UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN FREEDOM DEFENSE INITIATIVE, PAMELA GELLER, and ROBERT SPENCER,

Plaintiffs,

v.

Case 2:10-cv-12134
HON. DENISE PAGE HOOD

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.

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EMERGENCY MOTION FOR STAY OF ORDER GRANTING PLAINTIFFS' PRELIMINARY INJUNCTION [DOCKET NO. 24] PENDING APPEAL

NOW COME the Defendants, SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION ("SMART"), JOHN HERTEL, and BETH GIBBONS, by and through their attorneys, Vandeveer Garzia, P.C., and in accordance with the attached brief, request that this Court enter an Emergency Stay of Order Granting Plaintiffs' Preliminary Injunction [Docket No. 24] Pending Appeal.

STATEMENT REGARDING CONCURRENCE

Avery Gordon, Counsel for Defendants, participated in an email exchange with Counsel for Plaintiffs in which he was informed of this Emergency Motion for Stay and concurrence in the relief requested was not granted.

STATEMENT OF ISSUE PRESENTED

The issue presented by this Motion and Brief is whether this Court should stay enforcement of its Preliminary Injunction pending appeal to the Sixth Circuit Court of Appeals where enforcing the mandatory injunction would impair the due process rights of the Defendants, abrogate the right to appeal and irreparably damage the Defendants.

STATEMENT OF CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 62(c)

28 U.S.C. 1292(a)(1)

BRIEF IN SUPPORT OF EMERGENCY MOTION FOR STAY OF ORDER GRANTING PLAINTIFFS' PRELIMINARY INJUNCTION [DOCKET NO. 24] PENDING APPEAL

INTRODUCTION

On March 31, 2011, this Court entered an order [Docket No. 24] granting Plaintiffs' Motion for Preliminary Injunction [Docket No. 8]. These Defendants have filed a Notice of Appeal of this Court's order granting Plaintiffs' preliminary injunction pursuant to 28 USC 1292(a)(1), which provides for an immediate appeal of the order to the Sixth Circuit Court of Appeals.

Defendants believe that this Court has committed reversible error by granting the preliminary injunction, and these Defendants are likely to succeed in their appeal in this regard. Because this Court's preliminary injunction mandates action on the part of these Defendants, and because Plaintiffs seek no further relief in their complaint than what was granted by this Court in the injunction, Defendants will suffer irreparable harm if this Court's injunction were to be enforced during the pending appeal.

Defendants are seeking an appropriate review of this Court's order of March 31, 2011, and can only have a meaningful review if this Court grants a stay of its injunction pending that review.

LAW AND ARGUMENT

A motion for stay of an injunction pending appeal is governed by Fed. R. Civ. P. 62(c):

> **(c) Injunction Pending an Appeal.** While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

(Fed. R. Civ. P. 62(c)). In deciding whether to issue a stay of an injunction pending appeal, the court should consider: (1) whether the stay applicant [Defendants] has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. *Grutter v Bollinger*, 137 F Supp 2d 874-875 (E.D. Mich. 2001), citing *Hilton v Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987).

As shown below, Defendants have appealable issues arising out of this Court's order for preliminary injunction, and a stay should enter from this Court pending that appeal to the Sixth Circuit.

ANALYSIS OF FACTORS

I. Defendants are likely to succeed on the merits of their appeal.

a. Political Speech.

Defendants believe that this Court erred when it determined that the Plaintiffs had a likelihood of success on the merits of their complaint.

This Court was correct in its determination that Plaintiff *would not* likely succeed in establishing that SMART's advertisement space was a designated public forum. Further, this Court was correct in its determination that, at best, Plaintiffs could only

establish that SMART's advertising space was "non-public forum." A non-public forum is public property "which is not by tradition or designation a forum for public communication." *Perry Educ. Ass'n v Perry Local Educators*, 460 U.S. 37, 46 (1983).

As the Court noted:

> Protected speech on property determined to be a non-public forum receives significantly less protection. In a non-public forum, "the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker['s] view." *Id.* at 46.
>
> In analyzing whether a First Amendment violation has occurred in a non-public forum, the Court applies a rational basis review, rather than strict scrutiny. "Control over access to a non-public forum can be based on subject matter and speaker identity, so long as distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral; i.e., [the] government's decision to restrict access in [a] non-public forum need only be reasonable."

Order granting Plaintiffs' Preliminary Injunction, at p. 7 citing *Cornelius v NAACP Legal Defense Fund*, 473 U.S. 788, 806.

> The decision "need not be the most reasonable or the only reasonable limitation . . . . [A] finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the non-public forum is not mandated."

Order, at p. 7.

This Court then held that, despite the clear restriction in Defendants' policy that political speech not be allowed, there was nothing in the policy that could guide a governmental official to distinguish between permissible and impermissible advertisements.

