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To be argued by:
BARBARA GRAVES-POLLER
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Court of Appeals
State of New York

Index No. 101770/15

In the Matter of the Application of

FRANKLIN STREET REALTY CORP.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

(additional captions on inside cover)

BRIEF FOR RESPONDENTS

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February 20, 2019

Index Nos. 100303/16 and 101768/15

In the Matter of the Application of

J.P. & ASSOCIATES PROPERTIES CORP.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

Index No. 101769/15

In the Matter of the Application of

41-03 31 AVENUE REALTY CORP.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

Index No. 101767/15

In the Matter of the Application of

23-06 JACKSON AVENUE REALTY CORP.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

against

NYC ENVIRONMENTAL CONTROL BOARD, NYC OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS, and NYC DEPARTMENT OF BUILDINGS,

Respondents-Respondents.

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PRELIMINARY STATEMENT

In these article 78 proceedings, petitioners—four different corporate entities—seek to annul a series of determinations of the New York City Environmental Control Board (ECB), penalizing them for making outdoor advertising space on their buildings available to a separate professional services corporation. The Appellate Division, First Department, upheld the determinations.

This Court should affirm. The City of New York regulates the outdoor advertising business in the five boroughs for the benefit of the public. This appeal turns on a narrow question: when the City Council specified in the Administrative Code that the outdoor advertising business involves making outdoor advertising space "available to others," did it mean what it said—that this language is satisfied when one person makes space available to another? Or did the Council instead, as petitioners claim, sub silentio instruct ECB to engage in an amorphous inquiry as to whether the property owner and the advertised business, though separate persons, share ownership or control?

To state the question is to answer it. Here, ECB rationally found that each petitioner made outdoor advertising space available to a separate, distinct legal entity: Ciafone, P.C. Legally, it does not matter that Ciafone, P.C.'s principal, John J. Ciafone, claims to have an interest in the corporate petitioners. Contrary to petitioners' brief, ECB neither departed from precedent nor resolved an issue of first impression. ECB has consistently held that a corporate entity engages in the outdoor advertising business when it makes its property available for advertising purposes to a separate corporate entity that it does not own.

QUESTION PRESENTED

Was it rational for ECB to find that petitioners made advertising space "available to others," where they regularly advertised the business of a separate professional services corporation, with a distinct legal personhood, on their buildings?

STATEMENT OF THE CASE

A. New York City's regulation of the outdoor advertising business

In New York City's coveted consumer market, illegal advertising signs are all too common (Respondents' Addendum ("RAdd.") 3). Over the years, the City has extended its advertising laws and increased penalties for noncompliance. And yet, "outdoor advertising companies have long ignored or failed to comply with City regulation." *Clear Channel Outdoor, Inc. v. City of N.Y.*, 608 F. Supp. 2d 477, 481 (S.D.N.Y. 2009), *aff'd*, 594 F.3d 94 (2d Cir. 2010). Recent laws reflect the City's efforts to redress the visual blight and safety hazards attending outdoor advertising.

1. Local Law 14 of 2001

The City's Charter empowers the New York City Department of Buildings (DOB) to enforce the outdoor advertising laws. N.Y. City Charter § 643. Before 2001, DOB was constrained to pursue summonses against property owners in Criminal Court, where judges lacked authority to authorize illegal sign removal (RAdd.3). Local Law 14 of 2001 established "a comprehensive

scheme for the enforcement of the sign regulations," directly authorizing DOB to initiate enforcement actions at ECB where, through streamlined administrative proceedings, a broader range of enforcement remedies would be available (*id.*).

ECB, situated within the Office of Administrative Trials and Hearings (OATH), is the independent City agency whose board members apply their expertise in real estate, business, and matters of public health and safety to enforce enumerated City Charter and Administrative Code provisions, including the outdoor advertising laws. N.Y. City Charter § 1049-a. Once DOB identifies signs it believes are illegal and issues notices of violation to the property owner and other responsible parties, ECB conducts administrative hearings to adjudicate the alleged violations and, where appropriate, imposes civil penalties. *See* N.Y. City Charter § 1049-a(c), (d); Admin. Code §§ 28-502.6.1, 28-502.6.7; 48 R.C.N.Y. § 3-51.

Local Law 14 defined an "outdoor advertising company" broadly to include any person, corporation, 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." Admin. Code § 28-502.1. But the 2001 definition expressly excluded property owners and managers who marketed space on their buildings "directly to advertisers." *See* Admin. Code § 26-260.[1] Those advertisers, the primary target of the 2001 law, typically maintained portfolios of signs on multiple buildings with different owners (Radd.3). *See also Clear Channel Outdoor, Inc. v. City of N.Y.*, 594 F.3d 94, 99–100 (2d Cir. 2010).

In addition, Local Law 14 required entities engaged in the outdoor advertising business to register as an outdoor advertising company, submit appropriate security to insure against future liability, and document their sign inventory. Admin. Code §§ 28-502.2, 28-502.4. And the responsible company's registration number needed to appear on each sign, along with proof that the company had complied with safety regulations, contracting with a licensed sign hanger to install the signage. *Id.* § 28-502.5.

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[1] This provision of the 2001 law was originally included within Chapter 26 of the Administrative Code that the City amended in 2005 and later revised and recodified as Chapter 28 in 2008 (*see* Petitioners' Appendix ("A") 45).

2. Local Law 31 of 2005

Just four years later, DOB urged the City Council to address perceived shortcomings in Local Law 14 that had enmeshed the agency and sign owners "in protracted disputes over the lawfulness" of signs (*see* RAdd.7). The agency found that "the economics of the business" and the lack of transparency in relationships between advertisers and property owners hampered enforcement efforts (*id.).* Those factors, which Local Law 14 inadequately addressed, forced "the City into a 'cat-and-mouse' enforcement game" that consumed the agency's limited enforcement resources (*id.*).

