IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
34TH JUDICIAL DISTRICT

JOSE F. FONG d/b/a Tequila Sunrise, BRYAN S. FOSTER d/b/a Jaguar Gold Club, E.B.S. ENTERPRISES, INC. d/b/a Gateway News and Video, VENUS VIDEO, EROS VIDEO, and A.V.W., LTD. d/b/a Adult Video Warehouse,	§	
Plaintiffs,	§	
v.	§	**Cause Number 2007-2900**
CITY OF EL PASO,	§	
Defendant.	§	

PLAINTIFFS', JOSE F. FONG d/b/a TEQUILA SUNRISE, AND BRYAN S. FOSTER d/b/a JAGUAR GOLD CLUB, RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, Jose F. Fong d/b/a Tequila Sunrise, and Bryan S. Foster d/b/a Jaguar Gold Club, hereby files this response in opposition to the Defendant's motion for summary judgment, and in support thereof state as follows:

RESPONSE TO INTRODUCTION

At the outset, it would appear that the City is desperate to try to deprive the Plaintiffs of a trial on the merits of the issues presented in this action through a series of conclusory statements. Since the instant action deals with important Free Speech issues, the most important thing to note is that, unlike any other type of case, similar restrictions upheld in other jurisdictions, even letter for letter restrictions, can not automatically be upheld without a full evidentiary evaluation, subject to the rules of evidence applied in a trial setting, as to the sufficiency and, most importantly, the efficacy of the restrictions imposed. It is not enough to simply mimic another ordinance upheld elsewhere, regardless of the rejection of "similar constitutional challenges," as suggested by the City. Attempting to assert that similar ordinances have been upheld in other jurisdictions is sufficient to

support a summary judgment is simply not a correct statement of the law, and such an argument is without merit because "merely mimicking" an ordinance upheld elsewhere is *not enough*. *Basiardanes v. City of Galveston,* 682 F2d 1203, 1213 (5th Cir. 1982). Every challenge requires the Court:

> "…To examine the strength and legitimacy of the governmental interest behind the ordinances and the precision with which the ordinance is drawn. Unless the ordinance *advances* significant governmental interests and *accomplishes* such advancement without undue restraint of speech, the ordinance is invalid." *Basiardanes* at 1214, citing *Schad v. Borough of Mt. Ephraim,* 101 S.Ct. at 2183-2184. (Emphasis added).

Notwithstanding this Court's rejection of the Plaintiffs' efforts to obtain preliminary injunctive relief, the fact that, at that point in time, the Court concluded that "Plaintiffs can demonstrate neither a probable right to the relief sought nor a legally cognizable injury," should have no impact on the right to a trial on the merits of the Plaintiffs' claims. The decision of a trial court on a preliminary injunction is not binding as to a decision on the merits of the case. *Texas Foundries, Inc. v. International Moulders & Foundry Workers' Union*, 248 S.W.2d 460, 462 (Tex. 1952); *Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979); *Haynie v. General Leasing Co., Inc.*, 538 S.W.2d 244 (Tex. App. – Dallas 1976) ("A decision made for the purpose of determining the propriety of temporary relief is not controlling at the final trial"). In *Texas Foundries,* the Supreme Court of Texas held that neither the trial court's decision granting a temporary injunction nor a judgment of the Court of Civil Appeals modifying the injunction would be binding at the trial of the case on the merits. *Texas Foundries*, 248 S.W.2d at 462 ("Very different questions will be up for decision when and if the court comes to decide what character of permanent injunction, if any, should be issued. On that hearing what has been done in this proceeding will be ignored."). Based on this doctrine, and on the framework described

below, which this Court never had an opportunity to evaluate in the earlier proceedings, the prior denial is not dispositive of the merits of a summary judgment motion.

Simply stated, the City neglects to provide the Court with a proper framework for the evaluation of constitutional challenges to adult related legislation. In order to thwart what is ultimately an attempt to deprive Plaintiffs of their due process rights to a trial in this matter, a description of the relevant legal framework is critical. In an effort to efficiently address the arguments asserted in the City's Motion that the challenged legislation is *only* concerned with eliminating secondary effects, or that it *merely* imposes "time, place, and manner" restrictions that do not "ban speech," even under the "intermediate scrutiny" that has now been established as the level to be applied to these types of cases, it is well settled that ordinances which purport to regulate any form of "adult-entertainment" are unconstitutionally "content based" ***unless*** it can be shown that any challenged legislation is designed to target so-called "secondary effects" of adult businesses.

Even then, it must thereafter be shown to ***advance*** the governmental interest involved. From a historical perspective, the first case to address this issue was *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976). The "secondary effects" identified in the *Young* case were based on the belief that the concentration of the businesses sought to be regulated by the City of Detroit in its "anti-skid row" legislation (including pool halls, pawn shops, temporary help agencies, blood banks and other uses, besides "adult businesses") designed to prospectively zone the type of operation that "tends to attract an undesirable quantity and quality of transients, adversely effects property values, causes an increase in crime, especially prostitution and encourages residents and businesses to move elsewhere." It was in this case that the fiction of "content neutrality" was established, if it could be shown that the local government was more concerned with "secondary effects" than with censorship. Unfortunately, rather than "advance" any legitimate governmental interest, the "secondary effects" pretext has done violence to the First Amendment rights of affected individuals since its inception.

