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3 **DRAFT – SUBMITTED PURSUANT TO ER 408**
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6
7 SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

8 CLEAR CHANNEL OUTDOOR, a Delaware)
corporation,)
9)
Plaintiff,)
10)
v.)
11)
CITY OF TACOMA, a municipal corporation;)
12 and JOHN HARRINGTON, an individual.)
13)
Defendants.)

No.

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE RELIEF
TO BAR FORCED REMOVAL OF, AND
GOVERNMENT INTERFERENCE
WITH, CONSTITUTIONALLY-
PROTECTED SPEECH

14
15 **The outdoor sign or symbol is a venerable medium for**
16 **expressing political, social and commercial ideas. From the**
17 **poster or ‘broadside’ to the billboard, outdoor signs have**
placed a prominent role throughout American history, rallying
support for political and social causes.¹

18 **I. PARTIES, JURISDICTION & VENUE**

19 1. Clear Channel Outdoor is a Delaware corporation doing business in Pierce
20 County.

21 2. The City of Tacoma is a municipal corporation organized under the laws of the
22 State of Washington. The City of Tacoma has enacted, implemented, permitted and
23 condoned, and continues to permit and condone, the acts, practices, and failures to act, and
24 violations of law complained of herein to become and to continue to be the official policy and
25 custom of the City of Tacoma.

26
¹ Metromedia, Inc. v. San Diego, 453 U.S. 490, 501 (1981) (citations omitted).

1 no bearing on whether it was a “billboard.” Instead, the determination was based solely on
2 the content of the particular message on the sign on July 22, 1997. In particular, “billboard”
3 was defined as:

4 A sign which advertises goods, products, events, or services,
5 not necessarily sold on the premises on which the sign is
6 located; however, a person, business or event located on the
premises shall not be identified.

7 Ex. 1 at TMC § 13.06.520.C.

8 8. Thus, signs which on July 22, 1997, disseminated noncommercial messages
9 such as “don’t drink and drive” or “elect Jim Smith” were not billboards. Likewise, a sign
10 which was vacant on July 22, 1997, was not a billboard. Because such signs were not
11 billboards on July 22, 1997, they did not become “nonconforming billboards” under the Sign
Code.

12 9. The Amendment to the Sign Code further provided for the forced removal of
13 legal nonconforming billboards:

14 Amortization. All legal **nonconforming billboard** signs shall be
15 discontinued and removed or made conforming within 10 years
16 from the effective date of this section, on or before August 1, 2007,
17 and all billboard signs, which are made nonconforming by a
18 subsequent amendment to this section, **shall be discontinued and
removed or made conforming within 10 years after the date of
such amendment** (collectively the “amortization period”).

19 Ex. 1 at TMC § 13.06.521.N(6) (emphasis added).

20 10. Accordingly, under the Sign Code, the only signs subject to forced
21 removal were those that constituted “billboards” on July 22, 1997, as determined
22 by the content of the particular message posted on the sign on that day.

23 11. Clear Channel does not have records of the messages that were
24 posted on its sign structures in Tacoma on July 22, 1997. On information and
25 belief, Tacoma does not have records of the messages posted on that day.

1 Article II, Section 16 of the Washington Constitution. Tacoma has not offered such
2 compensation.

3 **C. The Controversy**

4 18. There is a bona fide, actual, and justiciable controversy between the parties.
5 Tacoma has failed to offer just compensation for the forced removal of the signs and there is
6 nothing in the Amortization/Forced Removal Ordinance providing for such compensation.
7 Tacoma has also sent letters to Clear Channel and its landlords instructing them to advise
8 Tacoma of the manner in which they intend to comply with the forced removal requirement.
9 Moreover, the Tacoma Municipal Code provides that a violation of the Sign Code gives rise
10 to a misdemeanor. As detailed herein, however, the Ordinance is unenforceable. Clear
11 Channel is uncertain about its rights under the Ordinance, has no adequate remedy at law, and
12 is entitled to declaratory and injunctive relief to determine and protect its constitutional,
13 statutory, and common law rights.

14 **III. CAUSES OF ACTION**

15 **1. Declaratory Judgment – Impermissible Discrimination Among Various**
16 **Forms of Protected Noncommercial Speech**

17 19. Clear Channel restates its prior allegations.

