

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

NORTHEASTERN PENNSYLVANIA
FREETHOUGHT SOCIETY,

Plaintiff,

v.

COUNTY OF LACKAWANNA
TRANSIT SYSTEM,

Defendant.

Civil Action No. 3:15-CV-00833-MEM
(Judge Mannion)

**PLAINTIFF NORTHEASTERN PENNSYLVANIA FREETHOUGHT
SOCIETY'S STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF
ITS MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 56.1, Plaintiff, the NEPA Freethought Society, by and through the undersigned counsel, hereby submits this Statement of Undisputed Facts in Support of Plaintiff's Motion for Summary Judgment.

THE PARTIES

1. The NEPA Freethought Society is an unincorporated association, with its principal office at 30 Hayes Lane, Wilkes-Barre, Pennsylvania 18702. *See* J. Vacula Dep. (attached as Ex. B), at 15:10-18.

2. The NEPA Freethought Society’s mission is to facilitate a social, educational, activist, and philosophical coalition of atheists, agnostics, humanists, secularists, and skeptics predicated on support and community that upholds the separation of church and state and promotes critical thinking. *See* Ex. B at 30:19-31:14, 48:9-22.

3. Justin Vacula is the co-organizer and the spokesperson for the NEPA Freethought Society. Ex. B at 9:3-6.

4. COLTS is a public transportation authority operating under the Municipal Authorities Act of 1945, 53 Pa. C.S. § 5607, and headquartered at 800 North South Road, Scranton, Pennsylvania 18504. *See* Compl., ECF No. 1, ¶ 5; Answer, ECF No. 22, ¶ 5 (attached as Ex. A).

5. COLTS’ mission is to “provide safe public transportation throughout Lackawanna County.” *See* G. Wintermantel 30(b)(6) Dep. (attached as Ex. C)¹, at 15:10-23.

6. Since June 2008, Robert Fiume has served as COLTS’ Executive Director and has been responsible for “oversee[ing] the whole

¹ Both Robert Fiume, COLTS’ Executive Director, and Gretchen Wintermantel, COLTS’ Communications Director, testified as a corporate designees of COLTS. *See* Ex. V (Amended Notice of 30(b)(6) Deposition of COLTS); G. Wintermantel 30(b)(6) Dep. (attached as Ex. C), at 9:23-12:22; R. Fiume 30(b)(6) Dep. (attached as Ex. D), at 5:15-6:16.

transportation system.” *See* R. Fiume 30(b)(6) Dep. (attached as Ex. D), at 11:3-23. Mr. Fiume delegated to the Advertising Manager and later to the Communications Director the responsibility for deciding whether to accept a proposed advertisement. Ex. D at 21:4-24:23.

7. Since April 2009, Gretchen Wintermantel has served as COLTS’ Communications Director. Ex. C at 7:25-8:8.

8. In her capacity as COLTS’ Communications Director, Ms. Wintermantel is responsible for deciding whether or not COLTS accepts particular advertisement proposals and interpreting COLTS’ advertising policies. Ex. C at 46:9-47:19, 54:7-24, 79:6-19, 97:5-22; Ex. D at 39:4-23.

COLTS HAS A LONGSTANDING POLICY OF LEASING ADVERTISING SPACE TO THE PUBLIC AS A MEANS OF RAISING SMALL AMOUNTS OF REVENUE

9. COLTS has a longstanding policy lasting at least a decade of leasing advertising space on the inside and outside of its vehicles. Ex. D at 19:8-20:5; *see also* Ex. E (COLTS advertising invoices sent to Hope Church in 2004).

10. Traditionally, COLTS has opened its advertising space to the public for the purpose of raising revenue, and not to further any other organizational policy or goal. Ex. D at 19:1-20:13; Ex. C at 21:16-19.

