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March 1, 2013

Mayor Antonio Villaraigosa
City of Los Angeles
200 N. Spring Street, Room 303
Los Angeles, CA 90025

City Council President Herb Wesson
Honorable City Council Members
Los Angeles City Council
200 North Spring Street
Los Angeles, CA 90012

City Attorney Carmen Trutanich
Los Angeles City Attorney's Office
200 N. Main Street, Room 800, MS 140
Los Angeles, CA 90012

Re: Clear Channel Outdoor Digital Signs in City of Los Angeles

Dear Mayor Villaraigosa, Council President Wesson and Council Members, and City Attorney Trutanich:

The Court of Appeal recently provided the people of the City of Los Angeles, and its leaders, with a wonderful opportunity to "clear the slate" and to move forward with the implementation and enforcement of fair, lawful and comprehensive off-site sign regulation. Gone now is the illegal agreement that forced the City and its residents to accept dozens – and potentially many hundreds – of glaring "jumbotron" digital billboards that diminish and tragically cheapen the community's appearance and quality of life.

My law firm represents Summit Media LLC, which brought the lawsuit that resulted in the Court of Appeal's ruling. Summit is in the sign business, but the victory belongs to *all* of the residents, businesses and property owners in Los Angeles. This victory – which is now final – was the result of six years of litigation that reached the highest court in California. Summit fought for the principle that municipalities must obey their own land use laws, and they may not enter into contracts with politically and financially powerful corporations that contravene those laws.

One of the two national billboard companies that erected the digital displays, Clear Channel Outdoor, after repeatedly losing in court, has now taken to threatening the residents of this

community with a $100 million lawsuit. Anticipating that the California Supreme Court would reject its petition for review of the Court of Appeal's decision – which occurred on Wednesday – Clear Channel sent to you and other City leaders a fusillade of letters on February 22 that was obviously designed to pressure the City Council into hurriedly enacting flawed legislation approving digital signs that the Court of Appeal has ruled are, and always have been, illegal. Clear Channel demands that the City engage in an alternative dispute resolution process that is no longer available. Clear Channel further proposes that the City enter into new, unlawful agreements for "relocation," even though no signs are being removed as part of a City project. Clear Channel also asks that the City declare that it is entitled to permits for its existing signs under a vested rights theory that already has been rejected by the courts.

Clear Channel does not offer any legal basis for any of its demands; rather, it repeatedly points to "costly litigation" – apparently assuming that hiring several big law firms and threatening to drag the City into court is sufficient reason (or muscle) to get its way. Bowing to threats is not good governance. Clear Channel's demands, if met, will violate court rulings, place in doubt the constitutionality of the City's 10-year-old ban on new and altered off-site signs, spawn endless litigation and administrative proceedings, and perpetuate the belief among many in the City that bullying and money ultimately prevail over the interests of the people. We are confident that you will respect the rule of law, and reject all of Clear Channel's demands.

This letter responds to a letter addressed to you from Sara Lee Keller, Clear Channel's general counsel, dated February 22, 2013 ("Keller Letter"), as well as five other letters from Ms. Keller and lawyers representing Clear Channel also dated February 22, 2013, and a letter from Douglas Axel of the Sidley Austin law firm to Deputy City Attorney William Carter dated February 28, 2013.

The City Is Not Permitted to Engage in Alternative Dispute Resolution with Clear Channel.

In the Keller Letter, and in letters dated February 22 and 28 from Mr. Axel, Clear Channel demands that the City engage in alternative dispute resolution pursuant to section 8 of the Stipulated Judgment in *Vista Media Group v. City of Los Angeles* ("Vista Action"), for the purpose of determining whether any of Clear Channel's digital conversion permits remain lawful notwithstanding the decision of the Court of Appeal. Ms. Keller and Mr. Axel assert in their letters that the Stipulated Judgment's dispute resolution provisions remain in effect.

