IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THREE EXPO EVENTS, L.L.C.	§	
	§	
Plaintiff	§	
	§	
v.	§	**CA NO: 3:16-cv-00513-D**
	§	
CITY OF DALLAS, et al	§	
	§	
Defendants	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND BRIEF

COME NOW Defendants[1] and file this Response to Plaintiff's Motion for a Preliminary Injunction and Brief. The Court should deny Plaintiff's motion for the reasons stated below:

I.
SUMMARY

Fraud, crime and breach of contract are a few of the many legitimate, nondiscriminatory reasons which justify the City's decision and establish that Plaintiff's request for injunctive relief should be denied. In addition to Exxxotica's "unclean hands" precluding its entitlement to injunctive relief, the City's reasonable time, place and manner regulations provide a constitutional justification for the City's Resolution.

[1] *CITY OF DALLAS, TEXAS, A.C. GONAZLEZ, solely in his official capacity as City Manager, RON KING, solely in his official capacity as Executive Director of the Department of Convention and Event Services, MIKE RAWLINGS, in his official capacity as Mayor of the City of Dallas, CASEY THOMAS, in his official capacity as a member of the City Council of the City of Dallas, CAROLYN KING ARNOLD, in her official capacity as a member of the City Council of the City of Dallas, RICKEY D. CALLAHAN, in his official capacity as a member of the City Council of the City of Dallas, TIFFINNI A. YOUNG, in her official capacity as a member of the City Council of the City of Dallas, ERIK WILSON, in his official capacity as a member of the City Council of the City of Dallas, B. ADAM McGOUGH, in his official capacity as a member of the City Council of the City of Dallas, and JENNIFER STAUBACH GATES, in her official capacity as a member of the City Council of the City of Dallas*

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BACKGROUND

A. Exxxotica Facts

1. Mr. Handy's Representations to the City About Exxxotica

1.1 During the spring of 2014, Mr. Jeffrey Handy made inquiries about leasing the Convention Center. Plaintiff's App. 44.[2] Mr. Handy provided Erika Bondy, the Convention Center's Sales Coordinator, with information about Exxxoticas in other cities and with his "Operating Requirements for Adult Entertainment Oriented Events" ("Operating Requirements"). Ds. App. 95-96, ¶ 3; 100-101; Plaintiff's App. 15-16, ¶ 5; Plaintiff's App. 50-52. Ms. Bondy shared these communications with other members of the Convention Center staff, including the Convention Center's Assistant Director, John Johnson. Ds. App. 44, ¶ 4; 53-59; 113-126.

1.3 Mr. Handy represented to the Convention Center that Exxxotica, "is a gathering place of all things exotic, erotic, sensual and sexy. Exxxotica features a show floor with all of the latest products and services catering to the Adult Lifestyle Community and nightly post-event parties at local nightclubs." Ds. App. 103. Mr. Handy emphasized that at Exxxotica, "[t]here is no live nudity or lewd acts, but rather an upscale gathering of products and services catering to the adult lifestyle." He explained that Exxxotica holds a full entertainment stage on the show floor, featuring fashion shows, music and other live performances." Ds. App. 53-59; 98-105.

1.4 Mr. Handy identified males, age 18-35 as Exxxotica's target demographic, accounting for approximately 39 percent of all attendees. Ds. App. 56; 104.

1.5 Mr. Handy also told the Convention Center that, "EXXXOTICA is not your 'typical' event and therefore cannot be treated as such." Ds. App. 57; 105.

[2] Defendants have filed objections to some of Plaintiff's evidence. Dkt. 18. Defendants' objections are incorporated into this response as if fully set forth herein.

1.6 Mr. Handy represented that Exxxotica "always abide[s] by" specified "Operating Requirements," which he provided to Convention Center staff. Ds. App. 44, ¶5; 53-59; 106-112.

1.7 Mr. Handy represented that all patrons and personnel at Exxxotica are prohibited from "the display of less than completely and opaquely covered genitals, pubic region, anus or female breasts below a point immediately above the top of the areolas." Mr. Handy also assured staff that "[s]exual activities are prohibited" and stated that those "include the fondling or other erotic touching of genitals, pubic region, buttocks, anus or female breasts." Ds. App. 58; 111.

1.8 Mr. Handy also represented that he and/or his affiliates would: (1) provide event security personnel to monitor compliance with the terms and conditions of the agreement; (2) post signs at the entrance doors of the leased exhibit space prohibiting unlawful conduct; (3) insure that "all exhibitors, attendees, lessee staff, and any other invitees and guests of lessee shall comply with all applicable laws with respect to activities and materials inside the leased premises; (4) inform each and every exhibitor, in writing, of the Operating Requirements and incorporate the exact language into all exhibitor agreements; (5) obtain written acknowledgement of the Operating Requirements from all exhibitors; (6) supervise the show and exhibitor conduct at all times; and (7) immediately eject the exhibitor's personnel or any invitee or guest of the exhibitor contributing to the violation of the Operating Requirements and immediately close any such exhibit. Ds. App. 58-59; 111-112. Additionally, Mr. Handy represented that no adult or obscene materials would be visible from any public right of way and that no one under 18 years of age would be admitted. Ds. App. 58; 111.

1.9 Convention Center staff reviewed Mr. Handy's proposed Operating Requirements with City personnel, including personnel from the Dallas Police Department, and explained that the Operating Requirements reflected what Mr. Handy was proposing to do and how he was

proposing to operate Exxxotica Dallas. Ds. App. 44, ¶ 5. Mr. Handy's Operating Requirements were important in the Convention Center staff's discussions concerning Exxxotica. The Convention Center's Assistant Director, Mr. Johnson, other Convention Center staff, and City personnel understood that Exxxotica would follow these Operating Requirements. Ds. App. 45, ¶ 6; 60-63.

1.10 Additionally, by signing the Convention Center's standard contract, Mr. Handy agreed that "every employer, agent, and permitted entrant connected with the purpose for which the Premises are rented, shall abide by, conform to, and comply with all laws of the United States, the State of Texas, and all ordinances of the City of Dallas." Plaintiff's App. 104 ¶ 28; Plaintiff's App. 18-19, ¶ 11.

1.11 In late July and early August of 2015, representatives from the Convention Center, the City Attorney's office, and the Dallas Police Department participated in a conference call and a separate meeting with Mr. Handy. Ds. App. 45, ¶ 7; 157, ¶ 6. One purpose of the conference call and meeting was to address the penal code provisions relevant to Exxxotica Dallas. Mr. Handy agreed to apply his definition and prohibition of sexual activities to performances occurring at Exxxotica Dallas, including any play, motion picture, dance or other exhibition performed before an audience. Ds. App. 45, ¶ 7; 60-81; 157, ¶ 6. The final in-person pre-conference meeting took place on August 5, 2015. Mr. Handy agreed to abide by the rules he discussed with the City. Ds. App. 45, ¶ 7. Mr. Handy admits that he agreed that "sexual activities would be prohibited and no Penal Code offenses such as obscenity, public lewdness, etc. would be permitted." Dkt. 1 at 10, ¶ 7.

2. Mr. Handy's False Representations to the City About Exxxotica Texas, LLC

2.1 In his communications with Convention Center staff during the spring and summer of 2014, Mr. Handy identified several business entities purportedly involved with

Exxxotica Dallas, including Three Expo Events, Exotica Texas LLC, and Exotica Dallas LLC. Ds. App. 127-128.

2.2 On August 11, 2014, Convention Center staff sent Mr. Handy a proposed contract for his proposed lease of the Convention Center for Exxxotica Dallas. Ds. App. 87-88, ¶¶ 3-4; 129-142. This proposed contract listed "Three Expo Events" as the user of the Convention Center. Ds. App. 129-142.

2.3 In response, on August 12, 2014, Mr. Handy sent Ms. Bondy an email in which he acknowledged receipt of the proposed contract and in which he explained that "[w]e definitely need the contract written to Exotica Texas, LLC…legally Exotica Texas, LLC is the company contracting the space." Ds. App. 143-146. The Convention Center reissued the proposed contract with this change. Ds. App. 88, ¶ 6; 143.

2.4 On January 9, 2015, Mr. Handy signed a contract with the Convention Center on behalf of Exotica Texas, LLC. Plaintiff's App. 101-108. This contract provided that notices for the User, Exotica Texas, LLC, were to be sent to Mr. Handy at an address in Philadelphia, Pennsylvania. Plaintiff's App. 105.

2.5 On July 30, 2015, Mr. Handy provided Convention Center staff with a Certificate of Liability Insurance pertaining to the Convention Center and listing the insured as Three Expo Events LLC & Exotica Dallas LLC dba Exotica Texas. Ds. App. 88, ¶ 5; 90; see also, Ds. App. 147-149. An address in Austin, Texas was provided for the entities which purported to be doing business as Exotica Texas. Ds. App. 90.

2.6 In fact, however, Exotica Texas, LLC does not exist. The Commonwealth of Pennsylvania has no record of any entity by the name of Exotica Texas, LLC. Ds. App. 641-642, ¶ 4; 644. The Secretary of State of Texas has no record of any entity by the name of Exotica

Texas, LLC. Ds. App. 642, ¶ 5; 645. The Secretary of State of Delaware has no record of any entity by the name of Exotica Texas, LLC. Ds. App. 642, ¶ 6. A search of all states returned no records for Exotica Texas, LLC anywhere in the United States. Ds. App. 642, ¶ 7. Additionally, no fictitious name certificate or other records for Exotica Texas LLC or Exotica Texas are on file in Travis County, Texas, or in Dallas County, Texas. Ds. App. 642, ¶ 8-9; 646-649.

3. Exxxotica Violated Its Agreement

3.1 Although Mr. Handy had represented that all Exxxotica Dallas patrons and personnel would be prohibited from "the display of less than completely and opaquely covered genitals, pubic region, anus or female breasts below a point immediately above the top of the areolas" (Ds. App. 111), in fact, many women at Exxxotica Dallas wore only pasties or tape covering their nipples and areolas and otherwise exposed their breasts. Ds. App. 1 [Files 1-4, 7-10, 12-15, 17, 20, 25, 29][3]; 2-17; 47-51 [¶¶ 11, 13-15, 18-20, 22, 24, 27, 29]; 624 [¶ 7]; 620 [¶ 9]; 627 [¶ 7]; 630 [¶ 7]; 634 [¶ 7]; 638 [¶ 7].

3.2 Although Mr. Handy had represented that sexual activities, including "the fondling or other erotic touching of genitals, pubic region, buttocks, anus or female breasts," were prohibited at Exxxotica Dallas (Ds. App. 111), in fact, such sexual activities took place at Exxxotica Dallas, and were observed and recorded. Ds. App. 1 [Files 1-4, 7, 11, 16, 20, 28]; 48-51 [¶¶ 13-15, 18, 21, 23, 28].

