



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Motion for Summary Judgment, Memorandum of Points and Authorities, and all attachments was served through the Electronic Case Filing System January 20, 2006 to

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/s/ Jonathan L. Katz  
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

LARRY W. BRYANT

Plaintiff,

v.

DONALD H. RUMSFELD, et al.

Defendants.

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:  
:  
:  
: Civ. No. 04-CV-01125-CKK  
: Civ. No. 05-CV-64-CKK  
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**PLAINTIFF’S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE**

Pursuant to the governing rules, Plaintiff presents this Statement of Material Facts as to which there is no genuine issue, in support of his summary judgment motion:

1. For purposes of the liability phase of this litigation, Defendants stipulate that the only legal basis on which Defendants will contend that Plaintiff’s submissions of paid advertisements were unacceptable for publication (assuming submission of a proper request) is Department of Defense Instruction (“DODI”) 5120.4 and its implementing regulations. Defendants’ Stipulation, Civ. No. 05-CV-64-CKK, Dkt. 18 (Aug. 5, 2005).

2. DODI 5120.4, listed in ¶ 1, *supra*, can be found at <http://www.afnews.af.mil/products/primer/dodi51204.pdf>.

3. In June 2003, Plaintiff submitted a paid advertisement to the *Pentagram* newspaper entitled “Blow the Whistle on Bush’s ‘Gulf of Persia’ Resolution.” Complaint at ¶ 7, Civ. No. 04-CV-01125-CKK; Answer at ¶ 7.

4. The contents of the paid advertisement described in ¶ 3, *supra*, are correctly shown in the Complaint at ¶ 7. Civ. No. 04-CV-01125-CKK. Complaint at ¶ 7; Answer at ¶ 7.

5. Defendants Rumsfeld and the Army Secretary refused to print Plaintiff’s paid advertisement described in ¶ 3, *supra*. Complaint at ¶ 7; Answer at ¶ 7.

6. In June 2003, Plaintiff submitted a written request to Army Colonel Christopher G. Essig, to reverse the rejection of Plaintiff's paid advertisement described in ¶ 3, *supra*. Complaint at ¶ .8; Answer at ¶ 8, . Civ. No. 04-CV-01125-CKK.

7. In June 2003, Col. Christopher G. Essig, replied to Plaintiff, and Col. Essig's response is shown at the Complaint at ¶ .9 in Civ. No. 04-CV-01125-CKK. Complaint at ¶ .9 and Answer at ¶ 9

8. In Civ. No. 05-CV-64-CKK, the Complaint, correctly shows the text of Plaintiff's paid advertisements entitled (a) "Blow the Whistle on Iraqnam's Battle-of-Baghdad Cover-Up!," Complaint at ¶ 12; (b) "Blow the Whistle on ALL Atrocities at Abu Ghraib!," Complaint at ¶ 13, (c) "Blow the Whistle on the Army-CIA McCarthy Saga!," Complaint at ¶ 14, (d) "Join the Revolt Against the 'Feres Doctrine!'," Complaint at ¶ 15, (e) "Blow the Whistle on the Military's Psychiatric Retaliation Against Whistleblowers!," Complaint at ¶ 16, and (f) "Resist the Government's Drafty Spin!," Complaint at ¶ 17.

9. Defendants rejected publication of Plaintiff's paid advertisements listed in ¶¶ 3 and 8, *supra*,

9. For purposes of the liability phase of this litigation, Defendants stipulate that the only legal basis on which Defendants will contend that Plaintiff's submissions of the paid advertisements listed in ¶¶ 3 and 8, *supra*, were unacceptable for publication is Department of Defense Instruction ("DODI") 5120.4 and its implementing regulations. Defendants' Stipulation, Civ. No. 05-CV-64-CKK, Dkt. 18 (Aug. 5, 2005).

10. In rejecting Plaintiff's submissions of the paid advertisements listed in ¶¶ 3 and 8, *supra*, Defendants particularly relied on DODI 5120.4-411. Defendants' Stipulation, Civ. No. 05-CV-64-CKK, Dkt. 18 (Aug. 5, 2005); Answer to Civ. No. 05-CV-64-CKK at ¶ 18(A)(1).

11. DODI 5120.4-411 provides in full (and is attached at , Exhibit 1 hereto):

DoD publications shall not contain campaign news, partisan discussions, cartoons, editorials, or commentaries dealing with political campaigns, candidates, issues, or which advocate lobbying elected officials on specific issues. DoD CE publications shall not carry paid political advertisements for a candidate, party, which advocate a particular position on a political issue, or which advocate lobbying elected officials on a specific issue. This includes those advertisements advocating a position on any proposed DoD policy or policy under review.

