326-12-A thru 337-12-A
APPLICANT – Gibson Dunn, for Contest Promotions-NY LLC by Jessica Cohen
OWNER OF PREMISES: Lily Fong, Michael A. Maidman, Thomas Young, George Aryeh, Lily Fong, Vincent J. Ponte, Hung Ling Yung, David R. Acosta, James B. Luu, Fred G. Eng.
SUBJECT – Applications December 11, 2012 – Appeals challenging the Department of Buildings determination to revoke 12 permits previously issued permitting business accessory signs on the basis that they are appear to be advertising signs.
PREMISES AFFECTED –

52 Canal Street, Block 294, Lot 22, C6-2 zoning district, Manhattan
1560 2nd Avenue, Block 1543, Lot 49, C1-9 zoning district, Manhattan
2061 2nd Avenue, Block 1655, Lot 28, R8A zoning district, Manhattan
2240 1st Avenue, Block 1709, Lot 1, R7X zoning district, Manhattan
160 East 25th Street, Block 880, Lot 50, C2-8 zoning district, Manhattan
289 Hudson Street, Block 594, Lot 79, C6-2A zoning district, Manhattan
127 Ludlow Street, Block 410, Lot 17, C4-4A zoning district, Manhattan
1786 3rd Avenue, Block 1627, Lot 33, R8A zoning district, Manhattan
17 Avenue B, Block 385, Lot 1, R7A zoning district, Manhattan
173 Bowery, Block 424, Lot 12, C6-1 zoning district, Manhattan
240 Sullivan Street, Block 540, Lot 23, R7-2 zoning district, Manhattan
361 1st Avenue, Block 927, Lot 25, C1-6A zoning district, Manhattan

COMMUNITY BOARD #2/3/6/8/9/11M
ACTION OF THE BOARD – Appeals Denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
THE RESOLUTION –

WHEREAS, the subject appeals come before the Board in response to the determinations of the Manhattan Borough Commissioner of the Department of Buildings ("DOB"), dated November 14, 2012, to revoke Permit Nos. 120975454, 120993283, 120993363, 120993452, 120993327, 121037939, 120975427, 120993354, 120993345, 120853736, 120993318, and 120993130 for signs at the subject sites (the "Final Determinations"); and

WHEREAS, the Final Determinations read, in pertinent part:

By letter dated September 12, 2012, the Department of Buildings (the "Department") notified you of its intent to revoke the approval and permit issued for work at the premises in connection with the application referenced above. As of this date, the Department has not received sufficient information to demonstrate that the approval and permit should not be revoked.

Therefore, pursuant to Section 28-104.2.10 and 28-105.10 of the Administrative Code of the City of New York, the APPROVAL AND PERMIT ARE HEREBY REVOKED.

In the event an order to stop work is not currently in effect, you are hereby ordered to STOP ALL WORK IMMEDIATELY AND MAKE THE SITE SAFE; and

WHEREAS, a public hearing was held on this application on March 5, 2013, after due notice by publication in *The City Record*, and then to decision on April 23, 2013; and

WHEREAS, the premises and surrounding areas had site and neighborhood examinations by Chair Srinivasan, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

WHEREAS, the 12 subject sites are occupied by (1) Newsstand Grocery (52 Canal Street, C6-2 zoning district), (2) formerly Hungarian Meat Market/now Elite Cleaners (1560 Second Avenue, C1-9 zoning district), (3) Triple A Diner (2061 Second Avenue, C1-5 zoning district), (4) Rims Tires and Hub Caps (2240 First Avenue, C1-5 zoning district), (5) Jimmy's House Vietnamese restaurant (160 East 25th Street, C2-8 zoning district), (6) Ellen's Deli & Grocery (289 Hudson Street, C6-2A zoning district), (7) M.A. Grocery (127 Ludlow Street, C4-4A zoning district), (8) Next Evolution Mixed Martial Arts Academy (1786 Third Avenue, C1-5 zoning district), (9) Cornerstone Café (17 Avenue B, C1-5 zoning district), (10) formerly Lighting Craftsman/now vacant (173 Bowery, C6-1 zoning district), (11) J.W. Market grocery store/deli (240 Sullivan Street, C1-5 zoning district), and (12) Dunkin Donuts-Baskin Robbins (361 First Avenue, C1-6A zoning district); and

WHEREAS, each site is also occupied by a sign with the surface area in the range of 80 to 250 sq. ft., which the applicant represents are complying parameters for accessory signs in the respective zoning districts (the "Signs"); and

WHEREAS, the Signs all include a narrow border at the top and bottom with the name and address of the respective business, a solicitation to enter the store to enter the sweepstakes, and arrows in the direction of the store; the main part of the Signs include multiple smaller posters (from three to 18) advertising items such as movies, television shows, music, and clothing stores; and

WHEREAS, accessory signs are permitted for the

noted businesses, but advertising signs are not; and

WHEREAS, these appeals are brought on behalf of the lessee of the Signs, Contest Promotions Incorporated (the "Appellant," "Contest Promotions," or "CPI"); and

WHEREAS, the Appellant seeks a reversal of DOB's determinations that the Signs are advertising signs and therefore not permitted at the subject sites, based on the Appellant's contention that the Signs are accessory to the businesses at the sites; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

PROCEDURAL HISTORY

WHEREAS, on March 17, 2010, DOB and the Appellant met in response to Appellant's request to discuss its proposed advertising sign plan and how it believed its signs constituted accessory signs pursuant to the ZR § 12-10 definition of accessory; and

WHEREAS, on March 30, 2010, the Appellant wrote a follow up letter to DOB, which included a rendering of a typical sign with a picture of a large advertisement for Tropicana Orange Juice; at the top of the ad, it said "Roberto's Groceries" and then in smaller type "Enter our Sweepstakes Inside for a Chance to Win These Products;" and at the bottom of the sign in even smaller type "No purchase necessary. Void Where Prohibited. Open to legal residents of 50 U.S. and D.C. 18 and Over. See Store for Official Rules;" and

