

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

American Freedom Defense Initiative, et al.)	
)	Civil Action No. 2:10-cv-12134
Plaintiff,)	
)	HON. DENISE PAGE HOOD
vs.)	
Suburban Mobility Authority)	
For Regional Transportation)	
(SMART), GARY L. HENDRICKSON,)	
Individually and in his official capacity as)	DEFENDANTS' RESPONSE TO
Chief Executive of SMART; JOHN)	PLAINTIFFS' MOTION TO
HERTEL, individually and in his official)	EXPEDITE RULING ON MOTION
Capacity as General Manager of SMART)	<u>FOR PRELIMINARY INJUNCTION</u>
and BETH GIBBONS, individually and in)	
her official capacity as Marketing Program)	
Manager of SMART,)	
Defendants.)	

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NOW COME Defendants, Suburban Mobility Authority for Regional Transportation (SMART), John Hertel, and Beth Gibbons, by and through their attorneys, and in Response to Plaintiff's Motion to Expedite Ruling on Motion for Preliminary Injunction state as follows:

INTRODUCTION

This matter arises by virtue of Plaintiffs' claims that their First and Fourteenth Amendment rights were violated by the Defendant regional transit authority's refusal to post certain anti-Islam political ads. Plaintiffs claim their ads are not political, and Defendants claim their policy and actions were directly on-point with the prevailing Defendants in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Following argument on Plaintiffs' Motion for a Preliminary Injunction, Plaintiffs filed the instant motion which demands the Court expedite its ruling.

LEGAL STANDARD

Plaintiffs have requested this Court allow *Plaintiffs* to set the timing of the Court's decision on the subject Motion. As a threshold consideration, Plaintiffs have cited to no law or other authority, nor could they, for the relief they demand. To the contrary, it has been recognized that both docket management, as well as the timing of a decision is almost exclusively within the Court's complete discretion. *See, Lowe v. Letsinger*, 772 F. 2d 308, 312 (7th Cir. 1985). "Deciding when to issue a decision is part and parcel of a judge's docket management function over which he has broad and virtually unfettered discretion....Moreover, the timing of a decision is normally, if not always, a judicial decision." The *Lowe* Court provides a number of reasons and legal grounds that can affect the Court's timing, including, the matters' relative importance,

prospects that another court will soon issue an important legal precedent, the difficulty of making a decision and the size and complexity of the case. *Lowe*, supra.

The Court can, of course, entertain Plaintiffs' Motion, but clearly the Motion is calculated to do little more than misrepresent the facts in a transparent effort to improve their position on the important element of irreparable harm.

FACTS AND ARGUMENT

Payment for Advertising on SMART Buses

Plaintiffs' motion and brief is comprised of literally four sentences. The balance of the submission is an attempt to bolster the groundless claim of pecuniary loss in order to make a case for irreparable harm.....a necessary element for Plaintiffs to prevail on the underlying Motion¹. However, Plaintiffs have undeniably misrepresented the evidence.

First and foremost, directly contrary to the instant Motion, Plaintiffs have previously admitted their missing money was never given to SMART, or non-party CBS for advertising on SMART, but rather, it was given to CBS for ads to run on the City of Detroit's DDOT. Plaintiff Geller's Declarations at paragraph 11 state²:

11. On or about April 30, 2010, FDI entered into an advertising agreement to place the Advertising on Detroit Department of Transportation ("DDOT") buses with CBS Outdoor acting as the advertising agent for the DDOT ("CBS-FDI Agreement-Detroit"). See a true and correct copy of the CBS-FDI Agreement-Detroit attached as Exhibit E and incorporated herein by this reference. The CBS-FDI Agreement-Detroit is identical in form and has the identical "Terms and Conditions" as the earlier agreements for Miami and New York City. Pursuant to the

¹ Plaintiffs point out that loss of First Amendment freedoms constitute irreparable harm, but such a loss has yet to be determined. Given the strong evidence Defendant acted precisely as the *Lehman* Defendants (*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)), Plaintiffs chances of prevailing are highly unlikely. As a result, the attempt to convince the Court of other harm becomes necessary, particularly in light of the fact that the Complaint itself admits to only "nominal damages".

² Exhibit 1 to Plaintiffs' Motion for Preliminary Injunction.

CBS-FDI Agreement-Detroit, FDI paid CBS Outdoor \$4,801.50.” Footnote omitted.

It is unfathomable how Plaintiffs today represent to this Court that Defendants in this action have any relationship whatsoever to their lost money.

Although Plaintiffs have provided this Court with no less than three sets of contract documents, none of them purport to contract with Defendant SMART. Instead, in support of their argument for pecuniary loss, Plaintiffs advise the Court that \$4,801.50 was paid, and then cite to Plaintiff Geller’s self serving Declarations, Exhibit 1, paragraphs 11 and 15, an exhibit to the underlying Preliminary Injunction motion. More importantly, those paragraphs do not support the assertion that SMART is in possession of Ms. Geller’s money. Rather, they might arguably support the proposition that money was spent with another contractor, the City of Detroit, but clearly *not* SMART.

