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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 AMERICAN FREEDOM DEFENSE
4 INITIATIVE, et al.,

5 Plaintiffs,

6 v.

14 Civ. 7928 (JGK)

7 METROPOLITAN TRANSPORTATION
8 AUTHORITY, et al.,

9 Defendants.

10 March 24, 2015
11 11:15 a.m.

12 Before:

13 HON. JOHN G. KOELTL,

District Judge

14 APPEARANCES

15 AMERICAN FREEDOM LAW CENTER
16 Attorneys for Plaintiffs
17 BY: DAVID YERUSHALMI

18 METROPOLITAN TRANSIT AUTHORITY
19 BY: PETER SISTROM
20 JASON BARNES

21 ALSO PRESENT: RANDALL HOLMAN, ESQ.
22
23
24
25

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1 (Case called)

2 THE DEPUTY CLERK: Will all parties please state who
3 they are for the record.

4 MR. YERUSHALMI: David Yerushalmi on behalf of the
5 plaintiff, your Honor, and Randall Holman not of record but
6 assisting.

7 MR. SISTROM: Peter Sistrom for the Metropolitan
8 Transit Authority, your Honor, and with me is Jason Barnes who
9 is an excelsior service fellow with the MTA.

10 THE COURT: Can you keep your voice up?

11 MR. SISTROM: Sorry.

12 THE COURT: Thank you.

13 This is a motion for a preliminary injunction. I have
14 read the papers. I have read the stipulation between the
15 parties. I'm prepared to listen to argument on the preliminary
16 injunction. If the parties have any evidence in addition to
17 the declarations that you have already submitted that you wish
18 to submit or present, I am perfectly happy to take any other
19 evidence.

20 So, why don't I start by asking whether the parties
21 intend to present any additional evidence whether testimony or
22 exhibits.

23 Plaintiff?

24 MR. YERUSHALMI: Thank you, your Honor.

25 We have discussed this with defense counsel and as we

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1 indicated in our joint statement earlier presented to the
2 Court, what we thought would be useful for the Court is if we
3 examined, in the form of a cross, Jeffrey Rosen, as the
4 Director of Real Estate, and Mr. Diaz, the Director of Security
5 who actually conducted the security assessment. And then,
6 following that, subject to of course Mr. Sistrum's redirect,
7 then we would have oral argument.

8 THE COURT: Fine.

9 Mr. Sistrum, is that fine with you? Your two
10 witnesses will be cross-examined and then we would have
11 redirect?

12 MR. SISTROM: Correct.

13 THE COURT: Fine.

14 Do the parties want to make any opening statements
15 first? Or move directly to the witnesses.

16 MR. YERUSHALMI: Your Honor, if I may just address
17 some housekeeping issues and then we would be prepared to go
18 right into the examination.

19 Mr. Sistrum and I, again, have consulted earlier and
20 we have agreed that plaintiffs are invoking Rule 615 to have
21 Mr. Diaz excluded from the courtroom during Mr. Rosen's
22 testimony, with the Court's permission. We have also marked,
23 just for ease of reference for the hearing, your Honor, the
24 revised stipulations; we marked those as Exhibit 1 because we
25 will be using those with the witnesses.

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1 THE COURT: There is only one, right?

2 MR. YERUSHALMI: There is only one; that's correct,
3 your Honor. Well, there is actually, in terms of the document
4 it is one but with the revised there are three separate
5 stipulated facts.

6 THE COURT: Three paragraphs.

7 MR. YERUSHALMI: Yes.

8 THE COURT: Got it.

9 MR. YERUSHALMI: In addition, we have marked again, as
10 a Hearing Exhibit no. 2 in the black folder Mr. Diaz'
11 declaration and his exhibit. Now, these are already part of
12 the record and it is a bit redundant, but we think it will be
13 easier for the purposes of the witnesses if I can refer to the
14 black book or another colored binder. In addition, we have
15 marked Mr. Rosen's declaration, all of his Exhibits 1 through 9
16 as Hearing Exhibit no. 3 and that is in the red binder.
17 Ms. Geller, one of the plaintiffs' declaration and six exhibits
18 have been placed into a white binder and we have marked that
19 hearing Exhibit no. 4. And then we have included the
20 defendant's document production in response to our first
21 request and only request for production of documents and those
22 documents are included in the blue binder and they have been
23 marked as hearing Exhibit no. 5. And we have provided all of
24 those to the Court earlier.

25 We might have some additional exhibits but only a few,

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1 and it would depend upon answers that we received from the
2 witnesses, your Honor.

3 THE COURT: Okay.

4 MR. SISTROM: Judge, if I may?

5 I haven't had a chance to look at the exhibit binders
6 that Mr. Yerushalmi has provided you. I have utmost faith in
7 David and I don't -- I just have not -- my understanding is he
8 is submitting them to you really as aids but not as supplements
9 to the record. They should be exactly what is in the record.
10 So, I just wanted to note that.

11 THE COURT: With the exception of Exhibit 5, I think,
12 because I don't think that your whole document production was
13 previously part of the record.

14 MR. SISTROM: That's correct, your Honor.

15 And also, just again to be strictly precise, there was
16 not in fact a formal document request made by the plaintiffs
17 but the MTA anticipating one produced what I believe to be the
18 relevant, non-privileged documents.

19 THE COURT: Okay.

20 MR. YERUSHALMI: Your Honor, if I may, just for the
21 record?

22 Mr. Sistrom and I normally agree on just about
23 everything other than the law, but there was a formal
24 plaintiff's first request, he might have just forgotten about
25 it, and we have that here.

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1 And, your Honor, you are correct that the document
2 production was not part of the record and just again for the
3 record, those are marked with Bates nos. MTA 1 through 105.

4 THE COURT: Okay.

5 Anything that you would like to say at the outset,
6 Mr. Siström?

7 MR. SISTROM: No, your Honor.

8 THE COURT: Mr. Yerushalmi, do you want to call your
9 first witness then?

10 MR. YERUSHALMI: Your Honor, we call Jeffrey Rosen to
11 the stand, please.

12 THE COURT: Okay. And Mr. Diaz is then going to leave
13 the courtroom?

14 MR. SISTROM: He is leaving, your Honor.

15 THE COURT: Okay. Any other witnesses to be excluded?

16 MR. YERUSHALMI: No, your Honor.

17 THE COURT: All right.

18 JEFFREY B. ROSEN,

19 called as a witness by the Plaintiff,

20 having been duly sworn, testified as follows:

21 THE DEPUTY CLERK: Please state your full name for the
22 record.

23 THE WITNESS: Jeffrey B. Rosen.

24 THE DEPUTY CLERK: Thank you.

25 THE COURT: Mr. Yerushalmi, you may examine.

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1 MR. YERUSHALMI: Thank you, your Honor.

2 CROSS EXAMINATION

3 BY MR. YERUSHALMI:

4 Q. Good morning, Mr. Rosen.

5 A. Good morning.

6 Q. You are employed by the Metropolitan Transit Authority as
7 Director of Real Estate, correct?

8 A. Yes.

9 Q. The Metropolitan Transportation Authority is typically
10 referred to as the MTA, correct?

11 A. Yes.

12 Q. I will use the MTA throughout this examination; is that
13 agreeable?

14 A. Yes.

15 Q. Mr. Rosen, you are a licensed New York attorney, correct?

16 A. Yes. I'm not a practicing attorney.

17 Q. You have been registered and are currently registered since
18 1982, correct?

19 A. Yes.

20 Q. Given your position at the MTA for the past six years and
21 your involvement in First Amendment issues and your 25 years as
22 a practicing lawyer before that, do you consider yourself
23 professionally competent in First Amendment-related questions
24 such as are at issue in this case?

25 MR. SISTROM: Objection, your Honor.

1 THE COURT: Overruled.

2 THE WITNESS: Not specifically. I never litigated. I
3 was never a Constitutional specialist.

4 BY MR. YERUSHALMI:

5 Q. Do you have any professional competency to measure or
6 assess security risk to the transit system that might arise as
7 a result of transit advertising?

8 A. No specific training in that area; no, sir.

9 Q. Do you have any specific or generalized experience in that
10 area?

11 A. No.

12 Q. Mr. Rosen, you understand that I and my co-counsel, Robert
13 Muise, represent the plaintiffs in this matter, correct?

14 A. Yes.

15 Q. You also understand that my clients are the American
16 Freedom Defense Initiative, Pamela Geller, and Robert Spencer,
17 do you not?

18 A. Yes.

19 Q. I am going to refer to my client, the American Freedom
20 Defense Initiative, as AFDI; is that agreeable?

21 A. Yes.

22 Q. You also understand that my clients have sued the MTA for
23 violating their First Amendment rights, correct?

24 A. Yes.

25 Q. And you understand the conduct about which my clients are

1 suing is MTA's refusal to run a specific advertisement,
2 correct?

3 A. Yes.

4 Q. I would like to hand you now, with the Court's permission,
5 the revised stipulations that have been filed as document
6 no. 27, stroke 1, and we mark that as hearing Exhibit no. 1.

7 May I approach the witness, your Honor?

8 THE COURT: Yes.

9 Q. I would like to direct your attention to paragraph 1. Are
10 you there?

11 A. Yes, I am.

12 Q. Do you see the ad that is at bottom of that paragraph on
13 the first page of the stipulations?

14 A. Yes.

15 Q. Now, you understand that this is the ad that my client
16 submitted for approval and that was ultimately rejected by the
17 MTA, correct?

18 A. Yes.

19 Q. I would ask you to turn the page and look at paragraph 2
20 and the ad presented at the bottom of that paragraph.

21 Do you see that?

22 A. Yes, I do.

23 Q. You understand that this is the ad that my clients have
24 previously run in Chicago and San Francisco, correct?

25 A. I don't know that for myself, but I believe you.

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Rosen - cross

1 Q. If you look at stipulation no. 2 which both parties, the
2 MTA and my clients have agreed to, it states very clearly --

3 A. No, as I say I grant you that. I just don't have personal
4 knowledge that it was run in Chicago but I gather it is
5 stipulated. So, I am fine.

6 Q. You may just set that aside and keep that with you for the
7 time being.

8 A. Sure.

9 Q. Thank you.

10 MR. YERUSHALMI: Your Honor, I would like to approach
11 the witness, if I may, to provide the witness with binder
12 no. 3, the red binder with exhibits.

13 THE COURT: All right.

14 Q. I have handed you, Mr. Rosen, a red binder which we have
15 marked as hearing Exhibit no. 3 and it includes your
16 declaration which was submitted by the MTA, together with all
17 of the exhibits.

18 Do you see that?

19 A. Yes, I do.

20 Q. Are you familiar with your declaration?

21 A. Yes, I am.

22 Q. What I would like to direct your attention to at the
23 present time is paragraphs 27 through 29.

24 A. Yes. I am there.

25 Q. Would you review those paragraphs, briefly, for me?

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Rosen - cross

1 A. Uh-huh. Yes, sir.

2 Q. Those paragraphs describe, do they not, the opportunity
3 that the MTA had following the earlier case before Judge
4 Engelmayr to revise its advertising standards, correct?

5 A. Yes.

6 Q. And, indeed, at the hearing itself and subsequently the MTA
7 considered the possibility of simply allowing commercial speech
8 and not to include or allow public issue speech, correct?

9 A. That's correct.

10 Q. The MTA chose not to reduce the form to simply commercial
11 speech but in fact left it open to all public issue speech,
12 correct?

13 A. That's correct.

14 Q. Subject only to the stated exceptions or preclusions,
15 correct?

16 A. Yes.

17 THE COURT: Mr. Rosen, keep your voice up.

18 THE WITNESS: I'm sorry.

19 THE COURT: Thank you.

20 BY MR. YERUSHALMI:

21 Q. Indeed, not only did the MTA allow the form to include all
22 the public issue speech that it had allowed previously, it also
23 eliminated, because of the unconstitutionality of the
24 provision, the disparaging provision and didn't try to replace
25 it with any other similar civility provision that might not

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Rosen - cross

1 have been constitutionally infirm, correct?

2 A. That's correct.

3 Q. So, in fact, the form is actually broader today when it
4 comes to speech than it was prior to the previous case before
5 Judge Engelmayer, correct?

6 A. In that respect, sure.

7 THE COURT: But it added the incitement provision.

8 THE WITNESS: Yes. Exactly, your Honor.

9 BY MR. YERUSHALMI:

10 Q. Indeed, we are going to get into that right now.

11 Under the standard, if you turn to paragraph 34 of
12 your declaration, you make the point there that the previous
13 standard -- and I am just for purposes of the reference here,
14 Mr. Rosen, going to refer to the standard at issue in this
15 litigation as the (a)(x) standard; is that agreeable?

16 A. Yes, sir. (a)(x) is the incitement to violence or
17 provoking to violence standard?

18 Q. That's correct.

19 A. Okay. Yes, sir.

20 Q. And for the record that is typically written (a)(x).

21 You make the point in paragraph 34 that the 1997
22 (a)(x) standard only included the language as follows:
23 "directly adverse to the commercial or administrative interest
24 of the MTA, or is harmful to the morale of the MTA employees."

25 Correct?

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Rosen - cross

1 A. Yes.

2 Q. And then, in 2012 that was revised to include, in addition
3 to that earlier language, the language relating to the
4 incitement of violence or lawlessness, correct?

5 A. Yes, sir.

6 Q. Did the MTA turn to a First Amendment expert or scholar to
7 help them draft the 2012 (a)(x) language as it did for the 1994
8 revisions and the 1997 revisions?

9 A. I don't know to what extent the counsel's office may have
10 done that. I did not participate in such a discussion.

11 Q. Let me direct your attention to paragraphs 35 through 36 of
12 your declaration. Do you see those?

13 A. Yes, I do.

14 Q. After you set out the relevant language in paragraph 35 of
15 the (a)(x) standard you go on to say in paragraph 36, as
16 follows: "In adopting this standard, the MTA Board intended to
17 make clear to potential advertisers, as well as to its
18 customers and employees and the public, that the MTA would not
19 permit advertisements that are unprotected speech under the
20 First Amendment because their display would jeopardize public
21 safety and disrupt MTA's transportation operations by inciting
22 or provoking violence."

23 Do you see that?

24 A. Yes, sir.

25 Q. Did I read that correctly?

1 A. Yes.

2 Q. What do you mean there by, "unprotected speech under the
3 First Amendment."

4 A. I have no specific scholarship on that subject. I was
5 given to understand, from counsel, that we are working on
6 revising the standards; that speech that would provoke or
7 incite violence was in fact not protected. I don't mean it in
8 any technical sense.

9 Q. So that I understand that answer, I understand that you
10 have testified that you don't have any technical or
11 professional competency in the First Amendment issues and that
12 might have just been a layman's term but I just want to be
13 clear: What did you mean when you wrote the terms unprotected
14 speech under the First Amendment?

15 A. I understand, as I think most citizens do, that the First
16 Amendment protects the right to engage in speech subject to
17 various limitations and what I mean by speech that is
18 unprotected is speech that is not covered by the First
19 Amendment due to those exceptions.

20 Q. And what would those exceptions be?

21 A. As I say, I'm not in a position to enumerate all of them
22 for you. I have always understood that there are limits to the
23 First Amendment in an absolute sense.

24 Q. As the Director of Real Estate you are the individual
25 charged with overseeing the transit authority advertising

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Rosen - cross

1 program as one of your duties, correct?

2 A. That's correct.

3 Q. And as part of your responsibility you were to enforce the
4 standards including the (a)(x) standard, correct?

5 A. I am charged with doing that to the best of my ability in
6 consultation with others, yes.

7 Q. And your view of the (a)(x) standard being to foreclose
8 unprotected speech, as you have described that today, is the
9 MTA policy with regard to the enforcement of the (a)(x)
10 standard, correct?

11 A. I have no sort of generalized sense of what the rule and
12 protocol related to the rule is meant to indicate other than
13 what it says on its face.

14 Q. So, the (a)(x) standard is understood by the MTA to mean
15 what it says facially, correct?

16 A. Again, I am not speaking for the counsel's office. I am
17 explaining that I don't bring any sort of special
18 interpretation to it.

19 Q. Is the standard (a)(x) meant to prohibit true threats as a
20 category of unprotected speech?

21 MR. SISTROM: Objection, your Honor.

22 THE COURT: Overruled.

23 THE WITNESS: I'm sorry. Could you repeat the
24 question, please?

25 BY MR. YERUSHALMI:

1 Q. Is standard (a)(x) meant to prohibit true threats as a
2 category of unprotected speech?

3 A. Again, I am not giving you a legal opinion. It is my
4 understanding of the intent in lay terms, yes.

5 Q. Is standard (a)(x) meant to prohibit fighting words as a
6 category of unprotected speech?

7 A. I would give you the same answer.

8 Q. Which is yes?

9 A. Which is that I don't consider myself qualified to deliver
10 to you an explanation of all the legal precedents of what
11 fighting words are.

12 Q. Is standard (a)(x) meant to prohibit incitement speech as a
13 category of unprotected speech? Same answer?

14 A. Same answer, yes.

15 Q. Is standard (a)(x) meant to prohibit speech beyond these
16 three categories of unprotected speech? Is it fair to say that
17 since you are not clear about what those three categories are
18 you might not know how to answer that question?

19 A. Yes, that is fair to say.

20 Q. Is standard (a)(x) meant to prohibit speech based upon the
21 audience's reaction to the speech?

22 A. That's my understanding.

23 Q. Let me direct your attention to paragraphs 37 through 39 of
24 your declaration in the red binder before you.

25 A. Yes, sir.

1 Q. Paragraph 39 speaks to the process when the advertising
2 contractor -- in our case CBS -- believes there is a potential
3 problem under the (a)(x) standard.

4 Do you see that?

5 A. Yes, sir.

6 Q. Now, these three paragraphs, 37, 38, and 39 are just your
7 effort at explaining what you have identified there in the text
8 as Exhibit D, correct?

9 A. Exhibit D that references the -- sorry, sir -- the review
10 procedure that was embodied in Mr. Lhota's memorandum?

11 Q. That's correct.

12 A. Yes, sir.

13 Q. Now, just for the record, you have indicated in the text in
14 your declaration Exhibit D and throughout you have identified
15 exhibits by letter, but in fact they were filed and covered by
16 numbered exhibits so I am going to refer to that Exhibit D as
17 Exhibit 4, as it was actually filed.

18 A. All right.

19 Q. And Exhibit 4, as you have indicated, is Mr. Lhota's
20 memorandum of October 5, 2012 setting forth the actual
21 enforcement procedures for Exhibit 3 which are the (a)(x)
22 standards, correct?

23 A. Yes, sir.

24 Q. Now, is there any reason why we should not just look at the
25 actual procedure set out in Exhibit 4 as opposed to your

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Rosen - cross

1 declaration? In other words, did the practice at the MTA
2 follow the procedure set out by Mr. Lhota's memo fairly
3 faithfully?

4 A. I believe so, yes.

5 Q. Then let's turn to Exhibit D, Mr. Lhota's procedures memo,
6 if we may.

7 A. Okay.

8 Q. I note -- have you had a chance to look at that Exhibit?

9 A. I have it in front of me; yes, sir.

10 Q. I note that the second paragraph beginning: In applying
11 the advertising standards... do you see that?

12 A. Yes, sir, I do.

13 Q. That sets up the first stage where CBS, the advertising
14 contractor, might have some question about an ad that it may or
15 may not violate standard (a)(x), that they then refer their
16 inquiry to the director of real estate which is yourself,
17 correct?

18 A. Yes, sir.

19 Q. And the paragraph below that beginning: In the event the
20 MTA director of real estate is notified... do you see that
21 paragraph?

22 A. Yes, sir.

23 Q. That once you have gotten that notification, your job is to
24 turn that over to the Director of Security Mr. Diaz in this
25 case, correct?

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Rosen - cross

1 A. Yes, sir.

2 Q. And he is to perform a security assessment, correct?

3 A. Yes.

4 Q. And that is what follows in those numbered paragraphs,
5 correct?

6 A. Yes.

7 Q. At the bottom of the page and the third indented -- the
8 paragraph numbered 3 it indicates that the Director of Security
9 is to assess whether it is -- and I am reading at the very end
10 of that page -- reasonably foreseeable that the display of the
11 proposed advertisement would imminently incite or provoke
12 violence or other immediate breach of the peace.

13 Do you see that?

14 A. Yes.

15 Q. Is that the kind of security assessment that you expect of
16 Mr. Diaz under this procedure?

17 A. Yes.

18 Q. Paragraph 4 appears to be an indication that depending upon
19 where the ad is placed Mr. Diaz, as the Director of Security,
20 is to turn to local police agencies or departments and try to
21 solicit an opinion whether they believe that the ad represents
22 a security risk, correct?

