Exhibit B

New York County Clerk's Index No. 653584/12

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

NEW YORK STATEWIDE COALITION OF HISPANIC CHAMBERS OF COMMERCE, THE NEW YORK KOREAN-AMERICAN GROCERS ASSOCIATION, SOFT DRINK AND BREWERY WORKERS UNION, LOCAL 812, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, THE NATIONAL RESTAURANT ASSOCIATION, THE NATIONAL ASSOCIATION OF THEATRE OWNERS OF NEW YORK STATE, and THE AMERICAN BEVERAGE ASSOCIATION,

Petitioners-Respondents,

For a judgment pursuant to Articles 78 and 30
of the Civil Practice Law and Rules,

—against—

NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, THE NEW YORK CITY BOARD OF HEALTH, and DR. THOMAS FARLEY, in his official capacity as Commissioner of the New York Department of Health and Mental Hygiene,

Respondents-Appellants.

[PROPOSED] BRIEF FOR *AMICUS CURIAE* THE STREET VENDOR PROJECT

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April 25, 2013

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The Street Vendor Project respectfully submits this brief *amicus curiae* in support of Petitioners-Respondents.[1]

PRELIMINARY STATEMENT

This case illustrates that good intentions do not always make good law. With the laudable goal of improving New York City's public health, the New York City Board of Health ("Board" or "Board of Health") amended the New York City Health Code ("Health Code") to prohibit food service establishments from selling, offering, or providing a "sugary drink" (as defined in the regulation) in a cup or container whose volume exceeds 16 fluid ounces (the "Ban"). R.C.N.Y. tit. 24, § 81.53(c). The Ban sought to address spreading obesity among New York City residents by countering the trend of increased consumption of sugary drinks and reacquainting New Yorkers with smaller portion sizes. But the Ban is being applied in an arbitrary, capricious, and ultimately self-defeating manner.

The Board of Health has elected to wage its war on obesity in some venues, but not others. Establishments such as street vendors, restaurants, and movie theaters fall within the scope of the Ban, while establishments such as grocery stores, drugstores, convenience stores, bodegas, and gas stations do not.

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[1] This brief was not written, in whole or in part, by counsel to any party. No party, no party's counsel, and no person or entity other than the Street Vendor Project, its members, or its counsel contributed money for the preparation or submission of this brief. Counsel to the Street Vendor Project does not otherwise represent any party to this action.

These latter businesses are free to sell sugary drinks in containers that exceed 16 ounces – indeed, there is no cap on the size of sugary drinks that these stores may sell. If the Ban's objective is to curb obesity, excluding certain businesses from the 16-ounce limit in no way furthers this goal. In fact, this double standard undermines the Ban's stated public health goals, and inflicts unnecessary economic injury upon covered business establishments in favor of exempt establishments.

In response to complaints about the Ban's arbitrary and capricious distinction between types of business establishments, Respondents-Appellants throw up their hands and claim that the exempt establishments are subject only to the jurisdiction of the New York State Department of Agriculture and Markets ("Department of Agriculture"), rather than to the jurisdiction of the New York City Department of Health ("DOH"), the Board, and Commissioner Farley. This is simply not the case. To the extent Respondents-Appellants have the authority to promulgate and enforce the Ban on any business establishment engaged in the sale of beverages – and the lower court held they do not – they retain ample authority to impose the Ban on all business establishments engaged in the sale of beverages. Moreover, even if the DOH lacked authority over all establishments, it still could have created a uniform regulatory scheme though coordination of the Ban with the Department of Agriculture, but it failed to do so. For these reasons, among others,

the lower court correctly invalidated the Ban as an arbitrary and capricious regulation.

INTERESTS OF THE AMICUS

The Street Vendor Project ("Project") is a membership-based project of the Urban Justice Center that advocates for the rights of New York City's approximately 20,000 street vendors. With the active membership of more than 1,500 street vendors, the Project seeks to ensure that these entrepreneurial small businesspeople are given a fair opportunity to earn a livelihood on the street. The Project supports equitable laws and regulations protecting the public health and safety of New York City, while combating discriminatory laws and regulations that impair the ability of street vendors to ply their trade, in favor of other private interests.

A sizable segment of the Project's active members – and of New York City's street vendors as a whole, whose interests the Project represents – are subject to the jurisdiction of New York City's Board of Health and sell beverages that would be proscribed under the Ban. At the same time, other private businesses – often less than a stone's throw away from vendors subject to the Ban – are permitted to sell the very same beverages. The Project accordingly has a substantial interest in preventing this discriminatory measure from taking effect.

ARGUMENT

THE LOWER COURT PROPERLY INVALIDATED THE BAN AS AN ARBITARY AND CAPRICIOUS REGULATION

As with any administrative regulation, the Ban will be upheld in judicial review "only if it has a rational basis, and is not unreasonable, arbitrary or capricious." *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166 (1991). Regulations such as the Ban "are not judicially reviewed pro forma in a vacuum, but are scrutinized for genuine reasonableness and rationality in the specific context." *Id.* The Ban cannot meet this standard.

