

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER**

MINUTE ORDER

DATE: 03/17/2011

TIME: 02:00:00 PM

DEPT: C08

JUDICIAL OFFICER PRESIDING: Kirk Nakamura

CLERK: Kathy Beltran

REPORTER/ERM: Kathy Lusk-3545 CSR# 3545

BAILIFF/COURT ATTENDANT: Diana Acosta

CASE NO: **30-2011-00448549-CU-OR-CJC** CASE INIT.DATE: 02/09/2011

CASE TITLE: **The Retail Property Trust vs. Orange County People for Animals**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Other Real Property

EVENT ID/DOCUMENT ID: 71179220

EVENT TYPE: Order to Show Cause re: Preliminary Injunction

APPEARANCES

The Court having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Tentative Ruling posted on the Internet now becomes the final fuling of the court.

Order to Show Cause re; Preliminary Injunction: DENY

Defendant OCPA's Evidentiary Objections to the Declaration of Katherine Armstrong and to the Supplemental Declaration of Katherine Armstrong are sustained.

Plaintiff's Evidentiary Objections to the Declaration of Kavita Patel are ruled on as follows:

Paragraphs 3, 6, 8, 9, 10 & 11 – Overruled.

Paragraph 7 – Sustained.

Paragraph 5 - Sustained as to the sentence beginning with "The purpose of..." , and overruled as to the sentence beginning with "Our message..." .

Plaintiff's Evidentiary Objections to the Declaration of David Simon are ruled on as follows:

Paragraphs 3, 6, 8, 10, 11, 13, 14 (misnumbered as paragraph 13), 15 (including objections to statements allegedly made in part of paragraph 14, which were actually made in paragraph 15), 16, 17, 18 & 19 – Overruled.

Paragraphs 4, 5, 7 & 9 – Sustained.

The Court declines to issue a preliminary injunction against the defendants. The TRO issued on February 9, 2011 is dissolved.

A. The Rules Discriminate Based on Content

Rules that discriminate based on the content of speech are presumptively unconstitutional. *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 487.

Different rules for speech which involves labor activity as opposed to non-labor activity are discriminatory, and therefore are unconstitutional.

The question presented is whether article 1, section 2 of the California Constitution [the "liberty of speech" clause of the California Constitution] permits a privately owned shopping mall to enforce rules that give preferential treatment to labor speech and thereby discriminate against other types of speech. The answer is no.

Best Friends Animal Society v. Macerich Westside Pavilion Property LLC (Second District Court of Appeal, Division 2, March 2, 2011) Westlaw Citation 2011 WL 711584, page 2 (the page numbers listed are from the slip opinion).

In the present case, as in *Best Friends*, the Brea Mall's Rules discriminate between "qualified labor activity" and "expressive activity" by granting participants in "qualified labor activity" more freedom to exercise their free speech rights than those engaged in non-labor expressive activity. For example, the Rules state that, in accordance with applicable law, some of the Rules may not be enforced or applied with respect to certain qualified labor activity, and thus individuals, labor organizations and/or their representatives requesting access to engage in qualified labor activity initially need only complete Sections (A) and (B) of the Application so that the Mall management can obtain sufficient information to determine which, if any, Rules may not apply to the proposed activity. *Declaration of Katherine Armstrong, Exhibit 2 – Mall Rules, Rule 1, paragraph 4*. The Application repeats this distinction in bold. *Id.*, *Mall Rules, page 1 of the Application*.

B. The Rules Allow for Unlimited Discretion to the Mall

Rules that contain ambiguous terms conferring unbridled discretion to the decision-maker are unconstitutional. To be valid, the regulation of expression must provide definite, objective written guidelines for the exercise of discretion. *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal. App. 3d 1193, 1211.

The Mall's Rules are unconstitutional in that they give the Mall unfettered discretion to ban expressive activity if the Mall determines that such activity would impose significant administrative burdens and risk, or if, in its sole discretion, the Mall asserts that the applicant poses a threat to the safety or well-being of patrons or business enterprises. *Declaration of Katherine Armstrong, Exhibit 2 – Mall Rules*.