The second important case dealing with adult entertainment businesses is the case of *City of Renton v. Playtime Theaters Inc.,* 475 U.S. 41 (1986). Again, the *Renton* case recognized that any zoning restrictions placed on businesses deemed to be "adult entertainment" would be unconstitutionally "content based" unless the zoning ordinance at issue was designed to prevent crime, protect the city's retail trade, maintain property values, and was otherwise the result of "predominate concerns" with the secondary effects of adult businesses, and not with the sexually themed "content" of the adult entertainment itself.

Indeed, in upholding the ordinance at issue in *Renton*, the Supreme Court held that, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever ***evidence*** the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres, Inc*. 475 U.S. 41, 53, 106 S.Ct. 925, 931 (1986) (Emphasis added). This is where the dispute lies, a dispute that eliminates the applicability of a summary judgment. In the Third Circuit, it was held that:

> "When a legislative body acts to regulate speech, it has the burden, when challenged, of showing either (1) that its actions serves a compelling state interest which cannot be served in a less restrictive way, or (2) that its actions serve a substantial content-neutral state interest… it must come forward with… evidence… justifying… reasonable time, place and manner restrictions on speech." *Phillips v. Borough of Keyport*, 107 F.3d 164, 172-173 (3rd Cir. 1997).

This position, the right to bring evidence into Court to ***challenge*** legislation, is also still the prevailing law in the Ninth Circuit, as set forth in *BSA, Inc. v. King County*, 804 F.2d 1104, 1108 (9th Cir. 1984) and *Acorn Investments v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). This is not a new development:

> ***"…[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected***

> ***under the first Amendment***. In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is "narrowly drawn [to] further a sufficiently substantial governmental interest," ante, at 68, the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as de minimus…
>
> "However, it is not enough for a local government to simply articulate an interest in preventing neighborhood blight; it must be prepared both 'to articulate and support,' a reasoned and significant basis for its zoning decisions." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 67, 101 S.Ct. 2176 (1981) (Blackmun, concurring) (Emphasis added).

The case of *City of Erie v. Pap's A.M.,* 120 S.Ct. 1382 (2000), contained substantial language somewhat lessening the requirement for an adequate "predicate," but, in no way, did the case do anything but strengthen the Supreme Court's recognition and respect for ***"as-applied" challenges to the application of restrictive legislation:***

> "Here, Kandyland has had ample opportunity to **contest** the council's findings about secondary effects -- before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. ***In the absence of any reason to doubt it,*** the city's expert judgment should be credited." *Id., Justice O'Connor, joined by Justices Kennedy, Rehnquist, and Breyer.* (Emphasis added).

Of dramatic additional importance to the instant case is also the Opinion of Justice Souter. To put this statement in context, Justice Souter apparently felt that governments had a minimal burden in supporting restrictive adult use legislation, as articulated by his concurrence in *Barnes v. Glen Theatre*, 501 U.S. 560, 111 S.Ct. 2456, 2470 (1991), wherein he stated, in addressing the concept of "legislation seeking to combat the secondary effects of adult entertainment":

> "I do not believe that a state is required affirmatively to undertake to litigate this issue in every case." *Id.*

In the *City of Erie* decision, Justice Souter's opinion, which was critical to reach a coherent majority in both the *Barnes* and *Erie* cases, **completely** changed his position:

> "The proposition that the presence of nude dancing establishments increases

> the incidence of prostitution and violence is amenable to empirical treatment, and the ***city councilors who enacted*** *Erie's* ***ordinance are in a position to look to the facts of their own community's experience as well as to experiences elsewhere***. Their failure to do so is made all the clearer by one of the amicus briefs, largely devoted to the argument that scientifically sound studies show no such correlation. See Brief for First Amendment Lawyers Association as Amicus Curiae 16-23; id., at App. 1-29." (Emphasis added).

In light of these authorities, to truly underscore the malfeasance that summary judgment would reflect, the *Alameda Books, infra,* decision (discussed at length in the following sections) clearly shows that affected parties can challenge legislation such as that at issue herein, and the proper context is to do so in trial. Numerous authorities also indicate the error of granting summary judgment at this point in the proceedings. Ultimately, the import of the above Supreme Court authorities is that affected parties should be given an appropriate opportunity to "challenge the findings," challenge the methodology, and, essentially, have the court properly recognize its obligation and responsibility to provide a forum where valuable fundamental rights are properly protected by requiring the government to justify, under appropriate evidentiary conditions, the imposition of any restrictions on such fundamental rights. Summary judgment denies this right and is therefore improper.

RESPONSE TO STATEMENT OF UNDISPUTED FACTS

In this section of the City's response, the statement is true that a longtime opponent [i.e. *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992);; *Woodall v. CIty of El Paso*, 950 F.2d 255 (5th Cir. 1992) (opinion withdrawn in part on rehearing by 959 F.2d 1305); *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995)] participating in challenging decades of efforts by the City of El Paso to regulate adult entertainment businesses was "convicted of engaging in organized criminal activity involving a prostitution ring run out of her adult cabaret." These characteristics should not contaminate the evaluation of the arguments raised in the instant action, current While this may be accurate, what is telling about this comment is the fact that he