23 A. Yes.

24 Q. The one at issue in this case is the first bullet point,
25 correct?

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Rosen - cross

1 A. Yes.

2 Q. Now, we note that in the record Mr. Diaz makes the point
3 both in his security assessment itself and in his declaration
4 that he did turn to the New York Police Department not once but
5 twice, and the New York Police Department refused to provide a
6 legal opinion or even any type of form of opinion, correct?

7 A. That is what I was told.

8 Q. And do you know why that is?

9 A. I don't. I don't have a specific understanding of what
10 that conversation was but my sense was that, generally, and not
11 with specific reference to the ad in question, that the police
12 department was reluctant to get into this, thought it was
13 something we should be looking at ourselves.

14 Q. Now, you say your sense. You just spoke with Mr. Diaz?

15 A. Right. I didn't participate in the discussion with New
16 York City Police.

17 Q. We will ask Mr. Diaz then directly.

18 A. Correct.

19 Q. Thank you.

20 In terms of this procedure that is formalized by
21 Mr. Lhota's memo, had there been any coordination with the New
22 York Police Department that in this event they would have
23 someone available to review an ad and provide a formal opinion?

24 A. I don't know.

25 Q. Let me direct your attention now to numbered paragraph 6 on

1 page 2 of Mr. Lhota's procedures memo and it reads, in the
2 middle of the paragraph five lines down at the end it begins:
3 In the event...

4 Do you see that?

5 A. Yes, sir.

6 Q. That sentence reads: In the event the chairman and chief
7 executive officer concurs in writing with that evaluation, the
8 Director of Real Estate and the MTA general counsel shall be
9 advised of the results, etc.

10 Do you see that?

11 A. Yes, sir.

12 Q. Now, we note that in your declaration and in Mr. Diaz'
13 declaration it references the chairman, one of the defendants
14 in this case, Mr. Prendergast's concurrence, in Mr. Diaz'
15 security assessment.

16 Do you recall that?

17 A. Yes. I should say I don't believe I have reviewed
18 Mr. Diaz' declaration but I do recall that I was told that
19 Mr. Prendergast had concurred.

20 Q. Who told you that?

21 A. I don't recall. I believe it was counsel.

22 Q. We note that we find no evidence in the record, neither in
23 Mr. Diaz' declaration or yours or in the documents produced
24 Mr. Prendergast actually provided, as required here, a written
25 concurrence.

1 Do you know of any written concurrence?

2 A. I don't one way or the other, frankly.

3 Q. Mr. Rosen, are there written policy standards or procedures
4 that set out what the objective guidelines are that the
5 Director of Security is to follow to determine what is imminent
6 violence or lawlessness?

7 A. I believe that the matter is left to the director's
8 professional judgment.

9 Q. In the MTA's view is imminent an hour, a day, a week, a
10 month?

11 A. I am pretty sure it is not a month. I am not sure whether
12 it is an hour or a day.

13 Q. Could it be a week?

14 A. It is a slippery slope, isn't it? I don't know. I would
15 say that -- I would say that the concern is that the effect of
16 the ad would be to cause someone to take action in the near
17 term and not in the long term. I don't know what the
18 Constitutional standard is if that is what you are asking me.

19 Q. No. I am asking you what the MTA's understanding of their
20 standard is. It refers to imminent violence. We now have it
21 broken down to near term versus long-term. As I understand
22 your testimony you don't know what near term is other than it
23 is not a month, correct?

24 A. Okay.

25 Q. Correct?

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Rosen - cross

1 A. Sure.

2 Q. Is there a written policy standard or procedure that sets
3 out what the objective guidelines are that the Director of
4 Security is to follow to determine what is the level of
5 reasonable foreseeability for imminent violence or lawlessness?

6 A. I don't believe so.

7 Q. So it could be a 50 percent likelihood or it could be a 2
8 percent likelihood, correct?

9 A. I wouldn't think that 2 percent would be reasonable and
10 imminent and for this purpose and I would suggest to you that
11 the pattern of Mr. Diaz' review of these matters suggests that
12 he wouldn't -- he wouldn't either have a hair trigger as far as
13 that is concerned.

14 Q. I'm not sure I understood that answer.

15 A. Well, I am saying that there were numerous ads that were
16 reviewed by him through this process that had been submitted by
17 AFDI including I believe it was three at the same time that
18 this one was submitted that were not rejected by him despite
19 the possibility that, in theory, someone, somewhere, might have
20 some 2 percent reaction.

21 Q. But you are speculating now about --

22 A. Yes, I am.

23 Q. Let me finish my question, Mr. Rosen.

24 A. Yes, sir.

25 Q. You are speculating now about Mr. Diaz' assessment in terms

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1 of the quantification of the reason foreseeable risk?

2 A. Yes. I think you would have to ask him these questions.

3 Q. And, indeed, based upon your earlier testimony, it could
4 have been that those other ads had, in his mind, a zero risk
5 and this particular ad had a 1 percent risk and that was
6 sufficient to pass the threshold to be precluded under
7 Standard (a)(x), correct?

8 A. I doubt it, but I don't have a, you know, a particular
9 understanding of what percentage of risk he applied in these
10 cases.

11 Q. You have no idea, correct?

12 A. That's right.

13 Q. Must there be some objective empirical fact that suggests
14 violence and result imminently?

15 MR. SISTROM: Objection, your Honor.

16 THE COURT: Overruled. I will let the witness testify
17 about whether he knows or has any understanding of that.

18 THE WITNESS: I'm sorry. Could you repeat the
19 question?

20 BY MR. YERUSHALMI:

21 Q. Must there be some subjective empirical fact that suggests
22 that violence will result and will result imminently to violate
23 Standard (a)(x)?

24 A. I don't know. I would think not if you mean empirical in
25 the sense that something already happened.

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Rosen - cross

1 Q. Or empirical that there is evidence in the past that
2 individuals have reacted to transit ads violently.

3 A. I don't know that there has ever been an ad like this one.

4 Q. But that doesn't quite answer the question, Mr. Rosen. The
5 question is under the standard is it your understanding that
6 Mr. Diaz, in his security assessment, must take into account
7 actual facts, empirical evidence about what has happened in the
8 past relative to the ad itself or relative to transit ads in
9 general?

10 A. No. I have no such understanding.

11 Q. As I think you are aware, because it is in Mr. Diaz'
12 security assessment that was provided to Mr. Prendergast and to
13 you, Mr. Diaz bases his analyses on parodic context. In other
14 words, he knows that the ad at issue in this litigation ran in
15 substantially the same form in Chicago and San Francisco
16 without any issues, correct?

17 A. I don't specifically recall that, but I will grant you that
18 if that is what it says I will look at it with you if you want
19 me to. Which exhibit is that, sir?

20 Q. We don't need to go there but just for the record --

21 A. Okay.

22 Q. -- let me note that stipulation 3, which all the parties
23 agreed to including yourself states: The MTA, including its
24 Director of Security, Raymond F. Diaz, when he undertook the
25 security assessment of the AFDI advertisement at issue in this

1 case, knew that the AFDI advertisement referred to in paragraph
2 had been displayed in early 2013 on buses operated by the
3 public transit systems in Chicago and San Francisco and the MTA
4 was unaware of any acts of violence in either city provoked by
5 the display of those advertisements.

6 Do you see that?

7 A. That's fine. I was merely saying that I did not
8 specifically recall that sitting here this moment. I did see
9 it in the stipulation and that is fine.

10 Q. But you know that that is one of the important facts in
11 this case, do you not?

12 MR. SISTROM: Objection, your Honor.

13 THE COURT: Sustained.

14 MR. YERUSHALMI: I will rephrase. Thank you, your
15 Honor.

16 BY MR. YERUSHALMI:

17 Q. In Mr. Diaz' security assessment which you have reviewed,
18 correct?

19 A. Yes.

20 Q. It states there, explicitly, that he was aware that there
21 was no problems in Chicago or San Francisco when my client's ad
22 ran, correct?

23 A. Yes. As I say, I understood that at the time. I have not
24 reread his letter in the last few days.

25 Q. Are you aware of the fact that Mr. Diaz had actually sent

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Rosen - cross

1 an e-mail or had someone send, from his office, an e-mail to
2 the security personnel at the San Francisco transit authority
3 and ask them, pointedly, if my client's ad had caused any
4 issues whatsoever, violence or otherwise, in San Francisco?

5 A. If I was aware of that I don't know it now.

6 Q. Are you aware that San Francisco security personnel
7 responded by e-mail and said absolutely no problem whatsoever?

8 A. No, sir; I am not aware of that.

9 Q. Given Mr. Diaz' emphasis open the parodic context of the
10 ads that ran in Chicago and San Francisco and that the CAIR
11 MyJihad ads did not run in New York, had CAIR run its MyJihad
12 ads a month or two prior to my client's ads here in New York as
13 they did in Chicago and San Francisco, would the MTA have
14 approved my client's ad?

15 MR. SISTROM: Objection, your Honor.

16 THE COURT: Overruled.

17 THE WITNESS: Well, I can't speak for Mr. Diaz and I
18 am sure you will ask him. My own view is that the man on the
19 street who is viewing this ad and who might react to it and be
20 inclined to violence would probably not be aware of that it was
21 a rejoinder to an ad that had run a month before somewhere
22 else, whether in New York or otherwise.

23 BY MR. YERUSHALMI:

24 Q. You have no experience, though, in assessing security risk,
25 do you?

1 A. As I say, I can't tell whether you are asking me what my
2 opinion is or what Mr. Diaz decided.

3 Q. No. I asked you, you don't have any experience or
4 professional expertise --

5 A. That is not my --

6 Q. Let me finish my question.

7 A. That is not my expertise.

8 Q. May I finish my question?

9 A. Sure.

10 Q. You don't have any expertise or experience in assessing
11 security risk yourself, do you?

12 A. That's correct.

13 Q. You rely on Mr. Diaz, do you not?

14 A. Yes, I do.

15 THE COURT: But then you can't ask him for his own
16 opinions if you don't want them.

17 Go ahead.

18 Q. At paragraph 33 of your declaration, Mr. Rosen, you testify
19 that my client's earlier savages ad was torn down and defaced.

20 Do you see that?

21 A. Yes, sir. You said 33?

22 Q. Yes.

23 A. I recall being told that. I don't have any first-hand
24 knowledge of that.

25 Q. I ask you that because, again, there is no evidence of that

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Rosen - cross

1 anywhere in the record in terms of the document production and
2 there is no public record of that defacement. In the same
3 paragraph you note that a person was arrested for spray
4 painting one of the savages ads, correct?

5 A. Yes. And again it was -- what I said was it was my
6 understanding that that was the case.

7 Q. And that was just the one event, correct?

8 A. As far as I know.

9 Q. Is there evidence of any other acts of vandalism relating
10 to any of my client's ads that have ever run on MTA property?

11 A. Not that I know of.

12 MR. SISTROM: Objection, your Honor.

13 THE COURT: I'm sorry?

14 MR. SISTROM: Objection, your Honor.

15 THE COURT: Overruled.

16 You can only testify about what you know, so if you
17 know the answer --

18 THE WITNESS: I am not sort of prepared to answer that
19 question so I don't know what instances there may have been.
20 There have been many ads over many years and I can't answer
21 that that is the one and only case. I just don't know either
22 way.

23 BY MR. YERUSHALMI:

24 Q. Nothing stands out in your mind, though?

25 A. That's right.

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Rosen - cross

1 Q. And just to cover some ground that I thought was in your
2 declaration for purposes of foundation, as the Director of Real
3 Estate you are in charge of the entire operation relative to
4 placing ads on transit property, correct?

5 A. Well, I oversee that very indirectly as one of my many
6 responsibilities.

7 Q. But that is one of them, correct?

8 A. Yes, but we have also, within the individual agencies,
9 people who are more directly involved in the liaison with the
10 advertising contractors in the facilities. I have one deputy
11 who his primary responsibility for the relationship with the
12 contractors. He is not personally out in the field checking
13 every time that an ad is going up or coming down.

14 Q. Again, just based upon your personal knowledge as the
15 Director of Real Estate, in the history of MTA are you aware of
16 any acts of violence incited or provoked by any advertisement
17 that the MTA has run?

18 A. By violence if you mean something exceptional as opposed to
19 vandalism, no, sir, I don't have specific knowledge.

20 Q. And to be clear, what I refer to in terms of violence would
21 be the violence referred to or the lawlessness referred to in
22 Standard (a)(x).

23 A. Again, my answer stands. I don't have any specific
24 knowledge.

25 Q. Who at the MTA would have better knowledge about that issue

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Rosen - cross

1 other than you? Would that be Mr. Diaz?

2 A. Yes, I believe so, and his predecessors.

3 Q. Let me direct your attention to paragraph 4 --

4 A. Excuse me. And I would say also people within the
5 operating agencies.

6 Q. Let me direct your attention to paragraph 4 of your
7 declaration, just to clean up a typo.

8 A. Did you say 4?

9 Q. Paragraph 4 of your declaration.

10 A. Yes, sir.

11 Q. You have indicated earlier before we came in to court that
12 you had found a typographical error and I just wanted to clear
13 that up for the record.

14 MR. SISTROM: Excuse me, your Honor. If I might? I
15 think you mean paragraph 40.

16 THE WITNESS: Yes. I didn't think it was 4.

17 MR. YERUSHALMI: 40. I apologize.

18 THE WITNESS: Yes.

19 MR. YERUSHALMI: I have my hearing aids in today but
20 apparently they're only so good.

21 THE WITNESS: Yes, sir. There was a reference there
22 to the savages ad and what I meant to say was the killing Jews
23 ad.

24 MR. YERUSHALMI: Can you identify --

25 THE COURT: Whoa, whoa. Hold on, please. There is a

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Rosen - cross

1 reference to the savages ad and you meant to say what?

2 THE WITNESS: The killing Jews ad, your Honor.

3 THE COURT: What line are you talking about?

4 THE WITNESS: That appears in the very last line of
5 page 15.

6 THE COURT: Okay. Thank you.

7 BY MR. YERUSHALMI:

8 Q. Also for housekeeping affairs and cleaning up the typo, let
9 me direct your attention to paragraph 63 of your declaration.

10 A. Yes.

11 Q. Four lines down, the word AFDI, you actually meant there
12 CAIR, did you not?

13 A. Yes. And I apologize for that.

14 Q. No reason to apologize.

15 Let me direct your attention --

16 THE COURT: Hold on.

17 THE WITNESS: Beginning of the line, your Honor. Four
18 lines down AFDI should be CAIR.

19 MR. YERUSHALMI: That's correct, your Honor. CAIR
20 planned to...

21 THE COURT: Thank you.

22 BY MR. YERUSHALMI:

23 Q. Let me direct your attention to paragraph 71 of your
24 declaration. Are you there, Mr. Rosen?

25 A. Yes.

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Rosen - cross

1 Q. You indicate in that paragraph -- let me just read it for
2 the record: Not surprisingly, because AFDI's parody
3 advertisements were meant to parody CAIR's MyJihad
4 advertisements, and CAIR's MyJihad advertisements were never
5 displayed in New York City on MTA properties or facilities,
6 AFDI submitted none of its parody advertisements to MTA for
7 display on MTA property or facilities in early 2013.

8 Do you see that?

9 A. Yes, sir.

10 Q. Where did you come to understand my client's
11 rationalization for not submitting the ads?

12 THE COURT: Rationale.

13 MR. YERUSHALMI: I'm sorry. Yes, your Honor.

14 THE COURT: Rationale.

15 THE WITNESS: I guess that is an inference that
16 perhaps wasn't justified. On reflection, not surprising to us.

17 BY MR. YERUSHALMI:

18 Q. So you have no basis in fact for that speculation?

19 A. No.

20 Q. Let me direct your attention to paragraph 73 and, indeed,
21 what I would like you to do is take a look at paragraph 73
22 through 76. Have you reviewed those?

23 A. Yes.

24 Q. The MTA does have a standard that prohibits libel, does it
25 not?

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Rosen - cross

1 A. Yes.

2 Q. And you understand libel is a rubric of defamation,
3 correct?

4 A. Again, I'm not a specialist in that area but I understand
5 the related terms.

6 Q. Okay.

7 Now, you indicate in paragraph 73 that MTA has
8 approved my client's ads critical of the Council on
9 American-Islamic Relations -- or CAIR -- the organization that
10 had run the campaign regarding MyJihad ads; correct?

11 A. Yes, sir.

12 Q. This particular ad compares CAIR to Hamas -- H-A-M-A-S --
13 in the U.S.

14 Do you see that?

15 A. Yes.

16 Q. It also identifies CAIR leaders who have been convicted of
17 Jihad terror-related crimes, correct?

18 A. Yes.

19 Q. Now, after this ad ran CAIR contacted the MTA and asked it
20 to remove it on the basis that it violated the libel standard,
21 correct?

22 A. On the basis that it was defamatory, yes.

23 Q. And defamation and libel in this case are the same; would
24 you agree with me?

25 A. It has been a long time since I was in law school.

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Rosen - cross

1 Q. You can take my word for it.

2 A. I will.

3 Q. Paragraph 76 indicates that the MTA declined to do so. Do
4 you see that?

5 A. Yes.

6 Q. Why?

7 A. My understanding was that their stated objection was
8 that -- was not with respect to the naming of the individuals
9 but with respect to the equating of CAIR and Hamas and we did
10 not understand that -- based on review with counsel we did not
11 understand that to be defamatory.

12 Q. What was your understanding of that analysis?

13 MR. SISTROM: Objection, your Honor. I think he is
14 getting very close to privileged --

15 THE COURT: I'm sorry?

16 MR. SISTROM: I think he is getting very close to
17 privileged attorney-client communications.

18 THE COURT: Okay.

19 MR. YERUSHALMI: Your Honor, I can come at it a
20 different way.

21 THE COURT: Fine.

22 If there is a conversation you had with counsel to get
23 legal advice you don't have to disclose that. There may be
24 issues as to whether you have already waived the privilege with
25 respect to advice of counsel, but if you get close to advice

1 from counsel you can just say that that is really advice of
2 counsel and then we can deal with it then. Although, I should
3 add that the subject of the ad and whether it is libelous or
4 not is really quite removed from the basis for the preliminary
5 injunction.

6 Go ahead.

7 MR. YERUSHALMI: Your Honor, if I may just respond to
8 that?

9 THE COURT: Sure.

10 MR. YERUSHALMI: Only in the sense that we wouldn't be
11 speaking about it except for the fact that defendants have put
12 it into the record to make the point that even when criticized
13 or when challenged by the organization CAIR itself, the MTA
14 allowed my client to criticize Hamas publicly. And so, what I
15 just want to understand is how the MTA applies its standards
16 both as to the (a)(x) standard and in this case as to the
17 defamation standard.

18 THE COURT: Go ahead. I mean, if you really think
19 that whether a preliminary injunction should be granted is
20 going to turn on this ad criticizing the leaders of CAIR, go
21 ahead, but I think that is a myopic conclusion.

22 MR. YERUSHALMI: Well, I would agree it doesn't turn
23 on it, your Honor.

24 THE COURT: But, go ahead.

25 MR. YERUSHALMI: I will try to redact this part of the

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Rosen - cross

1 examination.

2 THE COURT: Go ahead.

3 BY MR. YERUSHALMI:

4 Q. You understand that Hamas is a designated foreign terrorist
5 organization?

6 A. That is my understanding.

7 Q. And would you understand as a lawyer that linking an
8 organization such as CAIR to Hamas would be defamation, per se?

9 MR. SISTROM: Objection, your Honor.

10 THE COURT: Do you have any understanding about what
11 defamation, per se, is? At the moment, not necessarily what
12 you learned in law school, but today; do you know what
13 defamation, per se, is?

14 THE WITNESS: No, I do not.

15 BY MR. YERUSHALMI:

16 Q. Do have you any knowledge whether CBS sought clarification
17 from my clients regarding the truth or falsity of this
18 particular CAIR ad?

19 A. I don't recall, honestly. It was some while ago and I
20 don't remember how much discussion there was about this.

21 Q. Do you recall CBS asking my client to verify that CAIR was
22 an unindicted co-conspirator in the largest criminal trial for
23 material support of terrorism?

24 A. No, I do not recall that.

25 Q. Do you recall that CBS sought verification from my client

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Rosen - cross

1 that each of these CAIR leaders were in fact CAIR leaders and
2 had been convicted of terror-related crimes?

3 A. No, I do not recall that. I mean, it doesn't surprise me
4 if that happened, but I don't recall it.

5 Q. And do you recall that my clients provided CBS -- let me
6 rephrase that.

7 Did CBS inform you or have you learned in your
8 position as Director of Real Estate that my client in fact
9 provided that verification to CBS which is why it permitted the
10 ad to stay up?