Dispute resolution pursuant to section 8 is not available here, and the City is barred from participating in such proceedings. The entire Settlement Agreement was held to be invalid by

Superior Court Judge Terry Green. The Court of Appeal affirmed this portion of Judge Green's decision in its entirety:

> After multiple hearings, the trial court (Judge Green) granted plaintiff's motion for a writ of mandate, ***ordering the city to set aside and cease implementing the settlement agreement.*** The court ruled on each of the contentions we discuss in this opinion, and ***we affirm all of the rulings which led the court to conclude the settlement agreement was void for all purposes.***

Summit Media v. City of Los Angeles, 211 Cal. App. 4th 921, 929 (2012) (emphasis added). In its disposition of Clear Channel and CBS's appeal, the Court of Appeal ruled as follows:

> The order granting plaintiff's motion for judgment on the peremptory writ of mandate ***is affirmed to the extent it requires the city to set aside and cease implementing the settlement agreement*** entered into with real parties dated September 30, 2006.

Id. at 941 (emphasis added).[1]

Digital conversions in violation of the 2002 Sign Ban were central to the courts' invalidation of the Settlement Agreement, but the whole contract was found to be unlawful. ***The City has been ordered to stop implementing the entire Settlement Agreement.*** This includes the agreement's dispute resolution provisions, which contravene the abatement procedures that apply to all other non-compliant signs and purport to limit the City's rights to enforce its sign regulations against Clear Channel and CBS in the civil and criminal courts. *Id.* at 927 & n.4.[2]

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[1] Mr. Axel's assertion in his February 28 letter that "the Court of Appeal's decision is not self-executing," is wrong. Judge Green invalidated the Settlement Agreement by order dated November 4, 2009, and that aspect of his order has been affirmed and is now final. That Judge Green has been instructed by the Court of Appeal to *also* invalidate the digital conversion permits does not change the fact that the City is currently forbidden from implementing any provisions in the Settlement Agreement.

[2] Mr. Axel's representation that "no one has ever contended that the City lacked the power to commit to dispute resolution" is not correct. That the City contractually abdicated its criminal enforcement rights, including the power to order immediate removal of signs violating the municipal code (LAMC 21.6202), was identified by Summit Media as a basis for invalidating the Settlement Agreement. (*See, e.g.,* Summit Media's Respondent's Brief in the Court of Appeal, at 15.)

The Court of Appeal made crystal clear that its decision was not limited to the City's approval of digital displays, and it extended to every right contractually granted to Clear Channel and CBS in the Settlement Agreement:

> [A]n agreement to circumvent applicable zoning laws is invalid and unenforceable. That is precisely what happened here: the settlement agreement exempted [CBS Outdoor and Clear Channel] ***from prohibitions in the 2002 sign ban and other regulations***. . . . An agreement is ultra vires when it contractually exempts settling parties from ***ordinances and regulations that apply to everyone else and would, except for the agreement, apply to the settling parties.*** The trial court's ruling was correct.

Id. at 937 (emphasis added).[3]

Indeed, the Court of Appeal explicitly rejected the contention that Clear Channel is now urging on the City – that some provisions of the Settlement Agreement survived:

> The trial court correctly concluded: "[T]he central purpose of the Settlement Agreement – the exemption of [real parties] from zoning laws in return for certain alleged benefits to the City – is illegal, ***so the contract as a whole cannot stand***."

Id. at 938 (emphasis added).

Clear Channel's assertion that the Stipulated Judgment in the Vista Action has an independent existence and still binds the City is ludicrous. In addition to ordering the City not to comply with any aspect of the Settlement Agreement, the Court of Appeal in effect vacated that Stipulated Judgment, which tracked the unlawful Settlement Agreement, because the judge who approved it acted beyond his statutory authority in a reverse validation action.

The rights purportedly granted in the Stipulated Judgment, the Court of Appeal ruled, "covered matters far beyond the scope of those subject to the validating statutes – matters that were not litigated and were not subject to or proper for litigation under the validation statutes." *Id.* at 931.

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[3] The invalidation of the Settlement Agreement includes the agreement's exemption of CBS Outdoor and Clear Channel from "provid[ing] evidence that pre-1986 sign structures were lawfully erected, a direct violation of LAMC section 91.6205.18(3)," and its approval of "[o]ff-site signs erected by [real parties] between 1986 and 1998 . . . even if no permit was ever obtained or the signs were illegally modified." *Id.* & n.3. And it includes the agreement's special procedures for the issuance of permits to CBS and Clear Channel. *Id.* at 928.

> [W]e agree with Judge Green that ***it was beyond the trial court's power to enter a stipulated judgment adopting the terms of a settlement agreement*** that was ultra vires or otherwise exceeded the scope of the city's authority.