3.3 Although Mr. Handy had represented that no adult or obscene materials would be visible from any public right of way (Ds. App. 111), in fact, he did not arrange for drapes or screens to be positioned so as to block the view of the exhibit space from the lobby when the entrance and exit doors to the exhibit space were open to permit people to pass through. Instead, when these doors were open to permit passage, individuals in the lobby of the Convention Center

[3] Defendants have filed a motion for leave to file adult-oriented evidentiary materials under seal.

could observe a variety of booths which were situated near these doors, and could observe adult material such as, for instance, pole dancing performed on a platform visible through these doors. Ds. App. 46-47 [¶ 9]; 1 [File 19, 0:40-0:45]; 82; 630 [¶ 6]; 634 [¶ 6]; 638 [¶ 6]. The booths which were visible from the lobby when the entry and exit doors were open to permit entry and exit included LA Direct Models, Simply Erotic Xtras, Chaturbate,[4] ArrangementFinders.com, MyFreeCams.com and, possibly, Clips4Sale.com. Ds. App. 25; 46-47 [¶ 9]; 82; 620 [¶ 4]. The Chaturbate booth included live models wearing pasties and g-strings. Ds. App. 1 [File 7]; 26; 50 [¶24]. The MyFreeCams.com booth included women wearing nothing more than pasties or tape on their nipples and areolas and/or wearing g-strings or similar attire which exposed their buttocks, and was the location where some sexual activities and public lewdness took place. Ds. App. 1 [File 3, 0:01-0:03 and 0:21-0:25; File 29].

3.4 Although Mr. Handy had represented that he would be checking identification and that no one under the age of 18 would be admitted to Exxxotica Dallas, and although, days prior to Exxxotica Dallas, DPD stated, "we cannot stress enough how vigilant you must be on this," (Ds. App. 111; Ds. App. 61), in fact, people were admitted to Exxxotica Dallas without having their identification checked, including at least one young-looking woman in her twenties. Ds. App. 629-630 [¶ 4]; 633-634 [¶ 4]; 637-638 [¶ 4]. Some attendees of Exxxotica Dallas saw a young woman in the exhibit space who did not appear to be 18 years old Ds. App. 630 [¶ 9]; 634 [¶ 9]; 638 [¶ 9].

3.5 Although Mr. Handy had promised to post signs at the entrance doors of the leased exhibit space prohibiting unlawful conduct (Ds. App. 111), Convention Center staff and Exxxotica attendees saw no such signs. Ds. App. 47 [¶ 10]; 630 [¶ 5]; 634 [¶ 5]; 638 [¶ 5].

[4] Chaturbate defines "chaturbate" as "the act of masturbating while chatting online." https://twitter.com/chaturbate?lang=en

3.6 Although Mr. Handy had represented that he would monitor compliance with the terms and conditions of the agreement and supervise the show and exhibitor conduct at all times, (Ds. App. 112), in fact, multiple different violations of the Operating Requirements occurred. *Supra* ¶¶ 3.1-3.5.

4. Exxxotica Violated State Law

4.1 Although Mr. Handy had agreed that "every employer, agent, and permitted entrant connected with the purpose for which the Premises are rented, shall abide by, conform to, and comply with all laws of the United States, the State of Texas, and all ordinances of the City of Dallas" (Plaintiff's App. 104, ¶ 28; Plaintiff's App. 18-19, ¶ 11) and that he would insure that "all exhibitors, attendees, Lessee staff, and any other invitees and guests of Lessee shall comply with all applicable laws with respect to activities and materials inside the leased premises (Plaintiff's App. 104 ¶ 28), and although Mr. Handy admits that he agreed that "no Penal Code offenses such as…public lewdness…would be permitted" (Dkt. 1 at 10, ¶ 7), in fact, the City now[5] has evidence of multiple violations of law which took place during Exxxotica Dallas. Ds. App. 1 [File 1, 0:54-1:04; File 2, 0:50-1:10; File 3, 0:01-0:03 and 0:21-0:25; File 4 0:45-0:57 and 1:15-1:20]; 48 [¶¶ 13-15]; 154 [¶ 4]; 158 [¶ 9]; 197 [¶¶ 4-5]; 199-204.

4.2 Despite Mr. Handy's initial representation that his Exxxotica events include no lewd acts (Ds. App. 53-59; 98-105), video footage from Exxxotica Dallas demonstrates that conduct which involved fondling and touching of breasts and simulation of sexual intercourse by

[5] Plaintiff's assertions that Exxxotica Dallas "gave rise to no illegal conduct" (Dkt. 1 at 5) and that, "[i]n response to Council Member Kingston's questioning, the Chief of Police affirmed that no criminal activity had been engaged in at the expo" (Dkt. 10 at 8) are not supported by the evidence and overstate the actual answers Chief Brown gave during the February 10, 2016 City Council session. Mr. Kingston asked narrow questions concerning only whether undercover vice officers at Exxxotica reported any criminal activity and whether DPD was aware of any increase in crime that is related to Exxxotica. Ds. App. 42 [File 2, 27:50-29:33]. Chief Brown did not state that no illegal conduct or criminal activity took place at Exxxotica. The three undercover vice officers who attended Exxxotica Dallas did so only for a limited time, no more than an hour and a half on one day and two hours on another day, during which time they did not observe criminal activity. Ds. App. 619-621 [¶¶ 3, 10]; 626-627 [¶¶ 3, 8]; 623 [¶ 3]. However, this does not mean that no illegal conduct or criminal activity took place at Exxxotica Dallas.

oral sodomy did occur at Exxxotica Dallas. Ds. App. 1 [File 1, 0:54-1:04; File 2, 0:50-1:10; File 3, 0:01-0:03, 0:21-0:25; File 4, 0:45-0:57, 1:15-1:20]; 620-621 [¶ 10]; 627 [¶ 8]. Under Texas law, the conduct which was captured on these videotapes constitutes acts of public lewdness.[6] Ds. App. 1 [File 1, 0:54-1:04; File 2, 0:50-1:10; File 3, 0:01-0:03 and 0:21-0:25; File 4, 0:45-0:57 and 1:15-1:20]; 154 [¶ 4]; 158 [¶ 9]; 197 [¶ 5].

4.3 Additionally, a patron of Exxxotica Dallas was arrested for assault in the Convention Center when he punched a protestor in the face. Ds. App. 197, ¶ 4; 199-202. Another patron of Exxxotica Dallas was issued an arrest on a warrant after he was involved in a disturbance at the Convention Center and was found to have an outstanding warrant. Ds. App. 197, ¶ 4; 199-202.

4.4 On the weekend that Exxotica Dallas took place, August 7-9, 2015, the vice section of the DPD conducted an operation designed to target the demand side of human trafficking in the City of Dallas by targeting the "Johns" who solicit prostitution off the internet, specifically through the website backpage.com. This operation involved the DPD posting two ads on the backpage.com website designed to attract "Johns" who seek to pay for sexual encounters with young or underage females. Both of the DPD's ads made reference to "Exxotica" or "Exxxotica." This operation resulted in nine arrests of "Johns" who responded to the DPD's backpage.com ads. Ds. App. 35-41; 156-160, ¶¶ 3-5, 10-12; 162-195.

5. Exxxotica Violated Dallas City Code Chapter 41A, the Sexually Oriented Business Ordinance

[6] Under TEXAS PENAL CODE ("TPC") Sec. 21.01(2), "sexual contact" means "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." Under TPC Sec. 21.07, a person commits the offense of public lewdness if he or she "knowingly engages in any of the following acts in a public place… (3) [an] act of sexual contact." "'Sexual contact' need not be flesh-on-flesh but may occur despite the existence of a cloth or other barrier which prevents or impedes flesh-on-flesh contact. *See Steinbach v. State*, 979 S.W.2d 836, 838–40 (Tex. App.-Austin 1998, pet. ref'd) (internal citations omitted)." *Coutta v. State*, 385 S.W.3d 641, 653 (Tex. App.—El Paso 2012, no pet.); *see also Williams v. State*, No. 05-03-648-CR, 2004 WL 95204 (Tex. App.—Dallas 2004, no pet.) (mem. op. not designated for publication); *Resnick v. State*, 574 S.W.2d 558 (Tex. Crim. App. [Panel Op.] 1978).

5.1 Although Mr. Handy had agreed that "every employer, agent, and permitted entrant connected with the purpose for which the Premises are rented, shall abide by, conform to, and comply with all laws of the United States, the State of Texas, and all ordinances of the City of Dallas" (Plaintiff's App. 104, ¶ 28; Plaintiff's App. 18-19, ¶ 11), in fact, Exxxotica Dallas violated City ordinances relating to sexually oriented businesses.

5.2 The record shows that Exxxotica's primary business is the offering of services and the display of items intended to provide sexual stimulation to its customers. Throughout Exxxotica, women repeatedly displayed specified anatomical areas, including breasts and buttocks. Ds. App. 1 [Files 1, 2, 3, 4, 9, 12, 17, 22, 23, 24, 28, 29]; see also Ds. App. 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 17 (pictures). This live nudity, as defined in § 41A-2(24), was a continuous feature of Exxxotica, providing sexual stimulation and sexual gratification to Exxxotica customers.

5.3 Exxxotica's nude women also provided sexual stimulation and sexual gratification to Exxxotica customers by engaging in specified sexual activities. Both the attire of the entertainers and the conduct in which they engaged is indiscernible from the typical conduct at adult cabarets and nude model studios.

5.4 For example, nude women at Exxxotica fondled, rubbed, and kissed one another's bare breasts and buttocks. Ds. App. 1 [File 1]. They simulated engaging in oral sex together. Ds. App. 1 [File 3, 0:00-0:03]. Several models appeared nude within the "MyFreeCams.com" area, where they "performed" live for viewing patrons. MyFreeCams.com was the "presenting sponsor" repeatedly promoted in Exxxotica's 2015 program materials, and it occupied a large area. Ds. App. 17, 18, 22, 23 (program cover, pp. 2-3, 10, 12). MyFreeCams.com is a pornographic website that bills itself as "The #1 Adult Webcam Community" (see

www.myfreecams.com), where users pay to "chat" with women who engage in sexual activity via webcam. For example, one woman with exposed breasts and tape on her nipples put a large simulated penis in her mouth and simulated performing oral sex. Ds. App. 1 [File 29, 0:34-0:58]. Models from www.Chaturbate.com, a similar webcam company, occupied another area. Ds. App. 25 (program).

5.5 On stage with scores of patrons watching, a nude woman "masturbated" a bottle that was made to look like a black, over-sized penis with a scrotum at one end, and then squirted whipped cream onto her bare breasts (with a tape "X" covering her nipples). Ds. App. 1 [File 2]. She then straddled a patron that was seated in a chair on the stage, and she rubbed and bounced her bare breasts in the man's face until the whipped cream was gone. Id.

5.6 After that, the nude woman sat in the chair, squirted whipped cream on her pubic region, raised her feet, spread her legs in the air, and thrust about in the chair while the male customer (on his hands and knees) put his mouth into her crotch, eventually coming up with a face full of whipped cream. The woman then turned around in the chair, squirted whipped cream onto the top of her bare buttocks, and had the patron rub his face in it. Ds. App. 1 [File 4].

5.7 During another activity, a woman in a sheer outfit—that exposed her buttocks—had her bare buttocks fondled, spanked, and whipped while on the main stage with a large group of patrons watching. Ds. App. 1 [File 28].

5.8 One of Exxxotica's central features was a two-night "Ms. Exxxotica Competition" on the main stage, where women displaying specified anatomical areas (buttocks and breasts) engaged in live entertainment for a large crowd of customers. Ds. App. 1 [File 7, 0:00-1:17, 3:00-9:30; see also File 20]. Women engaged in sexual dancing such as twerking and humping, and specified sexual activities such as "erotic touching of human genitals, pubic

region, buttocks … [and] breasts." § 41A-2(34); Ds. App. 1 [File 20, 2:00-2:08; 2:20-2:25; 3:20-3:30; 4:45-4:53].

