NO JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALAMEDA BOOKS, INC.; et al., Plaintiff, v. CITY OF LOS ANGELES, Defendants.	Case No. CV 95-07771 DDP (CTx) **ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS** [Motions filed on May 31, 2007]

In this matter the owners of two adult bookstores, Alameda Books, Inc., and Highland Books, Inc.,[1] sue the City of Los Angeles to enjoin the enforcement of an ordinance which they claim unlawfully abridges their First Amendment right to free speech. The ordinance, enacted by the Los Angeles City Council in order, allegedly, to reduce criminal activity indirectly associated with the operation of adult businesses (so-called "secondary effects"), prohibits the combined operation of multiple types of sexually

[1] Subsequent to the initiation of this action, Alameda Books, Inc., and Highland Books, Inc., merged into Beverly Books, Inc., another California corporation. That consolidation has not impacted the operation of either business. (Andrus Decl. ¶¶ 3-4.) For the sake of continuity, the action is being continued in the name of the original parties, pursuant to Federal Rule of Civil Procedure 25(c).

explicit commerce "in the same building, structure or portion thereof." Los Angeles Mun. Code § 12.70(C).

Applying the standard elucidated by the Supreme Court in Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), this Court previously found that section 12.70(C) was a content-based regulation of speech that failed strict scrutiny and therefore violated the First Amendment. Accordingly, the Court granted summary judgment to the business owners. The Ninth Circuit affirmed this order, albeit on different grounds. Alameda Books v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000) (as amended) ("Ninth Circuit Alameda Books"). It held that, even if the ordinance was content neutral, the City failed to demonstrate through its reliance on a study of the effects of concentrations of adult businesses that the regulation was designed to serve a substantial government interest.

A divided Supreme Court reversed. While no opinion carried a clear majority, five justices agreed that the City had satisfied its initial evidentiary burden to demonstrate that its ban on multiple-use adult establishments furthers its interest in reducing crime. City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002) ("Alameda Books"). The Court then remanded this case for further proceedings in light of its elaboration of the Renton standard. Having conducted further discovery, the parties now move this Court to rule on their cross motions for summary judgment. After reviewing the materials submitted by the parties and considering the arguments therein, the Court GRANTS summary judgment in favor of Plaintiffs.

I. BACKGROUND

A. Factual Background

In 1978, the City of Los Angeles enacted Los Angeles Municipal Code section 12.70(C), which prohibits adult entertainment establishments within 1,000 feet of each other or within 500 feet of a religious institution, school, or public park. In enacting this ordinance, the Los Angeles City Council relied on a 1977 study conducted by the Department of City Planning, which concluded that concentrations of adult entertainment establishments are associated with higher rates of prostitution, robbery, assaults, and thefts in surrounding communities than their stand-alone counterparts. See Los Angeles Dep't of City Planning, City Plan Case No. 26475, City Council File No. 74-4521-S.3, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles (June 1977). The ordinance directed that "[t]he distance between any two adult entertainment businesses shall be measured in a straight line . . . from the closest exterior structural wall of each business." Los Angeles Mun. Code § 12.70(D) (1978).

Subsequent to enactment, the City realized that this method of calculating distances allowed for multiple adult enterprises in a single structure. Thereafter, the City Council in 1983 amended section 12.70(C) to prohibit "the establishment or maintenance of more than one adult entertainment business in the same building, structure, or portion thereof." Los Angeles Mun. Code § 12.70(C) (1983). The amended ordinance defines an "adult entertainment business" as an "Adult Arcade, Adult Bookstore, Adult Cabaret, Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage

Parlor, or Sexual Encounter Establishment." Id. § 12.70(B)(17). Moreover, each of these enterprises "shall constitute a separate adult entertainment business even if operated in conjunction with another adult entertainment business at the same establishment." Id. The ordinance thus uses the term "business" to refer to the commerce of a particular type of good or service sold in adult establishments, rather than the establishment itself.

Relevant for the purposes of this case are the ordinance's definitions of adult bookstores and arcades. An adult bookstore is an establishment that "has as a substantial portion of its stock-in-trade and offers for sale" either 1) "Books, magazines or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations" that emphasize the depiction of specified sexual activities; and/or 2) "Instruments, devices or paraphernalia which are designed for use in connection with 'specified sexual activities.'" Id. § 12.70(B)(2). An adult arcade is an establishment where, "for any form of consideration, one or more motion picture projectors, slide projectors or similar machines, for viewing by five or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by an emphasis on the depiction or description of 'specified sexual activities' or 'specific anatomical areas.'" Id. § 12.70(B)(1).

Alameda Books and Highland Books are two adult establishments operating in Los Angeles. Neither is located within 1,000 feet of another adult establishment or within 500 feet of any religious institution, public park, or school. Both establishments operate

both adult arcades and bookstores in the same commercial space. After a Los Angeles city inspector discovered in 1995 that these entities were in violation of the City's adult zoning regulations, Alameda and Highland joined as Plaintiffs and sued the City under 42 U.S.C. § 1983 for declaratory and injunctive relief to prevent enforcement of the ordinance. Plaintiffs contend that the ordinance violates the First Amendment because it impinges on their fundamental right to freedom of speech. See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .")

B. Procedural Background

Early in the litigation, Plaintiffs and Defendant each filed motions for summary judgment with respect to Count I of the complaint, which alleges a facial violation of the First Amendment. This Court initially denied both motions, concluding that there was a genuine issue of fact as to whether the operation of a combination adult bookstore/arcade business leads to the same harmful secondary effects as those that are associated with the concentration of separate adult businesses in a single urban area. After Plaintiffs filed a motion for reconsideration, however, this Court found that the City's prohibition on multiple-use adult establishments was not a content-neutral regulation of speech and subjected the ordinance to strict scrutiny.[2] The Court granted summary judgment for Plaintiffs because it found that the evidence

[2] This Court reasoned that neither the City's 1977 study nor a report cited in Hart Book Stores v. Edmisten, 612 F.2d 821 (4th Cir. 1979), supported a reasonable belief that multiple-use adult establishments produced the secondary effects that the City asserted as its content-neutral justification for the prohibition.

offered by the City did not demonstrate that its prohibition is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Simon & Schuster, Inc. v. Member of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (internal quotation marks omitted) (explaining the "strict scrutiny" standard of review).

The Court of Appeals for the Ninth Circuit affirmed on different grounds. The Ninth Circuit did not reach the question of whether the ordinance was content neutral. It reasoned that, even if the ordinance was content neutral and therefore subject to intermediate scrutiny, the City had failed to present evidence upon which it could reasonably rely to demonstrate that its regulation of multiple-use establishments is "designed to serve" the City's substantial interest in reducing crime. Ninth Circuit Alameda Books, 222 F.3d at 723-28. Accordingly, the Ninth Circuit concluded that the challenged ordinance was invalid under City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). See Ninth Circuit Alameda Books, 222 F.3d at 728.

The Supreme Court granted certiorari to clarify the standard for determining whether an ordinance serves a substantial government interest under Renton. With no opinion carrying a majority of the justices, the Court reversed the Ninth Circuit. Justice O'Connor announced the judgment and delivered the plurality opinion, which applied Renton and found that the City could rely on its 1977 study to support the ordinance at the summary judgment stage. Justice Kennedy concurred in the plurality's judgment but employed a distinct analytical approach, which will be explained

infra. The remaining justices, led by Justice Souter, dissented. Alameda Books, 535 U.S. 425 (2002).

