IN THE 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.

2:10-cv-12134-DPH-MJH

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO AMEND THEIR RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

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INTRODUCTION

On March 8, 2011, Defendants filed a "motion to amend their response to Plaintiffs' motion for preliminary injunction" (Doc. No. 21), in an apparent effort to bring to this court's attention supplemental authority that Defendants believe supports their position in the litigation. Specifically, Defendants bring to the court's attention (and attach as Exhibit A to their motion) a district court order on a motion for a preliminary injunction that was entered in *Seattle Mideast Awareness Campaign v. King County*, No. C11-94RAJ, a case arising out of the U.S. District Court for the Western District of Washington at Seattle.

Plaintiffs will treat Defendants' motion as a notice of supplemental authority, which is what it is in essence.

ARGUMENT

Defendants' reliance on *Seattle Mideast Awareness Campaign v. King County* (hereinafter "*SeaMAC*"), is misplaced. As an initial matter, the district court's ruling in *SeaMAC*, which essentially effectuated a "heckler's veto," is exceedingly suspect in terms of its precedential value. Indeed, the ruling appears to run contrary to U.S. Supreme Court precedent. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (holding that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (O'Connor, J.) ("The emotive impact of speech on its audience is not a 'secondary effect' [that can justify restriction]."); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."); *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("The fact that society may find speech

offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."). And it appears to run contrary to Ninth Circuit precedent. *See Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008) ("It would therefore be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children."). Nonetheless, *SeaMAC* is factually and legally distinguishable from the case at bar, and its reasoning compels this court to issue the requested injunction.

Defendants claim that *SeaMAC* stands for the proposition 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.'" (Defs.' Br. at ECF pages 5 to 6) (citing *SeaMAC* at 12-13).

In *SeaMAC*, the court stated that "government restrictions (via policy and practice) on access to a forum based on *objective standards* indicate a limited public forum."[1] *SeaMAC* at 8 (emphasis added). The court further noted that the advertisement at issue was denied "on the basis of the threats generated by the" advertisement in light of the policy restrictions. *SeaMAC*

[1] The policy standards at issue in *SeaMAC* were King County's restrictions on "material that is so objectionable under contemporary community standards as to be reasonably foreseeable that it will result in harm to, disruption of, or interference with the transportation system," and "material directed at a person or group that is so insulting, degrading or offensive as to be reasonably foreseeable that it will incite or produce imminent lawless action in the form of retaliation, vandalism or other breach of public safety, peace and order." *SeaMAC* at 2, 12.

at 13. According to the court, this basis was legitimate because it was well supported by the evidence in the record. *SeaMAC* at 3-5, 15-17. It is also important to highlight that "[t]here [was] no suggestion in the record . . . that other advertisements generated threats to disrupt orderly transit operations but were nonetheless published." *SeaMAC* at 14.

Therefore, having concluded that the forum was a limited public forum, the court denied the request for an injunction and ultimately upheld the restriction because it was reasonable in light of the threats of vandalism and violence generated by the advertisement. *SeaMAC* at 17 (finding that based on the evidence it was "reasonably foreseeable that [the advertisement] 'will result in harm to, disruption of, or interference with the transportation system,' and 'will incite or produce imminent lawless action in the form of retaliation, vandalism or other breach of public safety, peace and order'").

The facts of <u>this</u> case in light of the court's reasoning in *SeaMAC* compel the opposite conclusion—*i.e.*, that a preliminary injunction is warranted.

Here, SMART has designated its advertising space as a public forum (*i.e.*, designated public forum) based on its policy *and* its practice—particularly its practice of accepting controversial advertisements, such as an atheist advertisement.[2] *See United Food & Commercial Workers Union, Local 1099*, 163 F.3d at 355 (concluding that the bus advertising space was a public forum and stating that the acceptance of advertisements "which by their very nature generate conflict, signals a willingness on the part of the government to open the property to controversial speech"). Thus, Defendants' content- and viewpoint-based restriction on Plaintiffs' speech cannot stand. *See Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800

[2] The atheist advertisement, which Defendants accepted and ran on the SMART buses in February/March 2010, read as follows: "Don't believe in God? You are not alone. DetroitCoR.org." (Prelim. Inj. Hr'g Tr. (hereinafter "Tr.") at 6).

(1985) (stating that a speaker cannot be excluded from a designated public forum "without a compelling government interest").

Nonetheless, Defendants' restriction on Plaintiffs' advertisement was unreasonable in light of the evidence. Therefore, this restriction is unconstitutional even if the SMART advertising space was a limited public forum (which it isn't). *See generally SeaMAC*.

Unlike the situation in *SeaMAC*, in this case there are no objective standards that were applied to deny Plaintiffs' advertisement. Defendant Gibbons testified at the preliminary injunction hearing as follows:

> Q: So in fact, there is no policy or guideline or training manual or anything else that would set out why [Plaintiffs' advertisement] is political [and thus impermissible] and the Atheist Ad is not political [and thus permitted]?
> A. Right.

(Tr. at 15).

Defendant Gibbons also admitted during her testimony that when she examined Plaintiffs' proposed advertisement (*i.e.*, its "four corners"), she found nothing about the ad itself that was political, nor could she say that it disparaged or scorned any particular people.[3] (Tr. at 10).

With regard to *how* Defendants decide whether or not an advertisement is permissible, Defendant Gibbons' testimony reveals that SMART's practices and procedures are "haphazard

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[3] Defendant Gibbons testified as follows:

> Q: So when you examined [Plaintiffs'] ad, there was nothing about the ad itself that was political?
> A: No.
>
> * * *
>
> Q: There is nothing in the ad that disparages or scorns any particular people?
> A: Correct, yes. I'm not sure.
> Court: You're not sure whether it scorns any particular people; is that your answer?
> A: Right.

(Tr. at 10-11).

and inconsistent." For example, Defendant Gibbons admitted that she did not look to anything extrinsic to the atheist advertisement to determine whether it was permissible—she looked only at its "four corners." (Tr. at 6-7). However, she denied Plaintiffs' advertisement based solely on a news story in the *Miami Herald*, indicating that when Plaintiff ran a similar advertisement in Florida, it was controversial (*i.e.*, "political").[4] (Tr. at 10, 17, 19, 22). Thus, Defendants did not use the same practice and procedure for Plaintiffs' advertisement as they used for the atheist advertisement. As noted above, based on the "four corners" of Plaintiffs' advertisement, Defendants concluded that it was not political and, therefore, should have allowed it to run. (Tr. at 10).

Moreover, there was no evidence presented that violence, vandalism, or threats of violence or vandalism occurred as a result of Plaintiffs' advertisement in Florida. And there was no evidence presented that Plaintiffs' advertisement would subject SMART buses to violence or vandalism if they ran here in Michigan. Indeed, the only evidence of violence and vandalism presented in this case related to the atheist advertisement, which SMART accepted and continued to run even *after* the violence and public controversy surrounding the advertisement came to light. (Tr. at 7-8, 11-12).

CONCLUSION

Based on the evidence of this case in light of the court's reasoning in *SeaMAC*, this court should grant Plaintiffs' request for a preliminary injunction.

[4] Indeed, when denying Plaintiffs' advertisement, Defendants equated "political" with "controversial." (Tr. at 19) (answering the question as to whether she was "able to determine that [Plaintiffs' advertisement] was political" by stating, "I [Defendant Gibbons] knew that it was of concern in that there is controversy on both sides of the issue on whether they should be posted or shouldn't be posted").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2011, 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 a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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