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THE ARC MERCER, INC.,	:	
Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY LAW DIVISION
v.	:	
MEDIANEWS GROUP, THE TRENTONIAN, and L.A. PARKER,	:	DOCKET NO. MER-L-000168-23
Defendants.	:	CIVIL ACTION

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 4:6-2(e)

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Defendants respectfully submit this reply brief in further support of their motion to dismiss pursuant to Rule 4:6-2(e).

INTRODUCTION

As Defendants demonstrated in their opening brief, the Arc's effort to deploy the LAD as a weapon against criticism of the organization's actions in newspaper columns is inconsistent with the plain language of the statute as well as the federal and state Constitutions. Since Defendants filed their motion to dismiss, the unconstitutionality of applying the LAD to their speech has only become more apparent. The U.S. Supreme Court's recent decision in 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2023 U.S. LEXIS 2794 (June 30, 2023), made crystal clear that the First Amendment does not permit the application of anti-discrimination laws to punish pure speech under any circumstances. Thus, even if the Arc could establish that Defendants' speech is squarely within the scope of the LAD—and its present allegations fall far short of that mark—dismissal of the Complaint with prejudice would still be required on constitutional grounds. In the words of the Supreme Court, "[w]hen a state public accommodations law and the Constitution collide, there can be no question which must prevail." Id. at *30.

ARGUMENT

I. PLAINTIFF HAS FAILED TO PLEAD FACTS SUFFICIENT TO STATE A CLAIM UNDER THE LAW AGAINST DISCRIMINATION.

As Defendants noted in their opening brief ("Br."), this Court need not reach their constitutional argument if it concludes that the Arc fails to state a claim under the LAD as a matter of statutory interpretation. Br. at 9-10. There is sound reason to do so.

First, as Defendants explained, the allegations in the Complaint do not give rise to a *reasonable* inference of intent to discriminate on the basis of disability. Id. at 5-7. Not a single

word in the Columns expressed a discriminatory viewpoint toward the disabled individuals who receive services from the Arc. Compl. Exs. A-D. Instead, as the opposition brief ("Opp.") confirms, the sole basis for Plaintiff's claim of discriminatory intent is that the Columns did not *also* criticize other organizations that held events at the Stone Terrace. Opp. at 7-10.

The Arc has cited no authority for the notion that being "singled out" for negative media coverage, id. at 8, without more, supports an inference of discriminatory motive under the LAD. If Plaintiff's interpretation of the LAD were correct, a claim could be brought whenever a newspaper criticized a member of a protected class, so long as others outside the class who engaged in the same conduct were not subject to negative coverage. Indeed, the Arc's theory would seem to give it grounds to sue over *any* criticism, as it claims to be "the *only* agency to provide premier transportation and health care services to the disabled in Mercer County." Compl. ¶ 6 (emphasis added). The LAD should not be applied to produce such an absurd result.

Courts have long recognized that a publisher's exercise of editorial judgment will inevitably result in decisions that others view as selective or uneven. Journalists are "particularly vulnerable" to such claims because "even principled exclusions rooted in sound journalistic judgment" can be attacked as biased or discriminatory. See Arons v. New Jersey Network, 342 N.J. Super. 168, 176 (App. Div. 2001) (rejecting claim that public television network unfairly covered plaintiff's gubernatorial campaign) (quoting Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673-674 (1998)). Accordingly, courts are exceedingly reluctant to second-guess a publisher's editorial choices. See Miami Herald Publ'g v. Tornillo, 418 U.S. 241, 258 (1974). There is no expectation that a newspaper provide equal coverage of the activities of every member of the community. Id. For the same reason, the Arc cannot maintain an LAD claim simply because it feels singled out by The Trentonian's coverage.