Id. at 933 (emphasis added).

Thus, Clear Channel's demand for alternative dispute resolution pursuant to the Settlement Agreement should be entirely disregarded. The City is obligated by law to ***promptly and without delay*** enforce its sign regulations against Clear Channel.

All of Clear Channel's Digital Permits Are Void Now, And In Their Entirety.

Ms. Keller, in her letter to Robert Ovrom of the Department of Building and Safety, asserts that Clear Channel is entitled to LADBS "proceedings" to determine whether its digital conversion permits are valid notwithstanding the decision of the Court of Appeal. Clear Channel is not entitled to any such review because the Court of Appeal has decided the matter and that decision is now final. Ms. Keller's request is designed solely to delay removal of the signs, and invites the City to defy the Court of Appeal, which explicitly rejected case-by-case review of the digital conversion permits. Immediately after remand, Judge Green must issue a new order that "invalidates all digital conversion permits issued by the city to [Clear Channel and CBS] under the settlement agreement." *Summit Media,* 211 Cal. App. 4th at 941-42. *See Cuccia v. Superior Court,* 153 Cal. App. 4th 347, 353-54 (2007) (on remand, a trial judge may not "state its disagreement and rule contrary to the appellate opinion").

There is no ambiguity regarding which permits are now invalid, and why. In its claim for damages delivered the City Clerk on February 22, 2013, Clear Channel identifies 84 signs that received permits under the terms of the Settlement Agreement.[4] No further proceedings are necessary to identify the Clear Channel permits that are invalid.

If Clear Channel believes it has a right to the existing digital conversion permits independent of the Settlement Agreement, it was required to present those arguments and evidence prior to Judge Green's ruling on Summit Media's motion for writ of mandate, which sought the invalidation of the Settlement Agreement and all permits issued pursuant to it. *See North Coast Business Park v. Nielsen Constr. Co.,* 17 Cal. App. 4th 22, 28-29 (1993) ("Under general principles of 'waiver' and 'theory of the trial,' the [issue not raised by non-movant] was waived.

[4] Summit believes that Clear Channel obtained a permit for an 85th digital sign, which is not operating at this time.

. . . This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant."); *see also Pulver v. Avco Fin'l Services,* 182 Cal. App. 3d 622, 632 (1986); *In re B.D.*, 159 Cal. App. 4th 1218, 1239 (2008). Clear Channel and CBS merely contended in Superior Court and the Court of Appeal that their signs should receive individualized consideration, rather than categorically invalidated – and the Court of Appeal rejected this. Clear Channel's assertion that its permits were issued for some reason other than the Settlement Agreement has been waived, and the courts have adjudicated, with finality, that all of Clear Channel's permits for digital signs are invalid.

Mr. Axel and Ms. Keller repeat arguments in their letters that were rejected by the Court of Appeal, and are simply wrong. They contend that Clear Channel's digital signs are lawful because they were converted in reliance on the City's representations, and they contend that the law did not prohibit digital conversions until 2009. The Court of Appeal found otherwise: "[T]he trial court held, and we have held, that ***digital conversions were indeed unambiguously prohibited by the municipal code at the time of the settlement agreement***." 211 Cal. App. 4th at 939-40 (emphasis added).

Clear Channel's arguments – and its legal threats against the City – rest on the faulty notion that the company had valid digital conversion permits, or the right to get such permits, when the digital signs were erected. But Clear Channel never had valid permits, and such permits were always unavailable to Clear Channel under the 2002 Sign Ban. The Court of Appeal stated this repeatedly: "[P]ermits issued in contravention of municipal ordinances ***are invalid*** . . . ." *Summit Media,* 211 Cal. App. 4th at 940 (emphasis added). "[T]he city does not and did not have the discretion to issue permits that contravened existing municipal ordinances." *Id.* "[T]here was no legal basis for the trial court's refusal to revoke digital conversion permits that were issued under an illegal settlement agreement and in violation of unambiguous municipal ordinances." *Id.* at 941.

