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

BLAINE COLEMAN,

Plaintiff,

Case No. 11-cv-15207

vs.

Hon. Mark A. Goldsmith

ANN ARBOR TRANSPORTATION AUTHORITY, et al.,

Defendants.
_____/

PLAINTIFF'S POST-HEARING BRIEF

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INTRODUCTION

As plaintiff has argued in previous briefs, AATA's advertising policy is facially unconstitutional regardless of whether its advertising space is a public forum or a limited forum. The evidentiary hearing on July 23 lent further support to plaintiff's claim that AATA operates as a public forum, and it additionally highlighted the First Amendment problems that flow from having policies that are unconstitutionally vague and viewpoint-based on their face.

FACTS

AATA first saw plaintiff's proposed ad on January 12, 2011.[1] At that time:

- Only two ads had ever been rejected by AATA, and the rejections had occurred in 2007 and 2008, more than two years previously.[2]
- Both those ads had been rejected because they were not "considered in good taste" as required by Section A of the policy and did not "further the purposes" of AATA's advertising policy. They were not rejected for violating any specific provision of Section B of the policy.[3]
- A third ad in 2008 was approved, but the advertiser was warned by AATA that the ad would be removed if there was "negative community response." There is no provision in the advertising policy that provides for ad removal based on negative community response.[4]
- Also in 2008, AATA approved two ads for political candidates, which clearly did violate a specific provision of Section B of the policy.[5]

Upon learning of plaintiff's proposed ad, Randy Oram told Mary Stasiak that he did not want to run the ad because his company had a policy of not advertising "distasteful messages." Stasiak consulted with Dawn Gabay, AATA's deputy CEO, and they agreed that the ad should be rejected. Stasiak testified that the ad violated Section B(5) of the policy: "defames or is likely to hold up to scorn or ridicule a person or group of persons." She also testified that the picture in

[1] Tr. 30; Exs. 12, 13 & 32.
[2] Tr. 20-22; Ex. 30; AATA Resp. to Interrog. # 11.
[3] Tr. 20-22; Ex. 1; Ex. 30 ¶ 11.
[4] Tr. 27; Exs. 8 & 9.
[5] Tr. 28-30; Ex. 30 ¶ 14.

the ad violated Section A of the policy in that it would be frightening to passengers and thus violated the "purpose of the policy," "good taste," and AATA's "aesthetic standards." Gabay also testified that the ad violated the "good taste" and "aesthetic standards" requirements, as well as Section B(5). She said the ad was distasteful because its picture was scary and frightening, which would create an unpleasant atmosphere for passengers.[6]

In February, Stasiak asked Oram if he was going to respond to plaintiff because she wanted to know how plaintiff's request would be resolved. (It is standard practice for TAG, and not AATA, to communicate directly with the advertiser.) Oram subsequently told plaintiff his ad was being rejected because it did not comply with AATA's advertising policy. Oram did not say which provision(s) of the policy the ad allegedly violated.[7]

Just three weeks after seeing plaintiff's ad, AATA rejected an ad for StatusSexy.com, an HIV-prevention website sponsored by the Michigan Department of Community Health ("MDCH"). This was the first ad rejected since 2008. Although Stasiak expressed concern that the advertised website was not operational, she knew that MDCH was sponsoring the ad, the featured website was for HIV prevention, it would become operational in just a few days, and screen shots of the website were available for her review. AATA nonetheless rejected the ad. Asked what provision of AATA's policy the ad appeared to violate, Stasiak and Gabay both testified that it allegedly violated Section B(8) of the policy, which prohibits ads containing "obscene" or "sexually explicit" material as those terms are defined by statute. Gabay testified that the ad was also rejected because of its aesthetics and because it was offensive. And after Oram said "if we allow this type of advertising with the man's shirt off, we will not be able to regulate other advertisers with revealing copy," Gabay replied, "I agree with Randy. We need to

[6] Tr. 33-38, 80, 160-64; Ex. 14.
[7] Tr. 26-27, 34-36; Exs. 18 & 21.

apply the policy consistently…especially in view of the 'Israel / apartheid' ad request."[8]

In July 2011, AATA rejected a PETA ad that called on the University of Michigan to replace cruel animal labs with simulators. Because the ad allegedly suggested that the University was cruel to animals, AATA rejected the ad for holding the University up to scorn and ridicule. That was the only ad besides plaintiff's to be rejected under Section B(5) of the policy.[9]

