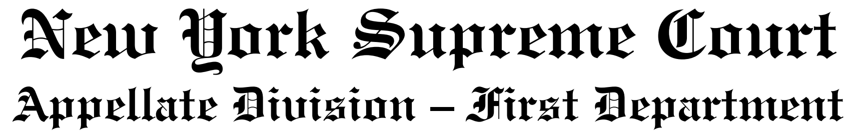
To be Argued by:
RONALD D. COLEMAN

New York County Clerk's Index No. 116293/06



OTR MEDIA GROUP, INC.,

Plaintiff-Appellant,

– against –

THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, in his official capacity as the Mayor of the City of New York; THE COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS; THE COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT

GOETZ FITZPATRICK LLP
Attorneys for Plaintiff-Appellant
One Penn Plaza, Suite 4401
New York, New York 10119
(212) 695-8100
rcoleman@goetzfitz.com

Printed on Recycled Paper

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES…………………………………………………………...…iii

STATEMENT PURSUANT TO CPLR §5531……………………………………………….……..…1

QUESTIONS PRESENTED…………………………………………….………1

PRELIMINARY STATEMENT…………………………………………………...3

FACTS……………………………………………………………………………...4

ARGUMENT

POINT ONE

THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS BECAUSE THE CITY'S BAD FAITH IN REFUSING TO ENFORCE ITS SIGNAGE ZONING REGULATION AGAINST PUBLIC PROPERTY OWNERS AS IT DOES PRIVATE PROPERTY OWNERS PROVIDED SUFFICIENT LEGAL GROUND TO DEFEAT THE CITY'S MOTION FOR SUMMARY JUDGMENT…………………………11

POINT TWO

THE COURT BELOW ERRED IN DISMISSING THE CASE ON SUMMARY JUDGMENT BECAUSE OTR IS ENTITLED TO A PRELIMINARY INJUNCTION PENDING THE OUTCOME OF THIS ACTION……………………...……………………..………18

A. THE STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF…………………………………...19

B. THE CHALLENGED REGULATIONS…………………20

C. OTR WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUCTION……………………………22

D. OTR HAS DEMONSTRATED A LIKELIEHOOD OF SUCCESS ON THE MERITS……………………………………………..28

1. THE EQUAL PROTECTION STANDARD………………………………………..28

2. THE CHALLENGED REGULATIONS ARE DISCRIMINATORY……………………………….32

3. THE PENALTY SCHEDULE VIOLATES THE EXCESSIVE FINES CLAUSE……………………………………36

4. THE NEW YORK CITY PRECLUDES A PENALTY OF EXCESS OF $25,000……………38

E. THE BALANCING OF THE EQUITIES FAVORS OTR……………………………………………39

POINT THREE

THE REGULATIONS IN QUESTION ARE UNCONSTITUTIONAL ON THEIR FACE………………………40

CONCLUSION…………………………………………………………...…50

CASES PAGE

A.B.C. Home Furnishings, Inc. v. Town of E. Hampton, 947 F.Supp. 635, 643 (E.D.N.Y.1996) 42

Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 332 (1976) 28

Baltic Indep. Sch. Dist. No. 115 of Minnehaha County, S. Dakota v. S. Dakota High Sch. Activities Ass'n, 362 F. Supp. 780 (D.S.D. 1973) 32

Burson v. Freeman, 504 U.S. 191 (1992) 29

Canwest Global Communications Corp. v. Mirkaei Tikshoret Limited, 9 Misc. 3d 845, 872 (Sup. Ct. N.Y. Co. 2005) 23

Central Hudson [*Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980)] 42, 44, 46

Cecere =s Holiday, 49 A.D.3d 1162 (4th Dep = t 2008) 37

Children of Bedford, Inc. v. Petromelis, 77 N.Y.2d 713 (1991) 42

Citizens for a Safer Cmty. v. City of Rochester, 164 Misc.2d 822 (Sup.Ct. Monroe Co.1994) 43

City of Buffalo v. New York Cent. R. Co., 125 Misc. 801 (Sup. Ct., Erie Co.) 34, 38, 40

City of Cincinnati v. Discovery Network, 507 U.S. 410, 425 (1993) 44

City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) 31

Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 106 (2d Cir.), *cert. denied*, 10-79, 2010 WL 2771433 (U.S. Oct. 18, 2010) 13, 14, 15, 17, 40, 42, 43, 45, 46, 47, 48

Countryman v. Schmitt, 176 Misc. 2d 736
(Sup. Ct., Monroe Co. 1998) 32

Delaware County Bd. of Sup'rs v. New York State Dep't of Health,
81 A.D.2d 968 (3d Dep't 1981)...20

Discovery Network, 507 U.S. at 420...44

Doe v. Dinkins, 192 A.D.2d 270 (1st Dep't 1993) 19

Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) 44, 46

El Dia v. Puerto Rico Dep't of Consumer Affairs,
413 F.3d 110, 115-16 (1st Cir. 2005) 45

Fodor's New York City 2007 (New York, 2007)..49

Friends Acad. v. Section VIII of New York State Pub. High Sch. Athletic Ass'n, Inc.,
154 Misc. 2d 1, 9 (N.Y. Sup. Ct., Nassau Co. 1992) 31, 32

Galaxy Rental Serv., Inc. v. State, 88 A.D.2d 99
(4th Dep't 1982)...43

Galvin v. New York Racing Association, 70 F. Supp.2d 163,
190 (E.D.N.Y. 1998) 23

Greater New Orleans Broadcasting Assn., Inc. v. United States,
527 U.S. 173, 189-190, 195 (1999)...44

Ibrahim v. United States, 650 F. Supp. 163 (N.D.N.Y.),
aff'd, 834 F.2d 52 (2d Cir.1987)..25

International Dairy Foods Association v. Amestoy, 92 F.3d 67,
71 (2d Cir. 1996)... 28

Kim v. United States, 822 F. Supp. 107, 110-11 (E.D.N.Y.1993)...........................25

Kingsbrook Jewish Medical Center v. Allstate Ins. Co.,
61 A.D.3d 13, 20, 871 N.Y.S.2d 680, 685 (2d Dep't 2009) 16

Latino Officers Ass'n v. Safir, 170 F.3d 167, 171 (2d Cir. 1999)............................20

*Masjid Usman, Inc. V. Beech 140, LLC,*68 A.D.3d 942
(2nd Dep = t 2009)..23

Mason v. Florida Bar, 208 F.3d 952, 956-58 (11th Cir. 2000)...............................45

McCain v. Koch, 70 N.Y.2d 109 (1987)...19

Medafrica Line, S.P.S. v. American West Africa Freight Conference,
579 F. Supp. 1039, 1041 (S.D.N.Y. 1984)...24

Metro Fuel L.L.C. v. City of New York, 2010 WL 2771433................. 40, 41, 42, 45

Metromedia and Central Hudson Gas & Elec. Co. v. Public Service Comm'n,
447 U.S. 557 (1980) 41, 43, 44

Miller v. California, 413 U.S. 15 47

Miracle Pub, Inc. v. New York State Liquor Authority,

210 A.D.2d 229, 231, 619 N.Y.S.2d 751, 752 (2nd Dep = t
1994)………………..37

Morales v. United States, 21 F. Supp. 2d 125, 130
(D. Conn. 1998)..24

Nichols Media Group LLC v. Town of Babylon,
365 F. Supp. 2d 295, 316-317 (E.D.N.Y 2005) 12

Northwest Airlines Corporation, 349 B.R. 338, 384
(S.D.N.Y. 2006)..23

Pagan v. Fruchey, 492 F.3d 766, 773-74 (6th Cir. 2007) 45

Parrino v. Russo, 19 Misc 3d 1127 (A), 866 N.Y.S.2d 93
(Civil Ct. Kings Co. 2008) 16

Pell, supra; *Oriental Boulevard Co. v. Heller,* 27 N.Y.2d 212,
220 (1970)..37

People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553,
557-58 (1986) 47

People v. Acme Markets, Inc., 37 N.Y.2d 326, 331 (1975) 13

People v. Barber, 289 N.Y. 378, 384 46

People v. P.J. Video, 68 N.Y.2d 296) 46

Prodell v. State, 166 Misc. 2d 608, 610 (Sup. Ct., Albany Co.),
order aff'd as modified on other grounds, 222 A.D.2d 178
(3d Dep't 1996) 30

Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 32
Rubin v. Coors Brewing Co., 514 U.S. 476, 488-89 (1995) 44

The Society of the Plastics Industry, Inc. v. The City of New York,
68 Misc. 2d 366 (Sup. Ct., N.Y. Co. 1971) 29

United States Automobile Association v. Curiale, 216 A.D.2d 163

(1st Dep=t 1995) 31

United States v. Bajakajian, 524 U.S. 321 (1998) 36

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,
425 U.S. 748, 758-70 (1976) 13

W. Reg'l Off-Track Betting Corp. v. Town of Henrietta,
78 Misc. 2d 169, 171 (Sup. Ct. Monroe Co.), *aff'd*, 46 A.D.2d 1010
(4th Dep't 1974) 20

W.T. Grant Co. v. Srogi, 52 N.Y.2d 496 (1981) 19

Ward v. Housatonic Area Reg'l Transit Dist., 154 F.
Supp. 2d 339, 355-56 (D. Conn. 2001) 18

Williams v. Rhodes, 393 U.S. 23, 30 (1968) 30

Willis of New York, Inc. v. DeFelice, 299 A.D.2d 240, 242

(1st Dep=t 2002) 23, 39

Young Jin Choi, 944 F. Supp. at 326, n. 2 24

Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995) 12

STATUTES

§ 1049-a(d)(1)(g)..38

§ 8.32...42

48 RCNY 3-103 .... 20, 21, 51

7 U.S.C. § 2023(a) 25

STATEMENT PURSUANT TO CPLR § 5531

1. The index number of the case in the Court below is 116293/06.
2. The full names of the original parties are set forth above. There have been no changes.
3. The action was commenced in the Supreme Court, New York County.
4. The summons and complaint were served on October 31, 2006. An amended complaint was filed on 4, 2010. Respondent's answer to the amended complaint was served on March 2, 2010.
5. The object of the action is to obtain a ruling invalidating certain regulations pertaining to outdoor advertising on grounds that they were promulgated and are being enforced unconstitutionally, *inter alia*.
6. The appeal is from an order of the Supreme Court, New York County dated July 20, 2010 and entered on July 22, 2010.
7. The appeal is being perfected on the full-record method.