11 MR. SISTROM: Objection, your Honor.

12 THE COURT: Basis?

13 MR. SISTROM: Beg your pardon?

14 THE COURT: I'm sorry.

15 MR. SISTROM: I objected to the form of the question,
16 your Honor.

17 THE COURT: What is wrong with the form?

18 MR. SISTROM: It assumes that CBS made a determination
19 to allow the ad to stay up. There is no evidence in the record
20 of that.

21 THE COURT: Well, the question is do you know whether
22 AFDI provided verification to CBS about the CAIR leaders and
23 their relationship to Hamas?

24 THE WITNESS: I am not aware, your Honor, of the
25 extent of discussion that may have taken place between CBS and

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Rosen - cross

1 AFDI. I do recall that this issue was presented, that MTA
2 counsel looked into it, and that there was some fact-finding as
3 I understood it that had taken place but I don't recall the
4 particulars or what the information source was.

5 THE COURT: That was handled by in-house counsel for
6 the MTA?

7 THE WITNESS: I believe that's right, sir; yes, sir.

8 MR. YERUSHALMI: Thank you, your Honor.

9 BY MR. YERUSHALMI:

10 Q. Let me direct your attention to paragraph 90 of your
11 declaration, Mr. Rosen.

12 A. Yes, sir.

13 THE COURT: By the way, when issues of libel come up,
14 whether an ad is libelous or not, is that handled by your
15 in-house counsel?

16 THE WITNESS: As distinct from outside counsel you
17 mean?

18 THE COURT: Well, handled by the lawyers inside or
19 outside?

20 THE WITNESS: Yes. Generally speaking our real estate
21 department is not set up to make that determination, sir.

22 THE COURT: Okay. Go ahead, Mr. Yerushalmi.

23 THE WITNESS: But I will also say that it comes up
24 very, very infrequently. The vast majority of our advertising
25 is commercial in nature and doesn't implicate these sorts of

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Rosen - cross

1 questions. This was a special case, certainly.

2 THE COURT: Okay. Go ahead, Mr. Yerushalmi.

3 MR. YERUSHALMI: Thank you, your Honor.

4 BY MR. YERUSHALMI:

5 Q. Let me direct your attention to Exhibit 3 --

6 THE COURT: I interrupted you and you were going to
7 paragraph 90.

8 MR. YERUSHALMI: I decided to go at it differently,
9 your Honor. Thank you.

10 THE COURT: Okay.

11 BY MR. YERUSHALMI:

12 Q. Are you there?

13 A. 93?

14 Q. I'm sorry?

15 A. Did you say 93.

16 Q. No, I said Exhibit 3 of your declaration?

17 A. Exhibit 3. Sorry. Okay.

18 Q. And for the record, these are the standards, the 2012
19 standards, and if you turn to page 2 we come to the (a)(x)
20 standard that we are involved with in this litigation, correct?

21 A. Okay.

22 Q. Correct?

23 A. Is it -- the question was is it on page 2?

24 Q. No, not quite, but that is close enough.

25 A. I am sorry. What was the question?

1 Q. We can move on.

2 THE COURT: The question was -- you are on page 2,
3 right?

4 Right?

5 THE WITNESS: Yes.

6 THE COURT: There is a little (x).

7 THE WITNESS: Yes.

8 THE COURT: That's the (a)(x) standard we are dealing
9 with in this case, right?

10 THE WITNESS: Yes, sir.

11 THE COURT: Okay.

12 MR. YERUSHALMI: Thank you, your Honor.

13 BY MR. YERUSHALMI:

14 Q. I don't see anywhere in that (a)(x) standard alternatives
15 that the MTA would provide to an advertiser whose advertisement
16 has been ruled in violation of (a)(x); is that correct?

17 A. When you say alternatives I don't understand. You mean
18 specific authorization to suggest alternatives to an
19 advertiser?

20 Q. That's correct.

21 A. No. Certainly not in that paragraph.

22 Q. And, indeed, I reviewed the entire standards and there is
23 nothing specific in the standards that I could find that
24 informed the MTA or its advertisers or its marketing contractor
25 that there would be alternatives offered, i.e. change the

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Rosen - cross

1 language, advertise somewhere else in the MTA transit
2 authority, etc.

3 Do you know of any language in the standards
4 themselves that would provide alternative avenues or means
5 for --

6 A. In the standards themselves? No, sir.

7 Q. Okay.

8 If we turn, though, to the procedures that we know to
9 be set out in Mr. Lhota's memo of October 5 and which is
10 Exhibit 4 of your declaration, there it does set out, does it
11 not, the opportunity to speak to the advertiser and to suggest
12 changes to allow the advertiser to suggest changes in the
13 language that would bring it in conformance with
14 Standard (a)(x), correct?

15 A. Yes.

16 Q. Are there any other memos or written procedures or manuals
17 or policies other than this memo by Mr. Lhota that we are
18 looking at now that articulates the enforcement procedures for
19 the (a)(x) standard or, more generically, the other standards?

20 A. No.

21 Q. I'm sorry?

22 A. No.

23 Q. So, if we want to find the enforcement procedures we come
24 to this memo, correct?

25 A. As a formal matter, yes.

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Rosen - cross

1 Q. Other than allowing the advertiser to change their
2 advertisement, are there any other ways or avenues or means
3 that the MTA provides the advertiser to display their ad even
4 though it would otherwise be not in conformance with the (a)(x)
5 standard pursuant to the MTA's assessment?

6 A. I don't understand your question. Could you give me an
7 example?

8 Q. It was a long one so I can understand why you don't.

9 We have seen in this memo that the advertiser can
10 change their speech, they can change the language in the
11 advertisement, and if they do it sufficiently they might bring
12 it into conformance with Standard (a)(x), correct?

13 A. Yes.

14 Q. Are there any other approaches taken in the policies and
15 procedures and practices of the MTA that would suggest that the
16 MTA would provide a different location or a disclaimer or some
17 other alternative means for protecting its interest for
18 security?

19 A. Well, we already have a disclaimer, as you well know.

20 Q. I understand that, but I am just asking a straight forward
21 question. Once an advertisement has been deemed not in
22 conformance with Standard (a)(x), as I read this memo the MTA
23 would suggest to the advertiser you can change your speech. We
24 won't suggest to you how but you can change it and if you can
25 change it sufficiently that we determine that it is no longer

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Rosen - cross

1 going to cause imminent violence we will run your ad, correct?

2 A. Yes.

3 Q. Are there any other policies, procedures, or practices,
4 written or oral or customary, that would provide that the MTA
5 would say you are not in conformity because we believe this
6 might incite violence but we are going to run a disclaimer
7 right next to your ad and say this is not a Hamas ad, this is
8 AFDI's ad and they're very much opposed to Hamas?

9 A. No. No, sir.

10 Q. Nothing like that whatsoever?

11 A. Nothing like that. No.

12 MR. YERUSHALMI: Your Honor, we are done with this
13 witness.

14 THE COURT: All right.

15 Mr. Sistrom, you may examine.

16 MR. SISTROM: Thank you, your Honor.

17 REDIRECT EXAMINATION

18 BY MR. SISTROM:

19 Q. Mr. Rosen, very briefly.

20 Just at the end of your cross-examination you were
21 being asked about Exhibit 3 to your declaration which was the
22 MTA advertising standards. Do you recall that?

23 A. Yes.

24 Q. And you were asked whether there was any provision in the
25 standards about -- for allowing a would-be advertiser to revise

1 its advertisement.

2 Do you remember that?

3 A. Yes.

4 Q. And can I call your attention to page 3 of Exhibit 3 toward
5 the bottom?

6 A. Okay. I'm sorry. I see it.

7 Q. There is a subsection C and there is a (iii), and if you
8 look at that provision does that refresh your recollection at
9 all?

10 A. Yes, it does. I was unduly focused on the standards
11 themselves as opposed to the process which is addressed in the
12 same document.

13 Q. And it says that if the MTA concurs that a submitted
14 advertisement might not conform to the standards, then the
15 advertising contractor can discuss with the advertiser
16 potential revisions and if the advertiser proposes a revision
17 then the MTA will review it. Is that right?

18 A. Yes.

19 Q. And is it your understanding that the procedure in the
20 Lhota memo that you were discussing certainly incorporates
21 that?

22 A. Yes. Conforming, yes. It is consistent with this.

23 MR. SISTROM: That's all I have, your Honor.

24 THE COURT: Well, that actually wasn't the question.

25 The question was is there any written procedure for the MTA of

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Rosen - redirect

1 not to have the advertiser change the advertisement but rather
2 to do alternatives such as counter-advertising, if you will?

3 THE WITNESS: Your Honor, I understood that question
4 to have reference specifically to the (a)(x) standard.

5 THE COURT: Okay.

6 THE WITNESS: And with respect to the (a)(x) standard
7 I am not aware that there is an alternative presented to
8 running an ad in one location versus another.

9 THE COURT: And what you have just been discussing in
10 (iii) is really what you talked about before, the process by
11 which an advertiser can change the ad.

12 THE WITNESS: Yes. This is generic, your Honor. This
13 applies equally to commercial ads that have a minor suggestive
14 pose and the like.

15 THE COURT: Okay. Fine. Thank you.

16 MR. YERUSHALMI: Your Honor, we are prepared to call
17 Raymond Diaz to the stand now. If I could indulge the Court
18 for a short break?

19 THE COURT: Sure.

20 Mr. Rosen, you may step down. The question is how
21 long you expect to go with Mr. Diaz and whether we should do
22 Mr. Diaz before or after lunch. I am perfectly happy to take a
23 break and proceed or not, as you will.

24 MR. YERUSHALMI: My guess it will run as long as
25 Mr. Rosen, maybe a hair longer.

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Rosen - redirect

1 THE COURT: So, maybe we should break for lunch and
2 resume at 1:30.

3 MR. YERUSHALMI: Very good. Thank you, your Honor.

4 THE COURT: Okay. Great.

5 (Luncheon recess)

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1 A F T E R N O O N S E S S I O N

2 1:45 p.m.

3 (Hearing resumed)

4 THE COURT: Good afternoon. Please, be seated.

5 Mr. Yerushalmi, you may call your next witness.

6 MR. YERUSHALMI: Thank you, your Honor. Plaintiffs
7 called Raymond Diaz to the stand.

8 RAYMOND DIAZ,

9 called as a witness by the Plaintiff,

10 having been duly sworn, testified as follows:

11 THE DEPUTY CLERK: Please state your full name for the
12 record.

13 THE WITNESS: Raymond Diaz.

14 THE DEPUTY CLERK: Thank you.

15 THE COURT: All right, Mr. Yerushalmi. You may
16 examine.

17 MR. YERUSHALMI: Thank you, your Honor.

18 CROSS EXAMINATION

19 BY MR. YERUSHALMI:

20 Q. Just for the record, Mr. Diaz, during the lunch break you
21 didn't have occasion to speak about my questioning of Mr. Rosen
22 or his answers in the earlier session, did you?

23 A. No, I did not.

24 Q. Thank you.

25 You are employed by the Metropolitan Transit Authority

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Diaz - cross

1 as Director of Security; is that correct?

2 A. That's correct.

3 Q. Since January 2014?

4 A. That's correct.

5 Q. You understand that the Metropolitan Transit Authority is
6 referred to as the MTA, correct?

7 A. That's correct.

8 Q. I will use the MTA throughout this examination. Is that
9 agreeable?

10 A. Yes, it is.

11 Q. I wish to pause here, Mr. Diaz, to note with humility and
12 sincere appreciation, your service to this country in and out
13 of uniform. Specifically I take note from your declaration of
14 the fact that you served in the U.S. Marine Corps and earned
15 two Purple Hearts in Vietnam, that you then went on to serve in
16 the New York Police Department for 41 years. Again, thank you
17 for your service.

18 And your Honor, I would just take note here that my
19 colleague, who is also a former Marine, 12 years combat duty,
20 would normally have been here today, Robert Muise, but he is
21 back in Ann Arbor. His second eldest daughter gave birth to
22 two twins and they were premature and they were in the ICU, he
23 is taking care of the other 11 children while the mother is
24 running back and forth. He normally would handle the oral
25 argument. I thought that would be of note for the record.

1 I also want to make note of your service and sacrifice
2 in addition to point out that my responsibility here today,
3 Mr. Diaz, is to probe, through this examination, your testimony
4 and indeed your assessments regarding the advertisement at
5 issue in this litigation. I will ask you to understand that
6 any express or implied criticism of your decision and
7 assessments has nothing do with my personal respect for your
8 service but I have a duty to my clients, to due process, and to
9 the First Amendment.

10 Do you understand my role here today?

11 A. Yes, I do.

12 Q. Thank you very much.

13 Mr. Diaz, you understand that I and my co-counsel
14 represent the plaintiffs in this matter, correct?

15 A. Yes.

16 Q. You also understand that my clients are the American
17 Freedom Defense Initiative, Pamela Geller and Robert Spencer;
18 do you not?

19 A. Yes.

20 Q. I am going to refer to my client, the American Freedom
21 Defense Initiative as AFDI; is that agreeable?

22 A. Yes, it is.

23 Q. You also understand that my clients have sued the MTA for
24 violating their First Amendment rights, correct?

25 A. That's correct.

F305afdH

Diaz - cross

1 Q. And you understand that the conduct about which my clients
2 are suing is MTA's refusal to run a specific advertisement,
3 correct?

4 A. That's correct.

5 Q. Now, we have marked certain documents that are before you
6 as hearing exhibits. The paper directly in front of you has
7 been marked Exhibit 1 and those are the revised stipulations
8 that are part of the record and have been filed in this matter
9 as ECF docket no. 27-1.

10 Would you take a look at that document? I would
11 direct your attention to the first page and the picture of the
12 ad underneath paragraph 1.

13 Do you see that?

14 A. Yes, I do.

15 Q. Now, you understand that this is the ad that my client
16 submitted to the MTA for display on transit property and the ad
17 that you determined violated a standard of the MTA, correct?

18 A. That's correct.

19 Q. And you also understand that this ad was rejected, correct?

20 A. That's correct.

21 Q. Let me have you flip the page to paragraph 2. Do you see
22 the picture there?

23 A. Yes.

24 Q. And you understand that this ad was in fact the ad that ran
25 in Chicago and San Francisco, correct?

F305afdH

Diaz - cross

1 A. Yes.

2 Q. Now, you were aware, prior to your security assessment, of
3 my client's ad, that there were never any violence or
4 lawlessness attributed to my client's ad that ran in San
5 Francisco or Chicago, correct?

6 A. That's correct.

7 Q. Indeed, you had affirmative knowledge that there had been
8 absolutely no problem with the ad in San Francisco, correct?

9 A. Well, that's not correct. I don't know what you mean with
10 no problem.

11 Q. I mean no problem whatsoever.

12 A. Well, when you say no problem I know people voiced
13 displeasure with the ad. I don't know if you consider that no
14 problem. I think that could be a problem.

15 Q. Okay. Let's look at that for just a moment.

16 Let me ask you to open the blue binder. Those are the
17 documents that the MTA produced in response to our first
18 request for production of documents and I am going to ask you
19 to turn to the Bates number MTA 80. If you look at the bottom
20 right of each page there is a Bates number "MTA" with a number.
21 Do you see that?

22 A. Yes.

23 Q. I am going to ask you just to review and then we will go
24 into the specifics, Bates nos. 80 through 84. Let me know when
25 you are done, Mr. Diaz.

F305afdH

Diaz - cross

- 1 A. I have finished.
- 2 Q. You recognize that this is a single e-mail thread, correct?
- 3 A. Yes.
- 4 Q. And that the most recent e-mail is at the top at MTA 80 and
5 it runs through that e-mail that concludes MTA 84, correct?
- 6 A. That's correct.
- 7 Q. Now, let's drop down to MTA 83 at the bottom which is the
8 first e-mail chronologically speaking, correct?
- 9 A. That's correct.
- 10 Q. Now, this is an e-mail that appears to be from a Phillip
11 Hoffman with an e-mail address suggesting he works at the MTA
12 headquarters, to a Scarlett Lam; is that correct?
- 13 A. Yes, sir. That is correct.
- 14 Q. Now, would you describe Mr. Hoffman's position, if you know
15 it?
- 16 A. Phillip Hoffman works for the Department of Security. He
17 works for me.
- 18 Q. Did he e-mail Ms. Lam at your request?
- 19 A. Yes, he did.
- 20 Q. And who is Ms. Lam?
- 21 A. I don't really know her position. I am not familiar with
22 that.
- 23 Q. If you look up at the e-mail just above that e-mail also at
24 MTA 83 where Ms. Lam writes back to Mr. Hoffman, do you see
25 there her title?

F305afdH

Diaz - cross

1 A. Yes, I do.

2 Q. Does that make sense to you, that she's the manager of the
3 Emergency Management, Systems Security, and Special Events for
4 the San Francisco Transit Authority?

5 A. It looks like she is terrorism liaison officer and
6 coordinator, and manager of emergency management, systems
7 security, and special events; yes.

8 Q. Does it make sense that Mr. Hoffman, at your request, would
9 have contacted her specifically for this query?

10 A. Not her specifically, no, but her agency, yes.

11 Q. What exactly did you ask Mr. Hoffman to determine?

12 A. I asked him to determine, to contact the agencies in the
13 area where these ads were run and to get feedback from those
14 agencies as to what their experiences were in the running of
15 the ads.

16 Q. Do you know of any other agencies that were contacted other
17 than the San Francisco MTA?

18 A. They might have. Offhand, I don't recall.

19 Q. We saw none in the document production other than the San
20 Francisco MTA.

21 A. Okay.

22 Q. Is that --

23 A. That's all I recall.

24 THE COURT: Did you contact anyone in Chicago?

25 THE WITNESS: We might have, your Honor. I'm not

F305afdH

Diaz - cross

1 sure. I don't recall.

2 BY MR. YERUSHALMI:

3 Q. Now, I want you to run up that e-mail thread to MTA 82. Do
4 you see that?

5 A. Yes.

6 Q. I am looking at the second e-mail from the top from
7 Mr. Hoffman to Scarlett Lam and Paul Rose, and it is dated
8 August 20, 2014 and it is clocked in at 12:19 p.m.

9 Do you see that?

10 A. Yes.

11 Q. He makes some specific inquiries, indeed, four numbered
12 inquiries. Do you see that?

13 A. Yes, I do.

14 Q. Did you have any input in the language that Mr. Hoffman
15 used to phrase these questions?

16 A. No, I did not.

17 Q. Let's look at paragraph 1. Do you know why Mr. Hoffman
18 would have used the language: Did the volatile language of the
19 ad foment a public outcry, etc.

20 Do you know why he used that particular language? Did
21 you discuss that with him in any way?

22 A. No, I did not.

23 Q. Now, if you turn to MTA 81, moving along the e-mail thread,
24 at the very bottom do you see that Scarlett Lam sent
25 Mr. Hoffman an e-mail indicating that this has now been

F305afdH

Diaz - cross

1 referred to Gail Stein of the MTA?

2 Do you see that?

3 A. Yes.

4 Q. And do you suppose that Ms. Stein is also involved in the
5 security issues relating to the San Francisco MTA, if you know?

6 A. I don't know.

7 Q. Now, if we go to MTA 80 the first of this e-mail thread but
8 the last e-mails in the thread you note that Scarlett Lam, in
9 the second e-mail down writes to Gail Stein, copies you and
10 others, and sets out the questions that were asked by
11 Mr. Hoffman?

12 Do you see that?

13 A. Yes.

14 Q. In the second paragraph leading to the numbered paragraph
15 do you not the language she used? She writes: Specifically,
16 the New York MTA is interested in the following questions (in
17 their own words).

18 Do you see that?

19 A. Yes, I do.

20 Q. Now, the e-mail above that is the last e-mail of the thread
21 and Gail Stein responds to Ms. Lam and she indicates initially,
22 please, see below.

23 Do you see that?

24 A. Yes.

25 Q. Now, do you see that in each of the numbered paragraphs

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Diaz - cross

1 there is a word written right after the question mark "none."

2 Do you see that?

3 A. Yes.

4 Q. Do you suppose that, as I do, that that "none" is the
5 iteration written there by Ms. Stein in response?

6 A. Yes, I would.

7 Q. So that is to the question: Did the volatile nature of the
8 ad foment a public outcry from your passenger base? If so,
9 were the majority of protestations in favor or against the
10 depicted subject content? She writes "none."

11 Do you see that?

12 A. Yes.

13 Q. And as to each question after that she writes "none,"
14 correct?

15 A. That's correct.

16 Q. And then as to the question more generally she responds in
17 her e-mail, time stamped 1:51 p.m. at the top of that page: We
18 did have some protest by letter from an earlier AFDI ad about
19 two years ago but none about this one or any of the ones that
20 followed that first one.

