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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUMES
TRIAL COURT CAUSE NO. DC-11-08739-FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS
4/12/2013 10:55:15 AM
CONSUMER SERVICE ALLIANCE) IN THE DISTRICT COURT
OF TEXAS, INC., ET AL.,)
PLAINTIFFS,)
vs.) DALLAS COUNTY, TEXAS
CITY OF DALLAS, TEXAS,)
DEFENDANT.) 14TH JUDICIAL DISTRICT

DEFENDANT'S PLEA TO THE JURISDICTION

On the 5th day of February, 2013, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Eric V. Moyé, Judge Presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by computerized stenotype machine.

DIANE L. ROBERT, CSR, RPR
TEXAS CSR NO. 2179
Expiration Date: 12/31/2014
Official Court Reporter of the 14th
Judicial District Court
Dallas County, Texas
600 Commerce Street, Dallas, Tx 75202
214-653-7298

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VOLUME 1

Defendant's Plea to the Jurisdiction

February 5, 2013

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1 P R O C E E D I N G S

2 (Open Court; Proceedings commenced at 10:13 a.m.)

3 *THE BAILIFF:* All rise. The 14th District
4 Court is now in session. The Honorable Eric V. Moyé
5 presiding.

10:13:26

6 *THE COURT:* Good morning. You may be
7 seated. We are on the record in 11-8739, Consumer
8 Service Alliance versus City of Dallas. May I have
9 announcements, please.

10:14:55

10 *MS. PAYNE:* Carol Payne on behalf of
11 Plaintiff TitleMax.

12 *THE COURT:* Ms. Payne.

13 *MR. LYNN:* Mike Lynn on behalf of Consumer
14 Service Alliance of Texas.

10:15:03

15 *THE COURT:* Mr. Lynn.

16 *MS. WANG:* Jennifer Wang on behalf of the
17 City of Dallas.

18 *THE COURT:* Ms. Wang.

19 *MS. WANG:* I am also joined by Peter
20 Haskel and Barbara Rosenberg.

10:15:09

21 *THE COURT:* I have read the Plea to the
22 Jurisdiction and the response and the replies. I'll
23 hear from you briefly.

24 *MS. WANG:* Thank you, Your Honor.

10:15:30

25 There was also filed with the Court a

10:15:33

1 supplement to the plea; I don't believe that that was in
2 the notebook that you were given earlier. Can I bring
3 that over to you at the bench?

4 *THE COURT:* When was that filed?

10:15:47

5 *MS. WANG:* It was filed December 20th.

6 *THE COURT:* I can't believe I don't have
7 it.

8 *(Document handed to the Court.)*

9 *THE COURT:* Thank you.

10:16:05

10 I have -- I do have this.

11 *MS. WANG:* You do? All right.

12 Your Honor, the City is seeking dismissal
13 of the lawsuit today because Plaintiffs have not and
14 cannot plead the facts necessary to establish the
15 Court's jurisdiction.

10:16:24

16 Even though the Plaintiffs' petition
17 asserts that this Court has jurisdiction over the City's
18 ordinance because it is civil in nature, we have since
19 conferred briefly this morning and Plaintiffs are now in
20 agreement with the City that the ordinance is penal in
21 nature and are taking that position in the response --
22 responsive brief that they have recently filed with the
23 Court.

10:16:39

24 And since we are treating the City's
25 ordinance as penal in nature, then the State of Texas

10:16:56

10:16:59

1 versus Morales sets forth the controlling standard for a
2 court's jurisdiction and that case requires that -- that
3 the ordinance be both unconstitutional and that
4 enforcement will result to irreparable injury to a
5 vested property right.

10:17:13

6 In this case Plaintiffs haven't pleaded
7 the necessary facts for either factor.

10:17:26

8 With respect to a constitutional
9 challenge, Plaintiffs have not made one; all they're
10 saying is that the ordinance is invalid because it is
11 preempted by state law, in this case, the Texas Finance
12 Code.

10:17:38

13 Plaintiffs appears to be arguing both
14 field preemption as well as concept preemption and there
15 simply is neither.

16 Texas law is clear that the entry of the
17 state into a field of regulation does not automatically
18 preempt that field from regulation.

10:17:53

19 In this case the Finance Code's regulation
20 of CABs, credit access businesses, does not mean that
21 they occupy the field of credit access business
22 regulation, and, in fact, state law says that if the
23 legislature decides to preempt a subject matter, it must
24 do so with unmistakable clarity.

