IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; and ROBERT SPENCER,

Plaintiffs,

-v.-

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ("MBTA"); and BEVERLY A. SCOTT, individually and in her official capacity as Chief Executive Officer / General Manager of the MBTA,

Defendants.

Case No. 1:14-cv-10292-NMG

PLAINTIFFS' MEMORANDUM OF REASONS FOR GRANTING PRELIMINARY INJUNCTION

[Fed. R. Civ. P. 65]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

INTRODUCTION

This motion for preliminary injunction, and indeed the case in its entirety, comes before the court dressed ***in part*** in the factual garments previously laundered and folded by this court and then carefully packed into the legal baggage originally designed by the First Circuit in *Ridley v. Mass. Bay Transp. Auth*., 390 F.3d 65 (1st Cir. 2004). *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:13-cv-12803-NMG, 2013 U.S. Dist. LEXIS 179729 (D. Mass. Dec. 20, 2013), *appeal docketed*, No. 14-1018 (1st Cir. Jan. 6, 2014) ("*MBTA I*"). In this case, however, Plaintiffs have been careful to tailor all of their ***new*** factual dress, and thus their claims, to fit neatly into *Ridley*'s baggage while devoutly honoring the rationale of this court's ruling in *MBTA I.*

The point of this exercise is neither recreational nor irreverently contentious, but rather fundamental to our liberties—indeed to our first liberty. So it is that while Plaintiffs continue to respectfully plead that *Ridley*'s legal baggage of a limited public forum was either wrongly applied in *MBTA I*, or wrongly decided by the First Circuit in the first instance, in this motion Plaintiffs seek to understand and to test the boundaries of an amorphous civility standard that fantastically stands on the difference between the word usage of a noun (*i.e*., savage) and an adjective phrase (*i.e*., those who engage in savage acts). Thus, accepting for purposes of this motion that the advertising panels on MBTA[1] buses are a limited public forum, Plaintiffs here assert that the MBTA's decision to reject their most recently proposed advertisement ("AFDI Advertisement III") is patently unreasonable in light of this court's rationale in *MBTA I*. This unreasonableness compels a finding that Defendants violated the Constitution by rejecting Plaintiffs' advertisement.

[1] "MBTA" refers specifically to the Massachusetts Bay Transportation Authority, and in context, to Defendants collectively.

STATEMENT OF FACTS

Plaintiff AFDI is an organization that is incorporated under the laws of the State of New Hampshire. AFDI is a human rights organization dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights. AFDI achieves its objective through a variety of lawful means, including through the exercise of its right to freedom of speech under the United States Constitution. (Geller Decl. at ¶¶ 3, 5, 6 at Ex. 1).

AFDI exercises its right to freedom of speech and promotes its objectives by, *inter alia*, purchasing advertising space on transit authority property in major cities throughout the United States, including Boston, Massachusetts. AFDI purchases these advertisements to express its message on current events and public issues, including the Israeli / Palestinian conflict (hereinafter referred to as "AFDI's advertising campaign"). (Geller Decl. at ¶ 7 at Ex. 1).

Plaintiff Geller is the president of AFDI, and Plaintiff Spencer is the vice president. Plaintiffs Geller and Spencer engage in protected speech through AFDI's activities, including AFDI's advertising campaign. (Geller Decl. at ¶¶ 2, 4 at Ex. 1).

The MBTA is a quasi-governmental organization which provides public transportation in the Commonwealth of Massachusetts. It operates bus routes, subway lines, a commuter rail network, and ferry service routes that provide transportation to millions of customers in the Greater Boston area. Defendant Scott is the CEO / General Manager of the MBTA and the final decision maker responsible for enforcing the MBTA Advertising Guidelines and for ultimately rejecting Plaintiffs' proposed advertisement at issue here (*i.e.*, AFDI Advertisement III). (Geller Decl. at ¶¶ 8, 28-30, 41 at Ex. 1).

The MBTA, through its advertising agent, Titan Outdoor LLC (a/k/a Titan360 and Titan) (hereinafter "Titan"), leases space on its vehicles and transportation stations for use as

advertising space. (Geller Decl. at ¶ 9 at Ex. 1).

As a matter of policy and practice, the MBTA accepts commercial and noncommercial advertisements for display on its advertising space, including noncommercial public service, public issue, and political issue advertisements, including advertisements providing political and social commentary on controversial issues such as the Israeli / Palestinian conflict. (Geller Decl. at ¶¶ 10-12, 14-21, 34-36 at Ex. 1).

Accordingly, the MBTA permits, as a matter of policy and practice, a wide variety of commercial, noncommercial, public-service, public-issue, and political-issue advertisements on its advertising space, including advertisements addressing the hotly debated Israeli / Palestinian conflict (hereinafter "Speech Policy"). (Geller Decl. at ¶¶ 10-12, 14-21, 34-36 at Ex. 1).

In October 2013 and pursuant to their Speech Policy, Defendants accepted for display on the MBTA advertising space a controversial advertisement that addresses the Israeli / Palestinian conflict from a viewpoint that criticizes Israel (hereinafter "Anti-Israel Advertisement"). (Geller Decl. at ¶¶ 14-19 at Ex. 1).

The Anti-Israel Advertisement, which appeared on approximately 80 posters throughout the transit system, depicts four maps that purport to show the "***Palestinian loss of land***" to Israel between 1946 and 2010. Text accompanying the maps says: "***4.7 million Palestinians are Classified by the UN as Refugees***." (Geller Decl. at ¶¶ 16-18 at Ex. 1).

After receiving a rash of complaints, on or about October 31, 2013, Defendants, acting through the MBTA's advertising agent, removed all of the Anti-Israel Advertisements from the MBTA's advertising space. (Geller Decl. at ¶ 20 at Ex. 1).

However, on or about November 1, 2013, Defendants decided, without much of a public explanation, except to claim that it was a "miscommunication" between the MBTA and its

advertising agent, to repost the Anti-Israel Advertisement on the MBTA's advertising space.[2] (Geller Decl. at ¶ 21 at Ex. 1).

Pursuant to Defendants' Speech Policy and *in direct response to* the original posting of the Anti-Israel Advertisement, on or about October 26, 2013, Plaintiffs submitted to Titan for display on the MBTA's advertising space an advertisement that supported Israel in the debate over the Israeli / Palestinian conflict. More specifically, Plaintiff Geller sent an email to Scott Goldsmith, the executive vice president and chief commercial officer of Titan, and requested to run AFDI's "pro-Israel ads in 10 of the Boston T stations where the anti-Israel campaign is running." (Geller Decl. at ¶ 22 at Ex. 1).

AFDI's pro-Israel advertisement ("AFDI Advertisement I") states, in relevant part: "***In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad***." (Geller Decl. at ¶¶ 23-24 at Ex. 1).

AFDI Advertisement I discusses the same subject matter as the Anti-Israel Advertisement, except it does so from a viewpoint that favors Israel. And the advertisement's quote, "In any war between the civilized man and the savage, support the civilized man," is

[2] The Anti-Israel Advertisement describes the Palestinians as "refugees," which, according to the United Nation's definition of "refugee," means, in the context of the advertisement, that the Israelis are *persecuting* the Palestinians on account of their "race, religion, nationality, membership of a particular social group or political opinion." *See* http://www.unhcr.org/pages/49c3646c125.html (providing U.N. definition of "refugee") (last visited on Feb. 6, 2014); *see also* 8 U.S.C. § 1101(a)(42) (defining "refugee" as unable to return to one's national homeland "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion"). This is not a "positive" message by any man's measure. Indeed, the Anti-Israel Advertisement created a firestorm of complaints, which then caused the MBTA (or its advertising agent) to take it down, only to be reposted soon thereafter. (Geller Decl. at ¶¶ 20-21 at Ex. 1). The MBTA apparently has no concern that its "ridership" is offended by the Anti-Israel Advertisement, demonstrating further the viewpoint-based nature of Defendants' speech restriction here. *See, e.g.*, *Ridley*, 390 F.3d at 87 (noting that impermissible discrimination is evidenced when the government "rejects something because of a certain characteristic, but other things possessing the same characteristics are accepted").

adapted from a quote by the famous Russian-born, American author of *Atlas Shrugged*, Ayn Rand.[3] (Geller Decl. at ¶¶ 25-26 at Ex. 1).

The message of AFDI Advertisement I was timely when it was submitted, and it remains so today in light of the fact that the Anti-Israel Advertisement received substantial publicity, and the issues addressed by the two competing advertisements remain current. Indeed, the President of the United States made special mention of the Israel / Palestinian conflict during the recent 2014 State of the Union address. (Geller Decl. at ¶ 27 at Ex. 1).

On November 4, 2013, Defendants made a formal determination and officially rejected AFDI Advertisement I because it allegedly "falls within the category (b)(i) 'Demeaning or disparaging.'"[4] (Geller Decl. at ¶¶ 29-30 at Ex. 1).

