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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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| ALAMEDA BOOKS, INC.; et al., |) | Case No. CV 95-07771 DDP (CTx) |
| |) | |
| Plaintiff, |) | ORDER GRANTING SUMMARY JUDGMENT |
| |) | FOR PLAINTIFFS |
| v. |) | |
| |) | [Motions filed on May 31, 2007] |
| CITY OF LOS ANGELES, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

In this matter the owners of two adult bookstores, Alameda Books, Inc., and Highland Books, Inc.,¹ sue the City of Los Angeles to enjoin the enforcement of an ordinance which they claim unlawfully abridges their First Amendment right to free speech. The ordinance, enacted by the Los Angeles City Council in order, allegedly, to reduce criminal activity indirectly associated with the operation of adult businesses (so-called "secondary effects"), prohibits the combined operation of multiple types of sexually

¹ Subsequent to the initiation of this action, Alameda Books, Inc., and Highland Books, Inc., merged into Beverly Books, Inc., another California corporation. That consolidation has not impacted the operation of either business. (Andrus Decl. ¶¶ 3-4.) For the sake of continuity, the action is being continued in the name of the original parties, pursuant to Federal Rule of Civil Procedure 25(c).

1 explicit commerce "in the same building, structure or portion
2 thereof." Los Angeles Mun. Code § 12.70(C).

3 Applying the standard elucidated by the Supreme Court in
4 Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), this Court
5 previously found that section 12.70(C) was a content-based
6 regulation of speech that failed strict scrutiny and therefore
7 violated the First Amendment. Accordingly, the Court granted
8 summary judgment to the business owners. The Ninth Circuit
9 affirmed this order, albeit on different grounds. Alameda Books v.
10 City of Los Angeles, 222 F.3d 719 (9th Cir. 2000) (as amended)
11 ("Ninth Circuit Alameda Books"). It held that, even if the
12 ordinance was content neutral, the City failed to demonstrate
13 through its reliance on a study of the effects of concentrations of
14 adult businesses that the regulation was designed to serve a
15 substantial government interest.

16 A divided Supreme Court reversed. While no opinion carried a
17 clear majority, five justices agreed that the City had satisfied
18 its initial evidentiary burden to demonstrate that its ban on
19 multiple-use adult establishments furthers its interest in reducing
20 crime. City of Los Angeles v. Alameda Books, 535 U.S. 425 (2002)
21 ("Alameda Books"). The Court then remanded this case for further
22 proceedings in light of its elaboration of the Renton standard.
23 Having conducted further discovery, the parties now move this Court
24 to rule on their cross motions for summary judgment. After
25 reviewing the materials submitted by the parties and considering
26 the arguments therein, the Court GRANTS summary judgment in favor
27 of Plaintiffs.

28

1 **I. BACKGROUND**

2 **A. Factual Background**

3 In 1978, the City of Los Angeles enacted Los Angeles Municipal
4 Code section 12.70(C), which prohibits adult entertainment
5 establishments within 1,000 feet of each other or within 500 feet
6 of a religious institution, school, or public park. In enacting
7 this ordinance, the Los Angeles City Council relied on a 1977 study
8 conducted by the Department of City Planning, which concluded that
9 concentrations of adult entertainment establishments are associated
10 with higher rates of prostitution, robbery, assaults, and thefts in
11 surrounding communities than their stand-alone counterparts. See
12 Los Angeles Dep't of City Planning, City Plan Case No. 26475, City
13 Council File No. 74-4521-S.3, Study of the Effects of the
14 Concentration of Adult Entertainment Establishments in the City of
15 Los Angeles (June 1977). The ordinance directed that "[t]he
16 distance between any two adult entertainment businesses shall be
17 measured in a straight line . . . from the closest exterior
18 structural wall of each business." Los Angeles Mun. Code §
19 12.70(D) (1978).

20 Subsequent to enactment, the City realized that this method of
21 calculating distances allowed for multiple adult enterprises in a
22 single structure. Thereafter, the City Council in 1983 amended
23 section 12.70(C) to prohibit "the establishment or maintenance of
24 more than one adult entertainment business in the same building,
25 structure, or portion thereof." Los Angeles Mun. Code § 12.70(C)
26 (1983). The amended ordinance defines an "adult entertainment
27 business" as an "Adult Arcade, Adult Bookstore, Adult Cabaret,
28 Adult Motel, Adult Motion Picture Theater, Adult Theater, Massage

1 Parlor, or Sexual Encounter Establishment." Id. § 12.70(B)(17).
2 Moreover, each of these enterprises "shall constitute a separate
3 adult entertainment business even if operated in conjunction with
4 another adult entertainment business at the same establishment."
5 Id. The ordinance thus uses the term "business" to refer to the
6 commerce of a particular type of good or service sold in adult
7 establishments, rather than the establishment itself.

8 Relevant for the purposes of this case are the ordinance's
9 definitions of adult bookstores and arcades. An adult bookstore is
10 an establishment that "has as a substantial portion of its stock-
11 in-trade and offers for sale" either 1) "Books, magazines or other
12 printed matter, or photographs, films, motion pictures, video
13 cassettes, slides or other visual representations" that emphasize
14 the depiction of specified sexual activities; and/or 2)
15 "Instruments, devices or paraphernalia which are designed for use
16 in connection with 'specified sexual activities.'" Id. §
17 12.70(B)(2). An adult arcade is an establishment where, "for any
18 form of consideration, one or more motion picture projectors, slide
19 projectors or similar machines, for viewing by five or fewer
20 persons each, are used to show films, motion pictures, video
21 cassettes, slides or other photographic reproductions which are
22 characterized by an emphasis on the depiction or description of
23 'specified sexual activities' or 'specific anatomical areas.'" Id.
24 § 12.70(B)(1).

25 Alameda Books and Highland Books are two adult establishments
26 operating in Los Angeles. Neither is located within 1,000 feet of
27 another adult establishment or within 500 feet of any religious
28 institution, public park, or school. Both establishments operate

1 both adult arcades and bookstores in the same commercial space.
2 After a Los Angeles city inspector discovered in 1995 that these
3 entities were in violation of the City's adult zoning regulations,
4 Alameda and Highland joined as Plaintiffs and sued the City under
5 42 U.S.C. § 1983 for declaratory and injunctive relief to prevent
6 enforcement of the ordinance. Plaintiffs contend that the
7 ordinance violates the First Amendment because it impinges on their
8 fundamental right to freedom of speech. See U.S. Const. amend. I
9 ("Congress shall make no law . . . abridging the freedom of speech,
10 or of the press. . . .")

11 **B. Procedural Background**

12 Early in the litigation, Plaintiffs and Defendant each filed
13 motions for summary judgment with respect to Count I of the
14 complaint, which alleges a facial violation of the First Amendment.
15 This Court initially denied both motions, concluding that there was
16 a genuine issue of fact as to whether the operation of a
17 combination adult bookstore/arcade business leads to the same
18 harmful secondary effects as those that are associated with the
19 concentration of separate adult businesses in a single urban area.
20 After Plaintiffs filed a motion for reconsideration, however, this
21 Court found that the City's prohibition on multiple-use adult
22 establishments was not a content-neutral regulation of speech and
23 subjected the ordinance to strict scrutiny.² The Court granted
24 summary judgment for Plaintiffs because it found that the evidence
25

26 ² This Court reasoned that neither the City's 1977 study nor a
27 report cited in Hart Book Stores v. Edmisten, 612 F.2d 821 (4th
28 Cir. 1979), supported a reasonable belief that multiple-use adult
establishments produced the secondary effects that the City
asserted as its content-neutral justification for the prohibition.

1 offered by the City did not demonstrate that its prohibition is
2 "necessary to serve a compelling state interest and is narrowly
3 drawn to achieve that end." Simon & Schuster, Inc. v. Member of
4 N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (internal
5 quotation marks omitted) (explaining the "strict scrutiny" standard
6 of review).

7 The Court of Appeals for the Ninth Circuit affirmed on
8 different grounds. The Ninth Circuit did not reach the question of
9 whether the ordinance was content neutral. It reasoned that, even
10 if the ordinance was content neutral and therefore subject to
11 intermediate scrutiny, the City had failed to present evidence upon
12 which it could reasonably rely to demonstrate that its regulation
13 of multiple-use establishments is "designed to serve" the City's
14 substantial interest in reducing crime. Ninth Circuit Alameda
15 Books, 222 F.3d at 723-28. Accordingly, the Ninth Circuit
16 concluded that the challenged ordinance was invalid under City of
17 Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). See Ninth
18 Circuit Alameda Books, 222 F.3d at 728.

