To be Argued by:
RONALD D. COLEMAN

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

New York Supreme Court
Appellate Division – First Department

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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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THE CITY'S RELIANCE ON THE PAUCITY OF THE FACTUAL RECORD BELOW DEMONSTRATES THAT THE COURT BELOW ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY WITHOUT PROVIDING OTR WITH AN ADEQUATE OPPORTUNITY FOR DISCOVERY

Predictably, in defending the grant of summary judgment below, Respondent seeks to make a "virtue" – from its perspective – out of the fundamental flaw in the ruling of the Court below: The fact that Supreme Court, New York County, hastily granted summary judgment without giving OTR the opportunity to develop a case through the normal course of pretrial discovery. The City thus urges that summary judgment was appropriate because "no material issue of fact exists," as long as this Court pays no attention to those "facts behind the curtain," such as the manifest unequal and unlawful selective enforcement by the City of the regulations that are the subject of this appeal.

These facts, the City says in its brief, "are not in its pleading, could only have occurred after the summary judgment motion was submitted, and are nevertheless without merit." (Respondent's Brief at 22.) These are odd ways to describe facts, especially when considering whether they are material enough to resist a summary judgment. But here the City both distorts the record and seeks

the very unjust benefit of a moving factual target. As set out in Appellant's brief, the City, as set out in OTR's brief, promised the Court – much, again, like the Wizard of Oz – to use its special wizardry to make them go away: The record evidence is very real that the Metropolitan Transit Authority ("MTA"), the Port Authority of New York and New Jersey ("Port Authority") (RA 1227) and others (RA 503) did not have to comply with regulations that OTR had to. And just as the City claimed that selective enforcement was no longer the City's policy 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 claimed in this action, too, that everything would be just fine as long as it were given the chance to just decide what and when to enforce, stating in oral argument – well after both pleadings and motion submissions were closed – as follows:

> In terms of the alleged exceptions for that the City has also imposed, there's no explicit exemption in the regulations for the City, for the MTA, or for the Port Authority, and in fact, as stated before the Federal court, we will enforce and continue to enforce against those entities, including ourselves, and we have removed signs.

(RA 15.)

The City's argument raises a number of issues, but on examination none of them supports its position. The City notes that OTR relies in part in its appeal on the City's actions "after the voluntary stay of enforcement expired on February 19, 2010," that because the facts relied on by OTR "are not contained in the pleadings" – which, of course, were filed in 2006 – that OTR should have sought to amend its complaint or otherwise submit proof of this ongoing discrimination at the summary judgment stage. (Respondent's Brief at 22-23.) The problem with this simplistic formulation is that the City's first massive summary judgment motion was filed on November 24, 2009 (RA 51) – while the stay was still in effect. OTR's opposition papers were filed after the lifting of the stay, on March 10, 2010, barely three weeks after the stay was lifted. Not only did OTR have to prepare its opposition to the City's voluminous submissions during this period, but surely any submission complaining of non-enforcement between February 19, 2010 and March 10, 2010 would have been met with the same response that so compelled the Second Circuit in *Clear Channel*, for, after all, it would only have been three weeks:

> 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.

Clear Channel Outdoor, Inc. v. City of New York, 594 F.3d 94, 111 (2d Cir.), *cert. denied*, 10-79, 2010 WL 2771433 (U.S. Oct. 18, 2010). Moreover, only ten days earlier, OTR was "hit" with the City's second motion for summary judgment as to the third, fourth and fifth causes of action (in the wake of *Clear Channel*). There is no way OTR could possibly have put the facts of the City's only nascent non-compliance with both its own regulations and its representations to two different courts about its intentions before the Supreme Court, New York in time for that court's review, even if it would have considered such submissions at all.[1]

Furthermore, as stated above, even if the court below would have been moved by a record of three weeks or even three months' of non-enforcement against public authorities (in reality, Supreme Court, New York County essentially skirted this issue in its oral ruling) the subsequent record of non-enforcement is only that much more compelling – and as time marches on and that "trend" continues, so will it continue to be.