As a result of Defendants' restriction on Plaintiffs' speech, Plaintiffs filed suit in this court pursuant to 42 U.S.C. § 1983, alleging violations of the First Amendment (freedom of speech) and Fourteenth Amendment (equal protection and due process). *See Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:13-cv-12803-NMG (D. Mass. filed Nov. 6, 2013) ("*MBTA I*").[5]

In denying Plaintiffs' motion for preliminary injunction in *MBTA I*, the court ruled that while the most reasonable interpretation of the word "jihad" in context was understood to implicate only violent terrorism, the MBTA's interpretation to include even peaceful or pietistic

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[3] "Savage" in the context of the advertisement, which juxtaposes the term with "civilized," means "uncivilized." *See, e.g.,* http://www.merriam-webster.com/dictionary/savage (defining "savage") (last visited on Feb. 6, 2013). However, using the term "savage" not only brings to mind the famous quote from Ayn Rand, but it *effectively* conveys Plaintiffs' viewpoint on the issue. Altering the message would alter its meaning, especially in context, and thus alter Plaintiffs' viewpoint. *See, e.g.*, n.6 *infra*.

[4] Attached to Defendants' email rejecting the AFDI Advertisement was a copy of the MBTA's Advertising Guidelines. (Geller Decl. at ¶¶ 29-30 at Ex. 1).

[5] Pending appeal, this court stayed all discovery and other pretrial deadlines in *MBTA I*. (Geller Decl. at ¶ 33 at Ex. 1).

jihad and together with the word "savage" could be reasonably understood to disparage all Muslims and Palestinians:

> The Court finds that the meaning of the AFDI Pro-Israel Advertisement is not as clear as plaintiffs assert. In fact, the advertisement is ambiguous in several respects. For instance, "war" could refer, as plaintiffs claim, to the violent acts committed against innocent Israeli citizens. But the term might also refer to the periodic conflicts between Israel and its majority-Muslim neighbors in Egypt, the Gaza Strip, the West Bank and Lebanon. Finally, the term could refer to the metaphysical or ideological struggle between Islam and the West.
>
> Similarly, "jihad" is susceptible to several interpretations. Plaintiffs are correct that it is commonly interpreted (by this judicial officer among others) as referring to the acts of radical Islamic terrorists. Jihad is also understood by many, however, to have a more nuanced meaning that emphasizes a duty of introspection and self-improvement over violence applicable to all Muslims. Dictionary definitions of the term do not resolve the ambiguity. *See* Oxford English Dictionary (2d ed. 2012) ("A religious war of Muslims against unbelievers in Islam, inculcated as a duty by the Koran and traditions"; "a war or crusade for or against some doctrine, opinion or principle"; "war to the death"); Webster's Third New International Dictionary (2002) ("a holy war waged on behalf of Islam as a religious duty"; "a bitter strife or crusade undertaken in the spirit of a holy war"); Webster's II New College Dictionary (3d ed. 2005) ("a Muslim holy war or spiritual struggle against infidels"; "a crusade"; "a struggle").
>
> Nevertheless, the Court agrees with the plaintiffs that the most reasonable interpretation of their advertisement is that they oppose acts of Islamic terrorism directed at Israel. Thus, if the question before this Court were whether the MBTA adopted the best interpretation of an ambiguous advertisement, it would side with the plaintiffs. But restrictions on speech in a non-public forum need only be reasonable and need not be the most reasonable. *See Ridley*, 390 F.3d at 90. In this case, the Court understands the inquiry to require only that the MBTA reasonably interpret the ambivalent advertisement. In light of the several divergent interpretations, it was plausible for the defendants to conclude that the AFDI Pro-Israel Advertisement demeans or disparages Muslims or Palestinians.

MBTA I, 2013 U.S. Dist. LEXIS 179729, at *16-*18.

After a careful review of this court's ruling in *MBTA I*, Plaintiffs submitted a new proposed advertisement to the MBTA ("AFDI Advertisement II"), which states, in relevant part: "***In any war between the civilized man and those engaged in savage acts, support the civilized man. Defeat Violent Jihad. Support Israel.***" AFDI Advertisement II appears as follows:

(Geller Decl. at ¶¶ 34-35 at Ex. 1). On January 7, 2014, Defendants accepted AFDI Advertisement II. (Geller Decl. at ¶ 36 at Ex. 1).

On January 8, 2014, Plaintiff Geller submitted a slightly revised version of AFDI Advertisement II to the MBTA for approval ("AFDI Advertisement III"). This advertisement states, in relevant part: "***In any war between the civilized man and the savage, support the civilized man. Defeat violent jihad. Support Israel.***" AFDI Advertisement III appears as follows:

(Geller Decl. at ¶¶ 37-38 at Ex. 1). After the MBTA notified Plaintiffs of its initial rejection of AFDI Advertisement III, the MBTA provided its written Formal Determination on January 29, 2014, rejecting the advertisement "based on the same considerations as its rejection of [AFDI Advertisement I]." (Geller Decl. at ¶¶ 39-41 at Ex. 1). This lawsuit follows.

ARGUMENT

I. Standard for Issuing a Preliminary Injunction.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in

the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs satisfy this standard. Moreover, when, as here, a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, "the likelihood of success on the merits is the lynchpin of the preliminary injunction analysis." *MBTA I*, 2013 U.S. Dist. LEXIS 179729, at *9-*10 (quoting *Sindicato Puertorriqueño de Trabajadores v. Fortuño*, 699 F.3d 1, 10 (1st Cir. 2012)).

II. Plaintiffs Are Likely to Succeed on the Merits of Their First Amendment Claim.

Plaintiffs' First Amendment claim is reviewed in essentially three steps. First, the court must determine whether the speech in question—Plaintiffs' advertisement—is protected speech. Second, the court must conduct a forum analysis as to the forum in question to determine the proper constitutional standard to apply. And third, the court must then determine whether Defendants' speech restriction comports with the applicable standard. *Am. Freedom Def. Initiative v. Metro. Transp. Auth*., 880 F. Supp. 2d 456, 466 (S.D.N.Y. 2012) (analyzing a free speech claim in "three parts"); *cf. Ridley*, 390 F.3d at 75 (conducting a forum analysis in a challenge to the MBTA's restrictions on several advertisements, but stating, "[p]ublic forum analysis itself has been criticized as unhelpful in many contexts, and particularly this one where the government is operating a commercial enterprise earning income from permitting advertising"). Moreover, Defendants' "refusal to accept [AFDI Advertisement III] for display because of its content is a clearcut *prior restraint*." *Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (Bork, J.) (emphasis added). And "[a]ny system of prior restraints of expression comes to this Court bearing a *heavy presumption* against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases) (emphasis added).

A. Plaintiffs' Advertisement Is Protected Speech.

The first question is easily answered. Sign displays constitute protected speech under the First Amendment, *Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."), and this includes signs posted on transit advertising space, *see Ridley*, 390 F.3d at 65; *see also United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (hereinafter "*United Food*"); *see generally MBTA I,* 2013 U.S. Dist. LEXIS 179729, at *13 (treating Plaintiffs' AFDI Advertisement I as political speech and stating that "[i]n order to pass constitutional muster, a restriction on speech in a non-public forum must be reasonable").

B. The Court Has Ruled that Defendants Created a Limited Public Forum.

"The [Supreme] Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for [expressive] purposes." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985). Forum analysis has traditionally divided government property into three categories: traditional public forums, designated public forums, and nonpublic forums. *Cornelius,* 473 U.S. at 800. The First Circuit has "adopt[ed] the usage equating limited public forum with non-public forum." *Ridley*, 390 F.3d at 76 n.4. Once the forum is identified, the court must then determine whether the speech restriction is justified by the requisite standard. *Id.*

As noted above, while Plaintiffs continue to challenge this court's application of *Ridley* to the facts in *MBTA I*, or, if properly applied, *Ridley*'s ruling that the MBTA may constitutionally pick and choose between controversial messages addressing the same subject matter based upon a vaguely worded and obtusely applied civility standard, for purposes of this motion Plaintiffs

accept that we are dealing with a limited public forum packed into and bound by the legal holdings of *Ridley* and *MBTA I.*

C. Defendants' Speech Restriction Was Unreasonably Applied.

1. The Legal Standard.

In a limited public forum, as in a nonpublic forum, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators,* 460 U.S. 37, 46 (1983). Thus, in a limited public forum, a speech restriction must be reasonable and viewpoint neutral to pass constitutional muster. *Id.*

Moreover, once the government "has opened a limited forum, [it] must respect the lawful boundaries it has itself set." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Accordingly, in a limited public forum, "[t]he State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." *Id.* at 829 (internal citations and quotations omitted). "Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a *class of speech* is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible *when directed against speech otherwise within the forum's limitations*." *Id.* at 829-30 (emphasis added).