19 The Supreme Court granted certiorari to clarify the standard
20 for determining whether an ordinance serves a substantial
21 government interest under Renton. With no opinion carrying a
22 majority of the justices, the Court reversed the Ninth Circuit.
23 Justice O'Connor announced the judgment and delivered the plurality
24 opinion, which applied Renton and found that the City could rely on
25 its 1977 study to support the ordinance at the summary judgment
26 stage. Justice Kennedy concurred in the plurality's judgment but
27 employed a distinct analytical approach, which will be explained

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1 infra. The remaining justices, led by Justice Souter, dissented.
2 Alameda Books, 535 U.S. 425 (2002).

3 On remand, the parties stipulated to defer discovery and
4 briefing pending the decisions in three cases concerning the
5 interpretation of the Supreme Court's opinion in Alameda Books then
6 before the Ninth Circuit. On July 28, 2003, the Ninth Circuit
7 decided two of the three cases, Center for Fair Public Policy v.
8 County of Maricopa, No. 00-01658, and L.J. Concepts, Inc. V. City
9 of Phoenix, No. 00-19605, in a consolidated opinion. See Ctr. for
10 Fair Pub. Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003).
11 On September 27, 2004, the Ninth Circuit filed its decision in the
12 third case, Dream Palace, Inc. v. County of Maricopa, 384 F.3d 990
13 (9th Cir. 2004).

14 At the request of the parties, this Court then issued a 38-
15 page order ruling on several threshold matters in order to properly
16 frame the issues to be tried and to guide discovery. After
17 conducting further discovery, the parties now each move for summary
18 judgment. In addition, Plaintiffs move to bifurcate the trial or,
19 in the alternative, for leave to file a first amended complaint.

20

21 **II. ANALYSIS**

22 **A. First Amendment in the Wake of Alameda Books**

23 On June 10, 2005, this Court ruled, at the request of the
24 parties, on certain preliminary issues regarding the interpretation
25 of the Supreme Court's Alameda Books decision and the Ninth
26 Circuit's application of that decision. Following is an updated
27 explanation of what this Court has already determined to be the
28 appropriate analysis to apply in this case.

1 **1. Renton and Alameda Books**

2 In Alameda Books, a divided Supreme Court revisited the
3 standard established by Renton and used by courts to review
4 municipal ordinances regulating adult entertainment establishments
5 for compliance with the First Amendment. In Renton, a majority of
6 the Supreme Court first agreed on the constitutional standard to
7 which cities must adhere when enacting ordinances targeting the
8 secondary effects of adult businesses, such as adult bookstores and
9 movie theaters. See 475 U.S. 41 (1986). This test requires a
10 court to make three inquiries into the design and effect of the
11 regulation. First, a court must review the ordinance to determine
12 if it bans the protected activity altogether. If the ordinance is
13 not a ban, but rather restricts the operation of the establishments
14 in some way, then it should be analyzed as a time, place, and
15 manner regulation. Id. at 46.

16 Next, the court must consider whether the ordinance was
17 designed to reduce secondary effects associated with the speech
18 activity or, rather, if it was intended to suppress the content of
19 the speech activity itself. Id. at 47. If the ordinance targets
20 the secondary effects, it should "be reviewed under the standards
21 applicable to 'content-neutral' time, place, and manner
22 regulations," id. at 49; that is, it should receive intermediate
23 scrutiny. Otherwise, the ordinance must withstand strict scrutiny.

24 Finally, assuming that the ordinance receives intermediate
25 scrutiny, a city must show that its ordinance is narrowly tailored
26 to meet a substantial government interest, and that it does not
27 unreasonably limit alternative avenues of communication. Id. at
28

1 50. Under Renton, if the ordinance survives this three-step
2 inquiry, it is a constitutional restriction on speech.

3 In Alameda Books, Justice O'Connor, writing for a four-justice
4 plurality, applied Renton to review Los Angeles Municipal Code
5 section 12.70(C).³ The plurality did not revise Renton, but
6 articulated a burden-shifting framework that courts should apply in
7 evaluating the evidence presented as part of a city's showing of
8 substantial governmental interests. The city bears the initial
9 burden of "providing evidence that supports a link between
10 concentration of adult operations and asserted secondary effects."
11 Id. at 437. To do this, "a municipality may rely on any evidence
12 that is 'reasonably believed to be relevant' for demonstrating a
13 connection between speech and a substantial, independent government
14 interest." Id. at 438 (quoting Renton, 427 U.S. at 51-52).
15 However, "[t]his is not to say that a municipality can get away
16 with shoddy data or reasoning." Id.

17 The municipality's evidence must fairly support the
18 municipality's rationale for its ordinance. If plaintiffs
19 fail to cast direct doubt on this rationale, either by
20 demonstrating that the municipality's evidence does not
21 support its rationale or by furnishing evidence that disputes
22 the municipality's factual findings, the municipality meets
23 the standard set forth in Renton. If plaintiffs succeed in
24 casting doubt on a municipality's rationale in either manner,
25 the burden shifts back to the municipality to supplement the
26 record with evidence renewing support for a theory that
27 justifies its ordinance.

28 Id. at 438-39.

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26 ³ Justice O'Connor was joined by Chief Justice Rehnquist, and
27 by Justices Scalia and Thomas. Justice Scalia also wrote a short
28 concurrence in which he expressed his well-known, but lone position
that "[t]he Constitution does not prevent those communities that
wish to do so from regulating, or indeed entirely suppressing, the
business of pandering sex." 535 U.S. at 443-44.

1 Reasoning from these statements, Justice O'Connor concluded
2 that the City of Los Angeles's reliance on the 1977 study was
3 sufficient to demonstrate that its ordinance was designed to meet a
4 substantial government interest. Id. at 439. The City had
5 therefore "complied with the evidentiary requirement in *Renton*."
6 Id. Left unstated by the plurality, but necessarily implied, is
7 the fact that the evidentiary burden now rests with Plaintiffs to
8 cast direct doubt on the City's rationale.

9 Writing for the dissent, Justice Souter rejected the
10 conclusion arrived at separately by both the plurality and Justice
11 Kennedy that the 1977 study provided any support for section
12 12.70(C).⁴ He noted that the 1977 study focused on the secondary
13 effects resulting from the concentration of separate adult business
14 establishments, not on effects arising from the traditional
15 combination of selling and viewing activities under one roof. Id.
16 at 463-64. Because the dissenting justices discovered no support
17 for the ordinance in the 1977 study, they would have deemed the
18 ordinance content based, applied strict scrutiny, and concluded
19 that it was an unconstitutional abridgment of free speech activity.

20 Justice Kennedy provided the necessary fifth vote to reverse
21 the grant of summary judgment, but he did not join the plurality's
22 opinion. He wrote separately "for two reasons." Id. at 444.
23 First, he criticized the Renton framework for inaccurately
24 designating ordinances like the ones at issue in Renton and Alameda
25 Books "content neutral." Id. at 446-47. Justice Kennedy was

27 ⁴ Justice Souter's opinion was joined in its entirety by
28 Justices Stevens and Ginsburg. Justice Breyer joined only as to
part II.

1 persuaded that this designation "was something of a fiction," and
2 not a particularly helpful one. Id. at 448. "After all, whether a
3 statute is content neutral or content based is something that can
4 be determined on the face of it; if the statute describes speech by
5 content then it is content based." Id.

6 Nevertheless, Justice Kennedy also found that "the central
7 holding of *Renton* is sound: A zoning restriction that is designed
8 to decrease secondary effects and not speech should be subject to
9 intermediate rather than strict scrutiny." Id. Thus,

10 zoning regulations do not automatically raise the specter of
11 impermissible content discrimination, even if they are content
12 based, because they have a prima facie legitimate purpose: to
13 limit the negative externalities of land use. . . . For this
14 reason, we apply intermediate rather than strict scrutiny.

15 Id. at 449.

16 Second, Justice Kennedy articulated an expanded "substantial
17 government interest" inquiry. The plurality opinion, like the
18 Renton majority, focused on the evidentiary showing required to
19 support the demonstration that an ordinance meets a substantial
20 government interest. Justice Kennedy agreed with the plurality
21 that the evidence offered by the City need only reasonably support
22 the justification offered for the ordinance. Id. at 449, 451-52.
23 "[A] city must have latitude to experiment, at least at the outset,
24 and . . . very little evidence is required." Id. at 451.
25 Therefore, "courts should not be in the business of second-guessing
26 fact-bound empirical assessments of city planners." Id. A
27 district court's task is to review the evidence relied on by the
28 city to ensure that it provides a reasonable justification for the
29 ordinance. Further, like the plurality, Justice Kennedy held that
30 Plaintiffs must have an opportunity to cast direct doubt on the

1 City's rationale. "If [the City's] assumptions can be proved
2 unsound at trial, then the ordinance might not withstand
3 intermediate scrutiny." Id. at 453.