11. Traditionally, advertising revenue has comprised less than two percent of COLTS’ yearly revenue. Ex. D at 16:6-20.

**PRIOR TO 2011, COLTS NEVER REJECTED ANY ADVERTISEMENTS
AND NEVER RECEIVED ANY COMPLAINTS ABOUT
ADVERTISEMENTS THAT IT DISPLAYED ON ITS BUSES**

12. Prior to 2011, COLTS did not have any advertising policy restricting the types of advertisements it would run, and COLTS is “unaware of any instance in which COLTS rejected an advertisement proposal.” Ex. C at 24:3-26:8; *see also id.* at 31:1-22; Ex. D at 35:9-36:5.

13. Indeed, in 2009, COLTS ran an advertisement for a website called “The Old Forge Times News.” *See* Ex. F (photograph of COLTS’ advertisement for The Old Forge Times News); Ex. C at 138:1-3.

14. The advertisement for The Old Forge Times News contained the URL address for an internet blog that, among other things, contained links to anti-Semitic websites, holocaust denial websites, and white supremacist websites. *See* Ex. G (screenshot of oldforgetimes.blogspot.com); Ex. C at 139:23-140:23.

15. COLTS also ran advertisements for:

- a. a beer distributor called “Brewers Outlet” (Ex. C at 56:1-25; *see also* Ex. H (COLTS’ advertising contract with Brewer’s Outlet));
- b. St. Mary’s Byzantine Catholic Church (Ex. C at 131:23-132:2);
- c. the Evangelism and Socialism Ministry of St. Matthew’s Lutheran Church (Ex. C at 133:9-134:13);
- d. Hope Church (Ex. C at 134:23-135:7);

- e. the Office of Catholic Schools (Ex. C at 128:12-22);
- f. the St. Stanislaus School's Polish Food Festival (Ex. C at 126:1-127:12);
- g. the Diocese of Scranton's "Adoption for Life" campaign (Ex. C at 121:20-124:4); and
- h. school board candidate (and current Lackawanna County Commissioner) Patrick O'Malley (Ex. C at 110:8-25).

16. COLTS never received any complaints about the advertisements listed above. *See* Ex. C at 28:1-23; Ex. D at 27:9-11.

17. Indeed, prior to adopting a restrictive advertising policy in 2011, COLTS never received a complaint about any advertisement than ran on a COLTS bus. Ex. C at 28:1-23; Ex. D at 27:9-11.

18. Additionally, COLTS was not aware of any disruption on a COLTS bus caused by advertisements that COLTS displayed or by debate among passengers occurring in the years before COLTS first adopted a restrictive advertising policy. Ex. C at 28:6-14; Ex. D at 46:21-24.

19. COLTS does not place—and has never placed—any restrictions on the extent to which passengers are allowed to speak or debate while riding its buses. Ex. C at 40:6-8, 42:3-18

20. Similarly, COLTS does not have—and has never had—any rules “with respect to what people [on COLTS buses] can and cannot speak about.” Ex. C at 40:9-13.

IN JUNE 2011, DESPITE THE FACT THAT COLTS HAD NEVER HAD ANY PROBLEMS RELATED TO DEBATES SPARKED BY ADVERTISEMENTS, COLTS ENACTED AN ADVERTISING POLICY DESIGNED TO SUPPRESS DEBATE AMONG PASSENGERS ON ITS BUSES

21. In May 2011, Jim Smith, who at the time, served as COLTS' Advertising Manager, received a phone call from a local man who wanted to run an ad that said "Judgment Day is Coming in May." Ex. C at 29:3-9.

22. Mr. Smith and Ms. Wintermantel were alarmed by the proposed "Judgment Day" advertisement because it "seem[ed] religious." Ex. C at 29:5-14. Ms. Wintermantel reviewed the website affiliated with the advertiser's campaign and confirmed that it was, in fact, religious. *Id.* at 29:18-20. So they "went to [Mr. Fiume] and our solicitors and I think as a group then we decided that's something that, you know, being religious, it could be controversial, and we didn't want anything happening inside our buses, any debates or arguments." *Id.* at 29:3-30:3.

