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 Hon. Denise Page Hood Magistrate Judge Hluchaniuk

PLAINTIFFS' MOTION TO FILE SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their undersigned counsel, hereby request permission from this court to file the supplemental brief appended hereto immediately below in further support of their motion for summary judgment (Doc. No. 58).

Plaintiffs' supplemental brief will be limited to, and focused solely on, an incorrect assertion of fact made by Defendants' counsel at the hearing on the parties' cross-motions for summary judgment. Specifically, at the hearing on November 13, 2013, Defendants' counsel told the court that Defendant Beth Gibbons, who had testified at the preliminary injunction hearing as Defendant SMART's Rule 30(b)(6) witness, was not a decision maker at SMART either at that hearing or any time prior to that relevant to Plaintiffs' submission of the

advertisement at issue in this litigation.[1] That assertion of fact is not true and certainly not supported by the record. Defendant Gibbons was a decision maker in applying Defendant SMART's advertising policies at the time Plaintiffs' advertisement was submitted to SMART; she was similarly a decision maker at the time of her testimony at the preliminary injunction hearing; and she remained a decision maker at the time of her deposition testimony subsequent to the Sixth Circuit's decision reversing this court's preliminary injunction.

Immediately after the hearing, Plaintiffs' counsel, Robert Muise and David Yerushalmi, conferred with one another about what Mr. Muise was certain he had heard at the hearing: that Defendants' counsel, Christian Hildebrandt, had contradicted the factual record when he told the court that Defendant Gibbons was not a decision maker at the time Plaintiffs' advertisement was submitted to SMART up through and including her testimony at the preliminary injunction hearing as SMART's Rule 30(b)(6) witness. Plaintiffs' counsel decided to hold off responding to this erroneous factual assertion until they could obtain the hearing transcript to be absolutely certain of Mr. Hildebrandt's statement. Plaintiffs' counsel immediately ordered an expedited copy of the hearing transcript, which was received on November 27, 2013.

[1] Whether Defendant Gibbons was a decision maker at the time of the preliminary injunction hearing is relevant because her testimony would therefore operate as an admission against SMART (and not just simply as an admission of a party opponent).

That same day, Plaintiffs' counsel sent Defendants' counsel a detailed email, which included the relevant portions of the hearing transcript wherein the court queried Mr. Hildebrandt about Defendant Gibbons' decision-making authority and wherein Mr. Hildebrandt answered the court in the form of an incorrect factual assertion that Gibbons was not a decision maker during the relevant time period. The email also included the relevant portion of Gibbons' deposition testimony which contradicts Mr. Hildebrandt's answer to the court. In this email, however, Plaintiffs' counsel made clear that he presumed Mr. Hildebrandt's incorrect factual assertion was innocent and asked for a meet-and-confer to discuss one of two possibilities: Defendants would either join with Plaintiffs in filing a notice of correction, based on the assumption that the factual assertion was an innocent misstatement by Mr. Hildebrandt or Plaintiffs would file this motion. (*See* a true and correct copy of the November 27 email from Mr. Yerushalmi to Mr. Hildebrandt attached hereto as Exhibit 2).

After another four emails passed between Plaintiffs' and Defendants' counsel later that same day, all counsel agreed that given the Thanksgiving holiday, counsel would discuss this matter the following Monday, December 2. (*See* a true and correct copy of the entire November 27 email thread between Messrs. Yerushalmi and Hildebrandt attached hereto as Exhibit 3).

Late Monday morning, Defendants' counsel sent an email to Plaintiffs' counsel contending that SMART did not believe there was any misstatement of fact, but Mr. Hildebrandt indicated he wished to order the hearing transcript to examine the issue further and suggested putting off the meet-and-confer until "sometime next week." Plaintiffs' counsel responded that same day by email and provided Defendants' counsel not only with the entire hearing transcript (which would be included as an exhibit to the filing), but with a proposed draft of a joint notice to correct the record which included the relevant testimony in the record (set forth in the proposed supplemental brief below). In that email, Plaintiffs' counsel explained to Mr. Hildebrandt that this matter could not linger because the court had taken the cross-motions for summary judgment under advisement, and Mr. Hildebrandt's factual assertion tainted the record. After another email exchange wherein Mr. Hildebrandt sought more time to discuss the matter with SMART, Plaintiffs' counsel agreed to extend the meet-and-confer deadline until close of business Tuesday, December 3. (*See* a true and correct copy of the entire December 2 email thread between Messrs. Yerushalmi and Hildebrandt attached hereto as Exhibit 4).

Late Tuesday afternoon, Defendants' counsel sent an email to Plaintiffs' counsel refusing to join a notice of correction and reasserting that it was SMART's position that there had been no misrepresentation. In response, Mr. Yerushalmi

telephoned Mr. Hildebrandt in a final effort to resolve the matter jointly but the conversation ended without resolution. This filing follows.

Therefore, pursuant to E.D. Mich. LR 7.1 and as set forth above, several conferences were held between the 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.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

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Robert J. Muise, Esq.

