

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

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

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

Plaintiffs,

v.

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

Defendants.

NO. 20-2-07428-4 SEA

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

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

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

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

18 **I. The First Amendment Protects Defendants’ Speech as a Matter of Law.**

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

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

2 1. Plaintiffs claim that “cable programmers do not have First Amendment rights on the
3 cable medium.” Opp.11. But the Supreme Court has held that “[c]able programmers and cable
4 operators ... are entitled to the protection of the speech and press provisions of the First
5 Amendment.” *Turner*, 512 U.S. at 636. “[T]he basic principles of freedom of speech and the press
6 ... do not vary when a new and different medium for communication appears.” *Brown*, 564 U.S. at
7 790-91. Accordingly, state law cannot “restrict expression because of its message, its ideas, its
8 subject matter, or its content” in any medium. *Id.* (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573
9 (2002)); *see also U.S. v. Playboy Entm’t*, 529 U.S. 803 (2000) (restricting pornography violated
10 cable programmer’s First Amendment rights).

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

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

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

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

14 4. To mask their distortion of Fox’s actual speech, Plaintiffs claim that the transcripts
15 are not judicially noticeable. Opp.15. But the transcripts are judicially noticeable three times over:
16 (1) they “enable” the Court “to understand the context of the CR 12 motion” (*Haberman*, 109 Wn.2d
17 at 121); (2) the “contents are alleged in [the] complaint” (*Rodriguez v. Loudeye*, 144 Wn. App. 709,
18 725-26 (2008)); and (3) Plaintiffs do not contest their accuracy, which is ““not subject to reasonable
19 dispute”” because they are on LexisNexis, *id.* (quoting ER 201(b)); *Marks v. Seattle*, 2003 WL
20 23024522, at *2 (W.D. Wash. Oct. 16, 2003) (judicially noticing transcripts); Wash. Judicial Council
21 cmt. 201 (1976) (following federal rules on judicial notice). The transcripts, and the true facts, show
22 that Fox highlighted the dangers of the Coronavirus even as Fox commentators criticized its
23 exploitation for political purposes. MTD.10-13. Plaintiffs cannot hide that their case rests on false
24 facts. But in all events, even accepting the Complaint’s distortions, the Constitution protects Fox’s
25 speech as a matter of law. MTD.4,5-10; *Trujillo v. Nw. Tr. Servs*, 183 Wn.2d 820, 827 n.2 (2015).

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

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

4 1. The CPA does not apply to news reporting and commentary because they are not “in
5 the conduct of ... trade or commerce.” MTD.15. Plaintiffs argue (at 29) that this principle applies
6 only to newspapers, not cable media, but that distinction is just as nonsensical under the CPA as it
7 is under the First Amendment. *Supra* p.3. Plaintiffs cite *Short v. Demopolis*, 103 Wn.2d 52 (1984),
8 but that case simply recognized that the CPA covers only *commercial* speech by attorneys (pricing,
9 billing, client development, etc.), not their *non-commercial* speech in practicing law. *Id.* at 61-62.
10 Courts apply the same distinction to media companies: the CPA covers their commercial speech
11 (e.g., advertising), not their reporting or commentary. *Fidelity v. Seattle Times*, 131 Wn. App. 462,
12 468 (2005). Even if commentary advances the company’s “entrepreneurial” goals by earning
13 “revenue and notoriety,” that does not make it commercial speech subject to the CPA. *Delashaw v.*
14 *Seattle Times*, 2018 WL 4027078, at *15 (W.D. Wash. Aug. 23, 2018). The same principle applies
15 to cable news.

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

1 DATED this 18th day of May, 2020.

2 HARRIGAN LEYH FARMER & THOMSEN LLP

3
4 By s/Tyler L. Farmer *

5 Tyler L. Farmer, WSBA #39912
6 Kristin E. Ballinger, WSBA #28253
7 999 Third Avenue, Suite 4400
8 Seattle, WA 98104
9 Tel: (206) 623-1700
10 Fax: (206) 623-8717
11 Email: tylerf@harriganleyh.com
12 Email: kristinb@harriganleyh.com

13 JONES DAY

14 Christopher Lovrien (*pro hac vice*)
15 555 South Flower Street, 50th Floor
16 Los Angeles, CA 90071
17 Tel: (213) 243-2316
18 Fax: (213) 243-2539
19 Email: cjlovrien@jonesday.com

20 Emily Faye Knox (*pro hac vice*)
21 555 California Street 26th Floor
22 San Francisco, California 94104
23 Tel: (415) 875-5815
24 Fax: (415) 875-5700
25 Email: egoldbergknox@jonesday.com

Michael A. Carvin (*pro hac vice*)
Anthony J. Dick (*pro hac vice*)
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Tel: (202) 879-3939
Fax: (202) 626-1700
Email: macarvin@jonesday.com
Email: ajdick@jonesday.com

Attorneys for the Fox Defendants'

* I certify that this memorandum contains [redacted] words, in compliance with the Local Civil Rules.

1 **CERTIFICATE OF SERVICE**

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

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

8 Elizabeth Hallock, WSBA #41825
9 Law Office of Elizabeth Hallock PLLC
10 420 S. 72nd St., Suite 180
11 Yakima, WA 98908
12 Phone: (360) 909-6327
13 Email: ehallock.law@gmail.com

14 *Attorney for Washington League For Increased
15 Transparency And Ethics*

Via Hand Delivery
 Via First Class Mail
 Via Facsimile
 Via Electronic Mail
 Via King County Clerk E-Service

14 Catherine C. Clark, WSBA #21231
15 Law Office of Catherine Clark PLLC
16 2200 6th Ave., Suite 1250
17 Seattle, WA 98121
18 Phone: (206) 838- 2528
19 Fax: (206) 374- 3003
20 Email: Cat@loccc.com

21 *Attorney for Washington League For Increased
22 Transparency And Ethics*

Via Hand Delivery
 Via First Class Mail
 Via Facsimile
 Via Electronic Mail
 Via King County Clerk E-Service

23 DATED this 18th day of May, 2020.

24 *s/ Erin Fujita*

25 _____
Erin Fujita, Legal Assistant
erinf@harriganleyh.com