Recently, AATA accepted an ad called "A Tip from a Former Smoker." The ad says "Clean your speech valve twice a day," and features a graphic image of a man reaching into a hole in his throat with a cleaning instrument. Stasiak testified that she "didn't care for the graphics," but the ad was accepted because it didn't violate "any one of the items in the policy" and it was "an educational ad more than anything."[10]

AATA also accepted an ad for a haunted house in which a picture of a monster is prominently figured. The monster has pointy teeth and horns and is surrounded by flames. Stasiak testified that the ad did not violate any of the provisions in Section B of the policy, and Gabay testified that the "context" of the monster in the haunted house ad was different from the context of the "scary and frightening" picture in plaintiff's ad.[11]

Plaintiff, through counsel, asked AATA to reconsider its decision to reject his ad, and the AATA Board of Directors voted to affirm the decision to reject it. The Board's entire discussion of this matter took place in a closed session for which AATA has asserted privilege. The only discoverable evidence about the Board's action is the written resolution it voted to approve (but did not debate or discuss) after emerging from closed session. That resolution simply listed two provisions of the advertising policy that the Board believes supports its decision: Section A in its

[8] Tr. 41-45, 167-74; Exs. 1, 2 (p. 104), 15, 16 & 19.
[9] Tr. 45-47; Exs. 25, 26 & 30 ¶ 12.
[10] Tr. 51-52; Ex. 3.
[11] Tr. 39, 79, 164-66; Ex. 2 (p. 131); Stip. ¶ 3 (Dkt. # 42).

entirety (including its "good taste" and "aesthetic standards" provisions), and Section B(5).[12]

Jesse Bernstein, Chair of the Board, was one of the board members who voted to reject plaintiff's ad. He testified as to what motivated his vote: the ad violated Section B(5) because he thought the graphic would upset a lot of riders, and because placing quotation marks around the word Israel implies that the country does not exist and thereby demeans its citizens. Bernstein testified that the legitimacy of the State of Israel is a "legal question," not a "political question."

> The fact is the U.N. sanctioned the creation of Israel in 1948 . . . . By world law, I'm assuming that says Israel is a legitimate state. . . . And therefore any call to question about it in this context with the quotes says to me that they don't accept what the U.N. has declared as a legitimate country . . . . [If] folks want to disagree with that, they have ways to do it, but not on our buses.

Bernstein agreed that the quotation marks "sent a message about Israel" that in his opinion violated the AATA advertising policy.[13]

ARGUMENT

I. The history of AATA's application of the advertising policy undercuts its assertion that its advertising space is not a public forum.

Argument A.1 of plaintiff's preliminary injunction brief discussed several aspects of AATA's actual practices that were confirmed at the evidentiary hearing: AATA has rejected very few ads (especially before receiving plaintiff's proposed ad), it has run political candidate ads in violation of its own written policy, and it has run other non-commercial ads about public issues. Two issues that arose at the hearing deserve further discussion here: the StatusSexy.com ad, and AATA's application of Section A of its advertising policy.

A. AATA's treatment of the StatusSexy.com ad demonstrates a failure to consistently follow its own policy.

AATA rejected the StatusSexy.com ad—the first ad to be rejected in years—only a few

[12] Tr. 40, 187-89, 196-201; Exs. 28 (§§ 5.3, 8.0, 9.3), 29 & 34.
[13] Tr. 209-12, 216.

weeks after receiving plaintiff's ad. It is unlikely that this timing was coincidental. After seeing plaintiff's ad, Stasiak asked her colleagues to consult with AATA's attorney "about our options right away." A few days later, Stasiak asked Oram whether AATA had *ever* rejected an ad for not complying with AATA policy. A fair inference is that AATA became aware that under prevailing case law its advertising space was more likely to be deemed a public forum if few other ads were being rejected. The StatusSexy.com ad presented an opportunity to refute allegations that AATA "permit[ted] virtually unlimited access to its advertising space" and thus could not reject plaintiff's ad based on its content. *United Food & Commercial Workers Union v. Sw. Ohio Reg'l Trans. Auth.*, 163 F.3d 341, 353 (6th Cir. 1998). Gabay's email confirms that concerns over plaintiff's ad played a role in the decision to reject the StatusSexy.com ad.[14]

