IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al.*,

Plaintiffs,

v.

SUBURBAN MOBILITY AUTHORITY for REGIONAL TRANSPORTATION ("SMART"); *et al*.,

Defendants.

No. 2:10-cv-12134-DPH-MJH

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

ISSUES PRESENTED

I. Whether Defendants created a public forum for the expression of a wide variety of commercial, noncommercial, public-service, and public-issue advertisements, including advertisements on controversial subjects, such that their restriction on Plaintiffs' message violates the First and Fourteenth Amendments.

II. Whether, regardless of the nature of the forum, Defendants' advertising "guidelines" facially and as applied to Plaintiffs' advertisement provide no objective guide for distinguishing between permissible and impermissible advertisements in a non-arbitrary, viewpoint-neutral fashion as required by the U.S. Constitution.

III. Whether Defendants' advertising "guidelines" facially and as applied to Plaintiffs' advertisement are viewpoint based in violation of the First and Fourteenth Amendments.

IV. Whether Defendants' advertising "guidelines" facially and as applied to Plaintiffs' advertisement violate the equal protection guarantee of the Fourteenth Amendment.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341 (6th Cir. 1998)

Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92 (1972)

As Defendants' response brief makes painfully clear, SMART's incoherent advertising "guidelines"—which provide no objective guide whatsoever as required by the Constitution—force Defendants into making incoherent arguments and resorting to red-herrings[1] in a feckless attempt to justify their prior restraint on

[1] In their response, Defendants claim that Plaintiffs have misrepresented the record. (Defs.' Resp. at 1-2). Plaintiffs will address these impertinent and demonstrably false claims by way of this footnote. First, Defendants state, "Plaintiffs appear to argue . . . that Ms. Gibbons had decision-making authority during [relevant] time periods . . . ." (Defs.' Resp. at 1 [asserting that "Plaintiffs know this to be untrue."]). To be clear, this is not an "argument"; it is a fact based on SMART's testimony. (*See, e.g.*, SMART Dep. at 16 ["Q: Does Beth Gibbons have any role at SMART with regard to the application of any policies that would apply as to whether or not an advertisement will be accepted or rejected by SMART? A. Yes. * * * Q: *Does she have authority to make determinations* [*i.e.*, 'whether there is a violation of the policy and the advertising restriction content'] *on her own*? A. *Yes*." (emphasis added)] [Doc. 58-5]; *see also* Gibbons Dep. at 23 ["Q: But you have authority to make a determination to run an ad or not run an ad; isn't that correct? A. I could."], *see also* 15-16 [Doc. 58-7]).

Next, Defendants claim that "Plaintiffs also mischaracterize their relationship with CBS Detroit (sic) with respect to this *Leaving Islam* ad," claiming further that Plaintiffs "are intentionally misleading the Court" by stating that Plaintiffs "entered into a contract through SMART's advertising agent to run the advertisement." (Defs.' Resp. at 2). Not only do these remarks by Defendants' counsel warrant sanctions by this court, they are incorrect as a matter of fact. Indeed, in her declaration filed in support of Plaintiffs' motion for preliminary injunction, Plaintiff Geller set forth in detail the facts demonstrating that an agreement had been entered into with CBS Outdoor to run the "*Leaving Islam*" advertisement on SMART's buses (*n.b.*, Plaintiff Geller's declaration filed in support of Plaintiffs' motion for summary judgment was a simple reaffirmation of this undisputed fact). In her declaration, Plaintiff Geller testified, in relevant part, as follows:

> On or about May 12, 2010, I emailed Mr. Hawkins and *asked him to modify the CBS-FDI Agreement-Detroit to have the Advertising placed on SMART buses* running in the Detroit metropolitan area for the existing contract price, *which FDI had already paid*. *By return email the next day*, *Mr. Hawkins*

Plaintiffs' speech. Unfortunately for Defendants, in doing so, they concede the very points they are attempting to rebut.