4 However, unlike the plurality, Justice Kennedy emphasized that
5 courts must also consider whether the municipality has advanced a
6 legitimate proposition justifying the ordinance. It is here that
7 Justice Kennedy moved beyond Renton and the plurality opinion to
8 require something more of the authors and defenders of ordinances
9 regulating adult entertainment establishments. "[A] city must
10 advance some basis to show that its regulation has the purpose and
11 effect of suppressing secondary effects, while leaving the quality
12 and accessibility of speech substantially intact." Id. at 449.
13 Thus, "[t]he rationale of the ordinance must be that it will
14 suppress secondary effects - and not by suppressing speech." Id.
15 at 449-50.

16 Justice Kennedy added this requirement to the Renton structure
17 because the plurality's approach failed to address "how speech will
18 fare under the city's ordinance." Id. at 450. Whereas the
19 plurality considered only the narrow question of whether the
20 evidence relied upon by the City reasonably justified the design of
21 the ordinance, Justice Kennedy perceived that

22 [t]his question is actually two questions. First, what
23 proposition does a city need to advance in order to sustain a
24 secondary-effects ordinance? Second, how much evidence is
25 required to support the proposition? The plurality skips to
26 the second question and gives the correct answer; but in my
27 view more attention must given to the first.

28 Id. at 449. Justice Kennedy reasoned that the rationale of a
secondary-effects ordinance must be that it will reduce the
externality costs associated with the speech activity "without

1 substantially reducing speech" because "[i]t is no trick to reduce
2 secondary effects by reducing speech or its audience; but a city
3 may not attack secondary effects indirectly by attacking speech."
4 Id. at 450. Turning to the instant ordinance, Justice Kennedy held
5 that the City's claim "must be that this ordinance will cause two
6 businesses to split rather than one to close, that the quantity of
7 speech will be substantially undiminished, and that total secondary
8 effects will be significantly reduced. This must be the rationale
9 of a dispersal statute." Id. at 451. With this analysis, Justice
10 Kennedy inserted a new "proportionality requirement" into the
11 substantial government interest inquiry.⁵ A district court must
12 review the city's justification for the zoning ordinance in order
13 to ensure that the law is designed to reduce significantly the
14 disfavored secondary effects while leaving the quantity and
15 accessibility of speech substantially intact. So long as the city
16 complies with this requirement, and so long as the city offers some
17 evidence that reasonably supports its justification, it has made an
18 initial showing that the regulation was designed to meet a
19 substantial government interest. Justice Kennedy analyzed section
20 12.70(C) under this new regime and concluded that the City had
21 satisfied its initial burden of showing that the ordinance is
22 "reasonably likely to cause a substantial reduction in secondary
23 effects while reducing speech very little." Id. at 453.
24 Accordingly, he joined the plurality in reversing the grant of
25 summary judgment. In his conclusion, however, he noted that

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27 ⁵ The term "proportionality requirement" was not used by
28 Justice Kennedy but has since been adopted by circuit courts
applying this part of his opinion. See, e.g., Fair Pub. Policy,
336 F.3d at 1162 (9th Cir. 2003).

1 Plaintiffs must have the opportunity to disprove the assumptions
2 relied upon by the City in justifying their ordinance. "If these
3 assumptions can be proved unsound at trial, then the ordinance
4 might not withstand intermediate scrutiny." Id.

5 **2. Ninth Circuit Application of Alameda Books**

6 The Ninth Circuit first applied Alameda Books in Center for
7 Fair Public Policy v. Maricopa County, 336 F.3d F.3d 1153 (9th Cir.
8 2003). There, the circuit court reviewed an Arizona statute that
9 required the closing of "sexually-oriented businesses" between 1:00
10 a.m. and 8:00 a.m. on Monday through Saturday and between 1:00 a.m.
11 and noon on Sunday. The court held that Justice Kennedy's opinion
12 in Alameda Books was the controlling opinion because he concurred
13 in the judgment on the narrowest grounds. Id. at 1161 (citing
14 Marks v. United States, 430 U.S. 188, 193 (1976)).

15 The court applied Justice Kennedy's revised classification
16 approach. It held that the Arizona statute was content based on
17 its face, and then, following Justice Kennedy, it reviewed the
18 statute's full record to determine whether its purpose was to
19 reduce the secondary effects arising from the late-night operation
20 of the regulated establishments.⁶ After finding various "objective
21 indicators of intent" in the record, the majority was satisfied
22 that the regulation was directed at the secondary effects, and not
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25 ⁶ The Ninth Circuit in fact broadened Justice Kennedy's
26 holding. Whereas he limited his holding to zoning ordinances,
27 which he believed inherently possess a prima facie legitimate
28 purpose, that is, reducing the negative externalities of land use,
the Ninth Circuit generalized his approach to include all
regulations designed to ameliorate the secondary effects associated
with the commerce of sexual and pornographic speech. 336 F.3d at
1164-65.

1 at the content of the speech itself. It therefore reviewed the
2 statute using intermediate scrutiny.

3 However, the majority declined to apply the other criterion
4 emphasized in Justice Kennedy's Alameda Books opinion - the
5 "proportionality requirement." The circuit court reasoned that
6 applying the proportionality requirement to regulations limiting
7 the hours of operation for certain businesses - "time" restrictions
8 rather than "place" restrictions like the one at issue in Alameda
9 Books - would invariably lead to the invalidation of all such
10 regulations. Id. at 1163. This is because these statutes
11 expressly do what Justice Kennedy said was improper; they reduce
12 the secondary effects of speech by reducing the quantity of the
13 speech itself. The court noted that the constitutionality of such
14 statutes had uniformly been upheld by circuit courts pre-Alameda
15 Books, and it reasoned that, based on Justice Kennedy's insistence
16 that "'the central holding of *Renton* remains sound,'" he did not
17 intend "to precipitate a sea change in this particular area of
18 First Amendment law." Id. at 1162 (quoting Alameda Books, 535 U.S.
19 at 448 (Kennedy, J., concurring)).⁷

20 In World Wide Video v. Spokane, 368 F.3d 1186 (9th Cir. 2004),
21 the Ninth Circuit expressly reaffirmed that Justice Kennedy's
22 opinion represented the holding in Alameda Books. Id. at 1193.
23 The court also held that the burden-shifting framework discussed by
24 the Alameda Books plurality was part of the holding because Justice

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26 ⁷ Judge Canby dissented, arguing that the two judges in the
27 majority simply failed to apply Justice Kennedy's holding, even
28 though they admitted it was controlling. Judge Canby would have
applied the proportionality requirement and invalidated the statute
under Alameda Books.

1 Kennedy implicitly concurred with it. Id. at 1194. Further, the
2 panel unanimously applied the proportionality requirement to the
3 zoning restriction before the court, reasoning that it "dovetails
4 with the requirement that an ordinance must leave open adequate
5 alternative avenues of communication." Id. at 1195. Because the
6 panel found that the ordinance met this prong of the original
7 Renton standard, it held that the ordinance also met Justice
8 Kennedy's proportionality requirement.

9 The Ninth Circuit has published four more opinions applying
10 Alameda Books since World Wide Video. First, the court again
11 confronted a "time" restriction in Dream Palace v. County of
12 Maricopa, 384 F.3d 990 (9th Cir. 2004). Following Fair Public
13 Policy, the panel declined to apply the proportionality requirement
14 and, applying the balance of the Renton-Alameda Books standard, it
15 held that the regulation survived intermediate scrutiny. Id. at
16 1013 n.16. Next, in Gammoh v. La Habra, 395 F.3d 1114 (9th Cir.
17 2005), the panel addressed a city ordinance requiring adult cabaret
18 dancers to remain two feet from patrons during performances. It
19 applied Justice Kennedy's modified framework to the ordinance, but
20 did not mention the proportionality requirement, perhaps because
21 the ordinance clearly did not eliminate any speech but only
22 regulated the manner of its expression.

23 Third, in Tollis Inc. v. County of San Diego, 505 F.3d 935
24 (9th Cir. 2007), the court addressed a San Diego ordinance that
25 restricts the hours in which adult entertainment businesses can
26 operate, "requires the removal of doors on peep show booths, and
27 mandates that the businesses disperse to industrial areas of the
28 county." Id. at 937. With this case the Ninth Circuit elucidated

1 its interpretation of the proportionality requirement in a deeper
2 fashion. The panel reasoned that "[u]nder Justice Kennedy's
3 construct," a city

4 must have had some basis to assume three propositions: [1]
5 that this ordinance will cause two businesses to split rather
6 than one to close, [2] that the quantity of speech will be
substantially undiminished, and [3] that total secondary
effects will be significantly reduced.