QUESTIONS PRESENTED

1. Did Supreme Court, New York County, err in granting summary judgment to defendants-respondents despite the existence in the record of genuine issues of material facts concerning plaintiff-appellant's claim of selective enforcement by defendant-respondents of the subject regulations?

Supreme Court, New York County, erroneously granted the application of Respondent for a summary judgment, where OTR made a competent record of the existence of genuine issues of material facts concerning plaintiff-appellant's claim of selective enforcement by defendant-respondents of the subject regulations.

2. Did Supreme Court, New York County, err in denying the application of OTR for a preliminary injunction staying the issuance of violations and excessive and unfair penalties pending the final resolution of this action, where OTR could lose its entire business due to the implementation of a punitive penalty scheme?

   Supreme Court, New York County, erroneously denied the application of OTR for a preliminary injunction, where OTR demonstrated all of the elements necessary for preliminary relief, including irreparable harm based on the fact that OTR is in danger of losing its business.

3. Did Supreme Court, New York County, err in granting summary judgment to defendants-respondents despite meritorious arguments as to the extent of New

York's constitutional protection of outdoor advertising as a form of commercial speech?

Supreme Court, New York County, erred in failing adequately to address the application of New York's broad constitutional protections of forms of expression regarding which it has a long history and tradition of fostering, such as outdoor advertising.

PRELIMINARY STATEMENT

This action involves claims of unconstitutional promulgation and enforcement of regulations pertaining to outdoor advertising throughout New York City. A stay of the action was granted by this Court on September 8, 2010.

The grounds for reversal of the lower's court's grant of summary judgment are the following:

The advertising ban contained in Zoning Resolution §§ 32-662, 45-55(a), Local Laws 14 and 31 and Rule 49 of the Rules of the City of New York violate the rights of the plaintiff-appellant to free speech and equal protection under the New York State Constitution, Article 1, § § 8 and 11.

The enforcement scheme and penalty schedule contained in New York Administrative Code Article 26, subchapter 4, as amended by Title 28, chapter 5,

and portions of the Environmental Control Board Penalty Schedule sections of Title 15, § 31-103 of the Rules of the City of New York violate the right of the plaintiff-appellant to equal protection under Article 1, §11 of the New York State Constitution and violate the right of the plaintiff-appellant to be free from excessive fines pursuant to Article 1, §5 of the New York State Constitution.

The plaintiff-appellant is entitled to a declaration that: (a) the New York City Charter precludes the defendants-respondents from issuing fines in excess of $25,000; and (b) that the penalty schedule the defendants-respondents have imposed is *ultra vires*.

The court erred in granting the summary judgment before the completion of discovery.

The court erred in denying plaintiff-appellant's motion for a preliminary injunction enjoining the enforcement of the onerous penalty schedule and fines defendants-respondents' unlawfully imposed.

FACTS

OTR Media Group, Inc. ("OTR") is an Outdoor Advertising Company as defined by the New York City Administrative Code (an "OAC"). In October, 2006, OTR brought a challenge to the constitutionality of new New York City regulations restricting outdoor advertising signs on arterial highways and in proximity to certain

public parks on the ground that said regulations impermissibly interfered with OTR's right to free speech and equal protection in violation of the New York State Constitution. In this action, the City of New York and various of its officers were named as Respondent (collectively, the "City").

These regulations radically changed the landscape of outdoor advertising regulation in the City of New York. As admitted by Defendant-Respondent City, and as alleged by OTR, the City enacted a land-use scheme that bans advertising signs across huge swaths of territory in all five boroughs, but has at the same time carved out an invidious, arbitrary and irrational set of exemptions from the City's regulations of outdoor advertising that benefits only select outdoor advertisers. (RA 1638). Specifically, New York City amended its Rules to single out OAC's for punitive treatment, including discriminatory classification of violations, permitting the assessment of multiple violations against various persons for a single act or non-conforming aspect of the same sign, imposing minimum penalties of $10,000 for minor violations and daily penalties in the staggering amount of $25,000, as well as other penalties and fines (the "Penalty Scheme"). OTR brought an order to show cause for a preliminary injunction staying enforcement of sections 32-662 and 42-55 of the Administrative Code pending the outcome of the instant litigation. That order to show cause was settled by a So-Ordered Stipulation to such a stay.

On February 3, 2010, this Court granted Appellant leave to amend its Complaint to assert additional causes of action relating to the New York Administrative Code Articles 26, subchapter 4, and as amended by Title 28, chapter 5 and portions of the Environmental Control Board Penalty Schedule sections at Title 15, § 31-103 of the Rules of the City of New York, which regulations, we respectfully submit, both violate the New York State Constitution and were effectuated *ultra vires* of the New York City Charter. In its Order granting Appellant leave to amend its Complaint to assert these additional causes of action, the Court specifically concluded that Plaintiff's claims did not, its view, lack merit.

Since the date the Court granted leave to amend, February 3, 2010, there was no discovery as to the Third, Fourth, and Fifth Causes of Action in accordance with a compliance conference order, and no other material progress in the litigation until Respondent filed a motion seeking to dismiss those causes of action on the grounds that Appellant had allegedly failed to state a cause of action. In opposition to the motion, Appellant demonstrated that it had pled each and every requirement for the three causes of action Respondent seek to dismiss, while Respondent failed to submit any factual basis for their motion.

Moreover, Appellant submitted proof demonstrating the existence of material issues of fact that, as a legal matter, should have precluded the granting of the

motion. These submissions demonstrate the arbitrary and capricious nature of the enactment and the enforcement of New York's regulations concerning outdoor advertising. These include orders from the Environmental Control Board issuing violations against Appellant and its vendors and affiliates in amounts over $25,000.00. A penalty exceeding this amount is a contravention of the New York City Charter.

As a practical matter, when evaluating whether a given outdoor advertising display complies with regulations, ECB Administrative Law Judges issue what the ECB calls "master decisions and orders" with respect to one sign for one date which, as shown in the exemplar, impose fines in excess of $25,000. In the one "master decision and order" alone, Appellant was assessed over $160,000 with respect to a single outdoor sign—over six times the $25,000 limit set by the New York City Charter. This is done via a single written order relating to a given outdoor sign, setting out any number of violations in one omnibus order and assessing a single, massive penalty *in totum*.

Respondents maintain that these massive assessments do not run afoul of the law because, they say, each violation constitutes a separate penalty. But for the respondent party charged with such alleged violations, such as Appellant, the ECB "master decision and order" has all the practical impact of a single, massive penalty.

The fact that the single violations are laid out in a "laundry list" does not adequately protect Appellant's rights, including its rights under the New York City Charter, because any attempt by a respondent to address any single "individual" violation, or even some number of violations, on that list – whether by bringing a sign into compliance, appealing the determination of an inspector or ALJ, or otherwise – can never, as a practical matter, be of any moment. This is because practically speaking, the "master decision and order" constitutes one controlling administrative determination, typically based on one inspection "out of nowhere," with respect to the entire sign. The result is a commercially intolerable penalty, for each one of these orders amounts to "death by a thousand cuts." Such massive penalties, assessed in a single order and applied to a single sign, cannot be saved from illegality by the Respondent's expedient of "breaking out" the single-sign "indictment" into arbitrarily tiny elements, each of which is technically appealable in their own right but which are so interlocked and cross-referred that they amount in reality to a single "violation."

As to the Fourth Cause of Action, based on the excessive nature of the penalties being assessed, the record demonstrates the assessment of penalties in the amount of $160,000 for one sign. OTR maintains that a penalty of this magnitude for a single billboard is excessive, disproportionate and punitive.

The record below is clear that such penalties will destroy Plaintiff's business. The imposition of penalties of $160,000 based on inspection of one sign should be even more shocking to the judicial conscience in light of the fact that nothing in the Penalty Scheme limits Respondent's power to issue other orders against other OAC's – i.e., the landlord, for example, of a building hosting a sign via a lease – with respect to the same sign and for violations found on the same date.

