IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al.*,

Plaintiffs,

v.

SUBURBAN MOBILITY AUTHORITY for REGIONAL TRANSPORTATION ("SMART"), *et al.*,

Defendants.

No. 2:10-cv-12134-DPH-MJH

PLAINTIFFS' MOTION TO COMPEL DISCOVERY

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

AMERICAN FREEDOM LAW CENTER
Robert J. Muise, Esq. (P62849)
P.O. Box 131098
Ann Arbor, Michigan 48113
rmuise@americanfreedomlawcenter.org
(734) 635-3756

David Yerushalmi, Esq. (Ariz. Bar No. 009616; DC Bar No. 978179; Cal. Bar No. 132011; NY Bar No. 4632568)
1901 Pennsylvania Avenue NW
Suite 201
Washington, D.C. 20006
david.yerushalmi@verizon.net
(646) 262-0500
Counsel for Plaintiffs

THOMAS MORE LAW CENTER
Erin Mersino, Esq. (P70866)
24 Frank Lloyd Wright Dr.
P.O. Box 393
Ann Arbor, MI 48106
emersino@thomasmore.org
(734) 827-2001
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

VANDEVEER GARZIA, P.C.
John J. Lynch (P16887)
Christian E. Hildebrandt (P46989)
1450 W. Long Lake Road, Suite 100
Troy, MI 48098
jlynch@vgpclaw.com
childebrandt@vgpclaw.com
(248) 312-2800
Fax: (801) 760-3901
Co-Counsel for Defendants

Plaintiffs American Freedom Defense Initiative, Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs"), by and through their undersigned counsel, hereby move

this court pursuant to Rule 37(a)(3)(B) of the Federal Rules of Civil Procedure for an order compelling the production of documents requested under Rule 34 of the Federal Rules of Civil Procedure and answers to questions asked under Rule 30 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 37(a)(3)(B). The requested discovery is directly related to Plaintiffs' claim that Defendants' content-based advertising guidelines at issue in this case are unconstitutional facially and as applied to Plaintiffs' Leaving Islam advertisement, which Defendants rejected.

In support of this motion, Plaintiffs rely upon the pleadings and papers of record, as well as their brief accompanying this motion and the declaration and exhibits attached thereto.

Pursuant to E.D. Mich. LR 7.1, counsel for the parties exchanged correspondence on multiple occasions in an effort to narrow the issues and potentially resolve the matter. Finally, after several unsuccessful attempts by Plaintiffs' counsel to expedite this matter, on June 17, 2013, counsel for the parties held a telephone conference at 1:00 p.m., which lasted nearly an hour, to further discuss the issues related to this motion. At the close of this conference, Plaintiffs' counsel suggested that the parties file a joint motion requesting an *in camera* review of the documents at issue by the magistrate judge. In response, Defendants' counsel requested yet another 48 hours (until Wednesday, June 19, 2013) to consider this option. When Plaintiffs' counsel reached out to Defendants' counsel at 5 p.m. on June 19, 2013 (3 hours past the deadline) by email, noting that Defendants had asked for *48 hours* and asking for Defendants' position on the matter, Defendants' counsel responded by email as follows: "You're right. My oversight. We do not want to participate in a joint motion. We believe our privilege has been preserved and that our log complies with the Court Rules."

In sum and as discussed further in the accompanying brief, Plaintiffs have fully complied with E.D. Mich. LR 7.1 in that there was a conference between attorneys to be heard on the

motion in which Plaintiffs' counsel explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought.

For the reasons set forth more fully in the accompanying brief, Plaintiffs hereby request that this court grant their motion to compel discovery.

WHEREFORE, Plaintiffs hereby request that the court grant this motion.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

/s/ David Yerushalmi
David Yerushalmi, Esq.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino, Esq.

Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

AMERICAN FREEDOM DEFENSE INITIATIVE; *et al.*,

Plaintiffs,

v.

SUBURBAN MOBILITY AUTHORITY for REGIONAL TRANSPORTATION ("SMART"), *et al*.,

Defendants.

No. 2:10-cv-12134-DPH-MJH

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

ISSUES PRESENTED

I. Whether information directly related to Defendants' application of their content-based advertising guidelines at issue in this case is, as Defendants claim, privileged, when Defendant SMART's office of general counsel participates in the actual decision-making process to accept or reject advertisements pursuant to these guidelines.