The Council enacted Local Law 31 of 2005 in response to those concerns (*id.*). Among other things, the 2005 amendments deleted language that had exempted property owners who leased space directly to advertisers (RAdd.8), bringing property owners within the definition's scope.[2] Local Law 31 redefined the "outdoor

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[2] While a lead concern behind the amendments was enforcement near arterial highways, the amendments applied to all zoning areas (*see* RAdd.8). *See also Matter of JT Tai & Co., Inc. v. City of N.Y.*, 85 A.D.3d 433, 434 (1st Dep't 2011), *aff'd*, 18 N.Y.3d 804 (2012).

advertising business" to capture "directly or indirectly making space on signs situated on buildings and premises … available to others for advertising purposes, whether such advertising directs attention to a business, profession, commodity, service, or entertainment conducted, sold, or offered on same or different zoning lot and whether such sign is classified as an advertising sign [under] the zoning resolution" Admin. Code § 28-502.1. That provision eliminated various defenses to enforcement actions, including the argument that signs merely advertised a "profession" or "service," not a "business," as well as defenses based on the Zoning Resolution's differential treatment of "accessory" and "advertising" signs.

Under the Zoning Resolution, accessory signs promote a property's onsite services and may appear in zoning districts where advertising signs are prohibited. *See* Zoning Resolution § 12-10. Historically, advertisers have "claimed that advertising signs would be used for permissible on-premises accessory business purposes in order to obtain permits from the DOB" even when the signs were "used for offsite advertising purposes, which

were proscribed under the applicable regulations." *Clear Channel Outdoor, Inc.*, 594 F.3d at 100. And since the 2001 law permitted property owners to market space on their buildings directly to advertisers without incurring outdoor advertising liability, owners themselves could convert accessory signs into prohibited, but lucrative, advertising without facing steep penalties (RAdd.7, 8). The 2005 amendments closed those loopholes.

Thus, after the 2005 amendments, a property owner engaged in the outdoor advertising business by making outdoor advertising space "available to others." Admin. Code § 28-502.1. Proof of advertising profits was not required. And while some Building Code provisions expressly define ownership to encompass a variety of corporate interests for enforcement purposes, *see, e.g.,* Admin. Code § 29-202 (including "any other person, firm or corporation, directly or indirectly in control of real property" within definition of "owner" for Fire Code enforcement), the outdoor advertising laws include no such expanded definitions of the terms "property owner" and "others." Nothing in the scheme created an exemption when a property owner made advertising

space available to an affiliate or corporate entity with common ownership or control.

B. Petitioners' illegal advertising for a separate professional services corporation

Petitioners in these actions are four limited liability companies that each own one or two buildings, a total of five, throughout New York City (Respondents' Appendix ("RSA") 7; Appendix ("A") A25).[3] Although petitioners call themselves "Mr. Ciafone's corporations" (Br. for Petitioners-Appellants ("App. Br.") 11), referring to their purportedly common owner, John J. Ciafone, their corporate structures and Mr. Ciafone's ownership interest remain unclear. Mr. Ciafone maintains that he serves as "either" the sole shareholder or "member" of each petitioner (A18). However, his wife is the "principal executive officer" for petitioner

[3] For example, petitioner Franklin Street Realty Corp. (Franklin) has owned a six-family, residential building in Brooklyn, New York since it purchased the property from another corporation, 202 Franklin Street Realty LLC, in 2010 (RSA 67–74). Franklin's building is located within a zoning district that restricts advertising signs of the kind petitioners displayed (A58).

JP & Associates Properties, and she serves as both the "president" and "sole shareholder" of 41-03 31st Avenue Corp. (A18, 84).

In July 2014, a DOB inspector visited the properties involved in these appeals, including Franklin's, and observed signs displaying Mr. Ciafone's likeness (RSA10). Those signs offered members of the public a "free consultation" for "accident[] cases" and "medical malpractice" to be provided by the "Law Offices John J. Ciafone, Esq." (*id.*). That law office was registered as a professional services corporation—Ciafone P.C.—with the New York State Department of State in 2004 (A55–56).

The DOB inspector reasonably inferred from the sign copy, missing proof of DOB rule compliance, and public records of building ownership that the property owners had advertised a separate business (*see* App. Br. 5). The inspector issued notices of violation, citing petitioners as outdoor advertising companies that violated DOB's outdoor advertising rules (A16).

Petitioners challenged DOB's violations before ECB (RSA11). At the initial hearings conducted by OATH hearing officers, DOB established petitioners as the "cited owners" of the

properties (*see* A59, 84, 91, 93, 101). Petitioners offered no proof that they were "holding companies" or that they owned Ciafone P.C. Instead, the bulk of the record consists of Mr. Ciafone's testimony about periodic client meetings he purportedly conducted in a vacant apartment (A58), basement storage area (A84), back area of a barbershop (A93), and other random locations within petitioners' properties—evidence offered in support a defense that Ciafone P.C. maintained a "satellite office" at each location and had simply annexed "accessory" signs to the properties (*see* A58). But as a fallback, petitioners proposed that "even if the signs were found not to be accessory signs," they had not engaged in the outdoor advertising business "because Mr. Ciafone, owner in all but name was selling himself, and not making space available for others" (A59).

After reviewing the record, the hearing officers concluded that the advertising signs were "illegal" and that none of petitioners' "evidence or argument[s] amount[ed] to a valid defense on the merits" (A59, 60). Not only did the hearing officers reject petitioners' "excessive" fine arguments, they found Mr.