This Court appears to have relied upon SMART's prior decision to allow the "atheist advertisement" that was previously determined by SMART to be a religious

message. Religious messages are allowed by the policy whereas political messages are not. It is uncontested between the parties to this action that the Plaintiffs' message was a "political message." In this regard, Plaintiffs' own Complaint specifically denotes its message as *political*:

> 1. This case seeks to protect and vindicate fundamental constitutional rights. It is a civil rights action brought under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983 challenge Defendants' restriction on ***Plaintiffs' right to engage in political and religious speech*** in a public forum… .
>
> * * *
>
> 8. FDI promotes its ***political objectives by, inter alia, sponsoring anti-Jihad bus and billboard campaigns,*** which includes seeking advertising space on SMART vehicles.
>
> 9. Plaintiff Pamela Geller is the Executive Director of FDI ***and she engages in political and religious speech through FDI's activities***, including FDI's anti-Jihad bus and billboard campaigns.
>
> * * *
>
> 21. On or about May 24, 2010, Defendants denied Plaintiffs' request and refused to display Plaintiffs' advertisement. Defendant[s] denied Plaintiffs' advertisement, and thus denied Plaintiffs access to a public forum ***to express their political and religious message***, based on the content and viewpoint expressed by Plaintiffs' message.
>
> * * *
>
> 23. By reason of the aforementioned Free Speech Restriction created, adopted, and enforced under color of state law, Defendants have deprived Plaintiffs of their right ***to engage in political and religious speech*** in a public forum. . . .

(Plaintiffs' Complaint [Docket No. 1], filed May 27, 2010). It is fundamental that factual statements made in pleadings are admissions and can be relied on as such by the parties and the court. 14 A.L.R. 65-72 and cases cited therein; *Pennsylvania R. Co. v Girard*, 201 F. 2d 437, 440 (6th Cir. 1954).

Defendants' briefs and evidence presented in this matter demonstrate that they also considered Plaintiffs' advertisements to be *political speech.* **As such, the parties are in agreement that Plaintiffs' advertisements are political advertisements.** It is irrelevant whether the message is both political and religious, which are not mutually exclusive, because if it is political speech at all, it is prohibited by SMART's guidelines.

This Court's finding that SMART may constitutionally restrict political advertisements, and that SMART's policy does in fact do so, should have ended this Court's inquiry into Defendants' actions. SMART's actions in this regard were neither arbitrary nor capricious: By simple application of the policy barring political advertisements, Plaintiffs' advertisements are not permitted. This Court improperly employed an "unconstitutional as applied" analysis where none was warranted.

In such a situation, where the parties agree that the message at issue is a political message, and further where the guidelines specifically bar advertising political messages, there is no discretion on the part of the governmental official and no need for further application of any guidelines. This is so whether the guidelines are found deficient or not. Beth Gibbons' testimony, relied upon by this Court in determining Plaintiffs' "likelihood" of success, is simply irrelevant to the application of this policy to these advertisements.

When one corrects the error of reliance on irrelevant testimony, this case is directly on point with the U.S. Supreme Court's decision in *Lehman v City of Shaker Heights*, 418 U.S. 298 (1974). As the Court summarized:

> First, the advertisement in *Lehman* was clearly political advertising, promoting a specific candidate for an upcoming election. Second, there was "uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system, pursuant to City Council action,

> had not accepted or permitted any political or public issue advertising on its vehicles." [citation omitted]

(Order Granting Plaintiffs' Preliminary Injunction, at p. 9). Like *Lehman*, Plaintiffs' advertising in this case is incontestably political in nature. The parties agree that the advertisement is political.

Further, the testimony in this matter is also uncontested. No testimony was provided whatsoever that SMART had ever allowed any political advertising in violation of its policy in this matter. While Plaintiffs pointed to what has been referred to in this matter as the "atheist advertisement," the uncontested testimony in this matter by Beth Gibbons was that that advertisement was determined to be religious in nature, and more importantly, *not political*. It was not demonstrated that SMART has been inconsistent in the application of its policy.