Given this, each of Clear Channel's proposed rationales for further review of its permits falls flat. First, the exceptions in the 2008 and 2009 ICOs where permit holders have incurred "substantial liabilities" and performed "substantial work," require a ***valid building permit*** – which Clear Channel did not have. *See* Ordinance No. 180445 (exception requires "a valid building permit"); *see also Toigo v. Town of Ross,* 70 Cal. App. 4th 309, 321 (1998) (a vested right based on substantial work and substantial liabilities requires "a valid building permit or its functional equivalent"); *accord Strong v. City of Santa Cruz,* 15 Cal. 3d 720, 727 (1975); *Burchett v. City of Newport Beach,* 33 Cal. App. 4th 1472, 1479-80 (1995). (*See also* Letter from Chief Deputy City Attorney William W. Carter to Keller, Feb. 27, 2013 (rejecting Clear

Channel's request for a determination of "vested rights" in the digital signs because the Court of Appeal held in *Summit Media* "that Clear Channel has no rights to these digital signs or digital sign permits, vested or otherwise").)

Second, Clear Channel's claim that the 2008 ICO, Ordinance No. 180445, and 2009 ICO, Ordinance No. 180745, somehow breathed life into permits for signs erected in violation of the 2002 Sign Ban is just a waiver argument that fails for the same reasons as a contract that attempts to contravene generally applicable zoning laws. (Keller Letter to Ovrom, Feb. 22, 2013.)[5] *See Strong,* 15 Cal. 3d at 727 ("[A] governmental body may not waive the requirements of an ordinance enacted for public benefit."). In fact, Clear Channel's waiver theory is debunked by section 6 of Ordinance No. 180445 and section 5 of Ordinance No. 180745, which provide that the ICOs "do not contain any rights not otherwise granted under the provisions and procedures contained in [the Zoning Code] or any other ordinances." Ordinance Nos. 180445 and 180745 did not magically transform sign permits that were issued by the City in violation of the 2002 Sign Ban into valid permits.[6]

Third, at no point in the litigation did Clear Channel present evidence that its digital sign conversions cost less than 50 percent of the replacement cost of the sign and its support structure

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[5] Clear Channel's tired argument that digital conversions were not banned prior to the ICOs was rejected by the Court of Appeal. Ordinance Nos. 180445 and 180745 – on their face – do not create a new category of banned digital signs, and nowhere do those ordinances "recognize[] that existing digital signs should be allowed to persist." (Keller letter to Ovrom, Feb. 22, 2013, at 2.) Rather, the City Council expressed concern that a ruling against the City in the then-pending *World Wide Rush* appeal in the Ninth Circuit might "result in new Off-Site Signs, *including* Digital Displays." (Emphasis added.) The City Council also expressed concern that no regulations "addressed where and how [digital] conversions [*pursuant to the Settlement Agreement*] could take place." Throughout the ordinances, the "Digital Displays" are *included* in the category of "Off-Site Signs." New and altered off-site signs already were prohibited – as the Court of Appeal recognized – under the 2002 Sign Ban. Further, both ICOs expressly prohibited "new Off-Site Signs, including Off-Site Digital Displays," for the express purpose of halting the ongoing uncontrolled conversions by Clear Channel and CBS *under the Settlement Agreement* without regard to negative impacts on the community, and the ICOs eliminated certain exceptions to the 2002 Sign Ban pending enactment of a new, permanent sign law. The ICOs do not acknowledge, explicitly or implicitly, that static wood-and-vinyl billboards could be lawfully converted to digital displays under the 2002 Sign Ban.

[6] Ms. Keller is incorrect when she asserts in her letter to Mr. Ovrom that the *Summit Media* "case concerns only the City's authority to enter into the settlement agreement in 2006 . . . Nothing in *Summit Media* precludes a determination that the digital sign permits issued to Clear Channel are valid under current law . . . ." The Court of Appeal has ordered Judge Green to invalidate Clear Channel and CBS's permits. If Clear Channel believes its signs comply with current law, it should apply for new permits. But it is not within the power of the LADBS to determine that permits for the existing signs remain valid today.

– and it cannot do this now because it is too late, and is simply untrue. Summit Media presented evidence in Superior Court that each conversion cost approximately $450,000, a figure never rebutted by Clear Channel or CBS. Again, it was Clear Channel's responsibility to establish prior to Judge Green's decision on Summit's motion for writ of mandate that the permits were lawfully issued independently of the Settlement Agreement, and it did not do this.