On remand, the parties stipulated to defer discovery and briefing pending the decisions in three cases concerning the interpretation of the Supreme Court's opinion in Alameda Books then before the Ninth Circuit. On July 28, 2003, the Ninth Circuit decided two of the three cases, Center for Fair Public Policy v. County of Maricopa, No. 00-01658, and L.J. Concepts, Inc. V. City of Phoenix, No. 00-19605, in a consolidated opinion. See Ctr. for Fair Pub. Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003). On September 27, 2004, the Ninth Circuit filed its decision in the third case, Dream Palace, Inc. v. County of Maricopa, 384 F.3d 990 (9th Cir. 2004).

At the request of the parties, this Court then issued a 38-page order ruling on several threshold matters in order to properly frame the issues to be tried and to guide discovery. After conducting further discovery, the parties now each move for summary judgment. In addition, Plaintiffs move to bifurcate the trial or, in the alternative, for leave to file a first amended complaint.

II. ANALYSIS

A. First Amendment in the Wake of Alameda Books

On June 10, 2005, this Court ruled, at the request of the parties, on certain preliminary issues regarding the interpretation of the Supreme Court's Alameda Books decision and the Ninth Circuit's application of that decision. Following is an updated explanation of what this Court has already determined to be the appropriate analysis to apply in this case.

1. Renton and Alameda Books

In Alameda Books, a divided Supreme Court revisited the standard established by Renton and used by courts to review municipal ordinances regulating adult entertainment establishments for compliance with the First Amendment. In Renton, a majority of the Supreme Court first agreed on the constitutional standard to which cities must adhere when enacting ordinances targeting the secondary effects of adult businesses, such as adult bookstores and movie theaters. See 475 U.S. 41 (1986). This test requires a court to make three inquiries into the design and effect of the regulation. First, a court must review the ordinance to determine if it bans the protected activity altogether. If the ordinance is not a ban, but rather restricts the operation of the establishments in some way, then it should be analyzed as a time, place, and manner regulation. Id. at 46.

Next, the court must consider whether the ordinance was designed to reduce secondary effects associated with the speech activity or, rather, if it was intended to suppress the content of the speech activity itself. Id. at 47. If the ordinance targets the secondary effects, it should "be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations," id. at 49; that is, it should receive intermediate scrutiny. Otherwise, the ordinance must withstand strict scrutiny.

Finally, assuming that the ordinance receives intermediate scrutiny, a city must show that its ordinance is narrowly tailored to meet a substantial government interest, and that it does not unreasonably limit alternative avenues of communication. Id. at

50. Under Renton, if the ordinance survives this three-step inquiry, it is a constitutional restriction on speech.

In Alameda Books, Justice O'Connor, writing for a four-justice plurality, applied Renton to review Los Angeles Municipal Code section 12.70(C).[3] The plurality did not revise Renton, but articulated a burden-shifting framework that courts should apply in evaluating the evidence presented as part of a city's showing of substantial governmental interests. The city bears the initial burden of "providing evidence that supports a link between concentration of adult operations and asserted secondary effects." Id. at 437. To do this, "a municipality may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." Id. at 438 (quoting Renton, 427 U.S. at 51-52). However, "[t]his is not to say that a municipality can get away with shoddy data or reasoning." Id.

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton.* If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39.

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[3] Justice O'Connor was joined by Chief Justice Rehnquist, and by Justices Scalia and Thomas. Justice Scalia also wrote a short concurrence in which he expressed his well-known, but lone position that "[t]he Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex." 535 U.S. at 443-44.

Reasoning from these statements, Justice O'Connor concluded that the City of Los Angeles's reliance on the 1977 study was sufficient to demonstrate that its ordinance was designed to meet a substantial government interest. Id. at 439. The City had therefore "complied with the evidentiary requirement in *Renton*." Id. Left unstated by the plurality, but necessarily implied, is the fact that the evidentiary burden now rests with Plaintiffs to cast direct doubt on the City's rationale.

Writing for the dissent, Justice Souter rejected the conclusion arrived at separately by both the plurality and Justice Kennedy that the 1977 study provided any support for section 12.70(C).[4] He noted that the 1977 study focused on the secondary effects resulting from the concentration of separate adult business establishments, not on effects arising from the traditional combination of selling and viewing activities under one roof. Id. at 463-64. Because the dissenting justices discovered no support for the ordinance in the 1977 study, they would have deemed the ordinance content based, applied strict scrutiny, and concluded that it was an unconstitutional abridgment of free speech activity.

Justice Kennedy provided the necessary fifth vote to reverse the grant of summary judgment, but he did not join the plurality's opinion. He wrote separately "for two reasons." Id. at 444. First, he criticized the Renton framework for inaccurately designating ordinances like the ones at issue in Renton and Alameda Books "content neutral." Id. at 446-47. Justice Kennedy was

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[4] Justice Souter's opinion was joined in its entirety by Justices Stevens and Ginsburg. Justice Breyer joined only as to part II.

persuaded that this designation "was something of a fiction," and not a particularly helpful one. Id. at 448. "After all, whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." Id.

Nevertheless, Justice Kennedy also found that "the central holding of *Renton* is sound: A zoning restriction that is designed to decrease secondary effects and not speech should be subject to intermediate rather than strict scrutiny." Id. Thus,

> zoning regulations do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a prima facie legitimate purpose: to limit the negative externalities of land use. . . . For this reason, we apply intermediate rather than strict scrutiny.

Id. at 449.

Second, Justice Kennedy articulated an expanded "substantial government interest" inquiry. The plurality opinion, like the Renton majority, focused on the evidentiary showing required to support the demonstration that an ordinance meets a substantial government interest. Justice Kennedy agreed with the plurality that the evidence offered by the City need only reasonably support the justification offered for the ordinance. Id. at 449, 451-52. "[A] city must have latitude to experiment, at least at the outset, and . . . very little evidence is required." Id. at 451. Therefore, "courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." Id. A district court's task is to review the evidence relied on by the city to ensure that it provides a reasonable justification for the ordinance. Further, like the plurality, Justice Kennedy held that Plaintiffs must have an opportunity to cast direct doubt on the

City's rationale. "If [the City's] assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." Id. at 453.

However, unlike the plurality, Justice Kennedy emphasized that courts must also consider whether the municipality has advanced a legitimate proposition justifying the ordinance. It is here that Justice Kennedy moved beyond Renton and the plurality opinion to require something more of the authors and defenders of ordinances regulating adult entertainment establishments. "[A] city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quality and accessibility of speech substantially intact." Id. at 449. Thus, "[t]he rationale of the ordinance must be that it will suppress secondary effects - and not by suppressing speech." Id. at 449-50.

Justice Kennedy added this requirement to the Renton structure because the plurality's approach failed to address "how speech will fare under the city's ordinance." Id. at 450. Whereas the plurality considered only the narrow question of whether the evidence relied upon by the City reasonably justified the design of the ordinance, Justice Kennedy perceived that

> [t]his question is actually two questions. First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition? The plurality skips to the second question and gives the correct answer; but in my view more attention must given to the first.