21 Do you see that?

22 A. Yes, I do.

23 Q. Does that refresh your recollection that in San Francisco
24 there was absolutely no problem with the running of my client's
25 ad?

F305afdH

Diaz - cross

1 A. I seem to recall newspaper articles that there were some
2 protests regarding the ads.

3 Q. Well, she indicates there might have been some issue two
4 years earlier but as to the ad in question, the ad that is at
5 issue in this litigation, the ad that was being queried in this
6 e-mail thread from Ms. Stein's report, all we know is that
7 there were absolutely no problems or issues arising from the
8 running of that ad.

9 Would you agree that that is at least what Ms. Stein
10 is reporting?

11 A. Not exactly. She is saying there was no protest by letter.
12 I don't know that there were no newspaper articles or other
13 correspondence that might have expressed displeasure with the
14 ad.

15 Q. All right. I might take issue with your reading of
16 Ms. Stein's e-mail but we will move on.

17 You have been in your position as Director of Security
18 a relatively short period of time, correct, since January 2014?

19 A. That's correct.

20 Q. In taking over that position were you briefed by your
21 predecessors or colleagues about security issues that had taken
22 place prior to your current tenure?

23 A. No, I wasn't.

24 Security issues regarding my employment with the MTA?

25 Q. Yes. That is to say issues that the MTA might have had

F305afdH

Diaz - cross

1 relating to security in the past that they would want to brief
2 you on to bring you up to speed.

3 A. Not prior to my employment there, no.

4 Q. After your employment did they brief you on prior security
5 issues?

6 A. Yes, they did.

7 Q. So that they would speak to you about what had occurred
8 prior to your employment and explain to you some of the history
9 of the security issues relating to the MTA?

10 A. Yes.

11 Q. Would you say that those briefings were thorough?

12 A. Well, I would have liked to have been more thorough. I
13 mean, when I get into a new assignment of course you want to
14 know everything about that assignment that is possible and, of
15 course, sometimes in a short period of time that is not always
16 possible.

17 Q. Are you aware of any violence or lawlessness ever
18 attributed to an MTA ad?

19 A. Yes.

20 Q. And on what occasion did that -- let me withdraw that.

21 What was that ad that occasioned this violence or
22 lawlessness?

23 A. What was the ad? I'm not sure I understand the question.

24 Q. What was the specific ad that you understand --

25 A. I don't recall the specific ad but I know it was an ad.

F305afdH

Diaz - cross

1 Q. Was it a published ad or a commercial ad?

2 A. No, no; it was an AFDI ad.

3 Q. Are you referring to the occasion where a woman spray
4 painted over one of my client's ads?

5 A. From my understanding there were a number of ads that were
6 graffitied or had criminal mischief to.

7 Q. And this occurred prior to your employment, correct?

8 A. That's correct.

9 Q. And where did you learn this information from?

10 A. I learned it from -- I have a director of our unit called
11 ICTF -- Interagency Counter Task Force -- and in my
12 conversations with representatives from that task force I got
13 that information.

14 Q. Was there more than one occasion of spray painting or
15 criminal mischief, as you termed it?

16 A. From my understanding there were a number of ads that were
17 posted and it was my understanding that every one of them were
18 defaced.

19 Q. Now, in our first request for production of documents we
20 had asked for all documents relating to any violence that
21 related to my client's ad or any other ad and we don't have any
22 occasion -- we haven't seen any documents relating to this
23 report of yours.

24 Other than the one publicly reported upon criminal
25 mischief, the spray painting of an ad, have you seen any actual

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Diaz - cross

1 documentation or records that evidence this vandalism that you
2 are referring to now?

3 A. To the best of my recollection I did, yes.

4 Q. And what are those documents?

5 A. To the best of my recollection it was an e-mail from
6 someone from our ICTF unit that actually referenced that
7 mischief and indicated that all of the posters that were
8 displayed were destroyed.

9 Q. Other than the vandalism of the ads, was there any violence
10 attributed to those acts that you understand?

11 A. None that I know of.

12 Q. Mr. Diaz, let me ask you to turn to the red binder, and
13 that is Mr. Diaz' declaration and exhibits and let me ask you
14 to turn to tab 3 which is the --

15 THE COURT: May I stop you for a moment?

16 To what degree, if you can give me some idea, of how
17 common it is to have graffiti in the subways and buses?

18 THE WITNESS: Your Honor, I would like to say today
19 that it is nowhere near the extent where it was a number of
20 years ago. Today the MTA has a policy when there is graffiti
21 on any of our train cars those train cars are immediately put
22 out of service and that is rectified. So, it is nowhere near
23 an issue as it once was, although occasionally we do still have
24 an instance of graffiti.

25 THE COURT: Well, occasionally. Trains, buses, are

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Diaz - cross

1 taken out of service if there is any graffiti on them?

2 THE WITNESS: That's correct.

3 THE COURT: So, how often does it happen that you have
4 graffiti that you have to take trains or buses out of service?

5 THE WITNESS: Well, today I don't think it happens --
6 it is not as common as it was at one time. In time frame,
7 again, those reports are usually handled through the NYPD and I
8 don't get copies of every one of those reports but I can tell
9 today, for instance, I got an e-mail about graffiti at one of
10 our stations. So, it does happen.

11 THE COURT: Okay.

12 MR. YERUSHALMI: Thank you, your Honor.

13 BY MR. YERUSHALMI:

14 Q. If you turn to the red binder which is Mr. Rosen's
15 declaration, turn to tab 3 which is Exhibit 3 to Mr. Rosen's
16 declaration, if you would. Are you there?

17 A. Yes.

18 Q. Are you familiar with this document?

19 A. Yes, I am.

20 Q. In fact, this is the 2012 standards for advertising,
21 correct?

22 A. That's correct.

23 Q. Now I am going to ask you to flip the page to
24 Standard (a)(x). Do you see that?

25 A. Yes, I do.

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Diaz - cross

1 Q. That is the standard that you were applying when you were
2 conducting your security assessment, correct?

3 A. Yes, it is.

4 Q. Let me ask you to flip to the tab 4 which is the Exhibit 4
5 of Mr. Rosen's declaration. Are you familiar with this
6 document as well?

7 A. Yes, I am.

8 I would like to go back to the prior document to look
9 at that again.

10 Q. Please, do.

11 A. What page is that again?

12 Q. Tab 3.

13 A. Tab 3.

14 Actually, I think I have to correct my testimony. The
15 page in Exhibit 3, I don't know if I have ever seen it before
16 but the one in Exhibit 4, as I think, is the one that I am
17 familiar with.

18 Q. Okay. Well, in fact, there are several pages in Exhibit 3
19 so you have never seen Exhibit 3 or the 2012 standards before.
20 Is that what you are saying?

21 A. I don't believe I have ever seen the Exhibit 3 document
22 before. I think I have seen the Exhibit 4 document is the one
23 that I am familiar with.

24 Q. Okay.

25 A. It looks like the wording is somewhat similar.

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Diaz - cross

1 Q. Do you understand Exhibit 4 to be a memo by the former
2 chairman of the MTA, Joseph Lhota, setting out the enforcement
3 procedures for the Standard (a)(x) that we were looking at
4 earlier?

5 A. Yes.

6 Q. And this is the document that you are personally familiar
7 with, correct?

8 A. Yes. I believe it is, yes.

9 Q. When you are called upon to conduct a security assessment
10 pursuant to the Lhota memo found at Exhibit 4 of Mr. Rosen's
11 declaration, do you follow those procedures as they relate to
12 the requirements of the Director of Security faithfully?

13 A. I believe I do. Yes.

14 Q. Let me ask you to look at that Lhota memo at Exhibit 4 of
15 Mr. Rosen's deposition and let's just walk through quickly what
16 that procedure involves.

17 I understand that your first involvement is when
18 Mr. Rosen, as the Director of Real Estate, contacts you and
19 tells you there is an issue with a specific ad vis-a-vis
20 Standard (a)(x), correct?

21 A. Standard A?

22 Q. Standard (a)(x).

23 A. On Exhibit 3?

24 Q. Well, let me just direct you.

25 I asked you earlier that this memorandum that is at

F305afdH

Diaz - cross

1 tab 4 is an enforcement procedure for the Standard (a)(x) which
2 was at tab 3, correct?

3 A. Yes.

4 Q. Indeed, if you look at the subject line of this memo, tab
5 4, it says Procedures for Implementation of Advertising
6 Standard Section (a)(x).

7 Do you see that?

8 A. Yes, I do.

9 Q. So I am going to refer to the Standard (a)(x) which we saw
10 is in Exhibit 3 or tab 3 of the Rosen declaration as
11 Standard (a)(x). Is that agreeable?

12 A. Yes.

13 THE COURT: But you have told us you have never seen
14 Exhibit 3 before.

15 THE WITNESS: That's correct, your Honor. I don't
16 believe I have seen that.

17 THE COURT: Okay. So you never saw the full text of
18 (a)(x) which is in Exhibit 3.

19 THE WITNESS: That's correct.

20 THE COURT: You were working from Exhibit 4 which
21 describes the procedure for implementing Section (a)(x)?

22 THE WITNESS: That's correct, your Honor.

23 THE COURT: Okay. Go ahead.

24 MR. YERUSHALMI: Thank you, your Honor.

25 BY MR. YERUSHALMI:

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Diaz - cross

1 Q. So, we see that in the second full paragraph beginning in
2 applying the advertising standard. Did you see that?

3 A. The second paragraph?

4 Q. Second full paragraph, not the indent beginning in applying
5 the advertising standards MTA's advertising contractors.

6 Do you see that?

7 A. Yes, I do.

8 Q. The advertising contractor would make note to the Director
9 of Real Estate, Mr. Rosen, of some problem with an ad relative
10 to Standard (a)(x), and in the very next paragraph it indicates
11 that Mr. Rosen, as Director of Real Estate, contacts you to do
12 a security assessment; is that correct?

13 A. That's correct.

14 Q. And we see in the numbered paragraphs the enforcement
15 procedures are broken down further. Do you see that?

16 A. Yes, I do.

17 Q. Now, in numbered paragraph 3 at the bottom of the first
18 page of the Lhota memo it reads:

19 No proposed advertisement shall be rejected for
20 display based on the above grounds unless a security assessment
21 has first been performed by the Director of Security, and the
22 security assessment has resulted in an evaluation made by the
23 Director of Security, with the written concurrence of the MTA
24 Chairman and Chief Executive Officer, that it is reasonably
25 foreseeable that the display of the proposed advertisement

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Diaz - cross

1 would imminently incite or provoke violence or other immediate
2 breach of the peace and so harm, disrupt, or interfere with
3 safe, efficient, and orderly transportation operations.

4 Do you see that?

5 A. Yes, I do.

6 Q. Now, I note in your declaration that you also indicated
7 there that once you conducted your security assessment
8 Mr. Prendergast, the current MTA Chairman and Chief Executive
9 Officer, concurred in your security assessment.

10 Do you recall that?

11 A. Yes, I do.

12 Q. Was that concurrence in writing?

13 A. Yes, it was.

14 Q. Now, in the document production that we received from MTA
15 requesting all documents relating to the rejection of my
16 client's ad, there is no written concurrence that we can locate
17 from Mr. Prendergast. Do you have a specific recollection of
18 that written concurrence?

19 A. I recall receiving a communication from the chief of staff
20 of the MTA saying that -- informing me that the MTA chairman
21 concurred with my assessment, yes.

22 Q. Who is this chief of staff?

23 A. Chief of staff was Cathy Rinaldi.

24 Q. That was an e-mail communication?

25 A. I believe it was. Yes.

1 Q. Now, on the next page at the numbered paragraph 4 it
2 indicates that you, as the Director of Security, are to turn to
3 your counterparts -- the New York Police Department and
4 elsewhere -- to assist you in obtaining a formal opinion from
5 them regarding the security assessment. Correct?

6 A. That's correct.

7 Q. And that first bullet point on paragraph 4 is the one
8 relevant to this particular ad, correct?

9 A. That's correct.

10 Q. Now, in your security assessment which for reference for
11 the record is at Exhibit 5 of the Rosen declaration; it happens
12 to also be at Exhibit 1 of your declaration, you indicate that
13 you would turn to the New York Police Department twice for an
14 opinion and you indicate there simply that they refused to
15 provide one, correct?

16 A. I don't know they refused to provide one but I didn't
17 receive one.

18 Q. Well, we will take a look at that in a moment.

19 In your declaration, however, for this particular
20 hearing, you mentioned several individuals from the New York
21 Police Department that you did speak with and at least on one
22 occasion that I can recall you indicated he agreed orally with
23 you but couldn't formalize that or memorialize it in a writing.

24 A. That's correct.

25 Q. Do you know why the NYPD would not provide an opinion?

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Diaz - cross

1 A. I don't.

2 Q. You were working in the New York Police Department dealing
3 with issues of this type for many years, were you not?

4 A. That's correct.

5 Q. And in a command position, correct?

6 A. That's correct.

7 Q. Do you know of any rule or procedure that the NYPD would
8 not coordinate with and provide an opinion about a security
9 risk to the Transit Authority?

10 A. I don't.

11 Q. In your 41 years of working with the New York Police
12 Department do you recall at any point in time whether the New
13 York Police Department would actually provide a written view
14 about a security threat to the transit system?

15 A. That would provide?

16 Q. Would provide, yes.

17 A. I couldn't know.

18 Q. Would it be odd, based upon your many years of experience,
19 that the New York Police Department would not provide a written
20 opinion or view about a specific or even generalized security
21 threat to the transit system if the Transit Authority asked for
22 one?

23 A. Sorry, sir. Just repeat the first part of the question
24 again.

25 Q. It was long. I apologize.

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Diaz - cross

1 Based upon your many years working with the New York
2 Police Department and in dealing with Transit Authority
3 officials, would you not find it strange that the New York
4 Police Department would not, as a general rule, provide written
5 assessments of a security threat to the transit system?

6 A. No, I wouldn't.

7 Q. You would not find it odd that they would not coordinate?

8 A. No.

9 Q. Why is that?

10 A. Because I recall on a former occasion when I was commanding
11 officer of the transit bureau, there was another legal
12 question, I believe, or an opinion that we had asked if the
13 NYPD wanted to weigh in on something and I think the opinion
14 was that that is an MTA legal issue, not an NYPD legal issue,
15 and that they should answer that question.

16 Q. So, no matter how grave the risk in the view of the New
17 York Police Department they would not put anything down in
18 writing, as you understand it?

19 A. I don't know that. I don't know that.

20 Q. So, just to be clear, you don't know that it is a policy of
21 the NYPD not to respond to these kinds of queries in a writing?

22 A. I don't know that. No.

23 Q. Are the written policies, standards, or procedures that set
24 out what the objective guidelines are that you, as the Director
25 of Security, are to follow to determine what is imminent

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Diaz - cross

1 violence or lawlessness?

2 A. I'm not sure if I understand the question. The policy is
3 that how do I go about determining that or --

4 Q. No. We will get to that in a moment.

5 A. Yes.

6 Q. I want to understand if you have any written policies or
7 written standards or written procedures that set out what the
8 objective guidelines are for you as the Director of Security to
9 determine what is imminent in the phrase imminent violence or
10 lawlessness.

11 A. None that I know of.

12 Q. Do you have any practice or custom in assessing security
13 threats under Standard (a)(x) for defining imminence?

14 A. Just from personal experience.

15 Q. Could imminence be a month way?

16 A. Well, I think that is difficult to say. It could be a
17 month, it could be longer, I think.

18 Q. So you see a threat articulating itself a month down the
19 road and you might, under some circumstances, consider that
20 imminent?

21 A. I might.

22 Q. Well then that makes it easy. I was going to ask you about
23 a week, a day, and an hour, so.

24 Is there a written policy standard or procedure that
25 sets out what the objective guidelines are that you, as the

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Diaz - cross

1 Director of Security, are to follow to determine what is the
2 level of reasonable foreseeability for imminent violence or
3 lawlessness?

4 A. None that I know of.

5 Q. So, let me ask the following question. Do you have any
6 custom or practice that sets out the level of reasonable
7 foreseeability when you do a security assessment?

8 A. Yes, I do.

9 Q. And what is that?

10 A. To confer with my other law enforcement partners, confer
11 with other people in the Department of Security, and to develop
12 my own opinion based on my own experience.

13 Q. Let me try to be more specific in my question.

14 When I speak of the level of reasonable foreseeability
15 I want to quantify it a bit. So, if you understood a risk to
16 be 50/50, a coin toss, would that be a reasonable
17 foreseeability for imminent lawlessness and violence?

18 A. It is a risk I wouldn't want to take.

19 Q. I appreciate that but I am asking you, in developing your
20 security assessments under the Lhota memo, would you consider a
21 50/50 risk to be a reasonable foreseeability of imminent
22 lawlessness and violence?

23 A. Yes, I would.

24 Q. 30 percent?

25 A. I think it is hard to quantify it in numbers like that.

F305afdH

Diaz - cross

1 Q. Might it go down to as low as 1 percent? One chance out of
2 a hundred?

3 A. Well, if I can elaborate and talk about it?

4 If a hundred people saw this ad and one of those
5 persons that saw this ad resorted to violence, I think that
6 would be a concern.

7 Q. Let's go now to your specific security assessment and apply
8 those standards that you have just mentioned, or lack thereof,
9 to your actual assessment in this case. So, let me ask you to
10 turn to the Exhibit 1 of your declaration which is found in the
11 black binder. Let me know when you are there.

12 A. I have it.

13 Q. You are very familiar with this security assessment, are
14 you not?

15 A. Yes.

16 Q. Now, in the first page you don't actually set out any of
17 the basis of your security assessment, do you?

18 A. No, I don't.

19 Q. In fact, the ultimate assessment occurs in the penultimate
20 paragraph on page 2, does it not? Beginning: It is my
21 understanding...

22 A. On page 2, what paragraph?

23 Q. Beginning: It is my understanding...

24 A. I am not sure what paragraph we are on here.

25 Q. We are on the first full paragraph on the second page of

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Diaz - cross

1 your security assessment. If you look at the very top,
2 Mr. Diaz, you will see the stamp by the Court, page 3 of 7.

3 A. You said page 3 or page 2?

4 Q. Let's back it up.

5 Are you at tab 1 of your declaration? Black binder,
6 tab 1?

7 A. Is that Exhibit 1?

8 Q. That is Exhibit 1.

9 A. Okay. I was in the wrong section here.

10 Now I am in Exhibit 1, page --

11 Q. Let me ask the question because if you were looking at the
12 wrong page let's clean up the record.

13 The first page of your security assessment -- and I am
14 going to refer to the stamps at the top -- you see where it
15 says page 2 of 7?

16 A. Yes, I do.

17 Q. That is the first page of your security assessment,
18 correct?

19 A. Yes, it is.

20 Q. You don't provide any actual analysis or security
21 assessment on that first page, do you?

22 A. The last paragraph, I think, does.

23 Q. Where is that? Could you read that to us?

24 A. The last paragraph on page 2 where it starts: Three of the
25 four proposed ads... and then it continues.

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Diaz - cross

1 Q. Okay. So, you are referring specifically to the part of
2 that paragraph, that last paragraph on page 1 of your security
3 assessment that you write, three lines up from the bottom: And
4 in my judgment it is reasonably foreseeable that its display at
5 this time on New York City subway entrances and buses would
6 imminently incite, provoke violence or other immediate breach
7 of the peace or so harm, disrupt, or interfere with safe,
8 efficient and orderly transportation operations.

9 Is that what you are referring to?

10 A. Yes, I am.

11 Q. Very good. Thank you very much.

12 Now, you indicate there that it is reasonably
13 foreseeable, correct?

14 A. Yes.

15 Q. What was your security assessment about the likelihood of
16 reasonable foreseeability; 1 percent? 2 percent? 50 percent?

17 A. I didn't put a percentage into it.

18 Q. On what basis, what empirical factual basis did you assess
19 that that ad would lead to reasonable foreseeability of
20 violence or lawlessness?

21 A. Well, in reading that ad to me, my first brush in looking
22 at it is that it advocates violence in my experience and from
23 what I read on a daily basis or intelligence briefings we see
24 people who are easily radicalized and there are a number of
25 people -- radicals -- on almost a daily, weekly, monthly basis

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Diaz - cross

1 committing very, very violent acts.

2 Q. So there are individuals out there. Are there a lot of
3 these individuals?

4 A. Well, when we say -- when you want to quantify it, again, I
5 think it is difficult to say a lot but I think we see what is
6 happening, acts of violence almost on a daily basis throughout
7 the world so I think there is a good number of them.