The problem is that the StatusSexy.com ad did not violate AATA's advertising policy in any way. Stasiak and Gabay both tried to justify the rejection of the ad under Section B(8) of the policy, which prohibits ads containing material that is "obscene" or "sexually explicit" as those terms are defined by statute. However, the statutory definitions of those terms reveals that the ad does not come close to being obscene or sexually explicit. *See* M.C.L. §§ 752.362, 722.673. Although Stasiak was concerned that the advertised website was not operational at the time she reviewed the ad, she told TAG that the ad violated the policy *after* being informed that it was being sponsored by the Michigan Department of Community Health for HIV prevention, the website would be going live in a few days, and screen shots were available. Even assuming that AATA's policy allows ads to be rejected because of the unknown content of an advertised website (as opposed to the content of the ad copy itself), did Stasiak really believe that MDCH, a government agency, intended to advertise a website that was obscene or sexually explicit? That is not credible—or reasonable. The ad was rejected because AATA disliked the content of the

[14] Tr. 32, 81-82; Exs. 13, 14 & 19.

ad itself (although it did not violate the policy) and because rejecting a second ad might help justify the rejection of plaintiff's ad. AATA's failure to follow its own policy consistently renders its advertising space an open forum. *United Food*, 163 F.3d at 353 & n.6.[15]

B. Evidence regarding the application of Section A of the policy demonstrates that AATA's standards for inclusion and exclusion are not clear.

The government can avoid creating a public forum only when its criteria for including and excluding speech are clear, as opposed to ad hoc and subject to the whim of the decisionmaker. *Id.* at 352, 353 n.6. Plaintiff has already argued that based on *United Food*, AATA's "good taste" and "aesthetic standards" policy is unconstitutionally vague on its face. The evidentiary hearing confirmed that in actual practice, AATA's application of Section A of its policy is inconsistent, standardless, and does not even conform to the policy as written.

AATA staff testified that they attempt to evaluate each individual ad based on whether it furthers the purposes of the policy as set forth in Section A: revenue, ridership, and a pleasant environment.[16] But such a practice is plainly inconsistent with the written policy itself. The "purposes" of the policy are *not* the criteria by which individual ads are to be evaluated under the policy. The policy states that ads must meet "specified standards." As *United Food* makes clear, the government must have policy *justifications* (such as ridership, community standing, and atmosphere) for *creating* the specified standards that are used to limit speech in individual cases. *Id*. at 354. Thus, the *reason* why the "specified standards" exist (whatever those standards may happen to be) is "to further" AATA's three purposes. But these three purposes, or policy justifications, are not the criteria (or "standards") by which each ad is to be evaluated. The actual criteria or "standards" that must be used are "specified" elsewhere in the policy.

The witnesses' inconsistent testimony demonstrates their confusion over how Section A

[15] Tr. 41-45, 167-74; Exs. 1, 2 (p. 104), 15, 16 & 19.
[16] Tr. 23-28, 37-38, 52-55, 67, 80, 162-64; Ex. 1.

of the advertising policy is supposed to work in practice:

- Stasiak testified that in Section A, "good taste," "aesthetic standards," and even "specified standards" were not defined by the policy, but they were "implied" in the policy to be *anything* that could impact ridership and AATA's image. Thus, the picture in plaintiff's ad violated the "purpose of the policy" because by being frightening it could impact ridership and revenue. But when asked about the haunted house monster, Stasiak testified that the monster did not violate the policy because it did not violate any subsection of Section B. Yet Stasiak's own signed declaration states that two ads were rejected in 2007 and 2008 under Section A, not Section B.[17]

- Gabay testified that plaintiff's ad violated the "good taste" and "aesthetic standards" provision of the policy. She also testified that it would not create a "pleasant atmosphere," which she said came "directly" from the policy. "Aesthetic standards" and "good taste" are equivalent to one another, she said, and these are both defined by her (although not in any written policy) as "things that are acceptable to our community" and "not usually offensive to the public." The StatusSexy.com ad, for example, was rejected because it was "offensive." And when asked what are the "specified standards" referred to in Section A of the policy, Gabay said that the standards are good taste, aesthetic standards, *and* Subsections B(1) through B(9).[18]

- Bernstein, meanwhile, testified that "good taste" and "aesthetic standards" were *themselves* defined in Section B(1) through B(9) of the policy. Yet in his deposition two weeks previously he said that good taste varied from person to person and that the aesthetic standards were unwritten and must be determined on a situational basis.[19]

Based on this testimony, it is apparent that AATA does not, in practice, have clear standards for determining whether an ad will be accepted or rejected. What are the "specified standards" referred to in Section A? What does "good taste" mean, and what are the "aesthetic standards"? How are the "purposes" of the policy used in evaluating an ad? By allowing its staff and board members to answer these questions in an inconsistent and ad hoc manner and not in accordance with the written policy itself, AATA has created an open forum.