7 Id. at 939 (internal quotation marks omitted)). The Ninth Circuit
8 explained that the first proposition "mirrors the 'alternative
9 avenues of communication' requirement under intermediate scrutiny,
10 which requires that the displaced business be given 'a reasonable
11 opportunity to open and operate.'" Id. (quoting Renton, 475 U.S.
12 at 53-54). The third proposition "restates the requisite
13 'substantial governmental interest' for regulating adult
14 establishments based on their secondary effects." Id. In other
15 words, the burden-shifting framework and proportionality
16 requirement articulated in Alameda Books constitute a rephrasing of
17 the intermediate scrutiny standard as applied in the context of
18 zoning regulations aimed at adult establishments.

19 For the first time, in addition, the Ninth Circuit interpreted
20 Justice Kennedy's second proposition. The court reasoned that

21 Justice Kennedy's reference to whether the "quantity of speech
22 will be left substantially undiminished" is shorthand for
23 asking whether the ordinance will impose a significant or
24 material inconvenience on the consumer of the speech. At the
time of enactment, the city must have some reasonable basis to
believe that interested patrons would, for the most part, be
undeterred by the geographic dispersal of the adult
establishments.

25 Id. at 940 (internal alterations omitted). The court further
26 rejected the "contention that[, at least at the initial stage of
27 the burden-shifting analysis,] Alameda Books imposed a heightened
28

1 evidentiary burden on the County to show 'how speech would fare'
2 under the ordinance." Id.

3 Applying this framework to the ordinance at issue, the court
4 held that "[s]o long as there are a sufficient number of suitable
5 relocation sites, the County could reasonably assume that, given
6 the draw of pornographic and sexually explicit speech, willing
7 patrons would not be measurably discouraged by the inconvenience of
8 having to travel to an industrial zone." Id. The court further
9 held that because the County had satisfied its burden of proposing
10 a sufficient number of potential relocation sites, and the adult
11 business had not cast doubt on that showing by demonstrating "that
12 the proposed sites are inadequate or unlikely to ever become
13 available," id. at 941, the ordinance could stand.

14 Finally, in Fantasyland Video, Inc. v. County of San Diego,
15 505 F.3d 996 (9th Cir. 2007), the latest Ninth Circuit case to
16 review a law regulating sexually-oriented adult businesses, the
17 panel confronted the same ordinance at issue in Tollis. Here,
18 however, the court addressed the open-door peep show requirement
19 rather than the dispersal requirement, and held that Justice
20 Kennedy's proportionality requirement was inapplicable to such a
21 provision, as it had so held before with regard to time
22 restrictions:

23 Any regulation that deters these activities will necessarily
24 make the forum for the speech less attractive, but only
25 because the speech and sexual acts originate with the same
26 person and occur at the same time. The overall quantity of
27 the protected expression must be reduced, but only because the
patron is chilled from also contemporaneously engaging in the
unprotected behavior. Justice Kennedy's proportionality
language was not designed for situations where the protected
speech and the unprotected conduct merge in the same forum.

28 Id. at 1005.

1 **B. Legal Framework for Remand**

2 **1. The Holding of Alameda Books**

3 In its Order of June 10, 2005 ("2005 Order"), this Court found
4 that while the Renton standard is still the controlling standard in
5 this case, that standard was modified by the Supreme Court's
6 holding in Alameda Books. Specifically, the proportionality
7 requirement adds a new element to the Renton inquiry. In this
8 case, the City has met its initial evidentiary burden, and the
9 Plaintiffs must now rebut that showing.

10 The Court confirms that the findings articulated in the 2005
11 Order with respect to the applicable legal standard to use in
12 reviewing section 12.70(C) remain valid. First, Justice Kennedy's
13 opinion in Alameda Books represents the holding of the case. See
14 Marks, 430 U.S. at 193. His opinion concurred in the judgment of
15 the case on the narrowest grounds, and therefore must be regarded
16 as the controlling opinion. See, e.g., Fair Pub. Policy, 336 F.3d
17 at 1161.

18 Following Justice Kennedy's statement that "the central
19 holding of Renton remains sound," Alameda Books, 535 U.S. at 448,
20 the Court further finds that the overall three-step framework of
21 Renton has been supplanted but not overturned. A court must first
22 review the ordinance to see if it completely bans the protected
23 activity. If not, then the court should determine if the
24 regulation is designed to reduce the disfavored secondary effects
25 associated with the regulated activity and not the content of the
26 speech activity itself. If so, the court applies intermediate
27 scrutiny; it determines whether the regulation is narrowly tailored
28 to serve a substantial government interest, and whether it leaves

1 open alternative avenues of communication. In determining whether
2 the regulation is designed to meet a substantial government
3 interest, courts should review the evidence relied upon by the
4 legislating body to ensure that it provides a reasonable basis for
5 the justification of the ordinance.

6 Finally, the Court finds that Alameda Books made three
7 fundamental modifications to the Renton standard. First, after
8 Alameda Books, the classification of the regulation as content
9 neutral or content based does not determine which level of scrutiny
10 to apply. See id. at 449 (noting that zoning ordinances "have a
11 prima facie legitimate purpose: to limit the negative externalities
12 of land use. . . . For this reason, we apply intermediate rather
13 than strict scrutiny (Kennedy, J., concurring in the judgment));
14 Fair Pub. Policy, 226 F.3d at 1164-54 (expanding this approach
15 beyond zoning ordinances). Thus, when reviewing zoning ordinances
16 restricting, but not banning, the operation of adult
17 establishments, courts should apply intermediate scrutiny.

18 Second, at the point where courts review an ordinance to
19 determine whether it is designed to further a substantial
20 government interest, they should engage in the two-step inquiry
21 articulated by Justice Kennedy. "First, what proposition does a
22 city need to advance in order to sustain a secondary effects
23 ordinance? Second, how much evidence is required to support the
24 proposition?" Alameda Books, 535 U.S. at 449.

25 Thus, courts must first examine the justification offered by
26 the ordinance's authors to ensure that it complies with the
27 proportionality requirement, and then review the evidence relied
28 upon by the legislative body to determine whether it reasonably

1 supports the rationale. As interpreted by the Ninth Circuit, in
2 the context of zoning ordinances that require the dispersal of
3 adult businesses, the proportionality requirement is "shorthand"
4 for a determination "whether the ordinance will impose a
5 significant or material inconvenience on the consumer of the
6 speech." Tollis, 505 F.3d at 940. In other words, "[a]t the time
7 of the enactment the city must have some reasonable basis to
8 believe that interested patrons would, for the most part, be
9 undeterred by the geographic dispersal of the adult
10 establishments." Id.

11 However, the Court emphasizes that although this language may
12 sound in terms of the First Amendment rights of the patrons, in
13 many cases - including the instant one - the rights at issue are in
14 fact those of business-owners. In such cases, therefore, the
15 question is not whether the patrons might access the protected
16 speech through some other medium. The question, rather, is whether
17 the patrons will be deterred from frequenting the establishments at
18 issue, thereby diminishing or eliminating the ability of the
19 business-owners to disseminate the speech of their choice.

20 The proportionality requirement thus requires a city to
21 justify an ordinance regulating adult entertainment establishments
22 on the grounds that the ordinance will reduce the secondary effects
23 associated with such commerce, and that this reduction in secondary
24 effects will not substantially diminish the underlying speech.
25 Because Justice Kennedy found that the City's rationale passes the
26 initial stage of review, see Alameda Books, 535 U.S. at 451-53, the
27 assertions attributed by Justice Kennedy to the City will be

28

1 understood to be the City's position with respect to the design and
2 effect of the ordinance.

3 The third addition to the Renton structure is the burden-
4 shifting framework articulated in Alameda Books. The City bears
5 the ultimate burden of showing that the ordinance it enacted passes
6 intermediate scrutiny. To show that the ordinance advances a
7 substantial government interest, the City "may rely on any evidence
8 that is 'reasonably believed to be relevant' for demonstrating a
9 connection between speech and substantial, independent government
10 interest." Alameda Books, 535 U.S. at 438 (quoting Renton, 475
11 U.S. at 51-52).

12 If the Court, after reviewing the evidence presented by the
13 authors of the regulation, finds that the evidence is sufficient to
14 support the rationale for the law, the burden shifts to Plaintiffs
15 "to cast direct doubt on this rationale, either by demonstrating
16 that the municipality's evidence does not support its rationale or
17 by furnishing evidence that disputes the municipality's factual
18 findings." Id. at 438-39; see also id. at 453 ("If these
19 assumptions can be proved unsound at trial, then the ordinance
20 might not withstand intermediate scrutiny." (Kennedy, J.,
21 concurring)). Finally, "[i]f the plaintiffs succeed in casting
22 doubt on a municipality's rationale in either manner, the burden
23 shifts back to the municipality to supplement the record with
24 evidence renewing support for a theory that justifies its
25 ordinance." Id. at 439. A municipality's failure to supplement
26 the record in a satisfactory fashion means that it cannot, as a
27 matter of law, demonstrate that the ordinance survives intermediate
28 scrutiny, thereby entitling the plaintiff to summary judgment.