Fourth, section 5216.1 of the Business and Professions Code creates only a *presumption* of legality after five years. The Court of Appeal determined that Clear Channel's permits are – and always have been – invalid, and that is the end of the matter. Any presumption under section 5216.1 is rebutted. *See Farr v. County of Nevada,* 187 Cal. App. 4th 669, 681 (2010). That the City did not send Clear Channel a written notice of violation makes no difference. *West Washington Props., LLC v. Cal. Dept. of Transp.,* 210 Cal. App. 4th 1136, 1144-45 (2012) (section 5216.1 just shifts the burden of proof, which is met by substantial evidence that a sign was not in compliance with the law when erected, even if the government was aware of but did not enforce against the sign).

When an appellate court gives directions to enter a particular judgment on remand, the trial court has a duty to enter judgment in conformity with those directions, and can neither reopen or retry the case nor allow the filing of additional pleadings. *See* Civ. Proc. Code § 43; *Bach v. County of Butte*, 215 Cal. App. 3d 294, 301 (1989) (rejecting request for evidentiary hearing where appellate court did not direct or authorize same); *Hampton v. Superior Court*, 38 Cal. 2d 652, 655–56 (1952) (where the appellate court directs entry of a specific judgment "the trial court has no discretion but to enter the judgment called for"). Any material variance from the appellate court's directions is unauthorized and void and may be challenged by immediate petition for writ of prohibition or writ of mandate. *Hampton,* 38 Cal. 2d at 1529; *Karlsen v. Superior Court*, 139 Cal. App. 4th 1526, 1529 (2006).

Judge Green is required now to obey the Court of Appeal – and the City must respect that judgment. There will be no further judicial or administrative proceedings relating to the validity of Clear Channel's permits.

Clear Channel Is Not Entitled to Any Relocation Agreements Involving Its Digital Signs.

Cindy Starrett, with another of Clear Channel's law firms, Latham & Watkins, proposed by letters to the Planning Department on February 22, 2013 that the City enter into two relocation agreements:

- For the preservation of two digital signs, notwithstanding their illegality, at 10333 West Santa Monica Boulevard (which she proposes be moved to Councilman Alarcon's district), and at 721 North La Brea Avenue.

- For the preservation of 77 other digital signs, notwithstanding their illegality, at unspecified locations, in return for the removal of static signs, at unspecified locations, "at a rate of three to one."

This proposal has no basis whatsoever, in the law or common sense, and Ms. Starrett does not offer one. Relocation agreements were approved by the Legislature in section 5412 of the Business and Professions Code to relieve state and local government of having to financially compensate sign owners for the compelled removal of "lawfully erected" displays. None of Clear Channel's digital displays was lawfully erected. Each one lacks a valid permit, and, upon entry of an amended judgment by Judge Green, the City must proceed promptly to have the signs removed.

Ms. Starrett apparently has not actually read the Court of Appeal's decision; she writes that the decision "may call into question the continuing validity of these digital permits," and she urges that the City enter into agreements that "may confirm the legality of the existing digital signs." (Starrett letter to Michael LoGrande, Feb. 22, 2013, at 1, 3.) There is no question here, and nothing to confirm. The Court of Appeal ordered: "[T]he cause is remanded to the trial court with directions to amend its order so that it invalidates all digital conversion permits issued by the city to real parties under the settlement agreement." *Summit Media,* 211 Cal. App. 4th at 941-42. (*See also* Letter from Carter to Keller, *supra* (rejecting Clear Channel's proposal for relocation agreements because (1) "there is no government project or use of eminent domain at issue" and (2) the "*Summit Media* appellate decision ruled that Clear Channel's digital signs did not have lawful permits, which means that . . . those signs will ***not*** be 'lawfully erected.'" (original emphasis).)

Clear Channel is Not Entitled to Any Damages or Restitution From the City.

Clear Channel's headline-grabbing threat to seek $100 million in damages from the City should be disregarded, and it was properly rejected today by the Office of the City Attorney.

The Settlement Agreement itself prohibited such a recovery:

> In the event that any third party brings any challenge . . . either to this Agreement as a whole or to any application for permits or approvals under this Agreement,

> . . . [and] any such third-party challenge impairs any of CBS's or Clear Channel's rights under this Agreement, CBS or Clear Channel, as the case may be, may terminate the Agreement ***but no party may recover damages against any other Party for breach of this Agreement based on such challenge.***

(Settlement Agreement §17(B) (emphasis added).)