8 Q. And these individuals that you are talking about
9 radicalizing, you are talking about radicalizing to commit acts
10 of what is termed jihad, correct?

11 A. That's correct.

12 Q. And so these individuals would come out of the population
13 of New York Muslims?

14 A. Yes, some. And I wouldn't say solely New York Muslims but
15 including some Muslims, yes.

16 Q. Well, who else would radicalize as a result of this ad to
17 committing acts of jihad other than Muslims?

18 A. Well, two weeks ago we saw within a -- last week we saw a
19 young fellow on an airline that was walking up and down the
20 aisles yelling "jihad." I don't know if he was Muslim or not
21 but I think that he definitely provoked an incident on that
22 airline which was very concerning to people on that airline.

23 Q. But you don't know that he was not Muslim, correct?

24 A. I don't know.

25 Q. In the next paragraph you appear to accept the fact that my

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Diaz - cross

1 clients do not intend to advocate for violence against Jews and
2 then proceed to explain why San Francisco and Chicago, in your
3 mind are different, correct?

4 A. That's correct.

5 Q. And, indeed, there you point out that the CAIR MyJihad ad
6 had run earlier and that those individuals who would see the
7 Hamas ad by my client would contextualize that and understand
8 that my client's ad was parody, correct?

9 A. Those people that saw that ad would probably make that
10 association, yes.

11 Q. Well, in fact my client's ad ran in San Francisco and
12 Chicago without any incident whatsoever, correct?

13 A. No, no incident that I know of.

14 Q. Based upon your assessment in that paragraph -- let me
15 withdraw that and ask this question.

16 Would you have run CAIR's MyJihad in New York?

17 A. I would have to see that ad again. I don't recall exactly
18 what that is.

19 Q. In fact, just for the record, it was approved to run with
20 certain qualifications about a disclaimer at the bottom. But,
21 had the CAIR ad run prior to my client's ad running here in New
22 York would you have determined my client's ad to still be a
23 security risk?

24 MR. SISTROM: Objection.

25 THE COURT: Overruled.

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Diaz - cross

1 THE WITNESS: Yes, I would.

2 BY MR. YERUSHALMI:

3 Q. Well, let's look at your language here in this paragraph a
4 little bit more carefully. You mention that the ads ran in San
5 Francisco and Chicago and then you write --

6 MR. SISTROM: Objection, your Honor. It doesn't say
7 that.

8 THE COURT: I'm sorry?

9 MR. SISTROM: It does not say that.

10 MR. YERUSHALMI: You are correct.

11 THE COURT: Okay.

12 MR. YERUSHALMI: I will withdraw that.

13 BY MR. YERUSHALMI:

14 Q. It says that -- let's just read it together: It is my
15 understanding that this is not AFDI's viewpoint -- meaning the
16 advocacy of jihad, correct?

17 A. That's correct.

18 Q. To the contrary, AFDI's ad, I am told, is intended to mock
19 a series of ads sponsored by the Council on American-Islamic
20 Relations -- CAIR -- a civil rights and advocacy group that,
21 among other things, promotes a positive image of Islam and
22 Muslims in America. These ads are part of what --

23 THE COURT: Those ads. Those.

24 MR. YERUSHALMI: Those ads, I'm sorry. Those ads,
25 part of what CAIR called its MyJihad campaign would show, CAIR

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1 hoped, that Jihad is a concept relating to individual and
2 personal struggles rather than a motion of war or violent
3 conflict. They, themselves, responded to earlier ads displayed
4 by AFDI but what matters is not what is AFDI's intent but how
5 the ad would be interpreted. In my judgment, most people in
6 New York City who saw AFDI's "killing Jews" ad on a bus would
7 not interpret it as a parody of CAIR's MyJihad ad. CAIR's
8 MyJihad ads did not run in New York City. CAIR proposed them
9 to MTA's advertising contractor but chose not to run them after
10 told they would be displayed with a required MTA disclaimer.
11 The much more likely interpretation of AFDI's "killing Jews" ad
12 by most people would be that it urges Muslims to kill or attack
13 Jews as a religious obligation.

14 Now, your view of the parody and the relationship --
15 withdraw that.

16 When my client's ad ran in Chicago and San Francisco
17 why do you understand -- why would you -- let me withdraw that
18 as well.

19 Let's turn to your declaration which is the initial
20 document in the black binder. Now, in your declaration I note
21 that you don't mention the parody issue of the CAIR MyJihad ad
22 at all. Is there a reason for that?

23 A. I don't think -- in my assessment of that ad I looked
24 solely at that ad to make my assessment. I didn't look at
25 other prior ads.

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Diaz - cross

1 Q. So what occurred in San Francisco and Chicago didn't affect
2 your security assessment at all?

3 A. No, it did not.

4 Q. The fact that there was no violence when those ads ran did
5 not affect your assessment?

6 A. No, it did not.

7 THE COURT: Why not?

8 THE WITNESS: Because in my viewing of that ad, that
9 ad clearly advocated violence and whether another jurisdiction
10 wanted to approve it or disprove it had no bearing, I think, on
11 my assessment. My assessment is just on the basis of viewing
12 that ad, that ad was advocating violence.

13 THE COURT: But the question is not whether -- well,
14 one question is not whether Chicago or San Francisco decided to
15 run the ad but whether a reasonable assessment of the ad would
16 be considered to incite violence. So, the ad had run in two
17 other cities without violence. The issue is not why did
18 Chicago or San Francisco decide to run the ad. But, the only
19 empirical evidence that you had with respect to the ad was it
20 ran in two other cities and in two other cities there were no
21 violence, no problems with the ad.

22 So, did you take that into account in looking at the
23 ad and making your assessment about whether violence was
24 reasonably foreseeable as a result of running that ad?

25 THE WITNESS: Your Honor, I probably -- if I heard

1 that there was violence in running those ads in other
2 jurisdictions of course I would have taken that into
3 consideration but the fact that there was no violence, in my
4 mind, does not mean that we didn't plant the seed in somebody's
5 mind that "killing Jews brings us closer to God," as the banner
6 says on the top of that ad.

7 I don't know that somebody that is easily radicalized
8 in reading that -- and again, my interpretation is I don't
9 think a lot of people read the entire ad; you are on a passing
10 bus, you are going to catch a train or a bus, you just see that
11 large "killing Jews brings us closer to God" -- I forget the
12 exact terminology -- but I think that is what people see and,
13 to my mind, that is advocating killing people and that is not
14 something we should do.

15 THE COURT: Okay.

16 Go ahead.

17 MR. YERUSHALMI: Thank you, your Honor.

18 BY MR. YERUSHALMI:

19 Q. Let me ask you again to pull out the stipulations, the two
20 sheets that are marked as hearing Exhibit no. 1. Do you have
21 that?

22 A. Which?

23 Q. The separate sheets that are in front of you. On the first
24 page at the bottom of the paragraph the first page is the ad
25 that you reviewed is, correct?

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Diaz - cross

1 A. Yes.

2 Q. Now, other than the language, the statement in quotation
3 marks, "killing Jews is worship that draws us closer to Allah,"
4 what is the advocacy that you continue to refer to?

5 A. Where is the what?

6 Q. Advocacy that you continue to refer to?

7 A. I think all things. "Killing Jews is worship that draws us
8 closer to Allah." That is the first thing that hits you when
9 you read that ad.

10 Q. Mr. Diaz, let me pause for a moment. That is a statement,
11 I am asking for the advocacy.

12 A. And then it goes on to challenge you: "That's his jihad,
13 that's his call to violence. What is yours?" And my
14 interpretation is what is your call to violence.

15 Q. But, again, where is the advocacy?

16 A. When you say advocacy.

17 Q. You used the term advocacy, that it advocates violence and
18 I want to know what you refer to when you say it advocates for
19 violence.

20 A. Well, you are telling us in the top of that ad that killing
21 Jews is worship that draws us to Allah. So, in a radical's
22 mind that killing Jews is going to bring us closer to God and
23 that is this person who I guess that we are attributing that
24 comment to who I guess is a jihadist; that is his jihad,
25 killing Jews. So, when you say jihad, what is the violence

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Diaz - cross

1 that you are going to commit against the Jewish population?

2 So, that is his jihad. What violence are you going to now --
3 what type of violence are you going to commit to bring you
4 closer to God? And that is the way that I interpreted that.

5 Q. Let me ask you to turn to your declaration which is the
6 plain document in the black binder in front of you. Before I
7 ask you a specific question, is it important to you in your
8 security assessment that this quote was from Hamas MTV?

9 A. Was that important you said?

10 Q. In other words, again, looking at the ad it appears to me
11 that that statement "killing Jews is worship that draws us
12 close to Allah" which is in quotation marks and then, as is
13 typically symbolized by being sourced, there is the "- Hamas
14 MTV" right underneath that, correct?

15 A. That's correct.

16 Q. And most readers of that ad would understand that is a
17 quote from Hamas TV, correct?

18 A. That's correct.

19 Q. Was it important to your security assessment that this
20 quotation was from Hamas?

21 A. Yes.

22 Q. If it had been from David Yerushalmi it probably wouldn't
23 have been so important in your security assessment, correct?

24 A. Of course it still would have been important.

25 Q. Is it likely that individuals are going to be radicalized

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Diaz - cross

1 by a statement by someone who is not recognized as an Islamic
2 authority or Islamic power?

3 A. I think when people read that, that first top two lines,
4 that it is just advocating killing somebody and then, when we
5 ask the question: "That is his jihad, what is yours?" we are
6 indicating what other violent acts can you commit against Jews.
7 I don't think that matters whether it was from Hamas or no
8 matter who it was from, to me it was advocating violence
9 towards Jews.

10 Q. Well, the advocating of violence is one thing but you have
11 made your security assessment based upon its reasonable
12 foreseeability to result in imminent violence, correct?

13 A. Yes.

14 Q. Does it matter in your assessment of reasonable
15 foreseeability that the quotation was from Hamas?

16 A. Well, I think for a radicalized Muslim I think that might
17 be important.

18 Q. Might be important?

19 A. Yes.

20 Q. If it was a quotation from President Obama do you think a
21 Muslim would be radicalized by that statement?

22 A. I think making that statement by anyone is advocating
23 violence and I don't think we should accept that.

24 Q. Okay. That's fine. You might have a policy view but I am
25 talking about your security assessment. You made a security

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Diaz - cross

1 assessment about the reasonable foreseeability that something
2 is going to lead to violence. That's all I'm talking about
3 now.

4 The author, does it matter who and what authority that
5 individual has in your security assessment of reasonable
6 foreseeability?

7 MR. SISTROM: Objection, your Honor.

8 THE COURT: Overruled.

9 A. Well, again, I was asked to make an assessment of the ad as
10 written, not if it was written by other persons. But, you
11 posed a question and I think my answer would be the same, that
12 you are still advocating violence against Jews and I don't
13 think whether it was Hamas or it was anyone else, I think I
14 still would have had that same objection.

15 Q. Do you know what Hamas is?

16 A. Hamas is the military wing of the PLO.

17 Q. I would probably disagree with that particular description
18 but that is your testimony.

19 Hamas currently is a designated foreign terrorist
20 organization, correct?

21 A. That's correct.

22 Q. And you understand, given your 41 years in the New York
23 Police Department and your command positions there and your
24 current position, that if an individual provides material
25 support to a designated foreign terrorist organization that

1 that individual has committed a felony under federal law,
2 correct?

3 A. Yes. That's correct.

4 Q. Let me ask you to turn to paragraph 26 of your declaration,
5 that is the main document in the black binder.

6 THE COURT: Can I go back to your thought process in
7 making your assessment?

8 The ad explains that Hamas TV says what it says, so
9 Hamas TV advocates the position that's set there. What is it
10 about the ad that would then make the link that because Hamas
11 advocates this horrific position -- we can all accept that
12 killing is a horrific position -- that someone reading the ad
13 being advised that Hamas takes this horrific position would
14 then go out and follow it, would then do it because there is an
15 ad that explains, which probably is not surprising to many
16 people, that Hamas takes a horrific position.

17 THE WITNESS: Yes.

18 THE COURT: What is it about the ad when you saw it
19 that led you to believe that informing people about the
20 horrific position that Hamas takes would lead someone to say,
21 well, as long as Hamas takes that position I should go out and
22 act on that.

23 THE WITNESS: Because, your Honor, in the following
24 statement right below the Hamas MTV it says "that is his jihad"
25 so that is his call to violence to further his religious

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Diaz - cross

1 belief. And then it asks the question: "Well, what is yours?
2 What is your jihad?" What is the violence that you could
3 perpetrate to further your religious belief?

4 THE COURT: Okay.

5 Go ahead.

6 MR. YERUSHALMI: Thank you, your Honor.

7 BY MR. YERUSHALMI:

8 Q. Are you at paragraph 26 of your declaration, Mr. Diaz?
9 Have you read the paragraph?

10 A. Yes.

11 Q. This paragraph describes your assessment of this ad in
12 somewhat the same way that you were answering the Judge's
13 question a moment ago, correct?

14 A. That's correct.

15 Q. The first sentence reads. However, the "Killing Jews"
16 advertisement -- and you are referring to our advertisement,
17 the AFDI advertisement, correct?

18 A. Yes.

19 Q. -- was different. Read as most reasonable New Yorkers
20 would read it, it advocates direct and violent attacks on Jews.

21 Do you see that?

22 A. Yes, I do.

23 Q. Going to the sixth line from the bottom, the sentence
24 beginning: The phrase below... do you see that?

25 A. Yes.

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Diaz - cross

1 Q. You write: The phrase below the Hamas quotation - "that's
2 his jihad, what's yours?" - I thought would be read in an
3 implicit command.

4 Why did you think that?

5 A. Why did I think that the "his" referred to the person in
6 the picture?

7 Q. Let me repeat the question.

8 You write in that sentence: The phrase below the
9 Hamas quotation - "that's his jihad, what's yours" - I thought
10 would be read as an implicit command.

11 Why did you think that the reasonable New Yorker would
12 read that to be an implicit command?

13 A. Because it begs the question. The question begs that is
14 his jihad, that's his call to violence, what is yours? What is
15 your jihad? What is your call to violence?

16 Q. Might the reasonable New Yorker read that as a statement of
17 criticism? That's his jihad, what is yours? Maybe in what
18 peaceful jihad might you have?

19 A. I think most New Yorkers -- and again and I think there
20 could be misinterpretation of the phrase, but I think the
21 common interpretation of the phrase jihad is a call to
22 violence.

23 Q. Now, the Judge had asked you earlier you understand that
24 Hamas' position is to destroy the State of Israel and to kill
25 Jews around the globe, correct?

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Diaz - cross

1 A. That's correct.

2 Q. They've stated it many times publicly, correct?

3 A. That's correct.

4 Q. They have a charter which operates as their Constitution
5 which has been publicized in many domains that calls for just
6 that, correct?

7 A. I am not familiar with the charter.

8 Q. But you are familiar with Hamas' position?

9 A. Yes.

10 Q. You also understand that Hamas has been designated as a
11 foreign terrorist organization, correct?

12 A. That's correct.

13 Q. And that even if you don't know that Hamas has been
14 designated as a foreign terrorist organization, if you provide
15 material support to that organization you've committed a crime,
16 correct?

17 A. That's correct.

18 Q. Because it has been designated a foreign terrorist
19 organization, correct?

20 A. That's correct.

21 Q. Now, at the last sentence on page 8 of your declaration at
22 paragraph 26 you write: The "Killing Jews" advertisement
23 effectively would have likely be read by most reasonable New
24 Yorkers as an advertisement sponsored by Hamas itself or some
25 individual or group affiliated with or individual supporting

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Diaz - cross

1 Hamas.

2 A. Yes, I did.

3 Q. And that is your assessment because that would indicate
4 that this is an advocating violence ad as opposed to simply a
5 statement about the horrific position that Hamas takes,
6 correct?

7 A. Yes, it is.

8 I would like to add something to that, if I may.

9 Q. I would like to ask the following question.

10 THE COURT: No, go ahead.

11 THE WITNESS: In reading the rest of the ad and the
12 bottom line about the AFDI and when I made my assessment of
13 when I first saw this ad I said, well, I am reading something
14 wrong here because AFDI is a pro-Jewish organization so why
15 would they be sponsoring an ad such as this. And then,
16 thinking about it more I said, well, this ad could be taking
17 both sides as a call to violence. Whether you are pro-Hamas or
18 whether you are pro-Jewish, I think it would be the same
19 interpretation because -- and my thoughts were if I saw this on
20 a wall of a terrorist camp or if I saw this on the wall of an
21 Israeli Army company it would be getting the same advocating of
22 violence. *His jihad is killing Jews.* Well, if it was in the
23 Jewish camp that's his jihad, killing Jews, to the soldiers in
24 the Israeli camp. *What is your jihad? What are you going to*
25 *do about that? What call to violence are you going to do? I*

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Diaz - cross

1 don't think that is to pray for them or to wish them good luck.

2 Q. Okay. When a reader, the individuals that you were worried
3 about who might erupt into violence, so far you have identified
4 the self-radicalizing Muslim, jihadist to be or possibly a
5 current jihadist, when they see this ad on the bus do you
6 suppose that they don't know what Hamas' position is vis-a-vis
7 Jews and Islamic worship?

8 A. Just to make sure I am clear with the question.

9 If I was a radicalized Muslim would I know what Hamas'
10 position is, is the question, basically?

11 Q. Yes.

12 A. Yes.

13 Q. So, these individuals that you are worried about in your
14 reasonable foreseeability assessment already know Hamas'
15 position, correct?

16 A. That's correct.

17 Q. And they've seen it in newspapers, they can go Google it,
18 they can watch the bombs blow up. They are intimately familiar
19 with the horrific position that Hamas takes and the actions
20 they take to follow up on that position, correct?

21 A. That's correct.

22 Q. Yet it is your position that this ad is going to, with all
23 that information, is going to then radicalize them further?

24 A. Because it reinforces that position. It reinforces it and
25 it just plants a seed and it advocates violence and I don't

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Diaz - cross

1 think the MTA should allow ads that advocate violence.

2 Q. Now, we saw in your last sentence of paragraph 6 that part
3 of your security assessment was based on the fact that
4 individuals would see this as advocating violence on behalf of
5 Hamas because, as you write: The reasonable New Yorkers would
6 see the advertisement sponsored by Hamas itself or some
7 individual or group affiliated with or supporting Hamas,
8 correct?

9 A. I'm sorry. I lost the page. Page 6?

10 Q. If we go to page 8 of your declaration, paragraph 26, the
11 last sentence?

12 A. Page 8, paragraph 26.

13 Q. The last sentence on that page, read slowly for the court
14 reporter.

15 A. The "killing Jews" -- I am not sure if I am in the right
16 spot.

17 Q. The last sentence on the last line.

18 A. Okay. The "killing Jews" advertisement effectively would
19 likely be read by most reasonable New Yorkers as an
20 advertisement sponsored by Hamas itself or some individual or
21 group affiliated with or supporting Hamas.

22 Q. And that's important because that would make it an
23 advocacy, correct?

24 A. Yes.

25 Q. If Judge Koeltl or David Yerushalmi stated that and we had

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Diaz - cross

1 our names there it would be clear that we weren't advocating,
2 we were simply stating Hamas' horrific position, correct?

3 A. Say that again? I'm sorry.

4 Q. I will withdraw the question.

5 The point is that it is important when the reader sees
6 this add to believe that it is actually a Hamas ad or someone
7 affiliated with Hamas advocating violence, correct?

8 A. That was my interpretation, yes.

9 Q. Yes.

10 Now, is it really your security assessment, Mr. Diaz,
11 that most reasonable New Yorkers would think that the MTA would
12 take funds from Hamas or some group affiliated with Hamas and
13 run an ad advocating the death of Jews?

14 MR. SISTROM: Objection, your Honor.

15 THE COURT: Overruled.

16 THE WITNESS: I don't think most New Yorkers would
17 want this ad to be run, if that's the question.

18 BY MR. YERUSHALMI:

19 Q. No, Mr. Diaz, that's not the question. I will ask the
20 question again.

21 Is it really your security assessment that the MTA
22 would take funds from a designated terrorist organization --
23 Hamas -- or someone affiliated with a designated terrorist
24 organization and post an ad calling for the death of Jews?

25 A. We would not take money to do that, no.

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Diaz - cross

1 Q. You are not answering the question.

2 Is it really your security assessment that most
3 reasonable new Yorkers -- that is what you have stated under
4 oath in this declaration -- that most reasonable New Yorkers
5 would see this ad and assume it to be an ad actually run by
6 Hamas or an individual affiliated with Hamas which means, of
7 course, Mr. Diaz, that the MTA would have had to have taken
8 funds from a designated terrorist organization? That, in and
9 in and of itself is a felony, as you testified to earlier --

10 THE COURT: Sustained.

11 Q. The question is, Mr. Diaz, is it really your security
12 assessment that the MTA would take funds and post an ad --
13 strike that.