1 **2. Scope and Parameters of Plaintiffs' Burden**

2 The plurality and Justice Kennedy both held that the City had
3 met its initial evidentiary burden. Id. at 439 (plurality
4 opinion), 445 (Kennedy, J., concurring). Thus, Plaintiffs now have
5 the opportunity to cast direct doubt on the City's rationale for
6 the ordinance by either 1) demonstrating that the City's evidence
7 does not support its rationale or 2) furnishing evidence that
8 disputes the City's factual findings. Id. at 439.

9 Relying on their own evidence, Plaintiffs may dispute the
10 rationale in either of two ways. First, they can demonstrate that
11 the ordinance will not in fact substantially diminish the targeted
12 secondary effects. Second, Plaintiffs may show that the ordinance
13 will reduce secondary effects only by reducing speech "in the same
14 proportion," for Justice Kennedy made clear that "[t]he rationale
15 of the ordinance must be that it will suppress secondary effects -
16 and not by suppressing speech." Id. at 449-50.

17 In concluding that the City's rationale was not aimed at
18 speech, Justice Kennedy made a number of assumptions. He assumed
19 that "[d]ispersing two adult businesses under one roof is
20 reasonably likely to cause a substantial reduction in secondary
21 effects while reducing speech very little." Id. at 453. He
22 reasoned that if two neighboring businesses split, the dispersed
23 stores will attract fewer patrons (for example, 49 patrons each
24 instead of 100 patrons combined). This, in turn, could lead to a
25 "dramatic" reduction of secondary effects, assuming that 49 patrons
26 at each establishment will attract less crime than 100 patrons
27 concentrated at one establishment. Id. at 452-53. Justice Kennedy
28 further assumed that while the secondary effects might be

1 substantially reduced, the corresponding reduction in speech would
2 likely be very little. Indeed, Justice Kennedy thought that speech
3 might even increase due to the "hospitable surroundings." Id. at
4 453.

5 At the end of his opinion, Justice Kennedy stated that "[i]f
6 these assumptions can be proved unsound . . . , then the ordinance
7 might not withstand intermediate scrutiny." Id. Therefore, the
8 Plaintiffs may "cast direct doubt" on the City's asserted rationale
9 either by showing that secondary effects will not in fact decrease
10 substantially, or by demonstrating that the City has violated the
11 "proportionality requirement."⁸

12 **B. Summary Judgment**

13 **1. Legal Standard**

14 Summary judgment is appropriate where "the pleadings,
15 depositions, the discovery and disclosure materials on file, and
16 any affidavits show that there is no genuine issue as to any
17 material fact and that the movant is entitled to a judgment as a
18 matter of law." Fed. R. Civ. P. 56(c). A genuine issue exists if
19 "the evidence is such that a reasonable jury could return a verdict
20 for the nonmoving party," and material facts are those "that might
21 affect the outcome of the suit under the governing law." Anderson
22 v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In adjudicating
23

24 ⁸ The proportionality requirement thus comes into play twice -
25 when a court initially reviews the justification advanced by a city
26 for its ordinance and later when the court weighs the evidence
27 proffered by the plaintiffs. In both instances, courts must be
28 alert to the possibility that the ordinance accomplishes its goal
of reducing secondary effects only through the suppression of
speech. Because the Supreme Court already held that the City met
its initial burden in this case, only the second instance is at
issue.

1 a motion for summary judgment, the court must draw all reasonable
2 inferences in favor of the nonmoving party. Id. at 255.

3 **2. Evidentiary Issues**

4 Before reaching the merits of the cross motions for summary
5 judgment, the Court first addresses evidentiary issues raised by
6 both parties.

7 **a. Vanita Spaulding**

8 Plaintiffs object to the Second Declaration of Vanita
9 Spaulding, filed December 17, 2007. They argue that she is an
10 inappropriate expert because her testimony will not "assist the
11 trier of fact to understand the evidence or determine a fact in
12 issue," see Fed. R. Evid. 702, because it will create a "danger of
13 . . . confusion of the issues, . . . undue delay [and] waste of
14 time," Fed. R. Evid. 403, and because it lacks foundation, Fed. R.
15 Evid. 703. The Court agrees, and therefore strikes the
16 declaration.

17 The City offers the testimony of Vanita Spaulding as an
18 expert. She is the Managing Director of Trenwith Group LLC, where
19 her responsibilities "include oversight responsibility for the
20 Regional Valuation Group." (2nd Spaulding Decl., at ¶ 4.) She has
21 "substantial expertise regarding financial, market, business and
22 industry research and analysis," and serves as a consultant to
23 "business management, investment advisors, auditors, shareholders,
24 financial investors and potential investors for use in business and
25 litigation." (Id. at ¶¶ 5,6.) These entities use her input "in
26 making decisions that include, among many others, whether to invest
27 in a business, determining an appropriate purchase price for a
28 partial interest in a business, and making informed decisions

1 regarding whether it will be economically feasible for separate
2 segments of a business to operate profitably if required to
3 separate." (Id. at ¶ 6.) She has testified or been deposed
4 regarding these issues in several cases, but none relating to the
5 adult entertainment industry. (1st Spaulding Decl., May 31, 2007,
6 at Ex. 1, App. 3.)

7 The Second Spaulding Declaration states the following: Ms.
8 Spaulding visited the Alameda Books and Highland Books sites. She
9 observed their design and reviewed their schematic diagrams. She
10 reviewed their income statements from the years 2003-2006, which
11 show high profit margins. She considered the various categories of
12 revenues and expenses from their income statements, and allocated
13 them between, as relevant here, the bookstore portion and arcade
14 portions of the business. She concludes that based on an "analysis
15 of revenues and expenses generated and incurred by each segment of
16 the business," it would be "economically feasible" to separate the
17 arcade from the retail bookstore component.

18 Ms. Spaulding's conclusion lacks foundation. "What Ms.
19 Spaulding knows how to do - and Plaintiffs do not challenge this -
20 is to separately evaluate the profitability of" separate components
21 of a business." (Pls' Obj. 2nd Spaulding Decl., at 4.) However,
22 the question in this case is not whether the arcade portion of the
23 combination business is profitable. The question, more precisely,
24 is whether the arcade as a stand-alone business will continue to
25 exist once unmoored from the bookstore component. Alameda Books,
26 535 U.S. at 451 (purpose of the ordinance must be that the two
27 business will "split rather than [that one will] close" (Kennedy,
28 J., concurring)).

1 Ms. Spaulding does not claim to have any knowledge (much less
2 expert knowledge) of the adult entertainment industry. She does
3 not claim to have surveyed customers or interviewed business owners
4 to gain an understanding of consumer patterns. She therefore has
5 no basis to conclude that customers would be willing to visit a
6 stand-alone arcade. Instead, she simply "assume[s] no decline in
7 operating revenues of the arcade operations" as a separate entity
8 based upon the fact that it has been profitable when combined with
9 a bookstore. (2nd Spaulding Decl. ¶ 17.)

10 The current situation is thus different from a company with
11 two entirely separate components, such as a chain of gas stations
12 and a chain of grocery stores both run by the same central
13 management company. Ms. Spaulding's analysis provides support for
14 the conclusion that, given that the gas stations and grocery stores
15 exist independently, if they are financially viable when operated
16 by the same management company they are likely to be financially
17 viable when operated by separate companies. Her analysis does not
18 provide support, however, for the conclusion that a single business
19 with two intertwined pieces (such as a gas station/minimart
20 combination) could be separated. For that, Ms. Spaulding would
21 need expertise in more than the financials; she would need
22 expertise in consumer patterns, the reasons why and the ways in
23 which customers shop at that particular business.

24 The following analogy from a more familiar industry, offered
25 by Plaintiffs, is useful in explaining why Ms. Spaulding's
26 conclusion does not follow from her testimony: Consider a multi-
27 screen (non-adult) motion picture theater, the typical multi-cinema
28 in a building containing a half-dozen screens, with a central area

1 containing concessions. Nobody would dispute that the concession
2 stands at these theaters sell extremely expensive popcorn, candy,
3 soda, hot dogs, and other goods. Assume that a municipality adopts
4 a regulation requiring concession stands to operate more than 1,000
5 feet away from a theater complex.