Moreover, the custom and practice in the outdoor adsvertising business is that the media company, such as Appellant, in contractually bound to indemnify the lessors, vendors and subsidiaries that make a given outdoor sign possible. Notwithstanding that each "master decision and order" purports to penalize the different parties involved with a given sign for putatively different acts, in each case the act that is the basis for the penalty is exactly the same. The only variable is that the penalties are increased in each case from $800 to $10,000 per violation if there is a determination by Respondent that the entity responsible for the sign meets the statutory definition of an OAC. Not surprisingly, Respondent typically finds that it does when applied to smaller OAC's – which, OTR argued below, also amounted to an unconstitutional equal protection violation, administered in an arbitrary and capricious fashion.

As a practical matter therefore, the imposition of multiple massive fines, violations and penalties for the same sign ultimately bears down on one business – the media company, in this case Plaintiff, and threatens Plaintiff's existence. It is worthwhile for the Court to consider the massive penalties involved here in light of the true economics of the outdoor advertising business, a consideration which, unfortunately, it is respectfully submitted that the Court below failed to do.

The effect of the Penalty Scheme, seen in this light, cannot possibly be viewed as "remedial" or in any way rationally related to any lawful goal. Outdoor advertising is a bona fide form of commerce that stimulates additional commerce, consumer choice and opportunity. And, as addressed below, it is a form of constitutionally protected commercial speech.

The Court below refused to give OTR the opportunity to develop a record to make its case, granting a "lightning" summary judgment based mainly on rulings in other cases involving related, but not identical issues, and depriving OTR not only of its day in court but – by denying OTR's request for continuation of the stipulated stay pending the outcome of the appeal – any future at all if the Penalty Scheme is permitted to go into immediate effect. The economic harm to OTR, its employees, vendors and creditors, if the Court permits these draconian, and unlawful, measures

to go into effect without a full review of their legality would be devastating, to say the least.

ARGUMENT

POINT I.

THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS BECAUSE THE CITY'S BAD FAITH IN REFUSING TO ENFORCE ITS SIGNAGE ZONING REGULATIONS AGAINST PUBLIC PROPERTY OWNERS AS IT DOES PRIVATE PROPERTY OWNERS PROVIDED SUFFICIENT LEGAL GROUND TO DEFEAT THE CITY'S MOTION FOR SUMMARY JUDGMENT

Supreme Court, New York County, erred in dismissing Plaintiff-Appellant OTR's claim based on denial of equal protection (RA 1655). OTR's claim is based on the fact – *admitted* by Defendant-Respondent City – that the City "has enacted a land-use scheme that bans advertising signs across huge swaths of territory in all five boroughs [but has] at the same time…carved out an invidious, arbitrary and irrational set of exemptions from the City's regulations of outdoor advertising that benefits only select outdoor advertisers" (RA 1638). This dismissal was error considering not only of the paucity of opportunity given OTR for discovery on this issue, but the City's admission of disparate enforcement.

> The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is essentially a direction that all persons similarly situated should be treated alike. [Plaintiff]'s equal protection

> claim herein is not a challenge to the [legislative enactment on its face] – it is a claim of "selective enforcement" of [it]. . . . [S]uch a claim is proper where it is established that: (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.

Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995) (citations and internal quotes omitted). Here OTR was wrongfully deprived of the opportunity to develop, in discovery, what the public record now reveals is an unlawful and unconstitutional denial of equal protection of the law and that the City has, in fact, "carved out an invidious, arbitrary and irrational set of exemptions from [its] regulations of outdoor advertising that benefit only select outdoor advertisers" (RA 1638) in bad faith.

"A regulation may . . . be deemed constitutionally problematic if it contains exceptions that undermine and counteract the government's asserted interest." *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 106 (2d Cir.), *cert. denied*, 10-79, 2010 WL 2771433 (U.S. Oct. 18, 2010). Such exceptions are particularly offensive when, as here, they involve speech restrictions. See, *Nichols Media Group LLC v. Town of Babylon,* 365 F. Supp. 2d 295, 316-317 (E.D.N.Y 2005), and all the more so when the state exempts itself or other government agencies from restrictions on expression it imposes on private parties. See, *Virginia State Bd. of*

Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 758-70 (1976) (commercial advertising signs are protected by the First Amendment).

Whatever resistance there may be in certain cases to claims of discriminatory enforcement, courts are more receptive to them where, as here, "the . . . record meticulously details and squarely presents the issue." *People v. Acme Markets, Inc.*, 37 N.Y.2d 326, 331 (1975) (finding selective enforcement of Blue Laws in response only to public complaints unconstitutional). The record in this case amply demonstrates the City's admission that there are entities, including the Metropolitan Transit Authority ("MTA") and the Port Authority of New York and New Jersey ("Port Authority") (RA 1227) – and others (RA 503) – whose properties it has chosen, from time to time and on its own whim or, perhaps, in deference to political or other agendas unknown, to unilaterally "exempt" from enforcement of the City's highway sign regulations. The City claims, however, that selective enforcement is no longer the City's policy, having representing to Second Circuit Court of Appeals in the *Clear Channel* case, 608 F. Supp.2d 477 (S.D.N.Y.), that once the "stay of enforcement is lifted, DOB will seek to treat advertising signs on property owned, operated or controlled by the MTA (except for TA property), Port Authority (except for The World Trade Center) and Amtrak in the same manner that it treats advertising signs on private property" (RA 504).

The City's self-serving, and constitutionally troubling, formulation– that it should not be accountable for its record of selectively enforcing its advertising sign regulations, because it promises be even-handed in the future – was, surprisingly, accepted at face value by the Second Circuit, which held as follows in affirming the decision in *Clear Channel*:

> In other words, Plaintiffs suggest that the City will simply revert to a pattern of non-enforcement after the resolution of this litigation. This argument is unpersuasive. First, the record demonstrates that the City's current efforts to remove signs from government property began well before this litigation was instituted. Second, Plaintiffs' speculation that the City will fail to enforce its regulations is insufficient. Plaintiffs' bare allegation that the City will exhibit bad faith in failing to enforce its regulations in an evenhanded manner in the future is similarly unavailing. Indeed, just as some deference must be accorded to a governmental entity's representations that certain conduct has been discontinued, the City is entitled to deference with respect to its assurances that it has undertaken a good-faith enforcement effort.

594 F.3d at 111 (citations and internal quotes omitted). Partially on that basis, the Circuit Court ruled that "the City is entitled to deference with respect to its assurances that it has undertaken a good-faith enforcement effort," and granted the City summary judgment 594 F.3d *supra* at 111.

Yet even while according the City this broad "deference," the court explicitly conditioned that deference, and its related finding that the Zoning Resolution "is tailored to serve a substantial interest," on a vague requirement that "the City must

continue its enforcement efforts." *Id.* Notwithstanding any questions that may be raised about the Second Circuit's reasoning however, and keeping in mind the teaching of *Acme Markets* that a "meticulously developed record" of selective enforcement is entitled to heightened consideration, it is no longer either "speculation" nor a "bare allegation" that that court's premise for giving the City "the benefit of the doubt" no longer obtains. The Second Circuit's thinly-justified presumption, and stated expectation, that the City would diligently and even-handedly enforce its zoning regulations against the MTA, the Port Authority and Amtrak's signage just as it does against private sign owners has, objectively, not been met. Rather, notwithstanding the lifting of the stay in *Clear Channel*, the City has, in fact, exhibited "bad faith in failing to enforce its regulations in an even handed manner," *see*, 594 F.3d *supra* at 111, as set forth below.

In *Clear Channel*, *supra*, 608 F. Supp.2d at 489-490, the trial court found that "there are approximately 75 arterial billboards on property belonging to the Metropolitan Transit Authority ("MTA"), the Port Authority of New York and New Jersey (the "Port Authority") and Amtrak" as well as "one arterial sign on U.S. Government property at the U.S. Post Office along the West Side Highway in Manhattan." Notwithstanding this finding; despite the City's representations to the Second Circuit Court of Appeals that it would enforce the Zoning Resolution against

the MTA, Port Authority and Amtrak signage in the same manner as it would against private property owners (RA 504); and despite a notice on the City's website to the effect that the Zoning Resolution enforcement stay expired on February 19, 2010 and that by March 22, 2010 each previously registered sign will have to provide a "Sign Inventory Certification," none of these things has happened.[1] To the contrary, review of the DOB website reveals no indication that the City has taken any enforcement action whatsoever against any on the arterial signs of the MTA. It shows no actions for non-compliant arterial signs on Port Authority property.

---

[1] Following the Second Circuit's decision, the New York City Department of Buildings "DOB") posted the following notice it on its website under the heading "Sign Registration Program: City Prevails in Appeal":

> Following a *decision favorable to the City* by the Federal Court of Appeals, the Sign Registration Program is now in full effect as follows:
>
> - On February 19, 2010, the previous stay of enforcement agreement expires.
> - By March 22, 2010, applicants who have previously registered signs will have to provide for each sign a Sign Inventory Certification, which is item 4 at the bottom of the OAC2 form.
>   - Enforcement will begin against all uncertified signs as of that date.