actually supports the Plaintiffs' position in this action by showing that, for any legitimate criminal problem, the City has ample "tools" in its arsenal of criminal statutes to fully and adequately address any perceived criminal activity, and that the ordinance challenged in the instant action is superfluous and unnecessary. It also reveals that the City obviously has no reluctance to attempt to impugn *all* adult business operators with the misdeeds of one, not unlike trying to discredit every judge or politician because of the corruption of a few. This type of blanket discrimination has no place in the American system of justice and certainly does not support a summary judgment. The City's Motion also argues that "The County explicitly relied on the evidence of secondary effects discussed in 25 judicial decisions, etc., etc.," but it is doubtful that any County Commissioner even looked at the over 1,600 pages that make up the "record" purportedly relied on by the County to adopt the legislation, the same "record" that appears in virtually every ordinance crafted by opposing Counsel throughout the Country. While there is no doubt that the "record" for the challenged legislation is huge, what is notable is that it contains many of ***the same studies*** that the 11th Circuit stated were "…unreasonable for Defendants to rely on," because they were "...outdated, foreign studies concerning secondary effects," which were irrelevant, because, "…the county's own current, empirical data conclusively demonstrated that such studies were ***not relevant to local conditions***, especially where adult businesses were not a recent addition…" *Peek-a-Boo, et al v. Manatee County,* 337 F.3d at 1251, 1258 (11th Cir. 2003).

As for that ever critical consideration of the ***evidence*** used by the City to support the adoption of the challenged legislation, the evidence amassed in *Peek-A-Boo,* was evaluated and criticized by Judge Barkett (and purportedly utilized in the adoption of the new legislation at issue in this action), it was shown that, 1) the materials presented by the proponents of that legislation were, at best, "shoddy"; 2) the Plaintiffs' businesses were significantly below the average of places of public

assembly for "calls for police service"; and 3) the Plaintiffs' businesses had absolutely no adverse impact on property values. Just like Manatee County, rather than try to compile "***local evidence***," the City of El Paso recruited the services of a renowned opponent and counsel to scores of communities seeking to restrict "SOB'S," and the challenged legislation was adopted.

While the procedural description is accurate, it is truly irritating that the City would again try to foist the unsuccessful attempt to obtain injunctive relief as some type of basis to obtain a summary judgment. As stated in the previous section herein, neither the trial court's decision granting a temporary injunction nor a judgment of the Court of Civil Appeals modifying the injunction would be binding at the trial of the case on the merits. *Texas Foundries*, 248 S.W.2d at 462.

RESPONSE TO "SUMMARY JUDGMENT EVIDENCE"

Currently, summary judgment is not favored in adult entertainment cases, even in light of the fact that "secondary effects" jurisprudence is "all over the road," primarily because the basic application of both state and Federal Rules of Evidence to adult entertainment cases fails to support the agenda of local governments' desire to restrict such businesses, and, as noted by Judge Barkett, just regurgitating the same old "secondary effects party line" just doesn't cut it:

> "As the Fifth Circuit has observed, [HN30] it is not enough under Renton 'simply to tailor one ordinance to another that has survived judicial review.' *SDJ, Inc. v. Houston, 837 F.2d 1268, 1274 (5th Cir. 1988)*. Instead, the County 'must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.' *Alameda Books, 122 S. Ct. at 1742* (Kennedy, J., concurring)." *Peek-a-Boo*, 337 F.3d at 1257.

Plaintiffs would incorporate by reference the depositions of the City's expert witnesses, Dr. Richard McCleary and Dr. George Tita, generally admitting the absence of any evidence to show that similar legislation adopted in other jurisdictions had any beneficial impact on the alleged problems the legislation was presumably designed to prevent. Without that evidence, the City cannot request a summary judgment, since whether or not the challenged legislation "advances a governmental interest" is a critical requirement to uphold the legislation. The City, later in their brief, cites the cases supporting this proposition, most importantly *United States v. O'Brien*, 391 U.S. 367 (1968).

Responding both to the "Standard of Review" section of the City's Motion, and the critical dispute regarding whether or not Plaintiffs' businesses cause "secondary effects," the majority of case law, and, indeed, the leading decisions from the United States Supreme Court, consistently show a profound disfavor toward granting a summary judgment in these types of cases. As it relates to the "secondary effects" doctrine, the City's lack of ***relevant local evidence***, and the simple accumulation of criminal reports without anything more, does not undermine the most recent evaluation of the merit of granting a summary judgment in this case, a position articulated in the cases of *City of Erie v. Pap's A.M.,* 529 U.S. 277 (2000), *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Georgia,* 242 F.3d 976, 985 (11th Cir. 2001), *City of Los Angeles v. Alameda Books, Inc., et al.,* 122 S.Ct. 1728 (2002), *Peek-A-Boo Lounge of Bradenton, Inc., v. Manatee Co., supra.*

RESPONSE TO THE CITY'S ARGUMENT

I. Response to "The Ordinance Does Not Violate the Right to Free Expression"

The character of Plaintiffs' First Amendment materials, as protected forms of expression under both the North Carolina and United States Constitutions, does not lose that protected character based on the content of such expression, even if the message of "sensuality and eroticism" is deemed objectionable by many. Local governments cannot unilaterally choose to regulate such expression by any procedures they want, irregardless of the impact on the constitutional protections involved. *Simon & Schuster, Inc. v. New York Crime Victims Board,* 112 S.Ct. 501, 508-509 (1991); *Stanford v. Texas,* 379 U.S. 476, 484-485 (1964); *A Quantity of Books v. State of Kansas,* 398 U.S. 205, 212 (1964); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 65-66 (1963). In light of the huge controversy surrounding ANY "adult oriented" materials, it must be noted that regulations or governmental actions cannot be constitutionally validated as an effort to establish community concepts of proper or desirable forms of expression. *Id; see also Triplett Grille v. City of Akron*, 816 F.Supp 1249, 1258 (ND Ohio 1993).