WHEREAS, on May 18, 2010, DOB responded to CPI's March 30, 2010 letter stating that it was DOB's position that CPI's proposed sign did not qualify as an accessory sign "simply because it depicts a product that is sold or may be won via a raffle contest, on the zoning lot;" the letter noted that the product displayed – orange juice – directed attention to a product that was sold in grocery stores throughout the City, and was not the principal use of the zoning lot and thus was an advertising sign and stated that "It is the Department's well-settled position that a sign may refer primarily to a product rather than the business itself, only where the business at the site is readily identifiable by the product."; and

WHEREAS, on June 30, 2010, CPI submitted another letter to DOB, with an image of an actual sign at 132 Eldridge Street and sought a final determination about whether the proposed signs qualify as accessory signs; and

WHEREAS, on July 28, 2010, DOB responded that "an accessory sign at a grocery store must direct attention to the name and/or purpose of such store and not to any product sold at the store" and that "a final determination for purposes of an appeal to the Board of Standards and Appeals (BSA) may only be issued in connection with a specific job application" and was directed to forward the request to the Borough Commissioner so that his determination could be appealed to the Board; and

WHEREAS, the Appellant filed eight of the 12 professionally-certified permit applications on March 1, 2012, two on February 10, 2012, and the others on October 13, 2011 and April 16, 2012, respectively; and

WHEREAS, on September 12, 2012, DOB issued letters of intent to revoke the permits; and

WHEREAS, on November 14, 2012, DOB revoked the permits; the permit revocations serve as the basis for the appeal; and

CONTEST PROMOTIONS LITIGATION

WHEREAS, on September 17, 2010, DOB filed a declaratory judgment action in New York State Supreme Court seeking a ruling that its two signs – its business model – constituted accessory signs, Contest Promotions-NY LLC v. New York City Department of Buildings et al, Index No. 112333/10 (Sup Ct NY Co) (Rakower J) ("CPI I"); and

WHEREAS, on October 15, 2010, after the submission of papers and hearing oral argument, the Court ruled in CPI's favor and on December 10, 2010 the Court entered a judgment finding that signs consistent with CPI's business model meet the definition of accessory use and it is unlawful for DOB to reject outright permit applications submitted for any signs consistent with CPI's business model; and

WHEREAS, DOB appealed the December 10, 2010 decision; and

WHEREAS, on March 6, 2012, the Appellate Division, First Department agreed with DOB's position and unanimously reversed Justice Rakower's decision, ruling that "failure to exhaust its administrative remedies precludes judicial review of its nonconstitutional claims" and barred the claim because sign permit applications that are disapproved should be appealed to the Board, Contest Promotions-NY LLC v. NYC DOB et al 93 AD3d 436 (1st Dept 2012); and

WHEREAS, the Appellant asserts that the Appellate Division's reversal is limited to the narrow issue of exhaustion but that Justice Rakower's decision still stands in every other way and that Justice Rakower's original decision upheld its model sign as an accessory sign and that any sign that is consistent with its model must be approved by DOB despite the ruling of the First Department; and

WHEREAS, the decision in CPI I includes the following:

> Judgment . . . declaring that signs consistent with petitioner's business model qualify as 'accessory' signs under New York City Zoning Resolution (ZR) §12-10 … unanimously reversed on the law, without costs, the judgment vacated, the petition denied, and the proceeding dismissed. Id.; and

WHEREAS, DOB's position is that no part of

Justice Rakower's January 12, 2011 judgment or October 15, 2010 decision stands and there is no judicial determination that CPI's model signs are to be considered legal accessory signs; and

WHEREAS, DOB states that if the Appellate Division desired to uphold Justice Rakower's underlying legal interpretation, it would have stated so in its Decision and Order instead of making a blanket declaration of null and void; and

WHEREAS, secondly, DOB states that the Appellant is incorrect in its assertion that Justice Rakower finds that any sign that meets the "model" must be accepted as a legitimate accessory sign even where there has been no demonstration of the actual accessory nature of the sign; and

WHEREAS, DOB asserts that in CPI I, Justice Rakower specifically stated that the legality of each sign was to be determined by itself and that the signs must meet the three-prong test of the Zoning Resolution's accessory definition; and

WHEREAS, approximately one year after Justice Rakower's initial decision, but prior to the Appellate Division ruling declaring the initial decision null and void, Justice Rakower ruled on an Order to Show Cause Motion challenging DOB's issuance of advertising violations and permit revocations to signs following CPI's model, which CPI alleged DOB violated; Justice Rakower dismissed the motion; and

WHEREAS, on September 21, 2012, Contest Promotions-New York LLC v. NYC DOB et al Index Nos. 112333/10 and 103868/12 (Sup Ct NY Co) (Rakower J) (CPI II) CPI sought a declaration by the court that its signs qualified as accessory signs and asked that DOB be prohibited from rejecting applications for permits for signs that met its model; CPI also challenged four ECB Appeals Board determinations regarding DOB NOVs for four signs in Brooklyn; and

WHEREAS, initially, the ECB Administrative Law Justice had concluded that he was constrained to follow Justice Rakower's decision of October 15, 2010 in CPI I; however, after the First Department's decision in March 2012, the ECB Appeals Board, on August 30, 2012, upheld the DOB NOVs for these signs, finding them to be advertising; and

WHEREAS, on November 9, 2012, Justice Rakower issued a ruling in CPI II and found the ECB Appeals violations to be arbitrary and capricious; and

WHEREAS, the Appellant asserts that through the ruling in its favor in CPI II, the court approved the model sign; and

WHEREAS, DOB asserts that the court in CPI II was limited to the four ECB determinations and did not have broader application; and

WHEREAS, DOB has appealed the decision in CPI II to the Appellate Division, where it is pending; and