(Emphasis in original). Plaintiff-Appellant acknowledges that this notice is not part of the record on appeal, but submits that the Court should take judicial notice of the materials posted on the DOB website as courts have explicitly been requested to do by the City throughout this litigation. See RA 1228 wherein the City's Answer (¶ 38 and 44) explicitly refers the Court to the DOB website for the full text of the City's sign regulations. Also see *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13, 20, 871 N.Y.S.2d 680, 685 (2d Dep't 2009) ("material derived from official government websites may be the subject of judicial notice"); *Parrino v. Russo*, 19 Misc 3d 1127 (A), 866 N.Y.S.2d 93 (Civil Ct. Kings Co. 2008) ("the Court confirmed the allegation by reference to the Department of Buildings Records… the Court confirmed the authenticity of the document through the ACRIS website").

Similarly, by all indications the City continues to exempt signs on Amtrak property from its sweeping new policies respecting outdoor advertising. It is a matter of public record that notwithstanding the premise of the Second Circuit's "deference" to the City's anti-private-ownership enforcement strategy – i.e., that the City would, following the resolution of Clear Channel, begin evenhanded and just enforcement of these regulations and their potentially ruinous penal provisions – the City has contumaciously refused to treat the MTA, Port Authority or Amtrak signage in the same manner, and subject its owners to the same crippling penalties, as those advertising signs located on private property.

Therefore, given that the Zoning Resolution enforcement stay was lifted nine months ago and that no enforcement activity against the arterial sign of the MTA, Port Authority and Amtrak has taken place, it is submitted that if the City's representation of equal enforcement of its Zoning Resolution was ever entitled to the deference shown to it by the Second Circuit Court of Appeals, it is **not** entitled to any further deference. The facts now speak for themselves, and the public evidence demonstrates the City's representations to the Court of equal enforcement were false. This lack of enforcement activity against the MTA, Port Authority and Amtrak signage at the very least constitutes evidence that "a material issue of disputed fact" has been demonstrated, i.e., that the City has exhibited "bad faith in failing to

enforce its regulation in an evenhanded manner" (594 S.3d, *supra* and 111), making the grant of summary judgment by the Court below inappropriate in light of both the OTR's inadequate opportunity to take discovery on the issue as well as the public record on the matter as it now stands. See, *Ward v. Housatonic Area Reg'l Transit Dist.*, 154 F. Supp. 2d 339, 355-56 (D. Conn. 2001) (summary judgment denied because of existence of genuine issues as to material facts concerning selective enforcement claim against municipality in equal protection suit).

For this reason, the decision of the Supreme Court, New York County, granting summary judgment to Respondent should be reversed.

POINT II.

THE COURT BELOW ERRED IN DISMISISNG THE CASE ON SUMMARY JUDGMENT BECAUSE OTR IS ENTITLED TO A PRELIMINARY INJUNCTION PENDING THE OUTCOME OF THIS ACTION

As demonstrated above, it is respectfully submitted that this Court should do as OTR urges and reverse the trial court's award of summary judgment in favor of the City. Upon doing so, this Court should, upon allowing this case to proceed and remanding for further proceedings, also reverse the denial by the Supreme Court, New York County, of OTR's application for a preliminary injunction, and should enjoin the City from enforcing regulations that provide for disparate treatment of OAC's through the imposition of excessive, punitive fines. The court below

erroneously denied OTR application for a preliminary injunction seeking a stay of the issuance of violations and excessive and unfair penalties by the City. OTR met all the legal criteria for a preliminary injunction, including the requirement of irreparable harm, in light of the City's imposition of a penalty as high as $160,000 for a single sign and has issued violations carrying fines of nearly $500,000. (RA 1958) Penalties of that magnitude for routine municipal violations are beyond "mere financial damages," for they literally make the continued existence of OTR (and other smaller outdoor advertisers) impossible – ample grounds for a finding of irreparable harm under the preliminary injunction standards, whose other requirements, as set out below, were also met by OTR.

a. <u>The Standard For Preliminary Injunctive Relief</u>

A party seeking a preliminary injunction must demonstrate: (a) a likelihood of ultimate success on the merits of the action; (b) irreparable harm in the absence of preliminary injunctive relief; and (c) a balancing of the equities in favor of the moving party. *W.T. Grant Co. v. Srogi,* 52 N.Y.2d 496 (1981). "It is now well settled that the Supreme Court has the power, as a court of equity, to grant an injunction mandating conduct by municipal agencies." *Doe v. Dinkins*, 192 A.D.2d 270 (1st Dep't 1993), citing *McCain v. Koch,* 70 N.Y.2d 109 (1987). "A preliminary injunction prohibiting enforcement of a statute by a government agency

may issue where the Appellant establishes a likelihood of success on the merits, as well as the threat of injury in the absence of injunction." *Delaware County Bd. of Sup'rs v. New York State Dep't of Health*, 81 A.D.2d 968 (3d Dep't 1981). *See*, e.g., *W. Reg'l Off-Track Betting Corp. v. Town of Henrietta*, 78 Misc. 2d 169, 171 (Sup. Ct. Monroe Co.), *aff'd*, 46 A.D.2d 1010 (4th Dep't 1974) (town enjoined against enforcement of zoning ordinance against plaintiff); c*f.*, *Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171 (2d Cir. 1999) where moving party seeks to stay governmental action taken pursuant to a statutory or regulatory scheme, injunction may be granted if moving party can demonstrate irreparable harm and a likelihood of success on the merits).

As set forth in full below, OTR satisfied all three criteria before the court below, which erred in denying OTR's motion for a preliminary injunction.

b. The Challenged Regulations

OTR brought this action seeking, *inter alia*, a stay of enforcement of New York City Administrative Code Article 26, renumbered Article 28, Chapter 5, and portions of the New York City Environmental Control Board (the "ECB") Penalty Schedule targeting Outdoor Advertising Companies, set forth in 1 RCNY § 102, recodified at 48 RCNY § 3-103 (the "Penalty Schedule") in Supreme Court, New York County. In 2005, the City replaced Local Law 14 with Local Law 31, which

expanded the range of entities subject to regulations governing outdoor advertising signs. Both laws defined "outdoor advertising company"("OAC") as "a person, corporation, partnership or other business entity that as a part of the regular conduct of its business engages in or, by way of advertising, promotions or other methods, holds itself out as engaging in the outdoor advertising business." (RA 525-530). Local Law 31, however, removed from the definition of "outdoor advertising company" the exemption under Local Law 14 for owners and managers of buildings that market space on their buildings to advertisers. *Id.* The new regulations also made it unlawful to place or maintain a sign, without a permit, "if such sign is within a distance of nine hundred feet from and within view of an arterial highway or within a distance of two hundred linear feet from and within view of a public park with an area of one half acre or more . . ." (RA 525-26) Local Law 14 had banned signs without permits "if such sign [was] within a distance of two hundred linear feet from and within view of an arterial highway or within a distance of two hundred linear feet from and within view of a public park with an area of one half acre or more . . . ." (RA 505-06)

This regulatory scheme must be considered in conjunction with Title 48 of the Rules of the City of New York ("RCNY"), § 3-103, which constitutes the Buildings Penalty Schedule applicable to Violations that occurred on or before June 30, 2008

and the Buildings Penalty Schedule II: Effective for Notices of Violation With a Date of Occurrence On or After July 1, 2008. (RA 1964-1990) Buildings Penalty Schedule II provides, in pertinent part, that Immediately Hazardous Violations

> are those specified as such by the New York City construction Codes or those where the violating condition poses a threat that severely affects life, health, safety, property, the public interest, or a significant number of persons so as to warrant immediate corrective action, or, with respect to outdoor advertising, those where the violation and penalty are necessary as an economic disincentive to the continuation or the repetition of the violating condition. *Immediately hazardous violations shall be denominated as Class 1 violations.*

(RA 1991-1992) (emphasis added). The violations that apply to OAC's – supposedly "immediately hazardous" violations – are Class 1 violations, which means that the enhanced Penalty Schedule provides for minimum fines of $10,000 per violation, per day. (RA 511) As set forth above, the imposition of such onerous penalties on OAC's, but not on other entities such as the Port Authority and the MTA that display the same types of advertising signs, violates the Equal Protection rights of the OAC's.

c. <u>OTR Will Suffer Irreparable Harm In The Absence Of A Preliminary Injunction</u>

It is a commonplace that the equitable remedy of an injunction is mean to prevent "irreparable harm" that is conceived as being in contradistinction to harm

that can be remedied by an award of money damages. But courts have long acknowledged that "In the business context, irreparable harm may be established 'where a party is threatened with the loss of a business.'" *Galvin v. New York Racing Association,* 70 F. Supp.2d 163, 190 (E.D.N.Y. 1998) (citations omitted), *aff'd* 166 F.3d 1200 (2d Cir. 1998). Similarly, in *Willis of New York, Inc. v. DeFelice,* 299 A.D.2d 240, 242 (1st Dep't 2002), for example, this Court held that the Appellant had made the necessary showing of irreparable harm where, in the absence of a restrain on the solicitation of the plaintiffs' clients by the defendant, the "plaintiffs would likely sustain a loss of business impossible, or very difficult to quantify. . . ." (citations omitted). *See also Masjid Usman, Inc. V. Beech 140, LLC,*68 A.D.3d 942 (2nd Dep't 2009) (Appellant showed irreparable harm from the imminent threat of loss of a valuable, long term leasehold interest); *Canwest Global Communications Corp. v. Mirkaei Tikshoret Limited,* 9 Misc. 3d 845, 872 (Sup. Ct. N.Y. Co. 2005) (loss of customers, revenue and an erosion of reputation constitutes irreparable harm); *In re Northwest Airlines Corporation,* 349 B.R. 338, 384 (S.D.N.Y. 2006) ("loss of an ongoing business can constitute irreparable harm") (citations omitted).