While there is no doubt that several Texas state court decisions have shown to be antagonistic to the plight of adult entertainment businesses targeted by unnecessary and overly restrictive legislation (especially *Hang On III, Inc. v. Gregg County*, 888 S.W. 2d 123, 127 (Tex. App.- Texarkana), the zoning and "vested rights" issues in *Hang On* and other state cases do not support a blanket application of the theory that adult businesses have no due process rights, whatsoever. In this section of the City's brief, the case law cited is accurate, but, again, the existence of adverse decisions does not automatically justify the granting of a summary judgment.

In response to the allegation that the City has the authority to enact the Ordinance, also, there is no argument made against the City's assertions of having a legislative ability to adopt legislation, however, regulations of constitutionally protected speech can only be validated as reasonable time, place and manner restrictions if they are "designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47, 50 (1986); *United States v. O'Brien,* 391 U.S. 367 (1968). Such restrictions must be "unrelated to the suppression of free expression," must place no more than "incidental" burdens on protected expression, and must further the governmental interest asserted. *O'Brien, supra*. In addition, there are several other constitutional requirements necessary to support legislation, such as El Paso's challenged legislation.

Defendant argues that the Ordinance serves a substantial governmental interest and is also narrowly tailored because of a recitation in the Ordinance that it purportedly serves the purpose of reducing secondary effects, and further contends that similar ordinances have been upheld in other contexts and therefore this Ordinance should also be upheld. This argument misconstrues the burden on the government in adopting these types of regulations if such

regulations are to pass constitutional muster. Simply put, Defendant cannot simply rely upon a "cookie-cutter" ordinance that was upheld in another jurisdiction and argue that it serves a substantial governmental interest in this jurisdiction. *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1213 (5th Cir. 1982) ("merely mimicking the ordinance upheld in American Mini Theatres is not enough"); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Fla.*, 337 F.3d 1251, 1267 (11th Cir. 2003) ("As the Fifth Circuit has observed, it is not enough under *Renton* 'simply to tailor one ordinance to another that has survived judicial review'") (quoting *SDJ, Inc. v. Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988)).

Notably, simply putting a statement to that effect in the preamble of an ordinance, or in a motion for summary judgment, is not sufficient. See *XLP Corp., et al v. County of Lake,* 743 N.E.2d 162 (III App. 2000), which says that "preamble" language is never dispositive of the issue, and also shows another example of the courts' disfavor for resolving these issues on summary judgment:

> "Defendant relies on *Renton* to maintain that a legislative body does not have to wait until a problem occurs before enacting an adult use ordinance. However, this conclusion by the *Renton* Court has to be considered in the context of that case. In *Renton* there were no adult businesses in existence at the time the city enacted its ordinance. Consequently, the Supreme Court determined that the City of Renton could rely on the experiences of other communities, in particular those of Seattle, which had conducted detailed studies of adult use businesses, to adopt its ordinance. Here, however, where plaintiffs had been in business for 5 years at the time defendant enacted its ordinance, plaintiffs' allegation that defendant wrongly relied on outside studies instead of considering plaintiffs' existing businesses to determine whether such businesses cause adverse secondary effects presented an issue of fact." *Id* at 743 N.E. 2d, 169.

This burden is particularly important in light of the *Alameda Books* decision, as reflected in the following cases:

- *DiMa Corp. v. High Forest Township*, 2003 WL 21909571 (D. Minn. 2003) (in denying Township's motion for summary judgment because "DiMa has raised genuine issues of fact as to the validity and applicability of the studies relied upon by High Forest

Township to enact its ordinance," stating that "…*Alameda Books* certainly clarifies the manner in which the Court should determine whether the municipality relied on evidence that was " 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent governmental interest." *Alameda Books,* 535 U.S. at 438. Here, under the standard set forth in *Alameda Books,* the Court finds that genuine issues of fact exist as to whether High Forest Township was reasonable in relying upon the studies that provided the rationale for its ordinance. Primarily, the Court finds persuasive that the studies relied upon by High Forest Township were conducted in metropolitan, not rural, areas, and the studies did not particularly examine the secondary effects of purely take-home fare. In addition, some of the studies were more than 25 years old. While these factors alone may not be enough to overcome the mere rationality test of *ILQ,* **the conflicting studies presented by DiMa have certainly cast doubt on whether the studies relied upon by High Forest Township are applicable or valid**. Under *Alameda Books,* this is sufficient to shift the burden back to High Forest Township to further justify its rationale.") (emphasis added)

- *Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003) (in striking down a zoning provision, stating that "The city justifies this ordinance on the ground that it will reduce the adverse secondary effects (such as increased crime and the reduction of property values) of sexually oriented businesses. Therefore, in order to demonstrate that the ordinance is narrowly tailored, **the city must show that the ordinance addresses these problems.**") (emphasis added)
- *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004) (in holding that ordinance does not serve substantial governmental interest and is not narrowly tailored, stating that

"At this stage, courts are "required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' " *Ben's Bar,* 316 F.3d at 724 (quoting *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728). **In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech.** In evaluating the sufficiency of this connection, courts must "examine evidence concerning regulated speech and secondary effects." *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728.") (emphasis added)

- *22nd Ave. Station, Inc. v. City of Minneapolis*, 429 F.Supp.2d 1144 (D. Minn. 2006) (in holding that plaintiff raised serious doubt as to whether ordinance was constitutional and that plaintiff's expert evidence raised substantial questions about whether studies relied upon by City were shoddy, stating that "As the Supreme Court explained in *Alameda,* even if the City has made a facially sufficient factual showing to justify its ordinance, the affected party may cast direct doubt on the City's rationale by showing that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). If the affected party succeeds in casting direct doubt, "the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* **Plaintiff has presented sufficient evidence to cast direct doubt on the City's rationale. It has submitted both an expert affidavit and a peer-reviewed study casting grave doubt on the reliability**

of the foreign studies upon which the City relied. It has submitted its own recent expert analysis of Plaintiff's impact on crime, property values, and blight in its surrounding neighborhood, which shows that Plaintiff has not caused the secondary effects that the City seeks to combat.") (emphasis added).