23. Accordingly, although COLTS had never before "informed a potential advertiser that [it] would not run their ad," COLTS contacted the person who had sought to run the "Judgment Day" advertisement and "said that we would not run the ad." Ex. C at 30:4-31:22.

24. Despite the fact that COLTS had never had a problem on its buses arising from the content of an advertisement or from a debate among passengers, COLTS based its denial of the "Judgment Day" advertisement on the

fact that “we just felt it was pro-religion and we didn’t want any pro or con kind of religion being discussed on the buses . . . Ads that are religious in nature can cause heated debates and heated arguments on either side.” Ex. C at 32:1-16; *see also id.* at 35:1-3; Ex. D at 46:21-47:3.

25. COLTS officials were concerned, based on media reports from other states, that atheist groups might also try to advertise on COLTS buses and start a “war of words,” turning the buses into a “place for debate” that could make riders feel unwelcome or even lead to vandalism of the buses or compromise safety. Ex. C at 33:19-34:4, 34:21-25, 35:4-8, 39:5-8, 89:20-90:12.

26. In response to the proposed Judgment Day advertisement, Ms. Wintermantel drafted COLTS’ first formal advertising policy, which was approved by the COLTS Board of Directors on June 21, 2011. Ex. C at 34:8-36:9; *see also* Ex. I (June 21, 2011 COLTS Advertising Policy) (the “2011 Policy”).

27. The 2011 Policy states that:

COLTS will **not** accept advertising:

- for tobacco products, alcohol, and political candidates
- that is deemed in COLTS [sic] sole discretion to be derogatory to any race, color, gender, religion, ethnic background, age group, disability, marital or parental status, or sexual preference
- that promotes the use of firearms or firearm-related products
- that are obscene or pornographic
- that promotes violence or sexual conduct
- that are deemed defamatory, libelous or fraudulent based solely on the discretion of COLTS

- that are objectionable, controversial or would generally be offensive to COLTS' ridership based solely on the discretion of COLTS

Ex. I.

28. The 2011 Policy further stated, "Finally, it is COLTS' declared intent **not** to allow its transit vehicles or property to become a public forum for dissemination, debate, or discussion of public issues." Ex. I (emphasis in original).

29. The 2011 Policy was neither designed to increase COLTS' ridership nor prompted by any revenue-related goals or concerns. Ex. C at 51:17-52:1.

30. There is no evidence that the 2011 Policy had any effect on COLTS' ridership. Ex. D at 48:21-49:8.

31. The 2011 Policy was enacted because COLTS wanted to suppress debate on controversial or important topics on its buses. Ex. C at 29:3-30:3, 32:13-33:5, 34:21-25, 38:23-39:17, 73:19-22.

32. COLTS does not "want people debating or arguing on our buses in a small confined space on advertisements that may be controversial or debatable." Ex. D at 46:10-20.

33. Ms. Wintermantel, the drafter of the 2011 Policy, explained that "the intent is to not allow people to start arguing over issues . . . if there's an ad for Donald Trump running on one of our buses you could imagine there would be

huge fights on our bus given the political atmosphere that's out there today." Ex. C at 41:7-16.

34. The goal of COLTS' advertising policy "was specifically to prevent debate inside of COLTS' buses . . . and had nothing to do with debate outside the buses." Ex. C at 73:19-74:4.

35. However, the 2011 Policy applied to advertisements on both the outside and inside of COLTS buses, and did not distinguish between proposals for advertisements on the inside and outside of the bus. Ex. C at 55:21-25.

36. Although COLTS' passengers "sure[ly]" discuss and debate public issues during their rides, "there haven't been any . . . fights that have broken out" nor have such discussions and debates ever affected a COLTS bus driver's ability to do his or her job in a safe and efficient manner. Ex. C at 42:19-23; Ex. D at 69:16-70:3, 91:3-5.