The Ban purportedly seeks to stem rising obesity among New Yorkers, yet it pursues this goal in a strangely cramped fashion. The Ban encompasses all "food service establishments," which is broadly defined in the Health Code as "place[s] where food is provided for individual portion service directly to the consumer[.]" R.C.N.Y. tit. 24, § 81.03(s). Yet Respondent-Appellants will not apply the Ban to retail food establishments that generate less than half of their total annual dollar receipts from the sale of food for consumption on the premises or ready-to-eat for off-premises consumption. As a result, businesses such as street vendors, restaurants, and movie theaters cannot sell proscribed sizes of sugary drinks, whereas grocery stores, drugstores, convenience stores, bodegas, and gas stations can do so with impunity. The Ban bars a street

vendor from selling a 20-ounce soda to a customer, but a drugstore or 7-Eleven ten feet away may sell the same exact item to the customer, or even a 64-ounce soda.

Given the asserted rationale of the Ban – fighting obesity – this inequitable distinction between business establishments cannot be justified. Sugary drinks sold by exempt establishments are, of course, equally likely to contribute to customers' obesity as the sugary drinks sold by covered establishments. Moreover, the ready availability of the exempt establishments would completely undercut the efficacy of the Ban even vis-à-vis covered establishments. A customer craving a proscribed size of his or her beverage of choice would simply forgo covered establishments and patronize a nearby alternative establishment that is exempt.

Consequently, the Ban's discriminatory applicability would inflict a twofold economic injury upon covered business establishments. First, covered business establishments would forfeit the revenue of the proscribed-size beverages with no concomitant benefit to public health, since exempt establishments would supplant their unfortunate counterparts in selling such beverages. Second, because customers prefer to patronize establishments whose beverage options are not limited by law, they would favor exempt establishments for the purchase of other

items, as well. The Ban would arbitrarily place covered establishments at a competitive disadvantage.

Although Respondents-Appellants quibble with the extent of the Ban's economic impact on covered establishments, they do not deny that, in light of its goal to reduce obesity, the Ban reasonably should apply to all business establishments. Respondents-Appellants argue only that the Ban does not extend to retail food establishments that generate less than half of their total annual dollar receipts from the sale of food for consumption on the premises or ready-to-eat for off-premises consumption because these entities are not subject to the DOH's authority. They claim that a Memorandum of Understanding ("MOU") between the Department of Agriculture and the New York State Department of Health ("State Department of Health") limits their ability to apply the Ban to these entities.

Respondents-Appellants' reliance upon the MOU is misplaced. Even if the MOU divides general jurisdiction for the regulation of retail food establishments in New York City between the Department of Agriculture and the DOH, the DOH still retains and employs an expansive authority that allows it to specifically regulate the sale of all sugary drinks by any business establishment, including retail food establishments that are under the supervision of the

Department of Agriculture. For example, the DOH has enacted tobacco regulations that apply to the same stores Respondents-Appellants now claim are outside their jurisdiction. *See* R.C.N.Y. tit. 24, §§ 181.17, 181.19. Respondents-Appellants attempt to distinguish the tobacco regulations on the grounds that the DOH has enforcement powers with respect to tobacco products pursuant to the New York City Administrative Code ("Administrative Code"), but the Administrative Code's grant of authority with respect to tobacco products differs not at all from the broad statutory authority to take all necessary steps – including legislative measures – to protect public health that Respondents-Appellants have claimed in this litigation.

Even if the DOH's authority over other retail food establishments were hamstrung by the MOU – which it is not – the DOH still could and should have coordinated its regulation of sugary drinks with the Department of Agriculture so that the coverage of the resulting policy would be uniform, as anticipated and required by the MOU. The DOH did not even attempt to coordinate the Ban with the Department of Agriculture, a failure that was itself unreasonable.

In any event, even if the DOH's authority were limited to only certain stores and it had no obligation to coordinate its regulatory policy with the

Department of Agriculture, that would still be no excuse for enacting a regulation that irrationally discriminates between different types of businesses. The Ban's inconsistent regulation of sugary drinks harms covered business establishments, benefits unregulated establishments, and subverts its asserted public health objectives. In short, the Ban is arbitrary and capricious and should be invalidated.

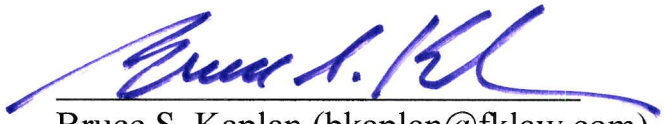
CONCLUSION

For the foregoing reasons, the Street Vendor Project supports and adopts the arguments of the Petitioners-Respondents in this appeal, and submits that this Court should affirm the Decision and Order of the lower court and invalidate the Ban.

Dated: New York, New York
April 25, 2013

Respectfully submitted,

FRIEDMAN KAPLAN SEILER & ADELMAN LLP



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