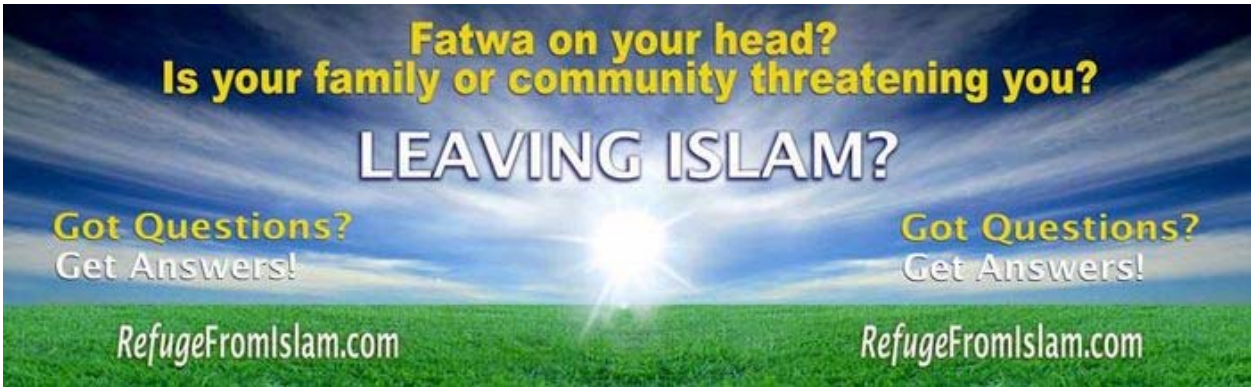
Based upon these facts, *Lehman* is controlling in this matter, and Plaintiffs have no reasonable likelihood of success on the merits in this regard.

b. Scornful Speech.

This Court erred by failing to address SMART's argument that the advertisements also violate the separate and distinct content restriction contained at Section 5.07(B)(4) of the contract. This provision bars:

> 4. Advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons.

(**Exhibit** A, Contract, Section 5.07(B)(4)). Recall the advertisement in this matter:



There are some obvious aspects of this advertisement which are "likely to hold adherents to Islam up to scorn or ridicule." For instance, the phrase "Is your family or community threatening you?" clearly proposes that adherents to Islam are a violent or threatening people, and that in fact this violence and threatening behavior occurs *within families*. Also, the name of the website referred to in the ad, *Refuge*FromIslam*.com*, unabashedly states that "refuge" is required when leaving Islam. "Refuge" is defined as:

> *n.* Shelter or protection from danger, distress or difficulty || a place offering this || a person, thing, or course of action offering protection, *tears were her usual refuge;* **to take refuge** to put oneself in a place or state that affords protection [F.]

(WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE, LEXICON PUBLICATIONS, INC., 1972, revised and updated 1987). Plaintiffs' statement holds the entire Muslim faith up to scorn and ridicule by stating affirmatively that those who are not adherents require protection or sanctuary as from danger, distress or difficulty.

Although Plaintiffs' counsel questioned Ms. Gibbons about the political nature of the advertisement, there was no clear testimony whatsoever, by any witness, as to whether the advertisement was considered scornful or disparaging to the adherents to Islam. Plaintiffs provided no evidence to this Court that SMART improperly applied this restriction.

Because this Court failed to address this important issue, an appeal is necessary. Further, as demonstrated by the clear language of the advertisement, Defendants have a likelihood of success on the merits in the Court of Appeals.

II. Defendant will be irreparably injured by the injunction absent a stay.

The entire gravamen of Plaintiffs' suit was to obtain an order from this Court compelling SMART to post the advertisements on their buses. Plaintiffs sought no further relief, beside nominal damages, in their Complaint. This Court's injunction grants, on a mandatory basis, virtually all of the relief requested by Plaintiffs in this litigation.

28 USC 1292(a)(1) provides for an immediate appeal of:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

It is axiomatic that where the statutes of the United States and court rules provide for an immediate appeal, that that appeal should not be abridged. The fundamental principles of procedural due process provide for the meaningful exercise of the appeal of right.

Where, as here, this Court's mandatory injunction provides full relief to the Plaintiffs for the claims in their Complaint, and where the terms of the injunction requires SMART, before a review of the decision of this Court, to post a political advertisement that is defamatory and likely to hold adherents to Islam up to ridicule, the appeal right contained in the statutes and court rules becomes meaningless. In fact, if SMART is required to post these advertisements for the 30 days requested by Plaintiffs, it is likely

that the issues for review by the Sixth Circuit might be mooted by the time this matter comes up on appeal.

It is fundamentally inconsistent with the tenets of procedural due process to essentially eliminate the ability to appeal by granting Plaintiffs all of their requested relief in the nature of a mandatory injunction.

If SMART were required to post the advertisements, it can expect, based upon information and belief, a number of adverse effects that represent irreparable damage to SMART's rights. These include the potential for violent reaction to these inflammatory advertisements, damage and vandalism to SMART's property and potentially its employees, reduced ridership and certainly ill will and derision among the ridership, as well as employee unrest and potential labor issues. One need not look very far into recent events to determine that holding Muslims up to scorn can, and frequently does, result in undesirable consequences, at least by a minority of those adherents.

SMART believes that its decision to refuse the advertising by the Plaintiffs was fully in accord with what this Court recognized as a constitutionally valid exercise of governmental power. This Court held that SMART could, in this non-public forum, restrict the content of speech as long as its decision to do so was based upon a reasonable and rational governmental interest, i.e., the lowest level of constitutional review.

