

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

ROBERT PETERSON and LEIBUNDGUTH )  
STORAGE & VAN SERVICE, INC. )

Plaintiffs, )

v. )

VILLAGE OF DOWNERS GROVE, ILLINOIS, )  
an Illinois municipal corporation )

Defendant. )

Case No. 14-cv-9851

Hon. Edmond E. Chang

**PLAINTIFF’S REPLY TO DEFENDANT’S RESPONSE TO ITS STATEMENT  
OF FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Plaintiff submits, pursuant to Local Rule 56.1(a), its Reply to Defendant’s Response to Plaintiff’s Local Rule 56.1 Statement of Uncontested Material Facts.

**The Parties**

1. Leibundguth is an Illinois corporation located in Downers Grove, Illinois, that provides moving and storage services for its customers. (Dkt. 10, Am. Compl. ¶ 11.) Robert Peterson is the sole owner of Leibundguth. (Dkt. 10, Am. Compl. ¶ 10.)

**Response:** Undisputed.

**Reply:** None.

2. The Village of Downers Grove is an Illinois municipal corporation located in DuPage County, Illinois. (Dkt. 10, Am. Compl. ¶ 12; Dkt. 12, Ans. ¶ 12.)

**Response:** Undisputed.

**Reply:** None.

**Jurisdiction and Venue**

3. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343, and 2201 because Plaintiff brought this suit under 42 U.S.C. §§ 1983 and 1988 to

seek relief for alleged violations of their federal constitutional rights. (Dkt. 10, Am. Compl. ¶¶ 4, 5; Dkt. 12, Ans. ¶¶ 4, 5.)

**Response:** Undisputed except for the Village disputes and specifically denies that Plaintiff has standing to challenge the constitutionality of the entire sign ordinance as asserted in Count I of the Complaint. (See Defendant's Combined Reply in Support of Its Motion For Summary Judgment, generally).

**Reply:** Count I challenges the painted sign ban and size and number limitations on signs generally as content-based restrictions on speech. Leibundguth does not challenge the constitutionality of the entire sign ordinance. For the reasons stated in Section III.A of Leibundguth's Reply in Support of its Motion for Summary Judgment, Leibundguth has standing under the overbreadth doctrine to assert these challenges.

4. Venue is proper in this district under 28 U.S.C. § 1391(b) because the events giving rise to Plaintiffs' claims occurred within the district and because Defendant is located in this district. (Dkt. 10, Am. Compl. ¶ 9; Dkt. 12, Ans. ¶ 9.)

**Response:** Undisputed.

**Reply:** None.

## FACTS

### Leibundguth's Business and Signs

5. Leibundguth is located at the property and building at 1301 Warren Avenue in Downers Grove. The back wall of the building runs parallel to the BNSF railroad tracks. (Dkt. 10, Am. Compl. ¶ 14; Dkt. 12, Ans. ¶ 14.)

**Response:** Undisputed.

**Reply:** None.

6. The building bears four signs advertising Leibundguth's business. (Dkt. 10, Am. Compl. ¶ 23; Dkt. 12, Ans. ¶ 23.)

**Response:** The Village disputes this assertion and any suggestion the building bears four “separate” signs. Two of the four signs referenced by Plaintiff form a “single” wall sign under the code. Only three “separate” signs exist at the property as defined and measured under the Village sign ordinance (Dkt. 12, Ans. ¶¶ 20, 21; Dkt. 10, Compl. Ex. B, November 19, 2014 staff report; Dkt. 37, Def. SOF, Ex. 7, Popovich Dep., Ex. 9 PageID #3742-3743; Ex. 10 PageID #3744; Ex. 11 PageID #3745; Ex. 18 PageID #3812-3813; Popovich Dep., 14:6-17).

**Reply:** The Village’s assertion that the building has only three signs, not four, and that the block lettered Leibundguth sign and the Wheaton sign are really one sign, contradict any reasonable person’s understanding of what a sign is (see the picture of the two signs in Dkt. 10, Compl. ¶ 20-21). None of the citations that the Village provides in its Response to Statement of Fact 6 actually references the sign ordinance or the municipal code or provides any basis in law to assert that Leibundguth’s two signs are really one. Paragraphs 20 and 21 of the Village’s Answer (Dkt. 12) state the Village’s assertion that the two signs are one but do not provide any authority for that assertion. Nor does the staff report submitted to the Zoning Board of Appeals regarding Leibundguth’s variance application cite any authority for the assertion that the two signs are one; it simply assumes it to be true. (Dkt. 10, Compl. Ex. B.) Additionally, the notices that Leibundguth’s signs were not in compliance with the amended sign ordinance say nothing at all about the two signs being one, nor do they provide any authority to support that assertion. (Def. SOF, Ex. 7, Popovich Dep., Ex. 9 PageID #3742-3743; Ex. 10 PageID #3744; Ex. 11 PageID #3745.)

The 1977 Village of Downers Grove Department of Building and Zoning Sign Review Form actually contradicts the Village’s assertion that the two signs are one.

That form indicates that there are two mounted wall signs and only one painted sign. The pictures do not include a picture of the sign on the back of the building (which presumably the inspector missed), but do include Leibundguth's painted wall sign in the front and indicate that there are two mounted wall signs of 60 and 2 square feet respectively. Nor does the 1977 Sign Review Form provide any legal basis for counting two signs as one. (Def. SOF, Ex. 7, Popovich Dep., Ex. 18 PageID #3812-3813.)

Finally, the Village's reference to Planning Manager Stan Popovich's deposition does not support its claim that the two signs are counted as one. Indeed, the reference to the deposition transcript cited by the Village addresses Mr. Popovich's employment background and has nothing to do with the issue of whether the sign ordinance treats two signs as one. (Def. SOF, Ex. 7, Popovich Dep., 14:6-17.)

However, when asked in his deposition "is there any reason . . . why you don't treat [the block-lettered and Wheaton] signs as separate signs?" Mr. Popovich did not cite to any authority, including the sign ordinance or municipal code, but instead asserted: "Because the ordinance requires or allows only one wall sign per tenant frontage facing a public roadway or drivable right-of-way." (Def. SOF Ex. 7, Dep. of Popovich, 137:19-23.) In other words, the Village implements the restriction of the number of wall signs by creating a fiction that two signs are one in order to avoid that prohibition. This, of course, makes the restriction on the number of wall signs more susceptible to a First Amendment challenge since the Village created a rule completely out of thin air, which makes it ripe for arbitrary application and abuse.

The Municipal Code does define “Surface Area (of a sign)” in relevant part, by stating:

In the case of a wall or window sign with more than one exterior surface containing items of information, the area shall be the sum total of the display surface as determined by drawing an imaginary square or rectangular envelope so as to completely enclose the copy on each sign face excluding the support structure and architectural features.”

(Dkt. 40, Pl. SOF, Ex. E, Sect. 15.220.) Notably, this definition does not explain that two signs may be determined to be one sign, it simply explains how surface area is measured when a wall sign has more than one exterior surface containing items of information. It does not indicate that two distinct signs are to be considered one sign simply because of their proximity to each other. Moreover, the Village does not even cite this as a basis for its assertion that Leibundguth’s two signs must be considered as one. Therefore, the Village’s assertion that these two signs are considered one is merely that; it has no basis in the sign ordinance or municipal code, and the Village has not identified any other basis for it

7. The back of the building bears a sign that is painted directly on the wall of the building that advertises to train commuters riding Metra along the BNSF railway. (Dkt. 10, Am. Compl. ¶ 16; Dkt. 12, Ans. ¶ 16.)

**Response:** Undisputed.

**Reply:** None.

8. The sign on the back wall of Plaintiff’s building exceeds Section 9.050(C)(5)’s size limit, (Dkt. 10, Am. Compl. ¶ 16) and violates Section 9.020(P)’s prohibition on signs painted directly on a wall. (Dkt. 10, Am. Compl. ¶ 29).