Ciafone's testimony about "satellite" law offices in cramped corners, vacant apartments, and basement storage areas of petitioners' buildings to be entirely incredible (*see* A59).

Nevertheless, the hearing officers dismissed the outdoor advertising company violations at issue in these appeals based on their flawed understanding of an earlier ECB decision, *NYC v. Joseph Nativo*, ECB Appeal No. 1000307 (Aug. 19, 2010), reprinted at A122–25. The hearing officers extended *Nativo*—at best a narrow carve-out relevant only where the property owner is a natural person and advertises a business he or she also owns—to a corporate property owner for the first time, reasoning that the property owner's controlling shareholder could promote "himself," or his law office in these cases, without complying with the outdoor advertising law (*id.*).

DOB sought an administrative appeal of the hearing officers' expansion of the exemption and departure from a separate line of cases holding that corporate property owners are not similarly situated to the petitioner in *Nativo*. Petitioners submitted a brief statement in opposition, urging ECB's appeals board to "uphold

all of the Decisions reached" at the initial hearings (RSA76–77) (emphasis added). Petitioners insisted, without reservation, that the hearing officers had correctly responded to each argument presented at the administrative hearings (*id.*).[4]

ECB's board—the final administrative authority—reviewed and reversed the hearing officers' decisions, distinguishing *Nativo* for two reasons. *First*, unlike the respondent in *Nativo*, a natural person who advertised on his own vacant lot, Mr. Ciafone did not own any of the properties (A66). *Second*, petitioners—the legal property owners—did not own Ciafone P.C., a distinct legal entity. The board referenced several of its other decisions to conclude that petitioners made advertising space available to others by advertising for a separate corporate entity (*id.*).

C. The Appellate Division's denial of petitioners' transferred article 78 petitions

Petitioners commenced separate article 78 proceedings, alleging that the record contained insufficient evidence to support

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[4] However, J.P. & Associates Properties Corp., never opposed DOB's appeal to ECB's board with respect to its property at 33-51 Vernon Boulevard.

ECB's determinations (RSA20–23). Petitioners further posited that ECB irrationally "refuse[d] to pierce the veil" and arbitrarily rejected their *Nativo* defense to the violations (RSA20). Petitioners did not assert any free speech-related claims (RSA23–24).

Because petitioners challenged the evidentiary support for ECB's decisions (RSA23–24), claims subject to the highly deferential "substantial evidence" standard of review, the petitions were transferred to the Appellate Division.[5] Since the petitions did not challenge DOB's evidence of petitioners' and Ciafone P.C.'s distinct legal identities, the basis for ECB's determination, and petitioners waived all but their *Nativo*-related arguments during the administrative appeals process (*see* A33, RSA76–79), the only issue for the Appellate Division to decide was whether it was rational for ECB to conclude that petitioners made advertising space available to others (A33)

A divided panel (3-2) of the Appellate Division denied the petitions and held that the governing statutes contained "no

[5] *See 300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978) (defining substantial evidence as "more than seeming or imaginary" but "less than a preponderance of the evidence").

exceptions … which would permit petitioners to make advertising space available to others under the factual circumstances of this case" (A26), adding that ECB's reading of the statute "further[ed] the goal of strong enforcement of the regulations" (*id.*).

Two justices dissented. They opined that ECB irrationally allowed "the form of ownership chosen by the building owner" to compel its determination even though, in their view, there was "no substantial difference for outdoor advertising purposes between Ciafone holding title to the buildings in his individual name or in the name of a holding company" (A40–41).

ARGUMENT

ECB RATIONALLY FOUND THAT PETITIONERS MADE ADVERTISING SPACE "AVAILABLE TO OTHERS"

In our constitutional system, when an administrative agency like ECB makes a determination within its delegated authority, it is entitled to substantial deference. *Consolation Nursing Home v. Comm'r of N.Y. State Dep't of Health*, 85 N.Y.2d 326, 331 (1995). Put bluntly, if any "rational basis" for the agency's determination can be found, "the judicial function is at end." *Matter of Marine Holdings, LLC v. N.Y.C. Comm'n on Human Rights*, 31 N.Y.3d 1045, 1047 (2018). The upshot is that an article 78 petitioner faces a high bar, bearing the heavy burden of showing that the determination is truly "arbitrary"—that is, "without sound basis in reason" and "taken without regard to the facts." *Matter of Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1*, 34 N.Y.2d 222, 231 (1974). And here, petitioners have not come close to satisfying that demanding standard.

A. Nothing in the statute compelled ECB to ignore that each petitioner made advertising space available to a distinct legal person.

Petitioners' central argument here is narrow. They concede that they advertised for an extended period of time, but insist that they did not make that space "available *to others*" and—for that reason alone—claim that they did not engage in the "outdoor advertising business" within the meaning of Administrative Code § 28-502.1. But the simple—and undisputed—fact is that each petitioner did make advertising space available to a corporate entity with a legal personhood separate and apart from its own: Ciafone P.C. That leaves petitioners with a claim that is so tortured that they struggle to articulate it without offending the rules of grammar (*see, e.g.*, App. Br. 4 (asserting that "petitioners

did not make space available on its [sic] buildings available 'to others,' only to himself [sic]")).[6]

The premise behind petitioners' contention—one they appear reluctant to say outright—is that the phrase "to others" should *not* be read here consistently with its natural meaning: a reference to any person that is different or distinct. According to petitioners, the phrase must instead be read to always exclude "others" who share ownership, control, or some other unspecified characteristic with the principal party (petitioners are never clear about exactly what must be shared, or to exactly what degree).