Finally, even if the speech restriction is facially reasonable in light of the purpose served by the forum, it must be reasonably applied in the case at bar. *Ridley*, 390 F.3d at 66; *MBTA I*,

2013 U.S. Dist. LEXIS 179729, at *14-*15 ("*Ridley* acknowledged that deciding whether an advertisement is demeaning or disparaging involves 'some degree of interpretation.' The fact that the standard requires the MBTA to exercise some discretion does not mean that the Court is required to accept whatever decision it reaches. Instead, the Court must examine the MBTA's basis for rejecting the AFDI Pro-Israel Advertisement to determine if its conclusions were reasonable.") (internal citation omitted).

2. The Speech Restriction Unreasonably Applied.

The MBTA Formal Determination informs us that AFDI Advertisement III was rejected based upon the same considerations the MBTA applied to reject AFDI Advertisement I. Presumably, Defendants consider AFDI Advertisement III to be demeaning of all Muslims and Palestinians because the word "savage" demeans those who oppose Israel, including those who do not resort to or promote the use of violent jihad. But given the content and context of AFDI Advertisement III, and given this court's reasoning in *MBTA I*, this interpretation is not only unreasonable as applied, it points rather indelicately to the MBTA's lack of an objective standard in applying this "civility" standard.

To flush this as-applied challenge out a bit, we return to this court's reasoning in *MBTA I* and retreat one step to examine AFDI Advertisement II in that context. Following *Ridley*'s rationale, this court's opinion in *MBTA I* pointed out that, given the predicate of a limited public forum, while the MBTA might not necessarily bring to bear the most reasonable interpretation of an advertisement, there must be some objective analysis that leads reasonably to the conclusion that an advertisement is demeaning. *Id.*

While the MBTA did not explain its rationale for its rejection of AFDI Advertisement I beyond the claim that the advertisement was demeaning, in its opposition to Plaintiffs' motion

for preliminary injunction, the MBTA claimed that the advertisement insulted all Muslims and Palestinians, citing the rationale of both *Am. Freedom Def. Initiative v. Metro. Transp. Auth*., 880 F. Supp. 2d 456, 467 (S.D.N.Y. 2012) and *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth*., 898 F. Supp. 2d 78, 79 (D.D.C. 2012). *See* Opp'n Br. of MBTA at 12-13, *Am. Freedom Def. Initiative*, No. 1:13-cv-12803-NMG (D. Mass. Nov. 21, 2013), ECF No. 19.

Indeed, in *MBTA I*, this court accepted this rationale—while not the most reasonable interpretation—as at least one possible interpretation given the ambiguities inherent in the words "war" and "jihad." *MBTA I*, 2013 U.S. Dist. LEXIS 179729, at *15-*18. Specifically, the court proceeded with the implicit premise set out explicitly later in its opinion that the term "savage" presumptively "debases [a] person's dignity." *Id.* at *25-*26. With this premise in mind, the court noted that a "war" between civilized men and savages might be a kinetic violent war or it might also be something more metaphorical and thus non-violent. Further, because the word "jihad" may be defined as a non-violent struggle, it was not unreasonable, the court reasoned, for the MBTA to interpret AFDI Advertisement I as labeling all Muslims and Palestinians as savages insofar as the advertisement might sweep in those who oppose Israel peacefully, politically, and ideologically. *Id.* Again, implicit in the court's decision is that to label these non-violent opponents of Israel as savages would be demeaning. *Id.*

With this legal analysis front and center, Plaintiffs submitted AFDI Advertisement II to the MBTA. This advertisement removed the ambiguity from the word "jihad" by making explicit that the jihad Plaintiffs' political speech refers to is "*violent* jihad." Beyond this change, Plaintiffs modified the noun "savage" to an adjective to describe "those engaged in savage acts." The MBTA accepted this advertisement, apparently concluding that the adjective clause ("those who engage in savage acts") was not referring to peaceful Muslims or Palestinians, but only

those engaged in the savage act of *violent* jihad.

In an effort to understand the reasonableness of the MBTA's application of its "civility" speech restriction and to more adequately express Plaintiffs' viewpoint that those Palestinians and Muslims who engage in the savage act of *violent* jihad are, by virtue of their savagery, savages, Plaintiffs submitted AFDI Advertisement III. This advertisement retains the clarity of AFDI Advertisement II that the political speech at issue refers to the *violent* jihad employed by terrorists who, juxtaposed against the civilized man, are properly delineated as savages. The MBTA, however, somehow concluded that AFDI Advertisement III demeaned all Muslims and Palestinians in the same way or for the same "considerations" as AFDI Advertisement I.

The only distinction between AFDI Advertisements II and III is the distinction between the noun "savage" and the adjective phrase "those who engage in savage acts." But this begs the question: how does one identify the savage if not by his savage acts? And more important, is it constitutionally reasonable for a government agency to conclude that AFDI Advertisement III is somehow more demeaning because it expresses Plaintiffs' viewpoint that those engaged in savage acts (*i.e.*, "***violent*** jihad") are savages?

And this points to a more fundamental constitutional infirmity of the MBTA's "civility" standard. Having opened up its forum to a rancorous debate over the violent relations between Israeli Jews and Muslim Palestinians, the MBTA is left to carve and craft in an *ad hoc* fashion what kind of political speech on this controversial and highly emotional subject matter crosses some invisible line of civility. This entirely subjective and arbitrary standard is now laid bare as the MBTA tries to explain how there is a constitutionally reasonable distinction (one that must be objective) between "those who engage in savage acts" and the "savage" who, by definition, engages in savage acts (*i.e.*, "***violent*** jihad")—unless, of course, the MBTA rejects simply

Plaintiffs' viewpoint that acts of "violent jihad" against Israeli Jews are savage acts—a position which would also violate the First Amendment, as well as commonsense and decency. *Perry Educ. Ass'n,*460 U.S. at 46 (prohibiting viewpoint-based restrictions in a nonpublic forum).[6]

As the court noted in *MBTA I*, "The MBTA, in deciding to open its advertising program to speech on controversial topics, has taken on the difficult task of determining whether speech on that topic crosses the line from being offensive or hurtful to being demeaning or disparaging such that it can be excluded from the forum." *MBTA I*, 2013 U.S. Dist. LEXIS 179729, at *26-*27. Thus, what we have discovered is that while AFDI Advertisement I "presents a close call," *see id.* at 27, AFDI Advertisements II and III expose the MBTA's close call as an unreasonable and arbitrary (and thus unconstitutional) line-drawing that defies any objective logic because it is nothing less than a fear that the noun "savage" somehow expresses the dispositively reasonable definitional viewpoint that the violent jihadist is a savage precisely because his actions define him as such. *See, e.g., United Food*, 163 F.3d at 359 (holding that a speech restriction "offends the First Amendment when it grants a public official 'unbridled discretion' such that the official's decision to limit speech is not constrained by *objective criteria*, but may rest on 'ambiguous and subjective reasons'") (quoting *Desert Outdoor Adver., Inc. v. City of Moreno Valley,* 103 F.3d 814, 818 (9th Cir. 1996)) (emphasis added).

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[6] In *Ridley*, the court held that the MBTA's restriction on advertisements that were critical of laws prohibiting drug use were viewpoint based in violation of the First Amendment. The MBTA attempted to avoid the fact that its restriction was viewpoint based by arguing that a similar message could run *if a different manner of expression was used.* The court rejected the argument, stating,

> The MBTA's concession means simply that it will run advertisements which do not attract attention but will exercise its veto power over advertisements *which are designed to be effective in delivering a message*. Viewpoint discrimination concerns arise when the government intentionally tilts the playing field for speech; *reducing the effectiveness of a message*, as opposed to repressing it entirely, thus may be *an alternative form of viewpoint discrimination*.

Ridley, 390 F.3d at 88 (emphasis added).

In sum, the MBTA's rejection of AFDI Advertisement III violates the First Amendment.

III. Plaintiffs Will Suffer Irreparable Harm in the Absence of an Injunction.

It is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" sufficient to justify injunctive relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Maceira v. Pagan*, 649 F.2d 8, 18 (1st Cir. 1981) (same); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*).

IV. The Balance of Equities Tips Sharply in Favor of Granting the Injunction.

The likelihood of harm to Plaintiffs without the injunction is substantial because the deprivation of First Amendment rights, even for minimal periods, constitutes irreparable injury. *See* sec. III. *supra*. On the other hand, if the MBTA is enjoined from enforcing its prior restraint on Plaintiffs' speech, it will suffer no harm because the exercise of constitutionally protected rights can never harm any of the MBTA's legitimate interests. *See* sec. V. *infra.*

V. Granting the Injunction Is in the Public Interest.

The public interest is best served by upholding First Amendment freedoms. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("[T]he public as a whole has a significant interest in . . . protection of First Amendment liberties . . . ."); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("[The] public interest favors protecting core First Amendment freedoms. . . ."); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) (same); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013)

("[E]nforcement of an unconstitutional law is always contrary to the public interest."). Thus, the public interest favors granting the requested injunction.

