asserted, not their truth.

> (1) the "universe" [of survey respondents] was properly defined, (2) a representative sample of that universe was selected, (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner, (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted, (5) the data gathered was accurately reported, (6) the data was analyzed in accordance with accepted statistical principles and (7) objectivity of the entire process was assured. *Toys R Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y.1983) (paraphrasing *Manual for Complex Litigation*, 116 (5th Ed. 1981)).

Defendants' proffer establishes none of those things, and in fact there are good reasons to be skeptical on all seven points, particularly given the extraordinarily leading tone of some of the questions.[4] Other problems with the ICR study include the absence of any information about how participants were selected, the qualifications of those who constructed the survey, the order and manner in which questions were asked, who performed the interviews, and whether interviewers knew about this lawsuit or the purpose for which the study was to be used.

Finally, besides being inadmissible, the ICR study is irrelevant because it fails to ask the one question that might actually matter in this case: namely, whether people expect that someone using the term "interior designer" possesses a particular set of credentials or qualifications, and if so, what. One can only imagine why the study would omit such a simple and obvious question.

B. Most of the "Facts" Set Forth in the Landreth and Green Affidavits Are Not Based on Personal Knowledge and Are Therefore Inadmissible.

The affidavits of Gordon Landreth and Congressman Gene Green are filled with assertions regarding matters about which it is clear neither witness has any personal knowledge. Also, Mr. Landreth's affidavit has three attachments that each present evidentiary concerns: Exhibit 1, the legislative "Interim Report," is admissible in principle, but it is incomplete (every other page is missing) and contains substantial amounts of inadmissible hearsay; Exhibits 2 and 3 are unsworn letters that are plainly inadmissible hearsay. Finally, Mr. Green's affidavit is

[4] *See, e.g.*, Defs.' SJ Br. Exh. C, Item LS-4 (referring to "appropriate" qualifications for interior designers).

largely couched in terms of his "intentions," "purposes," or "beliefs," none of which are relevant to any issue in this case. Rather than analyzing the affidavits line-by-line, Plaintiffs have confined their objections to the following potentially material assertions:

1. *Deceptive/Misleading speech*. Messrs. Landreth and Green both claim it is misleading for nonlicensees who perform services that are defined by Texas statute as "interior design" to hold themselves out as "interior designers." To the extent that assertion is based on anything more than circular reasoning, they offer no foundation for it nor any basis to conclude that either has any personal knowledge about the matter. Plaintiffs therefore object to Landreth Aff. ¶¶ II.3-4, III.2; Green Aff. ¶ XII.3.[5]

2. *Public benefit/interest*. Messrs. Landreth's and Green's assertions about the supposed public benefits of the Registration Law consist entirely of "ultimate or conclusory facts and conclusions of law," which are insufficient to defeat (or support) a motion for summary judgment. *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir.1997). Also, their statements about the supposed public benefits of the Registration Law are plainly not based on personal knowledge and, in the case of Mr. Green, are largely expressed in terms of his intentions, purposes, or beliefs, which are irrelevant. Accordingly, Plaintiffs object to Landreth Aff. ¶¶ IV.7, V, VI, VIII (all but the first sentence), IX-XIII; Green Aff. ¶¶ VII-XIII.

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

A. Defendants' Argument About "Misleading" Speech Is Both Circular and False.

Defendants claim it is "inherently misleading" for Plaintiffs to refer to themselves as interior designers because the law says they may not use that term without a license, which none of them have. Defs.' SJ Br. at 2, 5-17. Of course, that is a textbook example of circular reasoning. As Daniel Webster famously put it: "We come before the Court alleging the law to be

[5] The number after the decimal point indicates the specific sentence in the paragraph to which Plaintiffs object.

void and unconstitutional; they stop the inquiry by opposing to us the law itself. Is this logical?" *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 242 (1827).