But in the eyes of the law, each legal entity is a person in its own right. *See* BLACK'S LAW DICTIONARY at 1178 (8th ed.). An agency does not act *irrationally* when it applies a statute consistent with its most natural meaning. At a bare minimum

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[6] Petitioners have not preserved any argument that their conduct was not part of their regular operations. In any case, the record here could also support such an inference, given the number of signs displayed on each property and length those signs remained in place—a point that petitioners that do not challenge. *See NYC v. 415 89th St. LP* (A73) (finding extended presence of advertising sign on property supported "reasonable inference that the advertising sign was at least a part of Respondent's regular course of business").

ECB's conclusion that petitioners and Ciafone P.C. are not the same person was among the rational alternatives available to the agency. And because rationality is all that is required, this point alone establishes that the decision below is correct.

What remains is petitioners' groundless notion that "the arbitrary way" property owners choose "to structure their corporation" offers no "meaningful reflection of who or what controls a piece of property or business" (App. Br. 11). But the choice to adopt a corporate form—carrying limitations on liability and other benefits—is not generally an arbitrary one. *See Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993). To the contrary, it is a choice that the law ordinarily respects. ECB did not act irrationally when, in accord with the common-law backdrop as well as the statute's letter and spirit, it respected Mr. Ciafone's (and perhaps other interested parties') choice by regarding those separate corporations as distinct legal persons. *See Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009).

When the City Council wanted to depart from the usual practice of treating separate legal entities as distinct and thus to

capture a different range of actors within a single legal definition, it showed itself more than capable of doing so. Indeed, it incorporated an effective control standard elsewhere in the statute to *expand* liability and capture affiliated outdoor advertising companies. *See* Admin. Code § 28-502.1 (basing affiliation on a company's "controlling interest" in another entity through "whatever manner exercised, including without limitation, control through ownership [or] management"). The Council knew how to limit the class of "others" when defining the "outdoor advertising business"; it just opted not to do so.

Petitioners try to reframe the dispositive inquiry to ask not whether two entities are separate—"others"—but whether one party or multiple parties "benefitted" from the illegal advertising (App. Br. 7, 9–10). Petitioners propose that Mr. Ciafone is "the only party that benefitted" in this case because he presumably reaps financial rewards from petitioners' property ownership and the legal services they illegally advertised (*id.* at 7). But as to two petitioners, Mr. Ciafone was not even the "sole shareholder" or "member" he purported to be (*see* A18, 84). And in any case,

petitioners' profit-based gloss finds no home in the statute. The definition of an outdoor advertising company does not require proof of advertising-related income. *See* Admin. Code § 28-502.1; *see also NYC v. 415 89th Street LP*, ECB Appeal No. 1200974 (Jan. 31, 2013), reprinted at A73 ("that Respondent received no payment for the advertising … is not a decisive factor").

Indeed, the attempt to refocus the analysis on who "benefits" raises more questions than it answers. Both petitioners and the dissent refer to Mr. Ciafone as the property "owner" in a lay, not legal sense (*see* A1, 9, 42). In colloquial terms, all kinds of relationships might be considered to fall under the umbrella of "ownership"—a majority shareholder of a company, the managing member of a joint venture, an attorney who practices through a professional services corporation, or any number of other arrangements. Petitioners fail to identify concrete guidelines for deciding when an interest ripens into something so substantial that there is no choice but to disregard the corporate form.

From both a common sense perspective and, more importantly, from the practical understanding of the enforcement

process, it makes sense to draw the line where the statute does: advertising space is made available to "others" when separate entities are involved. And, as a practical matter, that inquiry requires nothing more than looking at the name on the deed and asking whether the named property owner also owns the business advertised. ECB could answer that question easily in *Nativo* since one individual, who owned property for any number of personal reasons, was identified as the "sole owner" of advertised businesses (A125). The same is not true here.

Consider the on-the-ground reality: violations of the outdoor advertising law are *premises-based* violations that DOB issues based on deeds and unambiguous ownership records. When a DOB inspector observes a sign that reasonably appears to violate the outdoor advertising laws, the inspector identifies the property owner by searching readily-available public records identifying the property owner, affixes notices of violation to the property where the signs are displayed, and mails copies of the notices to the registered property owner (*see, e.g.*, A122–23).

That process would grind to a halt if corporate property owners could avoid liability by pointing to individuals who are unidentified in readily-available property records. That system would not only be ripe for abuse, but would require DOB inspectors to undertake the impossible task of disentangling complex webs of ownership and control in the midst of on-site inspections. And enforcement proceedings would be sidetracked by disputes over such issues. Fortunately, the statute contemplates no such thing and, to the contrary, aims to streamline administrative hearings in a system that must effectively resolve a high volume and large range of quality-of-life disputes across the Nation's largest city (RAdd.3, 7).

B. Nor did ECB's past decisions compel it to ignore that each petitioner made advertising space available to a distinct legal person.

In truth, petitioners make no real attempt to root their argument in the statute itself. Instead, they complain that ECB has in the past given differently situated parties the benefit of an exemption from the statute's terms—the so-called *Nativo*

exemption—and that it would be inherently inconsistent to deny them the same relief.

But petitioners overlook two pivotal distinctions that set their cases apart from *Nativo*. First, there, unlike here, the property owner was a natural person, not a corporate entity. Second, the property owner was also the sole owner of the small businesses advertised on site (A125). Under those circumstances, ECB refrained from extending liability to "the display of signs by a property owner that advertise services of companies owned by such property owner" (*id.*).

Nativo reflected a fair and equitable outcome, though, to be sure, not one that was statutorily compelled. But as ECB has repeatedly explained, the exemption is narrow, targeted at providing relief to natural persons—real people—who advertise their own businesses on property that they directly own. To be clear, ECB has applied *Nativo* just one other time, in *NYC v. Eileen Halvatzis* (RSA84–85). There too, ECB declined to impose liability where individuals owned the underlying property,

potentially for reasons unrelated to any business endeavors, and promoted small businesses they also owned.