Courts have applied this principal to situations such as this one, where extreme financial penalties, rather than being presumed lawful or appropriate regardless of their effect, have been stayed because of the disproportionately severe

harm they would inflict on a lawful business. Thus, for example, in a commercial context, the court in *Medafrica Line, S.P.S. v. American West Africa Freight Conference,* 579 F. Supp. 1039, 1041 (S.D.N.Y. 1984), preliminarily enjoined enforcement of a $9 million contractual assessment where the financial viability of the Appellant would be in serious doubt if the assessment were collected and where there were material questions as to whether the assessment was an invalid punitive award and not a remedial assessment. Nor are government agencies exempt from being enjoined when unlawful policies or regulations threaten irreparable harm to business interests. *Morales v. United States*, 21 F. Supp. 2d 125, 130 (D. Conn. 1998), typifies a line of cases in which the owner of a grocery store has brought action seeking review of a decision by an administrative review officer of the Food and Consumer Service disqualifying him from participating in the Food Stamp Program for one year. In *Morales*, court granted the plaintiff's motion for a preliminary injunction pending the outcome of the case, holding as follows on the issue of irreparable harm:

> Although the issue of irreparable harm was not addressed at the preliminary injunction hearing, Appellant has submitted a statement from his bookkeeping service representing that the percentage of the store's yearly food stamps deposits were 60% of gross sales. (Pl.'s Ex. 6; Pl's Ex. E). The loss of 60% of one's business can constitute irreparable harm. See *Young Jin Choi*, 944 F. Supp. at 326, n. 2 (irreparable harm established where plaintiff's

> affidavit attested to a 40% loss of business if his store is disqualified); *Kim v. United States*, 822 F. Supp. 107, 110-11 (E.D.N.Y.1993) (irreparable harm established where plaintiff's affidavit attested to a 30% loss in gross weekly income and that this loss will force the store out of business); *Ibrahim v. United States*, 650 F. Supp. 163 (N.D.N.Y.), aff'd, 834 F.2d 52 (2d Cir.1987) (irreparable harm established where plaintiff's affidavit attests to a 30% loss of business). Accordingly, Appellant has established that he will suffer irreparable injury if the preliminary injunction is not granted.

Id. at 130. *Morales* and the cases cited above were proceedings under 7 U.S.C. § 2023(a), with authorizes a stay of administrative decisions under Food Stamp Act upon a showing of irreparable harm and likelihood of success on the merits, but the definition of irreparable harm is no different from that used in other contexts.

Here irreparable harm based on a realistic threat of business failure was clearly established by OTR, and unrebutted by the City. Ari Noe, the chief executive officer of OTR, attested in his Emergency Affidavit in support of the application for a preliminary injunction that "OTR is in jeopardy as a going concern due to the imposition by Respondent of excessive fines and penalties against Appellant . . ." (Emergency Affidavit, ¶ 4) (RA 2078). Mr. Noe stated further that all told, "Appellant and its vendors have been fined approximately $500,000 dollars since July 1, 2008, when Respondent amended the Penalty Schedule and Administrative Code." (Id., ¶ 6) (RA 2079) Mr. Noe concluded that, as a result,

"Appellant is simply unable to continue as a going concern under this oppressive statutory framework." (*Id.,* ¶ 7) Similarly, in his affidavit submitted in support of Plaintiff's application for a preliminary injunction, Mr. Noe points out, "In the event that the Defendants' issuance of excessive and unequal fines continues . . . Appellant will no longer be able to continue as a going concern." (Noe Affidavit, ¶ 11) (RA 1959).

Nothing submitted by the City contradicted or rebutted this testimony, which meets both the tests enunciated in the cases and the test of common sense. Not only has OTR made a compelling showing of irreparable harm by submitting credible testimony that it cannot stay in business if it is faced with if the City persists in the enforcement of its onerous Penalty Schedule. Not only has the City not disputed that the continuing imposition of these massive fines, far out of scale to the economics of OTR's business, would result in the shuttering of OTR's business, the casting of its executives and staff into the ranks of the unemployed and the elimination of one of the few remaining "middle market" participants in the outdoor advertising business in New York City. But beyond technical matters such as whether OTR has met its burden of coming forward, logic and a basic understanding of "how the world works" fairly screams that penalties as high as $160,000 for one advertising sign "violation" and assessments of nearly $500,000 in fines, such as are

at issue in this case, qualify axiomatically as "irreparable harm" in any business. It certainly qualifies as irreparable harm for a mid-sized outdoor advertising business in which few if any signs, "compliant" or otherwise, generate income of such magnitude in an entire year. Indeed, it is every bit as self-evident that the only reason OTR is still in business, despite the exorbitant fines the City has imposed only on certain private outdoor advertising companies, is that OTR and the City voluntarily stipulated to a stay, which was filed in the New York County Clerk's Office on November 22, 2006 (RA 1801-1804), which was continued by this Court (after being denied by the Supreme Court, New York County) pending the outcome of this appeal.

Moreover, besides demonstrating irreparable harm on the basis of the threat to its economic survival, OTR has demonstrated, as set forth below, that the selective enforcement of the advertising regulations violate OTR's constitutional rights to Equal Protection under the law (due to the City's continued non-enforcement of the regulations against public agencies) and Free Speech clauses (because advertising is a form of speech and the regulations could be characterized as a form of prior restraint). The credible possibility of the impingement of these rights also satisfies the requirement for irreparable harm for purposes of a preliminary injunction. *See*,

e.g., *International Dairy Foods Association v. Amestoy,* 92 F.3d 67, 71 (2d Cir. 1996) (curtailment of First Amendment rights constitutes irreparable injury).

d. OTR Has Demonstrated A Likelihood Of Success On The Merits

As OTR set forth in this brief, this Court should reverse the award of summary judgment awarded to the City by the trial court, for several reasons. The selective enforcement of the advertising regulations violates the equal protection and First Amendment rights of OTR. In addition, OTR has demonstrated that the City has selectively enforced its excessive and punitive penalty scheme. For all of the reasons set forth above, OTR is likely to succeed on the merits if this Court reverses the erroneous award of summary judgment in favor of the City and allows this action to proceed.

1. The Equal Protection Standard

Courts consider equal protection challenges to state action under either of two possible legal standards, the rational purpose test or the strict scrutiny test. The less stringent standard of rationality requires that "the challenged classification bears a reasonable relationship to some legitimate legislative objective." *Alevy v. Downstate Medical Center,* 39 N.Y.2d 326, 332 (1976). Because the advertising regulations involved here directly implicate the First Amendment right to free speech of OAC's, however, the Court should apply strict scrutiny to its Equal

Protection analysis. "Where . . . a statute affects a 'fundamental interest' or employs a 'suspect' classification, the strict scrutiny test has been applied. That test requires that the legislative purpose be so compelling as to justify the means utilized." *Id.* at 332. *See, Burson v. Freeman,* 504 U.S. 191 (1992) (where either freedom of speech or equal protection is implicated, appropriate standard of review is strict scrutiny).

Under strict scrutiny, courts have not hesitated to find violations of plaintiffs' equal protection rights in cases, such as this one, in which governments have promulgated regulations claiming lofty policy goals which in practice amount to an unconstitutional program of government favoritism of one class of citizens, or government compared to private endeavor, over another. For example, in *The Society of the Plastics Industry, Inc. v. The City of New York,* 68 Misc. 2d 366 (Sup. Ct., N.Y. Co. 1971), the Appellant challenged a local law, purportedly grounded in environmental concerns, that imposed a tax on plastic containers, but not on other items, such as paper, metal, fiberboard and glass, that were specifically enumerated in the enabling legislation. The plaintiffs, representatives of plastics manufacturers, contended that the tax violated the Equal Protection Clauses of the United States and New York State Constitutions "in that it imposes unreasonable and arbitrary classifications unrelated to the object of the legislation." 68 Misc. 2d at 375. The court rejected the Respondent's suggestion that "any imaginable state

of facts which could justify a separate treatment of plastics would enable the City to impose a tax on it under the Equal Protection Clause." *Id.* To the contrary, the court pointed out, the presumption of constitutionality that attaches to legislative action is a rebuttable, not a conclusive presumption, stating:

> There is no rule of law which makes legislative edict invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as sufficient to repel attack . . . . In a recent decision involving an equal protection challenge to a state law, the Supreme Court stated the present day view that "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting and the interests of those who are disadvantaged by the classification."

