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8 SCENIC NEVADA, INC.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

SCENIC NEVADA, INC.,

Plaintiff,

Case No. CV12-02863

vs.

Dept. No.: 7

CITY OF RENO, a political subdivision
of the State of Nevada, and the CITY
COUNCIL thereof,

Defendant.

**PLAINTIFF SCENIC NEVADA,
INC.'S TRIAL STATEMENT**

Date: February 20, 2014

Time: 9:00 a.m.

SAUNDERS OUTDOOR
ADVERTISING, INC., a Utah
corporation,

Plaintiff,

Case No. CV12-02917

vs.

Dept. No.: 7

THE CITY OF RENO, a municipal
corporation

Defendant.

Pursuant to WDCR 5 and this Court's Pretrial Order entered August 27, 2013,
Plaintiff Scenic Nevada, Inc. respectfully submits the following trial statement.

1 **A. A concise statement of the claimed facts supporting the party's claims**
2 **or defenses**

3 Billboards are litter on a stick. They are public nuisances. This is not just the
4 opinion of Scenic Nevada, it is written into the law. Nevada statutes strictly limit
5 construction of billboards outside city limits. When the City Council refused to stop the
6 proliferation of these urban eyesores in Reno, Scenic Nevada sponsored a ballot initiative
7 to ban them from being built anymore anywhere in the city.

8 The evidence will show that almost immediately after passage of the billboard
9 ban, the City Council undermined the people's vote with ordinances whose aim was to
10 allow Clear Channel and other operators to keep building new billboards. These post-ban
11 ordinances first allowed billboards to be taken down, banked and relocated, which
12 essentially eviscerated the ban. Then, in 2012, the City passed a new ordinance allowing
13 the industry to "upgrade" to digital billboards (Scenic Nevada does not consider an
14 ordinance that makes a nuisance even more obnoxious to be an "upgrade").

15 As soon as the City made it known that it would be allowing digital billboards,
16 Scenic Nevada began fighting it. Scenic Nevada fought long and hard against digital
17 billboards from 2008 through 2012, and when the Council passed the ordinance over
18 Scenic Nevada's objection, Scenic Nevada filed this action. The Court is somewhat
19 familiar with the course of events during the years 2000 through 2012, from Scenic
20 Nevada's First Amended Complaint to Invalidate City of Reno Digital Billboard
21 Ordinance, because the City tried three times to get the case thrown out before trial, with
22 motions to dismiss and for summary judgment.

23 The City has admitted the majority of the 50 paragraphs of factual allegations in
24 Scenic Nevada's First Amended Complaint, but Scenic Nevada intends to prove that all
25 50 of those paragraphs are true.

26 To that end, Lori Wray attended the hearings and workshops on digital billboards
27 from 2008 through 2012 on behalf of Scenic Nevada. She will testify for perhaps 90
28 minutes to two hours. The purpose of her testimony is to prove that the allegations that

1 the City denied in its Answer should have been admitted, and that Scenic Nevada has
2 proven its case on the facts.

3 Following Wray, Scenic Nevada expects to call Claudia Hanson, a city staffer who
4 chiefly was responsible for shepherding the digital billboard ordinance through the
5 administrative process. Her deposition was taken recently. The Court may find it
6 interesting as Ms. Hanson attempts to explain how issuing permits for new billboard
7 construction does not violate the voter initiative.

8 Scenic Nevada is not intending to call Dwight Dortch to the stand, but his
9 deposition also was taken recently, the transcript is marked as Exhibit 200, and excerpts
10 will be provided to the Court as part of Scenic Nevada's case. The deposition also was
11 on video, if the Court is interested in viewing the evidence in that form.

12 Having argued this case three times already in motion practice, Scenic Nevada
13 believes the Court has heard all the legal arguments, but Scenic Nevada is prepared to
14 argue the case once again after the witnesses are done on February 20th.

15 **B. Admitted or Undisputed Facts**

16 The parties have stipulated to admission of all the trial exhibits.

17 The City's Answer admits certain allegations of Scenic Nevada's First Amended
18 Complaint, which will be referred to during trial.

19 **C. Issues of Law and Points and Authorities**

20 The parties have argued, re-argued, and re-re-argued their legal positions in two
21 motions to dismiss and one motion for summary judgment. Succinctly as possible,
22 Scenic Nevada contends that billboards are public nuisances, and everyone knows it, and
23 thus the people of Reno in their wisdom banned them from ever being built again, and
24 they are entitled to have their vote honored by the City Council of Reno.