37. COLTS is not aware of there *ever* being *any* problem on a COLTS bus arising from a debate among the bus's passengers. Ex. D at 46:21-24.

**COLTS DENIED THE NEPA FREETHOUGHT SOCIETY'S FIRST
ADVERTISEMENT PROPOSAL IN FEBRUARY 2012**

38. On January 30, 2012, Justin Vacula sent an email to Mr. Smith on behalf of the NEPA Freethought Society seeking to run an advertisement on a COLTS bus containing an image of clouds and the word "Atheists" in large font above the URL address of the NEPA Freethought Society's webpage

(WWW.NEPAFREETHOUGHT.ORG) in smaller font. *See* Email to Jim Smith from Justin Vacula (Jan. 30, 2012, 3:05 PM) (attached as Ex. J). Upon receipt, Mr. Smith showed the email to Ms. Wintermantel. Ex. C at 75:2-4.

39. The NEPA Freethought Society wanted to place the advertisement on COLTS buses in order to recruit potential members to the Society. Ex. B at 8:11-19, 35:20-36:6.

40. However, after looking at the NEPA Freethought Society's website, COLTS concluded that "the NE[PA] Freethought Society wanted to advertise so that they could spark a debate on our buses." Ex. C at 76:3-77:13, 79:9-11.

41. COLTS decided to reject the proposed advertisement because the word "Atheists" would likely cause passengers to engage in debates about atheism aboard COLTS' buses, and COLTS' intent behind the advertising policy was to avoid that. Ex. C at 76:11-21, 78:5-8, 89:20-91:1.

42. The content of the NEPA Freethought Society's website "supported" COLTS' decision to reject the proposed advertisement because, in COLTS' view, the website indicated "that their intent was to cause debate." Ex. C at 78:9-13. But COLTS still would have rejected the proposed advertisement even if it had not listed the NEPA Freethought Society's website address because the word "Atheists" was likely to promote debate. Ex. C at 77:14-78:8.

43. COLTS contends that advertisements containing the words “Atheist,” “Agnostics,” “Catholic,” “Jews,” “Muslims,” or “Hindu”—or any word referring to a religion or lack of religion—regardless of the message of the advertisements, “could spark debate on a bus” and “be a controversial issue” and should therefore be banned. Ex. C at 77:14-25, 88:6-11.

44. Thus, “a few days later,” Mr. Smith telephoned Mr. Vacula and informed him that COLTS would not run the NEPA Freethought Society’s proposed advertisement. Ex. C at 79:12-80:1.

**IN AUGUST 2013, COLTS DENIED THE NEPA FREETHOUGHT
SOCIETY’S SECOND ADVERTISEMENT PROPOSAL**

45. On August 29, 2013, the NEPA Freethought Society again submitted an advertisement for placement on COLTS buses. *See* Email from Justin Vacula to Gretchen Wintermantel and J. Timothy Hinton, Jr. (Aug. 29, 2013, 12:52 PM) (attached as Ex. K). The proposed advertisement stated “Atheists. NEPA Freethought Society. NEPAfreethought.org.” *Id.*

46. COLTS again rejected the NEPA Freethought Society’s advertisement proposal for “the same reasons” it had rejected the first advertisement proposal, which included COLTS’ belief that “the word ‘atheist’ would cause debate on buses.” Ex. C at 85:16-20, 86:4-16.

47. On September 9, 2013, Ms. Wintermantel, writing on behalf of COLTS, sent a letter to Mr. Vacula stating that COLTS would not display the NEPA Freethought Society's proposed advertisement because:

It is COLTS' goal to provide a safe and welcoming environment on its buses for the public at large. The acceptance of advertisements that promote debate over public issues such as abortion, gun control or the existence of God in a confined space like the inside of a bus detracts from this goal.

Letter to Mr. Vacula from Gretchen M. Wintermantel, Communications Director and Right-to-Know Officer, COLTS (Sep. 9, 2013) (attached as Ex. L).