WHEREAS, DOB asserts that in Justice Rakower's final proceeding on the matter, on November 9, 2012, she evaluated four violations issued under ZR § 32-63, she determined that CPI signs at a pharmacy and a restaurant in Brooklyn were improperly sustained as advertising signs and, contrary to CPI's allegations, there is currently no judicial determination holding that CPI's business model is a valid accessory sign which the City is constrained to follow; and

WHEREAS, the Appellant and DOB contest the precedential value of the ongoing Contest Promotions litigation; and

WHEREAS, the Appellant relies heavily on the decisions by and record of Justice Rakower in CPI I and II and asserts that the prior determinations mandate the Board's approval of the Signs; and

WHEREAS, DOB asserts that the Appellant mischaracterizes Justice Rakower's decisions; (1) first, the Appellant's assertion that the Appellate Division's decision has no impact on the Board's review of the Signs; (2) the assertion that Justice Rakower determined that CPI's model is a valid accessory sign, which would render the entire administrative process meaningless; and (3) that DOB is flouting Justice Rakower's rulings by issuing advertising sign violations and permit revocations for these purported accessory signs; and

RELEVANT STATUTORY PROVISIONS

ZR § 12-10 *Definitions*

Accessory use, or accessory (2/2/11)

An "accessory use":

(a) is a #use# conducted on the same #zoning lot# as the principal #use# to which it is related (whether located within the same or an #accessory building or other structure#, or as an #accessory use# of land), except that, where specifically provided in the applicable district regulations or elsewhere in this Resolution, #accessory# docks, off-street parking or off-street loading need not be located on the same #zoning lot#; and

(b) is a #use# which is clearly incidental to, and customarily found in connection with, such principal #use#; and

(c) is either in the same ownership as such principal #use#, or is operated and maintained on the same #zoning lot# substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal #use#.

When "accessory" is used in the text, it shall have the same meaning as #accessory use#.

* * *

Sign, advertising (4/8/98)

An "advertising sign" is a #sign# that directs attention to a business, profession, commodity, service or entertainment

conducted, sold, or offered elsewhere than upon the same #zoning lot# and is not #accessory# to a #use# located on the #zoning lot#; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant seeks for the Board to issue a ruling that makes clear that signs that meet Contest Promotions' business model—including the 12 at issue--are, in fact, "accessory" signs, providing legal clarity and binding precedent for both Contest Promotions and DOB going forward; and

WHEREAS, the Appellant contends that the Final Determinations should be reversed because (1) the Signs satisfy all three prongs of the ZR § 12-10 definition of accessory and (2) because they follow the model; and

WHEREAS, the Appellant asserts that DOB's interpretation is contrary to the plain language of the statutory text and is inconsistent with New York State case law as well as the decisions in CPI I and CPI II with respect to signs that it finds to be identical for all relevant purposes to the Signs at issue in this appeal; and

A. The Signs Relate to the Business on the Same Zoning Lot as the Principal Use

WHEREAS, as to the first prong of the accessory use analysis, the Appellant says that it applies because the requirement is only that an accessory sign be located on "the same zoning lot as the principal use" and the Signs plainly meet this requirement; and

WHEREAS, the Appellant states that DOB imports new requirements into this prong that are nowhere found in the text of the Zoning Resolution, stating that in order to qualify as an accessory sign, "the text of the ads . . . for movies, jeans, concerts, TV shows, a boutique etc." must be "directly related to the principal uses of the zoning lots in question;" and

WHEREAS, the Appellant states that the Zoning Resolution does not require that the "text of the ads" or the "products" relate to the principal use, only that the sign *itself* is located on the same zoning lot as the principal use establishment to which it directs attention; and

WHEREAS, further, the Appellant asserts that even if there were such a requirement, that requirement would be met by Contest Promotions signs because it is the sweepstakes contest itself that is the "product," and that product *is* available at each primary use establishment; and

WHEREAS, additionally, the Appellant asserts that there is no requirement under any prong that the sweepstakes must be the principal use of the zoning lot, and it does not argue that the principal use of the premises is as a "sweepstakes contest store;" rather, the principal uses are, uses like a household appliance store, an eating and drinking establishment, or a newsstand; and

WHEREAS, the Appellant states that the Signs are each related to these principal uses because they direct attention to a sweepstakes that can be entered at the principal use, and they include the name and address of the principal use, arrows pointing towards the principal use facility, and an exhortation to come inside to win prizes; and

B. The Signs are "Clearly Incidental to" and "Customarily Found in Connection with" the Small Businesses Contest Promotions Serves

WHEREAS, as to the second prong, the Appellant asserts that the Supreme Court found that the Contest Promotions model signs on which the Signs at issue here were based satisfy this standard and the Signs at issue here are identical to the model signs the Supreme Court found meet the definition of an "accessory sign" under the Zoning Resolution; and

WHEREAS, the Appellant asserts that the use is "incidental" where it is "subordinate" and has a "reasonable relationship" to the primary use, citing to Gray v. Ward, 74 Misc. 2d 50, 54–55, 343 N.Y.S.2d 749, 753 (Sup Ct Nassau Co 1973); and

WHEREAS, the Appellant asserts that the proper application of the Zoning Resolution results in a conclusion that a modest sign, hung on the exterior wall of the building is "subordinate" to the primary use establishment itself and the subordinate nature of the Signs in relation to the primary use is ensured by the fact that the signs conform to the size and height regulations that are applicable in the underlying zoning district—namely, a maximum size of 150-200 sq. ft. *See* ZR §§ 32-642, 32-655; and

WHEREAS, the Appellant also references the Board's decision BSA Cal. No. 151-12-A (the "Ham Radio Case") in which the Board granted an appeal that concluded that a ham radio tower is accessory to the principal use of the residential building; and

WHEREAS, the Appellant cites to the Ham Radio Case for the conclusion that amateur radio towers are "customarily found" in connection with residences and are therefore an accessory use under the Zoning Resolution and that the Board considered evidence submitted of nine ham radio towers maintained throughout the City as "a representative sample" of the radio towers maintained throughout the City, and accepted this evidence as establishing that radio antennas are "customarily found" in connection with the primary use residences, in fulfillment of this second prong of the accessory use test; and