10:18:11

25 There's simply nothing in the state laws

10:18:14

1 that states with unmistakable clarity or otherwise that
2 it intends to occupy the field of regulation of credit
3 access businesses.

10:18:26

4 In fact, the Texas Finance Code, I
5 believe, indicates otherwise. It says that credit
6 access businesses may assess fees as permitted and is
7 permitted to charge amounts as allowed by other laws as
8 applicable, clearly recognizing that "other laws" may
9 apply to the regulation of credit access businesses.

10:18:43

10 Furthermore, as a part of the supplement
11 that the City has filed, the Texas Office of Consumer
12 Credit Commissioner, the OCCC, the state agency
13 responsible for regulating CABs and for implementing the
14 Texas Finance Code, issued a bulletin in December that
15 clearly indicated that they did not consider the City of
16 Dallas's ordinance preempted by the Finance Code.

10:19:02

17 In fact, the OCC bulletin was warning CABs
18 that any attempt to circumvent municipal regulations,
19 including the ordinance at issue here in Dallas, may be
20 an indication that CABs are running afoul of the
21 legislative intent of the very laws that Plaintiff now
22 allege are preempted by the City ordinance.

10:19:18

23 *THE COURT:* Well, that in and of itself
24 would not particularly -- I mean, isn't that just being
25 prudent? I mean, you're not suggesting that there is a

10:19:33

10:19:39

1 waiver or -- of any acknowledgment -- of any position
2 asserted by the Plaintiffs, are you, by that?

10:19:55

3 MS. WANG: No. What I'm saying is rather
4 than stating with unmistakable clarity that the state
5 occupies the field of CAB regulation, I believe both the
6 face of the statute of the Texas Finance Code, as well
7 as this bulletin by the OCCC, which is the agency
8 responsible for implementing, is -- are indications that
9 they see no such preemption. And, in fact, you know,
10 there's no indication of any conflict preemption.

10:20:14

11 THE COURT: Should we take anything from
12 the fact that the Labor Code speaks in terms of law as
13 opposed to ordinances?

10:20:28

14 MS. WANG: No -- No, Your Honor -- The
15 Texas Finance Code you mean?

16 THE COURT: Yes. I'm sorry. Did I say --
17 I said Labor Code. Forgive me. I'm sorry. I meant
18 Finance Code.

10:20:39

19 MS. WANG: No. No, I don't believe so.
20 Texas -- Dallas is a Home Rule city --

21 THE COURT: Right.

22 MS. WANG: -- with all the powers --

23 THE COURT: I understand that.

10:20:46

24 MS. WANG: -- consistent, you know, with a
25 Home Rule city, and I don't see the fact that it says

10:20:51

1 "as allowed by other laws" indicates, you know, that
2 that would preclude cities.

3 *THE COURT:* Proceed.

10:21:00

4 *MS. WANG:* Furthermore, there simply, on
5 the face of the -- the Texas Finance Code, the statute
6 and the ordinance by the City, there is no conflict.

10:21:26

7 *THE COURT:* What am I to take from the --
8 The issue of the enforcement since the enactment has
9 been seeming to me somewhat unorthodox. What am I to
10 take from the fact that the City has not for a time been
11 enforcing this ordinance?

12 *MS. WANG:* Nothing. The --

13 *THE COURT:* Then why hasn't it been?

10:21:38

14 *MS. WANG:* Plaintiffs have said that they
15 are afraid to violate the ordinance for fear of whatever
16 financial repercussions --

17 *THE COURT:* I understand that.

10:21:46

18 *MS. WANG:* -- that they want to cite, and
19 so if there have been no violations of the ordinance
20 then ostensibly there can be no enforcement either.

21 *THE COURT:* Is it your position that there
22 have been no enforcements because there have been no
23 violations and there has not been a decision --

10:22:01

24 That's -- That's really distracting,
25 Counsel. Would you please stop doing that?

10:22:05

1

MR. HASKEL: Yes, Your Honor.

2

THE COURT: I'm sure it distracts her as much as it does me.

4

MR. HASKEL: Yes, Your Honor.

10:22:09

5

THE COURT: Okay. Are you representing to the Court that there have been no enforcement actions because there have been no violations, or has there not been -- It appears that there's been some tacit agreement that there was not going to be a violation -- -- Excuse me. -- there's not going to be an enforcement of the statute, am I correct in that or not?