At the end of the day this argument – "our selective enforcement wasn't in

[1] Indeed, Supreme Court, New York, made it clear that by the time the record was better developed – the date of oral argument, July 20th of this year – anything else OTR might have had to say would not have made a difference, because "[T]his has been fully briefed and I wouldn't accept new factual recitations. . ." (RA 10-11.)

the record on summary judgment" – is the first one presented in the City's opposition brief. Presumably it is its strongest. But OTR relied on the public record, as set out on its brief in Note 1, on the authority of both the City's reference to its website as well as the rulings in *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2d Dep't 2009) and *Parrino v. Russo*, 19 Misc 3d 1127 (A) (Civil Ct. Kings Co. 2008). In contrast, the City has made no effort to parry with contrary citations or to even argue why the holdings of these cases would not apply here. By its silence, the City tacitly concedes OTR's legal point – that such information is entirely appropriate for this Court to consider – and, by extension, it implicitly concedes the factual premise of this appeal. Thus, notwithstanding the City's sarcasm about OTR's reference to a "meticulously developed record" (Respondent's Brief at 34), by forfeiting this indisputable legal point the City is left with two very unappealing positions. The City must argue that the facts demonstrating its selective enforcement are, in fact, not reliable – and then explain how this can be when that source is the City itself. Or it must argue, as it does, that the information on its website does not really prove anything, even if it appears consistent with OTR's interpretation of it, because any number of alternative explanations besides selective enforcement could also "work" – which only proves OTR's point that there are material questions of disputed fact such that

summary judgment was wholly inappropriate here.

This Court, therefore, has ample legal grounds to do what Supreme Court, New York County declined to do: Give OTR's claims a fair hearing in light, not of promises and vague representations such as "we have removed signs," but of a plain and public admission by a party that is a public entity that it alone will decide who will, and who will not, be ruined by its regulatory enforcement.

a. Supreme Court, New York County Erred in Applying Factual Determinations in an Unrelated Case to the Undeveloped Record Here

The City, understandably, places great stock in the holding of *Clear Channel* that "the City treats billboards on government property differently than [*sic*] billboards on private property." (Respondent's Brief at 28.) So did the Supreme Court, New York. The City's reliance on this finding is troubling, however, because this Court is not reviewing any aspect of that federal case. The only relevance of Clear Channel to this appeal is the effect of its legal rulings, and then only as to federal questions – not New York statutory or constitutional law. *See*, *Oneida Indian Nation of New York v. Pifer*, 43 A.D.3d 579, 581 (App. Div. 3rd Dept. 2007).

Notwithstanding the great reliance placed on *Clear Channel* by Supreme Court, New York County, the Second Circuit's findings of fact (or even mixed law

and fact) on a different record in a case litigated by a different plaintiff should not have had any effect on the outcome of this case, and are of absolutely no significance on this appeal. A "decision . . . involv[ing] primarily factual determinations, does not fall within the doctrine of stare decisis, which recognizes that *legal* questions, once resolved, should not be reexamined every time they are presented. " *NYCO Minerals, Inc. v. Town of Lewis*, 42 A.D.3d 841, 842 (App. Div. 3rd Dept. 2007) (emphasis added; internal quotations omitted).

Faced with the fact, as set out in OTR's brief, that this "determination" was based on little more than the same sort of vague promises quoted above in the City's representations to Supreme Court, New York County, the City then completely changes the subject, segueing to the assertion that "The record there, as it does here, contains ample evidence that there has been a dramatic increase of [*sic*] illegal advertising signs throughout the City on and adjacent to buildings." (Respondent's Brief at 29.) The City follows up this dramatic statement – one that is actually not at all at issue in this case –with exactly *zero* citations to the record, either in *Clear Channel* or this case.

Either way, the City's pronouncement on this point is irrelevant, for the sentence it is meant to support is yet another non-sequitur: "Contrary to plaintiff's and the amici's claim, the Second Circuit did not simply defer to the City's

judgment in the absence of any evidence of a 'concrete harm,'" citing to Appellant's Brief at 44-45. But *nothing* in OTR's brief says that in *Clear Channel* there was not "*any evidence* of a 'concrete harm.'" The words "concrete harm" do not appear anywhere in OTR's brief. In fact, far from referring to "any evidence of concrete harm," OTR's brief analyzed, with close citation to the applicable precedents, whether in *Clear Channel* the Circuit properly applied *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,* 447 U.S. 557 (1980). OTR argued that in Clear Channel, the Second Circuit had merely deferred to the City's regulations about "urban planning" and "placement" of billboards as if there were no free speech implications to such regulations at all. This is a question even the *Clear Channel* court itself acknowledged was easily answered, citing *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.,* 134 F.3d 87, 96-97 (2d Cir.1998) for its holding that "It is clear that the advertisements in question involve commercial speech." *Clear Channel*, 594 F.3d at 103.