18 20. The Ordinance discriminates between and among various forms of protected
19 noncommercial speech. Under the Ordinance, certain constitutionally-protected
20 noncommercial messages rendered a sign a “billboard” subject to forced removal, while other
21 protected noncommercial messages did not make that same sign a billboard subject to
22 removal. For example, if a sign read “Attend Services Each Sunday at Your Local Church,”
23 on July 22, 1997, it was a billboard because it advertised an “event” which was not “sold” on
24 the premises on which the sign is located. Ex. 1 at TMC § 13.06.521.N(5). By contrast, a
25 sign which read “Save the Whales” on July 22, 1997, was not a billboard because it did not
26 advertise “goods, products, events, or services”

1 Under Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), a municipality may not
2 discriminate among permissible forms of noncommercial speech:

3 With respect to noncommercial speech, the City may not choose
4 the appropriate subjects for public discourse: “To allow a
5 government the choice of permissible subjects for public debate
6 would be to allow that government control over the search for
7 political truth.”

8 Metromedia, 453 U.S. at 515 (citations omitted) (footnote omitted).

9 21. Because the Ordinance allows signs that carried certain noncommercial
10 messages on July 22, 1997, to continue past August 1, 2007, while requiring removal of
11 identical signs carrying other noncommercial messages, it unlawfully discriminates between
12 and among various forms of protected, noncommercial speech. As such, the Ordinance
13 violates the First and Fourteenth Amendments and Article I, § 5 of the Washington
14 Constitution.

15 22. Clear Channel is entitled to a declaratory judgment that the Ordinance is
16 invalid because it impermissibly discriminates between and among protected noncommercial
17 speech.

18 **2. Declaratory Judgment – Impermissible Content-Based** 19 **Regulation of Speech**

20 23. Clear Channel restates its prior allegations.

21 24. The Amortization/Forced Removal Ordinance is not content neutral. The sole
22 and determining criteria as to which signs must be removed is the message on the sign. Ex. 1
23 at TMC § 13.05.521.N(6). Because the Ordinance is not content neutral, it is presumed
24 unconstitutional and subject to a strict scrutiny analysis. Under the strict scrutiny test, the
25 City must “show that the regulation is necessary to serve a compelling state interest and that it
26 is narrowly drawn to achieve that end.” Boos v. Barry, 45 U.S. 312, 321-322 (1988). The
Ordinance cannot withstand this scrutiny.

1 25. First, the stated goals of the Ordinance are to “create a more attractive
2 environment” and to prevent signs from being a hazard to pedestrians or traffic. Ex. 1 at
3 TMC 13.06.520.A.4. As a matter of law, these are not sufficiently “compelling” interests to
4 justify content-based restrictions on protected non-commercial speech. See, e.g., King
5 Enterprises v. Thomas Township, 215 F. Supp.2d 891, 910 (E.D. Mich 2002) (“Although
6 ‘safety’ and ‘aesthetics’ are substantial government interests, they are not compelling enough
7 to justify content-based restrictions on fully-protected speech.”). This alone is fatal to the
8 Ordinance.

9 26. Second, even if the interests sought to be advanced were sufficiently
10 compelling, the Ordinance is not narrowly tailored to reach those interests and does not use
11 the least restrictive means to meet its objectives. The Ordinance applies to any sign of any
12 size, however large or small, that carried a message which makes it a “billboard.” As a result,
13 many signs subject to removal under the Ordinance do not contribute to the stated concerns
14 about traffic or aesthetics. Nevertheless, such signs must be removed by August 1, 2007.
15 Thus, the Ordinance is not “narrowly tailored” but is instead over-inclusive. At the same
16 time, however, it is entirely speculative whether the Ordinance would reach its goal at all. A
17 sign owner on July 22, 1997, could avoid forced removal in 2007 by changing the message on
18 the sign such that it was no longer a “billboard.” Thus, at the time the Ordinance was enacted,
19 there was no assurance that it could achieve its objective because it was unclear whether it
20 would result in the removal of even one sign.

21 27. Clear Channel is entitled to declaratory judgment that the Ordinance is invalid
22 because it is not content neutral and cannot withstand a strict scrutiny analysis.

23 **3. Declaratory Judgment – Violation of Cambridge Doctrine**

24 28. Clear Channel restates its prior allegations.

