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KING COUNTY
SUPERIOR COURT CLERK
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CASE #: 20-2-07428-4 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WASHINGTON LEAGUE FOR INCREASED
TRANSPARENCY AND ETHICS, a
Washington non-profit corporation; JOHN
DOE and JANE DOE 1-1,000,

Plaintiffs,

v.

FOX CORPORATION, a Delaware
corporation; FOX NEWS NETWORK, I.I.C, a
Delaware corporation d/b/a FOX NEWS
CHANNEL; FOX BUSINESS NETWORK, a
for profit company d/b/a FOX BUSINESS;
JOHN MOE and JANE MOE, 1-100

Defendants.

NO. 20-2-07428-4 SEA

ORDER GRANTING MOTION TO DISMISS

THIS MATTER came before the Court on the Fox Defendants' Motion to Dismiss. The Court, having considered the following pleadings and records in this matter, including:

1. Fox Defendants' Motion to Dismiss First Amended Complaint;
2. WASHLITE's Response to Motion to Dismiss;
3. Fox Defendants' Reply in Support of Motion to Dismiss;
4. Amici Curiae Brief of NCTA – The Internet & Television Association and the Reporters Committee for Freedom of the Press, and
5. WASHLITE's Response to Amici Curiae Brief,

1 and deeming itself fully advised, now makes the following findings and conclusions:

2
3 1. Plaintiffs are the Washington League for Increased Transparency & Ethics, a
4 Washington non-profit corporation and John and Jane Does 1 through 1,000 (representatives of
5 consumers of cable television services). Plaintiffs are hereinafter referred to as WASHLITE.

6 2. Defendants are Fox Corporation, Fox News Network, Fox Business Network and
7 Jane and Jane Moes 1 through 100 (other alleged companies owned by Fox). Defendants are
8 hereinafter referred to as "Fox." Fox is an international media corporation which, among other
9 things, provides programming for the Fox News Channel and the Fox Business Channel.

10 3. On April 15, 2020, WASHLITE filed a first amended complaint alleging that Fox
11 violated the Consumer Protection Act ("CPA"), RCW 19.86.090. The complaint alleges Fox
12 programs "purport to present news stories of the day interspersed with the opinion of the television
13 host(s) and/or guests appearing on the program." First Amended Complaint at 8. The complaint
14 alleges that in February and March 2020, hosts and guests on Fox's programs falsely described the
15 coronavirus as a "hoax" and falsely minimized the threat of the coronavirus and COVID-19.
16 According to WASHLITE, "[t]hese representations were deceptive because they caused consumers
17 to fail to take appropriate action to protect themselves and others from the disease, mitigate its
18 spread, and contributed to a public health crisis and a subsequent state wide shut down causing
19 damage to businesses and the loss of employment by persons located in Washington State." Id. at
20 29.

21 4. By way of relief, WASHLITE seek an order enjoining Fox from televising any
22 misinformation regarding COVID-19, an order directing Fox to issue specific retractions of every
23 false and/or misleading statement, and treble damages.

1 5. On April 23, 2020, Fox filed a motion to dismiss, citing the First Amendment. The
2 applicable court rule was not cited in the opening brief, and Fox subsequently clarified that the
3 motion is brought under CR 12(b)(6).

4 6. In its motion to dismiss, Fox disputes the accuracy of the statements allegedly made
5 by Fox hosts and guests and has provided transcripts from some of the programs discussed in the
6 first amended complaint. However, under CR 12(b)(6), a plaintiff's factual allegations are presumed
7 true, and the court may grant dismissal only if it appears beyond doubt that the plaintiff can prove
8 no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. For purposes
9 of this motion, this Court presumes the allegations in the first amended complaint are true, and the
10 Court has not considered the documents attached as appendices to Fox's motion.

11 7. On May 18, 2020, Amici Curiae NCTA The Internet & Television Association and
12 the Reporters Committee for Freedom of the Press filed an amici curiae brief in which they joined
13 Fox's motion to dismiss.

14 8. Fox argues that its commentary on the coronavirus is protected under the First
15 Amendment because it constitutes core political speech on a matter of public concern. The United
16 States Supreme Court has recognized that speech on matters of public concern is at the heart of the
17 First Amendment's protection. Snyder v. Phelps, 562 U.S. 443, 451–52 (2011). Speech deals with
18 matters of public concern when it can “be fairly considered as relating to any matter of political,
19 social, or other concern to the community.” Id. Speech on public issues occupies the “highest rung
20 of the hierarchy of First Amendment values,” and is entitled to special protection. Connick v. Myers,
21 461 U.S. 138, 145 (1983).

22 9. WASHLITE does not dispute that the speech at issue in this case involves a matter
23 of great public importance. Instead, it argues that Fox, as a cable programmer, does not have the
24 same First Amendment rights accorded to newspapers and broadcast television stations. According
25 to WASHLITE, “cable programmers do not have First Amendment rights on the cable medium”

1 and, therefore, Fox “does not have First Amendment protections on the cable medium.”
2 WASHLITE Response at 11 and 18.

