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

NORTHEASTERN PENNSYLVANIA FREETHOUGHT SOCIETY,	:	CIVIL ACTION - LAW
Plaintiff	:	JURY TRIAL DEMANDED
	:	ELECTRONICALLY FILED
vs.	:	
COUNTY OF LACKAWANNA TRANSIT SYSTEM	:	3:15-CV-00833
Defendant	:	

BRIEF IN SUPPORT OF MOTION TO DISMISS

I. FACTS AND PROCEDURAL HISTORY

Plaintiff filed a Complaint on April 28, 2015. A copy of the Complaint is attached hereto as Exhibit "A'. Plaintiff brings this action as a facial challenge to COLTS' advertising policies and the challenge to the policies as applied to NEPA Freethought. Id. at 2. Plaintiff alleges that COLTS has a longstanding policy of leasing advertising space on its vehicles, route schedules, literature, bus shelters, and other property. Id. at 8. The Complaint further alleges that in February, 2012, COLTS rejected their request for ad stating "Atheist. NEPA Freethought.org" as they believed it may spark public debate and attacked religion. Id. at 11-12. On August 29, 2013, Plaintiff again submitted an advertisement. Id. at 19. That advertisement was rejected on September 9, 2013.

On September 17, 2013, COLTS adopted a new advertising policy which is attached to the Complaint as Exhibit "F". Id. at 21. The policy indicates, in pertinent part, that it is COLTS intent to maintain its advertising space on its property as a nonpublic forum and not to allow its transit vehicles of property to become a public forum for the dissemination, debate, or discussion of public issues or issues that are political or religious in nature." Id. at 23.

On July 21, 2014, Plaintiff submitted a new ad which was nearly identical to those previously rejected. Id. at 26. That ad was rejected pursuant to the 2013 policy. Id. at 27. On July 21, 2014, Plaintiff submitted a new ad which stated only "NEPA Freethought Society. Meetup.com/NEPA Freethought Society." Id. at 29. That ad was accepted for publication on July 21, 2014 and began to run in October 2014. Id. at 29.

Count I of the Complaint alleges First Amendment violations pursuant to 42 U.S.C. §1983. Plaintiff alleges that COLTS advertising policy violates the First Amendment of the United States Constitution. Id. at 34. Plaintiff alleges that the refusal to run the ad with the word Atheist in it is an impermissible content and viewpoint based restriction on their rights under the free speech clause of the First Amendment. Id. at 42. They seek declaration that the rejection violates the First Amendment, declaration that the policy violates the First Amendment, an injunction, and costs and fees.

II. ISSUES PRESENTED

Should the Court Dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted?

Suggested Answer: Yes.

III. LAW AND ARGUMENT

Motion to Dismiss Standard

Pursuant to Fed. R.C.P. 12(b)(6), a court may dismiss a Complaint for failure to state a cause of action. If a Plaintiff has not plead "enough facts to state a claim to relief that is plausible on its face", dismissal is appropriate. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The purpose of a 12(b)(6) motion is to test the legal sufficiency of the complaint and to "streamline litigation by dispensing with needless discovery and fact finding." Neitzke v. Williams, 490 U.S. 319, 326-27 (1989); Holder v. City of Allentown, 987 F.2d 188, 194 (3rd Cir. 1993). Mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." Fowler v. UPMC Shadyside, 578 F.3d 203, 211. Instead, a complaint must "show" this entitlement by alleging sufficient facts. Id.

A. Plaintiff's Complaint must be dismissed as they have failed to allege a First Amendment Violation

i. COLTS' advertising spaces are a nonpublic forum

The government may, as a general rule, limit speech that takes place on its own property without running afoul of the First Amendment. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). Where, however, the property in question is either a traditional public forum or a forum designated as public by the government, the government's ability to limit speech is impinged upon by the First Amendment. Perry, 460 U.S. at 45-46. Specifically, transit bus advertisement is considered a nontraditional forum subject to a lighter standard. In either a traditional or a designated public forum, the government's content-based restrictions on private speech must survive strict scrutiny to pass constitutional muster. Id.; International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678, 120 L. Ed. 2d 541, 112 S. Ct. 2701 (1992).

The government has, however, a far broader license to curtail speech if the forum has not been opened to the type of expression in question. In such a case, the government's restrictions need only be viewpoint neutral and "reasonable in light of the purpose served by the forum." Rosenberger v. Rector and Visitors of the

Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510, 2516-2517, 132 L. Ed. 2d 700 (1995) (*quoting* Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 806, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985)); Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1262 (3d Cir. 1992).

