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

KEVIN J. MURRAY,

Plaintiff,

v.

TIMOTHY F. GEITHNER, in his official capacity as Secretary, U.S. Department of Treasury; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Defendants.

Case No. 08-CV-15147

Hon. Lawrence P. Zatkoff

Magistrate Mona K. Majzoub

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PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ISSUES PRESENTED

I. Whether the use of taxpayer funds to approve, endorse, and support Shariah-based Islamic religious activities and religious indoctrination, including the use of such funds to acquire government ownership and control of a company that engages in such activities, violates the Establishment Clause of the First Amendment to the United States Constitution.

II. Whether the government's ownership and control of a company that engages in Islamic religious activities and indoctrination violates the Establishment Clause of the First Amendment to the United States Constitution.

III. Whether the government's approval and support of Shariah-based Islam is sufficiently likely to be perceived as conveying a message of endorsement of religion in violation of the Establishment Clause of the First Amendment to the United States Constitution.

CONTROLLING AND MOST APPROPRIATE AUTHORITY

American Atheists, Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278 (6th Cir. 2009)

Bowen v. Kendrick, 487 U.S. 589 (1988)

Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002)

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)

Flast v. Cohen, 392 U.S. 83 (1968)

Hunt v. McNair, 413 U.S. 734 (1973)

Larson v. Valente, 456 U.S. 228 (1982)

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Murray v. Geithner, 624 F. Supp. 2d 667 (E.D. Mich. 2009)

Tilton v. Richardson, 403 U.S. 672 (1971)

The following facts (and law) are undisputed:

- Sharia-compliant finance ("SCF") is an Islamic religious activity.[1]

- AIG's SCF business is pervasively sectarian in that its "secular" business purposes and its Islamic religious mission are inextricably intertwined.[2] *See Bowen v. Kendrick*, 487 U.S. 589, 620 n.16 (1988) (stating that an entity is "pervasively sectarian" when its "secular purposes and religious mission are 'inextricably intertwined'").

- AIG promotes ***itself*** and its wholly owned subsidiaries as engaged in Shariah-complaint practices, thus holding itself out to the ***public*** as a market leader in SCF.[3]

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[1] Defendants' arguments to the contrary are frivolous. (*See* Defs.' Resp. Br. at 11). Defendants presented no expert testimony to refute the testimony of Plaintiff's experts. Defendants cannot refute AIG's own statements and publications on the matter. Specifically, in addition to AIG's description of takaful as based upon Shariah and Shariah in turn described as "Islamic law based on Quran [sic] and the teachings of the Prophet (PBUH)," (AIG Takaful-FAQs at 1 at Ex.14; Defs.' Admis. at No. 131 at Ex.5), AIG promotes Shariah and takaful as a way to proselytize non-Muslims through an "ethical product" and a "new way of life." (Coughlin Decl. at Ex.A at slide 7 at Ex.12). Further, Defendants are estopped from refuting their own responses to Plaintiff's requests for admissions. (Defs.' Admis. at Nos. 110-15; 130; 132-38; 140-52; 158-69 at Ex.5) (acknowledging that SCF involves "a theological proposition"). Finally, Defendants' patent dishonesty in denying the religious-Islamic nature of SCF is no where better highlighted than in the seminal work on SCF by Harvard Professors Samuel Hayes III and Frank E. Vogel, whose book opens with the following statement: "One of the more striking facts about the rise of Islamic banking and finance is that it represents an assertion of religious law in the area of commercial life, where secularism rules almost unquestioned throughout the rest of the world. . . . [Islamic finance] challenges the secular separation of commerce from considerations of religion and piety." (Yerushalmi Decl. at ¶ 6.f. at Ex.41). The remainder of this groundbreaking and still quite authoritative text is devoted to a study of how Islamic religious dictates infuse SCF with its characteristics, meaning, and operational demands. (*See generally* Yerushalmi Decl. at ¶¶ 2-6 at Ex.41.) It is not the least bit ironic that Professor Hayes served as the moderator at Defendants' Islamic Finance 101 seminar as a leading expert on SCF as evidenced by the promotional biographical material provided by Defendants at Plaintiff's Exhibit 35 (pages 1-2).

[2] Coughlin Decl. at Ex.A at ¶ 13 at Ex.12.

[3] See, for example, a copy of the AIG press release that was issued in December 2008, shortly after the federal government took control over AIG. (Doc. No. 6-12 (Defs.' Mot. to Dismiss); Coughlin Decl. at Ex.C at Ex.12).

