UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

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.

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

RESPONSE TO PLAINTIFFS' MOTION TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF DEFENDANTS, SMART, HERTEL AND GIBBONS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

Other Authorities

INTRODUCTION

As an initial consideration, Defendants vehemently deny that any misrepresentations were made by SMART relating to Ms. Gibbons' testimony or any other evidence in this case. It would appear that Plaintiffs' only motive in raising the issue and ignoring the evidence presented is to insert a red herring through the brief submitted and to keep the issue of whether their advertisement is political alive. Plaintiffs' brief fails to do so.

The Plaintiffs have petitioned this Court for leave to supplement briefing to tell the Court what they have already presented, and with what Defendants disagree: That Beth Gibbons was THE "decision-maker" with respect to the advertisement presented by Plaintiffs and that statements she made in testimony in this Court effect some type of admission against SMART that Plaintiff can rely upon. The issue is not material to this Court's decision.

COUNTER-STATEMENT OF FACTS

Beth Gibbons, at the time that this advertisement was submitted, was the Marketing Program Manager for SMART. In her position, she answered directly to Elizabeth Dryden, who was then the Director of Marketing for SMART. Although, consistent with her testimony, Ms. Gibbons did "apply" the guidelines on occasion, and "could" make a decision on certain types of advertisements, Ms. Gibbons never assumed or had the authority to deny an advertisement on the basis

of political content or content that held a person or group up to scorn or ridicule. As a practical matter, Ms. Gibbons always consulted with her direct supervisor, Ms. Dryden, and with legal counsel for these important decisions and allowed the general manager to make the decisions.

Further, it has never been contested that Ms. Gibbons *did not actually make the decision* with respect to this proposed advertisement. The decision was made by the General Manager, John Hertel, after consulting with the Marketing Department and the Office of the General Counsel.

Plaintiffs seek to make Ms. Gibbons THE "decision-maker" with respect to the advertising policy. Plaintiffs have confused the facts to such an extent that the Court appeared to focus, to some degree, on the issue at oral argument of the cross motions for summary judgment. Whether she was the "decision-maker" or not is immaterial to the issue for which Plaintiffs seek to establish the point, as shown below.

ARGUMENT

Plaintiffs cite to but one rule (by reference) and no case law. Plaintiffs rely upon Fed. R. Evid. 801(d)(2)(D)[1] for their argument that a statement by Ms. Gibbons:

[1] Although Plaintiffs cite to their three separate briefs filed on the cross-motions for summary judgment, the only reference or authority contained in the briefs on this point is Fed. R. Evid. 801. *Plaintiff's supplemental brief*, at p. 7, note 2.

> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed. . . .

Fed. R. Evid. 801 is a rule of evidence concerning only the admissibility of evidence that does not by itself direct the Court or the parties to a particular decision. It does not direct the fact finder as to how the statement is to be weighed or considered. The rule itself states only that "[t]he statement must be considered but does not establish . . . the existence or scope of the relationship under (D)." As an *evidentiary* admission, the statement does not establish any point in contention, and, at best, is only to be admitted into evidence and considered with the other evidence in the case.

Defendants have not challenged the admissibility of this statement made by Ms. Gibbons in open court. Defendants have not taken the position that the statement is inadmissible. As a result, applying the factors of Fed. R. Evid. 801 to the statement accomplishes no purpose whatsoever. The "issue" raised in this motion is irrelevant and immaterial to the determination of the cross-motions for summary judgment.

Plaintiffs' brief appears to criticize Defendants simply for taking a position that disagrees with their interpretation of Ms. Gibbons' statement. Defendants believe that Plaintiffs are interpreting Ms. Gibbons' testimony incorrectly and have argued so in their prior briefing. See, Defendants' Reply Brief in Support of Motion for Summary Judgment [Docket # 66], at p. 4. However, even if Ms.

Gibbons' statements could be attributed to SMART as an admission, the statement is not *binding* on the Defendants or the Court. *Evidentiary* admissions can be appropriately contradicted by other evidence and statements in the case.

It is important to distinguish between *evidentiary* admissions and *judicial* admissions. An evidentiary admission, such as a statement that is admitted under a Rule of Evidence and sought to be attributed to another party, is merely considered another item of evidence and is not binding or conclusive on the other party or the trier of fact. 9 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2590 at p. 823. Like any other evidence, evidentiary admissions are subject to contradiction or explanation. 2 MCCORMICK ON EVIDENCE § 254 at p. 142; *Aide v Taylor*, 7 N.W.2d 757, 759 (1943).

A *judicial* admission, on the other hand, is conclusive. A judicial admission is "a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true." MCCORMICK § 254 at p. 449. They are formal concessions **in the pleadings in the case** or stipulations **by a party** that have the effect of withdrawing the fact from issue and dispensing wholly with the need to prove the admitted fact. *Kurek v Pleasure Driveway & Park Dist.*, 557 F.2d 580, 595 n. 13 (7th Cir. 1977), *vacated by*, 435 U.S. 992 (1978). A fact that is judicially admitted is no longer a fact in the case

and has been conceded. 9 WIGMORE § 2590 at pp. 822-23. Not only are facts judicially admitted established beyond the need to prove them, but are beyond the power of evidence to controvert them. *Best Canvas Prod. & Supplies, Inc. v Ploof Truck Lines, Inc.*, 713 F.2d 618, 621 (11th Cir. 1983) (quoting *Hill v Federal Trade Comm'n*, 124 F.2d 104, 106 (5th Cir. 1941)).