10:22:25

10

12

MS. WANG: There previously had been --

13

THE COURT: Right.

14

10:22:34

15

MS. WANG: -- at the institute of this lawsuit a tacit agreement not to proceed, but as the Plaintiffs have pointed out in their responsive brief and in the e-mail that they've attached as an exhibit, the City gave them notice that as of June 7th, I believe, of this -- of 2012, that the City would, in fact, be enforcing the ordinance.

10:22:51

20

21

And part of what's necessary is to be able to receive a complaint from a consumer. And since there have been no complaints that have come in, ostensibly because there's been no violation of the ordinance, the City simply hasn't had time or reason to enforce, but

10:23:07

25

10:23:11

1 there is no agreement that the City will never enforce
2 and there's certainly no implication by the City that it
3 does not intend to enforce.

10:23:21

4 *THE COURT:* Let me hear from the
5 Plaintiffs, please.

6 *MS. PAYNE:* Thank you, Judge.

10:23:35

7 I think you have zeroed in on what makes
8 this case different from the Morales case and why we
9 believe City of Austin is the appropriate case to look
10 at.

11 *THE COURT:* Uh-huh.

10:23:43

12 *MS. PAYNE:* The problem with Morales is
13 that there was a long history of nonenforcement, and I
14 believe the state even stipulated that they had no
15 intention of enforcing going forward --

16 *THE COURT:* We don't have that here now,
17 do we?

10:23:49

18 *MS. PAYNE:* We don't have that here. We
19 have -- The statute has been in effect since -- or the
20 ordinance -- Excuse me. -- has been in effect since
21 January 1st. There was an agreement of nonenforcement
22 through about June.

23 *THE COURT:* Right.

10:23:56

24 *MS. PAYNE:* And then we got the e-mail
25 that said open season on your folks.

10:23:54

1 THE COURT: Right.

10:24:08

2 MS. PAYNE: And so -- And so there has
3 been -- these are businesses that some of which are
4 larger than others, but with respect to my client, for
5 example, there's been an attempt to comply with this.
6 And, in fact, my client has been the one that is
7 discussed although, you know, in very general terms in
8 that supplemental plea that you've received.

10:24:22

9 THE COURT: Uh-huh.

10 MS. PAYNE: And so the problem there is
11 that there's an ordinance that's out here, they're not
12 enforcing it, there's concerns about economic suicide if
13 you run afoul because you have no idea when the City
14 might enforce it, and now you've got these other --

10:24:35

15 THE COURT: The City said as of June they
16 were going to enforce it, did they not?

17 MS. PAYNE: Well, they said that anybody
18 could be subject to enforcement, all right?

10:24:44

19 THE COURT: Is that not a "yes" to my
20 question?

10:24:55

21 MS. PAYNE: Well, you would think so
22 except that there's been a six-month period where we
23 have heard of no instances of enforcement, and I suspect
24 that had there been any instances of enforcement the
25 City would have come forward with some evidence of that.

10:24:58

1 *THE COURT:* Ms. Wang suggests that the
2 only reason that there's been no enforcement is because
3 there's been no violation; is that correct?

10:25:07

4 *MS. PAYNE:* We -- We don't know. I think
5 my client would feel like -- feels like it has not
6 violated, but I don't know about any of the other folks.

7 *THE COURT:* So you're not aware of any
8 violations of the ordinance as we stand here, are you?

10:25:18

9 *MS. PAYNE:* We are not aware and I believe
10 that that is a fact question that could be subject to
11 discovery and fleshing out in this case. And that leads
12 to another issue --

13 *THE COURT:* Well, let me -- Hang on now.

14 *MS. PAYNE:* Sure.

10:25:29

15 *THE COURT:* Before we get to whether they
16 have a property right or not, wouldn't the Consumer
17 Service Alliance of Texas know -- which I understand to
18 be some measure -- some manner of a -- an umbrella
19 organization for these businesses, wouldn't they know --

10:25:51

20 *MS. PAYNE:* My understanding is --

21 *THE COURT:* -- if --

22 Let me finish my question, please.

23 *MS. PAYNE:* Certainly.

10:25:56

24 *THE COURT:* Wouldn't they know if there
25 was, indeed, one of their members who was actively

10:25:59

1 violating the statute?