Id. at 449. Justice Kennedy reasoned that the rationale of a secondary-effects ordinance must be that it will reduce the externality costs associated with the speech activity "without

substantially reducing speech" because "[i]t is no trick to reduce secondary effects by reducing speech or its audience; but a city may not attack secondary effects indirectly by attacking speech." Id. at 450. Turning to the instant ordinance, Justice Kennedy held that the City's claim "must be that this ordinance will cause two businesses to split rather than one to close, that the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced. This must be the rationale of a dispersal statute." Id. at 451. With this analysis, Justice Kennedy inserted a new "proportionality requirement" into the substantial government interest inquiry.[5] A district court must review the city's justification for the zoning ordinance in order to ensure that the law is designed to reduce significantly the disfavored secondary effects while leaving the quantity and accessibility of speech substantially intact. So long as the city complies with this requirement, and so long as the city offers some evidence that reasonably supports its justification, it has made an initial showing that the regulation was designed to meet a substantial government interest. Justice Kennedy analyzed section 12.70(C) under this new regime and concluded that the City had satisfied its initial burden of showing that the ordinance is "reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little." Id. at 453. Accordingly, he joined the plurality in reversing the grant of summary judgment. In his conclusion, however, he noted that

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[5] The term "proportionality requirement" was not used by Justice Kennedy but has since been adopted by circuit courts applying this part of his opinion. See, e.g., Fair Pub. Policy, 336 F.3d at 1162 (9th Cir. 2003).

Plaintiffs must have the opportunity to disprove the assumptions relied upon by the City in justifying their ordinance. "If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." Id.

2. Ninth Circuit Application of Alameda Books

The Ninth Circuit first applied Alameda Books in Center for Fair Public Policy v. Maricopa County, 336 F.3d F.3d 1153 (9th Cir. 2003). There, the circuit court reviewed an Arizona statute that required the closing of "sexually-oriented businesses" between 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between 1:00 a.m. and noon on Sunday. The court held that Justice Kennedy's opinion in Alameda Books was the controlling opinion because he concurred in the judgment on the narrowest grounds. Id. at 1161 (citing Marks v. United States, 430 U.S. 188, 193 (1976)).

The court applied Justice Kennedy's revised classification approach. It held that the Arizona statute was content based on its face, and then, following Justice Kennedy, it reviewed the statute's full record to determine whether its purpose was to reduce the secondary effects arising from the late-night operation of the regulated establishments.[6] After finding various "objective indicators of intent" in the record, the majority was satisfied that the regulation was directed at the secondary effects, and not

[6] The Ninth Circuit in fact broadened Justice Kennedy's holding. Whereas he limited his holding to zoning ordinances, which he believed inherently possess a prima facie legitimate purpose, that is, reducing the negative externalities of land use, the Ninth Circuit generalized his approach to include all regulations designed to ameliorate the secondary effects associated with the commerce of sexual and pornographic speech. 336 F.3d at 1164-65.

at the content of the speech itself. It therefore reviewed the statute using intermediate scrutiny.

However, the majority declined to apply the other criterion emphasized in Justice Kennedy's Alameda Books opinion - the "proportionality requirement." The circuit court reasoned that applying the proportionality requirement to regulations limiting the hours of operation for certain businesses - "time" restrictions rather than "place" restrictions like the one at issue in Alameda Books - would invariably lead to the invalidation of all such regulations. Id. at 1163. This is because these statutes expressly do what Justice Kennedy said was improper; they reduce the secondary effects of speech by reducing the quantity of the speech itself. The court noted that the constitutionality of such statutes had uniformly been upheld by circuit courts pre-Alameda Books, and it reasoned that, based on Justice Kennedy's insistence that "'the central holding of *Renton* remains sound,'" he did not intend "to precipitate a sea change in this particular area of First Amendment law." Id. at 1162 (quoting Alameda Books, 535 U.S. at 448 (Kennedy, J., concurring)).[7]

In World Wide Video v. Spokane, 368 F.3d 1186 (9th Cir. 2004), the Ninth Circuit expressly reaffirmed that Justice Kennedy's opinion represented the holding in Alameda Books. Id. at 1193. The court also held that the burden-shifting framework discussed by the Alameda Books plurality was part of the holding because Justice

[7] Judge Canby dissented, arguing that the two judges in the majority simply failed to apply Justice Kennedy's holding, even though they admitted it was controlling. Judge Canby would have applied the proportionality requirement and invalidated the statute under Alameda Books.

Kennedy implicitly concurred with it. Id. at 1194. Further, the panel unanimously applied the proportionality requirement to the zoning restriction before the court, reasoning that it "dovetails with the requirement that an ordinance must leave open adequate alternative avenues of communication." Id. at 1195. Because the panel found that the ordinance met this prong of the original Renton standard, it held that the ordinance also met Justice Kennedy's proportionality requirement.

The Ninth Circuit has published four more opinions applying Alameda Books since World Wide Video. First, the court again confronted a "time" restriction in Dream Palace v. County of Maricopa, 384 F.3d 990 (9th Cir. 2004). Following Fair Public Policy, the panel declined to apply the proportionality requirement and, applying the balance of the Renton-Alameda Books standard, it held that the regulation survived intermediate scrutiny. Id. at 1013 n.16. Next, in Gammoh v. La Habra, 395 F.3d 1114 (9th Cir. 2005), the panel addressed a city ordinance requiring adult cabaret dancers to remain two feet from patrons during performances. It applied Justice Kennedy's modified framework to the ordinance, but did not mention the proportionality requirement, perhaps because the ordinance clearly did not eliminate any speech but only regulated the manner of its expression.

Third, in Tollis Inc. v. County of San Diego, 505 F.3d 935 (9th Cir. 2007), the court addressed a San Diego ordinance that restricts the hours in which adult entertainment businesses can operate, "requires the removal of doors on peep show booths, and mandates that the businesses disperse to industrial areas of the county." Id. at 937. With this case the Ninth Circuit elucidated

its interpretation of the proportionality requirement in a deeper fashion. The panel reasoned that "[u]nder Justice Kennedy's construct," a city

> must have had some basis to assume three propositions: [1] that this ordinance will cause two businesses to split rather than one to close, [2] that the quantity of speech will be substantially undiminished, and [3] that total secondary effects will be significantly reduced.

Id. at 939 (internal quotation marks omitted)). The Ninth Circuit explained that the first proposition "mirrors the 'alternative avenues of communication' requirement under intermediate scrutiny, which requires that the displaced business be given 'a reasonable opportunity to open and operate.'" Id. (quoting Renton, 475 U.S. at 53-54). The third proposition "restates the requisite 'substantial governmental interest' for regulating adult establishments based on their secondary effects." Id. In other words, the burden-shifting framework and proportionality requirement articulated in Alameda Books constitute a rephrasing of the intermediate scrutiny standard as applied in the context of zoning regulations aimed at adult establishments.

For the first time, in addition, the Ninth Circuit interpreted Justice Kennedy's second proposition. The court reasoned that

> Justice Kennedy's reference to whether the "quantity of speech will be left substantially undiminished" is shorthand for asking whether the ordinance will impose a significant or material inconvenience on the consumer of the speech. At the time of enactment, the city must have some reasonable basis to believe that interested patrons would, for the most part, be undeterred by the geographic dispersal of the adult establishments.