In order to decide whether a public forum is involved here, we must first determine the nature of the property and the extent of its use for speech. As the Court noted in Pittsburgh League of Young Voters Education Fund v. Port Authority of Allegheny County, 653 F.3d 290 (3d Cir 2011):

> The government does not have "to grant access to all who wish to exercise their right to free speech on every type of [public] property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 799-800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). The Supreme Court has developed a forum analysis to determine when the government's interest in limiting the use of its property outweighs the interest of those wishing to use the property as a place for expressive activity. Id.
>
> There are three types of fora. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2984 n.11, 177 L. Ed. 2d 838 (2010). On one end of the spectrum lie traditional public fora. These fora, of which public streets and parks are examples, "'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)). In traditional public fora, content-

> based restrictions on speech are subject to strict scrutiny (i.e., the restrictions must be narrowly tailored to serve a compelling governmental interest). Id. Next are designated public fora. These fora consist of public property "that has not traditionally been regarded as a public forum" but that the government has intentionally opened up for use by the public as a place for expressive activity. Pleasant Grove City v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 1132, 172 L. Ed. 2d 853 (2009). As is the case in traditional public fora, content-based restrictions are subject to strict scrutiny in designated public fora. Perry, 460 U.S. at 45. Finally, public property that "is not by tradition or designation a forum for public communication" constitutes a nonpublic forum. Id. at 46. Access to a nonpublic forum can be restricted so long as the restrictions are reasonable and viewpoint neutral. Cornelius, 473 U.S. at 800.

The forum at issue here is COLTS advertising space on its buses, literature and stops. *See* Airline Pilots Assoc. v. Dept. of Aviation of the City of Chicago, 45 F.3d 1144, 1151 (7th Cir. 1995) (holding that display diorama in airport, not entire concourse, constituted relevant forum); Lebron v. Nat'l. R.R. Passenger Corp., 69 F.3d 650, 655-656 (holding that one billboard was the relevant forum, not the entire Penn Station).

Clearly, the advertising space on COLTS buses and stops do not constitute a "traditional" public forum. Traditional public forums include public streets, parks, and other public areas traditionally devoted to assembly and debate. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677, 118 S.Ct. 1633, 1641, 140 L. Ed. 2d 875 (1998).

The facts also fail to establish that COLTS created a designated public forum. A party creates a designated public forum when it intentionally designates property that traditionally has not been regarded as a public forum for use as a public forum. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez, 130 S.Ct. 2971, 2984 n.11, 177 L. Ed. 2d 838 (2010). The question is whether COLTS has created a designated public forum by "expressly" dedicating its advertising space to "speech activity." U.S. v. Kokinda, 497 U.S. 720, 726-727, 111 L. Ed. 2d 571, 110 S. Ct. 3115 (1990) (plurality opinion). A designated public forum is created because the government so intends. Inaction does not make such a forum; neither does the allowance of "limited discourse." Cornelius, 473 U.S. at 802. The Court must look to the COLTS' intent with regard to the forum in question and ask whether they clearly and deliberately opened its advertising space to the public. Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 269- 270, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988); Perry, 460 U.S. at 37.

To gauge COLTS' intent, the Court must examine its policies and practices in using the space and also the nature of the property and its compatibility with expressive activity. Gregoire v. Centennial School District, 907 F.2d 1366, 1371 (3d Cir. 1990) (citing Cornelius, 473 U.S. at 802); Brody v. Spang, 957 F.2d 1108, 1117 (3d Cir. 1992). Courts must rely on several factors to gauge the government's intent. Cornelius, 473 U.S. at 802. They look first to the terms of any policy the

government has adopted to govern access to the forum. Id. If the government requires speakers seeking access to obtain permission, under pre-established guidelines that impose speaker-based or subject-matter limitations, the government generally intends to create a limited, rather than a designated, public forum. Forbes, 523 U.S. at 679-80; Cornelius, 473 U.S. at 804; Perry, 460 U.S. at 47. Granting selective access in that fashion negates any suggestion that the government intends to open its property to the "indiscriminate use by all or part of the general public" necessary to create a designated public forum. Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1050 (9th Cir. 2003) (per curiam); *see also* Forbes, 523 U.S. at 679; Perry, 460 U.S. at 47.

