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.	§	

UNOPPOSED MOTION FOR LEAVE TO FILE SURREPLY AND CONDITIONAL MOTION FOR LEAVE TO TAKE DISCOVERY PURSUANT TO RULE 56(f)

The parties have filed cross-motions for summary judgment regarding the constitutionality of a Texas statute that censors the speech of interior designers. On July 16, 2007, Defendants submitted a reply brief that included four new affidavits, three new witnesses, and dozens of pages of new documents. Plaintiffs initially moved to strike that submission because federal courts in Texas have made clear that parties may not attempt to cure defective summary judgment motions by submitting new evidence with their reply, as the Defendants did in this case. *See, e.g.*, *Spring Indus., Inc. v. Am. Motorists Ins. Co.*, 137 F.R.D. 238, 239 (N.D. Tex. 1991). This Court dismissed Plaintiffs' motion to strike without prejudice because Plaintiffs did not make clear the fact that they had made a good faith effort to resolve the disputes set forth in the motion as required by Local Rule CV-7, which in fact they had. While they still object to the untimely submission of new evidence with Defendants' reply, Plaintiffs believe it would be more efficient for all concerned to forego their motion to strike and simply explain why the latest submissions are inadequate to support Defendants' considerable burden in this case.

Plaintiffs' counsel has conferred with Defendants' counsel regarding this motion pursuant to Local Rule CV-7. Defendants' counsel does not oppose the filing of Plaintiffs' surreply; however, she does not agree that Plaintiffs would need to take discovery pursuant to Fed. R. Civ. P. 56(f) should the Court determine that Defendants' factual assertions—which Plaintiffs dispute—are relevant to the resolution of the cross-motions for summary judgment.

I. SURREPLY

Plaintiffs lawfully perform statutorily-defined "interior design" services in Texas. They consider themselves to be—and their work establishes that they are—"interior designers." Even though perfectly accurate, state law forbids Plaintiffs from using those terms because they are not licensed to do so. To justify that censorship of Plaintiffs' commercial speech, Defendants must show either that: (i) Plaintiffs' use of the words "interior design" or "interior designer" is misleading; or (ii) the state has a *substantial* interest in preventing Plaintiffs from using those terms that is *directly and materially* advanced by the Registration Law in a manner that is *reasonably proportionate* to the interests served. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980)). Defendants have done neither.

Regarding the first point, Defendants' submissions present two basic shortcomings. First, while they *assert* it on nearly every page of their briefs, Defendants offer no actual evidence that anyone has ever been misled by the use of the terms "interior design" or "interior designer." Second, Defendants never even explain exactly what "misleading" even means in this context. Does it simply mean suggesting that one is officially licensed when one is not? *E.g.*, Defs.' Cross-Motion for SJ at 10-13. If so, that argument is circular and thus invalid because it *presupposes* the validity of the regulation instead of justifying it. Plfs.' Resp. at 5-6. If

"misleading" means something else (i.e., suggesting that the speaker possesses a particular set of credentials that in fact she does not), the Defendants offer no support for the proposition that consumers hearing the word "interior designer" tend to assume the speaker in fact possess some particular set of credentials—let alone the credentials established for licensure by the Registration Law. Thus, the Defendants have not even offered a coherent explanation for their assertion that the speech at issue here can be misleading, let alone evidence that it actually is.

Regarding the second point, Defendants have not me their burden under *Central Hudson* because they have presented no credible evidence that the unregulated speech of interior designers presents any threat of harm or confusion to the public. Those points are addressed in turn below.

A. The Speech at Issue Is Not Misleading.

Throughout their papers Defendants argue that it would be "misleading" for Plaintiffs to use the terms "interior design" and "interior designer" to describe themselves, even though they have conceded that Plaintiffs lawfully perform interior design services in Texas.[1] But a careful reading of their summary judgment submissions shows the Defendants have not offered a shred of evidence to support that assertion.

1. *Amended Affidavit of TBAE Chair Gordon Landreth*. Despite having been rewritten in a futile (and improper) attempt to correct defects identified by the Plaintiffs in their response brief, Mr. Landreth's "Amended Affidavit" still does not provide any support for the Defendants' arguments because it reveals no personal knowledge about anyone being misled by

[1] *See, e.g.*, Defs.' Answer at ¶ 13 (admitting that anyone may practice interior design in Texas but only licensees may use the terms "interior design" or "interior designer"); ¶ 37 ("Defendants admit that the [Registration Law] prohibit[s] unlicensed persons from using the title 'interior design' and the term 'interior design' but do not prohibit the performance of the same services that registered interior designers perform"). *See generally* Defs.' Cross-Motion for SJ (not disputing any of the factual assertions in Plaintiffs' summary judgment papers, including Plaintiffs' assertions that "[a]ll four of the Plaintiffs perform interior design work in Texas, and each Plaintiff considers him- or herself to be an interior designer," Pls.' Motion for SJ at 4 ¶ 8).

the use of the terms "interior design" or "interior designer." Instead, Mr. Landreth simply offers his gloss on select portions of the legislative history together with a series of purely conclusory suppositions and "beliefs" about the legislature's purpose in enacting the Registration Law.[2] Such "ultimate or conclusory facts and conclusions of law" are not competent summary judgment evidence, *Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997), and they certainly do not support Defendants' assertion that it can be "misleading" for people who lawfully perform statutorily-defined interior design services in Texas to use that term to describe what they do.

