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' REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Hon. Denise Page Hood

Magistrate Judge Hluchaniuk

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Plaintiffs American Freedom Defense Initiative, Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs"), by and through their undersigned counsel, hereby file this reply in support of their motion 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.[1] (Pls.' Mot. to Compel [Doc. No. 50]). As noted in the motion, the requested discovery is ***directly related*** to Plaintiffs' claim that Defendants' advertising guidelines are unconstitutional both facially and as applied to Plaintiffs' Leaving Islam advertisement. Moreover, as an initial matter, Defendants' reliance on the Sixth Circuit's ruling on the preliminary injunction motion in this case is overblown and incorrect as a matter of law. (*See* Defs.' Opp'n at 4 [claiming that this case and the issues it presents have "already been decided by" the Sixth Circuit] [Doc. No. 52]).[2] As Plaintiffs will demonstrate

[1] Defendants do not address this aspect of the motion and have thus waived any such opposition.

[2] Contrary to Defendants' assertions, a preliminary decision on a request for an injunction is not binding at a trial on the merits or when deciding a motion for summary judgment, and thus does not constitute the "law of the case." *Univ. of Tx. v. Camenisch*, 451 U.S. 390, 395 (1981) ("[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."); *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989) (holding that the trial court's denial of a preliminary injunction did not establish the law of the case with respect to the court's subsequent summary judgment determination); *Tech. Publ'g Co. v. Lebhar-Friedman, Inc.*, 729 F.2d 1136, 1139 (7th Cir. 1984) ("A factual finding made in connection with a preliminary injunction is not binding" on a motion for summary judgment); *City of Angoon v.*

further in their motion for summary judgment, the Sixth Circuit's ruling was based on a woefully incomplete factual record and does not constitute "law of the case."[3] (*See* n.2, *infra*). Indeed, as Plaintiffs' counsel explained during the preliminary discussions on the issues presented by this motion:

> [The Sixth Circuit's ruling on the preliminary injunction] 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.

(Muise Decl. at ¶ 6, Ex. E, at Ex. 1 [Doc. No. 50-2]).

In their opposition, Defendants do not address (nor attempt to refute) the undisputed fact that SMART's general counsel is a ***decision maker*** with regard to the advertising guidelines at issue. And as Defendants acknowledge, the withheld documents address the *application* of these advertising guidelines—(*i.e.*, how a relevant decision maker applies the guidelines to accept or reject a proposed

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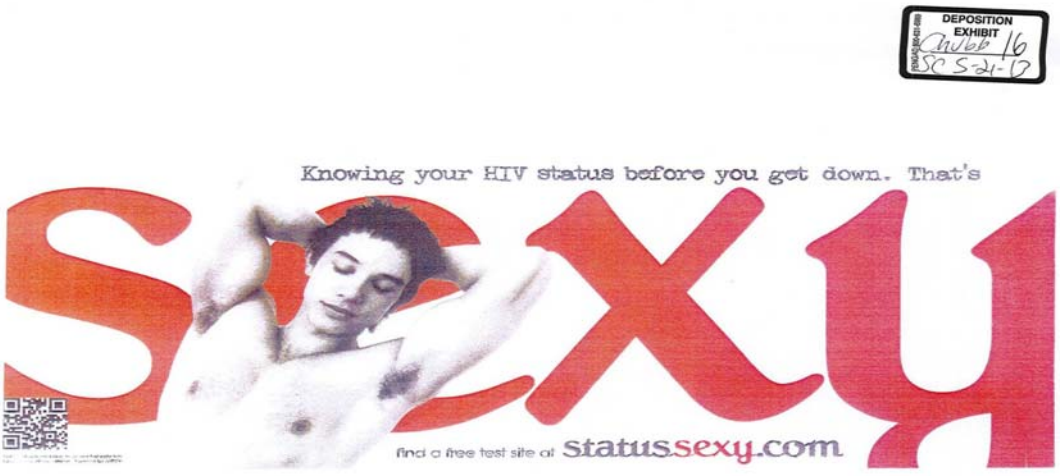
Hodel, 803 F.2d 1016, 1024 n.4 (9th Cir. 1986) (determinations corresponding to a preliminary injunction do not constitute law of the case).

[3] As this court is aware, Plaintiffs did not have the benefit of discovery prior to filing their motion for preliminary injunction.

advertisement).[4] Defendants make a feeble (and factually incorrect) argument that the emails produced "reflect *conclusions*" made by counsel regarding the application of the guidelines—emails which Defendants claim are not privileged and thus discoverable because they show "how SMART applied its content policy to particular advertisements." (Defs.' Opp'n at 7 [Doc. No. 52]). Yet, Defendants claim that the withheld documents are privileged because they contain information revealing "mental impressions, analyses, and interim discussions" as to whether an advertisement should be accepted or rejected by SMART under the guidelines at issue. (Defs.' Opp'n at 8 [Doc. No. 52]). In other words, the withheld emails show precisely the same thing: how SMART applies the guidelines to accept or reject an advertisement—information that is highly relevant because it goes to the