Specifically, the following rules give the Mall too much discretion and/or contain ambiguous terms.

Rule V - The Mall will determine whether special insurance protection is required.

Rule VI - The Mall will determine whether or not a designated area will be available based on whether, as determined by the Mall, the applicant poses a threat to the safety or well-being of the patrons or business enterprises.

Rule X - The Mall may, in its discretion, limit or ban expressive activity if it would impose significant administrative burdens and risk on the Mall.

Rules XII.A - Signs must be of professional quality. "Professional quality" is not defined.

Rule XVIII.B.4 - A failure to comply with the reasonable requests of Mall management or security officers may result in a ban on any future expressive activity. "Reasonable requests" is not defined.

Rule XIX.B - The Mall reserves the continuing right, without the necessity of any advance notice or hearing, to alter, amend, modify, change or terminate the Rules and to make new or different Rules.

C. The Rules Impose Unconstitutional Time, Place and Manner Restrictions

A content-neutral regulation of the time, place, or manner of speech is subjected to intermediate scrutiny to determine if it is "(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication.

Fashion Valley Mall, LLC v. N.L.R.B. (2007) 42 Cal.4th 850, 865.

The Mall admits that the time, place and manner rules that the Court approved in *UNITE v. Superior Court* (1997) 56 Cal. App. 4th 996 are substantially similar to, and were the genesis for, the Mall's Rules. See *Motion, page 11, lines 22 - 24*.

UNITE has been extensively criticized. See *United Brotherhood of Carpenters ("Carpenters") v. NLRB* (9th Cir. 2008) 540 F. 3d 957, 970, 972, fn. 12 & 14; and *Snatchko v. Westfield LLC* (2010) 187 Cal.App.4th 469, 490.

The 9th Circuit declined to follow *UNITE* because it was convinced that the California Supreme Court would decide otherwise (*Carpenters at 970, fn. 12*), and in *Snatchko* the court explicitly questioned the authority of *UNITE*. *Snatchko at 490*.

The Second District Court of Appeal, the same District which decided *UNITE*, determined in *Best Friends* that *UNITE* cuts against the weight of authority, and the court decided to follow *H-CHH* and *Snatchko* with respect to the validity of designated areas for protests. *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (Second District Court of Appeal, Division 2, March 2, 2011) Westlaw Citation 2011 WL 711584, page 8. In addition, the court decided to follow *Carpenters* (a 9th Circuit case, cited above) because *Carpenters* offers a full analysis of the issue and *UNITE* does not.

The Mall cites to *Savage v. Trammel Crow* (1990) 223 Cal. App. 3d 1562, for the proposition that a regulation is valid so long as the property owner could reasonably have determined that its interests overall would be served less effectively without the regulation. But *Savage* has been undermined, if not overruled, by the court's strong affirmation of free speech rights in the shopping mall context in *Fashion Valley Mall, LLC v. N.L.R.B.* (2007) 42 Cal.4th 850. *Klein v. San Clemente* (9th Cir. 2009) 584 F. 3d 1196, 1207.

Best Friends is "on all fours" with the present case. In *Best Friends* the right of an animal advocacy

group to protest in front of a Barkworks store in a mall (The Westside Pavilion in Los Angeles) was at issue. The court of appeal reversed the trial court's denial of the animal advocacy groups' request for a preliminary injunction to stop the Mall from enforcing the Rules to restrict it from protesting within aural and visual range of Barkworks or from protesting on blackout days.

The following specific Rules impose unconstitutional restrictions on the time, place and manner of expressive activity.

Rule III.A – This Rule requires every individual, organization or entity desiring to use the Mall's common areas for expressive activity to apply to the Management Office for permission to use the Mall Property five business days preceding the date and time desired for the proposed activity.