5.9 In the finals, a woman with fully exposed buttocks "crowd-surfed" on the audience, which let many patrons get "a handful of ass" (per the announcer) as they touched her bare buttocks and passed her around above their heads. Ds. App. 1 [File 20, 23:15-24:03; File 7, 8:20-9:30, 10:10-10:42].

5.10 During a stage performance four women exposed their buttocks while performing live entertainment. They touched each other's bare buttocks while twerking and rubbing their pelvic/pubic region and buttocks against one another. The women also grabbed their own buttocks and breasts while performing simulated sex acts and rubbed t-shirts between their legs onto their vaginas. Some of the women simulated sexual intercourse by humping the floor as if they were on top of another person, while exposing their bare buttocks to the crowd. Ds. App. 1 [File 11, 00:32-5:33; 7:15-7:29].

5.11 At another booth, pornography star "Sara Jay" sold sexually explicit items and pulled down her dress, exposing her breasts. She posed in this state of nudity with multiple male customers, pressing her bare breast against the customers' chests. Ds. App. 1 [Files 9, 10].

5.12 Several nude women also posed in sexual positions with male customers. Ds. App. 1 [File 8, 1:55-2:28]. In one area, a woman in a G-string and "dress" (with horizontal slits exposing her buttocks and breasts) would invert her body against a seated customer's torso and spread her legs, which put her bare buttocks and covered vaginal area right under the customer's mouth and tongue. Ds. App. 1 [Files 12, 13]; see also *id*. [Files 14, 15 (same woman climbing over seated customer's head and straddling him, putting bare buttocks and covered pubic region area near customer's face)].

5.13 At yet another booth, a woman exposing her buttocks posed in a kneeling position with her mouth open at a patron's crotch, and then posed in a bent-over position as though she were offering her anus for sexual penetration. Ds. App. 1 [File 21]. Many other similar sexual poses were recorded. Ds. App. 1 [File 8, 1:25-1:35 (simulating masturbation); 2:05-2:14 (oral sex pose); File 16, 1:10-1:20 (three-way anal and oral sex position); File 18, 0:20-0:38 (anal sex position)].

5.14 This type of conduct at Exxxotica events is not unusual. In one video, at a LA Direct Models booth, a woman in a G-string sat on a patron's lap and let him masturbate her by rubbing her covered vaginal area with his hand as she gyrated on his laps. Several patrons, including one with an Exxxotica VIP bag (like those carried by Dallas VIP patrons), looked on while this genital stimulation was occurring. Ds. App. 1 [File 26].

5.15 Exxxotica also featured several booths dedicated to sexual stimulation through "visual representations" that "depict or describe 'specified sexual activities' or 'specified anatomical areas'"—and/or the sale or rental of "instruments, devices, or paraphernalia that are designed for use in connection with 'specified sexual activities.'" § 41A-2(3). This is a longstanding feature of Exxxotica, as an earlier promotional video highlights sex toys and pornographic DVDs, emphasizing the opportunity to "$ Obtain Massive $ On-Site $ Cash Sales $." Ds. App. 1 [File 5, 0:45-1:04].

5.16 For example, Exxxotica has several booths selling sexually explicit media materials. Ds. App. 1 [File 9, 0:08-0:10 (listing DVDs for $10, 8x10 pictures for $10, posters for $15, and "TOPLESS" photo with Sara Jay for $20); File 10 (selling sexually explicit pictures and DVDs); File 25 at 00:54-00:59 (offering pornographic DVDs); *id*. at 1:15-1:23 (selling nude calendars)].

5.17 Similarly, Clips4Sale.com occupied area 705 at Exxxotica. (Ds. App. 25, program.) Clips4Sale.com offers a vast collection of pornographic videos categorized by various fetishes, and it bills itself as "The #1 Downloadable Video Clip Site on the Web." (www.clips4sale.com). Also featured at Exxxotica were a litany of devices designed for use in connection with specified sexual activities, including simulated penises and vibrators. Ds. App. 1 [File 8, 0:54-1:18 ("Adults Need Toys Too")].

5.18 Exxxotica's sexual device offerings also featured BDSM (Bondage, Discipline, Sadism, and Masochism) devices intended to provide sexual stimulation, including whips and paddles. Ds. App. 28, 29, 30 (Exxxotica's show program, advertising Venus, the "Ultimate Male Masturbation System," The Stockroom Dungeon Experience (www.stockroom.com), and Kink Furniture for BDSM); see also Ds. App. 1 [File 8, 2:40-3:14 (showing restraints, paddles, sex swings, and DVDs)]. These devices and items are of the kind commonly sold in Dallas-area adult bookstores.

6. The City Did Not Commit to Provide a Contract for Exxxotica in 2016

6.1 After Exxxotica Dallas ended, Mr. Handy expressed his desire to return to the Convention Center in 2016. Ds. App. 51, ¶ 30.

6.2 On August 24, 2015, Mr. Handy sent the Convention Center a formal request for dates for 2016. Ds. App. 151-152. In this request, Mr. Handy did not identify any business entity on whose behalf he requested dates. *Id*.

6.3 Convention Center staff provided Mr. Handy with several tentative dates for a possible 2016 show, but Mr. Johnson informed Mr. Handy that the Convention Center had several steps to pursue before they could issue a proposed contract for 2016. Plaintiff's App. 177; 180; 181. Mr. Handy indicated that his preferred dates in 2016 were May 20-22, and he asked to be penciled in for those dates. Ds. App. 51, ¶ 30; 83-86.

6.4 No proposed contract was ever issued for dates in 2016. Ds. App. 51, ¶ 31.

7. The City Council Approves the Resolution

7.1 At the February 10, 2016 City Council meeting, members of the City Council explained that Exxxotica is a sexually oriented business as defined in Chapter 41A, and encouraged the City Council to approve the resolution disallowing Exxxotica at the Convention Center, which is in close proximity to residences, public parks, and a church. In adopting the resolution, a majority of the Council signaled their agreement.

7.2 Mayor Rawlings' public statements indicate that Chapter 41A applies to Exxxotica. He explained that Exxxotica "is a business that participates in the commerce of sex, plain and simple," and that the City's Code addresses sexually oriented businesses: "We know how to do sexually oriented businesses in this city." Ds. App. 42 [File 2, 5:28-5:39; 12:13].

7.3 Council Member McGough, applying the language of Chapter 41A, explicitly concluded that it applies to Exxxotica. "As we look at the SOB ordinance, I think it is absolutely clear that this particular business" is covered. Ds. App. 42 [File 2, 14:57-15:10]. He specifically emphasized the language at the end of the "sexually oriented business" definition in § 41A-2(31):

> "or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer." If you look at the videos from last year's Dallas event, you see exactly this type of behavior. I see no argument that this is not a sexually oriented business ordinance our ordinance.

Ds. App. 42 [File 2, 15:20-15:51].

7.4 The City Council voted to approve Resolution 160308, which "directs the City Manager to not enter into a contract with Three Expo Events, LLC for the lease of the Dallas Convention Center." Ds. App. 42 [File 2, 1:01-1:02:36]; Dkt. 1 at 26.

B. The Dallas Sexually Oriented Business Ordinance

8. The Enactment of the Ordinance

8.1 On June 12, 1986, the Dallas City Attorney presented a proposed ordinance regulating sexually oriented businesses to the Dallas City Plan Commission. *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1064 (N.D. Tex. 1986). The City Attorney of Dallas at that time was Ms. Analeslie Muncy. Ds. App. 699, ¶ 2. The Commission considered studies carried out by at least three other cities – Austin, Indianapolis and Los Angeles. *Dumas*, 648 F. Supp. at 1064. Full copies of these studies are attached at Ds. App. 732-972. The Commission also heard testimony and voted unanimously to recommend adoption of the proposed ordinance. *Dumas*, 648 F. Supp. at 1064.

8.2 On June 18, 1986, the proposed ordinance went before the Dallas City Council. *Id*. After hearing the public comment – unanimously in favor of the ordinance – the City Council adopted the proposed ordinance by a unanimous vote. *Id*. A certified copy of that ordinance, Ordinance No. 19196, can be found at Ds. App. 650-677. Both the Plan Commission and the City Council approved the ordinance by a unanimous vote. *Dumas*, 648 F. Supp. at 1064. The City enacted the SOB ordinance pursuant to its home rule authority.

8.3 The original SOB ordinance was immediately challenged in court, and, after various amendments to its licensing provisions, has been found to be constitutionally sound. *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986) affirmed by *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988); affirmed in part, reversed in part, vacated in part, and remanded by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); Ds. App. 699-700, ¶ 4; *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 114 F. Supp. 2d 531 (N.D. Tex. 2000), aff'd. 295 F.3d 471 (5th Cir. 2002).

9. The Legislative Intent of the Ordinance

9.1 In *Dumas*, Judge Buchmeyer conducted a detailed review of the City's SOB ordinance and concluded that the intent of both the Commission and the City Council in adopting the ordinance was "transparently clear." *Dumas*, 648 F. Supp. at 1064. He found that the City's ordinance was adopted for the content-neutral purpose of controlling the negative secondary effects of sexually oriented businesses. *Id*. at 1066.[7]

9.2 Judge Buchmeyer further noted that each of the three studies which were considered by both the Plan Commission and the City Council (Austin, Indianapolis and Los Angeles) came to the conclusion that sexually oriented businesses were associated with rising neighborhood crime rates and dropping neighborhood property values. *Id*. He further noted that other studies, both those explicitly relied on by the drafters and those not used, came to similar conclusions. (referring to studies from Houston, Beaumont, Amarillo, Phoenix, Las Vegas and Seattle). *Id*. Full copies of the Houston, Beaumont, Amarillo, and Phoenix studies are attached at Ds. App. 973-1052.

9.3 Judge Buchmeyer stated "most importantly, the study performed of a section of Dallas…determined that crime in an area dominated by sexually oriented business was 90 percent higher than in the City as a whole. *Id*.

9.4 Judge Buchmeyer noted that both the Plan Commission and the City Council stated that they were concerned not with the content of the speech associated with sexually oriented businesses, but with the crime, urban blight, and plummeting property values that inevitably seize the neighborhoods where such businesses locate. *Dumas*, 648 F. Supp. at 1065. He specifically quoted Plaintiff's lead counsel, Mr. Albright, who was at that time a member of the Plan Commission, who stated "it isn't the product itself that we're attempting to address here,

[7] Judge Buchmeyer found that the clear intent of the drafter of the ordinance, Ms. Muncy, was constitutional. *Id*. at 1065, fn. 10.

but rather it's the problems that are caused by a certain type of business" and "the content has absolutely nothing to do with it." *Dumas,* at footnote 8.[8] Judge Buchmeyer concluded that the intent of the City in passing the SOB ordinance "was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself." *Id*. at 1066. Essentially, Judge Buchmeyer concluded that the City statement of purpose and intent was more than mere words – he found that it was true.[9]

10. The Dallas City Council's Legislative Findings of Fact in Support of the Dallas SOB Ordinance

9.1 The Dallas City Council, based on its legislative record including studies and testimony, made legislative findings of fact with regard to sexually oriented establishments. The Council found that it had home rule authority to license businesses and to enforce all ordinances necessary to protect health, life, and property. It found that legitimate reasons exist to regulate sexually oriented businesses. Ds. App. 650-656.

11. The Dallas City Council's Legislative Findings of Fact Regarding the Licensing of SOBs

11. 1 The Dallas City Council also found that, "it is in the interest of the public safety and welfare to prohibit persons convicted of certain crimes from engaging in the occupation of operating a sexually oriented business." Ds. App. 654.

