IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CHARLES EASTWOOD,

Plaintiff/Appellee,

v.

ATLAS LOCKSMITH SOLUTIONS, L.L.C.; MILLER LOCK & SAFE, L.L.C.; MILLENNIUM LOCKSMITH, L.L.C.; COMPLETE LOCKSMITH SERVICES, L.L.C.; APPLE CONTRACTING, L.L.C., and ADAM AVIGDOR,

Defendants/Appellants.

Court of Appeals
Division One
No.: 1-CA-CV-11-0554
1-CA-CV-12-0016
(Consolidated)

Maricopa County
Superior Court
No.: CV2010-027605

APPELLEE'S ANSWERING BRIEF

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STATEMENT OF THE CASE

This is a case about consumer fraud and misrepresentation. Appellee, Charles "Locksmith Charley" Eastwood, filed his complaint against Appellants on September 21, 2010, alleging that Appellants' advertisements listing their businesses at locations at which they maintained no physical presence violated A.R.S. § 44-1221, and as such, Appellants' unlawful practices violated section 44-1522 of the Arizona Consumer Fraud Act. (Index of Record "I.R.A." 1).

The Superior Court heard arguments spanning four days – December 7, 2010, regarding Appellants' motion to dismiss, and April 18, 2011, May 5, 2011, and June 6, 2011, regarding Locksmith Charley's request for a preliminary injunction. (I.R.A. 85, 135, 140, 147, and 155). On December 8, 2010, the Superior Court denied Appellants' motion to dismiss, finding that Locksmith Charley met his burden to avoid dismissal of his basic claims because "[t]he improper use of fictional addresses by [Appellants] seems to constitute a violation of the statute." (I.R.A. 89, p. 3).

Appellants ask this Court for relief from the Superior Court's preliminary injunction prohibiting them from "using false addresses, that is to say, an address where they do not have a physical presence," by minute entry on June 28, 2011, (I.R.A. 155, p. 12). Locksmith Charley posted the required bond on July 12, 2011. (I.R.A. 156).

Appellants timely appealed the Superior Court's order of a preliminary injunction, and this Court has jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(b).

STATEMENT OF FACTS

Locksmith Charley is a general locksmith with 20-plus years of experience servicing residences, commercial offices, automobiles, and safes. (I.R.A. 155 ¶¶ 3-4; Preliminary Injunction Hearing Transcript "TR," page 13:19-23).

On or about December 8, 2008, Locksmith Charley began searching locksmith advertisements on the internet. (I.R.A. 155, ¶ 5; TR: 14:5 – 15:10). Locksmith Charley discovered that Appellants' advertisements listed business locations at which the Appellants' businesses were not located, and that the Appellants' practice of advertising their business locations at sites where they were not actually located continued through June 6, 2011. (I.R.A. 155 ¶¶ 5-8, 11-12, 17, 43; TR: 15:18-19, 18:21 – 20:4; 26:1 – 28:22, 30:16-18; 224:1-5).

Locksmith Charley is a consumer of locksmith products and services. (I.R.A. 155 ¶¶13; TR: 29:4-6). Locksmith Charley suffered injuries and continues to suffer injuries daily because of the Appellants' ongoing practice of advertising their business locations at sites where they are not actually located. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20). Locksmith Charley suffered injuries as a result of his reliance on the false information provided by the Appellants' advertisements. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20). Locksmith Charley's injuries include lost time, money, and gas driving around in search of Appellants' businesses at advertised locations at which they do not operate their business, loss of reputation and goodwill; and loss of revenue and market share. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20, 63:2-20, 77:17-22, 78:14-19, 79:7-10).

Some of Locksmith Charley's injuries are irreparable, unable to be quantified, and cannot be remedied by monetary damages. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20, 63:2-20, 77:17-22, 78:14-19, 79:7-10). The false locations advertised by the Appellants damages the reputation of legitimate locksmiths like Locksmith Charley. (I.R.A. 155 ¶ 18; TR 40:2-5). Advertising hundreds of addresses where a business does not exist ruins a consumer's trust because it is lying. (TR 40:11-16).

The Appellants are in the business of providing locksmith services as well as selling locks and safes. (I.R.A. 155 ¶¶ 2, 45; TR: 141:5, 155:4, 186:13-18). The Appellants' annual business revenue is about $300,000.00, not in the tens of millions. (I.R.A. 155 ¶ 48; TR 150:9-14).

The Appellants' use an address and telephone marketing system, listing multiple addresses and phone numbers, in an attempt to get more jobs. (I.R.A. 155 ¶¶ 52-53; TR 166:16-18; 167:17-24; 168:1-4). The Appellant is not physically present at the address advertised. (I.R.A. 155 ¶¶ 51, 52, 54, 55, 57, 58, 59, 61; TR 153:3-11). The Appellants never said on their website that they are at the addresses advertised. (I.R.A. 155 ¶ 55; TR 171:22-23).

Appellants testified that they advertise under other business names as dba's. (I.R.A. 155 ¶ 58; TR 174:1-18). Appellants testified that they do business using the names Chandler Locksmith, Searz Locksmith, and AZ Locksmith, among others. (TR 174:1-18; Exhibit 3). Appellants' business, Chandler Locksmith, is advertised as located at 13 E. Chandler Blvd., Chandler, and Appellants testified that they do not have a place of business at that address. (TR 149:5-15, Exhibit 3). Appellants' business, Searz Locksmith, is advertised as located at 4343 E. Indian School Rd., Phoenix, and Appellants testified that they do not have a place of business at that address. (TR 149:5-15, Exhibit 3). Appellants business, AZ Locksmith, is advertised as located at 6340 S. Rural Rd., #18, Tempe, and 1380 W. Elliot Rd., Tempe, and Appellants testified that they do not have a place of business at those addresses. (TR 149:5-15, Exhibit 3.)

Appellant Trust Locksmith advertises using locations, not addresses. (TR 235:6-9). Trust Locksmith's ads show street names, cities, and ZIP codes, without a specific street number. (TR 235:14-17).

The Appellants understood that advertising their business location using false addresses was unlawful since September or October 2010. (TR 145:5-15). The Appellants failed to make any changes in the way they advertise since September or October 2010. (I.R.A. 155 ¶ 52; TR 145:16-25). The Appellants agree that statements that they were operating businesses at locations at which they did not have facilities would be very deceptive. (TR 149:12-17). The Appellants would not have used the false addresses if they had known that it was illegal. (I.R.A. ¶ 52; TR 167:7-14).

The Appellants do not know if some of the false addresses bring them business. (I.R.A. 155 ¶ 51; TR 169:6-20, 176:2-20). The Appellants' use of the multiple listing advertising structure is not generating revenue and the Appellants would not be harmed if they were precluded from using false addresses in their advertisements. (I.R.A. 155 ¶ 53; TR 169:6-20). Appellants would be harmed if they were precluded from using false addresses in their advertisements. (I.R.A. 155 ¶ 53; TR 176:2-20).