The conclusion that free speech was the subject of regulation may have been "clear" in *Clear Channel,* notwithstanding the Circuit's desultory deference to both the City's crafting of its regulation of that speech and its admittedly selective enforcement of it. On this point, the City's brief is hardly helpful; highly emblematic is its citation of *Children of Bedford, Inc. v. Petromelis,* 77 N.Y.2d

713, 731 (1991) for the proposition that the heightened protections for free speech under the New York State Constitution have never been afforded to commercial speech. Nothing in that opinion says or suggests anything of the sort. Another case cited by the City for this proposition, *Bellanca v. New York State Liquor Auth.*, 54 N.Y.2d 228, 245 (1981), also makes no mention of the term "commercial speech." Nor does it engage in any analysis at all concerning whether New York's Constitutional broader guarantee of free speech as compared to that of the federal Constitution applies to commercial speech – hardly surprising because as of 1981, the Court of Appeals indicated, in that decision, that it could not even say that such a broader right existed for *any* form of expression. *See id*. at 234.

Ultimately, Supreme Court, New York County erred in its accepting the City's invitation to clear its docket of an unwieldy, complex litigation by transplanting the "head" of *Clear Channel* – 20 pages of analysis, citation and reasoning – onto the undeveloped factual "body" of this case. New York's citizens, including its commercial citizens, deserve more.

b. The City's Regulations Treat Similarly Situated Signs Differently and Thus Violate the Equal Protection Clause

Following page after page of argument purporting to demonstrate why the City was justified in penalizing non-compliant billboards one or more orders of magnitude than it penalizes construction equipment dangling over crowded streets,

the City urges that its enforcement of these draconian regulations against OTR is constitutionally defensible even though it blithely ignores identical "perils" unleashed by public agencies. The reason for this, the City says, is that at least with respect to Transit Authority or World Trade Center property, it lacks statutory authority to act. This rationale, however, not only completely undermines the City's purported rationale for its business-destroying regulatory scheme, which by this reasoning ultimately has no ability to effectuate its policy goals as long as such significant "players" such as the MTA are exempt from it. It also completely misapprehends the requirement under equal protection jurisprudence that similarly situated persons be treated similarly under the law.

It is preposterous to suggest, as the City does, that a rational basis for distinguishing how two different categories of actors – private parties and public entities – are treated under the law, is that there are *different laws* that apply to each category! This argument, which applies as well to the City's attempt to defend its arbitrary classification of OAC's versus non-OAC's, is worse than a syllogism; by such logic no equal protection claim would ever survive. For this reason, it is unsurprising that the City simply ignores the on-point decisions in OTR's brief that demonstrate that, indeed, public and private entities – the former always creatures and wards of the law – must nonetheless presumptively be

regulated the same way. The City's brief has nothing to say, and no legal counterweight, to *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) (rejecting favored status for school district as against private taxpayers), *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) (barring favored treatment of public versus private schools in athletics), *Countryman v. Schmitt*, 176 Misc. 2d 736 (Sup. Ct., Monroe Co. 1998) (invalidating a local law treated telecommunications towers on private property differently those on property owned by the town and the fire department).

The City's reasoning is not only constitutionally deficient, it is internally inconsistent. The City acknowledges that the exemption for World Trade Center properties can readily be "authorized by the Port Authority in an agreement with the City." (Respondent's Brief at 33.) In other words, it has a "deal" with the favored party in question, the Port Authority, and – shockingly! – either this party just will not "authorize" having its revenue stream for outdoor advertising compromised by the possibility of six-figure penalties for a single non-complying billboard, or for some reason the City (including the City Council) has taken no

measures, despite the claim the regulations here are of grave urgency, to press the Port Authority to enter into such an agreement as authorized by law.

Finally, the City's admits that it "now realizes" it was wrong to focus its enforcement efforts on destroying a small business and ignoring non-compliance by the MTA, Port Authority and Amtrak for years. (Respondent's Brief at 33.) Notwithstanding its promise to "do better next time," this statement is no less than *an admission of liability* for abridging OTR's constitutional right to equal protection. The City's wan reliance on the "acceptance" of the Clear Channel Court and Supreme Court, New York County of "the City's representation" that some day it will enforce the law equally would be incomprehensible as a legal argument in favor of summary judgment against a party deprived of its constitutional rights that is, at the very least, entitled to damages for past infringements of those rights – except that the City does not even, in its submission, claim that it is enforcing these regulations even now! By the time the City decides to "get around to" that, it will have completely destroyed OTR and businesses like it, unable to compete with these agencies handed an illegal exemption from a regulation the City calls a matter of "immediate hazard."[2] To

[2] Similarly, the City's claim that "Rather than focusing on enforcement, the City, instead, had to focus an extraordinary amount of effort defending the onslaught of litigation that has been filed in State courts since the City prevailed in the Second Circuit" is comical. (Respondent's Brief at 34.) Besides having no support in the record, the image conveyed is that of members of the

the extent the City reads *Clear Channel* as authority for the proposition that a party may be deprived of redress for a municipality's admitted violations of its equal protection rights, much less for ongoing ones, merely by promising eventually to end them, this Court should not consider itself bound by either such an interpretation or such a holding.