Even aside from the Settlement Agreement, the law does not give Clear Channel any right to damages based on what Clear Channel expected to be the "benefit of the bargain." ("Notice of Potential Claim for Damages Against the City of Los Angeles" by letter from David Axel to City Clerk June Lagmay, dated Feb. 22, 2013 ("Clear Channel Notice"), at 3-4.) "[A] party to an illegal contract can neither recover damages nor, by rescinding, recover the performance that he has rendered, or its value." *Owens v. Haslett,* 98 Cal. App. 2d 829, 833 (1950). "A contract made contrary to public policy or against the express mandate of a statute may not serve as the foundation of any action, either in law or in equity." *Tiedje v. Aluminum Taper Milling Co.,* 46 Cal. 2d 450, 453-54 (1956).

In the context of a government contract, such as the Settlement Agreement, the rule is no different: if a contract with a municipality is ultra vires, it is wholly void, and no recovery is available from the municipality. 10 E. McQuillin, The Law of Municipal Corporations (3d ed.) § 29.14; *see Kelley v. Chicago Park Dist.*, 635 F.3d 290, 308 (7th Cir. 2011); *Santella v. Grishaber*, 672 F. Supp. 321 (N.D. Ill. 1987); *Scofield Engineering Co. v. City of Danville*, 35 F. Supp. 668 (W.D. Va. 1940), *judgment aff'd*, 126 F.2d 942 (4th Cir. 1942).

There is no damages recovery based on an alternative theory, either, such as ratification, estoppel, or implied contract, even if the municipality has received benefits from the contract. 10 E. McQuillin, *supra*, §§ 29.14, 29.108; *see also Schaefer v. Anne Arundel County, Md.*, 17 F.3d 711 (4th Cir. 1994); *Cameron County Water Imp. Dist. No. 8 v. De La Vergne Engine Co.*, 93 F.2d 373, 375 (5th Cir. 1937); *Tolliver v. Harlan County Bd. of Educ.*, 887 F. Supp. 144 (E.D. Ky. 1995). The United States Supreme Court has long taken the view that a municipal corporation's contract, if it is ultra vires (as the courts determined in the *Summit Media* case), is wholly void and of no legal effect. *See Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 55 (1891). There can be no damages recovery against the City based alleged breach of the Settlement Agreement.

Clear Channel also is not entitled to compensation under section 5412 of the Business and Professions Code, which requires payment of compensation under the Eminient Domain Law for the compelled removal of a "lawfully erected" advertising display. (Clear Channel Notice, at 4-

5.) "'Lawfully erected' means, in reference to advertising displays, advertising displays which were ***erected in compliance with state laws and local ordinances in effect at the time of their erection***, . . . [and] does not apply to any advertising display whose use is modified after erection in a manner which causes it to become illegal." Bus. & Prof. Code § 5216.1 (emphasis added). The Court of Appeal has ruled that "digital conversions were indeed ***unambiguously prohibited by the municipal code*** at the time of the settlement agreement." *Summit Media,* 211 Cal. App. 4th at 939-40 (emphasis added). Conversions were prohibited by the municipal code throughout the period when permits were issued and the digital displays were erected. Compensation under section 5412 is not available to Clear Channel.

Clear Channel also is not entitled to any restitutionary recovery from the City. (Clear Channel Notice at 3 & n.2.) Clear Channel and CBS have operated their illegal signs for five years, and have reaped far more in financial benefits from advertising income than their expenditures in erecting and dismantling their digital displays. *See, e.g., In re Lloyd*, 369 B.R. 549, 563 (N.D. Cal. 2007) (no restitution where "value has been fully offset by other effects of the transaction" (citing *Gatje v. Armstrong*, 145 Cal. 370, 374 (1904))). Restitution is appropriate only if "the circumstances are such that, as between the two individuals, it is *unjust* for the person to retain it." *McBride v. Boughton,* 123 Cal. App. 4th 379, 389 (2004) (original emphasis). And there can be no "disgorgement" here either, because the City has not obtained and retained any benefit at the expense of Clear Channel. *Peterson v. Cellco P'Ship,* 164 Cal. App. 4th 1583, 1593 (2008).

