

EXHIBIT 3

David Yerushalmi

From: David Yerushalmi [dyerushalmi@americanfreedomlawcenter.org]
Sent: Wednesday, November 27, 2013 5:55 PM
To: 'Christian E. Hildebrandt'
Cc: 'Gordon, Avery'; 'rmuise@americanfreedomlawcenter.org'; 'emersino@thomasmore.org'
Subject: RE: Meet and Confer

Chris, I don't find you to be uncooperative. Assuming you turn your attention to this matter first thing Monday, it should not take more than a few minutes to understand this issue now that we have provided you with the most relevant portion of the transcripts. And, of course, the important point here is that we do not want the court laboring under a misstatement of fact at the hearing while laboring over the decision. We all have an obligation to move with prudent alacrity.

And, permit me to take this opportunity to wish you a happy and meaningful Thanksgiving (I'm assuming you do not celebrate Chanuka, which of course was a victory by the Jewish People led by the Maccabees over government oppression in the form of censorship of free speech and religion).

Sent from my BlackBerry® wireless handheld

David Yerushalmi*

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From: Christian E. Hildebrandt [mailto:CHildebrandt@VGpcLAW.com]
Sent: Wednesday, November 27, 2013 5:42 PM
To: <dyerushalmi@americanfreedomlawcenter.org>
Cc: Gordon, Avery; rmuise@americanfreedomlawcenter.org; emersino@thomasmore.org
Subject: Re: Meet and Confer

I'm willing to look at this when I return to my file and the office on Monday. Set whatever deadline you want. However, it would be wrong to say I was uncooperative. I am on holiday. So is SMART. I'll look at it when I get to my office on Monday afternoon. I will talk to SMART then too.

Happy Hanukkah and happy Thanksgiving to all.

Chris

On Nov 27, 2013, at 4:42 PM, "David Yerushalmi" <dyerushalmi@americanfreedomlawcenter.org> wrote:

Chris: I appreciate your struggle here but you should slow down and actually read my first email and the portions of the hearing testimony and Gibbons' deposition testimony I have already provided to you. The court asked you a very pointed question after you insisted twice that Gibbons was never a decision maker at any time relevant to the ad. The court followed up by asking you pointedly whether Gibbons was a decision maker at the time she testified at the preliminary hearing. Your answer was an unequivocal no.

But your statements at the hearing as to whether Gibbons was a decision maker either at the time the ad was submitted or at the time she testified at the preliminary hearing were false (if we believe Gibbons' deposition testimony) and they were false even as to whether Gibbons was a decision maker at the time the ad was submitted. Read her testimony at her deposition that I've provided to you. At the time the ad was submitted and well before the preliminary hearing Gibbons was a decision maker within the chain of command at SMART. So, unless you are saying that your witness misspoke at her deposition and you failed to correct it on direct examination or through an errata, your statements at the hearing and in your email below are wrong: Gibbon was a decision maker at the time the ad was submitted and at the preliminary hearing and at her deposition. She might have been given a kind of promotion once Dryden left, but that doesn't diminish the authority she had at the preliminary hearing or at the time the ad was submitted. Moreover, the court did not ask you whether she was THE decision maker only that she was A decision maker. Because as a decision maker, even her testimony at the preliminary hearing outside of her role as a 30(b)(6) witness (i.e., her personal testimony) is an admission against a party's--SMART's--interest. That was the point of the court's questioning based upon our argument in the brief and at the oral argument.

Your statement in response to the court flatly contradicts Gibbons' deposition testimony. What about this testimony of Gibbons do you not understand?

Beth Gibbons (Pages 15:19 to 16:15):

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.

You of course recall Gibbons' description of her title as program manager at the time the ad was submitted and that she was the one responsible for the ad submission:

Beth Gibbons (Pages 11:11 to 13:6)

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.

And, Chris, so we are absolutely clear, the Monday COB deadline stands.

Sent from my BlackBerry® wireless handheld

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From: Christian E. Hildebrandt [<mailto:CHildebrandt@VGpcLAW.com>]
Sent: Wednesday, November 27, 2013 3:50 PM
To: David Yerushalmi
Cc: Gordon, Avery; rmuise@americanfreedomlawcenter.org; emersino@thomasmore.org
Subject: Re: Meet and Confer

What I'm unclear about in your email and the transcript is what "at that time" you are referring to. I agree that at the time of her deposition, she was a decision maker. At the time the ad was submitted, she was not. When that changed in between I can't say today. I'm just trying to figure out what you're referring to as "at that time".

What do you think was conveyed that you want corrected? Just tell me what you think I said and I can look at it in that context. I'm not being adversarial at all. I'm just trying to understand what you think was misrepresented.

If I believe that the totality of my statements created a misunderstanding, I am of course willing and happy to correct it. I just don't have all of the context to say yet.

Chris

On Nov 27, 2013, at 3:43 PM, "David Yerushalmi" <dyerushalmi@americanfreedomlawcenter.org> wrote:

Chris: my email and the transcripts are crystal clear. She was "a decision maker at the time" versus your statement she was not. We've offered you the opportunity to rectify your misstatement in a non-adversarial fashion. Your choice, my friend.