[17] Tr. 23-25, 37-38, 53-54, 67, 79; Ex. 2 (p. 131) & Ex. 30 ¶ 11.
[18] Tr. 160-63, 167-72, 175.
[19] Tr. 182-84, 208.

II. AATA's application of the advertising policy, in practice, is viewpoint-based.

Viewpoint discrimination is prohibited regardless of what forum is involved. Plaintiff has already argued that the "scorn or ridicule" policy is unconstitutional because it is viewpoint-based on its face. The evidence at the hearing shows that in actual practice as well, AATA also engages in viewpoint discrimination. *Compare United Food*, 163 F.3d at 360-63 (facial viewpoint-based challenge to the written policy) *with Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290, 297-99 (3d Cir. 2011) (as-applied viewpoint-based challenge to the rejection of an individual ad).

A. AATA's practice regarding Section A of the policy is viewpoint-based.

Even if AATA's policy as written allowed ads to be rejected for violating the "purposes" of the policy, such a policy would be overbroad because it would allow for viewpoint discrimination. *See United Food*, 163 F.3d at 361-62 (striking down ban on "controversial ads that adversely affect SORTA's ridership" on such grounds). Stasiak testified that an ad violates the "good taste" and "aesthetic standards" provisions of the policy when it could cause harm to AATA's image or negatively impact ridership. And Gabay testified that an ad violates the "good taste" and "aesthetic standards" provisions of the policy when they are not "acceptable to our community" or are "offensive to the public."[20] Using these criteria to accept and reject ads unquestionably invites viewpoint discrimination. Because AATA's image and ridership are far more likely to be negatively impacted by ads expressing very unpopular or disagreeable ideas, the viewpoint expressed in an ad will often serve as the basis for rejecting it. Similarly, ads with unpopular speech are all too likely to be rejected for being "unacceptable to the community" or "offensive to the public" because, by definition, the general public is less accepting of and more offended by unpopular messages and ideas. Therefore, if the criteria are AATA image and

[20] Tr. 23-24, 53-55, 67, 172.

ridership, or whether the public is offended, then it is virtually inevitable that AATA will reject ads on the basis of their unpopular or disagreeable messages while accepting ads with popular or uncontroversial messages. *See id*.

AATA's practice in this regard essentially enables a "heckler's veto." The government cannot burden speech based on the fact that other people will respond negatively to it. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Even if the government itself does not disagree with the speaker's message, it cannot censor speech based on the fact that others will react poorly to it. *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1104 (D. Md. 1997). To be clear, maintaining AATA's image and ridership are legitimate goals that AATA is entitled to pursue. But AATA must pursue those goals by adopting policies and practices that do not themselves favor popular messages and ideas over unpopular ones.

B. AATA's practice regarding Subsection B(5) of the policy is viewpoint-based.

AATA's treatment of the PETA ad demonstrates that it uses the "scorn or ridicule" provision in Subsection B(5) of its policy to censor speech on the basis of viewpoint. The PETA ad has no scary pictures, no aesthetic deficiencies, and is unlikely to negatively impact AATA's image or its ridership. The ad has a simple message: it calls on the University of Michigan to stop using cruel animal labs. Yet AATA rejected this ad purely because this speech was deemed to hold the University up to scorn and ridicule. Meanwhile, AATA accepts the University of Michigan's ads touting its personnel and programs as "the leaders and best."[21] There is no way to characterize AATA's rejection of the PETA ad as anything but viewpoint-based censorship.

With that background, there can be little doubt that the rejection of plaintiff's ad under the same policy was also viewpoint-based. Although AATA can probably point to elements of plaintiff's ad that are more contentious or controversial than the PETA ad, plaintiff's ad was

[21] Tr. 45-48; Exs. 25, 26 & 30 ¶ 12; Dkt. # 26-2.

nonetheless rejected because of its overall *message* and the *ideas* that it expressed.