12. In 1987, Plaintiff obtained a Consent Judgment for the military to publish advertisements that had been rejected for publication in Civilian Enterprise Newspapers. *Larry W. Bryant v. Sec'y of Defense, Sec'y of Army & Sec'y of Air Force*, Civ. No. 86-1323-A (E.D. Va. Apr. 15, 1987). *See* Consent Judgment, attached hereto.

13. In 1994, Plaintiff won a partial summary judgment in this Court, that enjoined the United States Army from "applying viewpoint-based restrictions in selecting commentary for publication in its Civilian Enterprise Newspapers." *Larry W. Bryant v. Sec'y. of the Army*, 862 F.Supp. 574 (D.D.C. 1994) (attached hereto).

14. DODI No. 5120.4, § E4.1.7.3 provides that:

Before each issue of a CE publication is printed, the public affairs staff shall review advertisements to identify any that are contrary to law or to DoD or Military Service regulations, including this Instruction, or that may pose a danger or detriment to DoD personnel or their family members, or that interfere with the command or installation missions. It is in the command's best interest to carefully apply DoD and Service regulations and request exclusion of only those advertisements that are clearly in violation of this Instruction. If any such advertisements are identified, the public affairs office shall obtain a legal coordination of the proposed exclusion. After coordination, the public affairs office shall request, in writing if necessary, that the commercial publisher delete any such advertisements.

If the publisher prints the issue containing the objectionable advertisement(s), the commander may prohibit distribution in accordance with DoD Directive 1325.6.

§ E4.1.7.3.

15. Plaintiff received numerous replies from military personnel rejecting his paid advertisement submissions that are the subject of this litigation, as well as other paid advertisements.

See Affidavit of Larry W. Bryant, and e-mailed replies accompanying said Affidavit. Many of these replies are detailed in Plaintiff's Complaint in Civ. No. 05-CV-64-CKK, at ¶¶ 17 and 18.

16. On October 21, 2005, Plaintiff deposed John Rives, who is the publisher of Comprint, which publishes the *Pentagram*, which is the subject of Civ. No. 04-CV-01125-CKK. Mr. Rives confirmed that he gives full censorship and veto authority to the military over the contents of his Comprint publications. Rives Deposition at 37 (deposition transcripts are attached hereto).

Respectfully submitted

**MARKS & KATZ, L.L.C.**

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**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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

**PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. Proc. 56 and Local Rule 56.1, Plaintiff hereby moves for summary judgment, for the following grounds.

**INTRODUCTION AND FACTUAL BACKGROUND**

Plaintiff Larry W. Bryant has an effective way (that is to say, had he not first been stymied in his tracks by Defendants) of communicating his views, by taking out paid classified opinion advertisements with such catchy titles as (a) "Blow the Whistle on Iraqnam's Battle-of-Baghdad Cover-Up!," (b) "Blow the Whistle on ALL Atrocities at Abu Ghraib!," (c) "Blow the Whistle on the Army-CIA McCarthy Saga!," (d) "Join the Revolt Against the 'Feres Doctrine!'," (e) "Blow the Whistle on the Military's Psychiatric Retaliation Against Whistleblowers!," and (f) "Resist the Government's Drafty Spin!."

Plaintiff's paid ads, quoted in full in his Complaints (e.g., Civ. No. 05-CV-64-CKK, at ¶¶ 12-17), are the words of a patriot who shows his love for his country by challenging what he finds to be abuse of governmental power, with soldiers often suffering the most heavily from such abuses.

The American military's propaganda machine has come a long way since the horrors, violence, and blood of the Vietnam War filled Americans' television sets as they ate dinner, eventually transitioning into the first Gulf War where military commanders debriefed reporters more as if they were giving commentary on a Space Invaders video game, than about the carnage on the ground. Today, such

sophistication of the military propaganda machine is met with a vast percentage of Americans who spiritedly dissent from the Bush Administration's Gulf War policy. In response to Plaintiff Bryant's small-sized paid classified ads, the military has responded "no".

The military might wish that Plaintiff went away, and that plenty of other dissenters did the same, lest military members start questioning their convictions to be with the military. Mr. Bryant wouldn't need to keep coming back to fight for his rights if he didn't keep getting his paid ads rejected.

With this litigation, Mr. Bryant challenges the military's rejection of his paid ads. His 1994 partial summary judgment victory involved opinion letters, rather than paid ads. In said 1994 case, Mr. Bryant's "Complaint arises primarily as a result of the Army's decision not to publish a number of **letters** he has written to the editors of two such CENs: The Pentagon and The Stripe." *Larry W. Bryant v. Sec'y. of the Army*, 862 F.Supp. 574, 576 (emphasis added).