**Response:** Undisputed.

**Reply:** None.

9. The front of the building bears a smaller sign that is also painted directly on the wall of the building. (Dkt. 10, Am. Compl. ¶ 19; Dkt. 12, Ans. ¶ 19.) The sign painted on the front of the building violates Section 9.020(P)'s prohibition on signs painted directly on a wall. (Dkt. 10, Am. Compl. ¶ 29.)

**Response:** Undisputed.

**Reply:** None.

10. These painted signs predate the ownership interest of Robert Peterson, the sole owners of Leibundguth, Peterson believes that these signs were erected shortly after the building was built in the 1930s. (Def. Ex. 5, Peterson Dep., 21:11-15; 36:10 – 38:11; Dkt. 10, Am. Compl. ¶¶ 16, 19.)

**Response:** The Village disputes this assertion as Peterson has admitted that the painted signs have changed since they were originally installed. The rear painted sign was modified after 1987 (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., 88:1-24; 89:1-15; 37:7-8) and the front painted sign was modified after 1977. (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., 95:24; 96:1-24; 97:1-24; 98:5; Dkt. 10, Compl. ¶ 19).

**Reply:** The painted signs existed before Mr. Peterson's ownership regardless of whether Leibundguth made minor modifications to them by, for example, updating the phone number or updating the name of Leibundguth's long distance carrier.

And even if the Village were correct that Leibundguth has changed its signs, that would have no effect on Leibundguth's constitutional challenges.

11. The front of the building also contains a sign with "Leibundguth Storage & Van Service" in red and white hand-painted block letters. This sign was erected in 1965. (Dkt. 10, Am. Compl. ¶ 20; Dkt. 12, Ans. ¶ 20; Def. Ex. 5, Peterson Dep., 39:20 – 40:5.)

**Response:** The Village disputes that the sign referenced is a single sign. It is only a portion of the larger sign described by Plaintiff in paragraph 12 below (Dkt. 12, Ans. ¶¶ 20, 21; Dkt. 10, Compl. Ex. B, November 19, 2014 staff report; Dkt. 37, Def. SOF, Ex. 7, Popovich Dep., Ex. 9 Page ID #3742-3743; Ex.10 PageID #3744; Ex. 11 PageID #3745; Ex. 18 Page ID #3812-3813; Popovich Dep., 14:6-17). While the Village does not dispute the plastic manufactured letters were first installed in 1965, the Village disputes any suggestion the sign is "painted" on the wall as it has manufactured letters affixed to the building. (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., Ex. 11, PageID #2310-2311).

**Reply:** As explained in support of Plaintiff’s Reply to Statement of Fact 6, the Village does not provide any basis from any authority, including the sign ordinance and municipal code, to support its assertion that the block letter sign is part of a larger sign. (Pl. Reply SOF 6.)

In addition, Leibundguth has made no “suggestion” that the blocked lettered sign is “painted” on the wall. Rather, it is a sign with manufactured letters – which have themselves been hand-painted – affixed to the building. (Dkt. 10, Am. Compl. ¶ 20; Dkt. 12, Ans. ¶ 20; Def. Ex. 5, Peterson Dep., 39:20 – 40:5.)

12. Directly under that sign is a sign that says “Wheaton World Wide Moving,” which advertises Leibundguth’s relationship with its long-distance mover. That sign was erected in 1987, replacing a similar sign with the previous business name of Wheaton. (Dkt. 10, Am. Compl. ¶ 21; Dkt. 12, Ans. ¶ 21; Def. Ex. 5, Peterson Dep., 42:22-24; 43:1-24; 44:1-19; 88:15-24; 89:1-15.)

**Response:** The Village disputes that the “Wheaton” sign referenced is a single sign. It is only a portion of the larger sign described by Plaintiff in paragraph 11 above. (Dkt. 12, Ans. ¶¶ 20, 21; Dkt. 10, Compl. Ex. B, November 19, 2014 staff report; Dkt. 37, Def. SOF, Ex. 7, Popovich Dep., Ex. 9 PageID #3742-3743; Ex. 10 PageID #3744; Ex. 11 PageID #3745; Ex. 18 Page ID #3812-3813; Popovich Dep., 14:6-17). The Village does not dispute the “Wheaton” portion of the sign was erected in 1987, but does dispute it replaced a similar sign as the 1977 photograph of the building from the official code enforcement file shows no sign existed there as of 1977. (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., Ex. 12, PageID #2313-2314).

**Reply:** As explained in support of Plaintiff’s Reply to Statement of Fact 6, the Village does not provide any basis from any authority, including the sign ordinance and municipal code to support its assertion that the Wheaton sign is part of a larger sign. (Pl. Reply SOF 6.)

The Village’s assertion that the 1977 photograph of the building from the official code enforcement file shows that no sign existed there as of 1977 does not appear to

be supported by the small, blurred photograph the Village cites. (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., Ex. 12, PageID #2313-2314.) In addition, the Sign Review Form on PageID #2313 indicates that there are 2 mounted wall signs and one painted sign on the front of the building. (Apparently the Village inspector did not know about the sign on the back of the building.) But even if it were true that there was no sign there in 1977, it would still be possible that a similar sign to the Wheaton sign was put up after 1977 and then replaced in 1987.

13. Collectively, according to the Village, the signs on the front of the building violate Section 9.050(A)'s limitation on the total aggregate size of signs. (Dkt. 10, Am. Compl. ¶ 39; **Pl. Ex. A**, Downers Grove Zoning Board of Appeals Minutes, Nov. 19, 2014.) Collectively, the signs on the front of the building violate Section 9.050(C)'s limit on the total number of wall signs per tenant frontage. (Dkt. 10, Am. Compl. ¶ 30.)

**Response:** The Village does not dispute that the collective two wall signs on the front of the building violate and exceed the size and number of wall signs allowed under the sign ordinance provisions cited by Plaintiff. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** None.

14. All four of Plaintiffs' signs are truthful and not misleading. The signs communicate only the name of the business, the telephone number of the business, and Leibundguth's relationship with Wheaton World Wide Movers. (Dkt. 10, Am. Compl. ¶ 23; Dkt. 12, Ans. ¶ 23.)

**Response:** The Village does not dispute that the two signs on the front of the building are truthful and not misleading. However, the Village does dispute that the rear wall sign is truthful and not misleading as it advertises a relationship with a non-existent business (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep. Ex. 10, PageID #2309), and Peterson has admitted it was therefore untruthful. (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., 45:20-24; 46:1-6). The Village also disputes the existence of four separate signs on the building, as only three exist as defined by the Village code. (Dkt. 12, Ans. ¶¶ 20, 21; Dkt. 10, Compl. Ex. B, November 19, 2014 staff report; Dkt. 37, Def. SOF, Ex. 7, Popovich Dep., Ex. 9 PageID #3742-3743; Ex. 10 PageID #3744; Ex. 11 PageID #3745; Ex. 18 PageID #3812-3813; Popovich Dep., 14:6-17).



**Reply:** As explained in support of Plaintiff's Reply to Statement of Fact 6, the Village does not provide any basis from the Village code to support its assertion that the four separate signs on the building are really three signs. (Pl. Reply SOF 6.)

The Village's assertion that the rear wall sign is not truthful and is misleading because it advertises a relationship with a non-existent business is baseless. No one has been or could be misled by the fact that the sign said "Movers" instead of "Moving." The difference is not substantive: "movers" and "moving" communicate the same message. Wheaton World Wide Moving has a website address of [wheatonworldwide.com](http://wheatonworldwide.com) and a Google search of "Wheaton World Wide Movers" provides [wheatonworldwide.com](http://wheatonworldwide.com) as the first hit, and every link on the first page of that search refers to Wheaton World Wide Moving. There is absolutely no way that the rear painted sign could mislead anyone. Despite the fact that a picture of the rear painted sign features prominently on the first page of Leibundguth's complaint, with the word "Wheaton World Wide Movers" and page 6 of the Complaint provides a picture of the sign of the front which states "Wheaton World Wide Moving," the Village was not misled, because it states that it did not even know about the discrepancy until Bob Peterson's deposition on March 19, 2015, four months after the Complaint was filed. (Def. Resp. 10.)

