

ORIGINAL

IN THE SUPERIOR COURT OF GWINNETT COUNTY  
STATE OF GEORGIA

FILED IN OFFICE  
CLERK SUPERIOR COURT  
GWINNETT COUNTY, GA

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RICHARD ALEXANDER, CLERK

STARSHIP ENTERPRISES  
OF ATLANTA, INC.,

Plaintiff

v.

GWINNETT COUNTY, GEORGIA,

Defendant

CIVIL ACTION **17 A00699-1**  
FILE NO. \_\_\_\_\_

**COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT**

Comes now Starship Enterprises of Atlanta, Inc. ("Starship"), Plaintiff in the above-styled action, and files this Complaint for Injunction and Declaratory Judgment declaring certain portions of Defendants' Ordinance no. 2015-1082 unconstitutional and enjoining Defendants from enforcing the unconstitutional provisions, and shows the Court the following:

**PARTIES, JURISDICTION AND VENUE**

1.

Plaintiff Starship is a corporation licensed to do business in the State of Georgia.

2.

Defendant Gwinnett County is a political subdivision of the State of Georgia acting through members of its Board of Commissioners, pursuant to the Constitution of the State of Georgia. Pursuant to O.C.G.A. § 9-11-4 (e) (5), Defendant Gwinnett County may be served with process by service upon Charlotte J. Nash, Chairperson of the Gwinnett County Board of Commissioners whose office address is Gwinnett Justice and Administration Center, 75 Langley Drive, Lawrenceville, GA 30046.

3.

A component part of the declaratory and injunctive relief sought herein is based upon independent state constitutional guarantees contained in the due process clause embodied in Article 1, Section 1, Paragraph 1 of the Constitution of the State of Georgia and the equal protection clause embodied in Article 1, Section 1, Paragraph 2 of the Constitution of the State of Georgia.

4.

Plaintiffs assert their position, as set forth in this Complaint, is legally sound and supported by fact and law. The Defendant's actions, however, have created a *bonafide* controversy between the parties, and Plaintiffs are in doubt as to their rights, privileges and immunities with respect to the enforcement of the licensing scheme at issue herein. Plaintiffs require, therefore, a declaratory judgment declaring its rights, privileges and immunities. There is a clear, present, actual, substantial and *bona fide* justiciable controversy between the parties.

#### STANDING

5.

Starship had suffered injury-in-fact as a result of the Gwinnett County ordinances complained of herein.

6.

The Supreme Court has held that (1) bans on commercial transactions involving a product can unconstitutionally burden individual substantive due process rights and (2) lawsuits making this claim may be brought by providers of the product. See *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

Other U.S. Supreme Court cases hold that businesses can assert the rights of their customers and that restricting the ability to purchase an item is tantamount to restricting that item's use. *See, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678, 683–91, 97 S.Ct. 2010, 2015–19, 52 L.Ed.2d 675 (1977) (holding that contraceptive sellers had standing to assert the constitutional rights of their users and striking down restrictions on the distribution and advertising of contraceptives); *Washington v. Glucksberg*, 521 U.S. 702, 723, 117 S.Ct. 2258, 2269, 138 L.Ed.2d 772 (1997) (scrutinizing a ban on providing suicide assistance as a burden on the right to receive suicide assistance).

In line with these cases, Gwinnett County's statute placing limitations upon distribution of "sexual devices" must be scrutinized for impermissible burdens on the constitutional rights of those who wish to use sexual devices.

### FACTS

Plaintiff Starship of Atlanta, Inc. operates 21 general merchandise stores in Georgia and Tennessee, selling a wide variety of items, including smoking supplies, books, clothing, costumes, condoms, body paint, candles, adult sex toys and novelty items and sexually explicit media items.

10.

Starship has owned and operated a store located at 4785 Sugarloaf Parkway in Gwinnett County since July, 2006, pursuant to a Gwinnett County occupational tax certificate (OTC) to sell general merchandise including some sexually explicit merchandise.

11.

Starship has owned and operated another store at 2595 Highpoint Road in Gwinnett County since July, 2006, and has also been granted a Gwinnett County OTC to sell general merchandise including some sexually explicit merchandise.

12.

Pursuant to Gwinnett County's Business License Code, Section 18-1, *et. seq.*, OTC renewal costs are based upon gross receipts calculations from the previous year. Renewal applications and tax payments are due by March 31 of the following year.