The Appellants claim that other companies in Arizona and the United States are using this marketing scheme and if they are precluded from doing what others do they would be at a disadvantage. (I.R.A. 155 ¶ 54, 61; TR 177:1-3, 179:3-7).

ISSUES PRESENTED FOR REVIEW

Appellants erroneously ask this Court to rule on the underlying complaint instead of the only issue before this Court – which is:

1. Whether the trial court abused its discretion in preliminarily enjoining Appellants from "using false addresses, that is to say, an address where they do not have a physical presence."

STANDARD OF REVIEW

The scope of review of preliminary injunctions is limited to determining whether the trial court committed a clear abuse of discretion. *Financial Assocs., Inc. v. Hub Properties, Inc*., 143 Ariz. 543, 545, 694 P.2d 831, 833 (App. 1984). The trial court's factual findings are accepted unless clearly erroneous, but the trial court's legal conclusions are reviewed de novo. *IB Property Holdings L.L.C., v. Rancho Del Mar Apartments*, 228 Ariz. 61, 64 ¶ 5, 263 P.3d 69, 72 (App. 2011).

The appeal court must affirm unless the trial judge either made a mistake of law or clearly erred in finding the facts or applying them to the legal criteria for granting an injunction. *Shoen v. Shoen*, 167 Ariz. 58, 62, 804 P.2d 787, 792 (App. Div. 1, 1990). A trial court abused its

discretion if it applied the incorrect substantive law or preliminary injunction standard; based its decision on a clearly erroneous material finding of fact; or, applied an acceptable preliminary injunction standard in a manner that results in an abuse of discretion. *McCarthy Western Constructors, Inc., v. Phoenix Resort Corp*., 169 Ariz. 520, 523, 821 P.2d 181, 184 (App. 1991).

An appellate court may not disturb factual findings at injunction proceedings unless they are clearly erroneous or not supported by any credible evidence. *Phoenix Elementary School Dist. No. 1 v. Green*, 189 Ariz. 476, 478, 943 P.2d 836, 838 (App. 1997). An appeal court does not reweigh the evidence or re-determine the preponderance of evidence. *Watson v. Roman Catholic Church of the Diocese of Phoenix, Inc.*, 393 Ariz. Adv. Rep. 17, 64 P.3d 195 (App. 2002).

Finally, the appeal court is bound by the trial court's finding unless it is clearly erroneous, giving "due regard . . . to the opportunity of the trial court to judge the credibility of witnesses." *Watson v. Roman Catholic Church of the Diocese of Phoenix, Inc.*, 393 Ariz. Adv. Rep. 17, 64 P.3d 195 (App. 2002); Ariz. R. Civ. P. 52(a). The trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O*., 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004). The appeal court defers to the trial court's determination of the weight to give conflicting evidence. *Watson v. Roman Catholic Church of the Diocese of Phoenix, Inc.*, 393 Ariz. Adv. Rep. 17, 64 P.3d 195 (App. 2002).

Implied in every judgment, in addition to the express findings made by the court, is any additional finding that is necessary to sustain the judgment, if reasonably supported by the evidence, and not in conflict with the express findings. *John C. Lincoln Hospital and Health Corp. v. Maricopa County*, 208 Ariz. 532, 96 P.3d 530 (App. Div. 1 2004).

ARGUMENT

Appellee, Locksmith Charley, urges this Court to affirm the preliminary injunction ordered below. There is ample evidence in the record to support the trial court's findings. The trial court did not abuse its discretion by granting a preliminary injunction prohibiting the Appellants' from using false addresses to mislead consumers regarding the location of their businesses. The trial court properly found Locksmith Charley's cause of action justiciable – that Locksmith Charley has proper standing because he had suffered damages and that the Appellants' continuing violation of the Consumer Fraud Act removed any statute of limitations challenge.

The crux of the Appellants' argument is reminiscent of the famous "it depends on what the meaning of 'is' is" response. The Appellants advance the preposterous position that their advertising, utilizing thousands of different phone numbers linked to thousands of "virtual addresses" at which the Appellants' businesses are not located, is not false advertising because they did it as a marketing strategy, because they never claimed to operate their businesses at the virtual address, because listing just cross streets is not the same as an "address," because they operate Valley-wide, and because "everyone else is doing it."

The trial court properly interpreted A.R.S. § 44-1221 and found Locksmith Charley likely to succeed on the merits of his complaint, that irreparable harm would result if the Appellants continued to mislead consumers using false addresses. Appellants argue that Locksmith Charley presented absolutely no evidence to justify his complaint. The trial court, however, obviously found Locksmith Charley's testimony more credible than the Appellants'.

The trial court properly determined that the balance of hardships favored Locksmith Charley, and that the preliminary injunction enjoining the Appellants from violating the Consumer Fraud Act was in the public interest. Additionally, the trial court did not abuse its discretion in setting a *de minimis* bond because there is no risk of damages to Appellants' by discontinuing illegal behavior. Finally, A.R.S. § 44-1221 is facially Constitutional and as applied to Appellants.

A. THE TRIAL COURT PROPERLY FOUND LOCKSMITH CHARLEY'S CAUSE OF ACTION JUSTICIABLE

Locksmith Charley's claims are properly before this court because the trial court found Locksmith Charlie an injured consumer entitled to bring suit under the Arizona Consumer Fraud Act. The trial court also found that Appellants' continuing violations nullify any statute of limitations and that Appellants' claim of Locksmith Charlie's failure to join indispensable parties is not a proper defense.

1. Locksmith Charley Has Standing

The trial court properly found that Locksmith Charley had standing to bring his complaint because the Arizona Consumer Fraud Act provides a private right of action. The trial court found that Locksmith Charlie suffered injuries as both a consumer and a locksmith. Finally, Locksmith Charley also has standing under the private attorney general doctrine.

a. Private Right of Action

The Arizona Consumer Fraud Act provides the injured consumer with an implied private right of action against the violator of the act. *Holeman v. Neils,* 803 F.Supp. 237 (D. Ariz. 1992). A private right of action exists for damages caused by a violation of Consumer Fraud Act. *Haisch v. Allstate Ins. Co*., 197 Ariz. 606, 5 P.3d 940 (App. Div. 1, 2000). The Consumer Fraud Act, § 44-1521 et seq., does not require a "mass" or any particular number of aggrieved parties to maintain an action. *People ex rel. Babbitt v. Green Acres Trust*, 127 Ariz. 160, 618 P.2d 1086 (App. Div. 1, 1980).