48. In addition to the fact that COLTS believed that the NEPA Freethought Society's proposed advertisement would cause debate on buses, COLTS claims that it was also worried that the advertisement would offend or alienate its elderly bus riders. Ex. C at 88:16-90:6.

COLTS ONLY REJECTED PROPOSED ADVERTISEMENTS FROM TWO ADVERTISERS PURSUANT TO ITS 2011 ADVERTISING POLICY

49. Aside from the NEPA Freethought Society's proposed advertisements, COLTS only rejected one other advertisement proposal under the 2011 Policy. Ex. C at 93:15-20.

50. In May 2012, COLTS rejected an advertisement proposal for the "Wilkes-Barre Scranton Night Out." Ex. C at 52:2-18. The proposed advertisement for "Wilkes-Barre Scranton Night Out" (attached as Ex. M) stated:

WBSNightOut.com
Stay Connected With Our Free Smartphone App!
“My Night Out”
Your link to everything fun!

Ex. M.

51. COLTS rejected the proposed advertisement for “Wilkes-Barre Scranton Night Out” because “the website had links to bars.” Ex. C at 54:7-12.

52. Ms. Wintermantel, who made the decision to reject the advertisement on COLTS’ behalf, conceded the arbitrariness of the rejection, noting, “[w]ould I have made the decision again the same way, probably not, but I did at the time.” Ex. C at 54:7-24.

**COLTS AMENDED ITS ADVERTISING POLICY IN SEPTEMBER 2013
TO FURTHER ITS GOAL OF SUPPRESSING DEBATE AMONG
PASSENGERS ON ITS BUSES**

53. On September 17, 2013—eight days after it sent a letter to Justin Vacula, denying the NEPA Freethought Society’s second advertisement proposal—the COLTS Board of Directors enacted a new policy (the “2013 Policy”), drafted by COLTS’ attorneys, to “clarify” the 2011 Policy as COLTS understood it and to more clearly “set forth the types of advertisements it will and will not accept[.]” *See* Ex. N (Sep. 17, 2013 COLTS Advertising Policy); *see also* Ex. C at 93:1-95:6; Ex. D at 79:15-80:4.

54. Currently, the 2013 Policy is still in effect. Ex. C at 102:1-3.

55. The 2013 Policy applies equally to advertisements on the inside and outside of COLTS buses; COLTS has never distinguished between advertisements on the interior and exterior of the bus for the purpose of approving an advertisement. Ex. D at 47:4-10, 79:2-10.

Intent of the 2013 Policy

56. The 2013 Policy states:

It is COLTS' declared intent to maintain its advertising space on its property as a nonpublic forum and not to allow its transit vehicles or property to become a public forum for the dissemination, debate, or discussion of public issues or issues that are political or religious in nature.

Ex. N (emphasis in original). COLTS' corporate designee explained that this provision means that "the intent is to not allow people to start arguing over issues."

Ex. C at 39:18-41:11.

57. COLTS' advertising policy serves the primary goal of suppressing debate on controversial or important topics on its buses. *See, e.g.*, Ex. C at 104:8-12; 118:15-20, 119:12-120:10, 126:1-25.

58. COLTS believes that debates aboard buses "could be dangerous" and render the buses "potentially unsafe." Ex. C at 32:15-33:5.

59. COLTS testified that it was concerned that advertisements that spark debate might cause a decrease in ridership among the elderly. Ex. C at 88:20-25 ("if there's a debate on a bus, I believe that many of our seniors would

be, you know, would definitely not want to ride our buses anymore, and I think that ridership of our senior citizens would go down.”); *id.* at 29:24-30:3 (“we didn’t want anything happening inside our buses, any debates or arguments. You know, I’m certainly not going to send my 73 year-old mom on a bus where there’s people fighting over anything.”).

60. No senior citizen, however, had ever indicated to COLTS that they would not ride the buses if certain advertisements were accepted. Ex. C at 89:1-7.