25 In beautiful locales across the globe, there are no billboards to be seen. People
26 who value scenic beauty are aligned with people who simply don't want to see their
27 property values negatively affected by an ugly billboard down the street. No one wants a
28 billboard anywhere near their home or business.

1 NRS 405.020 declares that if a billboard is erected without complying with the
2 restrictions of state law, it is a public nuisance. Unfortunately, one of the allowances is
3 that billboards are allowed within city limits, and the city fathers over the years have
4 tolerated a proliferation of billboards that is not allowed either in Washoe County or in
5 the City of Sparks. The citizens' initiative of 2000 was a response to the spread of a
6 public nuisance, and the law that was passed should be enforced.

7 Nationally, of course, the Highway Beautification Act recognizes that billboards
8 are blights on the scenic vistas of our country, and therefore, the intermittent lighting that
9 characterizes digital billboards is banned by the Act. When the *Scenic Arizona* case came
10 along in November 2011, at the same time that Scenic Nevada was arguing its case to the
11 Planning Commission, Scenic Nevada cited the case as additional legal support for its
12 position. Unfortunately, the City Attorney took the view that the *Scenic Arizona* case and
13 provisions of federal law had no import to the City Council. Scenic Nevada respectfully
14 disagrees, and bases its lawsuit in part on the provisions of federal law that are violated
15 when a digital billboard is erected alongside a federal aid highway.

16 Ironically, the City's own sign code prohibits off-premises signs using intermittent
17 lighting, which is an additional reason why the digital ordinance is unlawful.

18 (1) The Citizens' Initiative Bans New Billboards

19 The strength of Scenic Nevada's case is both in the facts and the law. The citizen
20 initiative is clear and direct.

21 **"The construction of new off-premises advertising displays/billboards is**
22 **prohibited, and the City of Reno may not issue permits for their construction."**

23 In *City of Reno v. Citizens for Cold Springs*, 236 P.2d 10, 17 (Nev. 2010), the
24 court rejected the City of Reno's unreasonable interpretation of its own ordinance and
25 held "courts should read each sentence, phrase, and word to render it meaningful within
26 the context of the purpose of the legislation." *Id.* at 18.

27 The initiative not only bans construction of new billboards, it also bans the
28 issuance of permits for their construction. If only a "cap" were intended, the law would

1 say permits are okay for replacement billboards up to the cap number. Instead, the law
2 states explicitly that no permits can be issued, which refutes any argument that this law is
3 merely a “cap” on billboard numbers.

4 When a statute uses words which have a definite and plain meaning, the words
5 will retain that meaning unless it clearly appears that such meaning was not so intended.
6 *Balboa Ins. Co. v. Southern Distrib. Corp.*, 101 Nev. 774, 710 P.2d 725 (1985); *City of*
7 *Las Vegas, v. Macchiaverna*, 99 Nev. 256, 661 P.2d 879 (1983). If language is plain and
8 unambiguous, it must be given effect. *State v. State of Nevada Employees Ass’n, Inc.*,
9 102 Nev. 287, 289-290, 720 P.2d 697, 699 (1986); *see also, Kay v. Nunez*, 122 Nev.
10 1100, 1104, 146 P.3d 801, 804 (2006) (absent an ambiguity, the courts interpret a law
11 according to its plain meaning).

12 The citizens’ initiative should be given its plain and ordinary meaning. “Statutes
13 are generally construed with a view to promoting, rather than defeating, legislative policy
14 behind them.” *Motion, p. 23, citing Dept. of Motor Vehicles v. Lovett*, 110 Nev. 473,
15 477, 874 P.2d 1247, 1249-1250 (1994). The policy behind this law is to ban new
16 billboards, at least according to the law’s author, Scenic Nevada. By issuing permits for
17 new billboard construction, the City attempts to defeat the legislative policy behind the
18 law.

19 The City justifies the banking and relocation ordinance of 2003 with the rationale
20 that so long as the aggregate number of billboards does not increase, existing billboards
21 can be “maintained, repaired, replaced or relocated.” The City similarly justifies the
22 digital ordinance of 2012 with the rationale that as long as the aggregate number does not
23 increase, the law allows “repair, relocation or *upgrading*” of existing billboards. *See*
24 *Motion, p. 10, line 11-14, citing Staff Report, COR 192, emphasis added.*

25 As Scenic Nevada previously pointed out in the motion practice, the scope of the
26 “exceptions” is swallowing the rule. First, replacement and relocation, and now,
27 “upgrades” (translated, “digitals”) supposedly are consistent with an ordinance that bans
28 construction of new billboards. The City simply refuses to admit that repair, relocation

1 and “upgrading” actually require new permits for new billboard construction, which
2 directly conflicts with the billboard initiative.