Further, a moving company's use of the terms "moving" and "movers" interchangeably appears common as Leibundguth's own website address is [leibundguthmovers.com](http://leibundguthmovers.com), while it sometimes does business as Leibundguth Moving

& Storage. Thus, the use of the word “movers” instead of “moving” in Wheaton World Wide’s name does not make the sign untruthful or misleading.

15. All four of Plaintiffs’ signs advertise a lawful activity – moving and storage – for which Leibundguth is licensed. (Dkt. 10, Am. Compl. ¶ 24; Dkt. 12, Ans. ¶ 24.)

**Response:** The Village disputes this assertion as after preparation of the Village’s Answer, in discovery the Village learned that the rear sign is not truthful as it advertises a relationship with a non-existing business. (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., Ex. 10, PageID #2309; Peterson Dep., 45:20-24; 46:1-6). The Village also disputes four separate signs exist, as only three exist on the property. (Dkt. 12, Ans. ¶¶ 20, 21; Dkt. 10, Compl. Ex. B, November 19, 2014 staff report; Dkt. 37, Def. SOF, Ex. 7, Popovich Dep., Ex. 9 PageID #3742-3743; Ex. 10 PageID #3744; Ex. 11 PageID #3745; Ex. 18 PageID #3812-3813; Popovich Dep., 14:6-17). The Village does not dispute that moving and storage is a lawful business activity.

**Reply:** Leibundguth refers to its statements in Reply to Statement of Fact 6 and 14, addressing the Village’s incorrect assertions that the rear painted sign is not truthful and that Leibundguth has three signs, not four.

16. The sign on the back of Leibundguth’s building accounts for about 15 to 20 percent of the business’s revenue. (Dkt. 10, Am. Compl. ¶ 18; **Pl. Ex. B**, Taylor Expert Report 14-17.)

**Response:** The Village disputes this allegation (Dkt. 12, Ans. ¶ 18). Plaintiff has not produced any evidence of actual lost income or income generated from the rear sign, as it is an estimate only (Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., 56:11-24; 57:1-24; 58:1-24; 59:1-24; 60:1-24; 61:1-5).

**Reply:** Leibundguth only asserts damages in the amount of \$1 (Dkt. 10), and therefore an estimate is adequate to show that the rear painted sign is important to its business. In addition, Leibundguth notes that its expert, Charles Taylor, has given undisputed testimony supporting Leibundguth’s estimate of the revenue for which the rear painted sign accounts. (Dkt.40, Pl. SOF, Ex. B, Taylor Expert Report 14-17.)

## Village Actions Denying Plaintiff Relief from the Sign Ordinance

17. At meetings on September 2, September 9, and October 7, 2014, the Village Council discussed a proposed amendment to the sign ordinance, suggested by Leibundguth, to allow signs to face the BNSF railway. Resolutions introduced at the September 2 and October 7 Village Council meetings, which would have allowed signs to face the railway, failed. (**Pl. Ex. C**, Downers Grove Village Council Meeting Minutes, Sept. 2, 2014 at 9-11; Sept. 9, 2014 at 2; and Oct. 7, 2014 at 7-9.)

**Response:** The Village does not dispute the meetings cited were held and the proposed resolutions failed. The Village disputes the amendment proposed would allow “signs” to face the BNSF railway, as the amendment addressed only wall signs, and the sign ordinance allow a number of other types of signs such as monument signs, shingle signs, projecting signs, awning signs, under-canopy signs and window signs to face the BNSF railway as admitted by Leibundguth. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance (§ 9.050); Dkt. 10, Compl. ¶ 32).

**Reply:** Leibundguth acknowledges that the meetings and resolutions discussed in Statement of Fact 17 addressed whether *wall* signs should be permitted to face the BNSF railway.

18. Mr. Peterson also applied to the Downers Grove Zoning Board of Appeals for a variance that would have allowed him to have a sign facing the Metra, have a sign directly painted on the wall of the building, and have signs exceeding the maximum aggregate sign area. On November 19, 2014, the Zoning Board of Appeals denied Mr. Peterson’s variance request. (**Pl. Ex. A**, Downers Grove Zoning Board of Appeals Meeting Minutes, Nov. 19, 2014, at 2-9.)

**Response:** The Village disputes a single variation was sought by Plaintiff, as multiple variations were sought and needed to comply with the sign ordinance. (Dkt. 10, Compl. Ex. B, November 19, 2014 staff report). The Village further disputes that Plaintiff needed a variance for a sign to face the Metra railway, as at the time the request was made multiple different types of signs were allowed to do so under the sign ordinance as admitted by Leibundguth. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance (§ 9.050); Dkt. 10, Compl. ¶ 32).

**Reply:** Leibundguth submitted a request for several variations from the sign ordinance that were presented at the same time before the Zoning Board of Appeals. Leibundguth needed the variations in order to keep its existing painted wall sign

along the BNSF railway because wall signs along the BNSF were not at that time permitted, painted wall signs were not permitted, and the collective size (and number) of signs on Leibundguth's building exceeded the maximum size the sign ordinance allowed. (Dkt. 40, Pl. SOF, Ex. A, Downers Grove Zoning Board of Appeals Meeting Minutes, Nov. 19, 2014, at 2-9.)

19. In a letter denying Leibundguth's petition for a variance, Patrick Ainsworth, Village Planner, stated that, to comply with the sign ordinance, Leibundguth could remove its two painted signs by applying a solid paint color over them. The letter also gave Leibundguth until April 17, 2015, to paint the building walls over those signs because an average temperature of 50 degrees Fahrenheit is required. (**Pl. Ex. D**, Letter from Ainsworth, Nov. 26, 2014.)

**Response:** The Village does not dispute the content of the letter referenced and denial of the multiple variations requested by Plaintiff, (Dkt. 40, Pl. SOF, Ex. D, November 26, 2014 letter from Patrick Ainsworth), as the text of the letter speaks for itself. The Village does dispute any suggestion that the Village or Mr. Ainsworth instructed or directed Peterson to remove the painted signs by painting over them, as it was simply assumed he would elect that option as the least-expensive and easiest option to achieve compliance.

**Reply:** The November 26, 2014 letter from Patrick Ainsworth states: "It is assumed that the two painted wall signs are going to be removed by applying a solid painted color." (Dkt. 40, Pl. SOF, Ex. D, Letter from Ainsworth, Nov. 26, 2014.) This is not inconsistent with Leibundguth's assertion that "to comply with the sign ordinance, Leibundguth *could* remove its two painted signs by applying a solid paint color over them." (Dkt. 40, Pl. SOF 19 (emphasis added).)

### **Village Ordinances**

20. The sign ordinance does not restrict the size, location, or number of governmental signs, temporary decorations and signs, noncommercial flags, and memorial signs and tablets. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

**Response:** The Village does not dispute that each of these signs is allowed without a permit. The Village does dispute the signs identified are not restricted in size, location and number as they must conform to Sections 9.010, 9.020 of the sign ordinance and temporary signs must also comply with Section 9.040 of the sign ordinance, so no “blanket” statement can be made as to when or where they are allowed in isolation without reference to a specific property and/or zoning classification. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** While other types of signs have specific limitations that restrict their size, location, or number, the sign ordinance does not provide any specific limitations that restrict the size, location, or number of governmental signs, temporary decorations, noncommercial flags, and memorial signs and tablets. Section 9.010 of the sign ordinance applies to all signs and requires that they meet setback regulations of their subject zoning district (Dkt. 37, Def. SOF, Ex. 2, Section 9.010(D)(2)), and it allows off-premise signs when a business or service does not have direct access to a public street (Dkt. 37, Def. SOF, Ex. 2, Section 9.010(D)(3)). Section 9.020 is a list of prohibited signs, which does not provide limitations on the size and number of signs generally. The only limitations on location of signs in Section 9.020 are the statement that signs may not be “attached to utility, traffic signal poles, light poles, or standards” except for government signs (Dkt. 37, Def. SOF, Ex. 2, Sect. 9.020(B)), and the statement that signs, except for government signs, may not be “located on the public right-of-way, or affixed to or upon public property” (Dkt. 37, Def. SOF, Ex. 2, Sect. 9.020(D)).