In his 1987 litigation, Plaintiff obtained a Consent Judgment for the military to publish advertisements that had been rejected for publication in Civilian Enterprise Newspapers. *Larry W. Bryant v. Sec'y of Defense, Sec'y of Army & Sec'y of Air Force*, Civ. No. 86-1323-A (E.D. Va. Apr. 15, 1987). *See* Consent Judgment, attached hereto.

### **SUMMARY JUDGMENT STANDARD**

Summary judgment is only appropriate where the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) and *Holcomb v. Powell*, 2006 U.S. App. LEXIS 520 (D.C. Cir. Jan. 10, 2006).

"An issue is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' [citation omitted]. If there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law if the nonmoving party 'fails to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial." *Holcomb v. Powell*, 2006 U.S. App. LEXIS 520 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

## **ARGUMENT**

Plaintiff is entitled to (1) Summary Judgment in that the rejection of Plaintiff's paid classified advertisements is violative of Plaintiff's Constitutional rights to free expression, and (2) an injunction enjoining Defendants from continuing to reject Plaintiff's advertisements. Damages, including attorney's fees, would remain to be litigated.

Concerning the military's rejection of Plaintiff's paid advertisements in this litigation, Plaintiff wisely sought out the military's approval in advance to publish his paid classified ads, due to the military's final say about what gets printed in these and all civilian enterprise newspapers ("CEN's"). The military's tremendous control over the CENs is clearly spelled out as follows:

Before each issue of a CE publication is printed, the public affairs staff shall review advertisements to identify any that are contrary to law or to DoD or Military Service regulations, including this Instruction, or that may pose a danger or detriment to DoD personnel or their family members, or that interfere with the command or installation missions. It is in the command's best interest to carefully apply DoD and Service regulations and request exclusion of only those advertisements that are clearly in violation of this Instruction. If any such advertisements are identified, the public affairs office shall obtain a legal coordination of the proposed exclusion. After coordination, the public affairs office shall request, in writing if necessary, that the commercial publisher delete any such advertisements.

If the publisher prints the issue containing the objectionable advertisement(s), the commander may prohibit distribution in accordance with DoD Directive 1325.6 (reference (u)).

DODI No. 5120.4, § E4.1.7.3 (emphasis added).

DODI 5120.4-411 that:

DoD publications shall not contain campaign news, partisan discussions, cartoons, editorials, or commentaries dealing with political campaigns, candidates, issues, or which advocate lobbying elected officials on specific issues. DoD CE publications shall not carry paid political advertisements for a candidate, party, which advocate a particular position on a political issue, or which advocate lobbying elected officials on a specific issue. This includes those advertisements advocating a position on any proposed DoD policy or policy under review.

The foregoing regulatory provisions (DODI No. 5120.4, § E4.1.7.3 and 5120.4-411) operate hand-in-hand, thus causing Plaintiff even more obstacles to fully exercising his First Amendment rights. The foregoing provisions are unconstitutionally vague and overbroad in their language, give unconstitutionally unbridled discretion to those who administer said regulations, and amount to unconstitutional content-based restrictions on speech. *FW/PBS, Inc. v. City of Dallas*, 493 US 215 (1990).

Where, as here, these CEN's invite advertising, the Constitution does not permit the continuation of some sort of military exemption from the First Amendment. *Flower v. U.S.*, 407 U.S. 197-99 (1972) (where a military base makes itself fully accessible to the public, it cannot restrict civilian's leafleting on such parts of the base). *See also ACLU v. Mineta*, 319 F.Supp.2d 69, 86-87 (D.D.C. 2004). Moreover, by the CEN's opening themselves to advertising by the general public, even if the public forum doctrine applies, the CEN's are public forums for purposes of this litigation, where the CEN's and the military fully opened the CEN's to advertising from the public at large. *Id.* at 80-81 (addressing the distinction, for First Amendment analysis, among the traditional public fora, the designated public forum, and nonpublic fora). Moreover, First Amendment rights in these CEN's increases when considering how unobtrusive is the advertising activity that Defendants prevented Plaintiff from engaging in. *Lee v. Int'l Soc. of Krishna Consciousness*, 505 U.S. 830 (1992); *Int'l Soc. of Krishna Consciousness v. Lee*, 505 US 672 (1992) (the first case provides Constitutional rights to hand out leaflets in a bus port authority; the latter case upholds a ban on proselytizing at airports. ;

**CONCLUSION**

For the foregoing reasons, Plaintiff's Summary Judgment Motion should be granted.

Respectfully submitted

**MARKS & KATZ, L.L.C.**

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