Clear Channel's assertion that its conversions took place during a period when the 2002 Sign Ban was in doubt, and were lawful at that time, is frivolous. (Clear Channel Notice at 5.) The Sign Ban was upheld by the Ninth Circuit Court of Appeal in *Metro Lights, LLC v. City of Los Angeles,* 551 F.3d 898 (9th Cir. 2009), and *World Wide Rush, LLC v. City of Los Angeles,* 606 F.3d 676 (9th Cir. 2010). Clear Channel and CBS never obtained any order from any court that approved their digital conversions or enjoined the City from enforcing the 2002 Sign Ban against Clear Channel and CBS signs – and Clear Channel is wrong when it asserts that the City was enjoined from enforcing the Sign Ban when the digital conversions occurred. (Keller Letter at 6; Clear Channel Notice at 5.) The injunctions against enforcement of the Sign Ban in the *Metro Lights* and *World Wide Rush* cases involved *particular signs owned by particular companies. See Metro Lights,* 551 F.3d at 902 (City enjoined from enforcing the Sign Ban "as to twenty specified signs"); *World Wide Rush,* 606 F.3d at 683-84 (injunctions entered as to particular signs owned by World Wide Rush and Sky Tag).

Moreover, Summit Media filed an action in federal court in early 2007, challenging the Settlement Agreement, and then filed its writ of mandate petition in Superior Court in 2008

which resulted in the invalidation of the agreement and the digital conversion permits issued to Clear Channel and CBS. And, as the Court of Appeal noted, Clear Channel and CBS were fully aware that the City was precluded from entering into an ultra vires contract that conflicted with its existing land use laws, given the positions they took in the earlier Vista Action. *Summit Media,* 211 Cal. App. 4th at 940. Clear Channel understood the risks of proceeding with conversions in defiance of the Sign Ban in 2007 and 2008 – but went ahead anyway. Clear Channel has no entitlement to a monetary recovery of any kind from the City.

Approval of the Existing Digital Signs by Ordinance or Another Agreement Will Doom the City's General Sign Ban.

The City is not allowed to make private agreements or enact ordinances that conflict with generally applicable land use laws. The Court of Appeal stated:

> In sum, the cases are clear that an agreement to circumvent applicable zoning laws is invalid and unenforceable. That is precisely what happened here; the settlement agreement exempted [CBS and Clear Channel] from prohibitions in the 2002 sign ban and other regulations. [CBS and Clear Channel's] fundamental premise – that an agreement by the city is not ultra vires, so long as it does not "contractually exempt a private property from all future legislative and regulatory control" – is simply wrong. An agreement is ultra vires when it contractually exempts settling parties from ordinances and regulations that apply to everyone else and would, except for the agreement, apply to the settling parties. The trial court's ruling was correct.

Summit Media, 211 Cal. App. 4th at 937.

Section 14.4.4(11) of the Los Angeles Municipal Code prohibits the erection of new off-site signs, or the alteration of existing off-site signs. Clear Channel's existing digital signs fall within this ban, and must be removed, and the City may not enter into any contract that preserves those signs because such an agreement would necessarily conflict with section 14.4.4(11).

Legislation also cannot save Clear Channel's digital signs. Any ordinance approving the existing signs will conflict with and will be constitutionally lethal to the City's general sign ban. The First Amendment does not allow municipalities to pick-and-choose whether and where to allow digital signs based merely on political expediency and revenues for the City.

To withstand a First Amendment challenge to a ban on offsite signs that exempts digital displays, the City must establish that distinguishing between the two forms of commercial speech (the

Clear Channel and CBS digital signs vs. all other new or altered off-site signs) furthers the city's interests behind the Sign Ban, namely traffic safety and aesthetics. *See Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564-66 (1980). Stated another way, there must be a logical connection between the City's interests and a legislative exception for digital displays scattered around Los Angeles. A regulation can be unconstitutionally underinclusive if it is "so pierced by exceptions and inconsistencies" that it directly undermines the City's stated interests. *World Wide Rush*, 606 F.3d at 686. "To put it in the context of a *Central Hudson* test, a regulation may have exceptions that undermine and counteract the interest the government claims it adopted the law to further; such a regulation cannot 'directly and materially advance its aim.'" *Metro Lights*, 551 F.3d at 905 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)).