II. Whether, assuming *arguendo* the existence of the attorney-client privilege, Defendants have waived the privilege by knowingly producing exactly the same type of email communications on the same subject matter between and amongst SMART's counsel without any effort to preserve the privilege.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Rule 26 of the Federal Rules of Civil Procedure

Rule 37 of the Federal Rules of Civil Procedure

In re Grand Jury Proceedings October 12, 1995, 78 F.3d 251 (6th Cir. 1996)

BRIEF IN SUPPORT OF MOTION

This case challenges Defendants' refusal to display Plaintiffs' Leaving Islam advertisement on SMART buses. At issue in this case is the constitutionality of the content-based advertising guidelines used by Defendants to reject Plaintiffs' advertisement. How these guidelines are defined, interpreted, and applied by Defendants is at the heart of this constitutional challenge.

RELEVANT FACTS FOR THIS MOTION

On January 14, 2013, the court issued a scheduling order in this case. (Doc. No. 45). Pursuant to the scheduling order, discovery closes on July 15, 2013. (Doc. No. 45).

On February 11, 2013, Plaintiffs served on Defendants a request for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure. (Muise Decl. at ¶ 2, Ex. A at Ex. 1). Defendants served their response on March 15, 2013. (Muise Decl. at ¶ 3, Ex. B, at Ex. 1). However, Defendants did not provide a privilege log along with their response as required by Rule 26 of the Federal Rules of Civil Procedure. The production of a privilege log would have indicated at that time that responsive documents were being withheld.

Included in the documents produced by Defendants were ***numerous*** emails containing communications involving Avery Gordon, SMART's General Counsel, and Anthony Chubb, SMART's Assistant General Counsel, regarding SMART's advertising guidelines and the application of those guidelines to certain proposed advertisements, including Plaintiffs' Leaving Islam advertisement. (*See* Muise Decl. at ¶ 4, Ex. C, at Ex. 1)[1]

On May 21, 2013, Plaintiffs' counsel took the deposition of Defendant SMART pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. (Muise Decl. at ¶ 5, Ex. D, at Ex. 1).

[1] Exhibit C contains thirty-seven pages of sample email communications produced by SMART that include SMART's counsel in the communication. (*See* Muise Decl. at ¶ 4, Ex. C, at Ex. 1)

Defendant SMART designated Anthony Chubb, SMART's Assistant General Counsel, as its Rule 30(b)(6) witness. (Muise Decl. at ¶ 5, Ex. D at 11-12, at Ex. 1).

During the deposition, SMART's witness testified that there are three departments that have independent authority to make decisions on behalf of SMART regarding whether an advertisement should be accepted or rejected under the relevant advertising guidelines. (Muise Decl. at ¶ 5, Ex. D at 27-28, at Ex. 1). These three departments are (1) the marketing department, (2) the office of the general counsel, and (3) the general manager's office. (Muise Decl. at ¶ 5, Ex. D at 27-28, at Ex. 1). Each department can act unilaterally, or the departments can collaborate in the decision-making process. (Muise Decl. at ¶ 5, Ex. D at 27-28, at Ex. 1). Consequently, with regard to the application of the advertising guidelines, SMART's general counsel is in the decision-making chain and does not simply act as a legal advisor. (*See* Muise Decl. at ¶ 5, Ex. D at 27-28, at Ex. 1).

During the course of the SMART deposition, it became clear to Plaintiffs' counsel that Defendants were withholding information regarding the application of SMART's advertising guidelines pursuant to a claim of attorney-client privilege. In fact, Defendants' counsel directed the witness for SMART not to answer a question directly related to the decision-making chain based on this privilege because the next department in the chain was the office of the general counsel. (*See* Muise Decl. at ¶ 5, Ex. D at 31-32, at Ex. 1). That question attempted to understand if, in this case, the marketing department and the office of general counsel "collaborated" in the decision-making process as to whether Plaintiffs' advertisement complies with the advertising guidelines at issue (*i.e.*, should it be accepted or rejected).[2] (Muise Decl. at ¶ 5, Ex. D at 31-36, at Ex. 1).