2 MS. PAYNE: I have to let Mike address
3 that, that is his client, but --

4 THE COURT: You mean "Mr. Lynn".

10:26:07

5 MS. PAYNE: -- I will say this --

6 THE COURT: "Mr. Lynn". Right?

7 MR. LYNN: Your Honor, --

8 THE COURT: Ma'am? Ms. Payne, we're a
9 little bit more formal than that in this Court, --

10:26:14

10 MS. PAYNE: Yes, sir.

11 THE COURT: -- if you don't mind.

12 Do we know -- Isn't that a fair
13 assumption, Mr. Lynn?

14 MR. LYNN: That we would know?

10:26:21

15 THE COURT: Yes.

16 MR. LYNN: Well, I don't have any evidence
17 to suggest that there's been a violation, but, on the
18 other hand, there are a number of the folks that I
19 believe that are out there and operating and --

10:26:36

20 THE COURT: Sure.

21 MR. LYNN: -- and my supposition is that
22 there are probably violations out there if they were
23 investigated.

24 THE COURT: Okay. But my -- Is it not a
25 reasonable -- Would it not be reasonable to assume that

10:26:49

10:26:53

1 if a member of the Alliance were operating in opposition
2 to the statute that the Alliance would know?

10:27:08

3 MR. LYNN: I don't believe so because I
4 don't believe that -- And let me explain why. The
5 governing structure of it is that these folks get
6 together on telephone calls and they have sometimes
7 inside counsel and sometimes not --

10:27:19

8 THE COURT: Right.

9 MR. LYNN: -- and they're discussing for
10 all practical purposes --

11 THE COURT: (Tapping). Mr. Haskel.

12 MR. HASKEL: Yes, Your Honor.

10:27:30

13 THE COURT: I'm not going to let Ms. Payne
14 and Mr. Lynn talk while you're up because that's just
15 rude. I want you to give them the same courtesy.

16 MR. HASKEL: I apologize, Your Honor.

17 THE COURT: I'm sorry, Mr. Lynn, would you
18 make your point again.

10:27:40

19 MR. LYNN: It is that the -- the
20 conversations that I've been on, and there have been
21 few, the discussions are very general in nature about
22 the operation of the business and this particular
23 lawsuit. So I wouldn't know and I'm not sure it's a
24 fair supposition that those would be discussed at those
25 meetings.

10:27:57

10:27:57

1 *THE COURT:* All right. That's fair.

2 Thank you.

3 Ms. Payne, you may proceed with your
4 argument.

10:28:02

5 *MS. PAYNE:* So we have a situation now
6 where we have an ordinance on the books.

7 *THE COURT:* Right.

10:28:15

8 *MS. PAYNE:* We have, we know, some parties
9 that are, you know, cowed into complying with it even
10 though they don't think it's an appropriate ordinance,
11 and we believe that there are probably some out there
12 who are -- could be cited but have not, and so we sit in
13 that netherworld between, you know, how do we get
14 judicial review. And, you know, either the lack of
15 enforcement -- well, the lack of enforcement
16 specifically has made it very difficult.

10:28:29

17 *THE COURT:* If we've got somebody who's --
18 I don't want to misquote you.

10:28:45

19 You say, "We believe there are probably
20 some who could be cited and who have not."

21 Couldn't you get judicial review by one of
22 your clients who's out there acting in a manner which
23 could get them cited merely to have them cited and then
24 proceed in the criminal context?

10:29:04

25 *MS. PAYNE:* Well, I guess the question

10:29:05

1 is --

2 *THE COURT:* No, actually, that's the
3 question that I want answered.

10:29:11

4 *MS. PAYNE:* Okay. If I understood your
5 question I would answer it this way: You could have one
6 of these organizations out there violating the
7 ordinance.

8 *THE COURT:* Uh-huh.

10:29:22

9 *MS. PAYNE:* And you have for each -- for
10 each customer that comes in and each loan that is
11 accessed, for every day there's a \$500 penalty and
12 another \$500 penalty, and it continues to roll, and we
13 don't know how long it might take the City to enforce
14 it. All right?

10:29:36

15 So it could happen quickly, in which case
16 you're right, we might end up there in front of a
17 criminal court and we could challenge it.

10:29:50

18 The problem is, is that we don't know.
19 And it could be economic suicide for somebody to do that
20 for any length of time. And the fact is that we've been
21 out here for a year and nothing's happened that we are
22 aware of. We're not -- There have been no enforcements,
23 we're not in front of any criminal court, and so, I
24 mean, Judge, this is not all that different from a
25 situation where what if the City of Dallas in response

10:30:04

10:30:06

1 to all of those awful shootings that have happened,
2 decided that it was going to pass an ordinance where it
3 became illegal to own or maintain a gun in one's
4 household.