Leibundguth acknowledges that Section 9.040 limits the size and number of temporary signs, but the limitations in Section 9.040 do not apply to temporary decorations.

21. The sign ordinance limits street address signs to four square feet. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

**Response:** Undisputed.

**Reply:** None.

22. The sign ordinance limits “no trespassing” signs to two square feet. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

**Response:** Undisputed.

**Reply:** None.

23. The sign ordinance limits political and noncommercial signs, which it defines to include home occupation signs, to a total of 12 square feet for all such signs per lot, and these signs may not be placed on the public right-of-way. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

**Response:** The Village disputes that home occupation signs are regulated and defined under Section 9.030 as they are regulated under Section 9.070.B. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance (§ 9.070.B)). It is undisputed that Section 9.030 states: “Political signs and noncommercial signs, provided that total area of all such signs together may not exceed a maximum area of 12 square feet per lot. Political and noncommercial signs may not be placed in the public right-of-way.” (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** Section 15.220 of the Zoning Ordinance, in its definition of noncommercial signs, states that “[h]ome occupation signs are also deemed noncommercial signs.” (Dkt. 40, Pl. SOF, Ex. E.) Leibundguth does not dispute that Section 9.070(B) regulates home occupation signs. Section 9.070(B) provides that home occupation signs are limited to one per lot, may not exceed 2 square feet in area, and must be flat-mounted against the principal building. (Dkt. 37, Def. SOF, Ex. 2.)

24. The sign ordinance limits real estate signs to 5.5 square feet in residential zones and 36 square feet in nonresidential zones, but real estate signs may not exceed 10 feet in height. The sign ordinance also limits the number of real estate

signs and prohibits them in the public right-of-way, except that open house signs are allowed only on Friday, Saturday, and Sunday at certain times. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

**Response:** The Village does not dispute any of the text of Section 9.030.H of the sign ordinance which addresses real estate signs, as this provision speaks for itself. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** None.

25. The sign ordinance states that garage sale, rummage sale, yard sale and estate sale signs may not exceed four square feet and are allowed in the public right-of-way, except that such signs are allowed only on Friday, Saturday, and Sunday at certain times. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

**Response:** The Village does not dispute any of the text of Section 9.030.J of the sign ordinance as governing garage sale, rummage sale, yard sale and estate sale signs, as this provision speaks for itself. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** None.

26. The sign ordinance states that help wanted signs must not exceed two square feet and may only be placed on a window or door. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

**Response:** The Village does not dispute any of the text of Section 9.030.L of the sign ordinance as governing help wanted signs, as this provision speaks for itself. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** None.

27. The sign ordinance does not permit vehicle signs to remain stationary for an extended period of time for the purpose of attracting attention to a business. (Def. Ex. 2, Sign Ordinance, Sec. 9.030.)

**Response:** The Village does not dispute any of the text of Section 9.030.N of the sign ordinance as governing vehicle signs, as this provision speaks for itself. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** None.

28. The sign ordinance does not count certain signs in calculating Section 9.050(A)'s limit on total aggregate sign size. Properties abutting the right-of-way of I-88 or I-355 are allowed an additional monument sign that may not exceed 225



square feet, which does not count in calculating the lot's total sign area. (Def. Ex. 2, Sign Ordinance, Sec. 9.050(B)(3).) A building of four stories or more is allowed one wall sign of 100 square feet or less on no more than three sides of the building, and these are not counted against the maximum allowable sign area. (Def. Ex. 2, Sign Ordinance, Sec. 9.050(C)(4).) The Village also does not count a panel sign in a multi-tenant shopping center (Def. Ex. 2, Sign Ordinance, Sec. 9.050(B)(2)), window signs (Def. Ex. 2, Sign Ordinance, Sec. 9.050(H)), or menu boards (Def. Ex. 2, Sign Ordinance, Sec. 9.050(D)) in calculating a building's sign area.

**Response:** The Village does not dispute the actual text of each section recited by Plaintiff, and admits as undisputed that the text of each section speaks for itself. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** None.

29. The sign ordinance places no limit on the number of window signs or shingle signs a property may have (Def. Ex. 2, Sign Ordinance, Sec. 9.050(H), (B)(4)); allows multiple window signs (Def. Ex. 2, Sign Ordinance, Sec. 9.050(H)); and, in addition to a wall sign, allows building owners to display a shingle sign or a monument sign (Def. Ex. 2, Sign Ordinance, Sec. 9.050(B)), a menu board (Def. Ex. 2, Sign Ordinance, Sec. 9.050(D)), a projecting sign, (Def. Ex. 2, Sign Ordinance, Sec. 9.050(E)) an awning sign (Def. Ex. 2, Sign Ordinance, Sec. 9.050(F)), and an under-canopy sign (Def. Ex. 2, Sign Ordinance, Sec. 9.050(G)).

**Response:** The Village does not dispute the actual text of each section recited by Plaintiff, and admits as undisputed that the text of each section speaks for itself. The Village does dispute that there are no other limitations on each of these signs as they are all subject to Section 9.010 and 9.020 of the sign ordinance, so no "blanket" statement can be made as to when or where they are allowed in isolation without reference to a specific property and/or zoning classification. (Dkt. 37, Def. SOF, Ex. 2, sign ordinance).

**Reply:** Leibundguth does not dispute that these signs are subject to the limitations in Section 9.010 and 9.020 of the sign ordinance, but for the reasons stated in its Reply in support of Statement of Fact 20, those limitations do not provide specific limitations on the number of signs, such as the limitations on the number of wall signs.

30. The Zoning Code, of which the Sign Ordinance is part, defines "Commercial Sign" as "A sign that identifies, advertises, or directs attention to a commercial



business, or is intended to induce the purchase of goods, property, or service; including, without limitation, a sign naming a brand of goods or service.” (Pl. Ex. E, Zoning Code, Sec. 15.220.)

**Response:** Undisputed.

**Reply:** None.

31. The Zoning Code defines “Noncommercial sign” as “A sign that does not promote commercial activity, such as ornamental entry gate signs. Home occupation signs are also deemed noncommercial signs.” (Pl. Ex. E, Zoning Code, Sec. 15.220.)

**Response:** Undisputed.

**Reply:** None.

32. The Village does not prohibit a brick exterior wall of a building from being painted. (Pl. Ex. F, Municipal Code, Sections 7.1901, 7.104.)

**Response:** Undisputed, with the exception that if the exterior wall of a building is painted with a “sign” as defined under the Village zoning ordinance, it would be prohibited under Section 9.020.P of the sign ordinance. (Dkt. 40, Pl. SOF, Ex. E, Zoning Code, § 15.220).

**Reply:** Leibundguth does not dispute that if the exterior wall of a building is painted with a sign as defined under the Village zoning ordinance, it would be prohibited under Section 9.020(P) of the sign ordinance, except that some painted flags and murals are permitted by the sign ordinance. (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3; see also Dkt. 40, Pl. SOF 33.)

33. The Village staff report accompanying Ordinance No. 5472 states: “There are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech.” (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3.)

**Response:** Undisputed that this statement is included as part of the overall report referenced.

**Reply:** None.

34. The Village staff report accompanying Ordinance No. 5472 states: “The allowance of painted signs in limited locations of the Village versus other locations may be somewhat more difficult to defend relative to the intent and purpose of the Sign Ordinance as detailed in Section 9.010.” (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3.)