REQUEST FOR ORAL ARGUMENT

Oral argument will assist this court in reaching a full understanding of the important constitutional issues presented and the underlying facts, and it will allow the attorneys for both sides to address any outstanding legal or factual issues that this court deems relevant.

CONCLUSION

Plaintiffs respectfully request that the court preliminarily enjoin the MBTA's prior restraint on their speech, thereby permitting the display of AFDI Advertisement III.

Respectfully submitted,

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*Subject to admission *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that, prior to the filing of a notice of appearance by Defendants' counsel, a copy of the foregoing will be served this date by electronic mail with a follow-up hard copy by USPS upon counsel for Defendants by written agreement of the parties.

Respectfully Submitted,

/s/ David Yerushalmi
David Yerushalmi

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; and ROBERT SPENCER, Plaintiffs, -v.- MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ("MBTA"); and BEVERLY A. SCOTT, individually and in her official capacity as Chief Executive Officer / General Manager of the MBTA, Defendants.	Case No. **DECLARATION OF PAMELA GELLER** [28 U.S.C. § 1746]

I, Pamela Geller, make this declaration pursuant to 28 U.S.C. § 1746 and based upon my personal knowledge and upon verifiable public information and information and belief, where noted.

1. I am an adult citizen of the United States and a plaintiff in this case.

2. I, along with Robert Spencer, who is also a plaintiff in this case, co-founded the American Freedom Defense Initiative ("AFDI"). I am currently the president of AFDI, and Mr. Spencer is the vice president.

3. AFDI is a nonprofit organization that is incorporated under the laws of the State of New Hampshire. AFDI is also a plaintiff in this case.

4. Mr. Spencer and I engage in free speech activity through various projects of AFDI. One such project is the posting of advertisements on the advertising space of various government transportation agencies throughout the United States, including the Massachusetts Bay Transportation Authority (hereinafter "MBTA"), which provides public transportation throughout the Greater Boston area.

5. AFDI is a human rights organization dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights.

6. AFDI achieves its objectives through a variety of lawful means, including through the exercise of its right to freedom of speech under the U.S. Constitution.

7. AFDI exercises its right to freedom of speech and promotes its objectives by, among other things, purchasing advertising space on transit authority property in major cities throughout the United States, including Boston, Massachusetts. AFDI purchases these advertisements to express its message on current events and public issues, including issues involving the Israeli / Palestinian conflict (hereinafter referred to as "AFDI's advertising campaign").

8. Based upon public information, the MBTA is a quasi-governmental organization which provides public transportation in the Commonwealth of Massachusetts. It operates bus routes, subway lines, a commuter rail network, and ferry service routes that provide transportation to millions of customers in the Greater Boston area. The Chief Executive Officer / General Manager of the MBTA is Beverly A. Scott (the defendants are collectively referred to as the "MBTA" or "Defendants").

9. The MBTA, through its advertising agent, Titan Outdoor LLC (a/k/a Titan360 and Titan) (hereinafter "Titan"), leases space on its vehicles and transportation stations for use as advertising space.

10. The MBTA accepts noncommercial and commercial advertisements for display on its advertising space.

11. The MBTA accepts noncommercial public service, public issue, and political issue advertisements, including advertisements on controversial issues, such as the Israeli / Palestinian conflict, for display on its advertising space.

12. The MBTA has leased its advertising space for political and social commentary advertisements covering a broad spectrum of political views and ideas.

13. Accordingly, the MBTA permits, as a matter of policy and practice, a wide variety of commercial, noncommercial, public-service, public-issue, and political-issue advertisements on its advertising space, including advertisements addressing the hotly debated Israeli / Palestinian conflict (hereinafter "Speech Policy").

14. Upon public information, in October 2013, the MBTA accepted for display on its advertising space a controversial advertisement that addresses the Israeli / Palestinian conflict by conveying a message and viewpoint that criticizes Israel (hereinafter "Anti-Israel Advertisement").

15. The Anti-Israel Advertisement, which, upon public information, appeared on approximately 80 posters throughout the transit system, depicts four maps that purport to show "the Palestinian loss of land" to Israel between 1946 and 2010. Text accompanying the maps says: "4.7 million Palestinians are Classified by the UN as Refugees."

16. The Anti-Israel Advertisement appears as follows:

17. A true and accurate copy of the Anti-Israel Advertisement is attached to this declaration as **Exhibit A** and incorporated herein by reference.

18. As defined by the U.N. (and as referenced in the Anti-Israel Advertisement), a "refugee" is "someone who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.'" This definition of "refugee" is also consistent with federal law, which defines a "refugee" as someone who is unable to return to his or her national homeland "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* 8 U.S.C. § 1101(a)(42).

19. Consequently, the Anti-Israel Advertisement conveys the unmistakable message that Israelis are "*persecuting*" Palestinians, and as a result of this persecution, are forcing the Palestinians "*outside the country of* [*their*] *nationality*." In short, the advertisement conveys the unmistakable message that Israelis are war criminals (or violators of international law, at a minimum), thereby demeaning and disparaging Israelis, Israel as a nation, and Jews in general.

20. Upon public information, after receiving a rash of complaints, on or about October 31, 2013, the MBTA, through its advertising agent, removed all of the Anti-Israel Advertisements from the MBTA's advertising space.

21. However, based upon public information, on or about November 1, 2013, the MBTA decided, without much of a public explanation, except to claim that it was a "miscommunication" between the MBTA and its advertising agent, to repost the Anti-Israel Advertisement on the MBTA's advertising space.

22. Pursuant to the MBTA's Speech Policy and in direct response to the original posting of the Anti-Israel Advertisement, on or about October 26, 2013, I submitted to Titan for display on MBTA's advertising space an advertisement that supported Israel in the debate over the Israeli / Palestinian conflict. More specifically, I contacted via email Scott Goldsmith, the executive vice president and chief commercial officer of Titan, and requested to run AFDI's "pro-Israel ads in 10 of the Boston T stations where the anti-Israel campaign is running." A true and correct copy of my email to Mr. Goldsmith is attached to this declaration as **Exhibit B** and incorporated herein by reference.

23. AFDI's pro-Israel advertisement states, in relevant part: "In any war between the civilized man and the savage, support the civilized man. Support Israel. Defeat jihad" (hereinafter "AFDI Advertisement I"). AFDI Advertisement I appears as follows:

24. A true and correct copy of AFDI Advertisement I is attached to this declaration as **Exhibit C** and incorporated herein by reference.

25. The AFDI Advertisement discusses the same subject matter as the Anti-Israel Advertisement, except it does so from a viewpoint that favors Israel, and more important, considers those jihadi terrorists who target, kill, and maim innocent men, women, and children in Israel as a legitimate means of achieving some political goal as savages. To me, there is no noun that can properly express my viewpoint about who these terrorists are other than "savage."

26. The quote, "In any war between the civilized man and the savage, support the civilized man," is adapted from a quote by the famous Russian-born, American author of *Atlas Shrugged*, Ayn Rand.

27. The message of AFDI Advertisement I was timely when I submitted it, and it remains so today in light of the fact that the Anti-Israel Advertisement received substantial publicity, and the issues addressed by the two competing advertisements remain current. Indeed, the President of the United States made special mention of the Israel / Palestinian conflict during the recent 2014 State of the Union address.

28. Acceptance of political- and public-issue advertisements, specifically including the MBTA's acceptance of the Anti-Israel Advertisement, demonstrates that the forum is suitable for AFDI Advertisement I.

29. On November 4, 2013, Defendants officially rejected AFDI Advertisement I. In an email from Titan executive Scott E. Goldsmith to me, Mr. Goldsmith states, "Pamela: The MBTA has rejected your ad because it falls within the category (b)(i) 'Demeaning or disparaging'. I have attached the ad policy for your review. Thank you. Scott." A true and correct copy of this email containing Defendants' rejection of AFDI Advertisement I is attached to this declaration as **Exhibit D** and incorporated herein by reference.

30. Attached to Defendants' rejection email was a copy of the MBTA's Advertising Guidelines. A true and correct copy of this email attachment is attached to this declaration as **Exhibit E** and incorporated herein by reference.

31. As a result of Defendants' restriction on our speech, AFDI, Robert Spencer, and I filed suit in this court pursuant to 42 U.S.C. § 1983, alleging violations of the First Amendment (freedom of speech) and Fourteenth Amendment (equal protection and due process). *See Am. Freedom Def. Initiative et al. v. Mass. Bay Transp. Auth.*, No. 1:13-cv-12803-NMG (D. Mass. filed Nov. 6, 2013) ("*MBTA I*").

