HONORABLE BRIAN MCDONALD
Department 48
Noted for Consideration: May 21, 2020, 9:30 a.m.
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WASHINGTON LEAGUE FOR INCREASED TRANSPARENCY AND ETHICS, a Washington non-profit corporation; JOHN DOE and JANE DOE 1-1,000,

Plaintiffs,

v.

FOX CORPORATION, a Delaware corporation; FOX NEWS NETWORK, LLC, a Delaware corporation d/b/a FOX NEWS CHANNEL; FOX BUSINESS NETWORK, a for profit company d/b/a FOX BUSINESS; JOHN MOE and JANE MOE, 1-100

Defendants.

NO. 20-2-07428-4 SEA

FOX DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

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Plaintiffs' opposition rests on the astounding claim that "cable programmers do not have First Amendment rights." Opp.11. That is wrong. "Cable programmers and cable operators … are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994). "[T]he basic principles of freedom of speech and the press … do not vary when a new and different medium for communication appears." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790-91 (2011). Plaintiffs' position would allow the government to censor not just Fox News but also CNN, CNBC, MSNBC, Bloomberg, ESPN, and every other cable network. That is as dangerous as it is frivolous.

Plaintiffs' state-law arguments are equally baseless. They concede that the Consumer Protection Act would not apply if Fox had published the identical commentary in "traditional print media." Opp.29. But their imagined distinction has no basis in law or logic. The CPA regulates deceptive commercial speech. It does not cover news reporting or political commentary.

Undeterred by black-letter law, plaintiffs seek to mask bad facts by arguing that the Court cannot look at the actual transcripts of the speech they distort and attack. Plaintiffs' argument does not lack chutzpah, but it also belies their account of the facts. They cannot hide that their assault on the First Amendment rests on a false portrayal of what Fox's commentary actually said. Fortunately, in all events, the Constitution protects Fox's speech even accepting the Complaint's distortions.

I. The First Amendment Protects Defendants' Speech as a Matter of Law.

Fox's motion explained (5-10) why the First Amendment requires dismissal, and Plaintiffs do not dispute the key points. First, Fox's speech addressed a "matter of public concern." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). Second, Fox's speech does not fall in any "traditional categor[y]" of unprotected speech. *United States v. Alvarez*, 567 U.S. 709, 717 (plurality op.). Third, censoring disfavored viewpoints about the Coronavirus would trigger strict scrutiny, which they cannot satisfy. *Id*. at 731 (Breyer, J., concurring). Fourth, restricting "purportedly false speech" in this area would "present a grave and unacceptable danger" to free debate. *Id*. at 751 (Alito, J., dissenting).

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Having conceded all these points, Plaintiffs rest on four novel arguments.

1. Plaintiffs claim that "cable programmers do not have First Amendment rights on the cable medium." Opp.11. But the Supreme Court has held that "[c]able programmers and cable operators … are entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 512 U.S. at 636. "[T]he basic principles of freedom of speech and the press … do not vary when a new and different medium for communication appears." *Brown*, 564 U.S. at 790-91. Accordingly, state law cannot "restrict expression because of its message, its ideas, its subject matter, or its content" in any medium. *Id*. (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)); *see also U.S. v. Playboy Entm't*, 529 U.S. 803 (2000) (restricting pornography violated cable programmer's First Amendment rights).

Plaintiffs would rely on Justice Thomas's separate opinion in *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996). But Justice Thomas expressly stated that a governmental restriction on "programming that the operator has agreed to carry" "clearly implicates" the "free speech rights" of cable programmers. *Id*. at 832. His point was that cable operators also have First Amendment rights and cannot be forced to carry the programmers' content, but he never suggested that cable programmers lack a First Amendment right to convey their content to the public. *Id*. at 816-17. Similarly, *Lloyd v. Tanner* (Opp.17) held only that the First Amendment does not compel private property owners to provide a forum for others. 407 U.S. 551, 570 (1972).

Plaintiffs also cite *Red Lion* and *Columbia Broadcasting* (Opp.16-17 n.7), but those cases merely acknowledged that *broadcasters* can be required to provide access to competing viewpoints due to spectrum scarcity. 395 U.S. 367 (1969); 412 U.S. 94 (1973). The Court later held that this doctrine does not apply to cable, *Turner*, 512 U.S. at 637, or to newspapers, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). Plaintiffs' argument is not just an error of law but a failure of diligence; the very cases they cite squarely foreclose their position.

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2. Plaintiffs attack a strawman in arguing that "constitutional rights are not unlimited." Opp.18. Of course the First Amendment has narrow exceptions, but none applies here. MTD.5-10. Plaintiffs do not show otherwise, but cite three cases having nothing to do with free speech. *Crowley v. Christensen* held that states could restrict the sale of intoxicating liquors. 137 U.S. 86 (1890). *O'Connor v. Donaldson* addressed the constitutionality of involuntary psychiatric confinement. 422 U.S. 563 (1975). And *Jacobson v. Massachusetts* addressed compulsory smallpox vaccinations. 197 U.S. 11 (1905). None involved the First Amendment.

3. Plaintiffs argue that Fox's speech was not "political" because it discussed "facts" not "ideas." Opp.25-26. That is irrelevant. What matters is that Fox's speech addressed a matter of public concern, which includes any "subject of general interest and of value and concern to the public." *Snyder*, 562 U.S. at 453. Plaintiffs do not dispute that point, or cite any case denying protection to *non-political* speech on matters of public concern. Instead, for reasons unknown, they cite inapposite cases addressing the political-question doctrine (Opp.26).