WHEREAS, the Appellant states that the Board noted that the relevant inquiry is not whether the use is a "common accessory use," but rather whether, "when amateur radio antennas are found, they are customarily found" in connection with the primary use; and

WHEREAS, the Appellant asserts that the Ham Radio Case clarified that the relevant inquiry in this case is not how common signs like the ones at issue are against the totality of possible accessory uses, but rather, whether, when signs that identify an establishment and direct potential customers inside using product images and sweepstakes prizes are found, they are customarily found in connection with the kinds of small storefront locations at issue here; and

WHEREAS, the Appellant states that there is a direct relationship between the Signs and the primary use on the zoning lot as the Signs prominently feature the name of the store, information about the sweepstakes located inside the store, and a depiction of the sweepstakes prize or related item and the Signs expressly direct onlookers to go into the store to enter the sweepstakes; and

WHEREAS, the Appellant asserts that there is not any "proportionality" test to measure the size of a sign against the primary use, only that there be a "reasonable relationship" to the primary use, as set forth in the Zoning Resolution and case law; and

WHEREAS, the Appellant asserts that where the Signs feature the name of the store, information about a sweepstakes located inside the store, a depiction of a sweepstakes prize, and direct onlookers to go inside there is far more than a "reasonable" relationship; and

WHEREAS, the Appellant rejects DOB's assertion that the proportionality between the copy that "directs attention to the business" and the copy that "directs attention to products sold" is not consistent with its prior decision on the Fresh Direct sign or in any relevant case law; and

WHEREAS, the Appellant asserts that even if DOB were correct, the sign space is "predominantly devoted to" promoting the primary use establishment, as the copy in the center of the signs "refers to products offered at the store—the sweepstakes;" and

WHEREAS, the Appellant adds that the Signs each include the address and phone number of the store and arrows that direct passersby to the store entrance; the Appellant states that by size, location, and design, the Signs direct and draw customers to the establishment, increasing foot traffic and visibility; and

WHEREAS, the Appellant states that the Supreme Court held twice, and the Board should find that signs such as the ones at issue here are "incidental to" the principal use under the Zoning Resolution and reinstate the Permits; and

WHEREAS, the Appellant states that it is equally clear that accessory signs containing the name of an establishment and directing potential customers into the establishment using product images and sweepstakes prizes, are "customarily" found "in connection with" such stores; and

WHEREAS, the Appellant asserts that Signs such as the ones used by businesses working with Contest Promotions can be found in every borough of the City in connection with small retailers such as the proprietors here, as the examples submitted with Contest Promotions' two Article 78 petitions—both historical and contemporary—reflect; and

WHEREAS, the Appellant distinguishes the case law on which DOB relies, finding that in Mazza v. Avena, Index No. 14304/97 (Sup Ct Queens Co 1998), the sign at issue was classified as an advertising sign rather than an accessory sign because of "the *size* of the sign, because the sign *does not promote business* for the store on the premises, does not direct attention to the premises, and the sign *faces only an arterial highway* and is *not visible to those in the immediate vicinity* of the premises." No. 14304/97 (Sup Ct Queens Co 1998), *aff'd*, 261 A.D.2d 546, 687 N.Y.S.2d 909 (2d Dept 1999) (emphases added) and in NYP Realty Corp. v. Chin, Index No. 119194/99 (Sup Ct NY Co 2000), the sign was more than 1,200 sq. ft., had "no direct connection to the subject premises," and did not "direct attention to a use on the subject lot;" and

WHEREAS, the Appellant states that its Signs are between 88 and 240 sq. ft. in surface area, explicitly promote and direct attention to the business, and are easily seen by passersby; and

WHEREAS, the Appellant cites to the examples it submitted in court of storefront sweepstakes and Lotto signs, as well as signs containing logos and name brands as a means of drawing customers into a store to support its assertion that the Signs are customarily found; and

WHEREAS, the Appellant states that for the Signs, the representative evidence submitted by Appellant and credited by the Supreme Court—as well as the notice taken of Lotto and other similar signs throughout the City—easily establishes that signs displaying the name of a store along with images and/or contests that seek to drive customers into the store are "customarily found" in connection with such primary use establishments; and

WHEREAS, the Appellant distinguishes Fresh Direct in that the Signs are all similarly proximate to the sweepstakes located inside the site while Fresh Direct is an online retailer, and the Fresh Direct sign sits atop a distribution center, not a retail site and, thus, it cannot drive customers into the physical location on the zoning lot as Contest Promotions' signs do; and

WHEREAS, the Appellant states that DOB must rely on its determination that the Fresh Direct sign is accessory; and

WHEREAS, the Appellant states that if the Fresh Direct sign is an accessory sign even though it does not and cannot exhort the onlooker to go into the primary use establishment, even though no products or services are available to the general public at the primary use,

and even though the only connection between the sign and the primary use is that the sign sometimes includes products that are sold by, or a logo of, the business that owns the primary use food processing plant, then Contest Promotions signs must be accessory signs too.

WHEREAS, the Appellant compares its signs to McDonald's promotional Monopoly sweepstakes and the Lotto and does not see any relevant distinction between those two kinds of campaigns and its own Signs; and

WHEREAS, the Appellant asserts that Lotto signs are not all within windows or otherwise exempt from signage regulations; and

WHEREAS, the Appellant offers 7-11 sweepstakes and instant win campaigns as other examples of such enterprises; in the contest, the winners received 7-11 products, which the Appellant says did not relate to the principal use of the establishment; and

WHEREAS, the Appellant cites to other examples retail stores in New York – Lacoste, Murray's Cheese, Modell's Sporting Goods, and 7-11, where customers have had a chance to win shopping sprees or other prizes related to the business hosting the prize, to support the assertion that the Signs are customarily found; and

C. The Signs Are Substantially for the Benefit of the Stores' Owners, Employees, Customers, and Visitors

WHEREAS, as to the third prong, the Appellant states that the Signs satisfy the requirement in that they are "operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal use;" and