Just as clearly, Plaintiffs unequivocally understand that SMART and the City of Detroit are not the same entity. Plaintiffs state unambiguously that only after being rejected by the City of Detroit did they seek “...other bus lines in the Detroit metropolitan area...” (Geller’s Declarations, Ex. 1 to underlying Motion, at para. 14).

It should be noted Ms. Geller does not provide any evidence to this court of the expenditure: no receipt, no credit card slip, indeed no evidence at all, except perhaps the only-partially executed contract between CBS and Plaintiffs for advertising on the City of Detroit’s DDOT: Completely and totally irrelevant to the case at bar.

In reality, the only credible testimony before this Court is the Affidavit of CBS employee, Robert Hawkins. (Exhibit E to Defendants Response to Plaintiffs’ Motion for Preliminary Injunction.) At paragraph 7 Mr. Hawkins states without reservation, “CBS

did not accept any money on behalf of SMART from Ms. Geller, nor anyone else on behalf of the American Freedom Defense Initiative, for advertisement on SMART buses.”

As such, notwithstanding any statement or implication to the contrary, Plaintiffs had no contract with Defendants herein and paid them no money. Insofar as Plaintiffs’ Motion For Preliminary Injunction relies on these facts, this further sets forth the support for why the Motion should be denied, given Plaintiffs’ inability to establish any harm, let alone irreparable harm.

Plaintiffs Alleged Contract With SMART

By Plaintiffs own admission then, payment was made on “...the CBS-FDI Agreement-Detroit...”³ (Geller’s Declarations as noted above, Ex. 1 to underlying Motion, at para. 11, emphasis added). Indeed, Plaintiff Geller herself testified to the fact that though she referred to the area as “Detroit”, she understood perfectly that the City’s transit system, DDOT, is not the same entity as SMART, (*See*, Excerpts from Hearing on Preliminary Injunction at page 30, beginning at line 11.) She recognized that she was rejected by both SMART and DDOT, but the only city she claimed to have rejected the advertisement was Detroit.

Importantly, though Plaintiffs attach contract documents they claim were entered into with the cities of New York, Miami and Detroit, they attach no exhibits claiming to be contract documents with SMART, or for advertising on SMART. Exhibit E to the

³ In Ms. Geller’s Declarations, reference is made to various contracts entered into elsewhere, and are always described the same way, such as: “CBS-FDI Agreement-Miami” for Miami, Florida (at paragraph 8), and “CBS-FDI Agreement-NYC” for New York City (at paragraph 10). The singular conclusion that can be drawn from this is the contract attached to Plaintiffs Motion, set out as “CBS- FDI Agreement-Detroit”, would be with Detroit...but in any event, not with SMART.

Geller Declarations (the unexecuted contracts with CBS for DDOT ads), undeniably concern the City of Detroit's Department of Transportation, or DDOT, but not SMART.....and they so state .⁴ Nowhere is there any evidence of a contract with SMART, or payment of any money to CBS, or anyone else, for ads on SMART buses.

Insofar as Plaintiffs pleadings and arguments imply differently, Defendants vehemently deny such implications, and believe they are included only mislead the Court into believing differently in order to improve their position relating to irreparable harm.

In the instant Motion to Expedite Ruling on Preliminary Injunction, Plaintiffs continue to play "fast and loose" with the facts in their attempt to convince this Court that a contract existed between the parties and that \$4,801.50 has been paid, and is still being held by CBS for advertising on SMART buses.

Given the foregoing, Defendants pray this Honorable Court deny the instant Motion, along with the underlying Motion for Preliminary Injunction.

CONCLUSION

Plaintiffs are entitled to craft their legal *arguments* to suit their own needs, but they are not entitled to craft the *facts* to suit their own needs. In an apparent attempt to bolster their argument for irreparable harm, Plaintiffs have filed this Motion, citing no support in the law for the relief requested, and in the process have shown their willingness to mislead this Court into thinking that they had a contract with Defendant SMART, upon which, in the face of contrary and credible evidence, they have paid in

⁴ Defendants would be remiss if it was not mentioned that even these purported contract documents have not been counter-signed by CBS (or DDOT) and are only signed by Plaintiffs. As such, unlike Exhibit C, the contract with Dade County, no contract appears to have been formed between Plaintiffs and CBS/DDOT, let alone between Plaintiffs and SMART.

excess of \$4,000, and that they claim is still being held by SMART or CBS (not a party hereto, but affirmatively and without reservation denied by Affidavit).

In light of the foregoing, Defendants pray this Honorable Court DENY this Motion and the underlying Motion for Preliminary Injunction.

Respectfully submitted,

/s/ Avery E. Gordon

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Anthony Chubb, Esq. (P72608)

Counsel for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on **Friday, February 18, 2011**, I electronically filed the Defendants' Response to Plaintiff's Motion to Expedite Ruling on Motion for Preliminary Injunction with the Clerk of the court using the ECF system which will send notification of such filing to the following:

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