[2] A relevant portion of the exchange during the deposition is as follows:

Following the completion of the SMART deposition on May 21, 2013, Plaintiffs' counsel sent an email to Defendants' counsel stating the following:

> In light of the testimony of the witness today regarding his refusal to answer certain questions relating to the application of SMART's content-based restriction on our clients' advertisement pursuant to the attorney client privilege, it appears that you have likely withheld documents related to SMART's decision based on this privilege. If so, please produce a privilege log as soon as possible. Thanks.

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1).

On May 29, 2013, Plaintiffs' counsel sent an email to Defendants' counsel inquiring about the status of the privilege log. (Muise Decl. at ¶ 6, Ex. E, at Ex. 1).

On June 5, 2013, Defendants' counsel produced a privilege log. (Muise Decl. at ¶ 7, Ex. F, at Ex. 1). In an email sent to Defendants' counsel on June 5, 2013, Plaintiffs' counsel objected to the privilege log, stating, in relevant part:

> Rule 26 of the Federal Rules of Civil Procedure provides in relevant part as follows:
>
> (5) *Claiming Privilege or Protecting Trial-Preparation Materials.*
> (A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
> (i) expressly make the claim; and
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

> Q. Did the marketing department make a recommendation to the office of general counsel as to whether my client's ad should be accepted or rejected?
> MR. HILDEBRANDT: I'm going to object. That's privileged information. The advice that they sought from the attorney from SMART is privileged.
> MR. MUISE: I'm not asking for the advice –
>
> * * * *
>
> Q. Do you know what recommendations either Beth Dryden or Beth Gibbons made as to whether this advisement should be accepted or rejected?
> MR. HILDEBRANDT: I'm objecting, that's attorney client privileged.

(Muise Decl. at ¶ 5, Ex. D at 31-32, at Ex. 1; *see also* Ex. D at 31-36). It should be noted that Beth Gibbons is a defendant in this case.

> This privilege log does not in any way "describe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that . . . will enable other parties to assess the claim." All it does is indicate the date, the correspondents, and your claim. While the date and correspondents might in some instances allow Plaintiffs to assess your clients' claim of privilege, that would only be true of any correspondence on or after the date of filing the complaint (May 27, 2010).
>
> Importantly, we have learned in discovery that attorneys Chubb and Gordon are part and parcel of the chain-of-command of the decision about whether an advertisement is acceptable or not, specifically including the decision to reject Plaintiffs' advertisement at issue here. That is not legal advice in preparation for litigation, but rather very much part of a corporate decision that Plaintiffs claim violates the First Amendment.
>
> * * * *
>
> While the presence of attorneys as senders or recipients of a correspondence might raise the possibility of attorney-client privilege, merely receiving communications or sending them in and of itself does not provide us with any clue whatsoever about how to assess your clients' claims of privilege.
>
> You have until Friday at 5:00 pm, June 7, 2013, to provide an adequate privilege log, or we will move to compel disclosure and, at the very least, an in camera inspection to test your claims.

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1). Defendants' counsel responded the same day as follows:

> That my client seeks advice is as much privileged as what they seek advice about. The legal department is part of this process only when advice on issues is sought. As Mr. Chubb said, this is not appellate review, but collaboration. When clients collaborate with attorneys, the collaboration and result are privileged.
>
> The vast majority of ads, as you know from the deposition, never get reviewed by legal. Only those ads for which advice is sought get reviewed.
>
> Give me an example of a description that won't reveal the privileged information itself. I can't say things like "sought advice about whether to post the ad for ABC organization" without revealing privileged information. I can't say "provided a recommendation not to post the ABC ad" without revealing privilege. Maybe if you can give me an example, we can work this out.
>
> * * * *

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1). Plaintiffs' counsel responded the same day as follows:

> Your Rule 30(b)(6) witness testified, without equivocation, that there are three departments that each have independent authority to approve (or disapprove) an advertisement under the challenged policy: Marketing, General Counsel, and the General Manager. Indeed, the emails you did produce evidence this fact as you provided any number of emails from Chubb and Gordon (or emails cc'ing them) regarding whether an ad should be approved or rejected under the policy. How SMART applies its policy—and, in particular, how it was applied to our clients' ads—is a decision that we are challenging here. Communications regarding that government policy decision are not privileged—and certainly not privileged under the facts here where the General Counsel is in the decision-making chain and not simply a legal advisor—as your witness' testimony and your document production demonstrate. And even if there were a colorable privilege claim, you waived it through the production.
>
> Regarding the log. The examples you provide do not reveal any privilege, nor would a description such as: communication whether the Leaving Islam ad violates SMART's advertising guidelines. Please correct your log by Friday.