**Response:** Undisputed that this statement is included as part of the overall report referenced.

**Reply:** None.

35. The Village staff report accompanying Ordinance No. 5472 does not identify any reasons why, or ways in which, the prohibition on signs painted on a wall, roof, or fence advances traffic safety. (Def. Ex. 4, Report of Plan Commission, July 6, 2015, at 3.)

**Response:** The Village disputes this statement as the report includes references to visibility issues resulting from aging and fading painted signs, illumination issues and visual chaos resulting from excessively large or deteriorating painted signs, all of which may impact and impair traffic safety and the wayfinding function of painted signs. (Dkt. 37, Def. SOF, Ex. 4, July 6, 2015 Report of the Plan Commission).

**Reply:** The Village staff report accompanying Ordinance No. 5472 does not mention any reasons that the prohibition on painted signs on a wall, roof, or fence advances the Village’s interest in traffic safety. The report does not mention traffic safety at all. The paragraph in the report discussing “visibility issues resulting from aging and fading painted signs, illumination issues and visual chaos resulting from excessively large or deteriorating painted signs,” (Def. Resp. SOF 35), begins by stating: “The elimination of painted wall signs throughout the Village relates to promoting uniform and equal treatment of such signs regardless of their location or message, and further enhances aesthetics.” (Dkt. 37, Def. SOF, Ex. 4, Report of Plan Commission, July 6, 2015, at 3.) After discussing the problem with aging and faded painted signs, illumination issues and visual chaos, that same paragraph concludes:

“Order and effective display of signs projects a high quality commercial environment that is far more attractive than an area dominated by the visual chaos of signs that are excessively large or deteriorating.” (Dkt. 37, Def. SOF, Ex. 4, Report of Plan Commission, July 6, 2015, at 3.) It is clear that the report’s discussion addresses aesthetic concerns and not issues of traffic safety.

Even if the issues brought up in the report did address traffic safety concerns, for the reasons stated in Leibundguth’s Motion, Section I.A (Dkt. 41 at 2-5) and Reply Section I, the painted sign ban does not advance the Village’s interest in traffic safety in a narrowly tailored way.

36. On July 6, 2015, the Village of Downers Grove Plan Commission held a hearing on a petition to approve multiple text amendments, including the amendments to the sign ordinance to allow a wall sign along the railway but limit the size of such wall sign and to prohibit signs painted on a wall, roof, or fence in all zoning districts in the Village. During the hearing the only public comment was from Bob Peterson, owner of Plaintiff Leibundguth, Jeffrey Schwab, attorney for Plaintiff, and one other citizen from Downers Grove, whose only relevant comment was that the Village staff in discussing signs only addressed the negatives and did not mention the positive aspects of signs, like advertising. The members of the Plan Commission had no relevant discussion and passed the petition unanimously. (**Pl. Ex. G**, Plan Commission Meeting Minutes, July 6, 2015, at 9-11.)

**Response:** The Village does not dispute the public hearing referenced and that public comment was taken by the individuals identified by Plaintiff to consider multiple text amendments that were ultimately approved by the Village Council by adoption of Ordinance No. 5472 on July 21, 2015. (Dkt. 37, Def. SOF, Ex. 3, Ordinance No. 5472). The Village does not dispute the accuracy or content of the minutes from the meeting (Dkt. 40, Pl. SOF, Ex. G, July 6, 2015 Plan Commission Meeting Minutes), but does dispute Plaintiff’s characterization as to what testimony and discussion was relevant, and that the minutes include the complete record of the discussion held.

**Reply:** The Plan Commission Meeting Minutes of July 6, 2015 speak for themselves and were created by the Village itself and obtained from its website.

37. On July 14, 2015, the Village of Downers Grove Council heard the first reading of a proposed ordinance to approve multiple text amendments, including the amendments to the sign ordinance to allow a wall sign along the railway but limit the size of such wall sign and to prohibit signs painted on a wall, roof, or fence in all zoning districts in the Village. Only two members of the public spoke about this proposed ordinance at this meeting: Bob Peterson, owner of Leibundguth, and another member of the public, who stated that modern technology allows painted bricks to breathe, but stated that he does not like painted masonry. He also questioned who gets to decide when a mural is not advertising. Commissioner Barnett spoke in favor of the amendments. Commissioner White stated that the regulation of painted wall signs should be consistent; either they should be allowed everywhere or prohibited everywhere. He stated that he prefers to remove the prohibition on painted wall signs across the Village. (**Pl. Ex. H**, Village Council Meeting Minutes, July 14, 2015, at 9-10.)

**Response:** The Village does not dispute that the meeting referenced was held, and public comment was received by the individuals named by Plaintiff to approve multiple text amendments that were ultimately adopted by Ordinance No. 5472 on July 21, 2015, (Dkt. 37, Def. SOF, Ex. 3, Ordinance No. 5472). The Village also does not dispute the accuracy or content of the minutes from said meeting (Dkt. 40, Pl. SOF, Ex. H, July 14, 2015 Village Council Meeting Minutes), however, those minutes reflect only a portion of the complete record of the testimony and discussion held at the meeting.

**Reply:** The Plan Commission Meeting Minutes of July 14, 2015 speak for themselves and were created by the Village itself and obtained from its website.

38. On July 21, 2015, the Village of Downers Grove Council held a hearing on the proposed ordinance to approve multiple text amendments, including the amendments to the sign ordinance to allow a wall sign along the railway but limit the size of such wall sign and to prohibit signs painted on a wall, roof, or fence in all zoning districts in the Village. During public comment, only Bob Peterson, owner of Leibundguth, and Jeffrey Schwab, Plaintiff's attorney, spoke. After a short discussion by the Commissioners in which three commissioners expressed support, the Village Council passed the ordinance unanimously. The Commissioners did not discuss traffic safety or aesthetics implications of this ordinance. (**Pl. Ex. I**, Village Council Meeting Minutes, July 21, 2015, at 7-8.)

**Response:** The Village does not dispute that the meeting referenced was held, public comment was taken by the individuals identified by Plaintiff and that Ordinance No. 5472 was passed unanimously on July 21, 2015. The Village does not dispute the accuracy or content of the minutes from the meeting (Dkt. 40, Pl. SOF, Ex. I, July 21, 2015 Village Council Meeting Minutes), but the minutes are not a

complete record of what was said at the meeting. The Village does dispute that traffic safety and aesthetic implications were not considered, as both are clearly stated in the findings within Ordinance No. 5472 as adopted and approved by each of the Village Council members by unanimous vote. (Dkt. 37, Def. SOF, Ex. 3, Ordinance No. 5472).

**Reply:** The Village Council Meeting Minutes of July 21, 2015 speak for themselves and were created by the Village itself and obtained from its website.

Regardless of whether the ordinance adopted and approved included findings related to traffic safety and aesthetics, as Statement of Fact 38 states, the Commissioners did not discuss traffic safety or aesthetics implications of this ordinance at their July 21, 2015 meeting.

### **Planned Development Amendment for Art Van Furniture**

39. On November 18, 2014, the Village Council approved a Planned Development Amendment to grant the Art Van Furniture store at 1021 Butterfield Drive in Downers Grove three variations from sign regulations: to increase the total sign area from 300 square feet to 990 square feet; to permit a sign on the east façade of the building with no frontage where no sign is allowed; and to allow two signs each on the north, south, and west façades of the building where only one sign each is permitted. (**Pl. Exs. J and K**, Village Council Meeting Minutes, Nov. 11, 2014, at 9-11, and Nov. 18, 2014, at 6.)