32. *MBTA I* is currently on appeal to the United States Court of Appeals for the First Circuit following this court's denial of our (the plaintiffs') motion for preliminary injunction. *Am. Freedom Def. Initiative v. Mass. Bay Transp. Auth.*, No. 1:13-cv-12803-NMG, 2013 U.S. Dist. LEXIS 179729 (D. Mass. Dec. 20, 2013), *appeal docketed*, No. 14-1018 (1st Cir. Jan. 6, 2014).

33. Pending appeal, this court stayed all discovery and other pretrial deadlines in *MBTA I*.

34. After a careful review of this court's ruling in *MBTA I*, I submitted, on behalf AFDI, Robert Spencer, and myself, a new proposed advertisement to the MBTA ("AFDI Advertisement II"), which states, in relevant part: "In any war between the civilized man and those engaged in savage acts, support the civilized man. Defeat Violent Jihad. Support Israel." AFDI Advertisement II appears as follows:

35. A true and correct copy of AFDI Advertisement II is attached to this declaration as **Exhibit F** and incorporated herein by reference.

36. On January 7, 2014, Defendants accepted AFDI Advertisement II. In an email from Titan executive Scott E. Goldsmith to me, Mr. Goldsmith states in relevant part, "Pamela: Your ad has been approved by the MBTA. . . . Thank you. Scott." A true and correct copy of this email containing Defendants' acceptance of AFDI Advertisement II is attached to this declaration as **Exhibit G** and incorporated herein by reference

37. On January 8, 2014, I submitted, on behalf of AFDI, Robert Spencer, and myself, a slightly revised version of AFDI Advertisement II to the MBTA for approval ("AFDI

Advertisement III"). This advertisement states, in relevant part: "In any war between the civilized man and the savage, support the civilized man. Defeat violent jihad. Support Israel." AFDI Advertisement III appears as follows:

38. A true and correct copy of AFDI Advertisement III is attached to this Complaint as **Exhibit H** and incorporated herein by reference.

39. On January 17, 2014, Defendants rejected AFDI Advertisement III. In an email to my counsel, David Yerushalmi, Titan's Mr. Goldsmith writes, "David: The MBTA has formally rejected your (sic) revised ad pursuant to Article b(I) of the MBTA Advertising Standards. I have attached a copy of the Advertising Standards for your convenience. Please feel free to call me with any questions. Thank you. Scott." The MBTA Advertising Guidelines attached to the January 17 email and referred to by Mr. Goldsmith as "Advertising Standards" are the same standards set forth in **Exhibit E**. A true and correct copy of the January 17 email containing Defendants' rejection of AFDI Advertisement III is attached to this declaration as **Exhibit I** and incorporated herein by reference.

40. That same day, my counsel emailed Mr. Goldsmith, requesting a written "Formal Determination" from MBTA pursuant to MBTA's Advertising Standards c(vi). A true and correct copy of this email requesting a Formal Determination of the MBTA's rejection of AFDI Advertisement III is attached to this Complaint as **Exhibit J** and incorporated herein by reference.

41. On January 29, 2014, my counsel received by email the written MBTA Formal Determination rejecting AFDI Advertisement III in the form of a letter from Paige Scott Reed,

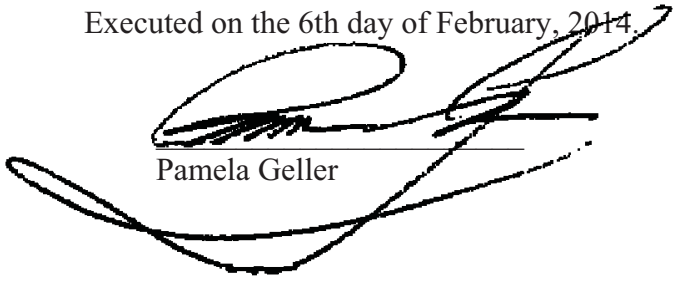
General Counsel, MBTA and MassDOT. Based upon information and belief, it is my understanding that this Formal Determination was approved by Defendant Scott. A true and correct copy of the MBTA Formal Determination rejecting AFDI Advertisement III is attached to this declaration as **Exhibit K** and incorporated herein by reference.

42. Defendants' application of its Advertising Guidelines as a basis to reject AFDI Advertisement III is a pretext to censor my message and the message of my co-plaintiffs because MBTA officials oppose our view on the Israeli / Palestinian conflict. Moreover, Defendants' decision to restore the advertisements critical of Israel (the Anti-Israel Advertisement), but then deny AFDI Advertisement III, which supports Israel, was motivated by a discriminatory animus against those speakers who support Israel in this conflict and who believe that Islamic terrorists who murder innocent men, women, and children in Israel in the name of violent jihad are savages and deserve to be publicly labeled as such. Defendants' decision to reject AFDI Advertisement III was further motivated by a discriminatory animus against me and the viewpoint I express about Islam in general.

43. Defendants' rejection of AFDI Advertisement III has caused and will continue to cause me irreparable harm.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on the 6th day of February, 2014.



Pamela Geller

EXHIBIT A


Palestine
1946
Israel
U.N.
Plan
1947
Israel
1949
–1967
Israel
2010
Palestinian Loss of Land – 1946 to 2010
4.7 Million
Palestinians
are Classified
by the U.N.
as Refugees
The Committee for Peace in Israel and Palestine
Henry Clifford, Chairman

EXHIBIT B

---------- Forwarded message ----------
From: **Pamela Geller** <pamelageller@gmail.com>
Date: Sat, Oct 26, 2013 at 4:23 PM
Subject: Boston ad buy: Pro-Israel ad campaign
To: Scott Goldsmith <Scott.Goldsmith@titan360.com>, Greg Wolinsky <Greg.Wolinsky@titan360.com>

Scott,

We wish to run our pro-Israel ads in 10 of the Boston T stations where the anti-Israel campaign is running. We want 10 of the busiest transit hubs (http://www.bostonglobe.com/metro/2013/10/25/mbta-restores-ads-critical-israel/61EuEtlckODpYHKd08JEqM/story.html?s_campaign=email_BG_TodaysHeadline)

You know the ad. You've run it before. **We wish to begin ASAP** - same ad placement as the anti-Israels ads in the Globe article.

Please send specs.

--

Yours in liberty,
Pamela Geller
Editor, Publisher Atlas Shrugs
President, AFDI, SIOA and SION

Pamela Geller on Facebook
@AtlasShrugs in Twitter
@PamelaGeller on Twitter

Author: Freedom or Submission: On the Dangers of Islamic Extremism & American Complacency
Author The Post-American Presidency: The Obama Administration's War on America
Author: Stop the Islamization of America: A Practical Guide for the Resistance

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Yours in liberty,
Pamela Geller

EXHIBIT C

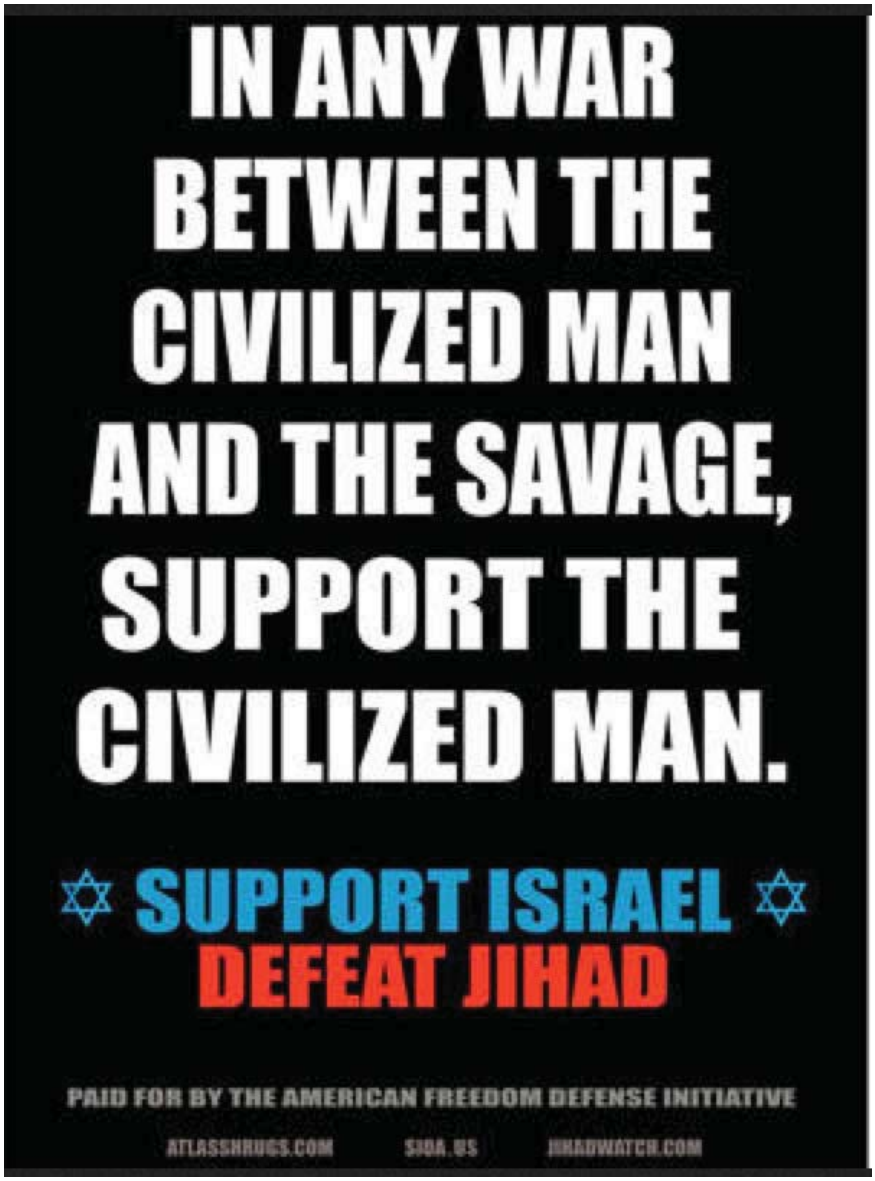
IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE, SUPPORT THE CIVILIZED MAN.
SUPPORT ISRAEL
DEFEAT JIHAD
PAID FOR BY THE AMERICAN FREEDOM DEFENSE INITIATIVE
ATLASSHRUGS.COM
SIOA.US
JIHADWATCH.COM