- Defendants have *de jure* and *de facto* control over AIG, and this control was made possible through the infusion of billions of federal tax dollars pursuant to the Emergency Economic Stabilization Act of 2008 ("EESA"), 12 U.S.C. § 5201 et seq.[4] This fact distinguishes this case from *Mitchell v. Helms*, 530 U.S. 793 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), and *American Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278 (6th Cir. 2009), ***such that the Establishment Clause violation is inescapable***. *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (holding that the "active involvement of the sovereign in religious activity" is a clear violation of the Establishment Clause) (citation omitted); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) (holding that Amtrak was an instrumentality of government for purposes of the First Amendment); *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 296 (2001) (holding that a challenged activity is government action for constitutional purposes when there is "entwinement" between the government and a private actor); *see also Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor J., concurring) ("[***E***]***very*** government practice must be judged ***in its unique***

[4] Defendants argue throughout that the monies committed to AIG for SCF are trivial. This is wrong both as to the absolute amounts provided to AIG for SCF purposes (*see infra* notes 6-7), and as to the relative amounts. As of April 2010, Defendants established the following discreet funding programs under TARP: the Capital Purchase Program; the Targeted Investment Program; the Asset Guarantee Program; the Consumer and Business Lending Initiative; the Public-Private Investment Program; the American International Group, Inc. Investment Program (formerly known as the Systemically Significant Failing Institutions Program, which was singularly, exclusively, and entirely dedicated to AIG); and the Automotive Industry Financing Program; as well as the Home Affordable Modification Program. These programs collectively have committed to dole out $491.1 billion dollars. Of this amount, the funds paid out and committed to AIG are $69.84 billion. In other words, Defendant Geithner has committed 14.2 percent of all of the TARP funds paid or committed to date to AIG as the only company that has qualified under the Systemically Significant Failing Institutions Program. (*See* Yerushalmi Decl. at ¶¶ 7-9 at Ex.41).

circumstances to determine whether it constitutes an endorsement or disapproval of religion.") (emphasis added).[5]

- Federal reserve funds (more than $900 million) were diverted directly to support AIG's SCF business, and these funds were a mere placeholder for the EESA funds that soon followed.[6]

- EESA funds have been used (diverted) to support SCF, and billions of such funds remain available for future diversion to support SCF.[7]

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[5] Leaving aside the overwhelming factual evidence supporting Plaintiff's claim, consider the testimony of the former, *government-selected* CEO of AIG, Edward Liddy, to Congress (and the American public), in which he admitted (under oath) that ***"the Federal Reserve and U.S. Treasury"*** are AIG's ***"primary day-to-day partners in government."*** (Test. of Liddy on May 13, 2009, at 5-6 at Ex.29) (emphasis added).

[6] After receiving more than $37 billion from the FRBNY by September 22, 2008 ($14 billion of which AIG received on September 16, 2008), an amount that jumped to $62 billion by October 1, 2008, none of which were segregated, AIG then provided funding and other financial support of almost one billion dollars to several AIG subsidiaries engaged in SCF. Specifically, [redacted] received a capital contribution of $[redacted] on [redacted], and on [redacted] an additional loan of $[redacted] from [redacted], a direct AIG subsidiary that receives money in nonsegregated accounts directly from AIG on a daily basis. Testimony from [redacted] further establishes that there could be significant intra-company transactions that are impossible for [redacted] to trace precisely because [redacted] operates its various branch offices as a single corporate entity with consolidated financing and accounting, using nonsegregated bank accounts. ([redacted] Aff. at ¶¶ 2, 4, 13 at Ex.8; *see also* [redacted] Supp'l Aff. at ¶¶ 2-3 at Ex.37; Ex. 39). It is indisputable that [redacted] engaged in SCF during these funding periods. ([redacted] Aff. at ¶¶ 5, 8 at Ex.8). During this same time period, another such subsidiary, [redacted] located here in the United States, received $[redacted] from AIG pursuant to a [redacted] on [redacted] (AIG [redacted] Aff. at ¶ 9.e. at Ex.4), and on [redacted] and [redacted] received [redacted] of $[redacted] and $[redacted] respectively, ([redacted] at ¶ 11(a-b) at Ex.11; *see also* Ex.39).

[7] We know that [redacted] received TARP funds from the Millstein Declaration provided in support of Defendants' motion for summary judgment. Specifically, Millstein's declaration makes clear that more than $[redacted] was drawn down by AIG on [redacted] in part to [redacted] from [redacted] (Millstein Declaration at ¶ 26 (filed under seal as Ex.1 to Defs'. Mot.)). We also know from AIG [redacted] that [redacted] received $[redacted] on [redacted] for the [redacted] (AIG [redacted] Aff. at ¶ 9.d. at Ex.4). (As set forth *supra* note 6, this is in addition to the $[redacted] [redacted] received after the FRBNY credit facility was set up pursuant to the Credit Agreement.) Testimony from [redacted] further establishes that there could be significant intra-company transactions that are impossible

- EESA provides no statutory safeguards to prohibit the use of taxpayer funds to support SCF. As the uncontested evidence demonstrates, there are "***no*** [***AIG***] ***policies, whether required by the U.S. government or otherwise, created or implemented to prevent the use of any government funds from promoting, supporting, or funding*** [***AIG's Shariah-based Islamic practices***]."[8] To this day, neither Congress nor Defendants have issued rules, regulations, or any other such restrictions on the use of EESA funds for the impermissible purpose of supporting SCF.[9] ***Consequently, immediate injunctive relief prohibiting such future diversions is warranted and necessary***.

