UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

VAGUELY QUALIFIED PRODUCTIONS LLC,

Plaintiff,

v.

METROPOLITAN TRANSPORTATION AUTHORITY (the "MTA"); THOMAS F. PRENDERGAST, in his official capacity as Chairman and Chief Executive Officer of the MTA; and JEFFREY B. ROSEN, in his official capacity as the Director of the MTA Real Estate Department,

Defendants.

Case No. 1:15-cv-04952-CM

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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September 18, 2015

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INTRODUCTION

Defendants rejected VQP's Ads[1] as supposedly "political in nature" based on an intensive review that included scrutinizing outside sources of information, like a third-party website, to try to decipher VQP's *motivations* behind the Ads and the Film they promote. Defendants now further defend their rejection by claiming that the Ads—submitted by a for-profit production company, containing the Film's web address, and rich with humor representative of the Film—do not "read as" commercial. They also assert that the message of the Ads, which contain silly statements reflecting that American Muslims are ordinary people, represents an "important political statement." MTA Br. at 3.

Yet, under the same advertising policy, Defendants approved and displayed ads containing politically charged messages (e.g., "banks own your money") and quoting Republican presidential candidates (e.g., "It is a bad system when billionaires can pick the one who can be president"). Decl. of Jordan Wells ¶ 4, Ex. 1 (ECF No. 38); Decl. of Dean Obeidallah ¶ 3, Ex. 3. Incredibly, even this content did not prompt Defendants to dissect the ad-makers motives or conduct any other review, let alone to reject the ads as "political in nature." That treatment was reserved for VQP's Ads—just in time to boast about the rejection in unrelated litigation.

Defendants' rejection of the Ads under the Revised Policy was neither reasonable nor viewpoint neutral, both of which are requirements of the First Amendment. Moreover, because VQP will suffer irreparable harm if Defendants are permitted to continue violating the Constitution by refusing to display the Ads, the Court should grant VQP a preliminary injunction.

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[1] Capitalized terms not defined herein have the meanings ascribed to them in VQP's Memorandum Of Law In Opposition to Defendants' Motion To Dismiss, No. 15-04952 (S.D.N.Y. Sept. 11, 2015), ECF No. 46. (the "Opposition").

ARGUMENT

I. VQP IS ENTITLED TO A MANDATORY PRELIMINARY INJUNCTION

A. VQP Has Demonstrated A Clear And Substantial Likelihood Of Success On Its Claim That Defendants' Rejection Of The Ads Under The Revised Policy Violated The Free Speech Clause Of The First Amendment

As detailed in VQP's Memorandum of Law in Support of its Motion for a Preliminary Injunction, ECF No. 31, (the "PI Memorandum"), VQP has met its burden of demonstrating a clear and substantial likelihood of success on its claim that Defendants' rejection of the Ads as "political in nature" under the Revised Policy violates the First Amendment. *See Mastrovincenzo v. City of New York*, 435 F.3d 78, 89 (2d Cir. 2006). The arguments advanced in VQP's Opposition, which are substantiated by the evidence submitted in support of the Motion for a Preliminary Injunction, provide further support.[2]

While mandatory injunctions are reviewed under a heightened standard, they are clearly attainable in First Amendment cases. *See, e.g.*, *Ritell v. Village of Briarcliff Manor*, 466 F. Supp. 2d 514 (S.D.N.Y 2006) (granting a mandatory injunction in a First Amendment action challenging the government's selective rejection of religious displays); *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334 (S.D.N.Y. 1998) (granting a mandatory injunction in a First Amendment action challenging the government's denial of a permit for a religious political event). Moreover, VQP's burden is not heightened further simply because it seeks to enjoin the government, as Defendants suggest. The same "clear or substantial likelihood of success" standard applies, notwithstanding that the government is the intended subject of the injunction. *See D.D. ex rel. V.D. v. New York City Bd. of Educ.*, 465 F.3d 503, 510 (2d Cir. 2006).

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[2] VQP also incorporates by reference the discussion of the legal framework in VQP's Opposition, showing that Defendants' rejection of the Ads is subject to strict scrutiny, a standard which Defendants do not claim to have met.

1. Defendants' Argument That VQP's Ads Are Not "Commercial Advertising" Under The Revised Policy Is Patently Unreasonable

As VQP explained in its Opposition, Defendants' Final Determination that the Ads violate the Revised Policy referred only to the "political in nature" provision of that policy. VQP Br. at 6. The notion that the Ads were something other than "commercial advertising" understandably did not enter their analysis.[3] This argument raised for the first time in their Combined Brief is completely without merit.