- *Flanigan's Enterprises, Inc. of Georgia v. Fulton County, Georgia*, 2006 WL 2927532 (after an earlier decision invalidated the challenged legislation, 242 F.3d 976 (11th Cir. 2001), the court, in granting summary judgment in favor of plaintiffs, held "**Fulton County has failed to show that the ordinance furthers an important governmental interest because it did not consider the most comprehensive analysis of the secondary effects of alcohol consumption in adult entertainment establishments.** Instead, the defendants relied on less relevant studies that supported the county's goal. Once again, this court concludes that **it was unreasonable to ignore the most relevant local study in favor of a less comprehensive study and foreign studies; therefore, the ordinance is an unconstitutional restraint on the plaintiffs' constitutional rights under the First Amendment.**") (emphasis added)

In the instant matter, Defendant has failed to demonstrate how the Ordinance serves to reduce alleged secondary effects. Simply stated, it doesn't. There is no evidence that enforcement of the Ordinance would have any appreciable impact on alleged secondary effects, nor do any studies or cases relied upon in enacting the Ordinance suggest enforcement would reduce alleged secondary effects. What is even more frustrating is the fact that the County's well worn government expert consistently tries to cloud the issues by saying that the Plaintiffs' experts have "admitted" that our "SOB'S" cause "secondary effects." As well established in the responsive affidavits of Dr. Fisher, Dr. Danner and Mr. Schauseil, any place of public assembly will have problems, the question is whether thos characteristics are indicative of "secondary effects" ***caused*** by

the sexual content of the expression, or whether they are simply reflective of "routine activities theory," a criminological doctrine reflecting that ***any*** place of public assembly will have "issues," based simply on the "law of averages," or "social disorganization theory," which essentially states if your business is in a "problematic" area of town, you will have the same problems as other businesses in that environment, regardless of ***any*** other factor. As the Expert Reports filed contemporaneously herewith clearly show, it is disingenuous to associate the content of Plaintiffs' operations with "secondary effects" that have no relationship with protected expression, even if based on themes of human sexuality. This was the exact conclusion reached in *Wet Sands, et al v. Prince George's County, Maryland,* Case No. 8:06-cv-02243-MJG, DC MD, April 12, 2007, where the Court criticized the fact that the "evidence" did not "match up to" the restrictions imposed or the governmental interest asserted:

> "b. Second Prong - Secondary Effects
> 1. County Evidence Relied Upon The "Declaration of Findings and Public Policy" that beginsCB-61 states that the ordinance is intended to "mitigate the secondary effects of adult-oriented businesses." CB-61, § 52600(1). Among those secondary effects, the ordinance notes, are"(a) prostitution and other sex related offenses (b) drug use and
> dealing and (c) health risks through the spread of AIDS and other sexually transmitted diseases." Id. § 5-2600(3).
> …
>
> "The County introduced at trial thirty-three "studies" from other jurisdictions on the effects of various types of sexually oriented businesses.20 Def.'s Ex. 4. Many of these "foreign jurisdiction" studies have been relied upon by other jurisdictions in prior cases. See Carandola I, 396 F. Supp. 2d at 643-45 (listing some of the studies relied upon by North Carolina that were also relied upon by Prince George's County).
> …
>
> "FN 20
>
> Though termed "studies," Plaintiffs established that the different materials cited as "studies" by Defendants varied greatly in method and statistical significance. The Court finds the semantic question of what is a "study" to be insignificant and thus will simply refer to anything termed as a "study" as such.
>
> "Of course, the County "need not conduct local studies or produce evidence independent of that already demonstrated by other municipalities to demonstrate the efficacy of its chosen remedy, 'so long as whatever evidence [the County] relies upon is reasonably believed to be relevant to the problem it addresses.'" Peek-A-Boo Lounge, 337 F.3d at 1265 (emphasis

added). However, deference to the County must be balanced with the Court's "obligation to exercise independent judgment when First Amendment rights are implicated." Alameda, 535 U.S. at 440 (citing Turner Broad. Sys., Inc., 512 U.S. at 666). In accordance with that balance, this Court must require the County's actions to be narrowly tailored, such that the ordinance "be drawn to affect only that category of business shown to produce the unwanted secondary effects." Peek-A-Boo, 337 F.3d at 1272 (citing Renton, 475 U.S. at 52) (emphasis added).

"4. The Conduct Restrictions The County has not produced any credible evidence that the conduct restrictions it seeks to impose on adult entertainment businesses such as Plaintiffs' would reduce the alleged secondary effects it sought to alleviate, such as drug dealing, the spread of STDs, and an "atmosphere of deviance." See Trial Tr. 14. Indeed, there is nothing of any substance to support a conclusion that the secondary effects alleged by the County (such as rape, robbery, assault, theft from automobiles, etc.) would be reduced at all by requiring dancers to perform on an elevated stage, keeping patrons six feet away from performers, prohibiting tips during performances, banning any physical contact between patrons and entertainers, etc."