25 29. The Amortization/Forced Removal Ordinance was passed on July 22, 1997,
26 and became effective upon publication in Tacoma’s official newspaper on July ___, 1997.

1 Once the Ordinance became effective, it retroactively narrowed the class of future permissible
2 signs, based on past lawful speech, in violation of the Cambridge Doctrine. See Ackerley
3 Communications of Massachusetts, Inc. v. Cambridge, 88 F.3d 33 (1st Cir. 1996). Briefly,
4 any sign that was a “billboard” on July 22, 1997, became a legal nonconforming billboard.
5 Whether a sign was a “billboard” was based on the message on the structure. When the
6 Amortization/Forced Removal Ordinance became effective three days later, it retroactively
7 dictated that signs which were “billboards” on July 22, 1997, would be subject to forced
8 removal.

9 30. Under the First Amendment and Article I, § 5 of the Washington Constitution,
10 it is impermissible for the government to distribute or limit future speaking rights based on the
11 content of earlier, lawful speech. See, e.g., Ackerley Communications of Massachusetts, Inc.
12 v. Cambridge, 88 F.3d 33 (1st Cir. 1996). Here, the determination of which signs are allowed
13 to continue in existence past August 1, 2007, is impermissibly based on the speech that
14 appeared on those signs on July 22, 1997 – before the Ordinance became effective.

15 31. Clear Channel is entitled to declaratory relief holding that such a retroactive
16 content-based distribution of future speech rights is unconstitutional and the forced removal
17 requirement is therefore unenforceable.

18 **4. Declaratory Judgment – Central Hudson Violation**

19 32. Clear Channel restates its prior allegations.

20 33. The Ordinance regulates and limits “billboards” as a medium for commercial
21 speech. The validity of a regulation restricting commercial speech is governed by the test set
22 forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,
23 447 U.S. 557 (1980). Under that test, the speech must concern lawful activities and not be
24 misleading. Assuming the speech so qualifies, the government must: (i) prove a substantial
25 interest in support of its regulation; (ii) demonstrate that the restriction directly and materially
26 advances that interest; and (iii) prove that the restriction is narrowly drawn, i.e., no more

1 extensive than necessary to serve the government interests. The government must establish
2 these elements by more than “speculation and conjecture.” Edenfield v. Fane, 507 U.S. 761,
3 770-771 (1993).

4 34. The City asserts an interest in regulating signs based on creating a more
5 attractive environment, and preventing signs from becoming a potential hazard to pedestrian
6 and vehicular traffic. Ex. 1 at TMC § 13.06.520A.4. The Ordinance does not, however,
7 directly and materially advance that interest. Whether a sign was a billboard subject to forced
8 removal depended on its content on July 22, 1997. If the message on a given structure read
9 “Save the Whales,” the structure was not a billboard, and not subject to forced removal. If
10 that same structure had a message reading “Shop at Joe’s,” it was a “billboard” subject to later
11 forced removal. Accordingly, a sign owner could avoid forced removal by changing the
12 message on the sign. Thus, the Ordinance did not directly materially advance the asserted
13 interests because it is by no means certain that the Ordinance will ultimately require the
14 removal of any signs. It is at best speculation and conjecture. Moreover, the City cannot
15 establish how content-driven restrictions materially advance the City’s stated interests. Signs
16 urging attendance at one’s church are no more a traffic hazard or aesthetic issue than a sign
17 reading “Save the Whales.” Under the Ordinance, however, the former is subject to forced
18 removal, the latter is not.

19 35. The Ordinance is also not narrowly drawn. As written, it applies to all signs,
20 however small, so long as the message renders the sign a “billboard.” Thus it encompasses,
21 and bans, far more vehicles for speech than is necessary to achieve its stated objectives.

22 36. Clear Channel is entitled to declaratory judgment that the Amortization/Forced
23 Removal Ordinance violates the First and Fourteenth Amendments, and Article I, § 5 of the
24 Washington Constitution, and is unenforceable.

