UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE CENTER FOR INVESTIGATIVE REPORTING, Plaintiff, v. SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, Defendant.	Civ. No. 18-01839-MMB

THE SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S POST-HEARING MEMORANDUM IN OPPOSITION TO THE CENTER FOR INVESTIGATIVE REPORTING'S MOTION FOR INJUNCTION

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Pursuant to the Court's direction at the preliminary injunction hearing and the Order dated September 14, 2018 (ECF No. 26), Southeastern Pennsylvania Transportation Authority ("SEPTA"), the Defendant, respectfully submits this amended brief in opposition to Plaintiff the Center for Investigative Reporting's ("CIR" or "Plaintiff") motion for a preliminary injunction. In addition, SEPTA, pursuant to paragraph 2 of the Court's Order, SEPTA attaches as Exhibit A a letter sent to CIR's counsel John Stapleton setting forth SEPTA's substantive response to SEPTA's second proposed ad (Ex. 83).[1]

I. SCREENS IN SEPTA BUSES DO NOT DISPLAY PROHIBITED CONTENT.

Approximately 192 of SEPTA's 1,455 buses (Benedetti Dep. 136: 11) are recently-purchased "New Flyer" model buses that, unlike the other buses, feature a digital screen that shows advertisements. (*Id.* at 136:14, 18-20.)

Mr. Benedetti, who in preparing for his deposition spoke with three employees of Intersection, the company that manages SEPTA's advertising (Benedetti Dep. 13:16-24; 20:14-20), explained that the digital screens on SEPTA's system are managed by Intersection. Intersection has a subscription with another company, Screenfeed, to provide digital content and information. (*Id.* at 30:20-31:13.) That information, which includes sports, entertainment, and news information consisting of headlines from Reuters and the Associated press (30:21-24; 31:3-5), can be transmitted onto digital screens managed by Intersection (31:6-9), including some of the screens on SEPTA's system (31:12). This information can be displayed in either 90-second or 180-second loops. (31:18-19.) In the past, some of this information, the text of news

[1] Citations to exhibits herein refer to those attached to the declarations submitted with the parties' briefing on the preliminary injunction motion (ECF Nos. 20-3 and 21-1).

headlines, was included in the displays on screens in SEPTA's New Flyer buses. Benedetti Dep. 135:23-136:4.[2]

As of September 21, 2018, SEPTA has directed Intersection to terminate the newsfeeds on the SEPTA buses as soon as possible. SEPTA understands this will take effect within 2 to 3 business days. *See Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015) (revision of its regulations to prohibit the display of all political advertisements rendered the preliminary injunction moot), *aff'd*, 815 F.3d 105 (2d Cir. 2016).

II. THIS COURT SHOULD NOT INFER THAT *MANSKY* OVERRULED *LEHMAN*.

SEPTA argued in the September 14 hearing that the recent *Minnesota Voters Alliance v. Mansky* decision, 138 S. Ct. 1876 (2018) did not upset settled law as set forth in *Lehman v.City of Shaker Heights*, 418 U.S. 298 (1974). Support for that proposition follows here.

It is a settled principle of law that the lower courts "remain bound by extant Supreme Court precedent directly on point even if its reasoning has been called into question by other Supreme Court decisions." *Virgin Islands v. Lettsome*, 680 Fed. App'x 88, 92 (3d Cir. 2017). "Lower courts should follow the case which directly controls, leaving this court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 20, 207 (1997); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998); *United States v. Hatter*, 532 U.S. 557, 567 (2001); *In re Horizon Healthcare*, 846 F.3d 625, 638 (3d Cir. 2017); *Herron v. Governor of Pennsylvania*, 564 Fed. App'x 647, 648-49 (3d Cir. 2014).

CIR, which largely ignored *Lehman* before the September 14 hearing argues that case does not extend to the range of political issues before the court. CIR does not distinguish the

[2] CIR has pointed to photographs of a digital display on a SEPTA train showing a display of Screenfeed news information. *See* Ex. 28; Benedetti Dep. 35:13-17; 22-24. The display of newsfeed information on the New Flyer SEPTA buses was different from the train display in Exhibit 28, and included only text, not photographs. Benedetti Dep. 135:23-136:4.

many cases that apply *Lehman* to situations remarkably close to this one. CIR's attempt to limit the holding in Lehman based on one appellate decision in this Circuit, is not consistent with a wider reading of the decisions of that Court. The Third Circuit has not taken up *Lehman* directly, but its commentary is not contrary to SEPTA's reading of that case and, as a whole, is very supportive. In *Gregiore v. Centennial School Dist*, for example, that court wrote:

> Just as this case is not *Student Coalition for Peace*, it is not, as the dissent argues, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974), nor does *Lehman* undermine our conclusions regarding the forum here. The Court's decision in *Lehman* supports the proposition that the nature of the property and its compatibility with expressive activity are important in determining intent. *Lehman* had little to do with the different types of speech allowed but everything to do with the nature of the property. The Court in *Lehman* found that the city, rather than creating a public forum, was engaged in commerce and the restriction on political advertising was incidental to that effort. . . . The rationale underlying the decision in *Lehman* does not, in our view, extend to this case.