The policy here is very specific and has been drafted with a clear intent. COLTS' prior policy provided that "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." *See* Complaint at 13. That intent was reiterated by COLTS' solicitor in March of 2012. Id. at 14. On September 17, 2013, COLTS adopted a new advertising policy. Id. at 21-22; Exhibit F to the Complaint. The Policy again indicates that "It is COLTS' declared intent to maintain its advertising space on its property as a nonpublic forum and not to allow transit vehicles or property to become a public forum for the dissemination, debate, or discussion of public issues that are political or religious in nature. " Id. Since the adoption of

the new policy on September 17, 2013, no ads have been permitted with regard to the exist or non-existence of god. In fact, Plaintiff has not made any allegation that such ads have ever been run on COLTS advertising space.

At best, the allegations of the Plaintiff establish only that COLTS intended to create a non public forum or limited public forum, open only to certain kinds of expression. See, e.g., Kreimer, 958 F.2d at 1261 (public library constituted a limited public forum for "reading, writing and quiet contemplation," but not for "oral and interactive" First Amendment activities); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995) (student activities fund, available to student groups meeting certain criteria, constituted limited public forum); See also, Ridley v. Massachusetts Bay Transportation Authority, 390 F.3d 65 (1st Cir. 2004) (an entity that allowed a wider range of speech than was permitted in Lehman is not automatically stripped of its ability to adopt other viewpoint-neutral criteria for selecting content that reasonably served the agency's overriding commercial purpose); *See also*, Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489 (9th Cir. 2015)(the fact that a transit system runs some controversial ads does not mean that its advertising program becomes a designated public forum).

The Supreme Court has used the term "limited public forum" interchangeably with "nonpublic forum," thus suggesting that these categories of

forums are the same. *See* Martinez, 130 S.Ct. at 2985 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49, 103 S.Ct. 948, 957, 74 L. Ed. 2d 794 (1983)); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106, 121 S.Ct. 2093, 2100, 150 L. Ed. 2d 151 (2001). The First Amendment prohibits restrictions based on a speaker's viewpoint in both types of forums. Id. In contrast to traditional and designated public forums, a governmental entity creates a limited public forum when it provides for "a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." Id.; Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 225 (3d Cir. 2003).

Herein, the facts alleged by Plaintiff can only establish a non public or limited public forum not that any type of discrimination occurred. Clearly, the COLTS advertising space is not a traditional public forum. Furthermore, Plaintiff has failed to allege sufficient facts to establish that the spaces are a dedicated public forum. As the Complaint makes clear, it was COLTS intention not to allow ads promoting or attacking religion. *See* Complaint at 14-15. The allegation that churches and other groups ran advertisements is not dispositive of the issue. *See* Complaint at 16. As Plaintiff's Complaint concedes, it was not prohibited from advertising the name of its organization and its website address. *See* Complaint at 29. The allegations of Plaintiff's Complaint fail to establish that COLTS ever accepted an advertisement promoting or attacking any religion. *See* Complaint

generally. As such, the COLTS advertising spaces must be treated as a non public or limited public forum.

ii. The restrictions placed upon COLTS advertising space are viewpoint-neutral and reasonable in light of the purpose served by the forum

COLTS Advertising Policy provides that "COLTS has decided to sell space for advertising on its vehicles, route schedules and other literature, bus shelters or other property, for the sole purpose of generating revenue for COLTS while at the same time maintaining or increasing its ridership." *See* Exhibit F to the Complaint. The Policy also provides that "It is COLTS' declared intent to maintain its advertising space on its property as a nonpublic forum and not to allow transit vehicles or property to become a public forum for the dissemination, debate, or discussion of public issues that are political or religious in nature. " Id.

In Eichenlaub v. Township of Indiana, 385 F.3d 274 (3d Cir. 2004), the Court addressed restrictions on speech in a limited public forum. There we held that the citizens' forum portion of the Indiana Township Board of Supervisors meeting was a limited public forum because "public bodies may confine their meetings to specified subject matter . . . matters presented at a citizen's forum may be limited to issues germane to town government." Id. at 281 (citations and internal quotation marks omitted). In limited public forums, to avoid infringing on First Amendment rights, the governmental regulation of speech only need be

viewpoint-neutral and "reasonable in light of the purpose served by the forum[.]" Good News Club v. Milford Cent. Sch., 533 U.S. 98, 107, 121 S.Ct. 2093, 2100, 150 L. Ed. 2d 151 (2001) (citation and internal quotation marks omitted).