Even the Defendant's expert witnesses were unable to recall any study concluding that such ordinances have any connection to reducing the problems that they purportedly seek to address:

- Deposition of Richard McCleary, Ph.D.
    - Page 27, Lines 15-25: "Q: And focusing on Page 8, where it talks about the required license for sexually oriented businesses and patrons, are you aware of any before-and-after study that has shown that the requirement to obtain a sexually oriented business license has had a beneficial impact or decrease in the incidents of crime?" "A: I could not cite a particular study. And I would not be able to say that any of the studies in the factual predicate of the El Paso ordinance do that."
    - Page 31, Lines 4-11: "Q: Are you aware of anything in the predicate materials in the El Paso ordinance that supports this restriction [hours of operation], or the efficacy of this restriction?" "A: The closing hours?" "Q: Yes." "A: I wouldn't be

surprised if there were not some empirical evidence in that. I cannot point to something specifically."

- Page 32, Lines 4-15: "Q: As far as Section 180 on Page 16, are you aware of any before-and-after research that ascertains whether the imposition of the anti-nudity regulations and the six-foot regulations has actually had any appreciable impact in preventing criminal experiences?" "A: Again, that's a very, very standard part of codes, the separation. And there is a literature – the combustible mixture, I guess – there is a literature that could be extrapolated reasonably to show that there is a rationale. I would guess – I cannot cite to anything specifically in the factual predicate of the El Paso code…"

- Deposition of George Tita, Ph.D.
  - Page 43, Lines 11-15: "Q: I'm wondering, has anyone actually taken the effort to take it to the next step to test that hypothesis [strangers to a neighborhood make themselves softer targets] in the context of adult entertainment businesses?" "A: Not set out with that hypothesis in mind."
  - Page 49, Lines 17-23: "Q: Are you aware of any actual research that supports this belief about the nonreporting issue in adult entertainment businesses?" "A: Not – I'm trying to think if there has been a study that asked people their likelihood of reporting. Look, I'm sorry, I honestly can't provide you a definitive yes or no on that and be happy."
  - Page 77, Lines 8-22: "Q: Okay. How about for the sections regarding the hours of operation, do you know if anybody's ever done a before-and-after study or ever tried to find out if the limitation on the hours of operation has actually had a

beneficial impact on the incidence of crime?" "A: Specifically to sexually oriented businesses?" "Q: Yes." "A: May I just ask for a clarification? When we say is conducted, relied on empirical evidence, is that what you're saying? Or again, from theory? There's ***theory*** to support this, for sure. And if there is a ***study*** that showed by reducing the time from time A to time B, what the additive effect of that is, I'm not recalling such a study." (emphasis added)

- Page 78, Lines 6-13: "Q: And the same question, are you aware of any research that's tested the actual before and after experience of this type of regulation being imposed on businesses exhibiting sexually explicit films or videos to find out if it actually, beyond theory, has some quantifiable beneficial impact on the incidence of crime?" "A: I'm not recalling a specific incident."
- Page 79, Line 7-12: "Q: You're not aware of any research that would directly support that [state of nudity combined with six-foot setback], though?" "A: To the extent – I'm familiar with research that has looked at different types of sexually oriented businesses. I'm not recalling anything that looks specifically at full versus non-full."

There is nothing in the legislative record, nor in the record in this case, that show any connection between the Ordinance and the alleged secondary effects that it is supposedly designed to address. Simply put, there is no evidence that would show that the Ordinance addresses alleged secondary effects, and therefore there is grave doubt as to whether the Defendant's reliance upon the studies and cases referenced in the Ordinance is reasonable. Accordingly, it cannot be said to serve a substantial governmental interest, nor can it be said to be narrowly tailored. Therefore, Defendant's motion for summary judgment should be denied.

Also, as an integral component of the assertion made by the City that their "interest in preventing secondary effects is content neutral," unless and until the City can prove, in an appropriate evidentiary setting, that the legislative record adequately establishes that the ordinance meets the four prongs of the *O'Brien* test, there is no basis for this Court to simply accept that statement as true. If the City cannot show that the Ordinance meets those tests, then the challenged legislation must be *content based.* In a similar challenge to restrictive adult entertainment legislation, the Court opined:

> *"*In this case, however, Plaintiffs have proffered substantial evidence that casts some doubt on the County of Pasco's findings about secondary effects. The Plaintiffs have presented testimony explaining the flaws in the County's foreign studies, and the Plaintiffs have also presented their own evidence showing comparatively minimal secondary effects emanating from their own businesses. There are other significant differences between the facts of this case and the facts of many of the Supreme Court cases cited by the County. The chief factual distinction is that the County of Pasco Ordinances are not prospective only in their application, while at the same time the County of Pasco Ordinances are not *de minimis* but appear instead to have the apparent practical effect of putting Plaintiffs out of business. Instead of a mere time, place, and manner restriction as conceived in *Young* and *Renton,* the County of Pasco Ordinances send existing adult entertainment/bar establishments to industrial parks presumably where no other commercial establishments are located and where alcohol cannot be served. ***It is the cumulative effects of the retroactive application and the diminishment of the opportunity to convey the message to the audience, along with the myriad signage, inspections, employee regulations and record keeping regulations, etc, that may have an unconstitutional effect upon Plaintiffs, and apparently may have, indeed, already chilled the Plaintiffs' expressive conduct. The full weight of these cumulative effects cannot be summarily evaluated, but the spectre of repression looms over these ordinances.***" *Mann v. Pasco County*, 2001 WL 1868513 (M.D. Fla. 2001)(emphasis added).