WHEREAS, the Appellant asserts that its affidavits from business owners establish that the Signs are for the benefit of business owners, occupants, employees or customers; and

WHEREAS, the Appellant asserts that it is the Signs that must benefit the owners or their customers and not the movies, television shows, concerts or clothing being advertised; and

WHEREAS, the Appellant identifies the benefits as including driving customers into the store and for the customers winning prizes; and

WHEREAS, the Appellant states that it is not simply that the owners benefit through rental payments; and

WHEREAS, further, the Appellant asserts that there is no requirement under the Zoning Resolution that the business owner benefits equally to or more than the building owner; and

WHEREAS, the Appellant asserts that business owners benefit from increased visibility and foot traffic and from satisfied customers and they benefit from the remuneration received in exchange for hosting the contests; and

WHEREAS, the Appellant states that in reaching this conclusion in 2010, the Court credited the affidavit of a business owner who discussed "what the Contest Promotions sign has done for his business and how he sees the benefit is so substantial to him to have people brought into the store in this way;" and

WHEREAS, the Appellant asserts that definitive proof of these benefits is that business owners voluntarily enter into agreements with Contest Promotions to host such signs and sweepstakes and if these arrangements were not "substantially for" the store owners' and occupants' "benefit," they would not enter into them; and

WHEREAS, the Appellant concludes that the Signs, like the signs approved by Justice Rakower in CPI II, each mirror the Contest Promotions business model and plainly satisfy the Zoning Resolution's "accessory sign" definition; thus, DOB's determinations revoking these permits are arbitrary, capricious, and contrary to law, and must be reversed; and

DOB'S POSITION

WHEREAS, as to the classification of the Signs, DOB asserts that the ZR § 12-10 definitions of advertising sign and accessory use establish the necessary distinctions between the two classifications of signs; and

WHEREAS, first, DOB notes that all 12 permit applications were filed pursuant to AC § 28-104.2.1, meaning that DOB accepted the applications and issued permits based not on its own examinations of the applications, but rather on the job applicants' professional certification that the applications complied with all applicable laws; and

WHEREAS, DOB states that it revoked the 12 sign permits that had been issued through professional certification process 12 signs that were not accessory at the time of permit, and are not currently accessory to any principal use at the premises; and

WHEREAS, DOB asserts that the determination of whether each of these 12 signs is an accessory sign must be made on an individual basis because the definition of an "accessory use" requires a site-specific analysis; and

WHEREAS, specifically, DOB asserts that the facts are different for each case, so it is necessary to review them individually; and

WHEREAS, DOB notes that an accessory sign must, (1) relate to a use conducted on the same zoning lot, (2) be clearly incidental to and customarily found in conjunction with the principal use of the zoning lot, and (3) be in the same ownership as the principal lot or maintained on the same zoning lot substantially for the benefit of the owner of the principal use; and

WHEREAS, DOB notes that the accessory sign definition is conjunctive and each of its three prongs

must be independently satisfied for a sign to be considered an accessory sign; and

A. The Signs are not Related to the Principal Use on the Zoning Lots

WHEREAS, DOB asserts that the first prong of the Zoning Resolution's accessory use definition requires that the sign's copy be directly related to the principal use on the zoning lot; and

WHEREAS, DOB asserts that one of the locations -173 Bowery - Manhattan, is associated with a business, the Lighting Craftsman, that was closed on May 4, 2012 just two weeks after the Appellant self-certified an application for an accessory sign and a second location – 1560 Second Avenue – was occupied by the Hungarian Meat Market which was destroyed by fire and is now occupied by Elite Cleaners; and

WHEREAS, accordingly, DOB asserts that it is impossible to have a contest take place at a store that has closed and that the Signs cannot meet the ZR § 12-10 "accessory use" definition if they do not relate to a use located on the zoning lot; and

WHEREAS, DOB notes that the other ten locations are occupied by (1) a martial arts academy, (2) a tire and hubcap store, (3) a Dunkin Donuts/Baskin Robbins, (4) three diner/cafes/restaurants – Triple A Diner, Jimmy's House (Vietnamese restaurant) and Cornerstone Café, and (5) four of the "mom and pop" newsstands or small groceries which the Appellant alleges are the stores it aims to help attract customers; and

WHEREAS, DOB states that at the time of the permit submissions, ten of the signs advertised movies – eight "Wrath of the Titans", one "The Thing" and one "Dark Shadows"; one ad is for "True Religion" brand jeans and another ad is for "Celine" a boutique on Madison Avenue; and

WHEREAS, DOB notes that, however, none of the locations feature movies; none of the ten signs that direct attention to movies could be considered an accessory sign; and likewise, the sign that directed attention to a boutique was at a newsstand and was not accessory to it, and the sign for jeans was not accessory to the grocery where it was displayed; and

WHEREAS, DOB cites to Operations Policy and Procedure Notice (OPPN) #10/99 of December 30, 1999 Sign Applications and Permits" states that in seeking a permit for an Accessory Sign "the applicant must establish the accessory relationship between the proposed sign and the use on the zoning lot on which the sign is being erected (the 'principal use'.)"; and

WHEREAS, DOB adds that pursuant to the OPPN, the documentation required is the "name of the owner of the principal use (i.e. the name of the business owner)" and a "lease demonstrating the amount of space leased at the zoning lot by the owner of the principal use and how the space is to be used" and the OPPN goes on to note that the "proposed sign is [must be] clearly incidental to the principal use;" and

WHEREAS, accordingly, DOB states that the OPPN is consistent with the Zoning Resolution requirement that an accessory sign have an accessory relationship with the principal use; and

WHEREAS, DOB asserts that the Signs do not have the required relationship with the principal use of the zoning lots because the products being advertised have no relationship to the principal use and the contest noted on the sign border is one of many products available on the particular zoning lot in question – it is not the principal use of the zoning lot; and