Id. at 940 (internal alterations omitted). The court further rejected the "contention that[, at least at the initial stage of the burden-shifting analysis,] *Alameda Books* imposed a heightened

evidentiary burden on the County to show 'how speech would fare' under the ordinance." Id.

Applying this framework to the ordinance at issue, the court held that "[s]o long as there are a sufficient number of suitable relocation sites, the County could reasonably assume that, given the draw of pornographic and sexually explicit speech, willing patrons would not be measurably discouraged by the inconvenience of having to travel to an industrial zone." Id. The court further held that because the County had satisfied its burden of proposing a sufficient number of potential relocation sites, and the adult business had not cast doubt on that showing by demonstrating "that the proposed sites are inadequate or unlikely to ever become available," id. at 941, the ordinance could stand.

Finally, in Fantasyland Video, Inc. v. County of San Diego, 505 F.3d 996 (9th Cir. 2007), the latest Ninth Circuit case to review a law regulating sexually-oriented adult businesses, the panel confronted the same ordinance at issue in Tollis. Here, however, the court addressed the open-door peep show requirement rather than the dispersal requirement, and held that Justice Kennedy's proportionality requirement was inapplicable to such a provision, as it had so held before with regard to time restrictions:

> Any regulation that deters these activities will necessarily make the forum for the speech less attractive, but only because the speech and sexual acts originate with the same person and occur at the same time. The overall quantity of the protected expression must be reduced, but only because the patron is chilled from also contemporaneously engaging in the unprotected behavior. Justice Kennedy's proportionality language was not designed for situations where the protected speech and the unprotected conduct merge in the same forum.

Id. at 1005.

B. Legal Framework for Remand

1. The Holding of Alameda Books

In its Order of June 10, 2005 ("2005 Order"), this Court found that while the Renton standard is still the controlling standard in this case, that standard was modified by the Supreme Court's holding in Alameda Books. Specifically, the proportionality requirement adds a new element to the Renton inquiry. In this case, the City has met its initial evidentiary burden, and the Plaintiffs must now rebut that showing.

The Court confirms that the findings articulated in the 2005 Order with respect to the applicable legal standard to use in reviewing section 12.70(C) remain valid. First, Justice Kennedy's opinion in Alameda Books represents the holding of the case. See Marks, 430 U.S. at 193. His opinion concurred in the judgment of the case on the narrowest grounds, and therefore must be regarded as the controlling opinion. See, e.g., Fair Pub. Policy, 336 F.3d at 1161.

Following Justice Kennedy's statement that "the central holding of *Renton* remains sound," Alameda Books, 535 U.S. at 448, the Court further finds that the overall three-step framework of Renton has been supplanted but not overturned. A court must first review the ordinance to see if it completely bans the protected activity. If not, then the court should determine if the regulation is designed to reduce the disfavored secondary effects associated with the regulated activity and not the content of the speech activity itself. If so, the court applies intermediate scrutiny; it determines whether the regulation is narrowly tailored to serve a substantial government interest, and whether it leaves

open alternative avenues of communication. In determining whether the regulation is designed to meet a substantial government interest, courts should review the evidence relied upon by the legislating body to ensure that it provides a reasonable basis for the justification of the ordinance.

Finally, the Court finds that Alameda Books made three fundamental modifications to the Renton standard. First, after Alameda Books, the classification of the regulation as content neutral or content based does not determine which level of scrutiny to apply. See id. at 449 (noting that zoning ordinances "have a prima facie legitimate purpose: to limit the negative externalities of land use. . . . For this reason, we apply intermediate rather than strict scrutiny (Kennedy, J., concurring in the judgment)); Fair Pub. Policy, 226 F.3d at 1164-54 (expanding this approach beyond zoning ordinances). Thus, when reviewing zoning ordinances restricting, but not banning, the operation of adult establishments, courts should apply intermediate scrutiny.

Second, at the point where courts review an ordinance to determine whether it is designed to further a substantial government interest, they should engage in the two-step inquiry articulated by Justice Kennedy. "First, what proposition does a city need to advance in order to sustain a secondary effects ordinance? Second, how much evidence is required to support the proposition?" Alameda Books, 535 U.S. at 449.

Thus, courts must first examine the justification offered by the ordinance's authors to ensure that it complies with the proportionality requirement, and then review the evidence relied upon by the legislative body to determine whether it reasonably

supports the rationale. As interpreted by the Ninth Circuit, in the context of zoning ordinances that require the dispersal of adult businesses, the proportionality requirement is "shorthand" for a determination "whether the ordinance will impose a significant or material inconvenience on the consumer of the speech." Tollis, 505 F.3d at 940. In other words, "[a]t the time of the enactment the city must have some reasonable basis to believe that interested patrons would, for the most part, be undeterred by the geographic dispersal of the adult establishments." Id.

However, the Court emphasizes that although this language may sound in terms of the First Amendment rights of the patrons, in many cases - including the instant one - the rights at issue are in fact those of business-owners. In such cases, therefore, the question is not whether the patrons might access the protected speech through some other medium. The question, rather, is whether the patrons will be deterred from frequenting the establishments at issue, thereby diminishing or eliminating the ability of the business-owners to disseminate the speech of their choice.

The proportionality requirement thus requires a city to justify an ordinance regulating adult entertainment establishments on the grounds that the ordinance will reduce the secondary effects associated with such commerce, and that this reduction in secondary effects will not substantially diminish the underlying speech. Because Justice Kennedy found that the City's rationale passes the initial stage of review, see Alameda Books, 535 U.S. at 451-53, the assertions attributed by Justice Kennedy to the City will be

understood to be the City's position with respect to the design and effect of the ordinance.

The third addition to the Renton structure is the burden-shifting framework articulated in Alameda Books. The City bears the ultimate burden of showing that the ordinance it enacted passes intermediate scrutiny. To show that the ordinance advances a substantial government interest, the City "may rely on any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and substantial, independent government interest." Alameda Books, 535 U.S. at 438 (quoting Renton, 475 U.S. at 51-52).

If the Court, after reviewing the evidence presented by the authors of the regulation, finds that the evidence is sufficient to support the rationale for the law, the burden shifts to Plaintiffs "to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." Id. at 438-39; see also id. at 453 ("If these assumptions can be proved unsound at trial, then the ordinance might not withstand intermediate scrutiny." (Kennedy, J., concurring)). Finally, "[i]f the plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." Id. at 439. A municipality's failure to supplement the record in a satisfactory fashion means that it cannot, as a matter of law, demonstrate that the ordinance survives intermediate scrutiny, thereby entitling the plaintiff to summary judgment.

2. Scope and Parameters of Plaintiffs' Burden

The plurality and Justice Kennedy both held that the City had met its initial evidentiary burden. Id. at 439 (plurality opinion), 445 (Kennedy, J., concurring). Thus, Plaintiffs now have the opportunity to cast direct doubt on the City's rationale for the ordinance by either 1) demonstrating that the City's evidence does not support its rationale or 2) furnishing evidence that disputes the City's factual findings. Id. at 439.

Relying on their own evidence, Plaintiffs may dispute the rationale in either of two ways. First, they can demonstrate that the ordinance will not in fact substantially diminish the targeted secondary effects. Second, Plaintiffs may show that the ordinance will reduce secondary effects only by reducing speech "in the same proportion," for Justice Kennedy made clear that "[t]he rationale of the ordinance must be that it will suppress secondary effects - and not by suppressing speech." Id. at 449-50.