25 **5. Declaratory Judgment – Impermissible Preference for Commercial**
26 **Speech Over Other Noncommercial Speech**

37. Clear Channel restates its prior allegations.

1 38. Tacoma’s Sign Code is prescriptive. Ex. 1 at TMC § 13.06.520.B.2. Only
2 those signs which are permitted by the Sign Code can be lawfully maintained. Id. In several
3 zones within the City (R-1, R-2, R-2 SRD, HMR-SRD, R-3, R-4, R-4-L, R-5 and PRD), the
4 only signs permitted are those which pertain to a proposed leasing, rental or sale of a building,
5 or which identify the name of boarding homes, or residential care facilities. Id. at
6 § 13.06.522.A-E. No other speech can be maintained on such signs and no other signs are
7 permitted. Thus, a sign can read “Apartment For Rent.” That same sign cannot read “Oppose
8 Rent Control.”

9 39. In the aforementioned zones, the Sign Code prescribes the messages that are
10 permissible on signs, and bars all other messages, including lawful noncommercial and
11 commercial speech. The Sign Code further makes a violation of these content-based
12 requirements a civil and criminal offense. Under Metromedia, Inc. v. San Diego, 453 U.S.
13 490 (1981), the government cannot discriminate between or among protected forms of
14 noncommercial speech. Accordingly, the provisions of the Sign Code impermissibly favor
15 commercial over noncommercial speech in violation of the First and Fourteenth Amendments
16 to the United States Constitution and the Washington Constitution.

17 40. Clear Channel is entitled to a declaratory judgment that the Tacoma Sign Code
18 violates the First and Fourteenth Amendments and Article I, § 5 of the Washington
19 Constitution, and is therefore unenforceable.

20 **6. Declaratory Judgment – Impermissible Prior Restraint**

21 41. Clear Channel restates its prior allegations.

22 42. Tacoma’s Sign Code is not content neutral with regard to “billboards.”

23 Whether a sign is a “billboard” depends on its message:

24 Billboard Sign. A sign which advertises goods, products,
25 events, or services not necessarily sold on the premises on
26 which the sign is located; however, a person, business, or event
 located on the premises shall not be identified.

1 Ex. 1 at TMC § 13.06.520.C. If a sign is a “billboard” and is not removed by August 2, 2007,
2 the sign owner is purportedly subject to a fine of \$125 per day for every day the sign is
3 maintained past August 2, 2007. Ex. 1 at TMC § 13.05.105. The sign owner is likewise
4 subject to criminal prosecution. *Id.* at 13.05.110.

5 43. As detailed above, the amortization/forced removal requirement is illegal and
6 unenforceable. Nevertheless, the City has stated its intent to attempt to enforce the
7 Ordinance. One who wishes to avoid the full force of a government prosecution action can
8 only do so by removing the sign, or changing the message on the sign such that it no longer
9 constitutes a billboard. Alternatively, the sign owner can leave the sign blank. The net result
10 is that the government is forcing sign owners to forego lawful, protected speech lest they be
11 subject to civil and criminal prosecution. The government is likewise dictating the type of
12 speech which must be used in order to avoid prosecution. These restrictions chill and restrain
13 protected lawful speech and, as such, constitute an impermissible prior restraint on speech in
14 violation of the First and Fourteenth Amendments and Article I, § 5 of the Washington
15 Constitution.

16 **7. Declaratory Judgment – Necessity of Determination**
17 **of Status As “Billboard” on July 22, 1997.**

18 44. Clear Channel restates its prior allegations.

19 45. The Sign Code made “billboards” a “lawful nonconforming use” beginning on
20 July 22, 1997, Ex. 1 at TMC § 13.06.521.N(5), and required that such legal nonconforming
21 “billboards” be removed by August 1, 2007. *Id.* at TMC § 13.06.521.N(6). Whether a sign
22 was a “billboard” on July 22, 1997, depended on the message on the sign on that day. *Id.* at
23 TMC § 13.06.520.C.

24 46. Tacoma has notified Clear Channel and various of its landlords of its position
25 that the Amortization/Forced Removal Ordinance applies to all billboard-type structures
26 regardless of whether they were “billboards” on July 22, 1997.

1 47. Clear Channel is entitled to a declaratory judgment that the
2 Amortization/Forced Removal Ordinance, to the extent it is lawful at all, only applies to those
3 signs which, by virtue of the message on those signs on July 22, 1997, constituted
4 “billboards.”