B. The Signs are not Clearly Incidental to and Customarily Found in Connection with the Uses on these Zoning Lots

WHEREAS, DOB asserts that the second prong of the Zoning Resolution's accessory sign definition requires that the sign be "clearly incidental to" and "customarily found in connection with" the principal use and the Signs fail to meet the requirement; and

WHEREAS, DOB asserts that the Signs are meant to, and do, primarily promote movies, TV shows, concerts, a boutique and jeans -- not the principal use of these zoning lots, such as a lighting store, a diner, martial arts academy, or a Dunkin Donuts; and

WHEREAS, DOB says that the purpose is apparent because the sign space is predominantly devoted to these products, while the copy concerning the various stores is not the central focus of the Signs and is less noticeable to a passerby; and

WHEREAS, DOB states that here, the principal use and over-all character of the properties in issue is that of various Use Group 6 uses; the accessory use in question – a sign for a contest – is not clearly incidental to and customarily found in connection with those uses; and

WHEREAS, DOB cites to Matter of 7-11 Tours v. BZA of Town of Smithtown 90 AD2d 486 (2d Dept 1982) in which the Court found that a travel agency was not customary nor incidental to the primary use of the premises as a motel; in so doing it set forth general definitions for "incidental" and "customary:"

> Incidental when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. To ignore this latter aspect of 'incidental' would be to permit any use which is not primary, no matter how unrelated it is to the primary use

Id at 486; and

WHEREAS, DOB states that the Appellant ignores this latter aspect of the definition of "accessory" by insisting that the sweepstakes use is incidental even though it is completely unrelated to the primary use of the premises; and

WHEREAS, DOB cites to the 7-11 Tours court's definition of "customarily":

> Courts have often held that the use of the word 'customarily' places a duty on the board or court to determine whether it is usual to maintain the use in connection with the primary use … The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use. Id at 488; and

WHEREAS, DOB states that CPI alleges that its signage refers to products offered at the store – a sweepstakes, but it cannot be said that sweepstakes have commonly, habitually and by long practice been established as reasonably associated with any of the uses at issue in the matters before the Board--a Dunkin Donuts store, a martial arts academy, a lighting store, a meat market, a tire store, a diner or a Vietnamese restaurant; consequently, the sweepstakes signs in question are not accessory to the principal use of the zoning lots at issue; and

WHEREAS, additionally, DOB asserts that it is not customary for a true accessory sign to change its text as frequently as once a month; and

WHEREAS, DOB asserts that the fact that in CPI II Justice Rakower reversed the four ECB determinations on the issue of "clearly incidental to" and "customarily found in connection with" has no precedential effect herein, the City is appealing this ruling and it nevertheless remains the case that Justice Rakower was explicit in her decision that her ruling was narrowly limited to four ECB determinations at two locations in Brooklyn; and

WHEREAS, as far as the Lotto, DOB states that the Appellant makes much of the fact that there are newsstands and delis which have ads for Lotto in their windows; and

WHEREAS, DOB asserts that the distinctions between the Signs and Lotto signs are significant including that Lotto signs often appear in windows which is a specifically legislated exemption and, otherwise are non-commercial signs (because the State created the Lotto a revenue-generating enterprise to help fund educational purposes) entitled to greater First Amendment protection; on the contrary, Contest Promotions signs are never in the window and are commercial signs controlled by a private entity with advertising sign permits separate and apart from the advertising profits made at the sweepstakes locations; and

WHEREAS, further, DOB asserts that if Contest Promotions signs were truly similar to Lotto signs, the Contest Promotions logo of crossed and checkered flags would be used to announce a sweepstakes; instead, that logo is nowhere to be found on any CPI sign or location nor are the words "Contest Promotions" anywhere on the Signs before the Board; and

WHEREAS, DOB notes that the Appellant has not argued or offered evidence that Lotto or any other contests are commonly found or incidental to the eight zoning lots before the Board which are not convenience stores – such as a martial arts academy, a tire store, a Baskin Robbins, or a meat market other than to say that Lotto logos are ubiquitous; and

WHEREAS, DOB also distinguishes the Appellant's McDonald's Monopoly example as in those cases, the sign is not advertising the "Monopoly" board game, but a game that occurs in McDonald's and, in fact, McDonald's gives its customers a custom-tailored version of the game which results "mostly in food prizes" that can be used at the McDonald's where the Monopoly game piece is offered; and

WHEREAS, DOB asserts that it is common for convenience stores to have signs for products such as magazines and cigarettes in their store windows; however, these are not signs within the ZR §12-10 (c) definition of "sign": "A sign shall include writing, representation or other figures of similar character, within a building, only when illuminated and located in a window;" thus, any non-illuminated writing in a store window is not a sign under the Zoning Resolution; and

WHEREAS, DOB asserts that its position in the subject appeal is consistent with its position in Fresh Direct, which it distinguishes on its facts; and

WHEREAS, specifically, DOB states that the Fresh Direct sign is a non-conforming use located on the same zoning lot as Fresh Direct's food processing and supply plant; and

WHEREAS, DOB asserts that it is clear that the sign is accessory to a legitimate principal use, specifically a Use Group 17 food processing plant and that its permit application contains no references to off-premises products or services and does not offer a sweepstakes; and

WHEREAS, DOB cites to Fresh Direct's statements that "the entire surface area of the Sign has been devoted to copy and images relating to Fresh Direct, products available on the Premises, and public service announcements…the Sign has not been used to display copy and images relating to products which are not sold on the Premises;" and

C. CPI Does not Own the Zoning Lots and its Signs Are not Substantially for the Benefit or Convenience of Those Tied to the Principal Use of the Zoning Lot

WHEREAS, DOB notes that the third prong of the accessory sign definition requires that the Signs be in the same ownership or operated substantially for the benefit or convenience of owners, occupants, employees, customers or visitors of the principal use of the zoning lot; and

WHEREAS, first, DOB notes that the Signs are

not under the same ownership or control as the zoning lots; the Signs are under the ownership and control of CPI; and