c. <u>The City's Penalty Scheme is Unlawful</u>

As mentioned above, the City's attempt to justify treating OAC's and non-OAC's differently, despite the identical "public safety" threat posed by non-compliant signs regardless of which type of arbitrarily-designated entity causes that peril, cannot be justified under the law of equal protection. The City continues, unsurprisingly, with a predictable argument about why the massive scope of its penalty scheme is justified. "The City may appropriately consider whether the penalty will deter the unlawful act. . . . It is well documented that the prior maximum fine of $5,000 proved ineffective to prevent the proliferation of illegal signs throughout the City." (Respondent's Brief at 47, n. 14.) In short, says the City, the problem is so bad that no penalty amount would be too high to solve

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City's Corporation Counsel legal staff chomping at the bit to hit the streets and "enforce" the City's billboard regulations in their wingtips and high heels, but being stymied by annoying litigation tasks. Of course the Court hardly needs to be informed that the conduct of litigation and the enforcement of zoning regulations are tasked to completely separate City agencies. Moreover, for all its purported inability to get enforcement under way, the City somehow has managed to levy millions in fines against one small, private defendant – OTR – and bring it to the brink of bankruptcy.

it. The problem with this argument, of course, is that it proves too much: If $25,000 per violation is satisfactory, and therefore "good," it stands to reason that $50,000 is "better" and $1 million is "best." There is no internal logic that can act as a brake on the City's argument.

Yet the people of the State of New York, in their wisdom, have made it a part of this State's Constitution that "Excessive bail shall not be required nor excessive fines imposed . . . ." Article 1, Section 5. The courts are charged with applying that brake where, as here, the Administrative Code and the Penalty Scheme permit the imposition of confiscatory fines against anyone having anything to do with a non-conforming sign, on a daily and repeated basis, amounting to decisions and orders imposing liability for as much as $55,000, $75,000 and $80,000 for *each* multiple respondent on the *same sign*. (RA 1950, 2009-2077) "The test is whether the fine "is grossly disproportional to the gravity of a defendant's offense. . . . In determining gross disproportionality, courts consider a multitude of factors, many of which concern the particular circumstances of the wrongdoer." *Street Vendor Project v. City of New York*, 43 A.D.3d 345, 346 (N.Y. App. Div. 2007). The City claims, in its brief, that "the Court below refused to base its excessive fine analysis with respect to the constitutionality of the scheme on a mere handful of examples provided by

plaintiff," citing to the trial court's bench ruling at RA 47. (Respondent's Brief at 47.) This characterization of the court's ruling is, to put it lightly, a masterpiece of interpretation.

In fact, notwithstanding the City's repeated insistence that "the record shows" any number of things that OTR supposedly did to offend public order (Respondent's Brief at 46) the record shows no indication that *the Court* made any such inquiry at all. Indeed, Supreme Court, New York County admitted that it "hadn't read [the penalty schedule] fully" and made *no* findings whatsoever with respect to proportionality or the particular circumstances of OTR. (RA 45-46.) The only words on RA 47 that could possibly relate to this point are the following, which actually begin on the previous page:

> [Outdoor advertising companies] were going around putting up illegal advertising signs. They were coming into the Department of Buildings asking for an accessory permit telling the Department of Buildings that's what they were going to erect, and going out and putting up an advertising sign. Outdoor advertising companies have a history of violating. That's why there's the higher fines. This simply just gets put into the penalty scheme. There's nothing new.

Not a word in the foregoing passage remotely addresses "the circumstances of the wrongdoer," i.e., OTR. Nor is there a single citation in the record to support any of these assertions. Neither is proportionality addressed in this dissertation. But most

of all, this quotation suffers from the deficiency, for purposes of this appeal, of having been delivered not by the trial court, but by the City Corporation counsel. The trial court said *nothing at all* about excessive fines on RA 47 or anywhere else, but launched into what appears to have been an analysis of whether the regulatory scheme was rationally based, leading to the vague conclusion on RA 48 that

> I don't think that there is a factual determination to be had. I don't think the discovery would unearth any great telling alternative to what we have here that there is a rational basis for this, and so I am going to grant summary judgment on both motions.

Absent any finding, ruling, rationale or even hint by the Court to support its grant of summary judgment and denial of a preliminary injunction with respect to OTR's excessive fines claim, it is respectfully submitted that reversal and remand, with instructions to permit the parties the opportunity for full discovery, is required as a matter of law and equity in this matter.

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

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
December 17, 2010

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Dated: December 17, 2010

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Date: December 17, 2010

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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 17th Day of December, 2010, deponent personally served via email the

REPLY 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.

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ORIGINAL

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