By contrast, ECB has not stayed its hand when the owner of the property is a corporation seeking to avoid liability for advertising a separate entity that is claimed to have common shareholders. In other words, when "the company being advertised and the owner of the [premises] are two separate corporate entities, even though there may be an overlapping of principals, *Nativo* is inapplicable" (A58). That was the case, for example, in *NYC v. 415 89th Street LP*, ECB Appeal No. 1200974 (Jan. 31, 2013), where the advertised business was separately-incorporated from the limited partnership that owned the premises, though the two had "close ties" (A73); in *NYC v. Lodz Development, LLC*, ECB Appeal No. 1400355 (July 31, 2014), where the advertised business and corporate property owner were owned and managed by the same principals (A77); and in *NYC v. Stahl and Stahl, LLC*, ECB Appeal No. 1400137 (Apr. 24, 2014), where the advertised business was the corporate parent of the entity that

owned the premises and the two shared a principal and office address (A69).

Petitioners never grapple with the differences between these cases and *Nativo*. When the distinctions are acknowledged, rather than ignored, two things become clear about ECB's determination in petitioners' cases: first, it "adheres to [ECB's] prior precedent"; and second, ECB has explained why it has reached a "different result" under different circumstances. *Matter of Charles A. Field Delivery Serv., Inc.*, 66 N.Y.2d 516, 516–517 (1985). Petitioners have not identified a single case—not one—where ECB failed to impose outdoor advertising company liability under circumstances akin to those here.

In sum, petitioners ask this Court to second-guess ECB's settled and sound interpretation even though nothing in the statutory scheme or its enforcement history compels their view. That is more than enough to reject petitioners' attempt to invalidate ECB's determination in this case based on *Nativo*. ECB had no obligation to stretch that exemption—to the extent two applications can even be called an "exemption"—to cover

petitioners and the individual who claims to control them, an attorney sophisticated enough to incorporate different types of businesses with at least five properties in different boroughs.

Setting all that to one side for a moment, petitioners never explain why—even assuming there were some inconsistency between the *Nativo* and the line of corporate property owner cases described above—the answer would be to *extend* the *Nativo* principle. To be sure, a truly inconsistent application of the statute might counsel in favor of revisiting *Nativo* itself in a future case. But it is not the least bit clear why petitioners think it would nullify ECB's rational application of the statute to petitioners, which, as described above, effectuates the most natural reading of the law.

C. All of petitioners' sundry other arguments are unpreserved or meritless.

This Court needn't be detained long by petitioners other scattershot arguments. Each is unpreserved, meritless, or both.

First, betraying a profound misunderstanding of corporate veil piercing, petitioners suggest that ECB arbitrarily prevented

them from "shedding" their corporate forms upon request (App. Br. 10). Veil piercing is an extraordinary remedy that extends liability to a corporate principal when the corporate form has been abused, not a license for the principal itself to limit liability by discarding the corporate form at will. *See Morris*, 82 N.Y.2d at 140–41. Petitioners possess no right to "shed" their legal personhood—which was deliberately chosen and confers an array of tax and other benefits—for Mr. Ciafone's personal gain.[7]

Second, petitioners propose to take BCL § 1505(a)—which, like corporate veil piercing, expands liability—map it onto the phrase "to others" in the Administrative Code for no articulable reason, and thus create a new limitation on corporate liability. Suffice it to say that this Court has held that BCL § 1505(a) is

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[7] Petitioners also misconstrue determinations where ECB either explicitly found that corporate veil piercing was irrelevant or had no occasion to consider it because the governing scheme already expressly extended liability to a range of different actors. *See Lam Kin*, reprinted at Petitioners' Addendum 2–4 (explaining that corporate veil piercing was irrelevant to Fire Code provisions applied to legal persons "indirectly in control of real property"); *Oleksandr Nad*, reprinted at Add.5–6 (describing Building Code liability based on "control of the premises"). But even if ECB had set aside the legal personhood to *enforce* public safety regulations, petitioners still could not infer a right *to avoid* penalties by casting off their corporate identities. *Uribe v. Merchants Bank*, 239 A.D.2d 128, 128 (1st Dep't 1997), *aff'd*, 91 N.Y.2d 336 (1998).

strictly construed to permit personal liability only for "direct rendition of professional services." *We're Assocs. Co. v. Cohen, Stracher & Bloom, P.C.*, 65 N.Y.2d 148, 151 (1985). It does not entitle the corporate petitioners here to set aside their legal personhood, or Ciafone P.C.'s, for Mr. Ciafone's benefit.[8]

Third, petitioners make much of the fact that Ciafone P.C. promoted its services while obscuring its incorporation from the public (App. Br. 8). But that apparent ethical violation[9] did not extinguish Ciafone P.C.'s legal identity. It is not without some irony that, in these appeals that touch upon legal services, petitioners are so quick to dispense with legal formalities. In any case, the statute does not distinguish advertising for a "profession" or "service" from a "corporation." Admin. Code § 28-502.1.

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[8] Petitioners cite *Infosearch, Inc. v. Horowitz*, 117 Misc. 2d 774 (Bx. County Civ. Ct. 1984), a decades-old Civil Court decision, for the broader proposition that "a shareholder or agent of a professional services corporation is liable for those torts of the corporation in which he is a participant" (App. Br. 13). But *Infosearch* is not good law. *See We're Assocs. Co. v. Cohen, Stracher & Bloom, P.C.*, 103 A.D.2d 130, 136 (2d Dep't 1984) (finding "absolutely no basis" for *Infosearch*'s holding), *aff'd*, 65 N.Y.2d 148 (1985).