In concluding that the City's rationale was not aimed at speech, Justice Kennedy made a number of assumptions. He assumed that "[d]ispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little." Id. at 453. He reasoned that if two neighboring businesses split, the dispersed stores will attract fewer patrons (for example, 49 patrons each instead of 100 patrons combined). This, in turn, could lead to a "dramatic" reduction of secondary effects, assuming that 49 patrons at each establishment will attract less crime than 100 patrons concentrated at one establishment. Id. at 452-53. Justice Kennedy further assumed that while the secondary effects might be

substantially reduced, the corresponding reduction in speech would likely be very little. Indeed, Justice Kennedy thought that speech might even increase due to the "hospitable surroundings." Id. at 453.

At the end of his opinion, Justice Kennedy stated that "[i]f these assumptions can be proved unsound . . ., then the ordinance might not withstand intermediate scrutiny." Id. Therefore, the Plaintiffs may "cast direct doubt" on the City's asserted rationale either by showing that secondary effects will not in fact decrease substantially, or by demonstrating that the City has violated the "proportionality requirement."[8]

B. Summary Judgment

1. Legal Standard

Summary judgment is appropriate where "the pleadings, depositions, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In adjudicating

[8] The proportionality requirement thus comes into play twice - when a court initially reviews the justification advanced by a city for its ordinance and later when the court weighs the evidence proffered by the plaintiffs. In both instances, courts must be alert to the possibility that the ordinance accomplishes its goal of reducing secondary effects only through the suppression of speech. Because the Supreme Court already held that the City met its initial burden in this case, only the second instance is at issue.

a motion for summary judgment, the court must draw all reasonable inferences in favor of the nonmoving party. Id. at 255.

2. Evidentiary Issues

Before reaching the merits of the cross motions for summary judgment, the Court first addresses evidentiary issues raised by both parties.

a. Vanita Spaulding

Plaintiffs object to the Second Declaration of Vanita Spaulding, filed December 17, 2007. They argue that she is an inappropriate expert because her testimony will not "assist the trier of fact to understand the evidence or determine a fact in issue," see Fed. R. Evid. 702, because it will create a "danger of . . . confusion of the issues, . . . undue delay [and] waste of time," Fed. R. Evid. 403, and because it lacks foundation, Fed. R. Evid. 703. The Court agrees, and therefore strikes the declaration.

The City offers the testimony of Vanita Spaulding as an expert. She is the Managing Director of Trenwith Group LLC, where her responsibilities "include oversight responsibility for the Regional Valuation Group." (2nd Spaulding Decl., at ¶ 4.) She has "substantial expertise regarding financial, market, business and industry research and analysis," and serves as a consultant to "business management, investment advisors, auditors, shareholders, financial investors and potential investors for use in business and litigation." (Id. at ¶¶ 5,6.) These entities use her input "in making decisions that include, among many others, whether to invest in a business, determining an appropriate purchase price for a partial interest in a business, and making informed decisions

regarding whether it will be economically feasible for separate segments of a business to operate profitably if required to separate." (Id. at ¶ 6.) She has testified or been deposed regarding these issues in several cases, but none relating to the adult entertainment industry. (1st Spaulding Decl., May 31, 2007, at Ex. 1, App. 3.)

The Second Spaulding Declaration states the following: Ms. Spaulding visited the Alameda Books and Highland Books sites. She observed their design and reviewed their schematic diagrams. She reviewed their income statements from the years 2003-2006, which show high profit margins. She considered the various categories of revenues and expenses from their income statements, and allocated them between, as relevant here, the bookstore portion and arcade portions of the business. She concludes that based on an "analysis of revenues and expenses generated and incurred by each segment of the business," it would be "economically feasible" to separate the arcade from the retail bookstore component.

Ms. Spaulding's conclusion lacks foundation. "What Ms. Spaulding knows how to do - and Plaintiffs do not challenge this - is to separately evaluate the profitability of" separate components of a business." (Pls' Obj. 2nd Spaulding Decl., at 4.) However, the question in this case is not whether the arcade portion of the combination business is profitable. The question, more precisely, is whether the arcade as a stand-alone business will continue to exist once unmoored from the bookstore component. Alameda Books, 535 U.S. at 451 (purpose of the ordinance must be that the two business will "split rather than [that one will] close" (Kennedy, J., concurring)).

Ms. Spaulding does not claim to have any knowledge (much less expert knowledge) of the adult entertainment industry. She does not claim to have surveyed customers or interviewed business owners to gain an understanding of consumer patterns. She therefore has no basis to conclude that customers would be willing to visit a stand-alone arcade. Instead, she simply "assume[s] no decline in operating revenues of the arcade operations" as a separate entity based upon the fact that it has been profitable when combined with a bookstore. (2nd Spaulding Decl. ¶ 17.)

The current situation is thus different from a company with two entirely separate components, such as a chain of gas stations and a chain of grocery stores both run by the same central management company. Ms. Spaulding's analysis provides support for the conclusion that, given that the gas stations and grocery stores exist independently, if they are financially viable when operated by the same management company they are likely to be financially viable when operated by separate companies. Her analysis does not provide support, however, for the conclusion that a single business with two intertwined pieces (such as a gas station/minimart combination) could be separated. For that, Ms. Spaulding would need expertise in more than the financials; she would need expertise in consumer patterns, the reasons why and the ways in which customers shop at that particular business.

The following analogy from a more familiar industry, offered by Plaintiffs, is useful in explaining why Ms. Spaulding's conclusion does not follow from her testimony: Consider a multi-screen (non-adult) motion picture theater, the typical multi-cinema in a building containing a half-dozen screens, with a central area

containing concessions. Nobody would dispute that the concession stands at these theaters sell extremely expensive popcorn, candy, soda, hot dogs, and other goods. Assume that a municipality adopts a regulation requiring concession stands to operate more than 1,000 feet away from a theater complex.

Assume further that Ms. Spaulding performs her analysis, tallying the costs and revenues from both the theater and the concession stand, and determines that both components of the business are profitable. Following the logic from her declaration, the concession stand would be a viable stand-alone business. However, customers generally buy concessions immediately before entering a film. The cinema and concession elements have, in effect, a symbiotic relationship. People are willing to pay exorbitant prices for popcorn because, at least in part, the convenience of being able to buy an item within feet of the theater entrance outweighs the increased cost of that item. It does not logically follow that customers would continue to purchase a $7 bag of popcorn if they had to go to an inconvenient location down the block to do so. It may be possible that a stand-alone concession stand would be an economically viable business, but Ms. Spaulding's analysis of the financials of the combined business simply does not provide a foundation upon which to so opine. For those reasons, the Second Spaulding Declaration lacks foundation under Rule 703, does not "assist the trier of fact" as required of expert testimony under Rule 702, and could confuse the issues and cause undue delay as proscribed by Rule 403. Accordingly, the Court strikes that declaration.

b. Rick Hinckley

Plaintiffs proffer Rick Hinckley as an expert witness. Mr. Hinckley owns an adult arcade installation business. He has been involved in the installation of over 250 arcades since 1990, and makes it his "business to stay abreast of the industry and" to "closely follow industry trends." (Hinckley Decl. ¶ 16.) He opines, based on his expertise and knowledge of the adult arcade industry, that an arcade standing alone would not be viable. The City moves to strike most of Mr. Hinckley's declaration on the grounds that it lacks foundation, is speculative, is not relevant, and is hearsay. The Court declines.