14 Is it really your testimony today that most reasonable
15 New Yorkers would understand this ad to be an actual Hamas ad
16 or someone affiliated with Hamas?

17 A. I think that people -- that most people are running in
18 public just glancing at a poster that is on a bus or doing down
19 a stairway and they have a few moments to see the headlines of
20 an ad and would say to themselves: Why is the MTA allowing
21 that poster to be up when it is advocating the killing of Jews?

22 THE COURT: Mr. Diaz, isn't there an inconsistency in
23 saying that people are just going to pass by this ad, see it
24 quickly on buses or trains and just have something in their
25 mind from it and saying that it is going to be sufficient to

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Diaz - cross

1 incite a person to violence, an ad which they see and as you
2 say don't see just in passing, don't concentrate on, don't
3 focus on, and they're going to read it and then they're going
4 to be incited to violence as a result of the ad?

5 THE WITNESS: Your Honor, I don't think most people
6 would be incited but, as we know, we have a large number of
7 terrorists and when we look at the population of the world I
8 think it is a relatively small number. But, I think that
9 people that might be on the edge of being radicalized this just
10 reinforces that: Killing Jews brings us closer to God.

11 Is that something we should advocate? If nobody did
12 it I still say that we shouldn't post an ad that is advocating
13 the killing of somebody. We have seen recent incidents in the
14 United States where an expression was made "burn them down" and
15 they burnt down one of our cities. We saw recent comments that
16 kill the police and we wound up with two police officers
17 killed. So, there are people out there that may be
18 simple-minded or maybe not so simple-minded but have an agenda
19 that will commit violence.

20 THE COURT: Okay.

21 MR. YERUSHALMI: Thank you, your Honor.

22 BY MR. YERUSHALMI:

23 Q. Let me direct your attention to paragraph 31 of your
24 declaration. If you would just review that briefly? Thank
25 you.

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Diaz - cross

1 You have reviewed it?

2 A. Yes, I did.

3 Q. Earlier we spoke about the constituent population that you
4 were concerned about might be moved as a result of this ad to
5 engage in imminent violence. Do you recall that discussion?

6 A. Yes.

7 Q. And you would indicate that it would draw from mostly
8 Muslims but possibly others.

9 Do you recall that?

10 A. That's correct.

11 Q. Let me just ask you, in all your 41 years in law
12 enforcement and subsequently at the MTA as Director of
13 Security, do you know of anyone other than a Muslim who has
14 radicalized and engaged in violence in the name of jihad?

15 A. Not that I know of offhand.

16 Q. Okay.

17 Now, in this paragraph, though, you seem to expand the
18 constituent populations to include Jews who might be so
19 incensed by reading this ad and the fact that most New Yorkers
20 would think that the MTA was running a Hamas ad that they would
21 engage in violence, correct?

22 A. Yes.

23 Q. So that in your security assessment you include,
24 purposefully, the reaction by the reader to ads, correct?

25 A. Yes.

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Diaz - cross

1 Q. And, in fact, in this case even knowing that my clients had
2 no intent to advocate for jihad, in fact criticized jihad, your
3 entire focus in your security assessment was how Muslims or
4 Jews might react to this ad, correct?

5 A. Muslims and/or Jews, yes.

6 Q. So that if someone looks at an ad and they find it
7 insulting or horrific or threatening, you will assess the
8 security risk, the reasonable foreseeability that they're going
9 to jump up and act violently in imminent fashion, correct?

10 A. Would you say first part again?

11 Q. I have a tendency to get long-winded. I apologize.

12 Part of your security assessment includes an
13 assessment of the reasonable foreseeability risk that an
14 individual is going to feel insulted by an ad -- not advocated
15 but insulted by an ad, and jump up and commit imminent
16 violence, correct?

17 A. No. That's not correct.

18 Q. Then why did you include Jews in your security assessment?

19 A. I think from what I said earlier, that I think that once I
20 read the AFDI and realized that this is not an ad that was
21 proposed by Hamas but by pro-Jewish organization, I read it
22 then conversely that killing Jews is worship that draws us to
23 Allah and saying this to the Jewish community, his worship is
24 killing Jews, that's his jihad, that's his call to violence to
25 further his religion, what is yours asking the person of the

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Diaz - cross

1 Jewish faith, well, what is your jihad? what is your call to
2 violence to counter his killing of Jews?

3 Q. Let me ask about this specific question. On page 11, still
4 part of paragraph 31 of your declaration five lines down toward
5 the end beginning: Whether that violence... do you see that?

6 A. Five down where? On paragraph 31?

7 Q. Paragraph 31, page 11 of the declarations pagination. Are
8 you with me? Whether that violence...

9 THE COURT: Fifth line down, whether that violence...

10 THE WITNESS: I am not sure I am following. We are on
11 page 11, is that correct?

12 MR. YERUSHALMI: Your Honor, may I approach the
13 witness to point it out?

14 THE COURT: Sure.

15 BY MR. YERUSHALMI:

16 Q. You write there Mr. Diaz: Whether that violence or breach
17 of the peace would be the work of a violent, self-radicalized,
18 would-be jihadist like the man in Queens who attacked NYPD
19 officers with a hatchet, or the apparently deranged man who, in
20 early December, fatally stabbed an Israeli student in the head
21 at the Chabad-Lubavitch headquarters in Brooklyn while
22 screaming "I want to kill the Jew," or of a Jew driven to
23 retaliation by anger and fear, I had no way knowing for
24 certain, of course.

25 Do you see all of that?

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Diaz - cross

1 A. Yes, I do.

2 Q. That was all part of your security assessment?

3 A. Yes.

4 Q. You indicated that you didn't want to quantify a reasonable
5 foreseeability but let me ask you if we can put it into a
6 context. Was the reasonable foreseeability of violence by the
7 radicalized Muslim greater or lesser than the threat that a Jew
8 would take umbrage at this ad and engage in violence?

9 A. I would say that reading the first lines, the banner part
10 of the ad, that of course that it would -- I would lean towards
11 the radicalized Muslim before someone of the Jewish faith.

12 Q. Reading any other part of the ad does it change your
13 relative security assessment between the potentially violent
14 Muslim and the potentially violent Jew?

15 A. I think they both, whether you read it from both sides I
16 think they both advocate violence.

17 Q. Meaning that the Muslim and the Jew were equally reasonably
18 foreseeable to commit violence as a result of this ad?

19 A. I think both sides -- I think reading this ad from both
20 sides I think it proposes violence on both sides, yes. It
21 would be tough to say equally.

22 Q. I think we all understand your assessment at that level.

23 So, based upon that testimony and your declaration I
24 understand that part of your assessment is to examine the risk
25 that individuals will be angered by an ad, not agree with it

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Diaz - cross

1 but be angered by it and commit violence, correct?

2 A. Part of the assessment, yes. As part of my recommendation
3 to the chairman I would add something else to it.

4 Q. What is that?

5 A. That it advocates violence.

6 If nobody ever committed a violent act as a result of
7 this ad and we knew in the future that nobody was ever going to
8 do that -- if we could read into the future -- but the fact
9 that I thought that it advocated violence I still don't think
10 it is an ad that we should have run.

11 Q. In other words it would violated Standard (a)(x), correct?

12 A. Yes.

13 Q. And your security assessment would be, even though you know
14 it had never caused someone to commit violence, never committed
15 violence that this ad should not run on MTA buses?

16 A. Because it advocates violence, correct.

17 Q. And it a violates Standard (a)(x), correct?

18 A. Yes.

19 Q. Going back to Jews getting angry as part of your security
20 assessment in your declaration, in Mr. Rosen's lengthy
21 declaration it speaks about all the other ads that my clients
22 ran that were critical of Hamas, critical jihad, critical
23 Palestinians who engage in jihad against Israel and calling
24 them savages. Do you recall that?

25 A. Yes, I do.

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Diaz - cross

1 Q. In your security assessment of the ads that you have
2 described in your declaration, in some detail you indicated
3 that there was no security assessment to be concerned about
4 relative to all of those other ads that criticize Hamas, jihad,
5 Islam, savages, what have you; correct?

6 A. There were concerns -- that is not correct.

7 There were concerns but no concern that I thought that
8 there would have been violation of the ad.

9 Q. You mention these angry Jews relative to the Hamas ad
10 because they would think the MTA authority was running a Hamas
11 ad and they would get angry. Did you not think that all these
12 radicalized Muslims, these mujahideen that are out there
13 working in the city would not see these ads that you approve
14 that criticize Hamas, criticized jihad, call individuals
15 savages?

16 A. I would think there would be concern on that side too, yes.

17 Q. Yet you approve those ads?

18 A. Which ads are we talking about now?

19 THE COURT: Hold on. The court reporter can only take
20 down one person at a time.

21 So, Mr. Diaz, I think you wanted to add on to your
22 last answer and so why don't you do that.

23 THE WITNESS: Sorry. My focus, your Honor was on this
24 particular ad. I wasn't thinking of the other ads.

25 MR. YERUSHALMI: I would like to thank the court

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Diaz - cross

1 reporter too.

2 THE COURT: Now, next question. Make sure that
3 neither of you talk over each other.

4 MR. YERUSHALMI: And I thank the court and court
5 reporter.

6 THE COURT: Next question.

7 BY MR. YERUSHALMI:

8 Q. So let's move your focus from the current ad, the Hamas
9 killing Jews ad, okay?

10 A. And we are going to open your declaration to the ad at the
11 top of the page 6.

12 Q. Did you do a security assessment of this ad?

13 A. I believe I did. Yes.

14 Q. Did you take into consideration in your security assessment
15 of this ad that Muslims and others who thought highly of the
16 Quran would get angry and engage in violence in the same way
17 that you did about Jews and the killing Jews ad?

18 A. Did I consider that they might engage in violence?

19 Q. Yes.

20 A. Yes, I did.

21 Q. And did you determine that there was no security risk that
22 Muslims would engage in violence as a result of this ad?

23 A. There was a -- let me be clear. I thought the ad, although
24 it might not be a violation of the MTA guidelines, I still had
25 a concern and I actually acted and did something as a result of

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Diaz - cross

1 that concern.

2 Q. What was the level of security risk --

3 THE COURT: No, stop.

4 Okay. Tell us what you did.

5 THE WITNESS: I found out where those ads were going
6 to be displayed and I notified the NYPD and our intelligence
7 division that these ads were going to be displayed so they
8 would be alerted to the fact that these ads are going up in
9 some public places on MTA property. And the officers would
10 then be alerted that there could be an issue with the posting
11 of these ads.

12 THE COURT: Were they in stationary places rather than
13 on buses or trains?

14 THE WITNESS: To the best of my recollection, your
15 Honor, I think they were on buses. I think they were on buses
16 at that time.

17 THE COURT: Okay.

18 THE WITNESS: It might have been also stationary but I
19 know they were definitely on buses.

20 THE COURT: Go ahead.

21 BY MR. YERUSHALMI:

22 Q. When you understand there to be a potential security risk,
23 one of the ways in which you deal with that security risk then
24 is to turn to transit authority police or NYPD and let them
25 know where those ads might appear, what routes and buses and

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Diaz - cross

1 keep an eye on them?

2 A. That's correct.

3 Q. That would ameliorate some of the risk, correct? It would
4 lower the risk, correct?

5 A. If there was a visible police presence there it would.
6 Sometimes it just alerts, we can't have presence at every one
7 of the posters.

8 Q. But you contacted the Transit Authority police and the NYPD
9 in the anticipation that they will have a higher presence and
10 that will lower the risk of the violence, correct?

11 A. Yes.

12 THE COURT: I think you have gone on longer than you
13 had originally intended.

14 MR. YERUSHALMI: And I think I am almost done, your
15 Honor, literally. I might be done, let me just review.

16 Just a few more questions, your Honor, if I may?

17 BY MR. YERUSHALMI:

18 Q. When someone reads the ad at issue in this litigation --
19 and again, we can look at it by turning to the stipulations on
20 the first page -- the disclaimer at the bottom is fairly large
21 print, correct?

22 A. I would not say it is fairly large.

23 Q. Is it meant to be visible so that the MTA won't be blamed
24 for the message in the ad?

25 A. It is meant to be visible, yes.

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Diaz - cross

1 Q. When someone sees this ad and they see American Freedom
2 Defense Initiative and they also see the AFDI logo, do you
3 suppose they might go to their smartphone and Google and say
4 *Who is putting this ad up?*

5 A. There might be some people that might do that.

6 Q. Those Jews that might react violently, you don't think they
7 would first assume that it was someone other than the MTA?

8 MR. SISTROM: Objection, your Honor.

9 THE COURT: Sustained.

10 THE WITNESS: I don't really know.

11 THE COURT: Sustained. It is okay.

12 THE WITNESS: Sorry.

13 MR. YERUSHALMI: I have no more questions, your Honor.

14 THE COURT: All right.

15 Mr. Sistrom, you may examine.

16 MR. SISTROM: Thank you, your Honor. Just very
17 briefly.

18 REDIRECT EXAMINATION

19 BY MR. SISTROM:

20 Q. Mr. Diaz, could you turn to, in the exhibits binder, MTA
21 59?

22 A. The exhibits is which?

23 Q. The blue binder.

24 A. The blue binder, page?

25 Q. 59.

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Diaz - redirect

- 1 A. 59. Okay.
- 2 Q. And have you had a chance to look at it?
- 3 A. Yes.
- 4 Q. Is that the written occurrence that you were referring to
5 by the chairman of the MTA?
- 6 A. Yes, it is.
- 7 Q. And it is an e-mail from Catherine Rinaldi, I guess, to
8 you, correct?
- 9 A. That's correct.
- 10 Q. And Ms. Rinaldi was?
- 11 A. Chief of staff.
- 12 Q. To?
- 13 A. To the MTA -- to Chairman Prendergast.
- 14 Q. You were asked a number of questions about the ad that ran
15 in Chicago and San Francisco and the fact that as far as you
16 knew it had not incited violence. Do you remember that?
- 17 A. Yes, I do.
- 18 Q. Of the three cities -- New York, Chicago and San
19 Francisco -- which would you say, based upon your professional
20 experience, is the prime terror target in the United States?
- 21 A. New York City.
- 22 Q. And when is it your understanding that the ad -- that the
23 AFDI ad that ran in Chicago and San Francisco ran when? In
24 early 2013?
- 25 A. I really don't recall the year.

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Diaz - redirect

1 Q. If I told you that it ran in early 2013 I am going to ask
2 you whether your understanding of the terrorist security threat
3 that faces New York has changed since early 2013?

4 A. Absolutely it has.

5 Q. And is one way it has changed is that this concern about --
6 sometimes they're called lone wolf jihadists, has increased?

7 A. Yes, it has. Absolutely.

8 MR. YERUSHALMI: Objection to form, your Honor.

9 THE COURT: Overruled.

10 BY MR. SISTROM:

11 Q. Is it the case that one of the concerns is that one of
12 these lone wolf jihadists are incited by social media, website
13 postings, YouTube videos?

14 A. Absolutely. Yes.

15 Q. And that, you are saying, is a substantially increased
16 concern today than it was in early 2013?

17 A. Yes.

18 MR. SISTROM: That's all I have, your Honor.

19 THE COURT: Okay. All right, Mr. Diaz. You are
20 excused.

21 THE WITNESS: Thank you, your Honor.

22 THE COURT: You may step down.

23 And we will take five minutes and then you all can
24 argue.

25 (Recess)

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1 THE COURT: Okay. Plaintiff?

2 MR. YERUSHALMI: Thank you, your Honor. It has been a
3 long day and I don't want to extend this hearing with a long
4 oral argument. What I will try to do is to address some of the
5 key issues, especially in light of today's testimony.

6 As the Court knows, we are here on a motion for
7 preliminary injunction and the standard is that we have the
8 burden of establishing four elements: The first is that
9 plaintiffs are likely to succeed on the merits; the second,
10 that plaintiffs are likely to suffer irreparable harm in the
11 absence of preliminary relief; three, that the balance of
12 equities tips in their favor; and four, that an injunction is
13 in the public interest.

14 In First Amendment cases and especially in cases
15 involving speech occupying the highest rung of speech --
16 political speech -- as in this case, the real crux of this
17 hearing is relating to the first issue, likelihood of success.

18 The New York Magazine case makes clear, as well as
19 other cases across the Circuit that denial of First Amendment
20 rights automatically establishes irreparable harm because, as
21 the Supreme Court has said, denying free speech for even
22 minimal amounts of time is irreparable harm.

23 Further, as in New York Magazine, the Court made clear
24 that the balance of the equities will tip in the plaintiff's
25 favor if the likelihood of success exists precisely because

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1 protecting First Amendment rights almost inevitably supersedes
2 the counterclaim, especially if MTA has not satisfied its
3 burden and, finally, that an injunction is in the public
4 interest. Again, New York Magazine and this Court and the
5 prior case before Judge Engelmayer made clear, that the public
6 always has superior interest to protect the Constitution.

7 The hearing today really highlights that part of our
8 brief that makes clear that we are challenging the (a)(x)
9 standard facially and as applied to our client. Let's first
10 examine the facial challenge.

11 The (a)(x) standard says that the MTA has the right to
12 prevent speech, that is to say prior restraint of speech, on
13 the basis that there is a reasonable foreseeability of imminent
14 violence or lawlessness. Now, for that standard not to be
15 facially unconstitutional it would first have to fall into one
16 of the historical categories of unprotected speech. Now,
17 Mr. Rosen's declaration attempted to use that phrase. I would
18 probably imagine it with words offered to him by another source
19 but the fact is unprotected speech in this context can only be
20 incitement, true threat, or fighting words. But, as we point
21 out in our brief, it can't be a true threat because a true
22 threat requires, under First Amendment jurisprudence, that one
23 be directing the threat toward a specific individual about a
24 specific crime. *I'm going to kill you.* Fighting words doesn't
25 make it exist because, in *Jablonski*, the Court makes clear it

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1 has to be face-to-face that kind of language, like the N word
2 that is so well understood to create that kind of immediate
3 reaction to the speaker.

4 The third category that it might fall under as
5 unprotected speech --

6 THE COURT: By the way, with respect to fighting words
7 *Jablonski*, what is the strongest case that stands for the
8 proposition that it requires face-to-face words? I mean, I
9 appreciate that the language face-to-face appears in cases but
10 is there a case that says, for example, if truly inflammatory
11 words which would otherwise be fighting words, if said in a
12 face-to-face context, lose their characterization as fighting
13 words if they are in prison and circulated?

14 MR. YERUSHALMI: I would probably choose two cases,
15 your Honor. The first case I would look at would be *Cohen v.*
16 *California*, 403 U.S. 15 at page 20 where the Court described
17 fighting words as those personally abusive epithets which, when
18 addressed to the ordinary citizen are, as a matter of common
19 knowledge, inherently likely to provoke a violent reaction.

20 THE COURT: And the other one?

21 MR. YERUSHALMI: The other one would be the *NAACP v.*
22 *Claiborne Hardware*. In that case the NAACP and Mr. Evers were
23 sued. Mr. Evers was the head of the Mississippi NAACP and he
24 went out and spoke about killing individuals and --

25 THE COURT: Right, but --

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1 MR. YERUSHALMI: Even though that is --

2 THE COURT: The Court found that those were not
3 fighting words. Those were spoken words. Those were words
4 spoken to a group, the Court said, not fighting words.

5 MR. YERUSHALMI: Yes.

6 THE COURT: My only question is what are the most
7 applicable cases that say simply because something is written
8 down and circulated it loses the possibility that it could be
9 characterized as fighting words. That's the only question.
10 So, *NAACP v. Claiborne* doesn't say that. I would have to
11 review again *Collin*. But, any other case?

12 MR. YERUSHALMI: *Jablonski* is where it refers to, I
13 also refer and say it tentatively, to *U.S. v Kelner*, 534 F.2d
14 at 1020 in which the Second Circuit speaking about true threats
15 does address the aspect of fighting words and again, in both
16 contexts, the Court notes that it has to be a personal,
17 one-on-one, directed communication.

18 THE COURT: Okay. Go ahead.

19 MR. YERUSHALMI: In this case the standard itself does
20 not set out the standards of true threat, fighting words, or
21 even incitement under *Brandenburg v. Ohio*, *NAACP v. Claiborne*
22 *Hardware*, or the progeny. Indeed, there is nothing about
23 face-to-face, there is nothing about the personal epithets that
24 would be required, and if there is any provision that it might
25 fit it would be the *Brandenburg*. The problem there, as we

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1 point out in our briefs and we have seen here today, there is
2 nothing in the standards, there is nothing in the enforcement
3 memo by Mr. Lhota that would cabin Mr. Diaz' security
4 assessment or his successor in order to understand that under
5 *Brandenburg* you have to advocate and advocate means you have to
6 be issuing an imperative to a specific group. If *Claiborne*
7 *Hardware* stands for anything it certainly stands for that.