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[8] As a result of his prior testimony, Mr. Albright is uniquely unable to suggest that the City's intent toward sexually oriented business involves intentional content-based discrimination.

[9] "CHAPTER 41A. SEXUALLY ORIENTED BUSINESSES

Sec. 41A-1. PURPOSE AND INTENT

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this Chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas.

12. No Exemption Exists for a Temporary Sexually Oriented Business

12.1 The SOB ordinance does not now, and never has, included any exemption for a commercial enterprise that meets the sexually oriented business definition, but operates at a location for only a short period of time. When the SOB ordinance was enacted, it was never contemplated that the SOB ordinance would not apply to a "temporary sexually oriented business use," which is not a defined term in the City's Code. In fact, such an interpretation would have undermined the intent and effect of the ordinance, by enabling SOBs at any location without regulation, so long as an operator could demonstrate that the use was "temporary." Ds. App. 699 [A. Muncy Afft. ¶ 3].

V.
ARGUMENTS AND AUTHORITIES

Plaintiff has limited the basis on which he seeks a preliminary injunction to the narrow, and mistaken, assertion that the City's action in passing Resolution 160308 constitutes a prior restraint in violation of the First Amendment.[10] However, due to Plaintiff's own conduct in connection with Exxxotica, the Court need not, and should not, reach Plaintiff's limited constitutional question. Because the City has legitimate, nondiscriminatory reasons for choosing not to engage in further commerce with Plaintiff, the Court should deny Plaintiff's motion for preliminary injunction.

A. The Doctrine of Constitutional Avoidance.

"A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-446 (1988), citing *Three*

[10] Although the Plaintiff's brief mentions issues which are beyond the scope of the motion, such as viewpoint discrimination, those other issues are not properly before the Court and have been waived for purposes of Plaintiff's motion. However, out of an abundance of caution, and without waiving their contention that those additional issues have been waived, Defendants will address those other issues.

Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138, 157–158 (1984); see also *Pearson v. Callahan*, 555 U.S. 223, 241 (2009) (It is wise judicial counsel "'not to pass on questions of constitutionality...unless such adjudication is unavoidable.'" (citations omitted)); *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012), citing *Pearson*, *Camreta v. Greene*, 131 S.Ct. 2020, 2030–2031 (2011), and *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011). If a case can be decided on non-constitutional grounds courts should do so and should avoid the constitutional question. *Lyng*, 485 U.S. at 445-446; see also, *Hodge v. Prince*, 730 F. Supp. 747, 749 (N.D. Tex. 1990) citing *Lyng* and *Edward J. DeBartolo Corp. v. N.L.R.B.*, 463 U.S. 147, 158 (1983).

In this case, Plaintiff is in no position to obtain the extraordinary equitable relief he seeks because he made repeated, significant misrepresentations to the City in conjunction with Exxxotica Dallas which took place in the City's Convention Center in 2015. As will be explained in greater detail below, Plaintiff fraudulently misrepresented the status of the alleged business entity on whose behalf he signed a contract to lease the Convention Center. Further, after representing that Exxxotica did not involve lewd behavior and that he would insure that all exhibitors and attendees would comply with all applicable laws, he in fact permitted his exhibitors and attendees to engage in multiple instances of public lewdness. Finally, Plaintiff engaged in multiple violations of the terms of his agreement with the City.

These reasons independently, and together, justify the City's decision not to sign a second contract for Exxxotica. Although, out of an abundance of caution, the City will address constitutional law questions, Defendants urge the Court to follow the well-established rule of constitutional avoidance and decline to decide the constitutional issue raised by Plaintiff.

B. Preliminary Injunction Standard

A preliminary injunction is an extraordinary remedy that should not be granted unless the movant has *clearly* carried the burden of persuasion on all four requirements. *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 268 (5th Cir. 2012) (citing *Planned Parenthood Ass'n of Hidalgo County Tex., Inc. v. Suehs*, 692 F.3d 343, 348 (5th Cir. 2012)). The requirements for a preliminary injunction are as follows:

1. A substantial likelihood that plaintiff will prevail on the merits;

2. A substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted;

3. That the threat and injury to plaintiff outweighs the threat and harm the injunction may do to the defendant; **and**

4. That granting the preliminary injunction will not disserve the public interest.

FED. R. CIV. P. 65; *Jackson Women's Health Organization v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014) (citation omitted); see also *Dennis Melancon, Inc.*, 703 F.3d at 268. A plaintiff who cannot prevail on any one of the requirements is not entitled to injunctive relief. *See* FED. R. CIV. P. 65. "A preliminary injunction 'is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion.'" *NTR Bullion Group, LLC v. Liberty Metals Group, LLC*, No. 3:13–CV–3945–D, 2013 WL 5637601 *2 (N.D. Tex. 2013) quoting *Jones v. Bush*, 122 F. Supp. 2d 713, 718 (N.D. Tex. 2000) quoting *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989); *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)). "The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir. 1985); *NTR Bullion Group*, No. 3:13–CV–3945–D, 2013 WL 5637601 at *2, citing *Miss. Power & Light Co.*, 760 F.2d at 621 (citations omitted).

C. Plaintiff Cannot Clearly Establish A Substantial Likelihood of Success on the Merits.

Plaintiff cannot clearly establish a substantial likelihood of success on the merits of his narrow claim because multiple, compelling, legitimate nondiscriminatory reasons support the City's decision. The City has good-faith, lawful, constitutional reasons to exercise its freedom to decline to enter into a second contract with Plaintiff. These reasons include fraud, crimes, breach of contract, and violations of the City's ordinance. Additionally, Plaintiff cannot clearly establish a substantial likelihood of success on the merits of his constitutional claim because the City did not engage in a prior restraint or viewpoint discrimination.

1. Plaintiff's Unclean Hands Precludes Its Entitlement to Equitable Relief.

"The doctrine of unclean hands 'closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.'" *Healthpoint, Ltd., v. Ethex Corp.*, 273 F. Supp. 2d 817, 847 (W.D. Tex. 2001), quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). "'Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause' for the court to invoke the doctrine." *Healthpoint*, 273 F. Supp. 2d at 847, quoting *Precision Instrument Mfg.*, 324 U.S. at 815. "The wrongful acts upon which the claim of unclean hands is premised must 'in some measure affect the equitable relations between the parties in respect of something brought before the court of adjudication.'" *Healthpoint*, 273 F. Supp. 2d at 847, quoting *Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.3d 852, 863 (5th Cir. 1979). Applied to preliminary injunctions, the doctrine of unclean hands "affords the equity court broad discretion in rejecting an unclean litigant's claims." *Healthpoint*, 273 F. Supp. 2d at 848.

Plaintiff asks the Court to enjoin the Defendants "from interfering with the 2016 Exxxotica Expo being held at the Dallas Convention Center by seeking to enforce the February 10, 2016 Resolution No. 160308, refusing to contract with Plaintiff or otherwise directing Defendants to enter into a contract with Expo for the planned 2016 convention." Dkt. 6 at 1-2 and 4. Plaintiff comes to the Court with unclean hands in connection with Exxxotica, because Plaintiff engaged in fraud, permitted multiple violations of laws, and committed multiple violations of the terms of his agreement with the City.

a. Plaintiff Should Not Obtain Equitable Relief Because It Made Fraudulent Misrepresentations to the City.

A party's statement to another party that a company exists, when it actually does not exist, is a fraudulent representation. *U.S. v. Morganfield*, 501 F.3d 453, 463 (5th Cir. 2007). Plaintiff made such fraudulent representations to the City with respect to the existence of a business entity called Exotica Texas LLC which, though it purported to contract with the City, does not in fact exist. *Supra* at ¶¶ 2.3-2.6. Plaintiff committed both statutory and common-law fraud in connection with Exxxotica Dallas in 2015, and, because Plaintiff has proven that his representations are unreliable, the City should not be forced to contract with Plaintiff again.

Texas recognizes both statutory and common-law fraud. *In re Base Holdings, LLC*, No. 3:11–CV–3531–D, 2015 WL 1808536 *4 (N.D. Tex. 2015) (Fitzwater, J.). The Texas Business and Commerce Code provides for liability when a person commits fraud in a transaction concerning real estate. *Id*. at *4. In relevant part, fraud is defined as,

> (1) [a] false representation of a past or existing material fact, when the false representation is
>
> > (A) made to a person for the purpose of inducing that person to enter into a contract; and
> >
> > (B) relied on by that person in entering into that contract[.]

TEX. BUS. & COM. CODE § 27.01; *In re Base Holdings, LLC*, No. 3:11–CV–3531–D, 2015 WL 1808536 at *4.

Fraudulent inducement is a type of common-law fraud arising in the context of a contract, and the existence of a contract is necessary to establish a claim. *In re Base Holdings, LLC*, No. 3:11–CV–3531–D, 2015 WL 1808536 at *4, citing *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001). The elements of this type of fraud include "(1) that the speaker made a material misrepresentation (2) that he knew was false when he made it or that he made recklessly without any knowledge of its truth and as a positive assertion (3) with the intent that the other party act upon it and (4) that the other party acted in reliance on the misrepresentation and (5) suffered injury thereby." *In re Base Holdings, LLC*, No. 3:11–CV–3531–D, 2015 WL 1808536 at *4, citing *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011). "A representation is material if 'a reasonable person would attach importance to [it] and would be induced to act on the information in determining his choice of actions in the transaction in question.'" *Id*., citing *Italian Cowboy*, 341 S.W.3d at 337 (citation omitted).

Plaintiff committed both statutory fraud and fraudulent inducement when, after receiving the Convention Center's proposed contract for Plaintiff's 2015 lease for Exxxotica, which listed "Three Expo Events" as the user of the Convention Center, Mr. Handy explained that "[w]e definitely need the contract written to Exotica Texas, LLC…legally Exotica Texas, LLC is the company contracting the space" although Exotica Texas LLC did not actually exist. Ds. App. 143-146; *supra* at ¶ 2.3. As Handy held himself out to be a "Director" of Exotica Texas, LLC, he had personal knowledge that the entity did not exist. Plaintiff's App. 101-108. Plaintiff obviously intended that the City rely on its representation about Exotica Texas, LLC in entering into a contract for the lease of the Convention Center, and the City did in fact rely on Plaintiff's

fraudulent representation when it accepted and countersigned the Convention Center lease contract which Plaintiff had signed on behalf of the non-existent Exotica Texas, LLC. *Id*. The City was injured as a result of the misrepresentation because it allowed an event to take place in the Convention Center based on the signature of a purported corporate entity that does not exist.[11]

If Exotica Texas, LLC had existed, it was required by law to register itself in Texas in order to transact business in 2015. TEX. BUS. ORG. CODE §§ 9.001, 9.004, 9.005.[12] Exotica Texas, LLC was not registered in Texas, or anywhere else in the United States. *Supra* at 2.6.

b. Plaintiff Should Not Obtain Equitable Relief Because It Repeatedly Allowed Criminal Activity to Occur at Exxxotica

(1) Violations of State Law

Although Plaintiff had agreed to ensure that the exhibitors and attendees of Exxxotica would comply with all state laws, (Plaintiff's App. 104, ¶ 28; Plaintiff's App. 18-19, ¶ 11; Ds. App. 111) and although Plaintiff admits that he agreed that "no Penal Code offenses such as…public lewdness…would be permitted" (Dkt. 1 at 10, ¶ 7), in fact, multiple violations of law, including multiple recorded instances of public lewdness by Exxxotica exhibitors, took place during Exxxotica Dallas. *Supra* at ¶¶ 4.1-4.3; Ds. App. 1 [File 1, 0:54-1:04; File 2, 0:50-1:10; File 3, 0:01-0:03 and 0:21-0:25; File 4 0:45-0:57 and 1:15-1:20]; Ds. App. 154, [¶ 4]; 158, [¶ 9]; 197, [¶¶ 4-5]; 199-204; 48, [¶¶ 13-15].