61. COLTS officials believe that, under the 2013 Policy, COLTS retains the authority that was explicitly included in the 2011 Policy to reject any advertisements that COLTS officials deemed to be controversial or likely to provoke debate. *See, e.g.*, Ex. C at 96:25-98:8, 99:20-25, 118:15-119:24, 126:1-25.

62. The 2013 Policy states that COLTS’ leasing of advertising spaces is “for the sole purpose of generating revenue while at the same time maintaining or increasing its ridership.” Ex. N.

Enumerated Prohibitions

63. The 2013 Policy states that:

COLTS will **not** accept advertising:

- for tobacco or alcohol or for businesses that primarily traffic in such goods;

- that promotes the use of firearms or firearm-related products or for businesses that primarily traffic in such goods;
- that are obscene, pornographic, or promotes or depict sexually-oriented goods or services or for businesses that primarily traffic in such goods or services or that appeal to prurient interests;
- that promotes violence or sexual conduct:
- that are deemed defamatory, illegal, fraudulent, misleading or false;
- that proposes a transaction or activity that is prohibited by federal, state or local law;
- that exploit the likeness, picture, image or name of any person, and/or trademark, trade name, copyrighted materials or other intellectual property of a third party, without adequate proof of express written authorization to do so;
- that contain, employ or imply profane or vulgar words;
- that demean or disparage a person, group of persons, business or group of businesses;
- that, if permitted, could reasonably subject COLTS to civil or criminal liability;
- that are political in nature or contain political messages, including advertisements involving political figures or candidates for public office, advertisements involving political parties or political affiliations, and/or advertisements involving an issue reasonably deemed by COLTS to be political in nature in that it directly or indirectly implicates the action, inaction, prospective action, or policies of a governmental entity.
- that promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures, religious text or texts involving religious beliefs or lack of religious beliefs; or are otherwise religious in nature.

Ex. N (emphasis in original).

64. COLTS specifically sought to preclude issues that are “political or religious in nature” because politics and religion are topics that people “feel

strongly about[.]” Ex. C at 32:13-22 (“Ads that are religious in nature can cause heated debates and heated arguments on either side. Political ads, religious ads, you know, people feel strongly about their religion or that they don’t believe or certain political candidates, and those are the topics – you never want to talk about religion or politics. Those are the things that cause people to feel strongly one way or another.”).

65. Likewise, COLTS prohibited advertisements for firearms “because people have strong opinions about guns frankly.” Ex. C at 37:15-18.

66. The 2013 Policy states that “[a]ll third party advertisements appearing on COLTS property must contain the following disclaimer: ‘The views and/or opinions expressed by the advertiser are not necessarily those of COLTS.’ The disclaimer shall appear in a consistent form and manner on all third party advertisements.” Ex. N.

**IN JULY 2014, COLTS DENIED THE NEPA FREETHOUGHT SOCIETY’S
THIRD ADVERTISEMENT PROPOSAL IN JULY 2014**

67. On July 21, 2014, the NEPA Freethought Society submitted a new advertisement proposal to COLTS (attached as Ex. O), that stated:

Atheists.
NEPA Freethought Society
meetup.com/nepafreethoughtsociety

Ex. O.

68. That same day, COLTS sent Mr. Vacula a letter denying the NEPA Freethought Society's advertisement proposal. Letter to Mr. Vacula from Gretchen M. Wintermantel, Communications Director and Right-to-Know Officer, COLTS (July 21, 2014) (attached as Ex. P).

69. The denial letter cited the 2013 Policy's prohibition on "religious" advertisement, noting that:

COLTS does not accept advertisements 'that promote the existence or non-existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religions, religious beliefs or lack of religious beliefs; that directly quote or cite scriptures; religious text or texts involving religious beliefs or lack of religious beliefs; or are otherwise religious in nature.

Ex. P.