**Response:** The Village does not dispute that the meeting referenced was held and the three variations were requested for this unique Planned Development property located in between Butterfield Road and the I-88 regional expressway. The Village does not dispute the accuracy and content of the minutes (Dkt. 30, Pl. SOF, Ex. J, November 11, 2014 Village Council Meeting Minutes; Ex. K, November 18, 2014, Village Council Meeting Minutes), but does dispute that the minutes reflect all discussion held at the meeting or that the minutes constitute the complete record of the meeting. Attached hereto as Def. Resp. SOF Ex. 1 is the Certification Affidavit of Village Clerk, April K. Holden, which includes the staff reports, the ordinances adopted for the project and other related Village documents reflecting the entire process and consideration undertaken by the Village prior to approval of the planned unit development including variations requested.

**Reply:** The minutes speak for themselves and were created by the Village itself and obtained from its website.

40. During the discussion on the Planned Development Amendment for the Art Van Furniture store at 1021 Butterfield Drive at the Village Council meeting on November 11, 2014, there was no discussion about the traffic safety consequences of allowing 990 square feet of signs, allowing a wall sign that was not along a right-of-way, or allowing two wall signs on three sides of the building where only one is permitted. The only discussion of aesthetics was the Mayor's comment that these variances would improve the aesthetics of the Village. (**Pl. Ex. J**, Village Council Meeting Minutes, November 11, 2014, at 9-11.)

**Response:** The Village does not dispute the accuracy or content of the minutes referenced (Dkt. 40, Pl. SOF, Ex. J, November 11, 2014 Village Council Meeting Minutes), but does dispute that the minutes constitute the complete record and include all discussions and comments made at the meeting, or the process and consideration undertaken on this unique Planned Development property located in between Butterfield Road and the I-88 regional expressway. (Def. Rep. Ex. 1).

**Reply:** The minutes speak for themselves and were created by the Village itself and obtained from its website.

41. The Village is providing a tax incentive to Art Van Furniture, rebating 50% of the sales tax generated over 15 years. (**Pl. Exs. J and K**, Village Council Meeting Minutes, November 11, 2014, at 9-11, and November 18, 2014 at 6.)

**Response:** The Village does not dispute the content and accuracy of the minutes referenced (Dkt. 40, Pl. SOF, Ex. J, November 11, 2014 Village Council Meeting Minutes; Ex. K, November 18, 2014 Village Council Meeting Minutes), nor that a tax incentive was given as reflected in the Economic Incentive Agreement and Amendment included within Def. Rep. Ex. 1.

**Reply:** None.

42. On November 11, 2014, during the discussion on the Planned Development Amendment for the Art Van Furniture store, Stan Popovich, Planning Manager of the Village of Downers Grove stated that the Village staff believed that the variations from the sign ordinance were important for the store's success. (**Pl. Ex. J**, Village Council Meeting Minutes, November 11, 2014, at 9-11.)

**Response:** The Village does not dispute that the meeting referenced was held, nor does the Village dispute the accuracy and content of the minutes (Dkt. 40, Pl.

SOF, Ex. J, November 11, 2014 Village Council Meeting Minutes; Ex. K, November 18, 2014 Village Council Meeting Minutes), but does dispute that the minutes reflect all discussion held at the meeting and that the minutes constitute the complete record of the meeting. (Def. Rep. Ex. 1).

**Reply:** The minutes speak for themselves and were created by the Village itself and obtained from its website.

### **Plaintiff's Expert Testimony**

43. Academic research indicates that signs that are readable and conspicuous do not pose a threat to traffic safety. Signs painted directly on the wall of a building pose no greater risk to traffic safety because they inherently pose no different issues related to readability, visibility, and obstruction of a driver's view than other signs. The Federal Highway Administration's reviews of signage and traffic safety have found that there is no conclusive link between signs and traffic accidents. (**Pl. Ex. B**, Taylor Expert Report 4-9.)

**Response:** The Village disputes in part and admits in part that academic research indicates on-premise commercial signs that are readable and conspicuous can enhance traffic safety by assisting the wayfinding function. The Village disputes that academic research indicates that merely making a sign readable and conspicuous eliminates traffic safety concerns. (Dkt. 37, Def. SOF, Ex. 14). The Village disputes that signs painted on a wall pose no different readability or visibility to a driver's view than manufactured signs. (Dkt. 36, Def. Memo, Ex. D; Dkt. 37, Def. SOF, Ex. 5, Peterson Dep., Ex. 12, PageID #2313-2314; Def. SOF, Ex. 3, Ordinance No. 5472).

The Village also disputes the credibility and opinions of Plaintiff's expert. (Dkt. 37, Def. SOF, Ex. 9, Pointner Dep., Ex. 5, PageID #4294-4300; Pointner Dep., generally; Dkt. 37, Def. SOF, Ex. 14, treatises). As is evident from a review of Dr. Taylor's report and deposition transcript, the "academic research" referenced dates back as far as 1955 and relates almost entirely to highways and billboard studies that the Village believes are irrelevant to this case. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., Ex. 4, PageID #2971-3029; Ex. 7, PageID #3068-3298; Taylor Dep., 44:50; 60:11-24; 61:1-11; 63:21-24; 64:1-15; 142:9-20). Notably also, Dr. Taylor has never visited the Leibundguth property, or even Downers Grove, he is not familiar with the surrounding communities, and has never written a sign ordinance. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 17:22-24). Dr. Taylor did not know what type of street Leibundguth's building faces, how many lanes of traffic there are in front of Leibundguth's building, the posted speed limit for the street nor the cone of vision for vehicles on the street. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 31:11-22). He also admitted he did not receive or review any of the Village documents concerning the 18-month history the Village undertook prior to adoption of the sign ordinance, nor



any minutes of the public hearings conducted on the sign ordinance (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 66:6-22; 67:9-11), while at the same time agreeing that a community's interest in preserving its aesthetic character is a substantial interest. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 149:11-15). Dr. Taylor's credibility stands in stark contrast to the Village's expert, Pete Pointner, who has over 50 years of practical experience in municipal land planning, including in Downers Grove and numerous surrounding communities, has written zoning ordinances and sign regulations, has researched the sign ordinances of 33 other Chicago suburban communities and reviewed the entire Village history on the sign ordinance in formulating his opinions in this case. (Dkt. 37, Def. SOF, Ex. 9, Pointner Dep., Ex. 4, PageID #4278-4293; Ex. 5, PageID #4294-4308; Pointner Dep., 35-36; 48; 52-53; 64-66; 78-80).

**Reply:** The Village does not provide expert testimony to contradict Dr. Taylor's testimony that academic research indicates that merely making a sign readable and conspicuous eliminates traffic safety concerns. In addition, the treatises the Village cites are inadmissible because they are not supported by any expert report or testimony. *See Finchum v. Ford Motor Co.*, 57 F.3d 526, 532 (7th Cir. 1995); Fed. R. Evid. 803(18). That leaves the Village with nothing but unsupported assertions to contradict Dr. Taylor's testimony that signs that are readable and conspicuous do not pose a threat to traffic safety.

The Village's dispute of Dr. Taylor's credibility is without merit. Notably, the Village does not challenge the admissibility of Leibundguth's expert witness under Fed. R. Evid. 702. Rather, the Village attacks his credibility – whether his testimony is believable. But credibility determinations are inappropriate on motions for summary judgment. *Mahurkar v. C.R. Bard, Inc.*, 1993 U.S. Dist. LEXIS 9259, \*28 (N.D. Ill. July 6, 1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Besides, the Village has not provided any evidence that Dr. Taylor's testimony is not credible. A party opposing a motion for summary judgment is



required to present evidence to create an issue of material fact, which the Village has not done. *Swearingen v. Momentive Specialty Chems., Inc.*, 662 F.3d 969, 974 (7th Cir. 2011) (citing *Caisse Nationale de Credit Agricole v. CBI Indus.*, 90 F.3d 1264, 1270 (7th Cir. 1996) (“A party seeking to defeat a motion for summary judgment is required to wheel out all its artillery to defeat it.”)). In sum, the Village cannot create an issue of fact by making unsupported assertions that Leibundguth’s expert is not credible.

