

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CITY OF NEW YORK,

Plaintiff,

-against-

BALLYHOO MEDIA, INC.,

Defendant.
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Index No. 19 cv

COMPLAINT

Plaintiff the City of New York (the “City”), by its attorney, Zachary W. Carter, Corporation Counsel of the City of New York, for its complaint against Defendant Ballyhoo Media, Inc., alleges upon personal knowledge as to itself, and on information and belief as to all other matters, as follows:

PRELIMINARY STATEMENT

1. This action seeks injunctive relief and civil penalties against Ballyhoo Media, a newcomer to the outdoor advertising market in New York City. Ballyhoo’s business model is to operate Times Square-style billboards on a barge that traverses New York City waterways such as the Hudson River and East River. Ballyhoo’s illuminated barge billboards violate New York City laws expressly restricting the operation of water-based advertising signs, and also constitute a public nuisance.

2. Dating to 1964, the water-based advertising restrictions, which apply to vessels in waterways adjacent to all major types of zoning districts and in view of major roadways, serve to protect traffic safety, preserve views of the water, and promote various recreational, cultural, and educational activities on the waterfront and waterways. The advertising restrictions are integral to protecting these public spaces and highways. Ballyhoo’s business model targets these areas by selling billboard space to clients seeking to promote their

brands through water-based signs directed at drivers, pedestrians, cyclists, ferry passengers, and residents along the water. This business is squarely at odds with the law.

3. Ballyhoo uses large, high-powered LED screens designed to stand out on the water and thereby maximize visibility. Ballyhoo's displays are often dynamic rather than static, cycling through various images—and also capable of showing video content—as the boat moves along the shoreline. As Ballyhoo puts it, the billboards are intended to “make a splash.”

4. These splashy, moving displays create a distraction for drivers and watercraft operators, as well as cyclists and pedestrians in crowded waterfront areas, posing a significant safety hazard. They also significantly degrade the view enjoyed by those using parks and other public spaces along the water and the waterways themselves, impairing the public's enjoyment of those important places. Moreover, the bright, dynamic billboards intrude on the private spaces of large numbers of residents and office workers with views of the water.

5. The restrictions that apply to Ballyhoo's water-based advertisements are part of a legal framework governing the saturated outdoor advertising market in New York City. These sign laws have been repeatedly upheld by courts against multiple legal challenges. Recognizing the need for robust enforcement, the law provides for injunctive relief as well as substantial penalties in order sufficiently to disincentivize violations within this highly lucrative industry. Ballyhoo, by plunging into the New York City market without ensuring compliance with applicable law, has made itself subject to these remedial provisions.

6. Ballyhoo is contravening local law. It is also creating a public nuisance by posing a safety hazard to drivers and others and by blighting New York City's waterways. Therefore, in order to protect the important public interests at stake, the City is entitled to an injunction against the operation of the company's barge billboards, as well as civil penalties.

PARTIES

7. Plaintiff the City of New York is a municipal corporation organized under the laws of the State of New York.

8. Defendant Ballyhoo Media, Inc. is a corporation organized under the laws of the State of Florida whose principal place of business is 1111 Brickell Bay Drive, Suite 2302, Miami, Florida, 33131.

JURISDICTION AND VENUE

9. This Court has jurisdiction over Defendant pursuant to 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.

10. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims occurred in this district.

NYC WATER-BASED ADVERTISING RESTRICTIONS

11. Enacted in 1964, New York City's water-based advertising restrictions are part of a framework of local laws governing outdoor advertising as a means of promoting traffic safety, preventing urban blight, and protecting public investments in highways. These laws are an exercise of the broad police powers delegated to the City by the State of New York. The City's restrictions on land-based advertising signs have been deemed valid as an "integrated effort by the City to reduce visual clutter, to improve the overall aesthetic appearance of the City, and to regulate traffic safety." *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 109 (2d Cir. 2010).

12. New York City has responsibility for regulating advertising signs in connection with the federal Highway Beautification Act of 1965, which declares that outdoor

advertising signs proximate to major highways “should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.” 23 U.S.C. § 131(a). The Highway Beautification Act requires states, themselves or through their localities, to exercise effective control of advertising signs along interstate and primary highways or risk losing substantial federal funding. New York State relies on municipal enforcement of local laws to satisfy this requirement within New York City.

13. The water-based advertising restrictions also advance the City’s comprehensive waterfront plan, which aims to increase public access to the waterfront and waterways for purposes such as recreation, relaxation, and educational and cultural programming.

