

Defendants Suburban Mobility Authority for Regional Transportation (SMART), John Hertel, and Beth Gibbons, by and through their attorneys, hereby move this Court to allow Defendants to amend their Response to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs move to amend their brief pursuant to E.D. Mich LR 15.1 in order to brief the court on newly published and persuasive case law.

STATEMENT OF FACTS

1. This matter arises from Plaintiffs' filing of a Complaint against Defendants seeking relief pursuant to the First Amendment and Fourteenth Amendment to the United States Constitution on May 27, 2010. (Docket Entry #1).
2. Thereafter, Plaintiffs filed a Motion for Preliminary Injunction and Temporary Restraining Order. (Docket Entry #8).
3. The Court issued an Order denying the Motion for Temporary Restraining Order and scheduled a hearing on the Motion for Preliminary Injunction. (Docket Entry # 9).
4. Defendants thereafter timely filed their Response to the Motion for Preliminary Injunction. (Docket Entry #12).
5. Defendants also timely filed their Answer to Plaintiffs' Complaint. (Docket Entry # 13).
6. The Court then held an evidentiary hearing and oral arguments on the Motion for Preliminary Injunction on July 13, 2010.
7. On February 4, 2011, Plaintiffs filed a Motion to Expedite Ruling on Motion for Preliminary Injunction.

8. On February 18, 2011, Plaintiffs timely filed a Response to the Motion to Expedite Ruling on Motion for Preliminary Injunction, citing to *Lowe v. Letsinger*, 772 F. 2d 308 (7th Cir. 1985), holding that judges have unfettered discretion over docket management for reasons including, in relevant portion, the prospect that another court will issue important legal precedent. (Docket Entry #20 at 2).

9. On February 18, 2011, such precedent was issued in case 2:11-cv-000904-RAJ, *Seattle Mideast Awareness Campaign v. King County* (“*SeaMAC*”) via an Order denying Plaintiffs’ Motion for a Preliminary Injunction. (Ex. A).

10. As the result of this newly issued Opinion and Order, SMART requests that the Court allow it to amend its Response to the Motion for Preliminary Injunction so that it references more completely cases persuasive to the pending Motion.

11. The *SeaMAC* Court’s Order is particularly instructive on the issue of “public forum”, and Defendants herein are similarly situated as the *SeaMac* Defendants.

PRAYER FOR RELIEF

WHEREFORE, as a result of such new and persuasive case law, and as set forth in the attached brief in support, Defendants hereby move this Court to grant this Motion to Amend Defendants’ Response to Plaintiffs’ Motion for a Preliminary Injunction.

Respectfully submitted,

/s/ Avery Gordon

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Anthony Chubb, Esq. (P72608)

Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

American Freedom Defense Initiative;)
Pamela Geller; and Robert Spencer,)
)
Plaintiffs,)
v.)
Suburban Mobility Authority)
For Regional Transportation)
(SMART), GARY L. HENDRICKSON,)
Individually and in his official capacity as)
Chief Executive of SMART; JOHN)
HERTEL, individually and in his official)
Capacity as General Manager of SMART)
and BETH GIBBONS, individually and in)
her official capacity as Marketing Program)
Manager of SMART,)
Defendants.)

Civil Action No. 2:10-cv-12134
HON. DENISE PAGE HOOD

**DEFENDANTS' BRIEF
IN SUPPORT OF
MOTION TO AMEND**

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Defendants Suburban Mobility Authority for Regional Transportation (SMART), John Hertel, and Beth Gibbons, by and through their attorneys, hereby move this Court to allow Defendants to amend their response to the Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs request to amend their brief in light of new case law that is persuasive to the instant case, and was not yet published at the time of the filing of the Response to the Motion for Preliminary Injunction.

Plaintiffs filed the Complaint in Case 2:10-cv-12134 on May 27, 2010. (Docket Entry #1). Thereafter, Defendants filed a Motion for Temporary Restraining Order and Preliminary Injunction on June 17, 2010. (Docket Entry #8). This Court denied the Motion for Temporary Restraining Order, and thereafter Defendants timely submitted a Response to the Motion for Preliminary Injunction on July 2, 2010. (Docket Entry #12).

On February 4, 2011, Plaintiffs filed a Motion to Expedite Ruling on Motion for Preliminary Injunction. In response, Plaintiffs timely filed a Response to the Motion to Expedite Ruling on Motion for Preliminary Injunction, citing to *Lowe v. Letsinger*, 772 F. 2d 308 (7th Cir. 1985), holding that judges have unfettered discretion over docket management for reasons including, in relevant portion, the prospect that another court will issue important legal precedent. (Docket Entry #20 at 2).

On February 18, 2011, an Order was filed by the Honorable Richard A. Jones of the United States District Court for the Western District of Washington in the case of *Seattle Mideast Awareness Campaign v. King County*, case 2:11-cv-00094-RAJ, denying a Motion for Preliminary Injunction filed by the Plaintiffs. (Ex. A). The Court found that Defendant King County's transit advertising space was a properly created limited public forum because they established a policy that evinced intent to restrict the type of speech

allowed upon the forum, and enforcement of this policy was not “haphazard or inconsistent”. (Ex. A at 12-13). As a result, the Court found that the Plaintiffs were unlikely to prevail upon the merits of their First Amendment claim. The Court therefore found that it failed to show irreparable harm, and further noted that there were many other forums available to display Plaintiff’s message. (Ex. A at 17). As a result, the Court denied the Plaintiff’s Motion for Preliminary Injunction.

The facts surrounding the case, the applicable law, and the relevant advertising content restriction policy are analogous to the instant case. While the Seattle case is a Ninth Circuit District Court opinion that Defendants recognize is not controlling authority, it is certainly persuasive in regard to the instant case.

CONCLUSION

Based upon the foregoing, Defendants respectfully request that this Court grant its request to amend their Response to the Plaintiffs’ Motion.

Respectfully submitted,

/s/ Avery Gordon

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Counsel for Defendants

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

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Pamela Geller; and Robert Spencer,) Civil Action No. 2:10-cv-12134
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Plaintiffs,) HON. DENISE PAGE HOOD
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(SMART), GARY L. HENDRICKSON,)
Individually and in his official capacity as)
Chief Executive of SMART; JOHN)
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Capacity as General Manager of SMART)
and BETH GIBBONS, individually and in)
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Manager of SMART,)
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CERTIFICATE OF SERVICE

I hereby certify that on **Tuesday, March 8, 2011**, I electronically filed the Defendants' Motion to Amend with the Clerk of the court using the ECF system which will send notification of such filing to the following:

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