Defendants argue that SMART's advertising "guidelines" are not what Plaintiffs claim in their motion. (*See* Defs.' Resp. at 5-6). Yet, Defendants cite to the *very same testimony* in support of their opposition (*i.e.*, that "political" means "any advocacy of a position of any politicized issue" and that "politicized" means "if society is fractured on an issue and factions of society have *taken up positions on it that are not in agreement*, it's politicized."). (SMART Dep. at 41 [Doc. 58-5]) (emphasis added). Thus, it is *impossible*—and, indeed, utterly dishonest—for Defendants to argue with a straight face that this definition of "political" means anything but contentiousness (or controversy).[2] *See, e.g.*, http://www.merriam-

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> *confirmed the request* and that he had sent our Advertising copy to his contact at SMART for approval. Our Advertising request met all of the procedural requirements for running an advertisement on the SMART buses. *See* a true and correct copy of the emails between Mr. Hawkins and me switching the Advertising from DDOT to SMART attached as Exhibit I and incorporated herein by this reference.

(Geller Decl. at ¶ 15, Ex. I, [Doc. 8-2]) (emphasis added). Indeed, Defendants admit that CBS Outdoor is their agent. Defendants admit that CBS Outdoor contracts for advertising on behalf of SMART. And Defendants admit that Robert Hawkins is an employee of CBS Outdoor who, as an agent for SMART, contracts for advertising on SMART's buses. (SMART Dep. at 17 [Doc. 58-5]).

[2] Defendants' reference to the decision in *Coleman v. Ann Arbor Trans. Auth.*, No. 11-CV-15207, U.S. Dist. LEXIS 78100 (E.D. Mich. June 4, 2013), in which the court upheld the rejection of an advertisement that was "critical of Israel" under a "no political ads" provision is not helpful to their position. It is not objectively unreasonable to conclude that an advertisement critical of Israel—a sovereign nation—is an advertisement that includes political *content*. *See*

webster.com/dictionary/contentious (defining "contentious" as "likely to cause disagreement") (*i.e.*, *tak[ing] up positions . . . that are not in agreement*).

But Defendants go a step further into the abyss. They admit—as they must based on the facts—that, despite their definition of "political," their advertising "guidelines" *actually permit the display of contentious and controversial public issues*.[3] (*See, e.g.*, Defs.' Resp. at 7 [admitting that "to the extent these ads are

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http://www.merriam-webster.com/dictionary/political (defining "political" as "of or relating to government, a government, or the conduct of government"). Under SMART's rendering of "political," however, a government official would have to make a subjective and arbitrary determination as to whether some vague, amorphous, and indeterminate "faction" of society has taken up a position that is not in agreement with the position taken up by some other vague, amorphous, and indeterminate "faction" of society with regard to the official's *perception* of the advertisement's message to determine whether it is "politicized"—*i.e.*, not simply "political" in its content (Note: It *is* the government official's arbitrary *perception* of the advertisement's message that matters as evidenced by the way in which Defendants seek to impute a message that does not appear in Plaintiffs' "*Leaving Islam*" advertisement [*i.e.*, arguing that the message is advocating a position with regard to the implementation of sharia law in the U.S.] and then turn a blind eye to the message conveyed by the "StatusSexy" advertisement campaign [*i.e.*, arguing that the advertisement no way "encourages or advocates sex at all, let alone between men"] (*see* Defs.' Resp. at 11-12).

[3] Any effort on the part of Defendants to claim that they only permit "commercial" advertisements and not "public issue" advertisements is feckless in the extreme. (*See* Defs.' Resp. at 8 [falsely asserting that "Plaintiffs cannot show that SMART has accepted any . . . public-issue advertisements"]). The "*Don't believe in God?*" atheist advertisement, the "*Knowing your HIV status before you get down. That's SEXY*" advertising campaign, the "*Put Yourself First, Plan First, Have a baby when the time is right for you*" free birth control advertisement, the "*Feeling Lost? Find Your Path!*" Christian advertisement, the "*After You Have A Lung Removed, Take Short Breaths*" stop-smoking advertising campaign, and a host of other advertisements are "public issue" advertisements. Period. They are not, as a matter of fact *and* law, "innocuous and less controversial *commercial*"

controversial, that was not a determining factor in SMART's decision-making process"). Thus, perhaps unwittingly, Defendants now concede that their advertising space is a designated public forum for Plaintiffs' "*Leaving Islam*" advertisement. And this point is underscored by the very case that Defendants claim is controlling on this issue: *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974), in which the Court found that the 26-year, *consistently enforced ban on noncommercial advertising* was consistent with the government's role as a proprietor precisely because the government "limit[ed] car card space to ***innocuous*** *and* ***less controversial*** *commercial and service oriented advertising*." (emphasis added).