3 **(2) The Digital Ordinance Violates the Constitution of Nevada**

4 The only ordinance that Scenic Nevada is seeking to declare void is the digital
5 ordinance of 2012. The digital/banking and relocation ordinance constitutes an ongoing
6 violation of constitutional rights guaranteed by Article 19 of the Nevada Constitution.
7 Contrary to the City’s argument, there is no “statute of limitations” on laws violating the
8 Constitution. A statute of limitations cannot insulate continued enforcement of an
9 unconstitutional law merely because no one challenges it within so many years of its
10 enactment. *Virginia Hosp. Ass’n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989); *Kuhnle*
11 *Bros. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997). If a statute of limitations
12 immunized unconstitutional laws, decisions like *Brown v. Board of Education*, 347 U.S.
13 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) would not have been possible and separate but
14 equal would still be the law of the land.

15 In this declaratory relief action, Scenic Nevada is going after the billboards.
16 Should Scenic Nevada prevail, the only ordinance that would be invalidated is the 2012
17 digital ordinance. The City’s inflammatory suggestion that invalidating the digital
18 ordinance would affect existing, vested rights of billboard owners is preposterous. No
19 one will lose their “banked” receipts for static billboards granted under the 2002 and
20 2003 ordinances. This lawsuit does not ask for the 2002 or 2003 ordinances to be
21 invalidated. This suit goes after digital billboards which have always been unlawful in
22 the City of Reno. The City’s attempt to alarm the Court over the impact of this case on
23 existing banked receipts is a red herring.

24 The City is wrong when it claims that the Council could repeal, annual or set aside
25 the billboard initiative “at any time for any reason.” If this were true, the initiative
26 powers of the citizens would be meaningless, because immediately upon the voters’
27 approval of an initiative, the Council could veto it. Under Article 19, § 3 of the Nevada
28 Constitution, an initiative measure so approved by the voters “shall not be amended,

1 annulled, repealed, set aside or suspended” within three years from the date it takes
2 affect. The City maintains this three-year rule only applies to statewide initiatives, under
3 Article 19, § 2. Yet as Scenic Nevada has pointed out before, the initiative powers
4 provided for in Article 19, § 2 are further reserved to the registered voters of each
5 municipality as to all local, special and municipal legislation of every kind. *See*, Article
6 19, §4. Because Section 4 states that initiative powers provided for in Article 19 apply to
7 municipal initiatives, the three-year prohibition on amendment, annulment, or repeal that
8 is found in Section 2 of Article 19 applies to municipal initiatives.

9 Scenic Nevada’s straightforward interpretation of Article 19, § 4 makes sense, and
10 additionally, the organization or structure of Article 19 makes clear that Scenic Nevada’s
11 interpretation is correct. Section 2 concerning statewide initiative deals with many
12 aspects of initiative petitions that are not restated or rehashed in Section 4 dealing with
13 municipal initiatives. Instead, Section 4 incorporates provisions of Section 2 by stating
14 the other provisions of Article 19 apply to municipal initiatives. Section 4 only adds the
15 percentage of signatures required for municipal initiative petitions.

16 The back-up argument by the City is that a municipal initiative is subject to
17 immediate repeal by the Council, because NRS 295.220 states a municipal initiative
18 “shall be treated in all respects in the same manner as ordinances of the same kind
19 adopted by the council,” and a city council can amend any municipal ordinance at any
20 time. The City has been known to assert unreasonable interpretations of its own
21 ordinances. *City of Reno v. Citizens for Cold Springs*, 236 P.3d 10, 17 (Nev. 2010). This
22 pattern and practice continues. The City is interpreting NRS 295.220 as overriding the
23 Nevada Constitution, although NRS 295.220 simply reflects the fact that a ballot
24 initiative passed by the voters must be treated as the law, the same as any other
25 ordinance. The statute does not override the Constitution.

26 In another unreasonable interpretation of the law, the City has argued that the
27 citizen initiative “cannot impinge upon the Legislature’s express grant of legislative
28 authority to the City Council under the city charter.” The City’s argument is meritless.