13.

Starship has timely submitted renewal applications and tax payments for each store every year, as the County requires.

14.

On or about January 28, 2016, Starship submitted OTC renewal applications and payments for 2016. See Exh. A, B.

15.

In early February, 2016, Gwinnett County Department of Planning and Development sent a letter to Starship, returning Starship's tax renewal application for both stores, stating that

because Defendant had enacted a new ordinance on October 27, 2015 (Ordinance no. 2015-1082), Starship's business was unlawful. Exh. C.<sup>1</sup>

16.

Said ordinance, Section 18-292, "Definitions" section creates, for the first time, an establishment denoted as a "sex paraphernalia store" that is defined as "a commercial establishment" where more than 100 sexual devices are **regularly made available for sale or rental**. This definition shall not be construed to include any establishment located within an enclosed regional shopping mall or any pharmacy or establishment primarily dedicated to providing medical products." Exh. C.

17.

Said ordinance, Section 18-292, "Definitions" section defines "sexual device" as

any three (3) dimensional object designed for stimulation of the male or female human genitals, anus, buttocks, female breast or for sadomasochistic use or abuse of oneself or others and shall include devices commonly known as dildos, vibrators, penis pumps, cock rings, anal beads, butt plugs, nipple clamps, and physical representations of the human genital organs. Nothing in this definition shall be construed to include devices primarily intended for protection against sexually transmitted diseases or for preventing pregnancy.

18.

Such an establishment is required to have an adult license.

19.

Neither of Starship's Gwinnett County stores satisfies the new ordinance's zoning and distances requirements for adult licensing.

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<sup>1</sup> The ordinance referenced in Defendants' letter returning Starship's renewal applications was attached to Exhibit C and attached hereto as Exhibit D.

20.

On March 17, 2016, undersigned counsel for Starship e-mailed a letter to Brandi Everett, Defendants' Licensing Clerk, stating, among other things, that both stores had removed excess sexual devices displayed to no more than 100 at a time, in order to comply with the new ordinance, and requested that the County issue OTCs for 2016. Exh. D.

21.

On March 31, 2016, Kathy Holland, on behalf of Gwinnett County Licensing and Revenue Manager, e-mailed and mailed a letter to the undersigned counsel for Starship stating that an investigation by the County indicated that both Gwinnett County Starship stores were "adult establishments," specifically "sex paraphernalia stores" because the stores make more than 100 "sexual devices" "available for sale." Exh. E.

22.

Said letter of March 31, 2016, also denied Starship's 2016 OTC renewal applications for both stores and stated the County's avenue of appeal said denials to the Licensing and Revenue Board of Appeals.

23.

Following the County's March 31, 2016 letter, Starship removed from its shelves in both stores all but 100 items conforming to the County's definition of "sexual devices."

24.

On April 4, 2016, undersigned counsel sent a letter to Ms. Holland requesting a discussion with the County in regard to Starship's compliance with Gwinnett County's ordinance. Said letter requested a walk-through each store with County officials so that Starship could assure its compliance. Exh. F.

25.

On April 11, 2016, Ms. Holland e-mailed undersigned counsel a message agreeing to conduct an inspection of the stores on April 15. Exh. G.

26.

On April 14, 2016, undersigned counsel e-mailed Ms. Holland an appeal of the County's OTC denials and requesting a hearing on said appeal. Exh. H.

27.

Also on April 14, 2016, undersigned counsel e-mailed Ms. Holland requesting that the County inspector who would do the walk-throughs the next day inform Starship what items are considered by the County to be included in the 100 "sexual devices" "available for sale." Undersigned counsel also requested permission to ask questions of the inspector, so as to enable Starship to come into compliance.

28.

On April 15, 2016, Gwinnett County's inspectors inspected both stores for compliance, but left the premises without making any comments or suggestions or answering any questions.

29.

On April 26, 2016, Ms. Holland wrote to undersigned counsel and stated, for the first time, that "available for sale" was not limited to items on display in the stores, but also included items stored in Starship's warehouse area where customers are not allowed. Exh. I.

30.

Said letter also stated that certain items, including novelty and gag gifts which do not meet Defendants' definition of "sexual devices" must be included in the limitation of display of

no more than 100 items, whether or not such items were designed for sadomasochistic use or abuse. Exh. I.