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Sent from my BlackBerry 10 smartphone.

From: Christian E. Hildebrandt
Sent: Wednesday, November 27, 2013 3:38 PM
To: <dyerushalmi@americanfreedomlawcenter.org>
Cc: Gordon, Avery; rmuise@americanfreedomlawcenter.org; emersino@thomasmore.org
Subject: Re: Meet and Confer

Just to be clear, are you trying to say that at the time the **ad was submitted** that Beth Gibbons was an independent decision maker? If not, what are you trying to correct?

Chris

On Nov 27, 2013, at 1:08 PM, "David Yerushalmi"
<dyerushalmi@americanfreedomlawcenter.org> wrote:

Chris: Rob and I will need a meet and confer by no later than Monday COB on the following issue.

During the hearing on the X-MSJs, you made a false representation to the court that we assume was simply an innocent error committed in a moment of over-zealous exuberance. We would like you to join with us in filing a correction. Specifically, beginning at page 19 of the transcript of the hearing, we find the following question and answer colloquy between you and the court--paying special attention to the highlighted portions:

Page 19:

12 THE COURT: Do you think that at the
time of
13 the testimony at the preliminary
injunction hearing that
14 SMART had the definition of
"political" that apparently
15 they have at this time?
16 MR. HILDEBRANDT: Your Honor, there
was no
17 written definition of "political" in
place at the time
18 of the preliminary motion, the
preliminary injunction
19 motion such that is the same as was
disclosed in the
20 testimony in this case.
21 THE COURT: So I want to just
understand this,
22 and maybe it doesn't really have
anything to do with
23 your motion, but it is important to
me to understand it.
24 MR. HILDEBRANDT: I understand.
25 THE COURT: For my own benefit.
Page 20

1 At the time of the preliminary
injunction,
2 there wasn't any written definition of
"political"; is
3 that right?
4 MR. HILDEBRANDT: Your Honor, at the
time of
5 the preliminary injunction, there was
no separate
6 written definition of "political".
7 THE COURT: You put "separate" before
it.
8 Was there any written definition of
"political" at that
9 time?
10 MR. HILDEBRANDT: Well, in the
guidelines,
11 "political" is expressed there, but
there is no separate
12 definition beyond the use of that
word "political" --
13 THE COURT: And you would agree that
the
14 witness that appeared did not give
any particular --
15 point to any particular thing that
informed her about
16 what was political?
17 MR. HILDEBRANDT: I would agree that
the
18 witness that was provided as the
30(b) witness did not,
19 but she was not part of the decision-
making process at
20 the time. She was not an individual
who was a
21 decision-maker at the time. She had a
direct supervisor
22 in the Marketing Department who was
unavailable at the
23 time. And that person was the
decision-maker in the
24 Marketing Department, in the General
Counsel's
25 Department and in the General
Manager's office.
Page 21
1 There were decisions, there were
different
2 decision-makers, but Beth Gibbons has
never been a
3 decision-maker at any time relevant to
this ad.
4 She was presented as the 30(b) (6)
witness
5 and provided testimony --
6 THE COURT: When she gave her
deposition,

7 would she have been considered a
decision-maker at that
8 time?
9 MR. HILDEBRANDT: When she gave her
10 deposition post-Sixth Circuit
decision in the discovery
11 of this case?
12 THE COURT: Well, that is when she
gave it.
13 MR. HILDEBRANDT: All right, that's
fine.
14 Yes, at that time she was --
15 THE COURT: Excuse me, Counsel, I want
to be
16 really clear so I understand this.
17 She testified as a 30(b)(6) witness,
but she
18 was not a decision-maker at that
time; that is your
19 position, right?
20 MR. HILDEBRANDT: Well, that is
correct, yes.

Chris, the Chubb and Gibbons testimony as a whole makes clear that Beth Gibbons was in fact a decision-maker as part of the decision-making chain of command. Indeed, you know very well that she had the authority to simply accept an ad that she determined did not violate any of SMART's policies. Or, if she had some concerns or questions, she sent it along the decision chain, including Dryden and legal. But, Gibbons was very clear that she participated as a decision maker during the relevant time period. Thus,

Beth Gibbons (Pages 15:19 to 16:15):

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?

Moreover, Gibbons testified that she was part of what Chubb described as the collaborative decision-making process:

Beth Gibbons (Pages 52:14 to 54:2):

Q Anthony Chubb, on behalf of SMART, testified that at times there is collaboration between marketing, legal, and the general manager to make a final determination as to whether an advertisement is accepted or rejected; is that your understanding of how the process works at times?

A Yes.

Q And was there a collaboration on the leaving Islam advertisement?

A Yes.

Q Did you participate in that collaboration?

A Yes.

Chris, while this issue is not in our view an ultimate dispositive issue, it is materially important and it was clearly important to the court. Thus, your representation to the court was and remains a material misrepresentation. Again, we accept presumptively that your misstatement was unintentional and without *scienter*. But, this error must be brought to the court's attention. We will do so Monday after COB, either in a joint statement with you or unilaterally.

We look forward to hearing from you very soon.

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