

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Opposition was served through the Electronic Case Filing System on February 28, 2006, to

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"political materials" out of context,. Moreover, Plaintiff's Summary Judgment Motion asserts that the provisions of D Instruction 5120.4' ¶ 4.11 are unconstitutionally vague and overbroad.

5. Plaintiff agrees that the six listed submissions were submitted as paid advertisements, and that Plaintiff also submitted the paid advertisement "Blow the Whistle on Bush's 'Guldf of Persia' Resolution," which is the subject Civ. No. 04-CV-01125.

6. Plaintiff agrees that none of his submissions identified in the Complaints was published by any CEN.

7. Plaintiff agrees that Defendant has made such an admission (as opposed to it being a joint stipulation

8. Plaintiff disputes Defendant's characterization of his actions. The deposition pages referenced by Defendant confirm that Plaintiff sent his paid ad to the Pentagon for his "Gulf of Persia" advertisement. Moreover, tl deposition pages submitted by Defendant do not establish that when Plaintiff submitted his ads to military public affai personnel, that he did it to the exclusion of simultaneously sending the ads to the CEN publishers.

Respectfully submitted

MARKS & KATZ, L.L.C.

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Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LARRY W. BRYANT	:
	:
Plaintiff,	:
	:
v.	: Civ. No. 04-CV-01125-CKK
	: Civ. No. 05-CV-64-CKK
DONALD H. RUMSFELD, et al.	:
	:
Defendants.	:

PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

This litigation boils down to the military’s decision to permit paid advertising in Civilian Enterprise Newspaper (CEN’s). Once paid advertising is accepted in CEN’s, the paid advertising pages in the CEN’s become public fora in periodicals that by definition are political (they advance messages of the world’s mightiest military). Defendants cannot prevent the types of paid ads submitted by Plaintiff without first stopping their practice of promoting and accepting paid advertising. *ACLU v. Mineta*, 319 F.Supp.2d 69, 86-87 (D.D.C. 2004).

The 1994 Bryant Decision Does Not Preclude Plaintiff’s Current Claims

Defendants erroneously assert that Plaintiff’s 1994 case against the Army (*Bryant v. Sec. of Army*, 862 F. Supp. 574 (D.D.C. 1994) precludes him from arguing that CENs are not public fora purposes of this litigation. At least two critical grounds show Defendants to be wrong in this regard. *First*, the 1994 *Bryant* case never addressed the extent to which the advertising pages of CENs are public fora, seeing that the 1994 *Bryant* case only dealt with rejection letters to the editor, whereas the current litigation deals with paid advertising. *ACLU v. Mineta*, 319 F.Supp.2d 69, 87 (D.D.C. 2004) (acceptance of paid advertising affects whether the paid advertising spaces become public fora). *Second*, such a case as *Mineta* clarifies that when government invites advertising revenue in a subway station (or, in instance in CEN newspapers) – versus imposing in-bus ads on a captivated riding audience that cannot so easily walk

audience that cannot so easily walk away from the ads – public forum protections take stronger hold. *Id.*

Defendants further misconstrue estoppel principles in their characterization of *Wagner v. Professional Engineers*, 354 F.3d 1036, 1044 (9th Cir. 2004), where *Wagner* frowned upon the same litigant trying to take opposite positions in two different pieces of litigation. In this instance, Plaintiff has consistently asserted the same position: that the military has denied his First Amendment rights.

If the Military Wishes to Keep Out Plaintiff's Paid Ads, It Must Reject Paid Advertising

The world's most powerful and wealthy military wants to have its cake and to eat it, too, by claiming that it can preclude basically all but "political" advertising. However, once paid advertising is accepted in CEN's, the paid advertising pages in the CEN's become public fora in periodicals that by definition are political (they advance messages of the world's mightiest military). Defendants cannot prevent the types of paid ads submitted by Plaintiff without first stopping their practice of promoting and accepting paid advertising. *ACLU v. Mineta*, 319 F.Supp.2d 69, 86-87 (D.D.C. 2004). This becomes particularly clear when reading *Mineta* together with *Flower v. U.S.*, 407 U.S. 197- (1972) (where a military base makes itself fully accessible to the public, it cannot restrict civilian's leafleting on such part of the base).

The Defendants arguably have the option to stop inviting any advertising, if they do not want paid ads of the type submitted by Plaintiff, but Defendants have not done so.

It appears to be a case of first impression as to whether the pages of CEN's that accept paid ads (or at least their advertising pages) – as all of them do that are involved in this litigation – are anything but public fora. The inescapable conclusion is that they are. This is not a situation where the military has an interest in shielding its members from having to see an anti-war demonstration as they walk to the mess hall. A paid ad in a CEN involves no captive audience in that the paid ad disappears from site upon the turning of the page or the closing of the newspaper.

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For Injunction Purposes, the Balancing Test Favors Plaintiff

This case is nearly on all fours with the reasons the injunction balancing test favored the Plaintiff in *ACLU v. Mineta* 319 F.Supp.2d at 87. The CEN's advertising pages are public fora, as are the subway stations in the *Mineta* case. In both instances, the government is barred from banning paid advertising based on category and content. *Id.* In both instances, the First Amendment harm of not enjoining such censorship is too heavy not to impose an injunction.

CONCLUSION

The issues for granting Plaintiff relief are simple, and do not require any further elaboration. For the foregoing reasons, Plaintiff's Summary Judgment Motion should be granted, and Defendant's Motion should be dismissed.

Respectfully submitted

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