EXHIBIT D

From: Scott Goldsmith <Scott.Goldsmith@titan360.com>
Sent: Monday, November 04, 2013 4:38 PM
To: Pamela Geller
Cc: david.yerushalmi@verizon.net; <rmuise@aflc.us>; spencergc1@yahoo.com
Subject: Proposed Ad - MBTA
Attachments: MBTA - Ad guidelines .pdf

Pamela: The MBTA has rejected your ad because it falls within the category (b)(i) "Demeaning or disparaging". I have attached the ad policy for your review. Thank you. Scott.

Scott E. Goldsmith, Esq.
EVP & Chief Commercial Officer
100 Park Avenue
New York, NY 10017

T (212) 891-5688
F (212) 418-1082
scott.goldsmith@titan360.com

TITAN
titan360.com

From: Pamela Geller <pamelageller@gmail.com>
Date: Friday, November 1, 2013 4:02 PM
To: Scott Goldsmith <Scott.Goldsmith@titan360.com>
Cc: "david.yerushalmi@verizon.net" <david.yerushalmi@verizon.net>, "<rmuise@aflc.us>" <rmuise@aflc.us>, "spencergc1@yahoo.com" <spencergc1@yahoo.com>
Subject: Re:

Scott, What's the hold-up? These delays hurt my message. I want to counter the blood libel currently running. I need a a yes or no answer ASAP.

On Mon, Oct 28, 2013 at 10:39 AM, Pamela Geller <pamelageller@gmail.com> wrote:
10
We need specs

Yours in liberty,
Pamela Geller

Sent from my iPhone

On Oct 28, 2013, at 9:39 AM, Scott Goldsmith <Scott.Goldsmith@titan360.com> wrote:

> Pamela: We will submit. How many posters do you want to do? Thanks. Scott

Scott E. Goldsmith, Esq.
EVP & Chief Commercial Officer
100 Park Avenue
New York, NY 10017

T (212) 891-5688
F (212) 418-1082
scott.goldsmith@titan360.com

TITAN
titan360.com

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Yours in liberty,
Pamela Geller
Editor, Publisher Atlas Shrugs
President, AFDI, SIOA and SION

Pamela Geller on Facebook
@AtlasShrugs in Twitter
@PamelaGeller on Twitter

Author: Freedom or Submission: On the Dangers of Islamic Extremism & American Complacency
Author The Post-American Presidency: The Obama Administration's War on America
Author: Stop the Islamization of America: A Practical Guide for the Resistance

EXHIBIT E

Guidelines Regulating MBTA Advertising
Adopted July 1, 2012

Purpose

Through these Guidelines the MBTA intends to establish uniform, viewpoint-neutral standards for the display of advertising. In setting its advertising standards, the MBTA seeks to fulfill the following goals and objectives:

(a) maximization of revenue generated by advertising;
(b) maximization of revenue generated by attracting, maintaining, and increasing ridership;
(c) maintaining the safe and orderly operation of the MBTA;
(d) maintaining a safe and welcoming environment for all MBTA passengers, including minors who travel on or come in contact with the MBTA system; and
(e) avoiding the identification of the MBTA or the Commonwealth of Massachusetts with advertisements or the viewpoints of the advertisers.

The MBTA reserves the right, from time to time, to suspend, modify or revoke the application of any or all of these Guidelines as it deems necessary to comply with legal mandates, to accommodate its primary transportation function and to fulfill the goals and objectives referred to herein. All the provisions of these Guidelines shall be deemed severable.

Advertising Program and Administration

(a) These guidelines shall apply to advertising on or in all MBTA equipment and facilities (including but not limited to land, terminals, stations, garages, yards, shops, structures, rolling stock, vehicles, fences, equipment, electronic and hard copy media, websites and other personal property) unless otherwise expressly provided by contract regarding a premise covered by an alcoholic beverages license.

(b) The MBTA shall, from time to time, select an "Advertising Contractor" who shall be responsible for the daily administration of the MBTA's advertising program in a manner consistent with these Guidelines and the terms of its agreement with the MBTA. The advertising program shall include, but not be limited to, promotion, solicitation, sales, accounting, billing, collections and posting of advertising displays on or in all MBTA equipment and facilities.

(c) The Advertising Contractor shall provide, or shall subcontract for, all employees and equipment necessary to perform the work and provide the services required by the MBTA.

(d) The MBTA shall designate an employee (typically, the Director of Marketing Communications) as its "Contract Administrator" to be the primary contact for the Advertising Contractor. Questions regarding the terms, provisions and requirements of these Guidelines shall be addressed initially to the Contract Administrator.

MBTA Operations and Promotions

The MBTA has the unqualified right to display, on or in its equipment and facilities, advertisements and notices that pertain to MBTA operations and promotions, consistent with the provisions of its agreement with the Advertising Contractor.

Disclaimer

The MBTA reserves the right, in all circumstances, to require that an advertisement on or in its equipment and facilities include a disclaimer indicating that it is not sponsored by, and does not necessarily reflect the views of, the MBTA.

Advertising Standards

(a) The MBTA intends that its equipment and facilities constitute nonpublic forums that are subject to the viewpoint-neutral restrictions set forth below. Certain forms of paid and unpaid advertising will not be permitted for placement or display on or in MBTA equipment and facilities.

(b) The MBTA shall not display or maintain any advertisement that falls within one or more of the following categories:

(i) Demeaning or disparaging. The advertisement contains material that demeans or disparages an individual or group of individuals. For purposes of determining whether an advertisement contains such material, the MBTA will determine whether a reasonably prudent person, knowledgeable of the MBTA's ridership and using prevailing community standards, would believe that the advertisement contains material that ridicules or mocks, is abusive or hostile to, or debases the dignity or stature of, an individual or group of individuals.

(ii) Tobacco. The advertisement promotes the sale or use of tobacco or tobacco-related products, including but not limited to depicting such products.

(iii) Alcohol. The advertisement advertises an alcohol product or a brand of alcohol products.

(iv) Profanity. The advertisement contains profane language.

(v) Firearms. The advertisement either (a) advertises a firearm or a brand of firearms, (b) contains an image of a firearm in the foreground of the

main visual or (c) contains image(s) of firearm(s) that occupy 15% or more of the overall advertisement.

(vi) Violence. The advertisement contains an image or description of graphic violence, including but not limited to (1) the depiction of human or animal bodies, body parts or fetuses, in states of mutilation, dismemberment, decomposition or disfigurement, and (2) the depiction of weapons or other implements or devices used in the advertisement in an act or acts of violence or harm on a person or animal.

(vii) Unlawful goods or services. The advertisement, or any material contained in it, promotes or encourages, or appears to promote or encourage, the use or possession of unlawful or illegal goods or services.

(viii) Unlawful conduct. The advertisement, or any material contained in it, promotes or encourages, or appears to promote or encourage, unlawful or illegal behavior or activities.

(ix) Obscenity or nudity. The advertisement contains obscene material or images of nudity. For purposes of these Guidelines, the terms "obscene" and "nudity" shall have the meanings contained in Massachusetts General Laws ch. 272, §31.[1]

(x) Prurient sexual suggestiveness. The advertisement contains material that describes, depicts or represents sexual activities or aspects of the human anatomy in a way that the average adult, applying contemporary community standards, would find appeals to the prurient interest of minors or adults in sex. For purposes of these Guidelines, the term "minor" shall have the meaning contained in Massachusetts General Laws ch. 272, §31.[2]

(xi) Political campaign speech. The advertisement contains political campaign speech. For purposes of these Guidelines, the term "political campaign speech" is speech that (1) refers to a specific ballot question, initiative petition, or referendum, (2) promotes or opposes a political party for local, state, or federal election, or (3) promotes or opposes a candidate or group of candidates. For purposes of these Guidelines, the term "candidate" shall include any person actively campaigning for office, any person who has filed their candidacy or declared their intent to run for office, or any person who has been reported in the mainstream media as likely to run for a particular public office.