Gregiore v. Centennial School Dist., 907 F.2d 1366, 1377 n.9 (3d Cir. 1990). Similarly, in *Christ's Bride*, the Third Circuit wrote:

> The Court thus reasoned that, in order to maximize commercial revenue and eliminate concerns about political favoritism, the city could restrict the car card space to exclude political advertisement.

Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 256 (3d Cir. 1998). Earlier, in *Students Coalition for Peace*, the Third Circuit explained:

> Here, the district court found that the Board's denial of access to appellants was based on a desire "to keep the 'podium of politics off school grounds.'" The President of the Board testified that "[w]e don't want to become embroiled in political matters or have our facilities turn into political battlegrounds." This desire to avoid potentially disruptive political controversy and to maintain the appearance of neutrality, *see Lehman v. City of Shaker Heights*, 418 U.S. 298, 304, 94 S.Ct. 2714, 2717, 41 L.Ed.2d 770 (1974), is sufficient justification for excluding speakers from a nonpublic

> forum. Although the Board's fears might have been unfounded, "the Government need not wait until havoc is wreaked to restrict access to a nonpublic forum." *Cornelius*, 105 S.Ct. at 3453.

Student Coalition for Peace v. Lower Merion School Dist. Bd. of School Directors, 776 F.2d 431, 437 (3d Cir. 1985). More recently, the Third Circuit cited Lehman in *NAACP v. City of Phila*, observing that:

> many courts that have considered similar dilemmas have found prohibitions on public transit like the one here reasonable attempts to keep the peace. *See, e.g.*, *Lehman*, 418 U.S. at 304, 94 S.Ct. 2714 (plurality opinion) (upholding a ban on noncommercial speech, in part, to avoid subjecting bus passengers and others to controversial messages).

NAACP v. City of Phila., 834 F.3d 435, 454 (3d Cir. 2016); *see id.* at 456 (describing Lehman as "upholding a regulation that banned political and issue-based advertising"). There is no reason to think that a decision in this Circuit will be at odds with others.

III. THE BANK ADS DO NOT TAKE A POSITION IN THE REDLINING DEBATE.

The Court has inquired as to the import of bank advertisements that include nondiscriminatory Equal Housing logos or equivalent text. The logos and/or text are required by federal agencies that regulate bank activity and are intended to insure the bank's *advertisements* are nondiscriminatory, as the example below shows.

> **§ 338.1 Purpose.**
>
> The purpose of this subpart A is to prohibit insured state nonmember banks from engaging in ***discriminatory advertising*** with regard to residential real estate-related transactions. . . .
>
> **§ 338.3 Nondiscriminatory advertising.**
>
> (a) Any bank which directly or through third parties engages in any form of advertising of any loan for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling or any loan secured by a dwelling shall prominently indicate in such advertisement, in a manner appropriate to the advertising medium

> and format utilized, that the bank makes such loans without regard to race, color, religion, national origin, sex, handicap, or familial status.
>
> (1) With respect to written and visual advertisements, this requirement may be satisfied by including in the advertisement a copy of the logotype with the Equal Housing Lender legend contained in the Equal Housing Lender poster prescribed in § 338.4(b) of the FDIC's regulations. . . .

12 C.F.R. § 338 (emphasis added). The logo and text ensure nondiscriminatory advertising, nothing more. *Sundae v. Anderson*, Civ. No. 02-855, 2003 WL 24014341, at *6 (D. Minn. 2003) (limiting required representation to its statutory purpose).

The bank ads each take a position that SEPTA bus riders should use the bank that is running the ad, not—as with the CIR ad—a position on alleged discrimination or redlining in the banking industry.

IV. SEPTA DOES NOT CONSIDER WHETHER ADS ARE "CONTROVERSIAL."

CIR's suggestion during argument that the Sixth Circuit *SMART* decision teaches that the reference to "public debate" in SEPTA's 9(b) Advertising Standard is constitutionally infirm. The Sixth Circuit specifically "found unbridled discretion had been vested in the decisionmakers because there was no articulated definitive standard to determine what was "controversial." *American Freedom Defense Initiative v. Suburban Mobility Authority for Regional Transp. (SMART)*, 698 F.3d 885, 894 (6th Cir. 2012). SEPTA doesn't use the term "controversial" and disagrees that "public debate" means the same thing. "Controversial" means "a prolonged public dispute, debate, or contention; disputation concerning a matter of opinion." https://protect-us.mimecast.com/s/jBisCPNMKji40By3IzWBc6?domain=dictionary.com. An ad covered by Standard 9(b) may or may not be controversial, but it is not subject to the same difficulties of definition.

CONCLUSION

For the reasons set forth above and in SEPTA's prior memorandum in opposition to CIR's motion for a preliminary injunction and the reasons presented by SEPTA during the preliminary injunction hearing, CIR's request for an injunction be denied with prejudice and that the case be dismissed, with judgment entered in favor of SEPTA.

Respectfully submitted,

Dated: September 21, 2018

/s/ Maryellen Madden

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CERTIFICATE OF SERVICE

I certify that on September 21, 2018, true and correct copies of the foregoing document were served upon the individuals listed below via ECF:

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