The 9th Circuit in *Rosen* determined that a Rule that requires participants to submit an application in advance of exercising their right to free speech is unconstitutional. *Rosen v. Port of Portland* (9th Cir. 1980) 641 F. 2d 1243, 1249 (advance notice or registration requirements drastically burden free speech in that they stifle spontaneous expression and prevent speech that is intended to deal with immediate issues. The overall effect is to seriously discourage political, religious, social and economic speech). Although the *Rosen* decision is not binding on this Court, *Rosen* should be followed because its reasoning is sound. **Requiring OCPA to complete an application before engaging in expressive activity stifles spontaneous expression and prevents speech that is intended to deal with immediate issues, especially since the Rules require that applications be submitted a minimum of five business days in advance.**

Rule VI – This Rule restricts expressive activity to designated areas. There are two designated areas of 64 square feet each in the Mall, neither of which is closer than 600 feet to Barkworks. See *Declaration of David Simon, paragraph 10*.

A rule that effectively prohibits a group from reaching its intended audience is unconstitutional. *United Brotherhood of Carpenters v. NLRB ("Carpenters")* (9th Cir. 2008) 540 F 3d 957, 971-972 (by confining expressive activity to designated areas which may be hundreds of yards from any given store or its patrons, the Mall has effectively cut off access to the intended audience). See also *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (Second District Court of Appeal, Division 2, March 2, 2011) Westlaw Citation 2011 WL 711584, page 14 (in general, a Mall must allow protests within aural and visual range of a targeted business).

Here the two designated protest areas are too far away from the intended audience of the protesters (Barkworks customers) for the protests to reach the intended audience. The closest designated area is 600 away and the furthest is 780 feet away. Declaration of David Simon, paragraph 10. Also, neither is in the line of sight of Barkworks. A Mall patron could enter the Mall through the adjacent Sears store and never see or make contact with protesters at either designated area. In fact, a Mall patron could enter anywhere on the first floor, and go up to the second floor using the stairwell outside of Barkworks and never see or make contact with protesters at either designated area. Declaration of David Simon, paragraphs 10 and 11; Declaration of Kavita Patel, paragraphs 6 and 7.

Also, a mall may not impose blanket bans on the time or place of free speech unless there is proof that blanket bans are the only way to prevent substantial disruption of normal business operations. Best Friends Animal Society v. Macerich Westside Pavilion Property LLC (Second District Court of Appeal, Division 2, March 2, 2011) Westlaw Citation 2011 WL 711584, page 14.

The Mall has not provided any admissible evidence (see evidentiary objections) that OCPA's presence

outside of Barkworks presents a safety hazard or is substantially disruptive of normal business operations.

The videos submitted by the Mall showing the protests, and photographs of a protest submitted by OCPA, reveal that there is ample room for demonstration outside of the store, and that the presence of the protesters does not hamper the Mall patrons ability to move through the Mall. See *Videos attached to the Declarations of Brian Sawyer and Anthony Molina; and Declaration of David Simon, paragraphs 14 – 15 (including photographs)*.

Further, it is clear from the photographs of the measurements taken by Mr. Simon that there is ample room for demonstration outside of the Barkworks store. Contrary to the assertions of Kathleen Armstrong in her Declaration that the passageway in front of the Barkworks store is only 7.8 feet wide, Mr. Simon has shown that, at its narrowest point, the passageway is 9 feet 2 inches wide, and at its widest point it is 13 feet 10 inches wide. See *Declaration of David Simon, paragraph 13 (which includes photographs)*.

Rule VIII – This Rule provides that no more than three participants may use a designated area at the same time, and that the names of all participants must be listed on the Application.

Where a mall attempts to limit the number of participants, it must have a significant justification. *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal. App. 3d 1193, 1214.

The Mall has not submitted any admissible evidence that this limitation is justified. Even if limited to designated areas, there is no apparent safety or other reason why more than three people cannot engage in expressive activity at the same time.