(xii) Endorsement. The advertisement, or any material contained in it, implies or declares an endorsement by the MBTA or the Commonwealth of any service, product or point of view, without prior written authorization of the MBTA (through its General Manager) or the Commonwealth (through the Secretary of the Executive Office of Transportation and Construction).

(xiii) False, misleading, or deceptive commercial speech. The advertisement proposes a commercial transaction, and the advertisement, or any material contained in it, is false, misleading or deceptive.

1 Mass. Gen. Laws ch. 272. §31, defines "obscene" as follows: "matter is obscene if taken as a whole it (1) appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed; (2) depicts or describes sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political, or scientific value" Mass. Gen. Laws. ch. 272, §31, defines "nudity" as follows: "uncovered or less than opaquely covered human genitals, pubic areas, the human female breast below a point immediately above the top of the areola, or the covered male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple or areola only are covered."[3]

2 Mass. Gen. Laws ch. 272, §3 I, defines "minor' as "a person under eighteen years of age.

(xiv) Libelous speech, copyright infringement, etc. The advertisement, or any material contained in it, is libelous or an infringement of copyright, or is otherwise unlawful or illegal or likely to subject the MBTA to litigation.

(xv) "Adult"-oriented goods or services. The advertisement promotes or encourages, or appears to promote or encourage, a transaction related to, or uses brand names, trademarks, slogans or other materials which are identifiable with, films rated "X" or "NC-17," **video games rated M or AO**, adult book stores, adult video stores, nude dance clubs and other adult entertainment establishments, adult telephone services, adult Internet sites and escort services.

(c) Review of advertisements. The Advertising Contractor shall review each advertisement submitted for display on or in MBTA equipment and facilities to determine whether the advertisement falls within, or may fall within, one or more of the categories set forth in (b) above. If the Advertising Contractor determines that an advertisement falls within, or may fall within, one or more of the categories set forth in (b) above, then:

(i) Referral to Contract Administrator. The Advertising Contractor shall promptly send the advertisement - along with the name of the advertiser, the size and number of the advertisements and the dates and locations of display - to the Contract Administrator for review of the advertisement by the MBTA.

(ii) Initial Review by MBTA. Upon the Contractor Administrator's receipt of the advertisement and supporting information, the Contract Administrator shall review the advertisement and supporting information to determine whether the advertisement falls within one or more of the categories set forth in (b) above. In reaching this determination, the Contract Administrator may consider any materials submitted by the advertiser and may consult with the Advertising Contractor. In the event that the Contract Administrator determines that the advertisement does not fall within any of the categories set forth in (b) above, the Contract Administrator shall advise the Advertising Contractor that the advertisement is in conformity with the MBTA's Advertising Guidelines.

(iii) Subsequent Review by MBTA. In the event that the Contract Administrator determines that the advertisement falls within, or may fall within, one or more of the categories set forth in (b) above, then the Contract Administrator shall, in writing, specify which of the categories the advertisement falls within, or may fall within, and shall refer the advertisement and supporting information to the General Counsel. Likewise, the General Counsel shall review the advertisement and supporting information to determine whether the advertisement falls within one or more of the categories set forth in (b) above. In reaching this determination, the General Counsel may consider any materials submitted by the advertiser and may consult with the Contract Administrator. In the event that the General Counsel determines that the advertisement does not fall within any of the categories set forth in (b) above, the Contract Administrator shall advise the Advertising Contractor that the advertisement is in conformity with

the MBTA's Advertising Guidelines.

(iv) Final Review by MBTA. In the event that the General Counsel determines that the advertisement falls within, or may fall within, one or more of the categories set forth in (b) above, then the General Counsel shall, in writing, specify which of the categories the advertisement falls within, or may fall within, and shall refer the advertisement and supporting information to the General Manager. Likewise, the General Manager shall review the advertisement and supporting information to determine whether the advertisement falls within one or more of the categories set forth in (b) above. In reaching this determination, the General Manager may consider any materials submitted by the advertiser and may consult with the Contract Administrator and the General Counsel. In the event that the General Manager determines that the advertisement does not fall within any of the categories set forth in (b) above, the Contract Administrator shall advise the Advertising Contractor that the advertisement is in conformity with the MBTA's Advertising Guidelines. In the event that the General Manager determines that the advertisement falls within one or more of the categories set forth in (b) above, then the General Manager shall, in writing, specify which of the categories the advertisement falls within and the Contract Administrator shall advise the Advertising Contractor that the MBTA has determined that the advertisement is not in conformity with its Advertising Guidelines.

(v) Opportunity for Revision by Advertiser. In the event that the MBTA determines that the advertisement falls within one or more of the categories set forth in (b) above, the Advertising Contractor may, in consultation with the Contract Administrator, discuss with the advertiser one or more revisions to the advertisement, which, if undertaken, would bring the advertisement into conformity with the MBTA's Advertising Guidelines. The advertiser shall then have the option of submitting a revised advertisement for review by the MBTA.

(vi) Formal Determination by MBTA. In the event that the MBTA and the advertiser do not reach agreement with regard to a revision of the advertisement, the advertiser may request that the MBTA memorialize its formal determination in the form of a final written notice of its decision, which shall then be relayed to the advertiser. The MBTA's formal determination shall be final.

(vii) Removal of Non-Complying Advertisements. Notwithstanding the foregoing, if the Contract Administrator, the General Counsel, and the General Manager determine at any time that an advertisement already accepted for display by the Advertising Contractor falls within one or more of the categories set forth in (b) above, they shall (1) in writing, specify which of the categories the advertisement falls within, (2) notify the advertiser that the MBTA has determined that the advertisement is not in conformity with its Advertising Guidelines and that the advertisement shall be promptly removed and (3) instruct the Advertising Contractor to remove the advertisement. Upon such

instruction, the Advertising Contractor shall promptly remove the advertisement, shall provide the advertiser with a copy of these Guidelines, and may, with the Contract Administrator, discuss with the advertiser one or more revisions to the advertisement, which, if undertaken, would bring the advertisement into conformity with the MBTA's Advertising Guidelines. The advertiser shall then have the option of submitting a revised advertisement for review by the MBTA. In the event that the MBTA and the advertiser do not reach agreement with regard to a revision of the advertisement, the advertiser may request that the MBTA memorialize its formal determination in the form of a final written notice of its decision, which shall then be relayed to the advertiser. The MBTA's formal determination shall be final.

Public Service Announcements

The MBTA will, from time to time, make unsold advertising space available for public service announcements proposed by non-profit corporations that are exempt from taxation under Section 501(c)(3) of the Internal Revenue Code or by federal, state or local government agencies or subdivisions thereof. Each such non-profit corporation shall provide the Advertising Contractor or the MBTA with documentation demonstrating that it currently qualifies under the above-referenced provision of the Internal Revenue Code. A public service announcement cannot contain a message that is retail or commercial in nature and shall comply with the Advertising Standards set forth in these Guidelines. A public service announcement may be required to bear the following legend if the sponsor is not readily or easily identifiable from the content or copy of the proposed advertisement: "This message is sponsored by_____".

EXHIBIT F


IN ANY WAR BETWEEN THE CIVILIZED MAN AND THOSE ENGAGED IN SAVAGE ACTS,
SUPPORT THE CIVILIZED MAN.
DEFEAT VIOLENT JIHAD
SUPPORT ISRAEL
ATLASSHRUGS.COM
AFDI.US
JIHADWATCH.COM

EXHIBIT G

David Yerushalmi

Subject: FW: Revised ad

From: Scott Goldsmith [mailto:Scott.Goldsmith@titan360.com]
Sent: Tuesday, January 07, 2014 4:19 PM
To: Pamela Geller
Cc: david.yerushalmi@verizon.net; <rmuise@aflc.us>; JihadWatchVideo .
Subject: Re: Revised ad

Pamela: Your ad has been approved by the MBTA. What size ad would you like to purchase? King or Queen size ads? Once I have the media format, I can give you a price and a contract for the 20-bus campaign. Thank you. Scott.

Scott E. Goldsmith, Esq.
EVP & Chief Commercial Officer
100 Park Avenue
New York, NY 10017

T (212) 891-5688
F (212) 418-1082
scott.goldsmith@titan360.com

TITAN
titan360.com

From: Pamela Geller <pamelageller@gmail.com>
Date: Friday, January 3, 2014 6:39 PM
To: Scott Goldsmith <Scott.Goldsmith@titan360.com>
Cc: "david.yerushalmi@verizon.net" <david.yerushalmi@verizon.net>, "<rmuise@aflc.us>" <rmuise@aflc.us>, "JihadWatchVideo ." <director@jihadwatch.org>
Subject: Revised ad

Scott, I have revised the ad in keeping with MBTA guidelines and Judge Gorton's ruling. Please submit the new artwork to the MBTA for a 20 bus run.