In a limited public forum "content-based restraints are permitted, so long as they are designed to confine the forum to the limited and legitimate purposes for which it was created." Eichenlaub, 385 F.3d at 280 (internal quotation marks and citation omitted). The government may not "regulat[e] speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829, 115 S.Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995). The government, however, may restrict the time, place and manner of speech, as long as those restrictions are reasonable and serve the purpose for which the government created the limited public forum. Pleasant Grove, 129 S.Ct. at 1132.

In Lehman v. City of Shaker Heights, 418 U.S. 298, 41 L. Ed. 2d 770, 94 S. Ct. 2714 (1974), the Court addressed a similar issue. In Lehman, the city imposed a ban on political advertisements in buses, but allowed other types of advertisements, including commercial and public service ads. A candidate for public office challenged this policy as a First Amendment violation, and the Court responded as follows:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the

> city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility "will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety." Public Utilities Comm'n v. Pollak, 343 U.S. [451,] 464-65 [(1952)].
>
> Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. . . . Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. . . . No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

Lehman, 418 U.S. at 303-04 (plurality opinion). Likewise, COLTS has similar goals for its advertisement spaces – revenue, not debate forms the basis for the advertisement.

The allegations of the complaint establish that the restrictions of the COLTS policy are both content-neutral and reasonable in light of the forum. COLTS will not accept advertising "that promote the existence or non existence of a supreme deity, deities, being or beings; that address, promote, criticize or attack a religion or religious beliefs or lack of religious beliefs." *See* Exhibit F to the Complaint. It was also COLTS intent not to make their property "a public forum for the dissemination, debate, or discussion of public issues or issues that are political or religious in nature." Id.

This is clearly not a viewpoint restriction. A viewpoint restriction "targets not subject matter, but particular views taken by speakers on a subject." Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *See* Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). COLTS policy placed no such restrictions on speech.

These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation. In a case involving a school district's provision of school facilities for private uses, the Supreme Court declared that "there is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 390, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993). The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. See, e. g., Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); Perry Ed. Assn., supra, at 49. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. *See* Perry Ed. Assn., supra, at 46. In other words, if the government allows speech on a certain subject in any forum, it must accept all viewpoints on the subject, even those that it disfavors or finds unpopular.

Pittsburgh League of Young Voters Educ., 653 F.3d at 296. The COLTS policy clearly precludes speech regarding the existence or non-existence of a supreme deity or deities, as well as advertising promoting or attacking a religion. Because it precludes all advertisements, regardless of their viewpoint on the issue, it is viewpoint neutral.

The restriction is also reasonable. It must be "reasonable in light of the purpose served by the forum." Cornelius, 473 U.S. at 806. This requirement focuses on whether the exclusion is consistent with "limiting [the] forum to activities compatible with the intended purpose of the property." Perry, 460 U.S. at 49. The intended purpose of the property at issue here, buses, stops and literature, is to provide safe and reliable public transportation. It is COLTS intent to not allow its property to become a forum for debate on political or religious issues. It is also their goal to "a safe and welcoming environment on its buses for the public at large." *See* Exhibit H and E to the Complaint. Any speech that will foreseeably result in harm to, disruption of, or interference with the transportation system is, by definition, incompatible with the buses' intended purpose. *See* Children of the Rosary v. City of Phoenix, 154 F.3d 972, 979 (9th Cir. 1998). Restrictions on speech that will foreseeably disrupt the intended function of government property have generally been held reasonable in limited public forums.

See United States v. Kokinda, 497 U.S. 720, 732—33, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (plurality opinion); Perry, 460 U.S. at 51—52 & n.12.

The COLTS policy is both content-neutral and reasonable in light of the forum. The allegations of the Complaint fail to establish otherwise. As such, Plaintiff's Complaint must be dismissed with prejudice.

MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

By:_____

William J. McPartland, Esquire
Attorney I.D. No: PA 94214
P.O. Box 3118
Scranton, PA 18505-3118
(570) 496-4600

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L.R. 7.8(b) CERTIFICATE

This brief complies with the Local Rule 7.8(b) The brief contains 4,189 words.

MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

By:_____
William J. McPartland, Esquire
Attorney ID. No: PA 94214
P.O. Box 3118
Scranton, PA 18505-3118
(570) 496-4600

LEGAL/100618379.v1