WHEREAS, DOB notes that instead of promoting a specific business or entertainment conducted on the zoning lot, the signs promote products available for purchase at sites other than the zoning lot and there has been no demonstration that the movies, TV shows, concerts or jeans being advertised substantially benefit the owners of these establishments or their customers; and

WHEREAS, DOB notes that CPI has submitted affidavits from several business owners who concede that they benefit by being paid by CPI to display CPI's signs at their stores; DOB asserts that mere rental payment is not the type of "benefit" to the zoning lot contemplated by the ZR; and

WHEREAS, DOB asserts that the building owner, not the business owner/lessee disproportionately benefits from the contract with CPI and this makes sense since the sign is on the side of the building controlled by the building owner not the lessee; and

WHEREAS, DOB asserts that the building owners earn many times more income for the Signs than do the proprietors, some of whom do not receive any payment; and

D. The Signs Meet the Advertising Sign Definition

WHEREAS, DOB asserts that the Signs are not accessory and that the ZR § 12-10 defines an "advertising sign" as "a sign that directs attention to a business, profession, commodity, service or entertainment conducted, sold or offered elsewhere than upon the same zoning lot and is not accessory to a use located on the zoning lot;" and

WHEREAS, DOB states that consistent with the Appellant's model, each of the Signs, are large wall signs that direct attention to a product off the zoning lot; specifically, ten of the permits authorized signs that direct attention to a movie shown in theaters on other zoning lots, (including eight for the same movie "Wrath of the Titans"), one permit directs attention to "Tru Religion" brand jeans not even sold at the premises and one directs attention to a boutique located at a significant distance away on the Upper East Side; and

WHEREAS, DOB asserts that even if posters of the movies, or the particular brand of jeans, were sold at the on-site stores, the court in Mazza & Avena ruled that a sign that directs attention to one product within the store does not make the sign an accessory sign; and

WHEREAS, DOB asserts that not only does it offend the Zoning Resolution, but it offends common sense and logic to conclude that "Wrath of the Titans" signs are accessory to the noted businesses or that the Celine clothing sign, which specifically directs the passerby to a boutique by repeating the address "870 Madison Avenue" three times could also be accessory to any of the noted businesses; and

WHEREAS, DOB states that in contrast, examples of accessory signs include those on awnings located above the entrance to the premises for the convenience of those visiting the establishment; furthermore, the names of the businesses appear prominently on the signs in bright clear letters, with fonts, symbols and logos unique to type of business the accessory sign is referring to, not in miniscule, generic, faded, and dirty yellow font like the Appellant's signs and, they are not dominated by advertising posters for off-premises offerings like the Signs; and

WHEREAS, DOB concedes that a very small edge of the Signs indicates the principal use occupying the premises along with language of a purported "sweepstakes contest" offered there, the dominant portion of the sign is directing attention to a use off the zoning lot, which takes the Signs outside the realm of accessory signage and into the realm of advertising signage; and

WHEREAS, DOB concludes that, at best, the limited perimeter of the Signs is accessory to an accessory use on the zoning lot; and

SUPPLEMENTAL ARGUMENTS

WHEREAS, in addition to the effect of the CPI litigation on the subject appeal and the application of the accessory use definition, the Appellant and DOB present opposing positions on several other issues including primarily whether CPI is a legitimate business or a sham and whether its sweepstakes practices comply with New York State Law; and

WHEREAS, CPI presented evidence regarding its business practices including affidavits from representatives of the businesses and employees of CPI and accounting for the contests all of which DOB called into question; and

WHEREAS, the Board does not find it necessary to address the facts and evidence associated with CPI's business practices as those can be addressed in another forum and are not relevant to an analysis of the Signs' content and relationship with the associated businesses; and

CONCLUSION

WHEREAS, the Board agrees with DOB and finds that the Signs do not satisfy any of the three prongs set forth in the ZR § 12-10 definition of accessory use; and

WHEREAS, specifically, the Board finds that the Signs (1) are not related to the principal use on the zoning lots (ZR § 12-10(a)); (2) are not clearly incidental to and customarily found in connection with the principal uses (ZR § 12-10(b)); and (3) are not in the same ownership as or operated for the benefit or convenience of the owners, occupants, employees, customers, or visitors of the principal uses (ZR § 12-10(c)); and

WHEREAS, the Board finds that the Signs are not accessory signs; they are advertising signs and fit squarely into the ZR § 12-10 definition of an advertising sign that directs attention to a "business,…commodity, service or entertainment conducted, sold, or offered elsewhere" and "is not accessory to a use located on the zoning lot;" and

WHEREAS, as far as ZR § 12-10-(a), the Board finds that the Appellant's focus on the mere coexistence of the principal use and the sign on the same zoning lot is misplaced as the location on the same zoning lot is meaningless without the second requirement of the first prong that the uses be related; and

WHEREAS, the Board notes that accessory business signs are allowed in many more zoning districts than advertising signs and are subject to numerous restrictions; those restrictions include, significantly, the content, per the ZR § 12-10 definition; and

WHEREAS, the Board finds that an essential element of an accessory sign is that it is related to the principal use; in fact, the sign must be a part of the business and be indistinguishable from it; and

WHEREAS, the Board cites to Matter of 7-11 Tours Inc. v. Board of Zoning Appeals of the Town of Smithtown, 90 A.D.2d 486 (2d Dept 1982) citing Lawrence v. Zoning Bd. of Appeals of Town of North Branford, 158 Conn. 509, 512-513 (1969) for the principle that an accessory use must not be just subordinate to the primary use but also concomitant; and

WHEREAS, the Board finds that the cases Mazza and NYP Realty strongly support its conclusion that the Signs are advertising rather than accessory; specifically, in Mazza (the Newport case), the sign directed attention to a product (Newport cigarettes) generally sold throughout the City, even though the product was also sold at the business on the zoning lot, it was deemed to be advertising because the sign must be designed so that it is clear that it is "accessory" to and directing attention to the business on the zoning lot as opposed to the sale of the product generally; and