The City argues that Mr. Hinckley has no basis for his conclusions that an "adult arcade would not be economically viable standing alone," that it "would not attract any significant number of customers," and that auditorium adult motion picture theaters have "become all but extinct" because they are "perceived by the public as 'seedy.'" (Hinckley Decl. ¶¶ 17, 18.) Mr. Hinckley offers his testimony as an expert witness in the field of adult entertainment. He is basing his opinion on his experiences with many hundreds of adult arcades, every one of which is attached to a retail store, and because of his experience and knowledge of the customer trends in this industry. (Id. at ¶ 17.) The Court finds that Mr. Hinckley's experience goes to the heart of this case - whether customers would frequent a stand-alone arcade - and indeed is precisely the type of knowledge that Ms. Spaulding lacks.[9] This

[9] Contrary to the City's contention, Mr. Hinckley does not need to provide financial data to back up his conclusions. It would be difficult, if not impossible, to provide financial data about stand-alone arcades because according to the undisputed evidence in this case, no one has ever heard of one existing.

(continued...)

information is relevant because, as discussed, if the ordinance reduces secondary effects by forcing businesses to close, then it is unconstitutional. Finally, the fact that some of Mr. Hinckley's information might be based on hearsay is, as expert testimony, of no consequence. See Fed. R. Evid. 703 (bases of expert testimony "need not be admissible in evidence").

C. William Andrus

William Andrus is an expert witness offered by Plaintiffs. He is the Vice President of Beverly Books (the combination bookstore/arcade involved in this case), has for twenty years been "involved in the operation of dozens of adult book and video stores," and presently oversees over thirty businesses similar to Plaintiffs. (Andrus Decl. ¶¶ 5, 6.) He is trained as a lawyer, is admitted to the bar in New York, and through his experience has "become intimately familiar with all aspects of [adult] businesses including the economics, legal issues, marketing, and customers' responses and attitudes." (Id. ¶ 5.) Mr. Andrus has submitted a declaration stating his opinion that if the arcade and bookstore components are required to split the arcade would lose a "dramatic[]" number of customers and the bookstore's sales would drop "appreciably." (Id. at ¶¶ 12, 9.) He also states that he has "never seen or heard of a business that existed only as an adult arcade," and that a significant portion of the income generated by

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[9](...continued)
Moreover, Mr. Hinckley does not claim to be an expert in business accounting. Rather, he claims an expertise in the practical functioning of arcade-related businesses and a knowledge of consumer tendencies in this area.

the arcade comes from customers previewing material that they then purchase or rent from the retail store. (Id. at ¶ 13, 9, 10.)

The City objects to portions of this declaration for much the same reason it objected to Mr. Hinckley's. For much the same reasons, the Court rejects these objections. The testimony is relevant as it relates to the economic viability of splitting the combined bookstore/arcade because the ordinance's constitutionality depends on it not substantially reducing speech by forcing the separated businesses to close. As an expert, Mr. Andrus may rely on hearsay and other inadmissible evidence in order to form his conclusions. The Court further rejects the City's contention that Mr. Andrus has no foundation for his conclusions. The Court finds that as Vice President of the companies at issue in this case and as someone who has worked for decades in the adult entertainment industry, Mr. Andrus has a basis for his knowledge about the sales and customer patterns at issue. If the City wished to challenge some of his facts or to extract more detail, it had the opportunity to depose him.

d. Daniel Linz

Because of the Court's conclusion that the ordinance violates the First Amendment by disproportionately reducing speech, it need not address the objections to the testimony of Mr. Linz, which related solely to whether the ordinance would in fact reduce secondary effects.

e. Jeffrey Cancino

Because of the Court's conclusion that the ordinance violates the First Amendment by disproportionately reducing speech, it need not address the objections to the testimony of Mr. Cancino, which

related solely to whether the ordinance would in fact reduce secondary effects.

3. Application

As discussed supra, the City has already satisfied its initial burden to provide a reasonable basis for concluding that the combined bookstore/arcade business increases the presence of undesirable secondary effects. Plaintiffs now bear the burden of casting direct doubt on that rationale. The Court finds that Plaintiffs have succeeded in casting such doubt and that the City has failed to supplement the record in a way that would undermine Plaintiffs' argument.

a. Plaintiffs' Direct Doubt

Plaintiffs have cast doubt on the City's rationale for the ordinance by providing compelling evidence that stand-alone arcades will not be economically viable. They have submitted the declarations of two experts - Mr. Hinckley, who owns a company that installs adult arcades, and Mr. Andrus, the Vice President of the bookstore/arcade business at issue in this case - who attest that, with their decades of experience in the industry, they have never seen or heard of an arcade that is not attached to a retail business. (Hinckley Decl. ¶ 17, Andrus Decl. ¶ 13.) This evidence itself suggests that the stand-alone arcade would not be viable economically because, logically, if it were, someone during the history of the adult entertainment industry would have tried it. It is no great stretch of logic to state that if a stand-alone arcade were a profitable venture, one would expect our economic system to have produced one. The fact that neither party is aware

of a single example of a stand-alone arcade is telling. Put another way, the economics speak for themselves.

Mr. Hinckley and Mr. Andrus also provide expert testimony suggesting two reasons why stand-alone arcades do not exist. First, many customers who use arcades do so in order to aid in their decisions to purchase or rent merchandise at the bookstore because "an enormous number of DVDs can be previewed in the arcade portion of business in a short period of time." (Hinckley Decl. ¶ 18; see also Andrus Decl. ¶¶ 8-10.) Regardless of the amount of income generated by the arcades, therefore, Plaintiffs' evidence shows that a primary motivation for customers to use the arcades would disappear without the presence of a connected retail store.

Second, it is the opinion of Mr. Andrus and Mr. Hinckley that unlike adult retail businesses, many of which are designed to be aesthetically appealing and which attempt to attract couples and even women alone as customers, stand-alone arcades are perceived by customers as "seedy," and would be unlikely to draw business on their own. (Hinckley Decl. ¶ 18; Andrus Decl. ¶ 18.) It is for this reason, in the opinion of Plaintiffs' experts, that "free-standing adult theaters (i.e., auditorium-style theaters) nearly vanished beginning as prerecorded home adult videotapes became more widely available." (Hinckley Decl. ¶ 16; Andrus Decl. ¶ 18.)

As discussed, the City objects to this evidence as "speculation and guess work." However, the Court finds that Mr. Hinckley and Mr. Andrus, with their decades of experience owning and operating the specific businesses at issue in this case and their knowledge of the industry, have sufficient foundation to testify that they are not aware of any stand-alone arcade ever

existing, and that arcades bring in business largely through customers who are also using the retail component of a store. They further have foundation to testify, through their expert knowledge of the industry, as to their understanding of customer opinions of arcades and adult cinema complexes. Unlike the cases relied upon by Defendant, Plaintiffs' experts are not testifying about a scientific process of causation. Cf. Guidroz-Brault v. Mo. Pac. R. Co., 254 F.3d 825, 829 (9th Cir. 2001) (expert testimony regarding whether train crew's failure to keep "a proper lookout" caused the train's derailment needed further foundation); Reynolds v. County of San Diego, 84 F.3d 1162, 1168-69 (9th Cir. 1996) (same, regarding the physical movements leading up to a gunshot wound), overruled on other grounds by Acri v. Crian Ass., Inc., 114 F.3d 999 (9th Cir. 1997). Instead, Plaintiffs' experts are testifying as to their understanding of the industry. See, e.g., Sentry Select Ins. Co. v. Royal Ins. Co. Of Am., 481 F.3d 1208, 1222 (9th Cir. 2007) (noting that experts may testify as to their understanding of an "industry generally"). Their experience is all the foundation necessary.