1 The City Charter states that the Council can pass a law “not repugnant to the Constitution
2 of the United States or the State of Nevada . . .,” so on its face, the charter recognizes the
3 right to challenge an unconstitutional ordinance. *See Reno City Charter, §2.080(1)*.

4 The City has also cited *Personhood Nev. v. Bristol*, 245 P.3d 572, 574 (Nev. 2010)
5 for the proposition that this Court cannot grant the relief sought by Scenic Nevada
6 because “the alleged procedural constitutional violation at issue” is “moot.” In *Bristol*,
7 the initiative proponent had been unable to acquire the necessary number of signatures to
8 put the measure on the ballot, and the election already had occurred before the case was
9 heard by the Supreme Court, so the challenge to the proposed initiative was moot. The
10 court in *Bristol* held that despite the mootness, the district judge’s injunction order would
11 have no preclusive effect if the initiative qualified for the ballot at the next election.

12 In contrast, this case involves an initiative placed on the ballot and approved by
13 the voters, following which the Council adopted a digital ordinance flouting the law. In
14 the instant case, the ballot initiative actually was codified in the Reno Municipal Code at
15 the time the offending digital ordinance was adopted. *See RMC §18.16.902 (a)*.
16 Furthermore, in the face of challenges by *both* Scenic Nevada and Saunders Outdoor
17 Advertising, the ordinance has been suspended with a moratorium on constructing digital
18 billboards pending the outcome of these proceedings. Therefore, it is specious for the
19 City to argue under *Bristol* that the instant case is “moot”.

20 (3) The Digital Ordinance Violates Federal Law

21 The City argues that the Nevada Department of Transportation adopts and
22 enforces regulations for signage along federal highways, and therefore, the City
23 ordinance cannot override NDOT’s prerogative as to whether to issue a permit for a
24 billboard that lies within NDOT’s jurisdiction. The City asks this Court to ignore any
25 violation of federal law by the City, because NDOT has concurrent jurisdiction, and
26 NDOT ultimately will determine whether a digital billboard can be constructed.

27 The simple response is that Scenic Nevada is seeking declaratory relief against the
28 City of Reno on the basis that the digital billboard ordinance violates the federal Highway

1 Beautification Act, 23 U.S.C. §131 et seq. Scenic Nevada is not presently seeking any
2 relief against NDOT. The violation of federal law by the City cannot be condoned
3 merely because the City claims that NDOT also may be violating it, or because the City
4 asserts that NDOT can prevent a billboard from being constructed.

5 In *Scenic Arizona v. City of Phoenix Board of Adjustment*, 268 P.3d 370
6 (Ariz.App. 2011) the court held all digital billboards are prohibited adjacent to federal aid
7 highways because they use intermittent light to display rotating advertisements as
8 frequently as every eight seconds, which violates Nevada's and most states' FSAs.
9 Notably, Scenic Arizona filed the action against the City of Phoenix, but the decision also
10 discusses the position of the Arizona version of NDOT before reaching its conclusion
11 that digitals are barred by federal law.

12 Nevada law is the same in all material respects as Arizona's and most other states.
13 Following passage of the HBA in 1965, Nevada wanted to maintain a certain level of
14 federal funding for highways and entered into an agreement with the federal government.
15 Indeed, our legislature adopted NRS 410.220 to 410.410 requiring Nevada to enter into a
16 FSA with the federal government. In 1972 and 1999, Nevada entered into FSAs to
17 ensure continued federal funding of highways, and Nevada promised that its regulations
18 would be consistent with federal highway standards, on "spacing, size and lighting."

19 Nevada's FSA states that billboards: "shall not include or be illuminated by
20 flashing, intermittent or moving lights (except that part necessary to give public service
21 information such as time, date, temperature, weather or similar information) and shall not
22 cause beams or rays of light to be directed at the traveled way if such light is of such
23 intensity or brilliance or is likely to be mistaken for a warning or danger signal as to
24 cause glare or impair vision of any driver, or to interfere with a driver's operation of a
25 motor vehicle." *SN 1-9*. Nevada's agreement not to allow signs with intermittent lights
26 remains the same today as when the first FSA was signed by Nevada 41 years ago.

1 Consistent with the FSA's and Nevada statutes, Scenic Nevada asserts a valid
2 claim against the City for a judicial declaration that the digital ordinance violates federal
3 law. Whether NDOT also is violating federal law is immaterial.