An exception to the Sign Ban for Clear Channel and CBS's digital signs will so undermine the City's justification for the Sign Ban that the courts will be obligated to invalidate the ban. "[S]elf-defeating speech restrictions will violate the First Amendment." *Id*. at 906 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)).

The City's stated purpose behind the Sign Ban include traffic safety and aesthetics, which constitute substantial government interests. LAMC § 14.4.1; *Metro Lights*, 551 F.3d at 904. Digital billboards or "jumbotrons" undoubtedly pose a greater threat to traffic safety and community aesthetics than traditional billboards. The City cannot argue, as it did in *World Wide Rush*, that allowing digital signs helps remove blight and dangerous conditions in a particular area – since the Clear Channel and CBS digital signs are scattered around Los Angeles. Their detriment to a particular neighborhood is not offset by some advancement in the neighborhood, or even in the city as a whole, such as with the entertainment districts of downtown and Hollywood. They do not reduce blight; they perpetuate and amplify it.

The prospect of additional fee income for the City is not a sufficient rationale under *Central Hudson* because increased revenues is not one of the City's interests behind the ban. The First Amendment requires that any exception to a restriction on commercial speech relate to an interest asserted by the City when it enacted the restriction (*i.e.,* traffic safety and aesthetics). *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (invalidating a ban on commercial newsracks where there was no basis for distinguishing between commercial and noncommercial newsracks that furthered the government's interests in safety and aesthetics); *cf. Metro Lights*, 551 F.3d at 911 (distinguishing *Discovery Network* and noting that "here there is some basis for distinguishing offsite commercial signage concentrated and controlled at transit stops and uncontrolled, private, offsite commercial signs").

A reduction in the total count of billboards in Los Angeles – such as removal of some static wood-and-vinyl signs in return for allowing Clear Channel and CBS to retain digital signs – fails to justify an exception to the Sign Ban for Clear Channel and CBS. First, digital signs are *not* equivalent to static signs in their impact on the City's appearance and on residents, visitors, and motorists. They are brighter and constantly changing, and they not only increase the visual clutter, they assault the eyes. What Clear Channel wants is a right to erect a *particular kind of sign* – giant televisions – and in return for that right, the company suggests that it will remove other, traditional poster-style billboards.

Even if we assume that digital and wood-and-vinyl signs are equivalent (and they are not), the mere fact that a ban on some signs advances the government's interests more than no ban at all is *not* enough by itself to justify inconsistent treatment of commercial speech. *Metro Lights*, 551 F.3d at 907-08 n10 (citing *Discovery Network*); *see also Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006) (invalidating ban on portable off-site signs in part because it exempted other commercial signs that posed no less of a traffic safety hazard); *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997) (federal ban on broadcast advertisement of casino gambling violated *Central Hudson* test because it allowed broadcast advertisement of other types of gambling). The City cannot simply wave a wand and approve more than 100 digital signs with very profound and negative impacts, creating an exception that undermines the general ban on new and altered off-site signs, and contend that this exception is justified merely by a reduction in a completely different form of advertising located elsewhere.

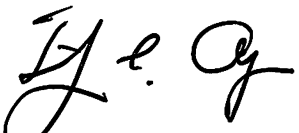
Clear Channel's assertion that its digital billboards promote public safety makes no difference. The Sign Ban was not enacted for the purpose of incentivizing occasional public safety announcements. An occasional Amber Alert does not advance aesthetics and traffic safety in Los Angeles, but compliance with zoning laws does.

The City Must Promptly Begin Aggressive Enforcement Proceedings Against Clear Channel and CBS's Digital Signs.

The citizens of Los Angeles have been plagued by the flouting of the City's land use laws for the last six years. Any further delay in completely correcting that wrong by removal of the digital signs is an affront to the community. Immediately upon issuance of an order by Judge Green invalidating the digital permits, the City should demand removal of the signs and, if Clear Channel and CBS do not immediately comply, the City should abate the signs and bring criminal and civil enforcement actions against the companies. At that point, the City – no longer burdened with a host of illegal digital signs and the threats of two companies with hollow legal

theories and baseless damage claims – may engage in fair and and constitutional regulation of advertising displays.

Very truly yours,



Timothy L. Alger