The Fifth Circuit recently rejected a similarly circular argument in a commercial speech case involving bail bondsmen in Houston. *Pruett v. Harris County Bail Bond Bd.*, No. 05-20714, 2007 WL 1632697 (5th Cir. June 7, 2007). Seeking to defend a statute that prohibited solicitation by bail bondsmen under certain circumstances, the county argued that: (a) the kind of solicitation at issue was already prohibited under a different statute governing solicitation generally, therefore (b) the First Amendment did not apply, because (c) unlawful conduct is not protected by the First Amendment. *Id*. at *4. The Fifth Circuit dismissed that argument as "bootstrapping" and explained that "[t]he threshold inquiry asks whether the speech is misleading or the product or service spoken about is illegal" and found that "*here the speech isn't misleading and the . . . service itself*—bail bonding—*isn't illegal*." *Id*. (emphasis added). The italicized portion of that quote maps perfectly onto the present case: (a) it is perfectly lawful for Plaintiffs to practice interior design in Texas; (b) they *do* in fact perform interior design services; therefore (c) it is not "misleading" for them to *say* that they do.

Additional support for the proposition that it is not misleading for nonlicensees like the Plaintiffs to call themselves "interior designers" comes from a remarkable source: the American Society of Interior Design (ASID). ASID has a website that provides, among other things, a referral service to help people find ASID-affiliated interior designers in their area. Thus, if one goes to ASID's homepage (www.asid.org) and places the cursor over the words "Find a Designer" in the left-hand margin, a drop-down menu appears that offers various ways of locating "designers" in any given state. Click on "View Designers Websites," and a map of the United States appears. Click on Texas, and a list of 121 websites appears under the heading

"View Designers Websites—Search Results for Texas." Comparing that list against the list of Texas-licensed designers maintained by TBAE,[6] one finds that 22 of those 121 businesses have *no state-licensed interior designer*.[7] An even more flagrant example of ASID holding out its unlicensed members as full-fledged "interior designers" in Texas may be seen by going to ASID's homepage, placing the cursor on "Find a Designer," and clicking on "Designer Referral Service." Type "Austin, Texas" into the respective city/state fields, put "500 miles" in the distance field, then click the box by "terms and conditions" and "search." This produces a list of 52 individuals under the heading "**Interior Designer**," 21 of whom are unlicensed.[8]

Consider this in light of the Defendants' assertion that "[s]ince the term 'interior designer' under Texas law means a certain level of training and education, as well as passage of an examination and the receipt of a license, anybody who has not met those standards and is advertising as an 'interior designer' is engaging in misleading advertising." Defs.' SJ Br. at 13. If that statement is true, then ASID has been "misleading" the people of Texas by holding out its unlicensed members as "interior designers" with no disclaimer about their unlicensed status. Fortunately for ASID, however, the statement is not true, for the simple reason that "interior designer" is a purely descriptive term—it is not a formal title that connotes some generally recognized level of education or training the way "medical doctor," "attorney," or "architect" do. Thus, anyone who performs interior design work is by definition an "interior designer," both in

[6] http://www.tbae.state.tx.us/PublicInfo/interiordata.xls.
[7] Exh. 4 (businesses with no Texas-licensed interior designer are highlighted in grey). The order in which the businesses are listed changes regularly, presumably to ensure that each business gets its turn at the top of the list. Other than the source text at the top of the first page and grey-highlighting, which were added by Plaintiffs, Defendants have stipulated that the pages attached as Exhs. 4 and 5 are accurate printouts of web pages in question.
[8] *See* Exh. 5 (nonlicensees highlighted in grey).

the mind of the average consumer and apparently—notwithstanding its trumped-up ICR study—in ASID's view as well.[9]

B. Texas' Interior Design Law Fails the *Central Hudson* Test.

Because the speech at issue here is neither fraudulent nor misleading, the first question under *Central Hudson* is whether Texas has a "substantial" interest in regulating who may refer to themselves as "interior designers." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Defendants argue that Texas has a substantial interest in regulating professions and protecting consumers from misleading information. Defs.' SJ Br. at 17. While that may be true as a general matter, neither concern is implicated here. First, Texas does not regulate who may practice interior design, sets no specific performance standards for interior design work, and, apart from censoring their speech, leaves interior designers completely alone. Accordingly, Texas has shown no interest—let alone a "substantial" interest—in regulating the actual practice of interior design. Second, given the incredibly broad definition of "interior design" under Texas law,[10] it is difficult to imagine how consumers could possibly be "misled" about whether a particular person was offering or performing interior design services; accordingly, there is no government interest to advance, let alone a "substantial" one.

