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*ADMITTED IN DC ONLY

May 19, 2015

Re: Last Chance for Animals - MTA

Dear Mr. Rosen:

I write on behalf of our client, Last Chance for Animals ("LCA"), a national, nonprofit animal advocacy organization focused on investigating, exposing, and ending animal exploitation. The purpose of the letter is to bring to your attention ongoing conduct of the MTA that impermissibly impairs the rights of our client and is in egregious violation of the First Amendment to the United States Constitution.

In February 2015, LCA entered into a contract with Outfront Media, MTA's agent, to place advertisements on an outdoor advertising display owned by the MTA in lower Manhattan. In essence, LCA leased the space for a three-month period to begin on April 6, 2015 and end on June 28, 2015 with the right to change copy at any time throughout that period upon payment of a small reinstallation fee. As required, LCA paid the entire balance due under the contract in advance and has otherwise performed all of its obligations under the contract.

LCA intended to present a three-part series of advertisements exposing the serious safety risks that are presented by the City's tolerance of the use of horse-drawn carriages on the streets of New York. The first such ad was submitted by LCA to Outfront Media for its approval in March of this year. The ad was approved and was installed at the space in early April.

On April 30th, LCA provided a copy of its second planned ad to Outfront Media. The text of the ad, displayed against the backdrop of a tragic collision between a car and a horse-drawn carriage, reads: "79 Traffic Incidents. 20 People Injured. 12 Horses Killed. HOW MANY **MORE?**" (A copy of the ad is attached to this letter.) On May 4th, Outfront Media advised LCA that "under new MTA guidelines we cannot accept copy changes. In fact, for the moment we are unable to take any PSA related advertisers." The change in position was attributed to the MTA's

having recently lost a lawsuit, presumably a reference to the ruling by Judge Koeltl of the United States District Court for the Southern District of New York, that MTA had acted in violation of the First Amendment for refusing to accept an advertisement because of its content.[1]

Under the terms of both MTA's old and new guidelines, Outfront Media was not permitted to decline advertising content without the consent of the MTA. We therefore presume that the decision to reject LCA's second ad was made by the MTA.

On May 5th, Chris DeRose, LCA's President and Founder, wrote to Carmen Bianco, the President of MTA New York City Transit challenging the MTA's decision to reject the ad. Mr. DeRose has not received the courtesy of a response to his letter.

I am therefore writing to you on behalf of LCA formally requesting that the MTA reconsider the decision to reject LCA's ad copy. As shown below, whether the ad is evaluated under the guidelines in effect at the time the contract was formed or under the terms of the new guidelines the MTA adopted after Judge Koeltl's ruling, the ad is permissible and cannot be banned consistent with LCA's rights guaranteed by the First Amendment.

The Guidelines in Effect on Formation of the Contract

There can be no dispute that LCA's rejected ad is speech protected by the First Amendment. There can also be no dispute, and Judge Koeltl's opinion confirms, that under the guidelines in effect when LCA entered its contract to display its ads, the rejected ad is entirely permissible. No exception even conceivably applies to justify rejection of the new copy. *See* Advertising Standards for Licensed Properties of the Metropolitan Transportation Authority, Section a (i) – (xii).

In entering into its contract for a three-month lease of the advertising space at issue, LCA relied on the guidelines in effect in making its purchase decision. MTA has no authority unilaterally to change the terms of the contract while it is in effect. *See Louis Dreyfus Negoce S.A.* v. *Blystad Shipping & Trading Inc.*, 252 F.3d 218, 228 (2d Cir. 2001) ("No one will be held to have surrendered or modified any of his contract rights unless he is shown to have assented thereto in a manner that satisfies the requirements of a valid contract." (quoting *Corbin on Contracts* § 1293 (1962))). Whatever else may be said about the MTA's recent change in position, it cannot be applied retroactively to impair LCA's pre-existing contractual rights.

The Guidelines Adopted on April 29th

Even assuming the newly-adopted guidelines could be said to apply to LCA's pre-existing contract, the result is the same. The ad in question is a public service advertisement (or

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[1] *American Freedom Defense Initiative* v. *Metropolitan Transportation Authority*, 2015 WL 1775607 (S.D.N.Y. Apr. 20, 2015).

PSA) as Outfront Media, MTA's agent, has already acknowledged. It is offered by "a nonprofit corporation that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code" (April 29 Guidelines at IV(A)(3)); it is directed to the general public and it relates directly to the promotion of safety (*id.*). Therefore it is a permissible PSA under the new guidelines. Although our client was told by Outfront Media that the MTA was not yet accepting *any* PSAs under the new guidelines, we have difficulty understanding how such a policy could possibly be deemed consistent with those guidelines.

Nor does any exception set forth in the new guidelines justify the ban on LCA's protected speech. The ad cannot be banned under the authority of section IV(B)(2)(a) because the ad is a PSA as defined in section IV(A)(3), and is thus exempt by the very terms of section IV(B)(2)(a) itself. Nor can the speech be banned under the authority of section IV(B)(2)(b) because it does not "prominently or predominately" advocate a political message. To the contrary, it expresses concern about issues of safety.

LCA is an organization that supports a cause, a cause to prevent the exploitation of animals. But that hardly justifies the banning of its speech. If it did, it would surely violate the First Amendment. Nor, in any event, could section IV(B)(2)(b) be so read. If it could, section IV(B)(2)(b) would overwhelm and render meaningless section IV(A)(3) which expressly permits non-profit corporations to publish advertisements on a range of topics, including education and training, art and culture, and services for children and families about which its sponsors presumably are just as passionate as LCA is about the issue of safety. If such a tension exists between what is permitted by section IV(A)(3) and what is prohibited by section IV(B)(2)(b), the new policy would be both unworkable and vague and would leave far too much discretion in the hands of the MTA to pick and choose between messages it agrees with and those it does not. All of these flaws would exacerbate the constitutional issues raised by MTA's new advertising policy as a whole under the First and Fourteenth Amendments. Those problems include vagueness—if the definition of "safety" raises difficult issues of interpretation, it is difficult to imagine what is clear about the new guidelines—and viewpoint discrimination, which is barred by the First Amendment.

We request that you treat this letter as a demand for a final determination of the propriety of the rejected ad and, given the substantial delay LCA has suffered to date, would ask that you respond in writing no later than the close of business on May 29th. As I'm sure you appreciate, each day that passes without a resolution of this important issue causes LCA irreparable harm. We expressly reserve all of LCA's rights to pursue appropriate steps to vindicate its constitutional rights going forward.

Sincerely,

Floyd Abrams

Mr. Jeffrey B. Rosen
Director of Real Estate
Metropolitan Transportation Authority
2 Broadway, 4th Floor
New York, NY 10004

Enclosure

By Hand

cc: Mr. Carmen Bianco
President, MTA New York City Transit

Victor Kovner, Esq.
Davis Wright Tremaine LLP

79 Traffic Incidents.
20 People Injured.
12 Horses Killed.

HOW MANY MORE?

LCA
LAST CHANCE FOR ANIMALS

BanHorseCarriages.NYC

NYCLASS

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