Thus, because the Act provides a private right of action, Locksmith Charley is entitled to bring his suit under the Arizona Consumer Fraud Act.

b. Suffered Injury as Consumer

Under the Arizona Consumer Fraud Act, an injury occurs when a consumer relies, even unreasonably, on false or misrepresented information. *Horowitch v. Diamond Aircraft*

Industries, Inc., 526 F.Supp.2d 1236 (M.D. Fla., 2007). An actionable consumer fraud injury occurs when a consumer relies on false or misrepresented information. *Kuehn v. Stanley*, 208 Ariz. 124, 91 P.3d 346 (App. Div.2, 2004). Therefore, a consumer is injured, and thus has standing to enforce the Consumer Fraud Act, simply by relying upon the misrepresentation.

In this case, Locksmith Charley testified, and the trial court properly found, that he was a consumer of locksmith products and services. (I.R.A. 155 ¶¶13; TR: 29:4-6). The evidence in the record demonstrates that Locksmith Charley suffered injuries and continues to suffer injuries daily because of the Appellants' ongoing practice of advertising their business locations at sites where they are not actually located. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20).

Locksmith Charley testified, and the trial court properly found that Locksmith Charley suffered injuries as a result of his reliance on the false information provided by the Appellants' advertisements. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20). Locksmith Charley's injuries as a consumer include lost time, money, and gas driving around in search of locks and other supplies to purchase from Appellants' at businesses advertised at locations at which they do not operate their business. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20, 63:2-20, 77:17-22, 78:14-19, 79:7-10). Some of Locksmith Charley's injuries are irreparable, unable to be quantified, and cannot be remedied by monetary damages. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20, 63:2-20, 77:17-22, 78:14-19, 79:7-10).

Because Locksmith Charley relied on the Appellants misrepresentations and he suffered injuries as a consumer, he has standing under the Arizona Consumer Fraud Act and, thus, Locksmith Charley's complaint is properly before the court.

c. Suffered Injury as Locksmith

The trial court also found evidence that Locksmith Charley suffered injuries as a locksmith, which include lost time, money, and gas driving around in search of locks and other supplies to purchase from Appellants' at businesses advertised at locations at which they do not

operate their business, a loss of reputation and goodwill; and a loss of revenue and market share. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20, 63:2-20, 77:17-22, 78:14-19, 79:7-10). Some of Locksmith Charley's injuries are irreparable, unable to be quantified, and cannot be remedied by monetary damages. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20, 63:2-20, 77:17-22, 78:14-19, 79:7-10).

The court also found that the false locations advertised by the Appellants damages the reputation of legitimate locksmiths like Locksmith Charley. (I.R.A. 155 ¶ 18; TR 40:2-5). Locksmith Charley testified that advertising hundreds of addresses where a business does not exist ruins a consumer's trust because it is lying. (TR 40:11-16). Locksmith Charley testified that consumers typically select a locksmith based upon the locksmith's business location because they want someone close by who would presumably offer a faster response time. (TR 28:12-16).

Locksmith Charley also testified that Appellants' use of hundreds of telephone numbers and phony addresses saturates the telephone directories and internet services to such an extent that it is nearly impossible for a general consumer to find his company. (TR 24:17-22).

d. Alternate standing as private attorney general

In addition to standing as an injured consumer and reputable locksmith, Locksmith Charley may properly bring his claims against Appellants under the private attorney general doctrine. "The private attorney general doctrine is an equitable rule which permits a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance, to recover attorneys' fees." *Arnold v. Arizona Dep't of Health Services*, 160 Ariz. 593, 609, 775 P.2d 521, 537 (1989). In this case, prohibiting Appellants from advertising false business locations does benefit a large number of consumers, required private enforcement, and consumer protection is of high societal importance. Thus, Locksmith Charley also has proper standing under the private attorney general doctrine.

2. Appellants' Continuing Violations Nullify Any Statute of Limitations

Appellants argue that Locksmith Charley's claims are barred by the statute of limitations. A complaint is not time-barred where the defendant was committing continuing violations up to and through the litigation. *Alaska Airlines Inc. v. Carey*, 395 F. App'x 476, 479 (9th Cir. 2010).

The trial court properly found that Appellants' continuing violation removed any statute of limitations challenge. (TR 8:6-11). The Appellants made continuous misrepresentations from 2008 until April 16, 2011. (I.R.A. 155 ¶¶ 5-8, 11-12, 17, 43; TR: 15:18-19, 18:21 – 20:4; 26:1 – 28:22, 30:16-18).

The language of the statute bars active conduct on the part of the defendants. Pursuant to A.R.S. § 44-1528(A), the Superior Court shall issue an injunction prohibiting continuing unlawful practices, and pursuant to A.R.S. §44-1245(B), a person is guilty of a separate offense for each day during any portion of which a violation of this article is committed, continued or permitted. The continued violation provisions are evidence of the legislature's belief that the detrimental effect to the public and the advantage to the violator continue and increase over a period of time, and the violator could eliminate the effects of the violation if it were motivated to do so, after it had begun. Further, the 'continuing failure' provisions of the Consumer Fraud Act were intended to assure that the penalty provisions would provide a meaningful deterrence against violations whose effect is continuing and whose detrimental effect could be terminated or minimized by the violator at some time after initiating the violation.

It seems apparent that continued actions in violation of the statute occur every day the Appellants continue to misrepresent their geographical locations. The harm continues as long as the misleading and false information is published, and the Appellants could undo or minimize any such effect by correcting such misleading and false information at any time. On the other hand, if the Appellants' continuous publication of misleading and false information were treated as a single violation, any deterrent effect of the statute would be entirely undermined, and the penalty would be converted into a minor tax upon a violation which could reap large financial benefits to the perpetrator.

3. The Failure to Join Indispensable Parties is Not A Proper Defense

The Appellants argue that the parties who appeared and defended in this action should not bear a heavier burden because other parties named as defendants were not able to be served, and because other locksmiths engaging in the same marketing techniques were not named in the suit.

Arizona Rule of Civil Procedure Rule 19(a) states that a "person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if, in the person's absence complete relief cannot be accorded among those already parties."

In this case, the only relief granted so far is the preliminary injunction prohibiting Appellants from advertising false addresses. The Appellants argue that they will be harmed if they are prohibited from using the unlawful marketing strategies while other competitors are allowed to do so. In other words, the Appellants argue that they should be allowed to continue to violate the Consumer Fraud Act because making them stop would be unfair.

B. THE TRIAL COURT PROPERLY INTERPRETED A.R.S. § 44-1221 IN FINDING LOCKSMITH CHARLEY LIKELY TO SUCCEED ON THE MERITS OF HIS COMPLAINT

A plain and simple reading of A.R.S. § 44-1221 is all that is necessary to determine that the Appellants unlawfully misrepresented the geographical origin and location of their businesses in violation of the Consumer Fraud Act. The record below contains more than enough evidence to meet the burden required under a preliminary injunction, and thus, the trial court properly found that Locksmith Charley would likely succeed on the merits of his complaint.