2. *Interim Report*. The Interim Report of the House Committee on State Affairs attached as Exhibit 1 to Mr. Landreth's affidavit likewise contains no evidence that anyone has ever been misled by another's use of the term "interior designer." Indeed, it does not even contain any *hearsay* statements to that effect. Instead, the report merely provides a summary of arguments for and against a proposed "title act" from which Defendants and their witnesses have cherry-picked a handful of statements they deem helpful while ignoring others that are not.[3]

3. *Transcript from Aug. 15, 1990, Hearing on Architectural Decisions*. The only mention of interior design in the entire 29-page transcript attached as Exhibit 2 to Mr. Landreth's amended affidavit occurs on pages 9-12, where an unidentified "Mr. Wells" from the Board of Architectural Examiners begins by telling the committee that "*we don't find a great harm to the public* as far as this unregulated community here [interior designers]." *Id*. at 10 (emphasis

[2] *E.g.*, Defs.' Reply Exh. B ¶¶ IV ("the Board *construes* the use of ['interior design' and 'interior designer'] as misleading and deceptive to the public"); VI ("I *believe* the law encourages design professionals to voluntarily acquire" greater skills); IX ("The Board *believes* that the Registration Law restricts misleading and deceptive speech") (emphases added).

[3] For example, the Interim Report notes that "[t]he *common perception of the public* is that an interior designer is the person you consult for help in making your environment more aesthetically pleasing." The Report also says it is "clear that persons may hold themselves out to be interior designers or interior decorators *without regard to their training or experience*," and that "[i]t is also clear that the title interior designer *includes persons performing vastly different and wide ranging services*." Defs.' Reply Exh. B.1 at 13-15 (emphases added).

added). There follows a largely incomprehensible exchange between Mr. Wells and Senator Green in which neither of them says anything about anyone being "misled" by the unregulated use of the words "interior design" or "interior designer." *Id*. at 10-12.

4. *Affidavits and Letters of Alan Fundy and Carole Zoom*. The affidavits and letters from Mr. Fundy and Ms. Zoom attached as Exhibits 3 and 4 to Defendants' reply brief likewise say nothing about anyone being misled by use of the words "interior design."

5. *ICR Study*. Defendants first tendered the ICR study as a Rule 803(6) business record, which it was not. Having added a brand new sponsoring witness and affidavit in their reply brief, Defendants now present the ICR study as a "reliable survey compiled in accordance with accepted survey methods,"[4] which it emphatically is not.

- The study is "constructively biased" because all of the survey questions address the issue of licensing from one perspective only; the survey does not ask questions about licensing from other perspectives, such as consumer cost, barriers to entry, or a cartelization effect, which might well have changed the results.[5]

- The study does not define "licensure," which lowers the validity and reliability of the survey results; in particular, the survey fails to advise respondents that nonlicensees in Texas are legally entitled to perform the exact same services as licensees.[6] Indeed, taken together, survey questions LS-2 and LS-4 strongly imply that there is something devious or improper about nonlicensees (i.e., those who do not possess what the survey suggestively deems "appropriate qualifications") even offering the same kinds of services as licensees, which is of course perfectly lawful in Texas.

- The study's new sponsor, John De Wolf, states in his affidavit that he "reviewed"—*but did not write*—the survey questions. There is no indication of who did write the questions, whether they were properly trained to do so, and whether they tested or validated the questions before including them in the survey, as would normally be done. This presents obvious concerns regarding reliability and bias.[7]

[4] Defs.' Reply at 2.
[5] Declaration of Dick Carpenter, Ph.D, Exh. 1 ¶ 5. Dr. Carpenter is Director of Strategic Research for the Institute for Justice and has over ten years of experience constructing, analyzing, and teaching about surveys of this kind. *See id*. ¶¶ 2-3.
[6] *Id*. ¶ 5.
[7] *See id*. ¶ 6.

- The ICR study was paid for by the American Society of Interior Design (ASID),[8] which continues to hold out its unlicensed members in Texas as "interior designers" while simultaneously lobbying for (and helping defend in court) legislation that forbids precisely that practice.[9] ASID's *actual conduct* on this point is far more persuasive than its litigation-crafted "study."

Other problems with the ICR study are set forth in the attached declaration of Dick Carpenter, Ph.D., which is attached hereto as Exhibit 1.

But even apart from its numerous technical deficiencies, the ICR study does not show what the Defendants claim it does—namely, that the term "interior design" is misleading to people in an unregulated environment. Instead, the ICR study assumes the existence (and thus the validity) of a title act and then asks about the use of the term "interior design" within that context using questions that are all but certain to elicit the desired response.[10] To have any relevance to this case—i.e., to avoid *presuming* the validity of the very law whose enactment it is supposed to support—the survey should have asked whether people in an unregulated environment understand that people who call themselves "interior designers" are representing that they possess some minimal level of training or experience. Because if people do not make that assumption—and Defendants have not offered a shred of evidence that they do—then there is no basis to conclude that it is "misleading" for people who lawfully perform interior design work to use that term in describing what they do.

