

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

LAUDER, INC. d/b/a HOUSTON
TRIBUNE AND HEIGHTS TRIBUNE,
PLAINTIFF,

V.

CIVIL NO. _____

CITY OF HOUSTON, TEXAS,
DEFENDANT.

PLAINTIFF, LAUDER, INC., D/B/A HOUSTON TRIBUNE AND HEIGHTS
TRIBUNE'S, ORIGINAL COMPLAINT AND REQUEST FOR TEMPORARY
RESTRAINING ORDER, TEMPORARY INJUNCTION
AND PERMANENT INJUNCTION AFTER FINAL TRIAL

This lawsuit is brought by LAUDER, INC., d/b/a Houston Tribune and Heights Tribune, hereinafter and sometimes referred to as Plaintiff, against the City of Houston, Texas, hereinafter and sometimes referred to as Defendant, complaining with respect to the violation of her free speech rights under federal law, and challenging the City of Houston Newsrack Ordinance on its face and as applied to Plaintiff. Plaintiff suffers immediate and irreparable harm in this matter. Plaintiff also asserts that the ordinance violate the Sherman Act, in that the City's planning, implementation and enforcement of the act work to suppress competition.

Plaintiff would show unto the court as follows, to-wit:

JURISDICTION

1. Jurisdiction vests with this Court under 28 United States Code sections 1331 (federal question) and 1343 (civil rights cases; First Amendment); U.S. CONST. amend. I and 15 U.S.C. section 26 (Clayton Act).

PARTIES

2. Plaintiff, LAUDER, INC., is a corporate entity during business in Houston, Harris County, Texas. Plaintiff is the owner of *The Houston Tribune* and *The Heights Tribune* ("The Tribune"), free bimonthly newspapers containing advertisements. *The Tribune's* circulation is between 20,000 - 25,000 per month, with over two-hundred and fifty (250) distribution locations across Houston with one-hundred (100) drop spots in the Downtown and Medical Center areas; each drop spot has either an indoor rack or an outdoor box. *The Tribune* has been in circulation since 1986.

3. Plaintiff is the publisher of *The Houston Tribune* and *The Heights Tribune* publications.

4. Defendant, City of Houston, is a municipality incorporated under Texas law.

UNDERLYING FACTS

Ordinance No. 2007-225

5. On February 14, 2007, the City Council and Mayor of Houston voted, passed and approved the City of Houston, Texas, Ordinance No. 2007-225 ("Ordinance"),¹ amending chapters 22 and 40 of the Code of Ordinances, relating to placement and maintenance of newsracks on public right-of-ways.

6. On May 2, 2007, City of Houston, Texas, Ordinance number 2007-537 was passed, amending the Ordinance so that the effective date for all newsracks outside the CBD effective on December 31, 2008, instead of 2009 for those located outside the 610 loop.

7. The City Council found that "regulating the placement, appearance, size and servicing of newsracks on public rights-of-way is necessary to promote the public health, general welfare, and safety of persons using public rights-of-way, and to foster the aesthetics of the City."

8. The Ordinance imposes mandatory newsrack dimensions, color (forest green), design, and requires newsracks to be made of metal, painted to avoid rust, and imposes a minimum weight requirement.

¹ Ordinance No. 2007-225 adding HOUSTON, TEX., REV. ORDINANCES, ch. 40, art. XX (2007), and amending HOUSTON, TEX., REV. ORDINANCES, ch. 22, § 22-22, § 40-8, § 40-362(b)(8), § 40-10.1(d)(1)(j), and repealing § 40-10.

9. Newsracks must be built with metal, and coin-operated newsracks must weigh no less than eighty pounds (80 lbs), free publication newsracks must weigh no less than fifty pounds (50 lbs).

10. The Ordinance requires each publication to apply for a permit, pay an application fee, and purchase decals to display on each newsrack.

11. The Permit application fee is three-hundred dollars (\$300) per publication, regardless of the number of newsracks it owns, its circulation, whether it is a free publication, or how often it is published.

12. The decal fee is five dollars (\$5) per newsrack, with a one dollar (\$1) replacement fee.

13. The cost to renew a permit is five dollars (\$5) if submitted before expiration of the Permit; otherwise, a new application and three-hundred dollar (\$300) fee are required.

14. The effective dates of the Ordinance are: December 31, 2007, for newsracks on public right-of-ways within the central business district (CBD); except for § 40-454(a)(6), (7), and (8) [maintenance and displace], § 40-454(b)(2) [display information for how to obtain a refund for paid publications; and § 40-455(b)(9) [**color**], which are not effective until December 31, 2008); December

31, 2008, for newsracks outside the CBD but outside the central business district but within (Interstate Highway 610) the loop; and December 31, 2009, for newsracks outside the 610 loop.