68 Misc. 2d 375, citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (some citations omitted). Similarly, in *Prodell v. State*, 166 Misc. 2d 608, 610 (Sup. Ct., Albany Co.), *order aff'd as modified on other grounds*, 222 A.D.2d 178 (3d Dep't 1996), a statute requiring the school district in which the Shoreham nuclear plant was located to pay a school tax refund if the assessment on the plant was reduced was found not to be rationally related to the state's interest in ensuring that similarly situated taxpayers incur the same tax burden with respect to real property tax refunds. "Statutes," wrote the court, "must be written to apply to all persons similarly situated and any statute written to apply to one individual or group would offend the 'element

of neutrality that must always characterize the performance of the sovereign's duty to govern impartially.'" 166 Misc. 2d at 614, *quoting City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985). *See also City of Cleburne, id.,* ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."); *United States Automobile Association v. Curiale,* 216 A.D.2d 163 (1st Dep't 1995) (disallowing tax credit for foreign insurer but allowing credit for domestic insurers violated the foreign insurer's right to equal protection).

Favorite treatment of government enterprise over similarly-situated private undertakings may also run afoul of the equal protection clause – even, unlike here, where the test is rationality rather than strict scrutiny:

> Even where no fundamental right or suspect classification is involved, citizens are entitled to equal protection under the law. . . . Where there is no fundamental right or suspect classification involved, the test to determine the validity of state action is whether the "unequal treatment" bears some rational relationship to a legitimate state purpose. A classification must be reasonable, and not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the state action, so that all persons similarly circumstanced shall be treated alike.

Friends Acad. v. Section VIII of New York State Pub. High Sch. Athletic Ass'n, Inc., 154 Misc. 2d 1, 9 (N.Y. Sup. Ct., Nassau Co. 1992) (some citations omitted), *citing Reed v. Reed,* 404 U.S. 71 (1971); *Royster Guano Co. v. Virginia,* 253 U.S. 412

(1920); *Baltic Indep. Sch. Dist. No. 115 of Minnehaha County, S. Dakota v. S. Dakota High Sch. Activities Ass'n*, 362 F. Supp. 780 (D.S.D. 1973). The court in *Friends Academy* held, based on these principles and the corollary rule that "[n]on-public school students have the right under the Fourteenth Amendment to be treated in the same manner as public school students with regard to participation in interscholastic athletics, absent some rational basis for treating the two classes of students differently," that "The respondent has not advanced any rational or legitimate state interest which is served by the 'unequal treatment' of public and non-public schools" in athletic competition. 154 Misc. 2d at 9. Similarly, in *Countryman v. Schmitt,* 176 Misc. 2d 736 (Sup. Ct., Monroe Co. 1998), a local law that treated private property with a telecommunications tower differently from property owned by the town and the fire department with a telecommunications tower was found to have no rational basis and deemed unconstitutional.

2. The Challenged Regulations Are Discriminatory

The Penalty Schedule that applies to OTR requires the ECB to fine an OAC a minimum of $10,000 for all violations (RA 511, 1986-1990) (*see also* RA 1739-1776). But that same Penalty Schedule permits the ECB to fine a non-OAC company, in all relevant respects situated no differently, only $800 for the same violations. (RA 1983-1986) For example, the Penalty Schedule provides for a

minimum penalty of $800 for the failure by a non-OAC to display a sign without a permit in violation of AC 27-147, but provides for a $10,000 minimum penalty for an OAC that displays a sign without a permit in violation of AC 27-147.

In the proceedings below, OTR produced evidence that the essentially capricious determination of whether a company was "acting as an OAC" – not public safety or the existence of "immediately hazardous" conditions – was the sole factor in deciding whether the ECB would impose the $800 fine per violation or one an entire order of magnitude greater, i.e., $10,000 per violation. (RA 1945-47, 2005-07, 1873-77) An even greater disparity arises from the fact that the Penalty Schedule and the Administrative Code permit the imposition of daily penalties for Class I violations for each day the violation is not corrected ("Each day's continuance shall be a separate and distinct violation.") (RA 511)

Such arbitrary distinctions exemplify government gone out of control. The unequal treatment of OAC's and non-OAC's, aggravated by the accumulation of massive penalties on a daily basis as to OAC's, constitutes an equal protection violation. As the Supreme Court, Erie County court held in a stunningly analogous situation –stated in the smaller dollar amounts of an earlier era – there is a point where the oppressive nature of a regulatory scheme, and the impossibility of

remaining in business while resisting it via litigation, reach constitutional proportions:

> It was stated upon the argument, and not denied, that defendant operated over 200 trains a day of one kind or another in the city of Buffalo. . . . A penalty of $250 for each one, assessed against the defendant, and a like penalty against each servant in charge of such trains, such penalties being reassessed every day, create a situation where defendant can, in a real sense, be said to have been denied the equal protection of the law granted to criminals even, as well as to public service corporations upon whose continued existence the very life of commerce and the prosperity of the nation depends. The defendant is threatened with annihilation for having the temerity to resist this ordinance and test its validity. The penalties accumulated since the case was argued stagger the imagination. The situation constitutes a denial to defendant of the equal protection of the law.

City of Buffalo v. New York Cent. R. Co., 125 Misc. 801 (Sup. Ct., Erie Co.) *aff'd sub nom. City of Buffalo v. New York Cent. R.R. Co.*, 218 A.D. 810 (4th Dep't), *aff'd sub nom. City of Buffalo v. New York Cent. R. Co.*, 271 N.Y. 658 (1936)

Similarly, the distinction in the Penalty Scheme between OAC's and non-OAC's that commit the same violation cannot survive a strict scrutiny review and has no rational basis. Distinguishing between OAC's and non-OAC's cannot possibly further the goals of promoting safety or aesthetics, or any other cognizable government interest, where two classes of advertising companies that commit the same violations are assessed with radically different penalties. Indeed, when

compared with decisions in which the ECB issued fines of only $4,000 for the failure to safely operate a crane (RA 1878-79) – truly an "immediate hazard" – the imposition of minimum fines of $10,000 per day, per violation against OAC's over what are often technical, aesthetic or even arbitrary specifications, eviscerates any purported justification for applying the onerous Penalty Scheme only to OAC's.

Worse still, the implementation of the Penalty Scheme is discriminatory, as well as capricious. In support of its application for a preliminary injunction below, OTR showed that the City implements the Penalty Schedule in a punitive manner by warehousing violations for up to one year and then issuing and serving the violations when it is no longer possible for OTR to correct or mitigate them. (RA 2084-2085, 2363-2369) Although the City attempted to refute that argument in the lower court by alleging that problems with its process server and with "typical 'administrative service lag'" caused the late service of violations (RA 2161), this issue, at a minimum, raises material issues of fact as to whether the City's explanation accounts for the late service of numerous violations on OTR, exposing OTR to liability for massive accrued penalties and depriving OTR of the opportunity to mitigate the alleged violations. (RA 2366-2369) OTR should not face the loss of its business while the lower court resolves that issue, and certainly should not be deprived of its ability to take discovery in order to elucidate the facts.

3. <u>The Penalty Schedule Violates The Excessive Fines Clause</u>

Article 1, Section 5 of the New York State Constitution provides that, "Excessive bail shall not be required nor excessive fines imposed . . . ." The Excessive Fines Clause is not limited to criminal prosecutions and is applicable to civil proceedings where punishment is imposed. The test is whether the fine "is grossly disproportional to the gravity" of an offense. *See United States v. Bajakajian,* 524 U.S. 321 (1998). Despite this guidance, the Administrative Code and the Penalty Scheme permit the imposition of a massive fine against any and every entity related to a non-conforming sign, including vendors, lessors, licensees and sign hangers. Each and every one of those entities can be assessed for **daily** violations and penalties **for the same sign**, all of which, as a practical matter and a matter of universal business practice, the OAC, such as OTR, will be required to reimburse and indemnify. (Noe Affidavit, ¶ 9) (RA 1959) Indeed, OTR has submitted evidence of decisions and orders issuing violations for as much as $55,000, $75,000 and $80,000 for **each** multiple respondent on the **same sign**. (RA 1950, 2009-2077) The shocking and excessive nature of the Penalty Scheme constitutes a violation of Article 1, Section 5.

In addition, the warehousing of violations makes compliance and mitigation impossible. As a result of warehousing, OTR has received as many as 13 violations

at once for various dates on the same. (RA 2084-2111) Warehousing enables the imposition of cumulative penalties. As mentioned above, it makes mitigation impossible, thus eviscerating any semblance of remediation that the regulations could possibly effect. And because they are served long after the on-site situation in question has changed, this administrative process completely deprives OTR of the ability to ascertain the factual accuracy of the alleged violation and defend itself. In its totality, the implementation of the Penalty Schedule is confiscatory and, therefore, invalid. Thus in *Matter of Cecere's Holiday,* 49 A.D.3d 1162 (4th Dep't 2008), where the petitioner had violated the Alcoholic Beverage Control Law by selling alcoholic beverages to minors or permitting alcoholic beverages to be delivered to them, the court held that revocation of petitioner's liquor license, the proscription of relicensing for a period of 24 months, a $24,000 fine and a $1,000 bond was excessive, and reduced the fine. *See also Matter of Miracle Pub, Inc. v. New York State Liquor Authority,* 210 A.D.2d 229, 231, 619 N.Y.S.2d 751, 752 (2nd Dep't 1994) (penalty of license cancellation was "'so grave in its impact on the individual subjected to it'" that it was "shocking to one's sense of fairness"), *citing Matter of Pell, supra*; *Oriental Boulevard Co. v. Heller,* 27 N.Y.2d 212, 220 (1970) ("if the requirements of a statute are impossible to satisfy, cumulative penalties would be confiscatory, as any penalty would be invalid because irrational"); *Matter*

of Cecere's Holiday, Inc. v. New York State Liquor Authority, ("Where a penalty is so disproportionate to the offense as to be shocking to one's sense of fairness, the penalty should not be enforced"); *City of Buffalo v. New York Cent. R. Co.*, *supra*.