The assertion that the VQP Ads are not "commercial advertising" is unreasonable under any reading of the Revised Policy, which provides:

> Commercial advertising. Paid advertisements that propose, promote, or solicit the sale, rent, lease, license, distribution, or availability of, or some other commercial transaction concerning, goods, products, services, or events for the advertiser's commercial or proprietary interest, or more generally promote an entity that engages in such activities.[4]

It is undisputed that VQP is a for-profit production company; that each of the Ads displays the website address www.themuslimsarecoming.com, which is also the title of the Film and is where the Film is available for purchase; and that one of the Ads also prominently features the Film's title. It is further undisputed that the Ads are wholly consistent with VQP's brand of "smart, insightful, and comedic social justice media." Decl. of Negin Farsad at ¶¶ 3, 6 (ECF No. 32). Those facts require a determination that the Ads are commercial advertising under the plain terms of the Revised Policy. Neither Defendants' subjective interpretation of what "reads as"

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[3] Even in the Combined Brief, Defendants never actually assert that the Ads are not commercial advertising under the Revised Policy. Defendants instead fall back on the fuzzy claims that the Ads do not "read as commercial" or are less "commercial in nature" than other ads. *See* MTA Br. at 22–24, 28. These terms are not used in the Revised Policy and any analysis of their applicability to the Ads is not relevant.

[4] MTA Board Action Items, Exhibit I to Compl., at 165; Decl. of Jeffrey B. Rosen at ¶ 65 (ECF No. 42).

commercial advertisements—a vague concept that the Revised Policy does not use—nor their view of VQP's methods of promoting its Film and brand survive First Amendment scrutiny.

Defendants proffer that the Ads have reduced commercial character because they do not expressly mention "the existence of a film," and the relevant website address is in a footer. *See* MTA Br. at 22–24. This argument fails. According to Vinny Tulley, a professor of advertising at the School of Visual Arts who has over 20 years' experience in the industry and has received its highest honors, the Ads "are very much consistent with other advertisements used in the commercial advertising industry." Tulley Decl. ¶ 9. As he explains:

> It is commonplace in the advertising industry for films and television shows to promote themselves in commercial advertisements without explicitly referencing their titles. Advertisements designed in this fashion may "tease" a later campaign which reveals more information about the work being promoted; they may direct the consumer to a website that contains further information about the work in question; or they may simply pique the consumer's interest without providing further details. These decisions are guided by a host of strategic and creative considerations. *I myself have designed several advertisements that simply direct consumers to the website of a business or product and have found them to be effective.*

Id. ¶ 6 (emphasis added). Furthermore, "[i]n mass transit advertising, advertisers only have a few seconds of riders' attention. As such, advertisements are more effective if they make readers curious regarding the product or the service." *Id*. ¶ 7.

Accordingly, Defendants' efforts to parse the Ads and offer their opinions about the absence of the Film's title,[5] the typeface size of a joke, and their effectiveness at drawing attention to the web address amount to nothing more than arbitrary quibbling with VQP's creative decisions. This is decidedly not the government's domain under the First Amendment,

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[5] Even a cursory review of the Ads reveals that the title of the Film *is* the website address that appears on each poster. Defendants' argument that the title does not appear on most of the Ads ignores this important point.

particularly in the face of objective facts that place the Ads squarely within the Revised Policy's definition of "commercial advertising" and the contrary opinions of an advertising expert.

2. Defendants' Treatment Of VQP's Ads Compared To Other Similarly Situated Ads Belies Reasonableness And Viewpoint Neutrality

Defendants' intensive review of the Ads, as described in their Combined Brief, included reviewing extrinsic evidence such as articles on third-party websites to try to decipher the ad-makers' "motives" and evaluating the message and purposes of the Film itself. *See* MTA Br. at 3, 11–12, 24, 26–29. However, Defendants do not assert or provide any evidence that this rigorous review is standard practice in determining whether an ad is "political in nature." Indeed, Defendants provide no evidence that they engaged in this same process for *any other ad*. This arbitrary application of the Revised Policy is not permissible under the First Amendment.

Defendants apparently did not engage in an intensive review—or any review—before approving ads that, on their face, contain content that is more "political in nature" than anything in the Ads. After rejecting VQP's Ads, which simply contain jokes reflecting the theme that Muslims are ordinary people, Defendants ran ads for CNN's coverage of a Republican presidential debate that contain photographs of candidates alongside prominently displayed quotes expressing political messages, such as John Kasich's "[i]t is a bad system when billionaires can pick the one who can be the president." Decl. of Dean Obeidallah ¶ 3, Ex. 1–4. Defendants also ran ads for the television show *Mr. Robot* that prominently state: "PRIVACY IS A MYTH," "CORPORATIONS OWN YOUR MINDS" and "BANKS OWN YOUR MONEY." Decl. of Jordan Wells ¶ 4, Ex. 1 (ECF No. 38). On their face, these ads satisfy the Revised Policy's definition of "political in nature" better than VQP's Ads, as they directly express a viewpoint regarding disputed economic, political or social issues.