/s/ David Yerushalmi
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PLAINTIFFS' SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their undersigned counsel, hereby present to the court this supplemental brief in further support of their motion for summary judgment (Doc. No. 58).

At the hearing on the parties' cross-motions for summary judgment, held on November 13, 2013, Defendants' counsel told the court that Defendant Beth Gibbons, who had testified at the preliminary injunction hearing as Defendant SMART's Rule 30(b)(6) witness, was not a decision maker at SMART either at that hearing[2] or any time prior to that relevant to Plaintiffs' submission of the

[2] Whether Defendant Gibbons was a decision maker at the time of the preliminary injunction hearing is relevant because Plaintiffs have argued in their motion for summary judgment, and in opposition to Defendants' motion for summary judgment, that to the extent that some portion of Defendant Gibbons' testimony at the hearing was not testimony for and on behalf of Defendant SMART as

advertisement at issue in this litigation. That assertion of fact is not true and certainly not supported by the record.[3] Defendant Gibbons was a decision maker in applying Defendant SMART's advertising policies at the time Plaintiffs' advertisement was submitted to SMART; she was similarly a decision maker at the time of her testimony at the preliminary injunction hearing; and she remained a decision maker at the time of her deposition testimony subsequent to the Sixth Circuit's decision reversing this court's preliminary injunction.

At the hearing on the cross-motions for summary judgment, the court apparently considered this point material to its decision, and the following colloquy occurred between the court and Defendants' counsel:

SMART's Rule 30(b)(6) designee, Defendant Gibbons was a decision maker at all relevant times—from the date of Plaintiffs' advertisement submission through the present, which includes the time of her testimony at the preliminary injunction hearing—and, as such, her testimony operates as an admission against SMART (and not just simply as an admission of a party opponent). (Pls.' Mot. for Summ. J. [Doc. No. 58] at 5, 8, 9-10 n.2; Pls.' Reply Br. in supp. of Mot. for Summ. J. [Doc. No. 65] at 1 n.1; Pls.' Opp. Br. to Defs.' Mot. for Summ. J. [Doc. No. 63] at 11 n.9).

[3] While Defendants also make this erroneous statement in their opposition brief to Plaintiffs' motion for summary judgment, they provide no reference whatsoever to the record and as such have presented no evidence to refute the deposition testimony presented by Plaintiffs. Thus, Defendants have presented no evidence to support their naked and unsubstantiated assertion that Defendant Gibbons was not a decision maker (an assertion repeated at the hearing as if it were a fact supported by the record). (*See* Defs.' Opp'n Br. to Pls.' Mot. for Summ. J. at 1-2 [Doc. No. 62] [asserting that the deposition testimony of Gibbons and Elizabeth Dryden established that Gibbons was not a decision maker at the relevant time period but failing to cite to any specific testimony of either deponent notwithstanding the pinpoint citation to the record testimony in Plaintiffs' motion for summary judgment]).

THE COURT: Do you think that at the time of the testimony at the preliminary injunction hearing that SMART had the definition of "political" that apparently they have at this time?

MR. HILDEBRANDT: Your Honor, there was no written definition of "political" in place at the time of the preliminary motion, the preliminary injunction motion such that is the same as was disclosed in the testimony in this case.

THE COURT: So I want to just understand this, and maybe it doesn't really have anything to do with your motion, but it is important to me to understand it.

MR. HILDEBRANDT: I understand.

THE COURT: For my own benefit. At the time of the preliminary injunction, there wasn't any written definition of "political"; is that right?

MR. HILDEBRANDT: Your Honor, at the time of the preliminary injunction, there was no separate written definition of "political".

THE COURT: You put "separate" before it. Was there any written definition of "political" at that time?

MR. HILDEBRANDT: Well, in the guidelines, "political" is expressed there, but there is no separate definition beyond the use of that word "political" –

THE COURT: And you would agree that the witness that appeared did not give any particular -- point to any particular thing that informed her about what was political?

MR. HILDEBRANDT: I would agree that the witness that was provided as the 30(b) witness did not, ***but she was not part of the decision-making process at the time. She was not an individual who was a decision-maker at the time***. She had a direct supervisor in the Marketing Department who was unavailable at the time. And that person was the decision-maker in the Marketing Department, in the General Counsel's Department and in the General Manager's office.

> ***There were decisions, there were different decision-makers, but Beth Gibbons has never been a decision-maker at any time relevant to this ad.*** She was presented as the 30(b)(6) witness and provided testimony –
>
> **THE COURT:** When she gave her deposition, would she have been considered a decision-maker at that time?
>
> **MR. HILDEBRANDT:** When she gave her deposition post-Sixth Circuit decision in the discovery of this case?
>
> **THE COURT:** Well, that is when she gave it.
>
> **MR. HILDEBRANDT:** All right, that's fine. Yes, at that time she was –
>
> **THE COURT:** ***Excuse me, Counsel, I want to be really clear so I understand this. She testified as a 30(b)(6) witness, but she was not a decision-maker at that time; that is your position, right***?
>
> **MR. HILDEBRANDT:** ***Well, that is correct, yes***.