4 Finally, the City's reliance on the discredited 2007 "guidance memo" by the
5 Federal Highway Administration is misplaced. *See, Sharpe, Susan C., "Between Beauty*
6 *and Beer Signs: Why Digital Billboards Violate the Letter and Spirit of the Highway*
7 *Beautification Act of 1965,"* 64 Rutgers Law Review 515 (2012). It is the same memo
8 that was rejected in *Scenic Arizona*. The memo states on its face that it is intended to
9 provide information to divisions within the federal agency evaluating proposals; that it is
10 not intended to amend applicable legal requirements; that divisions should work with
11 states to review existing FSAs; that if appropriate, the agency divisions should assist in
12 pursuing amendments; and that the divisions should also confirm that the state provided
13 for appropriate public input, consistent with applicable state law and requirements. *See*
14 *Rutgers Law Review article, filed May 13, 2013 with Scenic Nevada's Opposition to*
15 *Motion to Dismiss*. The memo does not justify the City's digital billboard ordinance.

16 (4) The Digital Ordinance Violates the Sign Code

17 The First Amended Complaint alleges the digital ordinance violates the sign code,
18 and the City demurs, arguing that the sign code is a law made by the City, and since "we
19 made the law, so we can break it." The City meanwhile concedes that Scenic Nevada is
20 correct that the sign code does not allow intermittent lighting, but calls it a "hyper-
21 technical legal interpretation" leading to the "unreasonable conclusion" that the sign code
22 bans LED billboards "across the board."

23 The City appears to forget what happened in 2012. In that year, the City legalized
24 digital billboards for the first time. Prior to 2012, they were *illegal* under the Reno sign
25 code. Therefore, Scenic Nevada's "hyper-technical legal interpretation" is in fact the
26 accurate expression of the law that existed before 2012.

27 The Council can argue that it is entitled to break its own laws, but as long as the
28 intermittent lighting prohibition is part of the sign code, the Council is violating the law

1 with its digital billboard ordinance. And contrary to the City's argument, even the
2 Council is obliged to comply with city ordinances. *City of Reno v. Citizens for Cold*
3 *Springs*, 236 P.3d 10, 17 (Nev. 2010). Declaratory relief should be granted in favor of
4 Scenic Nevada for violation of the sign code.

5 **D. List of Summaries Referring to Attached Itemized Exhibits.**

6 None

7 **E. The Names and Addresses of All Witnesses, Except Impeaching**
8 **Witnesses**

9 1. Lori Wray, Scenic Nevada director, c/o Law Offices of Mark Wray, 608

Lander Street, Reno, NV 89509, (775) 348-8877.

10 2. Claudia C. Hanson, Planning Manager, City of Reno, c/o Reno City
11 Attorney's Office, 1 East First Street, Reno, NV 89501-1609,
12 (775) 334-2381.

13 3. Ryan Saunders, Saunders Outdoor, c/o Robison Belaustegui Sharp & Low,
14 71 Washington Street, Reno, NV 89503, (775) 329-3151

15 **F. Any other appropriate comment, suggestion, or information for the**
16 **assistance of the court in the trial of the case**

17 None

18 **G. Any practical matters which may be resolved before trial.**

19 None

20 **H. A statement of any unusual evidentiary issues, with appropriate**
21 **citations to legal authorities on each issue.**

22 None

23 **I. Certification.**

24 The undersigned counsel certifies that discovery has been completed, unless late
25 discovery has been allowed by order of the court.

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1 The undersigned counsel certifies that prior to the filing of the trial statement,
2 counsel were unable to resolve the case by settlement..
3

4 DATED: Feb. 13, 2014

LAW OFFICES OF MARK WRAY

6 By

7 Mark Wray
MARK WRAY

8 Attorney for Plaintiff SCENIC NEVADA, INC.
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CERTIFICATE OF SERVICE

The undersigned employee of the Law Offices of Mark Wray certifies that a true copy of the foregoing document was delivered via email delivery to the following on Feb. 13, 2014 addressed as follows:

Jonathan Shipman
Reno City Attorney's Office
One E. First St., 3rd Floor
P.O. Box 1900
Reno, NV 89505

Frank Gilmore
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, NV 89503



1 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
2 IN AND FOR THE COUNTY OF WASHOE

3 **AFFIRMATION**

4 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding
5 document does not contain the social security number of any person.

6
7 DATED: Feb. 13, 2014 LAW OFFICES OF MARK WRAY

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10 By: 
11 MARK WRAY
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