5 **8. Declaratory Judgment – Noncompliance With RCW 47.42**

6 48. Clear Channel restates its prior allegations.

7 49. Under RCW 47.42, Clear Channel is entitled to compensation for the forced
8 removal of sign structures in Tacoma which are visible from a state route but which, by the
9 terms of the Amortization/Forced Removal Ordinance, must be removed. RCW 47.42.103(2)
10 requires the City to tender payment into the registry of the Court before requiring removal of
11 signs covered by the statute. The City has ordered Clear Channel to remove its signs by
12 August 1, 2007, but has not tendered compensation into the registry of the Court for the signs
13 covered by RCW 47.42.

14 50. Clear Channel seeks a declaratory judgment that to the extent the Ordinance is
15 lawful at all, Clear Channel cannot be required to remove any signs covered by RCW 47.42
16 unless and until Tacoma first tenders just compensation for those signs into the Registry of the
17 Court.

18 **9. Declaratory Relief – Failure to Offer Just Compensation**

19 51. Clear Channel restates its prior allegations.

20 52. The Fifth Amendment of the United States Constitution and Article II, Section
21 16 of the Washington Constitution require just compensation for property taken by the
22 government. The City has made no effort to provide payment for signs which, according to
23 the City, must be removed by August 1, 2007.

24 53. Clear Channel seeks a declaratory judgment that to the extent the
25 Amortization/Forced Removal Ordinance is enforceable, Clear Channel is entitled to
26 compensation for signs which must be removed pursuant to the Ordinance.

1 (a) for a declaratory judgment that the City of Tacoma cannot enforce TMC
2 § 13.06.521.N(6) in regard to any particular sign structure unless it possesses and provides
3 proof of the content of the message on that sign structure on July 22, 1997;

4 (b) for a declaratory judgment that the City of Tacoma cannot enforce TMC
5 § 13.06.521.N(6) against signs covered by RCW 47.42 without first tendering payment into
6 the registry of the Court in an amount equal to the fair market value of such signs and an
7 injunction barring enforcement until the City so tenders;

8 (c) for a declaratory judgment that the City of Tacoma cannot compel the removal
9 of Clear Channel's signs without first paying just compensation to Clear Channel pursuant to
10 the Fifth Amendment of the United States Constitution, and Article II, Section 16 of the
11 Washington Constitution, and an injunction barring any enforcement of the
12 Amortization/Forced Removal Ordinance until the City tenders just compensation;

13 (d) for a declaratory judgment that the City of Tacoma's Sign Code violates the
14 First Amendment because it impermissibly favors commercial over noncommercial speech in
15 violation of the First Amendment of the United States Constitution, and its Washington
16 counterpart, and is therefore invalid and unenforceable, and an injunction barring enforcement
17 of the Ordinance;

18 (e) for a declaratory judgment that the Amortization/Forced Removal Ordinance
19 violates the First Amendment, and its Washington counterpart, because it retroactively
20 narrowed the class of future permissible speakers based on past lawful speech, and is
21 therefore invalid and unenforceable, and an injunction barring enforcement of the Ordinance;

22 (f) for a declaratory judgment that the Amortization/Forced Removal Ordinance
23 violates the First Amendment, and its Washington counterpart, because the Ordinance does
24 not materially advance a legitimate interest of the City of Tacoma, as required by Central
25 Hudson, and an injunction barring enforcement of the Ordinance;

1 (g) for a declaratory judgment that the Amortization/Forced Removal Ordinance
2 violates the First Amendment of the United States Constitution, and its Washington
3 counterpart, because it constitutes an impermissible prior restraint on lawful speech, and an
4 injunction barring enforcement of the Ordinance;

5 (h) for an injunction barring the City from continued interference with Clear
6 Channel's contracts with its landlords;

7 (i) for a preliminary and permanent injunction barring the City from enforcing the
8 Amortization/Forced Removal Ordinance;

9 (j) for Clear Channel's costs and attorney's fees pursuant to 42 USC § 1983, et
10 seq.; and

11 (k) such other and further relief as the Court deems just and equitable.

12 DATED this 23rd day of July, 2007.

13 BYRNES & KELLER LLP

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15 By _____
16 Paul R. Taylor, WSBA #14851
17 Steven C. Minson, WSBA #30974
18 Attorneys for Plaintiff
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