[9] *See* N.Y. State Bar Assoc., Ethics Opinion 1028 (Oct. 24, 2014) (applying Rule 7.5(b), which requires law offices organized as professional corporations to include "P.C." in their attorney advertising); *see also* BCL § 1515 (affirming general applicability of attorney regulation under the judiciary law).

Petitioners promoted either the business of a separate legal person or a distinct natural person's services rendered on another corporation's behalf; the same result obtains.

Fourth, petitioners insist that Mr. Ciafone operated "a solo practice … at each building," rendering each of his advertisements an "accessory sign" (App. Br. 4, 15–17). But those findings reflect pure credibility determinations rooted in the record. OATH hearing officers found it unbelievable that Mr. Ciafone ran satellite law offices in cramped corners, vacant apartments, a basement, and a barbershop. And petitioners never challenged those findings (A19, 33; RSA76–77). Thus, the issue is effectively unpreserved, as well as plainly meritless under established law according the highest deference to credibility findings of administrative tribunals. *Pell*, 34 N.Y.2d at 230

Fifth, petitioners contend that ECB imposed "grossly disproportionate" penalties (App. Br. 17). But by aggregating the separate fines, petitioners commit the same offense of disregarding their separate personhoods (*see id.*). What is more, petitioners have not shown that the penalties "shock the

conscience." *Pell*, 34 N.Y.2d at 240, particularly since they rejected opportunities to mitigate the fines. *See OTR Media Grp., Inc. v. City of N.Y.*, 83 A.D.3d 451, 453–54 (1st Dep't 2011). And as even the two dissenting justices noted, the City adopted heightened penalties because lower fines failed to deter outdoor advertising companies' illegal advertising (A47; *see also* RAdd.3 (describing pre-2001 fines ignored by advertisers as "cost of doing business")).

Finally, petitioners argue that the City's outdoor advertising laws are unconstitutional (App. Br. 4–5, 17–20). That issue was never presented to the lower courts, so petitioners cannot raise it before this Court now.

CONCLUSION

The order of the Appellate Division should be affirmed.

Dated: New York, NY
February 20, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 5,380 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

/s/ Barbara Graves-Poller
BARBARA GRAVES-POLLER

ADDENDUM

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RAdd.1

MEMORANDUM IN SUPPORT OF LOCAL LAW 2001/14

(pp. RAdd.1-RAdd.4)

REPRODUCED FOLLOWING

RAdd.2

MEMORANDUM IN SUPPORT

TITLE: A LOCAL LAW to amend the administrative code of the city of New York, in relation to the regulation of outdoor advertising and repealing subdivision 10 of section 26-126.4 of such code in relation thereto

SUMMARY OF PROVISIONS: Section 1 of this bill would repeal subdivision 10 of section 26-126.4 of the Administrative Code which prohibits the Commissioner of Buildings from sending violations relating to the display of signs to the Environmental Control Board for adjudication.

Section 2 of the bill would add a new section 26-127.3 to the Code declaring illegal signs with a surface area greater than 150 square feet to be a public nuisance and providing for the removal of such signs by the Department of Buildings after notice and a hearing before an administrative law judge of the Office of Administrative Trials and Hearings. The costs of such removal would be a lien on the building and could be recovered from the owner or if an Outdoor Advertising Company controls the sign, from such company.

Section 3 of this bill would add a new subchapter 4 entitled "Regulation of Outdoor Signs" to chapter 1 of title 26 of the code. Article 1 of such new subchapter entitled "Maintenance Permit for Outdoor Signs" would require maintenance permits for certain outdoor signs that are within view of an arterial highway or public park where either (i) the signs are within 200 feet of such highway or park or (ii) there are more square feet in the surface area of the sign than there are linear feet in the distance of the sign from such highway or park. A maintenance permit would be required under this new article whether or not a permit for the erection of such sign is required or has been issued under section 27-177 of the code. A maintenance permit would be renewable on an annual basis and would automatically expire upon a change in copy on the sign or with respect to an accessory sign upon a change in ownership or operation of the principal use. Signs, other than advertising signs as defined in the zoning resolution, with a surface area of one hundred fifty square feet or less that are situated no higher than three feet above the floor of the second story of a building would be exempt.

Article 2 of new subchapter 4 entitled "Outdoor Advertising Companies" provides for the regulation of Outdoor Advertising Companies by the Department of Buildings. These companies control or manage advertising space on outdoor signs, which they sell or lease to others for the display of advertising. Under the new regulations, such companies would be prohibited from selling or leasing space on buildings in New York City unless they are registered with the Department of Buildings. An owner or manager of a building who markets advertising space on such building directly to advertisers would be exempt from the new regulations. Registered companies would be required to identify all of the signage space under their control and provide a certification by an architect or engineer that signs under the control of the registrant are in compliance with the zoning resolution and building code. Such companies would be liable for civil penalties for signs that violate the law and both civil and criminal penalties for doing business without registering with the department. Signs under the control of an Outdoor Advertising Company that fails to register with the Department would also be subject

to removal by the Commissioner of Buildings. Repeated violations of sign regulations would constitute grounds for revocation of registration; an Outdoor Advertising Company whose registration is revoked would be ineligible to obtain any city franchise or concession for a period of five years. Registrants would be required to post a bond, which could be drawn upon to collect civil penalties or to pay for the expense of removing an illegal sign.

Section 4 of this bill would amend section 27-177 of the Code to require that applications for permits to erect or alter signs identify the outdoor advertising company controlling the signage space and that such signs display the name and registration number of such company and the permit number of the sign. It would also (i) clarify the circumstances under which a new construction permit would be necessary for an existing permitted sign and, (ii) specify that the issuance of a permit by the Department of Buildings to erect a sign in cases where the sign is illegal under any other provision of law would not be a defense in a proceeding for the removal of such illegal sign.