Moreover, had Defendants reviewed extrinsic evidence to determine whether the *Mr. Robot* ads could have been rejected as "political in nature"—as they did for VQP's Ads—they could have found a *New York Daily News* article in which the creator of the show described it as "an indictment of the current capitalist system," that emphasizes "Occupy Wall Street rhetoric." Decl. of Glenn Katon ¶¶ 3, 4, Ex. A. Instead, Defendants made the blind assumption that the *Mr. Robot* ads were "solely promoting a fictional cable drama." *See* MTA Br. at 29. By contrast, Defendants did not make the similar assumption for VQP's ads that they are silly, innocuous jokes that promote a film about comedians performing in shows across the country.

Similarly, Defendants accepted ads for the film *Straight Outta Compton*, about rap group N.W.A., which the creator described as a chronicle of the controversial issue of police brutality. Decl. of Tanya Syed ¶ 2, Exs. 1–2 (ECF No. 34). Trailers for the film point to "a connection between the Los Angeles street confrontations of N.W.A.'s era, in the late 1980s and early 1990s, and recent conflicts between black youths and the police in Baltimore; Ferguson, Mo.; and elsewhere." Id. Again, Defendants found no need to look beyond the content of the ads or consider what motivated the producers to promote the film before approving the ads for display.

The stark contrast between Defendants' apparent lack of scrutiny of the *Mr. Robot, Straight Outta Compton*, and Republican presidential debate ads, and their probing review of VQP's Ads (including their review of extrinsic documentation about both the Ads and their underlying subject matter), strongly suggests that Defendants were looking for a reason to reject the Ads because of their perceived viewpoint. At the very least it was arbitrary and unreasonable.

In fact, Defendants' assertions in the Combined Motion well-illustrate their double standard in applying the Revised Policy to the *Straight Outta Compton* ads versus VQP's Ads. For the former, Defendants note that "the political resonance of the *film* being advertised does

not make the *ads*, which contain absolutely no political message . . . , political in nature." MTA Br. at 28–29 (emphasis added). Yet Defendants go to great lengths to impute the messages and motivations of the Film to the Ads. *See* MTA Br. at 3, 11–12, 24–25, 28. Defendants defend the "political in nature" classification by claiming "a major purpose of the Film was to use humor to 'explore the issue of Islamophobia' and attempt to 'repair[] the *political* wedge' between Islam and America." MTA Br. at 24. This is differential treatment in its purest form.

Additionally, this consideration of after-the-fact discussion about a film by its creator is simply not relevant to the "political in nature" determination set out in the Revised Policy, and is therefore unreasonable. Whether VQP's Film "explore[s] the issue of Islamophobia" does not bear on whether Ads that promote it "advocate or express a political message." "Exploring" an issue is not the same as advocating or expressing a political message related to that issue. *See* MTA Br. at 24. The same is true for attempting "to repair [a] political wedge." *See id.* Ads promoting an international food, music, or art festival in order to "repair [a] political wedge" would not satisfy any reasonable definition of advocating or expressing a political message.

Finally, VQP is not asking the Court to "second-guess" the reasonable judgment of the Defendants. These are not "borderline cases" in which VQP's Ads fell on one side of the line and ads for the Republican presidential debate, *Mr. Robot*, and *Straight Outta Compton* fell on the other. *See* MTA Br. at 19. Rather, Defendants have not even alleged, let alone offered evidence to prove, that they subjected any other ads to anything near the level of scrutiny they piled on VQP—namely, a review of external sources and a review of the film's message. That the Defendants conducted a unique investigation into the VQP Ads to try to discern the motive of the ad campaign and the film it promoted smacks of arbitrary application of the Revised Policy.

Defendants' unreasonable and viewpoint-based treatment of the VQP Ads compared to other ads is forbidden by the First Amendment and reflects a clear and substantial likelihood that VQP will prevail on its claim under the Revised Policy. *See, e.g., Travis v. Owego-Apalachin Sch. Dist.*, 927 F.2d 688, 694–95 (2d Cir. 1991) (holding that application of a policy in a way that distinguishes among speakers engaged in the same type of speech, but who voice different religious themes was "not viewpoint-neutral as a matter of law").