8 So, on its face, this provision does not fit any of
9 the three categories.

10 THE COURT: Your contention is that *Brandenburg*
11 requires a subjective intent to incite violence?

12 MR. YERUSHALMI: There is no question that under
13 *Brandenburg* itself the Court talks about directing and
14 advocating. The same is true with *Claiborne*.

15 THE COURT: Okay.

16 My question is do you contend that *Brandenburg*
17 requires a subjective intent to incite violence or does it
18 simply require that the reasonable interpretation of the words
19 to a reasonable person would be a direct incitement to
20 violence? So, the simple question is, is a subjective intent
21 to incite violence required under *Brandenburg*? Yes or no?

22 MR. YERUSHALMI: Plaintiffs would argue yes.

23 THE COURT: And the cases that you believe most
24 directly support the proposition that *Brandenburg* requires a
25 subjective intent?

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1 MR. YERUSHALMI: The two best cases that I can
2 articulate for the court now would be *Claiborne Hardware* and,
3 again, the reason *NAACP v. Claiborne Hardware*. Why? In that
4 case Mr. Evers was describing all the things that were going to
5 happen to those blacks who crossed the boycott line as it were.
6 What happened in that case, and the Court makes clear in its
7 opinion, is that those things did happen. That is to say
8 apparently someone took Mr. Evers seriously, shot into the
9 homes of those individuals who crossed the boycott line, beat
10 individuals up.

11 THE COURT: But --

12 MR. YERUSHALMI: And yet the Court said it required
13 something more than emotional words that someone else might
14 have understood. It required some action by Mr. Evers, some
15 imperative by him that would initiate that. If I may, your
16 Honor, just parenthetically say that while it is our position
17 that the case law surrounding *Brandenburg* and the subsequent
18 cases does suggest that there be a subjective intentionality.
19 The fact is that I don't know of any case that states that in
20 those terms expressly, only by virtue of the facts that we see
21 in *Claiborne*, and in *Hess v. Indiana*, another Supreme Court
22 case. However, even if it were reasonably objective standard
23 the fact is the standard, as written, Standard (a)(x) in the
24 standards and the enforcement memo, as written, still does not
25 satisfy the reasonable objective requirement because it doesn't

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1 exist there.

2 THE COURT: Okay. I just want to understand what the
3 legal framework is and so it is important to me to understand
4 what cases you are relying on for the necessity for a
5 subjective standard.

6 Okay. Go ahead.

7 MR. YERUSHALMI: As we saw in the testimony of
8 Mr. Diaz and Mr. Rosen, we have a standard that simply requires
9 reasonable foreseeability of imminent violence or lawlessness.
10 It doesn't --

11 THE COURT: Wait. One would have thought, and I will
12 review the language, that if *Brandenburg* requires an intent to
13 incite violence rather than whether the reasonable
14 interpretation of the words to a reasonable person would
15 directly incite violence, easy enough for the Supreme Court or
16 the Second Circuit to state that explicitly, right?
17 *Brandenburg* requires a subjective intent to incite violence.
18 If you cannot prove a subjective intent then the words do not
19 fall within the *Brandenburg* exception to the First Amendment.
20 Just a couple of sentences that could easily say that.

21 MR. YERUSHALMI: That's correct, your Honor. And the
22 element that I would examine to establish our position would be
23 that those might not have been at issue in those cases although
24 we will talk about the *Melzner* case here momentarily, but in
25 *Brandenburg* you had a man standing up in front of a group of

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1 people advocating the death of Jews and that blacks should be
2 shipped out of the country. The Court found that even though
3 he was advocating a position and even though a certainly
4 objective speaker would understand that to be advocacy, the
5 Court noted in *Brandenburg* that in order to satisfy its test it
6 had to be directed advocacy and then, of course, it added the
7 imminent and likelihood requirements.

8 In the case that we have discussed in the brief in
9 terms of the standard of review this Court imposes on Mr. Diaz'
10 security assessment, the *Melzner* case out of the Second
11 Circuit, that case involved the pedophile who had created a
12 manual that the Court said as part of the record could be
13 understood literally as a manual to commit pedophilia and get
14 away with it. There, in that case, it is clear from the facts
15 again that just having a reasonable, objective, view of
16 something as advocating behavior doesn't satisfy the incitement
17 requirement because it requires something more by the speaker.

18 THE COURT: Well, there are at least two aspects of
19 that. Academic advocacy of violence, reprinting *Das Kapital*
20 doesn't fall within the *Brandenburg* exception, so abstract
21 advocacy is still protected by the First Amendment. There has
22 to be incitement. So, the language of *Brandenburg* has to be
23 followed. That is a separate question from whether it depends
24 upon a subjective intent.

25 Okay. Go ahead.

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1 MR. YERUSHALMI: And I would agree, your Honor, and
2 that's where Evers is instructive because Evers was not only
3 advocating certain positions but he was indicating what was
4 going to happen in the future, yet even with those two elements
5 the Court couldn't find incitement even though I think the
6 reasonable observer, especially given the facts of the case
7 because it was a conspiracy case, the crimes were actually
8 committed that mirrored exactly what he called for and still
9 couldn't find incitement.

10 THE COURT: Okay. Go ahead.

11 MR. YERUSHALMI: Now, your Honor, the facial infirmity
12 of this standard is made clear even yet because there is no
13 instruction, no manual, and no custom within the MTA that would
14 cabin this within one of those three categories even if we were
15 to accept the proposition that *Brandenburg* would be satisfied
16 with simply an objective, reasonable perspective. The fact is
17 that under the standard, as written, and as described and as
18 described by Mr. Diaz, there is no limiting factor. It simply
19 includes any time he thought there would be violence and yet we
20 even heard that Mr. Diaz testified, quite clearly, that even if
21 there had never been violence and there never would be
22 violence, the ad would violate Standard (a)(x). Now, that in
23 and of itself might have been an excitable utterance that a
24 long-time police officer just wanted to impose his policy but
25 what did we hear? We heard Mr. Rosen testify that he had no

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1 guidance from Mr. Diaz. He relied on Mr. Diaz' interpretation
2 of that standard. That is the policy of the MTA, facially.
3 Without a whole lot of effort that standard is
4 unconstitutional.

5 THE COURT: If, in fact, the standard is
6 constitutional as applied to this ad, the fact that it would be
7 conceivable that there are other ads to which it could be
8 applied that it would be unconstitutional, doesn't it survive
9 in this case?

10 MR. YERUSHALMI: No, your Honor; for two reasons.

11 One, I would argue that as applied in this case it is
12 an *a fortiori* argument, but if I accept your Honor's
13 proposition that in this case it was applied constitutionally,
14 the fact is the standard itself has to be judged based upon
15 clarity and lack of ambiguity and on its face, as described by
16 the MTA itself, it is unconstitutional. The fact that
17 fortuitously in this case it was applied constitutionally,
18 although I find it difficult to say that even, the fact is it
19 would still be constitutionally infirm.

20 THE COURT: The reason that I raise that question is
21 most of the briefs are really devoted to the question of
22 whether, applied to this ad, the standard was unconstitutional,
23 it is unconstitutional as applied because the ad here doesn't
24 fall within any of the exceptions whether it be *Brandenburg* or
25 fighting words or true threats.

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1 There is a whole other body of case law which deals
2 with facial unconstitutionality including issues such as
3 over-breadth and the chilling aspect of an overbroad regulation
4 which really is not dealt with in the briefs. That whole body
5 of law with respect to facial unconstitutionality and the
6 standards to be applied is really not something that is
7 thoroughly briefed. I mean, the gist of the briefs is does
8 this ad fall within one of the areas of unprotected speech?
9 And if not, whether the designated public forum standard has
10 been satisfied. I mean, the whole area of facial
11 unconstitutionality raises a whole series of other First
12 Amendment cases which are really not thoroughly discussed in
13 the brief.

14 So, you begin your argument, facial
15 unconstitutionality, and my initial reaction is why? Why does
16 the argument not begin with was this ad properly rejected under
17 the constitutional standards that have to be applied to this
18 ad.

19 MR. YERUSHALMI: I understand your Honor's perspective
20 and I don't disagree and I would explain it as follows:

21 In our opening brief we do mention the fact that the
22 standard is unconstitutional facially and as applied. The fact
23 is that the focus that we have taken and as we always take on a
24 motion for preliminary injunction is to argue the easiest case
25 and, as I indicated earlier, it is very easy at this point to

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1 argue that, as applied, the standard was unconstitutional.

2 Now, the other aspect is that a facial challenge to
3 the way an agency understands its standard is essentially
4 hidden from our view until we get our witnesses on the stand.
5 So, for example, I could assume --

6 THE COURT: So, this whole argument is one that really
7 hasn't been briefed.

8 MR. YERUSHALMI: I would agree and often times, your
9 Honor, often times we have that occasion. Just two months ago
10 in Philadelphia in the Court there were examination of
11 witnesses on a motion for preliminary injunction against SEPTA.
12 We had oral argument and the Judge asked for some additional
13 briefing and we focused in on those kind of issues -- it didn't
14 happen to be the facial issue. And subsequent to that briefing
15 the Court ruled and ruled in our favor. We would have
16 absolutely no hesitancy or reluctance to brief the facial issue
17 in light of the testimony because, your Honor, if you also note
18 that while there is three unprotected categories, this standard
19 might fall under another area which is even if it doesn't fall
20 within one of the unprotected areas, as long as the
21 content-based prior restraint -- and that is what this is,
22 content-based in a designated public forum -- as long as it
23 satisfies strict scrutiny analysis it can still be
24 constitutionally permissible. The problem is, as we saw in the
25 testimony, that strict scrutiny requires that the standard

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1 include least alternative means of censorship. That is to say
2 if, indeed, the compelling state interest in this matter was
3 the security of MTA buses and we would concede in open court
4 that that is a compelling state interest, the question is was
5 there a compelling state interest in this case. We would
6 challenge that and that is the as-applies.

7 But, on the facial side, the standard would have to
8 require, on its face, that the MTA would provide the least
9 alternative means to get around the compelling interest that we
10 sought to be protected. In this case the standard itself says
11 nothing other than you can change your speech but that's not
12 what the requirement of the First Amendment is. The state has
13 to bend at the knee, not the speaker.

14 Secondly, the Lhota memorandum similarly sets out
15 nothing other than the speaker must change the speech.

16 Finally, with Mr. Diaz what we heard -- and of course
17 Mr. Rosen didn't know of any such alternative means -- what we
18 heard from Mr. Diaz is that, on occasion, he will reach out to
19 the police but the only occasion that we understood from him
20 was the occasion where he didn't think there was actually a
21 compelling state interest, i.e. a security risk. He might
22 inform the NYPD. However, it wasn't formalized, he didn't do
23 it in our case, so that on its face the standard is not applied
24 to even satisfy strict scrutiny. As applied, it certainly
25 wasn't in our case. It was you can suggest changes to your

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1 language and if it is satisfactory to us you might run it but
2 we are not going to do anything other than apply
3 Standard (a)(x). This case, from a as-applied challenge -- and
4 one of the things I would suggest, your Honor, for purposes of
5 the motion for preliminary injunction, all we need is the
6 as-applied challenge. There is a principle that the Court is
7 aware of and certainly plaintiffs that if there is a way to
8 avoid a finding of unconstitutionality either in the statute or
9 agency rule, the Court is obliged to take that approach. In
10 this case, the as-applied challenge is sufficient and the
11 threshold has been met, as it were, exponentially. If the
12 Court would like to address at this stage the facial challenge
13 we would be more than happy to address that.

14 Thank you, your Honor.

15 THE COURT: Thank you.

16 There was one other question for Mr. Yerushalmi. One
17 of the arguments that the MTA makes is that if the MTA ran
18 counter-advertising you would then sue them for running the
19 counter-advertising. In your reply brief you say you are fully
20 aware of the fact that the MTA, as government speech, is not
21 subject to the First Amendment, it has the right to speak, the
22 First Amendment is an amendment that protects private speech
23 against government action.

24 Is that a commitment that if the MTA ran
25 counter-advertising to your ad you would not sue them?

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1 MR. YERUSHALMI: 100 percent, your Honor. And,
2 indeed, empirically we know that because in San Francisco they
3 did run a counter-ad, criticizing as it were our client's ad,
4 we certainly didn't contemplate suing.

5 THE COURT: I have one other question.

6 The ad that was rejected differs slightly from the ad
7 in Chicago and San Francisco in that it doesn't include "to
8 learn more at the MyJihad website" and it doesn't use the
9 hashtag before "MyJihad." My question is why?

10 MR. YERUSHALMI: Well, first of all, your Honor, the
11 artistic aspect of the ad, the logo versus the hashtag has
12 something to do with the fact that the disclaimer at the bottom
13 is much larger -- much larger -- and takes up far more room in
14 the MTA required disclaimer than, for example, San Francisco.
15 If you look at the San Francisco ad there is a tiny gray
16 background disclaimer: "Paid for by the American Freedom
17 Defense Initiative." That is required in San Francisco.

18 The second aspect is because this ad was running well
19 after, as it were, the MyJihad campaign, this ad was running
20 specifically in response to Hamas and the connection to jihad.
21 And so, here the ad says that's his jihad, meaning a
22 third-party. There was no "MyJihad," "#MyJihad," it wasn't
23 really relevant anymore. So, our clients put in "that's his
24 jihad" thinking, of course, this would also make it fairly
25 clear that this was a third-party speaking about Hamas, not

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1 Hamas itself and speaking somewhat critically.

2 The other point I would make, your Honor, in terms of
3 the logo AFDI and the very large print, this is a paid
4 advertisement --

5 THE COURT: Right.

6 MR. YERUSHALMI: -- sponsored by the American Freedom
7 Defense Initiative, and I asked Mr. Diaz if he thought that
8 someone might use their smartphone and check it out really
9 quick before jumping up and lopping someone's head off. I took
10 the Court's subtle suggestion that I had gone long enough
11 without examination but we had prepared to provide Mr. Diaz --

12 THE COURT: It wasn't so subtle, so.

13 MR. YERUSHALMI: Pardon me?

14 THE COURT: I say it wasn't so subtle.

15 MR. YERUSHALMI: I have a thick head sometimes, your
16 Honor.

17 We were prepared to provide Mr. Diaz with the first
18 page of a Google printout of AFDI and American Freedom Defense
19 Initiative to see what those readers might actually see. I
20 don't know if the Court is interested. Obviously, if you
21 Google it yourself --

22 THE COURT: I wouldn't do that.

23 MR. YERUSHALMI: -- what you find is an enormous
24 presence of organization that is contrary to jihad, critical of
25 Islam in various aspects, and there is no question that once

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1 you see this bottom component, this disclaimer, the reader is
2 going to understand that that is his jihad, it doesn't mean it
3 is our jihad, it means it is this crazy group Hamas.

4 THE COURT: Okay, but there was part of the papers
5 that suggested that it helped the intellectual inquiry on the
6 ad to indicate that you could learn more by going to the
7 website MyJihad.US and then I looked and it doesn't include
8 that. I thought that would have supported your argument about
9 it is not incitement and if you wanted to learn more and you
10 went to the website you would find out the whole history of the
11 issue of the parody.

12 MR. YERUSHALMI: And I think some of that confusion is
13 from our reply brief where I believe we are confused ourselves
14 for a brief moment and it references that MyJihad as part of
15 this answer. I will take responsibility for that confusion.
16 However, our position is this, your Honor: In this day and age
17 you don't need to say WWW or even hashtag. People nowadays
18 jump to their phones and type in American Freedom Defense
19 Initiative, AFDI, whatever they're interested in -- that is
20 certainly what I would do --

21 THE COURT: Okay.

22 MR. YERUSHALMI: -- and I am long of tooth.

23 THE COURT: The MyJihad.US is a sponsored website by
24 AFDI which explains the whole campaign?

25 MR. YERUSHALMI: I would tend to answer yes. It is

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1 not part of the record. I don't believe that there is anything
2 in the record that says that and I am a little hesitant to --

3 THE COURT: I thought in your brief you said if you
4 wanted to learn more you could actually go to that website and
5 you would see the whole history of the parody campaign.

6 MR. YERUSHALMI: You could, and that is part of the
7 brief, yes. We do reference that. I am just saying as part of
8 the factual record in the case we just haven't addressed that.

9 THE COURT: Do you have any problem adding that to
10 your ad?

11 MR. YERUSHALMI: Well, at this point we would have a
12 problem with changing our speech at all, yes.

13 THE COURT: Okay. Thank you.

14 MR. SISTROM: Thank you, your Honor. I want to pick
15 up on the last exchange you had with Mr. Yerushalmi.

16 The AFDI argues that it is the MTA's burden to provide
17 or adopt a least restrictive alternative or a less restrictive
18 alternative if we have a public safety concern because their ad
19 is misleading or confusing. I think what is important by the
20 exchange you just had is that when we told AFDI that we had
21 this problem in August and that we did not want to run the ad
22 because we were concerned that it would be read as advocating
23 violence, they could have at that point said, well, you know,
24 we have this website that explains the parodic content that
25 explains the content to the ad and all you have to do is to do

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1 it.

2 And they didn't do that. They sued us and they say to
3 the Court today we have no obligation to revise our ad, to
4 explain it so that people aren't confused. It is our speech,
5 we can say whatever we want and, MTA, you have to bend to your
6 knee and you have to provide alternative means to ameliorate
7 the confusion and the possible public safety risk caused by our
8 ad. And I don't think that is the law.

9 The other thing I would like to --

10 THE COURT: Why isn't it? The first question would be
11 is the ad unprotected speech under the First Amendment. Is it
12 incitement or another category of unprotected speech, right?

13 MR. SISTROM: Right.

14 THE COURT: We can get to that in a moment, but if it
15 doesn't fall within the category of unprotected speech, then
16 under the law in the Second Circuit the MTA is a designated
17 public forum, right?

18 MR. SISTROM: Correct.

19 THE COURT: So you have to satisfy strict scrutiny in
20 order to prohibit the ad so you have to show compelling reason
21 and you have to show that the restriction is narrowly tailored,
22 that there are no other reasonable alternatives.

23 So, isn't it in fact your burden to show that there
24 are no reasonable alternatives? All they have to do -- and you
25 can correct me if I am wrong -- is to say, look, there are

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1 other possibilities. There is counter-advertising. It is not
2 our burden, they say, to come up with the counter-advertising.
3 The MTA has to show that its regulation is narrowly tailored
4 and the MTA hasn't shown that you can't run a big ad right next
5 to it and say ignore this ad or this ad is a parody. Right?
6 Isn't that the MTA's burden?

7 MR. SISTROM: Well, no. I don't think so, your Honor.
8 Let me try and explain why.

9 One of the least restrictive means is instead of just
10 categorically refusing to run the ad and end the discussion, we
11 invited them to come back to us with proposals of one of which
12 we just talked about but easily could have at least helped.
13 Now, would it have solved the problem? I don't know but that
14 was not their response.

15 Secondly, with respect to the counter-ads that ran in
16 San Francisco, first of all they were not counter to this ad,
17 they were countered, if I remember, to the savages ad that ran
18 in San Francisco and also ran here. And the reason that is
19 important is because you have to ask what it was that San
20 Francisco Transit Agency was countering. Their concern was --

21 THE COURT: No, no, no. I know the sequence but I am
22 talking about an obvious other alternative which is
23 contemporary counter-advertising. Right? Right next to it.
24 You know? Here is the ad. Here is an MTA ad right next to it.

25 MR. SISTROM: Right, but what happened in San

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1 Francisco was what they were countering was the concern that
2 people would blame the San Francisco Transit Agency for running
3 an ad that was controversial and hateful and they wanted to
4 make clear to the public and their riders we don't like doing
5 this. We have to but we don't like it.

6 What we would be asked to do here is not that. Our
7 concern isn't that the ad was controversial because, as
8 Mr. Rosen testified, I think, and Mr. Diaz, we have run more
9 than two dozen of their ads. At the same time we approved this
10 ad we ran five other ads that were harshly critical of Hamas.
11 So, it has nothing to do with controversy. The problem here is
12 trying to explain in the back of a moving bus in a couple of
13 words a very colorful ad with stark images and viscerally
14 emotive words doesn't mean what it actually says on its face
15 and that you have to understand there is a context, it is the
16 parody, don't take it literally. I mean, you could put up a
17 sign like that I suppose, if it were feasible. There is
18 limited space on the bus, it could cost us money, and secondly,
19 I don't think it would be effective.