3 10. These assertions do not hold up to scrutiny. Over 25 years ago, the United States
4 Supreme Court held, “There can be no disagreement on an initial premise: Cable programmers and
5 cable operators engage in and transmit speech, and they are entitled to the protection of the speech
6 and press provisions of the First Amendment.” Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622,
7 636 (1994). The Court observed that, “[t]hrough ‘original programming or by exercising editorial
8 discretion over which stations or programs to include in its repertoire,’ cable programmers and
9 operators ‘see[k] to communicate messages on a wide variety of topics and in a wide variety of
10 formats.’” Id.

11 11. The case primarily relied upon by WASHLITE, Denver Area Educ. Telcoms.
12 Consortium v. FCC, 518 U.S. 727, 812-826 (1996), does not stand for the notion that providers of
13 cable news programs lack First Amendment rights. The Denver decision held that a statute
14 authorizing cable operators to refuse to carry indecent programming on leased access channels did
15 not violate the First Amendment. 518 U.S. at 737-53 (plurality opinion); id. at 819-31 (Thomas, J,
16 concurring in the judgment in part and dissenting in part). In the opinion, the Court continued to
17 acknowledge the existence of “the First Amendment interests of cable operators and other
18 programmers.” Id. at 743. WASHLITE’s attempt to distinguish cable programmers from other
19 media providers is not supported by the relevant caselaw.

20 12. In its briefing, WASHLITE also argues the First Amendment does not apply because
21 “there is no First Amendment right to lie.” Response to Amici Curiae Brief at 5. The law on this
22 issue is more nuanced than suggested by WASHLITE.

23 13. In United States v. Alvarez, 567 U.S. 709 (2012), the United States Supreme Court
24 held that the Stolen Valor Act, which made it a crime to falsely claim to be a Congressional Medal
25 of Honor recipient, was unconstitutional under the First Amendment. In his plurality opinion, Justice

1 Kennedy explained, “Absent from those few categories where the law allows content-based
2 regulation of speech is any general exception to the First Amendment for false statements. This
3 comports with the common understanding that some false statements are inevitable if there is to be
4 an open and vigorous expression of views in public and private conversation, expression the First
5 Amendment seeks to guarantee.” Id. at 718.

6 14. In Alvarez, Justice Kennedy in his plurality opinion and Justice Breyer in his
7 concurrence set forth examples of where narrowly tailored statutes properly allowed for civil claims
8 or criminal prosecution based upon falsehoods. For example, Justice Kennedy noted that “[e]ven
9 when considering some instances of defamation and fraud, moreover, the Court has been careful to
10 instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The
11 statement must be a knowing or reckless falsehood.” 567 U.S. at 719.

12 15. The speech in this case involves matters of public concern that is at the heart of the
13 First Amendment's protection, and WASHINGTON does not explain how its CPA claim in this case
14 might fall under the few categories identified in Alvarez. Washington courts have previously
15 rejected attempts to use the CPA to punish speech made by the media. In Fid. Mort. Corp. v. Seattle
16 Times Co., 131 Wn. App. 462, 128 P.3d 621 (2005), the Court of Appeals upheld the trial court's
17 dismissal of a CPA claim against the Seattle Times based upon an allegedly false and deceptive
18 mortgage rate chart published in the newspaper. In doing so, the court held “the quarterly rate chart
19 is not paid advertising. It is a news article, and as such it is not published ‘in the conduct of any trade
20 or commerce.’ It does not fall within those activities governed by RCW 19.86.020.” Id. at 468.

21 16. In many of the United States Supreme Court's seminal First Amendment decisions,
22 the motives for seeking to curtail or prohibit speech were understandable and could be considered
23 righteous. Yet, as the Supreme Court recognized, “If there is a bedrock principle underlying the
24 First Amendment, it is that the government may not prohibit the expression of an idea simply because
25 society finds the idea itself offensive or disagreeable.” Texas v. Johnson, 491 U.S. 397, 414 (1989).

1 WASHLITE's professed goal in this lawsuit - to ensure that the public receives accurate information
2 about the coronavirus and COVID-19 - is laudable. However, the means employed here, a CPA
3 claim against a cable news channel, runs afoul of the protections of the First Amendment.

4 17. This Court concludes that WASHLITE's CPA claim against Fox is barred under the
5 First Amendment. Fox's Motion to Dismiss is GRANTED.

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7 Dated this _____ day of _____, 2020.
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10 HONORABLE BRIAN MCDONALD
11 Judge of the Superior Court
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King County Superior Court
Judicial Electronic Signature Page

Case Number: 20-2-07428-4
Case Title: WASHINGTON LEAGUE FOR INCREASED TRANSPARENCY
&apm; ETHICS VS FOX CORP ET AL
Document Title: ORDER

Signed by: Brian McDonald
Date: 5/27/2020 9:51:24 AM

A rectangular box containing a handwritten signature in black ink that reads "Brian McDonald".

Judge/Commissioner: Brian McDonald

This document is signed in accordance with the provisions in GR 30.

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