The bill would take effect ninety days after enactment but the Commissioner of Buildings could promulgate rules prior to such effective date.

REASONS FOR SUPPORT: Recent years have seen a proliferation of illegal outdoor advertising signs throughout the City. The strength of the local economy and advertising market, together with the availability of new technologies for the fabrication and installation of signs, have combined to create a situation in which zoning regulations governing the location, size, height and projection of advertising signs are often ignored and enforcement penalties are considered a 'cost of doing business'.

Enforcement of sign regulations by the Department of Buildings has produced successes, but is hampered by a lack of effective remedies. Currently, the Department prosecutes all sign violations in Criminal Court; local law prohibits it from prosecuting such cases before the Environmental Control Board. Sign violations are not a priority on the Criminal Court docket, and resolution of these cases in Criminal Court is slow and time-consuming. The inability to obtain injunctive relief in Criminal Court makes it difficult to ensure the violations do not recur. The Department also does not have any effective method for the removal of illegal signs. Most importantly, current law does not provide a clear method for the City to hold Outdoor Advertising Companies accountable for zoning violations involving advertising signs under their control. Instead, the City enforces against individual building owners with respect to signs located on their premises, without the ability to hold Outdoor Advertising Companies responsible for patterns of violations among the signs in their advertising portfolios.

This local law would establish a comprehensive scheme for the enforcement of sign regulations that would substantially strengthen the enforcement jurisdiction, allowing the Department of Buildings to pursue both criminal and civil remedies for sign violations. It would also establish a new sign permit for maintenance of signs located within close proximity to the City's arterial highways and public parks; this permit mechanism will serve to protect against the illegal conversion of accessory signs to advertising signs, a common technique used to evade the zoning prohibition against advertising signs along the highways.

Most importantly, the local law would establish a system to hold Outdoor Advertising Companies accountable for all advertising signs under their control. Companies that market

space on signs to advertisers in New York City would be required to register with the Department of Buildings, to identify all signs in their portfolios, and to certify compliance with zoning and building code requirements with respect to all such signs or take measures to ensure that compliance is achieved. Failure to register as an outdoor advertising company would be punishable as a misdemeanor. The company would also be liable for a civil penalty of up to $15,000, with each day's continuance considered separate and distinct violation. A company that has been found liable for sign violations on repeated occasions and has failed to adopt and implement appropriate corrective action and internal control measures to prevent recurrence of violations would face revocation of its registration and be prohibited from doing business in New York City for one year. A company whose registration has been revoked (or which failed initially to register) would be ineligible for the award of a City franchise or concession, and barred from administering an advertising program on behalf of a City franchisee or concessionaire, for a period of five years.

In addition to all other civil and criminal remedies, the Commissioner of Buildings would be authorized to commence a special nuisance abatement action before the Office of Administrative Trials and Hearings (OATH) to compel removal of any illegal sign with a surface area greater than 150 square feet. Upon a determination that the sign is illegal, the Commissioner could issue a removal order. If, following issuance of the order, the owner or the Outdoor Advertising Company does not remove the sign, the Department would remove the sign display copy and/or sign structure or contract for removal.

These measures will ensure that the City's sign regulations are complied with, while allowing Outdoor Advertising Companies to continue to do business in accordance with City requirements.

Accordingly, the Mayor urges the earliest possible favorable consideration of this legislation.

Respectfully submitted,

Joshua D. Filler

RAdd.5

MEMORANDUM IN SUPPORT OF LOCAL LAW 2005/31
(pp. RAdd.5-RAdd.8)

REPRODUCED FOLLOWING

MEMORANDUM IN SUPPORT

TITLE: **A LOCAL LAW** to amend the administrative code of the city of New York in relation in relation to the regulation of outdoor advertising and repealing sections 5, 6, 7, and 8 of local law 14 for the year 2001 in relation thereto.

SUMMARY OF PROVISIONS:

The proposed legislation would amend several sections of the Administrative Code enacted as part of local law 14 of 2001 and would repeal sections 5, 6, 7, and 8 of that law. The proposed amendments to the Administrative Code would, at this time, narrow the scope of the filing of signs, sign structures, and sign locations required at the time of registration of an outdoor advertising company (OAC) to those signs, sign structures, and sign locations located within prescribed proximity of arterial highways and parks; the Commissioner of Buildings would have authority to expand this filing requirement administratively. The proposal would additionally adjust the grounds for revocation, suspension, or refusal to renew an OAC's registration to reflect the priority given signs, sign structures, and sign locations in those areas within prescribed proximity of arterial highways and parks. The bill contains amendments to the governing definitions of the Administrative Code to capture more accurately OACs and their related entities, as well as amendments to the exemption from the required maintenance permit for certain types of signs. There would be provided additional flexibility regarding the acceptable forms of security required to be posted by OACs. The proposal would repeal registration requirements made redundant by enactment of this bill and, finally, would repeal the authority for OACs to enter into a voluntary compliance plan (VCP) and provisions associated with that option.

REASONS FOR SUPPORT:

The Council's enactment 21/2 years ago of Local Law 14 was heralded by many as a breakthrough in the City's efforts to control the proliferation of illegal outdoor advertising signs, particularly along the City's arterial highways in violation of the NYC Zoning Resolution. Local zoning prohibits advertising signs within 200 feet of arterial highways and parks and in residential and certain low-density commercial zoning districts; it imposes size limits in areas more distant than 200 feet but proximate to arterials and parks.