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1) (emphasis added).

On June 6, 2013, Defendants' counsel responded, stating: "I will discuss this with my client, but because of my schedule today and tomorrow, I can't work on it until early next week. I will respond to your message by then. Thank you." (Muise Decl. at ¶ 6, Ex. E, at Ex. 1).

On June 11, 2013, Defendants' counsel provided via email a revised privilege log. (Muise Decl. at ¶¶ 6, 8, Exs. E, G, at Ex. 1). Plaintiffs' counsel promptly responded to the revised privilege log with the following question: "Do the 'advice' and 'opinions' referenced here refer to the application of SMART's content-based policy that was used to deny my clients' advertisement in this case?" (Muise Decl. at ¶ 6, Ex. E, at Ex. 1). Defendants' counsel did not respond.

On June 12, 2013, Plaintiffs' counsel sent the following email to Defendants' counsel:

> I intend to move to compel the production of the withheld documents. In an effort, pursuant to our obligation to meet-and-confer on discovery matters prior to filing any motions, to minimize the issues or perhaps resolve them altogether, I need an answer to my prior question (reproduced here) and others:

> Do the "advice" and "opinions" referenced [in your privilege log] refer to the application of SMART's content-based policy that was used to deny my clients' advertisement in this case?
>
> The testimony of SMART was unequivocal: there are three departments that have the authority, independent of one another, to approve or reject an advertisement: marketing, general counsel, general manager—these are the decisionmakers. At times, the decisionmakers might collaborate on whether to accept or reject an advertisement. These decisions and discussions go to the heart of this case—whether your policy, facially as it is understood by the decisionmakers or as applied to my client's advertisement (particularly in light of how it has been applied in the past), is constitutional.
>
> Moreover, your production highlights this point. Indeed, you have provided numerous emails that include Anthony Chubb and Avery Gordon discussing the application of the policy to various advertisements (*see, e.g.*, the email chain attached here)[3] to determine whether to accept or reject the ad. How are these emails/documents substantively different from the ones you are withholding (except, of course by implication, that the ones you have not released are even more damaging to your case)? Further, even assuming there is some measure of privilege, how is it not waived at this point?
>
> I would also add that I intend to move to compel the answers to my questions during the SMART deposition as to the recommendation that the marketing department made regarding whether to accept or reject my client's advertisement. You instructed the witness not to answer based on attorney-client privilege. (*See* Dep. Tr. at 32-36)
>
> I am available this afternoon or tomorrow morning for a final meet and confer on this issue. Let me know what time works best for you. Thanks.

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1) (emphasis added).

Defendants' counsel responded as follows: "I am discussing your email with my client. I am not available this afternoon or tomorrow morning." (Muise Decl. at ¶ 6, Ex. E, at Ex. 1). Plaintiffs' counsel promptly responded to Defendants' counsel, stating: "Don't keep pushing this off. Saying you are simply unavailable without providing times for when you are available is unacceptable. We have been at this issue now for some time. Will you or will you not produce

[3] The email from Anthony Chubb referenced in, and attached to, this email communication between counsel is included in the exhibits filed in support of this motion (*n.b.*, it is the first email in Exhibit C). (*See* Muise Decl. at ¶ 4, Ex. C, at Ex. 1).

the documents and respond to the deposition questions? You know the nature of my request and its legal basis. When are you available, what is your answer?" (Muise Decl. at ¶ 6, Ex. E, at Ex. 1). Defendants' counsel then responded as follows: "I am discussing this with my client. Also, with other counsel of record as to their availability. Sorry I'm not jumping fast enough for your demands." (Muise Decl. at ¶ 6, Ex. E, at Ex. 1). Plaintiffs' counsel responded:

> Christian, might I suggest you drop the sarcasm. You do understand the seriousness of this matter. Our clients are certain that your clients, a government agency, violated their most basic right as citizens in a free society--the right to speak on important issues even if they are contentious. The trial judge agreed. At least on the preliminary injunction, though, your clients carried the day on appeal.
>
> But, that appeal on its face lacked the benefit of the actual factual record--that is, while your clients contend they have a constitutionally valid "political speech" restriction, it is Plaintiffs' claim that the facts demonstrate beyond cavil that there is no such policy--it is in effect and as applied a subjective, arbitrary, and capricious ad hoc decision--and to the extent it exists it is not based on what the Sixth Circuit understood it to be. Rather, it is a policy based on whether the subject matter is contentious. But, as noted above, even that policy is not applied coherently. In other words, the record clearly suggests that it is not politics, it is contentiousness. And, it is not just contentiousness, it is any viewpoint based contentiousness that SMART does not like.
>
> In this context, you produced communications between the general counsel's office and marketing and you withheld some. You did not produce a privilege log. We had to ask for the log on more than one occasion and waited patiently for it. Then you produced a privilege log that was facially deficient. We then had to point this out to you and to wait patiently for a revised log.
>
> The extant privilege log, however, suggests that there is no difference between what you have withheld and what you have produced. And, the reasons for that is set out in Robert's [Muise] earlier email.
>
> To be clear, if an attorney in the general counsel's office or outside counsel advises your client about the litigation risks of certain decisions, that is clearly privileged. But, if the attorney is looking at ad copy and applying SMART's so-called "policy" to arrive at a judgment about whether the ad is in compliance or not and that judgment is part of the decision-making process to evidence the policy as applied, those communications are not privileged.

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1).

Defendants' counsel followed up, stating,

> We believe we have complied with the applicable court rules in the format and content of the privilege log provided.
>
> We are available for a meet and confer conference call on Monday (6/17) afternoon or, if I'm not in trial on another matter, on Wednesday (6/19) morning. Please provide call-in information. Thank you.

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1). Plaintiffs' counsel responded:

> Why do you refuse to answer my straightforward questions? We have an obligation to narrow the issues. We can do that via email and follow up with any outstanding issues, if necessary, on our call. You seem to want to just delay the matter without addressing the substance of it, which will only waste our time and the court's time.
>
> Call in on Monday (6/17) at 1 pm.
> Conference call: [* * * *]. Enter conference number 1000 followed by # and then enter the conference call passcode 1234 followed by #.
>
> In the meantime, what is your response to my questions about your withheld production/answers? Thanks.

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1). Defendants' counsel responded as follows: "I believe addressing your further questions infringes on SMART's privilege. We will address your issues in the conference call on Monday. Thank you." (Muise Decl. at ¶ 6, Ex. E, at Ex. 1).

The conference call was held on Monday, June 17, 2013, commencing at approximately 1 p.m. and concluding at approximately 2 p.m. The parties were unable to resolve the discovery dispute. At the conclusion of the call, however, Plaintiffs' counsel suggested that the parties file a joint motion requesting an *in camera* review of the documents at issue by the magistrate judge. Defendants' counsel requested 48 hours (until Wednesday, June 19, 2013) to consider this option. When Plaintiffs' counsel reached out to Defendants' counsel at 5 p.m. on June 19, 2013 (3 hours past the deadline) by email, noting that Defendants had asked for *48 hours* and asking for Defendants' position on the matter, Defendants' counsel responded by email as follows:

"You're right. My oversight. We do not want to participate in a joint motion. We believe our privilege has been preserved and that our log complies with the Court Rules." (Muise Decl. at ¶ 9, Ex. E, at Ex. 1).

This motion to compel follows.

ARGUMENT

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, "Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense. . . ." Fed. R. Civ. P. 26(b)(1) (emphasis added). Federal law governs the analysis of Defendants' assertion of the attorney-client privilege in this case. *See* Fed. R. Evid. 501 (providing that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience").

"The elements of the attorney-client privilege are as follows: (1) Where *legal advice* of any kind is sought (2) from a professional legal adviser *in his capacity as such*, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) *unless the protection is waived*." *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998) (emphasis added).

"The burden of establishing the existence of the privilege rests with the person asserting it"—*i.e.*, Defendants in this case. *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999). And because the privilege operates to reduce the amount of information discoverable during the course of a lawsuit, it is *narrowly construed*. *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 (6th Cir. 1983) ("As a derogation of the search for truth, the privilege is to be

narrowly construed."). Moreover, "the privilege applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir. 2002) (adopting a *per se* waiver approach for attorney-client and work product privileges) (internal quotations and citation omitted) (emphasis added).