Plaintiffs' evidence casts the requisite doubt here. The City's rationale in passing the ordinance "must be that this ordinance will cause two businesses to split rather than one to close." Alameda Books, 535 U.S. at 451 (Kennedy, J., concurring). Although the City satisfied its initial burden, Plaintiffs have come forth with compelling evidence that stand-alone arcades are not economically viable; indeed they do not and have never existed. Because stand-alone arcades do not exist and are not a viable model, it is implausible that the City reasonably believed that the

arcades could move rather than close, that, in other words, the City had "some basis to think that its ordinance will suppress secondary effects, but not also the speech associated with those effects." Tollis, 505 F.3d at 939. Therefore, Plaintiffs' evidence suggests that the City's intent in passing the ordinances was to reduce secondary effects by closing arcades - impermissibly "reducing speech in the same proportion." Alameda Books, 535 U.S. at 449 (Kennedy, J., concurring).[10]

b. City's Rebuttal

The burden now shifts back to the City "to supplement the record with evidence renewing support for a theory that justifies its ordinance." Alameda Books, 535 U.S. at 439. The Court finds that the City has failed in this regard.

The City's primary focus in supplementing the record is on demonstrating that the ordinance does in fact reduce secondary effects. However, that evidence does not address whether the ordinance is designed, impermissibly, to reduce secondary effects by reducing speech. The City makes three arguments in opposition to Plaintiffs' contention that the ordinance unconstitutionally reduces speech significantly. None, however, is convincing.

First, the City suggests that Plaintiffs cannot cast sufficient doubt on the rationale for the ordinance because the Supreme Court has already held that the City's burden is low, and that it had a reasonable basis for passing the ordinance. This argument confuses the first and third stage of the Supreme Court's

[10] Because Plaintiffs have cast direct doubt in this fashion, the Court need not reach the alternate argument that the City's ordinance will not in fact reduce secondary effects.

burden-shifting analysis. Courts must afford liberal deference to the City's rationale only at the first stage. If Plaintiffs' succeed in casting direct doubt, however, a City's burden to rebut Plaintiffs' argument by supplementing the record is higher, and may well include providing empirical evidence to support its position. See Alameda Books, 535 U.S. at 439 (noting that the City may be required to supplement its position with empirical data once Plaintiffs provide "actual and convincing evidence . . . to the contrary"). Accordingly, the City had not successfully met its burden at the third stage simply by virtue of having met its burden at the first.

Second, the City contends that it would in fact be economically feasible to separate the combined adult businesses. However, the City has submitted no admissible evidence to this effect. Plaintiffs put forth evidence that stand-alone arcades are not viable economically. Defendant now bears the burden to present some evidence that arcades could survive on their own. The City has not made this showing. Instead, the City relies on the Vanita Spaulding's Second Declaration, which reviews the revenue and expenses generated and incurred by the arcade and retail components - an analysis with which no one disagrees. However, as already discussed, her declaration is not admissible as expert testimony regarding whether arcades could survive as stand-alone businesses because she has not established a basis for having knowledge of the adult entertainment industry. Her conclusion that arcades would survive standing alone because they produce revenue when linked to a retail store is an inference that simply does not follow.

While the City challenges Plaintiffs' experts contentions as speculation, in fact it does not contest their most important propositions: 1) no one is aware of a stand-alone arcade currently in existence or ever having existed, and 2) arcades draw significant revenue from those customers who also use the retail component of these stores. The City contends that the fact that a stand-alone arcade has never before existed is irrelevant. The Court disagrees. Of course, that neither party is aware of a stand-alone arcade in operation could also mean that, however improbably, it could be a profitable model that has simply never been tried. However, Plaintiffs need not prove that stand-alone arcades are not and could not be viable. They need only provide sufficient compelling evidence to cast direct doubt on the City's motive in passing the ordinance at issue.

Plaintiffs have submitted expert testimony that such businesses have never existed because they are not viable. That evidence casts sufficient doubt to shift the burden back to the City. The City has offered no relevant evidence to rebut Plaintiffs' contention.

Third, and finally, Defendant argues that even if the arcades close, the ordinance is constitutional because "[a]dult entertainment is readily available nearly everywhere within the City, at a cost comparable to or less than the cost of such services as provided through an adult arcade." (Def. Opp'n Summ. J. 24.) As evidence, the City has submitted a different declaration by Vanita Spaulding documenting the multitude of alternative avenues through which patrons can access pornography, such as the internet, blackberries, and DVDs.

The Court finds that this reasoning comprises the heart of the City's fundamental argument: The City, in the end, concedes that its ordinance may force the arcade businesses to close, but contends that these closures are of no consequence because patrons have many other avenues through which to view adult entertainment.

The City's argument fails to identify the correct speaker, and this mistake is fatal to its case. If the speakers at issue were the patrons, this argument might have some force. However, the speech of the patrons - protected though it is - is not the focus of this lawsuit. Rather, Plaintiffs have brought this lawsuit on behalf of themselves. As the Complaint puts it, Plaintiffs' allege that "By prohibiting the operation of traditional adult bookstores anywhere in the City of Los Angeles, the CITY has interfered with plaintiffs' First Amendment right to provide the adult media materials of its choice to its customers." (Compl. ¶ 61 (emphasis added).) It is thus the First Amendment rights of the business-owners, not the rights of the customers, that are at issue in this litigation.

There can be no doubt that the Constitution protects the business-owners' rights to their speech - disseminating the adult material of their choice - in this context. See, e.g., Illusions-Dallas Private Club v. Steen, 482 F.3d 299, 307 (5th Cir. 2007) (holding that an ordinance prohibiting sexually-oriented businesses from serving alcohol in a "dry" political subdivision implicated the First Amendment because it restricts the sexually-oriented businesses "ability to *serve* alcohol"); Ctr. for Fair Pub. Policy, 336 F.3d at 1165 (characterizing sexually-oriented businesses such as bookstore and video stores as those "protected by the First

Amendment"); Young v. City of Simi Valley, 216 F.3d 807, 818 (9th Cir. 2000) (holding that the First Amendment analysis required a consideration of whether an ordinance "will 'compromise recognized First Amendment protections' of those people who wish to operate adult businesses in Simi Valley" (emphasis added)).