1. Language of A.R.S. § 44-1221

A.R.S. § 44-1221 reads as follows:

> A. It is unlawful for a person to deceive another person by misrepresenting the geographical origin or location of the person's business in the conduct of the person's business.
>
> B. A person who intentionally or knowingly violates subsection A of this section is guilty of a class 2 misdemeanor.
>
> C. An act or practice in violation of this section is an unlawful practice under section 44-1522 and subject to enforcement through private action and prosecution by the attorney general. The attorney general may investigate and take appropriate action as prescribed by chapter 10, article 7 of this title.
>
> A.R.S. § 44-1221

2. Statutory Interpretation

a. Standards of statutory interpretation

The Appellants' arguments turn accepted principles of statutory interpretation on their head.

The goal of statutory interpretation is to determine legislative intent, and the "best and most reliable index of a statute's meaning is its language." *Progressive Casualty v. Estate of Palomera-Ruiz*, 582 Ariz. Adv. Rep. 8, 231 P.3d 384 (App. Div. 1, 2010) (*Internal citations omitted*.) "When the language is clear and unequivocal it is determinative of the statute's construction." Id. If a legislature's intent is clear in the plain language of the statute, it is not necessary for a court to inquire further. *Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp*., 188 Ariz. 441, 444, 937 P.2d 363, 366 (App.1996). Words in statutes are given "their usual and commonly understood meaning unless the legislature clearly intended a different meaning." *State v. Korzep*, 165 Ariz. 490, 493, 799 P.2d 831, 834 (1990).

As commonly understood, the term "location" means, "[t]he specific place or position of a person or thing." Black's Law Dictionary (8th ed. 2009). Thus, A.R.S. § 44-1221 prohibits a person from misrepresenting the geographical origin or specific place of their business. Therefore, the plain meaning of "geographical origin or location" requires that the specific place of the person's business be communicated or otherwise the communication is misleading.

In this case, the Court need not look further than the plain meaning of A.R.S. § 44-1221 to determine that the trial court properly interpreted the Consumer Fraud Act in finding that the Appellants misled consumers because they advertised that their businesses were located at addresses and cross streets at which they did not operate their businesses.

b. Statutory Interpretation of A.R.S. § 44-1221

If the plain language of the statute was not clear enough, however, the legislature specifically included a provision in the Arizona Consumer Fraud Act to assist the courts' interpretation of the statute. A.R.S. § 44-1522(C) states, "courts may use as a guide interpretations given by the federal trade commission and the federal courts to 15 United States Code §§ 45, 52 and 55(a)(1)." Pertinent sections of those statutes include:

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. 15 U.S.C.A. § 45(a)(1).
>
> It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, of food, drugs, devices, services, or cosmetics. 15 U.S.C.A. § 52(a)(2).
>
> The dissemination of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce [is deceptive and unlawful.] 15 U.S.C.A. § 52(b).
>
> The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account not only representations made or suggested by statement, but also the extent to which the advertisement fails to reveal facts material in the light of such representations. 15 U.S.C.A. § 55(a)(1).

Pertinent federal court holdings also support Locksmith Charley's interpretation:

> The mere fact that statements may be technically true does not prevent their being framed so as to mislead or deceive. *Koch v. Federal Trade Commission*, 206 F.2d 311 (6th Cir. 1953). An advertisement is false if it fails to disclose sufficient facts to counter any false assumptions. *F.T.C. v. Pharmtech Research, Inc.*, 576 F.Supp. 294 (D.C.D.C., 1983). Statements susceptible of both a misleading and a truthful interpretation will, under this section, be construed against the advertiser. *Country Tweeds, Inc. v. F.T.C.*, 326 F.2d 144 (2nd Cir. 1964).
>
> The defendants did not misrepresent the location of their business by listing in their publications the location of an answering service with which they had contracted to

> provide phone and mail service because the defendants had a legitimate business relationship and conducted business at that location. *Official Airline Guides, Inc. v. Churchfield Publications, Inc.*, 756 F. Supp. 1393 (D. Or. 1990) *aff'd sub nom. Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385 (9th Cir. 1993).

c. Arizona courts' interpretation of A.R.S. § 44-1221

Further, several Arizona courts have interpreted the Consumer Fraud Act similarly to the trial court below.

> The Arizona Consumer Fraud Act is intended to eliminate unlawful practices in merchant-consumer transactions. *Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, 985 P.2d 556 (App. Div.1 1998); *Holeman v. Neils*, 803 F.Supp. 237 (D.Ariz.1992).
>
> In determining whether a representation is deceptive, and, thus, is misleading under Consumer Fraud Act, the test is whether the least sophisticated reader would be misled. *State ex rel. Horne v. AutoZone, Inc.*, 227 Ariz. 471, 258 P.3d 289 (App. Div. 1, 2011). The technical correctness of the representation is irrelevant if the capacity to mislead is found. *Madsen v. Western Am. Mortgage Co*., 143 Ariz. 614, 694 P.2d 1228 (Ct. App. 1985).

d. Trial Court's interpretation and application was not "novel."

The Appellants advance the preposterous position that their advertising, utilizing hundreds of different phone numbers linked to hundreds of "virtual addresses" at which the Appellants' businesses are not located, is not false advertising because they did it as a marketing strategy, because they never claimed to operate their businesses at the virtual address, because listing just cross streets is not the same as an "address," and because they operate Valley-wide.

Appellants testified that they advertise under other business names as dba's. (I.R.A. 155 ¶ 58, TR 174:1-18). Appellants testified that they also do business using the names Chandler Locksmith, Searz Locksmith, and AZ Locksmith. (TR 174:1-18; Exhibit 3). Appellants' business, Chandler Locksmith, is advertised as located at 13 E. Chandler Blvd., Chandler, and Appellants testified that they do not have a place of business at that address. (TR 149:5-15, Exhibit 3). Appellants' business, Searz Locksmith, is advertised as located at 4343 E. Indian School Rd., Phoenix, and Appellants testified that they do not have a place of business at that address. (TR 149:5-15, Exhibit 3). Appellants business, AZ Locksmith, is advertised as located

at 6340 S. Rural Rd., #18, Tempe, and 1380 W. Elliot Rd., Tempe, and Appellants testified that they do not have a place of business at those addresses. (TR 149:5-15, Exhibit 3.) Appellant Trust Locksmith advertises using locations, not addresses. (TR 235:6-9). Trust Locksmith's ads show street names, cities, and ZIP codes, without a specific street number. (TR 235:14-17).

The Appellants argue that they have not violated A.R.S. § 44-1221 because they only advertise "virtual addresses" or "cross streets." "Virtual," as defined by Merriam-Webster[1], means "being on or simulated on a computer or computer network; or, occurring or existing primarily online." A street address or crossroads is a physical location that exists in reality, not on a computer or the internet. Thus, because the addresses or crossroads which the Appellants use actually physically exists the term "virtual" cannot apply.

