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NATIONAL ASSOCIATION OF THEATRE OWNERS, a New York corporation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TIMOTHY FORSYTH, individually and on behalf of a class of similarly situated individuals,

Plaintiff,

vs.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., a New York corporation, THE WALT DISNEY COMPANY, a Delaware corporation, PARAMOUNT PICTURES CORPORATION, a Delaware corporation, SONY PICTURES ENTERTAINMENT INC., a Delaware corporation, TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware corporation, UNIVERSAL CITY STUDIOS LLC. a Delaware corporation, WARNER BROS. ENTERTAINMENT INC., a Delaware corporation, and NATIONAL ASSOCIATION OF THEATRE OWNERS, a New York corporation,

Defendants.

Case No. 3:16-CV-00935-RS

DEFENDANT NATIONAL ASSOCIATION OF THEATRE OWNERS' SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' JOINT SPECIAL MOTION TO STRIKE AND MOTION TO DISMISS

Action Filed: February 25, 2016
Trial Date: None

Date: June 9, 2016
Time: 1:30 p.m.
Place: Courtroom 3, 17th Floor
Judge: Hon. Richard Seeborg

Defendant National Association of Theatre Owners ("NATO") joins Defendants' Joint Special Motion to Strike and Motion to Dismiss ("Joint Motion"). NATO also writes separately to emphasize the important First Amendment values at stake in this case and the breathtakingly unconstitutional remedy Plaintiff seeks.

For all of the reasons stated in the Joint Motion, NATO agrees that the movie ratings at issue—which on their face are subjective statements of guidance about what parents may find useful in deciding whether a movie is appropriate for children— "'do not imply facts capable of being proved true or false'" in an objective sense, and are thus "'pure' opinions . . . protected by the First Amendment." *Partington v. Bugliosi*, 56 F.3d 1147, 1153 & n.10 (9th Cir. 1995) (quoting *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)). NATO also agrees that the imposition of a duty on CARA to speak in a way that CARA has expressly refused would impose a significant chilling effect on a "publisher's role in bringing ideas and information to the public." *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1037 & n.8 (9th Cir. 1991).

NATO writes separately to address the unconstitutional relief Plaintiff seeks—namely, asking this Court to tell parents what is appropriate for their children. The Supreme Court has already held that such proscriptions are unconstitutional absent a showing of a compelling cause for the restriction, narrowly tailored to fit that cause. In *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), the Supreme Court struck down the California Legislature's attempt to restrict minors' access to violent video games as a content-based restriction on speech that could not survive strict scrutiny analysis. In reaching its opinion, the Court cautioned that adding new categories of unprotected speech was a "startling and dangerous" attempt to substitute the government's opinion for the "judgment of the American people." *Id.* at 792.[1]

[1] Although this case involves a request for an injunctive proscription on speech rather than the statutory one imposed in *Brown*, the Supreme Court has imposed heightened First Amendment scrutiny for injunctions because they "carry greater risks of censorship and discriminatory application than do general ordinances." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764-65 (1994); *see also Operation Save Am. v. City of Jackson*, 275 P.3d 438, 447 (Wyo. 2012) ("When courts are called upon to employ their injunctive authority, they must utilize this power with great caution." (quoting *Kincheloe v. Milatzo*, 678 P.2d 855, 861 (Wyo. 1984))).

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Chief among the Court's concerns was that California was attempting to create a "wholly new category of content-based regulation that is permissible only for speech directed at children." *Id.* at 794. Although the Court recognized that the Legislature was trying to protect minors from harm, it held that minors "are entitled to a significant measure of First Amendment protection" and the Government may not restrict that freedom "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id*. at 794-95 (citations omitted). Even "shocking" content, such as graphic violence, may not be regulated without running afoul of the First Amendment. *Id.* at 792-93. The same is no less true of content that depicts smoking even though Plaintiff's proposed content-based restriction may be "motivated by the laudable public purpose of shielding children from [smoking]." *People v Marquan M.*, 24 N.Y.3d 1, 11 (2014) (statute banning cyberbullying "of a sexual nature designed to cause emotional harm to children" could not survive First Amendment scrutiny); *Operation Save Am. v. City of Jackson*, 275 P.3d 438 (Wyo. 2012) (TRO banning anti-abortion group from demonstrating and showing images of a graphic nature, including those of aborted fetuses, during a Boy Scouts festival could not pass First Amendment scrutiny); *Jamal v. Kane*, 105 F. Supp. 3d 448, 456-57 (M.D. Pa. 2015) (striking down act prohibiting expressive conduct of violent criminals that causes mental anguish to victims or their families).

In words that could have been written for this case, the Supreme Court rejected California's attempt to unilaterally impose parental guidance because "the entire effect [of the Act] is only in support of what the State thinks parents *ought* to want. This is not the narrow tailoring to "assisting parents" that restriction of First Amendment rights requires." *Brown*, 564 U.S. at 804. As with *Brown*, Plaintiff is asking the courts to apply a content-based restriction on access to movies based on Plaintiff's judgment of what he thinks "parents *ought* to want." That is precisely the opposite of what CARA's rating systems is about. Indeed, it "is not CARA's purpose to prescribe socially appropriate values or to suggest any evolution of the values held by American parents." (Compl. Ex. 1 at 6.) It is also precisely the opposite of what parents want: "parents are very clear to us that they—not the industry and certainly not the government—should determine what is appropriate viewing for their kids." (Compl. Ex. 5 at 6.) "Under our

Constitution, 'esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.'" *Id.* at 790 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000)). And it is certainly not for the government to compel CARA to broadcast Plaintiff's message. *See, e.g., Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 133 S.Ct. 2321, 2327 (2013) ("It is, however, a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'" (citation omitted)); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that state may not compel an individual to participate in the dissemination of an ideological message).

Here, Plaintiff is asking this Court to impose content-based determinations about what is appropriate for children. The Plaintiff's judgment of what he thinks "parents ought to want" is not one this Court can impose on parents in a manner consistent with the Constitution. Plaintiff's proposal is even more flawed by his inclusion of two content-based exemptions for "real historical figures" that "actually used tobacco" and for depictions that "clearly and unambiguously reflect[] the dangers and consequences of tobacco use." These exemptions would leave the Court in an ongoing quagmire of policing which characters are sufficiently historical, whether they actually used tobacco, and whether a particular depiction adequately reflects the dangers and consequences of tobacco use. None of these content-based determinations can be made consistent with the First Amendment. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid." (citations omitted)).

This Court should strike Plaintiff's Complaint and dismiss this action with prejudice.

Dated: April 29, 2016

BRYAN CAVE LLP

By: */s/ Lee Marshall*

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