SMART's desire to protect its property, its employees, and its reputation in the community, as well as SMART's desire to prevent the violent effects that could result

from such an inflammatory advertisement, represents a valid exercise of its governmental authority. It also represents a rational basis for its decision.

However, if this Court were to allow the advertisement to be posted, before SMART obtained a review of this Court's decision in accordance with the arguments above, SMART would suffer this irreparable damage with no remedy if it is successful.

These effects, together with the virtual elimination of its right to appeal, represent irreparable harm to SMART that militates in favor of granting a stay pending appeal in this matter.

III. The issuance of a stay will not substantially injure the Plaintiffs in this matter.

Plaintiffs have always argued that any infringement upon their right to speak, is in and of itself a substantial injury that mandates the issuance of a preliminary injunction, and will likely argue that same represents a substantial injury in response to this motion as well.

However, this Court has recognized that SMART's advertising space is a non-public forum for which SMART may constitutionally limit the content of speech. If SMART is correct in its analysis of this matter, and if Plaintiffs' admission that their speech is political in nature is upheld, then SMART's policy will be upheld and Plaintiff will have suffered no infringement of their First Amendment rights whatsoever.

Further, once a court addresses and determines that SMART can limit the content of the advertisement through the other valid provisions prohibiting advertising that holds up to scorn a group of persons, Plaintiffs will be unable to succeed in showing any infringed right whatsoever.

Notwithstanding the above, SMART's decision in this matter does not and did not prevent the Plaintiff from conveying its message to the community to which that message is aimed. A government may limit First Amendment expression through reasonable restrictions on time, place, and manner. *Lowery v. Jefferson County Bd. of Educ.,* 586 F.3d 427 (6th Cir. 2009) (citing, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 295, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). ["Within such a forum, the government may regulate the time, place and manner of speech so long as the regulation is (1) 'content-neutral,' (2) 'narrowly tailored to serve a significant governmental interest' and (3) *'leave[s] open ample alternative channels for communication of the information."*]) This Court's decision addresses the availability of only one place.

Plaintiffs have numerous additional forums in which to convey their message beyond what could be posted on the side of a suburban bus. Plaintiffs could use the traditional methods of proclaiming from the steps of city hall, or producing and distributing flyers, or otherwise conveying their message by other means. To the extent that Plaintiffs may still, in a timely and effective manner, convey the message that they seek to convey, they suffer no *substantial* injury by the fact that they cannot, during theh pendency of an appeal, display it on the side of a bus.

Plaintiffs' speech has not been eliminated by SMART's action, and Plaintiffs will not suffer any substantial injury that should prevent a stay from entering in this matter.

IV. It is in the public interest to enter a stay pending appeal in this matter.

In *Seattle Mideast Awareness Campaign v King County*, Case No. C11-94 RAJ, United States District Court for the Western District of Washington, the Honorable

Richard Jones, in an order dated February 18, 2001, addressed the same factors in a case concerning the request for a preliminary injunction on similar facts to this case.

In that matter, a Palestinian action group sought to place advertisements on the sides of King County buses which read "Israeli War Crimes: Your Tax Dollars at Work," and featured a picture of children next to a bomb-damaged building. King County refused the advertisement after a public outcry on the basis that it received threats of violence and damage to both buses and employees. The court denied a preliminary injunction after weighing those factors similar to the factors at issue in this case. (**Exhibit B**)

The same problems experienced by King County can reasonably be expected in this case if SMART is required to post these similarly-disparaging advertisements. If SMART is correct in its analysis, the public outcry, the potential for violence against persons and property, and the ill will suffered by SMART in the community do not serve the public interest.

SMART's guidelines are put in place specifically to avoid the kind of polarizing messages that the type of advertisement in the *Seattle Mideast* and this case represent.

As such, this factor also weighs in favor of a stay pending the appeal of this Court's granting of the preliminary injunction.

CONCLUSION

On balance, all of the factors cited weigh in favor of a stay of this matter pending an appeal to the Sixth Circuit.

WHEREFORE, Defendants respectfully request that this Court grant their Emergency Motion for Stay, further stay the matter pending the appeal to the Sixth Circuit Court of Appeals, and award them costs and attorney's fees wrongfully incurred.

VANDEVEER GARZIA

By: __/s/ Christian E. Hildebrandt_____
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Dated: April 21, 2011

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by the method(s) indicated below on April 21 2011.

_____ U.S. Mail
_____ Hand Delivered
_____ Overnight Delivery Service
__x__ Electronic Notification Via the Court's CM/ECF System
_____ FAX
_____ UPS
_____ E-Mail

_____/s/ Christian E. Hildebrandt_____