Other courts, including the Sixth Circuit,[4] *see United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998) (hereinafter "*United Food*") ("Acceptance of political and public-issue advertisements, which by their very nature *generate conflict*, signals a willingness on the part of the government *to open the property to controversial*

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advertisements. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related *solely* to the economic interests of the speaker and its audience") (emphasis added).

[4] As Defendants acknowledge in their response, the Sixth Circuit in *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885 (6th Cir. 2012), is in accord with this conclusion, stating in the opinion the following: "An outright ban on political advertisements is permissible *if* it is a 'managerial decision' focused on increasing revenue *to limit advertising* 'space to *innocuous* and *less controversial* commercial and service oriented advertising.'" *Id*. at 892 (quoting *Lehman*, 418 U.S. at 304) (emphasis added); (*see* Defs.' Resp. at 9-10).

speech, which the Court in *Lehman* recognized as *inconsistent with operating the property solely as a commercial venture*.") (emphasis added), have followed *Lehman* to hold that a total ban on noncommercial speech may be consistent with the government acting in a proprietary capacity and have thus found transportation advertising space to be a nonpublic forum when the government "consistently promulgates and enforces policies restricting advertising . . . to commercial advertising." *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998); *see also N.Y. Magazine*, 136 F.3d at 130 ("Disallowing political speech, and *allowing commercial speech only*, indicates that making money is the main goal. Allowing political speech, conversely, evidences a general intent to open a space for discourse, and a deliberate acceptance of the possibility of *clashes of opinion and controversy* that the Court in *Lehman* recognized as *inconsistent with sound commercial practice*.") (emphasis added).

As the Sixth Circuit stated, a forum analysis "involve[s] a careful scrutiny of whether the government-imposed restriction on access to public property *is truly part of the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property*." *United Food*, 163 F.3d at 351-52 (internal quotations and citation omitted) (emphasis added). Courts will hold "that the government did not create a public forum *only* when its standards for inclusion and exclusion *are clear* and are *designed to prevent interference with the forum's*

designated purpose." *Id.* at 352 (emphasis added). Thus, permitting speech on exceedingly controversial, public issues—including speech on issues that cause vandalism to SMART's buses and that SMART's own bus drivers object to by refusing to drive the buses on which the advertisements are posted (we refer here to the atheist advertisement) (Gibbons Dep. at 29 [Doc. 58-7])—creates a public forum as a matter of fact and law. *See Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991) (noting that when conducting a forum analysis, "actual practice speaks louder than words"). Consequently, as Defendants now tacitly acknowledge in their response, they have "created a forum that is suitable for the speech in question . . . ." *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 252 (3d Cir. 1998).

Thus, having conceded the forum issue, the analysis as to whether Defendants' as applied rendering of their advertising "guidelines" comports with the constitutional requirements that the speech restriction (1) be "reasonable," *see Perry Educ. Ass'n v. Perry Local Educators*, 460 U.S. 37, 46 (1983) (stating that speech restrictions in a nonpublic forum must be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"); (2) not "offend[] the First Amendment" by "grant[ing] 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," *United*

Food, 163 F.3d at 359 (internal quotations and citation omitted) (emphasis added); and (3) viewpoint neutral—an analysis under which Defendants' prior restraint on Plaintiffs' speech fails miserably as to all three[5]—is somewhat beside the point because the *admittedly* content-based restriction on Plaintiffs' speech (SMART Dep. at 18 [Doc. 58-5]), violates the First Amendment as a matter of law, *see*, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985) (holding that "[s]peakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

CONCLUSION

Plaintiffs respectfully request that this court grant their motion and enter judgment in their favor on all claims as a matter of law.

Respectfully submitted,

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[5] *See also* Pls.' Resp. in Opp'n to Defs.' Mot. for Summ. J. at 27-39 (Doc. 63).

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2013, 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.

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