4. To mask their distortion of Fox's actual speech, Plaintiffs claim that the transcripts are not judicially noticeable. Opp.15. But the transcripts are judicially noticeable three times over: (1) they "enable" the Court "to understand the context of the CR 12 motion" (*Haberman*, 109 Wn.2d at 121); (2) the "contents are alleged in [the] complaint" (*Rodriguez v. Loudeye*, 144 Wn. App. 709, 725-26 (2008)); and (3) Plaintiffs do not contest their accuracy, which is "'not subject to reasonable dispute'" because they are on LexisNexis, *id*. (quoting ER 201(b)); *Marks v. Seattle*, 2003 WL 23024522, at *2 (W.D. Wash. Oct. 16, 2003) (judicially noticing transcripts); Wash. Judicial Council cmt. 201 (1976) (following federal rules on judicial notice). The transcripts, and the true facts, show that Fox highlighted the dangers of the Coronavirus even as Fox commentators criticized its exploitation for political purposes. MTD.10-13. Plaintiffs cannot hide that their case rests on false facts. But in all events, even accepting the Complaint's distortions, the Constitution protects Fox's speech as a matter of law. MTD.4,5-10; *Trujillo v. Nw. Tr. Servs*, 183 Wn.2d 820, 827 n.2 (2015).

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II. Plaintiffs Fail to State a Claim Under the CPA.

Because the First Amendment protects Fox's speech as a matter of law, the court need go no further. But Plaintiffs also fail to state a CPA claim.

1. The CPA does not apply to news reporting and commentary because they are not "in the conduct of … trade or commerce." MTD.15. Plaintiffs argue (at 29) that this principle applies only to newspapers, not cable media, but that distinction is just as nonsensical under the CPA as it is under the First Amendment. *Supra* p.3. Plaintiffs cite *Short v. Demopolis*, 103 Wn.2d 52 (1984), but that case simply recognized that the CPA covers only *commercial* speech by attorneys (pricing, billing, client development, etc.), not their *non-commercial* speech in practicing law. *Id*. at 61-62. Courts apply the same distinction to media companies: the CPA covers their commercial speech (e.g., advertising), not their reporting or commentary. *Fidelity v. Seattle Times*, 131 Wn. App. 462, 468 (2005). Even if commentary advances the company's "entrepreneurial" goals by earning "revenue and notoriety," that does not make it commercial speech subject to the CPA. *Delashaw v. Seattle Times*, 2018 WL 4027078, at *15 (W.D. Wash. Aug. 23, 2018). The same principle applies to cable news.

2. Plaintiffs concede that the Complaint alleges no "business or property" injury to WASHLITE or its members. MTD.15. That is fatal: the CPA authorizes suit only by those "injured in [their] business or property." RCW 19.86.090. Plaintiffs cite Complaint ¶ 5.6 (Opp.33), but that paragraph identifies no WASHLITE member, much less one with business or property loss. They try to remedy this by adding new "declarations" to their brief (*id*.), but that fails because they are not judicially noticeable and Rule 12 otherwise looks only to "the allegations contained in the complaint." *Rodriguez*, 144 Wn. App. at 725-26. Regardless, the declarants identify no business or property loss, instead speculating that, but for Fox News, they would be healthy, their businesses would thrive, and things would be cheaper.

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3. Plaintiffs concede that Fox's speech was not the "proximate cause" of any business or property injury. They insist that only "but for" cause is required (Opp.34), but the case they cite says "the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim." *Indoor Billboard*, 170 P.3d 10, 21 (2007); *see also Folweiler Chiropractic v. FAIR Health*, 2016 WL 5475812, at *3 (Wash. Sup. Ct. 2016), *aff'd*, 4 Wn. App.2d 1001, 2018 WL 2684374 (2018) (unpub.). A cause is not proximate unless it "produce[d]" Plaintiffs' injuries "in a direct sequence," "unbroken by any superseding cause." WPI 15.01. Thus, even if there is "but-for" causation, proximate cause requires a *legal* determination of whether the causal connection is too attenuated. *Tyner v. State*, 141 Wn.2d 68, 82-83 (2000); *Folweiler*, 2018 WL 2684374, at *7. Plaintiffs argue this is somehow a jury question (Opp.34), but courts do not hesitate to find proximate cause lacking as a matter of law where, as here, the causal connection is "too remote." *Kim v. Budget Rent A Car Sys., Inc*., 143 Wn.2d 190, 202-04 (2001) (causation too remote as a matter of law); *Folweiler*, 2018 WL 2684374, at *7 (causation "too remote to support liability under the CPA" as a matter of law). Here, the alleged causal chain between Fox's speech and the pandemic-related harms Plaintiffs assert is too indirect, remote, and speculative as a matter of law.

4. Plaintiffs concede that the Complaint fails to allege Fox's speech "induced" WASHLITE or its members to act. They claim *Hangman Ridge* abolished the "inducement" requirement for CPA causation. Opp.34. But they ignore Fox's authority showing otherwise. MTD.16. *Hangman Ridge* held only that inducement is not required under the CPA's "public interest element," 105 Wn.2d at 537, entirely separate from the *causation* element.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be granted.[1]

[1] Plaintiffs do not dispute that their request for injunctive relief also must be dismissed as an unconstitutional prior restraint and compulsion of speech. MTD.13-14.

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DATED this 18th day of May, 2020.

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* I certify that this memorandum contains 1,746 words, in compliance with the Local Civil Rules.

CERTIFICATE OF SERVICE

I, Erin Fujita, declare that I am employed by the law firm of Harrigan Leyh Farmer & Thomsen LLP, a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On May 18, 2020, I caused a true and correct copy of the foregoing document to be served on the persons listed below in the manner indicated:

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DATED this 18th day of May, 2020.

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