Additionally, two arrests were made at Exxxotica, including one which charged a patron of Exxxotica with assault in the Convention Center when he punched a protestor in the face. *Supra* at ¶ 4.3; Ds. App. 197, ¶ 4; 199-202.[13]

[11] With the detail provided herein, Defendants have complied with the requirements of FED. R. CIV. P. 9(b).
[12] A limited liability company that transacts business in Texas without first registering itself with the Secretary of State may become the subject of civil penalties. *Id*. at § 9.052.

(2) Violations of Dallas Ordinances

Although Mr. Handy had agreed that "every employer, agent, and permitted entrant connected with the purpose for which the Premises are rented, shall abide by, conform to, and comply with all laws of the United States, the State of Texas, and all ordinances of the City of Dallas" (Plaintiff's App. p. 104 [Exxxotica Contract ¶ 28]; Plaintiff's App. pp. 18-19 [J. Handy Decl. ¶ 11]), in fact, Exxxotica Dallas violated City ordinances relating to sexually oriented businesses. See paragraphs 5.1-5.18, above, for a thorough explanation of Exxxotica's violations of Dallas' SOB ordinance.

c. Plaintiff Should Not Obtain Equitable Relief Because It Violated Its Agreement With the City.

Plaintiff offered numerous, specific representations about the conduct it would not permit at Exxxotica, and the City relied on these representations, but Plaintiff violated many of these terms of its agreement with the City. In light of Plaintiff's failure to abide by the terms of its previous contract with the City, the Court should not order the City to enter into a new contract with Plaintiff.

The City's right to contractual liberty is as fundamental as Plaintiff's claim to expressive liberty. Well before the First and Fourteenth Amendments, the Constitution secured contractual rights against state infringement. U.S. CONST. art. I, §10, cl.1. This protection shielded not only private but also governmental contracts. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). As the Supreme Court noted in adjudicating this Contracts Clause, "we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation." *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837). While the letter of the Contracts Clause restricts state

[13] Additionally, on the weekend of Exxxotica, nine arrests were made of "Johns" who responded to ads placed by the DPD on the backpage.com website. *Supra* at ¶ 4.4. These ads referenced "Exxxotica" or "Exxotica." *Id.*

governments only, (See *Cox Cable Comm'ns, Inc. v. United States*, 992 F.2d 1178, 1182 (11th Cir. 1993)) its spirit, as well as the letter of the Tenth Amendment, militate against any federal judicial decision compelling the City to enter a contract.

The United States Constitution does not forbid a City from controlling the use of its own property for its own lawful nondiscriminatory purpose. *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966); *Lloyd Corp., Limited v. Tanner*, 407 U.S. 551, 568 (1972), citing *Adderly*; *Jones v. Kelly*, 611 Fed. Appx. 229, 231 (5th Cir. 2015), citing *Adderly*. The Court should defer to the City's judgment regarding its decisions about entering into contracts. It is one thing to declare that the resolution is unenforceable; it is quite another thing to force the City to enter into a new contract with Plaintiff, whose promises have proven to be unreliable.

In Texas the elements of a claim for breach of contract are: (1) the existence of a valid contract; (2) the claimant's performance of duties under the contract; (3) the respondent's breach of the contract, and (4) damages resulting from the breach. *Harrison v. Wells Fargo Bank, N.A.*, Cause No. 3:13–CV–4682–D, 2015 WL 1649069 *4 (N.D. Tex. 2015), quoting *Orthoflex, Inc. v. ThermoTek, Inc.*, 983 F. Supp. 2d 866, 872 (N.D. Tex. 2013) (citation and internal quotation marks omitted).

The City previously entered into a contract pertaining to Exxxotica, and Plaintiff admits to having promised the City that Exxxotica would not permit exhibitors or patrons to engage in "sexual activities," defined to include fondling or other erotic touching of buttocks or female breasts. Ds. App. 106; 111; Plaintiff's App. 18-19, ¶¶ 11-12; 101-108; Dkt. 1 at 10, ¶7. Plaintiff promised the City that Exxxotica would not permit exhibitors or patrons to display female breasts below a point immediately above the top of the areolas. Ds. App. 111. Plaintiff promised the City that no adult or obscene materials would be visible from any public right of

way. *Id*. Plaintiff promised that he would monitor compliance with the terms and conditions of the agreement and supervise the show and exhibitor conduct at all times. Ds. App. 111-112. He did not live up to any of these promises. *Supra* at ¶¶ 3.1-3.6.

Instead, exhibitors and patrons engaged in "sexual activities" and appeared in a state of nudity that violated Plaintiff's agreement with the City, adult material was visible from the Convention Center lobby, and Plaintiff did not monitor compliance with the terms and conditions of the agreement and supervise the show and exhibitor conduct at all times. *Supra* at ¶¶ 3.1-3.6. These breaches of Plaintiff's duties to the City damaged the City by permitting violations of state and local laws on City owned property. The Court should not order the City to enter into a new contract with Plaintiff, who has demonstrated that his promises are unreliable.

2. Exxxotica is A Sexually Oriented Business Under Chapter 41A and Fails to Comply With That Ordinance.

Several City Council members correctly observed that Exxxotica is a commercial enterprise that meets the definition of "sexually oriented business" in Chapter 41A. The City Attorney's contrary opinion, respectfully, did not address the established facts concerning Exxxotica's business and Chapter 41A's straightforward language.

a. Exxxotica is A Commercial Enterprise, the Primary Business of Which is the Offering of Services and the Exhibiting of Items Intended to Provide Sexual Gratification.

The documented activity at Exxxotica demonstrates that Exxxotica is a "sexually oriented business" under Dallas City Code Chapter 41A. See *supra* at ¶¶ 5.1-5.18, which contain detailed descriptions of occurrences at Exxxotica.

> SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, escort agency, nude model studio, or other commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer.

Ds. App. 682, DCC § 41A-2(31) (emphasis added).

Chapter 41A also defines several specific sub-classes of enterprises geared toward sexual stimulation. Each of these is defined by the offering of services or items involving "specified anatomical areas" or "specified sexual activities."

> SPECIFIED ANATOMICAL AREAS means: (A) any of the following, or any combination of the following, when less than completely and opaquely covered: (i) any human genitals, pubic region, or pubic hair; (ii) any buttock; or (iii) any portion of the female breast or breasts that is situated below a point immediately above the top of the areola; or (B) human male genitals in a discernibly erect state, even if completely and opaquely covered.
>
> SPECIFIED SEXUAL ACTIVITIES means and includes any of the following: (A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts; (B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (C) masturbation, actual or simulated; or (D) excretory functions as part of or in connection with any of the activities set forth in Paragraphs (A) through (C) of this subsection.

§§ 41A-2(33), (34).

These definitions are integral to defining commercial enterprises that have the primary business purpose of providing sexual stimulation.

For example, a "nude model studio" means "any place" where "a person who appears in a state of nudity or displays 'specified anatomical areas' is provided to be observed" by paying patrons. § 41A-2(23). "Nudity," as defined in Chapter 41A, is essentially interchangeable with the display of any specified anatomical area, such that a person displaying a specified anatomical area is "nude" under Chapter 41A. Compare § 41A-2(24) with § 41A-2(33).

Similarly, an "adult cabaret" is a business defined by its offering of live entertainment that is intended to provide sexual stimulation and is characterized by "matter depicting, simulating, describing, or relating to 'specified anatomical areas' or 'specified sexual activities.'" Ds. App. 680, § 41A-2(5), (6).

An "adult bookstore or adult video store" is a business that has "as one of its principal business purposes" the sale or rental of "visual representations" that "depict or describe 'specified sexual activities' or 'specified anatomical areas'"—or the sale or rental of "instruments, devices, or paraphernalia that are designed for use in connection with 'specified sexual activities.'" § 41A-2(3).

b. Exxxotica Does Not Comply with Chapter 41A and Produces Secondary Effects that Chapter 41A is Designed to Prevent.

Exxxotica's attempt to operate its sexually oriented business in Dallas violates Chapter 41A in multiple ways. First, § 41A-4(a) states that a person "commits an offense if he operates a sexually oriented business without a valid license" issued by the City. Exxxotica does not comply with this section because it does not have a sexually oriented business license from the City. Ds. App. 684.

Second, § 41A-13(a) states that a person "commits an offense if he causes or permits the operation … of a sexually oriented business within 1,000 feet of: (1) a church; … (3) a boundary of a residential or historic district as defined in this chapter; (4) a public park; … [or] (5) the property line of a lot devoted to a residential use as defined in this chapter…." Ds. App. 690. Exxxotica's operation of a sexually oriented business at the Convention Center would violate this section because the site is within 1,000 feet of a church (Eagle's Nest Cathedral), three parks (Ferris Plaza, Lubben Plaza, and Founders Square), and two residential properties (Residences at 1300 Jackson and Interurban Apartments) . Ds. App. 701-03 [S. Holt Afft. ¶¶ 3-4, and certified survey map depicting proximity between Convention Center and disqualifying sites].

Third, violations of Chapter 41A's "no-touch" rules are rampant at Exxxotica. Exxxotica meets the definitions "nude model studio" and "adult cabaret" because live entertainers expose

specified anatomical areas to Exxxotica's paying patrons. Thus, Exxxotica is subject to Chapter 41A's no-touch rules.

At nude model studios, § 41A-16(e) makes it unlawful for an employee (*i.e.*, a person who provides entertainment at the nude model studio) "while exposing any specified anatomical areas" to "touch[] a customer or the clothing of a customer." Ds. App. 694. Reciprocally, under § 41A-16(f), a "customer at a nude model studio commits an offense if the customer touches an employee who is exposing any specified anatomical areas," *i.e.*, any "less than completely and opaquely covered … buttock … or any portion of the female breast or breasts that is situated below a point immediately above the top of the areola." § 41A-2(33)(A). The same rules apply at adult cabarets. §§ 41A-18.1(b), (c). Ds. App. 695.

Video footage shows that Exxxotica patrons and entertainers repeatedly violate Chapter 41A (and often, state law) by touching one another while the entertainers are exposing specified anatomical areas, such as their bare buttocks and breasts. Ds. App. 1 [Files 2, 4, 9, 10, 12, 13, 14, 15; File 16, 0:45-1:29; File 17; File 20, 23:10-23:45 (crowd surfing Ms. Exxxotica contestant); Files 21, 26].

The record shows that Exxxotica produces the very secondary effects—unlawful sexual contact and public lewdness—that Chapter 41A's no-touch regulations were designed to prevent. Rules like these have been repeatedly upheld as a constitutional means of preventing such secondary effects. *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 557 (5th Cir. 2006) (holding that city's no-touch rule "targeted the very same secondary effects that continue to trouble the City today," including "the touching itself"); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997) ("Each officer testified that he has witnessed … violations of the old ordinance's prohibition on contact between entertainers and customers…. Furthermore,

particular dances described in the record—such as one instance in which a dancer invited customers to spoon-feed themselves whipped cream off of her breasts, buttocks, and vaginal area—pose a particularly acute risk of the transmission of disease."); *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 630 F.3d 1346, 1353 n.6 (11th Cir. 2011) (upholding SOB ordinance with no-touch provision, citing affidavits that "described in detail illegal activity taking place," including dancer allowing patron "to touch her breast, buttocks, and genital area"); *id.* at 1360 (noting county's secondary effects interest in preventing lewdness); *Foster v. City of El Paso*, 396 S.W.3d 244, 250, 260 (Tex. App.-El Paso 2013) (noting city's substantial interest in preventing lewdness and upholding city's reliance on Houston study documenting, *inter alia*, public lewdness in adult cabarets); *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 883 (11th Cir. 2007) (noting crimes, including lewdness, in sexually oriented businesses that city sought to reduce by enacting the challenged ordinances).

c. Chapter 41A is constitutional.