20 Now, I am not a security expert. I am not here to
21 tell you what the likelihood is that this ad would have incited
22 violence or the likelihood that a counter ad would have been,
23 as AFDI called it in the brief, a violence damper, but we
24 didn't think that that was a practical alternative and we
25 thought the much more reasonable alternative was for AFDI to

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1 withdraw the ad because the confusion was really accidental.
2 It was an ad that was designed to parody another ad that never
3 ran.

4 So, maybe since they already were running five other
5 Hamas ads partially critical of Hamas they could have run
6 another one, just not this one. Or they could have run
7 something themselves on the ad that made their point of view
8 more explicit and more understandable to people but they didn't
9 want to do that.

10 Now, I guess to me the threshold question, your Honor,
11 is, which is, is the ad actually, as is written and read
12 reasonably, does it incite violence or not. I think this is
13 what you alluded to. This is the *Brandenburg* issue.

14 THE COURT: You are not arguing, are you, that the ad
15 is unprotected speech because it's a true threat? Right?

16 MR. SISTROM: No, not explicitly. Although we do use
17 some principles from the true threat cases which I think if you
18 read them closely, your Honor, they're animated by the same
19 concerns.

20 THE COURT: Okay.

21 MR. SISTROM: But, no. You are correct.

22 THE COURT: As I did with your colleague, I just try
23 and make sure that I get the arguments clear.

24 MR. SISTROM: Fair enough.

25 THE COURT: So, I appreciate that we are not dealing

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1 with obscenity so we are dealing with three possible exceptions
2 to protected First Amendment speech; incite many, fighting
3 words, and true threat. So, I want to know what I have to deal
4 with. Are you arguing that the ad is a true threat?

5 MR. SISTROM: No.

6 THE COURT: Are you arguing that the ad is unprotected
7 because it is fighting words?

8 MR. SISTROM: Yes.

9 THE COURT: As to fighting words, there is language in
10 the cases that talk about face-to-face confrontation. What
11 cases do you rely on for the proposition that fighting words
12 can be an ad that you read and it could so rile people up that
13 it would be considered fighting words and outside the
14 protection of the First Amendment?

15 MR. SISTROM: Two cases, your Honor. I am going to
16 refer them the cross-burning cases the RAV case and West
17 Virginia.

18 THE COURT: The two cross-burning cases.

19 MR. SISTROM: But, when it came up to the Supreme
20 Court, the RAV case the Court said, look, your convention --

21 THE COURT: And Virginia v. Black?

22 MR. SISTROM: And I would add that there is, I think
23 as your exchange with Mr. Yerushalmi brought out, the
24 traditional fighting words cases were face-to-face but I don't
25 think there is anything intrinsic in the principle of fighting

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1 words that limits it to face-to-face encounters. I mean it
2 can't simply be that you can say that what is clearly a
3 fighting words epithet just, because you put it on a bus all of
4 a sudden it is sanitized in some way. I don't think that is
5 the law. But I don't have a case that says that, no. I am
6 hoping this one will.

7 THE COURT: Traditionally the reason that it is
8 unprotected is because it is, you know, someone may punch you
9 in the face when you say something. It is hard to do that when
10 you simply read an ad.

11 MR. SISTROM: Well, they could punch the bus in the
12 face with a rock through the window, your Honor, which is the
13 concern that was in the Seattle case where they were getting
14 threats and pictures of fire bombed buses put under the door.
15 This was the Ninth Circuit case just decided.

16 THE COURT: That was a limited purpose public forum.

17 MR. SISTROM: Sure enough.

18 THE COURT: So it doesn't apply in the Second Circuit
19 and this was a history of threats of violence reflected in that
20 case.

21 MR. SISTROM: Correct; but again the issue there, as
22 it was in San Francisco with the counter-ad, what motivated
23 King County, the transit company in Seattle, was not that the
24 ads on their face advocated violence, it was that people would
25 be so angered by the ads, by the message of the ads which they

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1 oppose which are clear, but they oppose them that they would
2 attack the buses and the bus drivers wouldn't drive and so
3 forth. It is a very different concern.

4 THE COURT: That is plainly limited-purpose public
5 forum where you could have a heckler's veto, right?

6 MR. SISTROM: If that's how you choose to characterize
7 it, yes -- which I wouldn't. I would say a public transit
8 agency which runs ads is legitimately concerned about threats
9 to its facilities and its riders and its employees and if that
10 concern rises to a sufficient level in a limited public forum,
11 they can act.

12 THE COURT: The third category, then, is Brandenburg?

13 MR. SISTROM: Yes.

14 THE COURT: Is there a case that says subjective
15 intent is irrelevant to analyzing whether the words constitute
16 incitement?

17 MR. SISTROM: Well, I don't think Brandenburg itself
18 ever says that you need subjective intent. That is the
19 starting point. There is talk about intentionality --

20 THE COURT: Could I?

21 As I did with your colleague, let's begin with the
22 most simple proposition, all right, before we get to an
23 analysis of what the meaning of the cases is. Is there a case
24 that simply says in order to have incitement under *Brandenburg*
25 you do not need subjective intent?

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1 MR. SISTROM: What I would say, your Honor is --

2 THE COURT: The answer to that is either yes or no.

3 MR. SISTROM: I can't have a yes but? I would say --

4 THE COURT: Let me rephrase.

5 Do you know of a case which says subjective intent is
6 irrelevant to satisfying *Brandenburg*?

7 MR. SISTROM: No.

8 THE COURT: Okay.

9 MR. SISTROM: I do know, however --

10 THE COURT: Now you can talk.

11 MR. SISTROM: You might think I am blurring the
12 categories but in the *Turner* case which was a, I guess you
13 would say it is a threats case, this is the Second Circuit case
14 where the fellow is posting website postings to his website
15 urging people to kill federal judges and the Second Circuit
16 says, *look. We don't* -- and his defense of course was it was
17 just rhetoric, I didn't mean it. And the Second Circuit said
18 well, we don't care whether you meant it or not. The issue in
19 that case was do the judges feel threatened by the possibility
20 that someone will act on this incitement and kill them and are
21 you therefore interfering with their job as a judge.

22 So, the Second Circuit said he can say whatever he
23 wants about his intent but it is not really an issue.

24 THE COURT: The meaning of true threat is up before
25 the Supreme Court this year. So, okay.

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1 Go ahead.

2 MR. SISTROM: So, I would say that I think *Brandenburg*
3 has been misconstrued if it has been construed as requiring a
4 subjective intent on the part of the speaker. Obviously, in
5 most cases, the speaker intends the words they say but this is
6 a slightly different case because of this confusion about the
7 parody. But, the purpose that intentionality serves in the
8 *Brandenburg* analysis is not actual subjective intent, it is do
9 the words, as you read them, concretely urge violent action or
10 do they, on the other hand, theoretically advocate this
11 broad -- theoretically I support the use of lawlessness or the
12 need for lawlessness against the government. And the Court
13 says if it is just advocacy of an abstract proposition, then
14 that's protected. What you can't do is urge concrete acts.
15 The words can't urge concrete acts. And in that analysis it
16 doesn't matter what you are thinking, it matters what you are
17 saying. And in this case the ad, it doesn't matter what AFDI
18 intended. That's totally irrelevant to the public safety
19 concern.

20 THE COURT: How should I factor in that substantially
21 the same ad produced no violence in either Chicago or San
22 Francisco?

23 MR. SISTROM: Well, I would say a couple of things,
24 Judge.

25 First, you saw substantially the same ad, it was not

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1 the same ad. There was a difference. Now, we can argue about
2 whether it was a significant difference but it is very
3 different.

4 THE COURT: It is very hard to argue on the one hand
5 that this is a quick ad, you see it on a bus, it goes by
6 quickly and yet you are going to focus on the hashtag consult
7 to learn more learn more at...

8 MR. SISTROM: Fair enough. There are other
9 differences.

10 As I asked Mr. Diaz, in what city -- Chicago, San
11 Francisco or New York -- is the terror threat actually the old
12 fashioned kind of cells implanted in the City acting under
13 orders from Yemen or who knows where or a lone wolf jihadist
14 the highest? And he said New York. Indisputable. Which city
15 has the largest Jewish population? New York; not Chicago, not
16 San Francisco.

17 The ad ran in a different content. It was in Chicago
18 and San Francisco, clearly and very openly, a parody of another
19 ad. Everybody understood that. And as Mr. Diaz said, again,
20 that ad ran in early 2013 and that's now, what is that two
21 years ago? And in that two years I don't think I need to
22 remind you, a lot has happened and, as Mr. Diaz testified, the
23 threat or the belief that there is an active and growing threat
24 from domestic terrorists or would be terrorists who are
25 motivated or incited by the internet, by YouTube videos to

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1 commit violent acts has grown substantially. Just this weekend
2 Isis reportedly published a website posting: Go kill U.S.
3 military. Although what is notable about that, and I realize
4 it is not in the record, that posting is filled with questions.
5 *What are you going to do about this? When are you going to*
6 *take action?*

7 So, I would say those are the differences that I would
8 point to between Chicago and San Francisco and new York.

9 THE COURT: You don't disagree, based on the law in
10 the Second Circuit, that the analysis goes is the speech
11 unprotected because it falls within one of the categories. If
12 in fact it is protected because it doesn't fall within one of
13 the categories then the MTA, it is a designated public forum
14 and you have to satisfy strict scrutiny.

15 MR. SISTROM: One caveat Judge. I would say --

16 THE COURT: You reserve your right to argue that the
17 Second Circuit was wrong.

18 MR. SISTROM: Yes.

19 THE COURT: I know.

20 MR. SISTROM: There is that but I wasn't going to --
21 two caveats then. That is one. And the other, and I think
22 this Ninth Circuit case has now added more help to that of why
23 should buses be -- but that is not before you.

24 THE COURT: So, perhaps it establishes a conflict in
25 the Circuits.

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1 MR. SISTROM: It might.

2 I would just say, and I am not inviting them to do
3 this but I say even before that on top of that structure that
4 you just laid out would be just the preliminary question is
5 does the ad incite violence.

6 THE COURT: Oh sure, because that's the question of
7 whether it falls within *Brandenburg*. If it falls within
8 *Brandenburg* --

9 MR. SISTROM: No, no, I mean on its face. If it
10 doesn't incite violence at all it doesn't get to *Brandenburg*,
11 just our standard doesn't apply, shouldn't have applied and
12 then the case is over.

13 THE COURT: I am not following you.

14 You rejected the ad because it fell within (a)(x).

15 MR. SISTROM: Correct.

16 THE COURT: So there is a restriction on speech. You
17 say if it doesn't even incite violence the case is over. It
18 would only be over if this was unprotected speech which fell
19 within *Brandenburg* or another exception so it comes down to is
20 this incitement that is covered by *Brandenburg*.

21 MR. SISTROM: Fair enough.

22 THE COURT: But that does raise another question
23 because in your brief what you said was if I disagree with you
24 as to whether this was incitement to violence, I should go no
25 further and find that the ad should not have been rejected and

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1 I shouldn't even consider any of the other issues.

2 MR. SISTROM: That was the point I was just trying to
3 explain and obviously I garbled it. Let me try again.

4 What I am saying is that if the threshold issue, it
5 seems to me, is did the MTA -- was the MTA's standard even
6 implicated in the first place, should we have even gone through
7 this exercise of sending it to Raymond Diaz for a security
8 assessment if it just read on its face that there is no way
9 that a reasonable person could read the ad as inciting
10 violence, then we should have stopped there and run the ad.

11 THE COURT: And then I should issue the injunction and
12 say carry the ad.

13 MR. SISTROM: You could do that. But then it seems to
14 me as if you think that the ad could incite violence, could be
15 read to incite violence, then I agree, then you have to go to
16 *Brandenburg* and say, okay, if the MTA, if it was a reasonable
17 decision for the MTA to make to look at the ad through the lens
18 of their standard.

19 THE COURT: Again, I am not following the difference
20 as between the first and second steps.

21 MR. SISTROM: I am not doing a good job.

22 THE COURT: If the ad doesn't reasonably incite
23 violence it should not have been rejected and there should
24 be -- it was wrong under the First Amendment to reject the ad
25 and the injunction should be granted, right?

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1 MR. SISTROM: Right. But we, of course, disagree that
2 it doesn't, reasonably read, it doesn't incite violence. We
3 say it does incite violence reasonably read. So, I agree with
4 you that as a practical matter --

5 THE COURT: In essence I took what you are saying as,
6 Judge, we have an important standard here which we would like
7 to continue to apply. Don't meddle with our standard. If you
8 think we were wrong in rejecting this ad, just tell us.

9 MR. SISTROM: Yes.

10 THE COURT: We were wrong in rejecting this ad and go
11 no further.

12 MR. SISTROM: Correct. You could do that. You could
13 also say I agree that there is at least -- it is at least
14 plausible that the MTA believed or that the MTA's belief was
15 plausible that -- at least plausible enough that the ad,
16 reasonably read, would incite violence, therefore they properly
17 deployed their standard but the question is whether the
18 standard actually applied -- whether it is constitutional under
19 *Brandenburg* as applied in this ad and that is where you get
20 into the issues about intentionality and subjective intent and
21 imminence and all of those questions. And then I agree with
22 you. If you decide that it is not *Brandenburg* incitement to
23 speech or it is not fighting words, then I think I agree with
24 Mr. Yerushalmi. I think the next step is, okay, but they have
25 restricted the speech because they had a public safety concern,

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1 I am going to look at that decision under strict scrutiny. And
2 did they have a compelling interest, which I don't think
3 anybody disputes that a reasonable concern about public safety
4 is a compelling state interest and then the question is the
5 least restrictive alternative discussion that we have.

6 THE COURT: Okay. Go ahead, if you wish.

7 MR. SISTROM: Well, I just wanted to briefly, on the
8 issue that we were just wrestling with about whether the ad,
9 itself, reasonably read incites violence. I just wanted to
10 talk a little bit, briefly, about that.

11 As Mr. Diaz testified, I think, fairly succinctly, we
12 read the ad and he read the ad as a demand that Muslims attack
13 Jews as a matter of religious obligation and AFDI, as I
14 understand it, says three things: One, the ad doesn't
15 expressly say that; two, the ad isn't sponsored by Hamas so you
16 must conclude therefore that it is a parody; and the third is
17 that it ran in San Francisco and Chicago.

18 Taking the first point that the ad doesn't expressly
19 command anyone to kill Jews, AFDI says that the ad is passive,
20 it just sits there and purports to quote Hamas. But, I think
21 as Mr. Diaz explained, that's not how we think the ad would be
22 read. The ad says *killing Jews is worship that draws you*
23 *closer to Allah. If you are a devout Muslim, therefore, you*
24 *will kill Jews. That's what he is doing, why aren't you?*

25 THE COURT: One related question.

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1 Is there any evidence in the record or any comparable
2 case where an ad, particularly an ad which is seen quickly on a
3 bus or the subway has produced violence -- not graffiti but
4 violence -- or any ad which has been found to meet the
5 *Brandenburg* standard? I mean I realize, and obviously it is
6 troubling the fact that there are, as you say, violence
7 inspired by the internet and social media and by campaigns
8 which slowly can warp people's minds but we are talking here
9 about an ad which the MTA constantly says is going to be seen
10 quickly and, you know, you can't concentrate on the nuances.

11 So, is there any case, any evidence that an ad like
12 that incites violence in any case?

13 MR. SISTROM: Two parts, Judge. You say any case, if
14 what you mean is a decided case by a Court, I don't know of a
15 case where a Court said this ad ran and an act of violence was
16 incited by it.

17 If you are asking me if there is evidence that
18 fleeting postings on websites and YouTube videos --

19 THE COURT: Not posting on websites or social media.
20 Print ads in the subways or buses.

21 MR. SISTROM: I can't put my finger on any, Judge, but
22 what I can say is that if the result of that, if where you are
23 going is that the conclusion of that is as I said in our
24 opening brief, then Isis could run an ad, oh, the MTA is saying
25 go ahead, somebody, because after all it is just an ad, nobody

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1 is going to respond. The only people who would react are
2 people are who are already incentivized so run the ad, or
3 Hamas, other than Mr. Yerushalmi's point about the --

4 THE COURT: We have, of course, laws about material
5 support for terrorist organizations which would prevent just
6 such an ad.

7 MR. SISTROM: But what if the ad is supportive --
8 well, perhaps, but I don't know, I'm not an expert in the
9 foreign terrorist law but what if it were -- what if it was
10 just an individual? I don't -- I'm not affiliated with Isis, I
11 don't have any -- I just really like what they do and I have
12 got money and I want to put up an ad that says I think people
13 should be beheaded.

14 As I say, I don't know, I don't think that person
15 would be prosecuted by the federal government for violating
16 that statute or he might but I don't think that should be the
17 MTA's only resource, is to hope that the people who sponsor
18 those ads get prosecuted after the ad has already run.

19 THE COURT: Okay.

20 MR. SISTROM: Which actually if I could, your Honor,
21 just very brief? I know it has been a long day, I want to
22 touch very briefly on the preliminary injunction standard.

23 Obviously the basic standard is likelihood of success
24 but in this case I think it is heightened to at least the clear
25 likelihood of success or substantial likelihood of success for

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1 three reasons: First, it is a mandatory injunction, it is not
2 preserving the status quo, it is telling us to do something
3 that we aren't now doing; second, if you tell us to put up the
4 ad now that is all of the relief that AFDI is seeking in this
5 case so it is an odd result that you bring a case seeking
6 ultimate relief and you get exactly what you are seeking in the
7 form of a preliminary injunction other than the \$1 damages this
8 they seek nominally; and the third, which is sort of related
9 which is that if you force us to put up the ad now, that can't
10 be undone on appeal if it turns out that the Second Circuit
11 doesn't agree with you.

12 Now, of course we can ask for a stay and so forth but
13 the order itself put up the ad and if you don't like my ruling
14 you can go appeal changes the nature of the -- I just think you
15 should take that into account when you are thinking about the
16 relief that you might order.

17 THE COURT: Okay. Thank you.

18 MR. SISTROM: Thank you, your Honor.

19 MR. YERUSHALMI: Your Honor, brief rebuttal?

20 THE COURT: Very brief.

21 MR. YERUSHALMI: Quickly.

22 As to the last issue of a heightened standard, there
23 is no heightened standard. There is no case law that
24 identifies specifically the issue that my colleague has put
25 forward here today or in the briefs. Moreover, this Court in

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1 AFDI v. MTA before Judge Engelmayer rejected that notion. It
2 just isn't the case and, indeed, the case law, as we point out
3 in our briefs, when you are dealing with a First Amendment
4 constitutional issue it is irreparable injury every minute my
5 client's speech is being restrained.

6 Secondly --

7 THE COURT: Two separate issues.

8 MR. YERUSHALMI: Two separate issues that as it were
9 intertwined.

10 THE COURT: One is the issue of irreparable injury.
11 Another issue is what is the standard with respect to
12 likelihood of success on the merits. And that does differ,
13 depending upon whether it's, in effect, permanent relief and is
14 that is a sliding standard.

15 MR. YERUSHALMI: I will accept in some cases it can be
16 but I would again suggest the Court look at New York Magazine
17 and we cite to the language and the Court itself, under the
18 likelihood of success, reaches into these other prongs.

19 The other point, your Honor, in terms of the facial
20 versus as-applied, again, relying on *Claiborne Hardware* I can't
21 imagine the fact in this case or the standard that language of
22 the standard being facially within that standard, *Brandenburg*,
23 or within the fighting words. However, the as-applied facts
24 that we have here, Mr. Diaz' testimony was clear as is
25 everything else in this case. He had no real indices, any

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1 empirical fact about violence that is going to take place. He
2 had nothing other than his reading of an ad which required many
3 iterations of inferences and if you look at his declaration at
4 paragraph 9 we looked at today in the hearing you could see
5 that he has to add all kinds of language to this ad to make it
6 even come close to anything that might reasonably foreseeably
7 lead to violence.

8 The final point I would make, your Honor, is that at
9 the beginning of the discussion about least alternative means,
10 my colleague at the other table suggested that the least
11 alternative means could have been either that we change the
12 speech by adding something to the ad or withdrawn it. That was
13 the language he used. Now, all that means is to put the least
14 alternative means on its head because if the least alternative
15 means is we change our speech or we eliminate our speech, there
16 is no such thing as least alternative means. It simply says
17 that the speaker is the one who will be censored one way or the
18 other.

19 Thank you, your Honor.

20 THE COURT: Okay. Thank you, all. I appreciated the
21 briefs, I appreciated the argument, and I will take the motion
22 under advisement.

23 MR. YERUSHALMI: Thank you.

24 THE COURT: Thank you, all.

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