As it pertains to the City's argument that the Ordinance is narrowly tailored, this, too, is incumbent on establishing the validity of the legislative predicate and some type of proof that the restrictions advance the legislative goals of the ordinance. When this type of data is overlooked, the legislation is invalid. See *Flanigan's, supra*. Critically, as it pertains to the City's recitation of other decisions where various components of the challenged legislation have been upheld, and

a litany of inflammatory activities and policed data ***not previously disclosed***. Plaintiffs would again stress that:

> "*Renton* stands in part for the proposition that a municipality enacting a zoning ordinance targeting secondary effects must rely upon evidence it reasonably believes to be relevant for this purpose *at the time of enactment.* This is the clear implication of the Court's holding that "[t]he First Amendment does not require a city, *before enacting such an ordinance,* to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.* " *Renton,* 475 U.S. at 51-52, 106 S.Ct. 925 (emphasis added).
> …
> "Manatee County argues that it "was not required to develop a specific localized evidentiary record supporting" Ordinance 98-46 and could reasonably "rely on the evidentiary foundation set forth in prior cases" such as *Barnes* and *Renton.* Brief for Appellee, at 20. However, these statements, though accurate, do not validate the County's contention that Ordinance 98-46 withstands intermediate scrutiny. This Court has held that *Renton* requires at least *some* pre-enactment evidence. *See, e.g., Ranch House v. Amerson,* 238 F.3d 1273, 1283 (11th Cir.2001) ("[S]tate actors in Defendants' position must cite to *some* meaningful indication-in the language of the code or in the legislative proceedings-that the legislature's purpose in enacting the challenged statute was a concern over secondary effects rather than merely opposition to proscribed expression") (emphasis original); *Flanigan's Enterprises, Inc., v. Fulton County, Ga.,* 242 F.3d 976, 986 (11th Cir.2001) (the court may not simply presume the evidence needed to sustain a secondary effects ordinance because "where the right to free speech is at issue, the government bears the burden of showing that the articulated concern has more than merely speculative factual grounds, and that it actually was a motivating factor").
>
> "In sum, although *Renton's* evidentiary burden for the passage of a secondary effects zoning ordinance is not a rigorous one and the Supreme Court has made plain its intention to give municipalities wide latitude to design and implement solutions to problems caused by adult entertainment without compiling an extensive evidentiary record, *see, e.g., Alameda Books,* 122 S.Ct. at 1736-37, 1742-43, this leeway is not without limits." *Peek-a-Boo,* 337 F.3d 1251, 1267 (11th Cir. 2003).

In comprehensive fashion, it is premature for the City to address *any* of the other constitutional arguments (prior restraint, overbreadth, vagueness, due process or equal protection) until a proper evidentiary hearing can be held to evaluate the merits of the City's evidence, or lack thereof, purportedly relied on to support the ordinance. Without

that support, valid and scientifically sound support, the licensing scheme would ***automatically*** become an unconstitutional prior restraint, and the legislation would then be overbroad, *per se*, since it could not be shown to "advance" any "legitimate governmental interest." Troublingly, the City again asserts that prior decisions regarding similar legislation must carry the day, but, as stated repeatedly herein, those results do not dictate the result in the instant action, absent a proper evaluation of the evidence, and the challenges to that evidence, at issue in this action. Even if some of the arguments may be redundant to the "First Amendment" arguments, that is not a proper issue for a summary judgment.

II. Response to "The Plaintiffs' Other State Law Claims Fail"

Chapter 243 of the Local Government Code permits a municipality to regulate employees of sexually oriented businesses and their conduct, which includes the authority to require such employees to obtain a license or permit. *Haddad v. State*, 9 S.W.3d 454 (Tex. App. – Houston 1999); *Thompson v. State*, 44 S.W.3d 171 (Tex. App. – Houston 2001); *Flores v. State*, 33 S.W.3d 907 (Tex. App. – Houston 2000); *Ex parte Smalley*, 156 S.W.3d 608 (Tex. App. – Dallas 2004). Also, it is agreed that the federal courts have upheld the requirement, "even when other types of entertainers are not subject to this requirement." (citing *N.W. Enterprises, Inc. v. City of Houston*, 27 F.Supp.2d 754, 839(S.D. Texas), aff'd. 352 F.3d 162, 193 (5th Cir. 2003). Again the requirement of a differential licensing requirement is absolutely dependant on whether there is a sufficient legislative predicate establishing disproportionate secondary effects caused by the subject businesses. This argument is true of the allegations regarding the "occupation tax," and the "restraint of trade" arguments, since, absent the City being able to prevail on the legitimacy

of the evidence they have relied on, the Plaintiffs' position on these restrictions would be valid as a matter of law.