In the case at bar, the Penalty Scheme is shocking to one's sense of fairness and should be stayed pending the resolution of this action.

4. <u>The New York City Charter Precludes A Penalty In Excess Of $25,000</u>

Section 1049-a(d)(1)(g) of the New York City Charter precludes the issuance or entry of a judgment in excess of $25,000 per respondent. In that regard, the Charter provides:

> Any final order of the board imposing a civil penalty . . . shall constitute a judgment rendered by the board which may be entered in the civil court of the city of New York or any other place provided for the entry of civil judgments within the state, and may be enforced without court proceedings within the state . . . *provided, however, that no such judgment shall be entered which exceeds the sum of twenty-five thousand dollars for each respondent.*

As a matter of law the City cannot enter or enforce a judgment based on a final order that imposes a penalty in excess of $25,000. In doing so under the Penalty Schedule – regardless of how it "dices and slices" the violations in order to create the illusion of compliance with § 1049-a(d)(1)(g) – the City is acting outside its power

under the New York City Charter, and OTR should be permitted the opportunity to take discovery, submit its proofs and seek appropriate relief upon motion or at trial.

OTR came forward, in the court below, with proof that there are serious issues as to the fairness of the Penalty Schedule and its implementation. The discriminatory imposition on OAC's of fines for advertising violations, coupled with the excessive nature of the fines imposed against OAC's, create a likelihood that OTR will succeed on the merits on its claims under the New York State Constitution.

e. The Balancing Of The Equities Favors OTR

If this Court reverses the award of summary judgment, the City stands to lose nothing if this Court holds that OTR is entitled to a preliminary injunction pending the outcome of the underlying action on remand. Win, lose or draw, City will ultimately be able to issue all lawful violations and will be able to collect any revenue to which it is legitimately entitled if OTR does not prevail.

OTR, on the other hand, is faced with paying onerous and unlawful fines. For example, a fine of $160,000 for one sign is, on its face, shocking to any sense of fairness. Under the circumstances, the balancing of the equities tip decidedly in favor of OTR. *See Willis of New York, Inc. v. DeFelice, supra* (the balancing of the equities favored the Appellant because the record contained no evidence that the

defendant would suffer significant professional hardship from a restraint). Once again, the words of the Supreme Court, Erie County come to mind: "The defendant is threatened with annihilation for having the temerity to resist this ordinance and test its validity. The penalties accumulated since the case was argued stagger the imagination. The situation constitutes a denial to defendant of the equal protection of the law." *City of Buffalo v. New York Cent. R. Co.*, *supra*. A reversal of the Supreme Court, New York County's summary judgment ruling without entry of a preliminary injunction staying enforcement of these onerous and unlawful regulations would be a pyrrhic victory for OTR and a truly unjust result.

POINT III.

THE REGULATIONS IN QUESTION ARE UNCONSTITUTIONAL ON THEIR FACE

This Court has an important opportunity here to clarify important issues of New York constitutional law respecting the protection of one of this State's most valuable assets and exports – commercial speech. As set forth in the *certiorari* brief of *amici curiae* Atlantic Outdoor Advertising Inc. and Willow Media, LLC in *Metro Fuel L.L.C. v. City of New York*, 2010 WL 2771433 (a case related to *Clear Channel*) – submitted by companies which, like OTR Media, are engaged in the business of placing and maintaining commercial signs on private property – outdoor advertising "provides consumers with accurate information about their economic

options. . . . The stark issue raised [here] is whether New York may seek to maximize its economic return on the flow of commercial speech on public property by censoring virtually identical competing commercial speech on private property." *Metro Fuel L.L.C. v. City of New York*, 2010 WL 3279298 (U.S.), 1-2. As the *amici* stated there:

> At a minimum, *amici* believe that the deferential standard of review announced by [the Supreme Court] in *Metromedia and Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980), does not govern in commercial speech settings where the neutrality of a city's regulatory process is called into question by massive economic self-interest. In view of the importance of the free flow of commercial speech, *amici* urge the Court to grant petitioner's application for a writ of certiorari in order to: (1) clarify the power of municipalities to regulate off-site commercial signage under *Metromedia*; and (2) limit the power of municipal governments to favor one commercial speaker by censoring the competition in return for a cut of the profits.

The issues raised in the quoted submission are intriguing, without a doubt, though because of the procedural distinctions here – not least the fact that this Court is not a federal court at all – this appeal, and this case, are not where they will be resolved, at least with respect to the federal Constitution (the Second Circuit having spoken). Yet the topic of the City's favored treatment of those outdoor advertisers described by the *amici* as benefiting from a process whereby "municipal governments . . . favor one commercial speaker by censoring the competition in

return for a cut of the profits" has been addressed at length, albeit in different terms, in this brief, in the context of the extensive record below of selective enforcement of the sign regulations and other equal protection violations.

No less substantively, the constitutional issues raised by the *amici* in *Metro Fuel* raise an additional, and profound, ground for reversal of the Supreme Court, New York County that is entirely with this Court's bailiwick, namely the interpretation of the New York State Constitution's guarantees of free speech. In Clear Channel, the District Court described the issue as follows:

> The Clear Channel Plaintiffs also allege a violation of the free speech provisions of the New York State Constitution, Article 1 § 8.32 The New York Court of Appeals has stated that the state constitution's free speech clause "contains language that is more expansive than its Federal counterpart and we have at times interpreted it in a manner that is more protective of free expression than the First Amendment to the Federal Constitution." *Children of Bedford, Inc. v. Petromelis*, 77 N.Y.2d 713 (1991), *rev'd on other grounds*, 79 N.Y.2d 972, (1992); see also *A.B.C. Home Furnishings, Inc. v. Town of E. Hampton*, 947 F.Supp. 635, 643 (E.D.N.Y.1996) ("New York courts have noted that the protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment.") (citation and internal quotation omitted).
>
> There is no indication either in the case law or in the parties' arguments that New York State courts impose a stricter test for commercial speech regulation than that discussed in *Central Hudson* [*Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980)]. This

> Court has found no case where a New York State court determined the standard for reviewing a commercial free speech challenge under only the New York State Constitution and not the Federal Constitution as well. Where the commercial free speech challenge included a federal right, the New York courts analyzed the entire claim under *Central Hudson*. *See*, e.g., *Galaxy Rental Serv., Inc. v. State*, 88 A.D.2d 99 (4th Dep't 1982); *Citizens for a Safer Cmty. v. City of Rochester*, 164 Misc.2d 822 (Sup.Ct. Monroe Co.1994). Since this Court has already determined that the arterial advertising regulations do not violate the First and Fourteenth Amendments to the U.S. Constitution under the Central Hudson test, the Court also finds that the City's regulations do not violate New York State's constitutional free speech protections.

Clear Channel Outdoor, Inc. v. City of New York, *supra*, 608 F. Supp. 2d at 508-09. OTR respectfully submits that the Clear Channel court's treatment of this question is insufficient, considering especially the public policy issues implicated by this appeal as well as the related cases that have recently been litigated, including *Clear Channel*.

The Second Circuit in Clear Channel ruled unequivocally that *Metromedia* "is controlling," and refused to consider either any post-*Metromedia* opinions of the United States Supreme Court – including those holding that restrictions on commercial speech violate the First Amendment when they are "pierced by exceptions and inconsistencies" that substantially undermine their purported rationale. *Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S.

173, 189-190, 195 (1999); *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 488-89 (1995); *City of Cincinnati v. Discovery Network,* 507 U.S. 410, 425 (1993) – or taking a serious look at the question of whether New York's Constitution would, in light of those post-*Metromedia* holdings, differ at all from that line.

Under the rule of *Central Hudson Gas & Elec. v. Public Service Comm'n,* 447 U.S. 557, 566 (1980), courts apply a four-part balancing test to analyze the constitutionality of governmental restrictions on commercial speech, considering (1) whether the speech is lawful and not misleading, (2) whether the asserted governmental interest is "substantial," (3) whether the regulation "directly advances the governmental interest asserted," and (4) "whether it is not more extensive than is necessary to serve that interest." The burden of demonstrating that all four prongs of the *Central Hudson* test are satisfied is on the government. *Greater New Orleans,* 527 U.S. at 183; *Discovery Network,* 507 U.S. at 420, and that burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane,* 507 U.S. 761, 770-71 (1993). The precise question as to how government meets that standard has resulted in a split among the Circuits. A number of Circuit Courts have demanded a level of proof far beyond the "rational

basis" test typically employed in challenges to statutes. See *Pagan v. Fruchey,* 492 F.3d 766, 773-74 (6th Cir. 2007) (affidavit containing "a conclusory articulation of governmental interests" insufficient to justify the suppression of commercial speech); *El Dia v. Puerto Rico Dep't of Consumer Affairs,* 413 F.3d 110, 115-16 (1st Cir. 2005) (government "failed to provide any evidence, other than conclusory assertions" justifying its favoring one commercial speaker over another); *Mason v. Florida Bar,* 208 F.3d 952, 956-58 (11th Cir. 2000) (government's "rote invocation of the words 'potentially misleading'" insufficient basis for restrictive law). In contrast, the Second Circuit, in *Clear Channel*, asked virtually nothing of the City in justifying a decision which – it is easy to forget in reading the opinion – is a restriction on speech that applies, as set forth above, only to one set of speakers (OAC's) and not others (public agencies). It is stunning, in this context, to consider the language from that opinion to the effect that "It is not this Court's role to second guess the City's urban planning decisions," 594 F.3d at 105, and that a court properly should "defer to the City's judgment in controlling the placement of outdoor advertising," *id.* at 104, as if the topic being discussed were the placement of planters or subway stations rather than the regulation of constitutionally protected speech. *See* Petition for Writ of Certiorari, *Metro Fuel L.L.C. v. City of New York*, 2010 WL 2786991 (U.S.), 26-29.