Second, the Arc has failed to rebut Defendants' argument that the Columns at issue cannot be construed to incite people to refuse to "do business with" the Arc within the meaning of the statute. Br. at 7-9; see also N.J.S.A. § 10:5-12(l) (making it unlawful for "any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of . . . disability"); N.J.S.A. § 10:5-12(n) (making it unlawful "to aid, abet, incite, compel, coerce, or induce" a violation of subsection (l), or "to attempt, or to conspire to do so"). The Columns did not call for any action against the Arc other than urging the three local mayors being honored at the organization's fundraising gala to not attend.[1] Compl. Exs. A-D. Discouraging people from attending a charity gala is not prohibited by the plain language of the LAD because, as Defendants set forth in their opening brief, subsections (l) and (n) encompass only the refusal to engage in *commercial* transactions. Br. at 7-9.

Nonetheless, citing the LAD's purpose of eradicating the "cancer" of discrimination, the Arc argues that a liberal reading of the statute compels the conclusion that subsection (l) applies outside the context of commercial transactions. Opp. at 10. It is one thing to interpret the statute liberally and another to disregard its terms entirely. Sashihara v. Nobel Learning Cmties., Inc., 461 N.J. Super. 195, 204 (App. Div. 2019) (courts should apply ordinary meaning of provisions of LAD "unless there is a clear indication otherwise"). As Defendants demonstrated in their opening brief, New Jersey courts have uniformly applied subsections (l) and (n) *only* in

[1] While the Arc claims that the Columns sought to induce "others not to do business with the Arc" and "not make charitable contributions to the Arc," Compl. ¶ 25, the Court need not credit allegations in the Complaint that contradict what the Columns actually said. See Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super 458, 482 (App. Div. 2015).

situations involving the refusal to participate in a commercial exchange of some kind.[2] Br. at 7-8 (collecting cases).

Unable to point to any case law in support of its expansive reading of the LAD, the Arc resorts instead to dubious methods of statutory interpretation. It first argues that the phrase "provide goods, services or information to" in subsection (l) would have no independent meaning unless it is read to encompass charitable donations in addition to commercial transactions. Opp. at 11 (arguing that "one may 'provide' such items by voluntary service, donation, gift, or devise"). In context, however, the phrase "provide goods, services or information to" more plausibly refers to commercial transactions not covered by the language that precedes it—"buy from, sell to, lease from or to, license, contract with, or trade with"—such as exchanging services for services. The Arc's interpretation runs counter to the "well established principle of statutory construction" that the "meaning of a word can be controlled by surrounding words." Gilhooley v. Cty. of Union, 164 N.J. 533, 542 (2000); see also Whateley v. Leonia Bd. of Educ., 141 N.J. Super. 476, 480 (Super. Ct. 1976) (invoking "doctrine of *noscitur a sociis*" to reject argument that LAD's prohibition of discrimination based on "ancestry" includes "discrimination based upon specific family relationships between individuals"). There is no indication that the Legislature intended to "dramatically expand the liability of private individuals beyond its current bounds" in this way. Perez v. Zagami, LLC, 218 N.J. 202, 216 (2014) (rejecting proposed statutory interpretation on that basis).

The Arc also relies on interpretive sleight-of-hand to argue that the phrase "otherwise do business with" in subsection (l) extends "well beyond strictly commercial transactions" and

[2] Oasis Therapeutic Life Centers, Inc. v. Wade, 457 N.J. Super. 218 (App. Div. 2018), is not to the contrary. See Opp. at 12-13. In that case, the charity's LAD claim was based on interference with a pending contract to purchase real estate—indisputably a commercial transaction.

includes "supporters of Arc who attend its fundraisers." Opp. at 11-12. Plaintiff first notes, citing the American Heritage Dictionary, that the word "business" can sometimes mean "patronage." Id. at 11. It then asserts that "patronage" means "support from a patron," and a "patron" is "one who supports, protects, or champions someone or something." Id. at 12. This logic falls apart, however, upon review of the dictionary definitions themselves. Even in the current edition of Plaintiff's preferred dictionary, the use of the word "patronage" as a synonym for "business" has a strictly commercial connotation. See https://ahdictionary.com/word/search.html?q=business (defining "business" as "[c]ommercial dealings; patronage: *took her business to a trustworthy salesperson*"); https://ahdictionary.com/word/search.html?q=patronage (defining "patronage" as "[t]he trade given to a commercial establishment by its customers: *Shopkeepers thanked Christmas shoppers for their patronage*"); https://ahdictionary.com/word/search.html?q=patron (defining "patron" as "[a] customer, especially a regular customer").