As it pertains to Defendant's argument that the Ordinance is not preempted by Section 1.08 of the Texas Penal Code, that position is unavailing insofar as the Ordinance proscribes the same conduct as various provisions of the Texas Penal Code, or, at the very least, criminalizes conduct that is inherently innocent but that the Ordinance presumes will inevitably lead to conduct that is already illegal. The Ordinance was purportedly adopted to prevent conduct which is already illegal, including prostitution (already criminalized by Texas Penal Code §§ 43.01-43.06), lewdness (already criminalized by Texas Penal Code § 21.07), public indecency (already criminalized by Texas Penal Code, Chapter 43), obscenity (already criminalized by Texas Penal Code §§ 43.21-43.27), illicit drug use and drug trafficking (already criminalized by Texas Health & Safety Code, Chapter 481), littering (already criminalized by Texas Health & Safety Code, Chapter 365), and sexual assault and exploitation (already criminalized by Texas Penal Code § 22.011). Since the conduct sought to be regulated is the same conduct criminalized under the Texas Penal Code, the City may neither enact nor enforce the Ordinance in that regard. *City of Houston v. Hill*, 482 U.S. 451, 460-461 (1987); *Knott v. State*, 648 S.W.2d 20, 21 (Tex. App. – Dallas 1983). Furthermore, Defendant's attempt to distinguish the various provisions of the Texas Penal Code and the Ordinance, by arguing that a requirement of recklessness is not necessary under the Ordinance, is insufficient to survive a preemption argument, as the only distinction from the lesser offense is protected First Amendment conduct. *See Karenev v. State*, 258 S.W.3d 210 (Tex. App. – Fort Worth 2008); *see Long v. State*, 931 S.W.2d 285, 294 (Tex.Cr.App. 1996).

In addition to the conduct proscribed by the Ordinance being already illegal under the Texas Penal Code, the enforcement provision of the Ordinance is preempted and thus unenforceable. Section 5.54.160 of the Ordinance makes some violations Class A misdemeanors, while other violations of the Ordinance are classified as Class C misdemeanors. This is wholly inconsistent with Chapter 243 of the Local Government Code, which authorizes municipalities to regulate sexually oriented businesses and which includes an enforcement provision making violations of such regulations Class A misdemeanors:

> "As a home rule municipality, the City of San Antonio has broad powers of self government--provided that no ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art XI, § 5. In this case, the applicable enforcement provision in the Ordinance sets punishment as a Class C misdemeanor, which directly conflicts with section 243.010(b) establishing punishment for a violation of a municipal regulation as a Class A misdemeanor. Tex. Loc. Gov't Code Ann. § 243.010(b). Had the Legislature intended a broad range of punishment for an offense under Chapter 243, it could have easily provided that an offense was punishable "**up to** a Class A misdemeanor"--reserving the municipality's authority to punish a violation as either a Class A, Class B, or Class C misdemeanor. However, the Legislature did not say that; instead, it plainly provided that an offense "is a Class A misdemeanor." Id.
>
> "Here, as conceded by the State, the City's Ordinance was enacted under the broad grant of authority provided by Chapter 243 in an effort to regulate sexually oriented businesses. Because the Ordinance contains an enforcement provision (Class C misdemeanor) that directly conflicts with and is, therefore, inconsistent with the enforcement provision of a state statute (Class A misdemeanor), we hold that the City's enforcement provision is preempted, and thus unenforceable. See Dallas Merchant's, 852 S.W.2d at 491." *State v. Chacon*, -- S.W.3d --, 2008 WL 4239498, *5 (Tex. App. – San Antonio 2008).

Similar to the ordinance in *Chacon*, the Ordinance in the instant case has an enforcement provision that directly conflicts with and is, therefore, inconsistent with the enforcement provision of a state statute. Accordingly, the enforcement provision of the Ordinance is preempted and thus unenforceable. Therefore, Defendant's motion for summary judgment as to Plaintiffs' preemption argument should be denied.

Finally, Defendant's argument that this case does not require a jury because it does not involve obscenity is misplaced. The simple fact that some cases challenging adult legislation have been decided at the summary judgment stage does not automatically preclude a jury trial on issues presented in such a challenge. Plaintiffs are entitled to a jury trial in this matter on all issues so triable. *Dr. John's, Inc. v. City of Sioux City, Iowa*, 467 F.Supp.2d 925 (N.D. Iowa 2006). This is further supported by the dramatic difference and the sacrosanct right that parties in Texas courts have to assert their scientific evidence when there are clearly disputed facts. In *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), the Court made several critical observations, all of which bode against any grant of a summary judgment.

First, the proponent of an expert witness has the burden of showing the following:

I. Showing that expert is qualified (TRE 702)

It has been held that the proponent of the expert must prove that the expert witness possesses special knowledge as to the actual subject on which he is offering an opinion. *Burns v. Baylor Health Care System*, 125 S.W.3d 589, 593 (Tex.App.—El Paso 2003, no pet.)

II. Testimony must be relevant to the issues in the case (TRE 702)

A. The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence.

B. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702 and 703's requirement that the testimony be of assistance to the jury.

III. Testimony must have a reliable foundation (TRE 702)

A. "Scientific evidence which is not grounded "in the methods and procedures of science" is no more than "subjective belief or unsupported speculation." Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible TRE.

B. The many factors that a trial court may consider in making the threshold determination of admissibility under TRE. These factors include, ***but are not limited to***:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of the theory or technique.

C. If an expert testifies that the research he conducted was independent of the litigation that provides objective proof the research is based on good science.

IV. Determination to Exclude Testimony

A. If the trial judge determines that the proffered testimony is relevant and reliable, he or she must then determine whether to exclude the evidence because its probative value is outweighed by the "danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

B. Once the party opposing the evidence objects, the proponent bears the burden of demonstrating its admissibility.

Essentially, every issue in the instant action is reliant on questions regarding evidence. This is not an "obscenity case," but it is a case with vast disputes regarding the evidence at issue and, more importantly, whether the unreasonable and superfluous restrictions contained in the challenged legislation can be shown to advance any governmental interest. This case is not appropriate for any summary judgment and the City's motion should be denied.