

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN

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

THOMAS MORE LAW CENTER
Robert J. Muise, Esq. (P62849)
Richard Thompson, Esq. (P21410)
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
rmuise@thomasmore.org
(734) 827-2001
Fax: (734) 930-7160
Co-Counsel for Plaintiffs

SMART
Avery E. Gordon, Esq. (P41194)
Anthony Chubb, Esq. (P72608)
535 Griswold Street, Suite 600
Detroit, MI 48226
agordon@smartbus.org
achubb@smartbus.org
(313) 223-2100
Fax: (248) 244-9138
*Co-Counsel for Defendants SMART,
Hertel and Gibbons*

LAW OFFICES OF DAVID YERUSHALMI, P.C.
David Yerushalmi, Esq. (Arz. Bar No. 009616;
DC Bar No. 978179; Cal. Bar No. 132011; NY Bar No. 4632568)
P.O. Box 6358
Chandler, AZ 85246
David.yerushalmi@verizon.net
(646) 262-0500
Fax: (801) 760-3901
Co-Counsel for Plaintiffs

INTRODUCTION

On March 8, 2011, Defendants Suburban Mobility Authority for Regional Transportation (SMART), John Hertel, and Beth Gibbons, by and through their attorneys, filed a motion to allow Defendants to amend their response to the Plaintiffs' Motion for a Preliminary Injunction. On March 14, 2011, Plaintiffs filed a response to that motion. Now, Defendants Suburban Mobility Authority for Regional Transportation (SMART), John Hertel, and Beth Gibbons, by and through their attorneys, reply to Plaintiffs' Response to Defendants' Motion to Amend Their Response to Plaintiffs' Motion for Preliminary Injunction.

ARGUMENT

Plaintiffs' response relies on case law prohibiting the limitation of free speech rights based upon fear that such speech may offend its audience, commonly referred to as a "heckler's veto". As in the instant case, the issue in *Seattle Mideast Awareness Campaign v. King County*, case 2:11-cv-000904-RAJ ("*SeaMAC*") was not so much as tangentially related to a "heckler's veto" situation. Rather, it involved the consistent application of an established advertising policy, which properly created a limited public forum. As such, the arguments contained in Plaintiffs' brief are inapplicable to the matter currently before the court.

Plaintiffs rely upon *Forsyth Cnty. v. Nationalist Movement*, 485 U.S. 312 (1988) ("*Forsyth*") to assert that *SeaMAC* is contrary to U.S. Supreme Court precedent. (Plaintiffs' Brief at page 2). The fact pattern of *Forsyth* is entirely unrelated to the similar fact patterns of the instant matter and *SeaMAC*. *Forsyth* involved an ordinance that allowed the county administrator to set a public event fee based upon the content of

the speech of the event, and entirely at his or her discretion. The court noted that it has repeatedly held that regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated, and ruled “the provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech, and lacks adequate procedural safeguards...”

SeaMAC, like the instant case, involves a properly established policy that was enforced in a consistent and content-neutral manner. As such, and as the *SeaMAC* court recognized, the proper test for Constitutionality is therefore set forth in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (“*Lehman*”). Application of the standards set forth in *Lehman* resulted in the *SeaMAC* court finding that a limited public forum was created.

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
Avery Gordon, Esq. (P41194)

/s/ Anthony Chubb
Anthony Chubb, Esq. (P72608)
Co-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

CERTIFICATE OF SERVICE

THOMAS MORE LAW CENTER
Robert J. Muise, Esq. (P62849)
Richard Thompson, Esq. (P21410)
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
rmuise@thomasmore.org
(734) 827-2001
Fax: (734) 930-7160
Co-Counsel for Plaintiffs

SMART
Avery E. Gordon, Esq. (P41194)
Anthony Chubb, Esq. (P72608)
535 Griswold Street, Suite 600
Detroit, MI 48226
agordon@smartbus.org
achubb@smartbus.org
(313) 223-2100
Fax: (248) 244-9138
*Co-Counsel for Defendants SMART,
Hertel and Gibbons*

LAW OFFICES OF DAVID YERUSHALMI, P.C.
David Yerushalmi, Esq. (Arz. Bar No. 009616;
DC Bar No. 978179; Cal. Bar No. 132011; NY Bar No. 4632568)
P.O. Box 6358
Chandler, AZ 85246
David.yerushalmi@verizon.net
(646) 262-0500
Fax: (801) 760-3901
Co-Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on **Monday, March 21, 2011**, I electronically filed the Defendants' Reply to Plaintiffs' Response to Defendants' Motion to Amend with the Clerk of the court using the ECF system which will send notification of such filing to the following:

THOMAS MORE LAW CENTER
Robert J. Muise, Esq. (P62849)
Richard Thompson, Esq. (P21410)
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106
rmuise@thomasmore.org
(734) 827-2001
Fax: (734) 930-7160
Co-Counsel for Plaintiffs

SMART
Avery E. Gordon, Esq. (P41194)
Anthony Chubb, Esq. (P72608)
535 Griswold Street, Suite 600
Detroit, MI 48226
agordon@smartbus.org
achubb@smartbus.org
(313) 223-2100
Fax: (248) 244-9138
*Co-Counsel for Defendants SMART,
Hertel, and Gibbons*

LAW OFFICES OF DAVID YERUSHALMI, P.C.
David Yerushalmi, Esq. (Arz. Bar No. 009616;
DC Bar No. 978179; Cal. Bar No. 132011; NY Bar No. 4632568)
P.O. Box 6358

/s/ Avery Gordon
Avery Gordon, Esq.
SMART
*Counsel for Defendants SMART,
Hertel, and Gibbons*