14. By their terms, the applicable restrictions prohibit the display of advertising signs on vessels plying waterways adjacent to any of the three major types of zoning districts in New York City—residential, commercial, and manufacturing—and within view from an arterial highway. New York City Zoning Resolution (Z.R.) §§ 22-35, 32-662, 42-551. Arterial highways include the Joe DiMaggio Highway a/k/a West Side Highway, the FDR Drive, the Williamsburg Bridge, the Manhattan Bridge, the Brooklyn Bridge, the Brooklyn-Queens Expressway (BQE), and the Belt Parkway. Z.R. Appendix H. The restrictions thus protect against, among other things, the hazard of highway drivers distracted by advertising displays on the water.

15. As with the laws governing outdoor advertising on land, each violation of any of these water-based advertising provisions is subject to a civil penalty of up to \$25,000. N.Y.C. Admin. Code § 28-202.1; 1 R.C.N.Y. § 102-01(b)(1). Each day when such a violation

occurs is a separate and distinct offense subject to a penalty up to that amount. N.Y.C. Admin. Code § 28-202.2.

BALLYHOO'S UNLAWFUL OPERATIONS IN NYC

16. Ballyhoo is an outdoor or “out-of-home” advertising company formed in 2016. By its own description, “Ballyhoo Media is a water-based multi-media company changing the landscape of outdoor advertising.”

17. For its first two years, Ballyhoo was active in the single market of Miami, Florida. In or around October 2018, the company began operating in its second market, New York City. Ballyhoo markets the ability of its water-based advertisements in the City to “Stand Out in a Crowd: Break through the clutter of traditional outdoor advertising.”

18. In New York City, Ballyhoo operates large-format advertising signage on a water vessel. The vessel is a motor-operated, catamaran-style barge with tall frame structures fixed to both sides of the deck. Attached to the structures are a large number of high-definition LED screens facing outward to both sides of the vessel. On either side, the LED screens typically function together to create, at any given time, a single display that measures approximately 60 feet long by 20 feet high, or 1,200 square feet. According to Ballyhoo, this size is intended “to maximize visibility.”

19. The display is not necessarily static but, rather, can and frequently does cycle through several different advertisements as part of a single promotional campaign. Moreover, Ballyhoo markets its platform as being capable of delivering not just fixed signs but also videos. As stated on Ballyhoo’s website, “Our high-powered digital signage technology allows for endless options for our clients, displaying anything from a static image to live TV.”

For example, the screens on a Ballyhoo boat in Miami have been used to display televised sporting events in areas frequented by boaters and bathers.

20. On a daily basis, Ballyhoo's vessel travels along various New York City waterways including the Hudson River and the East River. According to the company's CEO, in a television interview provided to a local media outlet, "The standard route is from the Intrepid on the West side, which is about in the 40s; we go around Battery Park and up the East side to about Roosevelt Island." At times, the boat also travels along the shoreline of Brooklyn in the Upper New York Bay, the Narrows, and the Lower New York Bay.

21. As an outdoor advertising company, Ballyhoo enters into contracts with clients, such as advertising agencies, to display content promoting the clients' brands. For example, Ballyhoo ran an advertising campaign for Universal Pictures' movie "Dr. Seuss's The Grinch." One of the displays that was part of this campaign featured a large cartoon picture of the Grinch next to the message, "Rude. Loud. Angry. New Yorkers are my kinda people."

22. As with any outdoor advertising company, the value of the service that Ballyhoo offers to its clients depends on Ballyhoo's ability to reach viewers. Ballyhoo's marketing materials show that the viewers Ballyhoo is attempting to reach in New York City include drivers on highways, pedestrians and cyclists along the water, others in waterfront parks, and people in their homes and offices. In marketing its services, Ballyhoo claims that "86.7 million cars travel [the] FDR and the West Side Highway annually," that the average household net worth in New York City's "waterfront communities" is \$1.2 million, and that the company's barge billboards allow brands to reach "millions of pedestrians walking, running, biking, [and] commuting." Ballyhoo's business is dependent on attracting the attention of these target audiences.

23. To that end, Ballyhoo's water-based advertisements are large, bright, and designed to distract drivers, cyclists, and others. Ballyhoo's website boasts that its "high-powered" technology includes "screens designed to emit a beautiful, glare-free image." As the CEO stated in a media interview, "It really stands out; it's by itself; there's nothing else impacting or fighting for competition in the waterways."

24. Examples of the ways in which Ballyhoo's barge billboard create a nuisance are found in Ballyhoo's colorful marketing materials, including the following images:





Additional examples from Ballyhoo's materials marketing its services in New York City are attached hereto as Exhibit 1.

25. Ballyhoo's vessel at times lingers in particular locations to display its advertising signs to a targeted area for a prolonged period. The advertising signs also remain on display while the boat is in transit. In order for the company's displays to reach their intended audience, Ballyhoo operates its boat well within 1,500 feet of the shore. The boat, including the billboards, is operated within view of arterial highways including the West Side Highway, the FDR Drive, the Williamsburg Bridge, the Manhattan Bridge, the Brooklyn Bridge, the BQE, and the Belt Parkway.