6 Assume further that Ms. Spaulding performs her analysis,
7 tallying the costs and revenues from both the theater and the
8 concession stand, and determines that both components of the
9 business are profitable. Following the logic from her declaration,
10 the concession stand would be a viable stand-alone business.
11 However, customers generally buy concessions immediately before
12 entering a film. The cinema and concession elements have, in
13 effect, a symbiotic relationship. People are willing to pay
14 exorbitant prices for popcorn because, at least in part, the
15 convenience of being able to buy an item within feet of the theater
16 entrance outweighs the increased cost of that item. It does not
17 logically follow that customers would continue to purchase a \$7 bag
18 of popcorn if they had to go to an inconvenient location down the
19 block to do so. It may be possible that a stand-alone concession
20 stand would be an economically viable business, but Ms. Spaulding's
21 analysis of the financials of the combined business simply does not
22 provide a foundation upon which to so opine. For those reasons,
23 the Second Spaulding Declaration lacks foundation under Rule 703,
24 does not "assist the trier of fact" as required of expert testimony
25 under Rule 702, and could confuse the issues and cause undue delay
26 as proscribed by Rule 403. Accordingly, the Court strikes that
27 declaration.

28 **b. Rick Hinckley**

1 Plaintiffs proffer Rick Hinckley as an expert witness. Mr.
2 Hinckley owns an adult arcade installation business. He has been
3 involved in the installation of over 250 arcades since 1990, and
4 makes it his "business to stay abreast of the industry and" to
5 "closely follow industry trends." (Hinckley Decl. ¶ 16.) He
6 opines, based on his expertise and knowledge of the adult arcade
7 industry, that an arcade standing alone would not be viable. The
8 City moves to strike most of Mr. Hinckley's declaration on the
9 grounds that it lacks foundation, is speculative, is not relevant,
10 and is hearsay. The Court declines.

11 The City argues that Mr. Hinckley has no basis for his
12 conclusions that an "adult arcade would not be economically viable
13 standing alone," that it "would not attract any significant number
14 of customers," and that auditorium adult motion picture theaters
15 have "become all but extinct" because they are "perceived by the
16 public as 'seedy.'" (Hinckley Decl. ¶¶ 17, 18.) Mr. Hinckley
17 offers his testimony as an expert witness in the field of adult
18 entertainment. He is basing his opinion on his experiences with
19 many hundreds of adult arcades, every one of which is attached to a
20 retail store, and because of his experience and knowledge of the
21 customer trends in this industry. (Id. at ¶ 17.) The Court finds
22 that Mr. Hinckley's experience goes to the heart of this case -
23 whether customers would frequent a stand-alone arcade - and indeed
24 is precisely the type of knowledge that Ms. Spaulding lacks.⁹ This

25

26 ⁹ Contrary to the City's contention, Mr. Hinckley does not
27 need to provide financial data to back up his conclusions. It
28 would be difficult, if not impossible, to provide financial data
about stand-alone arcades because according to the undisputed
evidence in this case, no one has ever heard of one existing.

(continued...)

1 information is relevant because, as discussed, if the ordinance
2 reduces secondary effects by forcing businesses to close, then it
3 is unconstitutional. Finally, the fact that some of Mr. Hinckley's
4 information might be based on hearsay is, as expert testimony, of
5 no consequence. See Fed. R. Evid. 703 (bases of expert testimony
6 "need not be admissible in evidence").

7 **C. William Andrus**

8 William Andrus is an expert witness offered by Plaintiffs. He
9 is the Vice President of Beverly Books (the combination
10 bookstore/arcade involved in this case), has for twenty years been
11 "involved in the operation of dozens of adult book and video
12 stores," and presently oversees over thirty businesses similar to
13 Plaintiffs. (Andrus Decl. ¶¶ 5, 6.) He is trained as a lawyer, is
14 admitted to the bar in New York, and through his experience has
15 "become intimately familiar with all aspects of [adult] businesses
16 including the economics, legal issues, marketing, and customers'
17 responses and attitudes." (Id. ¶ 5.) Mr. Andrus has submitted a
18 declaration stating his opinion that if the arcade and bookstore
19 components are required to split the arcade would lose a
20 "dramatic[]" number of customers and the bookstore's sales would
21 drop "appreciably." (Id. at ¶¶ 12, 9.) He also states that he has
22 "never seen or heard of a business that existed only as an adult
23 arcade," and that a significant portion of the income generated by

24
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26 ⁹(...continued)
27 Moreover, Mr. Hinckley does not claim to be an expert in business
28 accounting. Rather, he claims an expertise in the practical
functioning of arcade-related businesses and a knowledge of
consumer tendencies in this area.

1 the arcade comes from customers previewing material that they then
2 purchase or rent from the retail store. (Id. at ¶ 13, 9, 10.)

3 The City objects to portions of this declaration for much the
4 same reason it objected to Mr. Hinckley's. For much the same
5 reasons, the Court rejects these objections. The testimony is
6 relevant as it relates to the economic viability of splitting the
7 combined bookstore/arcade because the ordinance's constitutionality
8 depends on it not substantially reducing speech by forcing the
9 separated businesses to close. As an expert, Mr. Andrus may rely
10 on hearsay and other inadmissible evidence in order to form his
11 conclusions. The Court further rejects the City's contention that
12 Mr. Andrus has no foundation for his conclusions. The Court finds
13 that as Vice President of the companies at issue in this case and
14 as someone who has worked for decades in the adult entertainment
15 industry, Mr. Andrus has a basis for his knowledge about the sales
16 and customer patterns at issue. If the City wished to challenge
17 some of his facts or to extract more detail, it had the opportunity
18 to depose him.

19 **d. Daniel Linz**

20 Because of the Court's conclusion that the ordinance violates
21 the First Amendment by disproportionately reducing speech, it need
22 not address the objections to the testimony of Mr. Linz, which
23 related solely to whether the ordinance would in fact reduce
24 secondary effects.

25 **e. Jeffrey Cancino**

26 Because of the Court's conclusion that the ordinance violates
27 the First Amendment by disproportionately reducing speech, it need
28 not address the objections to the testimony of Mr. Cancino, which

1 related solely to whether the ordinance would in fact reduce
2 secondary effects.

3 **3. Application**

4 As discussed supra, the City has already satisfied its initial
5 burden to provide a reasonable basis for concluding that the
6 combined bookstore/arcade business increases the presence of
7 undesirable secondary effects. Plaintiffs now bear the burden of
8 casting direct doubt on that rationale. The Court finds that
9 Plaintiffs have succeeded in casting such doubt and that the City
10 has failed to supplement the record in a way that would undermine
11 Plaintiffs' argument.

12 **a. Plaintiffs' Direct Doubt**

13 Plaintiffs have cast doubt on the City's rationale for the
14 ordinance by providing compelling evidence that stand-alone arcades
15 will not be economically viable. They have submitted the
16 declarations of two experts - Mr. Hinckley, who owns a company that
17 installs adult arcades, and Mr. Andrus, the Vice President of the
18 bookstore/arcade business at issue in this case - who attest that,
19 with their decades of experience in the industry, they have never
20 seen or heard of an arcade that is not attached to a retail
21 business. (Hinckley Decl. ¶ 17, Andrus Decl. ¶ 13.) This evidence
22 itself suggests that the stand-alone arcade would not be viable
23 economically because, logically, if it were, someone during the
24 history of the adult entertainment industry would have tried it.
25 It is no great stretch of logic to state that if a stand-alone
26 arcade were a profitable venture, one would expect our economic
27 system to have produced one. The fact that neither party is aware
28

1 of a single example of a stand-alone arcade is telling. Put
2 another way, the economics speak for themselves.

3 Mr. Hinckley and Mr. Andrus also provide expert testimony
4 suggesting two reasons why stand-alone arcades do not exist.
5 First, many customers who use arcades do so in order to aid in
6 their decisions to purchase or rent merchandise at the bookstore
7 because "an enormous number of DVDs can be previewed in the arcade
8 portion of business in a short period of time." (Hinckley Decl. ¶
9 18; see also Andrus Decl. ¶¶ 8-10.) Regardless of the amount of
10 income generated by the arcades, therefore, Plaintiffs' evidence
11 shows that a primary motivation for customers to use the arcades
12 would disappear without the presence of a connected retail store.

13 Second, it is the opinion of Mr. Andrus and Mr. Hinckley that
14 unlike adult retail businesses, many of which are designed to be
15 aesthetically appealing and which attempt to attract couples and
16 even women alone as customers, stand-alone arcades are perceived by
17 customers as "seedy," and would be unlikely to draw business on
18 their own. (Hinckley Decl. ¶ 18; Andrus Decl. ¶ 18.) It is for
19 this reason, in the opinion of Plaintiffs' experts, that "free-
20 standing adult theaters (i.e., auditorium-style theaters) nearly
21 vanished beginning as prerecorded home adult videotapes became more
22 widely available." (Hinckley Decl. ¶ 16; Andrus Decl. ¶ 18.)