That patrons may access adult material through alternative fora is thus, while relevant to the speech of the patrons, irrelevant to the speech of the business-owners. It could scarcely be otherwise. If Defendant's argument were taken to its logical extreme, then a municipality could ban all adult establishments because the material is readily available on the internet. A city could ban printed newspapers for the same reason. As Defendant conceded at oral argument, a city could even ban auditorium movies theaters because, after all, they can be accessed on demand from your living room. Such is clearly not the law.[11]

At oral argument on these motions, Defendant insisted that the ordinance sufficiently protects the rights of the business-owner

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[11] For this reason, Defendant's reliance on this Court's prior 2005 Order holding that "adult arcades are not 'an important and distinct medium of expression' under Ladue v. Gilleo, 512 U.S. 43 (1994)," to minimize the relevance of any arcade closures is misplaced. (2005 Order at 38.) Defendant confuses the type of speech with the speaker. City of Ladue held that a broad municipal prohibition on residential signs violated the First Amendment because such expression was "an important and distinct medium." 512 U.S. at 55. The question before the Court in this case, however, is not whether adult arcades are themselves a particular medium of speech entitled to special protection, or whether a patron's First Amendment right to communicate via an adult arcade is preserved so long as he can view the same material via the internet. The issue before the Court, rather, revolves around the business-owner. If arcades shut down, the business-owner's First Amendment rights to disseminate the information of his choice are shut off completely. An ordinance may not force the closure of the arcades, therefore, regardless of whether arcades are a specially-protected medium of speech, because the closures eliminate the speech of the arcade's owner.

because even if stand-alone arcades are forced to close, business-owners may distribute and sell the adult entertainment of their choice using another business model. They may, for example, attach their arcade to a Laundromat, a hotel, or a McDonald's. Likewise, urges Defendant, Plaintiffs may start an online business, and exercise their free speech rights over the internet.

The Court rejects this contention ab initio. It would be unprecedented and unsupported by First Amendment jurisprudence to allow a municipality to force the owner of a legal business to, in essence, start a new business on a completely different business model in order to exercise his free speech rights. Unlike the ordinance at issue in Tollis, which required businesses simply to relocate, see 505 F.3d at 940, or Gammoh, which imposed a "manner" regulation - requiring a minimum distance between dancers and patrons, see 395 F.3d at 1127, Defendant here suggests that Plaintiffs embark on an entirely new business enterprise. If this argument were correct then municipalities could ban any business that distributes material also readily available online. Municipalities could ban any free-standing business as long as that business could survive parasitically if attached to some other business with significant foot traffic.

Such a burden is more than the First Amendment requires business owners to bear. Justice Kennedy could not have been more explicit that the motivation behind a valid ordinance "must be that this ordinance will cause two businesses to split rather than one to close." Alameda Books, 535 U.S. at 451. Justice Kennedy did not state that an ordinance would pass muster so long as a business owner could start an entirely new business that combined the first

business with a Laundromat, or as long as he could firm up his web skills and distribute his speech online.

Indeed, in applying intermediate scrutiny, courts have consistently held that the requirement that an ordinance leave open "alternative avenues of communication" means not that cities should guide all interested patrons to adult websites, but rather that "the displaced business [must] be given 'a reasonable opportunity to open and operate.'" Tollis, 505 F.3d at 939-40 (quoting Renton, 475 U.S. at 53-54) (focusing, in analyzing a statute requiring the relocation of adult businesses into industrial areas, on whether the municipality had provided a "suitable number of relocation sites" for the businesses, not on whether the business-owners or the patrons could find alternate means of distributing or accessing the protected material). In short, Defendant has not imposed a reasonable time, place, or manner restriction; it has asked Plaintiffs to find a new method of speaking. Such a restriction fails to pass constitutional muster.

In conclusion, Plaintiffs have cast direct doubt on Defendant's rationale in passing the ordinance by submitting compelling evidence that stand-alone arcades are not and have never been economically viable. They have thus demonstrated that the ordinance will reduce secondary effects only by, impermissibly, reducing speech in the same proportion. Defendant has failed to rebut Plaintiff's showing by supplementing the record. Indeed, the City appears to agree that the arcades may well close, but contends that such closures will not reduce speech. However, the City's attempt at rebuttal fails as a matter of law because the First Amendment has never allowed municipalities to regulate protected

speech by forcing a business-owner to embark on an entirely new business.

As such, Plaintiffs have presented undisputed evidence that Defendants did not have "some basis to assume [the] three propositions" required by "Justice Kennedy's construct" from Alameda Books. Id. at 939. First, the City could not have reasonably assumed that "this ordinance will cause two businesses to split rather than one to close" because the undisputed evidence shows that stand-alone arcades have never existed and are not economically viable. Second, by forcing the arcades to close, the quantity of speech will be "substantially" diminished. Id. Third, "total secondary effects [may] be significantly reduced," but only by unconstitutionally reducing speech in the same proportion. Id.

Accordingly, the Court finds that Defendant cannot, as a matter of law, succeed on its ultimate burden to demonstrate that section 12.70(C) furthers a substantial government interest (because it reduces secondary effects only by reducing speech in the same proportion), or to show that it leaves open adequate alternative avenues of communication (because stand-alone arcades are not viable economically). There is therefore no question of material fact but that Los Angeles Municipal Code section 12.70(C) cannot withstand intermediate scrutiny, and that it violates the First Amendment.[12]

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[12] It is possible that in fact, strict scrutiny is the appropriate level of review to apply to this ordinance. The case law on this question is ambiguous. The Alameda Books plurality suggested that if an ordinance failed Justice Kennedy's proportionality test, it would have effectively banned the speech at issue and should thus be subjected to strict, rather than intermediate, scrutiny. See Alameda Books, 535 U.S. at 443. In (continued...)

C. Bifurcation

Plaintiffs further move to bifurcate the issue of whether the City has provided a constitutionally adequate number of alternate locations where Plaintiffs can relocate. Because Plaintiffs have succeeded in casting doubt on the rationale for the ordinance by showing that a stand-alone arcade will not be economically viable, and the City has failed to supplement the record with relevant evidence in rebuttal, the Court need not reach the relocation issue, and therefore denies the motion as moot.

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[12](...continued)
other words, the plurality appears to read the proportionality test as a means of determining whether an ordinance constitutes a ban, and therefore whether it triggers strict scrutiny. The plurality declined to resolve this issue with respect to the instant ordinance because the Ninth Circuit had held that section 12.70(C) did not constitute a ban, and Plaintiffs had not petitioned the Supreme Court for review on that issue. However, the parties have provided significant new evidence and briefing since the Ninth Circuit's opinion, and this Court could well rule that the ordinance is indeed a ban in effect if not in name.

On the other hand, Justice Kennedy's concurrence seems to suggest that because section 12.70(C) is not, as a prima facie matter, intended to suppress speech, intermediate scrutiny is appropriate: "The ordinance may be a covert attack on speech, but we should not presume it to be so. In the language of our First Amendment doctrine it calls for intermediate and not strict scrutiny. . . ." Id. at 447 (Kennedy, J., concurring). This language implies that the proportionality test is a part of intermediate scrutiny, rather than a trigger for strict scrutiny. The Ninth Circuit has interpreted the proportionality test in this fashion as well. See Tollis Inc. v. County of San Diego, 505 F.3d 935, 939-40 (9th Cir. 2007). The Court need not determine whether strict scrutiny need be applied because the ordinance fails the more lenient intermediate scrutiny in any case.

III. CONCLUSION

Based on the foregoing analysis, the Court GRANTS Plaintiffs' motion for summary judgment, DENIES Plaintiffs' motion to bifurcate, and DENIES Defendant's motion for summary judgment.

IT IS SO ORDERED.

Dated: July 16, 2008

DEAN D. PREGERSON
United States District Judge