The Appellants argue that their advertising is not misleading because they offer valley-wide service. While Appellants may provide service to the entire Valley, framing their advertising in a way that the consumer may believe that Appellants are doing business at specific locations throughout the Valley is false and a violation of the Consumer Fraud Act. Further, even if it could be said that the Appellants would do business at a location at which they have advertised, in construing the language against the advertiser, the Appellants' advertisements are false and violate the Consumer Fraud Act.

In *Official Airline Guides, Inc. v. Churchfield Publications, Inc*., the court held that a defendant did not misrepresent the location of its business because it actually did business at that location. *Official Airline Guides, Inc. v. Churchfield Publications, Inc.*, 756 F. Supp. 1393 (D. Or. 1990) aff'd sub nom. Official Airline Guides, Inc. v. Goss, 6 F.3d 1385 (9th Cir. 1993). Here, Appellants made it very clear that they do not do business at the locations advertised and admit using false addresses and false street names in advertising the location of their businesses.

Appellants also argue that A.R.S. § 44-1221 is intended to apply to business names, not addresses. The Appellants' arguments are not persuasive because as interpreted above, the

[1] Definition of VIRTUAL, http://www.merriam-webster.com/dictionary/virtual (Accessed May 18, 2012.)

Consumer Fraud Act was intended to prohibit the exact type of misrepresentations advanced by the Appellants. Appellants' actions of linking fictitious or virtual addresses to phone numbers falsely gives consumers the impression that Appellants are actually doing business out of that specific location.

Appellants further claim that prohibiting them from advertising their business locations using this "virtual address" method will have the catastrophic consequences for home-based businesses using post office boxes or the mobile sales professional who meets her clients at a neighborhood coffee shop. The Appellants' claim is misguided because in neither case is there advertising in which the location of the person's business is misrepresented.

Thus, the trial court properly found the Appellants' use of false addresses and false street names in advertising the location of their businesses unlawfully violates A.R.S. § 44-1221.

e. Appellants' defense that "everyone else is doing it" is improper.

The Appellants claim that other companies in Arizona and the United States are using this marketing scheme and if they are precluded from doing what others do they would be at a disadvantage. (I.R.A. 155 ¶ 54, 61; TR 177:1-3, 179:3-7). The trial court properly pointed out to Appellants that this was a very difficult argument to make. (TR 258:1) "You know, you complain that the cop stopped you, but he left the other speeders alone. And his response is I couldn't stop them all." (TR 258:1-4).

A method of competition inherently unfair does not cease to be so because the falsity of the public representation has become so well known to those engaged in identical or similar enterprises. *Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175 (6th Cir. 1941).

Appellants' counsel conceded that this argument was based upon an inability to apportion damages. (TR 258:9-20). Because the issuance of a preliminary injunction does not involve apportioning damages, the argument is inappropriate, and the trial court properly enjoined Appellants' unlawful conduct.

3. Burden of Proof

In a Consumer Fraud Act suit, the plaintiff is required to prove his claim by a preponderance of evidence, as opposed to clear and convincing evidence. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 666 P.2d 83 (App. Div. 2, 1983). The level of proof needed for the issuance of a preliminary injunction is less than that required for the motion for summary judgment." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 860 P.2d 1328 (Ariz. 1993).

Thus, Locksmith Charley had a relatively low threshold of proof, which the trial court found was properly met. Because it would be improper for an appeal court to reweigh the evidence or re-determine the preponderance of evidence, *Watson v. Roman Catholic Church of the Diocese of Phoenix, Inc*., 393 Ariz. Adv. Rep. 17, 64 P.3d 195 (App. 2002), the Court should affirm the trial court's order.

4. The trial court found sufficient evidence that the Appellants' violated A.R.S. § 44-1221.

An appellate court may not disturb factual findings at injunction proceedings unless they are clearly erroneous or not supported by any credible evidence. *Phoenix Elementary School Dist. No. 1 v. Green*, 189 Ariz. 476, 478, 943 P.2d 836, 838 (App. 1997). The appeal court is bound by the trial court's finding unless it is clearly erroneous, giving "due regard . . . to the opportunity of the trial court to judge the credibility of witnesses." *Watson v. Roman Catholic Church of the Diocese of Phoenix, Inc.*, 393 Ariz. Adv. Rep. 17, 64 P.3d 195 (App. 2002); Ariz. R. Civ. P. 52(a). The trial court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O*., 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004).

Additionally, the appeal court defers to the trial court's determination of the weight to give conflicting evidence. *Watson v. Roman Catholic Church of the Diocese of Phoenix, Inc.*, 393 Ariz. Adv. Rep. 17, 64 P.3d 195 (App. 2002).

The Appellants' claim that no evidence was presented to the trial court is ludicrous. The trial court heard TEN HOURS of testimony over four days of hearings, and eleven exhibits were admitted. (I.R.A. 85, 135, 140, 147, and 155).

The trial court, sitting in the best position to judge a witness' credibility, found Locksmith Charley's testimony more credible than the Appellants. The trial court observed and drew conclusions from the Appellants' odd and obstinate behavior on the stand. Examples of the Appellants' testimony include:

> TR 148:8-12
> APPELLANT: [Exhibit 3] is showing all kinds of things here. Zero – zero something, there's no name of my business. I have no idea what he's asking me about. I don't know what I'm looking at. It's not the name of my business.
>
> TR 173:14 – 174:18
> THE COURT: I have some questions. On Exhibit 3, the list of phone numbers, if somebody calls any one of those phone numbers, it will ring at your business address? …
> APPELLANT: The first number is the phone number of Cox that rings in my shop, but the address is 1402. All the rest of the numbers, maybe I don't know. I have to check. Maybe not. We verify the phone numbers with him.
> THE COURT: Who's the "him" that you mean? [Appellee's counsel]? So when there is a name of Chandler Locksmith and that is a name that people might think is a separate business but, in fact, is part of your business?
> APPELLANT: All the names that we are using we have dba. If we don't have dba and it's not here, then I don't know what it is.
> THE COURT: Are you saying that Atlas Locksmith Services –
> APPELLANT (In English) Solutions.
> THE COURT: Atlas Locksmith Solutions does business as the names listed under the name column in Exhibit 3?
> APPELLANT: Okay, Sear[z] Locksmith is a dba of ours, and the rest of them I don't – … AZ Locksmith, I think, is also ours. The rest I will have to check.
>
> TR 159:3-5
> APPELLANT'S COUNSEL: Well, your honor, they are an L.L.C. –
> APPELLANT: Not exactly.
>
> TR 155:13 – 156:4
> QUESTION: Now sir, if you were precluded from utilizing in any form a geographic designation other than the 1402 designation, would you suffer any harm at all?
> APPELLANT: In this particular case the only service I give is out of this location, 1402. This is where I give the service. This is my shop.
> QUESTION: So if you were precluded from using the address, for example, on 7828 N. 19th Avenue [Exhibit 3] as a designation of where your business was located, you really wouldn't suffer any harm at all would you, because you only operate out of one location.
> APPELLANT: My shop where I give service is only in the shop at 1402. And I don't know where you took all these other addresses [on Exhibit 3] from.