Here, the information sought is not "legal advice" in the first instance. It is communications regarding the *application* of SMART's *advertising guidelines* to various advertisements to determine whether the advertisements should be accepted or rejected. This is a determination that can be made independently by the marketing department, the office of the general counsel, *or* the general manager's office. (*See* Muise Decl. at ¶ 5, Ex. D at 27-28, at Ex. 1). In this respect, the office of the general counsel is no different than the marketing department—it is in the chain of decision-making. Consequently, it is not "legal advice" to determine whether a proposed advertisement is "political" under SMART's content-based guidelines and thus prohibited (*i.e.*, the basis for rejecting Plaintiffs' Leaving Islam advertisement). How SMART defines and interprets "political" to determine whether an advertisement should be accepted or rejected, including how it defined and interpreted "political" to reject Plaintiffs' Leaving Islam advertisement as compared with how it defined and interpreted its guidelines to accept or reject other advertisements, goes to the very heart of the constitutional challenge in this case. That is, this information reveals whether the guidelines—as defined and interpreted by the government officials responsible for enforcing them and as applied to reject Plaintiffs' Leaving Islam advertisement—are constitutional. SMART cannot allow its general counsel to act as a decisionmaker in this process so as to conveniently hide communications that may very well reveal a disparate, if not unlawful, application of its advertising guidelines.

Moreover, even if such communications are privileged, SMART has waived that privilege in this case. Indeed, it is well established that voluntary disclosure of the content of a privileged communication constitutes a waiver of the privilege as to all other such communications on the same subject matter. *See, e.g., United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter."); *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter . . . ."); *see also Nguyen v. Excel Corp.*, 197 F.3d 200, 207 (5th Cir. 1999) ("Disclosure of any significant portion of a confidential communication waives the privilege as to the whole.") (internal quotations and citation omitted).

In *Glenmede Trust Co. v. Thompson*, 56 F.3d 476 (3rd Cir. 1995), for example, the plaintiff argued that it had waived its privilege only as to the tax advice and other advice set forth in the opinion letter which it had produced and objected to production of its attorney's entire file concerning services it received in connection with the transaction at issue. The court ordered production of the file, stating:

> There is an inherent risk in permitting the party asserting a defense of its reliance on advice of counsel to define the parameters of the waiver of the attorney-client privilege as to that advice. That party should not be permitted to define selectively the subject matter of the advice of counsel on which it relied in order to limit the scope of the waiver of the attorney-client privilege and therefore the scope of discovery. To do so would undermine the very purpose behind the exception to the attorney-client privilege at issue here—fairness.

Id. at 486; *see also In re Grand Jury Proceedings October 12, 1995*, 78 F.3d 251, 256 (6th Cir. 1996) (holding that the reviewing court "must be guided by fairness concerns" when determining

the scope of the waiver); *In re Lott*, 424 F.3d 446, 454 (6th Cir. 2005) ("To be sure, litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case. The attorney-client privilege cannot at once be used as a shield and a sword.") (internal quotations and citation omitted).

Here, Defendants have knowingly produced certain documents evidencing communications involving Avery Gordon, SMART's General Counsel, and Anthony Chubb, SMART's Assistant General Counsel, discussing the application of SMART's advertising guidelines to determine whether to accept or reject an advertisement. Yet, Defendants have refused to produce other emails addressing the very same subject matter, including emails addressing Plaintiffs' Leaving Islam advertisement. (*See* Muise Decl. at ¶ 8, Ex. G, at Ex. 1). There is nothing substantively different between the produced documents and those that have been withheld *except, of course by implication, that the withheld documents are detrimental to SMART's case*. Moreover, Defendants' counsel has refused to articulate what difference there might be between the communications produced and the ones withheld. Consequently, "fairness," and indeed justice, demand the disclosure of these documents. *In re Grand Jury Proceedings October 12, 1995*, 78 F.3d at 256 (stating that "fairness concerns" determine the scope of the waiver).

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this court grant this motion.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

/s/ David Yerushalmi
David Yerushalmi, Esq.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino, Esq.

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2013, 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.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq. (P62849)