The application requirement is also unconstitutional, as discussed above under the analysis to Rule III.A. *Rosen v. Port of Portland* (9th Cir. 1980) 641 F. 2d 1243, 1249. Not only does such a requirement stifle spontaneous expression and prevent speech that is intended to deal with immediate issues, but it also gives the Mall personal information which the Mall may disseminate or use to retaliate against individual protesters. The Application not only requires the name, address and telephone number of each protester, but it also requires the applicant to list the driver's license or other I.D. number of each of the protesters. See *Declaration of Katherine Armstrong, Exhibit 2 – Mall Rules, Application, pages 1 and 2*.

Rule X – This Rule allows the Mall, at its discretion, to completely ban expressive activity during certain "peak traffic days", which includes the entire two weeks of the Christmas holidays. See *Declaration of Katherine Armstrong, Exhibit 2 – Mall Rules, Exhibit B*.

A shopping mall must allow protests within aural and visual range of a targeted business whenever the mall is open to the public, and may not impose blanket bans on the time or place of free speech unless there is proof that blanket bans are the only way to prevent substantial disruption of normal business operations. *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (Second District Court of Appeal, Division 2, March 2, 2011) Westlaw Citation 2011 WL 711584, page 14.

The court in *Costco Companies, Inc. v. Gallant* (2002) 96 Cal.App.4th 740 upheld the constitutionality of Costco's blackout dates based on the potential for conflict on such dates between competing protesters. The court stated that "...Costco could be legitimately concerned with the impact on its business on those days when in fact a conflict between a group of petitioners and their opponents arose." *Id.* at 753. Here the Mall has not shown that imposing a "blanket ban" on protests by imposing "blackout dates" is the only way to prevent substantial disruption of normal business operations, or that there is a danger of

"competing protesters".

Also, OCPA has shown that Christmas is the time of year when OCPA would reach its largest audience, which is people who are considering buying a puppy for Christmas. *Declaration of David Simon, paragraph 16; Declaration of Kavita Patel, paragraph 10*. Thus imposing a blanket ban during this period has the effect of denying OCPA access to its intended audience.

Rule XVI – This Rule prohibits solicitations for immediate and future donations.

A rule that prohibits all forms of solicitations for donations is unconstitutional. *Fashion Valley Mall, LLC v. N.L.R.B.* (2007) 42 Cal.4th 850, 868-869. Soliciting for future donations is not intrusive or coercive because the potential donor is allowed adequate time away from the pressure of solicitation to reflect and decide whether or not to donate.

D. The Statutes on Which the Mall's Trespass Claim Rests do not Apply

Penal Code §602.1(a) makes it unlawful for any person to intentionally interfere with any lawful business by interfering with those attempting to carry on business or their customers and who refuses to leave after being requested to leave. Under *Penal Code §602(o)* any person who willfully commits a trespass by refusing or failing to leave real property or structures belonging to another and not open to the general public, upon being requested to leave by the owner, the owner's agent, or the person in lawful possession, is guilty of a misdemeanor trespass.

These statutes do not apply to persons on the premises who are engaging in activities protected by the California or United States Constitutions. See *Penal Code §602.1(c)(2)*. The defendants had the constitutional right to protest in front of Barkworks without complying with the Mall Rules which, as discussed above, are unconstitutional. Therefore the defendants did not commit a trespass.

The Relative Interim Harm to the Defendants if an Injunction is Issued is Greater Than the Relative Interim Harm to Plaintiff if an Injunction is not Issued

The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Brown v. CDOT* (9th Cir. 2003) 321 F. 3d 1217, 1226, citing *Elrod v. Burns* (1976) 427 U.S. 347, 373.

The Mall argues that denying the injunction would require it to relinquish control of its common areas, which would constitute an unconstitutional taking under the Fifth and Fourteenth Amendments. However, as the court in *Best Friends* recognized, allowing protests does not constitute an unconstitutional taking in that the Mall is still permitted to enforce time, place and manner restrictions as long as they are content-neutral and pass intermediate scrutiny or are content-based and pass strict scrutiny. *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (Second District Court of Appeal, Division 2, March 2, 2011) Westlaw Citation 2011 WL 711584, page 19.

Responding party to give notice.