3. Defendants' Impermissible Viewpoint Discrimination Was Motivated By Their Objectives In Other Litigation

The timing and record of Defendants' rejection of the Ads make clear that they were improperly motivated by a desire to reject ads they could portray as "pro-Islam" to project an image of even-handedness in the wake of their decision to reject an "anti-Islam" ad. MTA Br. at 17. While Defendants were delaying approval of VQP's Ads under the 2012 Advertising Standards, they were simultaneously engaged in litigation with the American Freedom Defense Initiative ("AFDI") concerning the MTA's refusal to display an anti-Islam AFDI ad. Just days after AFDI obtained a preliminary injunction compelling Defendants to display its ad under the 2012 Advertising Standards, Defendants adopted the Revised Policy and rejected AFDI's ad anew. Throughout the litigation that ensued in the wake of that decision, Defendants repeatedly referenced their rejection of VQP's Ads—an action taken an incredible *two days* after the Revised Policy was issued—to try to make the point that they applied the Revised Policy without regard to viewpoint.[6] Defendants made these claims about VQP and the Ads in a declaration and

[6] *Am. Freedom Def. Initiative v. Metro. Trans. Authority*, Case No. 14-cv-7928 (S.D.N.Y.) ("AFDI Matter"), Supplemental Decl. of Jeffrey B. Rosen, ECF No. 53 ("Supp. Rosen Decl.") ¶ 21 (referencing the rejection of the Ads as "put[ting] a lie to the AFDI's accusation that the MTA adopted the [Revised] Policy because the MTA dislikes and wants to censor AFDI's viewpoint."); *see also* AFDI Matter, Decl. of Jeffrey B. Rosen, ECF No. 46 (Rosen Decl.). ¶ 79–

brief filed in the AFDI Matter a mere *thirteen days* after informing VQP that they would not permit display of the Ads—*eight days* after issuing the Final Determination. *See* Decl. of Negin Farsad ¶ 35, 37 (ECF No. 32). In other words, it took over four months for Defendants to evaluate the Ads against the less-restrictive 2012 Advertising Standards, but just two days to reevaluate and reject the Ads under the Revised Policy, at the exact time they were drafting a declaration and brief in the AFDI Matter. Defendants clearly sought to identify, and reject as "political in nature," proposed ads that they wanted to characterize as opposing AFDI's "views regarding Islam."[7] The timing and record demonstrate clearly that Defendants targeted VQP's Ads for rejection based on viewpoint, in violation of the First Amendment.

B. VQP Will Continue To Suffer Irreparable Harm Unless This Court Issues A Preliminary Injunction

Defendants acknowledge that "the loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." MTA Br. at 30. They argue, however, that VQP's claim for injunctive relief is "undercut" because VQP waited until August 10, 2015 to move for a preliminary injunction. This Court has squarely rejected that argument.

When the alleged constitutional harm is ongoing, like Defendants' continuing refusal to run VQP's Ads, defendants cannot defeat a plaintiff's motion for preliminary injunction on the basis that its challenge is not timely. *See Hardy v. Fischer*, 701 F. Supp. 2d 614, 619 (S.D.N.Y. 2010) ("[T]he Court does not find that any delay in filing this lawsuit justifies the denial of interim relief from an ongoing alleged constitutional violation."); *Five Borough Bicycle Club v.*

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82 (identifying Obeidallah and Farsad as "pair of Muslim-American comedians and activists" and containing copies and describing the Defendants' rejection of the six Ads) and AFDI Matter, Defendants' Memorandum Of Law In Support Of Defendants' Motion To Dissolve Preliminary Injunction, ECF No. 45 ("Defendants' AFDI Br.") at 24.

[7] Defendants' AFDI Br. at 24.

City of New York, 483 F. Supp. 2d 351, 361 (S.D.N.Y. 2007) ("Plaintiffs should not be denied interim relief from possible constitutional violations simply because of their delay in seeking it"), *aff'd*, 308 Fed. App'x 511 (2d Cir. 2009).

The irony that Defendants delayed VQP's request to run the Ads for more than five months while now claiming VQP cannot obtain injunctive relief because it took three months to dispute the MTA's determination, find suitable counsel, send a demand letter, file a complaint, and move for a preliminary injunction should not be overlooked. Regardless, like the plaintiffs in *Hardy* and *Five Borough*, VQP should not be denied preliminary injunctive relief for an ongoing constitutional injury because of any delay in seeking it.

C. The Balance Of Equities Tips In VQP's Favor And Granting The Preliminary Injunction Is In The Public Interest

Defendants do not dispute VQP's argument that the harm resulting from their refusal to display the Ads outweighs whatever harm the preliminary injunction may cause Defendants, and they have not otherwise identified any such harm.[8] *See* VQP Br. at 20. Indeed, it is difficult to imagine *any* harm that running the Ads would cause Defendants, as they actually contracted to run the Ads before they changed their advertising policy. Decl. of Negin Farsad ¶ 26 (ECF No. 32).

CONCLUSION

For the reasons set forth above, the Court should grant VQP's Motion for Preliminary Injunction, and order Defendants to display VQP's Ads in the subway system.

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[8] Defendants also assert that the government's action is presumed to be in the public interest. MTA Br. at 32. However, a presumption can be overcome and courts have consistently given special attention to First Amendment freedoms when assessing the public interest. *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) ("No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech."), *aff'd*, 521 U.S. 844 (1997).

Dated: September 18, 2015

Respectfully submitted,

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