B. The Registration Law Fails All Three Prongs of the Central Hudson Test.

The government certainly has a "substantial interest" in preventing consumers from being confused or misled, just as it has a substantial interest in preventing forest fires, catching criminals, and promoting traffic safety. But Defendants have not shown that *any* of those

[8] Defs.' Cross-Motion for SJ, Exh. C at 2.
[9] Pls.' Resp. to Defs.' Cross-Motion for SJ at 6-8 & Exh. 5.
[10] *See, e.g.*, Defs. Reply Exh. A, ICR survey question LS-2 ("If there were two professionals offering the same service, one with a license and one without a license, do you think it is deceptive or misleading that both the licensed and unlicensed person can use the exact same professional title?").

interests are implicated by the unregulated speech of interior designers. To the contrary, their failure to stop ASID's practice of holding out its own unlicensed members as "interior designers" in Texas, despite having been advised of that conduct nearly a month ago, seriously undercuts their avowed public welfare concerns. *Cf. Edenfield v. Fane*, 507 U.S. 761, 772 (1993) (noting evidence that "belies the Board's concerns" about personal solicitation by CPA's). Having failed to establish that the "harms it recites are real," which is the first prong of *Central Hudson*, the Defendants certainly cannot show that the Registration Law "will in fact alleviate [those concerns] to a material degree." *Id*. at 770. Thus, the second prong of *Central Hudson* is not met either. And it likewise follows that the third prong—reasonable or "proportional" fit between the restriction and the interests served, *id*. at 768—cannot be met either because the Defendants have failed to establish the existence of any "real" harms.

It is no accident that Defendants have been unable to distinguish or rebut the cases cited on page five of Plaintiffs' summary judgment motion. Those cases all stand for the commonsense proposition that the government may not forbid people from accurately describing work they lawfully perform. In short, to justify the censorship of accurate commercial speech, the government must present much more than the hodge-podge of conclusory statements, one-sided legislative history, and nakedly partisan survey "evidence" offered by the Defendants in this case.

III. RULE 56(f) MOTION

As set forth above, Plaintiffs are entitled to judgment as a matter of law that the Registration Law violates their First Amendment right to free speech based on the undisputed facts contained in their summary judgment motion. While not disputing any of Plaintiffs' facts, Defendants have attempted to create a fact issue by asserting their own set of supposedly

undisputed facts, including the results of the ICR survey and the contents of the various affidavits and exhibits discussed above and in Plaintiffs' response brief. Plaintiffs do not believe any of those assertions are relevant to this case; however, should the Court conclude otherwise, Plaintiffs respectfully request the opportunity, pursuant to Fed. R.Civ. P. 56(f), to conduct discovery in order to properly investigate and rebut them.

Besides document requests from the Defendants and various third parties, Plaintiffs would expect to depose Mr. De Wolf concerning the ICR study, as well as various representatives of the TBAE and the American Society of Interior Design (ASID) to learn more about the creation, administration, and evaluation of the study. Plaintiffs would also seek to depose representatives of TBAE and ASID to learn more about why ASID advertises its unlicensed members as "interior designers" in Texas, whether anyone believes it is "misleading" for ASID to do so, and why TBAE has never done anything about it (and indeed still has not done anything to date). Plaintiffs would also seek to depose ASID's local representative, Marilyn Roberts, concerning the authenticity and significance of her June 6, 2007 email in which she sought "ammunition" from other ASID members to help TBAE defend this lawsuit.[11] And Plaintiffs might well commission their own, methodologically sound, public opinion survey.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for leave to file the surreply contained herein and that the Court grant Plaintiffs' motion for summary judgment and deny the Defendants' cross-motion. In the event the Court determines that Defendants' cross-motion for summary judgment presents any relevant issues of material fact, Plaintiffs request leave under Fed. R. Civ. P. 56(f) to conduct discovery regarding those assertions.

[11] *See* Pls.' Resp. to Defs.' SJ Mot. Exh. 3.

DATED this 1st day of August, 2007.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that on Wednesday, July 18, 2007, I conferred with Defendants' counsel Marina Grayson in a conference call regarding the contents of Plaintiffs' Motion to Strike Defendants' Reply and to File Surreply. On Monday, July 20, 2007, following the court's dismissal without prejudice and pursuant to Local Rule CV-7, I conferred a second time with Marina Grayson who did not oppose the filing of Plaintiffs' surreply; however, she did not agree that Plaintiffs would need to take discovery pursuant to Fed. R. Civ. P. 56(f) should the Court determine that Defendants' factual assertions—which Plaintiffs dispute—are relevant to the resolution of the cross-motions for summary judgment.

/s/
CLARK M. NEILY, III

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 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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And I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

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