Finally, the Arc devotes several paragraphs to attempting to refute an argument never raised in the motion to dismiss: that the LAD somehow excludes non-profit organizations from protection under subsection (1). Opp. at 10-11. Defendants do not contend that non-profit organizations are incapable of engaging in commercial transactions, but rather that the Columns did not interfere with any commercial transaction. Thus, it is irrelevant that the Arc sometimes engages in commercial activities, such as entering contracts with community partners, Opp. at 12, because nothing in the Columns can be read to interfere with those activities.

Because the allegations do not give rise to a reasonable inference of discriminatory intent or interference with a commercial exchange, the Complaint should be dismissed.

II. IMPOSING LIABILITY UNDER THE LAW AGAINST DISCRIMINATION BASED ON THE COLUMNS WOULD BE UNCONSTITUTIONAL.

As Defendants set forth in their opening brief, the free speech provisions of the federal and state Constitutions also foreclose liability under the LAD based on the Columns. Br. at 9-13. Just last month, that conclusion was further reinforced by the Supreme Court's decision in 303 Creative LLC v. Elenis, which invalidated on First Amendment grounds the application of Colorado's public accommodations law to a wedding website designer. In that case, the Court found that the wedding websites qualified as "pure speech," and that compelling the plaintiff to design websites for same-sex marriages against her beliefs was unconstitutional. 2023 U.S. LEXIS 2794, at *23, *44. The Court recognized that "Colorado and other States are generally free to apply their public accommodations laws, including their provisions protecting gay persons, to a vast array of businesses," id. at *29, but explained that States cannot use those laws "to deny speakers the right to choose the content of their own messages," id. at *30 (cleaned up). That is precisely the outcome the Arc seeks to obtain here; it asks this Court not only to punish Defendants for publishing Columns critical of Plaintiff, but also to enjoin The Trentonian from publishing similar views in the future. See Compl. at 10.

In its opposition, the Arc appears to argue that its LAD claims do not implicate Defendants' speech, but rather the "secondary effect" ostensibly caused by their speech, that is, "inciting others, or at least attempting to incite others, not to do business with Plaintiff." Opp. at 16. That argument is impossible to reconcile with 303 Creative or the long line of cases that came before it. The "printed word" is undoubtedly protected speech, and "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers

his speech sensible and well intentioned or deeply misguided and likely to cause anguish or incalculable grief." 303 Creative, 2023 U.S. LEXIS 2794, at *22, *24 (cleaned up). Thus, even if Defendants had published the Columns out of animus toward people with disabilities—a theory that is wholly unsupported by the Columns themselves or any of Plaintiffs' allegations—that would not justify imposing liability on them under the LAD. Id. at *30.

The Arc's reliance on Oasis Therapeutic Life Centers to counter Defendants' constitutional argument, Opp. at 14, is misplaced. The defendants in that case engaged in conduct, not just speech, to interfere with the plaintiff's real estate transaction—for example, they made a sham offer for the property, allowed their animals to trespass on the property, and constructed a fence across a disputed easement. 457 N.J. Super at 224-26. The Columns, by contrast, are quintessentially speech, which entitles them to maximum protection under the First Amendment. See 303 Creative, 2023 U.S. LEXIS 2794, at *23-24. In any event, the U.S. Supreme Court's recent decision in 303 Creative abrogates any lower court decisions that would permit liability under similar circumstances.

Accordingly, to the extent this Court concludes that the plain language of the LAD applies to the Columns, or that Plaintiff might be able to remedy the statutory deficiencies in its claim by re-pleading, it should nonetheless dismiss the Complaint with prejudice. There is no way to plead around the fundamental constitutional principles at stake here.

CONCLUSION

For the foregoing reasons, and those stated in their opening brief, Defendants respectfully request that the Court grant their motion and dismiss all claims against them with prejudice.

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Respectfully submitted,

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