10:30:22

5 *THE COURT:* Well, then we've got a
6 constitutional issue which --

7 *MS. PAYNE:* That's right.

10:30:29

8 *THE COURT:* -- which -- Hang on. -- which
9 impacts the Second Amendment. And I assume that if you
10 were both counsel for a Plaintiff in that context, one
11 of the first things that you would assert would be that
12 that offends the Second amendment.

10:30:44

13 *MS. PAYNE:* But I'm not sure that would be
14 enough under their standard and under the Morales case,
15 because you would need to have -- it would have to be
16 unconstitutional and you would have to have a vested
17 property right at issue, and if they never enforce it
18 would it be able to come in front of a civil court, and
19 the answer is I'm not sure that it would.

10:30:57

20 *THE COURT:* I'm pretty confident of the
21 way that that hypothetical would shake itself out.

10:31:09

22 *MS. PAYNE:* Okay. But you can also see
23 that there would be other variations of that, where it
24 could sit and be effectively unreviewable like this
25 ordinance has become, because we can't get in front of a

10:31:13

1 criminal court and they suggest that no civil courts
2 have the jurisdiction.

10:31:26

3 But the City of Austin case was different
4 from Morales. And Morales talked about City of Austin
5 and did not overrule it. It distinguished it.

10:31:38

6 *THE COURT:* Right.

7 *MS. PAYNE:* So we know that Morales sits
8 up here and City of Austin is still good law. There's
9 no services -- no cases out there that say the City of
10 Austin is bad law.

10:31:45

11 *THE COURT:* Uh-huh.

12 *MS. PAYNE:* And the City of Austin had a
13 situation where an ordinance became effectively
14 unreviewable because of the unique circumstances of that
15 particular case, and we argued that this case is far
16 closer to that than it is to Morales.

10:32:02

17 *THE COURT:* But in the City of Austin you
18 had no one dumping corpses outside the city limits or
19 out- -- outside, inside out, I don't remember.

20 *MS. PAYNE:* Right. Right.

21 *THE COURT:* But here we're in a situation
22 where you suggested just a couple minutes ago that you
23 have -- some of your clients who are acting in a manner
24 which could get them cited.

10:32:15

25 *MS. PAYNE:* No. I have one client --

10:32:16

1 *THE COURT:* No, that is exactly what you
2 said.

10:32:24

3 *MS. PAYNE:* But I have one client and I
4 know that my one client is trying his darndest to comply
5 and it's about shut it down which is our virtual
6 preemption argument. All right. So when they say that
7 we haven't made any allegations about the
8 constitutionality of this, we believe that we have.

10:32:36

9 *THE COURT:* Uh-huh.

10 *MS. PAYNE:* But -- but -- So I can't speak
11 for other clients. I suspect that there may very well
12 be folks out there, I don't know one way or the other.

10:32:53

13 But back to the Morales versus City of
14 Austin shift, City of Austin is -- is on point with the
15 situation that we have here. And the issue in Morales
16 which is actually very narrow, was that in Morales there
17 was no harm. There was no threat of enforcement and the
18 Plaintiffs that were pursuing the case were not
19 suffering any harm because of the statute, so there was
20 nothing to enjoin.

10:33:11

21 So the Morales case was determined on
22 those facts and on that basis.

10:33:21

23 Now, it goes on to -- there's a lot of
24 dicta in there about what happens or should happen in
25 other cases, but that was a hotly contested 5-4 opinion

10:33:26

1 and it doesn't overrule City of Austin. City of Austin
2 survives.

10:33:36

3 And so when you go to apply one of those
4 cases or the other, this case is far more analogous to
5 City of Austin than it ever will be to Morales.

6 *THE COURT:* All right.

7 *MS. PAYNE:* If you have any other
8 questions I would be happy to answer them.

9 *THE COURT:* No.

10:33:45

10 Anything you wish -- I invited you in a
11 little bit earlier than I think you -- If you've got a
12 comment you want to make, Mr. Lynn, the Court will
13 receive it now.

14 *MR. LYNN:* Thank you, Your Honor.

10:33:59

15 From our perspective the City's playing a
16 game. And it's playing a very serious game. And it's
17 regulating using an ordinance -- using an ordinance that
18 we think is challengeable but we're unable to get --
19 we're unable to challenge it.