(Hearing Tr. at 19:12-21:20 at Ex. 1) (emphasis added).

Yet, Defendants' counsel's statement to the court contradicts the unambiguous testimony of Gibbons, who made clear that she was a decision maker who applied SMART's advertising policies when SMART received bus advertisement submissions at the time Plaintiffs' advertisement was submitted, and she has remained so throughout, including at the time of her deposition testimony, which occurred after the preliminary injunction hearing:

> Q: And I'll represent to you that this is the latest deposition notice, which identified this location for the deposition. In the defendants' initial disclosures to plaintiffs, they indicated, they identified you as a potential witness with personal knowledge, and they indicated that

you have personal knowledge of SMART's policies and the application thereof; is that a correct statement?

A: Yes.

Q: And the policy that will be at issue in this case is the advertising guidelines; you understand that?

A: Yes.

Q: And do you have personal knowledge of SMART's application of the advertising guidelines?

A: Yes.

Q: ***In fact, in your position as marketing program manager, you were required at times to apply those guidelines to various advertising; is that correct?***

A: ***Yes***.

Q: ***And do you still have that responsibility today in the position that you're holding now***?

A: ***Yes***.

(Gibbons Dep. at 15:19-16:16 [Doc. No. 58-7]) (emphasis added).

Gibbons also testified about her job title as marketing program manager at the time Plaintiffs' advertisement was submitted, and she explained that the difference between her role then as marketing program manager and her current role as manager of marketing and communications is that today she is responsible for *all* SMART advertisements whereas as the marketing program manager she

was responsible for a smaller subset of SMART advertisements, *which included bus advertisement submissions such as Plaintiffs*':

Q: Now, ma'am, how are you currently employed?

A: I am the manager of marketing communications at SMART.

Q: How long have you held that position?

A: Five years, I believe.

Q: ***Was that the position you held when my clients' advertisement was presented to SMART for display***?

A: ***No, I had a different title***.

Q: ***And what was your title at that time***?

A: ***I think it was a marketing program manager***.

Q: Is the position you hold now, is it an elevated position from the one you held previously as the marketing program manager?

MR. HILDEBRANDT: Object; vague.

A: Not sure what you mean by "elevated."

BY MR. MUISE:
Q: Certainly. Who held the position of manager of marketing and what was the full title you have?

A: Marketing communications. That title didn't exist at that time.

Q: Well, the title you hold now, was that a promotion from the position you held previously?

A: Probably.

Q: Is there somebody who is the *marketing program manager* today?

A: *No*.

Q: How long have you worked with SMART?

A: 20 years.

Q: Are your job duties different from when you were their marketing program manager to your position now as the manager of marketing and communications?

A: Yes.

Q: What has changed between the two?

A: I'm now responsible for all of the marketing and communication that go out to the, externally and internally.

Q: ***And what were your duty and responsibilities as the marketing program manager***?

A: ***I was responsible for smaller pieces of programs that we ran***.

Q: ***Was one of those programs advertising on SMART buses and bus shelters***?

A: ***Yes***.

Q: Do you still have responsibility over that advertising in your present position?

A: Yes.

(Gibbons Dep. at 11:11-13:6 [Doc. No. 58-7]) (emphasis added).

And lest there be any doubt that Defendant Gibbons had decision-maker authority as the "marketing program manager"—the position she held at the time Plaintiffs' advertisement was rejected—Defendant Gibbons testified as follows:

> Q: You, in your position as the, the ***previous position***, and I guess, apparently, your position today, as the ***marketing program manager***, you make determinations, you can or you have made determinations of whether an advertisement should be displayed or not displayed based on the advertising guidelines, correct?
>
> A: I usually, if it's presented to me, send it to legal for an opinion.
>
> Q: But you *have the authority to make a determination to run an ad or not run an ad; isn't that correct*?
>
> A: *I could*.

(Gibbons Dep. at 23:2-13 [Doc. No. 58-7]) (emphasis added).[4]

Finally, it is important to point out that there is no evidence whatsoever in the record contradicting this testimony or in any way suggesting that Gibbons was not a decision maker.

[4] SMART's Rule 30(b)(6) deposition witness confirmed this fact as well. When asked to review SMART's procedure for accepting or rejecting an advertisement, using the process applied to reject Plaintiffs' advertisement, the witness confirmed that Defendant Gibbons—in her prior position as marketing program manager—had authority to reject an advertisement. (*See* SMART Dep. at 24:9-26:8 [testifying about the process used to reject Plaintiffs' advertisement, relying on Deposition Exhibit 2 (Doc. No. 58-6; Pg ID 1379), and describing the role of Beth Gibbons in that process] [Doc. No. 58-5]). In particular, SMART's witness confirmed as follows:

> Q: And I believe you testified previously that *in the sequence that you have described*, *Beth Gibbons*, if she based on her determination concluded that it violated the content restriction, *she could then tell Mr. Hawkins that the advertisement has been rejected without any further, seeking any further advice*; is that right?
> A: That's correct.

(SMART Dep. at 26:1-8 [Doc. No. 58-5]) (emphasis added).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 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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