SUPREME COURT OF THE STATE OF NEW YORK
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.

Index No. 116293/06

AFFIDAVIT IN SUPPORT OF MOTION FOR A STAY OF ENFORCEMENT OF SUMMARY JUDGMENT ORDER

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

ARI NOE, duly affirming, deposes and says:

1. I am the Chief Executive Officer of OTR MEDIA GROUP, INC. ("OTR" or "Plaintiff"). As such, I am fully familiar with the facts and circumstances set forth hereinafter.

2. This affidavit is respectfully submitted in support of a motion brought by Plaintiff to stay the enforcement of the Decision and Order of Supreme Court, New York County (Justice Eileen Rakower) dated July 20, 2010 (the "Order"), granting the motion for summary judgment of Defendants 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, and the Commissioner of the New York City Department of Transportation. (collectively, the "Defendants").

3. Plaintiff is compelled to make this motion because, as demonstrated below, immediate enforcement of the Order would not only be devastating to its business—indeed, perhaps fatally so—which would render its appeal effectively moot. More than this, absent a stay from this Court, Defendants would be authorized immediately to begin enforcement of an illegal and

unconstitutional statutory scheme enacted by the City of New York at the behest of Plaintiff's direct business competitors—major public corporations—designed with no purpose other than to eliminate competition and secure virtually the entire market for outdoor advertising for themselves.

4. These laws, whose enforcement has already, by stipulation, been stayed for a period of years, are rife with profound public policy implications. They implicate not only the rights of citizens of this State to free speech—commercial and otherwise—but the ability of businesses to make some measure of effort to contribute economically to their own recovery, despite every obstacle already placed before them, by the use of the ancient method of outdoor advertising subject to reasonable, but not arbitrary, capricious and punitive, restrictions as to time, place and manner.

FACTUAL BACKGROUND

5. OTR is an Outdoor Advertising Company as defined by the New York City Administrative Code (an "OAC").

6. 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.

7. These regulations radically changed the landscape of outdoor advertising regulation in the City of New York. Specifically, New York City amended its Rules so as 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").

8. Plaintiff 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.

9. Critically, that order to show cause was settled by a So-Ordered Stipulation attached hereto as Exhibit "A."

10. On February 3, 2010, this Court granted Plaintiff 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.

11. In its Order granting Plaintiff 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.

12. 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 Defendants filed their motion seeking to dismiss those causes of action on the grounds that Plaintiff had allegedly failed to state a cause of action.

13. In opposition to the motion, Plaintiff demonstrated that it had pled each and every requirement for the three causes of action Defendants seek to dismiss, while Defendants failed to submit any factual basis for their motion.

14. Moreover, Plaintiff 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.

15. For example, attached hereto as Exhibit "B" are copies of orders from the Environmental Control Board issuing violations against Plaintiff and its vendors and affiliates in amounts over $25,000.00. A penalty exceeding this amount is, Defendants acknowledge, a contravention of the New York City Charter.

16. 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 attached hereto as Exhibit B, impose fines in excess of $25,000.

17. In the one "master decision and order" in Exhibit B alone, Plaintiff 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*.

18. Defendants 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 Plaintiff, the ECB "master decision and order" has all the practical impact of a single, massive penalty.

19. The fact that the single violations are laid out in a "laundry list" does not adequately protect Plaintiff'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.

20. 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."

21. Such massive penalties, assessed in a single order and applied to a single sign, cannot be saved from illegality by the Defendants' 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."

22. As to the Fourth Cause of Action, based on the excessive nature of the penalties being assessed, Exhibit "B" demonstrates the assessment of penalties in the amount of $160,000 for one sign. It should go without saying that a penalty of this magnitude for **a single billboard** is excessive, disproportionate and punitive.

23. Such penalties will destroy Plaintiff's business, and many businesses like it. Plaintiff is a small regional and privately owned company. It does not have the type of resources, contacts and contracts that major OAC's have—nor does it own the "old" outdoor signs which are to a large extent deemed "compliant" because the regulations in question were "written around" them to ensure their domination of the outdoor advertising business.

24. In contrast, Plaintiff's profit margin per sign does not permit OTR to continue to operate in this punitive environment and it does not have the ability to continue to operate under the oppression of the Penalty Scheme.

25. 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 Defendants' 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.

26. Moreover, the custom and practice in our business is that the media company, such as Plaintiff, 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 Defendants that the entity responsible for the sign meets the statutory definition of an OAC. Not surprisingly, defendants typically find 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.