In addition, the Village’s assertion that Dr. Taylor is not credible because he has never been to Downers Grove and is not familiar with its geography is completely irrelevant to the testimony that Dr. Taylor provides: that the painted sign ban and size and number limitations *in general* do not advance the government’s interests in traffic safety and aesthetics based on the studies and academic literature. Similarly, Dr. Taylor’s knowledge of the process undertaken by the Village in adopting the sign ordinance is irrelevant to his testimony. The documents the Village has produced regarding that process, which total more than 900 pages, do not contradict or refute Dr. Taylor’s testimony; indeed, the Village has failed to point to a single page in those documents that relates in any way to the interests of traffic safety and aesthetics asserted by the Village in defending its painted sign ban and size and number restrictions. (Dkt. 41, Pl. Memo. 14-15.)

The Village’s complaint that the academic research cited by Dr. Taylor dates back as far as 1955 and relates almost entirely to highways and billboard studies not only is inaccurate, but also does not support its assertion that Dr. Taylor’s

testimony is not credible. The fact that the academic research dates back as far as 1955 makes the testimony *more* credible because Dr. Taylor also cites research as late as 2013, meaning he has cited over 50 years of research on the issue of signage and traffic safety. (Dkt. 40, Pl. SOF, Ex. B at 4-9.) The Village's assertion that the academic research on which Dr. Taylor relies relates almost entirely to highway and billboards studies ignores the fact that Dr. Taylor cites studies relating to the traffic safety effects of on-premise signs as well. (Dkt. 40, Pl. SOF, Ex. B at 4-9.) The Village has provided no evidence or argument that indicates that the studies addressing the traffic safety effects of billboards are irrelevant to the effects of on-premise signs to traffic safety. Indeed, as Dr. Taylor has testified, the fact that the studies on billboards have found very little correlation between billboards and traffic accidents makes it likely there is also little correlation between on-premise signs – signs that have been thought to be less of an issue for traffic safety – and traffic problems. (Dkt. 40, Pl. SOF, Ex. B at 8; Dkt. 37, Def. SOF, Ex. 6, Taylor Dep. 133: 21 – 135:10.) The Village provides no evidence that shows why these studies are irrelevant.

The Village's claim that its own expert witness, Pete Pointner, is more credible than Dr. Taylor is entirely baseless. Dr. Taylor is a professor of marketing whose primary field of study since 1992 has been signage; he has given presentations about regulatory issues in signage, has been an expert informant to the Federal Highway Administration's Assessment/Mediation of Outdoor Advertising issues, and has co-authored a book about on-premise signs, among other things. (Dkt. 40,

Pl. SOF, Ex. B, Taylor Report 1-2.) Mr. Pointner, in contrast, is not a marketing professor or signage expert; he is a municipal planner and an architect (Dkt. 37, Def. SOF, Ex. 9, Pointer Dep., Ex. 4, Pointner Expert Report at 3); has no specialized knowledge in traffic safety, signs, or sign regulation; has given no previous expert testimony addressing traffic safety, signs, or sign regulations (Dkt. 37, Def. SOF, Ex. 9, Pointer Dep. 11:20-12:18; 51:20-23; 52: 7-18); and has no professional activities, publications, or presentations that address signs or traffic safety (Dkt. 37, Def. SOF, Ex. 9, Pointer Dep. 42:17-44:17; 44:21-45:20).

Leibundguth has filed a Motion to Exclude Mr. Pointner's expert report and testimony on the basis that Mr. Pointner has no expert knowledge or experience on the issues of signs and traffic safety and that his report does not cite a single treatise or study for support. (Dkts. 31-32.) The Court denied without prejudice that motion on the basis that those arguments should be made in the context of the cross-motions for summary judgment. (Dkt. 34.) In the entire briefing of the parties' cross motions for summary judgment the Village only cites Mr. Pointner's report and deposition testimony in its Response to Leibundguth's Statement of Facts (it does not even cite Mr. Pointner's report and testimony in its Combined Response and Reply brief) for the proposition that Dr. Taylor's testimony is not credible. But for the reasons stated in its Motion to Exclude Mr. Pointner's Expert Testimony, Mr. Pointner is not an expert on the issue of signs or traffic safety and his report is not expert testimony because it fails to cite any treatises or studies on which it relies. (Dkt. 32, 4-8.) Mr. Pointner's report is particular inadequate in attempting to

create an issue of fact over Dr. Taylor's credibility, since Mr. Pointner's report relies on no studies, (Dkt. 32, 6-8), while Dr. Taylor's report relies on many (Dkt. 40, Pl. SOF, Ex. B, Taylor Report, at 19-21). The treatises that the Village cites further cannot be evidence to support the Village's assertion that Dr. Taylor is not credible because the Village's expert has not even authenticated them. *See Finchum v. Ford Motor Co.*, 57 F.3d 526, 532 (7th Cir. 1995); Fed. R. Evid. 803(18). Finally, the deposition transcript of Mr. Pointner does not support the Village's attempt to challenge the credibility of Dr. Taylor. The Village cites nothing in the deposition transcript of Mr. Pointner in which Mr. Pointner gives any basis for questioning Dr. Taylor's credibility. Indeed, the only references to Mr. Pointner that the Village cites relate only to Mr. Pointner's background. (Dkt. 37, Ex. 9, Pointner Dep., 35-36; 48; 52-53; 64-66; 78-80.)

Therefore, the Village cannot raise an issue of material fact as to the credibility of Dr. Taylor's testimony because it has not provided any admissible evidence to show that Dr. Taylor lacks credibility.

44. Limiting the size of signs may be more likely to threaten traffic safety than enhance it because a driver looking for a particular business (and thus its sign) will be more distracted and have a harder time finding the business if the signs are smaller, thus threatening traffic safety. Signage deficiency has been an issue in tort cases where signs have been too small. For that reason, the Federal Highway Administration has mandated a minimum size for traffic signs. Additionally, on-premises signs can actually enhance traffic safety, because they can assist in keeping drivers alert and in finding their way. "[A] FHWA study showed that on-premise signs located at high traffic intersection[s] increased traffic safety provided they met FHWA standards for legibility, conspicuity, [and] readability." (Pl. Ex. B, Taylor Expert Report 8-9.)

**Response:** The Village admits that the size of signs can directly impact traffic safety. The Village disputes that limitation of sign size is more likely to threaten traffic safety than unrestricted sign size. The Village admits that size limitations

which defeat the visibility of commercial on-premise signs defeat the wayfinding function and thus diminish traffic safety. The Village admits that the federal government regulates the size of signs because the size of signage impacts traffic safety. The Village admits that legibility, readability, and conspicuity of on-premise commercial signage serve traffic safety interests. The balance of paragraph 44 is disputed. (Dkt. 37, Def. SOF, Ex. 14).

The Village also disputes the credibility of Plaintiff's expert. (Dkt. 37, Def. SOF, Ex. 9, Pointner Dep., Ex. 5, PageID #4294-4308; Pointner Dep., generally; Dkt. 37, Def. SOF, Ex. 14, treatises). As is evident from a review of Dr. Taylor's report and deposition transcript, the "academic research" referenced dates back as far as 1955 and relates almost entirely to highways and billboard studies that the Village believes are irrelevant to this case. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., Ex. 4, PageID #2971-3029; Ex. 7, PageID #3068-3298; Taylor Dep., 44:50; 60:11-24; 61:1-11; 63:21-24; 64:1-15; 142:9-20). Notably also, Dr. Taylor has never visited the Leibundguth property, or even Downers Grove, he is not familiar with the surrounding communities, and has never written a sign ordinance. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 17:22-24). Dr. Taylor did not know what type of street Leibundguth's building faces, how many lanes of traffic there are in front of Leibundguth's building, the posted speed limit for the street nor the cone of vision for vehicles on the street. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 31:11-22). He also admitted he did not receive or review any of the Village documents concerning the 18-month history the Village undertook prior to adoption of the sign ordinance, nor any minutes of the public hearings conducted on the sign ordinance (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 66:6-22; 67:9-11), while at the same time agreeing that a community's interest in preserving its aesthetic character is a substantial interest. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 149:11-15). Dr. Taylor's credibility stands in stark contrast to the Village's expert, Pete Pointner, who has over 50 years of practical experience in municipal land planning, including in Downers Grove and numerous surrounding communities, has written zoning ordinances and sign regulations, has researched the sign ordinances of 33 other Chicago suburban communities and reviewed the entire Village history on the sign ordinance in formulating his opinions in this case. (Dkt. 37, Def. SOF, Ex. 9, Pointner Dep., Ex. 4, PageID #4278-4293; Ex. 5, Page ID #4294-4308; Pointner Dep., 35-36; 48; 52-53; 64-66; 78-80).