This conclusion is inescapable based on testimony by Gabay and Bernstein.[22] Gabay said that plaintiff's ad violated the policy because its picture was scary and frightening, but the haunted house ad with the monster did not violate the policy because the "context" of the two pictures were different. Gabay is correct that the context is different. And her distinction between the two ads proves that plaintiff's ad was rejected not because of its picture per se, but rather because of the message that the picture sends to people who view the entire ad. When speech about an otherwise includible subject is censored because of its messages or ideas about that subject (including messages and ideas that may be conveyed through pictures), that is viewpoint discrimination.

Similarly, Bernstein said that the quotation marks around the word Israel motivated his vote. He testified that the punctuation sent a *message* about Israel that an ad without the punctuation would not have sent. And he testified that if plaintiff wanted to disagree with the United Nations' declaration as to Israel's political legitimacy, he could do so—but not on an AATA bus.[23] This, too, is viewpoint discrimination, and it is always unconstitutional.

III. Even if some of the reasons for rejecting plaintiff's ad were not unconstitutional, the preliminary injunction should be granted.

The court has asked for briefing regarding what relief would be appropriate if only one of

[22] Tr. 164-66, 209-12, 216.

[23] Bernstein also testified that plaintiff's ad was not "factual," but this cannot be taken seriously. In the realm of political speech, rhetorical hyperbole and figurative speech are fully protected under the First Amendment. *Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). Thus, just as no one who read Hustler Magazine would reasonably believe that Jerry Falwell literally had sex with his mother in an outhouse, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), no one who sees plaintiff's ad would reasonably conclude from his use of quotation marks that Israel literally does not exist. At most, one might conclude that plaintiff is employing a rhetorical device to express his opinion about Israel's political legitimacy in an area of the world where the rightful control of territory has long been in dispute.

multiple reasons for rejecting plaintiff's ad was not constitutionally valid. The preliminary injunction should still be granted, for three reasons.

First, plaintiff has third-party standing under the First Amendment to challenge AATA's policies on their face regardless of whether his own ad could be prohibited for legitimate reasons. *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 348 (6th Cir. 2007). Thus, the appropriate focus is on the vagueness and overbreadth of the advertising policy itself, as opposed to the reasons AATA asserts for having rejected plaintiff's ad. *See Grossbaum v. Indianapolis-Marion County Bldg. Auth.*, 100 F.3d 1287, 1294-96 (7th Cir. 1996) (discussing differences between facial challenges to rules and claims regarding specific applications of those rules).

Second, even if the court does examine AATA's actual motives for rejecting plaintiff's ad, it would be AATA's burden to prove that it would have rejected the ad even in the absence of any unconstitutional considerations. *See Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). Here, AATA has not carried its burden of proving that its reasons for rejecting plaintiff's ad were constitutional, or that it would have rejected the ad anyway for constitutionally valid reasons or under a constitutionally valid policy.

Third, the court has also inquired whether proper relief would consist of an injunction to reconsider plaintiff's ad under a constitutionally valid policy and in a constitutionally valid manner. Plaintiff does not believe that would be proper relief because of the high risk that AATA would simply assert facially valid reasons as pretext for viewpoint discrimination. *See Pittsburgh League of Young Voters*, 653 F.3d at 297. If, as the fact finder, this court determines that plaintiff's ad was rejected for unconstitutional reasons, then the preliminary injunction should issue. *See id*. at 299.

CONCLUSION

AATA could have avoided the situation it is in now by adopting an advertising policy with clear and explicit standards that do not favor some viewpoints over others. The consequence of AATA's failure in this regard was on display at the evidentiary hearing last week. AATA's staff are hopelessly confused about how to implement the policy in a consistent, objective and neutral fashion; some ideas and messages about any given subject are unquestionably favored over other ideas and messages about the same subject; and the Chairman of the Board believes that plaintiff's alleged disagreement with the United Nations about a foreign country's political legitimacy is a view he cannot express on a public bus. The First Amendment proscribes this type of censorship, and plaintiff's motion for a preliminary injunction should therefore be granted.

Respectfully submitted,

Dated: August 2, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2012, I electronically filed the foregoing paper and attachments with the Clerk of the Court using the ECF system, which will send notification of such filing to:

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