Plaintiffs bear the burden of proof at the preliminary injunction stage to demonstrate a likelihood of success on any claim that Chapter 41A is unconstitutional. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

Plaintiff Exxxotica cannot meet that burden because the Fifth Circuit has held that Chapter 41A is constitutional. *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 114 F. Supp. 2d 531 (N.D. Tex. 2000), *aff'd*, 295 F.3d 471 (5th Cir. 2002).[14] As this Court held—and the Fifth Circuit affirmed—Chapter 41A is not a ban on speech, but a time, place, and manner regulation that satisfies intermediate scrutiny. 114 F. Supp. 2d at 544-49. The ordinance is

[14] See also, *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986) affirmed by *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988); affirmed in part, reversed in part, vacated in part, and remanded by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

content-neutral, and it is narrowly tailored to serve the City's substantial government interest in preventing negative secondary effects. *Id.*; *Baby Dolls*, 295 F.3d at 480-82, 484-85.

(1) Chapter 41A is Narrowly Tailored to Serve A Substantial Government Interest.

To justify an ordinance regulating sexually oriented businesses, a local government may rely upon *any* evidence "reasonably believed to be relevant" to the secondary effects of sexually oriented businesses. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality opinion); *id.* at 451 (Kennedy, J., concurring); *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546, 559 (5th Cir. 2006). This includes evidence from a wide range of sources, including anecdotal reports, judicial opinions, or land use studies, that recognize the harms targeted or the regulations employed to address secondary effects. *City of Erie*, 529 U.S. at 297 (2000) (plurality opinion). Such secondary effects include a diverse set of problems—occurring both inside and outside of the sexually oriented business—including negative impacts on surrounding properties, crime, and illicit sexual behavior. *Fantasy Ranch*, 459 F.3d at 559 (noting that city relied on studies and numerous court opinions, "all of which demonstrate a connection between dancer-patron touching and unsavory secondary effects").

Secondary effects evidence need not be local, *City of Renton*, 475 U.S. at 52-53, and need not consist of empirical data or a scientific study. *Alameda*, 535 U.S. at 438-39 (rejecting "empirical data" requirement); *City of Erie*, 529 U.S. at 300 (same); *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1195-96 (9th Cir. 2004) ("Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects….").

Indeed, the Fifth Circuit has explained that:

> The [*Alameda Books*] Court added that it would not require localities to disprove other possible implications of the legislative materials at their disposal, because Renton "specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech." *Id*. at 438, 122 S. Ct. at 1736, n.14. Nor would municipalities be required to prove, not merely by common sense, but empirically, that SOB ordinances will successfully reduce crime, as this would undermine Renton's allowance of local experimentation in responding to secondary effects. *Id*. at 439, 122 S. Ct. at 1736.

N.W. Enterprises, Inc. v. City of Houston, 352 F.3d 162, 180 (5th Cir. 2003); *Fantasy Ranch*, 459 F.3d at 561 (holding that "[u]ltimately, we are not empowered by *Alameda* to second-guess the empirical assessments of a legislative body" seeking to address secondary effects); *accord Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d at 882 ("[W]e cannot simply substitute our own judgment for the City's.").

Finally, secondary effects evidence can be adduced prior to enactment of the ordinance, or during litigation when the ordinance is challenged. *BGHA, LLC v. Universal City*, 340 F.3d 295, 299 (5th Cir. 2003). The "'appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a *current governmental interest* in the service of which the challenged application of the statute may be constitutional.'" *Fantasy Ranch*, 459 F.3d at 560 (emphasis added) (quoting *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring)). Thus, a "local government can justify a challenged ordinance based both on evidence developed prior to the ordinance's enactment and that adduced at trial." *N.W. Enterprises*, 352 F.3d at 175.

Applying the foregoing principles, it is clear that Chapter 41A is based on legislative evidence "reasonably believed to be relevant" to the secondary effects of sexually oriented businesses that the City seeks to prevent.

The City studied the efforts of other cities, *Baby Dolls*, 114 F. Supp. 2d at 534, and it has relied on several studies showing the adverse secondary effects of sexually oriented businesses.

Id. at 539-40 (listing various studies). The current Chapter 41A expressly states the City Council's concerns about "deleterious secondary effects of sexually oriented businesses both *inside* such businesses and outside" the businesses. § 41A-1(a) (emphasis added).

Chapter 41A also relies on testimony "that public lewdness and other crimes sometimes occur in sexually oriented businesses as a result of touching or groping by dancers and customers." *Baby Dolls,* 114 F. Supp. 2d at 541-42 (noting police officers observations and ongoing nature of such crimes in the businesses).

The record here shows that acts of lewdness are among the adverse negative secondary effects generated by sexually oriented businesses, including Exxxotica.

Under Texas Penal Code ("TPC") Sec. 21.01(2), "sexual contact" means "any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person." Under TPC Sec. 21.07, a person commits the offense of public lewdness if he or she "knowingly engages in any of the following acts in a public place… (3) [an] act of sexual contact." "'Sexual contact' need not be flesh-on-flesh but may occur despite the existence of a cloth or other barrier which prevents or impedes flesh-on-flesh contact. *See Steinbach v. State*, 979 S.W.2d 836, 838-40 (Tex. App.-Austin 1998, pet. ref'd) (internal citations omitted)." *Coutta v. State*, 385 S.W.3d 641, 653 (Tex. App. 2012); *see also Williams v. State*, No. 05-03-648-CR, 2004 WL 95204 (Tex. Crim. App. 2004) (not designated for publication); *Resnick v. State*, 574 S.W.2d 558 (Tex. Crim. App. 1978).

Although local secondary effects evidence is not required to uphold the constitutionality of Chapter 41A, the City has adduced such evidence relative to Exxxotica Dallas. Inside Exxxotica, nude entertainers engaged in lewd acts with each other, with paying attendees, and for onlookers. Just outside, an Exxxotica attendee punched a protestor and was arrested for

assault. Ds. App. 197 [R. Sherwin Afft. ¶ 4]; Ds. App. 199-202 [Sherwin Exh. 1]. Another attendee caused a disturbance at the Convention Center and was arrested on an outstanding warrant from another jurisdiction. Ds. App. 197 [R. Sherwin Afft. ¶ 4]; Ds. App. 203-204 [Sherwin Exh. 2].

The City has also adduced the testimony of an expert, Dr. Richard McCleary. Ds. App. 704-731 (expert report and curriculum vitae). Dr. McCleary's report explains the criminological theory of secondary effects and a number of studies that empirically corroborate the theory. Attached to his report are several of the studies (Austin, Los Angeles, Houston, Phoenix) referenced in this Court's *Dumas* opinion upholding Chapter 41A, a later report commissioned by the City of Dallas in 1997, and a published journal article demonstrating secondary effects at sexually oriented businesses. Ds. App. 732-1107.

Dr. McCleary reviewed the evidence from Exxxotica (including the video evidence) and concludes that "[a]s defined in the Ordinance, *Dallas eXXXotica* ("*eXXXotica*") is a sexually oriented business." Ds. App. 707-08 (citing Chapter 41A's definitions of "sexually oriented business," "specified anatomical areas," and "specified sexual activities"). He states that the body parts displayed, sexual activities conducted, and sexual items offered at Exxxotica are the types of acts and merchandise offered at adult bookstores and adult cabarets. Ds. App. 708-09.

He concludes that "[a]lthough the Dallas Convention Center is not *per se* a sexually oriented business, *eXXXotica* operated (and seeks to operate) a sexually oriented business there, as defined by the Ordinance." Ds. App. 710. He then explains, based on the documented operations of Exxxotica:

> It is reasonable to conclude that *eXXXotica*, which is a sexually oriented business, would generate the same crime-related secondary effects that have been repeatedly documented for other sexually oriented businesses. It is reasonable for

> the City to conclude that its Ordinance, as applied to *eXXXotica*, would ameliorate the expected secondary effects.

Id.

Chapter 41A is also narrowly tailored to address secondary effects, as it is limited to commercial enterprises with the "primary business purpose" of offering services and items catering to sexual stimulation and gratification. § 41A-2(31).

"[S]o long as the means chosen are not substantially broader than necessary," an ordinance is narrowly tailored if the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). Pursuant to this standard, courts have repeatedly upheld licensing and conduct regulations similar to those in Chapter 41A. *See, e.g., TK's Video, Inc. v. Denton County*, 24 F.3d 705, 710 (5th Cir. 2004) (noting that licensing helps to weed out "persons with a history of regulatory violations or sexual misconduct who would manage or work" in sexually oriented businesses); *Fantasy* Ranch, 459 F.3d at 562-63 (upholding extra rules to ensure compliance with "no-touch" rule between patrons and nude performers).

In *Baby Dolls*, this Court concluded that Chapter 41A:

> is narrowly tailored because it effectively promotes the City's substantial interest by classifying as sexually oriented businesses only those businesses that are associated with actual or potential secondary effects, and by classifying those businesses that have heretofore avoided the location restrictions of Chapter 41A. The fact that these objectives may be achieved by forcing Intervenors to either change their dancers' attire to avoid being classified as a sexually oriented business or relocate to a site that conforms with Chapter 41A's location requirements does not make the Ordinance insufficiently tailored because sexually oriented expression is entitled to less than full First Amendment protection.

114 F. Supp. 2d at 548 (citing *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1276 (5th Cir. 1988)).

Applying Chapter 41A to Exxxotica Dallas comports with narrow tailoring analysis. The evidence shows that Exxxotica has the sort of secondary effects that Chapter 41A is designed to target, and that Exxxotica is a "commercial enterprise the primary business of which is the offering of a service or the selling, renting, or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to the customer" as set forth in § 41A-2(31).

The Eighth Circuit has upheld a similar application of an adult business ordinance in *BZAPS, Inc. v. City of Mankato*, 268 F.3d 603 (8th Cir. 2001). In *BZAPS*, a male dance revue that performed in various states of nudity sought to perform for one night at a local bar. The city's ordinance regulated the location of adult uses and allowed them in other zoning areas but not the one where the bar was located. Even though the adult entertainment was to occur for one night only, the district court denied the bar's preliminary injunction request and granted summary judgment to the city. The Eighth Circuit affirmed. *Id.* at 604-05.

Like Chapter 41A, the ordinance in *BZAPS* defined adult businesses based on their depiction of "specified sexual activities" or "specified anatomical areas." *Id.* at 605. The ordinance was justified by a secondary effects rationale, and the city relied on studies reasonably related to its concerns about adult entertainment. *Id.* Concluding that the short duration of the event did not prevent application of the city's ordinance, the Eight Circuit explained:

> Once a city has decided to regulate adult entertainment to prevent its secondary effects, however, the city is not required to prove that a particular adult use creates secondary effects before regulating that use, so long as the city reasonably believes that the use is related to other uses that have been shown to cause secondary effects. *See Holmberg v. City of Ramsey*, 12 F.3d 140, 143 (8th Cir.1993), *cert. denied*, 513 U.S. 810, 115 S. Ct. 59, 130 L.Ed.2d 17 (1994). BZAPS's proposed use differs little from many other adult performances. The fact that this performance is to last for only one night as opposed to what occurs in a so-called "strip club" that features an identical performance on a nightly basis does not preclude the city from reasonably believing that the uses are related.