23 As discussed, the City objects to this evidence as
24 "speculation and guess work." However, the Court finds that Mr.
25 Hinckley and Mr. Andrus, with their decades of experience owning
26 and operating the specific businesses at issue in this case and
27 their knowledge of the industry, have sufficient foundation to
28 testify that they are not aware of any stand-alone arcade ever

1 existing, and that arcades bring in business largely through
2 customers who are also using the retail component of a store. They
3 further have foundation to testify, through their expert knowledge
4 of the industry, as to their understanding of customer opinions of
5 arcades and adult cinema complexes. Unlike the cases relied upon
6 by Defendant, Plaintiffs' experts are not testifying about a
7 scientific process of causation. Cf. Guidroz-Brault v. Mo. Pac. R.
8 Co., 254 F.3d 825, 829 (9th Cir. 2001) (expert testimony regarding
9 whether train crew's failure to keep "a proper lookout" caused the
10 train's derailment needed further foundation); Reynolds v. County
11 of San Diego, 84 F.3d 1162, 1168-69 (9th Cir. 1996) (same,
12 regarding the physical movements leading up to a gunshot wound),
13 overruled on other grounds by Acri v. Crian Ass., Inc., 114 F.3d
14 999 (9th Cir. 1997). Instead, Plaintiffs' experts are testifying
15 as to their understanding of the industry. See, e.g., Sentry
16 Select Ins. Co. v. Royal Ins. Co. Of Am., 481 F.3d 1208, 1222 (9th
17 Cir. 2007) (noting that experts may testify as to their
18 understanding of an "industry generally"). Their experience is all
19 the foundation necessary.

20 Plaintiffs' evidence casts the requisite doubt here. The
21 City's rationale in passing the ordinance "must be that this
22 ordinance will cause two businesses to split rather than one to
23 close." Alameda Books, 535 U.S. at 451 (Kennedy, J., concurring).
24 Although the City satisfied its initial burden, Plaintiffs have
25 come forth with compelling evidence that stand-alone arcades are
26 not economically viable; indeed they do not and have never existed.
27 Because stand-alone arcades do not exist and are not a viable
28 model, it is implausible that the City reasonably believed that the

1 arcades could move rather than close, that, in other words, the
2 City had "some basis to think that its ordinance will suppress
3 secondary effects, but not also the speech associated with those
4 effects." Tollis, 505 F.3d at 939. Therefore, Plaintiffs'
5 evidence suggests that the City's intent in passing the ordinances
6 was to reduce secondary effects by closing arcades - impermissibly
7 "reducing speech in the same proportion." Alameda Books, 535 U.S.
8 at 449 (Kennedy, J., concurring).¹⁰

9 **b. City's Rebuttal**

10 The burden now shifts back to the City "to supplement the
11 record with evidence renewing support for a theory that justifies
12 its ordinance." Alameda Books, 535 U.S. at 439. The Court finds
13 that the City has failed in this regard.

14 The City's primary focus in supplementing the record is on
15 demonstrating that the ordinance does in fact reduce secondary
16 effects. However, that evidence does not address whether the
17 ordinance is designed, impermissibly, to reduce secondary effects
18 by reducing speech. The City makes three arguments in opposition
19 to Plaintiffs' contention that the ordinance unconstitutionally
20 reduces speech significantly. None, however, is convincing.

21 First, the City suggests that Plaintiffs cannot cast
22 sufficient doubt on the rationale for the ordinance because the
23 Supreme Court has already held that the City's burden is low, and
24 that it had a reasonable basis for passing the ordinance. This
25 argument confuses the first and third stage of the Supreme Court's

26

27 ¹⁰ Because Plaintiffs have cast direct doubt in this fashion,
28 the Court need not reach the alternate argument that the City's
ordinance will not in fact reduce secondary effects.

1 burden-shifting analysis. Courts must afford liberal deference to
2 the City's rationale only at the first stage. If Plaintiffs'
3 succeed in casting direct doubt, however, a City's burden to rebut
4 Plaintiffs' argument by supplementing the record is higher, and may
5 well include providing empirical evidence to support its position.
6 See Alameda Books, 535 U.S. at 439 (noting that the City may be
7 required to supplement its position with empirical data once
8 Plaintiffs provide "actual and convincing evidence . . . to the
9 contrary"). Accordingly, the City had not successfully met its
10 burden at the third stage simply by virtue of having met its burden
11 at the first.

12 Second, the City contends that it would in fact be
13 economically feasible to separate the combined adult businesses.
14 However, the City has submitted no admissible evidence to this
15 effect. Plaintiffs put forth evidence that stand-alone arcades are
16 not viable economically. Defendant now bears the burden to present
17 some evidence that arcades could survive on their own. The City
18 has not made this showing. Instead, the City relies on the Vanita
19 Spaulding's Second Declaration, which reviews the revenue and
20 expenses generated and incurred by the arcade and retail components
21 - an analysis with which no one disagrees. However, as already
22 discussed, her declaration is not admissible as expert testimony
23 regarding whether arcades could survive as stand-alone businesses
24 because she has not established a basis for having knowledge of the
25 adult entertainment industry. Her conclusion that arcades would
26 survive standing alone because they produce revenue when linked to
27 a retail store is an inference that simply does not follow.

28

1 While the City challenges Plaintiffs' experts contentions as
2 speculation, in fact it does not contest their most important
3 propositions: 1) no one is aware of a stand-alone arcade currently
4 in existence or ever having existed, and 2) arcades draw
5 significant revenue from those customers who also use the retail
6 component of these stores. The City contends that the fact that a
7 stand-alone arcade has never before existed is irrelevant. The
8 Court disagrees. Of course, that neither party is aware of a
9 stand-alone arcade in operation could also mean that, however
10 improbably, it could be a profitable model that has simply never
11 been tried. However, Plaintiffs need not prove that stand-alone
12 arcades are not and could not be viable. They need only provide
13 sufficient compelling evidence to cast direct doubt on the City's
14 motive in passing the ordinance at issue.

15 Plaintiffs have submitted expert testimony that such
16 businesses have never existed because they are not viable. That
17 evidence casts sufficient doubt to shift the burden back to the
18 City. The City has offered no relevant evidence to rebut
19 Plaintiffs' contention.

20 Third, and finally, Defendant argues that even if the arcades
21 close, the ordinance is constitutional because "[a]dult
22 entertainment is readily available nearly everywhere within the
23 City, at a cost comparable to or less than the cost of such
24 services as provided through an adult arcade." (Def. Opp'n Summ.
25 J. 24.) As evidence, the City has submitted a different
26 declaration by Vanita Spaulding documenting the multitude of
27 alternative avenues through which patrons can access pornography,
28 such as the internet, blackberries, and DVDs.

1 The Court finds that this reasoning comprises the heart of the
2 City's fundamental argument: The City, in the end, concedes that
3 its ordinance may force the arcade businesses to close, but
4 contends that these closures are of no consequence because patrons
5 have many other avenues through which to view adult entertainment.

6 The City's argument fails to identify the correct speaker, and
7 this mistake is fatal to its case. If the speakers at issue were
8 the patrons, this argument might have some force. However, the
9 speech of the patrons - protected though it is - is not the focus
10 of this lawsuit. Rather, Plaintiffs have brought this lawsuit on
11 behalf of themselves. As the Complaint puts it, Plaintiffs' allege
12 that "By prohibiting the operation of traditional adult bookstores
13 anywhere in the City of Los Angeles, the CITY has interfered with
14 plaintiffs' First Amendment right to provide the adult media
15 materials of its choice to its customers." (Compl. ¶ 61 (emphasis
16 added).) It is thus the First Amendment rights of the business-
17 owners, not the rights of the customers, that are at issue in this
18 litigation.

19 There can be no doubt that the Constitution protects the
20 business-owners' rights to their speech - disseminating the adult
21 material of their choice - in this context. See, e.g., Illusions-
22 Dallas Private Club v. Steen, 482 F.3d 299, 307 (5th Cir. 2007)
23 (holding that an ordinance prohibiting sexually-oriented businesses
24 from serving alcohol in a "dry" political subdivision implicated
25 the First Amendment because it restricts the sexually-oriented
26 businesses "ability to serve alcohol"); Ctr. for Fair Pub. Policy,
27 336 F.3d at 1165 (characterizing sexually-oriented businesses such
28 as bookstore and video stores as those "protected by the First

1 Amendment"); Young v. City of Simi Valley, 216 F.3d 807, 818 (9th
2 Cir. 2000) (holding that the First Amendment analysis required a
3 consideration of whether an ordinance "will 'compromise recognized
4 First Amendment protections' of those people who wish to operate
5 adult businesses in Simi Valley" (emphasis added)).