10:34:14

20 And the way I look at the case law, the
21 way I've read it, Your Honor, there are four elements.
22 There has to be a threat, a realistic threat. And I
23 think that's what Morales said, there was an -- a sodomy
24 of law, there was no threat, that they'd ever tried to
25 enforce the law, it was not something that was out

10:34:28

10:34:30

1 there.

2 Here we have e-mails and we have letters
3 that suggest that they are threatening to do this, but
4 they're not doing it. Why they're not doing it

10:34:39

5 politically or whatever else, I'm not sure, but what it
6 does is it basically freezes a business in place where
7 it can't get review of the statute.

8 What does that do? The second element.

9 There is a vested property right that we have here. I

10:34:54

10 mean, we have businesses that are being put out of
11 business and we have this case that we've cited Your
12 Honor to, this Smith versus Decker case, which is a 1958
13 case, Texas Supreme Court, which I believe is on point
14 and I believe Your Honor will find that to be on point.

10:35:14

15 *THE COURT:* Consumer Service Alliance of
16 Texas doesn't have a vested property interest, does it?

17 *MR. LYNN:* We're representing those who
18 do.

19 *THE COURT:* That means, "No, it does not";
20 isn't that right?

10:35:23

21 *MR. LYNN:* It -- It itself will not be put
22 out of business --

23 *THE COURT:* Right.

24 *MR. LYNN:* -- but its constituents will

10:35:31

25 be --

10:35:31

1 *THE COURT:* Yeah, but the initial -- as
2 the case started, when it was just this one association
3 or the corporation and -- the Alliance -- Excuse me. --
4 versus the City of Dallas, it had no vested property
5 rights; isn't that true?

10:35:46

6 *MR. LYNN:* The association has --

7 *THE COURT:* Right.

8 *MR. LYNN:* -- no -- it does not run a
9 business and those vested property rights to which I've
10 been referring, it does not have.

10:35:55

11 *THE COURT:* Okay. All right.

12 *MR. LYNN:* But, that said, just like a
13 number of associations, those that involved in
14 education, those involved in racial protection, those
15 involved in a variety of others, those associations also
16 brought claims on constitutionality and argued that they
17 were representing their members in these takings.

10:36:11

18 *THE COURT:* We don't have a constitutional
19 assertion here, do we?

10:36:24

20 *MR. LYNN:* We do, because we're arguing
21 that there was a taking of that right. And we are
22 saying there is no remedy.

23 *THE COURT:* Okay. I'm sorry, I want
24 you ...

10:36:48

25 *MR. LYNN:* That's, I think --

10:36:49

1 THE COURT: Hold on for me just a minute,
2 if you don't mind.

3 MR. LYNN: May I consult with Mr. Krabill?

10:37:20

4 THE COURT: Okay. I'm look- -- Yes --
5 Yes, you may consult with whomever you want if you need
6 to for a second.

7 MR. LYNN: Don't we have --

8 *(Sotto voce discussion ensued.)*

10:37:53

9 MR. LYNN: I'm sorry, Your Honor, I
10 apologize.

11 THE COURT: My question is where -- I'm
12 looking in the Third Amended Petition and I don't see a
13 claim asserting that the City's ordinance is somehow
14 unconstitutional.

10:38:04

15 MR. LYNN: Do we not argue preemption,
16 Your Honor?

17 THE COURT: I want you to direct me where
18 in your pleading you are asserting that the ordinance is
19 unconstitutional.

10:38:15

20 *(Sotto voce discussion ensued.)*

21 MR. LYNN: I -- Page 7.

22 THE COURT: Okay.

23 MR. LYNN: I think we have the virtual
24 prohibition argument that we have alleged --

10:38:25

25 THE COURT: I understand but -- I

10:38:26

1 understand virtual prohibition but I'm asking, you --
2 you made an assertion a couple minutes ago with regard
3 to the -- the Alliance making an argument that the
4 ordinance was unconstitutional, and I don't see that in
5 this petition and I'm asking if I'm missing it.

10:38:43

6 MR. LYNN: No, you're not missing anything
7 and, yes, your analysis --

8 THE COURT: That's always a good answer --
9 always a good response.

10:38:54

10 MR. LYNN: I've learned that at home as
11 well.

12 The argument would be this and it's
13 probably one you understand and I probably stated it and
14 frankly I may have stated it wrong.