QUESTION: So if somebody said you couldn't use any address but 1402 associated with your business, you wouldn't suffer one ounce of harm would you, sir?
APPELLANT: I don't understand your question. Does – a pizzeria does any other deliveries. They do other deliveries too.

TR 172:25 – 173:5
QUESTION: And would that net profit of $30,000 go down one dime if you were precluded from using any address other than 1402 Miller Road?
APPELLANT: All these addresses don't cost me money. They are only on the internet. I have no idea where they're coming from and what are they.

TR 172:17-20
APPELLANT: We're not doing false addresses. We're doing virtual addresses. And I can explain to you why, but you continue to tell me that you don't want to hear.

TR173:9-13
APPELLANT: Can I say something?
THE COURT: Yes, go ahead.
APPELLANT: We're using Voice over IP. It's not a land line. It doesn't go in the wall. We have to use a virtual address.

TR 174:19 – 175:5
THE COURT: Well, let me ask, what is the difference between a virtual – you were going to describe what a virtual address was, and you mentioned that it's different than a false address. What do you understand by virtual address?
THE WITNESS: When a representative, for example, of Qwest is coming to me, a salesman to my shop, and wants to sell me this service, he tells me that because we use the technology called "Voice over IP," we must give an address. We must give an address, but it doesn't have to be an exact address. It can be a city name, it can be a crossroads.

TR 184:18-21
APPELLANT: I don't have any false addresses. I told you that before and you keep mentioning false addresses. This is not my main advertisement. I have other advertisements.

TR 166:24 – 167:6
APPELLANT'S COUNSEL: The entire structure here was created by Veritel and its principal, a gentleman by the name of Clay Van Dorn, correct?
APPELLANT: Yes.
APPELLANT'S COUNSEL: Did you change the structure of this campaign since Veritel and Van Dorn put it together?
APPELLANT: No. and I don't have the ability to do any of this.

TR 180:4-7
APPELLANT'S COUNSEL: Okay. Now, when you pay your telephone bill, you pay your telephone bill to Cox or Qwest for the number of lines that they give you, true?
APPELLANT: Yes.

TR 145:16 – 146:6
QUESTION: And since that date—you say you had an advertising company. Since that date, have you done anything to direct that advertising company to stop their method of advertising which falsely designates the origin of your business?
APPELLANT: The first thing I would like to correct you, that you have said I have an advertisement company. I don't have an advertisement company. And, secondly, I didn't make any changes in the way I advertise my company.
QUESTION: Okay. So you've continued business as usual since receiving the complaint which said you were doing a false advertisement of your original business. You haven't stopped at all, have you?
APPELLANT: From 2009 nothing has changed; nothing was added or omitted.

The Appellants' own admissions that they advertise their business location to be in places in which they do not actually have a business provided more than enough evidence to support the trial court's decision. Thus, because there is evidence to support the trial court's decision, the Court must affirm the trial court's preliminary injunction.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING THE PRELIMINARY INJUNCTION

The trial court properly ordered a preliminary injunction enjoining the Appellants' unlawful conduct because the trial court found Locksmith Charley was likely to succeed on the merits, Appellants' continued misrepresentation of their business locations would cause irreparable harm, the balance of hardships weighed in favor of Locksmith Charley, and the preliminary injunction was in the public interest. The trial court properly set a de minimis bond within its broad discretion.

1. Preliminary Injunction Elements and Burden of Proof

a. Elements

A party seeking a preliminary injunction traditionally must establish four criteria: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable harm to the plaintiff if the relief is not granted; (3) a balance of hardships favoring the plaintiff; and (4) in certain cases, advancement of the public interest. See e.g. *LaFaro v. Cahill,* 203 Ariz. 482, 56 P.3d 56 (App. 2002); *Kromko v. City of Tucson,* 202 Ariz. 499, 47 P.3d 1137 (App. 2002).

Arizona courts require a showing of either (1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) the existence of serious questions going to the merits and the balance of hardships tips sharply in the moving party's favor. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990). These tests are not separate tests, but rather are two extremes of the same continuum. See *Benda v. Grand Lodge*, 584 F.2d 308, 315 (9th Cir. 1978). In deciding whether a preliminary injunction is appropriate, the Court can also consider the balance between the harm suffered by the plaintiff if the relief is denied versus the harm suffered by the defendant if the action is enjoined. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990).

b. Lower burden of proof

The level of proof required for the issuance of a preliminary injunction is less than that required for a motion for summary judgment. *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II,* 176 Ariz. 275, 860 P.2d 1328 (Ariz. 1993). Further, in a Consumer Fraud Act suit, the plaintiff is only required to prove his claim by a preponderance of evidence – not by clear and convincing evidence. *Dunlap v. Jimmy GMC of Tucson, Inc.*, 136 Ariz. 338, 666 P.2d 83 (App. Div. 2, 1983).

2. The Trial Court Properly Found Locksmith Charley Likely to Succeed on the Merits

a. The record supports the trial court's conclusion that Locksmith Charley is likely to succeed on the merits of his complaint.

As argued above, the record below contains substantial evidence to support the trial court's finding that Appellants' violated the Consumer Fraud Act and thus, Locksmith Charley was likely to succeed on the merits of his complaint.

The Appellants admitted that using false addresses to advertise the location of their business is a violation of law. (I.R.A. 155 ¶ 52; TR 145:5-15). Appellants admit using addresses or locations where they have no physical presence. Appellants testified that they advertise under other business names as dba's. (TR 174:1-18). Appellants testified that they also do business

using the names Chandler Locksmith, Searz Locksmith, and AZ Locksmith. (TR 174:1-18; Exhibit 3).

Appellants' business, Chandler Locksmith, is advertised as located at 13 E. Chandler Blvd., Chandler, and Appellants testified that they do not have a place of business at that address. (TR 149:5-15, Exhibit 3). Appellants' business, Searz Locksmith, is advertised as located at 4343 E. Indian School Rd., Phoenix, and Appellants testified that they do not have a place of business at that address. (TR 149:5-15, Exhibit 3). Appellants business, AZ Locksmith, is advertised as located at 6340 S. Rural Rd., #18, Tempe, and 1380 W. Elliot Rd., Tempe, and Appellants testified that they do not have a place of business at those addresses. (TR 149:5-15, Exhibit 3.) Appellant Trust Locksmith advertises using locations, not addresses. (TR 235:6-9). Trust Locksmith's ads show street names, cities, and ZIP codes, without a specific street number. (TR 235:14-17).