BZAPS, 268 F.3d at 606-07.

The court continued, explaining "that once a city has validly forbidden adult uses within a particular area, it may enforce that ordinance against all adult uses in that area without showing that a particular use will produce secondary effects." *Id.* at 607. "If we were to accept BZAPS's argument, a city would have the burden of showing precisely how many adult performances were capable of producing an unacceptable level of antisocial activity before the city could regulate those performances." *Id*. The Eighth Circuit concluded that "neither the first amendment nor Supreme Court precedent requires a city to do the impossible." *Id*.; *see also Ward,* 491 U.S. at 801 ("[T]he validity of [an ordinance] depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case.")

The case for applying Chapter 41A to Exxxotica Dallas is even stronger than the one-time application in *BZAPS*. Exxxotica occurs at a convention center, drawing many thousands of attendees to pay to observe "specified anatomical areas" and activity that constitutes "specified sexual activities." Exxxotica is not limited to the space of a local bar, and it runs not for a single night, but for three full days. Moreover, the negative secondary effects of Exxxotica Dallas are not speculative. They have been demonstrated. As Chapter 41A is a constitutionally-valid time, place, and manner regulation targeting such negative secondary effects, there is no basis to exempt Exxxotica from the City's sexually oriented business regulations.

(2) Chapter 41A Leaves Open Adequate Alternative Avenues of Communication.

Plaintiff has not suggested that there is a lack of sites in Dallas where sexually oriented businesses can operate. Nor would such a claim prevail, as the City has multiple sexually oriented businesses already operating within its borders, and many other locations where

sexually oriented businesses may operate. *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 114 F. Supp. 2d 531, 548 (N.D. Tex. 2000), *aff'd*, 295 F.3d 471 (5th Cir. 2002).

While a City cannot ban adult businesses, it need only "refrain from effectively denying [plaintiffs] a reasonable opportunity to open and operate an adult theater within the city." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986). Applying *Renton*, the Fifth Circuit has held that "the provision of just one more site than the existing number of SOBs satisfies a city's obligation to provide alternative avenues of communication." *N.W. Enters. v. City of Houston*, 352 F.3d 162, 182 n.20 (5th Cir. 2003) (citing *Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995); *Lakeland Lounge v. City of Jackson, Miss.*, 973 F.2d 1255, 1259-60 (5th Cir. 1992) (holding that nine available sites were sufficient for six businesses needing sites)).

A basic Google Maps search shows an abundance of sexually oriented businesses in Dallas. For example, at least thirty-four (34) strip clubs ("adult cabarets" or "nude model studios" as defined by Chapter 41 A) are operating in the City. (https://www.google.com/search?q=strip+clubs+dallas&ie=utf-8&oe=utf8#q=strip%20clubs%20dallas&rflfq=1&rlha=0&tbm=lcl&tbs=lf_msr:-1,lf:1,lf_ui:1&rlfi=hd:;si). This does not include numerous "adult bookstore[s] or adult video store[s]" also operating in Dallas.

Moreover, in *Baby Dolls*, this Court considered challenges to the City's location restrictions, and concluded that "[t]here are within the City 80-90 available sites for Intervenors and others seeking to engage in sexually oriented businesses." 114 F. Supp. 2d 531, 541 (N.D. Tex. 2000). There is no reason to conclude that the City is currently lacking in available sites for sexually oriented businesses. To the extent that Plaintiff may seek to challenge the City's location restrictions, it would bear the burden at the preliminary injunction stage to disprove the availability of alternative sites. *MJJG Restaurant, LLC v. Horry County*, 11 F. Supp. 3d 541, 556

(D.S.C. 2014) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008), and holding that at preliminary injunction stage, adult cabaret bore the burden of proof that it is likely to succeed on the merits of its constitutional claim, including claim of lack of alternative avenues of communication).

(3) Exxxotica's Authorities are Inapposite Because Exxxotica is A Sexually Oriented Business Subject to A Time, Place, and Manner Ordinance.

The cases cited by opposing counsel are inapposite because, unlike the situations in those cases, Exxxotica is regulated by Chapter 41A—a duly-enacted time, place, and manner ordinance. It is well-settled that a city may regulate sexually oriented businesses via a time, place, and manner ordinance. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). As Exxxotica's cited authorities recognize, prior restraint doctrine does not apply when such an ordinance prohibits a business at a particular location. *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (noting "established exception[s] to the doctrine of prior restraint," such as where a "time, place, or manner" regulation applies); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 572-73 (9th Cir. 1984) (recognizing "that a municipality may have legitimate concerns about the collateral effects of concerts in an amphitheater," such as "the noise level of a concert, crowd overflow, and traffic congestion. For that reason, content-neutral time, place, and manner regulations that are narrowly drafted to further such significant governmental interests do not violate the First Amendment."); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) (citing *Renton*, and explaining that "[o]ur zoning cases" involving "regulations targeting the effects of crime or declining property values" are "irrelevant to the question here").

Here, Chapter 41A is a regulation governing the time, place, and manner of sexually oriented business operations. As detailed above, several members of the public and the City

Council observed (based on widely-available evidence, including video evidence), that Exxxotica meets Chapter 41A's definition of "sexually oriented business," and is thus prohibited from operating at its chosen location—close to residences, public parks, and a church. Ds. App. 42 [File 2, 15:40-15:51 (Council Member McGough, citing § 41A-2(31)'s definition of "sexually oriented business" and explaining that the Exxxotica Dallas videos show "exactly this type of behavior," and that he "see[s] no argument where this is not a sexually oriented business under our ordinance")].

As the Supreme Court explained in its most recent case involving licensing of sexually oriented businesses, application of an ordinance like Chapter 41A "is unlikely in practice to suppress totally the presence of any specific item of adult material in the [] community." *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 783 (2004). This is because "[s]ome license applicants will satisfy the criteria even if others do not; hence the community will likely contain outlets that sell protected adult material." *Id*. at 783.

The same is true here. Dallas has numerous sexually oriented businesses and ample outlets for selling sexual devices and media, as well as for offering live nude entertainment like that documented at Exxxotica. Thus, application of Dallas's longstanding, court-tested sexually oriented business ordinance does not censor any material, and satisfies First Amendment scrutiny.

d. Any Injury Exxxotica Suffered from the Resolution is Not Redressable Because Chapter 41A Independently Prevents Exxxotica's Sexually Oriented Business at the Convention Center.

"[T]he requirement that a claimant have standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011) (quoting *Davis v. Fed. Election Comm'n,* 554 U.S. 724, 733 (2008)). To establish standing, Exxxotica must show that: (1) it has suffered, or

imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury-in-fact is fairly traceable to the defendants' conduct; and (3) a favorable judgment is likely to redress the injury-in-fact. *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff "must demonstrate redressability—a *'substantial likelihood'* that the requested relief will remedy the alleged injury in fact." *Hollis v. Lynch*, 121 F. Supp. 3d 617, 633 (N.D. Tex. 2015) (quoting, with added emphasis, *Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771 (2000)).

As discussed above, Exxxotica is a sexually oriented business, but Chapter 41A prevents the operation of a sexually oriented business at the Convention Center. Consequently, Exxxotica is not eligible for a contract to operate at the Convention Center, regardless of Resolution No. 160308. Exxxotica's alleged harm from the resolution is, therefore, not redressable.

Thus, the Court should not resolve Exxxotica's challenge to the resolution, without first resolving the application of the Chapter 41A to Exxxotica. Even if the Court were to enjoin enforcement of the resolution, Chapter 41A independently prohibits Exxxotica from operating at the Convention Center. *Hollis v. Lynch*, 121 F. Supp. 3d 617, 632 (N.D. Tex. 2015) ("Were the Court to invalidate the [challenged federal firearms statutes], Section 46.05 of the Texas Penal Code would independently prohibit Hollis from manufacturing an M-16 machine gun."); *see also KH Outdoor, L.L.C. v. Clay County*, 482 F.3d 1299, 1303 (11th Cir. 2007) ("We find that KH Outdoor has not satisfied the redressability requirement. Any injury KH Outdoor actually suffered from the billboard and offsite sign prohibition is not redressable because the applications failed to meet other statutes and regulations not challenged.").

3. Exxxotica's First Amendment Claim Fails.

a. The Public Forum Issue.

The Convention Center is certainly not a traditional public forum. The only court to directly address the status of the Convention Center concluded that "it will be the rare case that a public forum is created." *Int'l Soc'y for Krishna Consciousness v. Shrader*, 461 F. Supp. 714, 719 (N.D. Tex. 1978). Nevertheless, assuming *arguendo* that the Convention Center is considered a public forum, Exxxotica still cannot establish a clear likelihood of success on the merits of its First Amendment claim. The facts and evidence available to the Court include the City's constitutional, written policy which has been in continuous existence for 30 years and the text of Resolution No. 160308. Ds. App. 650-677; Dkt. 1 at 26. Plaintiff's burden to establish intentional discrimination is particularly high given the City's longstanding constitutional policy regarding SOBs.

b. Exxxotica's Facial Attack on the City's Resolution Fails.

Exxxotica makes the specious argument that the City's resolution is, on its face, content-based because it allegedly "treats Plaintiff's expression less favorably than everyone else's." Dkt. 10, p. 13. Exxxotica misreads the resolution. The only reference to the "three-day adult entertainment expo" is found in the single whereas clause which recites the fact that of the plaintiff's request to the City. The operative part of the resolution, Section 1, makes no reference to any subject matter whatsoever. It merely states "that the City Council directs the City Manager to not enter a contract with Three Expo Events, LLC, for the lease of the Dallas Convention Center." By its terms, the resolution does not allow a contract with Three Expo Events for **any** event. It does not target the type of event but solely targets the particular entity of Three Expo Events. It also does not state that Three Expo Events' alleged expression is to be treated "less favorably than every else's." It does not comment on anyone's expression or how that expression is to be dealt with in comparison to the alleged expression of Three Expo Events,

LLC. It is a simple and straightforward resolution. There is nothing, on its face, to establish that the resolution is content-based. To the extent that the Court looks outside the four corners of the resolution, the evidence is overwhelming that the City's decision was constitutionally proper.

c. Exxxotica Cannot Prove Intentional Viewpoint Discrimination.[15]

(1) The City's Resolution.

Resolution 160308 is not a broad prohibition against any viewpoint, but instead a narrow prohibition against entering into another contract with Plaintiff. Dkt 1 at 26. As explained throughout this Response, Defendants were justified in refusing to contract with Plaintiff in light of the fraud in the negotiations, the violations of state and local laws, the breaches of contract, and the health and safety concerns that arose in conjunction with Exxxotica. Supra at ¶¶ 2.3-5.18.

(2) Exxxotica's Judicial Admissions Undermine It Claim of Viewpoint Discrimination.