While the Supreme Court in *Clear Channel / Metro Fuel* declined to grant certiorari and resolve the conflict among the Circuit courts, and of course it is not for the courts of this State to do so, it is in light of that controversy that OTR submits that this Court should address the desultory treatment of New York constitutional law in both the District Court and Circuit Court opinions. It is hard indeed to understand how both federal courts could acknowledge that this State's Constitution does indeed evince a higher level of protection for speech than the federal constitution, yet wave away that principle even in the face of a split among the Circuits as to how to apply *Central Hudson* and *Edenfeld* merely because there is no on-point decision in the New York cases governing this particular issue.

Yet the cases do suggest criteria by which a court can be guided in making such a determination here. Particularly instructive is the following passage from our Court of Appeals:

> We, of course, are bound by Supreme Court decisions defining and limiting Federal constitutional rights but "in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States" (*People v. Barber*, 289 N.Y. 378, 384; *see also*, *People v. P.J. Video*, 68 N.Y.2d 296). The Supreme Court's role in construing the Federal Bill of Rights is to establish minimal standards for individual rights

> applicable throughout the Nation. The function of the comparable provisions of the State Constitution, if they are not to be considered purely redundant, is to supplement those rights to meet the needs and expectations of the particular State.
>
> Freedom of expression in books, movies and the arts, generally, is one of those areas in which there is great diversity among the States. Thus it is an area in which the Supreme Court has displayed great reluctance to expand Federal constitutional protections, holding instead that this is a matter essentially governed by community standards (*Miller v. California*, 413 U.S. 15). However, New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other States would be found offensive to the community (*People v. P.J. Video*, *supra*). Thus, the minimal national standard established by the Supreme Court for First Amendment rights cannot be considered dispositive in determining the scope of this State's constitutional guarantee of freedom of expression.

People ex rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557-58 (1986). With respect to the second paragraph quoted above, the focus in opinions such as Clear Channel has been on a narrow inference from the words "Freedom of expression in books, movies and the arts, generally, is one of those areas in which there is great diversity among the States. . . . However, New York has a long history and tradition of fostering freedom of expression" – specifically, that New York's expansion of the right to free expression is limited to "books, movies and the arts." OTR respectfully suggests, however, that the proper emphasis is on the previous sentence, which reads, "The function of the comparable provisions of the State Constitution, if

they are not to be considered purely redundant, is to supplement those rights to meet the needs and expectations of the particular State" – of which "books, movies and the arts" are merely the example in the case being considered.

In this context, then, it is appropriate to place before this Court the question, arguably one of first impression but hardly one of small import, of whether – for purposes, not of blanket permissiveness, but rather for determining the level of proof government must provide to justify a restriction on speech – outdoor advertising is, like books, movies and the arts, regarding which "New York has a long history and tradition" that would inform "the needs and expectations" of the body politic of this State. We submit that, at the very least, this too is a fact question deserving of full consideration, and respectfully place before the Court the following facts that may inform the weight it gives to consideration of that question:

- The Outdoor Advertising Association of America, Inc. ("OAAA") describes itself as "the lead trade association representing the outdoor advertising industry," includes on its Board of Directors representatives from every major outdoor advertising company in the U.S., including Van Wagner Communications, CBS Outdoor, and Clear Channel Outdoor. Outdoor Advertising Association of America, "History of Outdoor," found at

http://www.oaaa.org/about/board.aspx (last accessed November 8, 2010).

- The chairman of the OAAA board is Mr. Wally Kelly, Chairman and Chief Executive Officer of CBS Outdoor, which is located at 405 Lexington Avenue in New York City.
- According to *Fodor's 2007 New York City*, "Times Square is dazzling. The city requires signs here to have a minimum "LUTS" rating (Light Unit Times Square) 1½ times brighter than that of the illuminated billboard. . . . It was O.J. Gude, a/k/a "The Boticelli of Broadway," who first coined the phrase "The Great White Way" in reference to the bright lights of Times Square signs. Travis, William, ed., *Fodor's New York City 2007* (New York, 2007) at 7.
- According to the OAAA website, New York is essentially the birthplace of the American billboard: "The large American outdoor poster (more than 50 square feet) originated in New York in Jared Bell's office where he printed posters for the circus in 1835." Outdoor Advertising Association of America, "History of Outdoor," found at http://www.oaaa.org/about/historyofoutdoor.aspx (last accessed November 8, 2010).

OTR respectfully suggests that, in light of the foregoing, the Court consider the possibility that outdoor advertising in no less a part of New York's "long history and tradition of fostering freedom of expression" than those other works, such as books, movies and the arts, that have for over a century been so famously promoted on billboard in this City. This suggestion, if accepted, is not dispositive regarding any legal issue. But, again, the point is raised to suggest that the degree of constitutional protection New York affords this form of expression, persuasion and even art should not be given short shrift. It is respectfully submitted that the Supreme Court, New York County, erred in this regard as well and failed adequately to address the unresolved question of whether our State constitution requires, as many Circuit Courts of Appeal have done under the federal Constitution, that the City be required to do more than rely on what now appears to be undeserved judicial deference regarding the manner in which it restricts commercial speech.

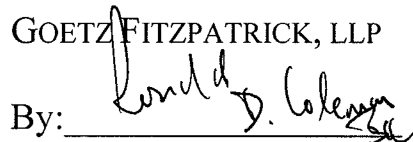
CONCLUSION

For all of the reasons set forth above, this Court should reverse the Order of Supreme Court, New York County, insofar as that Order granted summary judgment to the Respondent in this matter and denied the application of OTR for a stay of enforcement of New York City Administrative Code Article 26, renumbered Article 28, Chapter 5 and Portions of the New York City Environmental Control Board

Penalty Schedule targeting Outdoor Advertising Companies, set forth in 1 RCNY § 102, recodified at 48 RCNY § 3-103; remand this matter back to that court for further proceedings; and direct that court to preliminarily enjoin the City and stay it from enforcing those provisions.

Dated: New York, New York
November 8, 2010

GOETZ FITZPATRICK, LLP

By: 

Ronald D. Coleman
One Penn Plaza—Suite 4401
New York, NY 10019
(212) 695-81400
Attorneys for Appellant
OTR Media Group, Inc.

On the Brief:

Ronald D. Coleman, Esq.
Ellen August, Esq.
Bernard Kobroff, Esq.

Printing Specifications Statement

I, Ronald D. Coleman, attorney for the Plaintiff-Appellant, hereby certify that this brief is in compliance with § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2010. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and Point Headings are in compliance with § 600.10(d)(1)(i). The brief contains 11,828 words counted by the word-processing program.

Dated: November 8, 2010

ANTI-VIRUS CERTIFICATION FORM

CASE NAME: OTR Media v. The City of New York

DOCKET NUMBER: New York County Clerk's Index No. 116293/06

I, Jamie Price, certify that I have scanned for viruses the PDF version of the attached document that was submitted in this case as an email attachment to AD1copy-civil@courts.state.ny.us and that no viruses were detected.

The name and the version of the anti-virus detector that was used is Trend Micro Office Scan 8.0.

If you know, please indicate the version of revision and/or the anti-virus signature files: unknown.

Jamie Price

Date: November 8, 2010

STATE OF NEW YORK)

SS.

COUNTY OF NEW YORK)

Filed

☐ **Email**

Jamie Price, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address 7 West 36th Street, 10th floor, New York, New York 10018, that on the 8th Day of November, 2010, deponent personally served via email the

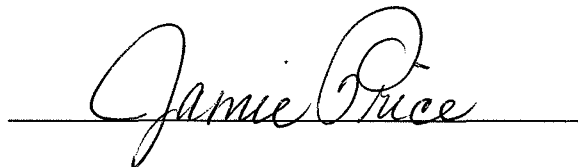
BRIEF FOR PLAINTIFF-APPELLANT

upon the attorneys who represent the indicated parties in this action, and at the email addresses below stated, which are those that have been designated by said attorneys for that purpose.

Names of attorneys served, together within the names of the clients represented and the attorney's designated email addresses.

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants-Respondents
100 Church Street, Room 5-154
New York, New York 10007
(212) 695-8100
lkoerner@law.nyc.gov

Sworn to before me this
8th Day of November, 2010.



ORIGINAL

16907