The trial court properly found more than enough evidence that the Appellants misrepresent their business locations in violation of the Consumer Fraud Act and mislead consumers. (I.R.A. 155 ¶ 70). The trial court further found that Locksmith Charley proved a probable violation of the Consumer Fraud Act by the Appellants, noting that the Appellants' motion to dismiss was denied and that "the preliminary injunction hearing strengthened the court's conclusions." (I.R.A. 155 ¶ 71).

b. Appellants' mental state is not an element required for preliminary injunction.

Appellants mistakenly argue that the trial court erred in omitting an analysis of conduct and culpable mental state. The purpose of a preliminary injunction is to simply prohibit the Appellants' continued unlawful behavior, not to adjudicate the complaint on the merits. Further, in a consumer fraud action, it is not necessary to show the defendant's intention to deceive the plaintiff. *Flagstaff Med. Ctr., Inc. v. Sullivan*, 773 F. Supp. 1325 (D. Ariz. 1991), aff'd in part, rev'd in part on other grounds, 962 F.2d 879 (9th Cir. 1992).

Although the record supports the Appellants' knowing and intentional violation of the Consumer Fraud Act (I.R.A. 155 ¶ 51, 52, 61), the mental state of the Appellants only applies to the classification of the Appellants actions as criminal conduct. A.R.S. § 44-1221(B) states that a person who intentionally or knowingly deceives another person by misrepresenting the geographical origin or location of the person's business is guilty of a class 2 misdemeanor.

Thus, the trial court properly enjoined the Appellants' actions without necessarily determining the Appellants' guilt.

3. The Trial Court Properly Found Appellants' Continued Use of False Addresses Would Cause Irreparable Harm

An irreparable injury is one that is not remediable by damages, where a loss is uncertain, and where the difficulty of proving damages with reasonable certainty should be considered. *IB Property Holdings, LLC v. Rancho Del Mar Apartments Ltd*., 228 Ariz. 61, 72, 263 P.3d 69, 80 (App. 2011).

Under the Arizona Consumer Fraud Act, an injury occurs when a consumer relies, even unreasonably, on false or misrepresented information. *Horowitch v. Diamond Aircraft Industries, Inc*., 526 F.Supp.2d 1236 (M.D. Fla., 2007). An actionable consumer fraud injury occurs when a consumer relies on false or misrepresented information. *Kuehn v. Stanley*, 208 Ariz. 124, 91 P.3d 346 (App. Div.2, 2004). Therefore, a consumer is injured, and thus has standing to enforce the Consumer Fraud Act, simply by relying upon the misrepresentation.

The court found, and Locksmith Charley testified that some of his injuries are irreparable, unable to be quantified, and cannot be remedied by monetary damages. (I.R.A. 155 ¶¶ 5-14, 18, 23-24; TR: 29:4-21, 31:3-25; 40:2-20, 63:2-20, 77:17-22, 78:14-19, 79:7-10). The false locations advertised by the Appellants damages the reputation of legitimate locksmiths like Locksmith Charley. (I.R.A. 155 ¶ 18; TR 40:2-5). Advertising hundreds of addresses where a business does not exist ruins a consumer's trust because it is lying. (TR 40:11-16).

The Appellants' continued unlawful activity even after notice is a significant indication of bad faith. The Appellants' practice of advertising their business locations at sites where they were not actually located continued through June 6, 2011. (I.R.A. 155 ¶¶ 5-8, 11-12, 17, 43; TR: 15:18-19, 18:21 – 20:4; 26:1 – 28:22, 30:16-18; 224:1-5). The Appellants understood that advertising their business location using false addresses was unlawful since September or October 2010. (TR 145:5-15). The Appellants failed to make any changes in the way they advertise since September or October 2010. (I.R.A. 155 ¶ 52; TR 145:16-25). The Appellants agree that statements that they were operating businesses at locations at which they did not have facilities would be very deceptive. (TR 149:12-17). The Appellants would not have used the false addresses if they had known that it was illegal. (I.R.A. ¶ 52; TR 167:7-14).

By definition, the continued violation of a statute is irreparable.

4. The Trial Court Properly Found the Balance of Hardships Weighed in Favor of Locksmith Charley

When determining in whose favor the balance of hardships tips, a court needs to consider who stands to be harmed the most by an adverse decision. *P & P Mehta LLC v. Jones*, 211 Ariz. 505, 508, 123 P.3d 1142, 1145 (App. 2005).

In this case, the balance of hardships tips strongly in favor of granting the injunction because Locksmith Charley is simply asking the Court to force the Appellants to refrain from illegal activity.

In contrast, the Appellants have no legitimate claim to continuing their conduct of misrepresenting their business locations. In other words, if the Appellants are enjoined from further harming Locksmith Charley and the public, they will not suffer any harm at all because the Appellants testified that they would not be harmed if they were precluded from using the virtual addresses. (TR 172:25 – 173:5).

5. The Trial Court Properly Found the Preliminary Injunction in the Public Interest

The Arizona Legislature has stated as public policy that misleading advertising is unlawful. Further, there is no constitutional right to distribute or disseminate false or misleading advertisements. *State ex rel. Corbin v. Tolleson*, 160 Ariz. 385, 773 P.2d 490 (App. Div.1 1989).

It is in the public interest that the Appellants be barred from continuing to deceive the public about where they operate their businesses.

6. The Trial Court Properly Set a de minimis Bond

Pursuant to Ariz. R. Civ. P. Rule 65(e), an applicant for a restraining order or preliminary injunction must be required to provide security, in an amount the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Ariz. R. Civ. P. Rule 65(e).

The trial court has broad discretion to determine a bond amount. *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co., Inc*., 240 F.3d 832 (9th Cir. 2001). The court has discretion to dispense with the security requirement, or to request mere nominal security. *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985).

Here, the trial court considered the relative hardship and reached a conclusion as to an appropriate bond amount. The trial court found evidence that a de minimis bond was proper because the injunction would have no effect on the real locations of the Appellants, the lawsuit was brought to stop the Appellants' unlawful actions, and Locksmith Charley can't afford a high bond. (I.R.A. 155, ¶ 19, 20).

Thus, the trial court's analysis clearly fell within the latitude of discretion afforded trial courts in setting the amount of bond.

D. A.R.S. § 44-1221 IS NOT UNCONSTITUTIONAL

The Court must presume that A.R.S. § 44-1221 is constitutional, and Appellants have not made any colorable argument that it is unconstitutional – unless, of course, the Court interprets A.R.S. § 44-1221 to only apply to out of state businesses, which would be a violation of the

Dormant Commerce Clause. A.R.S. § 44-1221 is not unconstitutionally overbroad because it does not criminalize legitimate commercial speech, nor is it unconstitutionally vague because it gives reasonable notice of what speech is prohibited. Finally, Appellants' unconstitutionality arguments must be stricken because appellants failed to serve the state notice of their unconstitutionality claims, in violation of A.R.S. § 12-1841.