10:39:07

15 We have associational standing because of
16 TitleMax to make the argument on the preemption, and I
17 think that that's what the pleading says and I think
18 fairly read. And I think that that is -- that's the way
19 we're able to connect those dots in this case.

10:39:25

20 THE COURT: Okay.

21 MR. LYNN: But nevertheless, the argument
22 is we have a valid -- we have a problem here that we're
23 seeking resolution of.

24 THE COURT: Uh-huh.

10:39:36

25 MR. LYNN: We're seeking to have this

10:39:37

1 Court open its doors and let us resolve it in a fair and
2 dignified and reasonable and lawyer-like way here
3 because we can't get before anybody else to do that.
4 And the City is attempting to have it both ways: Shut
5 this door but not open any other doors. And that
6 makes -- that makes it very difficult to do business in
7 the City of Dallas at the present time.

10:39:55

8 Now, without regard to whether or not one
9 likes this industry or dislikes this industry, we are
10 entitled to have, I believe, a reasonable opportunity to
11 resolve our differences with the City. And the City
12 through its actions has foreclosed our ability to seek
13 that resolution from -- in a reasoned and scholarly way;
14 we just can't do it.

10:40:12

10:40:36

15 *THE COURT:* I understand.

16 *MR. LYNN:* So we come before you, sort of,
17 frustrated because there's nothing we know that we can
18 do other than this. And all their arguments to the
19 contrary -- I mean, the problem is, we keep waiting for
20 an opportunity to challenge this and we think we have a
21 pretty good argument, but the City doesn't want to deal
22 with us on the merits and that's why we're here.

10:40:48

23 *THE COURT:* Okay. Thank you.

24 *MS. WANG:* Your Honor, this is not a
25 situation remotely like the City of Austin which the

10:41:03

10:41:06

1 Court recognized that the problem there was both the
2 customer as well as the business were unable to
3 challenge because the customer would be subject to
4 criminal prosecution. And so without a customer to bury
5 a body, the cemetery owners were unable to even violate,
6 to --

10:41:20

7 Here Plaintiffs are saying that they
8 actually believe there may be some members who are
9 violating, can violate, although others choose not to.
10 And here I would say it's Plaintiffs who cannot have it
11 both ways, to say we're not going to violate and yet we
12 want to have this Court here insert its equity
13 jurisdiction over this even though we're not willing to
14 violate in order to allow the City to bring a
15 prosecution.

10:41:34

10:41:50

16 As we've represented, this is not a case
17 similar to Morales -- Even if this were a case like
18 Morales, there is no position the City has taken that it
19 will never enforce or that -- that no enforcement
20 actions will ever be taken as Morales --

10:42:05

21 *THE COURT:* Tell me what the City -- I'm
22 sorry.

23 Tell me what the City has done since the
24 e-mail in June to ensure compliance with the ordinance,
25 if you know.

10:42:14

10:42:18

1 MS. WANG: We've actually answered
2 inquiries made on behalf of citizens, if you will,
3 wondering about what their rights would be under the new
4 city ordinance --

10:42:29

5 THE COURT: Okay.

6 MS. WANG: -- and we've actually said that
7 if you believe there's a violation, you know, to please
8 bring a complaint to the City.

10:42:38

9 Now, as I said, if there's not been a
10 complaint yet brought to the City either because many of
11 them are not violating the ordinance, or because as the
12 OCCC -- I'm sorry. -- OCC bulletin noted, a lot of them
13 are sending -- you know, initiating the loan within the
14 City of Dallas and then telling them to renew elsewhere
15 in which case there is still no violation the City can
16 prosecute or enforce, if you will.

10:42:56

17 In this case it is the City's hands that
18 are tied. Without a complaint coming into the City
19 where the City's aware of a violation, without --
20 without the Plaintiffs actually committing a violation,
21 the City is unable to enforcement.

10:43:11

22 This is not a situation like the City of
23 Austin where they could not under any circumstance
24 violate the ordinance and then seek redress through the
25 normal coarse by having enforcement and going through

10:43:27

10:43:30

1 prosecution, defending against that prosecution, this is
2 not that situation.

10:43:39

3 You know, what they're saying is they
4 would like to have it both ways, they would like to
5 continue on with their business model without ever, you
6 know, -- or -- or is to not challenge the ordinance in a
7 criminal court by ever violating it.

10:43:57

8 Second, a key factor here is the issue of
9 vested property rights. I mean, having an adequate
10 remedy of law is just one part of the equation; they
11 need to have a vested property right in order to bring
12 this -- to invoke the Court's equity jurisdiction.