31.

On May 12, 2016, undersigned counsel e-mailed a letter to Ms. Holland stating that although Starship disagreed with her interpretation of "available for sale," Starship had made the changes necessary to come into compliance.

32.

Undersigned counsel requested that Ms. Holland have the 2 stores reinspected and then issue renewals of the OTCs. Exh. J.

33.

On May 19, 2016, Defendant's inspectors and attorneys performed another walk-through to check for compliance. They did not discuss their observations with Starship representatives.

34.

On July 14, 2016, Defendant issued both stores renewal OTCs for 2016. Exhs. K, L.

35.

In order to comply with Defendant's contrived interpretation of "available for sale," Starship is obliged to restock sold items by searching for a replacement off-site.

36.

In order to comply with Defendant's contrived interpretation of "sex devices," Starship must refrain from making "available for sale" a large number of novelty and gag items that are not designed for sadomasochistic use or abuse.



37.

As a direct result of Defendant's prohibition of having "available for sale" no more than 100 sexual devices displayed or kept in stock in its stores, Plaintiff's store located at 4785 Sugarloaf Parkway has permanently removed 815 products and 1832 items that were for sale prior to the enactment of Ordinance no. 2015-1082. As such, those items are no longer available for sale to customers at that store.

38.

As a direct result of Defendant's prohibition of having available for sale no more than 100 sexual devices displayed or kept in stock in its stores, Plaintiff's store located at 2595 Highpoint Road has permanently removed 1008 products and 2085 items that were for sale prior to the enactment of Ordinance no. 2015-1082. As such, those items are no longer available for sale to customers at that store.

COUNT ONE – DUE PROCESS VIOLATION: VAGUENESS

39.

The County's actions have deprived, and will continue to deprive, Starship of property rights and liberty interests protected by the Georgia Constitution, Art. 1, Sec. 1, Para. 1, in that, inter alia:

- (a) The terms "sodomasochistic use or abuse" and "regularly made available for sale or rental" contained in § 18-292 are impermissibly vague, both facially and as applied to Starship, because the definitions lack guidance and vest the County with unbridled discretion to enforce The Adult Licensing and Zoning Codes based upon subjective criteria and thus encourage discriminatory enforcement.
- (b) The term "sodomasochistic use or abuse" contained in § 18-292 is also unconstitutionally over-inclusive because Defendant classifies items as included in the definition which are not intended used for sodomasochistic use or abuse.

- (c) Insofar as the Adult Licensing and Zoning Codes subject a person to a fine or imprisonment for violating conduct provisions (see §§ 18-297 & 86-76) without requiring that any such violation to be “knowingly” committed, the adult codes arbitrarily impose strict liability for exceeding the County’s threshold for protected speech.

40.

The County has deprived Starship of its property rights and liberty interests to operate a business free from arbitrary and capricious interference from the government by enforcing these vague code sections.

COUNT TWO – DUE PROCESS VIOLATION – PRIVACY INFRINGEMENT

41.

The right of privacy is a fundamental right for due process purposes.

42.

The Georgia Supreme Court has held that no other activity is more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity. Such activity is at the heart of the Georgia Constitution's protection of the right of privacy. *Powell v. State*, 270 Ga. 327, 332, 510 S.E.2d 18, 24 (1998).

43.

Defendant’s ordinance restricting the number of “sex devices” that Starship may make “available for sale” infringes Starship’s clients’ fundamental due process privacy rights in violation of Art. 1, Sec. 1, Para. 1 of the Georgia Constitution.

### COUNT THREE – DUE PROCESS – PROPERTY AND LIBERTY DEPRIVATION

44.

The police power of the state is constitutionally inhibited by Georgia's Due Process Clause.

45.

Legislative acts in violation of the Georgia Constitution are void, and the Judiciary shall so declare them.

46.

A law that places restrictions on certain merchants, while exempting others from the same restrictions infringes the liberty and property rights of those who are thus restricted, thereby violating the Due Process Clause of the Georgia Constitution.

47.<sup>4</sup>

The exemptions contained in Defendant's definition of "sex paraphernalia store" in § 18-292 infringes Starship's liberty and property rights and those of its clients.

### COUNT FOUR – EQUAL PROTECTION

48.