Because the state has no legitimate interest in dictating who may use the words "interior design" or "interior designer" in the first place, the second and third prongs of *Central Hudson*—direct advancement of the stated public purpose and reasonable ends-means fit—obviously

[9] *See supra* nn. 6-8 and accompanying text; *see also* Pls.' SJ App. Exh. 8, Mozersky Decl. ¶ 6 (Plaintiff Joel Mozersky has been named Austin's best "interior designer" for the past two years by Citysearch website, despite the fact that he is not a licensed interior designer).

[10] Texas law defines interior design as "the: (A) identification, research, or development of a creative solution to a problem relating to the function or quality of an interior environment; (B) the performance of a service relating to an interior space . . . ; or (C) preparation of an interior design plan, specification, or related document about the design of a non-load-bearing interior space." Tex. Occ. Code § 1051.001(3).

cannot be met because there is no genuine public policy to be advanced, whether directly or otherwise. But even if use of the term "interior designer" did present some genuine public policy concern (which it does not), a more "direct" and "reasonable" way of addressing it would be to do what fourteen other states do, namely, establish a subcategory of interior designers with particular credentials and give them a special name—"licensed," "registered," or "certified"—and then regulate the use of *that* terminology. *See* DESIGNING CARTELS at 6, Table I (listing states by style of regulation). Defendants' assertion that this approach would be "*more* misleading than the current law," Defs.' SJ Br. at 22, fails because it is wholly unsupported and counterintuitive to say the least. Moreover, it is an empirical claim that could easily have been tested—but notably was not—by the ICR study.

C. Relevant Case Law Uniformly Favors the Plaintiffs.

Plaintiffs cited four cases in their opening brief that deal with the precise issue here—namely, the constitutionality of laws forbidding people from accurately describing the work they lawfully perform. Pls.' SJ Br. at 5-6. Rather than addressing the merits of those cases, Defendants simply dismiss them out of hand because they are from other jurisdictions and have "no precedential value [for] this court." Defs.' SJ Br. at 9. Contrary to the Defendants' suggestion, however, it is quite common for courts presented with a novel legal issue and no controlling authority to consider cases from other jurisdictions. *E.g.*, *Feld v. Zale Corp.*, 62 F.3d 746, 751 n.14 (5th Cir. 1995) ("Very little Fifth Circuit case law exists concerning [the relevant issue]. For this reason, we have looked to cases in other circuits and utilized the other circuits' reasoning where we have found it persuasive."); *United States v. Tadlock*, 399 F. Supp.2d 747, 751 (S.D. Miss. 2005) ("The issue has not been addressed by the United States Court of Appeals

for the Fifth Circuit. This Court must therefore look to persuasive guidance from other jurisdictions.").

By contrast, the cases cited by Defendants are all distinguishable, starting with *Maceluch v. Wysong*, 680 F.2d 1062 (5th Cir. 1982), where the question was whether osteopaths (D.O.s) should be allowed to call themselves "M.D.s." Finding important differences between D.O.s and M.D.s, both in training and public perception, the Fifth Circuit persuasively rejected the osteopaths' First Amendment claim. *Id*. at 1066, 1069. Similarly, in *Accountant's Society of Virginia. v. Bowman*, 860 F.2d 602, 606-07, the Fourth Circuit found no First Amendment right for non-CPA accountants to call themselves "*public* accountants" because their non-CPA status significantly limited the scope of the duties they could perform—including specifically their ability to make public representations about their clients' finances—and thus the possibility of deception was "self-evident." Finally, in *American Academy of Pain Management v. Joseph*, 353 F.3d 1099 (9th Cir. 2004), the Ninth Circuit upheld a California law that provided minimum standards for medical professionals' use of the term "board certified" based on the government's obvious, substantial, and well-documented interest in preventing terms like "board certified" from being co-opted by *ad hoc*, fly-by-night "certifying" entities. *See id*. at 1104-05, 1109-10 (citing *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 (1990)).

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment, deny Defendants' motion for summary judgment, and enjoin the Defendants from enforcing Texas' Interior Design Registration Law.

DATED this 3rd day of July, 2007.

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I hereby certify that on the 3rd day of July, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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