The Defendants have adequately and completely explained Ms. Gibbons' testimony at the preliminary injunction hearing as her personal opinion, and not as a statement binding on SMART. See, Defendants' Reply Brief in Support of Motion for Summary Judgment [Docket # 66], at p. 4; *Amer. Freedom Def. Init. v Suburban Mobility Authority for Regional Transportation (SMART)*, 698 F.3d 885, 896 (2012). Further, her testimony at deposition on behalf of SMART refutes her statement that *she* did not see the ad as overtly political. Indeed, her testimony at the very same preliminary injunction hearing set forth the Authority's position and refuted her personal opinion. See, Transcript of Preliminary Injunction Motion hearing, [Docket #34], at p. 17. Because her statement represented, at best, an evidentiary admission, the Court could normally consider this other evidence to weigh against her statement accordingly.

However, the Court should not consider this testimony at all as it is irrelevant and immaterial to the issues that remain before the Court. The purpose for which Plaintiffs propose the statement is to address whether the proposed

advertisement is political. Whether the advertisement is a political ad is already determined by *Plaintiffs' own judicial admissions in their pleadings*. As set forth in the Defendants' Motion for Summary Judgment, Plaintiffs' Complaint contains the following paragraphs:

> 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 USC §1983 challenge Plaintiffs' 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, Plaintiffs have deprived Plaintiffs of their right ***to engage in political and religious speech*** in a public forum. . . .

(Docket #57**, Exhibit I [57-10]**, Plaintiffs' Complaint, filed May 27, 2010) (emphasis added).

As the case law cited above establishes, factual assertions in pleadings and pretrial orders are **judicial admissions conclusively binding on the party who made them**. *Barnes v Owens-Corning Fiberglas Corp.*, 201 F.3d 815 (6th Cir. 2000). See also, 14 A.L.R. 65-72 and cases cited therein; *Pennsylvania R. Co. v Girard*, 210 F.2d 437, 440 (6th Cir. 1954). The Sixth Circuit, in *Ferguson v Neighborhood Housing Services*, 780 F.2d 549 (6th Cir. 1986) recognized the importance of judicial admissions:

> **Judicial admissions "eliminate the need for evidence on the subject matter of the admission," as admitted facts are no longer at issue.** *Seven-Up Bottling Co. v. Seven-Up Co.,* 420 F. Supp. 1246, 1251 (E.D.Mo.1976), *aff'd,* 561 F.2d 1275 (8th Cir.1977). Once made, the subject matter of the admission should not be reopened in the absence of a showing of exceptional circumstances. *New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 24 (4th Cir.1963), *cert. denied,* 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed.2d 981 (1964). This court has observed that "[u]nder federal law, stipulations and admissions in the pleadings are generally binding on the parties and the Court." *Brown v. Tennessee Gas Pipeline Co.,* 623 F.2d 450, 454 (6th Cir.1980) (citations omitted). **Not only are such admissions and stipulations binding before the trial court, but they are binding on appeal as well.** *See, e.g., Glick v. White Motor Co.,* 458 F.2d 1287, 1291 (3d Cir.1972).

Id., at 551 (emphasis added). The Sixth Circuit, in this very case, has held Plaintiffs to their admissions:

> The complaint explains that AFDI "promotes its political objectives by, *inter alia*, sponsoring anti-jihad bus and billboard campaigns, which includes seeking advertising space on SMART vehicles." [Plaintiffs' Complaint], ¶ 8. **By its own admission, therefore, AFDI sought to place advertisements on the SMART vehicle to "promote[ ] its political objectives." Moreover, by denying the**

> **placement of the fatwa advertisement, AFDI alleges that SMART "denied Plaintiffs' advertisement, and thus denied Plaintiffs' access to a public forum to express their political and religious message.** *Id.* ¶ 21. AFDI understood its own advertisement to contain a political message; therefore, it would be reasonable for SMART to read the same advertisement and reach the same conclusion.

Amer. Freedom Def. Init., at 895 (emphasis added).

The issue for which Plaintiffs seek to use Ms. Gibbon's personal opinions and statements is already conclusively established by Plaintiffs' own judicial admissions. Defendants are not required to bring forward evidence to support the admissions, and the admissions are beyond the power of additional evidence to controvert them. *Best Canvas Prod. & Supplies, Inc., supra*.

Plaintiffs have judicially admitted that their advertisement was political and it is no longer a point at issue. Since SMART's content policy bars political advertisements, the Defendants are entitled to summary judgment of Plaintiffs' claims.

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2013, I electronically filed the attached papers, Defendants' Response to Plaintiffs' Motion for Summary Judgment, with the Clerk of the Court using the Court's ECF system which will send notification of such filing to the following:

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I declare under penalty of perjury that the foregoing is true and correct.

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Dated: December 19, 2013