1. Presumption of Constitutionality

An act of the legislature is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, it will be upheld. *State v. Ramos*, 133 Ariz. 4, 6, 548 P.2d 119, 121 (1982).

Thus, the Court must presume that A.R.S. § 44-1221 is constitutional.

2. Appellants' Interpretation That A.R.S. § 44-1221 Only Applies to Out-of-State Businesses Is Absurd

The Appellants argue that A.R.S. § 44-1221 does not apply to them because the legislative history shows the desire to protect Arizona businesses from out-of-state-competitors. This interpretation, however, would be an impermissible violation of the Dormant Commerce Clause.

The Dormant Commerce Clause "prohibits attempts on the part of any single state to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." *Edwards v. California*, 314 U.S. 160 (1941).

Interpreting A.R.S. § 44-1221, as Appellants suggest, to selectively target out-of-state businesses would restrain transportation of persons and property in commerce across Arizona borders in violation of the Dormant Commerce Clause. Appellants' suggested interpretation is absurd because it would render A.R.S. § 44-1221 unconstitutional, and thus, Appellants' argument lacks merit.

3. A.R.S. § 44-1221 is Not Unconstitutionally Overbroad Because it Does Not Criminalize Legitimate Commercial Speech

Appellants argue that A.R.S. § 44-1221 is unconstitutionally overbroad because it could criminalize legitimate commercial speech. A statute is unconstitutional if it sweeps unnecessarily broadly and thereby invades an area of protected freedoms. *State v. Johnson*, 112 Ariz. 383, 385, 542 P.2d 808, 809 (1975).

Appellants claim the language of A.R.S. § 44-1221 prohibiting advertisements "misrepresenting the geographical origin or location of the person's business" could be catastrophically interpreted to make the use of a virtual office or executive suite a criminal act. What Appellants fail to note, however, is that none of the professionals in their hypothetical examples are advertising a business location at which they do not have a presence. Meeting a client at a coffee shop although one works out of his home is not false advertising because the salesperson assumedly does not advertise that his office address is that of the coffee shop's. Conversely, a small business using a post office box on its advertisements is not misleading because the small business does, in fact, operate its business – at least receives mail – at the location of the post office box.

Therefore, the Appellants' claim that A.R.S. § 44-1221 is unconstitutionally overbroad is without merit.

4. A.R.S. § 44-1221 is Not Unconstitutionally Vague Because it Gives Reasonable Notice of What Speech is Prohibited

Appellants argue that A.R.S. § 44-1221 is unconstitutionally vague because it fails to give reasonable notice of what the statute prohibits. A statute is unconstitutionally vague if it defines the proscribed conduct in terms so indefinite that people of common intelligence must necessarily guess at its meaning. *Matter of Pima County Juvenile Appeal No. 74802-2*, 164 Ariz. 25, 28, 790 P.2d 723, 726 (1990).

Appellants argue that the phrase "geographical origin or location of the person's business in the conduct of the person's business" is vague and "not readily understood by persons of ordinary intelligence a [sic] reasonable so as to give them a fair warning and the opportunity to

avoid prohibited conduct." (Appellants Atlas, etc., Brief, p. 52). Appellants also argue, "[i]f the language in the statute referring to the 'geographical origin or location of the person's business' is not interpreted and construed by this Court to mean the boundaries of the State of Arizona as a whole, A.R.S. § 44-1221 is unconstitutionally vague."

As explained above, the statute is readily understood from its plain language: advertisements claiming a false or misleading geographic origin, i.e., French Champagne, or claiming a business location at which the business is not located, are misleading and unlawful. The Appellants argument that A.R.S. § 44-1221 is unconstitutionally vague is illogical and without merit.

5. Appellants' Unconstitutionality Arguments Must be Stricken Because Appellants Failed to Serve the State in Violation of A.R.S. § 12-1841

Appellants' claims of unconstitutionality should be stricken because Appellants failed to serve the Arizona Attorney General, the speaker of the house of representatives, and the president of the senate, in violation of A.R.S. § 12-1841.

Pursuant to A.R.S. § 12-1841(A), in any proceeding in which a state statute is alleged to be unconstitutional, the party making such allegation must serve a copy of the pleading containing the allegation upon the attorney general, the speaker of the house of representatives, and the president of the senate, at the same time the other parties in the action are served.

In this case, Appellants Atlas, Miller, and Millennium's Opening and Amended Opening Briefs argue that the preliminary injunction be invalidated because A.R.S. § 44-1221 is unconstitutionally overbroad and vague. Neither of Appellants' Certificates of Service dated March 21, 2012, or March 27, 2012, indicates that the Appellants' Brief was served upon the Arizona Attorney General, the speaker of the house of representatives, or the president of the senate. Thus, it must be inferred that Appellants failed to serve the Arizona Attorney General, the speaker of the house of representatives, and the president of the senate at the same time the other parties in the action were served, in violation of A.R.S. § 12-1841. Therefore, Appellants'

constitutionality arguments must be stricken because such arguments are not properly before this Court.

Lastly, Locksmith Charley hereby denies and repudiates any other issues raised by the Appellants not specifically denied and repudiated herein.

E. CONCLUSION

In conclusion, this Court should affirm the Superior Court's preliminary injunction because the trial court did not abuse its discretion. There is ample evidence in the record to support the trial court's findings that Locksmith Charley is properly before the court and a preliminary injunction was proper because Locksmith Charley is likely to succeed on the merits of his complaint and continues to suffer irreparable harm because Appellants continue to mislead consumers using false addresses. The balance of hardships favors Locksmith Charley and the amount of bond was proper. The preliminary injunction was in the public interest because the preliminary injunction protects the public from the Appellants' use of false addresses to mislead consumers regarding the location of their businesses.

REQUEST FOR ATTORNEYS' FEES AND COSTS

Pursuant to ARCAP Rule 21(c) and A.R.S. § 12-331, Appellees respectfully request the award of their reasonable attorneys' fees and costs.

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP Rule 14(b), I hereby certify that the foregoing Brief uses proportionately-spaced type of 10 and ½ characters per inch, is double-spaced using a Times New Roman font, and contains 11,280 words.

RESPECTFULLY SUBMITTED this 21st day of May, 2012.

THE LAW OFFICES OF DAVID W. DOW

/s/ David W. Dow

_____

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief were e-mailed on this 21st day of May, 2012, to:

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I further certify that the foregoing Brief was e-filed via AZTurboCourt with:

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RESPECTFULLY SUBMITTED this 21st day of May, 2012.

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