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for [redacted] to trace precisely because [redacted] operates its various branch offices as a single corporate entity with consolidated financing and accounting, using nonsegregated bank accounts. ([redacted] Aff. at ¶¶ 2, 4, 13 at Ex.8; *see also* [redacted] Supp'l Aff. at ¶¶ 2-3 at Ex.37). Further, after AIG began drawing down on the $30 billion Securities Purchase Agreement ("TARP"), AIG continued to fund its SCF subsidiaries right here in the United States. Specifically, on [redacted] AIG provided [redacted] additional [redacted] of $[redacted] $[redacted], and $[redacted] ([redacted] Aff. at ¶ 11(c-e) at Ex.11; *see also* Ex.39).

[8] [redacted] at ¶ 10 at Ex.11; [redacted] Aff. at ¶ 11 at Ex.8; [redacted] Aff. at ¶ 15 at Ex.7; [redacted] Aff. at ¶ 14 at Ex.9; and [redacted] Aff. at ¶ 10 at Ex.10.

[9] This is a significant fact that compels judgment in Plaintiff's favor. Defendants claim that "Justice O'Connor's concurring opinion [in *Mitchell v. Helms*, 530 U.S. 793, 836 (2000)] is the controlling authority" (Defs.' Resp. Br. at 3, n.2); yet, they proceed to misrepresent it. In *Mitchell*, Justice O'Connor did not say that a funding program need not have constitutionally sufficient safeguards to ensure that funds are not diverted for the impermissible purpose of supporting religious activity. What she found was that "[t]he safeguards employed by the program [were] constitutionally sufficient." *Id.* at 861. These *statutory* "safeguards" included, *inter alia*, a limitation on the use of the aid to "secular, neutral, and nonideological services, materials, and equipment" and a prohibition on the use of "any payment . . . for religious worship or instruction." *Id*. She went on to conclude that evidence of a possible use of such funds to purchase audiovisual equipment and a computer that might have been used during religious instruction was *de minimis* in that it ***did not prove that the safeguards were not working*** and thus was insufficient evidence ***to strike down the entire program***. She stated, "[T]he presence of so few examples over a period of at least 4 years (15 years ago) tends to show ***not that the 'no-diversion' rules have failed, but they have worked***. Accordingly, I see no reason to . . . declare a properly functioning aid program unconstitutional." *Id*. at 866. *See also Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 774 (1973) (observing that "[n]othing in the

- To this day, the federal government actively and ***publicly*** endorses SCF. Presentations by senior Treasury Department officials lauding SCF and stating explicitly that the U.S. government "***places significant importance on promoting . . . Islamic finance***" and has "***recently deepened our engagement in Islamic finance in a number of ways,***" including a "***call***[] ***for harmonization of Shari'a standards at the national and international levels***" remain posted on the Treasury Department's website.[10]

CONCLUSION

Plaintiff respectfully requests that the court grant his motion for summary judgment.

Respectfully submitted,

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statute" prohibits the use of funds for religious purposes and holding that "[a]bsent appropriate restrictions on expenditures for [religious] purposes, it simply cannot be denied that [the challenged statute] has a primary effect that advances religion"); *American Atheists, Inc.*, 567 F.3d at 293, 296 (stating that "a program may have the primary effect of advancing religion if the recipient diverts secular aid to further its religious mission" and finding that "the mechanics of the program ensured that the aid would go just to the approved [secular] uses") (quotations and citation omitted); *cf. Kendrick*, 487 U.S. at 621-22 (remanding to determine whether funds in particular cases were being used in violation of the Establishment Clause even though express restrictions were made). In this case, ***there are no statutory safeguards in place***—nor do Defendants care to impose them because Defendants favorably endorse SCF as a matter of official government policy.

[10] *See* Ex.33 (Treasury Department Press Release of May 2004) (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2010, a copy of the foregoing PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with index of exhibits and exhibits was filed electronically through the Court's ECF system. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that I served unredacted copies of the foregoing by electronic mail directly to John R. Colemen and Julie Straus, counsel for Defendants. I also further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: None.

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