70. COLTS clarified at deposition that the NEPA Freethought Society's proposed "Atheists" advertisement was not viewed as criticizing or attacking a religion, religious beliefs or lack of religious beliefs; rather, the denial was based on the fact that the proposed advertisement addressed the non-existence of a deity and involved a lack of religious beliefs. Ex. C. at 100:1-11.

71. The letter also stated that:

. . . it is COLTS' declared intent . . . not to allow its transit vehicles or property to become a public forum for the dissemination, debate, or discussion of public issues or issues that are political or religious in nature. The existence or non-existence of a supreme deity is a public

issue. Your proposed ad violates COLTS' advertising policy and COLTS has decided not to display it. It is COLTS' goal to provide a safe and welcoming environment on its buses for the public at large. The acceptance of ads that promote debate over public issues such as abortion, gun control or the existence of God in a confined space like the inside of a bus detracts from this goal.

Ex. P.

72. It was COLTS' position that the word "Atheists" on the advertisement would "promote debate over a public issue," and thus violated COLTS' advertising policy. Accordingly, COLTS rejected the NEPA Freethought Society's advertisement proposal. Ex. C at 104:8-16; *see also id.* at 103:23-104:1 ("again, we decided it was in violation of our policy creating a public forum for debate").

**IN JULY 2014, COLTS ACCEPTED A VERSION OF THE NEPA
FREETHOUGHT SOCIETY'S ADVERTISEMENT THAT OMITTED THE
WORD "ATHEISTS"**

73. On July 21, 2014, the same day that COLTS rejected the NEPA Freethought Society's third advertisement proposal, Mr. Vacula submitted an additional advertisement proposal. *See* Email from Justin Vacula to Gretchen Wintermantel (July 21, 2014, 7:01 AM) (attached as Ex. Q).

74. The NEPA Freethought Society's fourth advertisement proposal was identical to the advertisement proposal rejected earlier that day,

except that it did not include the word “Atheists.” Rather, it only contained the following text:

NEPA Freethought Society
meetup.com/nepafreethoughtsociety

Ex. Q.

75. On July 22, 2014, Ms. Wintermantel sent an email to Mr. Vacula agreeing to run the NEPA Freethought Society’s proposed advertisement.

Ex. Q; *see also* Ex. C at 105:1-8.

76. COLTS agreed to run the NEPA Freethought Society’s fourth advertisement proposal “because the word atheist had been taken out and on its face it did not violate our policy.” Ex. C at 105:9-11.

77. The NEPA Freethought Society’s fourth advertisement proposal was displayed on the outside of a COLTS bus in October or November of 2014. Ex. C at 106:11-19.

78. COLTS did not receive any complaints about the advertisement or reports of passengers debating the NEPA Freethought Society’s advertisement on COLTS’ buses. Ex. C at 106:11-107:17; Ex. D at 90:17-91:5.

**THE IMPLEMENTATION OF COLTS’ 2011 POLICY AND 2013 POLICY
CLARIFICATION HAS LED TO ARBITRARY OUTCOMES**

79. Since 2011, the implementation of COLTS’ advertising policies has led to many arbitrary outcomes. *See infra* ¶¶ 80-94.

Advertisements Likely to Spark Debate

80. In April 2012, COLTS displayed an advertisement for “National Infant Immunization Week” on its buses. The advertisement (attached as Ex. R) contained a picture of a baby and text that said “Love Them, Protect Them, Immunize Them.” Ex. R. COLTS interpreted this advertisement as an advertisement “encouraging people to vaccinate their children.” Ex. C at 117:12-17.

81. COLTS has testified that if the same “National Infant Immunization Week” advertisement were proposed today, COLTS would reject it as too controversial. Ex. C 118:24-119:24. COLTS’ changed view about whether the advertisement is prohibited or not stems from the fact that COLTS officials are now aware, from “[f]riends with kids, and news, media,” that “there is a significant difference of opinion among people concerning whether or not immunizations of children are good or bad,” but in 2012, were unaware “of the large debate concerning immunization in this country.” Ex. C at 118:21-119:11.