WHEREAS, the Board further notes that in its underlying review in Mazza, DOB considered a variety of factors in determining that the large Newport advertising sign was not accessory to the convenience store including that it was not satisfied that such a sign was "customarily found" in connection with a comparable type of retail store; additionally, the Board agreed with DOB's interpretation "that a sign may refer to a product rather than a business name, where the business at the site is readily identified by the product;" such a conclusion was not possible in the Newport example for a store which sold many products; and

WHEREAS, the Board finds the NYP Realty case to be directly on point as the New York Post sought to have the sign recognized as an accessory business sign since it referenced the newspaper which was published in the subject building but DOB determined that it was an advertising sign because the citation to the New York Post was not the focus of the sign; and

WHEREAS, the Board notes that in the New York Post example, the sign's primary purpose was to advertise the New York Life Company (and was not directly related to the principal newspaper business on the site), a business and product available elsewhere than the zoning lot and that the mention of the New York Post at the bottom of the sign did not suffice to extinguish the advertising nature of the sign, within the ZR § 12-10 definition; and

WHEREAS, the Board finds that proportionality is a relevant element in the analysis because the relationship between principal and accessory use is inherently about proportions in some form; and

WHEREAS, the Board notes that the NYP Realty court has recognized that proportionality is relevant in its holding that a mere writing of a business name or address is not sufficient; and

WHEREAS, the Board finds that the presence of the business' name on the Signs', if it serves any purpose at all, cannot alone tip the scale of the analysis to it being accessory; and

WHEREAS, as to ZR § 12-10(b), the Board again agrees with DOB that the Signs are not clearly incidental to or customarily found in connection with the principal uses; and

WHEREAS, the Board finds that the Appellant is disingenuous at best to say that a sign with posters for television programs, movies, other entertainment, and clothing companies are incidental to, customarily found in connection with, or have any other relationship to a martial arts studio, tire store, lighting store, or Vietnamese restaurant, most obviously, or even to small grocery stores/newsstands; and

WHEREAS, as to ZR § 12-10(c), the Board rejects the Appellant's broad reading of the concepts of ownership and benefit; and

WHEREAS, specifically, the Board finds that the Signs are not in the same ownership as the businesses and the Appellant has failed to demonstrate that they are for the benefit of any of the named parties at ZR § 12-10(c); and

WHEREAS, the Board finds that even if the Signs were related to the business, the Appellant is incorrect that a benefit to the building owner satisfies the condition because the building as a whole and the landlord have no connection to the business and are not part of the analysis for whether it is accessory; and

WHEREAS, further, the Board notes that the question is not whether the Signs are accessory to the building; the Appellant is unpersuasive to say that the sign must be on the same zoning lot as the business and related, incidental, and customarily found *with the*

business and then to say that it does not have to benefit the business and can benefit some unknown independent building owner; all three prongs must be rooted in the same enterprise, either the building or the business; and

WHEREAS, the Board notes that the only affidavits are from representatives of the businesses, who are potentially biased since they have relationships with the building owners; affidavits from unbiased customers of the businesses about the function of the Signs might tell a different story; and

WHEREAS, the Board rejects the Appellant's analogy to Lotto signs and to other contests; and

WHEREAS, the Board finds that the Lotto signs reflect logos that in most cases do not even qualify as signs because they are within windows and, further, are non-commercial; and

WHEREAS, also, the Lotto signs do not depict other products or entertainment, therefore, they would not enter into the realm of being unrelated to the principal commercial use; and

WHEREAS, the Board notes that the Appellant's examples of store promotions (Lacoste, Murray's Cheese, Modell's Sporting Goods, McDonald's, and 7-11) involved prizes of store merchandise or other direct connections to the business' products so, again, there was a clear relationship to the principal use; and

WHEREAS, the Board finds that the question is not whether the small business can advertise sweepstakes or businesses of any size can conduct or advertise their own prize offerings, but rather whether a sweepstakes company's advertisement of its prizes, completely unrelated to the host business, goes beyond being accessory and actually advertises those products independent from the host business or the participation in a sweepstakes; and

WHEREAS, the Board distinguishes the Ham Radio Case in that in the Ham Radio case, it recognized ham radio antennas may not be commonly found but, when they are found, they are consistent with the conditions of other ham radio antennas; and

WHEREAS, in contrast, the Board notes that even if sweepstakes contests like CPI's were customarily found at the subject businesses, the Signs – posters reflecting entertainment and clothing companies - are not consistent with accessory signs; and

WHEREAS, the Board also distinguishes the Fresh Direct sign which bears a clear relationship to the Fresh Direct warehouse on the zoning lot; and

WHEREAS, the Board agrees with DOB's characterization of the CPI I and II litigation and concludes that the Appellate Division vacated the CPI I decision and the CPI II decision had narrow applicability to the four signs at issue there; and

WHEREAS, additionally, the Board finds that there would be no utility in and it would be an inefficient use of judicial resources for the Appellate Division to require that the Appellant seek an appeal to the Board and then not allow the Board to exercise its expertise in reviewing a question of zoning interpretation by restricting it to the Supreme Court's recent holding on the matter; and

WHEREAS, finally, the Board does not find it necessary to consider whether CPI is a sham or to otherwise evaluate its business practices because the Appellant's arguments fail regardless of how genuine its business practices are; however, the Board agrees that DOB's inquiry casts certain doubts on the business; and

WHEREAS, therefore, the Board finds that DOB properly revoked the Signs' permits because they are advertising signs.

Therefore it is resolved that the subject appeals, seeking a reversal of the Final Determinations of the Department of Buildings, dated November 14, 2012, are hereby denied.

Adopted by the Board of Standards and Appeals, April 23, 2013.

A true copy of resolution adopted by the Board of Standards and Appeals, April 23, 2013.
Printed in Bulletin No. 17, Vol. 98.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

CERTIFIED RESOLUTION

Chair/Commissioner of the Board