6 That patrons may access adult material through alternative
7 fora is thus, while relevant to the speech of the patrons,
8 irrelevant to the speech of the business-owners. It could scarcely
9 be otherwise. If Defendant's argument were taken to its logical
10 extreme, then a municipality could ban all adult establishments
11 because the material is readily available on the internet. A city
12 could ban printed newspapers for the same reason. As Defendant
13 conceded at oral argument, a city could even ban auditorium movies
14 theaters because, after all, they can be accessed on demand from
15 your living room. Such is clearly not the law.¹¹

16 At oral argument on these motions, Defendant insisted that the
17 ordinance sufficiently protects the rights of the business-owner

18
19 ¹¹ For this reason, Defendant's reliance on this Court's prior
20 2005 Order holding that "adult arcades are not 'an important and
21 distinct medium of expression' under Ladue v. Gilleo, 512 U.S. 43
22 (1994)," to minimize the relevance of any arcade closures is
23 misplaced. (2005 Order at 38.) Defendant confuses the type of
24 speech with the speaker. City of Ladue held that a broad municipal
25 prohibition on residential signs violated the First Amendment
26 because such expression was "an important and distinct medium."
27 512 U.S. at 55. The question before the Court in this case,
28 however, is not whether adult arcades are themselves a particular
medium of speech entitled to special protection, or whether a
patron's First Amendment right to communicate via an adult arcade
is preserved so long as he can view the same material via the
internet. The issue before the Court, rather, revolves around the
business-owner. If arcades shut down, the business-owner's First
Amendment rights to disseminate the information of his choice are
shut off completely. An ordinance may not force the closure of the
arcades, therefore, regardless of whether arcades are a specially-
protected medium of speech, because the closures eliminate the
speech of the arcade's owner.

1 because even if stand-alone arcades are forced to close, business-
2 owners may distribute and sell the adult entertainment of their
3 choice using another business model. They may, for example, attach
4 their arcade to a Laundromat, a hotel, or a McDonald's. Likewise,
5 urges Defendant, Plaintiffs may start an online business, and
6 exercise their free speech rights over the internet.

7 The Court rejects this contention ab initio. It would be
8 unprecedented and unsupported by First Amendment jurisprudence to
9 allow a municipality to force the owner of a legal business to, in
10 essence, start a new business on a completely different business
11 model in order to exercise his free speech rights. Unlike the
12 ordinance at issue in Tollis, which required businesses simply to
13 relocate, see 505 F.3d at 940, or Gammoh, which imposed a "manner"
14 regulation - requiring a minimum distance between dancers and
15 patrons, see 395 F.3d at 1127, Defendant here suggests that
16 Plaintiffs embark on an entirely new business enterprise. If this
17 argument were correct then municipalities could ban any business
18 that distributes material also readily available online.
19 Municipalities could ban any free-standing business as long as that
20 business could survive parasitically if attached to some other
21 business with significant foot traffic.

22 Such a burden is more than the First Amendment requires
23 business owners to bear. Justice Kennedy could not have been more
24 explicit that the motivation behind a valid ordinance "must be that
25 this ordinance will cause two businesses to split rather than one
26 to close." Alameda Books, 535 U.S. at 451. Justice Kennedy did
27 not state that an ordinance would pass muster so long as a business
28 owner could start an entirely new business that combined the first

1 business with a Laundromat, or as long as he could firm up his web
2 skills and distribute his speech online.

3 Indeed, in applying intermediate scrutiny, courts have
4 consistently held that the requirement that an ordinance leave open
5 "alternative avenues of communication" means not that cities should
6 guide all interested patrons to adult websites, but rather that
7 "the displaced business [must] be given 'a reasonable opportunity
8 to open and operate.'" Tollis, 505 F.3d at 939-40 (quoting Renton,
9 475 U.S. at 53-54) (focusing, in analyzing a statute requiring the
10 relocation of adult businesses into industrial areas, on whether
11 the municipality had provided a "suitable number of relocation
12 sites" for the businesses, not on whether the business-owners or
13 the patrons could find alternate means of distributing or accessing
14 the protected material). In short, Defendant has not imposed a
15 reasonable time, place, or manner restriction; it has asked
16 Plaintiffs to find a new method of speaking. Such a restriction
17 fails to pass constitutional muster.

18 In conclusion, Plaintiffs have cast direct doubt on
19 Defendant's rationale in passing the ordinance by submitting
20 compelling evidence that stand-alone arcades are not and have never
21 been economically viable. They have thus demonstrated that the
22 ordinance will reduce secondary effects only by, impermissibly,
23 reducing speech in the same proportion. Defendant has failed to
24 rebut Plaintiff's showing by supplementing the record. Indeed, the
25 City appears to agree that the arcades may well close, but contends
26 that such closures will not reduce speech. However, the City's
27 attempt at rebuttal fails as a matter of law because the First
28 Amendment has never allowed municipalities to regulate protected

1 speech by forcing a business-owner to embark on an entirely new
2 business.

3 As such, Plaintiffs have presented undisputed evidence that
4 Defendants did not have "some basis to assume [the] three
5 propositions" required by "Justice Kennedy's construct" from
6 Alameda Books. Id. at 939. First, the City could not have
7 reasonably assumed that "this ordinance will cause two businesses
8 to split rather than one to close" because the undisputed evidence
9 shows that stand-alone arcades have never existed and are not
10 economically viable. Second, by forcing the arcades to close, the
11 quantity of speech will be "substantially" diminished. Id. Third,
12 "total secondary effects [may] be significantly reduced," but only
13 by unconstitutionally reducing speech in the same proportion. Id.

14 Accordingly, the Court finds that Defendant cannot, as a
15 matter of law, succeed on its ultimate burden to demonstrate that
16 section 12.70(C) furthers a substantial government interest
17 (because it reduces secondary effects only by reducing speech in
18 the same proportion), or to show that it leaves open adequate
19 alternative avenues of communication (because stand-alone arcades
20 are not viable economically). There is therefore no question of
21 material fact but that Los Angeles Municipal Code section 12.70(C)
22 cannot withstand intermediate scrutiny, and that it violates the
23 First Amendment.¹²

24 _____
25 ¹² It is possible that in fact, strict scrutiny is the
26 appropriate level of review to apply to this ordinance. The case
27 law on this question is ambiguous. The Alameda Books plurality
28 suggested that if an ordinance failed Justice Kennedy's
proportionality test, it would have effectively banned the speech
at issue and should thus be subjected to strict, rather than
intermediate, scrutiny. See Alameda Books, 535 U.S. at 443. In
(continued...)

1 **C. Bifurcation**

2 Plaintiffs further move to bifurcate the issue of whether the
3 City has provided a constitutionally adequate number of alternate
4 locations where Plaintiffs can relocate. Because Plaintiffs have
5 succeeded in casting doubt on the rationale for the ordinance by
6 showing that a stand-alone arcade will not be economically viable,
7 and the City has failed to supplement the record with relevant
8 evidence in rebuttal, the Court need not reach the relocation
9 issue, and therefore denies the motion as moot.

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16 ¹²(...continued)
17 other words, the plurality appears to read the proportionality test
18 as a means of determining whether an ordinance constitutes a ban,
19 and therefore whether it triggers strict scrutiny. The plurality
20 declined to resolve this issue with respect to the instant
21 ordinance because the Ninth Circuit had held that section 12.70(C)
22 did not constitute a ban, and Plaintiffs had not petitioned the
23 Supreme Court for review on that issue. However, the parties have
24 provided significant new evidence and briefing since the Ninth
25 Circuit's opinion, and this Court could well rule that the
26 ordinance is indeed a ban in effect if not in name.

27 On the other hand, Justice Kennedy's concurrence seems to
28 suggest that because section 12.70(C) is not, as a prima facie
matter, intended to suppress speech, intermediate scrutiny is
appropriate: "The ordinance may be a covert attack on speech, but
we should not presume it to be so. In the language of our First
Amendment doctrine it calls for intermediate and not strict
scrutiny. . . ." Id. at 447 (Kennedy, J., concurring). This
language implies that the proportionality test is a part of
intermediate scrutiny, rather than a trigger for strict scrutiny.
The Ninth Circuit has interpreted the proportionality test in this
fashion as well. See Tollis Inc. v. County of San Diego, 505 F.3d
935, 939-40 (9th Cir. 2007). The Court need not determine whether
strict scrutiny need be applied because the ordinance fails the
more lenient intermediate scrutiny in any case.

1 **III. CONCLUSION**

2 Based on the foregoing analysis, the Court GRANTS Plaintiffs'
3 motion for summary judgment, DENIES Plaintiffs' motion to
4 bifurcate, and DENIES Defendant's motion for summary judgment.

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6 IT IS SO ORDERED.

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9 Dated: July 16, 2008

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DEAN D. PREGERSON
United States District Judge