10:44:09

13 *THE COURT:* Doesn't TitleMax do that?

14 *MS. WANG:* There is no vested property
15 right, there's no authority that recognizes what they're
16 claiming to be essentially their business model, their
17 way of doing business as a vested property right.

10:44:24

18 The one case that Mr. Lynn had cited just
19 now, Smith V Decker, having to do with the right of bail
20 bondsmen, that case actually said that there was a right
21 to make a living subject only to valid and subsisting
22 regulatory statutes.

10:44:41

23 There are a whole host of cases that say
24 you can't go about doing your business in any manner in
25 which you choose to do it, you are still subject to

10:44:43

1 valid and subsisting regulatory statutes.

10:44:53

2 And, for example, I think one case that
3 runs very similar to this in terms of the kind of
4 financial harm argument they're trying to argue is, you
5 know, in the case of Morrow versus Truckload Fireworks,
6 there, there was a ban on the use of fireworks that the
7 Court recognized would destroy Truckloads business,
8 would cause an unrecoverable loss of income --

10:45:05

9 *THE COURT:* Slow down for my court
10 reporter, please. Thank you.

10:45:20

11 *MS. WANG:* And that even though the total
12 ban on the use of fireworks would result in tremendous
13 financial loss, and even though that loss would be
14 tangible and significant, it is insufficient to
15 constitute a vested property right.

16 *THE COURT:* All right.

10:45:33

17 *MS. WANG:* There's simply no authority in
18 Texas law that recognizes a business plan or a business
19 model or way of doing business as a vested property
20 right.

21 *THE COURT:* All right. Thank you. I will
22 have a decision to both of you before the end of the
23 day. Thank you very much.

10:45:44

24 *MS. PAYNE:* Your Honor, I have copies of
25 the two cases that deal with the vested property rights,

10:45:46

1 the two cases that we've cited.

2 *THE COURT:* Sure.

3 *MS. PAYNE:* May I approach?

4 *THE COURT:* You may.

10:45:56

5 *MS. PAYNE:* One is the Smith versus Decker
6 case --

7 *THE COURT:* I've read that already.

8 *MS. PAYNE:* And the other one is the
9 Brazos court case that deals with the franchise concept.

10:46:04

10 *MS. WANG:* May I take a minute to address
11 the Brazos court case?

12 *THE COURT:* I believe I've heard all I
13 need to.

14 *MS. WANG:* All right.

10:46:11

15 *THE COURT:* Thank you.

16 *MR. HASKEL:* Thank you, Your Honor.

17 *THE COURT:* Thank you-all very much.
18 You're excused.

19 *MR. LYNN:* Thank you.

10:46:15

20 *MS. PAYNE:* Thank you.

21 *THE COURT:* Do either of you have a
22 proposed form of order?

23 *MS. WANG:* I do, Your Honor.

24 *MS. PAYNE:* Your Honor, I left mine at the
25 office but I can send it up at a moment's notice.

10:46:23

10:46:28

1

MS. WANG: I'll give you copies here.

2

MR. LYNN: We'll transmit an order.

3

THE COURT: That will be fine.

4

(Document handed to the Court.)

10:46:37

5

THE COURT: Thank you.

6

MR. HASKEL: May we be excused?

7

THE COURT: You may be excused. Have a

8

pleasant day.

9

MR. HASKEL: Thank you, Your Honor; same

10:46:48

10

to you.

11

(Proceedings adjourned at 10:46 a.m.)

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24

25

1 STATE OF TEXAS

2 COUNTY OF DALLAS

3 I, Diane L. Robert, Official Court Reporter in
4 and for the 14th District Court of Dallas County, State
5 of Texas, do hereby certify that the above and foregoing
6 contains a true and correct transcription of all
7 portions of evidence and other proceedings requested in
8 writing by counsel for the parties to be included in
9 this volume of the Reporter's Record in the above-styled
10 and numbered cause, all of which occurred in open court
11 or in chambers and were reported by me.

12 I further certify that this Reporter's Record
13 of the proceedings truly and correctly reflects the
14 exhibits, if any, offered by the respective parties.

15 I further certify that the total cost for the
16 preparation of this Reporter's Record is \$ 218.00
17 and will be paid by Counsel of the City of Dallas.

18 WITNESS MY OFFICIAL HAND, on this the 14th day
19 of February, 2013.

20
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