**Reply:** The Village provides no evidence to contradict Plaintiff's expert's testimony that limiting the size of signs may be more likely to threaten traffic safety than enhance it because a driver looking for a particular business (and thus its sign) will be more distracted and have a harder time finding the business if the signs are smaller, thus threatening traffic safety.

Leibundguth refers to its Reply in Support of its Statement of Fact 44 in response to the Village's assertion disputing the credibility of Leibundguth's expert.

45. The individual academic studies over the past sixty years that have explicitly researched the issue and controlled for other factors have found no evidence of a correlation between signs and traffic accidents. Studies by insurance companies and law enforcement have also support the conclusion that there is no correlation between on-premise signs and traffic accidents. (**Pl. Ex. B**, Taylor Expert Report 7.)

**Response:** The Village disputes paragraph 45. The Village has submitted treatises and academic research which expressly finds that commercial on-premise signs which are visible, readable and properly located and properly illuminated promote the wayfinding function and traffic safety. (Dkt. 37, Def. SOF, Ex. 14).

The Village also disputes the credibility of Plaintiff's expert. (Dkt. 37, Def. SOF, Ex. 9, Pointner Dep., Ex. 5, PageID #4294-4308; Pointner Dep., generally; Dkt. 37, Def. SOF, Ex. 14, treatises). As is evident from a review of Dr. Taylor's report and deposition transcript, the "academic research" referenced dates back as far as 1955 and relates almost entirely to highways and billboard studies that the Village believes are irrelevant to this case. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., Ex. 4, PageID #2971-3029; Ex. 7, PageID #3068-3298; Taylor Dep., 44:50; 60:11-24; 61:1-11; 63:21-24; 64:1-15; 142:9-20). Notably also, Dr. Taylor has never visited the Leibundguth property, or even Downers Grove, he is not familiar with the surrounding communities, and has never written a sign ordinance. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 17:22-24). Dr. Taylor did not know what type of street Leibundguth's building faces, how many lanes of traffic there are in front of Leibundguth's building, the posted speed limit for the street nor the cone of vision for vehicles on the street. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 31:11-22). He also admitted he did not receive or review any of the Village documents concerning the 18-month history the Village undertook prior to adoption of the sign ordinance, nor any minutes of the public hearings conducted on the sign ordinance (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 66:6-22; 67:9-11), while at the same time agreeing that a community's interest in preserving its aesthetic character is a substantial interest. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 149:11-15). Dr. Taylor's credibility stands in stark contrast to the Village's expert, Pete Pointner, who has over 50 years of practical experience in municipal land planning, including in Downers Grove and numerous surrounding communities, has written zoning ordinances and sign regulations, has researched the sign ordinances of 33 other Chicago suburban communities and reviewed the entire Village history on the sign ordinance in formulating his opinions in this case. (Dkt. 37, Def. SOF, Ex. 9, Pointner Dep., Ex. 4, PageID #4278-4293; Ex. 5, Page ID #4294-4308; Pointner Dep., 35-36; 48; 52-53; 64-66; 78-80).

**Reply:** The treatises the Village relies upon and interprets are inadmissible because they are not supported by any expert report or testimony. *See Finchum v. Ford Motor Co.*, 57 F.3d 526, 532 (7th Cir. 1995); Fed. R. Evid. 803(18).

Leibundguth refers to its Reply in Support of its Statement of Fact 44 in response to the Village's assertion disputing the credibility of Leibundguth's expert.

46. "Section 9.020 (P)'s prohibition of painted signs does not advance traffic safety interests as painted signs can be readable and visible and cannot block drivers' views when making turns unless the building itself blocks drivers' views when making turns." (**Pl. Ex. B**, Taylor Expert Report 9.)

**Response:** The Village disputes paragraph 46. Chipped, deteriorated, faded, illegible on-premise commercial signs defeat the wayfinding function of commercial on-premise signs and diminish traffic safety. (Dkt. 37, Def. SOF, Ex. 14).

The Village also disputes the credibility of Plaintiff's expert. (Dkt. 37, Def. SOF, Ex. 9, Pointner Dep., Ex. 5, PageID #4294-4308; Pointner Dep., generally; Dkt. 37, Def. SOF, Ex. 14, treatises). As is evident from a review of Dr. Taylor's report and deposition transcript, the "academic research" referenced dates back as far as 1955 and relates almost entirely to highways and billboard studies that the Village believes are irrelevant to this case. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., Ex. 4, PageID #2971-3029; Ex. 7, PageID #3068-3298; Taylor Dep., 44:50; 60:11-24; 61:1-11; 63:21-24; 64:1-15; 142:9-20). Notably also, Dr. Taylor has never visited the Leibundguth property, or even Downers Grove, he is not familiar with the surrounding communities, and has never written a sign ordinance. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 17:22-24). Dr. Taylor did not know what type of street Leibundguth's building faces, how many lanes of traffic there are in front of Leibundguth's building, the posted speed limit for the street nor the cone of vision for vehicles on the street. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 31:11-22). He also admitted he did not receive or review any of the Village documents concerning the 18-month history the Village undertook prior to adoption of the sign ordinance, nor any minutes of the public hearings conducted on the sign ordinance (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 66:6-22; 67:9-11), while at the same time agreeing that a community's interest in preserving its aesthetic character is a substantial interest. (Dkt. 37, Def. SOF, Ex. 6, Taylor Dep., 149:11-15). Dr. Taylor's credibility stands in stark contrast to the Village's expert, Pete Pointner, who has over 50 years of practical experience in municipal land planning, including in Downers Grove and numerous surrounding communities, has written zoning ordinances and sign regulations, has researched the sign ordinances of 33 other Chicago suburban communities and reviewed the entire Village history on the sign ordinance in



formulating his opinions in this case. (Dkt. 37, Def. SOF, Ex. 9, Pointner Dep., Ex. 4, PageID #4278-4293; Ex. 5, Page ID #4294-4308; Pointner Dep., 35-36; 48; 52-53; 64-66; 78-80).

**Reply:** The Village's assertion that "[c]hipped, deteriorated, faded, illegible on-premise commercial signs defeat the wayfinding function of commercial on-premise signs and diminish traffic safety" is not based on any admissible evidence or expert testimony. And even if it were, the Village still could not dispute that painted signs can be readable and visible. The Village is merely asserting that signs that are chipped, deteriorated, faded, or illegible defeat the wayfinding function. But, of course, that is true of *all* signs: any sign that is chipped, deteriorated, faded, or illegible will defeat the wayfinding function. There is no reason that singling out painted signs because *some* of those signs *could* be chipped, deteriorated, faded, or illegible. Indeed, Section 9.110 of the sign ordinance already provides that "[a]ll signs must be properly maintained, which includes repair or replacement of all broken or missing parts, elimination of rust or oxidation, elimination of faded or chipped paint, and correcting all similar conditions of disrepair." (Dkt. 37, Def. SOF, Ex. 2.)

Leibundguth refers to its Reply in Support of its Statement of Fact 44 in response to the Village's assertion disputing the credibility of Leibundguth's expert.

Dated: October 5, 2015



Respectfully submitted,

**LEIBUNDGUTH STORAGE & VAN SERVICE,  
INC.**

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