Among other things, and in recognition of the fact that OACs rather than individual property owners play a key role in creating the visual blight these signs represent, Local Law 14 introduced regulation of OACs and their portfolio of holdings. The enactment addressed long-standing enforcement obstacles by moving enforcement of sign regulations from Criminal Court to the Environmental Control Board, authorizing enforcement against OACs, and creating enhanced penalties for infractions by OACs. It also gave the City the authority, under certain

conditions, to seek the removal of individual signs in proceedings before the Office of Administrative Trials and Hearings.

A key component of Local Law 14 was the VCP. The Council recognized that enforcement of the new provisions on a sign-by-sign basis would enmesh the parties in protracted disputes over the lawfulness of particular post-1979 sign displays, requiring enormous City resources that were dwarfed by those of industry. Local Law 14 therefore offered OACs an opportunity to bring into undisputed compliance with zoning their entire inventory of signs located in zoning districts where advertising is prohibited and within prescribed proximity of arterial highways and parks, regardless of any claim to and without resort to litigation over the lawfulness of post-1979 sign installations. OACs opting into the VCP would be given three years to remove all signs and sign structures within these locations and, in exchange, so long as they kept to the schedule, would be immunized from enforcement of all but public-safety-related provisions of zoning and code. The City expected the VCP to be the primary tool through which to achieve Local Law 14's goal of eliminating illegal signage in these locations.

Subsequent developments, particularly in the context of the Department of Buildings's (Department's) efforts to adopt rules implementing Local Law 14, rendered this expectation unrealistic. First, industry made clear that the economics of the business coupled with a three-year immunity period left OACs no financial incentive to participate in the VCP. Second, VCP-related provisions requiring the execution of a restrictive declaration with the property owner and all other parties financially interested in each sign or sign structure, designed to enhance the City's enforcement should the OAC fail to remove the sign and sign structure on schedule, were impossible to satisfy because OACs could not secure such agreements from all affected parties. Third, OACs considering opting into the VCP worried that they would be put at a competitive disadvantage relative to those companies choosing to litigate rather than participate in the program. Finally, it became clear that industry was prepared to comply technically with Local Law 14's registration requirements by removing "questionable" (i.e., advertising) copy from signs as of the date of registration and installing conforming non-advertising copy or leaving signs blank. Such a course of conduct would force the City into a "cat-and-mouse" enforcement game, whose prospect of winning created an additional disincentive for OACs to opt into the VCP.

The proposed local law is intended to address these shortcomings of Local Law 14 by eliminating the VCP entirely, narrowing, at this time, the scope of regulated signs, sign structures, and sign locations to those within prescribed proximity of arterial highways and parks, and responding to other industry concerns raised during consideration of Local Law 14's implementation.

SECTION-BY-SECTION ANALYSIS

Section 1. Repeals sections 5, 6, 7, and 8 of Local Law 14 of 2001.

Section 2. Amends subdivisions a, c, and g of §26-127.3 to increase from 200 to 300 square feet the size of signage deemed a public nuisance under the circumstances specified and to provide greater flexibility regarding the acceptable forms of security required to be posted by OACs.

Section 3. Amends subdivision a of §253 of the Administrative Code to provide that the maintenance permit is required for signs within 700 linear feet from and within view of an arterial highway or within 200 linear feet from and within view of a public park of half-acre or more. The 700 foot mark for arterials reflects the linear limit of any post-1968 lawful 1200 square foot sign. The 200 foot mark for parks reflects zoning's prohibition on advertising signs.

Section 4. Amends §26-258 of the Administrative Code to expand from 200 square feet or less to 300 square feet or less the surface area of signs otherwise located as specified and exempted from the requirement to secure a maintenance permit. This section also eliminates from such exemption signs with legal non-conforming use status.

Section 5. Amends §26-259 of the Administrative Code to change the definition of "affiliate" to capture as OACs two or more OACs in which a person or entity has a controlling interest. The section also eliminates in the definition of an "outdoor advertising company" the reference to owners or managers of buildings who market space on the premises directly to advertisers.

Section 6. Amends subdivision c of §26-260 of the Administrative Code to provide greater flexibility regarding the acceptable forms of security required to be posted by OACs. The section also amends subdivision d of section §26-260 of the Administrative Code to adjust the grounds for revocation, suspension, or refusal to renew an OAC's registration to reflect the priority given signs, sign structures, and sign locations within 700 linear feet from and within view of an arterial highway or within 200 linear feet from and within view of a public park of half-acre or more. The section proposes a "three strikes you're out" policy for violations of the advertising and related prohibitions in these areas; it provides a "repeated violations" standard for all zoning, code, and rule infractions. This section further amends subdivision d to specify as predicates for disciplinary action not just findings of liability but also admissions of violations in order to capture those OACs playing a version of the "cat-and-mouse" enforcement game. Finally, this section amends subdivision d to make explicit the Commissioner's existing authority to settle disciplinary proceedings through an agreement that calls for removal of any of an OAC's signs and sign structures.

Section 7. Amends §26-261 of the Administrative Code to eliminate the requirement that an OAC file at registration a listing of all signs and sign locations under its control and provides that such filing shall include those signs, sign structures, and sign locations within 700 linear feet from and within view of an arterial highway or within 200 linear feet from and within view of a public park of half-acre or more; the Commissioner of Buildings is given authority to expand this filing requirement administratively. This section also eliminates the requirement that an OAC's registration be accompanied by a certification of compliance with the Administrative Code and Department rules. Finally, this section makes minor housekeeping adjustments in the registration process to reflect the changes made elsewhere in the bill.

Section 8. Amends subdivision d of §26-262 of the Administrative Code to conform the language regarding surface area of signs to that reflected in section 26-127.3.

Accordingly, the Mayor urges the earliest possible favorable consideration of this legislation.