Background with respect to development of Ordinance

15. From the initial meetings to develop the ordinance, members of the media and city officials continuously expressed concern to Defendant regarding the early effective dates, insufficient time for compliance, cost, and effect of the Ordinance on small publications.

16. As early as October 2005, the City Council Quality of Life Committee ("Committee") began meeting to discuss the proposed ordinance, and invited fourteen (14), mostly large publications to attend, participate in "task forces" to research the problem, solutions, and to provide their input. These publications were referred to by the City as "the stakeholders."

17. The minutes of the January 25, 2006, Newsrack Ordinance Meeting repeatedly refer to "over 50" publications in downtown. The Committee was aware of the number of publications with newsracks in Downtown Houston alone, but invited only a limited number of publications to attend.

18. *The Houston Chronicle* ("The Chronicle"), distributor of multiple publications, was heavily involved in the meetings and produced notes/handouts for items of concern to be discussed.

19. *The Chronicle* made clear early on that it did not want to incur additional costs, the loss distribution points, the change their trademark colors, or for the city to dictate the locations.

20. The mandatory newsrack dimensions in the Ordinance are almost identical to the dimensions of newsracks *The Chronicle* already had in place.

21. To come into compliance with the ordinance, *The Chronicle* only had to paint their existing newsracks forest green (compliance would cost them \$140 per rack, compared to the \$400 cost to replace each newsrack for almost all other publications).²

22. The only portion of the physical requirements listed in § 40-454(b) of the Ordinance which does not take effect until January 1, 2009, is the requirement that the newsrack be painted forest green.

23. As of the final planned version of the Ordinance, prepared on January 1, 2007, *The Chronicle* was in

² *Council Looks to Tidy Newsracks; Color and Size Specifications are too Limited, Some Publications say*, *The Houston Chronicle*, February 2, 2007.

compliance without having made any changes to their newsracks.

24. *The Chronicle* requested a revision of the concrete base requirements in §40-455(b)(5) of the Ordinance, complaining that the enacted version would be costly for them, varied from the last planned version, and was inconsistent with *The Chronicle's* proposed specifications - the specifications of their existing newsracks.

25. The City Council plans to review the ordinance annually.

26. On August 31, 2007, (more than six (6) months after the enactment), Maria Irshad, Administration & Customer Service Manager, Parking Management, emailed various publications to inform them: i) of the City survey finding that many publications were unaware of the ordinance, ii) there were problems with overcrowded banks, and iii) to **hold off on ordering concrete bases if they can because "we are researching the concrete base measurements with Legal."** (emphasis added).

27. The "research" was a response to *The Chronicle's* complaints and threats of potential legal action.

28. As enacted, the ordinance required newsracks to be between 36" and 54" in height (including mandatory 3"

concrete base), between 15" and 25" wide, and have a depth between 12" and 21".

29. Around May 2, 2007, Stuart Folb, Publisher of *The Houston Press* (pre-planning participant), complained because the enacted version of the Ordinance contained a 3 inch concrete base requirement which was not present in any prior versions of the Ordinance. *The Houston Press'* newsracks already had concrete filled pedestals and were just barely within the maximum height (54"). Adding the required 3 inch base would make their newsracks too high.

30. The three inch (3") base was suggested by *The Chronicle* at a meeting, and added to the Ordinance.

31. On August 29, 2007, following *The Houston Press'* complaints, the Ordinance was amended so that the 3" concrete base is not included towards the height limit.³

32. On February 08, 2007, City Council invited the fourteen (14) stakeholders to submit an inventory of their current newsracks to City Council Member Pam Holm, to allow City Council to make "equitable and informed decisions in regards to newsrack standards and regulation."

33. Plaintiff's publication, as well as many others, was not invited to submit such an inventory.

³ City of Houston, Texas, Ordinance No. 2007-984, amending 40-435(1)(a) to require height between 26" and 54" **"(excluding 3" concrete base)"**. (emphasis added).

34. On or about July 30, 2007, Maria Irshad emailed the Stakeholders a summary of the ordinance's provisions, attaching the newsrack ordinance, newsrack permit application, newsrack meeting notes, newsrack locations templates, and other information. The email also stated that a meeting was being scheduled to further discuss the detailed and complicated requirements with the Stakeholders.

35. Concerns submitted by uninvited publications were entirely ignored.

36. The ordinance limits the number of newsracks per "bank" of newsracks (each row of newsracks is not to exceed ten (10) feet).