Exxxotica's viewpoint discrimination argument is undermined by its judicial admissions that Dallas was allegedly fully aware of the nature and content of the proposed event and nonetheless entered into a contract allowing the event.[16] Exxxotica then states that despite the City and the Mayor allegedly having full knowledge of the nature and content of the event, the City entered into a contract with Exxxotica and allowed the event to take place.[17] Exxxotica cannot plausibly claim that the city has a policy, custom or practice of viewpoint discrimination

[15] As explained above, Plaintiff did not raise the issue of viewpoint discrimination in his motion for a preliminary injunction, so this issue is not properly before the Court. Nevertheless, because Plaintiff improperly offered briefing on this point, out of an abundance of caution, Defendants also address this issue. In so doing, Defendants do not waive their contention that Plaintiff has waived this issue by not including it in his motion.

[16] See Dkt. 1 at 2-3 ("Dallas was fully aware of the nature of Plaintiff's event); Dkt. 1 at 7 ("Expo clearly and openly described the nature of its content."); and Dkt. 10, at 2 ("Plaintiff…fully disclosed the nature of the event." and "the Mayor…was made aware").

[17] See Dkt. 1, at 3 ("Nonetheless, the 2015 Expo convention went forward in the Dallas Convention Center…); Dkt. 1, at 8 ("In January, 2015, a contract was signed for the three (3) day event to take place at the Convention Center in August, 2015).

when, by its own admission, the City allowed Exxxotica to present its event last year allegedly knowing fully the nature and content of the event.

Exxxotica further undermines its claim of viewpoint discrimination by affirmatively referencing the purpose and intent of Chapter 41A.[18] The city's constitutionally sound approach to sexually oriented business is clearly stated in writing and has been continuously applied for the last 30 years. The City's decades old policy, referenced by the Plaintiff, undermines the Plaintiff's claim that the City is engaged in viewpoint discrimination. Exxxotica's claim is even further undermined by its own lead counsel, Mr. Roger Albright, who has been on record for decades as an affiant who testified that the City's approach to sexually oriented businesses is constitutionally proper. *Dumas v. Dallas*, 648 F. Supp. 1061, footnote 8 (N.D. Tex. 1986) (Albright: "the content has absolutely nothing to do with it").

(3) Exxxotica's Viewpoint is Not Clear.

It is impossible for Defendants' to have engaged in viewpoint discrimination because Plaintiff's viewpoint is not clear. Plaintiff first told the City Council that Exxxotica was about "education". Ds. App. 42 [File 2, 0:02-:57]. Plaintiff next told the City Council that Exxxotica was "at its core" about freedom of expression. *Id.* After Exxxotica took place in 2015, it could be assumed that Plaintiff's viewpoint was to present a positive image of pornography, but Plaintiff has clearly stated that pornography was not present at Exxxotica Dallas and that his viewpoint is not about pornography. Ds. App. 103. Additionally, Exxxotica did not seem to have a consistent view toward the adult entertainment industry because it simultaneously hosted exhibitors who were adult entertainment personalities selling sexually explicit videos and

[18] Dkt. 1, at 11 ("Section 41A-a(a) of the City's SOB Ordinance expressly provides that 'it is neither the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials and performances protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to the intended market'").

exhibitors, such as XXX Church and Eve's Angels, who seek to rescue participants from the adult entertainment industry. Ds. App. 23, 25; http://www.xxxchurch.com/start-here/im-in-the-porn-industry-and-want-out; http://www.evesangels.org/#!about/c1id8.

Defendants do not disagree that education is positive, Defendants are in favor of the freedom of expression, and Defendants accept that pornography is presumptively permissible speech, as reflected in the City's longstanding SOB ordinance that respects the right of free expression, while regulating negative secondary effects. In short, Defendants are unclear, even at the time of filing this Response as to the substance of Plaintiff's viewpoint, and so it impossible that Defendants engaged in viewpoint discrimination.

Assuming *arguendo* that Plaintiff has presented a specific viewpoint against which Defendants could discriminate, Plaintiff has presented no evidence of animus toward whatever that viewpoint may be and, therefore, no discrimination has taken place. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 707-10 (2000) (finding no unconstitutional content-based discrimination where a statute restricting anti-abortion speech was not adopted "because of disagreement with the message [conveyed]"); *Ward v. Rock Against Racism*, 491 U.S781, 791 (1989) (holding that "the principal inquiry in determining content-neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys"). As explained above, Defendants are not opposed to Plaintiff's various and serially stated viewpoints and, moreover, Defendants allowed Plaintiff the use of the Convention Center last year to stage Exxxotica. Defendants did not discriminate against Plaintiff in 2015 and they are not discriminating against Plaintiff in 2016 by refusing to enter into a new contract for Exxxotica.

d. Exxxotica Cannot Prove Prior Restraint.

Prior restraint is defined as "[a] governmental restriction on speech or publication before its actual expression." BLACK'S LAW DICTIONARY (10th ed. 2014). "Under the prior restraint doctrine, the government may not restrain a particular expression prior to its dissemination even though the same expression could be constitutionally subjected to punishment after dissemination." Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53 (1984).

Here, there has been no prior restraint. Plaintiff requested space at the Convention Center for 2015 and Plaintiff was allowed to lease the space. Plaintiff's App. 19, ¶ 13. Plaintiff put on Exxxotica Dallas between August 7-9, 2015, without any interference from Defendants. Plaintiff's App. 19, ¶ 13. There was no constitutionally cognizable governmental restriction on Plaintiff's speech for Exxxotica Dallas 2015. In other words, there was no prior restraint. As a result of Plaintiff's fraudulent representations to the City, the criminal activity that occurred, the violations of the City's SOB ordinance, and Plaintiff's breaches of contract with the City, as detailed above, the City is disinclined to enter into a new contract with Plaintiff for Exxxotica in 2016.

D. Exxxotica Cannot Clearly Establish that There is A Substantial Threat that Irreparable Harm Will Result if the Injunction is Not Granted.

The Supreme Court has repeatedly recognized the lower value of nude conduct and sexually explicit expression. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) ("[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice."); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 n.2 (1986) ("[S]ociety's interest in protecting this type of

expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate ….") (internal citation and quotation marks omitted).

The City has demonstrated that Exxxotica operates a "sexually oriented business" as defined in Chapter 41A, and is thus prohibited from operating at the Convention Center without a license and in close proximity to sensitive land uses. As Chapter 41A has been repeatedly upheld as constitutional, *Baby Dolls*, 295 F.3d 471, Exxxotica has not made a clear showing of irreparable harm if the injunction is not granted.

Additionally, Plaintiff's allegations of lost profits and goodwill do not give rise to irreparable harm justifying a preliminary injunction. See, e.g., *GTE Card Services v. AT&T Corp*., No. 3:96-CV-1970-D, 1997 WL 74712 (N.D. Tex. 1997).

E. Exxxotica Cannot Clearly Establish That the Threatened Injury Outweighs the Threatened Harm to the City.

Even if Exxxotica could establish irreparable harm, that does not mean that a preliminary injunction forcing the City to enter into a lease with Exxxotica should issue. *35 Bar and Grille, LLC v. City of San Antonio*, 943 F. Supp. 2d 706, 724 (W.D. Tex. 2013) (concluding that "Plaintiffs have shown irreparable harm" because "the requirement that dancers wear bikini tops deprives Plaintiffs of their First Amendment rights," but denying preliminary injunction). Exxxotica's desire to operate in Dallas does not outweigh the City's substantial interest in preventing negative secondary effects, and Exxxotica's violations of both its contract and various state and local laws show that the balance of equities favors the City.

Here, Exxxotica—a sexually oriented business that has not complied with Chapter 41A and that allowed numerous violations of law previously—cannot show that equities are in its favor. To the contrary, "the City has provided reports and affidavits describing harmful secondary effects" of sexually oriented businesses. *Id*. Those secondary effects have been well-

established by the City, *Baby Dolls*, 295 F.3d at 481-82, and the City does not have to prove secondary effects from a particular sexually oriented business, or that every application of its ordinance would affirmatively reduce such secondary effects. *Id*. at 482 (City's evidence did not have to connect wearing of bikini tops to the reduction of secondary effects). Rather, the City need only rely on some evidence "'reasonably believed to be relevant to the problem that the City addresses.'" *Id*. at 481 (quoting *Renton*, 475 U.S. at 51-52).

Here, the City has relied on numerous studies, its own secondary effects study, judicial opinions, and an expert report concluding that Exxxotica operates a sexually oriented business. Moreover, although it is not required to do so, the City has *demonstrated actual* secondary effects from Exxxotica, including numerous violations of the City's SOB ordinance and lewd acts in violation of state law. *See* Ds App. 1 [File 2, 0:50-1:10; File 4 0:45-0:57 and 1:15-1:20 (patron licking whipped cream off of dancer's body)]; 35-41; 48 [¶¶ 13-15]; 154 [¶ 4]; 156-160 [¶¶ 3-5, 9-12]; 162-195; 197 [¶¶ 4-5]; 199-204; 620-621 [¶ 10]; 627 [¶ 8].

Additionally, the City, as a governmental entity, has an interest in the enforcement of its ordinances and of state law. See *Fauntleroy v. Lum*, 210 U.S. 230, 241 (1908) (White, J. dissenting); *Acme Refrigeration Supplies, Inc. v. Acme Refrigeration of Baton Rouge, Inc.*, 961 F. Supp. 936, 941 (E.D. La. 1996); *Bailey v. Stanford*, No. 3:11–cv–00040–NBB–SSA, 2012 WL 569020 *8 (N.D. Miss. 2012). In this case, there is evidence of multiple violations of City ordinances and state law. See supra ¶¶ 4.1-5.18. Importantly, the City has health and safety regulations that exist for the safety of residents and visitors, and there are serious concerns raised by, for example, the Exxxotica Dallas stage show in which men from the audience immerse their faces into a whip cream covered crotch of a topless dancer. App. 1, [File 4].

F. Exxxotica Cannot Clearly Establish That a Preliminary Injunction Will Not Disserve the Public Interest.

"The City has an interest in promoting the health, safety, morals and general welfare of the citizens of the City." *35 Bar and Grille, LLC*, 943 F. Supp. 2d at 725. The City has specifically sought to further that interest by regulating sexually oriented businesses to prevent the very kinds of negative effects that the City has documented herein. "Thus, Plaintiffs have failed to show that granting the injunction will not adversely affect the public interest." *Id*.

Additionally, Plaintiff has engaged in a shadowy shell game involving a number of different, possibly related, not necessarily existent, entities such that it is difficult to ascertain exactly who is involved in negotiating with the City, contracting with the City, and complying (or failing to comply) with the terms of an agreement with the City. It is not at all clear who the Plaintiff is, who the Plaintiff's affiliates are and how they are involved in Exxxotica, this lawsuit, or in Mr. Handy's communications and negotiations with the City. *Supra* at ¶¶ 2.1-2.6; Ds. App. 151-152. Mr. Handy's request for dates in 2016 to lease the Convention Center continues this shadowy pattern, as Mr. Handy does not identify any entity on whose behalf he made his inquiry or on whose behalf he sought a new contract with the City. Ds. App. 151-152. The public interest would be disserved if the Court were to grant Plaintiff's request for injunctive relief while these questions remain.

VI.
CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendants pray that Plaintiff's motion for a preliminary injunction be denied, and for such other relief, both general and special, at law or in equity, to which Defendants are entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on 25th day of March, 2016, I electronically filed the foregoing document with the clerk of the Court for the United States District Court, Northern District of Texas, using the electronic case filing system of the Court, and served this document on all attorneys of record in accordance with Rule 5 of the Federal Rules of Civil Procedure.

/s/ Thomas P. Brandt
THOMAS P. BRANDT