26. For drivers and others, Ballyhoo's advertisements pose a distraction that creates a safety hazard. The signs also interfere with many people's enjoyment of parks and other public spaces along the waterfront, as well as the waterways themselves. And, Ballyhoo's bright displays intrude on the offices and homes of many who work or reside in buildings with views of the water.

27. Upon information and belief, although it markets its services in New York City, Ballyhoo has failed to register with the New York Secretary of State. Therefore, in addition to violating the Zoning Resolution and creating a public nuisance, Ballyhoo is in violation of Business Corporation Law § 1301, requiring foreign corporations to obtain authorization before doing business in New York.

28. To address violations of local laws like the water-based advertising prohibition, the City is authorized to bring a plenary action seeking injunctive relief and the imposition of civil penalties. In January 2019, the Office of the Corporation Counsel contacted Ballyhoo by letter to notify the company that its barge billboards were unlawful. The company responded through its New York counsel and declined to cease its operations, necessitating this action.

FIRST CLAIM FOR RELIEF
N.Y.C. Zoning Resolution §§ 22-35

29. Plaintiff repeats and realleges all of the above allegations with the same force and effect as if fully set forth in this paragraph.

30. Defendant has displayed, and continues to display, a moving or stationary advertising sign on a vessel plying waterways adjacent to a residence district and within view from an arterial highway in New York City, in violation of Zoning Resolution § 22-35.

31. For each such violation, Defendant is liable for a civil penalty of up to \$25,000, with each day when a violation occurs constituting a separate and distinct offense. Defendant is also subject to an injunction to restrain further violations.

SECOND CLAIM FOR RELIEF
N.Y.C. Zoning Resolution § 32-663

32. Plaintiff repeats and realleges all of the above allegations with the same force and effect as if fully set forth in this paragraph.

33. Defendant has displayed, and continues to display, a moving or stationary advertising sign on a vessel plying waterways adjacent to a commercial district and within view from an arterial highway in New York City, in violation of Zoning Resolution § 32-663.

34. For each such violation, Defendant is liable for a civil penalty of up to \$25,000, with each day when a violation occurs constituting a separate and distinct offense. Defendant is also subject to an injunction to restrain further violations.

THIRD CLAIM FOR RELIEF
N.Y.C. Zoning Resolution § 42-551

35. Plaintiff repeats and realleges all of the above allegations with the same force and effect as if fully set forth in this paragraph.

36. Defendant has displayed, and continues to display, a moving or stationary advertising sign on a vessel plying waterways adjacent to a manufacturing district and within view from an arterial highway in New York City, in violation of Zoning Resolution § 42-551.

37. For each such violation, Defendant is liable for a civil penalty of up to \$25,000, with each day when a violation occurs constituting a separate and distinct offense. Defendant is also subject to an injunction to restrain further violations.

FOURTH CLAIM FOR RELIEF
Common Law Public Nuisance

38. Plaintiff repeats and realleges all of the above allegations with the same force and effect as if fully set forth in this paragraph.

39. Defendant's conduct as described herein constitutes a public nuisance in that it interferes with or causes damage to the public in the exercise of rights common to all in a manner such as to interfere with use by the public of a public place, endanger or injure the property, health, safety, or comfort of a considerable number of persons, or offend public morals.

40. The City, its residents, and its visitors are being irreparably harmed by this nuisance.

41. The City is entitled to injunctive relief to abate this nuisance.

FIFTH CLAIM FOR RELIEF
N.Y. Penal Law § 240.45

42. Plaintiff repeats and realleges all the above allegations with the same force and effect as if fully set forth in this paragraph.

43. Defendant's conduct as described herein constitutes a public nuisance in that it interferes with or causes damage to the public in the exercise of rights common to all in a

manner such as to interfere with use by the public of a public place, endanger or injure the property, health, safety, or comfort of a considerable number of persons, or offend public morals.

44. Defendant's conduct violates New York Penal Law § 240.45 because it is either unlawful in itself or unreasonable under all the circumstances, and Defendants have knowingly or recklessly created or maintained a condition that endangers the safety or health of a considerable number of persons.

45. The City, its residents, and its visitors are being irreparably harmed by this nuisance.

46. The City is entitled to injunctive relief to abate this nuisance.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court grant judgment against Defendant as follows:

- (a) enjoining Defendant from operating advertising displays on any vessel in New York City waterways including, without limitation, the Hudson River, the East River, the Upper New York Bay, the Narrows, and the Lower New York Bay;
- (b) imposing a civil penalty of \$25,000 for each violation of Zoning Resolution §§ 22-35, 32-662, or 42-551 committed by Defendant, with each day when a violation occurs constituting a separate and distinct offense; and
- (c) granting such further relief as the Court may deem just and proper.

Dated: New York, New York
March 27, 2019

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