37. Newsrack locations are allocated on a first come first served basis to properly permitted and maintained newsracks.

38. The participant stakeholders were preparing for compliance long before the effective date.

39. As of August 31, 2007, City Council surveys indicated that many publications were "unaware of the ordinance."

40. Publishers who failed to obtain a permit by December 31, 2007, were in violation of the Ordinance,

their newsracks were subject to immediate seizure and removal by the city, and they were subject to citation.

41. The Ordinance only mandates notice and the right to appeal when an applicant is denied a permit, or when a permit is being suspended due to noncompliance.

42. Owners who never applied for a permit have no rights under the ordinance.

43. The Ordinance only applies to newsracks located on a public right-of-way.

44. On May 25, 2007, (also after the effective date), Ms. Irshad sent an email to various publications, including Plaintiff's, providing "clarification from legal on the issues that were brought up in our May 8 meeting." To clarify the City's definition of public versus private property, the email provided: "[t]he location requirements in the ordinance were defined to ensure that if a newsrack is in compliance, it will be on public property. Please see the requirements in question 1." Question 1 provides, in part: "[i]n the Central Business District, if the newsrack is on the sidewalk and in compliance with the location requirements in the ordinance, the newsrack will be in the public right-of-way."

45. In response to a request for clarification from Stuart Folb regarding public versus private property, Maria

Irshad provided the definition of sidewalk, and concluded that this is a public right-of-way. She then stated, "[t]hat doesn't specifically answer your question, but I'm not sure if there is a definition of 'private property' as such."

46. Plaintiff submitted an application for newsrack permit and decals and the required fee.

47. On January 18, 2008, Plaintiff's application was denied because *The Tribune's* newsracks did not meet the requirement that "a Newsrack shall be attached to a concrete base and pedestal, with a net weight of not less than 95 pounds, and the concrete base shall be 23 inches measured from front to back."

48. The denial misstates the requirements.

49. On January 30, 2008, Plaintiff requested an appeal within the required ten (10) days from receiving the denial.

50. Plaintiff's appeal was heard on March 27, 2008.

51. Plaintiff did not receive information for the appeal process until after her appeal. The appeal information was in a package left for her at the front desk of the City Legal Department, which she recovered only because she visited the City Legal Department for other purposes.

52. During the appeal process, Maria Irshad told Plaintiff that Plaintiff's newsracks would be confiscated on April 11, 2008, and Plaintiff would be fined if she was not in compliance.

53. On August 7, 2008, the City sent Plaintiff a "courtesy letter" informing her of their intent to seize and remove two (2) noncompliant *Tribune* newsracks in ten (10) days. The newsracks listed were located on 1300 block of St. Joseph Parkway, and 1300 Preston.

54. The City is not required to provide notice before removing noncompliant newsracks.

56. On July 10, 2008, Plaintiff responded requesting an appeal, and informing the City that the listed newsracks were not on public property. Plaintiff explained that the newsrack at St. Joseph Parkway was on property belonging to St. Joseph Hospital, and placed on the inside of a wall aligning the street.

57. After some discussion, the City admitted, on July 14, 2008, that the newsrack located at 1300 St. Joseph Parkway was in fact on private property and not subject to the Ordinance.

58. The City confirmed that Plaintiff's newsrack at 1300 Preston, Harris County property, was not on a public right-of-way.

59. The City also informed Plaintiff that the Ordinance makes no provision for hearings for non-permitted newsracks.

60. Similar threats/courtesy notices were issued for newsracks which were also later admitted to be on private property, not subject to the Ordinance.

61. On May 13, 2007, Ms. Irshad sent an email to Derrick Williams and Liliana Rambo, stating, "I received the list from enforcement, however, out of the 15 violations found, only 3 are within the CBD." That is, 12 of 15 cited violations were in areas not covered by the Ordinance.

62. A similar email was sent on May 7, 2007, stating that "based on the violations turned in yesterday, I thought we might need to clarify or train the PEOs [Parking Enforcement Officers] again on what to look for..."

64. The May 7th email also suggested that "since there are so many possible violations w/the ordinance, you all may find it easier to focus on the larger issues and we can drill down later. Perhaps **we should look at the plastic racks first?**" - The "larger issues" being the plastic racks used by Plaintiff and other free publications which are not concerned with theft of boxes containing coins.

65. The Houston Chronicle contacted the City, offering to drive around with its own vans and gather noncompliant newsracks.

66. As of January 14, 2008, only nine (9) out of sixteen publications which applied had received permits. There are over fifty (50) publications in downtown.