An arbitrary classification, where there exists no real difference as concerns the purpose of the legislation, is not allowed and constitutes a violation of the Georgia Constitution notwithstanding an arbitrary attempt to classify and then discriminate as between those in the different classifications.

49.

The Georgia Constitution states that a paramount duty of government shall be to ensure the protection of persons and property, and that in discharging that duty, "[n]o person shall be denied equal protection of the laws."

50.

The Georgia Equal Protection Clause, which is construed to be consistent with its federal counterpart, requires that the State treat similarly situated individuals in a similar manner.

51.

Under Georgia's Equal Protection Clause, legislative classification is permitted when the classification is based on rational distinctions and bears a direct and real relation to the legitimate object or purpose of the legislation.

52.

The Georgia Constitution allows classification ". . . when and only when the basis of such classification bears a direct and real relation to the object or purpose of the legislation, and when thus classified, uniformity upon all those coming within the class satisfies the Constitution.

53.

When a legislative classification discriminates without any rational relationship to the purpose of the legislation, such legislation violates the Equal Protection Clause of the Georgia Constitution.

54.

The exemptions contained in Defendant's definition of "sex paraphernalia store" in § 18-292 bear no rational relationship to the purpose of Defendant's adult business ordinance and therefore infringes Starship's equal protection rights and those of its clients.

55.

Defendant seeks to restrict Starship's distribution of items designed to stimulate the genital organs solely because of Defendant's moral objections to the distribution of such items and to individuals who make use of them.

56.

Moral disapproval, like a bare desire to harm, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. *Department of Agriculture v. Moreno*, 413 U.S., at 534, 93 S.Ct. 2821; *Romer v. Evans*, 517 U.S., at 634–635, 116 S.Ct. 1620. *Lawrence v. Texas*, 539 U.S. 558, 582–83, 123 S. Ct. 2472, 2486, 156 L. Ed. 2d 508 (2003).

57.

Moral disapproval, without any other asserted state interest, is not a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

*Id.*

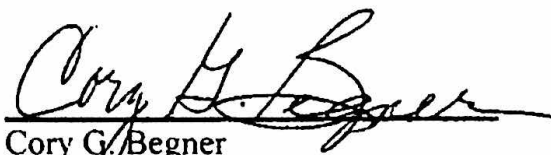
Gwinnett County's moral objections to the unfettered sale and use of devices designed to stimulate the genital organs is not a sufficient rationale under the Equal Protection Clause to justify the limitations contained in the County's adult business ordinance.

WHEREFORE, Plaintiff prays that this Court will grant it the following relief:

- 1) Declaratory Judgment finding that the terms "sodomasochistic use or abuse" and "regularly made available for sale or rental" contained in § 18-292 are impermissibly vague, both facially and as applied to Starship, because the definitions lack guidance and vest the County with unbridled discretion to enforce The Adult Licensing and Zoning Codes based upon subjective criteria and thus encourage discriminatory enforcement.
- 2) Declaratory Judgment finding that, insofar as the Adult Licensing and Zoning Codes subject a person to a fine or imprisonment for violating conduct provisions (see §§ 18-297 & 86- 76) without requiring that any such violation to be "knowingly" committed, the adult codes arbitrarily impose strict liability for exceeding the County's threshold for protected speech.
- 3) Declaratory Judgment finding that Defendant's ordinance restricting the number of "sex devices" that Starship may make "available for sale" infringes Starship's clients' fundamental due process privacy rights in violation of Art. 1, Sec. 1, Para. 1 of the Georgia Constitution.

- 4) Declaratory Judgment finding that the exemptions contained in Defendant's definition of "sex paraphernalia store" bear no rational relationship to the purpose of Defendant's adult business ordinance and therefore infringes Starship's liberty and property rights and those of its clients.
- 5) Declaratory Judgment finding that Gwinnett County's moral objections to the unfettered sale and use of devices designed to stimulate the genital organs is not a sufficient rationale under the Equal Protection Clause to justify the limitations contained in the County's adult business ordinance.
- 6) Issuance of an interlocutory and permanent injunction prohibiting Defendant county from enforcement of all restrictions on all items that it defines as "sex devices" and items that it items that it denotes as designed for "sodomasochistic use or abuse;"

Respectfully submitted, this 25<sup>th</sup> day of January, 2017,



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