82. COLTS is unaware of any debates among its bus riders related to the “National Infant Immunization Week” advertisement. Ex. C at 120:3-6, 121:14-19.

Religious or Atheist Advertisements

83. In 2011, COLTS buses displayed an advertisement from the Diocese of Scranton's "Adoption for Life" campaign that said "Consider Adoption . . . It Works!" *See* Ex. S (photograph of a COLTS bus displaying the advertisement as well as invoices sent to the Diocese of Scranton to pay for the advertisement).

84. COLTS does not believe that a Catholic religious organization's pro-adoption advertisement could be construed as an "anti-abortion ad" and Ms. Wintermantel maintains that if such an advertisement were proposed today, she would "recommend under the 2013 Policy that this ad be run." Ex. C at 123:1-13.

85. COLTS testified that it does not matter to COLTS whether the pro-adoption advertisement was paid for by a religious organization (or whether the content of the religious advertiser's website might offend anyone), even though COLTS believes that religion is an inherently controversial issue. *See* Ex. C at 123:19-124:4.

86. In February 2014, however, COLTS rejected advertisement proposals submitted by Lutheran Home Care & Hospice, Inc. advertising home health care and hospice services "because of the cross in the logo and the word Lutheran." Ex. C at 141:19-142:6; *see also* Ex. T (copies of the proposed advertisements submitted by Lutheran Home Care & Hospice, Inc.).

87. COLTS believes that there “could have been” debates aboard COLTS buses as a result of the Lutheran Home Care & Hospice advertisement if COLTS had run the advertisement. Ex. C at 142:18-23.

88. COLTS also testified that under the 2013 Policy, COLTS would reject an advertisement, which it previously ran, for “St. Stanislaus Polish Food Festival” that contained a reference to “St. Stanislaus Elementary School,” a parochial school, because it was “religious in nature and could possibly cause debate.” Ex. C at 126:1-25, 127:9-12.

Political Advertisements

89. COLTS claims that the campaign advertisements that it previously ran for school board candidate (and current Lackawanna County Commissioner) Patrick O’Malley would not be permitted under the 2013 Policy’s prohibition on “political” advertisements. Ex. C at 110:4-111:14.

90. Every year since 2013, however, COLTS has agreed to display advertisements on its buses paid for by Commissioner Patrick O’Malley for “Patrick O’Malley’s . . . Annual Free Children’s Halloween Party” because the advertisements did not mention Commissioner O’Malley’s elected position or candidacy (only his name), and because COLTS believes that a Halloween party paid for and thrown by an elected official less than one month before election day

has “no relation to politics[.]”. Ex. C at 112:20-117:3, 124:15-19; *see also* Ex. U (photograph of one O’Malley Halloween Party advertisement).

91. And despite the 2013 Policy’s statement that all advertisements must contain a disclaimer that “the views and/or opinions expressed by the advertiser are not necessarily those of COLTS,” the advertisement for Commissioner O’Malley’s Halloween party that ran on COLTS buses in 2013 did not contain any disclaimer. Ex. C at 116:2-10; *see also* Ex. U.

Alcohol Advertisements

92. At the time the 2011 Policy was enacted, COLTS was running an advertisement for a beer distributor called “Brewers Outlet.” Ex. C at 56:1-25.

93. Despite the 2011 Policy’s ban on advertisements for alcohol, COLTS continued to run advertisements for Brewer’s Outlet until its contract expired in April 2012 because “[Brewer’s Outlet sell[s] other things besides beer. They sell snacks, they sell lottery tickets, soda, hoagies, things like that.” Ex. C at 56:15-24.

94. However, one month later, in May 2012, COLTS rejected a facially unobjectionable advertisement for the “Wilkes-Barre Scranton Night Out” based on the fact that the website listed on the proposed advertisement contained advertisements for bars. Ex. C at 54:7-12.

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