67. On May 13, 2008, Derrick Williams, Parking Enforcement Manager emailed enforcement officials, "[p]rint out the list attached [enforcement log] and start with the plastic newsracks as far as enforcement is concerned."

Causes of Action

First Amendment Claim

68. The Ordinance is unconstitutional on its face and violates Plaintiffs First Amendment rights. Its provisions were formulated by a small number of publications, and designed to protect those publications from the tremendous costs of compliance; the Ordinance is overbroad in coverage and requirements, and vague with respect to its geographic coverage and enforcement; does not provide adequate procedural protections; provides no guidelines for uniform and equitable enforcement; and imposes outrageous costs on the exercise of protected speech. The costs and over-specific newsrack requirements are discriminatory as

written, and go far beyond the interest of safety and aesthetics.

69. Defendant violated Plaintiff's First Amendment rights by restricting Plaintiff's right to participate in protected speech. Defendant drafted an ordinance to benefit a small portion of the media, and without any protection for free speech; rushed through enactment of the Ordinance, promising revisions to the "work in progress," and choosing to enforce an incomplete enforcement despite the confusion and ambiguity; Defendant did not train those charged with enforcement, or provide procedures for uniform enforcement. Defendant actively targeted a small portion of the media for enforcement, and wrongfully interfered with Plaintiff's speech exercised on private property.

70. The practical effect of the ordinance is to take the small publications off the streets and to threaten their business model. The ordinance will have a profound economic effect on the business model of Plaintiff.

71. The practical affect of the ordinance is it works as prior restraint of Plaintiff's First Amendment rights. Besides the costs of compliance, the licensing and decal fees are beyond any amount necessary to defray reasonable administrative costs, and constitute an impermissible prior restraint on free speech.

Antitrust Violation

72. The City of Houston's Ordinance is designed to suppress competition. The compliance costs is prohibited for small publications such as Plaintiff's, and works to limit the marketplace to large corporate entities. These same large publication helped structure and design the ordinance.

73. Under section 16, the Clayton Act, Plaintiff is not required to show actual antitrust damages but only a "threatened loss or damage." 15 U.S.C.S. § 26. This in turn means that the requirements for standing for injunctive relief are less stringent than those under § 4 of the Clayton Act, 15 U.S.C. § 15, for standing to pursue damages claims. Plaintiffs must demonstrate a significant threat of injury from an impending violation or from a contemporary violation likely to continue or recur. The threatened injury must be an injury for which the plaintiff would be entitled to compensation if the injury actually occurred. Plaintiff has suffered actual injury b the removal of news boxes and the suppression of speech. Also there is no doubt that consumers paying artificially inflated prices due to antitrust violations are antitrust injuries.

**PRAYER FOR TEMPORARY RESTRAINING ORDER, TEMPORARY AND
PERMANENT INJUNCTIONS RELIEF AND DAMAGES**

73. Plaintiff suffers immediate and irreparable harm because of the unconstitutional restraint of Plaintiff's First Amendment rights. Plaintiff does not have an adequate remedy at law because of the unconstitutional acts of Defendant.

74. Plaintiff seeks a temporary restraining order and requests that such restraining order restrict the Defendant City of Houston taking any actions to enforce the ordinance pending the Court's consideration of the legality of the subject ordinance(s).

75. Plaintiff seeks a temporary injunction pending the final trial and ultimately a permanent injunction herein.

76. Plaintiff prays for declaratory judgment that the actions of the City of Houston and the enacted Newsrack Ordinance violated Plaintiff's rights under the First Amendment of the United States Constitution.

77. Plaintiff prays for actual and consequential damages in excess of the jurisdiction of the Court [including application and permitting costs, losses associated with denial of permit, appeal, threats of seizure, and reduced circulation of publication, costs of

moving newsracks to avoid unjust seizure] and compensatory damages for the emotional distress associated with the denial of Plaintiff's rights;

78. Plaintiff prays for reasonable and necessary attorneys' fees in this matter;

79. Pursuant to the Clayton Act, 15 U.S.C. § 15(a), Plaintiff prays for treble the damages sustained, and costs of suit, including reasonable attorney's fees, and simple interest on actual damages.

80. Plaintiff prays for pre- and post-judgment interest.

81. Plaintiff prays for injunctive relief, costs of court, and all matters in equity and law to which Plaintiff may be entitled.

DATE: October 28, 2008.

Respectfully submitted,

/S/ ANTHONY P. GRIFFIN

ANTHONY P. GRIFFIN

A JURY TRIAL IS DEMANDED

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