[4] Defendants grossly mischaracterize Plaintiffs' waiver argument as follows: "Plaintiffs argue that because emails authored by attorneys have been provided, the privilege has been waived. Plaintiffs then argue that all emails written by attorneys and all communications between those attorneys and their clients are consequently discoverable." (Defs.' Opp'n at 7 [Doc. No. 52]). As Plaintiffs argued in their motion—and as the case law makes clear—it is well established that the 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 United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). Thus, Plaintiffs are not seeking disclosure of "all emails"—only those emails to which Defendants have waived the privilege (assuming that the privilege attaches in the first instance, which Plaintiffs believe it does not). And that subject matter is the application of the advertising guidelines at issue here. These emails—similar to the ones already produced—demonstrate how the guidelines are applied and the facts SMART deems relevant when applying the guidelines.

very heart of this litigation.[5] Indeed, *how* SMART *applies* its advertising guidelines to conclude, for example, that Plaintiffs' advertisement is "political" but that the below advertisement, which promotes sex between males and which SMART *accepted* for display, is not "political" is exceedingly relevant as to whether SMART's guidelines provide clear, objective standards for its decisionmakers or whether these guidelines are applied subjectively and arbitrarily in violation of the Constitution.



[5] Even a cursory review of a sample of the emails Defendants produced demonstrates that these emails contain "mental impressions, analyses, and interim discussions." (*See* Muise Decl. at ¶ 4, Ex. C, at Ex. 1 [attorney email communication stating, "Typically, get out the vote drives are not political" but "targeted get out the vote drives paid for by politicians could very well cross the line" in response to a question from Defendant Gibbons asking, "What are your thoughts on this one?"; attorney email communication stating, "This decision [whether to accept or reject a particular advertisement] turns on whether the proposed advertisement is 'obscene' per section. 5.07. I believe an argument can be made that the proposed ad is repulsive by reason of crass disregard of moral or ethical principles, and should therefore be rejected. Avery makes the final decision. I'd ask for alternative graphics"] [Doc. No. 50-5' Pg ID 518, 550]). In short, Defendants are attempting to draw distinctions where none exist.

In fact, we learned during SMART's deposition that "political" for purposes of its advertising guidelines means "any advocacy of a position of any politicized issue." (Muise Decl. at ¶ 2, Ex. A [SMART Dep. at 41] at Ex. 1). In an effort to explain this tautology, SMART defined "politicized" as follows: "if society is fractured on an issue and factions of society have taken up positions on it that are not in agreement, it's politicized." (Muise Decl. at ¶ 2, Ex. A [SMART Dep. at 41] at Ex. 1).

Thus, if an advertisement addresses a contentious issue—at least one that *SMART* believes is contentious based upon SMART's sliding spectrum of contentiousness—then it is rejected. There is little doubt that the withheld emails will further demonstrate the arbitrary (indeed, discriminatory) way in which SMART applies its content-based guidelines. Defendants cannot hide this information by asserting attorney-client privilege, particularly when (1) the information in the first instance is not privileged because the general counsel is in the decision-making chain and the information sought directly relates to the *application* of the *advertising guidelines*, including the information SMART (and each of its decision makers) deems relevant to conclude that an advertisement should be accepted or rejected and (2) the privilege has, nonetheless, been waived. Indeed, with regard to waiver, SMART cannot pick and choose which communications it deems beneficial to its case and disclose those, but then

withhold other similar communications it believes are harmful. Fundamental fairness demands disclosure of all such communications. *In re Grand Jury Proceedings Oct. 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).

Finally, Defendants' objection to this court conducting an *in camera* review of the withheld documents is simply without merit. (*See* Defs.' Opp'n at 8-9 [citing no legal authority whatsoever] [Doc. No. 52]). As an initial matter, the Supreme Court has given its imprimatur for a trial court to conduct an *in camera* review to test the claim of attorney-client privilege, expressly holding that such review "does not have the legal effect of terminating the privilege." *United States v. Zolin*, 491 U.S. 554, 568-69 (1989). Indeed, submitting documents for *in camera* review is "a practice both long-standing and routine" in cases involving claims of attorney-client privilege. *In re Grand Jury Subpoenas*, 318 F.3d 379, 386 (2d Cir. 2003) (collecting cases). Moreover, judges presiding over bench trials are often called upon to make rulings on whether certain evidence is admissible, including whether the proffered evidence is prejudicial. *See* Fed. R. Evid. 403 & 404(b). And as noted by the Sixth Circuit, "[I]n a trial to the court it is presumed that evidence which is improper will be disregarded by the court." *Westwood Chem., Inc. v. Owens-Corning Fiberglas Corp*., 445 F.2d 911, 918 (6th Cir. 1971).

In sum, a court's *in camera* review does not violate the attorney-client privilege, which is meant to prevent the disclosure of potentially privileged information to opposing counsel and the public. Moreover, judges presiding over bench trials must routinely review evidence that might be highly prejudicial (or privileged) to determine whether it is admissible. And if the evidence is improper, it will be disregarded by the court. Thus, Defendants' claim that it would be improper for this court "to evaluate and see non-discoverable documents" because the court "would be called upon to make a decision in light of and with knowledge of information it could not appropriately see in deciding this case" (Defs.' Opp'n at 9 [Doc. No. 52]) is incorrect as a matter of law.

Because discovery closes on July 15th and dispositive motions are due on or before August 16th (Scheduling Order [Doc. No. 45]), Plaintiffs request that the court order Defendants' counsel to bring copies of the withheld documents to the hearing set for July 26, 2013, to expedite this matter and to minimize further delay in resolving the ultimate and important First Amendment issues at stake.

CONCLUSION

Plaintiffs respectfully request that this court grant their motion to compel discovery.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 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.

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