27. 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.

28. This is not rhetoric or hyperbole. 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.

29. Plaintiff operates 19 arterial highway or park signs at 17 locations in the City of New York. Several signs generate less than $10,000 per month for OTR. The maximum revenue—gross revenue, not profit—generated by any one of these signs in a month is $79,000. The average monthly revenue for all OTR's arterial highway or park signs in the City combined is $449,625—a monthly average of **$26,448.53** in gross revenue per sign. These returns are within the typical range for signs operated by OAC's of OTR's size.

30. Now I respectfully ask the Court to recall the kinds of figures utilized by the City in its punitive, arbitrary "enforcement" scheme: Minimum penalties of $10,000 for minor violations. **Daily penalties** of $25,000! Any and all of these figures can be and are multiplied by Defendants to be assessed on any number of respondents connected with a given sign, all of which end up being paid by OTR. These numbers quickly dwarf the revenue of virtually all the relevant signs operated by OTR.

31. Thus a single sign, as in the example cited and attached to this affidavit, can readily "add up" to $160,000 in penalties or, in theory, far more—far out of proportion to the economic value of signs generating an average of under $27,000 a month and, certainly, no less wildly out of proportion to any conceivable social, financial or other "harm" such alleged violations may impose on the City of New York or its citizens.

32. 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. We are not talking here about penalties for anti-social activities, much less crimes. Outdoor advertising is a bona fide form of commerce that stimulates additional commerce, consumer choice and opportunity. And, as briefly addressed below, it is a form of commercial speech.

33. Yet 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 permis these draconian measures to go into effect without a full review of their legality would be devastating, to say the least.

34. In contrast, and for purposes of weighing the relative harms of granting a stay here, the Defendants have weathered the pendency of the previous multi-year stay of both enforcement of these regulations and assessment of the associated penalties with little obvious practical harm and virtually no harm of record. Their opposition to continuation of this stay pending the appeal cannot be ascribed to anything but pique, or perhaps triumphalism.

35. I respectfully submit, however, that the latter emotion will, in the long run, be shown to be premature, and that in either event neither one is an adequate basis for denying the stay being sought here. The Defendants simply cannot suggest the existence of any harm in permitting the status quo to continue pending final resolution of this lawsuit when they have, for years, agreed to maintain that status quo when their views of how this case might go were less sanguine.

36. Finally, I bring to the Court's attention another relevant issue for consideration when deciding the question of whether or not to grant emergent relief, namely the public interest. The Defendants, naturally, will insist on the stated public and remedial purposes of the Penalty Scheme as essentially self-evident. Plaintiff, however, has been wrongly deprived of the opportunity for discovery and a full consideration of the merits of this action, which we submit would evince evidence to the contrary.

37. This is true regarding the economic effects of these regulations, not only on OAC's or even media companies or their clients but on commerce within the City as a whole. And it is especially true in connection with the free speech dimension of the underlying action, which is both a "public interest" factor the Court should consider here as well as one of the substantive counts in OTR's dismissed complaint.

38. I am not a lawyer and this is not a memorandum of law, but I have no trouble comprehending what my business is about: speech. Outdoor advertising is a way to express an idea—buy these or sell those; vote for her or vote against that; "welcome to this place" or "visit this

place"—by people with messages to send to people they hope will receive them. I understand very well that municipalities may need to regulate how this is done so that communities are not cluttered or made unattractive or unsafe. But the Penalty Scheme here is utilizing a sledgehammer to kill a gnat. It will shut down or seriously hamper businesses such as mine, place outdoor advertising out of reach for smaller businesses and other advertisers with fewer and fewer options for communicating their messages, and generally result in less expression.

39. OTR was not given the opportunity to prove why the Defendants were wrong to do this in the way they did it in the trial court, but we believe that on appeal we will be able to show why we are entitled to that chance, and why the law and public policy should support such an outcome. OTR and its clients, and the possible customers of those clients, have everything to lose if that appeal is made meaningless by the denial of a stay here which will let the Defendants loose to essentially shut down an entire sector of outdoor advertising in this City. Based on its behavior of the last few years, the City seems to have little to lose, in contrast, if this Court will just permit the status quo to remain in place while we make our case on appeal.

WHEREFORE, I respectfully request that this Court grant Plaintiff's motion for stay in its entirety, together with such other and further relief in Plaintiff's favor as this Court deems just and proper.

[FILE COPY]

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ARI NOE

Affirmed to before me this
____ day of _____, 2010

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Notary Public