--

Yours in liberty,
Pamela Geller
Editor, Publisher Atlas Shrugs
President, AFDI, SIOA and SION

Pamela Geller on Facebook
@AtlasShrugs in Twitter
@PamelaGeller on Twitter

Author: Freedom or Submission: On the Dangers of Islamic Extremism & American Complacency
Author The Post-American Presidency: The Obama Administration's War on America
Author: Stop the Islamization of America: A Practical Guide for the Resistance

EXHIBIT H


IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE,
SUPPORT THE CIVILIZED MAN.
DEFEAT VIOLENT JIHAD
SUPPORT ISRAEL
ATLASSHRUGS.COM
AFDI.US
JIHADWATCH.COM

EXHIBIT I

David Yerushalmi

Subject: FW: Revised ad
Attachments: MBTA - Ad guidelines .pdf

From: Scott Goldsmith [mailto:Scott.Goldsmith@titan360.com]
Sent: Friday, January 17, 2014 1:35 PM
To: dyerushalmi@americanfreedomlawcenter.org
Cc: 'Pamela Geller'; director@jihadwatch.org; 'Robert Muise'
Subject: Re: Revised ad

David: The MBTA has formally rejected your revised ad pursuant to Article b(I) of the MBTA Advertising Standards. I have attached a copy of the Advertising Standards for your convenience. Please feel free to call me with any questions. Thank you. Scott.

Scott E. Goldsmith, Esq.
EVP & Chief Commercial Officer
100 Park Avenue
New York, NY 10017

T (212) 891-5688
F (212) 418-1082
scott.goldsmith@titan360.com

TITAN
titan360.com

From: David Yerushalmi <dyerushalmi@americanfreedomlawcenter.org>
Organization: Law Offices of David Yerushalmi, P.C.
Reply-To: "dyerushalmi@americanfreedomlawcenter.org" <dyerushalmi@americanfreedomlawcenter.org>
Date: Wednesday, January 15, 2014 4:28 PM
To: Scott Goldsmith <Scott.Goldsmith@titan360.com>
Cc: Pamela Geller <writeatlas@aol.com>, "director@jihadwatch.org" <director@jihadwatch.org>, 'Robert Muise' <rmuise@americanfreedomlawcenter.org>
Subject: FW: Revised ad

Dear Scott: We need to get a determination by MBTA. Please update me directly on the estimated response date.

Sent from my BlackBerry® wireless handheld

David Yerushalmi*
American **F**reedom **L**aw **C**enter®
Washington, D.C., Michigan, New York, California & Arizona
**Licensed in D.C., N.Y., Cal., Ariz.*
T: 855.835.2352 (toll free)
T: 646.262.0500 (direct)
F: 801.760.3901
E: dyerushalmi@americanfreedomlawcenter.org
W: www.americanfreedomlawcenter.org
==========

From: Pamela Geller [mailto:pamelageller@gmail.com]
Sent: Wednesday, January 15, 2014 3:59 PM
To: david.yerushalmi@verizon.net; <rmuise@aflc.us>; JihadWatchVideo .
Subject: Fwd: Revised ad

---------- Forwarded message ----------
From: **Scott Goldsmith** <Scott.Goldsmith@titan360.com>
Date: Wed, Jan 8, 2014 at 12:26 PM
Subject: Re: Revised ad
To: Pamela Geller <pamelageller@gmail.com>
Cc: "david.yerushalmi@verizon.net" <david.yerushalmi@verizon.net>, "<rmuise@aflc.us>" <rmuise@aflc.us>, "JihadWatchVideo ." <director@jihadwatch.org>

Pamela: Your revised ad has been submitted to the MBTA. Attached please find the pricing for 10 and 20 queen sized ads. Thank you. Scott.

Scott E. Goldsmith, Esq.
EVP & Chief Commercial Officer
100 Park Avenue
New York, NY 10017

T (212) 891-5688
F (212) 418-1082
scott.goldsmith@titan360.com

TITAN
titan360.com

EXHIBIT J

David Yerushalmi

From: David Yerushalmi [dyerushalmi@americanfreedomlawcenter.org]
Sent: Friday, January 17, 2014 1:48 PM
To: 'Scott Goldsmith'
Cc: 'Pamela Geller'; 'director@jihadwatch.org'; 'Robert Muise'
Subject: RE: Revised ad

Scott: under the Advertising Guidelines c(vi), we hereby request a Formal Determination in writing. Thank you.

Sent from my BlackBerry® wireless handheld

David Yerushalmi*
American **F**reedom **L**aw **C**enter®
Washington, D.C., Michigan, New York, California & Arizona
**Licensed in D.C., N.Y., Cal., Ariz.*
T: 855.835.2352 (toll free)
T: 646.262.0500 (direct)
F: 801.760.3901
E: dyerushalmi@americanfreedomlawcenter.org
W: www.americanfreedomlawcenter.org

From: Scott Goldsmith [mailto:Scott.Goldsmith@titan360.com]
Sent: Friday, January 17, 2014 1:35 PM
To: dyerushalmi@americanfreedomlawcenter.org
Cc: 'Pamela Geller'; director@jihadwatch.org; 'Robert Muise'
Subject: Re: Revised ad

David: The MBTA has formally rejected your revised ad pursuant to Article b(I) of the MBTA Advertising Standards. I have attached a copy of the Advertising Standards for your convenience. Please feel free to call me with any questions. Thank you. Scott.

Scott E. Goldsmith, Esq.
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100 Park Avenue
New York, NY 10017

T (212) 891-5688
F (212) 418-1082
scott.goldsmith@titan360.com

TITAN
titan360.com

From: David Yerushalmi <dyerushalmi@americanfreedomlawcenter.org>
Organization: Law Offices of David Yerushalmi, P.C.
Reply-To: "dyerushalmi@americanfreedomlawcenter.org" <dyerushalmi@americanfreedomlawcenter.org>

EXHIBIT K

Deval L. Patrick, Governor
Richard A. Davey, MassDOT Secretary & CEO
Beverly A. Scott, Ph.D., General Manager
and Rail & Transit Administrator

massDOT
Massachusetts Department of Transportation
Rail & Transit Division

January 29, 2014

David Yerushalmi, Esq.
1901 Pennsylvania Avenue NW, Suite 201
Washington, D.C. 20006
dyerushalmi@americanfreedomlawcenter.org

VIA EMAIL AND REGULAR MAIL

Re: Final Written Notice of Determination

Dear Mr. Yerushalmi

This notice is sent in response to your email of January 17, 2014 to Scott Goldsmith of Titan Outdoor LLC ("Titan"), the MBTA's advertising contractor, requesting a Formal Determination pursuant to Section d(vi) of the MBTA's Advertising Standards.

As you know, American Freedom Defense Initiative (AFDI) submitted a proposed ad to Titan on October 26, 2013. Titan forwarded that ad to the MBTA which, pursuant to its Advertising Guidelines, determined that the proposed ad contained material that demeans or disparages an individual or group of individuals. As such, the ad did not comply with section (b)(1) of the Guidelines. The MBTA so informed AFDI.

Thereafter, AFDI filed a complaint with the Massachusetts federal district court seeking a preliminary injunction requiring the MBTA to accept the rejected ad. On December 20, 2013, the court issued its decision, rejecting AFDI's position that the MBTA acted unreasonably and denying its request.

By email dated January 3, 2014, AFDI"s Pamela Geller submitted a revised ad (the "second ad"), stating that it was "in keeping with MBTA guidelines and Judge Gorton's ruling." The MBTA reviewed the second ad, and on January 7 at 4:19 PM, Mr. Goldsmith notified Ms. Geller that the MBTA had approved it. He asked her to provide specifications.

On January 8, 2014, at 12:10 AM Ms. Geller sent Mr. Goldsmith an email with a proposed "tweak" of the accepted ad (the "third ad"). Mr. Goldsmith replied that Titan was submitting the third ad to the MBTA for review.

The third ad is very similar to the rejected ad that was the subject of the preliminary injunction hearing. The third ad reverses the order of the two lines below "civilized man" and

adds the word "violent" between "Defeat" and "Jihad." The MBTA undertook a review of the third ad and concluded that it was not in compliance with section (b)(i) of the MBTA's Advertising Standards. The MBTA's conclusion was based on the same considerations as its rejection of the first ad. On January 17, 2014, Mr. Goldsmith so informed you by email. You responded by requesting this Formal Determination.

The MBTA remains willing to display the second ad if AFDI so requests.

Sincerely,

Paige Scott Reed

Paige Scott Reed
General Counsel, MBTA and MassDOT